

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAUD CALVIN YOUNG and DORIS YOUNG : CIVIL ACTION
:
v. :
:
UNITED STATES OF AMERICA, ET AL. : NO. 02-343

MEMORANDUM

Padova, J.

October 15, 2002

Plaintiffs have brought this personal injury suit against the United States, Northampton Township, Stephen and Joan Haegele, and Bonnie H. Nolte, arising out of an automobile accident which occurred on August 11, 2000. Before the Court is the Motion for Summary Judgment brought by Defendant Bonnie Nolte. For the reasons which follow, Defendants' Motion is granted in part and denied in part.

I. BACKGROUND

On the afternoon of August 11, 2000, Claud Calvin Young ("Young") was driving on Sackettsford Road in Northampton Township, Bucks County, Pennsylvania approaching a sharp curve to the right. Pl.'s Ex. B at 22, 42-43. It was raining. Id. at 22. As Plaintiff came around the curve, he saw a United States Postal Service mail truck stopped on the road in front of him. Id. at 43, 50-51. There is evidence that the mail truck was blocking the road. Pl.'s Ex. C at 5. He swerved into the opposing lane of Sackettsford Road to avoid hitting the mail truck and collided with

a cement mixer going in the opposite direction. Pl.'s Ex. B at 43. He was severely injured as a result of the accident.

Sackettsford Road is a two lane road with one lane in each direction. Id. at 42. The speed limit on Sackettsford Road is 40 m.p.h. Pl.'s Ex. F at 24. There is an advisory sign before the curve to advise traveling motorists to negotiate the curve at 30 m.p.h. Id. at 64-66. Young was driving 30 m.p.h. Pl.'s Ex. B at 39.

The mail truck was stopped in the vicinity of the mailbox for 743 Sackettsford Road. Pl.'s Ex. C at 7. 743 Sackettsford Road is located on the north side of Sackettsford Road. Id. at 5. On August 11, 2000, the mailbox for 743 Sackettsford Road was located on property owned by Bonnie Nolte on the south side of Sackettsford Road because curbside mail delivery was only made on the south side of that portion of Sackettsford Road. Pl.'s Ex. N at 5, 9-10, Pl.'s Ex. H. The mailbox had been located on Nolte's property for approximately 55 years. Pl.'s Ex. E at 23-24. Photographs of the area of the mailbox show that there are bushes, vines, and trees around the mailbox for 743 Sackettsford Road and on Nolte's property on the inside of the curve in the road. Pl.'s Ex. A. Nolte has never cut any of the vegetation growing on the inside of that curve on Sackettsford Road and has never had anyone else cut that vegetation. Pl.'s Ex. E at 25-26.

Northampton Township has owned and maintained Sackettsford Road since 1984. Pl.'s Ex. F at 8-9. Northampton Township has a right of way of thirty-three feet on Sackettsford Road, the width of the cartway itself is twenty feet, so Northampton Township has a right of law for approximately six and one-half feet on either side of the cartway. Id. at 14-15. The Township has a program for controlling vegetation on the right-of-way of its roads; once in the spring and once in the fall the Township mows or trims back growth that overhangs the cartway. Id. at 18-19. The spring and fall mowing extends between four and five feet from the cartway. Id. at 34.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for

its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)). The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. However, "mere allegations, bare assertions or suspicions are not sufficient to defeat a motion for

summary judgment." Felton v. Southeastern Penn. Transp. Auth., 757 F. Supp. 623, 626 (E.D. Pa. 1991) (citation omitted).

III. DISCUSSION

The Complaint alleges two counts against Bonnie Nolte for negligence. The Complaint alleges that Nolte was negligent in:

- a. Failing to cut, trim or remove from her property at 730 Sackettsford Road the trees, plants, shrubs or other similar obstructions which obstructed the view of, and created inadequate sight distance for, eastbound motorists proceeding around the horizontal curve in the vicinity of the mail box serving 743 Sackettsford Road;
- b. Failing to keep the approach to the mailbox for 743 Sackettsford Road clear of obstructions which prevented safe access for delivery of mail, in violation of Federal Regulations and the Domestic Mail Manual of the Postal Service;
- c. Failing to control the overgrowth of vegetation on the inside of the aforesaid sharp horizontal curve that severely limited the sight distance of the plaintiff Claud Young, and others similarly situated, contrary to established standards, the laws of Pennsylvania and Federal Regulations; and
- d. Failing to inspect her property, failing to recognize the inherent danger of the location of the mailbox for 743 Sackettsford Road on the curve of the road thereon, and failing to request that the said mailbox be removed to a safer location for delivery of mail;¹

¹Plaintiffs admit, in their response to the Motion for Summary Judgment, that Nolte "was not negligent in the decision to place the mailbox, or maintain the mailbox, at that location." Pl.'s

- e. Failing to exercise ordinary care to avoid injuring others and failing to use reasonable care as the owner of property located at 730 Sackettsford Road, on which the aforesaid mailbox was placed, in violation of the common law of the Commonwealth of Pennsylvania.

Compl. ¶ 41.

To succeed on a cause of action for negligence under Pennsylvania common law, Plaintiffs must prove the following:

1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required: a breach of the duty.
3. A reasonably close causal connection between the conduct and the resulting injury.
4. Actual loss or damage resulting to the interest of another.

Ney v. Axelrod, 723 A.2d 719, 721 (Pa. Super. Ct. 1999) (citations omitted). Plaintiffs must prove that Nolte's breach of a duty owed to them was the legal cause of the accident. Vattimo v. Lower Bucks Hosp., Inc., 465 A.2d 1231, 1233 (Pa. 1983).

Nolte argues that Plaintiffs cannot prove that her failure to cut the vegetation on her property was the legal cause of Plaintiffs' injuries because there is no evidence connecting the vegetation on Nolte's property with the accident. Young testified

Mem. At 15. Accordingly, summary judgment is granted in favor of Nolte with respect to Plaintiffs' causes of action for negligence arising out of subparagraph 41(d) of the Complaint.

at his deposition that there was nothing obstructing his view of Sackettsford Road:

Q: As you were approaching the curve, did you realize you couldn't see around - fully around the curve?

A: No, I didn't.

Q: Was there anything obstructing your view?

A: No.

* * *

Q. Just on the basis of questions Mr. McNulty asked, as I understand it, Mr. Young, as you were driving down the highway before you entered into the last right-hand turn before you saw the postal truck, there was nothing to obstruct your vision of the highway ahead of you; is that correct?

A. I don't remember.

Q. You don't know the answer?

A. I just don't remember.

Q. You've indicated the [sic] one time you knew the answer and now you forgot it?

A. I don't remember any obstruction.

Pl.'s Ex. B at 101-02, 107-08. Daniel Owarzani, who was driving the mail truck on the day of the accident, testified that nothing obstructed his view as he drove east on Sackettsford Road before he got to the Haegele's mailbox. Pl.'s Ex. L at 80-81. Robert Millar, who drove around the mail truck right before Plaintiff, was specifically asked about vegetation alongside the road and could recall only ground cover:

Q. In the vicinity of the mailbox can you tell me if there were - what is on that property around the mailbox? Are there any trees, bushes, grass? What is there?

A. Ground cover there.

Q. Can you describe what the ground cover looks like? How tall it is? How big it is? Anything?

A. It's ground cover, so it's a few inches off the ground. I say - I believe that property slopes down into the road.

Q. As you came around the curve on the right-hand side - was there any vegetation along the right-hand side of the road?

A. I don't remember, other than the ground cover.

Pl.'s Ex. C at 21-22. In addition, Pasquale Giradi, Superintendent for Public Works for Northampton Township, testified that he traveled eastbound on Sackettsford Road the day of the accident and did not see vegetation obstructing the view of drivers on that road:

Q. As you drove on Sackettsford Road on the day of this accident, August 11th of 2000, did you observe any foliage or trees or shrubs that intruded into the traveling lanes of Sackettsford Road so as to block the vision of vehicle operators looking ahead?

A. No, sir.

Pl.'s Ex. F at 63-64.

Nolte relies on Salerno v. LaBarr, 632 A.2d 1002 (Pa. Commw. Ct. 1993), to support her argument that she is entitled to summary judgment because Plaintiffs cannot prove that the vegetation on her

property was a legal cause of the accident. Salerno concerned a accident in which a motorist struck and killed a ten year old boy who rode his bicycle out of a driveway onto a state road. Id. at 1003. The Salernos claimed that the Commonwealth was negligent for permitting a speed limit of fifty-five m.p.h. on the unmarked state road. Id. at 1004. They also claimed that the owners of the home were negligent for allowing vegetation to grow along the side of the road, impairing the vision of the motorist and the boy. Id. The Commonwealth Court affirmed summary judgment entered on behalf of the Commonwealth and homeowners where plaintiffs' expert report opined that the motorist was only driving 25-30 m.p.h. when he struck the boy and the motorist and other eyewitnesses to the accident reported that vegetation did not impair the visibility of either the motorist or the boy. Id. at 1004-05.

Plaintiffs have submitted evidence which they maintain connects the vegetation growing on Nolte's property with the accident. Millar testified that there is a clockwise bend in Sackettsford Road and "as you come around that bend you cannot see - I could not see him until I was probably about 20 feet from him, maybe less." Pl.'s Ex. C at 7. He also testified that the mailbox was set in bushes and that he could not see the postal truck as he approached the curve because it was a "blind curve." Id. at 5 and 19-20. Michael Macerato, the driver of the cement truck that struck Young's vehicle, also referred to that portion of

Sackettsford Road as a blind curve. Plaintiffs argue, based upon the pictures of the relevant portion of Sackettsford Drive, which show bushes, trees and other vegetation on the inside of the curve on Sackettsford Road and around the mailbox, that the vegetation is the reason why the curve was blind. Pl.'s Mem. at 12, Ex. A.

In addition, Young states, in an affidavit submitted in opposition to Nolte's Motion, that he was confused by the questions asked at his deposition and that the vegetation on Nolte's property did obstruct his view:

5. During that deposition, I was asked several times about whether there was anything obstructing my view of the road in front of the truck.
6. To me, this question meant: was there anything directly in front of me that kept me from seeing the road and, in fact, there was nothing in the roadway that I could see and there was nothing hanging from the rear view mirror and there were no papers or stickers on the windshield that obscured my vision of the road directly in front of my truck.
7. Obviously, I cannot see around a blind curve or see through the trees and vegetation that was on the right hand side of the road as I approached the curve. Although at the time I did not realize the danger that was created by the stopped mail truck around the bend, as I now look at the photographs attached to this affidavit it is obvious, to me, that I could not see the truck because of the trees and vegetation that was present on the inside of that curve, to my right as I approached and began to round the curve in the road.

8. In fact, I note that the photographs were taken in November, about 3 months after the accident, and I can state with certainty, based on my knowledge of the weather and what happens to trees and foliage in the fall of the year in Bucks County, that there would have been even more leaves on the trees in August than [sic] are present in the photographs that were taken in November.

Pl.'s Ex. P ¶¶ 5-8.² Viewing the evidence on the record of this Motion in the light most favorable to Plaintiffs, the Court

²Nolte has asked the Court to disregard Young's affidavit because it directly conflicts with his deposition testimony. Affidavits which directly contradict earlier sworn testimony may not be used to oppose a motion for summary judgment:

For a court to disregard and strike an affidavit, however, the contradiction must be clear; an affidavit that explains rather than contradicts prior testimony should not be disregarded. Generally, courts will only disregard an affidavit if the contradiction relates to questions actually posed to the witness. Nevertheless, courts may disregard an affidavit even if the witness was not explicitly examined on an issue, if allowing the affidavit to stand would change the "flavor and theory" of the case by introducing new causes of action or entirely new theories of recovery not previously disclosed. Finally, even if an affidavit does conflict with prior testimony, courts should not strike it if it satisfactorily explains the contradiction in terms of a mistake made while previously testifying."

Stein v. Foamex International, Inc., Civ.A.No. 00-2356, 2001 WL 936566, at *4 (E.D. Pa. Aug. 15, 2001) (citations omitted). Although Young's affidavit comes close to contradicting his earlier testimony, it provides an explanation for the inconsistency. Moreover, the affidavit does not change the theory of the case, since the Complaint alleges that Nolte was negligent in not clearing the vegetation which obstructed the view of motorists coming around the bend. Consequently, the Court has considered Young's affidavit with respect to Nolte's Motion.

concludes that there is a genuine issue of material fact for trial regarding whether the vegetation on Nolte's property obstructed Young's view as he drove around the curve on Sackettsford Road, and was, thereby, one of the causes of the accident. Nolte's Motion for Summary Judgment based upon lack of evidence of causation is, therefore, denied.

Nolte also contends that she is entitled to summary judgment because she had no duty to clear the vegetation on her property along Sackettsford Road because Northampton Township owns and maintains the road and is obligated to control the vegetation growing alongside it. Northampton Township clears the vegetation twice a year from the sides of Sackettsford Road. Pl.'s Ex. F at 8-9, 18-19, 33-34.

Nolte has a duty created by Pennsylvania law to keep her property clear of vegetation that would obstruct the view of drivers on Sackettsford Road: "[i]t is the duty of the owner of real property to remove from the property any tree, plant, shrub or other similar obstruction, or part thereof, which by obstructing the view of any driver constitutes a traffic hazard." 75 Pa. Con. Stat. Ann. § 6112(a). Northampton Township is also a Defendant in this case. Plaintiffs argue that a jury will have to decide whether the vegetation which obstructed Young's view of the mail truck was within Northampton Township's right-of-way, which it maintains, or on Nolte's property, just to the south of the right-

of-way. The Court finds that there is a genuine issue of material fact for trial regarding whether Nolte had a duty to clear the vegetation growing on her property on the inside of the curve on Sackettsford Road. Accordingly, Nolte's Motion for Summary Judgment based upon a lack of evidence of a duty owed to Plaintiffs is denied.

Nolte also argues that summary judgment should be entered in her favor because Young's contributory negligence was the cause of the accident. She bases her argument on evidence that Young was speeding at the time of the accident. Plaintiffs assert that the evidence underlying Nolte's argument is inadmissible and, therefore, cannot be considered in connection with this Motion. Regardless of whether this evidence is admissible, however, there is a genuine issue of material fact for trial concerning Young's contributory negligence as there is evidence on the record of this motion that he was driving 30 m.p.h., ten miles per hour below the maximum legal speed. Pl.'s Ex. B at 39, Pl.'s Ex. F at 24. Nolte's Motion for Summary Judgment based on Young's contributory negligence is, therefore, denied.

An appropriate order follows.

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UNITED STATES OF AMERICA, ET AL. : NO. 01-2683

ORDER

AND NOW, this 15th day of October, 2002, in consideration of Bonnie Nolte's Motion for Summary Judgment (Docket No. 33) and Plaintiffs' response thereto, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** in part and **DENIED** in part as follows.

1. Defendant's Motion for Summary Judgment is **GRANTED** with regard to Plaintiffs' claims for relief based on subparagraph 41(d) of the Complaint;
2. Defendant's Motion for Summary Judgment is **DENIED** with regard to Plaintiffs' claims for relief based on subparagraphs 41(a)-(c) and (e) of the Complaint.

It is **FURTHER ORDERED** that Bonnie Nolte's Motion for Leave to File a Reply (Docket No. 49) is **GRANTED** and the Clerk shall enter the Reply Brief attached to said Motion on the Docket.

BY THE COURT:

John R. Padova, J.