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

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CA 16-01557

PRESENT: WHALEN, P.J., SMITH, CENTRA, CURRAN, AND SCUDDER, JJ.

ANNA-MARIE H. RUSSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS B. PEARSON AND NIAGARA MOHAWK POWER CORP.,
DEFENDANTS-RESPONDENTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (STEPHANIE VISCELLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 27, 2016. The order denied plaintiff's motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving collided with a vehicle driven by Dennis B. Pearson (defendant) and owned by defendant Niagara Mohawk Power Corp. Supreme Court properly denied plaintiff's motion for summary judgment on the issues of serious injury and "negligence." Plaintiff's motion and supporting papers show that plaintiff was actually seeking a determination that defendant's negligence was the sole proximate cause of the accident and that she was not comparatively negligent. We conclude that plaintiff failed to meet her initial burden of establishing as a matter of law that defendant's negligence was the sole proximate cause of the accident and that there are no issues of fact concerning her comparative negligence (*see Jackson v City of Buffalo*, 144 AD3d 1555, 1556; *Bush v Kovacevic*, 140 AD3d 1651, 1653). " '[W]hether a plaintiff is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases' " (*Yondt v Boulevard Mall Co.*, 306 AD2d 884, 884). In support of the motion, plaintiff submitted her own deposition testimony, which raised a question of fact regarding her attentiveness as she drove her vehicle (*see Spicola v Piracci*, 2 AD3d 1368, 1369). Thus, we conclude that plaintiff "failed to establish that there was nothing she could do to avoid the accident and therefore failed to establish that she was free of comparative fault" (*Jackson*, 144 AD3d at 1556). We have considered plaintiff's remaining contention and conclude that it is

without merit.

Entered: March 31, 2017

Frances E. Cafarell
Clerk of the Court