

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Smith v. Maines Paper & Food Serv., Inc.

Smith, 2026 NY Slip Op 03466 (Supreme Court of the State of New York Appellate Division Second Judicial Department 2026) · No. 2022-06992 · Decided June 3, 2026

SUMMARY

The Appellate Division, Second Department, affirmed an order denying the plaintiffs' motion for summary judgment on liability and on whether Harold L. Smith sustained a serious injury under Insurance Law § 5102(d). The court held that the defendants' initially unsworn expert submissions could be considered after the experts submitted sworn affidavits incorporating and reaffirming those submissions, because CPLR 2001 permitted the defect to be cured without prejudice to the plaintiffs. The court concluded that the defendants thereby raised triable issues of fact.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Per Curiam; Francesca E. Connolly, J.P.; Paul Wooten; Lourdes M. Ventura; Phillip Hom
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
DECIDED	June 3, 2026
DOCKET	2022-06992
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed from an order of the Supreme Court, Orange County, denying those branches of their motion for summary judgment that sought judgment on liability and on whether Harold L. Smith sustained a serious injury under Insurance Law § 5102(d).
STANDARD OF REVIEW	The Appellate Division reviewed the Supreme Court's determination that the defendants' later-submitted sworn expert affidavits could be considered and its denial of summary judgment. Summary judgment requires a prima facie showing of entitlement to judgment as a matter of law; once that showing is made, the opposing party must raise a triable issue of fact.

PRECEDENTIAL VALUE	Published New York Appellate Division decision
PARTIES	Harold L. Smith, Harold L. Smith's wife, suing derivatively, Plaintiffs v. Maines Paper & Food Service, Inc., Robert Levi Joseph Lavine, Other defendants

TOPICS

summary judgment negligence personal injury expert testimony appellate procedure

PRACTICE AREAS

Torts Civil Procedure Evidence Appellate Procedure Insurance Law

QUESTIONS PRESENTED

1. Whether the defendants' sworn expert affidavits, submitted after their initial unsworn expert submissions and incorporating those submissions, could be considered to cure the initial defects under CPLR 2001.
2. Whether the defendants raised triable issues of fact sufficient to defeat the plaintiffs' motion for summary judgment on liability.
3. Whether the defendants raised triable issues of fact sufficient to defeat the plaintiffs' motion for summary judgment on whether Harold L. Smith sustained a serious injury under Insurance Law § 5102(d).

HOLDINGS

1. Under the circumstances of this case, the Supreme Court providently exercised its discretion in considering sworn affidavits that incorporated and reaffirmed the contents of the defendants' earlier unsworn expert submissions, because CPLR 2001 permitted the defect to be disregarded where the plaintiffs suffered no substantial prejudice.
2. The plaintiffs established prima facie entitlement to summary judgment on liability and on the serious-injury issue, but the defendants' admissible expert affidavits raised triable issues of fact; therefore, summary judgment was properly denied.

KEY QUOTATIONS

“Under the circumstances of this case, the Supreme Court providently exercised its discretion in considering those affidavits” ([*1])

“Those submissions cured the defects contained in the defendants' opposition papers, and the plaintiffs suffered no prejudice, as they had an opportunity to address the opinions of the defendants' expert witnesses in their reply papers.” ([*1])

FACTUAL BACKGROUND

Harold L. Smith allegedly sustained personal injuries in a motor vehicle accident involving a rear-end collision. The plaintiffs claimed that defendant Robert Levi Joseph Lavine breached a duty owed to Smith and that Smith sustained a serious injury within the meaning of Insurance Law § 5102(d). The defendants opposed summary judgment with expert submissions that were initially unsworn, then submitted sworn affidavits incorporating and reaffirming those opinions after the trial court directed statements of material facts.

PROCEDURAL HISTORY

The plaintiffs commenced an action seeking damages for personal injuries allegedly sustained by Harold L. Smith in a motor vehicle accident, including a derivative claim by his wife. They moved for summary judgment on liability and serious injury. After the defendants initially submitted unsworn expert affirmations and an unsworn expert report, the trial court directed the parties to submit statements of material facts; the defendants then submitted sworn expert affidavits incorporating and reaffirming their earlier submissions. The Supreme Court considered the affidavits and denied the relevant branches of the plaintiffs' motion. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Tsyganash v Auto Mall Fleet Mgt., Inc., 163 AD3d 1033, 1033-1034
- Abramov v Martinez, 224 AD3d 794, 796
- McRae v City of New York, 208 AD3d 775, 775-776
- Barr v Canales, 231 AD3d 786, 787
- Jaklitsch v Kelly, 176 AD3d 792, 793
- Matter of Mirzakandov v Mazal U Bracha, LLC, 216 AD3d 966, 967
- Kallo v Kane St. Synagogue, 241 AD3d 522, 523-524
- Galluccio v Grossman, 161 AD3d 1049, 1053