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INSURERS AND DEFENDANTS TAKE NOTE: THERE HAS BEEN A MONUMENTAL CHANGE TO NEGLIGENCE LITIGATION IN NEW YORK

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Until April of this year, plaintiffs who moved for summary judgment on the issue of a defendant's liability in negligence cases in New York only succeeded if they were able to demonstrate an absence of comparative negligence. Put differently, summary judgment typically was reserved for clear-cut cases involving a defendant's sole liability, such as rear-end automobile accidents, where there was no indication of a plaintiff's comparative negligence.

All a defendant had to do to defeat a summary judgment motion by a plaintiff was to raise an issue of fact as to the plaintiff's comparative negligence. At trial, if a jury found the defendant negligent, the jury then would consider whether the plaintiff had been comparatively negligent and, if so, reduce the amount of damages awarded to the plaintiff accordingly.

A recent decision by New York's top court has now completely upended that practice. In *Rodriguez v. City of New York*, No. 32 (N.Y. April 3, 2018), the New York Court of Appeals ruled that plaintiffs moving for summary judgment on the issue of liability need not establish an absence of comparative fault. More importantly, the Court also ruled that defendants will not avoid a finding of negligence and liability as a matter of law simply by establishing questions of fact that could lead a jury to find that the plaintiff was also negligent.

As discussed below, the practical significance of this change for insurance companies and their insureds cannot be understated.

The Case

The *Rodriguez* case arose when Carlos Rodriguez, who was employed by the New York City Department of Sanitation as a garage utility worker, was injured while "outfitting" sanitation trucks with tire chains and plows to enable them to clear the streets of snow and ice.

Mr. Rodriguez filed a negligence action against New York City. After discovery, he moved for partial summary judgment on the issue of New York City's liability. In response, New York City opposed Mr. Rodriguez's motion and cross-moved for summary judgment in its favor.

The trial court denied both motions. In denying Mr. Rodriguez's motion, the trial court held that there were triable issues of fact regarding, among other things, his comparative negligence.

The appellate court affirmed the denial of Mr. Rodriguez's motion, holding that he was not entitled to partial summary judgment on the issue of liability because he failed to make a prima facie showing that he was free of negligence.

Mr. Rodriguez appealed to the Court of Appeals.

The Decision of the Court of Appeals

The Court of Appeals reversed.

In its decision, the Court said that whether a plaintiff had to demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability was a question of statutory construction involving various sections of the New York Civil Practice Law and Rules (CPLR), which governs civil litigation in New York courts.

In particular, the Court cited to CPLR 3212(b), which provides that a summary judgment motion "shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" and if there is "no defense to the cause of action." The Court also referenced CPLR 1411, the state's codified comparative negligence principles, which provides that "[i]n any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages" (emphasis added), and CPLR 1412, which provides that "[c]ulpable conduct claimed in diminution of damages, in accordance with [CPLR 1411], shall be an affirmative defense to be pleaded and proved by the party asserting the defense."

The Court reasoned that placing the burden on a plaintiff to show an absence of comparative fault was "inconsistent with the plain language of CPLR 1412" because it required that the plaintiff, rather than the defendant, "prove an absence of comparative fault" to make out a prima facie case on the issue of the defendant's liability.

As an example of the problems with that practice, the Court assumed a hypothetical case in which a defendant's negligence could be established as a matter of law because the defendant's conduct violated a statute but the plaintiff was denied partial summary judgment on the issue of the defendant's negligence because the plaintiff failed to establish the absence of his or her own comparative negligence. According to the Court, the jury then would be permitted to decide whether the defendant was negligent and whether the defendant's negligence had proximately caused the plaintiff's injuries. If the jury found that the defendant had not been negligent, the plaintiff would be barred from recovery even though the defendant's negligence had been established as a matter of law. The "windfall" to the defendant would violate Section 1411's mandate that a plaintiff's comparative negligence "shall not bar recovery" and should only go to the diminution of damages recoverable by the plaintiff, the Court said.

The Court emphasized that comparative negligence was not a defense to a negligence claim because it was not a defense to any element (duty, breach, and causation) of a plaintiff's prima facie cause of action for negligence. Comparative negligence, the Court added, only served to "diminish" the amount of damages, and should be pleaded and proven by the defendant.

Accordingly, the Court concluded that the CPLR did not require plaintiffs to show an absence of comparative fault in order to obtain partial summary judgment on the issue of a defendant's liability, and it reversed the appellate court's decision.

Implications of the Court of Appeals' Decision

Lower courts already have begun implementing *Rodriguez*. For example, in late May, the appellate court in the *Rodriguez* case itself granted summary judgment in Mr. Rodriguez's favor, finding that he made out a prima facie showing that New York City was negligent. *Rodriguez v. City of New York*, No. 16336-16337N (N.Y. App. Div., 1st Dep't May 22, 2018).

Indeed, within days of the Court of Appeals' decision in *Rodriguez*, trial courts began to rely on Rodriguez to enter summary judgment in favor of plaintiffs notwithstanding allegations of comparative negligence. See, e.g., *Heller v. Zumba*, No. 17 Civ. 598 (PAC) (S.D.N.Y. April 9, 2018) (rejecting defendants' contention that plaintiff had not established that he was free of comparative negligence, declaring that argument "now moot"); *Marseille v. National Freight Inc.*, No. 1:15-cv-7924 (ALC) (S.D.N.Y. April 30, 2018) (explaining that *Rodriguez* necessitates that plaintiff's motion be granted as to defendants' liability, without consideration of plaintiff's comparative fault).

An increase in trial courts granting summary judgment on liability in favor of plaintiffs is quite a game changer. For one thing, under New York law, plaintiffs who obtain summary judgment on the issue of liability will begin accruing pre-judgment interest at a rate of nine percent per annum on any future damages awarded by a jury. In those New York counties where parties can wait for long periods before trials can proceed, the accumulation of pre-judgment interest can be significant – and certainly can affect motion practice, pretrial settlement negotiations, jury selection, and trial.

Defendants opposing summary judgment motions now must recalibrate. No longer can defendants point to questions of fact with regard to the potential negligence of the plaintiff to argue that summary judgment is unwarranted. Rather, a defendant in any negligence case will have to establish one or more questions of fact that could be found by a jury to show the reasonableness of the defendant's actions, an absence of negligence on the defendant's part, or the potential for finding for the defendant on the issue of causation. It appears as though most, if not all, pre-*Rodriguez* New York case law on the issue of summary judgment will be of limited precedential value as the burdens and framework have been changed.

The Court's *Rodriguez* decision is now almost certain to unleash a tidal wave of summary judgment motions by plaintiffs' counsel in a wide variety of negligence cases, including auto accident cases where there is no question as to the right of way, pedestrian cases where the plaintiff was in the crosswalk, and trip and fall cases with a demonstrable defect and an establishment of actual or constructive notice. It also may be used in other cases, including those involving statutory negligence and per se negligence. In all of these instances, defendants will have to establish facts showing a non-negligent explanation for the events in question to be able to avoid summary judgment.

Moreover, it also can be expected that attorneys for plaintiffs will be making motions for summary judgment earlier in the course of their lawsuits than ever before in order to try to start the meter running at a potential nine percent pre-trial interest rate. This will have to be factored in to any settlement evaluations and negotiations and certainly will be used as a hammer by counsel and judges pushing settlement.

At trial, jury selection will take on a much different tone if there has been a finding of summary judgment in the plaintiff's favor, yet the jury still will be asked to decide whether the plaintiff also was negligent. Jurors might understandably wonder why the trial court did not decide that issue as well, and may assume that all liability must rest only as the court already had decided – that is, with the defendant or defendants. Defense counsel will need to be able to explain the new framework of trying only the plaintiff's comparative negligence, while not being able to provide a defense for their clients.

The bottom line is that defense counsel now must be prepared to oppose summary judgment motions with a new strategy, will have to expect the tenor and tone of jury selection and trials to change, and will need to make sure clients and carriers are aware of the very important practical implications of *Rodriguez*.

About the Author

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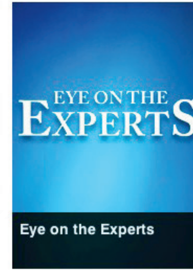

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