APL-2016-00235

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Court of Appeals

STATE OF NEW YORK

CARLOS RODRIGUEZ,

Plaintiff-Appellant,

against

THE CITY OF NEW YORK,

Defendant-Respondent.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

HEATHER WILTSHIRE CLEMENT
President of the Defense Association of New York, Inc.

By: ANDREW ZAJAC
Defense Association of New York, Inc. as Amicus Curiae

MCGAW, ALVENTOSA & ZAJAC
Two Jericho Plaza, 2nd Floor, Wing A
Jericho, New York 11753
516-822-8900

Of Counsel:

Andrew Zajac
Rona L. Platt
Brendan T. Fitzpatrick
Lisa L. Gokhulsingh

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a bar association, whose purpose is to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases and whose representation in such cases is primarily for the defense; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law

schools in emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques for the defense; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just claim and to present effective resistance to every non-meritorious or inflated claim; to promote diversity in the legal profession and to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

For the reasons set forth below, DANY respectfully submits that the decision and order of the Appellate Division, First Department should be affirmed.

STATEMENT OF FACTS AND OF THE CASE

Carlos Rodriguez ("Rodriguez") has been employed by the New York City Department of Sanitation ("DOS") for 19 years (R 60). (References are to the Record on Appeal. The numbers in the footnotes below correspond to the page numbers of the miniscripts that appear on the referenced pages of the Record. We do so for clarity as the miniscript pages are out of order.) On the date of his accident, Rodriguez was employed as a garage-utility man at DOS facility Manhattan East 5 from 8:00-4:00 p.m. (R 60[1], 61[2], 78, 220, 221). Garage-utility men perform various tasks related to upkeep and preparation of garbage trucks (R 222). He had been in that position for six months before the accident (R 60[3]). Before that, Rodriguez was a garbage collector and truck operator (R 60[4]).

Gilbert Ramos ("Ramos") has been employed at the DOS as a sanitation worker for 12 years (R 89[5], 90[6]). When he was hired, Ramos attended six weeks of training at Randall's Island (R 90[7]). The training included driving sanitation

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[1] At p. 10.
[2] At p. 16.
[3] At p. 10.
[4] At p. 11.
[5] At p. 5.
[6] At p. 8.
[7] At p. 10.

trucks, placing tire chains and plows on trucks (called "dressing"), and working with a guide man (R 90[8], R 114[9]).

Because of a sanitation truck's design, the driver cannot see directly behind it (R 96[10]). The truck is solely equipped with side mirrors (R 96[11]). A guide man is there to see what the driver cannot see through the side mirrors (R 114[12]). A guide man assists the driver during backing up so that the driver may navigate around potential hazards (R 90[13]; 91[14]). When a truck is reversing, a guide man, using hand signals, tells the driver whether he should stop or go (R 90[15], R 90[16]). After Ramos's training was complete, he was assigned to a garage and received on-the-job training (R 91[17]).

Early Carter ("Carter") has been employed with the DOS as a sanitation worker since 2000 (R 113[18]). While Carter had worked as a garage utility man, he was a sanitation worker

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[8] At pp. 10-11.
[9] At p. 15.
[10] At p. 32.
[11] At p. 32.
[12] At p. 15.
[13] At p. 11.
[14] At p. 12.
[15] At p. 11.
[16] At p. 11.
[17] At p. 14.
[18] At p 8.

who was assigned to help (R 95[19], 114[20], 128[21]).

On the morning of January 26, 2011, Rodriguez's supervisor assigned Carter, Ramos and Rodriguez to dress the trucks in preparation for snow (R 61[22], 62[23], 63[24], 95[25], 115[26], 230).

To complete their work, the men brought the trucks, which were parked outside, into a garage with two bays (R 62[27], 116[28], 226). The men were working in garage bay two, located on the right(R 99[29], 122[30]). No wall separates the two bays (R 94[31]).

A DOS Toyota Prius was parked in the lot in between bay one and bay two with its hood facing the garage (R 65[32], 66[33], 124[34], 128[35], 248). The Prius was parked five or six feet away from the garage's wall and did not impede the truck's ability

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[19] At p. 30.
[20] At p. 13.
[21] At p. 70.
[22] At p. 16.
[23] At p. 17.
[24] At p. 23.
[25] At p. 30.
[26] At p. 19.
[27] At p. 20.
[28] At pp. 22-23.
[29] At p. 46.
[30] At p. 45.
[31] At p. 24.
[32] At p. 36.
[33] At p. 35.
[34] At p. 52.
[35] At p. 69.

to enter the bay (R 65[36]). Additionally, approximately six tires were piled against the garage's exterior wall (R 65[37]). The Prius was three to four feet away from the stacked tires (R 65[38]).

One man would back the truck into the garage bay, where the truck would be lifted on metal ramps, allowing the other men to affix chains to the tires (R 62[39], 63[40], 78). The plows would then be transported to the front of the truck by forklift (R 95[41]).

January 26, 2011 was cold, windy and snowing (R 67[42]). Rodriguez testified the snow begin while he was traveling to work that morning (R 72[43]). The snowfall continued steadily throughout the morning (R 116[44]). There was an inch or two of snow on the ground in the area directly outside of the garage (R 73[45]). Ramos also testified that it was snowing pretty hard during the shift (R 97[46], 101[47]).

Before the accident, the men had dressed five sanitation

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[36] At p. 31.
[37] At p. 30.
[38] At pp. 30, 31.
[39] At p. 20.
[40] At p. 23.
[41] At p. 31.
[42] At p. 37.
[43] At p. 59.
[44] At p. 21.
[45] At p. 61.
[46] At p. 39.
[47] At p. 53.

trucks (R 64[48]). Carter and Ramos alternated driving the trucks into the garage bay without incident (R 64[49], 97[50], 100[51], 101[52], 117[53], 118[54]). Rodriguez was working inside the garage laying out the chains so they could be quickly locked onto the tires (R 65[55]).

Ramos had successfully backed two trucks into the garage before Rodriguez's accident (R 100[56]). The truck involved in the accident was located in the lot in front of the garage bay (R 101[57]). Ramos turned the steering wheel left to line the truck up with the bay and then began to back it into bay two(R 101[58]). Carter recalls that Ramos was traveling at a safe rate of speed (R 118[59]).

Right before the accident, Rodriguez left the garage "just to see how the weather [was]. Just to get out of the garage" (R 74[60]). He had been speaking with another DOS employee when he observed Ramos pulling up with the truck (R

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[48] At pp. 27-28.
[49] At p. 28.
[50] At p. 39.
[51] At p. 49.
[52] At p. 52.
[53] At p. 26.
[54] At p. 30.
[55] At p. 29.
[56] At p. 48.
[57] At p. 54.
[58] At p. 54.
[59] At pp. 28, 30.
[60] At p. 65.

64[61]).

Rodriguez "was about fifteen feet away from the Prius" when he first became aware that Ramos was backing up the truck (R 251). Both Rodriguez and the truck were heading towards garage bay two; "the bay that we were about to bring the truck in" (R 250, 252, 253). Ramos "was driving exceptionally slow" at about "five miles" per hour (R 255).

Although Rodriguez saw that Ramos was backing up when he was 75 feet away from the truck, Rodriguez was looking straight ahead as he was heading into the garage bay (R 250, 258). He heard the automatic beeping sound the truck makes when it reverses and recognized that the back of the truck was coming towards him as he headed to the garage bay (R 66[62], 249-250, 252). But once he began walking towards the garage bay, he did not know where Ramos and the truck were (R 251). Indeed, he admittedly did not keep the truck under observation and only looked straight ahead as he walked towards the garage bay (R 251, 254, 258). In fact, Rodriguez was unable to say where Ramos and the truck were two seconds before his accident (R 259).

When Ramos positioned the truck to reverse into the bay,

[61] At p. 27.
[62] At p. 34.

