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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT
CIVIL ACTION
NO. 2011-0248

JOSE DIAZ,
Plaintiff

vs.

CAROL JEPSON
MELANIE FIGUEROA,
Defendants

CONSOLIDATED WITH

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT
CIVIL ACTION
NO. 2011-1259

MELANIE FIGUEROA,
Plaintiff

vs.

CAROL JEPSON,
Defendant

INTRODUCTION

On October 26, 2011, the plaintiff, Jose A. Diaz (Diaz) filed civil action 2011-0248 against the defendants, Carol Jepson (Jepson) and Melanie Figueroa (Figueroa). Diaz alleged that on October 31, 2008, he was a passenger in a motor vehicle operated by Figueroa on a public way in Carver. He alleges that Figueroa negligently operated her motor vehicle so as to cause it to collide with a deer causing him serious injuries. Diaz also alleges that at the same time and place, Jepson negligently operated her motor vehicle causing it to collide with a deer which then

struck Figueroa's vehicle which caused him severe injuries.[1]

Jepson filed an answer denying liability and cross-claimed against Figueroa alleging that it was Figueroa's negligence which caused Diaz's injuries. Figueroa also filed an answer denying liability and cross-claimed against Jepson alleging that was it was Jepson's negligence that caused Diaz's injuries. In the interim, Figueroa filed an action against Jepson (Civil Action 2011-01259) seeking damages for injuries suffered by her as a result of Jepson's alleged negligence. Thereafter, Jepson filed a motion to consolidate both actions, which was allowed on October 31, 2012.

Figueroa has now filed a motion for summary judgment in Civil Action 11-1248 seeking judgment in her favor on Diaz' complaint, claiming that the summary judgment record entitles her to judgment as a matter of law. Jepson has filed a cross- motion for summary judgment asserting that she is entitled to judgment as a matter of law on Diaz' complaint against her as well as Figueroa's claim against her in Civil Action 11– 01259. A hearing was held on both motions on November 14, 2013.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and responses to requests for admissions under Rule 36, together with the affidavits . . . show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Mass.R. Civ. P. 56 (c); *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989); *Cassesso v. Commissioner of Corrections*, 390 Mass. 419, 422 (1983).

The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as matter of

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[1] The parties cannot agree if there was one or two deer which were involved in the collisions.

law. *Pederson*, 404 Mass. at 16-17. The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party will not reasonably be able to prove an essential element of his case. *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact for trial. Mass.R.Civ.P. 56(e); *Pederson*, 404 Mass. at 17. The opposing party may not rest on the allegations of the pleadings, or rely on "bare assertions and conclusions regarding [his]understandings, beliefs, and assumptions." *Polaroid Corp. v. Rollins Environmental Services (NJ), Inc.*, 416 Mass. 684, 696 (1993). Mere contradictions of factual allegations, without evidentiary support, are insufficient to raise questions of material fact sufficient to defeat a summary judgment motion. See *Madsen v. Erwin*, 395 Mass. 715, 721 (1985). The opposing party's obligation, rather, is to demonstrate the existence of admissible evidence sufficient to meet the burden of proof on the issues raised by the motion. The court reviews the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. *Attorney Gen. v. Bailey*, 386 Mass. 367, 370-71 (1982).

To prevail in a negligence action, a plaintiff must be able to establish by a preponderance of the evidence that: (1) the defendants breached the duty to use reasonable care; (2) the plaintiff suffered an actual loss; and (3) the defendants' negligence caused the plaintiff's loss. *Glidden v. Maglio*, 430 Mass. 694, 696 (2000). While summary judgment is rare in negligence cases, *Manning v. Nobile*, 411 Mass. 382, 388 (1991), it may be appropriate if "no rational view of the evidence permits a finding of negligence." *Roderick v. Brandy Hill Co.*, 36 Mass.App.Ct. at 949.

DISCUSSION

The parties submitted a joint statement of facts with appended exhibits that included a police report, excerpts of the depositions of Diaz, Figueroa and Jepson and Jepson's answers to interrogatories. Although some of Diaz' responses to the joint statement consisted of objections, he did not contest that the acts and events took place, but objected mainly to characterizations of those acts and events.

The parties submitted a copy of a police report authored by Carver Police Sgt. Michael O'Donnell. O'Donnell's narrative of the accident indicated that a deer ran into the roadway and struck Jepson's vehicle and was then catapulted onto and into Figueroa 's vehicle. Supplementing his report were photographs of Figueroa's vehicle. The photographs demonstrate a hole in the windshield and roof of the Figueroa vehicle but no evidence of any front-end damage. All parties agree that O'Donnell did not witness the accident and that his conclusion is not based on personal knowledge. Moreover there is nothing in the record to suggest that he is an expert in accident reconstruction and accordingly, his opinion as to how the accident occurred carries no weight and is disregarded.

The record indicates that at approximately 6:56 a.m. on October 31, 2008, Jepson was traveling on South Meadow Road in Carver when her vehicle struck a deer. The road where the collision took place is flat and curvy and the area heavily wooded. The speed limit in the area is 35 miles per hour. Jepson has no memory of seeing the deer before impact. There is no evidence to suggest that she was speeding, failed to keep a proper lookout, impaired or otherwise distracted. After the impact with the deer, Jepson attempted to locate it but could not.

Figueroa, with Diaz as a passenger, was traveling in the opposite direction when a deer crashed through her windshield and into her vehicle injuring both her and Diaz. Figueroa has no

memory of seeing the deer before impact. Like Jepson, there is no evidence to suggest that Figueroa was speeding, failed to keep a proper lookout, impaired or otherwise distracted. Diaz was looking at the radio at the time of the crash and has no memory of seeing the deer prior to the crash.

Diaz suggests there are genuine issues of material fact as to which of the defendants struck the deer first and/or whether there were one or two deer. While those issues may be genuine, I do not find either to be material for a summary judgement analysis. In the summary judgment context, a material fact is one that is essential to an element in the plaintiff's case. See *Dagan v. Jewish Community Hous. for the Elderly*, 45 Mass.App.Ct. 511, 513-14 (1998).

In order to defeat summary judgment there must be some evidence in the record to indicate that either Jepson or Figueroa was negligent. However there is none. All of the record evidence indicates that both drivers were operating their vehicles safely and properly before their respective collisions with a deer. I cannot assume either of the drivers negligent simply because each collided with a deer, as the mere fact that an accident occurred is not evidence of negligence. *Wilson v. Honeywell, Inc.*, 409 Mass. 803, 810 (1991).

ORDER

Accordingly, Figueroa's Motion for Summary Judgment is **Allowed** and Diaz's complaint is dismissed as against her. Likewise Jepson's Cross-Motions for Summary Judgment are **Allowed** and both Diaz and Figueroa's complaints are dismissed.

November 21, 2013
Entered 12/3/2013
w/SCC: BL MH HR SH

Cornelius J. Moriarty II
Justice of the Superior Court