CASE NO.: 22-CV-595

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

FRENNIEJO NIXON

Appellant,

v.

GIOVANNI IPPOLITO, ET AL.

Appellees

Appeal from the Superior Court of the District of Columbia in Civil Case No. 2021 CA 0001757 V (Honorable Hiram E. Puig-Lugo)

BRIEF FOR APPELLEE GIOVANNI IPPOLITO

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Rule 28 (a) Statement:

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JURISDICTION

The appeal is from the Order of the Superior Court for the District of Columbia's denying the Appellant's Motion to Reconsider and Alter or Amend a Judgment Granting Defendants' Motions for Summary Judgment.[1]

Appellee Ippolito joins in and fully incorporates Appellee Deer's Statement of Jurisdiction pursuant to the applicable rules in Superior Court related to the Motion to Reconsider filed by Plaintiff given the timing of the Notice of Appeal.

STATEMENT OF ISSUES

1. Did the trial court err in granting Defendant Ippolito's Motion for Summary Judgment as there were no disputes of material fact related to his negligence?

2. Did the trial court err in denying the Plaintiff's Motion to Reconsider and Alter or Amend the June 13, 2022, Order Granting Summary Judgment?[2]

STATEMENT OF FACTS

This case arises from an alleged multi-vehicle accident which occurred on or about July 4, 2018, on I-295 in Washington D.C. *App.* at p. 3, p. 185-186, lns.

[1] Ms. Nixon contends that the Appeal is from the final order of the Superior Court granting Appellee's Motions to Dismiss and Deny Appellant's Motion to Reconsider, which upon review of the record and Appendix is assumed to be based on the Motions for Summary Judgment filed by Appellees respectively.

[2] It should be noted that Mr. Ippolito fully incorporates and joins in Mr. Deer's arguments related to the denial by the Superior Court of Ms. Nixon's Motion to Reconsider and Alter or Amend the Order granting the Appellees respective summary judgments pursuant to Court of Appeals Rule 28 (j).

15-22; [3] Ms. Nixon was a passenger in a vehicle driven by Mr. Etile. *App.* at 187-188, lns. 19-22, 1; *App.* at 346-347, lns. 15-22, 1-4. Mr. Etile was operating the first vehicle, Mr. White was operating the second vehicle, Mr. Deer was operating the third vehicle, and Mr. Ippolito was operating the fourth vehicle, with Ms. Anna Chayka as a passenger in the left lane. *App*. at p. 352, lns. 2-4; *App*. at 429, lns. 19-21; *App.* at p. 521-22, lns. 21-22, 1-2; *App*. at 582, lns. 12-14. Ms. Nixon filed the Complaint against Mr. Ippolito, Mr. Deer, and Mr. Etile alleging negligence resulting in her injuries. *App.* at p 3. She also alleged that Defendant, Anna Chayka[4], negligently entrusted her vehicle to Mr. Ippolito. *Id.* Ms. Nixon further alleged that Mr. White, and the owner of his vehicle, Ms. Bennett, did not have sufficient insurance and sued GEICO and National General for breach of contract pursuant to applicable UIM/UM policies for damages related to this alleged occurrence; *Id*.

In the alleged occurrence, Ms. Nixon experienced one impact from her rear, resulting in her alleged injuries. *App.* at p. 195-196, lns. 12-22, 1-4; and *App.* at p.

[3] Ms. Nixon filed a Brief and Appendix on or about December 22, 2022, and a Supplemental Brief and Supplemental Appendix on or about December 30, 2022. The Court ordered on or about January 13, 2023, that the original Brief and Appendix of Ms. Nixon be stricken and substituted for the Supplemental Brief and Supplemental Appendix. For ease of reference, the replacement filings will be referred to as Ms. Nixon's Brief and Appendix ("App.") The Supplemental Appendix filed by GEICO with its Brief will be referred to as "Supp. App."

[4] Ms. Anna Chayka was originally included in this Appeal but was dismissed by Court order on January 13, 2023.

270, lns. 2-5. The vehicle in which Ms. Nixon was a passenger did not impact any other vehicles or objects after the initial impact from the rear. *App.* at p. 203, lns. 16-21. Ms. Nixon did not interact with any other drivers or persons on the scene. *App*. at p. 199, lns. 15-21.

Mr. Etile testified he did not recall hearing any impacts or observing any impacts behind him before the initial impact from the rear occurred to his vehicle. *App.* at p. 355-56, lns. 20-22, 1. After being hit from behind, Mr. Etile explained that he saw subsequent impacts between other vehicles behind him, but did not recall experiencing any additional impacts to his vehicle. *App.* at 356, lns. 2-22, 1-2 and *App*. at p. 401, lns. 9-19.

Mr. White was operating a vehicle behind Mr. Etile. He recalled experiencing one impact to the rear on his vehicle. *App*. at p. 585-586, lns. 20-22, 1-4 and *App*. at p. 623-25 lns. 12-22, 1-22, 1-10. Mr. White did not know of any additional impacts other than the first impact to the rear of his vehicle. *Id.*

Mr. Deer was operating the vehicle behind Mr. White and felt two distinct impacts, first to the front of his vehicle and then to the back of his vehicle. *App.* at p. 508, lns. 3-17. Mr. Deer failed to stop his vehicle in time and impacted the rear of Mr. White's vehicle. *Id*. Mr. Deer's vehicle was then subsequently impacted from the rear by Mr. Giovanni Ippolito's vehicle; *Id.*; *App.* at 432, lns. 12-16; and *Supp. App*. p. 4-5, lns. 15-22, 1-2; Mr. Deer did not know of any subsequent

impacts with Mr. White's vehicle after being struck by Giovanni Ippolito's vehicle; *App.* at 548-549, lns. 9-22, 1-3;

Ms. Anna Chayka, a passenger with Mr. Giovanni Ippolito, only felt one impact to her vehicle, and did not know of any subsequent impacts to other vehicles. *Supp. App*. at p.3, lns. 8-9 and *Supp. App*. at p. 6, lns. 4-11; Mr. Giovanni Ippolito did not know of any subsequent impacts to other vehicles after the initial impact with Mr. Deer's vehicle. *App.* at 437, lns. 14-17;

SUMMARY OF ARGUMENT

Appellant's Brief fails to show any genuine dispute of material fact that would allow for the Court to deny the Appellees' respective Motions for Summary Judgment. Ms. Nixon highlights various facts and testimony arguing it gives rise to various inferences for which negligence for each respective Appellee can be supposed by the jury and therefore should be left for the finder of fact to determine. She fails to acknowledge the lack of dispute of material facts as a failure of the ability to meet her burden of proof for causation and negligence for each respective Appellee. She cannot identify who was negligent and therefore argues that any and all respective parties caused her injuries. The Court eloquently explained in its denial that Ms. Nixon "has only provided speculative testimony of the possibility of number and order of impacts" and that 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. Accordingly the Court concludes that Plaintiff has not met her burden of producing specific facts showing there is a genuine issue for trial on her negligence claims…."

App. at 106-107. In the same way, Ms. Nixon's arguments on appeal still remain speculative at best.

ARGUMENT

A. There Are No Genuine Issues Of Material Fact As To The Liability Of Mr. Giovanni Ippolito Related To The Alleged Damages Of Ms. Nixon And Therefore The Trial court Should Be Affirmed

While summary judgment is to be reviewed *de novo* and viewed in a light most favorable to the non-moving party, once the defendant has made an initial showing that the record presents no issues of material fact, then the burden shifts to the plaintiff to show that one exists. *Bradshaw v. District of Columbia,* 43 A. 3d 318, 323 (D.C. 2012). The Court has explained that "'[a] plaintiff's mere speculations are insufficient to create a genuine issue of fact' and thus withstand summary judgment." *Hunt v. District of Columbia,* 66 A.3d 987, 990 (D.C. 2013). The non-moving party must have similarly specific facts in the record when opposing a motion for summary judgment to reveal a genuine issue of material fact that is suitable for trial. *Davis v. Bud and Papa*, 885 F.Supp.2d 85, 88 (D.C. 2012) (citing *Celotex Corp v. Catrett*, 447 U.S. 317 (1986)); see also *Mixon v. Washington Metropolitan Area Transit Authority*, 959 A.2d 55, 58 (D.C. 2008).

To establish negligence, the Court explained that:

> … a plaintiff must show 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." *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1098 (D.C.1994) (citing *Powell v. District of Columbia*, 634 A.2d 403, 406 (D.C.1993); *Levy v. Schnabel Found. Co.*, 584 A.2d 1251, 1255 (D.C.1991)).

Tolu v. Ayodeji, 945 A.2d 596, 601 (D.C. 2008). The Court further explained that proximate cause is key to establishing negligence. See *Richardson v.* Gregory, 210 U.S.App.D.C. 263, 266-67 (1960) (explaining that negligence and causation must be present for liability to be established). Ms. Nixon's Brief recognizes that the burden of proof relies upon her proving by a preponderance of the evidence that Mr. Giovanni Ippolito was negligent, resulting in her damages from this alleged occurrence. She also acknowledges that the jurors can make reasonable inferences based on the evidence presented. Yet, she completely ignores that juries cannot base their verdict on mere guesses or speculation and must base their verdict on an evidentiary predicate. See *Gebremdhim v. Avis Rent-a-car System, Inc.*, 689 A.2d 1202, 1204 (D.C.1997).

As Ms. Nixon pointed out in her Brief, there is no dispute of material facts that Mr. Giovanni Ippolito admitted that he struck the rear of Mr. Deer's vehicle. *App.* at p. 432, lns. 12-16; and *Supp. App*. at p. 4-5, lns. 15-22, 1-2. It is also undisputed, by Mr. Abron Deer's own testimony, that he impacted Mr. White's

vehicle first and then was struck from behind. *App*. at p. 508, lns. 3-17. Mr. Deer admitted to experiencing two separate impacts, first one from the front and then one from the back. *Id.* He does not testify that there were three distinct impacts. He did not testify that he was pushed into Mr. White's vehicle a second time but rather that he does not have knowledge of any subsequent impacts involving his vehicle and any other vehicles after he was struck from the rear. *App*. at p. 548-550, lns. 9-22, 1-22, 1-17.

Ms. Nixon argues in her Brief that there is "doubt about creation of a factual dispute" based upon Mr. Deer testifying that the rear impact to his vehicle happened instantaneously after the front of his car struck Mr. White's vehicle, and that he and Mr. White's vehicles were still in contact when the second impact occurred. (Emphasis added). Ms. Nixon argues that such testimony gives rise to multiple inferences that can be drawn to preclude summary judgment related to Mr. Giovanni Ippolito's negligence when coupled with eyewitness testimony. It is well established that "conclusory assertions offered without evidentiary support do not establish a genuine issue for trial." See *Davis*, 885 F.Supp.2d at 88 (citing *Green v. Dalton*, 164 F.3d 671, 675 (D.C.Cir.1999). It is unknown what multiple inferences Ms. Nixon refers to in order to meet her burden of proof and establish such a dispute of fact to give rise to negligence and causation between Mr. Ippolito and Ms. Nixon. At best, there is a vague reference in Ms. Nixon's Brief indicating a subsequent impact

occurred between Mr. Deer's vehicle and Mr. White's vehicle after Mr. Ippolito rear-ended Mr. Deer, but no specific details of such facts or testimony to support such an assertion are outlined by Ms. Nixon in her Brief.

Ms. Nixon appears to be requesting that a jury be permitted to infer that the impact she felt was due to negligence of Mr. Ippolito, without any evidentiary support. If anything, it appears clear and undisputed by the parties and witnesses that the contrary is true. Mr. Deer was impacted once from the rear by Mr. Ippolito shortly after rear-ending Mr. White. *App*. at p. 508, lns. 3-17. Mr. Deer testified that the impact was instantaneous, but still indicated that there was a sequential order, without knowledge of additional any subsequent impacts to other vehicles. *App*. at p. 548-550, lns 9-22, 1-22, 1-17. In the same manner, Mr. White only knew of one impact from the rear for certain. *App*. at p. 585-586, lns. 20-22, 1-4 and *App*. at p. 623-25 lns. 12-22, 1-22, 1-10. Mr. Giovanni Ippolito also had no knowledge of any subsequent impacts of other vehicles after his vehicle made contact with Mr. Deer's vehicle. *App*. at p. 437, lns. 14-17. Ms. Chayka, Mr. Ippolito's passenger, also had no knowledge of any subsequent impacts involving the vehicles ahead of them. *Supp. App*. at p. 3, lns. 8-9 and *Supp. App*. at p. 6, lns. 4-11. Mr. Salvatore Ippolito testified he had no knowledge of the sequence of impacts of the vehicles involved. *App*. at p. 681, lns. 1-11; *App*. at p. 682, lns. 7-11, and *App*. at p. 682-683, lns. 12-22, 1-11.

A plaintiff can defeat a defendant's motion for summary judgment when a reasonable inference can be drawn from the evidence, properly proffered, that the alleged injury would not have occurred but for the defendant's negligence. See *Tolu*, 945 A.2d 596 at 601 (2008) (citing *Thompson v. Shoe World., Inc.*, 569 A.2d 187, 190-91 (D.C. 1990)). Even when viewing such testimony in a light most favorable to Ms. Nixon as the non-moving party, there is no evidence or testimony to which she can point that creates a material factual dispute allowing for a reasonable inference of proximate cause for negligence by Mr. Ippolito. There is simply no evidence that any impacts occurred after Mr. Ippolito struck Mr. Deer's vehicle which would link the initial impact Ms. Nixon felt to Mr. Ippolito's operation of his vehicle. Mr. Deer testified that he had no knowledge of any subsequent impacts to Mr. White's vehicle after the initial impact between their respective vehicles. *App*. at 548-550, lns 9-22, 1-22, 1-17. All seven witnesses, Ms. Nixon, Mr. Gustave Elite, Mr. Giovanni Ippolito, Mr. Salvatore Ippolito, Mr. Tyrese White, Mr. Abron Deer, and Ms. Anna Chayka testified, that they had no knowledge of any subsequent impacts with Mr. White's vehicle as a result of the collision between the vehicles of Mr. Ippolito and Mr. Deer. *App.* at p. 203, lns. 16-21, p. 195-196, lns. 12-22, 1-4; and. at p. 270, lns. 2-5; *App*. at 356, lns. 2-22, 1-2 and *App*. at p. 401, lns. 9-19; *App*. at p. 508, lns. 3-17, *App*. at p. 548-550, lns 9-22, 1-22, 1-17.; *App.* at p. 585-586, lns. 20-22, 1-4, at p. 623-25, lns. 12-22, 1-22, 1-10; *App.* at p. 437, lns. 14-17; *Supp*. *App*.

p. 3, lns. 8-9 at p. 6, lns. 4-11; *App*. at p. 681, lns. 1-11, at p. 682, lns. 7-11, and *App*. at p. 682-683, lns. 12-22, 1-11; *App*. at p. 548-550, lns 9-22, 1-22, 1-17.

As Ms. Nixon's testimony was that she only felt one impact to her vehicle and that she was allegedly injured due to that impact, there are no facts which can causally relate the impact of Mr. Giovanni Ippolito's vehicle with Mr. Deer's vehicle to the impact Ms. Nixon experienced. *App.* at p. 195-196, lns. 12-22, 1-4; and *App.* at p. 270, lns. 2-5. There is no testimony or evidence in Ms. Nixon's Brief supporting any factual dispute that Mr. Ippolito caused the impact to her vehicle. Given the absence of facts giving rise to proximate causation, the jury is only left to speculate and draw impermissible inferences as there is no evidence to establish such negligence. See *Mixon,* 959 A. 2d at 59 (2008). Therefore, as there is no dispute of material facts supporting that Mr. Ippolito was liable to Ms. Nixon for her alleged damages as a matter of law, the Order of the trial court granting Summary Judgment should be affirmed.

B. <u>*Res Ipsa Loquitur* Is Inapplicable In This Case And Does Not Create A Dispute Of Material Facts Related To Negligence Of Any Party As A Matter Of Law, And Therefore The Order for Summary Judgment Of The Trial Court Should Be Affirmed</u>

Although not argued explicitly in the portion of Ms. Nixon's Brief related to Mr. Ippolito's negligence, but addressed in the statement of issues presented, she argues that *res ipsa loquitur* should apply in the instant case as she was rear-ended.

Therefore, in abundance of caution, Mr. Ippolito is addressing the issue of *res ipsa loquitur* related to his negligence.

Res ipsa loquitur requires that:

> the cause of the accident is (1) known, (2) in defendant's control, and (3) unlikely to do arm unless the person in control is negligent…[which, once all are present,] combine to support an inference of negligence without the necessity of presenting further evidence.

Andrews v. Forness, 272 A.2d 672, 673 (1971). The Court has applied *res ipsa loquitur* in such instances where evidence was sufficient to raise the inference of negligence as it was unlikely the accident and injury would have occurred but for the negligence of the defendant. *See Sullivan v. Snyder,* 374 A.2d 866, 868 (1977). See *Mixon*, 959 A.2d 55 at 60 (explaining that *res ipsa loquitur* permits an inference of negligence where plaintiff establishes that: "(1) an event would not ordinarily occur in the absence of negligence; (2) the event was caused by an instrumentality in defendant's exclusive control; and (3) there was no voluntary action or contribution on Plaintiff's part").

As GEICO pointed out in its Brief, all of the cases cited and relied upon by Ms. Nixon where such a rebuttable presumption applied, involved two car accidents where one was rear-ended. The cases cited by Ms. Nixon are easily distinguishable from the facts of the instant case, as in this instant case, the cause of the accident is unknown, and which party had exclusive instrumentality over the

negligent vehicle is also unknown, as Ms. Nixon alleges negligence against all parties. *App*. at 1-12. These are essential elements to application of the *res ipsa loquitur* presumption, and the doctrine cannot be applied if the essential elements are not present. The Court has explained that the principle of *res ipsa loquitur* "can be invoked only if a plaintiff's case establishes certain uncontroverted facts which indicate negligent conduct by a particular party." *Evans v.* Byers, 331 A.2d 138, 141 (1975). Ms. Nixon has no evidence to establish the cause or which of the driver's had exclusive instrumentality over the negligent vehicle. Ms. Nixon cannot identify and causally connect the negligent act of being rear-ended to any specific defendant based on the evidence presented. It is not "but for" Mr. Ippolito's negligence that this accident occurred, as Ms. Nixon argues the negligence of all of the respective Appellees caused the accident. She has sued all of the drivers in some capacity, including her own vehicle's driver, alleging negligence against all of them, which is not supported by the facts. *App*. at p. 1-12.

It is an undisputed material fact that Ms. Nixon simply felt an impact from the rear, made no other observations of the actual accident and did not interact with other drivers after the occurrence. *App.* at p. 195-196, lns. 12-22, 1-4; and *App.* at p. 270, lns. 2-5. Mr. Etile, the operator of the vehicle in which Ms. Nixon was a passenger, also acknowledged feeling one impact from the rear. *App.* at 356, lns. 2-22, 1-2 and *App*. at p. 401, lns. 9-19. Additionally, Mr. White, who was

undisputedly operating the vehicle immediately behind the vehicle Mr. Etile and Ms. Nixon, recalled being hit from the rear one time. *App.* at p. 585-586, lns. 20-22, 1-4 and *App*. at p. 623-25 lns. 12-22, 1-22, 1-10. It is undisputed that Mr. Deer struck Mr. White's vehicle from the rear and then was subsequently struck by Mr. Ippolito. *App*. at 508, lns. 3-17. Mr. Salvatore Ippolito testified he saw a number of impacts between the vehicles but did know the sequence of the vehicles striking each other; he only knew for certain that Mr. Giovanni Ippolito struck the vehicle in front of him. *App*. at p. 681, lns. 1-11; *App*. at p. 682, lns. 7-11, and *App*. at p. 682-683, lns. 12-22, 1-11. Mr. Deer testified he did not recall being pushed into Mr. White's vehicle a second time after he was rear-ended. *App*. at 548-550, lns 9-22, 1-22, 1-17. Mr. Ippolito and Ms. Chayka testified that they saw no subsequent impacts occur after their vehicle struck Mr. Deer's vehicle. *App.* at p. 437, lns. 14-17; *Supp. App*. at p. 3, lns. 8-9 and *Supp. App*. at p. 6, lns. 4-11.

The burden does not shift from Ms. Nixon in proving or identifying who was negligent in causing the alleged occurrence based on the facts presented given her allegations against each and every driver for negligence, even though she is contending she was rear-ended. See *Andrews v. Forness,* 272 A.3d 672 (D.C.1971). Ms. Nixon wants to allow a jury to infer an impact and causal connection between her damages and Mr. Ippolito's actions for which there is no evidentiary support. Thus, the principal of *res ipsa loquitur* cannot be invoked as

Ms. Nixon cannot establish the requisite uncontroverted facts which indicate negligent conduct by a particular party. See *Evans v. Byers*, 331 A.2d 138, 141 (D.C. 1975). Therefore the Summary Judgment Order of the trial court must be affirmed as a matter of law.

C. Ms. Nixon Has Not Shown That The Trial Court Erred In Denying the Motion To Reconsider And Alter Or Amend A Judgment

Appellee Ippolito fully joins, adopts and incorporates the Appellee Abron Deer's argument and portion of his brief applicable to this contention (Argument Section C, page 21), pursuant to Court of Appeals Rule 28(j).

CONCLUSION

For the foregoing reasons, Ms. Nixon has failed to establish any genuine dispute of material fact as to potentially establish negligence as a matter of law against Mr. Ippolito, Mr. Ippolito respectfully requests that the Order of the Superior Court granting the Motion for Summary Judgment and Order of the Superior Court denying the Motion to Reconsider and Alter or Amend a Judgment be affirmed respectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on this 9th day of March, 2023, a copy of the foregoing Brief was electronically filed/mailed first-class, postage prepaid, to:

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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 taxpayeridentification 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.

Jennifer Servary
Signature

22-CV-595
Case Number(s)

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