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COURT OF APPEALS

STATE OF NEW YORK

CARLOS RODRIGUEZ,

Appellant,

-against-

THE CITY OF NEW YORK,

Respondent.

NO. 32

20 Eagle Street
Albany, New York
February 14, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first matter on this afternoon's calendar is appeal
3 number 32, Rodriguez v. The City of New York.

4 Counsel?

5 MR. KELNER: Thank you. May it please the court.
6 My name is Joshua Kelner, and I represent the
7 plaintiff/appellant, Carlos Rodriguez.

8 May I reserve two minutes for rebuttal, Your
9 Honor?

10 CHIEF JUDGE DIFIORE: Of course, sir.

11 MR. KELNER: Thank you.

12 CHIEF JUDGE DIFIORE: You're welcome.

13 MR. KELNER: CPLR 3212 conditions a movant's
14 entitlement to summary judgment on whether they've shown
15 that judgment should be directed on their behalf. For a
16 personal injury plaintiff, this requires a showing of two
17 things: first, that the defendant was negligent, and
18 second, that this negligence proximately caused the
19 accident.

20 JUDGE STEIN: Why isn't - - -

21 JUDGE FEINMAN: Was a proximate cause, right, not
22 the proximate cause, right?

23 MR. KELNER: Yes, of course, Judge Feinman. And
24 when we say proximate cause, we always mean a substantial
25 factor.



1 JUDGE FEINMAN: Okay.

2 JUDGE STEIN: Why isn't the plaintiff required to
3 show the absence of a defense as a - - - to the claim as a
4 matter of law? Isn't that what the case law says?

5 MR. KELNER: Well, I think it depends on the type
6 of defense, Judge Stein. There are certain types of
7 defenses that defeat the plaintiff's entitlement to
8 judgement.

9 JUDGE STEIN: But where - - - where does it say
10 that?

11 MR. KELNER: Well, what it says in - - - it's in
12 CPLR 3212(b), is that they have to show that there is no
13 defense to the cause of action. So for example, the
14 emergency doctrine might be a defense to the cause of
15 action. It negates the idea that the defendant was
16 negligent. But here we're talking about comparative fault.
17 That doesn't go to any element of a cause of action, and it
18 doesn't negate the entitlement to judgment because that's
19 the ultimate touchstone of whether you get summary
20 judgment.

21 JUDGE FEINMAN: Specifically, it's not a bar to
22 recovery.

23 MR. KELNER: Yes. It's not - - -

24 JUDGE FEINMAN: So - - -

25 MR. KELNER: I'm sorry.



1 JUDGE FEINMAN: I want to understand,
2 practically, how you imagine this working. So the court
3 grants partial summary judgment, like it does perhaps in a
4 labor law case, and then does what? Does it give out a
5 special verdict form that says - - - that has the box is
6 already checked "yes", "yes" on the - - - the first two
7 questions about the defendant's negligence, and then go
8 from there, or how - - - how is this, practically, going to
9 be implemented?

10 MR. KELNER: It would work exactly the way that
11 Justice Acosta anticipated in his dissent in this case,
12 that the court is, in effect, directing a verdict on the
13 first two questions on any verdict sheet: was the
14 defendant negligent? And was that negligence a - - -

15 JUDGE FEINMAN: Substantial factor.

16 MR. KELNER: - - - substantial factor?

17 JUDGE STEIN: What does that achieve? I mean,
18 because, either way, the parties are going to be allowed to
19 and - - - and certainly have an incentive to lay out the -
20 - - at least the degree of fault of each other. And so
21 what - - - what is really the purpose of granting partial
22 summary judgment under these circumstances?

23 MR. KELNER: I'd say three things, Your Honor.
24 First, what it does is it effectuates the plain language of
25 the CPLR which anticipates that summary judgment is granted



1 under the circumstances enumerated.

2 Second, it realizes the purpose that underlies
3 summary judgment, which is that when a party opposing a
4 motion for summary judgment, given the opportunity to lay
5 bare its proof, can't raise an issue of fact, it shouldn't
6 go to a jury.

7 And third, what it's going to do is it's going to
8 streamline the nature of the dispute, avoid the possibility
9 for trials for show where, if the jury comes out the wrong
10 way, a verdict to the contrary would need to be directed.
11 And it's going to contribute to the likelihood for
12 settlement, because it's going to simplify the dispute, let
13 the parties know what issues actually are in dispute and
14 should be before the jury.

15 JUDGE STEIN: So what you're saying is is that
16 after hearing all the proof, that once this direction is
17 given, this ruling is given, that they cannot find that the
18 plaintiff was the sole proximate cause.

19 MR. KELNER: Yes, absolutely, it's part of our
20 position, and it's in the CPLR that to show that we're
21 entitled to judgment - - -

22 JUDGE STEIN: So - - -

23 MR. KELNER: - - - we have to show - - - I'm
24 sorry.

25 JUDGE STEIN: I'm sorry. So what - - - so how



1 would that play out on summary judgment? Okay. So the
2 issue of plaintiff's sole proximate cause; are you saying
3 then that the defendant has to show, as a matter of law,
4 that the plaintiff is the sole proximate cause - - -

5 MR. KELNER: Well, the - - -

6 JUDGE STEIN: - - - in order to defeat this
7 partial summary judgment motion on the part of the
8 plaintiff? That's - - - that's the part I don't really
9 understand.

10 MR. KELNER: Well, the plaintiff has to show that
11 the defendant was negligent and that the negligence was a
12 proximate cause. So to negate the - - -

13 JUDGE STEIN: And so how do we get to the sole
14 proximate cause?

15 MR. KELNER: Right, to negate the idea that the
16 defendant was a proximate cause, they'd have to show that
17 the plaintiff was the sole proximate cause, and that's a
18 boundary that this court - - -

19 JUDGE FEINMAN: Or at least that there's a
20 question of fact as to whether he's the sole proximate
21 cause - - -

22 MR. KELNER: Yes.

23 JUDGE FEINMAN: - - - or she's the sole proximate
24 cause.

25 MR. KELNER: Yes.



1 JUDGE STEIN: But - - - but - - -

2 MR. KELNER: And just note, if I might, I would
3 say that that's a boundary that this court routinely
4 enforces in labor law cases where it says: was the
5 plaintiff, by his violations, the sole proximate cause of
6 an accident. So it's been a manageable line to draw.

7 JUDGE FAHEY: But isn't this taking it - - -
8 isn't the majority's opinion taking this to a - - - a place
9 that they say is dictated by the decision in Thoma?

10 MR. KELNER: It's what they said, Your Honor, but
11 I don't believe it's the best reading of Thoma. There's
12 nothing in - - -

13 JUDGE FAHEY: But let's leave that aside for a
14 second. Let's just agree on what the majority is saying
15 here, because it seems to me that they're creating a double
16 burden for a plaintiff in a summary judgment action in a
17 negligence case. They're saying not only must you show
18 that the defendant was negligent and his negligence was the
19 proximate cause of the accident, but you must show that you
20 are free from any negligence in order to obtain summary
21 judgment against your opponent. So your burden isn't just
22 to prove that you - - - that this person over here was at
23 fault, but you must also prove that you're entirely free
24 from fault. And that doesn't seem to have any
25 justification in the statute.



1 MR. KELNER: It has no justification in the
2 statute. It - - -

3 JUDGE FAHEY: And it also represents a
4 significant change in the burden-shifting regimen that we
5 apply to any other party. And I don't say this just as to
6 plaintiffs; the same would apply to a defendant. It seems
7 to be a remarkable change. And why do you think that their
8 reading of Thoma in the majority is incorrect?

9 MR. KELNER: I would say that, first of all, as
10 Your Honor said, the first principal is in the statute and
11 in the standard this court has always used for summary
12 judgment.

13 JUDGE FAHEY: Um-hum.

14 MR. KELNER: So Thoma is incorrect, to whatever
15 extent it's taken - - - or they're reading it as to
16 whatever extent it's taken to ignore the statute or largely
17 to resurrect contributory negligence.

18 JUDGE FAHEY: Um-hum.

19 MR. KELNER: As to Thoma itself, and what we
20 think the best reading of it is, there's nothing in Thoma,
21 either in the briefing or in the decision itself, that
22 tells us that it was intended to represent a major
23 procedural rule. The court didn't cite any case law, it
24 didn't cite any - - -

25 JUDGE FEINMAN: It's a short memorandum. So - -



1 - so the question, I guess, in my mind is do you think we
2 actually have to explicitly overrule Thoma to rule in your
3 favor, or you know, how would you address it?

4 MR. KELNER: I'd address it the same way that
5 Justice Acosta did which is he said that it raised - - - it
6 directed itself to the issues the parties raised. And
7 that's just intrinsic in the adversarial process. Courts
8 don't go through fact patterns and issue spot. What they
9 do is they address themselves to issues the parties have
10 brought to the court's attention.

11 JUDGE FEINMAN: I want to actually take you back
12 a step to whether or not you think that these writings from
13 the - - - both sides of the Appellate Division are assuming
14 that in fact there has been a prima facie case made by the
15 plaintiff of negligence and that it was a substantial
16 factor. Is that a - - - in other words, is liability being
17 assumed by both sides? And if not, how did you make out
18 your prima facie case?

19 MR. KELNER: I think the City did dispute the
20 issues of liability in the court below, but I don't know
21 that there's any triable issue of fact on it. Mr.
22 Rodriguez was in a sanitation parking lot, and his two
23 coworkers lost control of the - - -

24 JUDGE FEINMAN: I'm familiar with the facts, but
25 I just - - - you know, do you think that the - - - all the



1 - - - whether it's the Supreme Court and the Appellate
2 Division have assumed liability and just, you know,
3 disputing whether or not the plaintiff has to sort of
4 establish their absence of their own negligence or - - -
5 that's what I'm trying to get at. I mean, I understand how
6 you think - - -

7 MR. KELNER: I don't think they've assumed
8 liability. I think they found that there's no issue of
9 fact on it. Obviously they found the Appellate Division
10 did, and the trial judge at least presumed that there was
11 some showing of comparative negligence. We don't think
12 there is any, but there's certainly no issue of fact as to
13 the City's negligence or whether hitting a parked car was
14 the proximate cause of the plaintiff's injuries.

15 JUDGE FEINMAN: Okay. So we don't need to get
16 into whether or not there was a violation of the VTL, that
17 is, either per se negligence, and we don't need to get into
18 what role the violation of the sanitation's own internal
19 rules and regulations, none of that is something that we
20 need to concern ourselves with?

21 MR. KELNER: I don't think it's necessary to the
22 case. The VTL is one way that the court could find that
23 the City was negligent. Another is just to say that they
24 lost control of their truck due a weather - - - due to a
25 weather condition they all knew existed. So no, I don't



1 know that the court has to get into VTL issues. But the
2 City clearly was negligent, and that's something that's
3 true as a matter of the common law as well.

4 CHIEF JUDGE DIFIORE: Thank you, Mr. Kelner.

5 MR. KELNER: Thank you, Your Honor.

6 CHIEF JUDGE DIFIORE: Counsel?

7 MR. DEARING: Thank you, Your Honor. May it
8 please the court. I'm Richard Dearing for the City.

9 Just to touch very briefly on - - - on your
10 point. Actually, both courts below found questions of fact
11 on the City's liability in addition to the plaintiff's
12 comparative fault. The Supreme Court said a question of
13 fact as to foreseeability and proximate cause. The First
14 Department said - - -

15 JUDGE FEINMAN: But if that's true then why are
16 they even getting to the second point?

17 MR. DEARING: I think that was a - - - that was
18 the second supporting ground. But - - - but honestly, this
19 court could affirm entirely on that first ground.

20 JUDGE RIVERA: Isn't - - - that's an alternative
21 ground.

22 MR. DEARING: It is, an alternative independent
23 ground. And I'll - - - I'll try to touch on that a little
24 bit later. I'd first like to go into, a little bit, the
25 broader question of - - - of the burden at summary - - -



1 summary judgment.

2 I think the key question is - - - the
3 practicality question is a key one. This is partial
4 summary judgment. I think that's something very important
5 to understand. This is not a pure 3212(b) summary
6 judgment, case is over. Everybody knows that this is
7 partial summary judgment. There's going to be a trial.
8 This we all know. And - - -

9 JUDGE STEIN: Is that discretionary on the
10 court's part to - - -

11 MR. DEARING: It is. 3212(e) makes - - - it
12 explicitly says "may". I mean, that's the key language,
13 not "shall"; that's 3212(b). 3212(e) says "may". It says
14 further "when warranted", and it ends with the clause "on
15 such terms as may be just". And those are all three very
16 important textual elements of 3312(e) when you're talking
17 about partial summary judgment.

18 JUDGE FEINMAN: So let me give you this
19 hypothetical. You have a plaintiff who's in the back of a
20 cab. Let's take it out of the facts of this case, all
21 right? And that plaintiff is in the back of a cab and gets
22 rear-ended, all right? And maybe that plaintiff isn't
23 wearing his or her seatbelt or has done something else that
24 is, arguably, comparatively negligent or goes to the
25 mitigation of damages. Why isn't that plaintiff entitled



1 to partial summary judgment against the defendant, even if
2 that defendant is going to then try to get contribution
3 from the - - -

4 MR. DEARING: Understood.

5 JUDGE FEINMAN: - - - the driver of the front
6 vehicle?

7 MR. DEARING: I mean, I think the key is did the
8 - - - did that plaintiff do something that's arguably
9 negligent. In many - - - in many such circumstances the
10 plaintiff will not have, and that case will be buttoned up,
11 from that standpoint, at summary judgment. I think if the
12 plaintiff did and we're in - - - we're in this - - -

13 JUDGE FEINMAN: So wait a minute. So if that's -
14 - - so under the scheme, it is possible, then, to give that
15 plaintiff partial summary judgment?

16 MR. DEARING: Partial summary judgment on
17 liability in - - - in the scenario where the plaintiff has
18 no comparative negligence, then it would go to damages.
19 And we - - - we don't - - - we acknowledge, obviously, as
20 we must, that - - -

21 JUDGE FAHEY: But what - - - so they weren't
22 wearing their seatbelt, so they were negligent, why can't
23 they get - - -

24 MR. DEARING: I - - -

25 JUDGE FAHEY: Let me just finish the thought.



1 MR. DEARING: Sure.

2 JUDGE FAHEY: Why can't they get judgment against
3 one party, and then the other party, the defense, they say,
4 well, you were negligent too, then fine, bring your own
5 motion?

6 MR. DEARING: Well, I think the key question - -
7 - if - - - if the plaintiff has - - - if there's an issue
8 of fact on contributory negligence, the real key question
9 to ask is what role is partial summary judgment playing?

