STATE OF MICHIGAN

COURT OF APPEALS

PEGGY D. PERLISKEY, Personal Representative of the Estate of DOUGLAS PERLISKEY, Deceased,

Plaintiff-Appellee,

v

BRIAN VANSUILICHEM,

Defendant-Appellant,

and

CRYSTAL CLENNEY,

Defendant.

UNPUBLISHED
December 29, 2009

Nos. 282503
Kent Circuit Court
LC No. 05-004763-NO

PEGGY D. PERLISKEY, Personal Representative of the Estate of DOUGLAS PERLISKEY, Deceased,

Plaintiff-Appellee,

v

CRYSTAL CLENNEY,

Defendant-Appellant,

and

BRIAN VANSUILICHEM,

Defendant.

No. 282504
Kent Circuit Court
LC No. 05-004763-NO

Before: Wilder, P.J., and Hoekstra and Davis, JJ.

PER CURIAM.

In this wrongful death action, a jury found no cause of action against defendants. The trial court granted in part plaintiff's motion for judgment notwithstanding the verdict (JNOV), concluding that defendants were negligent as a matter of law. Defendants appeal by leave granted the order granting, in part, plaintiff's motion for JNOV.[1] We reverse and remand.

At approximately 5:30 a.m. in late August, defendants Brian VanSuilichem and Crystal Clenney were driving their vehicles westbound on I-196 in Grand Rapids. VanSuilichem's vehicle was in the left lane, and slightly behind, Clenney's vehicle, which was in the center lane. The posted speed limit was 55 miles per hour (mph), but both VanSuilichem and Clenney traveled at about 40 to 45 mph because it was dark, raining hard, and continuously of poor visibility.

Just beyond a curve in the freeway, the vehicle of plaintiff's decedent Douglas Perliskey (Perliskey) was sitting stationary, perpendicular to traffic and in the center lane of traffic on westbound highway I-196. The Perliskey vehicle was dark gray and blended in with the road and the sky because its headlights and hazard lights were off. After Clenney drove around the curve, she saw windows and eventually realized she was seeing a vehicle. Clenney then saw a flash between her and the disabled vehicle and realized she was seeing a person, so Clenney slammed on her brakes. As VanSuilichem drove around the curve, he also noticed something in the middle of the road that appeared to him to be a vehicle. He noticed that the vehicle in front of him (Clenney's vehicle) was about to collide with the vehicle parked in the road, so he pushed on his brakes as hard as he could and maneuvered his vehicle onto the left shoulder. Perliskey then appeared in front of VanSuilichem's vehicle, moving from VanSuilichem's right to left. VanSuilichem's vehicle hit Perliskey.

VanSuilichem's braking caused skid marks on the shoulder of the road. There was testimony that the length of the skid marks indicated that VanSuilichem's vehicle was going 42 to 45 mph at the time of the accident.

In light of the foregoing evidence, the jury concluded that the accident was not the result of any negligence by defendants, and it returned a verdict of no cause of action in defendants' favor. Plaintiff filed a motion for JNOV, and the trial court granted the motion in part, determining that as a matter of law, both VanSuilichem and Clenney were negligent.

Defendants argue that the trial court erred when it granted in part plaintiff's motion for JNOV, because the trial court substituted its judgment for that of the jury, even though there was competent evidence to support the jury's verdict. We agree.

A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, we view the evidence and all legitimate inferences from it in a light most favorable to

---

[1] *Perliskey v Clenney*, unpublished order of the Court of Appeals, entered April 16, 2008 (Docket No. 282503); *Perliskey v Clenney*, unpublished order of the Court of Appeals, entered April 16, 2008 (Docket No. 282504).

the nonmoving party, to determine whether a question of fact existed. *Id*. The jury verdict must stand if a reasonable jury could have honestly reached a different conclusion. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Sniecinski*, 469 Mich at 131.

In Michigan, drivers must operate their vehicles at speeds that allow them to maintain an assured clear distance from other vehicles, and that allow them to stop, if necessary, within an assured clear distance ahead. MCL 257.627(1). The statute provides:

> 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. [MCL 257.627(1).]

The Supreme Court has directed that the assured-clear-distance statute must be reasonably construed. *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). It is not necessarily applicable under all circumstances where it might be literally applied. *Id*. Instead, it is subject to qualification by the general negligence law test of due or ordinary care, exercised in the light of the attending conditions. *Id*. For instance, "[w]hile it is true that a violation . . . of the assured-clear-distance-ahead statute constitutes negligence *per se*, such presumption is overcome and 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." *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964).

Michigan law also provides that a driver "may drive the vehicle in any lane lawfully available to traffic," MCL 257.634(2), and that the shoulder is not designed for vehicular travel, MCL 257.59a. Reading these statutes together results in a rule of law that driving on the shoulder of the road is prohibited. *Bush v Behrooz-Bruce*, 484 Mich 156, 167; 772 NW2d 272 (2009) (statutory provisions should be read in conjunction with other relevant statutes). Therefore, driving on the shoulder of the road creates a presumption of negligence. *Zeni v Anderson*, 397 Mich 117, 131-133; 243 NW2d 270 (1976). However, this presumption can likewise be rebutted by the sudden emergency exception. *Id*.

In sum, "the effect of violation of a penal statute in a negligence action is that such violation creates only a prima facie case from which the jury may draw an inference of negligence." *Zeni*, 397 Mich at 128-129 (footnote omitted). Thus, a rebuttable presumption of negligence is created. *Id*. at 131-133. So, even assuming that defendants were or may have been violating the assured-clear-distance statute, or the rule against driving on the shoulder of a road, at the time of the crash, a resulting presumption of negligence was rebuttable with facts demonstrating a sudden emergency. *Id*.; see also *White v Taylor Distributing Co*, 482 Mich 136, 139-140; 753 NW2d 591 (2008

To constitute a sudden emergency, the attending circumstances must present a situation that is unusual or unsuspected. *Vander Laan*, 385 Mich at 232. The Court explained:

> The term "unusual" is employed here in the sense that the factual background of the case varies from the everyday traffic routine confronting the motorist. Such an event is typically associated with a phenomenon of nature. A classical example of the "unusual" predicament envisioned by the emergency doctrine is provided by *Patzer v Bowerman-Halifax Funeral Home*, [370 Mich 350, 354-355; 121 NW2d 843 (1963),] wherein the accident occurred amid an Upper Peninsula blizzard.
>
> "Unsuspected" on the other hand connotes a potential peril within the everyday movement of traffic. To come within the narrow confines of the emergency doctrine as "unsuspected" it is essential that the potential peril had not been in clear view for any significant length of time, and was totally unexpected. A good example of this can be seen in *McKinney* . . . where defendant rear-ended a plaintiff's car [that] 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. [*Id*.]

Viewing the evidence in a light most favorable to defendants, and granting them every reasonable inference from the evidence, *Sniecinski*, 469 Mich at 131, reasonable minds could differ regarding whether the presumption of negligence was rebutted and defendants acted reasonably and in the midst of a sudden emergency. Therefore, the trial court erred by finding that no exceptions applied to defendants, and that defendants were negligent as a matter of law. *Zantel Marketing Agency*, 265 Mich App at 568; *Vander Laan*, 385 Mich at 232.

Here, the evidence supports the conclusion that on the morning of the accident, visibility was severely reduced by darkness and heavy, continuous rain, which appeared to be coming down in "buckets" at times. A streetlight was out where the accident occurred, which exacerbated the darkness. Perliskey's vehicle was perpendicular to oncoming traffic, in the middle lane of traffic, and without its lights or hazard flashers on. His vehicle was dark gray, which allowed it to blend in with the color of the roadway and sky, making it even more difficult to see.

There was also evidence that Clenney's vehicle was traveling at approximately 40 mph, and VanSuilichem's vehicle was traveling between 42 and 45 mph, at the time of the accident. The speeds of both vehicles were well below the posted speed limit of 55 mph. In addition, both defendants were driving around a curve when they noticed something in the middle of the road. Although Clenney tried her best to avoid Perliskey's disabled vehicle, by slamming on her brakes and steering to her right, she hit the vehicle. Clenney testified that the whole thing was "pretty immediate [and] instantaneous," notwithstanding that she was driving "[s]afely and cautiously."

Also, VanSuilichem testified that he tried his best to get out of the way of the impending collision by pushing on his brakes as hard as he could, and maneuvering to his left, onto the

shoulder. Thus, the only reason VanSuilichem's vehicle was on the shoulder was because VanSuilichem was engaged in an emergency maneuver.

Officer Gregory Edgcombe, who investigated the accident, concluded that VanSuilichem's evasive action was an appropriate accident-avoidance maneuver. However, in the midst of VanSuilichem attempting evasive measures, due to the sudden emergency he already encountered, Perliskey suddenly appeared before VanSuilichem's vehicle, running from right to left. Perliskey was wearing a dark blue shirt and pants. As VanSuilichem stated to Officer Edgcombe, Perliskey appeared to come out of nowhere.

Based on the foregoing facts, reasonable jurors could conclude that defendants acted in the midst of a sudden emergency, preventing them from stopping within the assured clear distance ahead of Perliskey or Perliskey's vehicle. *McKinney*, 373 Mich at 419. While the severe downpour of rain in the extreme darkness may not be unusual by itself, jurors could construe the fact that Perliskey's dark vehicle was perpendicular to oncoming traffic, and in the middle of the road, as an unsuspected peril not within the everyday movement of traffic, and not in clear view for any significant length of time. *Vander Laan*, 385 Mich at 232. Additionally, reasonable jurors could conclude that the sudden emergency excused VanSuilichem's violation of the prohibition against driving on the shoulder of the road. *Zeni*, 397 Mich at 131-133. Finally, reasonable jurors could conclude that VanSuilichem acted in the midst of a sudden emergency, preventing him from stopping within the assured clear distance ahead of Perliskey. A reasonable jury could find that Perliskey also was not in clear view for any significant length of time before he suddenly ran in front of VanSuilichem's vehicle and the jury could find that this peril was totally unexpected. Because a reasonable jury could have determined that defendants' actions were covered by the sudden emergency doctrine, the trial court erred when it granted, in part, plaintiff's motion for JNOV.

Reversed and remanded for entry of a judgment of no cause of action. We do not retain jurisdiction. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Alton T. Davis