SHORT FORM ORDER **INDEX NO.: 613986/2019**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

KARI ARAUS,

Plaintiff,

-against-

MARIA G. LAGATTA and PETER LAGATTA,

Defendants.

ORIG. RETURN DATE: December 10, 2019
FINAL RETURN DATE: January 28, 2020
MOT. SEQ. #: 001 **MotD**

PLAINTIFF'S ATTORNEY:
ROSENBERG & GLUCK LLP
1176 Portion Road
Holtsville, New York 11742

DEFENDANTS' ATTORNEYS:
LAW OFFICES OF JENNIFER S. ADAMS
One Executive Blvd., Suite 280
Yonkers, New York 10701

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by plaintiff, dated November 19, 2019, and supporting papers; and (2) Affirmation In Opposition by defendants, dated December 26, 2019, it is

ORDERED that the motion for partial summary judgment pursuant to CPLR 3212 by plaintiff is decided as follows:

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is granted; and it is further

ORDERED that plaintiff's motion for partial summary judgment on the issue of plaintiff's entitlement to punitive damages is denied; and it is further

ORDERED that plaintiff's motion to strike defendants' fourth and fifth affirmative defenses is denied, without prejudice to renewal after discovery in this action has been completed.

This action involves a motor vehicle accident that occurred on January 26, 2018 , at the intersection of Mastic Road and Wavecrest Drive in the Town of Brookhaven, when defendant Maria Lagatta, who driving south on Mastic Road in a vehicle owned by defendant Peter Lagatta, passed a red traffic light and struck plaintiff's vehicle, which was traveling West on Wavecrest Drive with a green traffic light in her favor. Maria Lagatta was arrested for Driving While Impaired By Drugs, Reckless Driving and Criminal Possession of a Controlled Substance in the Seventh Degree, and on April 4, 2018, she pled guilty to all charges. In her allocution for her guilty plea, Maria Lagatta admitted, *inter alia*, that she had taken phencyclidine (PCP) prior to operating the vehicle

and that, as a result, she was impaired at the time of the collision with plaintiff's vehicle, that she had been driving recklessly and that she had caused the accident. Maria Lagatta had been convicted previously on charges of Driving While Impaired By Drugs and other, related charges. Plaintiff now moves for partial summary judgment on the issue of liability and entitlement to punitive damages, and to strike defendants' fourth affirmative defense, which alleges culpable conduct and/or contributory negligence and/or assumption of the risk on plaintiff's part, and defendants' fifth affirmative defense, which alleges that plaintiff failed to utilize, or misused, available seatbelts. In support of the motion, plaintiff offers, *inter alia*, her own affidavit, in which she describes the accident and avers that she was wearing a seatbelt at the time it occurred, as well as copies of the pleadings, the MV-104A police accident report, certificates of conviction for defendant and the minutes of defendant's plea of guilty to charges related to the accident.

Defendants oppose the motion on the grounds that the motion is premature as no discovery has been conducted in the action and, as to that aspect of the motion which seeks summary judgment on the issue of entitlement to punitive damages, on the ground that plaintiff's demand is "excessive" and inapplicable to defendant Peter Lagatta, whose only role in the accident was his ownership of the vehicle Maria Legatta was driving.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Before summary judgment may be granted, it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn from them are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

If a driver successfully demonstrates that he or she lawfully entered an intersection with the expectation that other motorists would properly yield the right-of-way, that party has established a prima facie case of entitlement to judgment (*see* ***Simmons v Canady***, 95 AD3d 1201, 1202, 945 NYS2d 138 [2d Dept 2012]; ***Singh v Singh***, 81 AD3d 807, 808, 916 NYS2d 527 [2d Dept 2011]; ***Bonilla v Gutierrez***, 81 AD3d 581, 582, 915 NYS2d 634 [2d Dept 2011]). However, a movant may be found to be contributorily negligent if he or she failed to use reasonable care to avoid

the accident (*see* ***Antaki v Mateo***, 100 AD3d 579, 580, 954 NYS2d 540 [2d Dept 2012]; ***Steiner v Dincesen***, 95 AD3d 877, 878, 943 NYS2d 585 [2d Dept 2012]; ***Sirot v Troiano***, 66 AD3d 763, 764, 886 NYS2d 504 [2d Dept 2009]). A driver is negligent when he or she fails to see that which should be seen through proper use of his or her senses (*see* ***Calderon-Scotti v Rosenstein***, 119 AD3d 722, 989 NYS2d 514 [2d Dept 2014]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 1078, 965 NYS2d 609 [2d Dept 2013]; ***Amalfitano v Rocco***, 100 AD3d 939, 940, 954 NYS2d 644 [2d Dept 2012]).

Here, plaintiff has established a *prima facie* case of entitlement to judgment on the issue of liability as a matter of law. In opposition to the motion, defendants have failed to proffer any evidence showing facts sufficient to require a trial on any issue of material fact. Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted.

Plaintiff also moves for summary judgment on the issue of her entitlement to punitive damages. A claim for punitive damages does not state an independent cause of action; rather, a "demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (***Tighe v. North Shore Animal League Am.***, 142 AD3d 607, 610, 36 NYS3d 500 [2d Dept 2016], *citing* ***McMorrow v. Angelopoulos***, 113 AD3d 736, 740, 979 NYS2d 353 [2d Dept 2014], *and quoting* ***Rocanova v. Equitable Life Assur. Socy. of U.S.***, 83 NY2d 603, 616-617, 612 NYS2d 339 [1994]). Hence, a demand for punitive damages is neither a cause of action nor "a part thereof" as to which partial summary judgment may be granted (*see* CPLR 3212[e]). Whether to award punitive damages and, if so, the amount to be awarded is for the trier of fact to determine, taking into consideration the reprehensibility of a defendant's conduct; whether the harm caused was physical as opposed to economic; whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; whether the target of the conduct was financially vulnerable; whether the conduct involved repeated actions of a similar type or was an isolated incident; and whether the harm was the result of intentional malice, trickery, or deceit, or mere accident (*see* ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 US 408, 123 SCt 1513 [2003]). Thus, the amount of a punitive damages award and the degree of punishment depends upon the peculiar circumstances of each case (*see* ***McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.***, 256 AD2d 269, 270-271, 682 NYS2d 167 [1st Dept 1998]; ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 US1, 16, 111 SCt 1032). Accordingly, so much of plaintiff's motion as seeks summary judgment in her favor with respect to entitlement to punitive damges must be denied[1].

1 The court does note, however, that to the extent the claim against Peter Legatta is based solely upon his ownership of the vehicle Maria Legatta was driving when she collided with plaintiff's vehicle, a claim for punitive damages against him cannot stand (*see* ***O'Connor v Kuzmicki***, 14 AD3d 498, 498-99 [2d Dept 2005]).

With respect to so much of plaintiff's motion as seeks summary judgment dismissing defendants' fourth and fifth affirmative defenses, the application is premature, as discovery has not been conducted and could lead to evidence relevant to these affirmative defenses and as facts essential to opposing plaintiff's motion for summary judgment dismissing them almost certainly are within plaintiff's exclusive knowledge or under her control (*see* CPLR 3212[f]; *see generally* ***Turner v. Butler***, 139 AD3d 715, 32 NYS3d 174 [2d Dept 2016]; ***Deleg v. Vinci***, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; ***Monteleone v. Jung Pyo Hong***, 79 AD3d 988, 913 NYS2d 755 [2d Dept 2010]; *see genenrally* ***Rodriguez v. City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]). Accordingly, this prong of plaintiff's motion is denied, without prejudice to renewal after discovery in this action has been completed.

The foregoing constitutes the decision and order of the court.

Dated: May 4, 2020

HON. SANFORD NEIL BERLAND, A.J.S.C.

__X__ NON-FINAL DISPOSITION ___ FINAL DISPOSITION