

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Chenango, at the Court House in Norwich, New York, on the 16th day of November, 2018.

**PRESENT: HON. BRIAN D. BURNS
ACTING J.S.C. PRESIDING**

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CHENANGO

KYLE J. PIERCE ASHLEY J. PIERCE,

Plaintiffs,

Index #2017X474

vs.

RJI #2018-0231

THOMAS O. BIGELOW,

Defendant.

MEMORANDUM DECISION AND ORDER

The Court has two motions before it regarding this case. Plaintiffs seek summary judgment on the issue of Defendant's liability for Plaintiff's injuries. In support of their motion, Plaintiffs have submitted the Affidavit of attorney Bradley Pinsky, with annexed exhibits, and a Memorandum of Law. Defendant not only opposes the motion but has cross-moved for dismissal of the Amended Verified Complaint. Defendant has

presented the Affirmation of attorney Daniel Cartwright, together with attached exhibits, and a Memorandum of Law. Plaintiffs have submitted the reply Affirmation of attorney David Garwood, with attached exhibits, and a Reply Memorandum of Law in support of their motion and in opposition to the cross-motion. The Court heard oral arguments and reserved upon its decision.

Many of the facts of this case are undisputed. On November 15, 2016, Plaintiff Kyle J. Pierce (hereinafter Plaintiff) was a volunteer firefighter with the Sherburne Fire Department. In response to a two-vehicle accident, the Chief of the Sherburne Fire Department instructed Plaintiff to close the affected road at the intersection of Blanding Road and Route 12 in Sherburne, New York. The Fire Chief directed that all southbound traffic be diverted onto Blanding Road. Plaintiff was stopping traffic coming from Blanding Road, as well as the southbound traffic on Route 12. Plaintiff and another firefighter were each wearing an ANSI approved warning vest and full turnout gear, including a helmet. Each carried a lighted, colored traffic wand used to warn and stop traffic.

At approximately 5:33 pm, Defendant was driving his vehicle south on Route 12 when he struck Plaintiff. Defendant testified at his deposition that he was able to see flashing lights and cones in the southbound lane a quarter of a mile before the accident. According to the other firefighter working with Plaintiff, Plaintiff had been straddling the north and southbound lanes, and took maybe a step or jump to avoid Defendant's vehicle. This firefighter testified at his deposition that Plaintiff was struck by the front passenger side bumper. Plaintiff was pushed down below the front tire and, according

to this other firefighter, Plaintiff's legs were run over. After stopping his vehicle, Defendant saw Plaintiff laying in the road and writhing in pain. Plaintiff suffered a comminuted fracture to the right tibia and fibula along with other injuries. Defendant admitted to being convicted of unsafe speed.

Based upon the foregoing, Plaintiffs argue that Defendant was negligent as a matter of law. Plaintiffs assert that Defendant violated multiple sections of New York State Vehicle and Traffic Law. Further, Plaintiffs state that Defendant's negligence directly caused Plaintiff's injuries. Plaintiffs also claim that Defendant is liable for his violation of statutes that resulted in the injuries to Plaintiff, a firefighter, under **General Municipal Law Section 205-a**. Additionally, Plaintiffs argue that Defendant is liable as a matter of law for negligent infliction of emotional distress. As a result of the foregoing, Plaintiffs seek summary judgment on the First, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action.

Defendant's cross-motion to dismiss alleges that Plaintiffs' Amended Verified Complaint fails to state a cause of action. Specifically, Defendant states that Plaintiffs failed to plead a "serious injury" was suffered by Plaintiff. In regard to Plaintiffs' motion, Defendant argues that Plaintiffs failed to establish a prima facie case for summary judgment. In the alternative, Defendant states that he has raised issues of fact as to whether Plaintiff was the sole proximate cause of the accident.

The Court will begin with Defendant's motion to dismiss for failure to state a cause of action. See **CPLR 3211(a)(7)**. Defendant correctly states that **CPLR 3016(g)** requires that for personal injuries arising out of negligence in the use or operation of a

motor vehicle in this State, the complaint must state that the plaintiff has sustained a serious injury, as defined in subsection (d) of section five thousand one hundred two of the insurance law. Id. Defendant, however, overlooks the fact that Plaintiffs clearly state in the Amended Verified Complaint that Plaintiff was diagnosed with and treated for a comminuted fracture in his right tibia and fibula. As Defendant is aware from the quoted statute in his submissions, a fracture is a serious injury pursuant to **Insurance Law Section 5102(d)**. **Insurance Law Section 5102(d)**. As a result, Plaintiffs did state in the Amended Verified Complaint that Plaintiff sustained a serious injury by identifying the specific type of serious injury that was sustained. Under the liberal construction pleadings are to be afforded, the allegations in the Amended Verified Complaint are sufficient to satisfy **CPLR 3016(g)**. See Leon v. Martinez, 83 NY2d 84 (1994).

Moreover, Plaintiffs' Bill of Particulars specifically states that Plaintiff Kyle Pierce suffered a serious injury as defined by **Insurance Law Section 5102(d)** and again sets forth Plaintiff's fracture. Case law holds that use of the Bill of Particulars to satisfy **CPLR 3016(g)** is appropriate. See Epstein v. MTA Long Is. Bus., 161 AD3d 821 (2nd Dept. 2018). Defendant's cross-motion is denied accordingly.

The Court next considers Plaintiff's motion for summary judgment. A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Giuffrida v Citibank Corp., 100 NY2d 72, 81 ([2003]). Once this showing has been made, the burden shifts to the nonmoving party to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution. **Id. 100 NY2d at 81.**

As set forth above, Plaintiffs seek summary judgment on the issue of Defendant's liability on six of their eight causes of action. The first cause of action is for negligence. The fourth cause of action is for violations of the **Vehicle and Traffic Law**. The fifth cause of action is for negligent infliction of emotional distress. The sixth cause of action is for conscious pain and suffering. The seventh cause of action is for Plaintiff Ashley J. Pierce's loss of consortium and services. The eighth cause of action is pursuant to **General Municipal Law Section 205-a**.

The Court will first consider the cause of action brought pursuant to **General Municipal Law Section 205-a**. This statute creates a cause of action for firefighters who, while in the line of duty, are injured as a result of violations of statutes or regulations. **Giuffrida v Citibank Corp., 100 NY2d 72, 77 (2003)**. The Court of Appeals has held that to make out a valid claim under General Municipal Law §205-a, a plaintiff must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the firefighter was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter. **Id., 100 N.Y.2d at 79.**

In the present case, Plaintiffs have identified several sections of the **Vehicle and Traffic Law** that they allege Defendant violated, including **Vehicle and Traffic Law Section 1180(e)**. Plaintiffs provided Defendant's deposition testimony in which he admitted to being convicted of unsafe speed (**Vehicle and Traffic Law Section 1180**).

Plaintiffs further provided the deposition testimony of the other firefighter working with Plaintiff who described how Defendant struck Plaintiff while Plaintiff was directing traffic. It is clear that it was Defendant's striking and running over Plaintiff that caused Plaintiff's fractures. The foregoing is sufficient to satisfy Plaintiff's burden to establish Defendant's liability as a matter of law on the eighth cause of action.

The burden then shifts to Defendant to establish that an issue of fact exists that requires determination by the trier of fact. **CPLR 3212(b)**. Defendant alleges that he has raised questions as to whether Plaintiff was the sole proximate cause of the accident. In support of that assertion, Defendant has submitted the report of his accident reconstruction expert. The expert opines that Plaintiff did not act in accordance with his training by placing himself in a hazardous location in suboptimal conditions. He goes on to state that such actions made it more difficult for oncoming traffic to perceive and react to Plaintiff's presence. The opinions are irrelevant, since the Court of Appeals has clearly held that comparative fault cannot be used as a defense against a **General Municipal Law Section 205-a** claim. **Giuffrida, 100 N.Y.2d at 83**. Defendant's attempt to re-characterize his attempted use of this defense as an issue of proximate cause is unavailing. See **Andre v. Pomeroy, 35 NY2d 361 (1974)**. Moreover, a claim under **General Municipal Law Section 205-a** does not require proximate causation for liability. The statute states that in the event any accident, causing injury to a firefighter, occurs, directly or indirectly, as a result of any neglect, the person guilty of said neglect shall be liable to the firefighter. **General Municipal Law Section 205-a**. Defendant having failed to establish the existence of any issues of fact, Plaintiffs are

entitled to summary judgement as to Defendant's liability under the eighth cause of action.

The Court next turns to Plaintiffs' first and fourth causes of action, which are for negligence and violations of the **Vehicle and Traffic Law**. Plaintiff is allowed to assert these claims pursuant to **General Obligations Law Section 11-106**. The firefighter's rule that had prohibited negligence actions has been abrogated by this statute. See Sierk v. Frazon, 32 AD3d 1153 (4th Dept. 2006).

As noted above, Plaintiff has established that Defendant admitted that he was convicted of violation of **Vehicle and Traffic Law Section 1180[e]**. NY PJI 2:26 establishes that a violation of a section of the **Vehicle and Traffic Law** constitutes negligence. Liability, however, will follow only if such negligence was the proximate cause of the plaintiff's injury. Holleman v Miner, 267 AD2d 867, 869 (3d Dept 1999). Proximate cause is generally an issue of fact for the trier of fact. See NY PJI 2:70, **Commentary, Evidence of Causation**.

As set forth above, Defendant has submitted a report from an expert regarding Plaintiffs' actions at the scene. The report contains opinions that could be utilized for either or both proximate cause or comparative negligence. The expert opinion is sufficient to raise issues of fact as to both. Plaintiff, therefore, is entitled to summary judgment as to Defendant's negligence because of his violation of **Vehicle and Traffic Law Section 1180[e]**. The Court cannot grant summary judgment as to liability on the negligence cause of action nor violations of the **Vehicle and Traffic Law**, because of the proximate cause issue.

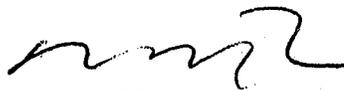
The Court must also deny summary judgment to Plaintiffs on the fifth, sixth and seventh causes of action. Claims of emotional distress, conscious pain and suffering, and loss of consortium and services require the determination of multiple issues of fact. **CPLR 3212(b)**. While Defendant's opposition papers did not specially address these causes of actions, a moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers. See Vega v Restani Constr. Corp., 18 N.Y.3d 499 (2012).

Based upon the foregoing, Defendant's motion to dismiss the Amended Verified Complaint is denied. Plaintiffs' motion for summary judgment on the issue of Defendant's liability for the injuries sustained by Plaintiff Kyle J. Pierce is granted as to the eighth cause of action. Plaintiffs are granted summary judgment as to Defendant's negligence on the first and fourth causes of action. Plaintiffs are denied summary judgment on the fifth, sixth and seventh causes of action.

This Decision shall constitute the Order of the Court.

Dated: March 29, 2019

Norwich, New York



Acting Supreme Court Justice