

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

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CA 08-02429

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ.

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KEVIN E. WHITCOMBE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

REBECCA PHILLIPS AND ROSEMARY PHILLIPS,  
DEFENDANTS-RESPONDENTS.

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MICHAEL J. KIEFFER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAWRENCE M. RUBIN, BUFFALO (DESTIN C. SANTACROSE OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 8, 2008 in a personal injury action. The order denied the motion of plaintiff for partial summary judgment on the issue of liability.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when a vehicle operated by Rebecca Phillips (defendant) collided with the motorcycle operated by plaintiff. We agree with plaintiff that Supreme Court erred in denying his motion for partial summary judgment on the issue of liability. In support of his motion, plaintiff established that he was operating his motorcycle in the curb side lane of a four-lane roadway, that he was traveling at or below the speed limit, and that "all of a sudden" defendant's vehicle exited a parking lot into his lane of traffic and struck his motorcycle. Defendant testified at her deposition that she saw plaintiff for the first time when she had already begun to pull out into the roadway and that she drove into the roadway despite the fact that her vision of the roadway was obscured by a legally parked vehicle. Plaintiff thus established that defendant was negligent as a matter of law in failing to see that which she should have seen (see *Miller v Richardson*, 48 AD3d 1298, 1300, *lv denied* 11 NY3d 710; *Stiles v County of Dutchess*, 278 AD2d 304; see also *Kornacki v Kornacki* [appeal No. 2], 280 AD2d 981, 981-982), and that the sole proximate cause of the accident was defendant's failure to yield the right of way to plaintiff (see Vehicle and Traffic Law § 1143; *Miller*, 48 AD3d

at 1300; *Wallace v Kuhn*, 23 AD3d 1042, 1043).

Entered: April 24, 2009

Patricia L. Morgan  
Deputy Clerk of the Court