

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARGARITA MORANTE-McRAE, Plaintiff

AND:

WILLIAM KING, Defendant

BEFORE: THE HON. MR. JUSTICE J.R. McCARTHY

COUNSEL: P.M. Rotondo, for the Plaintiff

H. Vaughan, for the Defendant

HEARD: April 12, 2013

ENDORSEMENT

- [1] The Defendant seeks to have the plaintiff's action dismissed on the issue of liability by way of Summary Judgment pursuant to Rule 20 of the *Rules of Civil Procedure*. The plaintiff opposes the motion on the basis that liability for the accident remains a genuine issue requiring a trial.
- [2] This action lies in a claim for damages for injuries allegedly suffered by the plaintiff arising out of a motor vehicle accident (MVA) which took place on December 17, 2008 at the intersection of the 10th Line and the 25th Sideroad (SR) in the Township of Essa in the County of Simcoe. There is no question that the Defendant was operating his vehicle southbound along the 10th line when he came into collision with the plaintiff's vehicle being operated eastbound along 25th SR. There is also agreement that that there were no stop signs or lights governing traffic travelling southbound at the said intersection. On the contrary, the eastbound approach to the intersection along the 25th SR was controlled by a stop sign. The collision took place on the travelled portion of the 10th line with the front of the Defendant's vehicle striking the Plaintiff's driver's side front and rear door panels. In these circumstances, it is evident that the Defendant enjoyed the right of way.

The Defendant's Position

- [3] The Defendant argues that the MVA in question was caused entirely by the plaintiff's failure to yield the right of way to the Defendant. Based on a full appreciation of the evidence regarding the collision, there is no genuine issue requiring a trial. The Defendant enjoyed the right of way; he was travelling straight ahead. The Plaintiff either failed to stop or came to only a partial stop. Either way, the Plaintiff then pulled out into

the path of Defendants vehicle leaving the Defendant no opportunity to avoid the collision. The Defendant put forward as evidence the following: an affidavit from the Defendant recounting his version of the MVA, the purchase and installation documentation for his vehicle's Michelin x-ice snow tires, the MVA report, the Defendant's statement to the investigating police officer, a witness statement of one Lyle Marvin, together with the transcripts from the examinations for discovery of the Plaintiff which took place on April 25, 2011. Finally, the Defendant relies on a Collision Investigation Report from proposed expert Craig Wilkinson. The Defendant submits that the evidence is clear that there was no reasonable opportunity for the Defendant to avoid the collision. The Defendant applied the brakes as soon as he saw the plaintiff entering onto the roadway. His vehicle was equipped with snow tires. He testified that he was travelling below the posted speed limit.

The Plaintiff's Position

- [4] The Plaintiff contends that the Defendant's primary if not sole ground for seeking summary judgment is that he claimed to have the right of way at the time of the accident. She relies on the cases of *Behmanesh v Yokhana*, (2011) ONSC 4950 wherein this court dismissed a motion for summary judgment on the basis that having the right of way does not absolve a driver from exercising proper care. An important question in these circumstances would be whether the driver with the right-of- way had the opportunity to avoid the collision in all of the circumstances. In *Gardner v Hann*, (2011) ONSC 162 (Can LII), this court declined to grant summary judgment even in the face of clear evidence that the Defendant had proceeded through a stop sign without stopping and had even been convicted of the accompanying traffic offence. The Court in that instance followed the British Columbia case of *Hynna v Peck*, [2009] CarswellBC 2088 (B.C.S.C.) which held that a Defendant is not automatically free of liability because a plaintiff may have had the more weighty duty to take care.

Analysis

- [5] The moving party has the legal burden to show that there is no genuine issue for trial. That burden never shifts.
- [6] Of course, the Plaintiff has the obligation to put her best foot forward in a summary judgment motion. She cannot rely on the possibility of new or better evidence being available at a later date. But the responding party must only adduce some coherent evidence based on an organized set of facts to show that there is real issue to be tried on admissible evidence.
- [7] In the case at bar, I am satisfied that a trier of fact, properly instructed, might, on the evidence find some degree of liability on the Defendant. The full appreciation of the evidence exercise leads me to make the following observations:
- There was considerable evidence of snow covered or slushy roads and inclement weather at the time of the accident;

- The police report blamed road conditions for the accident. And while the report incorrectly diagrams the accident, it is likely that the investigating officer was sufficiently impressed by the road conditions to make note of them;
- The expert report does not address the Defendant's reaction time or any opportunity he might have had to avoid the accident;
- The expert report does not address the issue of what an appropriate speed might have been in light of prevailing conditions;
- The Defendant was approaching the intersection while descending a steep hill;
- There is a discrepancy between the estimates of the Defendant's speed at the time he slammed on his brakes and the likely speed upon impact. The range given at discovery by the Defendant (30 to 40km per hour upon braking) and the range arrived at by the Defendant's expert (35 to 55km) are not easily reconcilable. If a court accepted the higher speed estimate, it might judge the Defendant's speed to have been excessive in light of all the circumstances;

[8] In my view, an important question at trial would be whether the Defendant, as a driver with the right of way, was travelling at an appropriate rate of speed given all of the prevailing conditions of weather, roads, topography. A finding that he was not is entirely possible on the evidence before me. That question is best left for trial. The relative liability of the Defendant for this action, if any, is a genuine issue that requires a trial in this case.

[9] Having fully reviewed the evidence, I am unable to conclude that liability is not a genuine issue for trial. A trier of fact, in possession of the evidence available before me, and having had the opportunity to weigh and assess evidence given under oath and which is subject to cross-examination, might conclude that the Defendant bears some share of responsibility for the subject accident.

[10] The motion is therefore dismissed.

McCARTHY J.

Date: April 12, 2013