IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE ESTATE OF BROOKE C. DAVIS, JODY C. VASEY, individually as Mother and as Administratrix of the Estate of Brooke C. Davis, EDWARD J. DAVIS, individually and as guardian ad litem of Reece Davis, and as father of Brooke C. Davis,	)	C.A. No. 09C-09-040 JTV
Plaintiffs,	)	
v.	)	
KATHERINE E. COTULLAS, GERALD T. BOYER, JR and EVELYN COTULLAS, a/k/a Evelyn Boyer, DANIEL C. BOONE, III, POLYTECH SCHOOL DISTRICT and THE BOARD OF EDUCATION OF POLYTECH SCHOOL DISTRICT,	)	
Defendants.	)	

Submitted: May 13, 2011
Decided: August 31, 2011

Francis J. Jones, Jr., Esq., Morris James, LLP, Wilmington, Delaware. Attorney for Plaintiffs Estate of Brooke C. Davis and Jody C. Vasey.

Charles E. Whitehurst, Esq., Young, Malmberg & Howard, P.A., Dover, Delaware. Attorney for Plaintiffs Reece Davis and Edward J. Davis.

Douglass L. Mowrey, Esq., Law office of Douglass Lee Mowrey, Newark, Delaware. Attorney for Defendants Cotullas and Boyer.

Noel E. Primos, Esq., Schmittinger & Rodriguez, Dover, Delaware and Marc P. Niedzielski, Esq., Department of Justice, Wilmington, Delaware. Attorneys for Defendant Polytech School District.

Upon Consideration of Defendants' Boone, Polytech School District, and The Board of Education for Polytech School District Motion For Summary Judgment
GRANTED in Part
DENIED in Part

VAUGHN, President Judge

ORDER

Upon consideration of the Motion for Summary Judgment filed by defendants Daniel C. Boone, III, Polytech School District, and the Board of Education of the Polytech School District, the opposition of the plaintiffs, and the record of the case, it appears that:

1. On December 20, 2008, at approximately 9:20 p.m., a three-car accident occurred at the intersection of Millchop Lane and Autumn Moon Lane. Viewing the facts in the light most favorable to the non-moving party, as I must on a motion for summary judgment, it appears that on the date of the accident, defendant Boone, who was employed as a special education instructor and wrestling coach at Polytech High School, was returning to Polytech after a wrestling tournament. He was driving a Polytech minivan with a student passenger and was being followed by another Polytech vehicle carrying two other wrestling coaches. As defendant Boone proceeded west on Millchop Lane, he approached the road's intersection with

Autumn Moon Lane. Stop signs face Autumn Moon Lane, making it the inferior road, with Millchop Lane being a through road.[1]

2. Defendant Boone had some familiarity with the intersection, having driven through it before. Because of having driven through the intersection before, he had a sense that the drivers on Millchop Lane "should have been the ones stopping," and that the "intersection wasn't safe."[2] He also stated that when going through the intersection previously on Millchop Lane he had slowed down and taken "another look"to make sure he was not supposed to be the one stopping.

3. As he approached the intersection on the day of the accident, defendant Boone's vehicle was going approximately forty-five miles per hour, which is five miles below the posted speed limit. He noticed another vehicle, the Davis vehicle, approaching him heading east on Millchop Lane. He also scanned the area for deer. The area around the intersection was a set of fields with no vegetation tall enough to have obstructed the vision of drivers on either road. Knowing that he had the right of way, he entered the intersection this time without slowing down. At precisely the same time, defendant Katherine Cotullas was driving south on Autumn Moon Lane. She ran the stop sign on Autumn Moon Lane and struck first defendant Boone's minivan and then the Davis vehicle. The collision caused the Boone vehicle to turn upside down and then strike the Davis vehicle. Prior to impact, Boone never saw the

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[1] The inferior, or subordinate, road refers to one controlled by a traffic signal, which gives cars on an adjoining road the right-of-way.

[2] (Boone Dep. P. A-9, 1.3,4 & p. A-7, 11.10-19).

Cotullas car. The driver of the second Polytech van had noticed the approaching Cotullas vehicle, could see that it was not going to stop, and began slowing down. As a result of the collisions Brooke C. Davis, the driver of the Davis vehicle, was killed and her brother, Reece Davis, was injured.

4. All claims against the movants have been dismissed except the negligence claim against defendant Boone and vicarious liability claims against the District and the Board of Education.

5. The moving defendants contend that there is no evidence that defendant Boone contributed to the accident; that since he had the right of way he was not negligent; and that he had no duty to anticipate defendant Cotullas' negligence. They further contend that the plaintiffs cannot establish proximate cause because if defendant Cotullas had not struck Boone first, she would have struck the plaintiffs with even greater force. Finally, the movants contend that summary judgment is appropriate as to the claims brought by the Estate of Brooke C. Davis because the plaintiffs cannot establish the decedent suffered some appreciable interval of conscious pain.

6. The plaintiffs contend that cases can arise where, under certain circumstances, a driver on a favored road may be found to have been negligent; that a driver must maintain a proper lookout or reduce his speed upon some warning of danger regardless of who has the right-of-way; that defendant Boone was aware of potential danger at the Millchop Lane and Autumn Moon Lane intersection; that on the night of the accident defendant Boone failed to maintain a proper lookout and did not slow down before entering the intersection despite having done so previously out

of awareness of potential danger at the intersection; that under the circumstances of this case defendant Boone negligently entered the intersection; that proximate cause may be established because the primary cause of death to Brooke C. Davis and injury to Reece Davis was that the Boone vehicle rolled over on the top of the Davis vehicle; and that the Estate is entitled to recover funeral expenses.

7. Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[3] The moving party bears the burden of establishing the non-existence of material issues of fact.[4] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[5] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[6] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[7] Summary judgment is inappropriate "when the record reasonably 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 law to the

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[3] Super. Ct. Civ. R. 56(c).

[4] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[5] *Id.*

[6] *Pierce v. Int's Ins. Co. Of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[7] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

circumstances."[8]

8. In their moving and responding papers, the parties primarily discuss four cases. In one, *Williams v. Chittick*,[9] a vehicle driven by John Kozelski had the right of way. A vehicle driven by Charles Williams should have been stopped at a stop sign. The Williams vehicle either failed to stop or failed to remain stopped and struck the Kozelski vehicle on the right side, causing the death of a passenger in the Kozelski vehicle. The widow of the deceased passenger filed suit against both Williams and Kozelski. At trial a directed verdict was granted to Kozelski. The directed verdict was affirmed on appeal. In the course of its opinion, the Delaware Supreme Court stated, in pertinent part, that the driver on the favored road, Kozelski, was entitled to assume that Williams would not enter the intersection until he could do so safely; that Kozelski's right to assume that Williams would not enter the intersection until he could do so safely continued until Kozelski was put on notice that Williams was entering the intersection unsafely; that absent circumstances that would place Kozelski on warning that Williams was about to enter the intersection unlawfully, he was not bound to anticipate Williams' negligence and was entitled to proceed without reducing his speed; that the driver on the favored road does have to keep such a lookout as a reasonably prudent person would do in order to discover possible danger; and that cases may arise where under certain circumstances the

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[8] *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *4 (Del. Super. Jan. 31, 2007).

[9] 1 Storey 122 (Del. 1958).

driver on the favored road may be guilty of negligence contributing to an accident, but such driver is not required to slow down in anticipation of danger which has not become apparent.

9. In *Scatasti v. Guyer*[10] Armand Scatasti was traveling northbound on Lancaster Avenue and Pierce Guyer was traveling eastbound on Brackenville Road where it intersects with Lancaster Avenue. Scatasti was on the favored road, but did face a flashing yellow light at the intersection. Guyer faced a stop sign and a blinking red light and had stopped. Scatasti was familiar with the intersection and stated that it was "bad." Guyer failed to remain stopped and pulled out onto Lancaster Road directly in front of Scatasti, causing a collision. The court stated that there was little evidence of whether Scatasti braked or attempted evasive action. Each driver had an unobstructed view of the other. Scatasti was the injured party and sued Guyer for damages. The jury found each driver to be fifty percent at fault. Scatasti filed a motion for a new trial, complaining of the finding of fifty percent fault on his part. The court denied the motion. In the course of its opinion, the court stated, in pertinent part, that generally, under these circumstances, Scatasti was not required to slow down when approaching the intersection, nor was he required to determine whether Guyer would obey the law; that because of the flashing yellow light, Scatasti was required to proceed with caution; that with such a light, a favored driver does have the duty to keep a proper lookout to discover potential danger and to act carefully under existing conditions.

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[10] 1996 WL 659474 (Del. Super.).

10. In *McCloskey v. Mckelvey*[11] the plaintiff was traveling in the inside lane of three lanes on northbound Route 13 where Roosevelt Avenue intersects with the highway. The middle and outside lanes of Route 13 were stopped with traffic. The defendant was stopped on Roosevelt Avenue. Motorists in the middle and outside lanes of Route 13 allowed him to cross. The plaintiff was moving in his lane at twenty-five miles per hour and struck the defendant as the defendant pulled across the plaintiff's lane. The jury returned a verdict in favor of the defendant. The plaintiff filed a motion for a new trial, which the court denied. In the course of its opinion, the court stated, in pertinent part, that a driver on a through highway is not required to reduce his speed before he reaches an inferior crossing in order to determine whether a driver on the inferior road will obey a stop sign; that unless the driver on the through highway has some warning of danger likely to occur at such intersection, he need not reduce his speed; that these principles do not mean that he does not have to keep such lookout as a reasonably prudent person would do in order to discover possible danger or to act carefully under existing conditions; that cases may arise where under certain circumstances the driver on a favored road may be guilty of negligence contributing to an accident, but he is not required to slow down in anticipation of danger which has not yet become apparent.

11. In *McNally v. Eckman*[12] a van owned by Kesterson was traveling north on U.S. Route 13. It struck a truck operated by John K. McNally, Jr. at a "T"-shaped

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[11] 54 Del. 107 (Del. Super. 1961).

[12] 466 A.2d 363 (Del. 1983).

intersection of Route 13 and Route 2. The McNally vehicle, proceeding west on Route 2, had failed to stop at a stop sign. A passenger in the Kesterson van brought suit against both Kesterson and McNally. At the conclusion of trial, the court directed a verdict against both defendants on the issues of negligence and proximate cause. The jury apportioned fault at sixty-five per cent against McNally and thirty-five percent against Kesterson. On appeal, the Delaware Supreme Court affirmed the directed verdict against Kesterson on the grounds that although Kesterson's driver had the right of way, he was speeding, which was negligence and a proximate cause of the accident.

12. Both sides emphasize the parts of the foregoing cases which support their contentions and distinguish the parts which do not. The movants also rely on Superior Court Pattern Jury Instruction 5.3 which reads, in pertinent part:

> Nobody is required to anticipate someone else's negligence. A driver is allowed to assume that another driver will not act negligently until he knows or should know that the other person is acting or is about to act negligently. Therefore a driver is required to act reasonably and prudently under the circumstances of the particular situation.

13. Read consistently, the foregoing authorities seem to establish the same following essential points: that a driver on a favored road is entitled to assume that a driver on an inferior road will obey the law and stop at the stop sign or red light; that the driver on the favored road has no duty to anticipate negligence on the part of the driver on the inferior road; that the driver on the favored road is not required to

reduce his speed on approaching an intersection in anticipation of danger which has not yet become apparent; that the driver on the favored road does have a duty, however, to keep such a lookout as a reasonably prudent person would do in order to observe possible danger; and that where a driver on a favored road fails to observe danger which a reasonably prudent person would have observed, he may be negligent.

14. Applying these principles to this case, I conclude that there is a jury question on the issue of defendant Boone's alleged negligence. This jury question arises from the facts, viewing them in the light most favorable to the plaintiffs, that defendant Boone had previously perceived the intersection to be unsafe; that there were clear lines of sight; that defendant Boone apparently did not see the lights of the Cotullas vehicle at all; and that the driver in the van following the Boone van did see the Cotullas vehicle and saw that it was not going to stop.

15. I also find that there is a jury issue on proximate cause based upon the report prepared by CED Investigative Technologies, Inc.

16. Finally, the movants contend that they are entitled to summary judgment against the Estate of Brooke C. Davis on the grounds that no survivorship claim exists under 10 *Del. C.* § 3701 because the record is undisputed and the parties have stipulated that the decedent did not suffer an "appreciable interval of conscious pain and suffering" after injury until death. The plaintiffs do not dispute this point but claim that an estate may recovery funeral expenses in a survivorship action where the estate is obligated to pay them or has already paid them. As support for this

contention, they rely upon *Reynolds v. Willis*.[13] However, in *Reynolds* the Supreme Court expressly stated that it made no ruling on that point. Later, in *Bennett v. Andree*[14] the Supreme Court held that funeral expenses cannot be recovered by the estate in a survivorship claim. Therefore, as to the estate's claim that it is entitled to recover funeral expenses on a survivorship claim, summary judgment is granted to the defendants. Since the issue has been framed solely in terms of a survivorship claim, I have not considered whether there is any alternative legal basis upon which the estate may recover funeral expenses. However, plaintiffs Jody C. Vasey and Edward J. Davis, as the parents of Brooke C. Davis, may recover funeral expenses as part of their wrongful death claim.[15]

17. Therefore, the movants' motion is ***granted in part*** and ***denied in part.***

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
Order Distribution
File

[13] 209 A.2d 760 (Del 1965).

[14] 252 A.2d 100 (Del. 1969).

[15] 10 *Del. C.* § 3724(d)(4).