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 WESTCHESTER**

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**MARLON CASTILLO,**

**Plaintiff,**

**-against-**

**DECISION & ORDER**
**Index No. 55360/2020**
**Sequence No. 1**

**MARCUS JOSE REBEIRO and NATIONWIDE MECHANICAL, INC.,**

**Defendants.**

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**WOOD, J.**

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 12-32 were read in connection with plaintiff's partial motion for summary judgment, on the issue of liability, and to strike the affirmative defenses relating to culpable conduct.

This is an action for alleged serious personal injuries arising out of a motor vehicle incident that occurred on August 30, 2019, at which time the vehicle in which plaintiff (owner of the vehicle) was a passenger, was struck in the rear by defendants' vehicle while it was stopped at a red traffic light on Ashburton Avenue at or near its intersection with North Broadway, in Yonkers.

The certified police accident report indicates that plaintiff related he was stopped at a steady red light when defendant struck plaintiff's vehicle in the rear; and defendant stated to the officer that he was driving when he felt drowsy, took his eyes off road for a second and struck plaintiff's vehicle in the rear (NYSCEF#17).

Upon the foregoing papers, the motion is decided as follows:

A 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Generally, Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v City of New York, 721 NYS2d 790 [2d Dept 2000]). "When a

driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle" (Young v City of New York, 113 AD2d 833, 834 [2d Dept 1985]). "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, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (Fernandez v Babylon Mun. Solid Waste, 117 AD3d 678 [2d Dept 2014]). In other words, proof of a rear-end collision establishes a prima facie case of negligence on the part of the driver of the vehicle that strikes the forward vehicle and imposes a duty upon said offending vehicle to come forward with admissible proof to establish an adequate, non negligent explanation for a rear-end collision (Parise v Meltzer, 204 AD2d 295 [2d Dept 1994]; Moran v Singh, 10 AD3d 707, 708 [2d Dept 2004]); Cerda v Parsley, 273 AD2d 339 [2d Dept 2000]). In addition, where a vehicle is lawfully stopped, there is a duty imposed on the operators of vehicles traveling behind it in the same direction to come to a timely halt (Carter v Castle Elec. Contr. Co., 26 AD2d 83 [2d Dept 1966]). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision because he or she is in the best position to explain whether the collision was due to a reasonable, non-negligent cause (Carter v Castle Elec. Contr. Co., at 85).

Plaintiff's submissions include the summons and complaint, his affidavit, and a certified copy of the police report. He states in her affidavit:

"Prior to the accident, I was a passenger in my vehicle that was stopped at a red light when a vehicle that I now know to be owned by Defendant Nationwide Mechanical, Inc. and operated by Defendant Marcus Jose Rebeiro, struck my vehicle in the rear... I, in no way, contributed to the happening of this accident" (NYSCEF#19).

Based upon this record, including plaintiff's affidavit, plaintiff is entitled to summary judgment, unless defendants present a nonnegligent explanation for the motor vehicle accident.

For instance, a nonnegligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause (Binkowitz v Kolb, 135 AD3d 884, 885 [2d Dept 2016]).

In opposition, defendant offers his affidavit that states:

"I was stopped for a red light behind plaintiff's Mercedes. Ashburton Avenue is fairly steep uphill grade where plaintiff's car and I were stopped. As I was waiting for the light to turn green I had my foot on the brake to hold the truck in place. . Suddenly, without any warning, I felt a very slight impact to the front of my truck. I was looking down at the truck's gas gauge at the time. As my truck had not moved it means the Mercedes, for whatever reason, moved backwards into my truck. With the assistance of an interpreter 1 have reviewed the police report. The statement he attributes to me in the report is not accurate. When the officer questioned me he asked me if the Mercedes rolled into me or backed up into me. I told him I was looking at the gas gauge at the time of the accident, so I couldn't be sure exactly what happened. Given how we were stopped on an uphill, my truck would not have moved forward if I had taken my foot off the brake. I did not cause this accident" (NYSCEF#25).

Contrary to the defendant's contention, his statement in his affidavit, which contradicted his admission made immediately following the accident, as set forth in the police accident report, failed to raise a triable issue of fact as to whether he had a nonnegligent explanation for striking the rear of the plaintiff's vehicle (Dolores v Grandpa's Bus Co., 189 AD3d 1539, 1540 [2d Dept 2020]). Based upon the applicable case law, defendant's attempt to change his version of events, and without anything more, fails to offer a non-negligent explanation for his vehicle rear ending plaintiffs' vehicle sufficient to raise a triable question of fact.

Further, New York no longer mandates that plaintiff must disprove comparative negligence. The Court of Appeals has clarified that Article 14-A of the CPLR contains New York's codified comparative negligence principles, and that "a plaintiff's comparative negligence is no longer a complete defense to be pleaded and proven by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages and should be pleaded and proven by the defendant" (Rodriguez v City of New York, 31 NY3d 312 [2018]). "To be entitled to partial summary

judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (Rodriguez v City of New York, *supra*). Thus, to be entitled to summary judgment on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case to the extent that the opposing party is negligent and a proximate cause of the incident (Edgerton v City of New York, 160AD3d 809 [2d Dept 2018]).

The issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, plaintiff moved for summary judgment dismissing defendants' affirmative defense of comparative negligence (Poon v Nisanov, 162 AD3d 804, 808 [2d Dept 2018]. Based upon the record, plaintiff has established that defendant was the sole proximate cause of the accident. In opposition, defendant failed to raise a triable issue of fact as to whether plaintiff was comparatively at fault in the happening of the accident (Yayoi Higashi v M & R Scarsdale Rest., LLC, 176 AD3d 788, 790 [2d Dept 2019]).

Therefore, in light of the foregoing, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on the issue of liability is granted, and also granted to the extent that the affirmative defenses relating to comparative fault are deemed struck from the pleadings, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the issue of serious injury will be tried during the damages phase of the trial, and that the granting of this summary judgment motion does not preclude further determination that plaintiff may or may not have sustained serious injury as defined by Insurance Law §5102[d]; and it is further

ORDERED, that the parties are directed to appear in the Compliance Part, at the date, time, method previously designated and ordered by that Part.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: June 15, 2021
White Plains, New York

**HON. CHARLES D. WOOD**
**Justice of the Supreme Court**

TO: All Parties by NYSCEF