

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 15-01735

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

LISA M. KELLOGG AND RAY L. KELLOGG,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

CHARLEEN S. PERNAT AND RONALD J. PERNAT,
DEFENDANTS-RESPONDENTS.

TABNER, RYAN AND KENIRY, LLP, ALBANY (LYNN KNAPP BLAKE OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (TERANCE V. WALSH OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 2, 2015. The order, among other things, denied the motion of plaintiffs for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Lisa M. Kellogg (plaintiff) in a motor vehicle accident. Plaintiff was traveling in the driving lane of a parking lot when her vehicle collided with a vehicle operated by Charleen S. Pernat (defendant), which was exiting a parking space. We conclude that Supreme Court properly denied plaintiffs' motion for partial summary judgment on the issue of liability. Here, in support of their motion, plaintiffs submitted both plaintiff's own deposition testimony and that of defendant. Plaintiff testified at her deposition that the collision occurred when defendant suddenly pulled out of a parking space, without warning, into the designated driving lane and plaintiff's immediate path. Defendant's deposition testimony, however, provided a conflicting account of the manner in which the accident occurred. We thus conclude that there is an issue of fact whether plaintiff's own conduct and rate of speed may have contributed to the collision and thus whether plaintiff was comparatively at fault (*see Drew v J.A. Carmen Trucking Co., Inc.*, 8 AD3d 1112, 1113; *Fisher v Ciarfella*, 300 AD2d 1028, 1028), precluding partial summary judgment.

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court