10 JUDGE FAHEY: Well, there's no contrib - - - I'm
11 sure you - - -

12 MR. DEARING: Well, if there's not, if there's
13 not.

14 JUDGE FAHEY: Let me finish. There's no control
15 on - - - if there is no contributory negligence anymore.
16 We're in a - - -

17 MR. DEARING: Fair enough.

18 JUDGE FAHEY: Okay. So let's - - -

19 MR. DEARING: If there's comparative, right? If
20 there's comparative, we're - - - we're talking about
21 partial summary judgment, and the key question is what role
22 is that meant to play. And - - - and here's really the
23 role of partial summary - - - it's not just a - - - a back
24 and forth on papers and something you do. You do it for a
25 reason, and the reason it's done is to narrow the scope of



1 what's presented at the trial. That is the - - -

2 JUDGE FAHEY: I don't know if that's cited. You
3 know, I would like to assume that there are motives that
4 are devoid of financial motives, but it seems to me a
5 negligence case is quite often it's done to fix the data on
6 which interest will begin to run. Let's assume it's that.
7 Let's assume there's a financial motivation for it. It
8 doesn't make it wrong. It doesn't make it improper. It
9 doesn't, certainly, make it illegal or unethical in any
10 way. They just say I want an earlier date to have my
11 interest run because I think I'm going to win because
12 you're so clearly negligent.

13 MR. DEARING: That's not - - - I would say that's
14 putting the cart before the horse in that - - -

15 JUDGE FAHEY: But - - - but - - -

16 MR. DEARING: - - - that's not what drives - - -

17 JUDGE FAHEY: - - - it's a common - - - it's a
18 common motivation, I would say.

19 MR. DEARING: It may be a motivation, but it's
20 not what drives, from the standpoint of the - - - of the -
21 - - the way the court system is set up, it's not what
22 drives whether someone gets summary judgment or not. And -
23 - -

24 JUDGE FAHEY: That's correct.

25 MR. DEARING: And what - - - what drives that is,



1 when it's partial summary judgment - - - and there's cases,
2 many cases that hold this, that - - - that you look for a
3 substantial narrowing of the scope of what's going to be
4 presented at trial. And in fact, actually there are
5 several cases from all four departments of the Appellate
6 Division that say even when - - -

7 JUDGE RIVERA: But isn't it also to focus what
8 the jury is going to look at? So if - - - if you're taking
9 away from the jury the opportunity to make a decision,
10 because that's already been made, that the City is not at
11 all negligent, right, that's been taken off the table, that
12 you had some negligence, you're now focusing the jury.
13 You're correct to the extent that perhaps both sides are
14 presenting the same evidence or overlapping evidence that
15 would have been necessary on summary judgment. But now
16 you've focused the jury on the particular issues you want
17 them to decide. As Judge Feinman was saying before, you've
18 got your list of questions; they're not getting to the
19 first two. You're moving on from there.

20 MR. DEARING: Well, I - - - I don't think you're
21 going to - - - I don't think you're really going to
22 meaningfully focus the jury at all. And I think the - - -
23 the most succinct statement of this is actually from the
24 Third Department 1984 - - -

25 JUDGE RIVERA: Why is that? They're not going to



1 discuss whether or not you're negligent.

2 MR. DEARING: Well, they're going to have - - -

3 JUDGE RIVERA: They're just going to discuss by
4 how much.

5 MR. DEARING: Well, I - - - I think that those
6 questions - - -

7 JUDGE RIVERA: They're not going to be at zero.

8 MR. DEARING: That's fair, but - - - but to the
9 extent it focuses, it focuses at one percent out of a
10 hundred percent. It's - - - it's a - - - that's a minor -
11 - - a minor marginal focus.

12 JUDGE FAHEY: But see, that - - - is that really
13 - - - is that really correct, because to follow up on Judge
14 Rivera's point, what it does is it says we have this series
15 of questions that the jury has to be asked: negligence,
16 proximate cause, damages, what form the damages take. It -
17 - - it - - - I've probably done a hundred automobile
18 accidents, and it's always been the same form. And
19 usually, in these things, the fewer cases that - - - that
20 you have - - - the fewer questions, I'm sorry, that you
21 have to put to the jury, the easier it is for everybody as
22 they move forward.

23 So from a - - - from a court point of view, you -
24 - - the questions that are clearly decided, we don't need
25 to put those to the jury because sometimes they get them



1 wrong even though - - - and then we've got a big mess on
2 our hands. And it's - - - it's more efficient, in terms of
3 the - - - as you proceed forward in trial. So - - - so
4 there is a practical point of view for doing that. It does
5 narrow the issues. That's a legitimate and a very common
6 summary judgment method. People sue, and they'll have
7 seven or eight causes of action; in point of fact only one
8 or two may be legitimate. You get rid of them. And that -
9 - - that's what this is, on the one hand. And there are
10 real world practical reasons to do it, but those - - -
11 those reasons are always there, aren't they?

12 I'd like you to really focus on the majority's
13 decision in what I refer to as a double burden being
14 created on the moving party for summary judgment to not
15 just prove that the person you're moving against is
16 negligent but proving their own negli - - - that they are
17 negligent-free.

18 MR. DEARING: Sure.

19 JUDGE FAHEY: That's what they seem to be saying
20 in the majority.

21 MR. DEARING: I don't think it's a double burden.
22 It is - - - it follows from the CPLR when it says you must
23 show that there is not only the elements of your cause of
24 action but that there is no defense to the cause of action
25 or that the defense has no merit. And - - -



1 JUDGE FAHEY: Well, the - - - when they say no
2 defense, they mean affirmative defenses, don't they?

3 MR. DEARING: They mean affirmative - - - any
4 defense; that's what - - - no defense means no defense.
5 That - - - that's the literal language of the statute.

6 I think, truly, if the whole - - - sole concern
7 is how the jury is instructed, in truth, that could be
8 decided when the jury is instructed. The - - - the real
9 function of partial summary judgment is to narrow the scope
10 of the proof at trial.

11 And if I could just get to what the Third
12 Department said, this is 1984, clearly a court that is
13 grappling with the change to comparative negligence. And -
14 - - and I think they put it as well as it could be put
15 there in denying partial summary judgment to a plaintiff on
16 precisely this ground. "Granting plaintiffs' motions would
17 be illusory and spare neither the court's nor the
18 litigants' time and effort." This is the E.B. Metal's
19 case, by the way. "The issue of plaintiffs' comparative
20 negligence would still need to be resolved, which
21 resolution would require a comparison of the parties'
22 culpable conduct, thereby necessitating a trial examination
23 of the nature and extent of the defendant's alleged breach"
24 - - -

25 JUDGE STEIN: I think you may have already



1 answered the question, but I just want to be sure I
2 understand. Are you saying that the - - - in this case the
3 plaintiff must disprove her own negligence or his own
4 negligence as the initial burden on summary judgment? Or
5 are you saying that once they prove the defendant's
6 negligence then the burden shifts back to you and you can
7 show a question of fact as to the plaintiff's negligence?

8 MR. DEARING: I think the way - - - I think under
9 either - - - either version we would win this appeal. I
10 mean, I - - - I think that the - - - that the standard
11 summary judgment law in New York is that the moving party -
12 - - party bears the burden at summary judgment, even on
13 elements or defenses that they would not bear the burden on
14 at trial. So that is - - - that is the - - - that is laid
15 out very clearly in the Yun Tung Chow case, Judge Smith's
16 concurrence there that explains how New York - - - New York
17 practice works in that regard.

18 JUDGE WILSON: Could you spend a second
19 identifying the issues that, in your view, bar the
20 plaintiff from getting summary judgment, the triable
21 issues?

22 MR. DEARING: Yes. I think there are two. And
23 I'll start with comparative negligence, but I - - - I'd
24 also like to touch on the City's negligence because I think
25 that's an independent - - -



1 JUDGE WILSON: Do you mind starting the other
2 way?

3 MR. DEARING: Absolutely. I'll start the other
4 way. I think this case could - - - should well go to a
5 jury on the City's negligence proximate cause but it needs
6 to go to a jury, and the reason is two major reasons. One
7 are the conditions that - - - that everybody agrees were
8 present. The - - - the plaintiff himself says there's
9 patches of ice and no ice on this - - - on this surface
10 that the - - - that the truck had to be backed over. It
11 was snowing, it had snowed a lot that month. They'd been
12 ordered by supervisors, on a rushed basis, to get ten
13 trucks outfitted with chains and plows to go out on the
14 City's streets and keep them safe. And what that means, in
15 part, importantly, is that this truck doesn't have chains
16 on it at the time, when it's navigating this surface, a
17 seventy-five-foot-long, twenty-ton garbage truck. That's
18 the conditions. That - - - that is - - - this is not a
19 case where you just have a party backing a vehicle into
20 another parked vehicle. Both the nature of the vehicle and
21 the conditions makes it very different.

22 The second question that raises on the City's
23 negligence issue is what - - - were reasonable precautions
24 taken. That's the standard, not - - - not anything beyond
25 that. Not did they do - - - did they pay the highest



1 degree of attention that was the safety agent's analysis.
2 That's not the question. It's was - - - were reasonable
3 precautions taken. What we know, there was a guide person
4 to help the person back up. That we know.

5 JUDGE FEINMAN: Well, didn't that person stand in
6 the wrong place?

7 MR. DEARING: That's disputed. That's disputed.
8 And - - - and there's also no law that says, as a matter of
9 law, that the guide person needs to be on one side or
10 another, as the matter of reasonable precautions. There
11 were practices - - -

12 JUDGE FEINMAN: No, but your own regulations do?

13 MR. DEARING: But that's not dispositive on - - -
14 on negligence.

15 JUDGE FEINMAN: I understand - - -

16 MR. DEARING: This court has said that many
17 times. And remember, we're not - - - we're not talking
18 about whether Mr. Kelner might not have a powerful argument
19 to the jury at trial to that effect. The question - - -
20 the question is does it go to a jury, and I think it
21 clearly does. And the safety regulations would not take it
22 out from the jury. So - - -

23 JUDGE FAHEY: Judge, would it be all right?

24 CHIEF JUDGE DIFIORE: Yes, of course.

25 JUDGE FAHEY: Just one more, if that's okay.



1 Listen, 14 - - - we're talking about 1412 in the
2 CPLR. We're talking about culpable conduct, and that's the
3 defense we're talking about here, right?

4 MR. DEARING: Sure.

5 JUDGE FAHEY: All right. And in 1411 it says:
6 "culpable conduct shall be an affirmative defense to be
7 pleaded and proved by the party asserting the defense", not
8 the plaintiff. The plaintiff isn't asserting a defense to
9 their own culpable conduct. That's not what the statute
10 says. Did you bring a motion on the plaintiff's culpable
11 conduct asking for summary judgment against the plaintiff?

12 MR. DEARING: Not on that basis. We did bring a
13 motion, but not on that basis. We did - - - that - - -

14 JUDGE FAHEY: No, let me just - - - let's just
15 stick with the statute for a second, all right? So you
16 didn't bring the motion, yet you want them to provide an
17 affirmative defense that the statute sets out that you have
18 to assert. You want them to answer the question on
19 culpable conduct when you haven't brought the motion on
20 culpable conduct. That's an affirmative defense that has
21 to be asserted by the defendant, not by the plaintiff.

22 MR. DEARING: Well, we - - - we did raise the
23 defense in our answer, which is the obligation we had at
24 that point. The - - - the - - -

25 JUDGE FAHEY: No, I understand that.



1 JUDGE STEIN: You do agree that it's your
2 obligation to - - -

3 JUDGE FAHEY: You didn't do it in summary
4 judgment.

5 JUDGE STEIN: - - - prove that at trial, right?

6 MR. DEARING: Trial, yes.

7 JUDGE STEIN: And - - -

8 MR. DEARING: That 1412 or - - - makes it our
9 burden at trial, but in - - - in New York, the movant bears
10 the burden on all of those elements, including affirmative
11 defense.

12 I'd like, if I could, to finish my answer to - -
13 - to your question about negligence, which are the
14 precautions that are relevant, not just the presence of a
15 guide person. Everyone admits he was drive - - - driving
16 exceptionally slow. That's the words of the plaintiff,
17 that the - - - that the - - - it was driving exceptionally
18 slow on this terrain, that the truck of course was beeping,
19 it has a huge white bright light that is engaged when it's
20 - - - when it's in reverse. So the question whether
21 reasonable precautions were taken is a question that a jury
22 would need to decide. It may be that there's - - - the
23 plaintiff has a strong case before the jury, but it's not
24 the kind of case you see where there's negligence as a
25 matter of law. And I'd refer the court - - -



1 JUDGE RIVERA: Let me ask you counsel; I just
2 want to go back to an earlier point you made about the - -
3 - the City's negligence, what you're talking about, as an
4 alternative ground to affirm. Are you suggesting we don't
5 have to reach this question?

6 MR. DEARING: I think that's right; you don't
7 have to reach it.

8 JUDGE RIVERA: Okay. But if there is a trial,
9 don't we have to reach the question so that the - - - the
10 parties know what are the questions being posed to the
11 jury?

12 MR. DEARING: Well, I don't think you'd - - -
13 you're saying you don't have to reach which question? You
14 don't have to reach the question of whether comparative
15 negligence, on its own, would defeat summary judgment,
16 because in any case there are questions of fact - - -

17 JUDGE RIVERA: Because that - - -

18 MR. DEARING: - - - as to defendant's negligence
19 and - - - and proximate cause as to the defendants, and
20 that means it's clear that all four of those questions
21 should be presented to the jury at trial.

22 The - - - the only thing I'd like to say, lastly,
23 is that the question - - - and the question of how a jury
24 should be instructed is always a question that can be
25 answered when the jury needs to be instructed. Partial

1 summary judgment is really and mainly about narrowing the
 2 proof that needs to be made at trial. And for the reasons
 3 identified in the E.B. Metals case and many others, that a
 4 partial summary judgment of this nature, where - - - where
 5 comparative negligence is outstanding, would not do that.
 6 And the reason is that - - - that both parties are going to
 7 need to - - - and if I could just quote from the pattern
 8 jury instruction, which I think makes this succinctly and
 9 nicely.

10 This is what the PJI says when you're about to -
 11 - - as a jury is about to assess the issue of comparative
 12 negligence: "Weighing all of the facts and circumstances,
 13 you must consider the total fault, that is, the fault of
 14 both the plaintiff and defendant." You must weigh all the
 15 facts and circumstances. They must be all presented to the
 16 jury. The jury must be given guidance about how to weigh
 17 those, meaning guidance about the standard of care and the
 18 standard of proximate cause as to both parties.

19 JUDGE FEINMAN: But the problem ultimately
 20 becomes now what happens if they - - - in a case where
 21 there's clearly negligence by the defendant, if we adopt
 22 your approach, they now put a zero for the defendant.

23 MR. DEARING: That - - - that is the posited
 24 concern of the dissent. They've identified no case where
 25 that's actually ever happened. I mean, this has been the



1 prevailing rule in the Second and Third Departments, and
2 more than half of the decisions in the First Department,
3 three decisions of this court. No one's identified a case
4 where that's happened. If it ever did happen - - -

5 JUDGE RIVERA: But isn't that also what the
6 majority says, that it's possible at trial?

7 MR. DEARING: It did because there's a - - -

8 JUDGE RIVERA: So both sides in that decision
9 think that this is a possibility.

10 MR. DEARING: I - - - I think that's right, but
11 for a different reason. And the - - - well, the majority
12 thinks it's possible because the majority, I would submit,
13 does not find - - - finds a fact question on the - - - on
14 the City's prox - - - on proximate cause as to the City,
15 which I think was correct and is an independent ground for
16 resolving this case.

17 I just say, firstly, if that ever happened, that
18 could be resolved by - - - it could be addressed then. It
19 could be - - - that verdict could be set aside, and the
20 case would have to be retried. As far as I know, it's
21 never happened. I don't think it's a good basis to flip a
22 rule and - - - and change the way this is done in every
23 case because of one scenario that's never happened.

24 JUDGE RIVERA: If I can just push you on that one
25 point you made. It'll be my last question.



1 Chief, my apologies.

2 Where - - - your reading of 3212(b) that says "no
3 defense", right? But it says "no defense to the cause of
4 action", which you've already, I thought, conceded that
5 it's not a defense to the cause of action, right?

6 MR. DEARING: I - - - I would describe it as - -
7 - as a defense to the cause of action.

8 JUDGE RIVERA: About how to mitigate how much you
9 might have to pay, but it's not a defense in the sense of
10 saying you're not going to be liable.

11 MR. DEARING: It is not a complete bar, but it is
12 a defense that goes to - - - properly seen, goes to
13 liability. And honestly, the - - - the dissent in the
14 First Department acknowledged that saying that if this goes
15 back down, comparative negligence will not be resolved at a
16 trial on damages; it'll be resolved at a trial on
17 liability. It's a defense that goes to liability, not to
18 damages, although it is not a complete bar.

19 And you can see that through a few - - - you
20 know, a few ways. The - - - the basic question is who
21 bears legal responsibility for this - - - for these - - -
22 this harm, not what is the quantum of harm that resulted.
23 It's who bears legal responsibility. It turns on questions
24 of culpable conduct and proximate cause, and as a result,
25 it's better seen as a defense going to the cause of action.



1 In any case, this is not a 3212(b) motion,
2 purely; it's a motion for partial summary judgment under
3 3212(e), and therefore really needs to be resolved under
4 the practical considerations that drive partial summary
5 judgment under the cases we've cited, both about
6 comparative negligence and about partial summary judgment
7 more generally. Thank you.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 Mr. Kelner?

10 MR. KELNER: Thank you, Your Honor. May I ask
11 the court for a little bit of additional time, just given
12 that this argument perhaps has covered - - - it's gone into
13 overtime?

14 CHIEF JUDGE DIFIORE: Let's see how it goes.

15 MR. KELNER: Thank you, Your Honor.

16 If I might, I want to come back to where Judge
17 Rivera ended the last argument. CPLR 3212(b) it says that
18 they have to show that there is no defense to the cause of
19 action. And defense counsel didn't say that comparative
20 negligence is a defense to a cause of action. That's
21 something that's established by CPLR 1411 and 12.

22 JUDGE STEIN: What is - - - what would you call
23 it?

24 MR. KELNER: It's a defense that operates in
25 diminution of damages. That's how it's defined by Article



1 14-A. And it actually sounds - - -

2 JUDGE STEIN: It goes - - - it goes to the
3 relative liability of the parties, doesn't it?

4 MR. KELNER: It goes to an apportionment between
5 the parties, but it doesn't go to any element of the cause
6 of action, and it doesn't defeat an entitlement to
7 judgment. And so when we look at the wording of (b), the
8 ultimate burden for movement on summary judgment is to show
9 that judgment should be directed on their behalf as a
10 matter of law. And comparative - - -

11 JUDGE FEINMAN: Well, what about his argument
12 that it's (e), 3212(e) not (b) that we should be looking
13 at?

14 MR. KELNER: I think it's under (b) because what
15 we're really looking for is whether the plaintiff has met
16 the elements that go into establishing that they're
17 entitled to judgment. And for - - -

18 JUDGE STEIN: So partial - - - so then what is
19 your definition of - - - when does (e) apply then? Only
20 when, what, you have separate causes of action; is that the
21 only time?

22 MR. KELNER: I think (e) applies in a couple of
23 cases. It discusses some of them. It says that summary
24 judgment can go to nonmovants. It says that courts can
25 resolve parts of causes of action. It says that, for



1 example, if I have a 240 - - -

2 JUDGE STEIN: Isn't this part of a cause - - -

3 MR. KELNER: - - - and a 241(6).

4 JUDGE STEIN: Isn't this part of a cause of
5 action?

6 MR. KELNER: No, because the element of a cause
7 of action are duty, breach, causation, and those are the
8 issues that are bound up in the summary judgment motion.
9 They had a duty of care. They breached the duty of care -
10 - - and I'll talk about the facts in a moment, if I could -
11 - -

12 JUDGE STEIN: So you read - - -

13 MR. KELNER: - - - and causation.

14 JUDGE STEIN: You read subdivision (e) as - - -
15 as being exclusive to those situations?

16 MR. KELNER: I think subdivision (e) touches on
17 other issues. So for example, it would let a court, say,
18 if the defendant was negligent, as a matter of law, without
19 resolving causation. But a problem with the City's
20 position is that they don't even acknowledge (e). What
21 they say is that a court can't even follow (e) and resolve
22 negligence on behalf of the plaintiff if they don't rule
23 out comparative negligence. And that's also against the
24 wording of the statute because it says that it applies
25 except in certain kinds of matrimonial circumstances.



1 So they're not only ignoring (b) as it relates to
2 this case, because we've shown that we'll be entitled to
3 judgment against the City; they're ignoring (e) as well
4 because they're saying that courts don't even have
5 discretion or the opportunity to say that the City is
6 negligent as a matter of law. And that's how far their
7 position is divorced from the plain wording of the statute,
8 and that's where the framework should be applied, and it's
9 where the case should end as far as the legal framework.

10 I also do want to talk about the conditions and
11 the facts of the City's negligence here. Counsel talked
12 about some of the things that may have complicated
13 circumstances for the City. But they get very far divorced
14 from what the duty of care of a motor vehicle operator is,
15 and that's to maintain control of your vehicle under
16 whatever the conditions are.

17 They knew it was icy in the parking lot. They
18 knew that there was ice on the - - - the driveway. They'd
19 already put four trucks into the garage without issue. And
20 neither Mr. Ramos nor Mr. Carter said that this was
21 something that was caused by the weather. Ramos said it
22 was caused because he slammed on his brakes too hard on the
23 ice and he couldn't get control of the truck back. And
24 Carter says it was because Ramos ignored him for a
25 prolonged period of time. Carter even said - - - and I



1 believe it's on page 134 of the record - - - that - - - or
2 125 - - - that Ramos told him at the end of it that he felt
3 the truck sliding but that he thought he could maneuver
4 around the car into the garage.

5 JUDGE FAHEY: Well, you know, rather than go
6 through all of the details of the facts, isn't it - - -
7 isn't this really a situation where the plaintiff wasn't
8 driving the truck, so whoever is driving the truck made an
9 error, and what form their error took is - - - is arguable,
10 but nonetheless, they made an error. Any reasonable person
11 is going to say that.

12 The only real question on the negligence point of
13 view is was the plaintiff negligent for being behind the
14 car when he shouldn't have been in that area. That's a
15 ques - - - that may be a question of fact. So if that is
16 true, if - - - if it's a question of fact as the plaintiff,
17 are you precluded from getting summary judgment against the
18 people who are driving the truck who are obviously a
19 substantial factor in slamming the car into the guy? The
20 only - - - that's clear as any reasonable person could make
21 it.

22 The one question that we have to have is should
23 you be barred from getting that decision if - - - and it
24 does appear that there may be some comparative fault on the
25 plaintiff because he may have been where he shouldn't have



1 been.

2 MR. KELNER: Assuming that there's comparative
3 fault, Judge Fahey - - -

4 JUDGE FAHEY: The facts almost speak for
5 themselves. The facts are - - - so the only question is -
6 - - is whatever percentage of negligence a reasonable
7 person may put on the plaintiff, is that relevant in
8 determining whether or not you find the other party is - -
9 - is negligent as a matter of law?

10 MR. KELNER: It's not, Your Honor. And Your
11 Honor is right: there is no reasonable issue here about
12 whether the City was negligent or whether it was a
13 proximate cause. What they are doing here is they are
14 imposing a double burden on plaintiffs who are movants.
15 They're requiring them to meet all of the elements in the
16 statute: negligence, proximate cause. And they're also
17 requiring them to negate an affirmative defense that
18 doesn't bear on any element of a cause of action and that
19 operates purely in diminution of damages. CPLR 3212(c)
20 addresses what happens if the only remaining issue is in
21 diminution of damages. Summary judgment is directed under
22 (b), and then we have a trial on the remaining issues that
23 relate to damages.

24 The very purpose of Article 14-A was to do away
25 with contributory negligence in this state. And the rule



1 that the Appellate Division followed here is largely
2 fashioned from its remnants. It builds comparative fault
3 back into the plaintiff's prima facie burden, which it
4 shouldn't be, conceptually, and it says that if the
5 plaintiff can't rule that out as well, that the court won't
6 recognize the defendant's liability or the plaintiff's
7 entitlement to judgment. That sounds a lot like
8 contributory negligence, and it's contrary to two
9 statutes - - -

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. KELNER: - - - 3212 and 14.

12 Thank you, Your Honor.

13 (Court is adjourned)



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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Carlos Rodriguez v. The City of New York, No. 32, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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