

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

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|---------------------------------|---|-------------------------|
| RODNEY HUFFORD, | : | |
| | : | C.A. No. 06C-05-007 WLW |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| DEREK W. MOORE, JEANETTE | : | |
| M. JOHNSON, JANE L. SCHNEIDER, | : | |
| J.J. HART, CODY LEAGER, and | : | |
| NATIONWIDE MUTUAL INSURANCE | : | |
| COMPANY, a foreign corporation, | : | |
| | : | |
| Defendants. | : | |

Submitted: July 20, 2007
Decided: November 8, 2007

Upon Defendant Nationwide Mutual Insurance Company's
Motion for Summary Judgment. Denied.

William D. Fletcher, Jr., Esquire, Schmittinger & Rodriguez, P.A., Dover,
Delaware; attorneys for the Plaintiff.

James E. Drnec, Esquire, Bifferato, Gentilotti, Biden & Balick, P.A., Newark,
Delaware; attorneys for Defendant Derek W. Moore.

Robert J. Leoni, Esquire, Shelsby & Leoni, Stanton, Delaware; attorneys for
Defendant Jeanette M. Johnson.

Maria J. Peohner, Esquire, Bifferato Gentilotti, LLC, Wilmington, Delaware;
attorneys for Defendant Jane L. Schneider.

Kenneth J. Young, Esquire, Young, Malmberg & Howard, Dover, Delaware; co-counsel Jeffrey A. Young, Young & McNelis, Dover, Delaware; attorneys for Defendant Cody Leager.

Arthur D. Kuhl, Esquire, Reger Rizzo Kavulich & Darnall, Wilmington, Delaware; attorneys for Nationwide Mutual Insurance Company.

WITHAM, R.J.

FACTS

Plaintiff Rodney Hufford commenced the present action as a result of an automobile accident that occurred on May 23, 2004. The Plaintiff alleges that the accident was caused by the negligent and reckless conduct of Defendant Derek Moore, along with other named Defendants.¹ The accident was allegedly the result of a high-speed chase by Defendant Moore of the Plaintiff. Plaintiff did not personally see Defendant Moore driving the maroon truck with a tan bottom and flares on its side that he recognized from school.

The trigger of the evening's events allegedly occurred when Plaintiff had left a party, located at the home of Pat Blizzard, to go to his girlfriend's house. After he exited the driveway, he saw approximately twenty (20) cars driving toward the party. One of these cars began to pursue Plaintiff. Plaintiff pulled into a gas station and the same vehicle—a maroon and tan pickup truck—pulled in too. Two passengers, Defendant J.J. Hart and Steve Green, got out, carrying a baseball bat, and approached Plaintiff's car. Plaintiff pulled out and sped away, stating that he feared for his life. A chase ensued. The drivers drove between the rates of 40 and 75 mph on Kent County back-country roads. Plaintiff stated that the truck was gaining ground on him, so he turned out his lights during a streetlight-less stretch, made a turn, and then turned his lights back on after driving about 10 yards. At about 150 yards after

¹The named Defendants in this action are Derek W. Moore, Jeanette M. Johnson, Jane L. Schneider, J.J. Hart, Cody Leager and Nationwide Mutual Insurance Company, a foreign corporation.

making this turn, Plaintiff went around a less-than-90-degree turn and slid into a tree and resulted in injuries.

DISCUSSION

I. Defendant Nationwide's Motion for Partial Summary Judgment.

Defendant Nationwide moves for a Partial Summary Judgment finding that Plaintiff was negligent as a matter of law, thereby proximately causing his injury. Negligence is defined under the Delaware Pattern Jury Instructions as "the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances." DEL. P.J.I. CIV. § 5.1 (2000). Indeed, Plaintiff was unsure whether he was still being followed at the exact time of the accident, however he arguably acted reasonably in his overall flight. This is a material fact for which the jury ought to weigh. Nationwide's Motion for Partial Summary Judgment is *denied*.

II. Defendant Nationwide's First Motion for Summary Judgment.

A. Comparative Negligence.

Defendant Nationwide moves for a Summary Judgment finding that Plaintiff's actions provided a higher degree of negligence than any attributable negligence, if any, to all defendants in total, thereby barring any recovery under Delaware's comparative negligence statute, 10 *Del. C.* §8132. That statute provides:

In all actions brought to recover damages for negligence which results in death or injury to person or property, the fact that the plaintiff may have been contributorily negligent shall not bar a recovery by the plaintiff or the plaintiff's legal representative where such negligence was

Rodney Hufford v. Derek W. Moore, et al.

C.A. No. 06C-05-007 WLW

November 8, 2007

not greater than the negligence of the defendant or the combined negligence of all defendants against whom recovery is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

Defendant Nationwide argues that Plaintiff's high rate of speed of 65 to 70 mph while negotiating a turn, without applying breaks, constitutes negligence to such a degree that it negates the negligence of the Defendants' chase from a distance. Defendant's vehicle never collided with or forced off the road Plaintiff's vehicle. Nationwide cites *Triewel v. Sabo*, 714 A.2d 742 (Del. 1998) where the Delaware Supreme Court upheld the trial court's finding that the plaintiff's actions, as a matter of law, outweighed defendant's negligence.

In *Triewel*, a bicyclist attempted to cross a major four-lane highway when she was struck by a driver's truck. She had a plain view of the oncoming traffic in broad daylight. The plaintiff died as a result of the collision. The Court found her to have failed her duty to exercise reasonable care for her own safety, and therefore the truck driver was not liable.

The case at bar is distinguished from the *Triewel* case. There is no indication that the bicyclist in *Triewel* was in an emergency situation. The doctrine of emergency provides that negligence be evaluated on what a prudent person would do in a similar situation. *Lloyd v. Great Coastal Express, Inc.*, 2001 WL 880090, *3 (Del. Super., 2001). In the case at bar, Plaintiff was arguably in an emergency situation. He was being pursued in a high speed chase, he had been approached by men with a baseball bat, and there is discussion that he suspected that his pursuers

Rodney Hufford v. Derek W. Moore, et al.
C.A. No. 06C-05-007 WLW
November 8, 2007

were looking for a fight. Whether his flight was reasonable should be measured based on what a reasonable and prudent person would do in the same set of circumstances and is a genuine question of material fact for the fact finder to determine.

Nationwide's Motion for Summary Judgment that Plaintiff's actions are over 50% of the total negligence is *denied*.

B. Gross Negligence

Nationwide argues that Plaintiff's actions amounts to gross negligence as a matter of law and bars recovery from the Defendants. Gross negligence is not clearly defined in Delaware tort law. *Brittingham v. Board of Adjustment of City of Rehoboth Beach*, 2005 WL 1653979, *3 (Del.Super.,2005).

Criminal negligence as defined in 11 *Del. C.* § 231(d) is the functional equivalent of gross negligence as that term is applied as a basis for the recovery of damages for civil wrongs. Gross negligence, though criticized as a nebulous concept, signifies more than ordinary inadvertence or inattention. It is nevertheless a degree of negligence, while recklessness connotes a different type of conduct akin to the intentional infliction of harm.

Id. Nationwide provides no substance to this claim beyond that alleged in its comparative negligence argument. However, even if Plaintiff is found to be grossly negligent, this does not necessarily bar recovery from Defendants. The Defendants can still be found to be in violation of 21 *Del. C.* §4172(A)(b), dealing with malicious mischief in the nature of wanton or reckless conduct that can result in injury or death

Rodney Hufford v. Derek W. Moore, et al.
C.A. No. 06C-05-007 WLW
November 8, 2007

to any person; and of 21 *Del. C.* §4175, providing that no person shall drive a motor vehicle in wanton disregard for the safety of person or property. This is a genuine issue of material fact that the fact finder ought to determine. Nationwide's Motion for Summary Judgment that Plaintiff's actions constitutes gross negligence is *denied*.

C. Superseding/Intervening Negligence

Nationwide argues that Plaintiff's actions constitute superseding and intervening negligence over any possible negligence by Defendants.

In order to qualify as a superseding cause, the criminal act must be "a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original tortious conduct and the injury ... If ... the intervening negligence was not reasonably foreseeable, the intervening act supersedes and becomes the sole proximate cause of the plaintiff's injuries, thus relieving the original tortfeasor of liability." Although this is a factual inquiry usually reserved for the jury, the question of intervening cause should be a question of law only when there can be no difference of opinion as to whether the intervening cause was abnormal, unforeseeable, or extraordinary.

Hart v. Resort Investigations & Patrol, 2004 WL 2050511, *9 (Del.Super.,2004) (quoting *Duphily v. Delaware Electric Cooperative, Inc.*, 662 A.2d 821, 829 (Del.1995) (Aff'd in *Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, *1209 (Del., 1997)). In this case, a high speed chase through unlit countryside roads can foreseeably result in a loss of vehicle control. This is a genuine issue of material fact for the fact finder to determine. Nationwide's Motion for Summary Judgment that Plaintiff's actions constitutes superseding and intervening negligence is *denied*.

D. Proximate Cause

Defendant Nationwide argues that Plaintiff has failed to provide evidence that Plaintiff's collision with a tree was proximately caused by any action of the Defendant or defendant's vehicle. Instead, they argue, the injuries resulted from "an inexperienced driver who showed extremely poor judgment and purposely engaged in dangerous driving behavior." According to the Delaware Pattern Jury Instructions, proximate cause "is a cause that directly produces the harm, and but for which the harm would not have occurred. . . . There may be more than one proximate cause of an [__accident/ injury__]." DEL. P.J.I. CIV. § 21.1 (2000). It can easily be argued that but for the high speed chase, Plaintiff would not have lost control of his car. This is a genuine issue of material fact and Nationwide's Motion for Summary Judgment that Plaintiff Allegations lack proximate cause is *denied*.

III. Defendant Nationwide's Second Motion for Summary Judgment as to Plaintiff's Uninsured Motorist Claim.

A. Relationship between Plaintiff's injuries and Defendant's vehicle.

Defendant Nationwide argues that Plaintiff's injury did not rise from the operation or use of an uninsured motor vehicle as it fails the *Klug* test. The *Klug* test consists of three factors: (1) whether the vehicle was an active accessory, (2) was there an act of independent significance that broke the causal link between the use of the vehicle and the injury, and (3) whether the vehicle was used for transportation purposes. *Continental Insurance v. Klug*, 415 N.W. 2d 876 (Minn. 1987). Nationwide alleges that Plaintiff fails the first two factors of the test because the

Rodney Hufford v. Derek W. Moore, et al.
C.A. No. 06C-05-007 WLW
November 8, 2007

Defendant's vehicle was not at the scene of the accident and therefore cannot be an active accessory; and because Plaintiff's actions broke the causal link.

There is an easy argument that the *Klug* test is met and the Defendant's motion should be denied. Though the vehicle may not have physically forced Plaintiff's car into the tree, the incident arose from a pursuit of the Plaintiff by a driver of what appears to be Defendant Moore's car. Whether this therefore constitutes an active accessory or not is an issue of material fact for the fact finder to determine. That Plaintiff was scared and therefore fled in the manner that he did and was allegedly tenaciously pursued could provide that the causal link was not broken. This too is a genuine issue of material fact for the fact finder to determine. Finally, whether the vehicle was used for transportation seems self explanatory. The truck was transporting driver and passengers through Kent County in pursuit of another driver. Nationwide's Motion for Summary Judgment that Plaintiff fails the *Klug* test is *denied*.

B. Phantom Vehicle.

Nationwide argues that as soon as Plaintiff identified the driver of the vehicle, the accident no longer fits into the phantom vehicle definitions and is thus barred from claiming uninsured motorist benefits. They argue that whether the proper defendant has been identified is irrelevant. The relevant provision of the statute is as follows:

(3) for the purpose of this section, an uninsured vehicle shall be defined as . . . (c) A hit-and-run motor vehicle that causes an accident resulting in bodily injury or property damage to property of the insured. Bodily

Rodney Hufford v. Derek W. Moore, et al.
C.A. No. 06C-05-007 WLW
November 8, 2007

injury or property damage must be caused by . . . a noncontact vehicle where the identity of both the driver and the owner of such vehicle are unknown.

18 *Del.C.* § 3902 (3)(c). Needless to say, the statute does not mention a phantom vehicle. However, the vehicle at issue is one that is like the one owned by Defendant Schneider and was operated by Defendant Moore. On the night in question, Defendant Moore may have been the operator, or it might have been a mystery person. Since the evidence so far is not conclusive, there is a genuine issue of material fact, and the issue should be given to the jury to decide. The motion for Summary Judgment is *denied*.

C. Uninsured Motorist Claims Are Limited to Acts by Owners or Operators of the Vehicle.

Nationwide claims that because Plaintiff was fearful of the passengers and not of the driver, that Plaintiff cannot claim under §3902. However, it was the driver that pressed the accelerator and followed the Plaintiff. Therefore the injury can arguably be caused by the operator of the vehicle. The motion for Summary Judgment is *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution