		Superior Court of New Jersey
GEORGE T. DAGGETT,	*	APPELLATE DIVISION
	*	DOCKET NO.: A-001607-23T
Plaintiff-Appellant,	*	
	*	DOCKET NO. BELOW: SSX-DC-1112-23
	*	
	*	
v.	*	ON APPEAL FROM:
	*	SUPERIOR COURT OF NEW JERSEY –
	*	LAW DIVISION, SUSSEX COUNTY
MICHAEAL SYDOR,	*	
	*	
Defendant-Respondent	*	SAT BELOW:
	*	Hon. Vijayant Pawar, J.S.C

PLAINTIFF-APPELLANT'S *AMENDED* APPEAL BRIEF

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PROCEDURAL HISTORY

The Plaintiff-Appellant George T. Daggett, who was originally pro se, filed the Two-Count Complaint is this matter in the Superior Court of New Jersey, Special Civil Part, Sussex County, against the Defendant-Respondent Michael Sydor on May 3, 2023 alleging intentional and negligent damage to his 2019 Lincoln Continental automobile from red paint (Pa-1a).

The Respondent filed his Answer on 6/13/2023 (Pa-28).

The respondent filed a Notice of Motion on July 24, 2023 to change venue (Pa-32).

On July 28, 2023, the Appellant filed a Notice of Motion to amend his Complaint to include a jury demand (Pa-34).

Both Respondent's Motion and Appellant's Cross Motion were denied in an Order entered by Judge David Weaver, J.S.C entered on September 15, 2023 (Pa-35).

On October 10, 2023, Gary A. Kraemer, Esq. entered his appearance as attorney for the Appellant (Pa-36).

This matter came on for a virtual non-jury trial via Zoom, before Judge Vijayant Pawar, J.S.C., on November 13, 2023 (1T)[1], upon which the Court reserved decision.

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[1] 1T - Transcript of Trial on 11/13/23.

On November 17, 2023, The Court entered an Order for judgment in favor of the Respondent and dismissing the Appellant's Complaint (Pa-37) which Order was not uploaded to Ecourts until December 6, 2023 (Pa-41).

On December 13, 2023 the Appellant filed a Notice of Motion for Reconsideration (Pa-42), which Judge Pawar denied on January 5, 2024 (Pa-44).

This Appeal followed (Pa-49).

STATEMENT OF FACTS

On April 22, 2023, the Appellant George T. Daggett was driving his Lincoln Continental car lawfully on a private road and right of way which crosses the residential property owned by the Respondent Michael Sydor at 25 Fox Hollow Road in Sparta, Sussex County, New Jersey. The path of the private road extends from the public street, Sussex Mills Road across lands including the Respondent's property and provides access to the Appellant's residential property which abuts the Respondent's lands (1T38- 1 thru 15).

The Appellant's rights to use the ROW across the Respondent's property was confirmed by the Judgment of the Superior Court of New Jersey, entered by Judge DeAngelis in litigation that has been recently concluded between the Appellant and the Respondent in a separate action in the Chancery Division (copy of Chancery Division Judgment is annexed at Pa-7 thru Pa-27).

On April 22, 2023 as the Appellant drove along the private road from Sussex Mills Road toward the Respondent's property, he observed the Respondent on his property painting sawhorse barriers with a roller using red paint in an area along the private road near Respondent's shed (1T40 – 9 thru 1T41 and Exhibit J-1 (longer video clip)).

The Appellant stopped the car for a few minutes before reaching the Respondent's property to size things up before approaching where the Respondent was painting. He then proceeded slowly towards Respondent and carefully moved past him while he continued his paint rolling (1T41- 22 thru 1T43- 14). The Appellant was unable to make the right turn past into the ROW past where the Respondent was working because his sawhorses were blocking passage to continue the drive to his property, so he backed up in reverse, passing the Respondent and his painting activities again turned around and drove back out to Sussex Mills Road (1T42- 24 thru 1T43- 12; Exhibit J-2 (video clip)).

The next morning, the Appellant noticed red paint blobs and spatterings, the same color the Respondent was using on his sawhorses when the Appellant drove past, on the right rear quarter panel and bumper of his Lincoln Continental and also on the right rear fender and wheel (1T46- 4 thru 1T49- 5).

The Respondent has admitted that the red paint from his roller splattered on the Appellant's car (1T60- 12 thru 15) and has also admitted that he continued

painting while the Appellant's car passed by in close proximity, not even stopping for the few seconds that it took for the car to move by, and was aware that paint from his roller was flying and spattering everywhere in the prevailing windy conditions at the time (1T67- 1 thru 15). The Respondent attributed getting paint from his roller on the Appellant's car as simply "bad luck," (1T67- 16 thru 21).

The Appellant's body shop expert provided unchallenged testimony that the reasonable cost to repair the areas of the car affected by the Respondent's paint was $1,833.95 (1T30- 7 thru 1T31- 9).

The evidence also shows that the Respondent tampered with the video clips (Ex. J-1 and J-2) to edit out the footage where the Appellant's car drives past the Respondent and then in another place on Exhibit J-2 there is a palpable blip or skip creating a noticeable gap where the car, travelling in reverse past the Respondent clearly jumps back several feet where the gap appears, raising the cleat inference of tampering by the Respondent, who put the footage from his security cameras on a disk or thumb drive and apparently manipulated the images as evidenced by the clearly missing footage (1T42 -7 thru 1T45- 17). The clear inference to be drawn from the conveniently (for the Respondent) omitted footage is that the images cut out from Ex. J-1 and J-2 showed the Respondent deliberately shaking or flicking his paint roller at the car as it passed closely by him to splatter red paint on the surfaces shown in the photograph exhibits (Pa-54, 55, and 56).

ARGUMENT

POINT I
THE TRIAL COURT'S NON-JURY DETERMINATION THAT THE RESPONDENT DID NOT INTENTIONALLY SPLATTER PAINT ON THE APPELLANT'S CAR WAS NOT SUPPORTED BY THE EVIDENCE (Pa 37)

The trial court determined that the absence of video footage from the two clips captured by the Respondent's security cameras in evidence (Exhibits J-1 and J-2) catching the Respondent in the act of splattering red paint on the Appellant's blue Lincoln Continental as he drove slowly past the location where the Respondent was painting traffic barriers with a paint roller "is enough to prove the [Respondent] acted deliberately," (Pa-38 and 39). Respectfully, the trial court committed error here. The reason that the Respondent's security camera footage did not capture him in the act of splattering the paint on the Appellant's car is that the video clips (Ex. J-1 and J-2) were prepared by the Respondent. The clip marked as Ex. J-2 clearly shows a skip in the recording as the rear side of the Appellant's car backs up and travels in reverse past the Respondent with his roller loaded with red paint. When the image picks up again, the car has moved about two-and-a-half feet in reverse in the span of that gap indicated by the skip. That gap is exactly at the point where the rear fender and wheel area of the Appellant's car was in closest proximity to the Respondent's hand holding the loaded paint

roller (1T70-11 thru 1T71-5). That crucial gap in an otherwise smooth extent of continuous footage clearly appears to have been edited out by the Respondent, who controlled the security cameras and produced the video clips Ex. J-1 and J-2 (1T43-21 thru 1T45-19).

First of all, there was red paint on the Appellant's car, the same red paint that the Respondent was using. Secondly, the Appellant passed the Respondent not once, but twice (the second time in reverse) when the Respondent was painting. There is a significant gap in the video showing the Appellant's car approaching the Respondent in a forward direction, after it stopped at a distance from the Respondent to size up the scene ahead. The Respondent testified that the camera stops recording when there is no motion (1T57-8 thru 12). The trial court overlooked the fact that the video clip showing the Appellant coming to a stop and watching the Respondent at a distance ended while the Appellant's car was still stationary.

