

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

D30869  
O/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - March 25, 2011

JOSEPH COVELLO, J.P.  
RANDALL T. ENG  
L. PRISCILLA HALL  
SHERI S. ROMAN, JJ.

2010-02445

DECISION & ORDER

Shaheena Iqbal, etc., et al., respondents, v David  
Thai, et al., appellants.

(Index No. 38109/08)

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Zaklukiewicz Puzo & Morrissey, LLP, Islip Terrace, N.Y. (Eric Z. Leiter of counsel),  
for appellants.

Paul Ajlouny & Associates, P.C., Garden City, N.Y. (Neil Flynn of counsel), for  
respondents.

In an action, inter alia, to recover damages for wrongful death, etc., the defendants  
appeal from so much of an order of the Supreme Court, Suffolk County (Tanenbaum, J.), dated  
January 26, 2010, as granted the plaintiffs' motion for summary judgment on the issue of liability.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The instant action arose out of an automobile accident which occurred in the  
eastbound shoulder of the Long Island Expressway, near Exit 51 in Huntington, at approximately  
4:00 A.M. on February 17, 2007. The car in which the plaintiffs' decedent was seated was struck in  
the rear while it was stopped, for reasons unknown, on the shoulder by a car operated by the  
defendant David Thai (hereinafter the defendant driver) and owned by the defendant Hoa Thai  
(hereinafter together the defendants). The defendant driver admitted that he had fallen asleep prior  
to the collision and recalled last being awake two exits before the collision.

Contrary to the defendants' contention, the Supreme Court properly granted the

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plaintiffs' motion for summary judgment on the issue of liability. Although, in general, the issue of proximate cause is for the jury (*see Derdarian v Felix Contr. Corp.*, 51 NY2d 308; *Ely v Pierce*, 302 AD2d 489), liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes (*see Ely v Pierce*, 302 AD2d at 489; *see also Saviano v City of New York*, 5 AD3d 581).

Here, the plaintiffs established their entitlement to judgment as a matter of law by submitting evidence that the location of the decedent's car merely furnished the condition for the accident, and was not a proximate cause of his injuries and death. Even if the decedent violated Vehicle and Traffic Law § 1202(a)(1)(j) by being stopped on the shoulder of the Long Island Expressway, the sole proximate cause of the subject accident was the defendant driver falling asleep before the subject accident (*see Spence v Lake Serv. Sta., Inc.*, 13 AD3d 276; *Honkala v Gibson Constr. Co.*, 300 AD2d 445; *Hyland v Calace*, 244 AD2d 318; *Lectora v Gundrum*, 225 AD2d 738; *Metzler v Brawley*, 209 AD2d 487; *cf. Dowling v Consolidated Carriers Corp.*, 103 AD2d 675, *affd* 65 NY2d 799). In opposition, the defendants failed to raise a triable issue of fact. Accordingly, the plaintiffs' motion for summary judgment on the issue of liability was properly granted.

The defendants' assertion that various items of evidence, including the deposition testimony of the defendant driver, should not have been considered by the Supreme Court is raised for the first time on appeal and, therefore, is not properly before this Court (*see Jones v Castro-Tinco*, 62 AD3d 957; *Mariano v New York City Tr. Auth.*, 38 AD3d 236; *Sher v Scott*, 203 AD2d 274).

COVELLO, J.P., ENG, HALL and ROMAN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court