IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CURTIS W. THOMPSON and JUDITH A. THOMPSON, Husband and Wife,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 99-821-JJF
NICHOLAS M. COPE,	:	
Defendant.	:	

Sidney Balick, Esquire of BALICK & BALICK, Wilmington, Delaware.
Attorney for Plaintiffs.

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Attorney for Defendant.

MEMORANDUM OPINION

September 28, 2001
Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is Defendant's Motion for Summary Judgment (D.I. 51). For the reasons set forth below, the Court will deny the motion.

BACKGROUND

At approximately 1:30 a.m. on Saturday, July 3, 1999, Defendant Nicholas Cope drove his automobile off of Interstate 95 and onto Southbound Route 141 headed towards New Castle. After he entered onto Route 141, he switched from the right lane to the left lane. (D.I. 53 at A-17). Approximately 100 yards from Route 141's intersection with Commons Boulevard, where the speed limit was 50 miles per hour, Defendant was traveling between 45 and 50 miles per hour. (D.I. 53 at A-10). There were no street lights along this stretch of the road and there were no cars in front of him. (D.I. 53 at A-11 to A-12). It was dark and, according to Defendant, was "hazy enough to impair [his] vision." (D.I. 53 at A-8). The police report filled out in connection with this case described the conditions as foggy. (D.I. 53 at A-8; D.I. 57 at B-1).

As Defendant approached the intersection with Commons Boulevard, the traffic light was green.[1] (D.I. 53 at A-138, D.I. 57 at B-4). After Defendant had entered the intersection but before he

[1] In their brief, Plaintiffs contend that the Court cannot conclude as a matter of law that the light was green because the only evidence as to this issue is from the testimony of Defendant, which is obviously self-serving. (D.I. 56 at 11). Plaintiffs also contend that a reasonable jury could refuse to accept Defendant's testimony because: (1) Defendant did not remember the color of the light at the previous intersection, and (2) the fog and haze impaired Defendant's vision. (D.I. 56 at 11). However, there is absolutely no evidence refuting Defendant's testimony that the light was green. (D.I. 53 at A-75). Therefore, under the summary judgment standard set forth in detail below, the Court concludes that no reasonable jury could find that the light was yellow or red when Defendant entered the

had passed all the way through it, Defendant suddenly saw Plaintiff Curtis W. Thompson ("Plaintiff")[2] standing less than 10 feet away from the front of his vehicle.[3] (D.I. 53 at A-17 & A-19). Defendant did not apply his brakes or reduce his speed, but did swerve to the right; however, he was unable to avoid striking Plaintiff with his car near the front left headlight. (D.I. 53 at A-20 & A-139). Defendant immediately turned his car around in order to illuminate Plaintiff's body, which was lying near the roadway. (D.I. 52 at A-139). Soon thereafter, police and an ambulance arrived on the scene and Plaintiff was transported to Christiana hospital, where we was diagnosed with multiple injuries. (D.I. 53 at A-22; D.I. 57 at B-3).

At the time of the accident, Plaintiff had been wearing dark clothing and had no flashlight or other reflective or illuminating device. (D.I. 57 at B-5). In addition, a blood sample taken from Plaintiff at the hospital revealed a blood ethanol level of 0.318 milligrams per deciliter. (D.I. 53 at A-134 & A-135). Dr. Richard T. Callery, a licensed forensic pathologist, estimated that, at a minimum, Defendant would have had to consume between 9.8 to 16.2 cans of 12-ounce beers for his blood ethanol level to be that high. (D.I. 53 at A-135).

Plaintiff suffered head injuries in the accident, and has no recollection of any of the events

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intersection.

[2] Although Plaintiff's wife, Judith A. Thompson, is also a plaintiff in this case, for simplicity, the Court will refer to Curtis Thompson as "Plaintiff" when discussing the relevant facts.

[3] Plaintiff's car had sustained a flat tire and he did not have a jack. (D.I. 53 at A-69). As a result, Plaintiff had been walking alongside Route 141 looking for a pay phone, and when he reached the intersection with Commons Boulevard, he decided to cross the road so that he could use the phone at the Cumberland Farms. (D.I. 53 at A-69).

immediately prior to the collision. (D.I. 53 at A-62 to A-63). Specifically, Plaintiff has no recollection of the color of the traffic light as he entered the intersection, whether any car was approaching as he began to cross it, or of being struck by Defendant's vehicle. (D.I. 53 at A-75 to A-76). There were no third-party eyewitnesses to the accident.

