STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. LITTLE, minor, by his next friend, LISA SHOCKEY, conservator of the estate of DAVID J. LITTLE, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED October 11, 2011
v	No. 298023 Muskegon Circuit Court
ROBERT E. LANG, Defendant-Appellee/Cross-Appellant.	LC No. 08-046353-NI

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

BECKERING, J. (*concurring in part and dissenting in part*).

While I agree that the trial court's ruling on the motion in limine must be reversed, I would also reverse the trial court's order granting summary disposition for defendant on the issue of noneconomic damages and remand for trial.

When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the evidence submitted by the parties in a light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Human Servs Dep't*, 286 Mich App 230, 235; 780 NW2d 586 (2009). A genuine issue of material fact exists when reasonable minds could differ on an issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

MCL 500.3135(2)(b) prohibits a party who is more than 50 percent at fault from recovering noneconomic damages:

> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:
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> * * *
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> (b) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

"The standards for determining the comparative negligence of a plaintiff are the same as those of a defendant . . . ." *Laier v Kitchen*, 266 Mich App 482, 496; 702 NW2d 1999 (2005). Thus, the trier of fact must "consider both the nature of the conduct of each person at fault and the extent of the causal connection between the conduct and the damages claimed." MCL 600.6304(2); see also *Lamp v Reynolds*, 249 Mich App 591, 605; 645 NW2d 311 (2002) ("Once the at-fault persons are determined, the trier of fact assigns percentages of fault to each person after considering the nature of each person's conduct and the extent of the causal relation between the conduct and the resulting damages."). Generally, the question of comparative negligence is for a jury. *Laier*, 266 Mich App at 496; see also *Jimkoski v Shupe*, 282 Mich App 1, 8 n 3; 763 NW2d 1 (2008) ("The extent of a plaintiff's comparative fault, if any, is generally a question for the jury . . . ."). But, as our Supreme Court has recognized, a trial court may decide a question of comparative negligence as a matter of law where no reasonable juror could find that the defendant was more at fault than the plaintiff. *Huggins v Scripter*, 469 Mich 898; 669 NW2d 813 (2003); see also *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 33; 761 NW2d 151 (2008) ("The question of a plaintiff's negligence for failure to use due care is a question for the jury unless no reasonable minds could differ or the determination involves some ascertainable public policy considerations.").

It is well established that the rights and duties of drivers and pedestrians are reciprocal. *Wilson v Johnson*, 195 Mich 94, 99; 161 NW 924 (1917); *Schock v Cooling*, 175 Mich 313, 323; 141 NW 675 (1913). Pedestrians must exercise reasonable care and caution when traveling on a road. *Wilson*, 195 Mich at 99; *Birkhill v Todd*, 20 Mich App 356, 362; 174 NW2d 56 (1969). And, a person must exercise reasonable care and caution while driving a motor vehicle. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956); see also MCL 257.627(1) (stating that a person operating a vehicle should do so at a careful and prudent speed that would allow the driver to stop within the assured, clear distance ahead). A driver's duty to exercise reasonable care and caution is commensurate to the conditions and circumstances of travel. *Ashworth v Detroit*, 293 Mich 397, 400-401; 292 NW 345 (1940); see also MCL 257.627(1) (stating that a person operating a vehicle should do so with due regard for traffic and any other condition then existing). Consequently, a driver may be negligent while driving within the speed limit where the circumstances and conditions of travel—and the lives and safety of the public—call for a slower, more reasonable speed. *Bade v Nies*, 239 Mich 37, 39; 214 NW 170 (1927); *Patterson v Wagner*, 204 Mich 593, 601-602; 171 NW 356 (1919). Conditions that may call for a person to drive a motor vehicle with greater caution and at a slower speed include pedestrians, snow, and a wet, slippery, or icy road. *Buchanan v Cockrill*, 385 Mich 292, 295; 187 NW2d 892 (1971); *Dempsey v Miles*, 342 Mich 185, 192-193; 69 NW2d 135 (1955); *Russell v Szczawinski*, 268 Mich 112, 115; 255 NW 731 (1934); *Howard v Drew*, 21 Mich App 146, 149; 175 NW2d 351 (1970).

Notwithstanding these reciprocal rights, Michigan law does not hold children to the same standard of care as adults.[1] *Bragan v Symanzik*, 263 Mich App 324, 328; 687 NW2d 881 (2004).

[1] While a minor engaging in a dangerous and adult activity is an exception to this principle, *Osner v Boughner*, 180 Mich App 248, 255-257; 446 NW2d 873 (1989), the exception does not apply in this case.

"Minors are required only to exercise that degree of care which a *reasonably careful minor* of the age, mental capacity and experience of other similarly situated minors would exercise under the circumstances." *Id.* (internal quotations omitted). And, not only does Michigan law differentiate between the standards of care of adults and children, it "requires [an adult] to 'exercise greater vigilance' when he knows or should know that children are nearby . . . ." *Id.* As Chief Justice Cooley explained, "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take, precautions accordingly." *Powers v Harlow*, 53 Mich 507, 515; 19 NW 257 (1884). Therefore, Michigan "courts [hold] drivers to a stricter degree of care when they see children on the road than when they see adults." *Edgerton v. Lynch*, 255 Mich 456, 460; 238 NW 322 (1931). A jury may find that a driver is negligent if the driver fails to "anticipate and take precautions against sudden actions of [a] child." *Tibitoski v Macomb Disposal Serv, Inc*, 136 Mich App 259, 262; 356 NW2d 15 (1984).

Viewing the evidence of this case in a light most favorable to plaintiff in conjunction with the different standards of care that Michigan law imposes on adult drivers and child pedestrians, I would hold that the trial court cannot conclude as a matter of law that D.J. Little was more at fault than defendant simply because Little failed to look both ways before crossing Brooks Road. Reasonable minds could disagree about whether Little was more at fault than defendant. *Latham*, 480 Mich at 111; *Allison*, 481 Mich at 425.

In the present case, the speed limit on the road where defendant hit Little was 45 m.p.h.; however, the area was residential. There were homes and mailboxes on both sides of the street. People "frequently" backed out onto the road from their driveways. Defendant knew that children lived and played near the road. And, there was a sign on the road indicating that a deaf person lived in the area. On the day of the accident, there was snow and ice on the road that made the road "slippery." Nevertheless, according to Ashton Sower, defendant was driving "very fast." Thus, a reasonable juror could conclude that defendant was not driving with reasonable care on Brooks Road before he first saw Little. *Ashworth*, 293 Mich at 400-401; *Bade*, 239 Mich at 39.

Furthermore, a reasonable juror could also conclude that defendant negligently failed to "anticipate and take precautions against [Little's] sudden actions." *Tibitoski*, 136 Mich App at 262; see also *Powers*, 53 Mich at 515. Defendant had a clear view of Little. Little did not do anything to indicate that he saw defendant. While the parties dispute whether Little was walking or running toward the road, it is clear that defendant did not immediately slam on his brakes when he first saw Little. Defendant "absolutely expected" Little to stop before entering the road. This evidence suggests that defendant had time to act to avoid the collision with Little regardless of whether Little was walking or running toward the road. Moreover, Sower opined that defendant could have avoided hitting Little and that defendant's truck did not slow down until after it hit Little. Defendant did not use his truck's horn or do anything to try to alert Little. Sounding a horn is a "very easy and simple way . . . to attract [a] boy's attention" where a boy is in danger of a collision. *Kelley v Keller*, 211 Mich 404, 409; 179 NW 237 (1920). Defendant's truck went "through" Little before the truck's brakes "slammed." The truck lost control, spun "completely around," and came to a stop. Given this evidence, a reasonable juror could conclude that defendant was more at fault than Little. *Huggins*, 469 Mich at 898. Therefore, the trial court is precluded from ruling on the issue of comparative negligence as a matter of law. *Id.*

Accordingly, I would reverse the trial court's order granting summary disposition for defendant on the issue of noneconomic damages and remand for trial as a genuine issue of material fact precludes summary disposition.

/s/ Jane M. Beckering