STATE OF MICHIGAN

COURT OF APPEALS

DANA MARTIN and ROBERT MARTIN,

Plaintiffs-Appellants,

v

STEVEN J. MASHINSKI 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UNPUBLISHED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.

O'CONNELL, J. (*dissenting*).

I respectfully dissent.

Plaintiff Dana Martin (Dana) rear-ended a garbage truck as it was collecting waste material from a residential customer. The trial court determined, based upon the assured distance statute, MCL 257.627(1), and the rear-end collision statute, MCL 257.402, that plaintiff was the proximate cause of the accident and granted summary disposition to the defendants. I agree. I would affirm the decision of the trial court.

Plaintiffs first argue that the trial court erred in granting summary disposition because there were genuine issues of material fact regarding whether Dana violated the assured clear distance and the rear-end collision statutes. I disagree.

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

> 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 MCL 257.627(1) constitutes negligence per se. *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). The rear-end collision statute, MCL 257.402, provides in pertinent part:

> In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence. [See also *Vander Laan, supra* at 231.]

Pursuant to its contract with Van Buren Township, defendant Waste Management was obligated to provide weekly curbside waste collection and disposal for all residences in the township. Defendants can lawfully stop on the highway to perform this task. See *Russo v Grand Rapids*, 255 Mich 474, 477; 238 NW 273 (1931).

Plaintiffs assert that both statutes are inapplicable because the glare from the sun and the presence of defendant Mashinske's truck in the roadway created a sudden emergency. The trial court determined that there was no sudden emergency and granted defendants' motion for summary disposition. To constitute a sudden emergency, the circumstances must be unusual or unsuspected. *Vander Laan*, *supra* at 232. Unusual means that the condition varies from the everyday traffic routine that a motorist confronts. *Id*. A blizzard or other extreme weather condition may be unusual, but the glare from the sun is not an extreme phenomenon, even if it is sporadic. *Vsetula v Whitmyer*, 187 Mich App 675, 681; 468 NW2d 53 (1991), lv den 439 Mich 857 (1991). Similarly, the presence of a garbage truck in the roadway is not unusual because it is part of the everyday traffic routine that a motorist confronts. Moreover, a garbage truck is not a small vehicle. Michigan law has long recognized that a driver must anticipate "large objects, such as other motor vehicles, easily seen, and on the open road" whether the objects are "lighted or unlighted, carefully or negligently driven or parked, and guard against collision with them." *Garrison v Detroit*, 270 Mich 237, 239; 258 NW 259 (1935).

To be unsuspected, a peril must not have been in clear view for a significant length of time and have been totally unexpected. *Vander Laan, supra* at 231. A potential peril within the everyday movement of traffic, such as icy patches on the roadway, may be unsuspected, but glare from the sun and the presence of a garbage truck in the roadway are not. *Vsetula, supra* at 681. The assured clear distance statute was designed to forbid a driver from going too fast for conditions, and the requirement that drivers have due regard for "any other condition" is broad enough to encompass weather conditions. *Jackson v Coeling*, 133 Mich App 394, 399; 349 NW2d 517 (1984). Therefore, drivers must regulate their speed according to weather conditions, including bright sunshine. The sunshine or the presence of Mashinske's truck in the roadway does not constitute a sudden emergency precluding application of the assured clear distance or the rear-end collision statutes. *Id*. Viewing the evidence in the light most favorable to the non-moving party, I conclude, as did the trial court, that plaintiffs failed to rebut the presumptions of negligence regarding the rear-end collision and assured clear distance ahead statutes.

Plaintiffs next assert that, even if Dana Martin violated the assured clear distance and rear-end collision statutes, the trial court erred in granting summary disposition because there were genuine issues of material fact regarding whether these violations were a proximate cause of the collision. Specifically, plaintiffs claim that Mashinske's truck was stopped on a curve in the roadway, on a hill, and that the truck's lights were not on at the time of the collision. 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 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.

At his deposition, Mashinske testified that he specifically recalled that the lights were operational and activated when he completed a vehicle condition report before leaving the Waste Management yard and again at his first stop on Huron River Drive. James Cucchiara, a motorist who was traveling behind Dana Martin, was unable to recall whether Mashinske's lights were on before the collision, but asserted that no lights were on after the collision occurred. Similarly, the evidence showed that the truck's rear lights or lamps were dirty, inoperable, and not visible after the collision occurred. However, Mashinske asserted that the truck was not dirty when he left the yard, but he explained that it might have gotten dirty during his route because he had earlier collected materials from some customers on dirt roads. Further, the vehicle examination report indicates that the inspector attributed the damage to the lamps to the collision, and none of these violations were serious enough to warrant taking the vehicle out of service. Weldon Greiger, plaintiffs' accident reconstruction expert witness, agreed that this damage was caused by the accident. Therefore, there was no genuine issue of material fact regarding whether Mashinske was operating the truck without any lights or whether the lights were operable and visible[1] when the collision occurred.

Witness Cucchiara claimed that Mashinske stopped the truck on a hill and a dangerous curve. Paul Olson, plaintiffs' expert witness who specialized in visual information processing and perception/response time, could not recall whether there was a hill or a curve. Greiger did state, however, that the curve was "just beyond" the scene of the accident. Similarly, the police photographs taken at the scene of the accident show that the truck was not stopped on a curve or a hill. Unlike the sudden emergency created by the plaintiff's stopped vehicle at the bottom of a hill in *McKinney v Anderson*, 373 Mich 414, 419-420; 129 NW2d 851 (1964), there is no evidence here that Mashinske was stopped without lights on, and the instant collision occurred in daylight. Similarly this situation is unlike the sudden emergency encountered by the defendant in *LaBumbard v Plouff*, 56 Mich App 495, 498-499; 224 NW2d 118 (1974), because it was not snowing. Viewing the evidence in the light most favorable to plaintiffs, I agree with the trial court and conclude that there were no genuine issues of material fact regarding whether the truck's lights were activated, the truck's lights were operable and visible,[2] and the truck was parked on a curve or a hill.

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[1] I note that few, if any, vehicles on the road have spotlessly clean taillights. Having some dirt on one's taillights does not make the taillights invisible or render the driver of the vehicle negligent.

[2] The majority opinion implies that there exists credible circumstantial evidence that the garbage truck's rear lights were inoperable/off prior to the collision. My reading of the lower court record does not support this assertion. No witness testified to the lights being inoperable or off prior to the collision. However, there exists testimony that, as a result of the collision, the lights were inoperable. This testimony is consistent with a rear-end collision. By analogy, following the majority's reasoning, if a vehicle has no rear window following an accident, and a witness

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This is particularly true in light of *Lett v Summerfield & Hecht*, 239 Mich 699, 700-703; 214 NW 939 (1927). In *Lett*, our Supreme Court upheld a directed verdict for the defendants where the plaintiff had hit a furniture van with no tail lights on that had been left "standing partly on and partly off the cement pavement" on a dark, foggy, rainy night with the end gate of the van down horizontal to the road. *Id.* at 702. Under the circumstances, it is inane to find that Dana rebutted the presumptions of negligence where she hit a large garbage truck on a road during daylight hours in clear weather.

I would affirm the decision of the trial court.

/s/ Peter D. O'Connell

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testifies he could not recall if the vehicle had a rear window prior to the accident, those facts would constitute circumstantial evidence that the driver was operating the vehicle without a rear window prior to the accident, thereby leaving a material fact-question for the jury. Needless to say, I disagree with this reasoning.