

**Barnett v Goodwin**

2021 NY Slip Op 33815(U)

April 6, 2021

Supreme Court, Orange County

Docket Number: Index EF005087/2020

Judge: Maria S. Vazquez-Doles

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This opinion is uncorrected and not selected for official publication.

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 6<sup>th</sup> day of April, 2021.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

WESTLEY J. BARNETT,

Plaintiff,

-against-

MEGAN T. GOODWIN,

Defendant.

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

**DECISION & ORDER**  
INDEX EF005087/2020  
Motion date: 2/4/2021  
Motion Seq. #1

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 8 were read on plaintiff's motion for summary judgment on the issue of liability against defendant, and to strike defendant's affirmative defense as to contributory negligence:

Notice of Motion/Affirmation in Support/Exhibits A-D.....	1-6
Affirmation in Opposition.....	7
Affirmation in Reply.....	8

Plaintiff's motion for summary judgment against defendant on the issue of liability and to strike defendant's affirmative defense as to contributory negligence is **GRANTED**.

**Background and Procedural History**

In this negligence action, plaintiff seeks to recover damages for personal injuries he claims to have sustained as a result of a motor vehicle accident that occurred on December 6, 2019. Plaintiff alleges he was struck in the rear by a vehicle operated by defendant near Wickham Avenue at an intersect with Fairlawn Avenue in the City of Middletown. Plaintiff commenced this action by filing a Summons and Verified Complaint on September 11, 2020 (Exhibit A to

moving papers). Defendant filed a Verified Answer with Affirmative Defenses on December 2, 2020 (Exhibit B).

### Liability

Plaintiff asserts he is entitled to summary judgment on liability based on the rear-end collision, which establishes a *prima facie* case of negligence on the part of defendant (*Hauswirth v. Transcare New York, Inc.*, 97 AD3d 792 [2d Dept 2012]). The Court of Appeals has held that a plaintiff does not bear the burden of establishing the absence of his own comparative negligence in order to obtain partial summary judgment in a comparative negligence case (*Rodriguez v. City of New York*, 31 NY3d 312 [2018]).

In *Rodriguez*, the Court of Appeals reversed the finding of the Appellate Division, First Department, that affirmed the denial of plaintiff's motion for partial summary judgment, on the basis that plaintiff failed to make a *prima facie* showing that he was free of comparative negligence (*See, Rodriguez v. City of New York*, 142 AD3d 778 [1<sup>st</sup> Dept 2016]).

The Court of Appeals held that Article 14-A of the Civil Practice Law & Rules provides that comparative negligence does not *bar* recovery, but can act to diminish the amount of damages otherwise recoverable, in the proportion of the claimant's culpable conduct (Civ. Prac. Law & Rules §1411). Moreover, section 1412 provides that such culpable conduct shall be an affirmative defense to be pleaded and proved by the party asserting the same.

The majority thus reasoned that to place the burden on the plaintiff to show an absence of comparative fault is inconsistent with the language of section 1412 (2018 NY Slip Op. at 3). "Comparative fault is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's *prima facie* cause of action for

negligence . . . but rather a diminishment of the amount of damages” (Id at 779).

Defendant claims that the instant motion is premature in that discovery has not been completed, and issues of fact may exist regarding the accident. In addition, the police report is inadmissible. This Court finds that defendant’s assertions do not raise a triable issue of fact as to whether plaintiff was at fault in the happening of the accident (see *Phillip v. D & D Carting Co.*, 136 AD3d 18 [2d Dept 2015]). According to the Police Report, “Operator of V1 [defendant], stated she was traveling in a Westerly direction on Wickham Avenue. Operator of V1, stated her grocery bags fell off of the back seat and she looked back to pick them up. Operator of V1, stated while she was looking back she struck the rear of V2 [plaintiff]. Operator of V2, stated he was stopped in traffic at a red light when V1 struck him” (Exhibit C). Defendant’s statement in the police report is an admission to her distraction while driving. “The police officer who prepared the report was acting within the scope of his duty in recording [her] statement, and the statement was admissible as the admission of a party” (*Guevara v. Zaharakis*, 303 AD2d 555 [2d Dept 2003]). In addition, plaintiff states in his affidavit that “At the time of the collision, I had been at a complete stop at the red light for over 30 seconds prior to being struck in the rear by the vehicle operated by Defendant, Megan T Goodwin.” Defendant failed to provide proof stating otherwise. Upon view of the foregoing, plaintiff’s motion for summary judgment on liability is granted.

### Conclusion

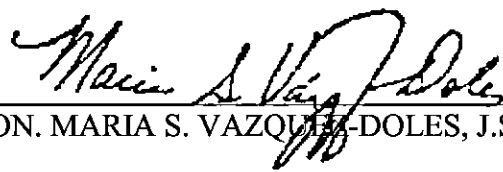
Accordingly, it is hereby

**ORDERED** that plaintiff’s motion for summary judgment on liability is **GRANTED**, and to strike defendant’s affirmative defense as to contributory negligence is **GRANTED**.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 6th, 2021  
Goshen, New York

ENTER:



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of record via NYSCEF