

2/1/2013

PART 03

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed
 Settle Order
 Schedule Appearance

SHILLINGFORD, MELLISA

Index No. 0303660/2012

-against-

Hon. LARRY S. SCHACHNER

NEW YORK CITY TRANSIT

Justice.

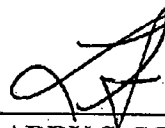
The following papers numbered 1 to 3 Read on this motion, SUMMARY JUDGMENT LIABILITY
 Noticed on December 21 2012 and duly submitted as No. 13 on the Motion Calendar of January 24, 2013

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion by plaintiff for Summary Judgment on the issue of liability is granted. The documents before the court indicate that plaintiff's vehicle was struck in the rear while stopped at a traffic signal. The affidavit of the bus operator is insufficient to defeat the motion as he fails to state what speed he was travelling at, nor does he specify the distance between the bus and the plaintiff's vehicle when he attempted to stop. In any event a wet roadway does not rebut the presumption of negligence. See Proctor v Diaz 100 AD3d 4811 (1st Dept 2012). Accordingly the motion for Summary Judgment is granted.

Motion is Respectfully Referred to:
 Justice:
 Dated:

Dated: 1/25/13

Hon. 
 LARRY S. SCHACHNER, J.S.C.

UNITED LAWYERS

LSS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

MELISSA SHILLINGFORD,

Index No. 303660/12

Plaintiff,

NOTICE OF
MOTION

-against-

NEW YORK CITY TRANSIT AUTHORITY,
TONY BEETAN,

Oral argument
is requested.

Defendants.

12/21
12/23

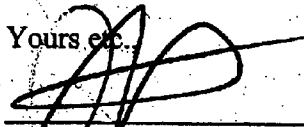
PLEASE TAKE NOTICE, that upon the annexed affirmation of JOSEPH P. STODUTO, ESQ., dated November 30, 2012, together with the exhibits annexed thereto, and all prior pleadings and proceedings had herein to date, the undersigned will move this Court on behalf of the plaintiff, at the Supreme Court of the State of New York, held in and for the County of Bronx, 851 Grand Concourse, Bronx, New York, on December 21, 2012, at 9:30 a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order pursuant to N.Y. C.P.L.R. § 3212: (a) granting the plaintiff partial summary judgment against the defendants on the issue of liability, upon the grounds that there are no triable issues of fact and that, as a matter of law, the plaintiff is entitled to such judgment; (b) dismissing the defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff; (c) upon granting summary judgment as aforesaid, setting this action down for a trial on the assessment of damages; and awarding such other and further relief as this Court deems just and proper.

STJ
SWB

Pursuant to N.Y. C.P.L.R. § 2214 (b), answering affidavits, if any, are to be served upon the undersigned no later than seven (7) days prior to the return date of the motion.

Dated: November 30, 2012
New York, New York

Yours etc.


JOSEPH P. STODUTO, ESQ.
WINGATE, RUSSOTTI & SHAPIRO, LLP
Attorneys for Plaintiff
420 Lexington Avenue, Suite 2750
New York, NY 10170
Tel No.: 212-986-7353

To:
Wallace D. Gossett, Esq.
Attorneys for Defendants
130 Livingston Street, 11th floor
Brooklyn, NY 11201

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
MELISSA SHILLINGFORD,

Index No. 303660/12

Plaintiff,

**AFFIRMATION
IN SUPPORT**

-against-

NEW YORK CITY TRANSIT AUTHORITY,
TONY BEETAN,

Defendants.
-----X

Joseph P. Stoduto, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under the penalties of perjury:

1. I am an attorney with the law firm of WINGATE, RUSSOTTI & SHAPIRO, L.L.P., the attorneys for Plaintiff MELISSA SHILLINGFORD (hereinafter referred to as "SHILLINGFORD"), in the above-referenced matter, and as such I am fully familiar with the proceedings and pleadings herein.

2. I make this affirmation in support of the present motion for an Order pursuant to N.Y. C.P.L.R. § 3212: granting the plaintiff partial summary judgment against the defendants on the issue of liability, upon the grounds that there are no triable issues of fact and that, as a matter of law, the plaintiff is entitled to such judgment; dismissing the defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff; upon granting summary judgment as aforesaid, setting this action down for a trial on the assessment of damages; and awarding such other and further relief as this Court deems just and proper.

FACTUAL AND PROCEDURAL HISTORY

3. This is an action for personal injuries sustained by Plaintiff SHILLINGFORD on November 23, 2011, in connection with a motor vehicle collision which occurred on the service road of the Cross Bronx Expressway at or near its intersection with Beach Avenue, in the County of Bronx, City and State of New York. At the time of the collision, the plaintiff was simply sitting sat at a full and complete stop at a red traffic light at the aforementioned intersection. Suddenly and without warning, a vehicle operated by Defendant TONY BEETAN (hereinafter referred to as "BEETAN") and owned by Defendant NEW YORK CITY TRANSIT AUTHORITY, approached the plaintiff's vehicle from the rear, failed to properly slow his vehicle, and struck the plaintiff's vehicle from the rear. As a result of the collision, the plaintiff sustained numerous serious and severe injuries to her spinal column, among other body parts.

4. The plaintiff commenced this action by the filing of a Summons and Complaint. Issue was joined by the defendants soon thereafter. The plaintiff subsequently served a Bill of Particulars. Copies of the aforementioned pleadings are attached hereto as **PLAINTIFF'S EXHIBIT 1**. An affidavit of merit of the plaintiff is submitted herewith as **PLAINTIFF'S EXHIBIT 2**. The affidavit further evinces the defendants' sole liability for this occurrence. A copy of the New York State Department of Motor Vehicles Police Accident Report prepared concerning this occurrence is attached hereto as **PLAINTIFF'S EXHIBIT 3**.

5. Your affirmant now seeks summary judgment on the issue of liability as the negligence of the defendants for this unexcused rear-end collision is incontestable. Furthermore, dismissal of the affirmative defenses relating to the contributory and/or comparative negligence of the plaintiff is also warranted under these circumstances. Given these facts, and the testimony

of the parties herein, the plaintiff is clearly entitled to partial summary judgment against the defendants as a matter of law.

THE PLAINTIFF'S AFFIDAVIT AND POLICE ACCIDENT REPORT ESTABLISHES THE DEFENDANTS' SOLE LIABILITY FOR THIS OCCURRENCE.

6. An affidavit of merit of the plaintiff is submitted herewith as **PLAINTIFF'S EXHIBIT 2**. The affidavit evinces the defendants' sole liability for this occurrence. According to the plaintiff:

"The motor vehicle collision which forms the basis for the present case happened on November 23, 2011. At the time of the collision, I was simply operating a motor vehicle at the intersection of the service road of the Cross Bronx Expressway and Beach Avenue, in the County of Bronx, City and State of New York. At the time of the collision, I was simply sitting at a full and complete stop at a red traffic light in a designated moving lane for travel at the aforementioned intersection.

Suddenly and without warning, a bus which I later came to learn was being operated by Defendant TONY BEETAN and was owned by Defendant NEW YORK CITY TRANSIT AUTHORITY, which was driving directly behind me on the same roadway that I was on, approached my vehicle from the rear, failed to stop and/slow down sufficiently, and struck my vehicle from the rear, causing a collision. The front of the defendants' vehicle struck the rear of my vehicle from behind, causing an impact, and ultimately causing me numerous physical injuries.

This collision was caused solely by reason of the carelessness and negligence of the defendants in the way that their vehicle was being operated on the day of the collision, including the fact that they failed to stop and/slow down their vehicle sufficiently prior to hitting me from behind, that they failed to keep their vehicle under reasonable control, and that they struck my vehicle from the rear. Furthermore, I did nothing to cause or contribute to the happening of the collision in any way, as I was simply driving my vehicle in a normal and reasonable manner at the time of the collision when I was inexplicably struck from the rear."

7. A copy of the New York State Department of Motor Vehicles Police Accident Report prepared concerning this occurrence is attached hereto as **PLAINTIFF'S EXHIBIT 3**. The complete absence of any triable issues of material fact concerning the happening of the

occurrence in question and the defendants' sole liability for this occurrence is further evidenced thereby, as the accident description offered by the responding police officer is as follows:

"At the time and place of the occurrence, the driver of vehicle #1 [Plaintiff SHILLINGFORD] was stopped at traffic light when driver of vehicle #2 [Defendant BEETAN] hit her vehicle from behind."

The Police Accident Report is properly received for consideration as part of the present motion under the business record exception to the hearsay rule. See, N.Y. C.P.L.R. § 4518 (a). The Police Accident Report speaks largely to the relatively uncomplicated and undisputed nature of the happening the accident in question.

8. As discussed below, the above testimony and evidence warrants a grant of partial summary judgment against the defendants on the issue of liability and dismissal of the defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff.

THE PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY AS THE NEGLIGENCE OF THE DEFENDANTS, AND THE ABSENCE OF COMPARATIVE NEGLIGENCE ATTRIBUTABLE TO THE PLAINTIFF, CANNOT BE DISPUTED.

9. Liability for such a collision as to the defendants cannot fairly be disputed.

Section 1129 (a) of the Vehicle and Traffic Law, entitled "Following too closely", indicates:

"The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

10. Pursuant to N.Y. P.J.I. 2:82:

"The plaintiff AB claims that (his, her) vehicle was struck in the rear by a vehicle driven by the defendant CD. Since AB's vehicle was struck in the rear, you must find that CD was negligent, unless CD has provided an adequate explanation that does not involve any negligence on (his, her) part.

AB claims [state plaintiff's claim, e.g., (he, she) was stopped at a traffic light, was stopped waiting to make a left turn, was parked]. CD claims that (he, she) was unable to stop in time to avoid striking the rear of AB's vehicle because [state CD's claim, e.g., there was an unexpected patch of ice in the road, (his, her) brakes unexpectedly failed]. You must first decide whether or not the collision occurred as explained by CD. If you do not accept CD's explanation, then you must find for AB. If you accept CD's explanation, you must then decide whether CD was negligent. Negligence is the failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. If you find that CD failed to use reasonable care, then you must find that (he, she) was negligent and therefore caused the collision. If you accept CD's version of the event, and you further find that CD did use reasonable care under the circumstances, then you will find that CD was not negligent."

