

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

KATRINA JEFFERSON, :
 : C.A. No. K10C-11-032 WLW
Plaintiff, :
 :
v. :
 :
NICHOLAS L. HELGASON and :
TANYA MOORE, :
 :
Defendants. :

Submitted: February 10, 2012
Decided: February 13, 2012

ORDER

Upon Defendant Tanya Moore's Motion for Summary Judgment.
Denied.
Upon Defendant Tanya Moore's Motion to Strike Sham Affidavit
of Plaintiff. *Denied.*

Douglas B. Catts, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware;
attorney for the Plaintiff.

Brian T. McNelis, Esquire of Young & McNelis, Dover, Delaware; attorney for
Defendant Nicholas L. Helgason.

Jon F. Winter, Esquire of Kent & McBride, P.C., Wilmington, Delaware; attorney for
Defendant Tanya Moore.

WITHAM, R.J.

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Before the Court is Defendant Tanya Moore's motion for summary judgment and motion to strike a sham affidavit. For the reasons set forth below, this Court denies the motion for summary judgment without prejudice and denies the motion to strike.

FACTS

This case involves two distinct and unrelated accidents consolidated by agreement of the parties. The facts of the accident at issue are as follows. At roughly 6:20 AM on January 23, 2008, Katrina Jefferson (hereinafter "Plaintiff") was driving a 2000 Ford Focus in the eastbound lane of travel on Route 9. A white van operated by Juan Lappost (hereinafter "Lappost") was also proceeding eastbound on Route 9 directly in front of Plaintiff. Defendant Tanya Moore (hereinafter "Moore") was traveling in the westbound lane in a Chevrolet Colorado truck. It was dark and the road was icy. Moore lost control of her vehicle and struck the truck driven by Lappost, spun around and struck Plaintiff's vehicle. Plaintiff alleges personal injuries, some of which are alleged to be permanent, medical expenses, lost earnings, lost earning capacity, and pain and suffering. Moore now moves for summary judgment and moves to strike a sham affidavit. Co-Defendant, Nicholas Helgason, takes no position on the motion for summary judgment and made no response on the motion to strike a sham affidavit.

Standard of Review

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as

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a matter of law.¹ The facts must be viewed in the light most favorable to the non-moving party,² and all reasonable inferences must be drawn in favor of the non-moving party.³ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.⁴ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.⁵ The movant bears the burden of demonstrating that a genuine issue of material fact does not exist.⁶ Should the movant satisfy his burden, then the non-movant must prove that genuine issues of material fact exist.⁷ Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant.⁸ If the non-moving party fails to make a sufficient showing on an essential element of his or her case for which he or she has the burden of proof, the moving party is entitled to judgment as a matter of

¹Super. Ct. Civ. R. 56(c).

²*Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

³*Lundeen v. Pricewaterhousecoopers, LLC*, 2006 WL 2559855 (Del. Super. Aug. 31, 2006).

⁴*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

⁵*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁶*Lundeen*, 2006 WL 2559855, at *5 (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

⁷*Id.* (citing *Moore* 405 A.2d at 681).

⁸*Id.* (citing *Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

law.⁹

DISCUSSION

Motion for Summary Judgment¹⁰

Generally, negligence is a matter to be determined by the jury.¹¹ Plaintiff alleges Moore was negligent in six ways:

(a) [She] operated her vehicle in a careless and imprudent manner in violation of 21 *Del. C.* § 4176(a); (b) [she] failed to give full time and attention to the operation of her vehicle in violation of 21 *Del. C.* § 4176(b); (c) [she] drove her vehicle on a highway at a speed that was greater than was reasonable and prudent under the conditions without regard to actual and potential hazards then existing and failed to control her speed as necessary to avoid colliding with another vehicle and breached her duty to use due care in violation of 21 *Del. C.* § 4168(a); (d) [she] drove her vehicle at an inappropriate speed when a special hazard existed by reason of weather and highway conditions in violation of 21 *Del. C.* § 4168(b); (e) [she] drove her vehicle in excess of the speed limit in violation of 21 *Del. C.* § 4169; and (f) [she] failed to maintain control of her vehicle.¹²

Moore alleges that she ran over a patch of black ice leading to her loss of control. She further alleges that there is no evidence that her operation of her vehicle

⁹*Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

¹⁰On February 3, 2012, Moore filed a reply brief for her motion for summary judgment in the absence of a briefing schedule and without requesting to do so. Such a filing is in violation of Kent County Civil Case Management Plan Rule 4(A)4. As such, it has not been considered.

¹¹*Frelick v. Homeopathic Hosp. Ass'n*, 150 A.2d 17, 19 (Del. Super. 1959).

¹²Compl. ¶4.

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was anything other than that of a reasonable person under similar circumstances. Moore claims that Plaintiff cannot prove that she breached a duty of care in a way that proximately caused injury to Plaintiff. The issue of the speed of Moore's vehicle cannot be established by the Plaintiff from Moore's perspective.

The Court finds Defendant's argument, as it stands, to be unavailing. Defendant admits to operating her vehicle between 40 and 45 miles per hour at the time she lost control. It is possible that she was negligent in traveling at such a speed given the conditions at the time. This dispute of fact as to a safe travel speed arises from several facts. The officer who responded to the accident, Corporal Andrew Partyka, stated that his normal response time to the accident scene from his starting location would have been ten minutes under normal conditions, but it took him thirty minutes as a result of the weather conditions.¹³ Further, Lappost, the driver of the van initially struck by Moore, stated that he was driving roughly 25 to 30 miles per hour due to the weather conditions.¹⁴ In short, there is a genuine issue of material fact as to a safe speed of travel for the conditions at the time of the accident.¹⁵ Given the fact

¹³Dep. of Partyka at 44-45.

¹⁴Dep. of Lappost at 9-10.

¹⁵Moore urges that her case is like *Sanchez-Casa v. Estate of Luciano Salem, et al.*, 2004 WL 692676 (Del. Super. Mar. 17, 2004). In that case, there was no evidence of negligence on the part of defendant other than the fact that he was a driver of one of the two cars in the accident. Further, defendant had been killed instantly in the accident as was the drunk and high driver who struck him, and therefore neither could testify. The case at bar is different in that there is evidence of negligence on the part of Moore with regard to the road conditions, her speed of travel, and her loss of control.

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that there are motions *in limine* outstanding with regard to Corporal Partyka and Lappost that could directly affect this summary judgment issue, however, the Court denies this motion for summary judgment without prejudice.

Motion to Strike Sham Affidavit

_____ Moore also moves to strike an alleged sham affidavit, sworn by Plaintiff, and attached as part of Plaintiff's response to Moore's motion for summary judgment. The affidavit is short and states in pertinent part, "The Defendant Tanya Moore was traveling at least 60 to 65 miles per hour just prior to the collision." The sham affidavit doctrine "refers to the practice of striking or disregarding an affidavit that is submitted in opposition to a motion for summary judgment, in cases where the affidavit contradicts the affiant's prior sworn deposition testimony."¹⁶ Although the Delaware Supreme Court has not commented as to the validity or scope of the doctrine,¹⁷ Superior Court has utilized it on several occasions¹⁸ as have all Federal Circuit courts and the courts of most states.¹⁹ As the Delaware Supreme Court stated, "The core of the doctrine is that where a witness at a deposition has previously

¹⁶*Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 740 (Del. 2003).

¹⁷*Id.* at 741.

¹⁸*E.g. In re Asbestos Litigation*, 2006 WL 3492370 (Del. Super. Nov. 28, 2006); *Jacobi v. Pala Bros., Inc.*, 1992 WL 52177 (Del. Super. Mar. 2, 1992); *Ross v. Sobel*, 1990 WL 81905 (Del. Super. June 15, 1990); *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690 (Del. Super. 1986) (first utilizing the sham affidavit doctrine in Delaware).

¹⁹*See Shelcuskys v. Garjulio*, 172 N.J. 185, 797 A.2d 138 (2002) (compiling an extensive list of cases).

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responded to unambiguous questions with clear answers that negate the existence of a genuine issue of material fact, that witness can not thereafter create a fact issue by submitting an affidavit which contradicts the earlier deposition testimony, without adequate explanation.” In the case at hand, Plaintiff gave deposition testimony in which she was cross-examined. Plaintiff contends that she was not ever asked her estimate of Moore’s speed and that Moore should fail on this element. Moore states that the question was covered without asking it. The relevant deposition testimony is as follows:

Q. Before Ms. Moore’s truck struck the white van were you able to observe her vehicle?

A. No. I didn’t see her.

Q. So the first time you saw her vehicle, the truck, was when it struck the white van?

A. Correct.²⁰

As the testimony reveals, Plaintiff was not asked her estimate of Moore’s speed. Moore’s argument that the question was covered without asking²¹ is not availing either as Plaintiff points to discovery responses, filed on September 16, 2010 explaining her speed estimate: “Defendant Moore was traveling approximately 10 miles per hour faster than that of her own vehicle (about 65 mph), due to the way the

²⁰Dep. of Jefferson at 80.

²¹Moore’s argument seems to be that it is logically impossible for a person to tell the speed of a vehicle when the first time she sees it is upon contact with another vehicle. The Court does not know this to be a truism and will not dismiss the observation out of hand without further reason to do so.

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Defendant's vehicle reacted upon colliding with the car in front of Plaintiff Jefferson."²² Although the Court makes no comment on Plaintiff's opinion or the basis for it, this past statement by Plaintiff makes her affidavit a reaffirmation of her opinion and not a contradiction. Therefore, Moore's motion to strike a sham affidavit fails because Plaintiff was not asked an unambiguous question with regard to her opinion of Moore's speed and the affidavit was a reaffirmation, not a contradiction.

Expenses Pursuant to Superior Court Civil Rule 56(g)

In association with Plaintiff's affidavit, Moore asks for costs and fees incurred by Moore in preparing and filing the motion to strike pursuant to Rule 56(g). As Plaintiff's affidavit was determined to be valid and not made in bad faith or for the purpose of delay, costs and fees are hereby denied.²³

CONCLUSION

Therefore, Defendant Tanya Moore's motion for summary judgment is hereby denied without prejudice and Defendant Moore's motion to strike Plaintiff's affidavit is hereby denied.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

²²Pl. Resp. Ex. A.

²³See Super. Ct. Civ. R. 56(g).