New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

# Memorandum in Support

NYSBA #29 May 24, 2016

S. 7779 By: Senator Bonacic
A.10117 By: M. of A. Ryan
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

**AN ACT** to amend the civil practice law and rules, in relation to the burden of demonstrating comparative negligence

**LAW AND SECTIONS REFERRED TO**: Section 1412 of the civil practice law and rules

This bill would make it clear that the party asserting culpable conduct as an affirmative defense bears the burden of proof in establishing the viability of the defense.

In recent years, case law has seemed to diverge from the original purpose and intent of CPLR 1412, as originally enacted in 1975 (see, Ch. 69, L. 1975).

CPLR 1412 codified the affirmative defense of culpable conduct in diminution of damages, consistent with CPLR 1411, which was also enacted at the same time. CPLR 1412 was adopted in order to join the vast majority of other jurisdictions in rejecting a plaintiff's contributory negligence as a bar to recovery. In addressing the provisions of CPLR 1412, the Judicial Conference stated:

> This section brings New York law on the issue into conformity with the majority rule and represent the culmination of the gradual but persistent erosion of the rule that freedom from contributory negligence must be pleaded and proven by the plaintiff . . . . Because 'they are both manifestations of the same or similar considerations . . . . burden of pleading and burden of proof are usually parallel.' James, *Civil Procedure* p. 265 (1965). This is generally true in New York (see 3 Weinstein, Korn & Miller, *New York Civil Practice*-CPLR 3018.14 [Matthew Bender]) and there is no reason to make an exception where one seeks to diminish damages otherwise recoverable by asserting, pursuant to this article, that the claimant's culpable conduct contributed to his harm.

Notwithstanding the plain intent of the Legislature to place the burden of pleading and proof of a plaintiff's comparative fault on defendant, some courts have, in recent years, placed upon a personal injury plaintiff moving for summary judgment the burden of disproving comparative fault as an element of his or her burden in making that motion. Thus, in numerous pedestrian knock-down cases, injured plaintiffs, struck while in a crosswalk, walking with the light, were denied summary judgment on liability because they failed in their moving papers to demonstrate the absence of comparative fault, notwithstanding defendants' failure to demonstrate in their papers that there was comparative fault on plaintiff's part (see, e.g., *Day v. MTA Bus Co*., 94 A.D.3d 940 (2nd Dept. 2012); *Rodgers v. Duffy*, 87 A.D.3d 1126 (2nd Dept. 2011); *Roman v. Al Limousine, Inc.*, 76 A.D.3d 552 (2nd Dept. 2010); *Yuen Lum v. Wallace*, 70 A.D.3d 1013 (2nd Dept. 2010)). In so ruling, the courts frequently rely upon the Court of Appeals holding in *Thoma v. Ronai*, 82 N.Y.2d 736 (1993). However, that decision merely held that, after all submitted papers had been considered, "plaintiff did not satisfy her burden of demonstrating the absence of any material issue of fact." It did not directly address who has the burden of going forward with evidence of comparative fault on a motion for summary judgment.

This legislation would not overrule *Thoma*. If, in response to a plaintiff's motion demonstrating defendant's liability, defendant presents evidence of plaintiff's comparative fault sufficient to raise a question of fact, summary judgment would be properly denied.

However, in light of the Legislature's intent to place the burden of pleading and proving a plaintiff's comparative fault upon the defendant, there is no reason to reverse that burden, and to place upon a plaintiff the burden of going forward with proof of a negative - - i.e., the absence of comparative fault - - in seeking summary judgment. This is the conclusion reached by noted commentators (Siegel, *New York Practice* § 280 (January 2013 Supplement); see, Connors, *Can Comparative Fault Stopthe Train Known as Summary Judgment?*, NYLJ, 1/16/13), and some thoughtful judges (e.g., *Capuano v. Tishman Construction Corp*., 98 A.D.3d 848 (1st Dept. 2012) (Concurring Op of Justices Saxe and Acosta).

Based on the foregoing, the New York State Bar Association **SUPPORTS** this legislation, which is based on a proposal by the Association's Committee on Civil Practice Law and Rules.