# STATE OF MICHIGAN

# COURT OF APPEALS

DANA MARTIN and ROBERT MARTIN,

Plaintiffs-Appellants,

v

STEVEN J. MASHINSKE and WASTE MANAGEMENT OF MICHIGAN, INC.,

Defendants-Appellees.

UNPUBLISHED
May 22, 2008

No. 275227
Wayne Circuit Court
LC No. 05-521198-NI

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order denying their motion for summary disposition and granting summary disposition to defendants. We affirm in part, reverse in part, and remand for further proceedings.

## I. Facts & Proceedings

Early in the morning of January 27, 2003, defendant Steven Mashinske began driving a garbage truck on a recyclable material collection route in Van Buren Township.[1] Shortly after 9:00 a.m., Mashinske's truck rounded a curve on Huron River Drive and stopped in front of a residential driveway. Despite the presence of a gravel shoulder, Mashinske parked the garbage truck on the road. After Mashinske exited the truck and began gathering the recyclables, plaintiff Dana Martin's pickup truck collided with the left rear portion of the garbage truck. Plaintiff sustained multiple serious injuries and does not remember the accident.[2]

James Cucchiara, the driver of a vehicle traveling "three to four car lengths" behind plaintiff when the collision occurred, recalled that he experienced difficulty seeing the garbage truck stopped in the road "due to the brightness of the sun, as it came through the bare trees."

[1] Defendant Waste Management of Michigan, Inc., employed Mashinske and owned the garbage truck.

[2] Because plaintiff Robert Martin's claims are derivative of those made by Dana Martin, the singular term "plaintiff" hereinafter refers solely to Dana Martin.

Cucchiara estimated plaintiff's speed as between 35 and 38 miles per hour, within the posted limit. According to Cucchiara, 80 to 90 percent of the garbage truck occupied the road's surface, with only the right side tires touching the shoulder. Cucchiara saw plaintiff's brake lights illuminate "[a]pproximately two to three seconds before" the crash. He could not remember seeing the garbage truck's rear warning signal lights before the accident, but noticed immediately afterwards that none of the truck's lights were illuminated. In his affidavit Cucchiara opined, "The curve was dangerous, and in combination with the sun flashing into a driver's eyes, I think the waste management driver created a bigger hazard because he did not pull off the road."

Inspection of the garbage truck after the accident by the Michigan State Police Motor Carrier Division revealed "dirty" rear tail lights, an inoperable left tail light, and "rear lamps not secured and visible as required." The inspection report noted that damage arising from the accident possibly explained some of the tail light violations.[3]

Weldon Greiger, an accident reconstruction expert retained by plaintiffs, offered deposition testimony that Mashinske could have parked the garbage truck completely off the road, in the "ample space" that existed on the gravel shoulder. In Greiger's opinion, even if the garbage truck's lights had been illuminated, their dirty condition likely obscured their glow. Greiger concluded that plaintiff bore no responsibility for the collision, explaining that she could not have avoided the accident because "she was confronted with a situation which left her no time to avoid or react . . . ."

Paul Olson, plaintiff's proposed expert in human factors and "perception-response time," opined that Mashinske "created a very dangerous situation by parking where he did," because the road curved just before the accident site and the sun's glare increased "just before [the driver] reach[ed] the area of impact." Olson calculated that "given the conditions as they existed on the date of the accident, the response time for Dana Martin would be about 1.25 seconds after she detected the hazard in front of her." Olson added that if Mashinske had activated the strobe light located "[a]bout halfway up on the back" of the garbage truck, it "could have been enormously helpful depending on how powerful it was, if it was reasonably clean."

Plaintiffs filed a complaint alleging that Mashinske negligently parked the garbage truck on the road, obstructing a lane of traffic. Plaintiffs further asserted that the garbage truck "was not readily visible to persons traveling eastbound on Huron River Drive," had inoperable or poorly visible rear warning lights and signals, and that its presence in the road "created a traffic hazard."

Defendants sought summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff undisputedly failed to stop her vehicle within the assured clear distance ahead, and plaintiffs thus could not establish that defendants' conduct proximately caused the accident.

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[3] On appeal, defendants submitted Mashinske's deposition testimony regarding his use of the lights. Because defendants did not provide Mashinske's deposition testimony to the circuit court, we decline to consider it. *Quinto v Cross & Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996).

Plaintiffs countered with a partial summary disposition motion also brought under subrule (C)(10), contending that Mashinske's decision to park the garbage truck in the roadway violated MCL 257.672, MCL 257.676b, MCL 257.675a, and MCL 257.698a, and therefore constituted negligence per se. According to plaintiffs' theory, Mashinske's negligence created an unavoidable sudden emergency as a matter of law, entitling them to partial summary disposition concerning the question of defendants' liability.

The circuit court rendered a bench opinion denying plaintiffs' motion for partial summary disposition and granting summary disposition to defendants. The circuit court initially expressed its view of the dispositive question as, "[W]hile we have a showing based on the admissible evidence that the plaintiff was negligent per se, what you've asked me to do in these cross-motions is to make some kind of determination that the plaintiff's ... presumed negligence is somehow overcome." The circuit court then ruled that neither Cucchiara's observations nor the experts' opinions "create a genuine issue of material fact to sustain the plaintiff's motion." Regarding defendants' motion, the circuit court observed that "[w]e don't have any admissible evidence in the record that shows that Defendants' lights were not on or working, and that there was no signal." According to the circuit court, the photos of the accident scene failed to demonstrate any obstructions that could have impaired plaintiff's vision. The circuit court concluded, "I do not think that the plaintiff can rely on the road or the lighting to create a duty on the part of the defendant or sudden emergency," and summarized that "nothing in this evidentiary record . . . overcomes the plaintiff's own negligence . . . ."

## II. Standard of Review

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). We also review de novo the interpretation of statutes and court rules. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

A court may grant summary disposition under MCR 2.116(C)(10) if no genuine issue exists regarding any material fact, and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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*, *supra* at 621. When the record leaves open an issue on which reasonable minds might differ, a genuine issue of material fact exists that precludes summary disposition. *West*, *supra* at 183. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).[4]

[4] The dissent acknowledges that the circuit court premised its grant of summary disposition, in part, on the *court's* review and interpretation of the accident scene photographs: "From viewing the police photographs taken at the accident scene, the trial court determined that Mashinske's truck was parked, and the accident occurred before the curve or at the beginning of the curve
(continued…)

## III. Analysis

### A. Defendants' Motion for Summary Disposition

Plaintiffs contend that the circuit court improperly granted defendants summary disposition because material questions of fact exist regarding whether Mashinske negligently parked the garbage truck on the road. Defendants respond that plaintiff's inexcusable violations of MCL 267.627(1), the assured clear distance statute, and MCL 257.402(a), the rear-end collision statute, proximately caused the accident, and that her inability to recall why she did not stop precluded her from asserting any theory of liability premised on the circumstances surrounding the crash.

Because our analysis involves the application of several aspects of the law governing negligence claims, we begin with a discussion of the general legal principles relevant to this case. To establish a prima facie negligence claim, a plaintiff must prove that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached the duty; (3) the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) the plaintiff suffered damages. *Berryman v K Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992). "Negligence may be established by circumstantial evidence as well as by direct proof and they are equally competent, their relative convincing powers being for the jury to determine." *Spiers v Martin*, 336 Mich 613, 616; 58 NW2d 821 (1953). Circumstantial evidence and permissible inferences arising therefrom may suffice to prove negligence. *May v Parke, Davis & Co*, 142 Mich App 404, 417; 370 NW2d 371 (1985).

Causation in a negligence action requires proof of both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). Cause in fact "generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Proximate cause involves an examination of the foreseeability of consequences, and a determination whether a defendant should be held legally responsible for those consequences. *Id*. at 163. An injury may have more than one proximate cause. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988). Two causes often operate concurrently so that both constitute a proximate cause of resultant harm. *Id*. Although the plaintiff bears the burden of proof as to causation, the plaintiff need not produce evidence positively eliminating every other potential cause of an accident. *Skinner*, *supra* at 159. Normally, the issue of causation belongs to the jury. *Reeves*, *supra* at 480.

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(…continued)

where it could not be said that Dana's vision was obscured. The trial court found that the photographs did not show that the collision occurred at the crest of a hill but rather at the beginning of the incline." The circuit court's conclusions regarding the photos conflict with the statement of eyewitness Cucchiara, which indicated that the accident occurred either within or immediately after a curve and on a hill: "Nobody is expecting a vehicle to be stopped on a curve on a hill." The circuit court engaged in impermissible fact finding, ultimately failing to recognize that the existence of a "genuine issue" regarding this "material fact" precluded summary disposition under MCR 2.116(C)(10).

In the vehicle collision context, a plaintiff's comparative fault does not bar the recovery of damages unless she is determined to have been "more than 50% at fault." MCL 500.3135(2)(b). Additionally, a plaintiff may not recover if her negligence is the sole proximate cause of her injuries. *DeGrave v Engle*, 328 Mich 565, 569-570; 44 NW2d 181 (1950). The standards for determining a plaintiff's comparative negligence are indistinguishable from those applicable to the negligence of a defendant, and the determination of a plaintiff's negligence is for the jury "unless all reasonable minds could not differ." *Rodriguez v Solar of Michigan, Inc*, 191 Mich 483, 488; 478 NW2d 914 (1991). "It is for the jury to determine whether a violation of a statute was a proximate cause of the accident." *Id*.

1. Mashinske's Duty & Its Breach

Plaintiffs' complaint set forth a two-pronged negligence theory: Mashinske should not have parked the truck in the traveled portion of the road, and he should have used clean rear flashing and strobe lights to signal his location. In support of their argument that Mashinske should not have parked the truck in the road, plaintiffs cited MCL 257.672, which provides in relevant part:

> Outside of the limits of a city or village, a vehicle shall not be stopped, parked, or left standing, attended or unattended, upon the paved or main traveled part of a highway, when it is possible to stop, park, or to leave the vehicle off the paved or main traveled part of the highway. . . .

The parties do not dispute that the collision occurred in Van Buren Township, which is a charter township. Because the accident occurred "[o]utside of the limits of a city or village," MCL 257.672 applies.[5]

Additionally, a truck driver owes a duty to use reasonable care when stopping on a highway, so as not to constitute a source of danger. *Camp v Wilson*, 258 Mich 38, 42; 241 NW 844 (1932). Greiger's testimony that Mashinske had "ample" space to park the garbage truck on the shoulder thus created a question of fact regarding whether Mashinske breached his duty of care.[6]

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[5] The dissent asserts that Mashinske "lawfully" stopped on the highway pursuant to a contract between Van Buren Township and Waste Management. The pertinent portion of the contract merely provides that Waste Management "will provide weekly curbside collection and disposal, including toters and recycling containers . . . ." The contract does not include a provision permitting the Waste Management trucks to park on the highway in contravention of MCL 257.672. Even assuming that it did, that provision would be void as against public policy. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002).

[6] Defendants' brief concedes in footnote 5 that if the first sentence of MCL 257.672 applies, "there is a question of fact as to whether it was possible for Defendants to pull the garbage truck off of the paved portion of the roadway."

The record evidence also creates a jury question with respect to whether Mashinske's rear signals were visible when he parked the truck. In his affidavit, Cucchiara stated that he could not recall if the truck's lights were activated before the accident, but observed that they were not on afterwards. Plaintiffs also provided the circuit court with Cucchiara's February 2006 recorded statement, in which he described having seen "a cloud of smoke in front" of him when plaintiff's car hit the truck, and continued, "The first thing I did was jump out of my truck and run to the back of the [garbage] truck where her truck was and happened to glance to the right, and here was the operator of the vehicle just standing there looking, not doing anything." Greiger testified that, based on the Michigan State Police report documenting the examination of the truck, the lights were probably inoperable or obscured by dirt when the crash occurred. This evidence, albeit circumstantial, supports a reasonable inference that Mashinske either neglected to clean the garbage truck's warning lights when he left the Waste Management premises that morning, or failed to engage the warning lights when he parked the truck.

2. Proximate Causation

Defendants contend that the circuit court correctly granted their motion for summary disposition because plaintiff's failure to see the truck in time to stop safely constituted the sole proximate cause of her accident. Plaintiffs argue that defendant violated various statutes by parking the garbage truck in the road, creating a question of fact regarding the proximate causation of the accident. The circuit court did not specifically address proximate cause in its bench ruling.

When a motion for summary disposition challenges causation pursuant to subrule (C)(10), "the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner*, *supra* at 161. "[I]f there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." *Kaminski v Grand Trunk Western R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (internal quotation omitted).

Viewed in the light most favorable to plaintiffs, sufficient evidence establishes a question of fact whether Mashinske's decision to park the garbage truck in the traveled portion of the road constituted a proximate cause of plaintiff's injuries. Specifically, the evidence presented could support a jury's reasonable conclusions that plaintiff's injuries resulted naturally, probably, and directly from the garbage truck's presence in the roadway, and that plaintiff would have avoided injury had Mashinske parked all or most of the truck on the shoulder or cleaned and activated the truck's warning signals. The question remains, however, whether plaintiff's percentage of fault for the accident exceeded 50% as a matter of law.

3. Plaintiff's Negligence

Defendants insist that plaintiff should have seen the truck before hitting it, that her negligence qualifies as the sole proximate cause of the accident, and that plaintiff's proffered excuse for hitting the truck "is wholly speculative." Defendants premise their negligence claim on plaintiff's alleged violation of two statutes, MCL 257.627(1), the assured clear distance statute, and MCL 257.402(a), the rear end collision statute.

The assured clear distance statute, MCL 257.627(1), provides in relevant part as follows:

> A person operating a vehicle on a highway shall operate that vehicle at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing. A person shall not operate 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 the assured clear distance statute constitutes negligence per se. *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). Nevertheless, the assured clear distance statute must be "reasonably construed," and does not apply under all circumstances. *Id*. Application of MCL 257.627 "is subject to 'qualification by the test of due or ordinary care, exercised in the light of the attending conditions.'" *Id*. (internal quotation omitted).

In *Dismukes v Michigan Express, Inc*, 368 Mich 197; 118 NW2d 238 (1962), our Supreme Court analyzed the application of the assured clear distance statute where the plaintiff collided head-on with a parked tractor trailer truck. The Supreme Court noted that the truck had parked illegally on the side of a road facing oncoming traffic, and may not have illuminated its parking lights. *Id*. at 200. The accident occurred during a foggy evening, and the nearby streetlights failed to shed much light on the accident scene, located just beyond the crest of a hill. *Id*. at 202. The plaintiff could not recall the accident, and investigators found no skid marks. *Id*. at 201-202. A jury found for the plaintiff, but the trial court entered judgment non obstante verdicto, finding as a matter of law that the plaintiff had a duty to observe the parked truck and to stop within the assured clear distance ahead.

The Supreme Court reversed, explaining in relevant part as follows:

> The peculiar nature of the street lighting, the partial absence of curbing, the descent of a hill, the uneven street surface, and the improperly and illegally parking of the truck, presented testimony from which the jury could have found, under the circumstances of this case, plaintiff was not guilty of violating the assured clear distance statute and was entitled to recover for the damages he suffered. [*Id*. at 205.]

*Dismukes* therefore illustrates the principle that courts should apply MCL 257.627 in a reasonable fashion, by considering the conduct of the plaintiff driver in light of all the facts and circumstances surrounding the collision.

