NEW YORK

BRONX COUNTY

MOTOR VEHICLE

Motorcycle — Motor Vehicle — Truck — Motor Vehicle — Broadside — Motor Vehicle — Red Light

Mediated Settlement $4,800,000
Case Christos Tselebis v. Tom Cat Bakery, Inc., James Melendez and Doe Truck Rental Companies, No. 17248/07
Court Bronx Supreme
Judge Howard R. Silver
Date 3/11/2010

Plaintiff Attorney(s)

Gerard N. Misk, Ginsburg & Misk, Queens, NY

Defense Attorney(s)

William P. Larsen, D'Amato & Lynch, LLP, New York, NY

Facts & Allegations

On June 17, 2007, plaintiff Christos Tselebis, 38, a computer programmer, was riding his motorcycle on the exit ramp of the Queensboro Bridge, approaching Thompson Avenue in Queens. As Tselebis entered the intersection, he was broadsided by a truck operated by James Melendez, traveling westbound on Thompson. Tselebis was knocked off his bike and pushed 150 feet, getting trapped under a city bus. He was extricated by firefighters and sustained injuries to his left foot, spleen, ribs, neck, jaw and lungs.

Tselebis sued Melendez and Tom Cat Bakery, Inc., his employer and renter of the vehicle. He alleged Melendez was negligent in the operation of his vehicle, and further alleged that Tom Cat Bakery was vicariously liable for his actions. Tselebis claimed he had a green light at Thompson Avenue, and that Melendez ran a red light and struck him in the intersection.

The defendants contended that the truck experienced brake failure, which prevented Melendez from stopping his vehicle as it drove through the intersection.

Tselebis had his technical expert inspect the truck, who concluded that there was nothing that could have caused brake failure. A motion for by the plaintiff, for summary judgment on liability against the defendants, was denied. The Appellate Division, First Department, however, ruled that the allegation of brake failure was unsupported, and didn't warrant the denial of summary judgment, and reversed the court's decision.

Tselebis also brought a claim against the truck rental company and the new owner that purchased the company, the names of which have been redacted due to a confidentially agreement. The defendants were brought in under claims of alleged brake failure.

Injuries/Damages

degloving injury; spleen, laceration; splenectomy; fracture, multiple ribs (bilaterally); compression fracture spinal cord; fracture, mandible; open reduction; internal fixation; pneumothorax; scar and/or disfigurement, body; laparotomy; paresthesia
Tselebis was taken by ambulance to the emergency room, from the scene of the accident. He suffered a degloving injury to his left foot, in which the first ray of his foot was traumatically amputated. A reattachment was attempted, but become gangrene after two weeks, resulting in a surgical amputation of the first ray. Tselebis also suffered a lacerated spleen, which was removed via a splenectomy. He also suffered multiple fractured ribs, and spinal compression fracture at C6. Tselebis further claimed a mandibular fracture of his jaw, which was treated with open reduction, internal fixation surgery, as well as pneumothorax (collapsed lung), for which he underwent a central line to evacuate the air. Finally, Tselebis underwent an exploratory laparotomy.

Tselebis claimed he now walks with a limp due to his disfigured left foot, and experiences residual pain and discomfort when walking or standing for a long period. He claimed he has permanent scarring on his foot, as well as his chest and abdomen, due to the laparotomy. He also claimed that the loss of his spleen has left him more vulnerable to future infection. Tselebis claimed his jaw fracture has left him with residual paresthesia in his face. He has not returned to work, and claimed that his physical limitations have prevented him from activities like marathon running and martial arts, which he was very active in prior to the accident. Tselebis sought damages for past and future pain and suffering, medical costs and lost earnings.

The defendants did not seek a personal medical examiner, and did not contest causation or severity of plaintiff's injuries.

Result

The parties negotiated a mediated settlement. Tselebis received $4.8 million in total damages. He received $3,351,070 in cash, with the remanding funds distributed through a structured settlement, paying him $6,000 a month for the remainder of his life. The structured settlement also included four yearly payments of $60,000 of college tuition for two children, starting in 2027. The lifetime yield of the structured settlement is expected to be $6,237,070. Hartford Insurance, the defendants' primary carrier, paid $956,000 of its $1 million policy limit toward the settlement. The excess coverage was paid by Lexington Insurance.

Plaintiff(s)

Christos Tselebis

Demand None reported

Offer None reported

Insurer(s)

Hartford (primary) both defendants
Lexington Insurance (excess) both defendants

Plaintiff Expert(s)

Joseph Carfi, physical rehabilitation, New York, NY (Gerard N. Misk) (did not testify)
David Joseph, orthopedic surgery, Brooklyn, NY (Gerard N. Misk) (did not testify)
Edmond A. Provder, vocational rehabilitation, New York, NY (Gerard N. Misk) (did not testify)
Chad L. Staller, economics, Philadelphia, PA (Gerard N. Misk) (did not testify)
Steven Weinfeld, M.D., orthopedic surgery, New York, NY (Gerard N. Misk) (did not testify)

Defense Expert(s)

None reported

A.D. — 1st DEPT. | MOTOR VEHICLES

Court Erred in Denying Crash Victim Judgment On Basis of Questions as to His Own Negligence

Before: Tom, J.P., Sweeny, McGuire, DeGrasse, Freedman, JJ.

