

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

85

**CA 15-01133**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

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ALEXANDER G. WEISER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MARYCLAIRE P. WILBER AND FREDERICK J. WILBER,  
DEFENDANTS-RESPONDENTS.

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GELBER & O'CONNELL, LLC, AMHERST (HERSCHEL GELBER OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered October 3, 2014. The order, insofar as appealed from, denied that part of the motion of plaintiff seeking to strike defendants' affirmative defense of failure to wear a seatbelt.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained in a motor vehicle accident. Contrary to plaintiff's contention, Supreme Court properly denied that part of his motion seeking to strike defendants' first affirmative defense insofar as that defense is premised on plaintiff's failure to wear a seat belt. Although plaintiff met his initial burden on that part of the motion, defendants raised a triable issue of fact by submitting expert proof in the form of an affidavit from a police officer, who conducted an investigation of the accident and concluded that plaintiff was not wearing his seatbelt (*see Regan v Ancoma, Inc.*, 11 AD3d 1016, 1017). Contrary to plaintiff's contention, the affidavit is not based on "mere speculation" (*Stickney v Alleca*, 52 AD3d 1214, 1215) and, "[i]f there is any doubt as to the availability of a defense, it should not be dismissed" (*Nahrebeski v Molnar*, 286 AD2d 891, 891 [internal quotation marks omitted]).

Entered: February 11, 2016

Frances E. Cafarell  
Clerk of the Court