11. Pursuant to N.Y. P.J.I. 2:77

"It was the duty of each of the drivers to operate (his, her) automobile with reasonable care taking into account the actual and potential dangers existing from weather, road, traffic and other conditions. Each of them was under a duty to maintain a reasonably safe rate of speed; to have (his, her) automobile under reasonable control; to keep a proper lookout under the circumstances then existing to see and be aware of what was in (his, her) view; and to use reasonable care to avoid an accident."

12. Pursuant to N.Y. P.J.I. 2:77.1:

"A driver is charged with the duty to see that which under the facts and circumstances (he, she) should have seen by the proper use of (his, her) senses, and if you find that (plaintiff, defendant) did not observe that which was there to be seen you may find that (he, she) was negligent in failing to look or in not looking carefully."

13. When a driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle. Under the case law applicable to rear-end collisions, a prima facie case of negligence is established by proof that a stopped car was hit in the rear; Briceno v Milbry, 16

A.D.3d 448, 791 N.Y.S.2d 622; Gaeta v Carter, 6 A.D.3d 576, 775 N.Y.S.2d 86; Gubala v Gee, 302 A.D.2d 911, 754 N.Y.S.2d 504; Leonard v New York, 273 A.D.2d 205, 708 N.Y.S.2d 467; Shamah v Richmond County Ambulance Service, Inc., 279 A.D.2d 564, 719 N.Y.S.2d 287; Hurley v Cavitolo, 239 A.D.2d 559, 658 N.Y.S.2d 90; Leal v Wolff, 224 A.D.2d 392, 638 N.Y.S.2d 110; Mead v Marino, 205 A.D.2d 669, 613 N.Y.S.2d 650; Conyers v Vinti, 107 A.D.2d 787, 484 N.Y.S.2d 620.

14. Absent a sufficient non-negligent excuse, colliding with the rear of a stopped vehicle is negligence as a matter of law, see Danza v Longioliere, 256 A.D.2d 434, 681 N.Y.S.2d 603; Corbly v Butler, 226 A.D.2d 418, 641 N.Y.S.2d 71; Barile v Lazzarini, 222 A.D.2d 635, 635 N.Y.S.2d 694; Mead v Marino, supra; Countermine v Galka, 189 A.D.2d 1043, 593 N.Y.S.2d 113. A duty of explanation is imposed on the operator of a moving vehicle that has hit a stopped vehicle because that operator is in the best position to explain whether the collision was due to a reasonable non-negligent cause, Higgins v Ridgewood Savings Bank, 262 A.D.2d 357, 691 N.Y.S.2d 175; Reid v Courtesy Bus Co., 234 A.D.2d 531, 651 N.Y.S.2d 612.

15. It is beyond question that drivers must maintain safe distances between their vehicles and vehicles in front of them, which imposes on them duty to be aware of traffic conditions, including vehicle stoppages. An operator of an automobile must at all times have his automobile under such control and at such a reasonable distance away from preceding automobile so that if the preceding automobile does stop suddenly for whatever reason the operator of following vehicle can stop his automobile without ramming into preceding one. A driver who operates his vehicle in and strikes the rear of a vehicle properly stopped at a red light in front of him is negligent.

16. The record herein establishes Defendant BEETAN's clear violation of the aforementioned fundamental principles. The defendants are unable to rebut the presumption of negligence caused by virtue of this rear-end collision. No non-negligent explanation for the happening of the collision exists. Under such circumstances, summary judgment must be granted against the rear-ending driver and in favor of the occupants of the front vehicle - in this case, the plaintiff. Applying the foregoing law to the one at bar, it is manifest that the plaintiff's motion for partial summary judgment on liability should be granted. The fact that the defendant struck the plaintiff from the rear confirms the defendant's failure to exercise reasonable care in the operation of his vehicle, and his sole liability for this collision.

17. Additionally, as a motorist lawfully operating a vehicle upon a roadway, the plaintiff herein had no duty to avoid a collision with the defendants' vehicle which was approaching from the rear. There is simply no factual basis to support the defendants' affirmative defenses alleging comparative negligence, contributory negligence, and/or culpable conduct of the plaintiff. Under such circumstances, dismissal of the defendants' affirmative defenses alleging comparative negligence, contributory negligence, and/or culpable conduct of the plaintiff must be granted in favor of the front most driver - in this case, the plaintiff. The defendants herein are unable to come forth with any evidence, other than pure speculation, as to any culpable conduct attributable to the plaintiff herein. As such, the defendants' affirmative defenses in this regard must be dismissed.

18. Applying the foregoing cases and law to the case at bar, it is manifest that the plaintiff's motion for partial summary judgment on the issue of liability should be granted. The defendants' failure to remain awake while driving, failure to observe traffic conditions, failure to maintain control of his vehicle, failure to maintain a safe following distance, and failure to

properly slow and stop his vehicle while approaching the plaintiff's vehicle from the rear, evince that the defendants' negligence was the sole proximate cause of this collision as a matter of law. No triable issues of material fact concerning the manner in which the collision occurred exist. The facts overwhelmingly indicate that there is no triable issue on the subject of liability. Furthermore, the defendants herein are also unable to submit sufficient evidence in opposition hereto to raise a triable issue of fact as to whether the plaintiff was comparatively negligent or contributed to the happening of the collision, beyond mere speculation.

19. Nor does the fact that depositions have yet to be conducted in this matter require a denial of the present motion. See, Ortiz v. Fage USE Corp., 69 A.D.3d 914, 893 N.Y.S.2d 270 (2nd Dep't 2010) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; defendants' contentions regarding discovery were mere expressions of hope and speculation that deposition of plaintiff might disclose relevant information sufficient to defeat motion); Lampkin v. Chan, 68 A.D.3d 727, 891 N.Y.S.2d 113 (2nd Dep't 2009) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; defendants purported need to conduct further discovery did not warrant denial of motion); Trobetta v. Cathone, 59 A.D.3d 526, 874 N.Y.S.2d 169 (2nd Dep't 2009) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; defense counsel's claim that further discovery required unavailing since defendant failed to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence); Emil Norsic & Son, Inc. v. L.P. Transp., Inc., 30 A.D.3d 368, 815 N.Y.S.2d 736 (2nd Dep't 2006) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; defendants purported need to conduct further discovery did not warrant denial of motion); Rainford v. Han, 18 A.D.3d 638, 795 N.Y.S.2d 645 (2nd Dep't 2005) (following driver's conclusory allegation that driver of vehicle ahead of him

made sudden stop, standing alone, was insufficient to rebut presumption of negligence arising from summary judgment evidence showing that following vehicle struck stopped vehicle; purported need to conduct depositions did not warrant denial of motion for summary judgment in suit arising out of rear-end collision as opponents of motion had personal knowledge of relevant facts).

20. Accordingly, it is submitted that the plaintiff is entitled to partial summary judgment against the defendants on the issue of liability as a matter of law.

WHEREFORE, based upon the foregoing, it is respectfully requested that the Court grant the present motion for an Order pursuant to N.Y. C.P.L.R. § 3212: granting the plaintiff partial summary judgment against the defendants on the issue of liability, upon the grounds that there are no triable issues of fact and that, as a matter of law, the plaintiff is entitled to such judgment; dismissing the defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff; upon granting summary judgment as aforesaid, setting this action down for a trial on the assessment of damages; and awarding such other and further relief as this Court deems just and proper.

Dated: November 30, 2012
New York, New York



JOSEPH P. STODUTO, ESQ.

JEJ/1443209
BU-11-11-23-09-01

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

AMERICAN

----- x
MELISSA SHILLINGFORD,

Index No.: 303660/12

Plaintiff,

-against-

**AFFIRMATION IN
OPPOSITION TO SUMMARY
JUDGMENT MOTION**

NEW YORK CITY TRANSIT AUTHORITY,
TONY BEETAN,

Defendants.
----- x

JOHN E. JERMAN, ESQ., an attorney duly admitted before the Courts of the State of New York, affirms the following under penalty of perjury pursuant to CPLR §2106:

1/24
FAB

1. That I am an attorney-at-law associated with the Law Offices of **Wallace D. Gossett**, attorneys for the defendants and that I am fully familiar with all the pleadings and proceedings heretofore had herein.

2. I submit this affirmation in opposition to the motion for summary judgment.

3. At the outset, it must be noted, that negligence cases do not generally lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination. Ugarriza v. Schmieder, 46 N.Y.2d 471, 414 N.Y.S. 2d 304 (1979); McCummings v. New York City Transit Auth., 81 N.Y.2d 923, 597 N.Y.S.2d 653 (1993). Moreover, it has been determined that if the facts are uncontested summary judgment is appropriate, but that this is not always so in negligence suits, because even when the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances, which is a question that can rarely be decided as a matter of law. Andre v. Pomeroy, 35 N.Y.2d 361, 362

N.Y.S.2d 131 (1974); See also Tronlone v. Lac d'Aminate du Quebec, Ltee, 297 A.D.2d 528, 747 N.Y.S.2d 79 (1st Dept., 2002). The role of the Court in deciding a motion for summary judgment is issue finding, rather than issue determination. Tronlone, supra; Birnbaum v. Hyman, 43 A.D.3d 374, 841 N.Y.S.2d 274 (1st Dept., 2007).

4. It is well settled that on a motion for summary judgment, the *movant* must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985); Matter Of Zuckerman v. City Of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); See also Hudson Ins. Co. v. David Morse & Assoc., Inc., 81 A.D.3d 407, 916 N.Y.S.2d 766 (1st Dept., 2011); Applewhite v. Accuhealth, Inc., 81 A.D.3d 94, 915 N.Y.S.2d 223 (1st Dept., 2010) (emphasis added). Moreover, the courts have held that evidence of negligence alone is not enough to establish liability. It must also be proven that the negligence was the cause of the event which produced harm to the plaintiff. Sheehan v. City of New York, 40 N.Y.2d 496, 387 N.Y.S.2d 92 (1976). In addition, the courts have found that an unexcused violation of a statute constitutes negligence per se; negligence per se is not liability per se as the protected class member must still establish that the statutory violation was the proximate cause of the occurrence giving rise to the lawsuit. Dance v. Town of Southampton, 95 A.D.2d 442, 467 N.Y.S.2d 203 (2nd Dept., 1983). As a general rule, the issue of proximate cause is to be decided by the finder of fact, aided by appropriate instructions from the court, and not by the court itself. Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980); Sweeney v. Bruckner Plaza Assoc., 57 A.D.3d 347, 869 N.Y.S.2d 453 (1st Dept., 2008).