TSELEBIS v. RYDER TRUCK RENTAL INC., 1042, Decided 02/18/10—

Ginsburg & Misk, Queens Village (Gerard N. Misk of counsel), for appellant

Lewis Johs Avallone Aviles, LLP, Melville (Brian J. Greenwood of counsel), for respondents

Plaintiff appeals from an order of the Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 17, 2008, which, to the extent appealed from as limited by the briefs, denied his motion for summary judgment, and order, same court and Justice, entered on or about January 16, 2009, which, upon reargument, adhered to the prior ruling.

LELAND G. DEGRASSE, J.

This matter involves a two-vehicle accident at an intersection controlled by a traffic light. While driving a truck in a westerly direction, defendant Melendez collided with plaintiff, who was riding his motorcycle in a northerly direction. Plaintiff testified that he had no recollection of the accident. Melendez, however, testified that he entered the intersection against a red light and did not see plaintiff prior to the impact. The motion court denied plaintiff's motion for summary judgment, citing questions of fact as to his own negligence. The court adhered to its decision upon plaintiff's motion for reargument. This was error.

As a preliminary matter, Supreme Court correctly rejected plaintiff's argument that his alleged memory loss entitled him to a lesser degree of proof under Noseworthy v. City of New York (298 NY 76 [1948]). In the absence of medical evidence establishing the loss of memory and its causal relationship to defendants' fault, the question of a lesser degree of proof cannot be considered (see Sawyer v. Dreis & Krump Mfg. Co., 67 NY2d 328, 335 [1986]). Nevertheless, summary judgment in favor of plaintiff is warranted by the proof before the court. Melendez's admission that he entered the intersection while the traffic light was red constituted a prima facie showing of liability on his part (cf. Diasparra v. Smith, 253 AD2d 840 [1998]). The proffer of brake failure by Melendez and his employer, defendant Tom Cat Bakery, as a cause of the accident, is insufficient to raise a triable factual issue with respect to their liability. A defendant claiming brake failure must make a two-pronged showing that the accident was caused by an unanticipated problem with the vehicle's brakes, and that he exercised reasonable care to keep them in good working order (O'Callaghan v. Flitter, 112 AD2d 1030 [1985]). These defendants have failed to meet the first prong in light of Melendez's testimony of problems he experienced with the truck's brakes prior to the accident.

Plaintiff is entitled to summary judgment on the issue of liability despite the fact that his own negligence might remain an open question. A plaintiff's culpable conduct no longer stands as a bar to recovery in an action for personal injury, injury to property or wrongful death. Under CPLR 1411, such conduct merely acts to diminish the plaintiff's recovery in proportion to the culpable conduct of the defendants. This statute, enacted in 1975, substituted the notion of comparative fault for the common-law rule that barred a plaintiff from recovering anything if he or she was responsible to any degree for the injury (Alexander, McKinney's CPLR Practice Commentaries C1411:1). Here, plaintiff's own negligence, if any, would have no bearing on defendant's liability. Stated differently, it is not plaintiff's burden to establish defendants' negligence as the sole proximate cause of his injuries in order to make out a prima facie case of negligence (see Kush v. City of Buffalo, 59 NY2d 26, 32-33 (1983]). To establish a prima facie case, a plaintiff "must generally show that the defendant's negligence was *a substantial cause* of the events which produced the injury" (Derdiarian v. Felix Contr. Corp., 51 NY2d 308, 315 [1980] [emphasis added]).

APPELLATE DIVISION

Justice **DeGrasse**

We note that opinions by this Court and others suggest that freedom from comparative negligence is a required component of a plaintiff's prima facie showing on a motion for summary judgment (see e.g. Palmer v. Horton, 66 AD3d 1433 [2009]; Cator v. Filipe, 47 AD3d 664 [2008]; Thoma v. Ronai, 189 AD2d 635 [1993], affd 82 NY2d 736 [1993]). These opinions cannot be reconciled with CPLR 1411 if the statute is to be given effect. Canh Du v. Hamell (19 AD3d 1000 [2005]) is distinguishable because it was a vacatur of a determination that a defendant's negligence was the sole proximate cause of an accident, a finding we do not purport to make. Parenthetically, CPLR 1412 makes culpable conduct claimed in diminution of damages under section 1411 an affirmative defense to be pleaded and proved by the party asserting it. In this regard, Melendez and Tom Cat offer only speculation in support of their assertion that plaintiff failed to use reasonable care to avoid the collision.

Accordingly, the order of Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 17, 2008, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, should be reversed, on the law, without costs, the motion granted on the issue of liability, and the matter remanded for a trial on damages, to encompass the issues of plaintiff's culpable conduct and the extent to which his recovery should be diminished in proportion thereto. Appeal from order, same court and Justice, entered on or about January 16, 2009, which, upon reargument, adhered to the prior ruling, should be dismissed, without costs, as academic.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ■