

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

Dr. David Burr,
Plaintiff,

v.

Golden Ticket City Stone Mountain Park, LLC
Defendant.

Civil Action
File No.: 18A71129

**PLAINTIFF'S BRIEF IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY
JUDGMENT**

COMES NOW, DR. DAVID BURR, Plaintiff in the above-styled action and files this
Plaintiff's Brief in Support of his Motion for Summary Judgment.

I. INTRODUCTION

Defendant claims that it was Dr. Burr's failure to exercise ordinary care on the incident date and not their agent's, Mr. Jones, illegal failure to yield the right of way that resulted in the pitch-over incident at the heart of this case. However, the evidence in this case unequivocally establishes that Dr. Burr **did** meet his burden to exercise ordinary care. Per well-established Georgia case law, a non-negligent vehicle operator has the duty to maintain a lookout for oncoming traffic and avoid a collision, if possible, once it is clear that the negligent driver has created a dangerous situation. The evidence in this case shows that Dr. Burr watched Mr. Jones carefully in the moments leading up to the incident, regularly adjusting his own actions to ensure that Mr. Jones' actions wouldn't result in a collision. While Mr. Jones was stopped at the stop sign, Dr. Burr veered to the left to make sure that he was even more visible to Mr. Jones. Dr. Burr also began to brake and reduce his speed. When Mr. Jones illegally failed to yield the right of way, Dr. Burr employed maximum braking and succeeded in avoiding a collision – this is the duty that Georgia precedent demands of non-

II. SUMMARY OF RELEVANT FACTS

Diagram illustrating a bicyclist accident scene at a T-intersection. The intersection is formed by Robert E Lee Blvd and John B Gordon Dr. A bicyclist is shown in the middle of a flip over their handlebars, having braked to avoid a collision with the lead van. The diagram includes a north arrow and the text "NOT TO SCALE". A red octagon marks the bicyclist's initial position. The text "NO COLLISION...BICYLIST BRAKED AND FLIPPED OVER HANDLEBARS" is present.

When Dr. Burr was approaching the intersection, a white van operated by Mr. Jones was stopped at the southside stop sign on John B. Gordon Drive. (Crash Report at 3). Notably, Mr. Jones was at a side street (John B. Gordon) and did not have the right of way. In fact, Mr. Jones was at a stop attached to another placard that cautioned drivers to **“WATCH FOR BICYCLES & PEDESTRIANS APPROACHING FROM THE LEFT.”** *See infra*. This is exactly the direction that Dr. Burr was traveling.



Adam Jones did not have any reason to dispute that the warning sign was attached to the stop sign on the incident date. (Deposition of Adam Jones, hereinafter “Jones Depo” at 112:8-113:20). And Defendant Golden Ticket City has admitted that the stop sign and warning sign were at the intersection on the incident date. (Deposition of Courtney Mitchell, hereinafter “Mitchell Depo.” at 147:16-19).

While traveling towards the intersection, Dr. Burr saw Mr. Jones stopped at the stop sign with what appeared to be a talking device held up to his left ear. (Deposition of Dr. Burr, hereinafter “Burr Depo.” at 87:23-88:1). Mr. Jones admitted in his deposition that he has a

habit of holding his two-way radio up to his left ear –**the direction in which Dr. Burr was approaching** – while driving and that he was doing so on the incident date. (Jones Depo. at 125:4-126:22). During his deposition, Mr. Jones demonstrated how he holds his radio to his ear while he drives. *See infra*.



To make himself even more visible to Mr. Jones, Dr. Burr veered to the left of his lane, towards the fog line. (Burr Depo. at 87:16-21). Because there was no stop sign controlling his right of way, Dr. Burr proceeded to cycle through the intersection at an estimated 20 mph – five miles below the posted speed limit of 25 mph. (Deposition of Dr. Jeffrey Broker, hereinafter “Broker Depo.” at 202:15-18). It is undisputed that Dr. Burr had the right of way. (Jones Depo. at 142:24-143:7). While Dr. Burr was entering the intersection, Mr. Jones crossed the stop line and pulled into Dr. Burr’s lane of traffic. (Crash Report at 3). Mr. Jones testified that he was trying to beat a truck approaching on his right when he pulled out into the intersection. (Jones Depo. at 80:11-13). When Dr. Burr saw Mr. Jones enter his lane, he executed maximum braking to avoid colliding with Mr. Jones’ van. (Crash Report at 3). Because he stopped so abruptly, Dr. Burr pitched over the handlebars of his bicycle,

landed on his head, and sustained severe injuries to his shoulders, neck, and head. (Crash Report at 3).

III. STANDARD FOR SUMMARY JUDGMENT

“Although the issue of whether a driver has exercised ordinary care under the circumstances is usually a jury question, where the undisputed facts show liability or the lack thereof such that reasonable minds cannot differ, the issue may be decided as a matter of law.” Rios v. Norsworthy, 266 Ga. App. 469, 470 (Ga. App. 2004). A party moving for summary judgment “may discharge its burden [...] by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue [...]” Handberry v. Manning Forestry Servs., LLC., 353 Ga. App. 150, 150 (Ga. App. 2019). “And if the movant meets this burden, the nonmovant cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue.” Id. (emphasis added). Moreover, “speculation which raises merely a conjecture or possibility is not sufficient to create even an inference of fact for consideration on summary judgment.” Id. (internal citations and punctuation omitted) (emphasis added).

IV. ARGUMENT AND CITATION TO AUTHORITY

A. DR. BURR MET HIS DUTY OF ORDINARY CARE.

While it is undisputed that Mr. Jones breached his duty to yield the right of way to Dr. Burr, defense has posited that Dr. Burr’s pitch-over incident was caused by his own failure to exercise ordinary care in the face of Mr. Jones’ negligence. Defendant’s Response and Objections to Plaintiff’s Motion in Limine to Exclude Evidence at 3. Georgia has a firmly established standard of ordinary care in situations where a non-negligent vehicle operator has a duty to avoid the injurious consequences of a negligent vehicle operator.

Even an operator of a vehicle having the right of way **has a duty to maintain a proper lookout**, to remain alert in observing approaching vehicles, **and to exercise ordinary care in the control, speed and movements of his or her vehicle to avoid a collision** if by ordinary diligence he or she could have seen that one was threatened or imminent.

Hite v. Anderson, 284 Ga. App. 156, 158 (Ga.App. 2007) (emphasis added) *See also* Gibson v. Carter, 248 Ga. App. 280, 281; Richardson v. Chesky, 235 Ga. App. 28, 28 (Ga.App. 1998); Hamilton v. Henderson, 260 Ga. App. 132, 133 (Ga.App. 2003); Currey v. Claxton, 123 Ga. App. 681, 681(Ga.App. 1971); Eddleman v. Askew Et Al., 50 Ga. App. 540, 540 (Ga. App. 1935). The above duty contains two conditions: (1) the requirement to maintain a lookout for oncoming traffic and (2) the responsibility to avoid a collision, if possible, once it is clear that the negligent driver has created a dangerous situation. As Plaintiff will establish below, Dr. Burr met his duty of ordinary care by maintaining a proper lookout which allowed him to avoid a collision with Mr. Jones after it was clear that Mr. Jones' negligence had created a dangerous situation.

1. Dr. Burr maintained a proper lookout in the moments leading up to the collision.

During his deposition, Dr. Burr testified that he saw Mr. Jones stopped in front of the stop sign in the moments leading up to the pitch-over event. (Burr Depo. at 115:5-9). He testified that, because he saw what appeared to be a phone in Mr. Jones' hand, he maneuvered closer to the fog line to make himself even more visible to Mr. Jones. (Burr Depo. at 85:3-17). He testified that he moved toward the middle of the lane because it gave Mr. Jones "a little bit more, so that when he turns his head, he's going to see me." (Burr Depo. at 85:14-17). Dr. Burr testified that he was looking at Mr. Jones the majority of the time, "trying to avoid him hitting me" (Burr Depo. at 113:2-7). He testified that he slowed down and coasted down the hill, trying to allow Mr. Jones to look to his left before he pulled out into the intersection. (Burr Depo. at 107:13-16). Because Dr. Burr had maintained such a

vigilant lookout, once Mr. Jones pulled into the intersection, he had the time and opportunity to react.

Defendant has put forth nothing to dispute Dr. Burr's testimony. And the facts of the case – specifically, the fact that Dr. Burr successfully avoided colliding with Mr. Jones – support Dr. Burr's testimony. The undisputed evidence shows that Dr. Burr maintained a proper lookout in the moments leading up to the pitch-over event, which allowed him to see and avoid the collision threatened by Mr. Jones' negligence.

2. Dr. Burr exercised ordinary care in the control, speed, and movements of his vehicle to avoid a collision once he saw that one was imminent.

Dr. Burr did many things to avoid a collision with Mr. Jones. When Dr. Burr approached the intersection and saw Mr. Jones at the stop sign, Dr. Burr veered to the left to ensure that he was highly visible to Mr. Jones. (Burr Depo. at 85:8-17). Before the incident occurred, Dr. Burr “was hitting [his] back brake trying to slow down.” (Burr Depo. at 146:20-22). When Mr. Jones pulled into the intersection, in addition to braking and veering left, Mr. Jones started shouting in a final failed attempt to get Mr. Jones to look to his left. (Burr Depo. at 111:19-20). Finally, when it was clear that Mr. Jones' negligence would result in a collision, Dr. Burr applied maximum braking to avoid colliding with Mr. Jones and successfully avoided the collision.

Defense acknowledges that Dr. Burr avoided the collision, but attempts to argue that it was Dr. Burr's duty not only to avoid the collision, but also to anticipate Mr. Jones' negligence and therefore stop sooner and avoid the pitch-over incident as well. However, it is well-established Georgia law that

[O]ne who is himself rightfully using the highway or street has a right to the use thereof, which is superior to that of one who is violating traffic regulations, and, in the absence of knowledge, he is not required to anticipate that some other user will unexpectedly violate the law or rule of the road and create a situation of danger.

Rios v. Norsworthy, 266 Ga. App. at 472 (emphasis added). As the party rightfully using the street, **Dr. Burr was under no duty to anticipate that Mr. Jones would illegally enter the intersection.** Dr. Burr was under no duty to preemptively lower his speed **even more** just in case Mr. Jones didn't check the intersection before entering it. Dr. Burr was under no duty to stop, just in case Mr. Jones didn't look to his left and see Dr. Burr cycling in the middle of the road in the moments leading up to the incident. Dr. Burr had the right to proceed through the intersection at the reasonable speed at which he was traveling in the anticipation that Mr. Jones would not negligently violate the law and create a dangerous situation.

The undisputed facts in this case show that after Dr. Burr knew that collision with Mr. Jones' van was imminent, he did not blindly and recklessly proceed without regard for conditions and consequences, but instead utilized maximum braking and succeeded in avoiding the collision. He testified that once it was clear that Mr. Jones had entered the intersection without looking left and it looked like they were going to collide, he executed maximum braking to the collision. (Burr Depo. at 112:1-7). **This is the duty that the law required of Dr. Burr – to avoid the collision, if possible.** And this is precisely what Dr. Burr did. When faced with the dangerous situation created by Defendant's negligent driving, Dr. Burr executed maximum braking and, through his own diligence and vigilance, managed to avoid the potentially life-ending results of Defendant's negligence.

Dr. Burr's pitch-over event is not evidence of his failure to exercise ordinary care, but a direct result of his exercise of ordinary care.

B. DR. BURR HAD NO DUTY TO AVOID EVERY DANGEROUS CONSEQUENCE THAT COULD HAVE RESULTED FROM MR. JONES' NEGLIGENCE.

In *Hendrix v. Sexton*, the Court of Appeals addressed a case in which the defendant was driving within the speed limit down a highway where he had the right-of-way when a car

illegally crossed an intersection and entered the defendant's lane. *Hendrix v. Sexton*, 223 Ga. App. 466, 466 (Ga. App. 1996). The defendant swerved to avoid colliding with the car, and as a result of this evasive maneuvering, crashed into a parked truck. *Id.* The defendant's passenger sued the defendant, who successfully moved for summary judgment at trial. On appeal, the passenger argued that "questions of fact regarding whether [the defendant] exercised ordinary care by **failing to reduce his speed as he approached the intersection where the collision occurred** precluded summary judgment." *Id.* at 882 (emphasis added). The Court of Appeals rejected the passenger's argument. The court held that "[t]he undisputed evidence indicate[ed] that [the defendant] had the right-of-way and the other car simply drove into his path" and that swerving out of the way of the car was the only way to avoid collision. *Id.* The court found nothing in evidence to indicate that the defendant breached his duty of ordinary care by not preemptively slowing down as he approached the intersection.

Plaintiff highlights *Hendrix* because it shares a fact pattern with the instant case. As in *Hendrix*, Dr. Burr was cycling down a road where he had the right of way when Mr. Jones illegally pulled out from a stop sign and entered Dr. Burr's lane. Like the defendant in *Hendrix*, Dr. Burr was cycling at or below the posted speed limit in the moments leading up to the incident. Also like the defendant in *Hendrix*, Dr. Burr's evasive maneuvering successfully avoided a collision with Mr. Jones but resulted in a different, unforeseen injury.

Like the plaintiff in *Hendrix*, Defendant Golden Ticket attempts to argue that Dr. Burr was negligent for failing to reduce his speed even more as he approached the intersection. Defendant tries to argue that the fact that Dr. Burr successfully avoided colliding with Mr. Jones **strengthens their argument that Dr. Burr failed to exercise ordinary care**. See Defendant's Response and Objections to Plaintiff's Motion in Limine to Exclude Evidence at

3 (“Here, one of the key issues in this case is whether the Plaintiff exercised the requisite standard of care for his own safety while operating a bicycle in Stone Mountain Park on the day of the incident. This is especially true *since no impact occurred between Plaintiff and the van operated by Mr. Jones.*”) (emphasis added). This argument is nonsensical and goes against governing case law. The *Hendrix* court held that “[the undisputed evidence [indicated] that [defendant] had the right of way and the other car simply drove into his path. As [plaintiff] himself admitted, [defendant] could have done nothing else to avoid the oncoming car.” See *Hendrix v. Sexton*, 223 Ga. App. at 470 (internal citations and punctuation omitted). Like the defendant in *Hendrix*, it is undisputed that Dr. Burr had the right of way. Also, like the defendant in *Hendrix*, Dr. Burr’s pitch-over incident occurred **because he successfully avoided a collision with Mr. Jones.** Similar to the facts in *Hendrix*, when Mr. Jones illegally entered Dr. Burr’s lane, there was **nothing else Dr. Burr could have done** except apply maximum braking to avoid colliding with Mr. Jones – had Mr. Jones veered even farther left, he would have cycled into the opposite lane and been hit by oncoming traffic and he if had done nothing he would have crashed into Mr. Jones’ van. (Burr Depo. at 147:6-12). Despite defense counsel’s attempt to illegally recharacterize the duty owed, **it was not Dr. Burr’s duty to avoid pitching over his bicycle.** It was Dr. Burr’s duty to avoid colliding with Mr. Jones’ van, if at all possible – a duty that Dr. Burr inarguably met.

By arguing that Dr. Burr’s pitch-over event occurred as a result of his failure to exercise ordinary care, defense counsel is trying to make the issue in this case not whether Dr. Burr did everything in his power to avoid colliding with Mr. Jones, but whether, in the face of Mr. Jones’ negligence, Dr. Burr exercised a degree of care that would have absolutely prevented injury. **This is a mischaracterization of the law and an attempt to illegally**

heighten the duty that Dr. Burr owed under the circumstances. As the Court of Appeals has repeatedly held, it is not incumbent upon the non-negligent vehicle operator to simultaneously avoid all other negative consequences of the negligent driver’s behavior **while also avoiding the collision.** “Where the duty is that of ordinary care, **one is not negligent (or contributorily negligent) merely because of failure to exercise that degree of care which would have absolutely prevented injury.**” *Rios v. Norsworthy*, 597 S.E.2d at 425 (Ga. App. 2004). *See also Seagraves v. ABCO Mfg. Co.*, 118 Ga. App. 414, 419 (Ga.App.1968); *Louisville & N.R. Co v. Rogers*, 136 Ga. 674, 674 (Ga. 1911). It was not Dr. Burr’s duty to avoid pitching over the handlebars of his bicycle – it was Dr. Burr’s duty to avoid colliding with Mr. Jones, if at all possible. Dr. Burr met this duty. Defense counsel cannot now argue that Dr. Burr was negligent because he did not exercise the degree of care that would have absolutely prevented any type of injury that Mr. Jones’ negligence could have caused.

