

**Menendez v Webb**

2021 NY Slip Op 33398(U)

January 25, 2021

Supreme Court, Westchester County

Docket Number: Index No. 55778/2019

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

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, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
LILIANA MENENDEZ and EDUARDO F. MENENDEZ

Plaintiffs,

DECISION and ORDER

-against-

Motion Sequence No. 1  
Index No. 55778/2019

DERRICK R. WEBB,

Defendant.

-----X  
RUDERMAN, J.

The following papers were considered in connection with the unopposed motion by plaintiffs for partial summary judgment against defendant on the issue of liability:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits 1 - 9	1

This is an action for personal injuries allegedly sustained as a result of a motor vehicle collision that occurred on May 18, 2018, at approximately 12:45 p.m. at the intersection of Hartsdale Road and Hillcrest Avenue in the Town of Greenburgh, Westchester County, New York. The action was commenced by the filing of a summons and complaint on April 15, 2019, and defendant filed an answer with six affirmative defenses on August 22, 2019.

In moving for summary judgment on the issue of defendant’s liability, plaintiffs relies on the affidavit and deposition testimony of plaintiff Liliana Menendez and the deposition testimony of defendant Derrick Webb. Plaintiff attests that she was driving approximately 25 or 30 miles per hour on Hartsdale Road, which is not controlled by any traffic device at that location, and that when she was approximately six to seven car lengths away from the

intersection with Hillcrest Avenue, a street which is controlled by a stop sign, defendant's vehicle pulled out from Hillcrest Avenue into the intersection in the path of her oncoming vehicle, leaving her unable to either stop in time or maneuver her vehicle to avoid a collision.

Defendant similarly testified to the basics of the accident: he was driving on Hillcrest Avenue, which was controlled by a stop sign at its intersection with Hartsdale Road, and that after he stopped and checked for oncoming traffic, he proceeded to make a left turn onto Hartsdale Road, where he came into contact with plaintiff's vehicle, which had driven up on his left on Hartsdale Road, and was not controlled by any traffic control device. Webb testified that when stopped at the stop sign, he checked for oncoming traffic in both directions, and saw no oncoming vehicles to his left, and only a vehicle 500 or 600 feet distant to his right. After he began his left turn, checking to his right to make sure that the distant vehicle had not accelerated, he proceeded with the turn, after which he first noticed plaintiff's vehicle to his left just before the collision. He asserted that after he began to proceed forward he again looked to his left and again saw no vehicle in that direction, and he further asserted, "I keep glancing right and left, right and left, as I eased out into the intersection"; however, he also responded tellingly to the question of why he did not see plaintiff's vehicle prior to the collision, with the explanation "Because I was looking at the car coming from my right, wanting to make sure that he does not speed up, and while taking my time to turn left. By the time I looked around, I heard – I – well, there was a collision."

Moreover, although Webb hinted that plaintiff may have been driving at an excessive rate of speed, his only basis for making such a suggestion was that he did not see plaintiff's vehicle until the collision, and his guess that she may have been rushing home from the supermarket because she was hosting a barbecue that day. When asked directly if he believed

that plaintiff was traveling at an excessive speed, he replied “I cannot tell you that because, like I said, I never saw it until there was an impact.” His attested-to belief that if plaintiff had been traveling more slowly he would have seen her vehicle in time, does not establish that she was traveling at an excessive rate of speed.

Defendant has not submitted opposition to the motion.

#### Analysis

Plaintiff’s affidavit and her deposition testimony establish a prima facie showing of her entitlement to judgment as a matter of law on the issue of defendant’s liability, since these proofs establish that the sole proximate cause of the accident was defendant’s making a left turn when it was not reasonably safe to do so, directly into the path of plaintiff’s oncoming vehicle which was lawfully present in the intersection, with the right of way (*see Ducie v Ippolito*, 95 AD3d 1067, 1067 [2d Dept 2012]; Vehicle & Traffic Law §§ 1141, 1142). “Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision” (*id.* at 1067-1068). In the absence of submissions creating a question of fact, defendant’s liability is established, and plaintiff is entitled to the award of partial summary judgment she seeks.

While the absence of comparative negligence need not be established by the plaintiff, since it is only relevant to the mitigation of plaintiff’s damages (*see Rodriguez v City of New York*, 31 NY3d 312, 321 [2018]), defendant has not submitted any evidence in support of the culpable conduct affirmative defense he pleaded, while plaintiff has established a prima facie showing of the absence of culpable conduct on her part. Accordingly, the culpable conduct affirmative defense is dismissed as well.

The affirmative defense of assumption of risk is inapplicable, as a motorist does not assume the risk of the dangers of lawfully operating a motor vehicle. Therefore, the third affirmative defense is also dismissed.

In view of the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of defendant's liability, and dismissing the answer's culpable conduct and assumption of risk defenses, is granted, and it is further

ORDERED that, since no trial readiness order has been filed to date in this matter, all parties are directed to appear before the Compliance Conference Part of the Westchester County Courthouse on a date and in a manner of which they will be notified by that Part, to schedule a damages trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
January 25, 2021

  
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HON. TERRY JANE RUDERMAN, J.S.C.