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COURT OF APPEALS
STATE OF NEW YORK

COFFED,

Appellant,

-against-

NO. 44

MCCARTHY,

Respondent.

20 Eagle Street
Albany, New York
March 23, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon. The next
2 case up on this afternoon's calendar is number 44, Coffed
3 v. McCarthy.

4 Counsel.

5 MR. GAMBINO: Good afternoon, Your Honor. Angelo
6 Gambino on behalf of the family of James Coffed. May I
7 reserve two minutes of my time for rebuttal?

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. GAMBINO: Thank you, Your Honor. May it
10 please the court.

11 There can be more than one proximate cause for an
12 accident. In this case, the facts do not support granting
13 summary judgment against my client as being the sole
14 proximate cause of this motor vehicle accident.

15 JUDGE GARCIA: Counsel, is it enough - - - I know
16 you have other arguments, but would it be enough if it was
17 the driver's initial statement that the light was green
18 versus all the other statements that it was red? Is that
19 enough to get you to be on summary judgment?

20 MR. GAMBINO: I think it is. I think it is.
21 That fact alone creates a question of fact that the jury
22 needs to resolve. The - - - the driver's initial statement
23 to the police is that the light is green, which would have
24 given my client the right of way. Other evidence suggests
25 that the light was red. Right there, there's a question of

1 fact that needs to be resolved by the - - - by a fact
2 finder, by the jury.

3 JUDGE STEIN: What - - - that - - - but that
4 wasn't the only one, was it?

5 MR. GAMBINO: That - - - no, there are multiple
6 questions of fact here that the evidence suggests raised
7 questions of fact that needed to be decided by the jury.
8 The defendant-driver's right-turn signal was not operable
9 at the time of the accident.

10 CHIEF JUDGE DIFIORE: And was that preserved in
11 the record?

12 MR. GAMBINO: I believe it was, Your Honor. The
13 police accident report, which is - - - which was marked
14 into evidence in support of our papers was submitted to the
15 trial court.

16 JUDGE STEIN: But - - - but you didn't
17 specifically argue that as a poten - - - as a question of
18 fact, correct?

19 MR. GAMBINO: We maybe did not complete the full
20 argument, however, we attached that accident report, we
21 cited to the violations that the defendant-driver received
22 in connection with the nonworking parts of his vehicle.
23 Any violation of the Vehicle and Traffic Law can be
24 determined a matter of negligence, and - - - and that was
25 what we did cite in - - - to the trial court.

1 The other argument, with respect to preservation,
2 is that an argument can be raised for the first time on
3 appeal if there are no counter arguments that could have
4 been made to the court below. And - - - and here, although
5 maybe this argument was fully raised for the first time to
6 the Fourth Department, there certainly were no counter
7 arguments that would have been made to the trial court that
8 were not adequately made to the Fourth Department.

9 The failure to have that operational right turn
10 signal, and then the accident occurs when the defendant-
11 driver turns right on red, certainly creates a question of
12 fact, with regard to comparative negligence, that a jury
13 must resolve.

14 JUDGE ABDUS-SALAAM: Counsel, could you comment
15 on the position of the bicycle? I was a little confused
16 about how the bike might have gotten from the right lane to
17 the left-hand side of the - - - of the crosswalk.

18 MR. GAMBINO: Yes, Your Honor. The - - -

19 JUDGE ABDUS-SALAAM: Is there a question there?

20 MR. GAMBINO: There's a question there as well as
21 to how the bicycle ended up where it - - - where it did,
22 and we suggest that an explanation for that could be that
23 the bicyclist was intending to actually turn left and cross
24 Walden Avenue at the time of the accident, and he would
25 have had then a green light if - - - if the defendant, as

1 the respondent says, the light on - - - on Walden was red,
2 he would've had a green light to cross Walden Avenue in
3 turning left, and the accident may have occurred that way.
4 That is yet another question that the jury must decide.

5 JUDGE STEIN: Is there anything that's not
6 speculative about that? I mean, is - - - there - - - was
7 there any expert testimony about that, or - - - not
8 testimony, but - - - because it's summary judgment, but
9 affidavits?

10 MR. GAMBINO: There was - - - there was no - - -
11 no, no reconstruction that was submitted in connection with
12 this motion. It - - - just the photographs would show that
13 the bicycle ended up not where you - - - one would assume
14 that it - - - it would, had the accident occurred - - -

15 JUDGE STEIN: Was there any evidence about the
16 decedent's practice of where he was going, and - - - and
17 where that was, and how he normally got there?

18 MR. GAMBINO: That's not in this record, Your
19 Honor. He was - - - we know he was traveling to work, and
20 his - - - his work - - - it would have made sense for him
21 to have continued straight on Walden or cross left. He was
22 going to need to turn left at some point.

23 JUDGE STEIN: But he was - - - there is some
24 evidence that he was an experienced bicyclist, right?

25 MR. GAMBINO: He was a very experienced

1 bicyclist.

2 JUDGE STEIN: And if he crossed over, he would
3 have been going against traffic, which is not the rules of
4 the road, as I understand it.

5 MR. GAMBINO: That is - - - that would be true.
6 However, if you put yourself in that situation, there are
7 three dump trucks in a convoy that approach that
8 intersection that are all trying to turn right. When is he
9 - - - if he - - - assuming he's intending to turn left at
10 that intersection, when is he supposed to get over to the
11 left lane? He can't weave in and out of these dump trucks
12 that are following one another. So the time to turn left
13 would be at the intersection - - -

14 JUDGE STEIN: I guess I'm asking - - -

15 MR. GAMBINO: - - - when that light turns red.

16 JUDGE STEIN: I'm asking whether there's any
17 evidence that he would have had any reason to turn left
18 there.

19 MR. GAMBINO: Eventually, he was going to need to
20 need to cross Walden Avenue to get to work. He - - - going
21 straight makes sense for his final destination, and turning
22 left also makes sense for his final destination.

23 JUDGE STEIN: Let me ask you about the right.
24 Was - - - was there evidence - - - can we tell from the
25 record whether there was, in fact, a marked bike lane on

1 the right - - -

2 MR. GAMBINO: Yes, Your Honor. It - - -

3 JUDGE STEIN: - - - shoulder, or near the right
4 shoulder, and does it matter?

5 MR. GAMBINO: There was a shoulder that was
6 designated for bike use on - - - on Walden Avenue. I don't
7 think that it does matter in - - - in this case. You have
8 a defendant-driver who failed to see what was there to be
9 seen. An important fact is that the defendant saw the
10 bicyclist a mile before in the roadway, and testified that
11 he needed to veer around the bicyclist to continue
12 traveling straight on Walden Avenue.

13 A mile later, he's trying to attempt a right turn
14 on red and fails to see the bicyclist again.

15 JUDGE WILSON: The truck driver also testified
16 that he failed to see the bike lane.

17 MR. GAMBINO: He did. He - - - he testified that
18 there was no bike lane, and there was clearly a marked
19 shoulder that was used as a bike lane on - - - on Walden
20 Avenue.

21 We believe that there are certainly questions of
22 fact with respect to proximate cause. There are more than
23 one proximate cause of this accident, and that must be
24 decided by - - - by the jury.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.

1 MR. GAMBINO: Thank you, Your Honor.

2 CHIEF JUDGE DIFIORE: Counsel.

3 MR. PALMERTON: Thank you, Your Honors.

4 Good afternoon and may it please the court. My
5 name is Nicole Palmerton.

6 I wanted to jump into the point - - -

7 JUDGE GARCIA: Counsel, can we just start with,
8 why isn't that enough? If there's a testimony from the
9 driver that says orig - - - initially the light was red,
10 it's changed, I understand. Why doesn't that create a
11 question of fact in and of itself?

12 MR. PALMERTON: Because the question of fact has
13 to be in material. And none of the people in this case,
14 none of the witnesses saw that it was a green light.

15 JUDGE GARCIA: No, but the material - - -

16 MR. PALMERTON: There was no - - -

17 JUDGE GARCIA: - - - issue is it green or red.
18 That's the material issue, right?

19 MR. PALMERTON: Well, the - - - all of the
20 parties concur that the light was red. But if the light
21 was, in fact, green, I don't think we have a - - - another
22 conclusion here. The sole proximate cause of the accident
23 is the decedent's failure to look up at any point as he
24 enters a busy intersection. Having failed to do that - - -

25 JUDGE STEIN: Well, do - - - do we know that? We

1 know we have one - - - we have one witness who saw his head
2 down, but we don't know what he could have seen just having
3 his eyes look up, even if his head was down, for one thing.

4 But I think more to the point of what we were
5 talking about, if the light was green, then there is
6 certainly an issue about who had the right of way there,
7 and - - - and who was supposed to yield to who. If the
8 light was red, then it's - - - it's a different story. So
9 how can that not be a material issue?

10 MR. PALMERTON: And again, because the record is
11 clear that all parties saw a red light. The - - -

12 JUDGE GARCIA: But you have this statement by the
13 driver saying it was green.

14 MR. PALMERTON: And now - - - he was cross-
15 examined on that. And - - - and he - - -

16 JUDGE GARCIA: And he - - -

17 MR. PALMERTON: - - - was cleared.

18 JUDGE GARCIA: - - - can be in front of a jury
19 too.

20 MR. PALMERTON: Well, but again, you know, that
21 opportunity, it arose. It was there for them to discuss,
22 and it was clear that he didn't mean what they're trying to
23 speculate to say that he meant. In other words - - -

24 JUDGE STEIN: Well, now, he says that. But - - -

25 MR. PALMERTON: Well, I think even at the time -

1 - -

2 JUDGE STEIN: - - - can a jury - - - doesn't a
3 jury have the right to have an opportunity to assess
4 whether his explanation is - - - is good or not?

5 MR. PALMERTON: I think the totality of the
6 evidence that was presented in this case, specifically the
7 expert conclusions - - -

8 JUDGE STEIN: Well, you may be right, but - - -

9 MR. PALMERTON: Right.

10 JUDGE STEIN: - - - this isn't - - - this is - -
11 - this is summary judgment. So - - -

12 MR. PALMERTON: Right.

13 JUDGE STEIN: - - - we're not - - - we're not
14 weighing the evidence, we're not looking at the totality -
15 - -

16 MR. PALMERTON: Absolutely.

17 JUDGE STEIN: - - - of the evidence. And it's,
18 you know, the question that we're, I think, all struggling
19 with is, how can a court say, as a matter of law, that the
20 light was red when we have the - - - the defendant himself
21 saying at one point it was green?

22 MR. PALMERTON: The expert proof in the case that
23 was submitted with the original - - - at the original trial
24 level was the accident investigation unit. And they went
25 through all of the evidence, and they concluded there was

1 no error by Mr. McCarthy in driving the truck, and they
2 concluded that the light was red. In fact, I believe they
3 said there was no question that light was red at the time
4 of the impact.

5 That information, that proof is in the case - - -

6 JUDGE WILSON: That's the - - -

7 MR. PALMERTON: - - - and there is no rebuttal.

8 JUDGE WILSON: - - - that's the - - - that a
9 police - - - that's a police report, right?

10 MR. PALMERTON: Well, it's the accident
11 investigation unit's report, which is definitely something
12 much grander than a police report that's submitted by a
13 patrolman who comes to the scene.

14 JUDGE WILSON: Is there an - - - is there an - -
15 -

16 MR. PALMERTON: This was a full-on investigation.

17 JUDGE WILSON: - - - opportunity to cross-examine
18 that?

19 MR. PALMERTON: That inf - - - that document
20 itself was presented by the plaintiffs in their papers. I
21 would think that if they wanted to rebut it themselves or
22 change their argument, an expert would have been used for
23 that.

24 JUDGE STEIN: But since when do we - - - we take
25 a police report for opinions that are asserted in

1 conclusions, as opposed to statements and - - - and facts?

2 I mean, as I read those reports, they're making

3 conclusions, but that's - - -

4 JUDGE GARCIA: There isn't any physical - - - you

5 know, it's not that the physical scene would make it

6 impossible for this to happen other than if the light was

7 red, right? I mean, that would be precluding. So if the

8 accident report says there's no way this bike could have hit

9 this car, in this angle, at this intersection unless the

10 light was red, but it doesn't say that, right?

11 MR. PALMERTON: The - - - the reconstructions of

12 the accident report?

13 JUDGE GARCIA: Right.

14 MR. PALMERTON: No, it doesn't say that. It

15 says there was no error by the driver of the dump truck.

16 It also states that the point of impact was two to three

17 feet past the stop sign - - - the stop line where we are

18 obligated, as bicyclists and motorists, to stop at a red

19 light. The irrefutable proof, and again, is that this

20 bicyclist was entering into this intersection without

21 looking. And - - -

22 JUDGE GARCIA: But if it's green and he's not

23 looking, that's just really who's more negligent at that

24 point.

25 MR. PALMERTON: Not - - - not to be cold, but if

1 it's green and he's negligent, we have same outcome,
2 different defendant. He can't enter an intersection
3 without looking. I mean, you can't be looking down. That
4 is - - - that is the sole - - -

5 JUDGE GARCIA: But then it's - - -

6 MR. PALMERTON: - - - proximate cause.

7 JUDGE GARCIA: - - - question of who's not, you
8 know, the truck driver has an obligation there, he's going
9 through the green light making a right, the bicyclist is
10 coming to a green light, has the green light, has the right
11 of way, whose negligent? That's clearly a jury question.

12 MR. PALMERTON: Well, and I'd like to address
13 that for a moment, because the issue of who's in the
14 intersection first, I think, also gives us who has the
15 right of way. And it's the dump truck that gets to the
16 intersection first, it's the dump trucks who's making the
17 turn first. It's the bicyclist who comes into the
18 intersection and does not yield the right of way, whether
19 the light is green or red. Because the dump truck is
20 entitled to come up to the intersection, look at - - -
21 through his mirrors, and begin his right-hand turn. He's
22 entitled to do that - - -

23 JUDGE STEIN: But the question - - -

24 MR. PALMERTON: - - - as he first gets there.

25 JUDGE STEIN: - - - is whether he should have

1 seen - - - whether, in fact, he - - - he carefully enough
2 looked in his peers. I mean, you know, you can look in
3 your mayor, and you can look in your mirror. But whether -
4 - - whether that bicyclist was there to be seen and the def
5 - - - and the driver of the dump truck didn't see him
6 because he wasn't being careful enough.

7 I mean, there's - - - there - - - there are some
8 - - - there are statements in - - - in the record that - -
9 - that he was wearing very colorful garb, that - - - that
10 he had colorful things on the bicycle, and - - - and that
11 sort of thing. So why doesn't that raise a question of
12 fact?

13 MR. PALMERTON: Well, it's not as though the dump
14 truck driver didn't see the bicyclist at all. He did, as
15 the record is clear, see him a mile before. And so - - -

16 JUDGE STEIN: So even more to the point. He
17 should have been on heightened alert, should he not have,
18 to be looking for this bicyclist?

19 MR. PALMERTON: There's no evidence that he was
20 not paying careful attention. And I - - - I think that's
21 also at the crux of our argument.

22 JUDGE ABDUS-SALAAM: But why is that, counsel?
23 Why - - - I - - - as I read this record, there was a
24 caravan of dump trucks, and they're making - - - your - - -
25 your client was in the middle, right?

1 MR. PALMERTON: Correct.

2 JUDGE ABDUS-SALAAM: And if the other truck - - -
3 say the light was red and the other truck had already made
4 a turn, the caravan is going, I don't know if your driver
5 knew exactly where he was following, I - - - I know that a
6 lot of times when drivers are following other drivers, they
7 try not to lose them. And so maybe the light was red, and
8 your client was going through a red light, and didn't have
9 the right of way. So why isn't that a question for the
10 jury?

11 MR. PALMERTON: Well, again, the dump truck gets
12 to this inter - - - well, the first dump truck gets to the
13 intersection, according to the testimony, and completes the
14 right-hand turn.

15 JUDGE WILSON: By clipping the curb.

16 MR. PALMERTON: Yes, by clipping the curb. I
17 think that's - - - Ms. Steele mentioned that in her
18 testimony.

19 But after that, my client slowly approached, I
20 think his term - - - term was crawled to the intersection,
21 he consulted all the mirrors that were there to be
22 consulted, he waited for cars to pass in front of him.

23 And further, actually, to the point of the green
24 light, Your Honor, that reminds me that three cars passed
25 through the intersection in front of the dump truck while

1 the - - - the proceeding light is red. There is further
2 evidence without dispute based on Ms. Steele's testimony
3 that that light was red. But beyond that, again, the dump
4 truck gets to the intersection first. And - - -

5 JUDGE WILSON: How do we - - - how do we know
6 that?

7 MR. PALMERTON: By - - - by sheer happening of
8 the accident.

9 JUDGE WILSON: Well, I mean - - -

10 MR. PALMERTON: I - - - I don't - - -

11 JUDGE WILSON: - - - what - - - what's - - -

12 MR. PALMERTON: - - - the accident can't happen
13 if the bicyclist is first into the intersection, because he
14 just - - - he would miss him. He - - - he has to be - - -

15 JUDGE WILSON: Why can't - - - why can't - - -

16 MR. PALMERTON: - - - in the intersection to be
17 hit.

18 JUDGE WILSON: Why can't it happen that the
19 bicyclist was already gotten in the intersection, is three
20 feet across from the limit line, stationary?

21 MR. PALMERTON: Say that again.

22 JUDGE WILSON: Why can't it happen that the
23 bicyclist gets to the intersection first, crosses the limit
24 line by three feet, and stops? Because there's three cars
25 going across the street.

1 MR. PALMERTON: Because none of the evidence
2 suggests that.

3 JUDGE WILSON: But I'm asking you, what does the
4 evidence that suggests that that didn't happen, that the
5 truck got there first?

6 MR. PALMERTON: The testimony of Mr. Tubbs that
7 said that he saw the - - - Mr. McCarthy's dump truck in
8 front of him, he was behind him, he saw the bicyclist
9 coming, he saw the bicyclist attempted to - - - it's at
10 page 53 in the record, he saw the bicyclist not stop. He
11 very specifically said, he did not stop, his head was down,
12 and he struck the side of the dump truck. So the dump
13 truck had to already have been turning. I mean, there's
14 just no physical other way to do it. It's not a material
15 issue of fact.

16 JUDGE ABDUS-SALAAM: And Mr. Tubbs is Mr.
17 McCarthy's co-employee, right?

18 MR. PALMERTON: They both worked for the - - -
19 the owner of the trucks.

20 So - - - and back to that location, again, at
21 page 71 in the record, I believe Justice Whalen and Justice
22 Centra indicated in their dissent that there was no actual
23 evidence that he entered into the intersection. I did want
24 to point out at page 71, there is a point of impact
25 determined, it just didn't, you know, factual part of the

1 accident report that indicates there were two to three feet
2 - - - the point of impact was two to three feet east or
3 past the stopping white line.

4 CHIEF JUDGE DIFIORE: Thank you, Ms. Palmerton.

5 MR. PALMERTON: Thank you, Your Honor.

6 CHIEF JUDGE DIFIORE: Counsel.

7 MR. GAMBINO: Yes, Your Honor.

8 I disagree with the assertion that the dump truck
9 necessarily entered the intersection first. The location
10 of the impact between the bicyclist and the dump truck was
11 near the front passenger side of the dump truck. And that
12 raises, again, questions of fact as to how this accident
13 occurred and who entered the - - - the intersection first.

14 As to the witness Tubbs, yes, Your Honor, he is a
15 co-employee of the defendant-driver. The testimony was
16 that they carpooled to work together every day.
17 Additionally, he was an employee of the defendant-owner of
18 the vehicle. So he - - - he's got a personal relationship
19 with both defendants in this case, and he is the only
20 witness that provides testimony that my client's head was
21 down as he entered the intersection.

22 And as Your Honor pointed out, a statement
23 viewing a bicyclist from behind, that the bicyclist's head
24 was down, does not, as a matter of law, conclude where the
25 bicyclist's eyes were looking at the time he entered the

1 intersection. Again, that's another question that the jury
2 should be allowed to answer.

3 The evidence that the defendant was not paying
4 careful enough attention was that he failed to relocate the
5 bicyclist. Someone that the police investigators had
6 determined took extraordinary bike-safety measures. He had
7 a foam pool - - - one of those noodles on the back of his
8 bicycle, he had multiple headlights, he had reflective
9 lights, he had a rearview mirror.

10 JUDGE GARCIA: So let's do it the other way then.
11 So let's say there was no issue of fact as to the red
12 light/green light; it's clearly red. And all you have is,
13 he passes the guy back there, and the truck is now making a
14 legal right turn after stopping; that's enough?

15 MR. GAMBINO: That's enough in this case because
16 the inoperable right-turn signal - - -

17 JUDGE GARCIA: There is another right-turn signal
18 anyway, right?

19 MR. GAMBINO: On the top of the dump box. The -
20 - -

21 JUDGE GARCIA: I'm assuming that's preserved.
22 But - - -

23 MR. GAMBINO: Right.

24 JUDGE GARCIA: So you would say, in that case, it
25 would be enough.

1 MR. GAMBINO: That would be enough with the turn
2 signal and the testimony that the driver - - -

3 JUDGE GARCIA: How about without the turn signal?

4 MR. GAMBINO: Without the turn signal, it's still
5 enough, because the defendant saw the bicyclist a mile
6 back, and - - -

7 JUDGE GARCIA: So if he's blowing a red light,
8 head down, there's still a question of fact as to whether
9 or not he - - - the truck driver should have picked him up
10 after passing him a mile before.

11 MR. GAMBINO: Yes, Your Honor, because - - -

12 JUDGE RIVERA: And is this the first intersection
13 during that one mile - - -

14 MR. GAMBINO: Yes, it was, Your Honor.

15 JUDGE RIVERA: - - - (indiscernible).

16 MR. GAMBINO: It was, and because, again, of the
17 location of the impact, the location of the bicycle after
18 the impact, the fact that the defendant's truck ran the
19 bicyclist over with his rear wheels after impact - - -

20 JUDGE GARCIA: But that - - - is there really a
21 dispute as to where the bike hits the truck?

22 MR. GAMBINO: No, there is not. What the dispute
23 is is that the location of the impact as to who entered the
24 intersection first. You cannot make a right turn on red
25 until the intersection is clear.

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CHIEF JUDGE DIFIORE: Thank you, Mr. Gambino.

MR. GAMBINO: Thank you very much.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Coffed v. McCarthy, No. 44 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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