To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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ELAINE ISAACS-RILEY,

Plaintiff,

-against-

LEILA GROLL,

Defendant.

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DECISION AND ORDER

Index No. 51515/2017

HON. JAMES D. PAGONES, A.J.S.C.

Plaintiff moves for an order, pursuant to CPLR 3212 and CPLR §3126, granting her summary judgment on the issue of liability and precluding defendant from testifying or presenting any evidence based upon her failure to attend an examination before trial.

The following papers were read:

Notice of Motion-Affirmation-Exhibits A-F-Affidavit of Service	1-9
Affirmation in Opposition-Exhibit A	10-11
Affirmation in Reply-Affidavit of Service	12-13

By way of background, this is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident which occurred on January 23, 2017. The plaintiff was operating her vehicle on Route 9 South when defendant made an unlawful left turn out of the "Route 9 Mall" and the collision occurred. Defendant was ticketed

pursuant to Vehicle and Traffic Law §1160(d). The defendant pled guilty in the Poughkeepsie Town Court on February 6, 2017 and was issued a fine and surcharge.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movant must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York.*, 49 NY2d 557 [1980]).

In support of her motion, plaintiff offers her affidavit, a copy of the police accident report and the certificate of disposition of the Town of Poughkeepsie Court.

In her affidavit, the plaintiff states that at and near the accident site, Route 9 consists of three lanes for travel southbound and three lanes of travel northbound. At the time of the accident, plaintiff was traveling in the southbound middle lane. At the accident site, adjacent to the northbound lane, is the "Route 9 Mall" which has an entrance and exit lane for

motorists. The exit lane from the property is regulated by both a traffic control signal and New York State Department of Transportation sign, which indicate that vehicles may only turn right out of the mall exit. Plaintiff states that prior to the accident she was traveling at approximately 30 mph in moderate to heavy traffic. The traffic signal was green and remained green when the accident transpired as she proceeded through the intersection. After plaintiff's vehicle entered the intersection, she observed the defendant's vehicle making a left turn directly into her path of travel. At the time of this observation, the vehicles were only two car lengths and two seconds apart. In attempt to avoid the accident, plaintiff sounded her horn and depressed her brakes, yet these effort were in vain. The front passenger's side of the defendant's vehicle struck the front driver's side of the plaintiff's vehicle.

Plaintiff also offers a certificate of disposition of the Poughkeepsie Town Court. Vehicle and Traffic Law §1160(d) provides the following:

> "When markers, buttons, signs, or other markings are placed within or adjacent to intersections and thereby require and direct that a different course from that specified in this section be traveled by vehicles turning at an intersection, no driver of a vehicle shall turn a vehicle at an intersection other than as directed and required by such markers, buttons, signs, or other markings."

On February 6, 2017, defendant pled guilty and was fined for her violation of Vehicle and Traffic Law §1160(d).

Additionally, plaintiff's motion is buttressed by the certified copy of the police accident report containing defendant Groll's admission that she attempted a left hand turn out of the Route 9 mall when the vehicles collided (*see Voskin v. Lemel*, 52 AD3d 503 [2nd Dept 2008]).

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see Vainer v. DiSalvo*, 79 AD3d 1023 [2nd Dept 2010]; *Blangiardo v. Hirsch*, 29 AD3d 841 [2nd Dept 2006]; *Gomez v. Sammy's Transport, Inc.*, 19 AD3d 544 [2nd Dept 2005]). The aforementioned evidence presented by the plaintiff, namely her affidavit and the certificate of disposition, establish that defendant, in disregard of a sign prohibiting left hand turns, turned left onto Route 9 and was therefore negligent as a matter of law (*see Vainer v. DiSalvo*, 79 AD3d 1023 [2nd Dept 2010]). Plaintiff also establishes that defendant's negligence was the sole proximate cause of the accident, without any comparative negligence on her part. A driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (*see Yelder v. Walters*, 64 AD3d 762 [2nd Dept 2009]).

Since plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]), the defendant must show that

genuine triable issues of material fact exist in order to defeat plaintiff's motion (*id.*).

In opposition, defendant offers her own affidavit. Defendant states that she was stopped at a red light at the exit of the shopping mall parking lot with the intention of making a right turn onto Route 9 in Poughkeepsie, New York. Suddenly, the vehicle behind her began honking its horn. Believing there to be an emergency, defendant entered Route 9 in an attempt to get out of the way of the honking vehicle. Defendant concludes that when she entered Route 9 from the parking lot, her vehicle was struck by the plaintiff's vehicle which, upon her observation, was traveling in excess of 45 miles per hour.

Under the emergency doctrine, when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context (*see Vitale v. Levine*, 44 AD3d 935 [2nd Dept 2007]). Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact, those issues may in appropriate circumstances be determined as a matter of law (*id.*). Here, it appears that the defendant is attempting to raise an issue of

fact as to whether or not she faced an emergency situation, not of her own making, when an unknown driver began honking at her vehicle. Defendant may not rely on the emergency doctrine in opposition to the plaintiff's motion, since the defendant failed to plead the emergency doctrine as an affirmative defense in her answer and the facts relating to the emergency were solely known to the defendant. Therefore, the opposition papers raised new issues of fact not appearing on the face of the pleading, which result in an unfair surprise to the plaintiff (*see Franco v. G. Michael Cab Corp.*, 71 AD3d 1082 [2nd Dept 2010]). Moreover, the Court is left to question the genuineness of this alleged "emergency" as the defendant admitted to the police officer responding to the accident that she was attempting to turn left in violation of the law and pled guilty to the same.

Moreover, defendant's assertion that plaintiff was traveling in excess of the speed limit is unsubstantiated and wholly subjective; thus, it is insufficient to raise a triable issue of fact (*see Sheppeard v. Murci*, 306 AD2d 268 [2nd Dept 2003]).

Accordingly, the branch of plaintiff's motion seeking summary judgment on the issue of liability is granted. To the extent that the remaining branch of the plaintiff's motion remains viable, it is granted to the extent that defendant is precluded from offering any testimony or evidence with regard to liability.

Based upon the foregoing, plaintiff's motion for summary judgment is granted in its entirety. This action shall proceed to trial solely on the issue of damages. The parties are reminded to appear for a compliance conference on June 20, 2018 at 10:30 a.m. Adjournments are only granted with leave of the Court.

The foregoing constitutes the decision and order of this Court. This decision and order has been filed electronically.

Dated: March 12, 2018
Poughkeepsie, New York

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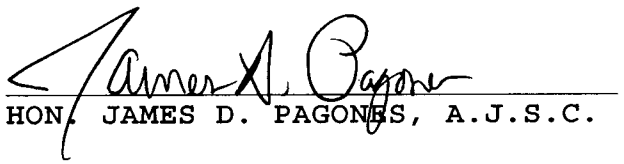

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