The Respondent's testimony as to his security cameras was that they do not activate unless there is movement in the field of view. Thus, when the Respondent is rolling paint with his arm moving back and forth, the video goes on and on and continues recording where the only discernible motion is the Respondent's arm moving the paint roller on the sawhorse surfaces. What the trial court's decision overlooked is that the Appellant's car had to move from where it was stationary to

pass the Respondent who was painting, and then come to a stop, none of which is captured on the clip, and then back up and return into camera view. All the video clips show is the Appellant's car coming into view and then stopping at a distance from the Respondent, and then that video segment ends with the Appellant's car still stopped. What is missing is the Appellant's car moving past the Respondent holding his loaded paint roller. The Appellant's car obviously had to move through the field of view, which contradicted the Respondent, who testified that his cameras will activate and record when ab object moves in the field of view. The Appellant's car, a large object, in fact much larger than the Respondent's arm, was moving, and clearly in close proximity to the camera when it passed the Respondent. Notably, when the Appellant's car was stopped for several minutes a good distance away from the Respondent painting his sawhorse barriers, the video kept rolling continuously where the only apparent motion was the Respondent's arm pushing his paint roller. But when the Appellant's car, a large object near the camera, actually moved forward toward the camera and past the Defendant, that footage is suspiciously and conspicuously missing.

The next sequence on the video shows the Appellant's car backing up past the Respondent from the opposite direction, where there is an obvious blip — a visible skip in the footage — where the Appellant's car appears to have jumped about 3 or 4 feet to where the image picks up again, from its position when the

skip/jump appears. Notably, this "skip" where several feet of the car's reverse motion is missing happens precisely when the area of the car that is spattered with red paint is within just a couple of feet of the Defendant's roller hand.

The trial court failed to give due recognition that the Appellant's car in motion as it passed the Respondent going forward was mysteriously missing from the video clip. The Respondent's testimony was that the cameras activate and record when something moves into or through the field of view. Two things were moving: the Appellant's car and the Respondent swishing his paint roller back and forth. As indicated, the first video clip (Ex. J-1) shows the Respondent continuously painting. The camera keeps rolling because, according to the Respondent's testimony, he is in motion while painting. The trial court did not give any weight to the fact that the Appellant's car first had to pass by the Respondent before it reached the place where it stopped at the ROW because it could not turn into the ROW access point and then had to back up and go past the Respondent in reverse with his paint roller again to get out of the area. As the Appellant's car moves along, both forward and in reverse, much of the two passes, conveniently for the Respondent, are not displayed. The inference to be drawn is that the recording was tampered with because the Respondent failed to include with the clip the portion between the stopped Appellant's car where it was stopped and a short time later when the car backed up towards the Respondent before

coming into view again travelling in reverse. It is clear that the Appellant passed the painting Respondent twice, and both segments are damning — one is entirely missing, and the other contains a skip with a missing movement of the car over a distance of several feet right at the critical point when the rear quarter panel with the red paint spatters is closest to the Respondent's hand with the paint roller loaded with the same red paint.

It also appears that the trial court overlooked the significance of the large gobs of red paint splatters on the car. The photos in evidence show large splotches of thickly splattered red paint on the quarter panel and rear wheel (Pa-54 thru Pa-56), not a mist of fine particles consistent with normal use of a paint roller. The clear inference from the thick blobs and splotches of red paint on the car instead of fine particles from normal use of a roller is intentional conduct. Quite evidently, the Respondent shook or flicked his paint roller at the car on either or both times it passed slowly by him to cause the appearance depicted in the photo evidence of a splattering of thick red blobs of paint on the car and rear wheel. The evidence shows the Appellant's car on the right-of-way with gobs of red paint on it, and two missing video segments of the two times when the car passed the Respondent, once going forward and then backing up.

The Respondent's own testimony contradicts the video footage in evidence. Again, he testified that there must be motion to activate the camera. What the trial

court overlooked was that the minimal motion of rolling paint on the sawhorses was captured continuously even with such slight movement as that. But the starkly glaring omission from the Respondent's video clips is that they very suspiciously fail to show any footage at all of the Respondent rolling paint while the Appellant's car moves slowly forward past him. And then on the car's return trip, the clip suddenly jumps to the car reentering the scene driving in reverse back towards the Respondent, where the video contains the dubious blip and skip with the missing three-four foot jump of the car to where the clip picks up again at the precise location where the fender and wheel which were splattered with thick gobs of paint were closest to the Respondent holding his loaded roller. These factors clearly bespeak the Respondent's intentional act in using his roller to shake gobs and thick splotches of paint on the Appellant's car.

POINT II

THE TRIAL COURT ERRED IN DETERMINING THAT THE RESPONDENT OWED NO DUTY OF CARE TO THE APPELLANT WITH RESPECT TO HIS PAINTING ACTIVITIES THAT WOULD GIVE RISE TO LIABILITY FOR NEGLIGENCE (Pa 44)

The trial court concluded in its decision that there was no proof that the Respondent violated a duty of care to the Appellant (Pa-39 and 40). The trial court also concluded generally that "the [Appellant] failed to establish the elements required to establish a cause of action for negligence," (Pa-40). As noted, the four elements of a cause of action for negligence are as follows:

(1) A duty of care owed by the Defendant to the Plaintiff;

(2) Breach of that duty by the Defendant;

(3) Damage suffered by the Plaintiff proximately caused by the Defendant's breach of duty;

(4) Ascertainable and measurable damages suffered by the Plaintiff.

[Weinberg v. Dinger, 106 N.J. 469, 484 (1987)]

The proofs at the trial clearly established that gobs of red paint from the Respondent's roller painting project splattered on the Appellant's car. The Appellant's body shop painting damage expert, John Mathews, established without any contradiction that the paint damage would cost $1,833.95 to repair (1T30- 7 thru 25; Pa-57). The Respondent himself did not dispute that the red paint splotches on the Appellant's car came from his paint roller manipulations.

Thus, only meaningful issues in terms of the negligence claim were whether or not the Respondent owed a duty of care to the Appellant, and if so, did he breach that duty? The trial court concluded that the Appellant's proofs did not show any duty of care that the Respondent owed to him. There was, however, ample proof of such a duty in the evidence.

In this analysis, it is useful to recall the landmark case of Palsgraf v. Long Island Railroad Co., 248 N.Y. 339 (Ct. of Appeals of N.Y., 1928) with the classic discussions by Chief Judge Cardozo of the outer reaches of liability for alleged negligent conduct (copy attached for convenient reference). In Palsgraf, of course, the Court of Appeals found that the Defendant Railroad was not liable in negligence for Mrs. Palsgraf's injuries when a train conductor allegedly caused a passenger to drop an unremarkable and otherwise ordinary-looking, nondescript package while assisting him from the platform onto a train car. This package, however, contained fireworks (unbeknownst to anyone, except perhaps the passenger who had been carrying it), and when it fell down to the rails below the train, it exploded with great force, causing scales at the far end of the platform many feet away to fall down upon Mrs. Palsgraf causing injuries. Chief Justice Cardozo framed the issue of whether a duty of care existed in terms of the relationship between the parties and the "risk reasonably to be perceived" from the act in question, (248 N.Y., supra at p. 344). In the Court's classic formulation, "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension," (248 N.Y., supra at p. 344). Using this classic statement of the applicable principles, the Court distilled the following rule, used to this day in our

jurisprudence: "wrong is defined in terms of the natural or probable, at least when unintentional," (248 N.Y., supra at p. 345).

See for example the case of Wytupeck v. Camden, 25 N.J. 450 (1957), where the Supreme Court dealt with the "basic question," similar to the issue framed by the trial court in the appeal in this case, the sufficiency of the evidence to sustain a finding that the defendant owed a duty of care to the infant plaintiff, Wytupeck, supra, at p. 454.

The Supreme Court in Wytupeck agreed that the Palsgraf case insofar as the notion of a duty of care owed to another party is a function of the foreseeable of harm or damage to the other based on the nature of the activity being conducted, Wytypeck, supra, at p. 464.

The Respondent admitted on cross examination that red paint from his roller splattered on the Appellant's car "by accident," (1T60- 12 thru 15). He also admitted that the Appellant was limited to using an access pathway for his car that at the farthest distance, compelled passage within a "few feet" of where the Respondent was painting (1T60- 16 thru 1T61-17). The Respondent admitted that the paint from his roller manipulations was a messy operation, with red paint splattering all over the concrete apron in front of the shed where he was working, as well as all over his own clothing, pants and shoes; it was also a "windy day,"

(1T67- 1 thru 15). He attributed the paint splattering onto the Appellant's car as simply a case of "bad luck," (1T67- 16 thru 21).

