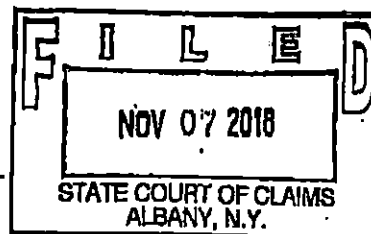


Decision and Order of Hon. Diane L. Fitzpatrick dated  
September 26, 2018



**STATE OF NEW YORK** **COURT OF CLAIMS**

**MICHAEL SABINE,**

**Claimant,**

**DECISION AND  
ORDER**

**-v-**

**STATE OF NEW YORK,**

**Claim No. 125759  
Motion No. M-92479**

**Defendant.**

**BEFORE: HON. DIANE L. FITZPATRICK**  
**Judge of the Court of Claims**

**APPEARANCES: For Claimant:**  
**KENNY & KENNY, PLLC**  
**By: Heidi M. P. Hysell, Esquire**

**For Defendant:**  
**BARBARA D. UNDERWOOD**  
**Attorney General of the State of New York**  
**By: Bonnie Gail Levy, Esquire**  
**Assistant Attorney General**

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Claimant brings a motion to renew from a motion Decision and Order of this Court dated November 8, 2017. Defendant opposes the motion.

Claimant previously moved for summary judgment pursuant to CPLR 3212 seeking summary judgment on the issue of liability and an order striking Defendant's first, second, fifth, and seventh affirmative defenses. The claim arose from personal injuries which Claimant sustained in a motor vehicle accident with a State vehicle operated by Linzy Patrick, an office manager at Seneca Lake State Park. On December 17, 2013, Claimant was driving a truck with a

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truck bed filled with hay traveling northbound on State Route 96A in the Town of Waterloo, County of Seneca. Ms. Patrick attempted to pass Claimant because of the distraction of hay blowing from Claimant's hay load. Upon switching lanes, Ms. Patrick lost control of her vehicle and it started to fishtail in the passing lane. The front of her vehicle struck the left guiderail and spun around to face a southerly direction. Her vehicle then occupied both lanes of travel, causing a collision with Claimant's vehicle. The Court denied the motion finding issues of fact existed as to Ms. Patrick's negligence and Claimant's comparative negligence. The claim was scheduled for trial for September 24 and 25, 2018. After conferencing the case with the Court, the trial has been adjourned until December 12 and 13, 2018, to allow time for this motion to be addressed.

CPLR 2221 (e) provides, in relevant part, that a motion for leave to renew must be identified as such, and demonstrate that there has been a change in the law that would change the prior determination.

Claimant, by this motion, argues that after this Court issued its Decision and Order dated November 8, 2017, the Court of Appeals in *Rodriguez v City of New York*, 31 NY3d 312, 324 [2018] held that a party bringing a partial summary judgment motion "does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." Since Claimant's comparative negligence is no longer an issue barring the granting of partial summary judgment for Defendant's negligence, Claimant argues that in light of this new case law, the Court should rehear the motion for summary judgment and grant judgment in favor of Claimant for Defendant's liability.

Defendant opposes the motion despite acknowledging that the change in the law no longer impedes the granting of partial summary judgment on the issue of Defendant's liability

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when Claimant's comparative negligence is in issue. Defendant argues that here the denial of Claimant's summary judgment motion was based not only upon the issue of comparative fault, but also on questions of fact involving Ms. Patrick's negligence. It is Defendant's position that as a result renewal should be denied, and the *Rodriguez* case does not warrant the Court altering its prior Decision and Order denying summary judgment to Claimant.

After reviewing the Claimant's submissions on this motion and the motion for summary judgment, as well as Defendant's opposition to both motions, and considering the *Rodriguez* case, the Court will grant Claimant's motion. After the *Rodriguez* case, this Court's Decision and Order denying summary judgment because of the issue of Claimant's comparative negligence is incorrect. To the extent that Defendant points to the Court's determination that there were also issues of fact surrounding Defendant's negligence, after further consideration this too needs correction.<sup>1</sup>

In re-reading the deposition testimony of Ms. Patrick, she acknowledges that on her ride back to the State Park from Trumansburg, the road had "more wet sludge" and was "slick and wet." The State Trooper who reported to the scene of the accident described the roadway as having snow/ice, and he attributed the accident in part to the slippery pavement. Despite these road conditions, Ms. Patrick accelerated to 50 miles per hour and attempted to pass Claimant's vehicle on a bridge less than 5 miles from her destination. The hay which was blowing off of Claimant's truck did not impair Ms. Patrick's ability to see the roadway, and nothing prevented

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<sup>1</sup> Although the time frame for reargument has passed the Court, in reviewing the papers on this motion, has determined that it will *sua sponte* reconsider its prior determination as to whether there is an issue of fact regarding Ms. Patrick's negligence since "every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action." (*Liss v Trans Auto Sys.*, 58 NY2d 15 [1986]; *Imanverdi v Popovici*, 109 AD3d 1179 [4th Dept 2013]).

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her from slowing down to increase the distance between her vehicle and the truck and blowing hay. She was not under any time constraints to return to work. Most persuasively, given the roadway conditions, Ms. Patrick acknowledged that passing on a bridge was "probably not so safe." The police report reflects that the State Trooper also attributed the accident to Ms. Patrick's unsafe lane change. Ms. Patrick admitted that she was charged with unsafe lane change<sup>2</sup> although she pled to another unidentified charge.

Vehicle and Traffic Law section 1128 (a) provides that:

"Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Ms. Patrick acknowledges that changing lanes to pass Claimant's vehicle on the bridge under the presenting road conditions was "probably not so safe", a violation of Vehicle and Traffic law section 1128 (a), and her plea to another charge in satisfaction of the charged violation for unsafe lane change establishes some evidence of negligence (*Smith v State of New York*, 72 AD3d 767 [3d Dept 2014]; *Freeley v St. Lawrence Univ.*, 13 AD3d 782, 783 [3d Dept 2004]). This evidence of negligence, coupled with Ms. Patrick's testimony about how the accident occurred and the police report, after further consideration, leads the Court to find that Claimant met his burden on the summary judgment motion. After the Court of Appeals decision in *Rodriguez*, Claimant's motion should be granted.

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<sup>2</sup> The police report does not indicate any traffic tickets were issued.

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Accordingly, based upon the foregoing Claimant's motion to renew is GRANTED, and after renewal Claimant's motion number M-90889 is GRANTED.

The Court will conference the case with counsel to determine whether the issue of damages will be heard on the December trial dates.

LET INTERLOCUTORY JUDGMENT be entered in favor of Claimant.

**Syracuse, New York  
September 26, 2018**

  
**DIANE L. FITZPATRICK**  
Judge of the Court of Claims

The Court has considered the following in deciding this motion:

- 1) Notice of Motion.
- 2) Affirmation of Heidi M. P. Hysell, Esquire, in support, with exhibits attached thereto.
- 3) Affirmation of Bonnie Gail Levy, Esquire, Assistant Attorney General, in opposition, with exhibits attached thereto.