No. 22-CV-595

IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

FRENNIEJO D. NIXON,

Appellant

v.

GIOVANNI IPPOLITO, et al.

Appellees.

Appeal from the Superior Court of the District of Columbia
(The Honorable Hiram E. Puig-Lugo)

BRIEF OF APPELLEE,
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LIST OF PARTIES AND COUNSEL

Pursuant to D.C. Ct. App. Rule 28(a)(2)(A), below is a list of the parties and their counsel in the trial court and in the present appellate proceeding:

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RULE 28(a)(5)ASSERTION

This appeal comes from Superior Court of the District of Columbia Judge Hiram Puig-Lugo's final Order entered on July 22, 2022 denying Appellant Frenniejo Nixon's Motion for Reconsideration and Alter or Amend a Judgment. That Motion by Appellant requested that the trial court reconsider its June 13, 2022 Order granting summary judgement to all of the defendants, which resulted in the dismissal of the case.

INTRODUCTION

In this multi-vehicle accident matter, Appellant Nixon has presented several competing theories, but no actual evidence, regarding who was responsible for triggering the impact which allegedly caused her damages. Instead, Appellant urged the Trial Court to allow a jury to engage in pure speculation regarding who caused the subject occurrence. Given that any such speculation is impermissible, this Honorable Court should affirm Judge Puig-Lugo's grant of Appellee Etile's Motion for Summary Judgment, and his denial of Appellant's Motion to Reconsider.

QUESTIONS PRESENTED FOR REVIEW

1. Was the Trial Court legally correct in finding that Appellant failed to meet her burden of producing specific facts showing that there is a genuine issue for trial on Appellant's negligence claim against Appellee Etile?

2. Was the Trial Court legally correct in denying Appellant's Motion to Reconsider?

STATEMENT OF THE CASE

On or around May 3, 2021, Appellant Nixon filed a Complaint against Appellees Ippolito, Chayka, Deer, Etile, National General Assurance Company, ("National General") and GEICO Casualty Insurance Company ("GEICO"), with the Superior Court for the District of Columbia. App. 3.[1] Ms. Nixon alleged

[1] All references to "App." are to the Supplemental Appendix filed by Appellant Nixon on or around January 3, 2023.

negligence against Appellees Ippolito, Deer, and Etile, and also brought a negligent entrustment claim against Appellee Chayka and breach of contract claims against Appellees National General and GEICO. App. 2 – 12. These claims arose from a multi-vehicle accident in which Ms. Nixon was an occupant of Mr. Etile's vehicle, which was struck in the rear. App. 3.

On May 26, 2022, Mr. Etile filed a Motion for Summary Judgment, arguing that there was no basis for Ms. Nixon's negligence claim against him, as Mr. Etile did not violate any of the District of Columbia's Municipal Regulations when he was rear-ended by at least one vehicle. App. 34 – 38. Appellees GEICO, Chayka, Ippolito, Deer, and National General all filed Motions for Summary Judgment as well. All of these Motions for Summary Judgment were granted on June 13, 2022. App. 102 – 108. Appellant filed a Motion to Reconsider, which was denied by the Court on July 22, 2022. App. 60.

Appellant's Notice of Appeal indicates that she is appealing the July 22, 2022 denial of her Motion to Reconsider. App. at 724.

STATEMENT OF FACTS

Ms. Nixon's Complaint arises out of a multi-vehicle accident that occurred on July 4, 2018. App. at 3. Ms. Nixon was a passenger in a motor vehicle which was being operated by Mr. Etile on Interstate 295. *Id*. Mr. Etile's vehicle was first in a

line of vehicles, and was followed by vehicles that were being operated by Tyrese A. White,[2] Appellee Deer, and Appellee Ippolito,[3] in that order. *Id*.

Ms. Nixon alleged in her Complaint that Mr. White's vehicle struck the rear of Mr. Etile's vehicle. *Id*. She also alleged that Mr. Ippolito struck the rear of Mr. White's vehicle, and that Mr. Deer had in turn struck the rear of Mr. Ippolito's vehicle. *Id*. at 3 – 4. Ms. Nixon brought a negligence claim against Mr. Etile (Count IV), alleging that "Defendant Etile's choices in this matter constitute negligent operation of a motor vehicle justifying an allowance of monetary damages against him." App. 11.

Mr. Etile testified at deposition that shortly before the impact a car in the right lane cut in front of Mr. Etile's vehicle "[a]nd I reduced my speed to avoid colliding the car that just had cut in front of me. That's when people hit me from the back." App. at 353. Mr. Etile did not have to come to a complete stop to avoid hitting the vehicle that had cut in front of him, and he was still traveling at approximately 40 miles per hour. App. at 354. He testified that he did not slam down on his brakes, but rather he did one tap on the brakes to reduce his speed. *Id*.

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[2] Ms. Nixon's Complaint alleges that Mr. White was operating a motor vehicle "with the permission and consent of Donnita D. Bennett…" App. 3.

[3] Ms. Nixon's Complaint alleges that Mr. Ippolito was operating a motor vehicle "with the permission and consent of Defendant Chayka…" App. 3.

In her Opposition to Mr. Etile's Motion for Summary Judgment, Ms. Nixon argued that there was a dispute of fact regarding whether Mr. Etile's vehicle was at a complete stop or moving when the impact occurred, and that a jury could have concluded that Mr. Etile stopped short or braked suddenly, thereby causing the impact. App. at 85. Ms. Nixon cited to her own testimony that Mr. Etile's vehicle was stopped at the time of the impact. App. at 191. She also noted that Mr. Ippolito's brother, Salvatore Ippolito, witnessed the entire occurrence from his own vehicle, and that he testified that Mr. Etile's vehicle was "just stopped in the middle of the street." App. at 676.

However, Mr. White, who was operating the vehicle immediately behind Mr. Etile's car, testified that Mr. Etile's vehicle "was slowing down as I'm slowing down moving along with traffic. I got rear-ended." App. at 611. Indeed, Mr. White testified that he did not hit Mr. Etile's car at all, and that he could still see the rear tires of Mr. Etile's car at the time that Mr. White's vehicle was impacted from behind. App. at 613 – 14. Mr. White then lost consciousness after he had been rear-ended and did not regain consciousness until an ambulance was on the scene. App. at 588, 615. There was no front-end damage to Mr. White's vehicle. App. at 587.

The Trial Court disagreed with Plaintiff that there was a genuine dispute of material fact as to Mr. Etile's alleged negligence. "Even when viewing these facts in the light most favorable to the Plaintiff, the Court does not find a genuine issue as

to any material fact." App. at 106. The Trial Court observed that "Plaintiff rests her oppositions on the notion that a jury could choose an interpretation of these statements to find negligence," but that "Plaintiff does not point to any specific evidence of responsibility and concedes that she has no personal knowledge as to the order of impacts that occurred behind her." App. at 106. The Trial Court pointed to Ms. Nixon's own inconsistent allegations that Mr. Etile stopped short, but also that Mr. Deer actually pushed Mr. White's vehicle into Mr. Etile's. *Id*. The Trial Court concluded that "At most, Plaintiff has only provided speculative testimony of the possibility of number and order of impacts," and that "Indeed, the number of impacts that may or may not have taken place provide no information at all about who may or may not have been negligent." App. at 106 – 07. The Trial Court ultimately held that "Plaintiff has not met her burden of producing specific facts showing there is a genuine issue for trial on her negligence claims," as to Mr. Etile, Mr. Deer, and Mr. Ippolito. App. at 107.

The Trial Court also denied Ms. Nixon's Motion to Reconsider as it "largely restates the arguments from her oppositions to summary judgment which the Court previously considered and rejected." App. at 162. In its Order denying the Motion to Reconsider, the Trial Court noted that Ms. Nixon "still does not point to any specific evidence of responsibility or the cause, order, and number of impacts that occurred." *Id*. As to Ms. Nixon's argument that the jury could chose an

interpretation of any theory to hold any Defendant liable, the Trial Court held that "What Plaintiff characterizes as an inference of negligence is nothing more than speculation," and that "such speculative testimony is insufficient to support a find of negligence." *Id*. The Trial Court therefore declined to disturb its prior ruling granting summary judgment in Defendants' favor.

The Superior Court for the District of Columbia was legally correct in granting summary judgment in Mr. Etile's favor, and in denying Ms. Nixon's Motion for Reconsideration as to that ruling.

SUMMARY OF THE ARGUMENT

Mr. Etile's Motion for Summary Judgment was granted when the Trial Court concluded that Ms. Nixon had failed to meet her burden of producing specific facts showing that there is a genuine issue for trial on her negligence claim against Mr. Etile. The judgment of the Trial Court should not be disturbed because Ms. Nixon has failed to produce any evidence that Mr. Etile's actions caused any of her alleged damages, and to permit a jury to consider the negligence claim against Mr. Etile solely based on the inferences Ms. Nixon suggests would be to invite impermissible speculation. For these same reasons, the Trial Court was also legally correct in denying Ms. Nixon's Motion to Reconsider.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANT HAD NOT MET HER BURDEN OF PRODUCTION AS TO HER NEGLIGENCE CLAIM AGAINST MR. ETILE.

The Trial Court properly found that Ms. Nixon had failed to meet her burden of producing specific facts to show that there is a genuine issue for trial on her negligence claim as to Mr. Etile. App. at 107. In the present appeal, Ms. Nixon has failed to set forth any such *specific* facts so as to disturb the Trial Court's judgment.

The grant of a motion for summary judgment will be reviewed *de novo*. *Joyner v. Sibley Mem. Hosp.*, 826 A.2d 362, 368 (D.C. App. 2003). When reviewing a trial court order granting summary judgment, the appellate court's "standard of review is the same as the trial court's standard for initially considering the parties' motions for summary judgment." *Holland v. Hannan*, 456 A.2d 807, 814 (D.C. App. 1983). The appellate court "will affirm the entry of summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Id.*; *see also* Super. Ct. Civ. R. 56(c). "The role of the court is not to act as factfinder and to resolve factual issues, but rather to see if the record demonstrates that there is no genuine issue of material fact on which a jury could find for the non-moving party. *Id*. at 814 – 15. Through the Court must "view the evidence in the light most favorable to the non-moving party, mere conclusory allegations by the non-moving party are legally insufficient to avoid the

entry of summary judgment." *Joyner*, 826 A.2d at 368.

In this matter, there was no genuine disputes of material fact to preclude summary judgment in Mr. Etile's favor. "In order to prove negligence, a plaintiff must provide evidence that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the breach of duty proximately caused damage to the plaintiff. *Sullivan v. AboveNet Comms.*, 112 A.3d 347, 354 (D.C. 2015) (quoting *Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. 2008) (citations omitted)).

It is well-established in the District of Columbia that the mere happening of an accident does not impose liability or reveal proof of negligence. *See District of Columbia v. Davis*, 386 A.2d 1195, 1200 (D.C. 1969). Rather, the plaintiff in a negligence case bears the burden of proving a causal relationship between the deviation in the standard of care and the injury. *See Metro. Transit Auth. v. Jeanty*, 718 A.2d 172, 174 (D.C. 1998). A breach of duty having no causal connection with the injury cannot produce legal responsibility. *See Richardson v. Gregory*, 281 F.2d 626 (D.C. Cir. 1960).

In the present matter, Ms. Nixon has failed to meet her production burden as to any specific evidence that Mr. Etile breached any duty owed to her, or that any such alleged breach was causally related to her alleged injuries. Ms. Nixon relies on her own testimony, as well as the testimony of non-party Salvatore Ippolito, to attempt to create a dispute of fact that Mr. Etile was completely stopped in the

roadway, rather than that he had slowed down to approximately 40 mile per hour, so as to avoid impact with a vehicle that had cut in front of him. App. at 85, 191, 676, 354. This alleged factual dispute is immaterial, however, because Mr. White, who was operating the vehicle directly behind Mr. Etile's vehicle, testified that he did not hit Mr. Etile's car at all, and that he could still see the rear tires of Mr. Etile's car at the time that Mr. White's vehicle was impacted from behind.[4] App. at 613 – 14. As such, regardless of whether Mr. Etile was completely stopped or had merely reduced his speed as per his testimony, there is no evidence that either of these courses of action caused Mr. White's vehicle to impact Mr. Etile's vehicle from behind.

While Ms. Nixon continues to argue that "different reasonable inferences" could be drawn from the above testimony, to echo the Trial Court, "What Plaintiff characterizes as an inference of negligence is nothing more than speculation." App. at 162. "Although the non-moving party is entitled to the benefit of all logical inferences, the jury may not be allowed to engage in idle speculation." *Wash. Metro. Area Transit Auth. v. Barksdale-Showell*, 965 A.2d 16, 24 (D.C. 2009); *see also Mixon v. Washington Metro. Area Transit Auth.*, 959 A.2d 55, 60 (D.C. 2008)(holding that a verdict cannot rest on speculation).

[4] Mr. White testified that he then lost consciousness after his vehicle had been rear-ended. App. at 615.

Here, it would be pure speculation for the jury to find that Mr. Etile's actions caused any of Ms. Nixon's injuries regardless of whether Mr. Etile's vehicle was still moving or completely stopped, because Mr. White testified that he did not strike Mr. Etile's car but rather was rear-ended himself. Given Ms. Nixon's own allegations that Mr. Deer caused the accident by pushing Mr. White's vehicle into Mr. Etile's, any theory that the accident actually originated with Mr. Etile not only flies in the face of Mr. White's actual testimony but calls for speculation of the highest order.

As Ms. Nixon has failed to identify any genuine disputes of material fact which would have precluded summary judgment in Mr. Etile's favor, Mr. Etile respectfully requests that this Honorable Court uphold the Trial Court's judgment in his favor.

II. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO RECONSIDER.

The Trial Court was also legally correct in denying Ms. Nixon's Motion to Reconsider.

"Rule 59 motions that claim an error of law are reviewed *de novo*…" *Callahan v. 4200 Cathedral Condo.*, 934 A.2d 348, 354 (D.C. 2007). As the Trial Court stated in its Order denying Ms. Nixon's Motion to Reconsider, that Motion largely restated the arguments which Ms. Nixon had advanced in her oppositions to the various Motions for Summary Judgment. App. 162. As Ms. Nixon's Motion to

Reconsider did not advance any new arguments regarding her negligence claim against Mr. Etile, the Trial Court was legally correct in denying the Motion to Reconsider for the same reasons as it granted Mr. Etile's Motion for Summary Judgment. As such, Mr. Etile respectfully requests that the judgment of the Trial Court not be disturbed.

CONCLUSION

The Trial Court was legally correct in granting Mr. Etile's Motion for Summary Judgment and in denying Ms. Nixon's Motion to Reconsider. Mr. Etile now respectfully requests that this Honorable Court affirm the judgment of the Trial Court.

Date: March 9, 2023

Respectfully submitted,

/s/ Diana Kobrin

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VERBATIM TEXT OF RULES RELIED UPON

Superior Court Civil Procedure Rule 56

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to file a motion; format.

(1) ***Time to file.*** Unless the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(2) ***Format: Parties' statements of fact.***

(A) Movant's statement. In addition to the points and authorities required by Rule 12-I(d)(2), the movant must file a statement of the material facts that the movant contends are not genuinely disputed. Each material fact must be stated in a separate numbered paragraph.

(B) Opponent's statement. A party opposing the motion must file a statement of the material facts that the opponent contends are genuinely disputed. The disputed material facts must be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement.

(c) Procedures.

(1) ***Supporting factual positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection that a fact is not supported by admissible evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials not cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it

incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Superior Court Civil Procedure Rule 59

(a) IN GENERAL.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court or District of Columbia courts; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court or District of Columbia courts.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial:

(A) open the judgment if one has been entered;

(B) take additional testimony;

(C) amend findings of fact and conclusions of law or make new ones; and

(D) direct the entry of a new judgment.

(b) TIME TO FILE A MOTION FOR A NEW TRIAL. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) TIME TO SERVE AFFIDAVITS. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) NEW TRIAL ON THE COURT'S INITIATIVE OR FOR REASONS NOT IN THE MOTION. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2023, a true and correct copy of the Brief of Appellee, Gustave Etile, was e-filed and served upon:

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/s/ Diana Kobrin

Diana Kobrin, Esquire

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#„ where the individual's social-security number would have been included;
     (2) the acronym "TID#„ where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#„ or "NDL#„ where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party,,, 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order,, to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

D. Kobrin

Signature

22-CV-595

Case Number(s)

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Name

03/09/2023

Date

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