STATE OF MICHIGAN

COURT OF APPEALS

DENISE PRICE,

Plaintiff-Appellant,

and

JOE B. PRICE,

Plaintiff,

v

JARRED SHANE BOYER and FURGESON PLUMBING & HEATING,

Defendants-Appellees.

UNPUBLISHED
February 20, 2001

No. 219297
Emmett Circuit Court
LC No. 98-004606-NI

Before: Talbot, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals from a no-cause of action entered after a jury trial in the Emmett Circuit Court. Plaintiff contends that the trial court erroneously instructed the jury, erroneously refused to allow certain expert testimony, and erroneously awarded defendants a portion of their trial costs. We affirm in part, reverse in part, and remand for a new trial.

I. Factual and Procedural Background

This case arises out of an automobile accident that occurred on July 2, 1997, at the intersection of southbound US-31 and Division Road in Petoskey. While driving a van owned by defendant Furgeson Plumbing & Heating, defendant Jarred Boyer rear-ended the vehicle in which plaintiff rode as a passenger.[1] Plaintiff later experienced medical problems which she alleged were caused by this accident.

[1] Plaintiff's husband, Joe Price, was driving that vehicle. He was a party to this case at trial and was initially a party to this appeal. His claim was solely derivative, based on loss of consortium. This Court approved a stipulated dismissal of Joe Price from this appeal by order dated
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Southbound US-31 narrows from two lanes to one as it approaches the intersection at Division Road. Witnesses agreed that plaintiff's vehicle was traveling in the left lane and that defendant Boyer's vehicle was traveling in the right lane, at some point preceding the accident. Witnesses also agreed that vehicles in the left lane were required to merge into the right lane. However, the witnesses disputed the manner in which plaintiff's vehicle merged to the right.

Plaintiff's husband testified that he first saw defendant Boyer's van approximately 300 feet behind him. When he looked in his rear-view mirror, he saw the van "quite a ways back," saw another vehicle beside or slightly in front of the van, and he estimated that the speeds of both vehicles were constant. He testified that he activated his turn signal, checked his mirrors, and merged from the left lane to the right. At that time, he estimated that defendant Boyer's van was approximately 200 feet behind him. Plaintiff's husband denied that he stopped suddenly in front of defendant Boyer's van.

In contrast, defendant Boyer denied that there was ever a time when plaintiff's vehicle was approximately 200 feet ahead of him. He testified that he first saw plaintiff's vehicle approximately 100-200 yards north of the intersection at Division Road, that plaintiff's vehicle was less than one car length ahead of him, and that only 8 to 10 feet separated his front bumper from plaintiff's rear bumper. He further testified that the vehicles were approaching the intersection when plaintiff's vehicle suddenly cut over into the right lane, without a signal, and abruptly stopped in front of him. Defendant Boyer's vehicle then collided with the rear bumper of plaintiff's vehicle.

Plaintiff's negligence suit was tried before a jury. After the close of proofs, the trial court instructed the jury regarding a motorist's duty to maintain an assured clear distance ahead, MCL 257.627(1); MSA 9.2327(1), and the duty to refrain from following another vehicle too closely, MCL 257.643(1); MSA 9.2343(1). The trial court instructed the jury that it could infer negligence on the part of defendant Boyer if it concluded that he violated either of those traffic statutes.[2] Finally, the trial court instructed the jury that any negligence on the part of defendant Boyer would be excused if he was confronted with a sudden emergency not due to his own misconduct. After the jury found in defendants' favor, the trial court entered a no-cause of action. Plaintiff appeals as of right.

II. Presumption of Negligence

Plaintiff first argues that the trial court erroneously denied her request to read a special jury instruction regarding the presumption of negligence that arises from a rear-end collision. Pertinent portions of the standard jury instructions must be given if they are applicable, if they

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November 6, 2000. For clarity, this opinion will refer to Denise Price as plaintiff.

[2] Plaintiff argues on appeal that the trial court erroneously denied her request to read SJI2d 12.01 to the jury, regarding the inference of negligence which may arise from a motorist's violation of MCL 257.627(1); MSA 9.2327(1), and MCL 257.643(1); MSA 9.2343(1). Because it is clear from the record that the trial court did read that instruction to the jury, plaintiff's argument is without merit.

accurately state the law, and if they are requested by a party. MCR 2.516(D)(2). When a party requests a special instruction that is not directly covered by the standard jury instructions, the decision to grant or deny the request is within the discretion of the trial court. *Lamson v Martin*, 182 Mich App 233, 235; 451 NW2d 601 (1990).

Plaintiff's requested special instruction was based on the rear-end collision statute, MCL 257.402; MSA 9.2102, which creates a rebuttable presumption of negligence in cases where one vehicle rear-ends another:

> In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence. This section shall apply, in appropriate cases, to the owner of such first mentioned vehicle and to the employer of its driver or operator.

The applicability of a legal presumption is a question of law for the trial court to determine. *Widmayer v Leonard*, 422 Mich 280, 288; 373 NW2d 538 (1985); *Isabella County Dept of Social Services v Thompson*, 210 Mich App 612, 615; 534 NW2d 132 (1995). Once a trial court determines that a presumption applies in a particular case, that presumption acts as a "procedural device which regulates the burden of going forward with the evidence." *Widmayer*, *supra* at 286. MRE 301 clearly provides that a presumption never shifts the burden of proof, but merely requires the opposing party to come forward with evidence to rebut the presumption:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Therefore, if the statutory presumption properly applied in the present case, and if that presumption had gone unrebutted, then plaintiff would have been entitled to a directed verdict on the issue of defendant Boyer's negligence. However, if sufficient evidence was presented to rebut the presumption, then the presumption effectively disappeared, like the proverbial "bursting bubble." *Widmayer*, *supra* at 286-287.

In the present case, the trial court accepted plaintiff's argument that the presumption of negligence contained in the rear-end collision statute applied to the facts presented. However, the trial court ruled that defendants had presented evidence sufficient to rebut the presumption. On appeal, plaintiff does not argue that the trial court erred as a matter of law in ruling that defendants presented evidence sufficient to rebut the presumption. Rather, plaintiff argues that the jury should have been instructed regarding the existence of the presumption, despite the rebuttal evidence produced by defendants. We disagree. "Pursuant to *Widmayer*, it is improper for the judge to instruct the jury regarding the presumption once the defendant has presented evidence sufficient to rebut it." *State Farm v Allen*, 191 Mich App 18, 23; 477 NW2d 445

(1991). We conclude that the trial court did not abuse its discretion in refusing to read plaintiff's requested special instruction.

III. Sudden Emergency Doctrine

Plaintiff next argues that the trial court erroneously instructed the jury that any negligence on the part of defendant Boyer would be excused if he was confronted with a sudden emergency. The sudden emergency doctrine is a judicially created principle that originated in *Socony Vacuum Oil Co v Marvin*, 313 Mich 528, 546; 21 NW2d 841 (1946), where our Supreme Court stated:

> One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence.

To constitute a sudden emergency, the situation confronting a motorist must qualify as either "unusual" or "unsuspected."[3] Our Supreme Court explained those terms in *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971):

> The term "unusual" is employed here in the sense that the factual background of the case varies from the everyday traffic routine confronting the motorist. Such an event is typically associated with a phenomenon of nature. A classical example of the "unusual" predicament envisioned by the emergency doctrine in provided by *Patzer v Bowerman-Halifax Funeral Home*, 370 Mich 350; 121 NW2d 843 (1963), wherein the accident occurred amid an Upper Peninsula blizzard.
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> "Unsuspected" on the other hand connotes a potential peril within the everyday movement of traffic. To come within the narrow confines of the emergency doctrine as "unsuspected" it is essential that the potential peril had not been in clear view for any significant length of time, and was totally unexpected.

At trial, defendants argued that the facts of this case presented an "unsuspected" peril. Specifically, defendants argued that plaintiff's vehicle suddenly cut over into defendant Boyer's lane of traffic, without any signal, and abruptly stopped in front of him. To decide whether such facts present an "unsuspected" peril, we must examine the case law addressing the application of the sudden emergency doctrine in the context of rear-end collision cases.

In *McKinney v Anderson*, 373 Mich 414; 129 NW2d 851 (1964), the defendant rear-ended the plaintiff's vehicle, which was pushing a disabled vehicle down the road. Viewing the

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[3] Both at trial and on appeal, defendants argued that the facts of this case presented an "unsuspected" peril. Defendants have never argued that defendant Boyer encountered an "unusual" predicament. Therefore, we confine our analysis to the "unsuspected" type of sudden emergency.

evidence in the light most favorable to the defendant, the Court found that the plaintiff's vehicle was stopped without any signal, that the defendant was traveling within the posted speed limit when he crested a hill behind the plaintiff's vehicle, and that obstructions to the right and left prevented the defendant from avoiding a rear-end accident. On those facts, the Court concluded that a sudden emergency existed, justifying a jury instruction regarding that doctrine. *Id*. at 419-420.

In *Vander Laan*, *supra* at 232, our Supreme Court cited the facts of *McKinney* as a prime example of an "unsuspected" peril that would justify a sudden emergency instruction. However, the *Vander Laan* case involved different facts which ultimately did not present a sudden emergency. In *Vander Laan*, the defendant truck driver rear-ended the plaintiff's vehicle. The defendant testified that he had crossed some bumps in the road and looked back in his rear-view mirror to ensure that his load was secure. When he looked forward, the plaintiff's car was stopped in front of him and he was unable to stop before rear-ending the plaintiff. *Id*. at 229. On appeal from a no-cause of action, the Supreme Court reversed and remanded for a new trial, holding that the facts did not support a sudden emergency instruction. *Id*. at 233-234.

In *Hill v Wilson*, 209 Mich App 356; 531 NW2d 744 (1995), this Court also considered the application of the sudden emergency doctrine in the context of a rear-end collision. In that case, the defendant's vehicle stopped suddenly in order to avoid hitting a family of ducks crossing the road. The plaintiff, who was driving a motorcycle behind the defendant's vehicle, was unable to stop in time and he rear-ended the defendant. The plaintiff alleged that the defendant breached her duty to comply with traffic statutes, causing the accident. The trial court dismissed the suit, holding that the family of ducks crossing the road presented a sudden emergency which excused any statutory violation by the defendant. Although this Court ultimately affirmed the trial court's grant of summary disposition to the plaintiff, we disagreed that the sudden emergency doctrine applied. *Id*. at 358. "Far from being a sudden emergency, we find the phenomenon of motorists being forced to make unanticipated stops is a common occurrence during rush hour." *Id*. at 358. Indeed, "[a]ny motorist in heavy traffic should anticipate that unexpected events may cause drivers ahead to slow down or stop." *Id*. at 361.

In the present case, defendants requested that the trial court read an instruction to the jury regarding the sudden emergency doctrine. Both at trial and on appeal, plaintiff argued that the instruction did not properly apply, given defendant Boyer's familiarity with the road and intersection in question and his knowledge that traffic in the left lane was required to merge to the right, before the intersection. The trial court conceded that it would be neither unexpected nor unusual for a vehicle such as plaintiff's to merge in front of defendant Boyer's vehicle, given the road configuration. However, because the merge was not a "known certainty," the trial court ruled that the jury should be allowed to determine whether defendant Boyer faced a sudden emergency.

The trial court relied on the following case law to support its application of the sudden emergency doctrine to the present case: *Vander Laan*, *supra*; *Hill*, *supra*; *Hunter v Szumlanski*, 124 Mich App 521; 335 NW2d 75 (1983), rev'd 418 Mich 958 (1984); and *Raffin v O'Leary*, 34

Mich App 398; 191 NW2d 481 (1971). We conclude that none of those decisions support the trial court's ruling.[4] First, both the *Vander Laan* and *Hill* decisions, discussed above, concluded that a sudden emergency instruction was not justified by the facts presented in those cases. Second, the *Hunter* opinion cited by the trial court was reversed by our Supreme Court, which remanded the case "for consideration of whether reversal is required because of the jury instruction on sudden emergency." *Hunter v Szumlanski*, 418 Mich 958; 344 NW2d 6 (1984). Third, this Court's opinion in *Raffin* did not apply the sudden emergency doctrine, but resolved the appeal on other grounds. *Raffin, supra* at 400-401.

On appeal, we must view the facts in the light most favorable to defendants, in order to determine whether the sudden emergency doctrine properly applies. *Amick v Baller*, 102 Mich App 339, 342; 301 NW2d 530 (1980). Therefore, we must accept defendant Boyer's version of the accident, i.e., that plaintiff's vehicle suddenly merged from the left lane to the right lane, without any signal, and abruptly stopped in front of him. However, we do not believe that such facts present an "unsuspected" peril justifying application of the sudden emergency doctrine.

Our Supreme Court ruled in *Vander Laan*, *supra* at 232, that a potential peril cannot be deemed "unsuspected," and therefore cannot constitute a sudden emergency, unless: (1) the peril "had not been in clear view for any significant length of time," and (2) the peril "was totally unexpected." Defendant Boyer admitted that he had plaintiff's vehicle in plain view at least 100 to 200 yards before the accident site. Further, the weather was clear and sunny at the time of the accident and defendant Boyer testified that there were no unusual conditions to distract his attention from the traffic in front of him. From these facts, it cannot logically be said that plaintiff's vehicle was not in defendant Boyer's "clear view for any significant length of time." *Id*. Defendant Boyer also testified that he was familiar with the road and intersection in question and he admitted knowing that traffic from the left lane had to merge into his lane before reaching the intersection at Division Road. Boyer further admitted that he knew traffic would sometimes slow down at that point in the road, and conceded that it is not unusual for traffic to merge from the left lane to the right. From these facts, it cannot logically be said that the peril, i.e., a vehicle merging from the left lane to the right lane, was "totally unexpected." *Id.*[5]

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[4] Defendants also cite case law to support their argument that the sudden emergency doctrine applies in the present case. *Vsetula v Whitmyer*, 187 Mich App 675; 468 NW2d 53 (1991), involved a defendant who slid on a patch of ice while pulling out of her driveway, causing her to slide into the plaintiff's on-coming vehicle. *Amick v Baller*, 102 Mich App 339, 342; 301 NW2d 530 (1980), involved a plaintiff who slid on a patch of ice while turning into her driveway. *Farris v Bui*, 147 Mich App 477; 382 NW2d 802 (1985), involved a child who suddenly darted in front of the defendant's vehicle. Finally, *Zyskowski v Habelman*, 150 Mich App 230, 251-252; 388 NW2d 315 (1986), vacated 429 Mich 873 (1987), involved a drunken pedestrian who stepped into the path of the defendant's vehicle. We conclude that the facts of those decisions are distinguishable from the present case and that those decisions fail to provide guidance regarding the application of the sudden emergency doctrine to the present facts.

[5] The trial court justified its decision to read the instruction by stating that the movement of plaintiff's vehicle into defendant Boyer's lane of travel was not a "known certainty." This is not the test set forth in *Vander Laan*, *supra*, for an "unsuspected" peril. Accordingly, we conclude that the trial court erred as a matter of law when it held that the movement of plaintiff's vehicle

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Unlike the facts presented in *McKinney*, *supra*, defendant Boyer did not first observe plaintiff's vehicle upon cresting a hill. His line of vision was not impaired and he did not come upon plaintiff's vehicle around an unexpected turn of the road. A sudden emergency is not merely an abrupt stop by a preceding vehicle, but "a sudden stop by the preceding driver at a time and place where it could not reasonably be expected by the following driver." *Hill*, *supra*, 209 Mich App 360. We conclude that the trial court erred as a matter of law when it read the sudden emergency instruction to the jury.

Further, we cannot conclude that the trial court's instructional error was harmless. "[W]here an excuse or sudden emergency instruction has been improperly given, application of the harmless error rule has been limited to cases in which the jury resolved the issue of liability in plaintiffs' favor." *Jackson v Coeling*, 133 Mich App 394, 400-401; 349 NW2d 517 (1984), citing *Moore v Spangler*, 401 Mich 360, 383-384; 258 NW2d 34 (1977). Accordingly, we must reverse the no-cause of action entered in defendants' favor and remand for a new trial.

IV. Expert Witness Testimony

Plaintiff next argues that the trial court erroneously refused to allow testimony from her accident reconstruction expert regarding the speeds and distances involved in the accident. The lower court record reveals that trial court excluded that testimony because plaintiff did not disclose the expert's opinion on that issue before trial. During discovery, defendants requested information regarding this issue and the expert responded that plaintiff had not yet instructed him to prepare such opinions. However, on the night before trial began, plaintiff's expert conducted an investigation of the accident scene. During trial, plaintiff's counsel attempted to elicit opinions based on that investigation.

A party who has responded to a discovery request with a response that was complete when made has a duty to supplement seasonably the response to include information acquired later, regarding the substance of an expert witness's opinion testimony. MCR 2.302(E)(1)(a)(ii). If the party fails to supplement seasonably the response, the trial court may enter an order as is just, including sanctions. MCR 2.302(E)(2); MCR 2.313(B)(2)(b). Plaintiff did not provide the substance of her expert witness's opinion testimony to defendants before trial. Therefore, the trial court properly excluded the undisclosed expert witness testimony as a sanction for plaintiff's failure to seasonably supplement her response to defendants' discovery requests.

V. Costs

Finally, plaintiff argues that the trial court erroneously awarded defendants a portion of their trial costs under MCR 2.625(A)(1). Because this issue is moot, given our decision to reverse and remand for a new trial, we decline to address it.

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into the right lane, while neither unexpected nor unusual, constituted a sudden emergency for the following driver.

VI. Conclusion

In summary, we affirm the trial court's refusal to instruct the jury regarding the presumption of negligence that arises from a rear-end collision. We also affirm the trial court's decision excluding testimony from plaintiff's expert witness regarding the speeds and distances involved in the accident. However, we conclude that the trial court committed error requiring reversal when it instructed the jury that any negligence on the part of defendant Boyer would be excused if the jury determined that he was confronted with a sudden emergency. Accordingly, we reverse the trial court's entry of a no-cause of action in defendants' favor and remand for a new trial.

Affirmed in part, reversed in part, and remanded for a new trial. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Michael R. Smolenski