STATE OF MICHIGAN

COURT OF APPEALS

DR. RICHARD STOBER,

Plaintiff-Appellant,

v

DR. MICHAEL MCCRACKEN,

Defendant-Appellee.

UNPUBLISHED
March 20, 2001

No. 217996
Oakland Circuit Court
LC No. 97-549582-NI

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

This negligence action arises out of a minor automobile accident. The jury returned a verdict of no cause of action in favor of defendant, and plaintiff appeals as of right. We reverse and remand for a new trial.

Plaintiff and defendant are both doctors. Defendant was a medical student assigned to plaintiff's office for an internship rotation. On a morning in January 1997, defendant was following plaintiff to a racquet club to exercise during their break. The roads were snowy and icy. Traffic was moving at a rate of thirty-five to forty-five miles per hour, which was below the posted speed limit. Plaintiff and defendant were moving with the flow of traffic, and defendant allowed a distance of approximately eight to ten car lengths between plaintiff's car and his own. The driver in front of plaintiff appeared to lose control of the car, and the car fishtailed on the slippery road. Plaintiff applied his brakes. He was able to maintain control of his car, and did not strike the car in front of him. Defendant saw plaintiff slow, and applied his own brakes. He found himself sliding on the slippery highway, and attempted to steer his car onto the shoulder of the road. He was unable to do so, and struck plaintiff's car from the rear. The jury found that defendant was not negligent and returned a verdict of no cause of action.

On appeal, plaintiff argues that the trial court made several errors in its instructions to the jury. We review claims of instructional error de novo, considering the instructions in their entirety to determine whether there is error. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "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." *Id.* Where the instructions, on balance, adequately and fairly present the theories of the parties and the applicable law to the jury, there is no reversible error. *Murdock v Higgins*, 454 Mich 46, 60; 559

NW2d 639 (1997). Reversal is only required where the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case*, *supra* at 6.

Plaintiff first contends that the trial court erroneously instructed the jury that the icy conditions of the road could excuse defendant's violation of the assured clear distance statute, MCL 257.627; MSA 9.2327. The trial court instructed the jury that it could infer that defendant was negligent if it found that he violated the statute. The court further instructed: "However, if you find that Defendant used ordinary care and was still unable to avoid the violation because of ice and snow, then his violation is excused." We conclude that this instruction was an erroneous statement of the law.

A defendant's violation of a statute creates a prima facie case from which the jury may infer the defendant's negligence. *Zeni v Anderson*, 397 Mich 117, 122; 243 NW2d 270 (1976); *Young v Flood*, 182 Mich App 538, 541; 452 NW2d 869 (1990). See also, *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996); *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 487-488; 478 NW2d 914 (1991). Under some circumstances, a statutory violation may be excused. The sudden emergency defense provides a legal excuse for the violation of a statute if the violation is caused by an "unusual or unsuspected situation." See *Vsetula v Whitmyer*, 187 Mich App 675, 680-681; 468 NW2d 53 (1991); *Farris v Bui*, 147 Mich App 477, 480; 382 NW2d 802 (1985); *Jackson v Coeling*, 133 Mich App 394, 397-399; 349 NW2d 517 (1984). However, it is well-established that ice and snow cannot qualify as a sudden emergency exception to the assured clear distance statute, which requires that a driver take such road conditions into account. *Young*, *supra* at 542-543; *Jackson*, *supra* at 397-399. See also, *Moore v Spangler*, 401 Mich 360, 381-383; 258 NW2d 34 (1977); *Morrison v Demogala*, 336 Mich 298, 303; 57 NW2d 893 (1953).

The assured clear distance statute prohibits a person from driving on a highway "at a speed greater than that which will permit a stop within the assured, clear distance ahead." MCL 257.627(1); MSA 9.2327(1). The statute requires a person to "drive 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." MCL 257.627(1); MSA 9.2327(1). In *Jackson*, *supra*, as in the case at bar, the trial court instructed the jury that if it found defendant violated the assured clear distance statute, it could infer negligence on that basis. *Jackson*, *supra* at 399. The trial court further instructed the jury that it could find that the defendant's violation of the statute was excused because of existing weather conditions. *Id.* at 397.