Being admittedly aware that his manner of using the paint roller on a windy day was causing the red paint to splatter all over the place where he did not intend to cover with paint, the Respondent did not even consider whether he should stop painting for the brief seconds that it took the car to pass by which would have eliminated entirely the risk of damage to the vehicle from errant splatters that he knew were flying everywhere in the wind in addition to the intended object being painted, (1T67- 22 thru 1T68- 3).

The evidence in the present case clearly showed that the foreseeable risk involved with the Respondent's use of the paint roller was paint spattering on areas and objects other than the sawhorses he was intending to paint. On cross examination, the Respondent was questioned about this. It was pointed out that the video clip showed what appeared to be a pristine concrete surface of the slab at the entrance to the shed where he was working, (1T67- 5 thru 15). The Defendant admitted that there were spatters of red paint all over the concrete surface not visible in the camera view, as well as on his own clothing, hence the protective apron he wore, which also was splattered red. So the Respondent was clearly aware of the risk of flying red paint from his roller technique landing on many other places and objects besides the sawhorses on which he was actually rolling the

paint. Harking back to the elegant phraseology of Palsgraf: "Risk imports relation" and "[t]he risk reasonably to be perceived defines the duty to be obeyed,... it is risk to another or to others within the range of apprehension," (emphasis added, Palsgraf, supra, at p. 344). See also the equivalent formulation of the rule by our Superior Court in the Wytupeck case, supra, at p. 462:

> "Duty" is not a rigid formalism according to the standards of a simpler society, immune to the equally compelling needs of the present order; duty must of necessity adjust to the changing social relations and exigencies and man's relation to his fellows; and accordingly the standard of conduct is care commensurate with the reasonably foreseeable danger, such as would be reasonable in the light of the recognizable risk, for negligence is essentially "a matter of risk * * * that is to say, of recognizable danger of injury."
>
> [cite omitted]

The Appellant drove his car into the scene, intending to use the ROW, stopped, and, as confirmed by the video clip, waited a good while at a considerable distance from the Respondent, sizing things up, before proceeding. Regrettably, as noted in Point I above, the video clip prepared by the Respondent very suspiciously does not display the Appellant's car moving forward from its stopped position and passing with care by the Respondent in the ROW.

This evidence clearly proves that the Respondent was aware of the proximity of the Appellant's car to where he was actively painting. The Appellant had to

travel that path to stay within the ROW which had been the subject of recently concluded litigation before Judge DeAngelis.

On cross, the Respondent was asked if it occurred to him to stop his paint rolling for a brief moment to allow the Appellant's car to pass by without risk of getting splattered with paint. The Respondent didn't consider that he should stop, even momentarily, while the car was passing through the zone of danger from paint flying off the roller which the Respondent knew was already happening because of the paint gobs splattering onto the concrete slab where he was working and onto his own clothing. That picture classically illustrates the Respondent's negligent conduct. In Chief Judge Cardozo's words, "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports [i.e., implies, signifies] relation," (Palsgraf, supra at p. 344).

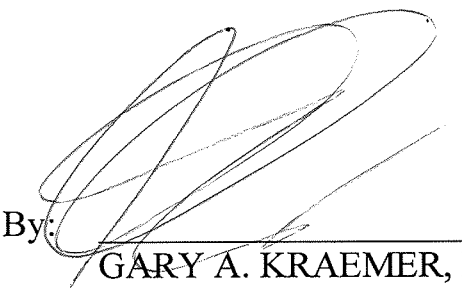
The evidence in this case clearly established that the Respondent owed a duty of care to the Appellant to stop rolling paint for the brief second or two that it took for the car to pass by in the ROW. The Respondent admitted on cross that he was well aware that in the windy conditions, the paint from his roller was blowing and landing on many other unintended places than his primary target, the sawhorses. He also admitted on cross that he deliberately disregarded that known risk because he knew he was splattering red paint all over the concrete slab and his own clothing. Deliberately disregarding the known risk that red paint was flying

off the roller and landing on many surfaces besides the sawhorses he was actually painting, and resulting in damage to the Appellant's car in the area of risk, as substantiated by the Appellant's body shop expert clearly bespeaks negligence by the Respondent.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed.

Respectfully submitted,



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