

Codd v Schultz

2018 NY Slip Op 34136(U)

October 9, 2018

Supreme Court, Erie County

Docket Number: Index No. 813470/2016

Judge: Catherine Nugent-Panepinto

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At a Special Term of the Supreme Court of the State of New York, held in and for the County of Erie at the Courthouse located at 92 Franklin Street Buffalo, New York on the 16th day of August, 2018.

P R E S E N T : Hon. Catherine Nugent-Panepinto, J.S.C.

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE**

ERIN T. CODD

Plaintiff

ORDER

v.

Index No.: 813470/2016

ELAINE SCHULTZ

Defendant

ELAINE SCHULTZ

Plaintiff

v.

Index No.: 807483/2017

ERIN T. CODD

Defendant

Defendant Erin T. Codd, in the matter of Schultz v. Codd, Erie County Index No. 807483/2017, having moved this Court for an Order granting her summary judgment on the issue of negligence, dismissing Plaintiff Elaine Schultz's Complaint; or in the alternative, an Order joining the matter of Schultz v. Codd, Erie County Index No. 807483/2017 with the matter of Codd v. Schultz, Erie County Index No. 813470/2016 for a joint, bifurcated trial on the issue of negligence; and

Defendant Elaine Schultz, in the matter of Codd v. Schultz, Erie County Index No. 813470/2016, having moved this Court for an Order finding that Plaintiff Erin Codd was comparatively negligent at the time of this accident and that her negligence was a substantial factor in causing the accident, and for an Order joining the matter of Schultz v. Codd, Erie County Index No. 807483/2017 with the matter of Codd v. Schultz, Erie County Index No. 813470/2016 for a joint, bifurcated trial on the issue of negligence; and

Plaintiff Elaine Schultz, in the matter of Schultz v. Codd, Erie County Index No. 807483/2017, having cross-moved this Court for an Order for summary judgment on the issue of negligence, joining the matter of Schultz v. Codd, Erie County Index No. 807483/2017 with the matter of Codd v. Schultz, Erie County Index No. 813470/2016 for a joint trial, and dismissing Defendant Codd's affirmative defenses; and

The motions having come on to be heard by this Honorable Court; and

NOW upon reading and filing:

Defendant Codd's *Notice of Motion*, dated May 18, 2018 together with the *Affirmation* of Kevin J. Graff, Esq., dated May 18, 2018 with attached Exhibits "A" through "H" submitted in support of the motion;

Defendant Schultz's *Notice of Motion*, dated June 29, 2018, together with the *Affirmation* of Leo T. Fabrizi, Esq., dated June 29, 2018 with attached Exhibits "A" through "H" submitted in support of the motion;

Plaintiff Elaine Schultz's *Notice of Cross-Motion*, dated June 25, 2018, together with the *Affirmation* of John J. Flaherty, Esq., dated June 25, 2018 with attached Exhibits "I" through "9" submitted in support of the motion and in opposition to Defendant Codd's motion;

The *Affirmation in Opposition* of Charles H. Cobb, dated August 8, 2018 with attached Exhibits "A" and B" on behalf of Plaintiff Erin Codd submitted in opposition to Defendant Schultz's motion;

The *Reply Affirmation* of Kevin J. Graff, Esq., dated August 9, 2018 on behalf of Defendant Erin Codd submitted in further support of her motion and in opposition to Plaintiff Schultz's cross-motion; and

The *Reply Affirmation* of Leo T. Fabrizi, Esq., dated August 12, 2018 on behalf of Defendant Elaine Schultz submitted in further support of her motion; and

NOW upon hearing oral argument from **LAW OFFICES OF JENNIFER S. ADAMS** (Nicole B. Palmerton, Esq. of counsel) on behalf of Defendant Codd; **LAW OFFICE OF JOHN J. FLAHERTY** (John J. Flaherty, Esq. of counsel) on behalf of Plaintiff Schultz; **LAW OFFICES OF JOHN WALLACE** (Leo T. Fabrizi, Esq. of counsel) on behalf of Defendant Schultz; and **WILLIAM MATTAR, P.C.** (Charles H. Cobb, Esq. of counsel) on behalf of Plaintiff Codd; and after due deliberation by this Honorable Court, it is hereby

ORDERED that as to both actions, Elaine Schultz is deemed to be negligent as a matter of law at the time of this accident, but there is a question of fact as to whether her negligence was a substantial factor in causing the accident, and is further

ORDERED that as to both actions, all motions for summary judgment made by Elaine Schultz relative to the conduct of Erin Codd are in all respects **DENIED**; and it is further

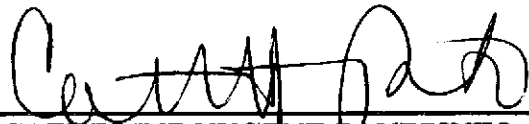
ORDERED that Plaintiff Elaine Schultz's motion to dismiss Defendant Codd's affirmative defenses as to assumption of risk, the seatbelt defense, and CPLR Article 16 is **GRANTED**, but the motion to dismiss the affirmative defense relative to the emergency doctrine is **DENIED**; and it further

ORDERED that the matters of Schultz v Codd, Erie County Index No. 807483/2017 and Codd v Schultz, Erie County Index No. 813470/2016 shall be joined for a bifurcated trial on the issues of whether the negligence of Elaine Schultz was a substantial factor in causing the accident, and if so, whether Erin Codd was negligent, and if so, whether her negligence was a substantial factor in causing the accident, and if so, the apportionment of fault between the two drivers; and it is further

ORDERED that this Order shall be filed in each of the above-captioned actions, and that the Erie County Clerk is hereby directed to accept such Order for filing in each of the above-captioned actions.

SO ORDERED:

10/9/18



HON. CATHERINE NUGENT-PANEPINTO, J.S.C.