IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT SCOTT McKINLEY and DEBORAH McKINLEY, h/w,	)	No.: 465, 2012
Plaintiffs Below, Appellants,	)	
v.	)	
MICHELE CASSON,	)	COURT BELOW: Superior Court of Delaware
Defendant Below, Appellee.	)	New Castle County C.A. No.: N10C-09-192 (PLA)

PLAINTIFFS BELOW, APPELLANTS' REPLY/ANSWERING BRIEF ON APPEAL

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Dated: 1/11/2013

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NATURE AND STAGE OF THE PROCEEDINGS

The Plaintiffs Below, Appellants Robert Scott McKinley and Deborah McKinley (hereafter "Plaintiffs") hereby incorporate by reference the Nature and Stage of the Proceedings contained in their Opening Brief.

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR A PROTECTIVE ORDER FOR THE DEFENDANT'S MEDICAL RECORDS WHEN SHE PLACED HER MEDICAL CONDITION IN ISSUE BY EXPLAINING HER ACTIONS TO THE POLICE OFFICER THAT SHE HAD AN ANXIETY ATTACK AND SHE TAKES PRESCRIPTION MEDICATION FOR HER FEAR OF BRIDGES.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE DEFENDANT'S MOTION IN *LIMINE* TO EXCLUDE REFERENCES TO HER MEDICATION AT TRIAL SINCE THE INFORMATION WAS MORE PROBATIVE THAN ANY PREJUDICE TO THE DEFENDANT AND WOULD HAVE IMPEACHED HER CREDIBILITY AT TRIAL.

III. THE TRIAL COURT ABUSED ITS DISCRETION ALLOWING BRANDON THOMAS TO TESTIFY REGARDING STATEMENTS OF BYSTANDERS WHICH WAS CONTAINED IN HIS REPORT SINCE SUCH STATEMENTS ARE HEARSAY AND DO NOT FIT WITHIN ANY EXCEPTION TO THE HEARSAY RULE.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE PLAINTIFFS' MOTION IN *LIMINE* TO EXCLUDE REFERENCES TO THE PLAINTIFFS' LACK OF USE OF A MOTORCYCLE HELMET AND THE MITIGATION OF DAMAGES AS HE IS NOT PROHIBITED BY LAW FROM WEARING A HELMET PURSUANT TO 21 *DEL.C.* §4185.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN ISSUING A JURY INSTRUCTION ON ASSUMPTION OF THE RISK DUE TO THE PLAINTIFFS' LACK OF USE OF A MOTORCYCLE HELMET AT THE TIME OF THE ACCIDENT WHEN THE INSTRUCTION WAS AN IMPROPER STATEMENT OF THE LAW AND COULD ONLY CONFUSE THE JURY.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE POLICE OFFICER TO PROVIDE THE JURY HIS OPINION OF THE MECHANISM OF THE ACCIDENT WHEN HE HAD NOT BEEN ADMITTED AS AN EXPERT IN ACCIDENT RECONSTRUCTION.

VII. DENIED. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS THERE WERE MATERIAL FACTS AT ISSUE AS TO WHETHER PLAINTIFF WAS MORE NEGLIGENT THAN DEFENDANT.

STATEMENT OF FACTS

Plaintiffs hereby incorporate by reference the Statement of Facts contained in their Opening Brief.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR A PROTECTIVE ORDER FOR THE DEFENDANT'S MEDICAL RECORDS.

A. Question Presented

See Plaintiffs' Opening Brief.

B. Standard and Scope of Review

See Plaintiffs' Opening Brief.

C. Merits of the Argument

It is Defendant's argument that answering a question by providing medical information is insufficient to put a medical condition into issue. (Answering Brief-16).[1] Based on this, Defendant asserts that they are being forced to defend an action put in play by Plaintiff. (Answering Brief-16). In the present case, however, Defendant relied on her medical condition as an element explaining to officer Downer why she stopped abruptly. Defendant voluntarily answered in the affirmative that she was prescribed medication for her anxiety of bridges. (A-151). She also volunteered information explaining to Trooper Downer that she had an anxiety attack while approaching Summit Bridge and that she was on medication. (A-27; A-150-51). Therefore, Defendant is not being forced to defend an issue because Defendant affirmatively asserted the condition putting her medical condition into issue.

[1] Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross Appeal will be referred to as "Answering Brief".

Defendant asserts that compelling Defendant's medical records would violate Delaware Rule of Evidence 503 based on their contention that Plaintiffs lack "a precise and compelling show of need" for the records. (Answering Brief-19). However, if Defendant's anxiety was the cause of her abrupt stop before crossing Summit Bridge, the use of medication would certainly warrant "a precise and compelling need." DRE 503. The use of medication for anxiety would establish for the jury whether Defendant's anxiety likely played a part in the cause of the accident.

Similarly, Defendant argues that the jury did not require information about Defendant's medication to decide if they believed that she had an anxiety attack causing her to abruptly stop before crossing the bridge. (Answering Brief-15). Contrary to Defendant's allegation, this information would establish for the jury whether Defendant was prone to anxiety attacks and likely suffered from prior to crossing the bridge prompting her to slam on her breaks without warning to other drivers.

Furthermore, the medical records would lean impeaching Defendant's testimony. Trooper Downer and Defendant offered conflicting testimony as to what was said upon Downer's investigation immediately following the accident. (A-16-18). The disclosure of Defendant's medical records would offer clarification for the jury as to the credibility of the witnesses. Additionally, Defendant presented differing testimony in her deposition than she had given to Trooper Downer the night of the accident. (A-16-18). Inspection of Defendant's medical records would clarify whether the statements that Defendant made

immediately following the accident were accurate or whether Defendant's later statements at trial were more accurate. Defendant's conflicting testimony has made her medical condition a crucial issue in determining causation of the accident.

Thus, Defendant's medical records stop being privileged once Defendant asserted her medical condition as a defense thus, putting it into issue.

II. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION IN *LIMINE* TO EXCLUDE REFERENCES TO HER MEDICATION AT TRIAL.

A. Question Presented

See Plaintiffs' Opening Brief.

B. Standard and Scope of Review

See Plaintiffs' Opening Brief.

C. Merits of the Argument

Although Defendant alleges that Plaintiffs improperly obtained Defendant's medical records, Plaintiffs exercised the proper channels in obtaining Defendant's records. Plaintiffs subpoena was limited to the records of Defendant's prescribing neurologist. (A-18). The records were not subpoenaed until two weeks after Defendant's September 12, 2011, deposition in which Defendant contradicted her previous remarks by admitted that she told the police officer that she had a fear of bridges but denied telling the officer that she takes prescription medication for her fear of bridges. (A-17-18). The subpoena was issued on September 26, 2011, and served on September 29, 2011. (A-18-19). Dr. Sommers' office almost immediately complied as the records were received in the undersigned's office on October 3, 2011. (A-19). Upon notice of Defendant's intent to file a Motion to Quash, Plaintiffs' counsel agreed to hold the records and not to disseminate the records until the Court issued a ruling on the matter. (A-19). Plaintiffs returned the medical records to Defendant's counsel pursuant to the Superior Court's Order granting Defendant's Motion for a Protective Order.

Moreover, Defendant attempts to argue, based on *Farmer v. State*, 698 A.2d 946 (Del. 1997), that Defendant's medical history offers no probative value to the current case. Defendant relies on *Farmer*, a criminal case, in which the court denied the use of a handgun found in defendant's home absent any showing that the weapon was linked to the crime. *Id.* The holding in *Farmer*, however, is factually based on a set of facts that differ greatly from the facts of the present case. The Court determined that the absent showing that the gun was linked to the crime, it could not be admissible as evidence. *Id.* In the present case, whereby Defendant initially alleged to have suffered a panic attack due to her fear of bridges, her anxiety would be linked to the accident that caused the injury and would, therefore, be relevant and of probative value to the case. (A-17).

In the current case, the relation between the Defendant's medical records and the accident are of probative value because Defendant's anxiety was a significant issue in the case. There is conflicting testimony as to whether the Defendant took medication for anxiety. The use of medication, or the prescribed use of medication, would contradict Defendant's testimony and affect her credibility. This would lean towards proving that the Defendant likely had an anxiety attack that caused her to abruptly stop her vehicle and also establish the creditability of Trooper Downer's testimony.

Accordingly, Defendant's anxiety condition was severe enough that it warranted her use of medication and is, therefore, something that the jury should, at the very least, be made aware of.

III. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION IN *LIMINE* ALLOWING BRANDON THOMAS TO TESTIFY REGARDING THE HEARSAY STATEMENTS OF BYSTANDERS.

A. Question Presented

See Plaintiffs' Opening Brief

B. Standard and Scope of Review

See Plaintiffs' Opening Brief.

C. Merits of the Argument

While contemporaneous statements do not have to occur at precisely the same moment in time as the triggering event, they must occur shortly thereafter in response to the event. *Green v. St. Francis Hosp. Inc.*, 791 A.2d 731, 736 (Del. 2002). There is, however, no bright line rule governing the remoteness of statements under DRE 803(1). *Warren v. State*, 774 A.2d 246 (Del. 2001)(citing *Abner v. State*, 757 A.2d 1277 (Del. 2000)). Defendant cites *Warren* as holding that statements made within ten to twenty minutes after an event *may* be admissible as present sense impression. *Id.* This is only a general statement, however, and *not* an established rule of law.

Additionally, the rationale behind the present sense impression is that the statements are trustworthy because the declarant has no time to fabricate the statements. *Id.* Defendant argues that fifteen minutes between the accident and the making of the statements is too short a time period for statements to be fabricated, however, given the circumstances at the time of the accident, fifteen minutes could be adequate time for bystanders to fabricate their statements.

(Answering Brief-24-25). Although Mr. Thomas does not recall the number of bystanders who made the so-called "statements," he testified that there were between two and twelve bystanders. (A-129; A-231). Within a fifteen-minute period it is reasonable that these bystanders could have discussed their perception of the accident amongst one another. Such discussion would likely result in fabrication or inaccuracy of statements.

Similarly, there was much commotion at the scene of the accident. There is testimony that there were multiple emergency responder crews present as well as multiple responding officers. (A-205; A-213). Defendant herself was described as emotional. (A-28). It is not unreasonable that the commotion could have resulted in some fabrication of statements made by bystanders. Thus, based on the circumstances immediately following the accident, it is unreasonable to assume that fifteen minutes would be contemporaneous enough to the accident to allow the statements to be admitted under the present sense impression exception.

Moreover, while the present sense impression exception does not, consider corroboration of a statement as a prerequisite for admission, the Court recognizes that there are instances whereby corroborating evidence may be required. *Warren*, 774 A.2d 246. There are some cases in which corroborating evidence may be required to determine whether the declarant made the statement at the time of the triggering event or whether the declarant actually perceived the triggering event. *Id.* In the present case, there is no reliable evidence as to whether the declarants actually witnessed the accident. (A-229). The report drawn

up by Mr. Thomas is absent any information indicating the location of the alleged witnesses at the time the accident occurred. (A-229). Due to the foggy and dark conditions at the time of the accident, it is imperative to know the location of the witnesses at the time the accident in order to determine if they truly witnessed the accident as it happened or simply approached the scene during its aftermath. Absent the opportunity to question the bystanders, there is no way of knowing whether they truly witnessed the accident.

Defendant relies on *Green* in which a duty nurse testified a few years after the incident to a statement she recalled and attributed to her supervisor who had perceived the event. *Green*, 791 A.2d 731, 736. The Court allowed the testimony. *Id.* Unlike *Green*, however, whereby the duty nurse recalled events relayed to her by an identifiable source, namely her supervisor, Mr. Thomas could not so much as recount the number of people he spoke with, let alone names of the declarants or their demeanor. (A-229). The duty nurse in *Green* was relaying a message made only by one person, whereas Mr. Thomas was relaying statements made by anywhere from two to twelve persons. (A-229). His testimony as to what was allegedly seen by multiple persons differs greatly from the testimony of the duty nurse who was recounting only one identified source's statement. In addition, the duty nurse testified to a specific statement made by her supervising nurse. *Green,* 791 A.2d 731, 735. In the present case, however, Mr. Thomas testified as to a collaboration of narratives rather than a specific statement. (A-231). The statements to which Mr. Thomas testified were not quotations as to what a specific person said, but rather, an

explanation in his own words from multiple bystanders' statements (A-231).

Defendant further argues that statements of Mr. Thomas that have been attributed to the bystanders are admissible pursuant to Delaware Rule of Evidence 803(4), statements made for purposes of medical diagnosis of treatment. (Answering Brief-27). This argument is misplaced. The hearsay exception for statements for the purpose of medical diagnosis or treatment "is premised on the theory that the patient's statements to a physician are likely to be reliable because the patient has a selfish motive to be truthful." *State v. Monroe*, 2008 Del. Super. LEXIS 393 (Del. Super. Ct. Oct. 31, 2008). In the present case, statements were made to Mr. Thomas, an EMT, as opposed to a treating physician. Moreover, the statements were made by bystanders who alleged to have witnessed the accident rather than the patient himself. (A-229). Under these facts, the so called "statements" transcribed by Mr. Thomas do not satisfy the rationale for which the medical purpose exception was designed to satisfy. While there is testimony that certain details of an accident such as speed or location of impact may be useful in treating a patient, the details of the accident did not come from the victim himself, and therefore, they cannot fall under the medical treatment exception. (A-220).

Defendant additionally relies on *Gates v. Texaco, Inc.*, 2008 Del. Super. LEXIS 441 (Del. Super. March 20, 2008). However, the facts in *Gates* differ greatly from the circumstances in the case at bar. In *Gates* the admissible statements were made *by the victim* to his

treating physician. *Id.* at *22. The court recognized that the statements were made for the purposes of medical diagnosis as they were a response to whether he had been exposed to benzene after being diagnosed with leukemia made to his treating physician. *Id.* at *23. In the case at bar, the so-called statements reported to Mr. Thomas were made not by the victim himself, but rather, by bystanders who alleged, absent any reliable evidence, that they had witnessed the accident. (A-229). Accordingly, the proposed statements as testified by Mr. Thomas do not fall within the medical diagnosis of treatment exception of hearsay.

Defendant additionally argues that the statements fall within the residual hearsay exception of Delaware Rule of Evidence 807. (Answering Brief-28-29). However, this argument must fail. The requirements of this rule must be narrowly construed. *Dougherty v. St. Ann's Roman Catholic Church*, 2010 Del. Super. LEXIS 567 Del. Super. Ct. Apr. 8, 2010) (citing *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 242 (Del. 2001)). Based on the above analysis, the statement cannot be shown as having equivalent circumstantial guarantees of trustworthiness, and therefore, cannot stand up to the narrowly construed requirements of the residual hearsay rule.

Based on the foregoing, the Superior Court abused its discretion by allowing Brandon Thomas to testify as to the statements made to him by witnesses.

IV. THE TRIAL COURT ERRED IN DENYING THE PLAINTIFFS' MOTION TO EXCLUDE REFERENCES TO THE PLAINTIFF'S LACK OF USE OF MOTORCYCLE HELMET.

A. Question Presented

See Plaintiffs' Opening Brief.

B. Standard and Scope of Review

See Plaintiffs' Opening Brief.

C. Merits of the Argument

Based on Delaware law, a motorcycle rider, over the age of eighteen, is not required to possess a helmet while riding. Title 21, *Del.C.* §4185. Thus, the mention of Plaintiff's lack of helmet is prejudicial against the Plaintiff in the case at bar.

Defendant relies on *Patton v. Simone*, 626 A.2d 844 (Del. Super. 1992) and *Spencer v. Wal-Mart Stores E., LP*, 930 A.2d 881 (Del. 2006), in which the court found that plaintiffs had assumed the risk by working around an elevator shaft without a door and opting to walk in the icy street as opposed to the sidewalk on an icy day, respectively. These cases differ from the case at bar because in both cases named by Defendant, the injury was a result of an act taken by plaintiff and not contingent upon the acts of a third party. In *Patton*, had the elevator been equipped with a door, plaintiff would have been safeguarded and not fallen down the unprotected elevator shaft. 626 A.2d 844. Similarly, in *Spencer*, had the plaintiff walked on the sidewalk and out of the way of the icy parking lot, she would have avoided injuries sustained from slipping on the ice. 930 A.2d 881. In the present case, however, had Plaintiff been equipped with a helmet,

he still would have collided with Defendant's vehicle and been thrown from his motorcycle. Having a helmet would not have prevented the collision between Plaintiff and Defendant that was the cause of his injury.

Defendant failed to provide expert testimony that had Plaintiff worn a helmet the night of the accident, his injuries would have been any less. A helmet's ability to mitigate a motorcyclist's head injury cannot be presumed absent conclusive evidence demonstrating this essential difference. Absent expert testimony to this point, the jury would be forced to speculate as to what, if any, difference in injury could have occurred had Plaintiff been in possession of a helmet the night of the accident. Where a layman could not be expected to appreciate or have knowledge of the medical arts, expert medical testimony is required. *Wagner v. Olmedo*, 365 A.2d 643 (Del. 1976).

In *Bieber v. Nace*, 2012 WL 727631 (M.D. Pa.), a Pennsylvania case based upon a law nearly identical to Delaware law, the court held that absent a showing that plaintiff's injuries were causally connected to Plaintiff's lack of helmet, defendant could not introduce evidence of the lack helmet.

It is Defendant's contention that because Plaintiff had been in a prior accident while riding a motorcycle, he knew of the possible dangers associated while riding, and therefore, assumed the risk. (Answering Brief-38). Defendant, however, cites no case supporting her allegation that when a party repeats an action whereby an injury had previously been sustained, that repetition is an assumption of risk.

Thus, the Trial Court erred by allowing mention of the fact that Plaintiff was not equipped with a helmet as there is no Delaware law requiring such and is therefore prejudicial against Plaintiff.

V. THE TRIAL COURT ERRED IN ISSUING A JURY INSTRUCTION ON THE ASSUMPTION OF RISK BECAUSE THE PLAINTIFF DID NOT WEAR A MOTORCYLE HELMET AT THE TIME OF THE ACCIDENT.

A. Question Presented

See Plaintiffs' Opening Brief.

B. Standard and Scope of Review

See Plaintiffs' Opening Brief.

C. Merits of the Argument

Instruction on the assumption of risk, both primary and secondary, was improper as Plaintiff did not have an affirmative duty to wear a helmet under Delaware law. Absent a statutory duty to wear a helmet, there is no assumption of the risk when riding without a helmet and any instructions making reference to such is prejudicial towards Plaintiffs.

As was held in *Mayes v. Paxton*, 437 S.E.2d 66 (S.C. 1993), one does not imply his consent that motorists are relieved of the duty to use reasonable care towards him" by riding without a helmet. To hold otherwise, would be to require plaintiff to anticipate the actions of another driver. There was no means by which Plaintiff could have anticipated that Defendant would abruptly slam on her brakes the night of the accident. His actions were that of a reasonable person approaching a bridge.

Defendant argues that if the instructions were determined to be improper, they constitute harmless error. (Answering Brief-35). Defendant based this argument on the allegation that the instructions

were clear in stating that the jury was only to consider the assumption of the risk instructions when determining damages. (Answering Brief-35). Despite this intention, however, the misplaced instruction planted a seed in the minds of the jury that not wearing a helmet while riding a motorcycle is an assumption of risk. This is contrary to law. Absent any mention of assumption of the risk in the instruction, is misleading to the jury, and therefore, improper.

It was improper for an instruction to be given on assumption of risk because there is no law in Delaware applicable to Plaintiff that would require his use of a helmet. Absent any law requiring the use of a helmet while operating a motorcycle, there is no place in the jury instruction for such highly prejudicial instructions.

VI. THE TRIAL COURT ERRED IN ALLOWING THE POLICE OFFICER TO TESTIFY REGARDING HIS OPINION OF THE MECHANISM WHEN HE HAD NOT BEEN ADMITTED AS AN ACCIDENT RECONSTRUCTION SPECIALIST.

A. Question Presented

See Plaintiffs' Opening Brief.

B. Standard and Scope of Review

See Plaintiffs' Opening Brief.

C. Merits of the Argument

Defendant argues that Plaintiffs did not object by stating this testimony would cause the witness to provide an expert answer and therefore that this argument is restricted from being raised on appeal. (Answering Brief-36). Defendant cites *Weedon v. State*, 647 A.2d 1078 (Del. 1994), which asserts that an objection should be waived on appeal if the contemporaneous objection was based on different grounds. Reliance on this holding is improper, however, as the objection in contention *was* based on likewise grounds and, therefore, can be raised on appeal.

In response to a question regarding the type of training he had received in terms of accident investigation Downer responded, "Basics, nothing advanced, nothing in the level of crash reconstruction or anything like that." (A-203). Despite his testimony denying any crash reconstruction training, Defendant asked Downer to speculate as to the impact of the vehicles based on the damage. (A-212). Plaintiffs' counsel objected, stating in part, "there's no expert that is here today that is going to be able to say - to make that

determination." (A-212). It is unmistakable that Plaintiffs' objection was to Trooper Downer's testimony as an expert. The objection was raised immediately following a question that undoubtedly required speculation from an officer who previously admitted to having received no accident reconstruction training. (A-212). Moreover, the language used in Plaintiffs' objection explicitly used the language "no expert." (A-212). This language undoubtedly raises the objection that this testimony would cause for expert testimony from a non-expert witness.

Defendant additionally contends that Downer's testimony was not intended as expert testimony. (Answering Brief- 31). Defendant bases this argument on Downer's use of the phrase "I don't know." (Answering Brief-31). Defendant argues that the use of this phrase negates the jury's assumption that Downer's testimony was the testimony of an expert. (Answering Brief-31). However, the use of the phrase "I don't know" cannot be assumed to negate the jury's interpretation that Trooper Downer was testifying as an expert. Rather, in allowing Trooper Downer to express his opinion on the point of impact based upon photographs, as well as, recognition of his status as an officer throughout the trial, the impression to the jury was that Downer was an expert.

Furthermore, Defendant alleges that Downer's response was not that of an expert, but rather, falls within DRE 701 and 702 whereby an exception has been made allowing a witness who is not an expert to testify in the form of opinions or inferences once certain conditions have been met. (Answering Brief-37). This argument must fail as it

does not satisfy the third prong of DRE 701 requiring that the opinion of a layperson is "not based on scientific, technical or other specialized knowledge." (Answering Brief-37). The speculative nature of the question required the use of specialized knowledge of years on the job as a police officer to accurately be able to identify, based on the damage of vehicles, the manner in which the vehicles struck. Because Trooper Downer relied on his years of experience as an officer, his response was based on specialized knowledge and cannot satisfy DRE 701(c).

Due to his lack of accident reconstruction training, Downer was not qualified to testify as an expert. The objection made by counsel was unmistakably intended to object to Downer's testimony as an expert witness. Therefore, the trial court erred in allowing Trooper Downer's opinion as to the mechanism of the accident into testimony.

VII. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS THERE WERE FACTUAL ISSUES.

A. Question Presented

Whether the Trial Court acted within its discretion when it denied Defendant's Motion for Summary Judgment?

B. Standard and Scope of Review

The Supreme Court of Delaware reviews the trial court's grant of summary judgment *de novo*. *Alston v. Alexander*, 49 A.3d 1192 (Del. 2012). The standard for granting summary judgment is high. *Williams v. Geier*, 671 A.2d 1368 (Del. 1996). The entry of summary judgment is appropriate only when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009)(citing *Williams*, 671 A.2d 1368). The Court "will accept as established all undisputed factual assertions, made by either party, and accept the non-movant's version of any disputed facts. *Merrill v. Crothal-American, Inc.*, 606 A.2d 96 (Del. 2002). The facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party. *Williams*, 671 A.2d 1368 (citing *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 844 (Del. Super. 1987)).

C. Merits of the Argument

Summary judgment cannot be granted where there exists a material fact in dispute or it is desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances. *Cropper v. State Farm Mutual Ins. Co.*, 671 A.2d 423

(Del. Super. 1995). In the present case a material fact exists regarding the facts that surround the accident based upon Defendant's differing versions of the accident. Trooper Downer indicated in his report that Defendant told him "she has a fear of bridges for which she takes prescription medication. She was northbound on Summit Bridge Road, approaching the Summit Bridge when she had an anxiety attack [and...] she abruptly stopped at the foot of the bridge." (A-64-65). At her deposition, however, Defendant stated otherwise, denying taking medication for her fear of bridges. (A-65). The differing statements offered by Defendant create a material issue of fact that occurred the night of the accident, thereby precluding summary judgment.

Additionally, Defendant attempts to call into question the credibility of Trooper Downer and the report he produced. (Answering Brief-39). Despite Trooper Downer's testimony in which he affirmatively answered he considered certain actions of Plaintiff in his investigation, Defendant alleges that Downer focused solely on the acts of Defendant. (B-5). However, in addition to weighing the evidence, the jury must weigh the credibility of the witnesses. *Cuonzo v. Shore*, 958 A.2d 840 (Del. 2008). Thus, Downer's credibility and actions taken in pursuit of his investigation following the accident are issues for the jury to weigh and not for the court rule upon.

Moreover, Defendant recognized duties that Plaintiff had while driving, but failed to recognize Defendant's duties, beyond signaling, while operating her vehicle. (Answering Brief-40-41). Defendant had a

duty to operate her vehicle exercising due regard for the road and traffic pursuant to 21 Del.C. §4176. In addition to violating this duty, Defendant violated 21 Del.C. §4171 which prohibits persons from driving at such a slow speed as to impede traffic. Defendant alleges that there was no proof that she failed to uphold these duties or that her conduct was a proximate cause of the accident. (Answering Brief-36). This is, however, a question of fact for the jury to determine.

The Cross-Appeal filed by Defendant alleges that the trial court erred in denying Defendant's motion for summary judgment based on the defense's claim that there were no factual issues as to whether Plaintiff was more negligent than Defendant in causing the accident. Summary judgment was inappropriate, however, because "in general, the question of negligence and its causal relationship to plaintiff's injuries are ordinarily issues for the jury and not to be resolved by summary judgment." *Gebelein v. Hopkins Trucking*, 1993 Del. Super. LEXIS 409 (Del. Super. Ct. Dec. 14, 1993). Thus, Defendant's allegation that Plaintiff was more than 50% at fault for the accident is an issue of fact that should be left to the jury to resolve and not one for the court. (Answering Brief-34).

Summary judgment is inappropriate if there are material issues of fact in dispute. In the current case, there are issues of credibility in dispute as well as facts as to the cause of the accident. Therefore, the court below properly denied Defendant's Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, this Court should reverse the Orders of the Superior Court and remand the case for a new trial.

Respectfully submitted,

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