This Court reversed, holding that the defendant's violation of the assured clear distance statute may not be excused based upon weather conditions. The statute "is designed to forbid a driver from going too fast for conditions." *Jackson*, *supra* at 399. Further, the statute requires drivers to take into account the surface of the highway, and "any other condition then existing," which encompasses weather conditions. *Id.* at 399. Because the statute requires a driver to account for such conditions in regulating his speed, the existence of these conditions cannot excuse a violation of the statute. *Id.*

In the case at bar, the trial court erroneously instructed the jury that defendant's violation of the assured clear distance statute, if the jury so found, may be excused because of ice and

snow. Further, the trial court's error cannot be deemed harmless. As in *Jackson, supra,* "[w]e note that where an excuse or sudden emergency instruction has been improperly given, application of the harmless error rule has been limited to cases in which the jury resolved the issue of liability in plaintiff['s] favor." *Jackson, supra* at 400-401. Accordingly, reversal is warranted in this case, and plaintiff is entitled to a new trial.

Plaintiff next argues that the trial court made several errors when it instructed the jury regarding proximate cause. Because the same issues may be implicated upon retrial, we will address plaintiff's remaining issues on appeal. *Jackson, supra* at 401.

Plaintiff contends the trial court improperly instructed the jury pursuant to SJI2d 15.06, which permitted the jury to find that the sole proximate cause of the accident was the snow and ice covering the road. We agree. In *Jackson, supra*, the jury was similarly instructed. Although this Court stated that any error in so instructing the jury was harmless, this Court addressed the issue in order to provide guidance to the trial court upon retrial. Relying upon *Jackson*, we conclude that SJI2d 15.06 was inappropriately given. The slippery nature of the road was a condition "which, in the exercise of ordinary care, [ ] defendant was required to take into account. The primary question in this case was whether [ ] defendant driver exercised ordinary care immediately before the accident." *Jackson, supra* at 401. "On the facts of this case, the jury was required to consider the weather conditions in deciding the question of negligence." *Id.* Accordingly, this instruction was unnecessary. *Id.* at 401-402.

Plaintiff further claims that the trial court erred in instructing the jury that it may find more than one proximate cause, and also that the jury may find that the conduct of the driver in front of plaintiff was the sole proximate cause of the incident, SJI2d 15.03 and SJI2d 15.05.[1] We disagree. "It is entirely proper for a defendant in a negligence case to present evidence and argue that liability for an accident lies elsewhere, even on a nonparty." *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 627; 415 NW2d 224 (1987). Plaintiff testified that, prior to the accident, the driver of the car in front of him appeared to lose control, and plaintiff observed the car fishtailing. In response, plaintiff applied his brakes. Defendant then applied his own brakes, but was unable to stop or to swerve prior to striking the rear of plaintiff's car. We conclude that these instructions were adequately supported by the evidence. See *Case, supra* at 6.

Finally, plaintiff claims that the trial court erred in denying his motion for judgment notwithstanding the verdict. In light of our determination that the trial court's instructional error

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[1] We note that plaintiff's challenges to the jury instructions regarding proximate cause were not entirely preserved. Plaintiff did not object to SJI2d 15.03, permitting the jury to find more than one proximate cause of the accident. MCR 2.516(C); *Phinney v Perlmutter*, 222 Mich App 513, 556; 564 NW2d 532 (1997) ("To preserve for review an issue concerning a jury instruction, a party must object on the record before the jury retires to deliberate.") Further, on appeal, plaintiff cites no authority in support of his argument that this instruction was erroneously given. Also, plaintiff's objection to SJI2d 15.05, permitting the jury to find that the conduct of a nonparty was the sole proximate cause, offered a different basis than that argued on appeal. However, we address these issues for purposes of retrial. See *Jackson, supra* at 401.

requires reversal, we decline to address plaintiff's remaining issue on appeal. See *Jackson*, *supra* at 402.

Reversed and remanded for a new trial in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper