

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

952

CA 21-00004

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

FRANCIS DESTINO, CLAIMANT-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT-RESPONDENT.
(CLAIM NO. 119498.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL),
FOR CLAIMANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Court of Claims
(J. David Sampson, J.), entered June 10, 2020. The judgment awarded
claimant money damages.

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

Memorandum: Claimant commenced this action seeking damages for
injuries he sustained when the vehicle he was operating collided with
a New York State Police (NYSP) vehicle responding to an emergency.
Following a bifurcated trial on liability, the Court of Claims
determined that defendant, State of New York (State), was 75 percent
liable and claimant was 25 percent liable for the accident.
Ultimately, a judgment was entered awarding claimant damages, as
reduced by his percentage of liability. The State appeals and
claimant cross-appeals. Both parties contend that the court's
liability determination is not supported by a fair interpretation of
the evidence. We affirm.

The undisputed testimony at trial established that an NYSP
trooper, while responding to a call regarding a domestic violence
incident with firearms present, proceeded into an intersection against
a traffic control device at a time when there was "[v]ery dense fog"
that created "almost . . . white-out condition[s]" with little
visibility. Claimant's vehicle, which was proceeding with the right-
of-way, struck the trooper's vehicle.

Addressing first the State's appeal, we agree with the State that
the applicable standard of liability with respect to the trooper is
reckless disregard for the safety of others, as opposed to ordinary
negligence (see Vehicle and Traffic Law § 1104 [e]), inasmuch as the

trooper was operating an authorized emergency vehicle while involved in an emergency operation and engaged in privileged conduct (see §§ 101, 1104 [a], [b]; *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; *Perkins v City of Buffalo*, 151 AD3d 1941, 1942 [4th Dept 2017]), and his police vehicle was not required to have its emergency lights or siren activated (see § 1104 [c]; *Perkins*, 151 AD3d at 1942).

Viewing the evidence in this nonjury trial in the light most favorable to claimant, the prevailing party (see *Yerdon v County of Oswego*, 43 AD3d 1437, 1438 [4th Dept 2007]), and deferring to the court's credibility determinations (see *Williams v State of New York*, 187 AD3d 1522, 1522 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021]; *Phearsdorf v State of New York*, 175 AD3d 1819, 1820 [4th Dept 2019]), we conclude that the evidence at trial established that the trooper passed a stop sign and entered an intersection at a high rate of speed and directly into oncoming traffic without a siren or horn in a situation where there was "almost no visibility" due to "extreme" and "[v]ery dense" fog. Contrary to the State's contention, such circumstances support a determination that the trooper acted with reckless disregard for the safety of others (see *e.g. Coston v City of Buffalo*, 162 AD3d 1492, 1493 [4th Dept 2018]; *Ruiz v Cope*, 119 AD3d 1333, 1334 [4th Dept 2014]; *Connelly v City of Syracuse*, 103 AD3d 1242, 1242-1243 [4th Dept 2013]; *cf. Levere v City of Syracuse*, 173 AD3d 1702, 1704 [4th Dept 2019]; *Williams v Fassinger*, 119 AD3d 1368, 1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]; *Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373-1374 [4th Dept 2012]).

Contrary to claimant's contention on his cross appeal, the court's determination that claimant was negligent and its apportionment of some liability to claimant are supported by a fair interpretation of the evidence (see *Ruiz*, 119 AD3d at 1334; *Yerdon*, 43 AD3d at 1438).

All concur except CARNI, J., who is not participating.