

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

519

CA 10-02378

PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND GREEN, JJ.

JASON A. BRUBAKER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MARIANNE M. HOUSEKNECHT, DEFENDANT-RESPONDENT.

COLLINS & BROWN, LLC, BUFFALO (LUKE A. BROWN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (WILLIAM BOLTREK, III, OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 21, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment on the issue of comparative negligence.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving was rear-ended by a vehicle driven by defendant. Plaintiff moved for partial summary judgment determining that defendant was negligent and that plaintiff was free from comparative negligence. Contrary to plaintiff's contention, Supreme Court properly granted the motion only with respect to the issue of defendant's negligence. "Viewing the evidence in the light most favorable to the nonmoving party, as we must . . . , we conclude that there are issues of fact that preclude summary judgment" with respect to the issue of plaintiff's comparative negligence, i.e., whether plaintiff's own conduct or the alleged failure of his brake lights to function contributed to the accident (*Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, 1089, lv dismissed 5 NY3d 746; see *Chilberg v Chilberg*, 13 AD3d 1089, 1090; see generally *Ramadan v Maritato*, 50 AD3d 1620).

Entered: April 29, 2011

Patricia L. Morgan
Clerk of the Court