IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RACQUEL M. JOHNSON, Individually and as Administratrix of the Estate of NIGEL SIMON, JR. and NIGEL SIMON, SR.,	)	
Plaintiffs,	)	C.A. No. N14C-01-271 MMJ
v.	)	
NATALIE M. NELSON,	)	
Defendant.		

Submitted: April 17, 2015
Decided: April 29, 2015

Upon Defendant's Motion for Summary Judgment
GRANTED

MEMORANDUM OPINION

Gary W. Aber, Esquire, Attorney for Plaintiffs

Douglass Lee Mowrey, Esquire, Attorney for Defendant

JOHNSTON, J.

PROCEDURAL CONTEXT

Plaintiffs Racquel M. Johnson, individually and as Administratrix of the Estate of Nigel Simon, Jr., and Nigel Simon, Sr. filed this lawsuit against Defendant Natalie M. Nelson ("N. Nelson") on January 31, 2014. The Trial Scheduling Order set the Discovery deadline as December 23, 2014. A Modified Scheduling Order extended the Discovery deadline to January 23, 2015. A second Modified Scheduling Order again extended the Discovery deadline to February 16, 2015.

On February 27, 2015, Defendant filed a Motion for Summary Judgment. Plaintiffs filed a Response accompanied by an Affidavit of Philip Kosak. Kosak failed to appear for deposition.

FACTS

On November 8, 2013, N. Nelson picked up her daughter, Margaret Nelson ("M. Nelson") from music school. N. Nelson and M. Nelson then went to KFC to buy dinner. Upon leaving KFC, a text was sent to N. Nelson's husband from N. Nelson's cell phone. According to N. Nelson's telephone records, the text was sent at 5:56 p.m.

While traveling east on Kirkwood Highway, N. Nelson's vehicle struck Simon. Simon died as a result of his injuries. Surveillance video from the Jiffy

Lube, located near the accident, showed that the accident occurred at 5:57:33 p.m. According to phone records, 911was called at 5:58 p.m. from N. Nelson's phone.

Corporal John Forester of the Delaware State Police responded to the call and conducted an investigation of the accident. In his FAIR Team Report, Forester opined that the primary cause of the accident was Simon's failure to yield to oncoming traffic as he crossed the highway. Forester noted in the report that as N. Nelson entered into the left turning lane of the roadway, Simon ran into the path of N. Nelson's vehicle and collided with the front left side of the vehicle. Forester stated that it would have been safer for Simon to have crossed the roadway at the intersection of Delaware Route 2 and Duncan Road, where there was a traffic light and crosswalk for pedestrian traffic. Forester also noted that the accident occurred during nighttime hours, that the road was poorly lit, and that Simon was wearing dark clothes. Forester stated that there was no indication that N. Nelson was distracted while she was driving.

On November 25, 2013, Forester interviewed Kosak, a witness who arrived on the scene after the accident occurred. Kosak worked with Simon at Jiffy Lube. Kosak stated that when he arrived at the scene, he heard N. Nelson saying: "I don't want to go to jail." Kosak informed Forester that he observed a white cell phone in the center console area attached to a cord and plugged into the dashboard. While Kosak did not observe N. Nelson using her cell phone while driving, he believed

she had been using it at the time of the accident because of the location of the phone in the car. Kosak also stated that Simon was on the median when he was hit by N. Nelson's car, so N. Nelson had to have driven up onto the median for the collision to have occurred.

On March 13, 2014, Kosak executed an Affidavit. He stated that when he arrived at the scene of the accident, he observed a white cell phone, plugged into the dashboard by a cord and laying on the floor of the driver's side of the car. He also stated that he observed a young girl using a cell phone, and that the phone being used was a different phone than the white phone he observed on the floor of the vehicle.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[1] All facts are viewed in a light most favorable to the non-moving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to specific circumstances.[3] When the facts permit a reasonable person to draw only

[1] Super. Ct. Civ. R. 56(c).
[2] *Hammond v. Colt Indus. Operating Corp.*, 656 A.2d 558, 560 (Del. Super. 1989).
[3] Super. Ct. Civ. R. 56(c).

one inference, the question becomes one for decision as a matter of law.[4] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[5]

ANALYSIS

The sole basis of Plaintiffs' liability claim is negligence *per se*, based upon an alleged violation of 21 *Del. C.* § 4176C. Section 4176C states in pertinent part that "[n]o person shall drive a motor vehicle on any highway while using an electronic communication device while such motor vehicle is in motion."[6] It is well-established under Delaware law that the violation of a statute that was enacted for the safety of others is negligence *per se*.[7] In order to prove negligence *per se*, it first must be established that N. Nelson was using her cell phone to text at or about the time of the accident. N. Nelson and M. Nelson are the only living witnesses to the accident and they both have stated that the passenger, M. Nelson, sent the text message to her father.

The only evidence that Johnson offers to prove that the driver, N. Nelson, was using her cell phone to text at or about the time of the accident is: (1) the

[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[6] 21 *Del. C.* § 4176C(a).
[7] *Sammons v. Ridgeway*, 293 A.2d 547, 549 (Del. 1972).

timing of the text message being sent in close temporal proximity to the accident; and (2) the statements made by Kosak.

The undisputed phone records demonstrate that the text message was sent to M. Nelson's father at 5:56 p.m. The Jiffy Lube surveillance video shows that the collision occurred at 5:57:33 p.m. This timeline shows that the text message was sent a minute and a half prior to the collision, not simultaneously.

Plaintiffs have not presented Kosak's testimony through deposition, which would have been subject to cross-examination. Because Kosak was not deposed prior to the twice-extended discovery deadline, the Court need not consider Kosak's statements. However, for purposes of this Summary Judgment Motion, the Court exercises its discretion to view Kosak's affidavit in the light most favorable to Plaintiffs.

Kosak's Affidavit and statements to Forester also fail to raise any genuine issue of material fact. Plaintiffs' counsel has conceded that certain parts of Kosak's Affidavit testimony are not accurate. It is undisputed that there was only one phone at the scene. The same cell phone was used to text prior to the accident and to call 911. Kosak's testimony that M. Nelson used a different phone to call 911 is simply incorrect. Kosak's statements also are inaccurate because it is undisputed that the collision occurred in the roadway. Simon was not struck on the median, as Kosak stated in his interview with Forester.

Additionally, the location of the cell phone in the vehicle is not indicative of whether or not it was in use while the vehicle was in motion. The location of the cell phone in the vehicle also fails to prove who was using it.

In a motion for summary judgment, if the moving party has met its burden under Superior Court Civil Rule 56(c), the burden shifts to the nonmoving party to establish facts that would support its *prima facie* case at trial.[8] Ordinarily, credibility is an issue for the trier of fact. However, if witness credibility is the only remaining issue raised by the nonmoving party, and there is no evidence supporting a reasonable inference that credibility may be questioned, then summary judgment may be appropriate. "The non-movant is not entitled to a trial on the basis of a hope that he can develop some evidence during the trial to support his claim."[9] "'There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.' But where 'the evidence is *merely colorable*, or *is not significantly probative*, summary judgment may be granted.'"[10]

The Court finds that Plaintiffs have failed to offer any probative evidence, or to raise any genuine issue of material fact, that N. Nelson was using her cell phone to text at or about the time of the accident. Plaintiffs' challenge to witness

[8] *Haglid v. Sanchez*, 2005 WL 2841609, at *2 (Del. Super.).
[9] *Id*.
[10] *Stayton v. Clariant Corp.*, 2014 WL 28726, at *2 (Del. 2014) (quoting *Health Solutions Network, LLC v. Grigorov*, 2011 WL 443996, at *2 (Del.)).

credibility is mere speculation, unsupported by any viable evidence or reasonable inference.

CONCLUSION

This is a very tragic case. It is only natural to seek to find someone responsible for the untimely loss of a loved one. Nevertheless, the undisputed evidence demonstrates that Simon lost his life as the result of a true accident. There simply is no evidence or reasonable inference that the driver was using her cell phone at the time of or immediately prior to the impact. Further, very unfortunately, it is not disputed that the decedent was crossing at a place where he should not have been crossing and was wearing dark clothing at night. The Court must find that no genuine issue of material fact exists to prevent the Court from granting summary judgment.

THEREFORE, the Defendant's Motion for Summary Judgment is hereby **GRANTED**. This case is hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

_/s/ *Mary M. Johnston*_____
The Honorable Mary M. Johnston