# STATE OF MICHIGAN

# COURT OF APPEALS

KRISTEN BESCHONER,

Plaintiff-Appellant,

v

WASTE MANAGEMENT OF MICHIGAN, INC., and JAMES KOTZE,

Defendants-Appellees.

UNPUBLISHED
October 25, 2007

No. 275372
St. Clair Circuit Court
LC No. 06-000080-NI

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10) and to strike plaintiff's expert witnesses. We reverse that portion of the order granting summary disposition, vacate that portion of the order striking plaintiff's expert witnesses, and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant Kotze, an employee of defendant Waste Management of Michigan, Inc., was operating a garbage truck on August 24, 2005, at approximately 7:42 a.m., on Yale Road, a two-lane road. He stopped the vehicle in the eastbound lane, approximately two-tenths of a mile past a "little hill." He noticed that the sun was at a "low angle." He placed the truck in neutral, applied the parking brake, and walked to the back to pick up some trash. Approximately one or two minutes after he stopped, a pickup truck driven by plaintiff collided with the rear of the garbage truck. Kotze did not see the pickup truck or hear the sound of brakes before the collision. Plaintiff was unable to recall the collision or the circumstances preceding it.

An eyewitness to the collision, two other drivers who arrived shortly after it occurred, and the police investigator who prepared the incident report indicated that the visibility of the truck in the roadway was severely hampered by the glare from the sun. In addition, there was evidence that the location of the truck in a shaded area and its position in relation to a knoll impeded the ability of eastbound drivers to see the truck in the roadway. The eyewitness and the other drivers indicated that lights on the back of the truck were not activated until after the collision, a point disputed by Kotze.

Plaintiff's complaint alleged that Kotze violated duties of care owed to her including that he:

a. operated his vehicle in a careless and reckless manner;

b. operated his vehicle along a trash pickup route headed eastbound, resulting in his being obscured by the rising sin from following traffic;

c. stopped in the eastbound lane of traffic without activating oscillating lights and safety flashers that would have made his presence in the roadway more conspicuous.

d. violated federal and state regulations regarding use of warning lights on his truck when it is stopped on a public roadway . . . .

Plaintiff alleged that Waste Management was vicariously liable for Kotze's negligence, was responsible under the owner's liability statute, MCL 257.401, negligently entrusted its vehicle to Kotze, and failed to enforce policies regarding use of lights and design of pickup routes to account for weather and sunlight conditions.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). Defendants also moved to strike plaintiff's liability experts, Paul Olson and Larry Baareman. The trial court did not explain what arguments it found persuasive, but granted both motions.

On appeal, plaintiff first argues that the trial court erred in granting summary disposition in favor of defendants.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

In support of their motion for summary disposition, defendants argued that plaintiff violated MCL 257.627 by failing to operate her vehicle at a speed that would allow her to stop within an assured clear distance.

Our Supreme Court has held that violation of the assured clear distance statute constitutes "negligence per se." *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). However, "negligence per se" does not denote strict liability. See *Zeni v Anderson*, 397 Mich 117; 243 NW2d 270 (1976). Rather, "the rule is that evidence of violation of a penal statute creates a rebuttable presumption of negligence." *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 86; 393 NW2d 356 (1986), citing *Zeni, supra.* "An accurate statement of our law is that when a court adopts a penal statute as the standard of care in an action for negligence, violation of that statute establishes a prima facie case of negligence, with the determination to be made by the finder of fact whether the party accused of violating the statute has established a legally sufficient excuse." *Zeni, supra* at 143.

