STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY MURRAY,

Plaintiff-Appellant,

v

GLORIA FANZINI, Personal Representative of the ESTATE OF FRANK FANZINI, JR., Deceased,

Defendant-Appellee,

and

ROBERT WRAY and TANDEM TRANSPORT, INC.,

Defendants.

UNPUBLISHED
February 5, 2002

No. 223353
Otsego Circuit Court
LC No. 98-007685-NI

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant Fanzini's motion for summary disposition. We reverse.

This action arises out of a three-vehicle automobile accident. Defendant, Frank Fanzini, Jr., who died of unrelated causes prior to the filing of this action, was driving westbound on M-32 in a pickup truck owned by his father, Frank Fanzini, Sr., who was a passenger in the truck. Fanzini entered a whiteout and struck the rear of a tractor-trailer owned by Tandem Transport, Inc. and driven by Jack Baunack. A few seconds later, a pickup truck driven by Robert Wray, in which plaintiff was a passenger, struck the rear of Fanzini's truck. Plaintiff, who sustained injuries in the collision, commenced this action alleging that Fanzini and Wray both violated various statutes, including MCL 257.627 (speed restrictions; assured clear distance ahead) and MCL 257.402 (rear-end collision) and that the driver of the tractor-trailer was negligent by driving into an area of zero visibility, abruptly slowing the vehicle without turning on his hazard lights, and creating the hazard in the roadway that started the accident. All three defendants filed separate motions for summary disposition, which were granted by the trial court. Only the trial court's grant of summary disposition to defendant Fanzini is at issue here.

We review a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Id.* In ruling on the motion, the court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in a light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

"[A]ny motorist who collides with the rear end of another vehicle traveling in the same direction is presumed negligent, although that presumption is rebuttable." *Hill v Wilson*, 209 Mich App 356, 359; 531 NW2d 744 (1995), citing MCL 257.402. MCL 257.627 provides, in pertinent part, that "[a] person shall not drive a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead." A violation of MCL 257.627 constitutes negligence per se. *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971).

Defendant Fanzini argued below that the statutory presumptions were overcome by application of the "sudden emergency" doctrine. The sudden-emergency doctrine is a judicially created principle, described as follows:

> 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. [*Socony Vacuum Oil Co v Marvin*, 313 Mich 528, 546; 21 NW2d 841 (1946), quoting Huddy on Automobiles (8th ed), p 359.]

To come within the purview of the sudden emergency doctrine, the circumstances surrounding the accident must be "unusual or unsuspected." *Vander Laan, supra* at 232, quoting *Barringer v Arnold*, 358 Mich 594, 599; 101 NW2d 365 (1960). In *Vsetula v Whitmyer*, 187 Mich App 675, 681; 468 NW2d 53 (1991), this Court explained:

> [T]he factual pattern is "unusual" if the facts present in the case vary from the everyday traffic routine confronting a motorist. Thus, a blizzard or other extreme weather condition may cause such an unusual driving environment that the normal expectations of due and ordinary care are modified by the attenuating factual conditions. "Unsuspected" facts are those which may appear in the everyday movement of traffic, but which take place so suddenly that the normal expectations of due and ordinary care are again modified by the attenuating factual conditions. [quoting *Amick v Baller*, 102 Mich App 339, 341-342; 301 NW2d 530 (1980).]

To come within the narrow purview of the emergency doctrine as "unsuspected," the potential hazard must not have been in clear view for any significant length of time and must be totally unexpected. *Vander Laan, supra* at 232; *Farris v Bui*, 147 Mich App 477, 480; 382 NW2d 802 (1985).

In granting summary disposition to defendant, the trial court observed that, although the occurrence of a whiteout may not be unusual during a northern Michigan winter, the evidence established that it was unexpected under the circumstances and conditions on the day and time of the accident. There was certainly evidence from which a factfinder could draw this conclusion. Fanzini, Sr., testified that, on the day of the accident the roads were not snow covered, it was not snowing, there were no patches of ice and he had not seen any other whiteouts on M-32. He estimated that his son was driving at approximately fifty miles per hour in a fifty-five mile per hour zone because there was a snow plow approximately one thousand feet ahead of them. The wind suddenly shifted and blew the flying snow from the plow over the top of the vehicles traveling on M-32. Thus, the evidence could convince a factfinder that the whiteout developed without warning in an unusual or unsuspected manner.

On the other hand, there was ample evidence that the accident occurred on a windy day. Further, Baunack, the driver of the first vehicle to enter the whiteout condition, testified at deposition that he was able to see snow blowing across the road from a sufficient distance to allow him to slow down prior to entering it. This contradicts the testimony of Fanzini, Sr., that a sudden windshift caused snow to blow over the roadway immediately before the accident. Wray, the driver of the third car to enter the whiteout, testified that he had passed through another whiteout caused by a snow plow some six miles before reaching the accident scene, suggesting that such an occurrence was certainly not beyond the realm of possibility under the conditions existing on the day of the accident. Even more to the point, Wray testified that he observed the Fanzini vehicle enter the whiteout which caused this accident from the "ample distance" at which he was traveling behind that vehicle. Thus, Wray could see the whiteout problem in advance of entering it and a factfinder might well conclude that the same was true for the Fanzini's.

As noted earlier, the evidence presented must be viewed in a light most favorable to plaintiff. *Quinto, supra*. The evidence just summarized could support a finding that the whiteout here was not the result of some sudden, last minute wind shift that made it sufficiently unexpected for the sudden emergency doctrine to absolve defendant of liability. We conclude that the trial court erred in finding that there was no genuine issue of material fact to be resolved by the factfinder.

We reverse.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage