

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

481

CA 06-02384

PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ.

MAGDALEN RICHARDS, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF WILLIAM J.
RICHARDS, DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ANGELA BARTHOLOMEW, DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, SYRACUSE (LOUISE A. BOILLAT OF
COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (SUZANNE MESSER OF COUNSEL),
FOR PLAINTIFF-RESPONDENT MAGDALEN RICHARDS, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF WILLIAM J. RICHARDS, DECEASED.

HARRIS BEACH PLLC, SYRACUSE (LAUREN H. SEITER OF COUNSEL), FOR
PLAINTIFF-RESPONDENT ESTATE OF WILLIAM J. RICHARDS, DECEASED, ON THE
COUNTERCLAIM.

Appeal from an order of the Supreme Court, Cayuga County (Peter E. Corning, A.J.), entered July 25, 2006 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: This action was commenced by plaintiff and plaintiff's decedent, who died during the pendency of the action, whereupon plaintiff was substituted as executrix of decedent's estate. Plaintiff, individually and on behalf of decedent, seeks damages for injuries they sustained when the vehicle operated by decedent in which plaintiff was a passenger collided with a vehicle operated by defendant. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint. Even assuming, arguendo, that defendant met her initial burden of establishing that she was operating her vehicle in a lawful and prudent manner when the vehicle operated by decedent unexpectedly entered her lane and that there was no evasive action that she could have taken to avoid the accident (see *Frantangelo v Benson*, 294 AD2d 880, 881; *Pilarski v Consolidated Rail Corp.*, 269 AD2d 821), we conclude that plaintiff's expert raised a triable issue of fact on the issue whether defendant could have taken evasive action to avoid the accident (see *Esposito v Wright*, 28 AD3d

1142, 1143-1144).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court