

106 A.D.2d 686, 484 N.Y.S.2d 171  
(Cite as: 106 A.D.2d 686, 484 N.Y.S.2d 171)

**FIND Request:** 106 A.D.2d 686

Supreme Court, Appellate Division, Third Department, New York.  
Eileen D'ARIENZO, Individually and as Parent and Natural Guardian of Christopher D'Arienzo et al.,  
Infants, Appellant,  
v.  
Arnold MANDERVILLE et al., Respondents. (Action No. 1.)  
Anthony D'ARIENZO, Appellant,  
v.  
Arnold MANDERVILLE et al., Respondents. (Action No. 2.)

Dec. 6, 1984.

In automobile accident case, plaintiff motorist appealed from judgment of the Supreme Court, Trial Term, Chenango County, Lee, Jr., J., in favor of defendant motorists. The Supreme Court, Appellate Division held that: (1) driving in blowing snow with reduced visibility, under the conditions shown, was not negligence as a matter of law, but rather a factual question to be resolved by trier of fact; (2) evidence established that plaintiff was negligent and that defendants were not negligent with respect to the accident; and (3) reconstructed police accident report was properly admitted.

Judgment affirmed.

West Headnotes

**[1] Automobiles 48A ⚡245(39)**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak245 Questions for Jury

48Ak245(39) k. Lookout, Signals, and Warnings. Most Cited Cases

Driving in blowing snow with reduced visibility, under conditions shown by the evidence, was not

negligence as a matter of law, but rather a factual question to be resolved by the trier of fact.

**[2] Appeal and Error 30 ⚡989**

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)1 In General

30k988 Extent of Review

30k989 k. In General. Most Cited

Cases

**Appeal and Error 30 ⚡996**

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)1 In General

30k996 k. Inferences from Facts Proved. Most Cited Cases

In nonjury case, if it appears on all the credible evidence that different finding or finding different from that of the trial court is not unreasonable, then appellate court must weigh the relative probative force of conflicting testimony and relative strength of conflicting inferences that may be drawn from such testimony.

**[3] Automobiles 48A ⚡244(34)**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak244 Weight and Sufficiency

48Ak244(34) k. Signals and Lookouts. Most Cited Cases

**Automobiles 48A ⚡244(41.1)**

48A Automobiles

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48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak244 Weight and Sufficiency


48Ak244(41) Contributory Negligence

48Ak244(41.1) k. In General.

Most Cited Cases

(Formerly 48Ak244(41))

Evidence established that plaintiff motorist was negligent and that defendant motorists were not negligent in connection with accident occurring during "whiteout" in blowing snow.

[4] Evidence 157  333(1)

157 Evidence

157X Documentary Evidence

157X(A) Public or Official Acts, Proceedings, Records, and Certificates

157k333 Official Records and Reports

157k333(1) k. In General. Most Cited Cases

Reconstructed police accident report was properly admitted in automobile accident litigation, since it was based on personal observations of the accident scene by state trooper, not on hearsay statements, it was made by person who was under business duty to make the report, and it was made within reasonable time after the event. McKinney's CPLR 4518(a).

\*\*172 John T. Roesch, East Meadow, for appellant in action no. 1.

Richard L. Gumo, East Meadow, for appellant in action no. 2.

Coughlin & Gerhart, Binghamton (Peter H. Bouman, Binghamton, of counsel), for respondent Manderville.

Hall & Karz, Canandaigua (Laurence M. Karz, Canandaigua, of counsel), for respondent Leslie Tiffany.

Before MAHONEY, P.J., and MAIN, MIKOLL, YESAWICH and HARVEY, JJ.

#### MEMORANDUM DECISION.

\*686 Appeals from a judgment of the Supreme Court in favor of defendants in Action Nos. 1 and 2, entered September 15, 1983 in Chenango County, upon a decision of the court at Trial Term, without a jury.

The primary issue presented on this appeal is whether there was sufficient evidence before the trial court to support its decision finding (1) that plaintiffs had failed to meet their burden of proof on the issue of the negligence of defendants in both actions, and (2) that the negligence of plaintiff Anthony D'Arienzo was the proximate cause of the accident. The other issue presented is whether the trial court's admission into evidence of a New York State Police accident report constituted \*687 reversible error. We conclude that there was sufficient evidence before the trial court to support its decision and that the trial court did not commit reversible error in admitting the State Police accident report into evidence. The judgment should be affirmed.

On Sunday, March 5, 1978 at about 10:30 A.M., Anthony D'Arienzo, plaintiff in Action No. 2, was driving southbound on Chenango County Route 27 near the Town of Coventry. D'Arienzo's wife, Eileen, and their three children, Christopher, Angela and Nicky, who are plaintiffs in Action No. 1, were riding with him in Eileen D'Arienzo's car. Arnold Manderville, a defendant in both actions, was operating his car northbound on Route 27 at the time of the accident. Leslie Tiffany, also a defendant \*\*173 in both actions, was driving his car southbound following behind the D'Arienzo car. Manderville had been traveling at about 40 miles per hour and the southbound cars had been proceeding at about 30 to 35 miles per hour approaching the accident scene. The weather that day was clear with some wind.

When Manderville saw snow blowing across the road about 800 to 1,000 feet in front of him, he slowed to about 20 miles per hour. As Manderville's car approached the D'Arienzo car, there was a "whiteout" and his visibility was limited. The Manderville car and the D'Arienzo vehicle collided on the two-lane road. Anthony D'Arienzo testified that Manderville entered his southbound lane, while Manderville said that the D'Arienzo car came into his northbound lane. Tiffany, who followed the D'Arienzo car into the blowing snow, testified that he lost

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sight of the D'Arienzo car for a few seconds. When the snow cleared, he saw the collision in front of him and applied his brakes, but slid into the rear of the D'Arienzo car.

State Trooper John McAvoy testified that, from his personal observation of the scene of the accident, the collision occurred in the northbound lane. McAvoy stated that about three quarters of the D'Arienzo car was in the northbound lane and that no part of the Manderville car was in the southbound lane. After the trooper's testimony, his accident report was admitted into evidence over objection. This report was a duplicate of the lost original report, reconstructed by McAvoy from his notes some 260 days after the collision.

The case was tried before the court without a jury as to liability only. The trial court found that plaintiffs failed to meet their burden of proving that either of defendants were negligent and dismissed the complaint in both actions. The court also held that Anthony D'Arienzo's negligence was the proximate cause of the accident. These appeals followed.

\*688 [1][2][3] The trial court correctly ruled that driving in blowing snow with reduced visibility, under the conditions shown, was not negligence as a matter of law, but rather a factual question to be resolved by the trier of the fact (*Agren v. Keller*, 9 A.D.2d 1000, 194 N.Y.S.2d 857). In a nonjury case, the rule is that:

“[T]his court's inquiry is not limited to whether the findings were supported by some credible evidence. If it appears on all the credible evidence that a different finding or a finding different from that of the court is not unreasonable, then this court must weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from such testimony” (*Koester v. State of New York*, 90 A.D.2d 357, 363-364, 457 N.Y.S.2d 655, quoting *Shipman v. Words of Power Missionary Enterprises*, 54 A.D.2d 1052, 1053, 388 N.Y.S.2d 721).

In the instant case a fair interpretation of the evidence supports the decision of the trial court. There is no reason to disturb that decision.

[4] Turning to the issue of the propriety of the

admission into evidence of the reconstructed police accident report, we note that the report was based on the personal observations of the scene by McAvoy, not on hearsay statements, and made by a person who was under a business duty to make the report. It is therefore admissible under CPLR 4518 (subd. [a] ) as long as it was made within a reasonable time of the event (see *Johnson v. Lutz*, 253 N.Y. 124, 128, 170 N.E. 517; see, also, *Toll v. State of New York*, 32 A.D.2d 47, 49-50, 299 N.Y.S.2d 589).

McAvoy prepared an accident report shortly after the accident which somehow became lost. Some eight months after the accident, he prepared a duplicate report. Since the reconstructed report was prepared from McAvoy's original notes and memory at that time, it does not appear that the trial court abused its discretion in admitting the report into evidence.

Judgment affirmed, with costs.

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