No. 22-CV-595

In the
District of Columbia
Court of Appeals

FRENNIEJO NIXON,

Appellant,

v.

GIOVANNI IPPOLITO, *ET AL.*,

Appellees.

On Appeal from the Superior Court of the District of Columbia,
Civil Division No. 2021 CA 001757 V *(Hon. Hiram E. Puig-Lugo)*

BRIEF FOR APPELLEE GEICO CASUALTY INSURANCE CO.

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Rule 26.1 Corporate Disclosure Statement

Pursuant to Rule 26.1, Appellee, GEICO Casualty Insurance Co. states there is no parent corporation or publicly held corporation that owns 10% or more of its stock.

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ASSERTION OF APPEAL

This appeal stems from an Order granting Summary Judgment for all defendants in the Superior Court for the District of Columbia on June 13, 2022.

ISSUES FOR REVIEW

A. Whether Summary Judgment should be reversed where Plaintiff offers only speculative testimony regarding the possible number and order of impacts.

B. Whether, where the undisputed evidence demonstrates Mr. White was struck in the rear and propelled forward into another vehicle, there is any basis to reverse summary judgment as to claims of liability predicated on his alleged negligence.

STATEMENT OF FACTS

The instant matter stems from a July 4, 2018 accident. The accident occurred in the far-left lane of northbound 295 in Washington, D.C. and involved a line of four vehicles. See *Apx.* at 3; *see also Apx.* at 352, L:2-4; 429, L:19-21; 521, L:21-22; 522, L:1-2; 582, L:12-14.[1] Plaintiff was a passenger in the front vehicle driven by Defendant Etile. *See Apx.* at 3; *see also Apx.* at 345, L:13-15.

Prior to the accident, Defendant Etile indicates he had begun to slow his vehicle in response to slowing traffic ahead. *Apx.* at 353, L:21-22; 354, L:1-4. At the same time, Tyrese White (hereinafter "Mr. White"), who was driving behind Mr. Etile, slowed his vehicle consistent with traffic ahead. *Apx.* at 586, L:21-22; 587, L:1-4. As he proceeded, Mr. White adjusted his speed to the car in front of him to maintain a consistent, safe following distance. *Apx.* at 619, L:1-13. At or about the same time, Defendant Deer, who was two cars behind the Etile vehicle and directly behind Mr. White's vehicle, attempted to move to the right lane. *Apx.* at 523, L:14-18. He looked into his side view mirror to see if he could change lanes. *Apx.* at 524, L:7-12. When he looked back in front of him, Mr. White's vehicle had significantly slowed

[1] The Court struck Appellant's original Brief and Appendix, filed on December 12, 2022, and found the Supplemental Brief and Supplemental Appendix as replacement filings on January 13, 2023. For ease of reference, the replacement filings will be referred to as the Appellant's Brief and Appendix ("App."). This Appellee's Supplemental Appendix will be referred to as "Supp. App."

in conjunction with Plaintiff's vehicle slowing. *Apx.* at 524, L:13-21. Defendant Deer did not have time to slow and rear-ended Mr. White's car. *Apx.* at 522, L:7-12; 523, L:1-3; 526, L:19-22; 527, L:1-3. Deer's impact to the rear of Mr. White's vehicle was the first impact involving Mr. White. *Apx.* at 587, L:8-12; 593, L:3-11; 609, L:21-22; 610, L:1. That impact propelled Mr. White forward and allegedly into the rear of the Etile vehicle, in which Plaintiff was riding. *Apx.* at 587, L:8-12; 609, L:21-22; 610, L:1.[2] The force of that impact rendered Mr. White unconscious. *Apx.* at 585, L:11-19.

Plaintiff did not witness how the accident occurred and testified she has no personal information regarding the order of impacts that occurred behind her, as she only felt one impact to the rear of her car. *Apx.* at 194, L:10-12; 195, L:12-17; 298, L:17-22; 299, L:1-19; 301, L:1-4. Mr. Etile also felt only impact and has no information as to the order of any prior impacts behind him.[3] *Apx.* at 348, L:15-22; 401, L:9-19. Similarly, none of the other defendants or witnesses have any information to indicate that Mr. White initiated or was the cause of any impact with the Etile vehicle. *Apx.* at 481, L:12-14; 524, L:22; 525, L:1-8; 547, L:21-22; 548, L:1-3; 675, L:17-22; 676, L:1-6. Mr. White specifically asserts that, prior to being struck in the rear, he had not hit any other car and had not been involved in any other accident. *Apx.* at 593, L:3-11. There is no evidence of any contact between Defendant Etile and Mr. White prior to Mr. White first being forcefully rear ended and propelled forward.

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[2] Mr. White had no damage to the front of his vehicle. *Apx.* at 587, L:20-22.

[3] In her Brief, Plaintiff asserts that Defendant Etile felt two impacts, as he testified that he "probably" felt two impacts. *See* Pltf. Brief at p. 3. This amounts to nothing more than speculation and conjecture. The non-speculative testimony shows that Defendant Etile "for certain" felt one impact. *Apx.* at 348, L:15-22; 401, L:9-19 Additionally, Plaintiff, who was riding in the same vehicle as Defendant Etile, testified she only felt one impact. *Apx.* at 195, L:10-17.

SUMMARY OF ARGUMENT

In this instance, the trial court, based on the undisputed evidence and any reasonable inferences to be drawn therefrom, properly entered Summary Judgment for the Defendants. In support of her claim, Plaintiff continues to offer only "scattershot" arguments, speculating to myriad causes of the accident resting on supposition without identifying any theory supported by the facts. The trial judge correctly noted that Plaintiff offered only speculative testimony as to the possible number and order of impacts and "such speculative testimony is insufficient to support a finding of negligence." *Apx.* at 162. The speculative nature of Plaintiff's contentions remains fatal to her claim.

Regarding any allegations directed to the uninsured motorist claim asserted against this Defendant, there is no evidence that Mr. White, a Third-Party Defendant, was negligent in the operation of his motor vehicle.[4] Plaintiff argues that the trial judge failed to consider the law of rebuttable presumption concerning rear-end accidents. That "presumption" is inapplicable in the face of the undisputed testimony. Unlike the cases where a rebuttable presumption for a rear-end accident has been applied, the accident at issue did not involve just the White and Etile vehicles but a line of four vehicles. More importantly, the undisputed evidence, and any reasonable inferences that can be drawn therefrom, shows that Mr. White's involvement in the accident was initiated by a vehicle that struck his automobile in the rear and propelled it forward into the Plaintiff's vehicle. No witness or party to the case testified that Mr. White was speeding, inattentive, or otherwise driving imprudently. There is no evidence that Mr. White failed to maintain a proper distance, keep a proper lookout, control the speed of his vehicle or was

[4] As the basis for her uninsured motorist claim, Plaintiff contends that Mr. White was uninsured and that his negligence entitles her to uninsured motorist benefits. *Apx.* at 4, 10, 12. Absent evidence of negligence by Mr. White, there is no basis for the asserted uninsured motorist claim.

otherwise negligent. Given the evidence, Plaintiff has no basis for relief premised on a theory of negligence against Mr. White. As such, Plaintiff's claim for uninsured motorist benefits against this Defendant fails.

The trial court's entry of summary judgment for the Defendants was proper in light of the undisputed evidence in this matter. The trial court's ruling should be affirmed, and Plaintiff's appeal denied.

ARGUMENT

I. IN THE ABSENCE OF NON-SPECULATIVE EVIDENCE IDENTIFYING THE NUMBER AND ORDER OF IMPACTS, THE TRIAL COURT'S RULING SHOULD BE AFFIRMED.

"To maintain an action for negligence, a plaintiff must allege more than speculative harm from defendant's allegedly negligent conduct." *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702 (D.C. 2009). *See also*, *Mixon v Washington Metro. Area Transit Auth.*, 959 A.2d 55, 60 (D.C. 2008) (verdict for Plaintiff cannot rest on speculation); *Cormier v. D.C. Water & Sewer Auth.*, 946 A.2d 340, 349 (D.C. 2008) (damages may not be awarded on the basis of speculation and conjecture); *S. Kann's Sons Corp. v Hayes*, 320 A.2d 593, 595 (D.C. 1974) (Plaintiff's claim cannot rest on speculation as to what happened). Here, the trial judge correctly held that Plaintiff has not pointed to "any specific evidence of responsibility or the cause, order, and number of impacts that occurred." *Apx.* at 162. Instead, Plaintiff argues "different theories of liability and states that the jury could choose an interpretation of *any* theory to hold *any* Defendant liable." *Apx.* at 162. As such, what Plaintiff offers "as an inference of negligence" amounts to "nothing more than speculation." *Apx.* at 162.

Importantly, the trial judge noted the different interpretations a jury would have to sift through to find a viable claim of negligence. *Apx.* at 106. For instance, Plaintiff argues a jury

could find that Defendant Etile stopped short and failed to keep a proper lookout; or alternatively, that Defendant Deer caused Mr. White's vehicle to impact Defendant Etile's vehicle; or, as another option, that Mr. White impacted Defendant Etile's vehicle before being struck by Defendant Deer. *Apx.* at 106. These differing inferences of alleged negligence, for which even the Plaintiff cannot resolve, rest wholly on speculation, conjecture and guesswork. As evidenced by the Plaintiff's inability to determine a cogent theory of how the accident occurred, jury resolution would require guesswork. "Cases are not to be submitted to the trier of fact when there is no evidentiary foundation on which to predicated intelligent deliberation and reach a reliable decision." *S. Kann's Sons Corp.*, 320 A.2d at 595 (additional citation omitted). As such, the trial court's ruling should be affirmed.

II. THE RECORD LACKS ANY EVIDENCE SHOWING MR. WHITE WAS NEGLIGENT.

A. The Undisputed Evidence, and Any Reasonable Inferences to Be Drawn Therefrom, Do Not Identify a Viable Claim of Negligence Against Mr. White.

In the District of Columbia, "[t]he elements of a cause of action for negligence are a duty owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." *District of Columbia v. Cooper,* 483 A.2d 317, 321 (D.C. 1984) (citations omitted). For a plaintiff to establish negligence in a rear-end collision, they "must show more than just the occurrence of the collision" and 'the mere happening of an accident does not constitute proof of negligence.'" *King v. Pagliaro Bros. Stone. Co.*, 703 A.2d 1232, 1234 (D.C. 1997) (quoting *Pazmino v. Washington Metropolitan Transit Authority,* 638 A.2d 677, 679-80 (D.C. 1994)).

In *Evans v. Byers,* the court of appeals affirmed the directed verdict for the defendant by the lower court, finding that the plaintiff had not established facts indicating negligent conduct by

the defendant. *See Evans v. Byers*, 331 A.2d 138, 141 (D.C. 1975). In *Evans*, the defendant hit the car the plaintiff was riding in. *Id.* None of the accident's witnesses testified that the defendant had been driving at an excessive speed, was inattentive to the traffic in front of him, or acting imprudently as a driver. *See id.* at 140. The record revealed "the only uncontroverted fact established by plaintiff was that the car in which she was riding was hit by the other car, for the totality of her own case failed to establish proof of any event which called for countervailing testimony by defendant Byers." *Id.* at 141. With no evidence raising a presumption of negligence on the part of the defendant, the court held that as a matter of law, the defendant was not negligent. *See id.* at 139, 141.

Here, there is no evidence to suggest Mr. White acted negligently. Similar to *Evans,* there is no evidence that Mr. White was speeding, inattentive, or otherwise driving imprudently. Plaintiff did not see any of the vehicles involved in the collision before her car was impacted and has no personal information as to the order of impacts that occurred behind her. *See Apx.* at 194, L:10-12; 301, L:1-4. Moreover, Plaintiff testified she was not even aware her vehicle was impacted until after Defendant Etile exited to investigate the "boom." *See Apx.* at 298, L:17-22; 299, L:1-7. Similarly, Defendant Etile testified he felt only impact, and he has no personal information about the order of impacts prior to being hit. *See Apx.* at 348, L:15-22; 356, L:2-13; 401, L:9-19. Mr. White testified that his vehicle slowed to keep a safe distance behind Plaintiff's vehicle. *See Apx.* at 618, L:10-22; 619, L:1-13. As he slowed to a near stop, he was forcefully rear-ended. *See Apx.* at 586, L:21-22; 587, L:1-4. This was the first impact involving his car. *See Apx.* at 587, L:8-12; 609, L:21-22; 610, L:1. Any alleged impact with the Etile vehicle occurred

subsequently because of that rear impact. *See Apx.* at 593, L:3-11.[5] No other witness has any knowledge of any earlier impact involving the White and Etile vehicles. *See Apx.* at 194, L:10-12; 298, L:17-22; 299, L:1-7; 299, L:17-19; 301, L:1-4; *see also Apx.* at 356, L:2-13; 547, L:21-22, 548, L:1-3; 481, L:12-14; 675, L:17-22; 676, L:1-6; *see also Supp. App.* at 2, L:16-22; 3, L:1-4; 12, L:17-22, 13, L:1-9. Any claim to the contrary is nothing more than impermissible speculation. *See Gebremdhin v. Avis-Rent-A-Car Sys., Inc.*, 689 A.2d 1202, 1204 (D.C. 1997) (holding that, in a rear-end collision case, there was no evidence by which the jury could properly infer the Avis car skidded, and therefore, any verdict based on skidding would be improper speculation).

In this instance, there is no evidence of any negligence on the part of Mr. White. *See Evans*, 331 A.2d at 141. Absent negligence by Mr. White, the claim against Defendant GEICO fails as a matter of law, and the trial court's ruling should be affirmed.

Plaintiff's suggestion that Mr. White failed to maintain a proper distance, keep a proper lookout, and control the speed of his vehicle rests on nothing more than speculation and guesswork deriving from the mere happening of the accident. *See* Pltf. Brief at pp. 6-7. The damage to the rear of Mr. White's vehicle is consistent with his description of a forceful rear impact that rendered

[5] Plaintiff's recitation of the material facts in her Opposition to the Motion for Summary Judgments reinforces the propriety of Defendant GEICO's argument that there is no evidence to support that Mr. White struck Defendant Etile's vehicle before he was rearended. Plaintiff's presentation of the collision's events confirms that the first contact involving the White vehicle occurred when he was forcefully rear-ended by Defendant Deer and propelled forward. *Apx.* at 94, 99. In describing the accident, Plaintiff affirms that: (1) the first impact Mr. White experienced was to his rear (*Apx.* at 94); (2) Salvatore Ippolito testified that the initiating accident occurred when an SUV struck another vehicle (*Apx.* at 94-95, 99); and (3) Defendant Deer's testimony that when Defendant Ippolito rear-ended his SUV, it was almost simultaneous with his striking the rear of Mr. White's sedan. (*Apx.* at 94). Plaintiff does not identify any evidence suggesting or supporting any different order of impacts, or than an impact occurred between the White and Etile vehicle prior to Mr. White being struck in the rear by Defendant Deer.

him unconscious and propelled his car forward. It neither supports nor suggests a prior impact with Etile or offers any insight into Mr. White's speed or following distance. Contrary to Plaintiff's argument, the testimony shows that Mr. White had been moving with traffic, and as Defendant Etile's vehicle began slowing down, Mr. White adjusted the speed of his vehicle with that of Defendant Etile. *Apx.* at 585, L:1-10; 586, L:21-22; 587, L:1-4; 618, L:2-5; 618, L:21-22; 619, L:1-13. Again, consistent with the testimony in this matter, there is no evidence of negligence by Mr. White, and the trial court's entry of summary judgment should be affirmed.

B. There is No Presumption of Negligence Under the Circumstances of this Accident.

In her Brief, Plaintiff cites to *Fisher, Warrick,* and *Gebremdhin* to argue that a rebuttable presumption of negligence should be imposed against Mr. White. *See* Pltf. Brief at pp. 5-7. These cases are inapplicable to the matter at issue.

Plaintiff argues that consistent with *Fisher v. Best*, "'[in] the absence of an emergency or unusual conditions, the following driver is negligent if he collides with the forward vehicle.'" *See id.* at p. 5 (quoting *Fisher v. Best,* 661 A.2d 1095, 1099 (D.C. 1995)). Unlike the instant claim, in *Fisher,* there was a multitude of testimony that the defendant admitted fault at the scene and may have taken her eyes off the road prior to the plaintiff slowing his vehicle, causing the collision. *See Fisher,* 661 A.2d at 1096. The accident in *Fisher* only involved two vehicles, and there was no suggestion of any other cause of the collision other than the actions of the following driver. *Id.*

In *Warrick v. Walker,* the plaintiffs were riding in a taxicab that was traveling down an incline and rear-ended a vehicle stopped at a red light. *See Warrick v. Walker,* 814 A.2d 932, 933 (D.C. 2003). Again, *Walker* only involved two vehicles and there was no suggestion of any other cause of the collision other than the actions of the following driver. *See generally id.* Lastly, in *Gebremdhin v. Avis Rent-A-Car Sys., Inc.*, the plaintiff stopped at a red light when his vehicle was

rear-ended by the defendant. *See Gebremdhin,* 689 A.2d at 1203. The defendant testified that she did crash into the plaintiff's vehicle, that she assumed the plaintiff would try to make the light and proceed through the intersection, and that due to this assumption, she took her eyes off his vehicle. *See id.* Once again, there was no suggestion of any other cause of the collision other than the actions of the following driver.

The instant matter is inapposite to the above cases due to the absence of any evidence of negligence by Mr. White. Unlike *Fisher,* Mr. White testified that his vehicle gradually slowed with the preceding flow of traffic, and he did not take his eyes off the road before being struck in the rear by the Deer vehicle. *See Apx.* at 586, L:21-22; 587, L:1-12; 593, L:3-11; 609, L:21-22; 610, L:1, 618, L:10-22; 619, L:1-13. Unlike *Walker,* the sole evidence in this case is that the initial collision involving Mr. White's vehicle was when he was struck in the rear. *See Apx.* at 587, L:8-17. That initial collision to Mr. White's rear rendered him unconscious and propelled his vehicle forward, allegedly into the Etile vehicle. *See Apx.* at 587, L:8-12; 588, L:7-15; 609, L:21-22; 610, L:1; *see also Apx.* at 524, L:7-17. Other than sheer speculation, the record identifies no evidence of negligence by Mr. White. There is no evidence that Mr. White contacted the Etile vehicle prior to first being rear-ended and propelled forward. The undisputed evidence offered regarding the circumstances of this accident preclude any presumption of negligence against Mr. White.

The facts referenced in Plaintiff's Brief do not bear on the issue of Mr. White's alleged negligence or suggest, in any way, that the initial impact to Mr. White's vehicle was other than when he was forcefully struck in the rear by Mr. Deer. *See* Pltf. Brief at pp. 5-7. Plaintiff's reference to Mr. White's loss of consciousness simply provides a basis for the inference that any impact between Mr. White and the Etile vehicle likely occurred while Mr. White was unconscious. Any claim of subsequent impacts Defendant Etile allegedly witnessed after he claims to have been

struck are also irrelevant as there is no claim (or evidence) that these resulted in any subsequent contact with Defendant Etile. There is no evidence suggesting or supporting a claim that Mr. White struck the Etile vehicle prior to being forcefully rear-ended. Neither Plaintiff's Brief nor the record identifies any theory of negligence against Mr. White that rests upon something other than speculation or guesswork.

CONCLUSION

As noted, the record is void of evidence that Mr. White was negligent, and the trial court correctly granted summary judgment in favor of this Defendant. Plaintiff's claim rests wholly on speculation and conjecture. Such guesswork cannot support a claim of liability. The trial court's ruling should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of March, 2023, the foregoing was e-filed and sent via email or first-class mail postage prepaid to the following counsel and parties:

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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.

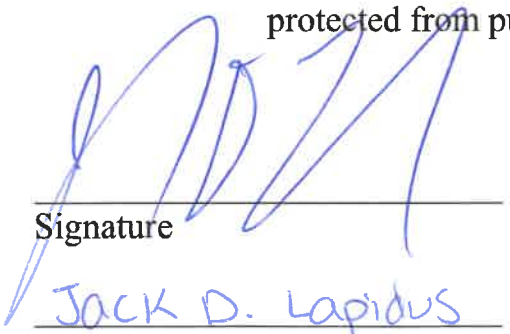
2. Any information revealing the identity of an individual receiving mental-health services.

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.



Signature

22-CV-595

Case Number(s)

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