

139 A.D.2d 857, 527 N.Y.S.2d 586  
(Cite as: 139 A.D.2d 857, 527 N.Y.S.2d 586)

**FIND Request:** 139 A.D.2d 857

Supreme Court, Appellate Division, Third Department,  
New York.

John P. MECHANICK et al., Appellants,  
v.

Richard R. CONRADI, Respondent.

April 28, 1988.

Motorcyclist brought negligence action against pickup truck driver to recover for injuries sustained in pickup motorcycle accident. The Supreme Court, Saratoga County, Keniry, J., entered judgment upon jury verdict in favor of pickup driver, and appeal was taken. The Supreme Court, Appellate Division, Kane, J.P., held that: (1) trial court did not abuse its discretion in refusing to permit videotape purporting to represent sight distance available to pickup driver; (2) testimony of trooper as to speed of motorcycle prior to accident was admissible; and (3) pickup driver's failure to present any expert testimony as to motorcyclist's speed at time of collision did not require jury to accept testimony of motorcyclist's expert.

Judgment affirmed.

West Headnotes

[1] Evidence 157 ↪ 359(6)

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k359 Photographs and Other Pictures;  
Sound Records and Pictures

157k359(6) k. Motion Pictures. Most Cited Cases

Question of whether videotape is admissible is within discretion of trial court and depends on facts and circumstances of each case.

[2] Evidence 157 ↪ 359(6)

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k359 Photographs and Other Pictures;  
Sound Records and Pictures

157k359(6) k. Motion Pictures. Most Cited Cases

Videotape of accident scene which reportedly represented sight distance available to pickup driver was inadmissible in negligence action brought against pickup driver by motorcyclist who collided with pickup; videotape depicted full-size van instead of motorcycle, and van was operated at speeds no greater than 55 miles per hour, which contradicted state trooper's testimony that motorcyclist was speeding.

[3] Evidence 157 ↪ 145

157 Evidence

157IV Admissibility in General

157IV(D) Materiality

157k145 k. Remoteness. Most Cited Cases

Decision whether to admit evidence of speed of vehicle prior to accident is factual one, not depending on specific distance or time, but causal connection.

[4] Evidence 157 ↪ 501(5)

157 Evidence

157XII Opinion Evidence

157XII(A) Conclusions and Opinions of Witnesses in General

157k499 Examination of Witnesses

157k501 Facts Forming Basis of Opinion

157k501(5) k. Due Care and Proper Conduct. Most Cited Cases

Although trooper briefly lost sight of motorcyclist as latter crested hill, trooper's testimony of motorcyclist's speed before collision with pickup truck was admissible; trooper testified that, at point where motorcyclist crested hill, motorcyclist was still speeding and that next time trooper saw motorcyclist, mo-

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torcyclist was in the air, and trooper arrived at accident only seconds thereafter.

**[5] Evidence 157 ↪ 570**

157 Evidence  
157XII Opinion Evidence  
157XII(F) Effect of Opinion Evidence  
157k569 Testimony of Experts  
157k570 k. In General. Most Cited

Cases

There is no absolute duty to rebut expert testimony and jury may evaluate as it sees fit failure of party to call any expert witnesses.

**[6] Evidence 157 ↪ 570**

157 Evidence  
157XII Opinion Evidence  
157XII(F) Effect of Opinion Evidence  
157k569 Testimony of Experts  
157k570 k. In General. Most Cited

Cases

Jury is free to reject expert's testimony even if it is uncontradicted.

**[7] Evidence 157 ↪ 571(8)**

157 Evidence  
157XII Opinion Evidence  
157XII(F) Effect of Opinion Evidence  
157k569 Testimony of Experts  
157k571 Nature of Subject  
157k571(8) k. Rate of Speed. Most

Cited Cases

Pickup driver's failure to present any expert testimony as to motorcyclist's speed at time of collision did not require jury to accept testimony of motorcyclist's expert.

\*\*587 W. Donald Carola (William A. Sekellick, of counsel), Mechanicville, for appellants.

Horigan, Horigan, Pennock & Lombardo (John H. Pennock, Jr., of counsel), Amsterdam, for respondent.

Before \*859 KANE, J.P., and WEISS, MIKOLL, YESAWICH and LEVINE, JJ.

\*857 KANE, Justice Presiding.

Appeal from a judgment of the Supreme Court (Keniry, J.), entered January 26, 1987 in Saratoga County, upon a verdict rendered in favor of defendant.

At approximately 10:00 A.M. on July 28, 1984, a traffic accident occurred between plaintiff John P. Mechanick (hereinafter plaintiff) and defendant. Plaintiff had been traveling southbound on State Route 147 in the Town of Charlton, Saratoga County, when the motorcycle he was operating collided with the pickup truck defendant had been driving northbound on Route 147. At the time of the accident, defendant was attempting to make a left-hand turn into a grocery store parking lot located on the west side of Route 147. While defendant was making his turn, the motorcycle hit his truck on the passenger side and plaintiff struck defendant's window and went flying over the truck. Thereafter, plaintiff commenced this negligence action against defendant. At trial, a State Trooper testified that just prior to the accident, he observed plaintiff's vehicle traveling in violation of the 55-mile-per hour speed limit at a rate of 70 miles per hour. This rate was confirmed by the Trooper's radar machine. In pursuing plaintiff, the Trooper testified that he briefly lost sight of plaintiff when plaintiff crested a hill in the road, but, before \*858 losing sight of him, the Trooper saw plaintiff look back over his shoulder at him. After plaintiff disappeared, the Trooper next saw him airborne as a result of plaintiff's collision with defendant. The jury returned a verdict in favor of defendant, from which plaintiff currently appeals.

[1][2] Plaintiff claims that Supreme Court erred in denying his request to introduce a videotape of the accident scene which purportedly represented, *inter alia*, the "sight distance" available to defendant before he made his left-hand turn. It is true that videotapes and motion pictures are admissible into evidence for various purposes ( *see, Boyarsky v. Zimmerman Corp.*, 240 App.Div. 361, 367, 270 N.Y.S. 134; 57 NY Jur 2d, Evidence and Witnesses, § 417, at 711). However, the question of whether a videotape is admissible is within the discretion of the trial court and depends on the facts and circumstances of

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each case ( *see, Caprara v. Chrysler Corp.*, 71 A.D.2d 515, 523, 423 N.Y.S.2d 694, *affd.* 52 N.Y.2d 114, 436 N.Y.S.2d 251, 417 N.E.2d 545). Furthermore, if there is "any tendency to exaggerate any of the true features which are sought to be proved" the trial court may reject it ( *Boyarsky v. Zimmerman Corp.*, *supra*, 240 App.Div. at 367, 270 N.Y.S. 134). In this case, the videotape depicted a full-size van heading \*\*588 south on Route 147 instead of a motorcycle. It presented a northbound view of what defendant would have seen but never shows what plaintiff would have seen while traveling south. Moreover, the videotape could have unfairly misled the jury since the van was clearly more visible than a motorcycle. Additionally, large red cones were placed on the side of the road as visual reference markers which were obviously not there at the time of the accident. The use of a telephoto lens also enhanced defendant's alleged sight distance. Finally, the van was operated at speeds no greater than 55 miles per hour, which, while consistent with plaintiff's claim that he was not speeding, contradicted the Trooper's testimony that plaintiff was speeding. Although plaintiff claims the videotape was not an attempt to reenact the accident, we agree with Supreme Court's determination that there was a possibility that a jury might not make that distinction and, accordingly, we find no abuse on the court's part in refusing to permit the videotape to be shown.

[3][4] Plaintiff next argues that the Trooper should not have been permitted to testify as to plaintiff's speed immediately before the accident because it was too remote in time to be relevant since it related to plaintiff's speed 1 1/2 miles before the accident. This, too, was a question within the discretion of Supreme Court and the decision as to whether to admit evidence of the speed of a vehicle prior to an accident is a factual one, not depending upon a specific distance or time, but on a causal connection ( *see, Christie v. Mitchell*, 10 A.D.2d 52, 53, 197 N.Y.S.2d 206). Here, although the Trooper briefly lost sight of plaintiff as the latter crested the hill, the Trooper testified that, at that point, plaintiff was still speeding and the next time the Trooper saw plaintiff he was in the air. Significantly, the Trooper arrived at the accident only seconds thereafter. Based on these facts, we are unable to say that Supreme Court erred in permitting the Trooper to testify as to the speed of the motorcycle prior to the accident ( *see, Bashaw v. Bouvia*, 14 A.D.2d 640, 641, 218 N.Y.S.2d 194).

[5][6][7] We likewise reject plaintiff's contention that, since defendant never presented any expert testimony as to plaintiff's speed at the time of the accident or on defendant's visibility, the jury was required to accept the testimony of plaintiff's expert on these issues. There is no absolute duty to rebut expert testimony and a jury may evaluate as it sees fit the failure of a party to call any expert witnesses ( *see*, 58 NY Jur 2d, *Evidence and Witnesses*, § 665, at 311). A jury is also free to reject an expert's testimony even if it is uncontradicted ( *see*, 58 NY Jur 2d, *Evidence and Witnesses*, § 669, at 315-316). Here, while defendant presented no expert testimony, the testimony of plaintiff's expert did not necessarily go unchallenged. In making his calculations, the expert testified that he assumed plaintiff drove with his attention to the road, while the Trooper testified that plaintiff was looking behind him at the Trooper as plaintiff crested the hill. The expert also based his estimate of plaintiff's speed on the existence of an alleged skid mark. However, the evidence was conflicting as to whether there were any skid marks at all. The expert and the Trooper also differed as to plaintiff's rate of speed when he actually hit defendant. The jury was free to accept or reject either opinion.

With respect to plaintiff's contention that the jury verdict was against the weight of the evidence, we reject this claim as lacking in merit. Plaintiff's argument in this regard involves primarily questions of fact and credibility which were properly left for the jury to resolve ( *see, Le Bel v. Airlines Limousine Serv.*, 92 A.D.2d 996, 997, 461 N.Y.S.2d 474). On the record before us, we find no basis for overturning the jury's verdict. We have reviewed plaintiff's remaining contentions and find them similarly lacking in merit.

Judgment affirmed, without costs.

WEISS, MIKOLL, YESAWICH and LEVINE, JJ.,  
 concur.

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