5. Section 1129 of the New York State Vehicle and Traffic Law provides in pertinent part that:

... (a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway...

Vehicle and Traffic Law Section 1129.

In interpreting the above statute, courts have found that when there is a rear end collision happens with a stopped vehicle, the occupants of the stopped vehicle are entitled to summary judgment on the issue of liability, unless the driver of the following vehicle can provide a non-negligent explanation, in evidentiary form, for the collision. Johnson v. Phillips, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept., 1999); Figueroa v. Luna, 281 A.D.2d 204, 721 N.Y.S.2d 635 (1st Dept., 2001). It has also been held that a police accident report made by a police officer who was not an eyewitness containing hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question and may be properly disregarded by the court determining the issue of liability. Figueroa, supra; Coleman v. Maclas, 61 A.D.3d 569, 877 N.Y.S.2d 297 (1st Dept., 2009).

6. On a motion for summary judgment, the opposing party is entitled to every favorable inference which can be drawn from the evidence. Mercer v. City Of New York, 88 N.Y.2d 955, 647 N.Y.S.2d 159 (1996); Cook v. Rezende, 32 N.Y.2d 596, 347 N.Y.S.2d 57 (1973); Dawson v. Alarcon, 154 A.D.2d 320, 546 N.Y.S.2d 609 (1st Dept., 1989). A summary judgment motion must be denied if there is any significant doubt as to existence of a triable issue or if there is even arguably such an issue. Sillman v. Twentieth Century Fox, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); Pirelli v. Long Island Railroad, 226 A.D.2d 166, 641 N.Y.S.2d 240 (1st Dept., 1996). It is also appropriate to deny a motion for summary judgment, since only

at trial, can the question of whether or not a party's actions contributed in any way to the collision be answered. Nash v. Kane, 36 A.D.2d 518, 317 N.Y.S.2d 717 (1st Dept., 1971).

7. Your affirmant will not burden the court with a second lengthy recitation of the facts as alleged by the plaintiff and circumstances of this case as alleged by the plaintiff or with its procedural history which is already contained in the plaintiff's motion. A copy of said motion is made part hereof as Exhibit "A". As all parties and the court are in possession of this Exhibit, the same will not be physically attached to the herein affirmation in opposition.

8. Mr. Tony Beetan, the operator of the bus at issue, makes clear in his affidavit of December 21, 2012, that the light was **green for traffic to move forward when the plaintiff was stopped at the light and she did not move for any apparent reason**. While hitting the brakes and blowing the bus horn, the bus skidded on **wet leaves and wet pavement** and then came into contact with the rear of the plaintiff's vehicle. A copy of Mr. Beetan's affidavit is attached hereto as Exhibit "B".

9. Primarily, it should be noted that as it is evident that Mr. Beetan, the person operating the bus at the time of the accident, states that the plaintiff did not move despite a green light in front of her and no apparent danger present, and that despite attempting to brake and avoid the alleged accident, the bus slid on **wet leaves on the pavement**, it is clear that there exist material issues of fact which require a trial of this matter. Furthermore, it is clear that Mr. Beetan's affidavit alone raises issues of fact with respect to why the plaintiffs did not move despite a green light in her direction of travel, and whether there was any comparative negligence on the part of the plaintiff. As such, the plaintiff has not eliminated the issues of fact in this matter. Furthermore, the issue of whether the defendants' negligence, if any, and/or the plaintiff's negligence is the proximate cause of the alleged injuries of the plaintiff has not been

eliminated by the plaintiffs' tender of evidence. Also, based the law described above, the police accident report, uncertified and written by a police officer that did not witness the alleged accident should be disregarded by this Court with respect to the issue of liability in this matter. As such, the plaintiff is not entitled to summary judgment on the issue of liability.

WHEREFORE, your affirmant respectfully requests that the plaintiff's Notice of Motion be denied in its entirety, and that the defendants be granted such other, further and different relief as the court deems just and proper.

Dated: Brooklyn, New York
January 16, 2013


JOHN E. JERMAN, ESQ.

TO: WINGATE, RUSSOTTI & SHAPIRO. LLP
Attorneys for Plaintiff
420 Lexington Avenue, Suite 2750
New York, New York 10170
Attn: Joseph P. Stoduto, Esq.

1/24

United Lawyers

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
MELISSA SHILLINGFORD,

Index No. 303660/12

Plaintiff,

**AFFIRMATION
IN REPLY**

-against-

NEW YORK CITY TRANSIT AUTHORITY,
TONY BEETAN,

Defendants.
-----X

JA-3
1/24/13

Joseph P. Stoduto, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under the penalties of perjury:

1. I am an attorney with the law firm of WINGATE, RUSSOTTI & SHAPIRO, L.L.P., the attorneys for Plaintiff MELISSA SHILLINGFORD (hereinafter referred to as "SHILLINGFORD"), in the above-referenced matter, and as such I am fully familiar with the proceedings and pleadings herein.

2. I make this affirmation in reply in further support of the present motion for an Order pursuant to N.Y. C.P.L.R. § 3212: granting the plaintiff partial summary judgment against the defendants on the issue of liability, upon the grounds that there are no triable issues of fact and that, as a matter of law, the plaintiff is entitled to such judgment; dismissing the defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff; upon granting summary judgment as aforesaid, setting this action down for a trial on the assessment of damages; and awarding such other and further relief as this Court deems just and proper.