Furthermore, a violation of a penal statute "establishes only a prima facie case of negligence, a presumption which may be rebutted by a showing on the part of the party violating the statute of an adequate excuse under the facts and circumstances of the case." *Zeni v Anderson*, 397 Mich 117, 129-130; 243 NW2d 270 (1976) (footnotes omitted). In *Zeni*, the Michigan Supreme Court examined the assured clear distance provision, and other statutes creating rebuttable presumptions, and concluded that the alleged wrongdoer should be afforded "an opportunity to come forward with evidence rebutting the presumption of negligence." *Id*. at 143. Although a violation of a penal statute establishes a presumption of negligence, the finder of fact must determine whether "a legally sufficient excuse" exists for the statutory violation. *Id*.

If an excuse is found, "the appropriate standard of care then becomes that established by the common law." *Id*. The Supreme Court specifically recognized that the "legally sufficient excuses" included in the Restatement Torts, 2d §288A could rebut a statutory presumption of negligence,[7] and held that whether a legally sufficient excuse exists "shall be determined by the circumstances of each case." *Id*.

According to the Restatement, an excused violation of a statute is not negligence, and a violation is excused if an actor "is confronted by an emergency not due to his own misconduct." 2 Restatement Torts, 2d, §§ 288A(1), (2)(d), pp 32-33. Substantial Michigan case law addresses this excuse, also known as the sudden emergency doctrine. A sudden emergency exists when the circumstances surrounding an accident present an "unusual or unsuspected" situation. *Vander Laan, supra* at 232. The term "unusual" means that "the factual background of the case varies from the everyday traffic routine confronting the motorist," and is exemplified by phenomena of nature, such as blizzards. *Id*. An "unsuspected" peril may arise "within the everyday movement of traffic," but only if it "had not been in clear view for any significant length of time," and was "totally unexpected." *Id*.

The Supreme Court in *Vander Laan, supra*, cited *McKinney v Anderson*, 373 Mich 414; 129 NW2d 851 (1964), as a "good example" of a case involving an unsuspected hazard. In *McKinney*, the defendant rear-ended the plaintiffs' car, which had stopped in the road while pushing a disabled vehicle. *Id*. at 417. Although the defendant first saw the plaintiffs' rear taillights from 400 feet away, he did not apply his brakes until he had arrived within 50 to 100 feet of the plaintiffs' car, and by then could not stop in time to avoid a collision. *Id*. at 418.

The Supreme Court recognized that the defendant's violation of MCL 257.402 (the rear-end collision statute) created a prima facie case of negligence, and that his violation of MCL 257.627 (the assured clear distance statute) constituted negligence per se. *McKinney, supra* at 419. Nevertheless, the Court explained, "such negligence is found not to exist when the collision is proven to have occurred in the midst of a sudden emergency not of defendants' making." *Id.* And the Supreme Court summarized that the evidence in *McKinney* revealed that the plaintiffs' car failed to signal that it had stopped, that a ravine on the right and a car on the left prevented the defendant from avoiding the crash, that the defendant drove within the posted speed limit, and that the defendant "had shortly before crested a hill." *Id*. at 419-420. The Supreme Court held that a jury reasonably could have concluded that these circumstances created a sudden emergency "not brought about by [the] defendant," and upheld the trial court's denial of the plaintiff's motion for a directed verdict. *Id*. at 420.

Shortly after *McKinney*, our Supreme Court analyzed a different sudden emergency situation somewhat similar to this case. In *Houck v Snyder*, 375 Mich 392; 134 NW2d 689 (1965), the plaintiff's pickup truck rear-ended the defendant's pickup truck. The plaintiff testified that shortly before the collision, the high-beam headlights of an approaching vehicle temporarily blinded him. When that vehicle passed his car, the plaintiff observed the back of the

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[7] The Supreme Court in *Zeni* clarified that the category of legally sufficient excuses was not limited to those contained in the Restatement. *Id*.

defendant's pickup truck approximately 100 feet in front of him, stopped on the highway in the process of making a left turn, and without lights illuminating its rear end. *Id*. at 395-396. Although the plaintiff immediately applied his brakes, he struck the defendant's car. *Id*. The jury found the defendant negligent, and awarded the plaintiff a small verdict. *Id*. at 397. The circuit court, however, granted the defendant's motion for judgment non obstante verdicto, from which the plaintiff appealed. *Id*. at 398.

