STATE OF MICHIGAN

COURT OF APPEALS

RICHARD DENNIS, Personal Representative of the Estate of WILLIAM DENNIS, Deceased,

Plaintiff-Appellant,

and

RONALD DENNIS,

Plaintiff,

v

STEVEN C. FORD and CAROL A. FORD,

Defendant-Appellees,

and

LEE WRIGHT SIDING,

Defendant.

UNPUBLISHED
August 10, 2004

No. 246485
Monroe Circuit Court
LC No. 00-011213-NO

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Plaintiff, Richard Dennis, as personal representative of the estate of William Dennis, deceased (hereinafter "plaintiff"), appeals an order of dismissal dismissing plaintiff Ronald Dennis' ("Dennis") individual claim against defendants Steven C. Ford (hereinafter "Ford") and Carol A. Ford (collectively, hereinafter "defendants"). The issue on appeal, however, relates to a prior order partially granting summary disposition in favor of defendants. We affirm.

On appeal, plaintiff contends that the trial court erred when it granted defendants' motion for summary disposition in part and held, as a matter of law, that decedent was more than fifty percent responsible for the accident in question, barring plaintiff's claim for noneconomic damages under MCL 500.3135(2)(b). We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). This Court must limit its review to evidence presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Under Michigan's no fault insurance act, damages in an automobile negligence action "shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault." MCL 500.3135(2)(b). The relative fault of the parties under this statute, as in other negligence cases, is generally a matter of fact to be decided by the jury, except where reasonable minds would not disagree. *West*, *supra* at 183. A moped is a "motor vehicle" under the Motor Vehicle Code and its driver is subject to the same standard of care as the drivers of other motor vehicles. *Van Guilder v Collier*, 248 Mich App 633, 637; 650 NW2d 340 (2001). Michigan's "clear distance statute" requires a driver not to drive at a speed greater than will allow him to stop within the assured, clear distance ahead. MCL 257.627(1). The clear distance statute does not apply when the accident is the result of a sudden emergency not of the defendants' own making, such as an object suddenly intersecting the assured clear distance of a motorist. *Vander Lann v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971); *Vsetula v Whitmyer*, 187 Mich App 675, 680-681; 468 NW2d 53 (1991). This exception applies when the circumstances presented to the driver are "unusual or unsuspected." *Vsetula*, *supra* at 681; *Farris for Farris v Bui*, 147 Mich App 477, 480; 382 NW2d 802 (1985). An "unusual" event is one typically associated with a phenomenon of nature, such as a blizzard. *Vander Laan*, *supra* at 231. An "unsuspected" event is one that presents a potential peril within the everyday movement of traffic. *Farris for Farris*, *supra* at 480. An event is unsuspected if: (1) the potential peril has not been in clear view for any length of time and (2) the potential peril was totally unexpected. *Id.*

A driver is entitled to assume that others using the highway will use reasonable care and take proper steps to avoid risk of an injury. *Berry v J & D Auto Dismantlers*, 195 Mich App 476, 484; 491 NW2d 585 (1992); see also *Corpron v Skiprick*, 334 Mich 311, 318; 54 NW2d 601 (1952) (recognizing that the defendant had no duty to avoid a collision with the plaintiff regardless of the circumstances); *Gibson v Traver*, 328 Mich 698, 702; 44 NW2d 834 (1950) (holding that the plaintiff had no duty to anticipate that the defendant would drive at an improper speed and in the wrong lane). By statute, drivers are required to operate their vehicles on the right side of the road, MCL 257.634(1), and may not drive on the left side of the road through a curve in the highway where the driver's view is obstructed within the distance as to create a hazard in the event another vehicle might approach from the opposite direction, MCL 257.639. A rebuttable presumption of negligence may be made for violation of a civil statute where: (1) the statute is intended to protect against the result of the violation, (2) plaintiff is within the class

intended to be protected by the statue, and (3) the evidence would support a finding that the violation was a proximate contributing cause of plaintiff's injuries. *Farmer v Christensen*, 229 Mich App 417, 420; 581 NW2d 807 (1998).

No issue of material fact exists regarding the conduct of decedent and the trial court properly found, as a matter of law, that decedent was more than fifty percent responsible. The trial court's summary disposition ruling is in line with our Supreme Court's order in *Huggins v Scripter*, 469 Mich 893; 669 NW2d 813 (2003),[1] where the Court held that summary disposition should have been granted in favor of the defendant barring noneconomic damages under MCL 500.3135(2)(b). Evidence showed that the defendant driver could not see the pedestrian decedent as he crested a hill and struck the decedent. *Id*. The Court assumed the defendant was negligent and pointed to a police accident reconstructionist's opinion that no driver would have enough time to avoid the collision given the decedent's location just beyond the crest of the hill, concluding that "no reasonable juror could find that [the] defendant was more at fault than the decedent in the accident." *Id*.

The trial court's ruling was based on police investigation findings, available testimony, circumstances in the area at the time of the accident, and the location of the collision on the road. The evidence is undisputed that decedent was driving in the wrong lane as he traveled through an "S" curve where he could not be seen by oncoming traffic, due in part to vegetation overgrowth on the edge of the road, and was in fact not seen by Ford in time for Ford to stop and avoid a collision. The police investigation determined that the collision took place in the center of the unmarked gravel road, although it may have occurred slightly in the southbound lane. The police investigator concluded that decedent's actions were "hazardous" and "the primary cause of the crash." Like the plaintiff in *Huggins, supra,* and in violation of statutory law, decedent put himself in a position where he could not be seen by oncoming traffic such that the police concluded that his actions were hazardous and Ford was not primarily responsible for the collision. Given this evidence, and in light of *Huggins, supra,* the trial court properly found that decedent was more than fifty percent at fault as a matter of law.

Although Ford was driving on a suspended license and had the presence of marijuana in his system, plaintiff produces no evidence indicating these facts caused Ford to crash into decedent. Furthermore, because the trial court ordered, following a motion in limine, that evidence of Ford's suspended license was inadmissible at trial, this Court should not consider it when reviewing the summary disposition ruling. MCR 2.116(G)(6). Plaintiff's reconstruction expert concluded that Ford failed to take evasive action when he locked his brakes and could have avoided the accident had he been driving at the thirty miles per hour advisory speed. But defendants correctly argue that there is no duty to anticipate the negligence of another or to avoid a collision no matter what the circumstances. See *Corpron, supra* at 318; *Berry, supra* at 484. Even if Ford's speed was excessive, the police accident investigation supports the conclusion

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[1] "An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001). Our Supreme Court's order in *Huggins, supra*, clearly meets the criteria and, thus, is binding precedent.

that decedent was the primary cause of the accident. However, as with the evidence of Ford's suspended license, this Court should not consider the affidavit of plaintiff's reconstruction expert because it was not presented to the trial court at the time of the summary disposition hearing. *Peña, supra* at 313 n 4.

Both parties urge this Court to find the other party negligent per se for violation of a civil statute. Plaintiff contends that Ford was negligent for driving above the thirty miles per hour advisory speed limit through the curve in violation of the clear distance statute, MCL 257.627(1). While the speed limit in effect on the road at the time of the accident was not decided by the trial court, Ford cannot be found presumptively negligent even if it is determined he was speeding because the clear distance statute was not meant to protect persons driving in the wrong lane and Ford's speed was not determined by police to be a proximate cause of plaintiff's injury. *Farmer, supra* at 420. But even if we were to determine that Ford violated the clear distance statute, he cannot be held responsible because of the sudden emergency exception. Although the action of decedent traveling in the wrong lane cannot be deemed unusual, it was an unsuspected event in that it presented a potential peril within the everyday movement of traffic, it was not within Ford's clear view for any length of time, and it was totally unexpected to Ford. See *Farris for Farris, supra* at 480. No evidence indicates Ford was aware that the Dennis brothers drove their mopeds on the wrong side of the road. Defendant had no duty to anticipate that decedent would drive in the wrong lane. See *Gibson, supra* at 702.

Defendants argue that decedent was presumptively negligent for violating MCL 257.634 and MCL 257.639 when he drove on the wrong side of the road through the "S" curve. Decedent can properly be found negligent per se because the statutes were intended to protect travelers driving in the proper lane and travelers whose view of oncoming traffic is obstructed around curves, Ford is a member of this class of people, and decedent's violations were determined to be a proximate cause of decedent's own injuries. *Farmer, supra* at 420. A presumption of negligence may be rebutted with a showing of an adequate excuse or justification under the circumstances. *Id.* Plaintiff points to no evidence which indicates an excuse or justification rebutting the presumption that *decedent* was negligent; plaintiff responds only with evidence that *Ford* was negligent.

Because plaintiff has not demonstrated that the trial court improperly resolved a question of fact, we conclude that the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad