

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UNPUBLISHED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.

HOEKSTRA, J. (*dissenting*).

I respectfully dissent.

I agree with the conclusion of the majority that instructional error occurred when the trial court failed to instruct the jury on the statutory presumption of negligence for a rear-end collision pursuant to MCL 257.402(a); MSA 9.2102(a).

However, I disagree with the majority's assertion that this error resulted in a substantial injustice and therefore required reversal. If instructional error occurs, we are to reverse only when a failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). No substantial injustice results if on balance the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id.*

On the facts of this case, not only was plaintiff entitled to an instruction on the statutory presumption of MCL 257.402(a); MSA 9.2102(a), but defendant also had the right to have the jury instructed on excused violation of a statute due to sudden emergency. *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971). The Court in *Vander Laan* cited the case of *Patzer v Bowerman-Halifax Funeral Home*, 370 Mich 350; 121 NW2d 843 (1963), as a classic example of sudden emergency. *Id.* The facts in *Patzer* are remarkably similar to the events at issue here. In *Patzer*, blowing snow caused reduced visibility on the very same section of M-28 that is at issue in this case. *Patzer, supra* at 354.

In the present case, the trial court gave the jury a standard negligence instruction without reference to either a presumption of negligence or an excuse for violating the statute. The

question in this context then is whether a straight negligence instruction is inconsistent with substantial justice.

In my opinion, the two omitted instructions, if given, essentially would have required the jury to make a decision regarding whether defendant, under the circumstances, had violated his obligation to use ordinary care. In effect, the sudden emergency doctrine allows a driver in the circumstance that defendant faced here to overcome the statutory presumption of negligence by showing that he used ordinary care. The language of the standard jury instruction to be used in instances of excused violation of statute due to sudden emergency states that one overcomes the presumption by using “ordinary care.” SJI2d 12.02. The trial court in this case instructed the jury that negligence is the failure to use ordinary care. The jury deliberated and in a special verdict form found that defendant was not negligent. Thus, in my opinion, reversal is not required because the jury was instructed on the essential law and rendered a verdict thereon. *Case, supra.*

/s/ Joel P. Hoekstra