STATE OF MICHIGAN

COURT OF APPEALS

BETTY TOBIN,

Plaintiff-Appellant,

v

DANIEL MARK DENTON,

Defendant-Appellee.

UNPUBLISHED
February 20, 2001

No. 218385
Alger Circuit Court
LC No. 97-003028-NI

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Following a jury trial in this negligence case, which arose out of an automobile accident, judgment was entered in favor of defendant. Plaintiff now appeals as of right. We reverse and remand for a new trial.

The facts in this case are relatively straightforward and, as are relevant for purposes of this appeal, are not in dispute. On January 17, 1997, at approximately 12:30 p.m., plaintiff left her house in Ishpeming and drove eastbound on M-28 to visit her daughter in Kinchloe for the weekend. When she left Ishpeming, the sky was clear and the sun was shining. However, as plaintiff passed AuTrain, she noticed that it was starting to snow and that the roads were becoming hazardous. Therefore, she turned on her headlights and hazard lights and slowed to fifteen to twenty miles per hour. The weather conditions continued to worsen. Plaintiff unsuccessfully attempted to get off the highway in Christmas. As she was leaving Christmas, plaintiff could only see about a car-length in front of her. Apparently, the snow was quite heavy by this time and there were heavy winds. Just outside of Christmas, plaintiff saw a sheriff on the right side of the highway waiving a red flare in an attempt to slow traffic due to the fact that there was an accident approximately a mile down the highway. Plaintiff began to pump her brakes to slow down. While pumping her brakes, she saw a black van in her rear view mirror. The van passed her on the left. Plaintiff continued to pump her brakes. Suddenly, she saw defendant's black truck in her rear view mirror. Defendant's truck then struck the rear of plaintiff's car.

Defendant admitted that he had been driving eastbound on M-28 during the snowstorm. Defendant acknowledged that outside of Christmas it was snowing heavily and visibility was poor. The evidence indicated that defendant was driving as much as twenty miles per hour at the time of the collision and that he was pulling a trailer that carried four snowmobiles, which made

it more difficult to stop. Defendant testified that when he saw plaintiff's car in front of him he tried to stop but was unable to do so. He admitted that he hit the rear of plaintiff's car.[1]

On appeal, plaintiff argues that because the evidence presented at trial established a statutory presumption of negligence on behalf of defendant pursuant to MCL 257.402(a); MSA 9.2101(a) and pursuant to MCL 257.627(1); MSA 9.2327(1), the trial court erred in denying her request to have SJI2d 12.01 read to the jury. We agree.

We examine jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case, supra*, 461 Mich 6; *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985).

When a party so requests, a court must give a standard jury instruction if it is applicable and accurately states the law. *Clark v Kmart Corp*, 242 Mich App 137, 143; 617 NW2d 729 (2000); *Jernigan v General Motors Corp*, 180 Mich App 575, 579-580; 447 NW2d 822 (1989). MCL 257.402(a); MSA 9.2102(a) provides that "any motorist who collides with the rear end of another vehicle traveling in the same direction is presumed negligent, although that presumption is rebuttable." *Hill v Wilson*, 209 Mich App 356, 359; 531 NW2d 744 (1995). SJI2d 12.01 would have informed the jury of this presumption.

After reviewing the record, we conclude that there was evidence supporting a statutory presumption of negligence on behalf of defendant pursuant to MCL 257.402(a); MSA 9.2102(a) and, therefore, SJI2d 12.01 was applicable to this case. As defendant admitted at trial, he was driving in the same direction as plaintiff, eastbound on M-28, when he hit the rear end of her car. *Id.* As above indicated, any motorist who collides with the rear end of another vehicle traveling in the same direction is presumed negligent. *Hill, supra*, 209 Mich App 359. Because the facts here supported such a presumption at trial, the trial court erred by refusing to instruct the jury with regard to SJI2d 12.01, the applicable standard jury instruction when there is evidence of a statutory presumption of negligence. See *Brownell v Brown*, 114 Mich App 760, 768-769; 319 NW2d 664 (1982). We believe that the error resulted in unfair prejudice to plaintiff such that the failure to vacate the jury verdict would be inconsistent with substantial justice. *Case, supra*, 463 Mich 6; *Johnson, supra*, 423 Mich 327.

[1] Defendant testified that he believed that plaintiff's car was stopped at the time of the collision. Plaintiff testified, however, that although she slowed down after seeing the sheriff next to the road, she did not come to a complete stop prior to being struck by defendant.

Having determined that it was reversible error for the trial court to refuse to give SJI2d 12.01 under the circumstances of this case, we need not address plaintiff's claim that the trial court erred in allowing defense counsel to argue the concept of sudden emergency during closing argument. In any event, we note that plaintiff agreed to the trial court's decision to allow defendant to argue this defense. Therefore, plaintiff has waived this issue. *Phinney v Perlmutter*, 222 Mich App 513, 537-538; 564 NW2d 532 (1997). A party may not take a position before a trial court and then seek appellate review based on a contrary position. *Id.*

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly