

STATE OF MICHIGAN  
COURT OF APPEALS

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RICHARD PAUSCH and TAMARA PAUSCH,

Plaintiffs-Appellants,

v

GIOVANNA MARIA RODRIGUEZ GALLO and  
DOMENICO PIETRO VETTRAINO,

Defendants-Appellees.

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UNPUBLISHED

June 14, 2002

No. 228481

Oakland Circuit Court

LC No. 99-012933-NI

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiffs commenced this action after plaintiff Tamara Pausch<sup>1</sup> was injured when her automobile was struck by an automobile driven by defendant Giovanna Gallo, which was owned by Gallo's grandfather, defendant Domenico Vettraino. Plaintiff alleged that Gallo negligently caused the accident by turning left without ascertaining the status of oncoming traffic and by failing to yield to that traffic. The trial court denied plaintiffs' motion for summary disposition and the case proceeded to a jury trial. The jury returned a verdict in favor of defendants, finding that neither Gallo nor Vettraino were negligent. Plaintiff's motion for a new trial or judgment notwithstanding the verdict (JNOV) was denied. Plaintiffs appeal as of right. We affirm.

Plaintiffs first argue that the trial court erred in denying their motion for a directed verdict and their subsequent motion for JNOV on the issue of Gallo's negligence. The standard of review for a motion for directed verdict and JNOV is identical. *Smith v Jones*, 246 Mich App 270, 273-274; 632 NW2d 509 (2001). The evidence and all legitimate inferences therefrom must be reviewed in the light most favorable to the nonmoving party. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). Only where the evidence so viewed fails to establish a claim as a matter of law should the motion be granted. *Id.*

At the outset, we note that plaintiffs' argument on appeal is based on an incorrect premise that "[w]here the crossing driver fails to comply with the duty to make sure the way was clear before undertaking to cross, that driver is guilty of negligence as a matter of law." In Michigan, a statutory violation does not establish negligence as a matter of law. *Zeni v Anderson*, 397 Mich

<sup>1</sup> When used in the singular in this opinion, the term "plaintiff" will refer only to Tamara Pausch. Plaintiff Richard Pausch's claims were derivative to Tamara Pausch's claims.

117, 128-129; 243 NW2d 270 (1976); *Gould v Atwell*, 205 Mich App 154, 158; 517 NW2d 283 (1994). Violation of a penal statute creates a prima facie case of negligence from which a jury may draw an inference of negligence. *Id.* The presumption of negligence can be rebutted by any legally sufficient excuse. *Massey v Scripter*, 401 Mich 385, 395; 258 NW2d 44 (1977). The range of acceptable excuses is not limited to natural hazards or sudden emergencies. *Zeni, supra* at 132-133. Thus, contrary to plaintiffs' position, we do not simply look at evidence of an alleged statutory violation to determine whether the trial court improperly denied a motion for directed verdict or JNOV. We also note that plaintiffs never pleaded a violation of MCL 257.650, which is the statute they now rely upon to argue that Gallo's statutory violation established negligence as a matter of law.

Drivers are required to exercise reasonable care under the circumstances. *Beasley v Grand Trunk W R Co*, 90 Mich App 576, 581-583; 282 NW2d 401 (1979). A favored driver is also required to exercise reasonable care, including being alert to potential dangers. *Edwards v Joblinski*, 108 Mich App 371, 383; 310 NW2d 385 (1981). While a favored driver is allowed to assume that subordinate drivers will yield the right of way and is not bound to anticipate unlawful or negligent acts, she is required to exercise reasonable care for her own protection. *McGuire v Rabaut*, 354 Mich 230, 234-235; 92 NW2d 299 (1958). The driver must remain alert to hazards surrounding her. *Id.* at 235. She must attempt to avoid collision when her "continuing observations (which [s]he must make, despite the fact that [s]he is on an arterial highway) reveal, or should reveal to the reasonably prudent person, an impending danger. *Id.* at 236; see also *Noyce v Ross*, 360 Mich 668, 677-678; 104 NW2d 736 (1960).

Viewing the evidence, and all legitimate inferences, in a light most favorable to defendants, there were questions of fact about which reasonable persons could honestly come to different conclusions as to Gallo's negligence and plaintiff's contributory negligence. Gallo testified that she put her turn signal on, stopped, and waited for an opportunity to turn left. About thirty seconds later, two vehicles, one in each of the "through" lanes stopped, creating a gap. The first driver waved her to cross in front of him. She turned her vehicle in front of him. The second driver also waved her to cross. She crossed in front of him. She did not proceed into the right hand turn lane because she could not see if oncoming traffic was approaching. She did not rely on the hand waves from the other two drivers to get all the way across. Gallo's view to her right was obstructed, so she began to inch forward into the right-hand turn lane, trying to get a better look. She was then hit by plaintiff's vehicle. Gallo never saw plaintiff because of the obstructed view. Gallo believed, based on the force of the collision, that plaintiff was traveling forty or forty-five miles an hour. It was undisputed that the roadways were wet and that there was heavy traffic. It was undisputed that the traffic was stopped for a red traffic light as plaintiff traveled down the right turn lane. Two drivers had created a gap in traffic to allow Gallo to turn into the parking lot. Plaintiff testified that she was aware of the entrance to the parking lot. There was also evidence that plaintiff indicated that she was in a hurry and on her way to a family function. The jury could have inferred from the evidence that plaintiff did not observe all of the conditions that would have revealed the impending danger, i.e., she was not paying attention. Plaintiff admitted that she never saw the Vettraino vehicle until the point of impact. The Vettraino vehicle was hit on the right front side from the headlight area to the beginning of the passenger door. The brunt of the collision occurred at the wheel well. Thus, the inference favorable to defendants was that if plaintiff was traveling in the safe manner she described at trial, and if she was being alert for potential danger, she would have, at least, seen the Vettraino

vehicle before impact. While there was evidence to the contrary, which plaintiffs set out in great detail in their brief on appeal, the evidence favorable to defendants was sufficient to allow a reasonable jury to conclude that Gallo exercised ordinary care in trying to cross southbound Rochester Road as she made her left turn and to allow a reasonable jury to conclude that plaintiff failed to use ordinary care for her own safety. We note that even if there was a presumption of negligence in this case, it was rebutted by a legally sufficient excuse, which the jury believed. See, e.g., *Hicks v Gillespie*, 346 Mich 593, 596; 78 NW2d 145 (1956).

Plaintiffs also argue that the trial court's denial of the new trial motion based on the great weight of the evidence was an abuse of discretion. As argument, plaintiffs simply refer to their argument with regard to the directed verdict motion. In that argument, plaintiffs did not address whether the great weight of the evidence favored a finding that Gallo was negligent. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, there is competent evidence to support the jury's verdict, consequently, the judgment of the factfinder will not be set aside. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Plaintiffs also argue that the trial court improperly denied their motion for summary disposition on the issue of Gallo's negligence. The denial of a motion for summary disposition is reviewed de novo. *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 333; 608 NW2d 66 (2000).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. [*Id.*, quoting *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).]

If there is no genuine issue with respect to any material fact, the moving party is entitled to summary disposition. *Latham, supra* at 334.

Analysis of this issue requires reference to the law set out above in the discussion pertaining to the directed verdict and JNOV motions. However, the evidence before the trial court at the time of the hearing on the motion must be reviewed. Reviewing that evidence, we find that summary disposition on the issue of Gallo's negligence was not appropriate. In making their argument, plaintiffs view the evidence in the light least favorable to defendant Gallo. This is improper. Viewing the evidence in a light favorable to Gallo, there were questions of material fact. Gallo testified at deposition that she waited approximately two minutes before beginning to make her left turn across the southbound lanes of Rochester Road. The occupants of two vehicles that were stopped in the southbound, through lanes of traffic waved her to proceed with her turn. Gallo testified that after turning in front of those two vehicles, she did not go directly into the right-hand turn lane. While she gave contradictory testimony at her deposition, she first stated that she did not rely on the waving to try to cross the right-hand turn lane. She unequivocally testified that her view was obstructed and that she moved slowly into the right-hand turn lane. She was trying to ascertain whether any traffic was approaching in that lane. She testified that she was traveling less than one mile per hour and was moving with caution.

Before she could get enough visibility to see if any oncoming traffic was proceeding, the accident occurred. Gallo testified that she believed the accident was not her fault alone. While she should not have pulled out so far, plaintiff should have been traveling slower under the circumstances. Alice Serra, Gallo's aunt, testified that after the accident, plaintiff stated that she was in a hurry and was late for a family function. While there was evidence to contradict this testimony, there clearly were questions of material fact with regard to whether Gallo exercised ordinary care under the circumstances. Thus, summary disposition was inappropriate.

Plaintiffs next argue that the trial court erred in failing to instruct the jury in accordance with SJI2d 12.01, based on a violation of MCL 257.650. Regardless of plaintiffs' argument to the contrary, this issue is unpreserved. Plaintiffs never requested this instruction at trial. Instead, they requested that the trial court instruct the jury on SJI2d 12.01, based on a violation of MCL 257.649. The trial court refused to do so, finding that the facts of the case did not warrant that instruction. On appeal, plaintiffs do not argue that the trial court erred in this respect. Rather, they raise the issue of a new statutory ground to support their request for SJI2d 12.01.

This Court reviews unpreserved instructional issues only when necessary to prevent manifest injustice. *Phinney v Perlmutter*, 222 Mich App 513, 557; 564 NW2d 532 (1997). Manifest injustice occurs where the defect constitutes plain error or where it pertains to a basic and controlling issue in the case. *Id.* "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In this case, there was no plain error in the trial court's failure to instruct the jury using SJI2d 12.01, based on MCL 257.650. The jurors heard testimony that Gallo admitted to failing to yield the right of way but believed she had an excuse for doing so, i.e., that her view was obstructed and she was slowing proceeding forward to try and ascertain the status of the traffic. If the trial court instructed on SJI2d 12.01, it would also have instructed on SJI2d 12.02, which pertains to excuses for statutory violations. Here, the jury heard about the failure to yield the right of way and heard the excuse. It is apparent from the jury's verdict that it found the excuse credible and that Gallo had exercised reasonable care. Therefore, we cannot conclude that plaintiffs' substantial rights were affected by the failure to instruct on SJI2d 12.01 in this instance.

Further, the trial court was not required to give the instruction where plaintiff never pleaded a violation of MCL 257.650 as a basis for negligence. In *Williams v Coleman*, 194 Mich App 606, 622-623; 488 NW2d 464 (1992), this Court stated that SJI2d 12.01 is to be given where the plaintiff has alleged a statutory violation as a ground for negligence. Here, the statutory violation at issue was not alleged as a ground for negligence.<sup>2</sup> Moreover, we do not believe that the instruction pertained to a basic and controlling issue in the case. The jury was instructed with regard to duty, standard of care, breach, proximate cause, and damages. These are the essential elements of a negligence case. *Haliw v Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). We further note that the use of a statutory violation to establish

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<sup>2</sup> We note that plaintiffs pleaded other statutory grounds as a basis of negligence, but did not plead the statutory ground at issue.

negligence is a matter of judicial discretion. *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78; 393 NW2d 356 (1986). That judicial discretion is involved suggests that a basic and controlling issue is not at hand.

Lastly, plaintiffs argue that the trial court improperly regulated the taking of a de bene esse deposition after trial began and that this conduct resulted in plaintiffs being forced to enter into a stipulation to cap damages. Plaintiffs request that the stipulation be set aside. The issue of the stipulation is moot because we affirm the judgment in favor of defendants and thus, the issue of damages is of no moment. Further, we note that the trial court had the authority to limit the taking of the de bene esse deposition where trial had already started. MCR 2.302(B)(4)(d) and MCR 2.306(B)(2). The trial court's conduct did not prejudice plaintiffs in front of the jury, nor did it deny them the right to a fair and impartial trial.

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly