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# What Really Happened in 'Carlos Rodriguez v. City of New York'?

'Rodriguez' does not represent a tectonic shift in summary judgment practice but is actually the next logical step in the drive towards achieving litigation efficiencies.

By **Timothy R. Capowski and Jonathan P. Shaub** | September 14, 2018

Most articles discussing the New York Court of Appeals' decision in *Carlos Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018), present a view that travels well afield of what the Court actually considered, what the Court actually held, and what relief the Court actually afforded. In reality, the Court reached a 4-3 determination on a narrow point of law in a general negligence case and held that a plaintiff does not bear the burden of establishing the absence of their own comparative negligence in order to obtain summary judgment. It remanded for determination of whether or not an issue of fact was presented on the record as to either: (a) the defendant's negligence or (b) whether the defendant's negligence was a proximate cause of the plaintiff's injury. That is all.

All of the other longstanding rules still apply in order for a party to obtain or defend against summary judgment. The Court simply eliminated an *extra* hurdle applicable to plaintiffs and did not drastically change the legal landscape.

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## Overarching Context

Initially, the "new" rule in *Rodriguez* isn't even really that new. Rather, it is the culmination of an evolving view that the Court noted had already taken root in three of the four appellate departments. Indeed, the *Rodriguez* decision is more properly framed as a continuation of the growing trend favoring greater litigation efficiency. Our court system has been overburdened for years, leading courts and commentators to encourage the increase in the grant of partial summary judgment, CPLR 3212(e), and the utilization of the previously underused section, CPLR 3212(g) (deeming facts established for all purposes), to "salvag[e] something from [otherwise] abortive summary judgment motions." CPLR 3212:1 Supplementary Practice Commentaries, John R. Higgitt (McKinney 2015). Each serves to assist in streamlining litigation. The Court in *Rodriguez* specifically emphasized this, pointing out that the "principal rationale of partial summary judgment is to narrow the number of issues presented to the jury". At base then, *Rodriguez* does not represent a tectonic shift in summary judgment practice, but is actually the next logical step in the drive towards achieving litigation efficiencies.

## What Didn't Happen in Rodriguez?

*Rodriguez* did not alter the framework for deciding a negligence claim or a Labor Law 241(6) claim and did *not* grant summary judgment to the plaintiff. Instead, it remanded for a determination as to whether there were issues of fact as to defendant's negligence and proximate causation. The Court did *not* suggest a new rule where plaintiff need merely establish a strong showing of negligence by defendant in order to obtain summary judgment. Indeed, the Court specifically recognized that a determination was necessary on both of the individual prongs of negligence and proximate cause.

The Court also did *not* suggest that comparative negligence was irrelevant in the determination of summary judgment. It merely held that the fact that an issue of fact existed as to plaintiff's comparative fault was, alone, an insufficient basis to deny summary judgment. This is a significant distinction. For example, if there exists an issue of fact as to whether plaintiff's negligence was the sole proximate cause of the injury, or as to which of multiple tortfeasors' (including plaintiff's) alleged negligence caused the injury, then this would obviously be a sufficient basis to deny summary judgment.

Contrary to what has been asserted, *Rodriguez* did *not* meaningfully impact the application of Labor Law 241(6). The Court did not hold that, "[f]ollowing *Rodriguez*, once the moving plaintiff has established that the defendant violated one of the Part 23 rules, the defendant must be held liable as a matter of law" (*Litigants, the Bench and the Bar Stand to Gain from 'Rodriguez' Decision*, John Zaremba and Dan Gluck, NYLJ (4/24/18)). Nothing could be further from the truth. Not only was *Rodriguez* a general negligence case, having little bearing on statutory Labor Law 241(6) causes of action, but the three-part test plaintiff must satisfy to establish entitlement to summary judgment on such a cause of action remains unchanged by the

decision. *See* PJI 2:216A; *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 349 (1998); *Belcastro v. Hewlett-Woodmere*, 286 A.D.2d 744 (2d Dep't 2001). First, the jury must decide whether the defendant violated a specific and applicable Industrial code provision. Importantly, the violation of a code provision only "constitute[s] some evidence of negligence." *See Belcastro*, *supra* at 746. Second, if a violation occurred, the jury must next determine "whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances". *Id*. Thus, if the jury finds a violation it must still decide whether that violation constituted a failure to use reasonable care. Lastly, if the jury finds that there was a violation of a specific industrial code provision *and* that the violation constituted a failure to use reasonable care (i.e., defendant was negligent), only then does it determine whether such negligence was the proximate cause of the injury. *See Rizzuto*, *supra*; PJI 2:216A.

As none of the elements of this settled three-part test has been affected by *Rodriguez*, any alleged impact on the application of Labor Law 241(6) appears to be nominal at best.

## Practical Implications of Rodriguez for the Bar

*Rodriguez* may have some impact on cases where a defendant's liability (negligence and causation) is a foregone conclusion and where the claim of plaintiff's comparative fault is exceedingly weak or pretextual. The standard example is where an injured plaintiff pedestrian is located in the crosswalk and the defendant driver runs a red light and testifies that he or she never saw the plaintiff pedestrian. Merely raising an issue of fact that the plaintiff was possibly texting or distracted while crossing the street will be insufficient for the defendant to avoid summary judgment on liability. Prior to *Rodriguez*, it would have been enough in some courts.

After *Rodriguez,* defendants can no longer rely on comparative fault as a crutch, and must instead undertake discovery with an eye toward the elements of plaintiff's claim and focus on developing evidence that can raise an issue of fact as to negligence and/or causation.

## More Summary Judgment Motions?

In light of *Rodriguez*, it has been predicted that the courts will see an uptick in summary judgment motions. However, a prominent plaintiff attorney disagreed when we raised this with him and advised that *Rodriguez* really made no difference to him or other counsel in significant personal injury cases. Rather, they viewed the presentation of a weak liability defense as a damages verdict escalator, as it detracted from the credibility of defendant's entire case, and was more strategically valuable than the potential early commencement of prejudgment interest accrual.

## Sauce For the Goose…

The trend towards efficiency embodied by *Rodriguez* should equally apply as between co-defendants, or even when a defendant seeks summary judgment against a plaintiff on the issue of comparative fault. If *Rodriguez* is properly understood as a beacon for *bona fide* issue determination and the promotion of litigation efficiency, then fringe defendants and deep-pocket, low-liability defendants will now consider moving for partial summary judgment against the primary tortfeasor or plaintiff. Fairly applying *Rodriguez* to these two instances, the opponent of summary judgment should not be able to avoid summary judgment by simply invoking a weak or pretextual issue of fact as to its adversary's shared or comparative fault. Hence, it will be interesting to watch and see if there is a resultant uptick in the making of such motions by defendants.

## Sequence of Trial

There is a strategic counterbalance for both sides to consider in bifurcated cases. The grant of partial summary judgment in favor of a plaintiff on liability necessarily impacts the sequence of openings, trial and closing arguments at the following trial on liability apportionment where an issue of fact exists as to plaintiff's comparative fault. In such an instance, the defendant carries the burden of proof and will be entitled to open and present its case first and present its closing argument last. "It is the well-settled rule in this state that the party holding the affirmative upon an issue of fact has the right upon the trial to open and close the proof, and to reply in summing up the case to the jury." *Heilbronn v. Herzog*, 165 N.Y. 98, 100-01 (1900).

## Bifurcation

One writer suggests that, in light of *Rodriguez*, "sound practical reasons" exist supporting unification of trials, and supports this position with reference to certain "jurisdictions that already presumptively conduct unified trials" ("*An Analysis of the Court of Appeal's Decision in 'Rodriguez v. City of New York,'*" Joshua Kelner, NYLJ (4/1/18)).

However, the actual rule in New York is a presumption favoring bifurcated trials. Pursuant to 22 NYCRR § 202.42(a), "[j]udges are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action." *See* Carmody Wait 2d New York Practice

with Forms § 52:17; *see also* PJI 1:2A; CPLR 603; CPLR 4011. This is the governing rule of practice applied throughout New York; trial courts in the Bronx and New York County have historically disregarded it in practice.

Accordingly, we suggest that the increased focus on litigation efficiency espoused by the Court in *Rodriguez* supports a change in the practice of these two counties. Bifurcation, a rule that undeniably favors efficiency, is one that should be adhered to in the wake of *Rodriguez*, not further disregarded.

## Conclusion

*Rodriguez* has sparked a renewed interest in the strategic value of CPLR 3212. This is a positive development, as its value has been underestimated as an issue-sharpening and discovery tool. Under New York's antiquated system of trial by near-ambush, summary judgment is a critical discovery weapon and a prophylactic tool for locking down your adversary into his or her claims or defenses well before trial. More often than not, it equips you with your adversary's expert affidavit and otherwise serves as the first real and full exposition of the case for both sides to examine and assess the strengths and weaknesses of their positions and assist in realistic valuation and risk determination for purposes of potential settlement.

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