

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

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CA 22-01468

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND NOWAK, JJ.

CHRISTOPHER CAROLLO AND BEATRICE CAROLLO,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

EMILY L. SOLOTES, DEFENDANT-RESPONDENT.

CANTOR WOLFF NICASTRO & HALL, BUFFALO (DAVID J. WOLFF, JR., OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY C. SENDZIAK OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 9, 2022. The order granted the motion of defendant for summary judgment and dismissed plaintiffs' complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Christopher Carollo (plaintiff) sustained when the motor vehicle he was driving collided with a motor vehicle operated by defendant. At the time of the collision, plaintiff was traveling eastbound on a roadway, and defendant was approaching in a westbound direction. The collision occurred as plaintiff's vehicle passed a moving mail truck and entered defendant's lane of travel. Defendant moved for summary judgment dismissing the complaint, based on, *inter alia*, application of the emergency doctrine. Plaintiff opposed the motion, contending that issues of fact exist regarding the applicability of the emergency doctrine and the reasonableness of defendant's actions. Supreme Court granted the motion. Plaintiffs appeal, and we reverse.

We conclude that defendant failed to meet her initial burden. Although defendant established that the emergency doctrine applied (*see generally Stewart v Kier*, 100 AD3d 1389, 1389-1390 [4th Dept 2012]), her own submissions raised an issue of fact with respect to the reasonableness of her conduct.

A person facing an emergency is "not automatically absolve[d] . . . from liability" (*Gilkerson v Buck*, 174 AD3d 1282, 1284 [4th Dept 2019] [internal quotation marks omitted]). In determining whether the

actions of a driver are reasonable in light of an emergency situation, the factfinder must consider "both the driver's awareness of the situation and [the driver's] actions prior to the occurrence of the emergency" (*id.*).

Defendant admitted that, after she noticed the mail truck, she observed two motor vehicles pass it by pulling out from behind the truck, crossing completely into the westbound lane, and returning to the eastbound lane of travel, but she nevertheless continued in the westbound lane without deactivating her cruise control. She then saw plaintiff's vehicle cross over into her lane "possibly to see if there was oncoming traffic" before it reentered the eastbound lane. It was not until that point that plaintiff deactivated her cruise control, which had been set to 45 miles per hour. We conclude that issues of fact exist whether, given her observations, defendant responded reasonably under the circumstances (see *Rick v TeCulver*, 211 AD3d 1542, 1543 [4th Dept 2022]).