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Our File No. 99-2024F

Plaintiffs-Appellants, RICHARD C. SHUE and HELEN SHUE, his wife PER QUOD, Vs. Defendants-Respondents, ABDERRAZA BUREDDAD and EXEC U CAR LIMOUSINE, INC., And John Does 1-X and Jane 1-10 (said names being Fictitious)	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: On Appeal From SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY DOCKET NO.: ESX-L-1355-07 Sat Below: HON. CLAUDE M.COLEMAN, J.S.C. Civil Action

BRIEF AND APPENDIX ON BEHALF OF PLAINTIFFS-APPELANTS
RICHARD C. SHUE and HELEN SHUE, his wife PER QUOD

STEVEN M. WEISBROT, ESQ.
On the Brief

Preliminary Statement

When used properly, summary judgment promotes the twin aims of judicial efficiency and the administration of justice, allowing for the conservation of judicial resources where the case at issue does not merit the use of those resources.

Invaluable as it is, summary judgment must nonetheless always be approached with the utmost level of caution and prudence. Judicial efficiency is meaningless when it comes at the expense of justice, and the conservation of judicial resources is unwarranted when a litigant is entitled to the use of those resources.

The present case involves a Plaintiff who has suffered severe, life-altering injuries. As a result of an improperly granted summary judgment motion, he has been deprived of his right to be heard by a jury of his peers. We respectfully ask this court to reverse and remand the case for trial.

Procedural History

Plaintiff Richard C. Shue was involved in an automobile collision in Livingston, New Jersey on April 25, 2006. Plaintiff filed a complaint on or about February 13, 2007, alleging negligence against defendants Abderraza Bureddad and Exec U Car Limousine, Inc.

After conducting discovery, defendants filed a motion for summary judgment on or about February 6, 2009. After hearing argument in the Law Division, Essex County, on March 20, 2009, the Honorable Judge Coleman granted summary judgment to defendants. Plaintiff filed a notice of appeal on or about April 27, 2009.

Statement of Facts

This case arises as a result of several permanent, significantly life-altering injuries sustained by plaintiff Richard C. Shue, in an intersectional automobile collision that occurred on April 25, 2006. Plaintiff was traveling northbound on Woodcrest Drive in Livingston, New Jersey.

According to an independent witness, Defendant Abderraza Bureddad was traveling eastbound on Manor Road after traveling westbound, hitting a dead end, and turning around. Pa 31-32. Both cars entered the uncontrolled intersection, and a collision ensued.

As a result of the collision, plaintiff sustained serious cranial injuries. Among these injuries were brain shift and a right-sided subdural hematoma that required cranial surgery and repeated hospital stays. Additionally, plaintiff was diagnosed with concussional syndrome, post traumatic stress disorder and permanent facial scarring. Plaintiff now suffers from constant headaches, difficulty sleeping, as well as significant cognitive and emotional impairment.

At the court mandated arbitration, each party was deemed to have been 50% causally negligent, yielding a gross award of $575,000.00 to plaintiff.

Argument

POINT I – DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT CONCERNING VEHICLE POSITION, VEHICLE SPEED,

AND THE PROPER PERCENTAGE OF NEGLIGENCE TO BE APPOINTED TO EACH PARTY

"In reviewing any summary judgment motion, both the trial court and the appellate court must consider the facts in a light most favorable to the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). Viewing the facts in this light minimizes the risk that a judge might usurp the role of the jury as the ultimate finder of fact. As such, summary judgment should only be granted when the evidence "is so one-sided that one party must prevail as a matter of law." *Id.* at 540. This decidedly high evidentiary burden was not met in the present case, yielding the conclusion that Judge Coleman improperly usurped the role of the jury as the ultimate finder of fact in granting summary judgment to the defendants.

