

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

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CA 10-01970

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

DALE R. GELSTER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MARIA L. JAOUDE, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF COUNSEL), FOR DEFENDANT-APPELLANT.

O'BRIEN BOYD, P.C., WILLIAMSVILLE (CHRISTOPHER J. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 11, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment.

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

Memorandum: Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Defendant met her initial burden by establishing that plaintiff, a pedestrian, unexpectedly darted into the path of her vehicle (*see Jellal v Brown*, 37 AD3d 179; *Sheppeard v Murci*, 306 AD2d 268; *Ash v McNamara*, 288 AD2d 956, *lv denied* 97 NY2d 612). In opposition to the motion, however, plaintiff raised a triable issue of fact whether defendant was speeding at the time of the accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to defendant's contention, the deposition testimony of a non-party witness regarding defendant's speed was not so inconsistent or speculative as to render it insufficient to defeat the motion (*cf. Sheppeard*, 306 AD2d 268; *Wolf v We Transp.*, 274 AD2d 514).

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court