C. DEFENDANT HAS PUT FORTH NO COMPETENT EVIDENCE TO SUPPORT THEIR THEORY THAT DR. BURR WAS NEGLIGENT.

The defense attempts to bolster their argument that Dr. Burr was negligent with answers that Plaintiff’s expert, Dr. Jeffrey Broker, gave to a hypothetical question posited to him by defense counsel during his deposition. During Dr. Broker’s deposition, defense counsel asked him whether he agreed “that had Dr. Burr *slowed down sooner* the accident *may not* have happened.” (Broker Depo. at 201:10-13) (emphasis added). Dr. Broker answered that had Dr. Burr “slowed down earlier, that *potentially could have avoided* the accident.” (Broker Depo. at 258:23-25) (emphasis added). As discussed above, it was not Dr. Burr’s duty to avoid the pitch-over event – **it was his duty to avoid the collision** – but even if defense counsel’s argument could establish negligence, these hypotheticals do nothing to support their theory. “[S]peculation which raises merely a conjecture or possibility is not

sufficient to create even an inference of fact for consideration on summary judgment.”

Handberry v. Manning Forestry Servs., LLC., 353 Ga. App. 150, 150 (Ga.App. 2019)

(internal citations and punctuation omitted). Dr. Broker’s answer to this hypothetical was nothing more than speculation, which raised nothing more than a mere possibility of a different outcome in this case. Dr. Broker didn’t even conclusively state that Dr. Burr could have avoided the pitch-over incident had he braked sooner, only that he could have potentially avoided the pitch-over incident. This answer was not supported by any calculations, research, or additional observations made by Dr. Broker. This hypothetical is simply insufficient to support defense counsel’s alternative theory of causation that Dr. Burr was negligent.

Defense counsel has also suggested that Dr. Burr was cycling faster than the speed limit in the moments leading up to the pitch-over incident. Despite this suggestion, defense counsel **has put forth absolutely no evidence to support this conclusion**. Plaintiff’s expert, Dr. Jeffrey Broker, has estimated that Dr. Burr was cycling at approximately 20 mph in the moments leading up to the incident. To arrive at this estimated speed, Dr. Broker reviewed a video prepared by Plaintiff’s Investigator, Doug Poff, in which Mr. Poff videotaped a person using a speed gun on random cyclists coming down the hill at the intersection where the incident occurred. Broker Depo. at 133:16-18. *See infra*.



Of the eleven cyclists on the videotape, the maximum speed was 24 mph, and the average speed was 20 mph. (Broker Depo. at 134:17-19). Dr. Broker also spent an hour and a half at the incident location, during which time he observed 40-50 cyclists come down the hill in the 15-20 mph range. (Broker Depo. at 134:22-25). Dr. Broker noted that there were very few cyclists who managed to cycle above 20 mph. (Broker Depo. at 134:25-135:1). Dr. Broker's estimate is also supported by the iBike data taken from Dr. Burr's bicycle, which shows that Dr. Burr was cycling between 18-22 mph during the moments leading up to the incident. **Defense has not put forth any expert testimony to rebut Dr. Broker's**

conclusions about the speed at which Dr. Burr was cycling. Defense hasn't put forth any evidence to discredit the iBike data. Instead, the defense attempts to place their entire theory on a vague, baseless argument supported by nothing more than speculation and hypotheticals.

"[N]egligence is not to be presumed, but is a matter for affirmative proof. And in the absence of affirmative proof of negligence, we must presume performance of duty and freedom from negligence." Handberry v. Manning Forestry Servs., LLC., 353 Ga. App. at 355 (internal citations and punctuation omitted). Defense has put forth **no affirmative proof** of Dr. Burr's negligence; their theory rests entirely on speculation unsupported by competent

evidence. As stated *supra*, this speculation is insufficient to overcome summary judgment.

Handberry v. Manning Forestry Servs., LLC, 353 Ga. App. at 355. In the instant case, the Court need not even presume that Dr. Burr sufficiently performed his duty of ordinary care – the undisputed facts in this case unequivocally establish that he met his duty. Because Defendant has not put forth any proof to support its theory of Dr. Burr’s negligence, this court should grant summary judgment on the issue of ordinary care.

CONCLUSION

Plaintiff respectfully submits this motion and its Memorandum in support and asks this Court to enter summary judgment in Plaintiff’s favor on the issue of ordinary care.