The Supreme Court emphasized that the defendant knew that the rear lights of his truck were inoperable, yet he made no effort to signal or warn oncoming traffic that he had stopped. *Houck*, *supra* at 399. The Supreme Court also referenced evidence that the plaintiff drove within the speed limit "prior to the emergency created by the approaching bright lights, which emergency was not of his own making," and that in the next interval of less than two or three seconds the plaintiff applied his brakes and tried to avoid the crash. *Id*. at 399-400. According to the Supreme Court, these facts sufficed to permit the jury to find that the plaintiff had not violated the assured clear distance statute and thus was not contributorily negligent. *Id*. at 400.

Citing *Dismukes*, *supra*, the Supreme Court in *Houck* stressed that the assured clear distance statute "must be reasonably construed."

> A literal reading thereof would compel us to say that in every case of collision the statute has been violated by the mere fact of collision alone. ... The situations under which collisions occur are infinite in complexity and variety, and, to accomplish justice in particular cases, *we have been forced to create a number of exceptions to the statutory edict.*" [*Houck*, *supra* at 400–401 (emphasis in original), quoting *Dismukes*, *supra* at 204.]

One recognized exception involved a driver blinded by oncoming headlights: "If plaintiff was not there before defendant was blinded, then the question of when defendant should have seen him was a matter of fact for the jury." *Id*. at 401. The Supreme Court in *Houck* held that the circuit court had erred by failing to take this exception into account when it granted the defendant's motion for judgment non obstante verdicto, because sufficient evidence existed for the jury to conclude that the defendant's negligence constituted a proximate cause of the plaintiff's damages. *Id*. at 402-402.[8]

In *Baker v Alt*, 374 Mich 492, 496; 132 NW2d 614 (1965), the Supreme Court described the sudden emergency doctrine as "a logical extension of the 'reasonably prudent person' rule,"

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[8] The dissent cites *Vsetula v Whitmyer*, 187 Mich App 675, 681; 468 NW2d 53 (1991), for the proposition that "glare from the sun is not an extreme phenomenon, even if it is sporadic," and thus cannot create a sudden emergency. *Vsetula* addresses icy patches on Michigan roads, observes that they "can be unsuspected," and holds that "[t]he sudden-emergency instruction should be given whenever there is evidence which would allow the jury to conclude that an emergency existed within the meaning of sudden-emergency doctrine." *Id*. *Vsetula* does not support the dissent's claim that "glare from the sun" cannot constitute a sudden emergency, or that this issue should not be submitted to a jury.

and that the "test to be applied is what that hypothetical, reasonably prudent person would have done under all the circumstances of the accident, whatever they were." This test is generally resolved by the finder of fact on proper instruction. *Baumann v Potts*, 82 Mich App 225, 231; 266 NW2d 766 (1978). If at least some evidence exists that a driver operated his or her vehicle "in a reasonable and prudent manner prior to the accident," the question of whether he or she violated the assured clear distance statute is "properly a factual one for the jury to resolve." *Lucas v Carson*, 38 Mich App 552, 558; 196 NW2d 819 (1972).

Applying these principles to the instant case, we conclude that the circuit court improperly granted summary disposition to defendants. A number of circumstances surrounding plaintiff's accident created factual questions regarding whether plaintiff exercised reasonable care, whether a sudden emergency existed, and whether plaintiff's percentage of fault, if any, exceeded fifty percent. Those circumstances include the sudden and intensely bright sunlight that dramatically reduced the vision of the driver directly behind plaintiff at the time of the collision, the unsuspected location of the garbage truck shortly beyond a curve and almost entirely in plaintiff's lane of travel, the possible failure of Mashinske to engage the truck's rear strobe and flashing warning lights, or the warning lights' obliteration by dirt. What plaintiff would have been able to see as she rounded the curve is in dispute here, based on the testimony of both an eyewitness and two experts.

The dissent characterizes as "inane" our conclusion that multiple questions of fact preclude summary determination that plaintiff's negligence constituted the sole cause of the accident. According to the dissent, the Supreme Court's decision in *Lett v Summerfield & Hecht*, 239 Mich 699, 700-703; 214 NW 939 (1927), eliminates any possibility that plaintiff could successfully rebut the presumption of her negligence. The plaintiff in *Lett* also rear-ended a large truck with no taillight, which the defendant parked partially on the road pavement. *Id*. at 701. Our Supreme Court recognized that "[t]he proofs introduced on behalf of plaintiff were abundantly sufficient to take the question of defendants' negligence to the jury." *Id*. The Supreme Court upheld the trial court's grant of a directed verdict, however, because in 1927 a plaintiff's contributory negligence offered a complete defense, "inasmuch as the doctrine of comparative negligence d[id] not obtain in this state . . . ." *Id*. at 701-702.

Our decision here recognizes the very real possibility that a jury may find plaintiff comparatively negligent. We also recognize, as did the Supreme Court in *Lett*, that a defendant, in this case Mashinske, may be guilty of negligence. In our view, a properly instructed jury must make these determinations, and not this Court.

Additionally, questions of fact exist with respect to whether the garbage truck's placement in the roadway created a sudden emergency. The record evidence reveals that plaintiff drove within the speed limit, that she applied her brakes shortly before the crash, and that she encountered an emergency caused by the unsuspected and unusually intense sunlight and the truck's placement in the road, for which conditions she bore no responsibility.[9] Viewing the

[9] The glare of the sun is analogous to the blinding oncoming headlights that served to create a sudden emergency in *Houck*, *supra*.

record evidence in the light most favorable to plaintiffs, we find that reasonable people may disagree about whether plaintiff should have seen the truck before she hit it.[10] When comparative negligence is alleged, "[t]he trend is to allow all issues, when supported by facts, to go to the jury." *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 151; 640 NW2d 892 (2002), quoting *Duke v American Olean Tile Co*, 155 Mich App 555, 566; 400 NW2d 677 (1986).

Because multiple factors may have contributed to causing this accident, a jury should decide whether plaintiff drove negligently, or whether a sudden emergency excused any negligence on her part. The question of the reasonableness of an actor's conduct is virtually always for the jury. A determination of comparative negligence requires a comparison of the reasonableness of the conduct of two actors, and inherently resides with the finder of fact. See *Lowe v Estate Motors Ltd*, 428 Mich 439, 461-462; 410 NW2d 706 (1987). Moreover, defendants retain the ability to argue that plaintiff's percentage of comparative negligence exceeds that of defendants, and thus extinguishes plaintiffs' claim for damages. MCL 500.3135(2)(b). Because the facts within the instant record would permit a reasonable jury to find negligence on the part of both plaintiff and Mashinske, we cannot conclude as a matter of law that plaintiff's percentage of negligence exceeds that of defendants.

B. Plaintiffs' Motion for Partial Summary Disposition

Plaintiffs contend that the circuit court erred in denying their motion for partial summary disposition because Mashinske's decision to park the garbage truck in the traveled portion of the road constituted negligence per se, pursuant to various statutory provisions. However, a question of fact exists concerning whether Mashinske could have parked the truck on the shoulder, precluding summary disposition of this claim. Therefore, the trial court properly denied plaintiffs' summary disposition regarding defendants' potential negligence per se.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher

[10] Our analysis under MCL 257.402(a), the rear-end collision statute, is identical to that concerning the assured clear distance law. Both create rebuttable presumptions, and we see no reason to consider whether § 402(a) independently creates a presumption that is qualitatively different from that created by § 627(1).