To commence the 30-day 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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DAVID J. MARKER,

Plaintiff,

-against-

BRENDAN L. KENNEDY and PATRICK J. KENNEDY,

Defendant.

----------x

DECISION AND ORDER

Index No.: 2019-53891

The following papers, numbered 1 to 12, were read on Plaintiff David J. Marker's (hereinafter "Plaintiff") motion pursuant to CPLR 3212 for partial summary judgment on the issue of liability against Defendants Brendan L. Kennedy and Patrick J. Kennedy (hereinafter "Defendant Brendan" and "Defendant Patrick" individually or "Defendants" collectively):

Notice of Motion-Affirmation of Michael A. Mainetti, Esq.-Exhibits A-I.....1-11
Affirmation in Opposition of Tristan Smith, Esq. 12

Plaintiff commenced this personal injury action on or about September 26, 2019 against Defendants regarding a car accident that occurred on August 21, 2019 at approximately 10:16 p.m. in Rhinebeck, New York. Plaintiff alleges that on that date, he was stopped on State Route 9 for approximately 3 or 4 minutes, waiting for traffic to clear in front of him. While he was stopped, his vehicle was struck in the rear by a vehicle owned by Defendant Patrick and driven by Defendant Brendan.

Plaintiff now moves for summary judgment on the ground that this is a rear-end accident and Defendants' negligence is the sole proximate cause of the accident. In support of the motion,

Plaintiff submits the pleadings, his Bills of Particulars, a copy of the police report and the deposition transcripts of Plaintiff and Defendant Brendan. In opposition, Defendant submits an attorney affirmation.

It is uncontested that the vehicle that Plaintiff was driving was struck in the rear by Defendants' vehicle. Plaintiff's deposition testimony confirms that he was stopped in traffic for approximately 3-4 minutes when he was struck in the rear. In addition, Defendant Brendan testified that Plaintiff's vehicle was stopped at the time that he struck it in the rear. Finally, the fact that Plaintiff's vehicle was stopped at the time Defendant struck it is also confirmed by the Police Accident Report.[1]

"A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence." *Orcel v. Haber*, 140 AD3d 937 [2d Dept 2016]. As Plaintiff has established his *prima facie* case, the burden shifts to Defendants.

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle." *Sayyed v. Murray*, 109 AD3d 464 [2d Dept. 2013]. As the operator of the moving vehicle, Defendant Brendan is required to rebut the inference of negligence because he "is in the best position to explain whether the collision was due to, inter alia, a mechanical failure, an unavoidable skidding on a wet pavement, or some

[1] This Report further notes that Defendant Brendan thought that Plaintiff's vehicle was moving, which it was not, and notes that "it is believed that [Defendant Brendan] was distracted or failed to pay attention to the roadway and traffic conditions."

other reasonable cause." *Id.* In the instant case, Defendants' counsel attempts to rebut the inference of negligence by inferring that Plaintiff's vehicle came to a sudden stop. This argument appears to be based upon Defendant Brendan's deposition testimony regarding the distance at which he first saw that Plaintiff's vehicle was stopped. Counsel asserts that Defendant Brendan's inability to give a more precise approximation of the space between the cars "suggests" that Plaintiff brought his car to a sudden stop. However, this "suggestion" is unsupported by the record and no affidavit from Defendant Brendan has been submitted to support this allegation.

In fact, according to Defendant Brendan's deposition testimony contained in the record, he realized that the vehicle in front of him was stopped only "briefly before the accident occurred." When he saw the vehicle was stopped, he took his foot off the gas and when he realized he was coming close to the vehicle, he just "froze." Mainetti Affirmation, Exhibit H, p. 22-24. This testimony, standing alone, fails to establish that Plaintiff's vehicle came to a sudden stop and does not raise a triable issue of fact as to whether there was a nonnegligent explanation for the rear-end collision. *De Castillo v. Sormeley*, 140 AD3d 918, 918–19 [2d Dept. 2016].

Now, therefore, it is hereby

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

ORDERED that, as the parties have previously been advised, this matter is scheduled for a settlement conference on **November 4, 2020 at 10:00 am**.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
September 28, 2020

CHRISTI J. ACKER, J.S.C.

To: All parties via ECF