Plaintiff initiated this action on November 30, 1999. Plaintiff's Complaint asserts that Defendant acted negligently by: (1) failing to maintain proper control over his vehicle, (2) recklessly driving his vehicle with a wilful and wanton disregard for others, in violation of 21 Del. C. § 4175, (3) operating his vehicle in a careless and imprudent manner without properly accounting for the road and traffic conditions, in violation of 21 Del. C. § 4176(a), and (4) operating his vehicle without giving full time and attention to the operation of the vehicle or maintaining a proper lookout, in violation of 21 Del. C. 4176(b). (D.I. 1). On July 13, 2001, after discovery was completed, Defendant filed the instant motion for summary judgment. (D.I. 51).

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). However, a court should not make

credibility determinations or weigh the evidence.[4] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). To defeat a motion for summary judgment, Rule 56(c) requires the non-moving party to:

> do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is "no genuine issue for trial."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Thus, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to deny the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

DISCUSSION

Defendant contends that Plaintiff has adduced no evidence of Defendant's negligence, and that, therefore, summary judgment should be granted. (D.I. 52 at 7). However, the evidence adduced is sufficient for a reasonable jury to conclude that Defendant was driving at an excessive rate of speed when taking into account the weather conditions. Specifically, the poor visibility due to the haze and fog prevented Defendant from seeing Plaintiff until Plaintiff was less than 10 feet away. There is no evidence that Plaintiff jumped or ran in front of the car immediately prior to the collision. Accordingly, the Court cannot conclude as a matter of law that Defendant was not negligent.

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[4] To properly consider all of the evidence without making credibility determinations or weighing the evidence, a "court should give credence to the evidence favoring the [non-movant] as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000).

Alternatively, Defendant contends that even if there is some evidence that he acted negligently, Plaintiff's negligence exceeded that of Defendant's as a matter of law. (D.I. 52 at 11)(citations omitted). Delaware has a comparative negligence statute that reads:

> In all actions brought to recover damages for negligence which results in death or injury to person or property, the fact that the plaintiff may have been contributorily negligent shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the negligence of the defendant or the combined negligence of all defendants against whom recovery is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

10 Del. C. § 8132. The determination of each party's percentage of responsibility under this statute is a question of fact to be resolved by the jury, except in rare cases. Trievel v. Sabo, 714 A.2d 742, 745 (Del. 1998).

Defendant primarily relies upon Trievel in support of his motion. In Trievel, a victim was struck and killed by a pick-up truck as she tried to cross a busy four-lane highway on a clear, sunny day. Id. at 743. The victim's survivors sued the driver of the pick-up truck for negligence, but the Delaware Supreme Court affirmed the trial court's granting judgment as a matter of law for the defendant because the evidence established that the victim was at least 51% at fault. Id. at 743-44. The Supreme Court emphasized that none of the seven eyewitnesses who testified suggested that the defendant was at fault for the accident. Id. at 746.

The instant case is distinguishable from Trievel for two reasons. First, there are no third-party eyewitnesses to the accident. See Jackson v. Thompson, 2000 WL 33115704, at *1 (Del. Super. Ct. Oct. 12, 2000)(refusing to grant summary judgment for the defendant and distinguishing Trievel

because there were no third-party eyewitnesses). Second, although Defendant was driving within the speed limit, a reasonable jury could conclude that he was driving too fast due to the haze and fog, which prevented Defendant from seeing Plaintiff until Plaintiff was less than 10 feet away. See 21 Del. C. § 4176(a)(making it unlawful to operate a motor vehicle "without due regard for road, weather and traffic conditions then existing"). While Defendant has produced evidence of Plaintiff's own negligence, the Court concludes that apportionment of fault in this case is a question of fact to be resolved by the jury. See Jackson, 2000 WL 33115704, at *2 (holding that, despite the fact that plaintiff-bicyclist was wearing dark clothing at 5:00 a.m. and under the influence of alcohol when he was struck by the defendant's vehicle, weighing the relative degrees of fault is a question of fact, especially when driving conditions were not ideal due to the weather).

CONCLUSION

For the reasons discussed, the Court concludes that Defendant's Motion for Summary Judgment (D.I. 51) must be denied.

An appropriate Order will be entered.

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Defendant.	:	

O R D E R

At Wilmington this 28 day of September, 2001, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (D.I. 51) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE