

SUPREME COURT OF NOVA SCOTIA
Citation: *Tibbetts v. Murphy*, 2014 NSSC 360

Date: 20140911
Docket: Pic No. 390520
Registry: Pictou

Between:

Shirley Tibbetts	Plaintiff
v.	
Reginald Greg Murphy	Defendant
v.	
Joseph George Joyce	Third Party

DECISION on SUMMARY JUDGMENT

Judge: The Honourable Justice Gerald R. P. Moir
Heard: September 10, in Halifax, Nova Scotia
Written Release: October 2, 2014
Counsel: Jamie MacGillivray, for the Plaintiff (not participating)
Tipper McEwan, for the Defendant
Tara A. Miller, for the Third Party

Moir J.:

[1] Three years ago, Ms. Tibbetts and her husband, Mr. Joyce, were travelling through Livingstone Cove on their motorcycles. At the important time, they were on Livingstone Cove Wharf Road and Mr. Joyce's motorcycle was in front. They came upon a sharp curve to the left.

[2] At the same time, Mr. Murphy was driving his truck in the opposite direction, negotiating the same curve but to the right. Mr. Joyce and Mr. Murphy passed one another. Then, unfortunately, the truck and the Tibbetts' motorcycle collided. Ms. Tibbetts suffered injuries.

[3] Ms. Tibbetts sued Mr. Murphy. Mr. Murphy brought third party proceedings against Mr. Joyce pleading, "Mr. Joyce entered the Defendant's lane of traffic, causing the Defendant to take evasive action which caused or contributed to the accident involving the Plaintiff." Mr. Joyce moves for summary judgment on evidence.

[4] The first, and often the only, issue on an evidence-based summary judgment motion is whether the moving party has demonstrated that there is no genuine issue of fact requiring a trial.

[5] Ms. Miller accurately summarizes discovery evidence in this case when she writes for the third party:

12. It is clear a collision between the Plaintiff and Defendant occurred. The Plaintiff maintains the Defendant was in her lane of travel when the collision between her motorcycle and his truck took place. The Defendant maintains he was properly in his own lane of travel at the time of impact with her. This is an issue for trial relevant to a determination of liability as between the Plaintiff and the Defendant.

13. The Plaintiff and Defendant both testified that there was nothing the Third Party did which contributed to or caused the collision between them.

14. The Defendant testified that prior to the collision with the Plaintiff, he encountered the Third Party travelling in the opposite direction of him on the Livingstone Cove Wharf. He perceived the Third Party to be veering left towards him in his lane of travel. As a result, he took evasive action to avoid a collision with the Third Party by steering his vehicle to the right of the road. The Third Party passed by him with no contact and the Defendant was able to continue driving his vehicle properly in his own lane of travel. This was where he was when he encountered the Plaintiff on her motorcycle and the collision ensued. At the time of the impact with the Plaintiff, he testified that any evasive movement he had taken to avoid a collision with the Third Party was over and had nothing to do with what caused the ultimate collision with the Plaintiff.

[6] If that evidence fully informed us on what will be before the trial judge, there would be no basis for a finding that evasion of Mr. Joyce by Mr. Murphy caused or contributed to the collision. However, there is more to it than that.

[7] The evidence will be that all of this happened in rapid succession. The perceptions of the three witnesses will have to be evaluated to determine who invaded whose space and why. That evaluation may be difficult because the

perceptions were tightly compressed in time, the parameters and centre of a gravel road are less certain, and the experiences are coloured by shock. There is the possibility of a finding that accepts Mr. Murphy's perception of the position of the Joyce motorcycle and Ms. Tibbetts' perception of the position of the Murphy truck. Conflicting evidence would necessarily have to be reconciled. In that event, a finding that the evasion caused Mr. Murphy to overcompensate when returning to the centre is possible, even though Mr. Murphy's perception is opposite.

[8] Going to the analysis of the witnesses' inconsistent perceptions or standing on its own as a separate question of material fact, is evidence about Mr. Joyce as lead motorcyclist and Ms. Tibbetts as follower. When examined for discovery by Mr. Palov, Ms. Tibbetts had this to say:

Okay. We are at the bottom of the hill. Like I said before, I was supposed to be one in the lead that day, so he would see what it is like because he was always in the lead and then I was behind and he was always complaining because he felt like I was too far back and I wanted him to feel what it was like to be in the other - have it switched. So, I was supposed to be in the lead. At the bottom of the hill, I guess I wasn't putting my gloves on fast enough or whatever, or I don't know why, but, or it was just habit. I have no idea what was going on in his mind. He pulled off first. I was still sitting there and I finished putting on my gloves and then I pulled away. So I would say, oh boy, well could have 1, 2, 3, maybe by the time I pulled away four bikes you could put two bikes between us.

Add this from her examination by Mr. Machum:

Q. ... you'd both be far to the right? Is that what's going on?

A. Yes.

Q. The same distance to the right? Is that -- was that your approach? Would you be effectively travelling ---

A. Well ---

Q. --- travelling in line with each other? Directly in line?

A. Most -- yes. Because we've only been on maybe three dirt roads all together up until that accident.

Q. Okay. That was your practice, though, on the -- the times you were on dirt roads together, that was your practice, to stay directly in line with each other?

A. Oh, yes.

[9] The points are made for the third party that the discovery evidence about leading and following is only about habit, not what happened on the day in question, and do not include any evidence that Mr. Joyce was leading Ms. Tibbetts' navigation. However, discovery testimony is not an immutable predictor of trial testimony. Nor does it mark the limits for inquiry. One possible finding is that Ms. Tibbetts crossed the centre of the road by, consciously or unconsciously, following Mr. Joyce's lead. That finding would accept Mr. Murphy's perception and explain, to some extent, Ms. Tibbetts' inconsistent perception.

[10] In conclusion, there are genuine issues of fact requiring a trial on the third party proceeding and I will dismiss the motion for summary judgment.

Moir J.