Far from being one-sided, the evidence in this case is substantially conflicting so as to leave many genuine issues of material fact unresolved. Defendants' primary evidence comes in the form of a video recorded on a dashboard-mounted mobile video recorder, in addition to an accident reconstruction report. The aforementioned video is shot from a fixed perspective, and plaintiff driver is

not visible at any point during the video. The accident reconstruction report is based almost exclusively on the video. Plaintiff's primary evidence comes in the form of a deposition of an independent witness who testified that defendant was speeding and plaintiff was not. Pa 33. Plaintiff's claim is also buttressed by the police report, which indicates contributory negligence on the part of both drivers *See* Pa 22.

A. There is a Question of Material Fact Regarding the Speeds of Each Party at the Time of Collision

The first disputed question of material fact pertains to the respective speeds of the vehicles at the time of collision. Defendants' accident reconstruction report indicates that defendant's vehicle was traveling at 21 MPH at the time of the accident. Pa 49. At oral argument, defendants' counsel contended that this calculation was arrived at by dividing the distance traveled by defendant's vehicle by the amount of time lapsed during the video. The accident reconstruction report, however, gives no indication that this was the method used. Furthermore, defendants' expert did not disclose any of the distance or time measurements that he purported to use in arriving at the 21 MPH figure.

Plaintiff's independent witness, on the other hand, contends that defendant was traveling around 35 MPH, while plaintiff seemed to be obeying the 25 MPH speed limit. Pa 33. The police report gives a third account, indicating that both plaintiff and defendant were driving fast at the time of collision. Pa 22.

These three divergent accounts as to the speed of each vehicle create a question of material fact that should have been decided by a jury. In the present case, a jury could have decided that the police report and the plaintiff's independent witness were more credible indicators of speed than the calculations of the accident reconstruction report. There was no legal basis to give greater weight to the latter. This was precisely what Judge Coleman did, despite not knowing nor inquiring about the specific measurements used to arrive at the calculation in the reconstruction report. Far from viewing the facts in the light most favorable to the plaintiff, Judge Coleman independently weighed the credibility of the evidence, clearly usurping a jury function. Largely ignored were both the police report and the testimony of the independent witness, both of which suggested significantly different speeds than the calculation arrived at by defendants.

The material question regarding the parties' respective speeds is particularly important given New Jersey's treatment of statutory violations as some evidence of negligence. *See, e.g., Horbal v. McNeil*, 66 N.J. 99, 103 (1974). That case involved an intersectional accident where the plaintiff was traveling at 30 MPH in a 25 MPH zone, violating N.J.S.A. 39:4-98, which requires that a driver "drive at an appropriate reduced speed when approaching and crossing an intersection." N.J.S.A. 39:4-98. The court held that while this statutory violation did not establish negligence *per se*, it nonetheless must be treated by the jury as some evidence of negligence. *See Horbal*, 66 N.J. at 103. In the present case, there is a genuine dispute as to whether or not the defendant was speeding at the time of the accident. If defendant was speeding, this statutory violation must be considered as some evidence of negligence, something largely ignored by Judge Coleman below.

B. The Judge Below Erred in Calculating the Percentage of Negligence to be Attributed to Each Party

"[I]t must be left to the jury to determine who was negligent, and, assuming that comparative fault is found,

what appropriate percentage of negligence should be allocated to each of the parties at fault." *Piccone v. Stiles*, 329 N.J. Super. 191, 196 (App. Div. 2000). Judge Coleman reasoned that since the video showed the defendant enter the intersection before plaintiff, the defendant enjoyed the right of way; therefore, no amount of negligence could be apportioned to him. This was error.

Intersectional collisions are particularly rife with questions of contributory negligence pertaining to vehicle speed and opportunity to avoid the collision through reasonable observation. These questions lend themselves to precise calculations of causal negligence, which are matters to be decided by a jury. In *Cermak v. Hertz Corp.*, the Supreme Court of New Jersey declared that "[t]he circumstances attending highway collisions are 'within the range of everyday observation and experience'; and primary and contributory negligence almost invariably raise questions that are preeminently for the jury." *Cermak v. Hertz Corp.*, 28 N.J. 568, 571-72 (1959). The court reasoned that the negligence inquiry depends upon one's behavior given the *totality of the circumstances* at the time of that behavior, and is therefore "an assessment of conduct that in its very nature is ordinarily for a jury." *Id.* at 572. Judge Coleman erred in treating the

defendant's right of way as unequivocal proof of a lack of negligence on his part. The defendant's behavior was not judged under the totality of the circumstances, despite the existence of New Jersey precedent declaring the negligence inquiry to be a holistic one.

In *Beck v. Washington*, for example, the court noted that even a driver who enjoys the right of way must still make all reasonable observations and take all reasonable actions to avoid an accident. *Beck v. Washington*, 149 N.J. Super. 569, 572 (App. Div. 1977). The Appellate Division reiterated this in *Piccone v. Stiles*, additionally noting that due observation and care on the part of a favored driver are inquiries that are particularly germane to intersectional accidents. *Piccone v. Stiles*, 329 N.J. Super. 191, 195 (App. Div. 2000).

In *German v. Harris*, the Appellate Division noted that questions regarding what could have been seen by reasonable observation and what actions would have been most prudent after taking such observations, "are questions to be determined by a jury, and not matter of law to be determined by a court." *German v. Harris*, 106 N.J.L. 521, 523 (App. Div. 1930).

Also relevant to the negligence calculation is the speed of each party at the time of collision. As

previously mentioned, there is a genuine dispute as to whether or not defendant was speeding. If so, this constitutes a statutory violation that must be taken by the fact finder as some evidence of negligence. *See Horbal*, 66 N.J. at 103. Set against the backdrop of the aforementioned authority, Judge Coleman committed error by usurping the role of the jury in calculating the causal negligence attributed to each party. Even if defendant enjoyed the right of way and was not speeding (both of which are big assumptions), questions of contributory negligence nonetheless linger in the background of the present case. These were questions to be answered by a jury.

POINT II – PLAINTIFF IS ENTITLED TO SURVIVE SUMMARY JUDGMENT BECAUSE THE VIDEO AND ACCIDENT RECONSTRUCTION REPORT RELIED UPON BY THE MOTION JUDGE WERE UNRELIABLE AND NOT PROPERLY AUTHENTICATED

An accident reconstruction report, like all scientific evidence, is only reliable when it "derives from reliable methodology supported by some expert consensus." *Langdrigan v. Celotex Corp.*, 127 N.J. 404, 417 (1992). In the present case, the methodology and conclusions of the accident report are questionable at best. The report indicates that distance measurements were taken (presumably in order to calculate the speed of defendant's vehicle), but these measurements are nowhere to be found in the report. The report also says that the "rotation and displacement (of defendant's vehicle) is consistent with the plaintiff's vehicle having greater speed than the defendant and entering the intersection before the plaintiff." Pa 49. If there was a methodology used to arrive at this conclusion, it certainly is not evident from the report. As it stands, the accident reconstruction report is little more than a collection of conclusory statements lacking in explanation.

The video on which the report was based should likewise be approached with a high level of scrutiny. The timer in the video has not been calibrated; a crucial consideration given that the speed cited in the accident reconstruction report was purportedly arrived at by

dividing distance by the amount of time lapsed in the video. Additionally, the video is shot from a fixed perspective, and at no point during the video is plaintiff's vehicle visible. The video gives an incomplete picture of the accident in question, and was improperly treated as dispositive evidence by the judge below.

Finally, the video itself was not authenticated until well after the discovery end date. The discovery end date may be extended only upon a showing of exceptional circumstances. R. 4:24-1(c) (2009). Defendant did not even file an application purporting to show such circumstances. The evidence therefore should have been barred altogether, precluding its consideration on the part of the Law Division Judge.

Conclusion

In granting summary judgment to defendants, Judge Coleman (a) failed to view the facts in the light most favorable to plaintiff, (b) failed to surmise the genuine issue of material fact regarding vehicle speed, (c)

improperly usurped the role of the jury in calculating the amount of causal negligence to be apportioned to each party, and (d) improperly allowed the admission of evidence that should have been barred. For the aforementioned reasons, plaintiff respectfully asks this court to reverse and remand the case for trial.

Respectfully Submitted,

STEVEN M. WEISBROT

On the Brief

APPENDIX