NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4675-13T1

ALMA VIVAS,

Plaintiff-Appellant,

v.

DAVID A. TANGO,

Defendant-Respondent,

and

STATE FARM INSURANCE COMPANY,

Defendant,

and

DAVID A. TANGO,

Third-Party Plaintiff,

v.

ANIBAL J. OSPINA and CINDY P. OSPINA,

Third-Party Defendants.

Submitted May 12, 2015 – Decided June 18, 2015

Before Judges Yannotti, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket Nos. L-2639-11 and L-0339-12.

The Rinaldo Law Offices, attorneys for appellant (Richard P. Rinaldo and Jeff Thakker, on the briefs).

McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys for respondent (Everett E. Gale, III, of counsel and on the brief; Jennifer M. Bennett, on the brief).

PER CURIAM

In this automobile negligence case, plaintiff Alma Vivas appeals from the May 1, 2014 Law Division order granting summary judgment in favor of defendant David A. Tango. We reverse and remand.

I.

We discern the following facts from the motion record. On March 15, 2011, plaintiff, defendant, and third-party defendant Cindy P. Ospino ("Ospino") were involved in an automobile accident. Plaintiff was stopped at a red light, and defendant approached from behind at between five and fifteen miles per hour. Defendant slowed, and was either stopping or stopped at the time of the collision. Ospino, traveling behind defendant at twenty-five miles per hour, misjudged the distance to his car, and struck the rear of his vehicle, pushing it into plaintiff's vehicle.

According to the police report from the accident, defendant "stated he was stopping at the red light when he was struck by [Ospino,] and then he struck [plaintiff]." However, at his deposition, defendant stated that he was stopped at least five

feet behind plaintiff at the time of the collision. He further asserted that he told the officer that he was stopped, and that the officer recorded his statement incorrectly.

At his deposition, defendant also disavowed knowledge of whether his car struck plaintiff's car, stating, "I didn't feel my car make physical contact with [plaintiff's] car. . . . My car may have made very, very minimal contact with [plaintiff's] car." In his answers to interrogatories, defendant stated, "I stopped at the red light. I was at least [five] feet behind the plaintiff's vehicle and was struck from behind by . . . Ospino and pushed forward into plaintiff's vehicle." At his deposition, defendant could not recall how far the impact pushed his car, but stated that, after the collision, his car was two or three feet away from plaintiff's, and there was no damage to the rear of plaintiff's car or the front of his own car.

Plaintiff did not notice defendant's vehicle prior to the accident. She stated that the impact pushed her car forward approximately two feet. She left the scene in an ambulance, and never viewed the damage to her car, which sustained approximately $1400 in damage. According to the police report, Ospino also reported that defendant's vehicle struck plaintiff's car.

Following oral argument, the motion court concluded that when the police officer wrote in his report that defendant

stated "he was stopping at the red light when he was struck[,]" the officer was paraphrasing defendant, not quoting him. Thus, the court found that the police report did not serve to materially contradict defendant's other statements. The court stated that the record contained "no evidence that contradicts [defendant's] version" of the accident, describing it as "unrebutted." The court further found that defendant "was stopped about five feet behind [plaintiff's] car . . . when he got rear ended." Therefore, the trial court granted defendant's motion for summary judgment.

This appeal followed. On appeal, plaintiff principally argues that the motion court erred by deciding genuine issues of material fact, including whether defendant's car was stopped or stopping, and if stopped, whether it was stopped a safe distance from plaintiff's vehicle. Plaintiff further argues that the court erred by not finding that defendant's unqualified adoption of the police report constituted an adoptive admission that his vehicle was moving at the time of the collision.

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the

moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We "'employ the same standard [of review] that governs the trial court[,]'" and give no deference to legal conclusions. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (alteration in original) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)).

In evaluating a motion for summary judgment, the courts must view the evidence "in the light most favorable to the non-moving party[.]" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). A trial court should not grant summary judgment unless "the evidence 'is so one-sided that one party must prevail as a matter of law[.]'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

Bald assertions without factual support are not sufficient to defeat a motion for summary judgment. Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014). However, the trial court should not make credibility

determinations, and contradictory statements of material facts should be left to the jury. Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 13 (App. Div. 2007).

It is well established that the failure to maintain a reasonably safe distance behind the automobile ahead, having due regard for the speed and volume of traffic and the condition of the road, is negligence and not merely evidence of negligence. N.J.S.A. 39:4-89; Dolson v. Anastasia, 55 N.J. 2, 10 (1969).

Here, the motion judge found that the police report only paraphrased defendant's words, and therefore misused the word "stopping" to signify the fact that defendant's car was, in fact, stopped. "Stopping," however, clearly denotes ongoing motion. By giving the word a contrary meaning, the judge failed to interpret all evidence in the light most favorable to plaintiff. Moreover, defendant's answers to interrogatories referred to the police report without qualification, giving the contradiction between his statements and the report further weight as an adoptive admission. See Sallo v. Sabatino, 146 N.J. Super. 416, 419 (App. Div. 1976), certif. denied, 75 N.J. 24 (1977).

Interpreting the police report in plaintiff's favor, the report materially contradicts defendant's deposition testimony. The significance of the contradiction is magnified by defendant's wavering accounts of whether the impact between his

car and plaintiff's car even occurred. The contradiction also casts doubt on defendant's assertion that he was at least five feet from plaintiff's vehicle at the time of the collision, and potentially undermines his entire account of the accident.

Viewing the evidence in the light most favorable to plaintiff as the non-moving party, we cannot say that defendant must prevail as a matter of law. The velocity and location of defendant's car before the accident are clearly material disputed facts.

We conclude that the record presents a triable issue as to defendant's negligence. A reasonable jury, relying upon the contradiction and variations in defendant's accounts, as well as the evidence that the front of defendant's car struck the rear-end of plaintiff's car, could infer that defendant's driving fell below an ordinary driver's standard of care. See N.J.S.A. 39:4-89; Paiva v. Pfeiffer, 229 N.J. Super. 276, 280-81 (App. Div. 1988). Therefore, we reverse the May 1, 2014 order granting summary judgment in favor of defendant.

Reversed and remanded.