Carter was behind the truck on the passenger's side (R 121[63]). Carter explained that the driver can see what is on the driver's side but that it is more difficult for the driver to see what is on the passenger's side (R 121[64]). Carter believes that Ramos was driving "less than five miles an hour" as he began to back the truck into bay two (R 129[65]).

As he walked towards the garage bay entrance, instead of entering through garage bay one, Rodriguez walked towards garage bay two in the space between the Prius and the tires (R 74, 259).

Carter observed that Ramos was drifting to the right and put up a stop signal (R 122[66]). But Ramos did not stop (R 122[67]). Assuming that Ramos could not see him because "snow [was] accumulating on the mirror," Carter crossed to the driver's side to give Ramos the stop signal (R 122[68]).

According to Ramos, Carter was standing on the driver's side behind the truck while Ramos was backing up (R 102[69]). While Ramos could see Carter, the snow made it difficult to see through the driver's side mirror (R 103[70]). Carter waved

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[63] At p. 40.
[64] At p. 41.
[65] At p. 72.
[66] At pp. 44-45.
[67] At p. 44.
[68] At p. 46.
[69] At p. 57.
[70] At p. 61.

for Ramos to reverse, then abruptly motioned for Ramos to stop (R 103[71]; 104[72]).

Because Carter's signal was abrupt, Ramos hit the brakes fairly hard, causing the truck to jerk and skid on the ice (R 103[73], 104[74], 123[75]). Ramos pumped the brake in an attempt to stop the skid (R 104[76]). Although Ramos testified that he did not feel any impact, the back of the truck struck the Prius (R 104[77], 123[78]). Carter estimates that the truck stopped a foot or two after Ramos hit the brake (R 123[79]).

Rodriguez testified that three seconds elapsed between when he began walking between the Prius and tires when he was struck (R 66[80]). He was three or four feet away from the garage entrance (R 63[81]). The Prius hit Rodriguez, who landed on its hood, with his legs hanging down in front of the car's bumper while the Prius was being pushed towards the stacked tires (R 66[82], 66[83]).

Rodriguez testified that he did not know if Ramos

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[71] At p. 62.
[72] At p. 64.
[73] At p. 63.
[74] At p. 64.
[75] At p. 49.
[76] At pp. 66-67.
[77] At p. 67.
[78] At p. 51.
[79] At p. 49.
[80] At p. 34.
[81] At p. 22.
[82] At p. 35.
[83] At p. 34.

continued to back up nor did he see what caused the Prius to move (R 66[84]). After a few seconds, Rodriguez got off of the Prius' hood and walked to an area behind bollards placed to prevent trucks from hitting the building (R 66[85], 67[86]).

Ramos exited the truck and walked to the back where he observed that he had hit the Prius, pushing it closer to the stacked tires (R105[87], 105[88], 124[89]). The Prius' rear bumper and passenger-side tail light were damaged (R 107[90]).

Carter and Ramos then noticed that Rodriguez was on the hood of the Prius (R 124[91]). Rodriguez told them that the Prius had hit him and injured his back (R 124[92]).

Rodriguez filed a Notice of Claim against the City on March 28, 2011 alleging negligence in ownership, operation, control, and, *inter alia*, repair of DOS vehicle DC 836 (R 39-41).

Soon after his 50-H hearing, Rodriguez commenced a personal-injury action against the City (R 42-48, 53). The City raised Rodriguez's culpable conduct as an affirmative defense (R 49). In his bill of particulars, Rodriguez

[84] At p. 36.
[85] At pp. 35, 36.
[86] At p. 37.
[87] At p. 68.
[88] At p. 69.
[89] At p. 53.
[90] At p. 78.
[91] At p. 54.
[92] At p. 54.

alleged that he had sustained a serious injury due to the City's negligent operation of the sanitation truck (R 82).

When discovery was complete, Rodriguez moved for summary judgment arguing that Carter and Ramos, as City employees, were solely at fault for the accident (R 18-38, 20, 22, 33).

The City cross moved for summary judgment arguing that, because Rodriguez was remedying the very condition that caused his accident - placing chains on tires to increase their traction - the City did not owe him a duty (R 152-177). The City also argued that there was an issue of fact as to whether Rodriguez's conduct of "walking behind and in close proximity to an undressed departmental truck on an icy lot instead of being inside the garage - - contributed to [Rodriguez's] injuries" (R 172).

The Supreme Court (Freed, J.S.C.) denied both Rodriguez's motion and the City's cross motion (R 9-15). In denying Rodriguez's motion, the court found "triable issues of fact concerning causation, comparative negligence, and foreseeability" (R 14). The court observed that "even assuming that the evidence submitted in connection with [Rodriguez's] motion established the City's negligence, [Rodriguez] would not be entitled to summary judgment as to liability since the question of his comparative fault must be

resolved at trial" (R 15).

In a 3-2 decision, the Firsts Department affirmed denial of Rodriguez's summary judgment motion (R 329-372). Rodriguez v. City of New York, 142 A.D.3d 778, 778 (1st Dep't 2016). The majority recognized that its past decisions regarding the plaintiff's burden of proof on a summary judgment motion had been inconsistent (R 330). Id. The majority announced, however, that "[a]fter a review of the relevant precedents, we believe that the original approach adopted by this Department, as well as that followed in the Second Department, which requires a plaintiff to make a *prima facie* showing of freedom from comparative fault in order to obtain summary judgment on the issue of liability, is the correct one" (R 330). Id.

For its part, the dissent opined:

> In this case, where plaintiff met his *prima facie* burden of establishing defendant's negligence as a proximate cause of the injury, and defendant failed to raise triable issues of fact with respect to its own negligence, but successfully raised triable issues of fact as to comparative negligence on the part of plaintiff, I would grant plaintiff's motion for partial summary judgment on the issue of liability (finding defendant negligent as a matter of law) and remand for a jury to determine (1) the percentage of liability attributable to each party, if it finds that plaintiff engaged in any culpable conduct that proximately caused the injury and (2) the total amount of damages (which the court would then reduce in proportion to plaintiff's share of

liability, if any, as previously determined by the jury). Id. at 785.

While the majority recognized the problem a defendant could face at trial where the "defendant is essentially enter[ing] the batter's box with two strikes already called," the dissent had no concern that the jury would be confused, writing "the jury would be instructed in the liability portion of the trial that defendant's negligence had already been established as a matter of law, and that, therefore, in apportioning fault, it cannot completely absolve the defendant of liability or find plaintiff 100% liable." Id. at 782, 797. Interestingly, the dissent found that its burden of proof for a plaintiff's summary judgment motion would "promote fairness" and "increase judicial efficiency." Id. at 798.

Recognizing the "discrepant decisions in this Department, [and] concomitant confusion to the bar," the court agreed that "the issue calls for resolution by the Court of Appeals." Id. at 786.

POINT I

SUMMARY JUDGMENT IS APPROPRIATE ONLY WHEN NO TRIABLE ISSUES OF FACT REMAIN FOR A JURY TO RESOLVE

Rodriguez moved for summary judgment on the issue of liability. The issue of liability, however, covers not simply the fault of the defendants, but also plaintiff's comparative fault. New York jurisprudence has long held that to grant summary judgment, no material and triable issue of fact can be presented. See, Nicholas Di Menna & Sons, Inc. v. City of New York, 301 N.Y. 118 (1950); Fredburn Constr. Corp. v. City of New York, 280 N.Y. 402 (1939). Significantly, this Court did not carve out an exception for moving parties to merely demonstrate that the opposing party was at fault. The law holds that parties moving for summary judgment must demonstrate, as a matter of law, that no material issues exist.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form." Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 1067 (1979)(internal citation omitted); See,

also, Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A motion for summary judgment deprives a party of their day in court and thus should be considered a drastic remedy. See, Andre v. Pomeroy, 35 N.Y.2d 361 (1974). As a drastic remedy, summary judgment should not be granted where there is any doubt as to whether such issues exist. See, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957).

The movant bears the burden of establishing his entitlement to judgment as a matter of law. See, Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985). The failure to satisfy this burden warrants the denial of the motion regardless of the sufficiency of the opposing papers. Id. Where a movant failed to assemble sufficient proof to dispel all questions of fact, "the motion should simply not be submitted." Ritt v. Lenox Hill Hosp., 182 A.D.2d 560 (1st Dep't 1992).

This principle was recently reaffirmed by this Court in Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039 (2016). "On a motion for summary judgment, the moving party must make a *prima facie* showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" 27 N.Y.3d at 1043 (emphasis supplied)(citation omitted). In the instant case, material

issues of fact exist on the critical issue of Rodriguez's comparative fault. Accordingly, summary judgment is not appropriate.

POINT II

REQUIRING A PLAINTIFF TO DEMONSTRATE BOTH THE DEFENDANT'S NEGLIGENCE AND FREEDOM FROM CONTRIBUTORY NEGLIGENCE *PRIMA FACIE* PROMOTES FAIRNESS AND CONSERVES JUDICIAL RESOURCES

Rodriguez's appeal seeks to establish that a plaintiff's burden of proof on a motion for summary judgment merely requires the plaintiff to demonstrate that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's injuries. This standard, the dissent propounds, would promote fairness and increase judicial efficiency. For reasons discussed below, eliminating the requirement that a plaintiff negate the fact-laden issue of contributory negligence would be both fundamentally unfair and increase judicial waste. Thus, based on the majority's opinion, this Court should affirm the denial of Rodriguez's summary judgment motion, and reiterate that a plaintiff's burden of proof in moving for summary judgment on liability requires evidence, not only that the defendant was negligent, but that the plaintiff was not contributorily negligent.

In describing a plaintiff's *prima facie* burden, the dissent relied on this Court's decisions in Solomon v. City of New York, 66 N.Y.2d 1026 (1985), Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308 (1980) and Nallan v. Helmsley-

Spear, Inc., 50 N.Y.2d 507 (1980). However, those cases are inapposite, as each appeal was preceded by a jury verdict. Solomon, 66 N.Y.2d at 1026; Derdiarian, 51 N.Y.2d at 312; Nallan, 50 N.Y.2d at 507. Because none of these cases speak to the burden of proof on a motion for summary judgment, they are neither instructive nor dispositive.

Because the body of law with respect to the burden of proof on a summary judgment motion is more developed with defendants, analysis of the standard should begin there. With this Court's decisions such as discussed in Point I herein as a foundation, the Appellate Courts have held that, "[o]n a summary judgment motion, a moving defendant does not meet its burden of affirmatively establishing its entitlement to summary judgment by merely pointing to gaps in the plaintiff's case; rather, it must affirmatively demonstrate the merit of its defense." Vanderhurst v. Nobile, 130 A.D.3d 716, 717 (2nd Dep't 2015)(citation omitted); Koulermos v. A.O. Smith Water Products, 137 A.D.3d 575, 576 (1st Dep't 2016); Rodrigues v. Lesser, 136 A.D.3d 1322, 1323 (4th Dep't 2016); Schillaci v. Sarris, 122 A.D.3d 1085, 1088 (3rd Dep't 2014). This is true despite the fact that the plaintiff bears the burden of proof at trial. Jacobsen v. New York City Health and Hosps. Corp., 22 N.Y.3d 824, 833 (2014) ("Notwithstanding

the differing burdens of proof at trial . . . an employer moving for summary judgment with respect to an employee's claims . . . still has the burden of showing that the employee's evidence and allegations present no triable material issue of fact"). Thus, when moving for summary judgment, a defendant must "adequately address [and dispose of] the plaintiff's claim[s], set forth in the bill of particulars . . .."(citation omitted) Valerio v. Terrific Yellow Taxi Corp., 149 A.D.3d 1140 (2nd Dep't 2017); Macaluso v. Pilcher, 145 A.D.3d 1559, 1560 (4th Dep't 2016); Hickey v. Arnot-Ogden Med. Ctr., 79 A.D.3d 1400, 1401 (3rd Dep't 2010); Breitman v. Dennett, 77 A.D.3d 498 (1st Dep't 2010) (holding that a defendant cannot establish *prima facie* entitlement to judgment as a matter of law without addressing the plaintiff's essential factual allegations).

Citing to his own concurring opinion in Capuano v. Tishman Const. Corp., 98 A.D.3d 848 (1st Dep't 2012), dissenting Judge Acosta wrote that "CPLR 1412 unequivocally states that contributory negligence is an affirmative defense to be pleaded and proved by the defendant asserting it, and the plaintiff never has the burden to demonstrate that he or she is free from negligence once a defendant asserts the defense." Rodriguez, 142 A.D.3d at 779. If fairness is to

prevail, however, notwithstanding the burden of proof at trial, a plaintiff should also be put through the paces of negating the defendant's affirmative defense of contributory negligence as part of his *prima facie* showing on a motion for summary judgment. The reason is two-fold. First, contributory negligence is a factual issue that must be eliminated by a summary judgment movant. Second, requiring a plaintiff to address and dispose of affirmative defenses, even if it would be the defendant's burden to prove it at trial, comports with the burden of proof to which defendants are held.

A. Contributory Negligence Is A Factual Issue And Its Absence Must Be Established By A Plaintiff Seeking Summary Judgment

Indeed, where a plaintiff moves for summary judgment, his burden of proof should include "demonstrat[ing] the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses." Stone v. Cont. Ins. Co., 234 A.D.2d 282, 284 (2nd Dep't 1996)(citation omitted); Morley Maples, Inc. v. Dryden Mut. Ins. Co., 130 A.D.3d 1413, 1413 (3rd Dep't 2015); Hoffman v. Wyckoff Hgts. Med. Ctr., 129 A.D.3d 526, 526 (1st Dep't 2015). As Rodriguez acknowledged here, the City asserted the affirmative defense of his culpable conduct as a bar to his

recovery (R 49). It would be disparate to hold the City to a standard under which it is required to eliminate all factual issues, but to allow Rodriguez to pass on the factual issue of contributory negligence until trial. Thus, requiring that a plaintiff negate the affirmative defense of contributory negligence as part of his *prima facie* showing comports with CPLR 3212(b) and promotes fairness (R 49).

Specifically, a summary judgment movant is required to eliminate jury questions. Throughout his brief, for example, Rodriguez acknowledges CPLR 3212(b)'s mandate that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment." See, Rodriguez Br. at pp. 27-28; CPLR 3212(b). He treats the City's affirmative defense not as a claim that he is required to address *prima facie*, but rather a claim that can be addressed to the jury at trial as a part of damages. But, as the majority recognized, "CPLR 1411 pertains to the damages ultimately recoverable by a plaintiff [and] has no bearing, procedurally or substantively, upon a plaintiff's burden of proof as the proponent of a motion for summary judgment on the issue of liability." Rodriguez, 142 A.D.3d at 779.

"The issue of comparative fault is generally a question for the jury to decide." Roberts v. Zirkind, 140 A.D.3d 940,

941 (2nd Dep't 2016)(citation omitted). Thus, evidence that a plaintiff is contributorily negligent would automatically leave jury issues. Because contributory negligence is an issue of fact, it runs counter to CPLR 3212's function and would be both inefficient and unjust to grant summary judgment where, as here, the plaintiff has failed to negate the affirmative defense of contributory negligence *prima facie*. Requiring a plaintiff to negate the jury question of contributory negligence adheres to CPLR 3212.

B. Requiring A Plaintiff To Establish A Lack Of Contributory Negligence Avoids Wasting Judicial Resources

In addition, the dissent's proposed burden of proof wastes judicial resources. This Court has opined that "[e]vidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm . . .." Sheehan v. City of New York, 40 N.Y.2d 496, 501 (1976)(citation omitted). But "there may be more than one proximate cause of an injury." Turturro v. City of New York, 28 N.Y.3d 469, 483 (2016), quoting Argentina v. Emery World Wide Delivery Corp., 93 N.Y.2d 554 (1999). To that end, Pattern Jury Instruction 2:36 requires that a jury be instructed as to both the plaintiff and defendant's

negligence at the same time. "This avoids a complicated jury instruction and allows the jury to consider the actions of both parties as a whole in making their determination." Rodriguez, at 783.

Under the dissent's standard, while recognizing that the plaintiff may be a proximate cause of the accident, the plaintiff would not be required to dispose of his contributory negligence during motion practice. Instead, the plaintiff's negligence would be determined by the jury at trial. Moreover, even though it would be assessing the plaintiff's contributory negligence at trial, the jury would be precluded from finding for the defendant after summary judgment has been granted. Rodriguez, 142 A.D.3d at 798. It is both unjust and inefficient to deprive the jury of the opportunity to find for the defendant when plaintiff's contributory negligence has never been determined but must be submitted to the jury for resolution. Further, as the majority acknowledged, departing from PJI 2:36 could cause confusion to the jury. Rodriguez, 142 A.D.3d at 783; Calcano v. Rodriguez, 91 A.D.3d 468, 470 (1st Dep't 2012) ("The concurrence's approach, while presumably entailing a highly confusing jury instruction, would not yield any significant benefit in terms of judicial economy or fairness to the

parties"). Of note, despite downplaying the possibility for jury confusion, neither Rodriguez nor the dissent proffers an alternative jury instruction on this complex issue.

Additionally, granting summary judgment where comparative fault remains outstanding defeats the very purpose of summary judgment and will tax the already overburdened courts. For example, Rodriguez has tied up the courts with his motion since 2014 (R 18-19). Yet, even if he succeeds, he will still be required to prove both his freedom from comparative fault and damages at a trial where all outstanding factual issues can be decided. Thus, where, as here, a plaintiff cannot eliminate jury questions *prima facie*, he should not be permitted to clog up the courts with both a motion and subsequent jury trial.

The upshot of summary judgment under these circumstances would be, as the majority recognized, to place the defendant in front of the jury with two strikes against him. Rodriguez, 142 A.D.3d at 782. However, CPLR 3212 is not a tool to gain advantage at trial; it is a method for eliminating the need for a trial on liability where there are no issues of fact.

Because contributory negligence is a factual issue, a plaintiff who cannot negate his contributory negligence in

his motion for summary judgment cannot make out a *prima facie* showing for summary disposal. Granting such a motion would be fundamentally unfair and would reduce judicial efficiency.

The dissent also indicated that once the defendant's negligence was established, the plaintiff's motion could only be denied with evidence raising an issue of fact as to the defendant's negligence. Evidence of the plaintiff's contributory negligence, unless it constituted the accident's sole proximate cause, the dissent maintained, was insufficient to deny summary judgment. Id. at 796-797. That position, however, runs counter to this Court's decision in Castiglione v. Kruse, 130 A.D.3d 957 (2nd Dep't 2015), rev'd, 27 N.Y.3d 1018, rearg denied, 28 N.Y.3d 941 (2016).

In Castiglione, the plaintiff pedestrian was struck by the defendant's vehicle. The Second Department granted the plaintiff's summary judgment motion finding that "the plaintiffs established that the defendant driver was negligent and that the injured plaintiff was free from comparative fault." 130 A.D.3d at 958. While the defendants attempted to raise an issue of fact based on the plaintiff's contributory negligence, the Second Department held that the defendant's "unsupported speculation that the injured plaintiff was comparatively at fault was insufficient to

raise a triable issue of fact." Id.(citation omitted) This Court reversed, holding that "[o]n this record, triable questions of fact preclude summary judgment in plaintiffs' favor." 27 N.Y.S.3d at 1019. Thus, this Court has already concluded that a plaintiff's contributory negligence is sufficient to raise an issue of fact precluding summary judgment.

C. Affirmance Of The First Department's Opinion Is Warranted As Plaintiff Failed To Establish He Was Free Of Contributory Negligence

In this case, there is no shortage of evidence that Rodriguez was contributorily negligent. Indeed, the dissent acknowledged the existence of such evidence noting, "[t]o be sure, [the City] raised triable issues of fact with respect to [Rodriguez's] comparative fault." Rodriguez, 142 A.D.3d at 796. For example, Rodriguez admitted that he could have entered the garage through the adjacent bay (R 74[93]). Certainly, had he been inside the building, he would not have been injured; there are bollards to prevent trucks from hitting the building (R 67[94], 265). Further, there is no question that even though he heard the reversing truck, Rodriguez did not maintain visual contact with the truck as he headed to the same garage bay where the truck intended to

[93] At p. 66.
[94] At p. 37.

reverse. Thoma v. Ronai, 82 N.Y.2d 736, 737 (1993) (noting that plaintiff's submissions, consisting of her affidavit and the police accident report, demonstrated that she may have been negligent in failing to look to her left while crossing the intersection); Albert v. Klein, 15 A.D.3d 509, 510 (2nd Dep't 2005) ("plaintiff's admission that she crossed a busy Manhattan intersection while 'looking straight ahead and walking for the entire time,' raises a triable issue of fact as to whether she acted with reasonable care given all of the circumstances")(citation omitted); Schmidt v. S. M. Flickinger Co., Inc., 88 A.D.2d 1068 (3rd Dep't 1982); Counihan v. J.H. Werbelovsky's Sons, Inc., 5 A.D.2d 80, 83 (1st Dep't 1957) (noting that plaintiff "has a right of way, but not a right to self-inflicted mayhem for which the defendant can be held liable")(citation omitted); Cf. Gomez v. Novak, 140 A.D.3d 831 (2nd Dep't 2016) ("plaintiff further demonstrated that, exercising due care, she had looked in all directions to check for approaching vehicles before she entered the intersection"). Under these circumstances, and in accord with this Court's decision in Castiglione, the City presented ample evidence of Rodriguez's contributory negligence so as to preclude summary judgment.

POINT III

IF THIS COURT SHOULD ADOPT THE DISSENT'S VIEW, THEN STATUTORY INTEREST SHOULD NOT RUN FROM SUCH AN AWARD

On pages 50-51 of its brief, the City raises the significant issue of statutory interest in this context.

On page 20 of his reply, Rodriguez states that "[i]t would not be illogical for a defendant whose liability has been resolved to be subject to interest under CPLR 5002 before comparative negligence were tried, but it is unnecessary to resolve the issue here."

DANY respectfully submits that, should this Court reach this issue, then it would be more than just illogical for interest to accrue based on an incomplete award of summary judgment. Indeed, DANY submits that this would be inequitable.

Such an award would be an unwarranted boon for plaintiffs, especially given the low hurdle for a plaintiff's summary judgment motion proposed by the dissent. The statutory 9% interest rate should not be triggered where significant liability issues remain outstanding.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Jericho, New York
August 21, 2017

Respectfully submitted,

Heather Wiltshire Clement, Esq.
President of the Defense Association of New York, Inc.

Andrew Zajac, Esq.
Amicus Curiae Committee of the
Defense Association of New York, Inc.
c/o McGaw, Alventosa & Zajac
Two Jericho Plaza, Floor 2, Wing A
Jericho, New York 11753-1681
(516) 822-8900

By: Andrew Zajac
Andrew Zajac, Esq.

Of Counsel

Andrew Zajac, Esq.
Rona L. Platt, Esq.
Brendan T. Fitzpatrick, Esq.
Lisa L. Gokhulsingh, Esq.

CERTIFICATION PURSUANT TO §500.13(c)(1)

Court of Appeals

I hereby certify pursuant to §500.13(c)(1) that the foregoing brief was prepared on a computer.

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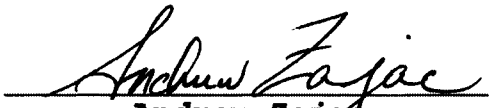

Andrew Zajac
McGaw, Alventosa & Zajac