

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DANTE WILLIAMS,

Plaintiff,

v.

UNITED PARCEL SERVICE OF
AMERICA, INC.,

Defendant.

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) C.A. No. N15C-10-251 JRJ
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OPINION

Date Submitted: August 7, 2017

Date Decided: November 9, 2017

*Upon Defendant's Renewed Motion for Summary Judgment: **GRANTED.***

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Jurden, P.J.

I. INTRODUCTION

Before the Court is Defendant United Parcel Services, Inc.'s ("UPS") Renewed Motion for Summary Judgment. Plaintiff Dante Williams ("Williams") claims he was injured in a motor vehicle collision caused by a UPS truck.¹ The only eyewitness to the collision, who is now deceased, told police that a UPS truck struck Williams' parked truck.² UPS denies that one of its vehicles struck Williams' truck.³ At issue is whether the eyewitness' statement is admissible because, if not, Plaintiff cannot establish a *prima facie* case against UPS and defendant is entitled to summary judgment. For the reasons explained below, Defendant's Renewed Motion for Summary Judgment is **GRANTED**.

II. BACKGROUND

On October 4, 2013, Williams was sleeping inside his truck, which was parked in the parking lot of a Wawa store located at Route 13 and Memorial Drive.⁴

¹ Pl.'s Am. Compl. at ¶ 3 (D.I. 4) (Trans. ID. 58119230) Pl.'s Opp'n to Def.'s Renewed Mot. Summ. J., ¶ 1 (D.I. 26) (Trans. ID. 60918768).

² Def.'s Renewed Mot. Summ. J., Ex. 3 (D.I. 23) (Trans. ID. 60743276) (Wawa Incident Investigation Witness Statement). The Wawa Incident Investigation Witness Statement is not relevant for purposes of this Motion because (1) Means did not identify the striking vehicle as a UPS truck in the Wawa Witness Statement, and (2) the issue is not *whether* an collision occurred, but *who* caused the collision.

³ Def.'s Renewed Mot. Summ. J. (D.I. 23) (Trans. ID. 60743276). After UPS filed its first Motion for Summary Judgment, the Court deferred making its decision pending a second deposition of the Plaintiff.

⁴ Pl.'s Am. Compl. at ¶ 2 (D.I. 4) (Trans. ID. 58119230). According to Williams, he had been awake most of the night of October 3, 2013.

Williams woke up and discovered his truck had been struck by another vehicle.⁵ Williams did not see the vehicle that struck his truck, and the striking vehicle fled the scene of the collision.⁶

Police were called and responded to the scene. The responding police officer completed a State of Delaware Uniform Collision Report (the “Police Report”).⁷ The only eyewitness to the collision, Nathaniel Means, Sr. (“Means”), a Wawa patron, gave a statement to the responding police officer.⁸ According to the Police Report, Means told the police officer that a “UPS truck [. . .] collided with the front of [Williams’ truck], causing damage to the grill.”⁹ The Police Report also notes that Williams “advised he was asleep in his truck, which was parked in the same location, and was awaken[ed] when a UPS semi-truck made contact with his vehicle.”¹⁰

⁵ Pl.’s Opp’n to Def.’s Renewed Mot. Summ. J., Ex. A (D.I. 26) (Trans. ID. 60918768) (Police Report).

⁶ Mot. to Dismiss Ex. D, Dante Alan Williams Deposition Transcript Dated January 14, 2016, 43:7–10 (D.I. 15) (Trans. ID. 60015118); Pl.’s Opp’n to Def.’s Mot. to Dismiss ¶ 1 (D.I. 20) (Trans. ID 60476003); Pl.’s Opp’n to Def.’s Renewed Mot. Summ. J., Ex. A (D.I. 26) (Trans. ID. 60918768) (Police Report).

⁷ Pl.’s Opp’n to Def.’s Renewed Mot. Summ. J., Ex. A (D.I. 26) (Trans. ID. 60918768) (Police Report) (The Police Report notes, “Wawa has a record of the incident for their records.”). Def.’s Renewed Mot. Summ. J., Ex. 3 (D.I. 23) (Trans. ID. 60743276) (Wawa Incident Investigation Witness Statement) (As noted earlier, there is no reference to UPS in the statement that Means gave to Wawa.).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* Because Williams concedes he did not observe the vehicle that hit his, someone must have told him it was a UPS truck. Williams’ purported mention of a UPS truck creates no genuine issue

III. PARTIES' CONTENTIONS

Defendant argues it is entitled to summary judgment because there is no evidence on record upon which a finder of fact could conclude that Williams' truck was struck by a UPS truck.¹¹ In opposition, Williams concedes he cannot identify the vehicle that struck his truck, but argues that Means' eyewitness account is admissible as a present sense impression under Delaware Rule of Evidence ("DRE") 803(1).¹²

IV. STANDARD OF REVIEW

Summary Judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.¹³ The moving party bears the burden of establishing the non-existence of material issues of fact.¹⁴ Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material issues of fact in dispute.¹⁵ In considering a Motion for Summary Judgment, the Court must view the record in a light most favorable to the non-moving party.¹⁶ The Court will not consider inadmissible

of material fact because the UPS reference is hearsay and a fact unknowable by Williams since he did not see the vehicle that struck his truck.

¹¹ Def.'s Renewed Mot. Summ. J., ¶ 2 (D.I. 23) (Trans. ID. 60743276).

¹² Pl.'s Opp'n to Def.'s Mot. Summ. J., ¶¶ 1, 3 (D.I. 20) (Trans. ID. 60476003); D.R.E. 803(1).

¹³ Super. Ct. Civ. R. 56(c).

¹⁴ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

¹⁵ *Id.* at 681.

¹⁶ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) (internal citations omitted).

hearsay when deciding a Motion for Summary Judgment,¹⁷ and “[t]he non-movant cannot create a genuine issue of fact with bare assertions or conclusory allegations, but must produce specific evidence that would sustain a verdict in its favor.”¹⁸

V. DISCUSSION

Because Williams did not see the striking vehicle, Means’ statement to the police officer is the only potentially admissible evidence linking UPS to this collision. There is no dispute that Means’ statement to the police is hearsay,¹⁹ and therefore the question is whether that statement falls within the Present Sense Impression exception to the hearsay rule.²⁰ If so, summary judgment is not appropriate. If not, then UPS is entitled to judgment as a matter of law because Plaintiff is unable to establish a *prima facie* case that UPS caused Plaintiff’s injuries.²¹

¹⁷ *Collins v. Ashland, Inc.*, 2009 WL 81297, at *2 (Del. Super. 2009) (Inadmissible hearsay is insufficient to create a genuine issue of material fact) (citing *Continental Cas. Co. v. Ocean Accident & Guar. Corp.*, 209 A.2d 743 (Del. 1965) (No rule in the law of evidence permits consideration of hearsay for purposes of a Motion for Summary Judgment)).

¹⁸ *Citimortgage, Inc. v. Stevenson*, 2013 WL 6225019, at *1 (Del. Super. 2013) (citing *Atamian v. Hawk*, 842 A.2d 654, 658 (Del. Super. 2003)).

¹⁹ DRE 801(c) (Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Williams offers Means’ alleged statement for the truth of the matter asserted, i.e., that a UPS truck struck Williams’ vehicle.); Pl.’s Opp’n to Def.’s Renewed Mot. Summ. J. (D.I. 26) (Trans. ID. 60918768). Plaintiff argues that Means’ statement is admissible evidence under DRE 803(1), the Present Sense Impression exception to the hearsay rule.

²⁰ Pl.’s Opp’n to Def.’s Mot. Summ. J., ¶ 3 (D.I. 20) (Trans. ID. 60476003); D.R.E. 803(1).

²¹ See *Keith v. Sioris*, 2007 WL 544039, at *5 (Del. Super. 2007) (“[T]o survive summary judgment, [the non-moving] party is obliged to point to facts in the record that will support its *prima facie* case at trial.”); see also *Roberts v. Delmarva Power & Light Co.*, 2 A.3d 131, 136 (Del. 2009), citing *Cerberus Intl., Ltd. V. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1149 (Del. 2002)

Under DRE 803(1), the Present Sense Impression exception applies if:

- (1) The declarant personally perceived the event described;
- (2) The declaration is an explanation or description of the event, rather than a narration; and
- (3) The declaration and the event described are contemporaneous.²²

In order to qualify as a present sense impression under DRE 803(1), all three prongs must be satisfied.

A. The Requirements for Statements to Constitute a Present Sense Impression

1. Declarant Must Have Personally Perceived the Event

Based on Means' statement, it appears he personally perceived the collision.²³

This prong is satisfied.

("A genuine issue of fact arises when 'any rational trier of fact would infer that plaintiffs have proven the elements of a *prima facie* case.'").

²² *Warren v. State*, 774 A.2d 246, 251–53 (Del. 2001). The statement does not need to be made exactly when the event occurs, and "courts generally find statements admissible as present sense impressions if the statements were made within about ten or twenty minutes of the event." This exception is based on the theory that this type of spontaneous statement, describing an event, is "trustworthy because the declarant has no time to fabricate the statements and because there is less concern that the statements reflect a defect in the declarant's memory."

²³ Def.'s Renewed Mot. Summ. J., Ex. 3 (D.I. 23) (Trans. ID. 60743276) (Wawa Incident Investigation Witness Statement).

2. *Declaration is an Explanation or Description of the Event, Not a Narration*

On the record before the Court, it appears that Means' statement to the police officer is an explanation or description of the event, and not a narration.²⁴ Thus, this prong is also satisfied.

3. *Declaration is Contemporaneous with the Event*

This prong is not satisfied. The record is devoid of admissible evidence as to when, in relation to the event, Means gave his account to the police officer and whether it was contemporaneous with the collision.²⁵ Means is now deceased, and there is no independent corroboration as to the timing of Means' statement to the police in relation to when he witnessed the collision.²⁶ While a present sense

²⁴ Pl.'s Opp'n to Def.'s Renewed Mot. Summ. J., Ex. A (D.I. 26) (Trans. ID. 60918768) (Police Report). To the extent Plaintiff tries to argue that Means' statement to Wawa is part of the Police Report, this argument fails. It is not. In any event, Means' Wawa statement is a narrative, not an explanation or description, and therefore does not satisfy this prong.

²⁵ *Abner v. State*, 2000 WL 990973 (Del. 2000) (ORDER), Order at ¶ 4 (citing *Paskins v. State*, 1983 WL 10913 (Del. 1983) (ORDER), Order at ¶ 5).

²⁶ See Def.'s Renewed Mot. Summ. J., Ex. 4 (D.I. 23) (Trans. ID. 60743276) (Wawa Incident Investigation Affected Person Statement); see also Def.'s Renewed Mot. Summ. J., Ex. 5, Dante Alan Williams Deposition Transcript Dated May 25, 2017, 14:17–24 (D.I. 23) (Trans. ID. 60743276); Pl.'s Opp'n to Def.'s Renewed Mot. Summ. J., Ex. A (D.I. 26) (Trans. ID. 60918768) (Police Report). In his Wawa statement and at deposition, Williams avers the collision occurred at 4:20 a.m., while the Police Report notes that the collision occurred at 5:47 a.m. Viewing the facts in a light most favorable to Williams, this Court will assume the collision occurred at 5:47 a.m., contrary to Plaintiff's sworn testimony. But that does not help Plaintiff avoid summary judgment because there is no independent corroboration establishing what time Means gave his statement to the police officer. Plaintiff had the opportunity to independently corroborate the contemporaneousness of Means' statement by providing a sworn affidavit from the police officer as to the time he arrived, when the collision occurred, and when he took Means' statement. Plaintiff provided no such affidavit in opposition to this summary judgment motion.

impression need not be precisely contemporaneous with the triggering event, it must be in response to it, and occur within a short time after the stimulus.²⁷ Here, Means' eyewitness account does not qualify as a present sense impression under the hearsay rule because due to Means' death, and the lack of testimony or affidavit from the responding police officer, Plaintiff cannot establish Means' statement to the police was contemporaneous with the collision.

B. Investigative Reports Are Inadmissible Hearsay Under DRE 803

Contrary to Plaintiff's argument, the Police Report is inadmissible under DRE 803(8)(A).²⁸ Furthermore, Williams' reference to UPS in the Police Report is

²⁷ *Id.*; *Warren*, 774 A.2d at 252–53 (“[C]ourts generally find statements admissible as present sense impressions if the statements were made within about ten or twenty minutes of the event.”). While there is no *per se* general requirement of independent corroboration for a statement to be admitted under the Present Sense Impression exception, independent corroboration may be required to determine whether the statement was contemporaneous.

²⁸ D.R.E. 803 (8)(A) (emphasis added).

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) **Public Records and Reports.** To the extent not otherwise provided in this paragraph, records, reports, statements or data compilations, in any form, of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (A) *Investigative reports by police and other law-enforcement personnel*; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case

hearsay within hearsay because Williams did not personally observe the vehicle that struck his truck.²⁹

VI. CONCLUSION

Means' statement in the Police Report is hearsay within hearsay. Williams cannot testify as to the vehicle that struck his truck because he did not personally see the striking vehicle. Means is deceased and therefore unavailable to testify at trial. Because there is no admissible evidence in the record before the Court linking UPS to this collision, Plaintiff cannot make a *prima facie* case against UPS. Therefore, there is no genuine issue of material fact in dispute, and defendant is entitled to judgment as a matter of law.

WHEREFORE, IT IS HEREBY ORDERED that Defendant's Renewed Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.


Jan R. Jurden, President Judge

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Original to Prothonotary
cc: Nancy C. Cobb, Esq.
Joseph J. Longobardi, Esq.

or incident; (E) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

²⁹ Mot. to Dismiss Ex. D, Dante Alan Williams Deposition Transcript Dated January 14, 2016, 43:7-10 (D.I. 15) (Trans. ID. 60015118); Pl.'s Opp'n to Def.'s Mot. to Dismiss ¶ 1 (D.I. 20) (Trans. ID 60476003); Pl.'s Opp'n to Def.'s Renewed Mot. Summ. J., Ex. A (D.I. 26) (Trans. ID. 60918768) (Police Report).