

38 A.D.2d 835, 329 N.Y.S.2d 630
(Cite as: 38 A.D.2d 835, 329 N.Y.S.2d 630)

FIND Request: 38 A.D.2d 835

Supreme Court, Appellate Division, Second Department,
New York.

Dawn SCHAFFNER, etc., et al., Appellants,
v.

Harry ROCKMACHER, Respondent.

Feb. 7, 1972.

Personal injury action on behalf of infant bicycle rider injured when struck by automobile. The Supreme Court, Suffolk County, entered judgment for automobile driver and plaintiffs appealed. The Supreme Court, Appellate Division, held that where infant was five years old at time she was struck, it was prejudicial error for trial court to charge jury that infant had duty to observe certain provisions of Vehicle and Traffic Law.

Reversed and new trial granted.

West Headnotes

[1] Appeal and Error 30 ↪ 1064.1(4)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1064 Prejudicial Effect

30k1064.1 In General

30k1064.1(2) Particular Cases

30k1064.1(4) k. Passengers,

Pedestrians, Children and Cyclists, Automobiles.

Most Cited Cases

(Formerly 30k1064(1))

Automobiles 48A ↪ 246(35)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak246 Instructions

48Ak246(23) Contributory Negligence

48Ak246(35) k. Children. Most

Cited Cases

Where infant was five years old at time she was struck by vehicle while riding her bicycle, it was prejudicial error for trial court to charge jury that infant had duty to observe certain provisions of Vehicle and Traffic Law.

[2] Evidence 157 ↪ 333(1)

157 Evidence

157X Documentary Evidence

157X(A) Public or Official Acts, Proceedings, Records, and Certificates

157k333 Official Records and Reports

157k333(1) k. In General. Most Cited

Cases

Where testimony at trial showed that infant bicycle rider who had been struck by automobile remained in roadway in same place where she landed until police arrived and moved her, exclusion of Police Department Traffic Accident Report containing diagram showing final positions of automobile, bicycle rider and bicycle, and measurements made by officer of distance of skid marks to bicycle and rider was error.

****631** Sacks & Wolf, Brentwood, for appellants; Julius A. Itzkowitz, New York City, of counsel.

O'Brien & Kelly, Mineola, for respondent; John D. Kelly, Mineola, Thomas Grimes, Brooklyn, of counsel.

Before MARTUSCELLO, Acting P.J., and SHAPIRO, GULOTTA, CHRIST and BENJAMIN, JJ.

MEMORANDUM BY THE COURT.

***835** In a negligence action to recover damages for personal injuries, loss of services, etc., plaintiffs appeal from a judgment of the Supreme Court, Suffolk County, entered November 13, 1970, in favor of defendant, upon a jury verdict.

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Judgment reversed, on the law, and new trial granted, with costs to abide the event. The findings of fact have not been considered.

[1] On April 28, 1962, the infant plaintiff, then five years old, was riding her bicycle on Grand Boulevard, in the Town of Islip, when she was struck by an automobile driven by defendant. In view of the infant plaintiff's age at the time of the accident, it was prejudicial error for the trial court to charge the jury that she had a duty to observe certain provisions of the Vehicle and Traffic Law (Dugan v. Dieber, 32 A.D.2d 815, 302 N.Y.S.2d 423).

[2] The trial court also erred in excluding from one of plaintiffs' exhibits, a Police Department Traffic Accident Report, a diagram showing the final positions of the automobile, the girl and the bicycle, and the measurements made by the police officer of the distance of the skid marks to the bicycle and the girl. The testimony adduced at the trial, including that offered by defendant, indicated that the **632 infant plaintiff remained in the roadway in the same place where she landed, after being struck, until the police arrived and moved her.

We have examined the other points raised by plaintiffs and have found them to be without merit.

On the new trial the expert proof as to skid marks should be based upon a proper foundation.

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