3. Defendants' Affirmation in Opposition dated January 16, 2013, fails to warrant a denial of the present motion. The defendants cannot, based upon their own witness's testimony,

prove a non-negligent excuse for the collision in question. In opposition to the present motion, the defendants rely upon Defendant TONY BEETAN's self-serving affidavit wherein he blames the collision on a wet roadway and/or wet leaves that were present on the roadway in question as a basis to avoid liability. However, the Appellate Courts have rejected this type of defense as insufficient on countless prior occasions, and this Court should likewise do so in the present case.

4. In fact, a close examination of the substantive aspects of the defendant's own version of the collision vis-à-vis his sworn affidavit, only confirms that the sole proximate cause of this collision was his negligence in failing to maintain a safe distance between his vehicle and the vehicle in front of him given the speed and stopping power of his vehicle and the roadway character.

5. Defendant TONY BEETAN states in his own affidavit that he was operating his vehicle "at a moderate rate of speed" but fails to quantify as to what his definition of "moderate" is, leaving us to speculate as to the meaning of said term. The defendants cannot claim that the bus driver's speed was reasonable under the circumstances given this intentional vagueness. The defendants also fail to establish that they maintained a safe following distance from the rear of the plaintiff's vehicle and/or that they applied the brakes of their vehicle a sufficiently adequate time prior to approaching the rear of the defendants' vehicle. The bus driver simply never states what his following distance was or how far he was from the rear of the plaintiffs' vehicle when he first applied his brakes. The evidence which they have submitted fails to demonstrate that they have not violated Section 1129 (a) of the Vehicle and Traffic Law and is therefore inadequate to warrant denial of the present motion.

6. The Court should also note that the New York State Department of Motor Vehicles Police Accident Report prepared concerning this occurrence previously submitted as **PLAINTIFF'S EXHIBIT 3** indicates that the defendant made absolutely no mention of there being any type of substance or debris on the roadway which caused or contributed to the happening of the collision to the police officers who investigated this collision. Only recently, and in response to the filing of the plaintiff's motion, did the defendant suddenly remember to bring to light the fact that this rear-end collision was caused, not through his own carelessness, but due to the condition of the roadway.

7. Given the explanation for the collision offered by the defendants herein, it is also worth noting that pursuant to N.Y. P.J.I. 2:84, entitled "Motor Vehicles Accidents – Skidding":

"The fact that defendant's motor vehicle skidded, if you find that to be the fact, should be taken into consideration in determining whether the defendant exercised reasonable care in its operation, but does not, standing alone, require that you find the defendant negligent. If, taking into consideration all of the facts and circumstances existing at the time of the accident, including the condition of the road and of the tires on the defendant's car, the condition of the weather and the speed at which the defendant was operating his vehicle, you decide that the defendant's car skidded because of his failure to use reasonable care, you will find that he was negligent." (emphasis added).

Proof of skidding which causes an automobile to deviate from its course of travel makes out a prima facie case of negligence, and does not constitute a non-negligent excuse for the happening of a rear-end collision.

8. It is also worth thinking about this case from a common sense perspective and asking the question, "How does a large city bus with several tires on each axle that is supposedly being driven at a moderate speed, be caused to completely lose control and skid due to the mere presence of some leaves on the roadway?" Are leaves in the roadway really that slippery? Do they cause a complete loss of traction for a vehicle that weighs several tons and is being driven at

a moderate speed? Bear in mind that this collision occurred in broad daylight. Surely a reasonably careful and prudent bus driver who is driving at a moderate rate of speed and is seeing that which is there to be seen by the ordinary use of his senses, would be able to see that there is an enormous swath of slippery leaves strewn about the roadway which they are driving on and be able to avoid those leaves in some way as opposed to driving right over them.

9. Any argument by the defendants herein that a slippery roadway should absolve them from liability has also been soundly rejected by the Appellate Divisions. With regard to the defendant's explanation, offered as part of his affidavit, that the road was slippery, the Appellate Courts have often emphasized, in a litany of cases, that when a motor vehicle is struck from the rear by another vehicle, the excuse proffered by the offending driver that her car slid because of a slippery roadway is unacceptable and insufficient to withstand summary judgment in favor of the front vehicle. In the First Department, a claim that a vehicle stopped short or that roadway was wet is not in it of itself sufficient to rebut the presumption of negligence. In November, 2012, this very principle was once again affirmed by the Appellate Division, First Department. See, e.g., Profita v. Diaz, 100 A.D.3d 481, 954 N.Y.S.2d 40 (1st Dep't 2012) (affirming Order of the Supreme Court, Bronx County, Mary Ann Briganti-Hughes, J., as wet roadway is not sufficient non-negligent explanation to negate prima facie case of negligence in rear-end collision involving stationary vehicle requiring judgment in favor of the stationary vehicle, even when coupled with an alleged "short stop" of the lead vehicle). See also, LaMasa v. Bachman, 56 A.D.3d 340, 869 N.Y.S.2d 17 (1st Dep't 2008) (wet roadway and/or rainy conditions are not sufficient non-negligent explanation to negate prima facie case of negligence in rear-end collision involving stationary vehicle requiring judgment in favor of the stationary vehicle); Mitchell v. Gonzalez, 269 A.D.2d 250, 703 N.Y.S.2d 124 (1st Dep't 2000) (reversing Order of

the Supreme Court, Bronx County, George Friedman, J., which denied summary judgment to driver of front vehicle in rear end collision case as rear driver's explanation for rear-end collision with front vehicle, that he applied brakes but his vehicle nevertheless skidded into vehicle at intersection due to slippery road conditions insufficient as matter of law to rebut inference of negligence).

10. This is because a driver is required to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles taking into account the weather and road conditions. See, e.g., Kosinski v. Sayers, 294 A.D.2d 407, 743 N.Y.S.2d 124 (2nd Dep't 2002) (affirming grant of summary judgment to driver of front vehicle in rear end collision case as defendant driver's explanation that she saw stopped vehicle and applied her brakes but her vehicle nevertheless slid into rear of other vehicle insufficient to rebut inference of defendant's negligence); Sabbagh v. Shalom, 289 A.D.2d 469, 735 N.Y.S.2d 593 (2nd Dep't 2001) (affirming gran of summary judgment to driver of front vehicle in rear end collision case as defendant failed to rebut inference of negligence created by rear-end collision, even though defendant testified that she applied her brakes but nevertheless slid into stopped vehicle on slippery roadway); Garcia v. Hazel, 287 A.D.2d 481, 731 N.Y.S.2d 211 (2nd Dep't 2001) (reversing denial of summary judgment to driver of front vehicle in rear end collision case as rear driver's explanation for rear-end collision with front vehicle, that he applied brakes but his vehicle nevertheless skidded into vehicle at intersection due to slippery road conditions insufficient as matter of law to rebut inference of negligence); Guinan v. Lee, 279 A.D.2d 507, 719 N.Y.S.2d 117 (2nd Dep't 2001) (evidence that driver of following automobile applied brakes but nonetheless skidded into front vehicle due to slippery

condition of roadway insufficient to rebut presumption of negligence which arose from rear-end collision with stopped vehicle).

11. The defendants' claim that the plaintiff was negligent for failing to move from her stopped position immediately upon the signal turning from red to green is equally ludicrous and unsupported by case law. The bottom line is at the defendants are required to maintain a safe following distance at all times. In the context of a rear end collision, a claim that the driver of the lead vehicle failed to move upon a green light or made a sudden stop is insufficient as a matter of law to rebut the presumption of negligence. Just last month, this very principle was once again affirmed by the Appellate Division, First Department. See, Corrian v. Porter Cab Corp., 101 A.D.3d 471, 955 N.Y.S.2d 336 (1st Dep't 2012) (defendant's claim that lead vehicle was stopped at a green traffic light at time of impact is not sufficient non-negligent explanation to negate prima facie case of negligence in rear-end collision involving stationary vehicle).

12. See also, Cabrera v. Rodriguez, 72 A.D.3d 553, 900 N.Y.S.2d 29 (1st Dep't 2010) (reversing Order of the Supreme Court, Bronx County, Geoffrey Wright, J. which denied summary judgment to driver of front vehicle in rear end collision case; following driver's testimony that preceding automobile stopped short fails to explain why said defendant did not maintain a safe following distance); Soto-Marquin v. Mellet, 63 A.D.3d 449, 880 N.Y.S.2d 279 (1st Dep't 2009) (affirming grant of summary judgment to driver of front vehicle in rear end collision case; following driver's testimony that preceding automobile stopped short fails to explain why said defendant did not maintain a safe following distance); Ramirez v. Konstanzer, 61 A.D.3d 837, 878 N.Y.S.2d 381 (2nd Dep't 2009) (defendant's contention, made in opposition to plaintiffs' summary judgment motion in motor vehicle action that plaintiff proceeded from stopped position into intersection once traffic light turned green but then suddenly stopped in

middle of intersection, failed to provide a non-negligent explanation for collision); Sosa v. Rehmat, 46 A.D.3d 306, 847 N.Y.S.2d 18 (1st Dep't 2007) (reversing Order of the Supreme Court, Bronx County, Wilma Guzman, J., which denied summary judgment to driver of front vehicle in rear end collision case; *following driver's failure to quantify his own speed prior to braking renders his testimony insufficient to rebut presumption of negligence created by rear-end collision*).

13. A defendant's claim that the vehicle in front failed to move upon a green light or made a "sudden stop" is insufficient to raise a triable issue of fact. See, Savarese v. Cerrachio, 79 A.D.3d 725, 911 N.Y.S.2d 921 (2nd Dep't 2010) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; defendant's claim that accident occurred after traffic light had turned green and plaintiff's vehicle began to slowly move forward did not raise triable issue of fact as to non-negligent explanation for happening of accident); Franco v. Breceus, 70 A.D.3d 767, 895 N.Y.S.2d 152 (2nd Dep't 2010) (affirming grant of summary judgment to driver of front vehicle in rear end collision case; defendants claim that front vehicle abruptly stopped even in highway traffic insufficient to raise triable issue of fact); Shirman v. Lawal, 69 A.D.3d 838, 894 N.Y.S.2d 458 (2nd Dep't 2010) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; assertion that front vehicle stopped short insufficient to raise triable issue of fact); Staton v. Ilic, 69 A.D.3d 606, 892 N.Y.S.2d 486 (2nd Dep't 2010) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; assertion that front vehicle stopped short insufficient to defeat motion); Arias v. Rosario, 52 A.D.3d 551, 860 N.Y.S.2d 168 (2nd Dep't 2008) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; rear drivers' claim of sudden stop even in fast moving highway traffic insufficient to rebut presumption of negligence).

14. See also, Lundy v. Llatin, 51 A.D.3d 877, 858 N.Y.S.2d 341 (2nd Dep't 2008) (affirming grant of summary judgment to driver of front vehicle in rear end collision case; defendants claim that plaintiff's vehicle abruptly slowed down or stopped insufficient to raise triable issue of fact as to plaintiff's negligence); Johnston v. Spoto, 47 A.D.3d 888, 850 N.Y.S.2d 204 (2nd Dep't 2008) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; assertion that front vehicle stopped short insufficient to raise triable issue of fact); Neidereger v. Misuraca, 27 A.D.3d 537, 811 N.Y.S.2d 758 (2nd Dep't 2006) (affirming grant of summary judgment to driver of front vehicle in rear end collision case; following driver's statement that stop of vehicle ahead of him "was pretty sudden" insufficient to rebut presumption of negligence); Russ v. Investech Securities, 6 A.D.3d 602, 775 N.Y.S.2d 867 (2nd Dep't 2004) (reversing denial of summary judgment to driver of front vehicle in rear end collision case; rear driver's claim that front made sudden stop insufficient to rebut presumption of negligence); Vecchio v. Hildebrand, 304 A.D.2d 749, 758 N.Y.S.2d 666 (2nd Dep't 2003) (affirming grant of summary judgment to driver of front vehicle in rear end collision case; fact that driver of lead vehicle suddenly stopped insufficient to rebut presumption of negligence on part of following vehicle); Dickie v. Pei Xiang Shi, 304 A.D.2d 786, 759 N.Y.S.2d 141 (2d Dept. 2003) (reversing denial of summary judgment to driver of front vehicle in rear end collision case as defendant motorist's explanation that plaintiff motorist's vehicle came to abrupt or sudden stop insufficient to rebut inference of negligence arising from rear-end collision); Irmiyayeva v. Thompson, 296 A.D.2d 439, 440, 745 N.Y.S.2d 199 (2nd Dept' 2002) (reversing denial of summary judgment to driver of front vehicle in rear end collision case as allegation that plaintiffs' vehicle suddenly stopped insufficient to rebut presumption of negligence).

15. See also, Dileo v. Greenstein, 281 A.D.2d 586, 722 N.Y.S.2d 259 (2nd Dep't 2001) (affirming grant of summary judgment to driver of front vehicle in rear end collision case; claim that driver of lead vehicle made sudden stop insufficient to rebut presumption of negligence); Mascitti v. Greene, 250 A.D.2d 821, 673 N.Y.S.2d 206 (2nd Dep't 1998) (reversing denial of summary judgment to driver of front vehicle in rear end collision case as evidence that vehicle that was struck from behind by following vehicle suddenly stopped in heavy traffic insufficient to rebut inference of negligence on part of following vehicle's driver and absence of negligence on part of stopped vehicle's driver); DiPaola v. Scherpich, 239 A.D.2d 459, 460, 657 N.Y.S.2d 883 (2nd Dep't 1997) (affirming grant of summary judgment to driver of front vehicle in rear end collision case as inference of negligence arising from rear-end collision was not rebutted by allegation that rear-ended driver stopped suddenly in middle of intersection).

16. In the present case, the plaintiff has demonstrated prima facie entitlement to summary judgment on the issue of liability. Therefore, the burden has shifted to the defendants herein to demonstrate an issue of fact which would preclude summary judgment. The defendants' Affirmation in Opposition fails to meet their burden to demonstrate an issue of fact which precludes summary judgment. The defendants have failed to submit any evidence to establish a sufficient non-negligent explanation for striking the plaintiff's vehicle in the rear. The undisputed facts on the record establish that the defendants' vehicle struck the plaintiff's vehicle in the rear and the defendants have offered no legally cognizable non-negligent excuse for the occurrence of the rear end collision. Moreover, the defendants' contention that the roadway was covered in wet leaves fails to provide a non-negligent explanation for the collision and thus is insufficient to rebut the inference of negligence arising out of the fact that the accident was a rear end collision with another vehicle, as confirmed by the wealth of Appellate Division case law

cited herein. Accordingly, it is submitted that the plaintiff is entitled to partial summary judgment against the defendants on the issue of liability as a matter of law.

WHEREFORE, based upon the foregoing, it is respectfully requested that the Court grant the present motion for an Order pursuant to N.Y. C.P.L.R. § 3212: granting the plaintiff partial summary judgment against the defendants on the issue of liability, upon the grounds that there are no triable issues of fact and that, as a matter of law, the plaintiff is entitled to such judgment; dismissing the defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff; upon granting summary judgment as aforesaid, setting this action down for a trial on the assessment of damages; and awarding such other and further relief as this Court deems just and proper.

Dated: January 22, 2013
New York, New York



JOSEPH P. STODUTO, ESQ.