# Supreme Court of the State of New York
# Appellate Division: Second Judicial Department

D21867
O/kmg

_____AD3d_____ Argued - December 16, 2008

REINALDO E. RIVERA, J.P.
FRED T. SANTUCCI
EDWARD D. CARNI
THOMAS A. DICKERSON, JJ.

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2008-00383 DECISION & ORDER

Michael J. Clark, respondent,
v Blacktop Maintenance Corp., et al., appellants.

(Index No. 6231/05)

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Ahmuty, Demers & McManus, (Max W. Gershweir, New York, N.Y. [Jennifer B. Ettenger], of counsel), for appellants.

Finkelstein & Partners, Newburgh, N.Y. (James W. Shuttleworth III of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Dutchess County (Brands, J.), dated December 12, 2007, which denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The defendants failed to make a prima facie showing of entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851). The deposition testimony of various witnesses submitted by the defendants in support of the motion showed that the parties did not agree as to how the accident occurred. At the time of the accident, the defendant Douglas Cameron was operating a tractor-trailer owned by the defendant Blacktop Maintenance Corp. Cameron alleged that the plaintiff's motorcycle crossed the double yellow line and struck the tractor-trailer. An acquaintance of the plaintiff, who was riding his motorcycle behind the plaintiff's motorcycle and allegedly witnessed the accident, stated that the tractor-trailer crossed the double yellow line and struck the plaintiff's motorcycle. Under the circumstances, the defendants' expert

evidence was insufficient to establish, prima facie, that the plaintiff's negligent operation of his vehicle was the sole proximate cause of the accident (*cf. Dorazio v Delbene*, 37 AD3d 645).

RIVERA, J.P., SANTUCCI, CARNI and DICKERSON, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court