STATE OF MICHIGAN

COURT OF APPEALS

PAUL DAVIS,

Plaintiff-Appellant,

v

AMANDA J. EDDY-DAVIS,

Defendant-Appellee.

UNPUBLISHED
January 8, 2008

No. 275319
Mackinac Circuit Court
LC No. 06-006129-NI

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

In this personal injury case, plaintiff appeals by right from the circuit court's order granting summary disposition to defendant. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

The parties were returning to their home[1] from church, with plaintiff driving a truck, when the truck became stuck in the lengthy, mud-covered driveway. Plaintiff left the vehicle and walked to the house to retrieve his other truck and a 30-foot chain. Plaintiff had maneuvered the vehicles so that the one that had originally become stuck was at the beginning of the driveway, now with defendant behind the wheel and the vehicle extending into the shoulder of the abutting highway, when plaintiff's other truck became stuck. Plaintiff was trying to release the chain connecting the two vehicles when a large truck came into defendant's view. Apparently thinking that she had to act fast to avert a collision, defendant quickly moved her truck in reverse, tightening the still-connected chain, and tossing plaintiff into the air. Plaintiff came to rest on icy ground, and suffered serious injuries.

Plaintiff sued defendant alleging she was negligent. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's own negligence was mostly responsible for his accident, and that defendant acted reasonably in response to a sudden emergency. The trial court granted the motion, holding that defendant had been confronted by an emergency.

[1] The parties married shortly after the accident that injured plaintiff.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

In rendering its decision, the trial court referred to M Civ JI 12.02, which concerns excused violations of statutes. Plaintiff points out that he never alleged that defendant had violated any statute. But subsection (d) of that instruction advises that a statutory violation is excused if the actor "is confronted by an emergency not due to his own misconduct." It was thus instructive in the present situation, where the propriety of defendant's actions in trying suddenly to move her truck was at issue, even if no violation of statute was alleged. At issue in this appeal is whether the trial court correctly held, in effect, that there was no question of material fact that defendant's actions fell under the sudden emergency doctrine.

> "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.]

"Accordingly, when a person faces a sudden emergency, it does not create an invitation to act in a negligent manner; rather, due consideration is given to the circumstances involved." *White v Taylor Distributing Co*, 275 Mich App 615, 622; 739 NW2d 132 (2007), leave granted ___ Mich ___ (11/30/ 2007).

Plaintiff asserts that the evidence does not suggest that defendant's truck was protruding at all into the traveled portion of the highway and implies that if it was not, then no emergency arose. We agree with the premise, but not with the conclusion.

Plaintiff averred by affidavit that defendant's truck was on the shoulder of the highway, not within or otherwise blocking the travel lane. On deposition, however, plaintiff admitted that defendant's truck was close to the fog line at the moment in question, and then estimated that the rear end of the vehicle was one and one-half feet from the fog line. Similarly, defendant testified that she understood the truck to be on the shoulder of the highway, "either on or very near the fog line." So, there was no testimony from suggesting that at the moment in question, defendant's truck was protruding beyond the shoulder and onto the traveled portion of the highway. Instead, the evidence ranges from plaintiff's estimate that it came within approximately one and one-half feet of the fog line to defendant's testimony that she thought she was on or very near the fog line.

Additionally, plaintiff himself repeatedly acknowledged that vehicles routinely traversed that stretch of highway at high speeds. Defendant testified that on the occasion in question, she felt endangered because she saw a large truck approaching on that highway, "on *and somewhat over* the fog line" (our emphasis). Accepting for present purposes, as we must, *Walsh*, *supra*,

plaintiff's version of how defendant's truck was situated, we nonetheless conclude that defendant, in a truck within 18 inches of the fog line, reasonably felt compelled to take evasive action. She acted in response to noticing a large truck headed her way that was not keeping strictly to the part of the pavement intended for travel: it was crossing the fog line onto the shoulder. Defendant thus had a reasonable basis for believing she had to act quickly to avoid a potentially serious collision.

Plaintiff admitted on deposition that he had no basis upon which to contest defendant's account of the truck's appearance and approach. "When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Because the evidence considered in the light most favorable to plaintiff suggests that the situation constituted a sudden emergency not of defendant's making and which she, acting in response, hastily backed up her truck, we conclude the trial court did not err in granting defendant summary disposition.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael R. Smolenski