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LAW DAY

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Thursday, April 29, 2021

See pg. 6 for details

WHAT'S INSIDE

OF NOTE

NCBA Member Benefit—I.D. Card Photo

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, March 4, 2021 at 12:45 PM

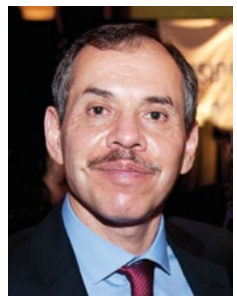
Thursday, April 1, 2021 at 12: 45 PM

NCBA Dinner Gala Update

The NCBA Dinner Gala, held annually in May, is the largest social event of the Nassau County Bar Association. In spring 2020, the COVID-19 Pandemic forced the NCBA to postpone the May 2020 Gala to ensure the safety of all. The Gala was rescheduled to Saturday, May 8, 2021 at the Long Island Marriott. Unfortunately, due to the progression of COVID-19, and concerns for the health and safety of staff and guests, the NCBA has made the difficult decision to further postpone the May Gala. The Bar will announce a new date for later in 2021 when it is determined that it is safe for guests to attend an in-person event.

The honorees being recognized this year include 77th Distinguished Service Medallion Honoree, Christopher T. McGrath, NCBA Past President, Past Co-Chair of WE CARE, and Partner at Sullivan, Papain, Block, McGrath, Coffinas & Cannavo; President's Award Recipient Hector Herrera, NCBA Building Manager; and NCBA Members who have been admitted to the New York Bar for fifty, sixty, and seventy years for their years of service to the legal profession.

Christopher T. McGrath



Hector Herrera

Although the Coronavirus has hindered the NCBA from being able to hold large in-person gatherings, our honorees deserve to be recognized despite the circumstances. In light of this decision, the Bar will move forward with the creation of the Dinner Gala Journal, which highlights the accomplishments of our honorees. The journal is an invaluable way to show support for the honorees in a safe and contact-free way. Due to the event's delay, the NCBA will honor not only last year's fifty-, sixty-, and seventy-year honorees, but this year's as well.

Within this issue, you will find a journal ad form listing ad options, pricing, and the full names of all honorees. To purchase a journal ad, forward the ad form to the NCBA Special Events Department at events@nassaubar.org or contact (516) 747-4071. We hope you will join us in paying tribute to these deserving individuals.

Virtual Recognition Reception to Honor 2018-2019 Attorney Volunteers for Service

Gale D. Berg

Each year, hundreds of Nassau County attorneys donate their time and talent to aid Nassau residents who cannot otherwise afford adequate legal assistance. In years past, the NCBA, the Safe Center LI, and Nassau/Suffolk Law Services have honored those volunteers at a cocktail reception held at Domus. Law firms are recognized in three categories by size—including large, medium, and solo practitioners or small firms—and ranked by the total number of combined pro bono service hours provided to the three organizations.

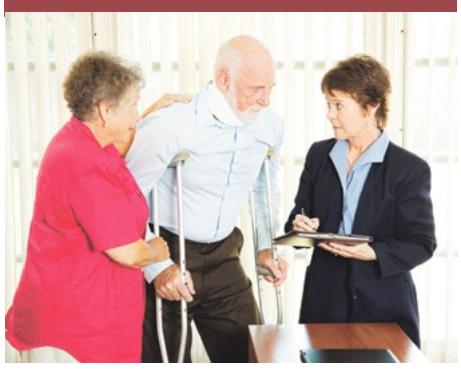
The most recent event held in May 2018 recognized those who volunteered their time in 2017 to assist Nassau County residents with issues related to mortgage foreclosure, landlord/tenant, bankruptcy, wills, senior issues, and a host of other areas.

Last year's ceremony was postponed due to COVID-19 and scheduling issues. To avoid any further delays in acknowledging volunteers from 2018-2019 for their efforts, commitment to service, and the generous donation of their time, NCBA Access to Justice Committee Chairs Rosalia Baiamonte, Kevin McDonough, Vice-Chair Sheryl Channer, Nassau Suffolk Law Services, and the Safe Center LI will host a virtual recognition event on March 3, 2021.

All members are invited to attend to acknowledge these inspiring professionals. Additional details to follow.

FOCUS:
PERSONAL INJURY

Impact of Court of Appeals' Holding in *Rodriguez v. City of New York*



Ira S. Slavit, Matthew Lampert, and Melissa Manna

"To be entitled to partial summary judgment a plaintiff 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."[1]

With that holding in *Rodriguez v. City of New York* almost three years ago, the Court of Appeals changed the landscape in personal injury litigation, no longer requiring plaintiffs to establish their complete freedom from comparative negligence to obtain summary judgment on the issue of liability. The Court's rationale, citing to the language and intent of CPLR 14-A, is essentially that comparative negligence relates to damages, not liability.

Impact of *Rodriguez*

Pre-*Rodriguez*, a plaintiff seeking summary judgment on the issue of liability was "required to establish that the defendant was negligent, that the negligence was a proximate cause of the plaintiff's injuries, and that the plaintiff was free from comparative fault."[2] By virtue of *Rodriguez*, plaintiff has been relieved of the burden to prove freedom from negligence to obtain summary judgment on liability.

Post-*Rodriguez*, there has been an influx of plaintiffs' summary judgment motions and court decisions that cite to this significant holding. Plaintiffs have relied on *Rodriguez* in obtaining summary judgment in motor vehicle, premises liability, Labor Law §§ 240(1), 241(6) and 2003, negligent security cases,[4] and General Obligations Law § 11-106 and General Municipal Law § 205-e causes of action involving injury to a police officer.[5]

As applied, arguing plaintiff's comparative negligence is the only summary judgment motion defense *Rodriguez* eliminates. All other defenses in defendant's arsenal are available. In addition, to obtain summary judgment, it remains plaintiff's burden to establish, prima facie, the defendant was negligent and the defendant's negligence was a proximate cause of the alleged injuries.[6]

Arguably, one of *Rodriguez*' biggest impacts is an increase in the number of cases where settlement negotiations take place at earlier stages in the life of the litigation as the threat of pre-verdict interest, generally at the statutory rate of 9% per annum, begins to run on the date of the court's decision granting summary judgment on liability or the date an appellate court reverses the denial of summary judgment.[7]

Thus, in evaluating case value and a reasonable settlement amount, both sides need to take into account that at trial plaintiff's comparative negligence is the only liability issue on the jury interrogatories, and having juries focus on plaintiff's conduct does not always benefit the plaintiff.

It does not appear that *Rodriguez* has or will re-open the door to a reexamination of pre-*Rodriguez* orders that followed then-existing precedent regarding plaintiff's burden when moving for summary judgment on liability.[8]

As a caveat to plaintiff's lawyers, interest does not begin to run upon execution of a stipulation between parties establishing the liability of one of them unless the stipulation explicitly provides for pre-judgment interest.[9]

Comparative Negligence After *Rodriguez*

Where summary judgment on liability is granted post-*Rodriguez*, CPLR Article 14-A affirmative defenses of culpable conduct such as comparative negligence and assumption of risk pled in the defendant's answer remain intact. To obtain dismissal of those affirmative defenses, plaintiff's notice of motion must explicitly include that request for relief.[10] A plaintiff cannot properly request dismissal of the affirmative defenses for the first time in reply papers.[11]

Plaintiff must demonstrate the absence of his or her comparative fault to obtain dismissal of culpable conduct affirmative defenses. In *Poon v. Nisanov*, the Second Department held that "[a]lthough a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability … the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where … the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence.[12]

Rodriguez does not ease a plaintiff's burden on a summary judgment motion on liability if the defendant possesses a "primary" assumption of risk defense. Primary assumption of risk applies to claims arising from sporting events, sponsored athletic activities, or athletic and recreational pursuits. Under this theory, a plaintiff who freely accepts a known risk commensurately negates any duty on the part of the defendant to safeguard plaintiff from the risk.[13]

Since no viable cause of action for negligence exists where plaintiff has assumed a primary assumption of risk, comparative negligence is an irrelevant issue. Just as before *Rodriguez*, to obtain summary judgment on liability where a defendant alleges primary assumption of risk, the plaintiff must prima facie establish that the defendant failed to satisfy its duty to make things as safe as they appear to be, that that the known risks of the activity were concealed or unreasonably enhanced, or that the conduct of others was reckless or intentional.

Practice Pointers: Plaintiffs

Plaintiff's counsel must be mindful that all the stringent requirements that a proponent of summary judgment must establish apply to plaintiff's summary judgment motions on liability. The moving papers must eliminate all issues of fact regarding the defendant's negligence and that the negligence was a proximate cause of plaintiff's injuries.

The court should be reminded that opposition relating to a damages issue, rather than liability, will not defeat the motion. For example, defendant's argument that the chain plaintiff tripped on was open and obvious was insufficient to defeat the motion as it was held the issue was relevant to comparative fault.[14] Opposition on the ground that the motion is premature will not prevail if the purportedly outstanding discovery would potentially lead solely to evidence of plaintiff's comparative fault.[15]

Perhaps the biggest pitfall for plaintiffs as movants is that in the quest to eliminate all genuine issues of fact, they fail to make sure none of the exhibits submitted with the motion raise an issue of fact. This will result in denial of the motion, regardless of the opposition's sufficiency.

In *Grant v. Carrasco*, not only did plaintiff submit evidence of a potentially nonnegligent explanation for striking plaintiff's vehicle in the rear, he also submitted an uncertified copy of a police accident report which stated,according to the defendant driver, that plaintiff's vehicle came to a sudden stop even though the traffic light was green. By submitting the report, the plaintiff waived any objection to its admissibility, notwithstanding that it contained self-serving statements not in admissible form.[16]

Summary judgment was similarly denied in *Tejada v. Cedeno*, where plaintiff's motion papers included documents containing a version of the accident indicating that the defendant may not have been negligent.[17]

It is imperative that plaintiffs' counsels carefully review all contemplated exhibits to make certain that, as helpful as they may appear to be, nothing therein can be construed to raise an issue of fact. Only proof needed to demonstrate prima facie entitlement to summary judgment should be submitted. An affidavit from the plaintiff may be the simplest way to get the necessary information to the court even if the information is already established elsewhere.

Practice Pointers: Defendants

Rodriguez' holding benefits the plaintiffs' bar, but the basics of defending a negligence action have not changed. Like any other case, plaintiff's burden to establish a defendant's alleged negligence and proximate causation have not changed. The facts of each case will always be significant. It is critical to obtain detailed information about the accident and its location during depositions. Use of photographs, plans, and maps, if available, will help depict the area where the accident took place and could impact plaintiff's version of the events. A question of fact as to plaintiff's credibility can result in the denial of summary judgment and be quick to highlight when plaintiff's evidentiary submission presents conflicting testimony, warranting a denial of summary judgment.[18]

It is imperative to anticipate that upon plaintiff's summary judgment motion as to liability, plaintiff may also move to dismiss defendant's affirmative defense of comparative negligence. As indicated above, plaintiffs must affirmatively seek this relief and must show that, as a matter of law, they were free from negligence in the happening of the accident.

Here, not only must defendants show a triable issue of fact to defeat summary judgment on liability, they must also make such a showing as to plaintiff's negligence when opposing a motion to strike this affirmative defense. The "existence of an open question as to a plaintiff's comparative

See *RODRIGUEZ*, Page 22

Ira S. Slavit is a partner in Levine & Slavit, PC in Mineola, representing plaintiffs in personal injury matters. He is also the Chair of the NCBA Plaintiff's Personal Injury Committee. Mr. Slavit can be reached at (516) 294-8282.

Matthew Lampert is a partner with Rivkin Radler LLP, defending personal injury, construction/labor law claims, premises liability, negligent supervision, and motor vehicle collision cases. He is also the Chair of the NCBA Defendant's Personal Injury Committee. Mr. Lampert can be reached at (516) 357-3245.

Melissa Manna is a partner with Cullen Dykman in Garden City, in the firm's General, Tort and Insurance Litigation department. She is also the Vice-Chair of the NCBA Defendant's Personal Injury Committee. Ms. Manna can be reached at (516) 357-3753.

Rodriguez ...

Continued From Page 8

fault [does] not bar summary judgment in favor of plaintiff on the issue of defendant's liability."[19]

In the context of a labor law case, a defendant who establishes plaintiff was a recalcitrant worker or the sole proximate cause of the accident would be entitled to dismissal of the labor law claim, thus defeating plaintiff's summary judgment motion. However, when a defendant cannot make such a showing, but raises a question of fact on the issue, it would seem, even post-*Rodriguez*, that plaintiff's summary judgment motion should be denied.

In *Allington v. Templeton Foundation*,[20] plaintiff obtained summary judgment on his labor law claims where the ladder he used kicked out from under him. In opposition, the defendant relied on its contention that plaintiff was the sole proximate cause of the accident, but the court held the defendant "failed to raise a triable issue of fact with respect to that issue (see generally *Rodriguez v City of New York*, 31 N.Y.3d 312, 324-325 [2018])."

The Fourth Department's citation to *Rodriguez* is unclear. Is the Court implying that had the defendant raised an issue of fact as to sole proximate cause, then plaintiff's motion would have been denied? The "see generally" citation to *Rodriguez* (with no other comment) is perplexing. It could also mean that even had the defendant established a question of fact on this issue, it would be irrelevant based on *Rodriguez*.

Since the recalcitrant worker/sole proximate cause defenses are all-or-nothing defenses which, if successful, bar recovery, they can be viewed as liability, not damages issues. Accordingly, they present questions of fact that even post-*Rodriguez* should defeat a motion for partial summary judgment on liability.

1. *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018).
2. *Castillo v. Slupecki*, 63 Misc.3d 325, 327 (Sup.Ct., Bronx Co. 2019).
3. *Ortega v. R.C. Diocese of Brooklyn*, 178 A.D.3d 940 (2d Dept. 2019); *Quizhpi v. South Queens Boys & Girls Club, Inc.*, 166 A.D.3d 683 (2d Dept. 2018); *Rodriguez v. Sea Crest Constr. Corp.*, 64 Misc.3d 1214(A) (Sup.Ct., Queens Co. 2019).
4. *Davis v. Commack Hotel, LLC*, 174 A.D.3d 501, 504 (2d Dept. 2019).
5. *Cioffi v. S.M. Foods, Inc.*, 178 A.D.3d 1006 (2d Dept. 2019).
6. *Sanders v. Sangemino*, 185 A.D.3d 617, 618 (2d Dept. 2020), *lv to appeal dismissed,* 35 N.Y.3d 1110 (2020).
7. CPLR 5002, 5004; *Rohring v. City of Niagara Falls*, 84 N.Y.2d 60, 68 (1994); *Van Nostrand v. Froehlich*, 44 A.D.3d 54, 57–58 (2d Dept. 2007).
8. *Rodriguez v. Coca-Cola Refreshments USA, Inc.*, 61 Misc.3d 789 (Sup.Ct., Queens Co. 2018).
9. *Mahoney v. Brockbank*, 142 A.D.3d 200, 205 (2d Dept. 2016).
10. *Castillo v. Slupecki*, 63 Misc.3d 325 (Sup.Ct., Bronx Co. 2019).
11. *Edwards v. Gorman*, 162 A.D.3d 1480, 1481 (4th Dept. 2018).
12. *Hai Ying Xiao v. Martinez*, 185 A.D.3d 1014, 1014–15 (2d Dept. 2020); *see also Flores v. Rubenstein*, 175 A.D.3d 1490, 1491 (2d Dept. 2019); *Poon v. Nisanov*, 162 A.D.3d 804, 808 (2d Dept. 2018).
13. *Custodi v. Town of Amherst*, 20 NY3d 83, 87 (2012); *Morgan v. State*, 90 N.Y.2d 471, 485 (1997).
14. *Derix v. Port Auth. of New York & New Jersey*, 162 A.D.3d 522 (1st Dept. 2018); *Mallory v. City of New York*, 69 Misc.3d 640, 643 (Sup.Ct., N.Y. Co. 2020).
15. *Francois v. Tang*, 171 A.D.3d 1139 (2d Dept. 2019).
16. 165 A.D.3d 631, 632 (2d Dept. 2018).
17. 173 A.D.3d 808, 809 (2d Dept. 2019).
18 *See Sanders v. Sangemino*, 185 A.D.3d 617 (2d Dept. 2020) (summary judgment denied where parties' deposition testimony conflicted as to how accident occurred).
19 *Koyl v. Gaudiuso*, 2019 NY Slip Op 33939(U), 2019 WL 8690151 (Sup.Ct., Nassau Co. 2019).
20 *Allington v. Templeton Foundation*, 167 A.D.3d 1437 (4th Dept. 2018).

Lessons ...

Continued From Page 10

of a fair trial."[1] There is a litany of case law on this topic, but in general, zealous advocacy can remain professional by focusing on the substance of the evidence, and refraining from personal comments on counsel or the witnesses.

An overriding theme of the presentation, in terms of dealing with a discourteous, unprofessional adversary, was simple: Be the Adult in the Room. Unprofessional behavior, whether intentional, tactical, or simply because your adversary is naturally unethical, should be combatted by making clear

records and refraining from similar attacks. If and when conduct gets to the point where the court or grievance committee must be enlisted, the paper trail (transcripts, letters, motion papers, etc.) should reflect who is being nice, and who is not. Bringing an adversary's conduct to the attention of the judge may seem like a painful exercise. But again, we turn to the sage words of Dalton: "Pain don't hurt."

The scenarios discussed, fortunately, do not apply to the vast majority of practitioners in our profession. But when we do encounter uncivil conduct, our panel's insight on how to address such behavior should be heeded by attorneys on both sides of the aisle.

1. *See Kleiber v Fichtel*, 172 A.D.3d 1048, 1052 (2d Dept. 2019).

Access ...

Continued From Page 5

"Free Legal Information Day," until eventually it became known as NCBA Access to Justice "Open House." Regardless of its name, it has become an enormous success. In 2016, due to the large response from the public, it was increased to twice a year under the leadership of Past President Steven G. Leventhal and Gale D. Berg: once in June, and again during Pro Bono Week in late October. NCBA was further aided in these efforts by the Nassau County Supreme Court through its representatives, who joined us during these events to provide the public with important information available through the court system.

Persevering Through the Pandemic

The Open House continued to be held twice each year until October, 2019. Unfortunately, the event slated for June 2020 had to be canceled during the shutdown period occasioned by the pandemic. Despite the fact that our historical and traditional means of pro bono work became exceedingly difficult, the need for such services during these extraordinary times nevertheless grew exponentially. When in-person consultation was not feasible, we focused on ways we can still come together.

Rather than cancel the October Open House, the Access to Justice Committee, Co-Chaired by NCBA Vice President Rosalia Baiamonte and Kevin McDonough and with Sheryl Channer as Vice Chair, were determined to find a creative solution through technological bridges to continue the critical pro bono work. As a result, the event was held virtually, with all services being provided through email or telephone. This virtual Open House drew over 138 Nassau and Suffolk County residents, thereby strengthening NCBA's resolve and commitment to provide much-need legal assistance to those in need despite the obstacles we faced.

NCBA is grateful to the Supreme Court personnel who recorded their public service announcement for this virtual event, as well as the ongoing encouragement and support provided by the Nassau County Administrative Judge, Hon. Norman St. George. This remarkable service to the community was made possible by the dedication and professionalism of the sixty to eighty volunteer attorneys who participated in each Open House, together with the collaboration of our Access to Justice partners, the Nassau Suffolk Law Services and The Safe Center of Long Island. This kind of creative response can empower other pro bono and volunteer teams to continue to have a positive impact.

Since its inception last Spring by then President Richard D. Collins, then President-Elect Dorian R. Glover, and Past President Martha Krisel, the NCBA COVID-19 Community Task Force has assisted Nassau County residents and small business owners in addressing free of charge the unique legal challenges ushered in by the pandemic. Approximately fifty NCBA volunteer attorneys, many of whom worked closely with law students from Hofstra, St. John's and Touro as part of the Task Force initiative, have provided approximately 500 hours of limited scope pro bono representation under the dedication and guidance of NCBA Director Hon. Maxine S. Broderick.

Many of the inquiries posed by community members through covidhelp@nassaubar.org, raise questions regarding unemployment benefits, navigating housing court, and enforcing Family Court orders. However, as vaccines are made available to the public, the Task Force anticipates an influx of inquiries concerning mandatory vaccinations, transportation, travel restrictions, and related privacy concerns. As an additional resource, NCBA staff, with law student assistance, have created helpful FAQs and posted updates to the COVID-19 web page at www.nassaubar.org.

Collaborative Effort

Over the course of four decades, the NCBA Access to Justice Committee has had a profound impact on the lives of the economically disadvantaged residents of Nassau County by helping to maximize the quantity and quality of pro bono assistance available to an otherwise underserved community.

None of this would have been possible without the strong relationships forged by the NCBA with its collaborative partners: The Nassau County Coalition Against Domestic Violence, Nassau Suffolk Law Services, The Safe Center of Long Island, Legal Aid Society of Nassau County, the Assigned Counsel Defender Plan, Hofstra, St. John's, and Touro Law Schools, and the Nassau County government and court system, with whom the NCBA Access to Justice Committee has coordinated legal services for the community to strengthen the core of volunteer attorneys through education and professional development.

Through 2021 and beyond, NCBA leadership and volunteer attorneys stand ready to assist future lawyers in developing skills through practical experience, to provide opportunities for substantial and meaningful interaction with clients, and more importantly, to continue to serve the interests of our community through greater access to justice.