The assured clear distance statute must be reasonably construed and is subject to qualification, including for example, "when a collision is shown to have occurred as the result of a sudden emergency not of the [driver's] own making." *Vander Laan, supra* at 231. "To come within the purview of this [qualification] the circumstances attending the accident must present a

situation that is 'unusual or unsuspected.'" *Id*. at 232 (citation omitted). "Unusual" in this context means that the facts of the accident varied from the "everyday routine traffic confronting the motorist," and is typically associated with "a phenomenon of nature," such as a blizzard. *Id*. at 232. "Unsuspected" connotes "a potential peril within the everyday movement of traffic," but which was "not in clear view for any significant length of time, and was totally unexpected." *Id*. As an example of the latter, the Court in *Vander Laan* discussed *McKinney v Anderson*, 373 Mich 414; 129 NW2d 851 (1971),

> where defendant rear-ended a plaintiff's car which had stopped while pushing a disabled vehicle on the highway. Coming over the crest of a hill, defendant first saw plaintiff's taillights when he was 400 feet away. However, defendant did not clearly see the peril of plaintiff's stopping until he was about 100-200 feet away, at which point it was too late to avoid a collision under the circumstances. Furthermore, the failure of the plaintiff to signal that he was stopping, coupled with the surrounding darkness, made the subsequent peril totally unexpected to the defendant. [*Vander Laan, supra* at 232.]

See also *Houck v Snyder*, 375 Mich 392; 134 NW2d 689 (1965) (overturning a judgment notwithstanding the verdict entered in favor of a defendant whose stopped, unlit vehicle was rear-ended by the plaintiff after he was blinded by the high-beam headlights of an oncoming vehicle).

Although application of the sudden emergency rule in the present case is complicated by plaintiff's inability to recall the accident, we conclude that a jury should resolve the issue. Plaintiff did not testify if or when she saw the garbage truck or that the sun was a factor in the collision. However, the eyewitness and expert testimony, as well as the police investigator, indicate that glare from the sun reduced visibility in the area at the time of the accident. Although there was a disputed question of fact concerning the lighting on the rear of the garbage truck at the time of the accident, for the purposes of the motion, the evidence must be viewed in the light most favorable to plaintiff. A jury could reasonably conclude that the stopped truck in the roadway, and the conditions that reduced its visibility, including the glare, the shadows, and lack of lighting on the truck, resulted in a sudden emergency not brought about by plaintiff.

Moreover, even if plaintiff violated the assured clear distance statute and was negligent per se, that negligence does not preclude her claim against defendants. Rather, a jury should evaluate her comparative negligence as well as defendants.

Defendants' motion also asserted that there was no evidence that their conduct caused the collision, and that the mere possibility that their negligence may have caused an accident is not sufficient to establish liability.

In general, the trier of fact should decide causation unless there is no genuine issue of material fact, in which case, the issue may be decided as a matter of law by the court. *Holton v A+ Ins Associates, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). "[A] plaintiff is not required to negate all other reasonable causation theories. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 150; 687 NW2d 380 (2004), aff'd 474 Mich 161 (2006).

Despite plaintiff's inability to recall the accident, there was sufficient evidence of causation to establish a question of fact for the jury. Plaintiff contended that Kotze was negligent for, among other things, parking the truck in the roadway in a shaded location, without appropriate lights being activated, at a time when glare from the sun reduced visibility. A jury may reasonably conclude that the presence of the truck in the roadway and the lack of lighting played a role in the occurrence of the accident.

Plaintiff also challenges the trial court's decision to grant defendants' motion to strike plaintiff's expert witnesses Olson and Baareman.

The qualification of a witness as an expert and the admissibility of the expert's testimony are also within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001).

A trial court serves as a gatekeeper under MRE 702 to ensure that any expert testimony admitted at trial is reliable. *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601-602; 705 NW2d 703 (2005), remanded in part, 477 Mich 1067 (2007). This role "mandates a searching inquiry" that a trial judge may neither abandon nor perform inadequately. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780, 782; 685 NW2d 391 (2004). Where the trial court fails to properly exercise its function as a gatekeeper, the appropriate remedy is to vacate the court's order and remand the case to the trial court. *Clerc*, *supra* at 603.

Here, the trial court offered no reason for granting defendants' motion to strike, which hinders this Court's ability to defer to the court's exercise of its discretion. See *Johnson v Corbet*, 423 Mich 304, 328 n 14; 377 NW2d 713 (1985). It granted defendants' motion without properly exercising its function as gatekeeper. *Clerc*, *supra*. Accordingly, as in *Clerc*, we vacate the trial court's order and remand for further proceedings.

We reverse the order granting summary disposition, vacate the order striking plaintiff's expert witnesses, and remand for further proceedings. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis