IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ASHLEY M. HOLLAND	)	
	)	CIVIL ACTION NUMBER
Plaintiff	)	
v.	)	06C-03-169-JOH
	)	
ALLSTATE INSURANCE COMPANY	)	
	)	
Defendant	)	

Submitted: February 13, 2008
Decided: March 7, 2008

MEMORANDUM OPINION

Appearances:

Gary S. Nitsche, Esquire, of Weik Nitsche Dougherty & Componovo, Wilmington, Delaware, attorney for plaintiff

Arthur D. Kuhl, Esquire, of Reger Rizzo Kavulich & Darnall, Wilmington, Delaware, attorney for defendant

HERLIHY, Judge

This is a single vehicle auto accident case. Plaintiff Ashley Holland was a passenger in a Jeep Wrangler which Kristin Robison was driving. There were two male passengers in the Jeep. The three passengers were injured when it went out of control and rolled over several times. Holland's carrier, Progressive, provided PIP payments but Holland claims that they were not enough to cover her damages. Allstate is the Holland family auto insurance carrier. It had provided underinsurance coverage and is the defendant for purposes of this action because it stands in the shoes of the tortfeasor.

Pre-trial, the parties raised one issue of Holland's potential comparative negligence. The issue arises because Holland has testified that she saw Robison have a drink while the two were at a "football party." Allstate claims this raises the issue of whether Holland should have either (1) further checked into Robison's drinking or its extent prior to riding with her, or (2) not gotten into the Jeep with Robison since she had seen her have that drink or both. Holland replies (1) she had not been drinking and (2) there is no evidence that this one car accident was due in any way to alcohol impairment.

Factual Background

This accident occurred on September 15, 2005, on Red Lion Road around 10:30 at night. The road was straight and is two lanes at this point. It had not been raining. The four had gone to a store and were returning from it to a party. Holland indicates Robison drifted over the double yellow line, saw an oncoming car, and overcorrected to avoid it. This caused the Jeep to go out of control leaving the roadway and overturning four times.

Holland and the young men were ejected. Robison was not, but she sustained a severe head injury. The extent of that injury rendered her unconscious, and it has left her with permanent amnesia as to most of the accident details except the multiple rollover. After she was taken to the hospital, blood was drawn for treatment purposes. Whatever else the results showed, one of them was that Robison had a .06 blood alcohol content. The police charged Robison with driving under the influence. Later, however, the State entered a *nolle prosequi* on that charge.[1]

Holland had arrived at the party around 9:30 p.m. Between then and the time the four left for the store, she saw Robison take "a shot." She made no inquiries of Robison or anyone about her condition or how many, if any, other drinks she had had. Holland, too, was severely injured, and for the same treatment reasons, a blood sample was drawn at the hospital. Her blood alcohol reading was .00.

In Holland's complaint against Allstate, she contends Robison was negligent in several ways, primarily relying upon negligence *per se* for violating various Motor Vehicle Code provisions. None of the provisions and nothing else in the complaint cites or refers to 21 *Del. C.* § 4177, which is the provision outlawing driving while under the influence. Nor is there anything in the complaint alleging that alcohol impairment was a factor in the accident.

Even though the police initially charged Robison with DUI, there is no investigative report stating that alcohol impairment was or could have been a contributing factor.

[1] The legal floor is now .08. 21 *Del. C.* § 4177(a)(5).

Further, Allstate is not presenting a witness to opine that Robison's alcohol consumption, such as it was, may have been a contributing factor.

Discussion

Bib v. Merlonghi[2] held that it was assumption of risk and possible contributory negligence for a passenger to voluntarily get into car with a driver who was under the influence. In that case, the "sparse record" was that the driver had done "considerable drinking" before the accident.[3] Subsequently, Delaware enacted its comparative negligence statute. In *Fell v. Zimrath*,[4] this Court held that under this statute, voluntarily riding with a driver who was under the influence was a secondary assumption of risk and was a proper claim of contributory negligence.[5] In that case, the plaintiff alleged the driver was under the influence at the time of the accident.[6] As noted, there is no such allegation here.

In the case of *Ayers v. Morrison*[7] this Court held it was proper to submit to the jury the issue of the plaintiff passenger's possible contributory (comparative) negligence. In

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[2] 252 A.2d 548 (Del. 1969).

[3] *Id.* at 549.

[4] 575 A.2d 267 (Del. Super. 1989).

[5] *Id.* at 268; *Accord* as to secondary assumption of risk being potentially contributory negligence, *Spencer v. Walmart*, 930 A.2d 881 (Del. 2007).

[6] *Id.* at 267.

[7] 1996 WL 944862 (Del. Super.).

that case the driver's BAC was over .10 (the then legal limit) and the plaintiff passenger's BAC was .232. This, the Court said, evidence gave rise to an inference of a failure to perceive a risk of riding with the defendants.

The Supreme Court on *Laws v. Webb*,[8] held that an injured pedestrian/plaintiff's alcohol consumption relevant to the degree of the plaintiff's contributory negligence. The Court also said it was relevant also to the plaintiff's perceptive abilities around the time of the accident.[9] This Court reached a similar conclusion in *Rachko v. Nationwide Mut. Ins. Co.*[10] There was evidence that plaintiff driver's alcohol consumption was relevant to his ability to perceive and react.[11]

An instructive case is *Robbins v. William H. Porter, Inc.*[12] The issue was the admissibility of toxicology reports which showed the presence of THC/marijuana in the occupants of a car, and it was being offered on the issue of causation for an accident. This Court ruled the toxicology report, without more, was inadmissible regarding causation.

The report did not specify the level of marijuana in the blood of any of the occupants. Nor did the report link the presence of the marijuana to any impairment of

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[8] 658 A.2d 1000 (Del. 1995).

[9] *Id.* at 1010.

[10] 1997 WL 817860 (Del. Super).

[11] *Accord Scott v. Ritterson*, 2004 WL 1790134 (Del. Super.).

[12] 2006 WL 2959483 (Del. Super.).

faculties, judgment, or observation. *Robbins* is instructive because all that Allstate is offering here is that Holland saw Robison take one drink and that Robison's BAC level was .06.

First, unlike *Robbins* or *Ayers*, Holland had not consumed any drugs or alcohol. The hospital blood tests confirm that. There is, therefore, unlike those cases, not an issue of Holland's ability to perceive and observe.

Second, Allstate really seeks to introduce Robison's drinking to show Holland's contributory negligence. But it is not offering any evidence, expert or otherwise, that Robison's consumption of alcohol or her .06 BAC level (1) meant her driving was impaired or (2) contributed in some way to this accident.[13] Further, Holland has never claimed Robison's alcohol consumption, which she has known about for several years, played any role in causing this accident. Without Allstate making that link of negligent causation, it is irrelevant that Holland had either a duty to inquire about Holland's drinking or assumed a risk (contributory negligence) in voluntarily getting into Robison's Jeep. The claim of contributory negligence is not tied to an appropriate claim of negligence, such as driving under the influence or to any of the alleged acts of negligence in the complaint.

Further, under the facts of this case, without any link of alcohol consumption to this accident, Holland would be unfairly prejudiced by this very limited evidence Allstate

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[13] Of course, that is Allstate's conundrum. To show that this evidence provides grounds for Robison's negligence, hence, liability for it.

proffers. Whatever relevance it may have, and the Court sees none, that probative value is outweighed by the substantial risk of unfair prejudice or confusion.[14]

Conclusion

For the reasons stated herein, the evidence of any alcohol consumption by Kristin Robison is inadmissible.

IT IS SO ORDERED.

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J.

[14] D.R.E. § 403.