DECISION AND ORDER

FILED & ENTERED
9 /10/13

To commence the statutory period of 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
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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JOSE R. LAGOS,

MOTION DATE:2/8/13
INDEX NO.: 56915/12

Plaintiff,

-against-

PATSY A. FUCALE and THE CITY OF WHITE PLAINS,

Defendants.

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The following papers numbered 1 to 4 were read on this motion by plaintiff for renewal, etc.[1]

Papers Numbered

Notice of Motion - Affirmation (Taub) - Exhs. (1-11) 1-3
Answering Affirmation (Frey) 4

Upon the foregoing papers, it is Ordered that this motion by plaintiff for renewal of this Court's Decision and Order, dated February 15, 2013, denying plaintiff's motion for partial summary

[1]By Decision and Order, dated February 15, 2013, this Court had denied plaintiff's earlier motion for reargument of this Curt's denial of his summary judgment motion on the issue of liability.

judgment on the issue of liability is granted.[2] See CPLR 2221, subd. (e), paras. 2, 3.

Plaintiff contends that "new facts and evidence have come to light since this court denied the plaintiff's previous application," specifically, that defendant Fucale "has effectively recanted the statements made in his prior affidavit, dated November 28, 2012 and submitted in opposition to the plaintiff's prior application for Summary Judgment, wherein Defendant, Fucale, denied knowledge of any contact whatsoever with the rear end of the plaintiff's motor vehicle," and that defendant also has recently disclosed documentary evidence wherein defendant had admitted vehicular contact. During his recent May 8, 2013, deposition, it is claimed that defendant Fucale had testified and "produced documentary evidence *confirming* contact between the front plow hitch of his motor vehicle and the spare tire mounted to the rear tail-gate door of the plaintiff's motor vehicle." Emphasis in original.

Although this Court, having read defendant Fucale's deposition, agrees with plaintiff that defendant Fucale apparently had admitted during questioning the offending contact between the hitch on the front of his vehicle and plaintiff's rear tire, this Court cannot

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[2]By Decision and Order, dated January 3, 2013, this Court had denied plaintiff's motion for partial summary judgment on the issue of liability, the Court having found that a triable issue of fact is presented with respect to whether there had been physical contact between the vehicles.

properly rely on same to grant plaintiff partial summary judgment on the issue of liability since the deposition is neither certified correct by the Court reporter, see CPLR 3116, subdivision (b), nor signed by defendant in accordance with CPLR 3116, subdivision (a). See Marks v. Robb, 90 A.D.3d 863 (2nd Dept. 2011); cf. Tinyanoff v. Kuna, 98 A.D.3d 501 (2nd Dept. 2012); Boadu v. City of New York, 95 A.D.3d 918 (2nd Dept. 2012); Martin v. City of New York, 82 A.D.3d 653 (1st Dept. 2011).

Nevertheless, based upon the submitted copy of November 28, 2011, "Accident Report, Auto & Truck," the Court finds that plaintiff is entitled to renewal and, upon renewal, this Court now grants plaintiff's motion for partial summary judgment on the issue of liability. Defendant Fucale's signed statement set forth therein describes the accident as follows:

> Stopped at red light Westchester Avenue & S. Kensico. I was the 6th car in line. All cars were inching up. I don't recall if I skidded on the wet pavement or just stopped short. I didn't realize I hit the car until the driver threw up his hands as to say what are you doing (sic). The plow lift hit the spare tire." Emphasis supplied.

Now that contact has been admitted by defendant, it is well settled that a rear-end collision with a stopped or stopping vehicle creates an inference of negligence and a prima facie case of liability on the part of the operator of the offending vehicle and imposes upon such operator a duty of explanation. See Davidoff v.

Mullokandov, 74 A.D.3d 862 (2nd Dept. 2011); Carhuayano v. J & R Hacking, 28 A.D.3d 413 (2nd Dept. 2006); Ruzycki v. Baker, 301 A.D.2d 48 (2nd Dept. 2003). The operator of a motor vehicle is under a duty to operate his motor vehicle with reasonable care and to be aware of the actual and potential hazards existing from road conditions, and to see that which, under the facts and circumstances, he should have seen by the proper use of his senses. See PJI 277.1; Vehicle and Traffic Law Section 1129(a); Marsella v. Sound Distributing Corp., 248 A.D.2d 683 (2nd Dept. 1998); Gage v. Raffensberger, 234 A.D.2d 751, 752 (3rd Dept. 1996); McCarthy v. Miller, 139 A.D.2d. 500 (2nd Dept. 1988). Thus, when a driver approaches another vehicle from the rear, he must maintain a safe distance between his vehicle and the vehicle in front of him, and the failure to do so, in the absence of a non-negligent explanation, constitutes negligence as a matter of law. See Leal v. Wolff, 224 A.D.2d 392 (2nd Dept. 1996); Abramowicz v. Roberto, 220 A.D.2d 374, 375 (2nd Dept. 1995); Aromando v. City of New York, 220 A.D.2d 617 (2nd Dept. 1994); Silberman v. Surrey Cadillac Limousine Service, 109 A.D.2d 833 (2nd Dept. 1985).

Here, defendant Fucale has failed to offer a non-negligent explanation for this accident's occurrence. Defendant's statements that he may have stopped short or may have skidded on wet pavement are insufficient to interdict plaintiff's entitlement to liability

judgment. See Cajas-Romero v. Ward, 106 A.D.3d 850, 852 (2nd Dept. 2013); cf. Ramos v. PC Paratransit, 96 A.D.3d 924 (2nd Dept. 2012).

The parties shall appear in the Settlement Conference Part, Room 1600, at 9:30 a.m., on November 13, 2013.

Dated: September 10, 2013
White Plains, New York

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J.S.C.

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