STATE OF MICHIGAN

COURT OF APPEALS

HALI M. STEELE,

Plaintiff-Appellant,

v

RONALD WAYNE GILLIS and PENNY LYN GILLIS,

Defendants-Appellees.

UNPUBLISHED
December 27, 2011

No. 300971
Calhoun Circuit Court
LC No. 2009-002926-NI

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of no cause of action entered in favor of defendants after a jury trial.[1] We affirm.

On July 7, 2009, plaintiff, then 17 years old, and Travis Dadow were riding bicycles northbound on 14 Mile Road in Calhoun County. The speed limit on that road was 55 miles per hour. Plaintiff and Dadow were riding side-by-side in the right lane. Dadow was nearest the white line, and plaintiff was to his left. A minivan driven by defendant approached plaintiff and Dadow from behind. Defendant slowed the minivan's speed from 55 to 40 miles per hour. When the minivan was approximately 100 yards behind plaintiff and Dadow, defendant moved the minivan into the left lane to pass the two bicyclers. However, plaintiff veered her bicycle into the left lane in front of the minivan. Defendant hit the minivan's brakes and swerved to the left, but he was unable to avoid a collision with plaintiff. Plaintiff sued. The jury concluded that defendant was not negligent, and a judgment of no cause of action was entered. This appeal followed.

On appeal, plaintiff asserts three claims of instructional error. We review de novo claims of instructional error. *Freed v Salas*, 286 Mich App 300, 327; 780 NW2d 844 (2009). However, a trial court's determination that an instruction is accurate and applicable is reviewed for an

[1] Defendants Ronald Gillis and Penny Gillis are husband and wife. Penny was named as a defendant because she was an owner of the minivan that collided with plaintiff. In this opinion, the term "defendant" in the singular refers to Ronald Gillis.

abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Instructional error does not require reversal unless failure to reverse would be inconsistent with substantial justice. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 627; 792 NW2d 344 (2010).

First, plaintiff argues that the trial court erred when it instructed that she was to be held to an adult standard of care although she was a minor at the time of the accident. We disagree.

A person is generally required to act with "ordinary care," which is "the care that a reasonably careful person would use under the circumstances." *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000). However, a child is not held to the same standard of care as an adult. *Bragan v Symanzik*, 263 Mich App 324, 333; 687 NW2d 881 (2004). "A child over the age of seven is required only to act as a minor of similar age, mental capacity, and experience would conduct himself, unless engaged in an adult activity." *Id*. at 334.

Here, the trial court instructed the jury that it was the duty of plaintiff "to use ordinary care" for her safety. It explained that plaintiff was required to conform her conduct to that "of a reasonable person of like age, intelligence, and experience under like circumstances." It later instructed the jury that a minor is not held to the same standard of care as an adult. The trial court again explained that plaintiff was to act as "a reasonably careful minor of the [same] age, mental capacity, and experience." This is the standard of care required of children. See *Bragan*, 263 Mich App at 334. The trial court never instructed the jury that plaintiff was required to act with the care that a reasonably careful person would use, which is the standard of care required of adults. See *Case*, 463 Mich App at 7. Accordingly, plaintiff's claim that the trial court instructed the jury that plaintiff was to be held to the standard of care required of adults is not supported by the record.

Second, plaintiff argues that the trial court erred when it instructed the jury on the sudden emergency doctrine. According to plaintiff, the sudden emergency instruction contradicted and nullified the instruction regarding conduct required when in the vicinity of children, M Civ JI 10.07, and was inapplicable to the facts of the case. We disagree with both claims.

In *Ivy v Binger*, 39 Mich App 59, 60; 197 NW2d 133 (1972), this Court held that the sudden emergency instruction did not contradict the instruction regarding conduct required when in the vicinity of children. It stated that the two instructions "authorized [the jury] to find that such sudden emergency existed only if [the] defendant was exercising the greater vigilance required when one drives through an area where children are likely to be present." *Id*. Plaintiff's reliance on *Tibitoski v Macomb Disposal Serv, Inc*, 136 Mich App 259; 356 NW2d 15 (1984) is misplaced. The sudden emergency instruction was not at issue in *Tibitoski*, and unlike the erroneous instruction in *Tibitoski*, the sudden emergency instruction in this case did not instruct the jury that defendant was not negligent if he simply did not anticipate plaintiff crossing into the left lane.

"The sudden-emergency doctrine applies when a collision is shown to have occurred as the result of a sudden emergency not of the defendants' own making." *White v Taylor Distrib Co, Inc*, 482 Mich 136, 139-140; 753 NW2d 591 (2008) (quotation marks and citation omitted).

A sudden emergency exists when the circumstances giving rise to the accident are "unusual" or "unsuspected." *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971).[2] The term "unsuspected" means "a potential peril within the everyday movement of traffic." *Id*. "[I]t is essential that the potential peril had not been in clear view for any significant length of time, and was totally unexpected." *Id*. "A party who invokes the sudden emergency doctrine is entitled to a proper instruction if any evidence exists which would allow a jury to conclude that an emergency existed within the meaning of the doctrine." *Farris v Bui*, 147 Mich App 477, 480; 382 NW2d 802 (1985). In reviewing a trial court's decision regarding the giving of a sudden emergency instruction, this Court views the evidence in the light most favorable to the defendant. *Id*.; *Spillers v Simons*, 42 Mich App 101, 105; 201 NW2d 374 (1972).

Here, when the evidence is viewed in the light most favorable to defendants, there is evidence that plaintiff's conduct of veering into the left lane was an unsuspected peril. Defendant first observed plaintiff and Dadow when they were approximately 500 yards in front of the minivan, and they remained in his clear, unobstructed view. Defendant moved the minivan into the left lane when it closed to within 100 yards of plaintiff and Dadow. There was evidence that plaintiff's veering of her bicycle into the left lane was sudden and unexpected. According to defendant Penny Gillis, who was a passenger in the minivan, plaintiff was aware that the minivan had changed lanes. Penny testified that when plaintiff looked back at the minivan, the minivan was approximately 100 yards behind plaintiff and Dadow and in the left lane. Penny further testified that she thought plaintiff understood that the minivan was going to go around her and Dadow. Similarly, defendant testified that he did not expect either plaintiff or Dadow to cross into the left lane in front of the minivan. In addition, Dadow testified that when he told plaintiff that the minivan was still behind them, plaintiff panicked and crossed in front of the minivan. Significantly, there was no evidence that plaintiff or Dadow were weaving across the lanes as the minivan approached them. We find these facts to be similar to those in *Farris*, 147 Mich App at 480-481, where the Court held that there was evidence to warrant the sudden emergency instruction.[3] When the evidence is viewed in the light most favorable to defendants, the evidence establishes that the situation confronted by defendant—plaintiff's act of riding her bicycle into the left lane—was not in clear view and was totally unexpected. Accordingly, the trial court did not abuse its discretion in determining that the sudden emergency instruction was applicable to the facts of the case.

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[2] The term "unusual" refers to circumstances that "var[y] from the every day traffic routine confronting the motorist." *Vander Laan*, 385 Mich at 232. It is generally associated with a phenomenon of nature. Defendants do not dispute that there were no "unusual" circumstances giving rise to the accident.

[3] In *Farris*, the defendant observed the plaintiff, then six years old, and his brother step off the curb to cross the street. The two boys turned and returned to the curb. The defendant slowed her vehicle, but had the impression that the boys would not attempt to cross the street until she passed them. However, the plaintiff darted into the street, and the defendant's vehicle hit him. The Court stated that the evidence, when viewed in the light most favorable to the defendant, established that "the peril was not in clear view [and] was totally unexpected." *Farris*, 147 Mich App at 480.

Third, plaintiff argues that the trial court erred when it instructed the jury on her alleged violation of MCL 257.660a[4] and her comparative fault. According to plaintiff, defendants did not properly plead her comparative fault as an affirmative defense and did not prove her statutory violation at trial. We disagree.

Defendants listed plaintiff's comparative fault as an affirmative defense in their answer to the first amended complaint. But even assuming that the defense was not properly pleaded because defendants did not state the facts of plaintiff's alleged negligence, see MCR 2.111(F)(3); *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664-665; 741 NW2d 857 (2007), we find no error in the trial court's decision that defendants' pleading was sufficient to warrant the instruction. When plaintiff objected to the trial court's instruction of her alleged violation of MCL 257.660a, defendants requested to amend their answer to include the statutory violation. MCR 2.118(C) permits amendment of pleadings to conform to the proofs presented at trial. Four months before trial, defendants moved for summary disposition, in part, on the basis that plaintiff violated MCL 257.660a and that her negligence was the cause of the accident. Plaintiff responded to the argument on the merits and even stated that her negligence was a question for the jury. Thus, when the trial court denied the motion for summary disposition, plaintiff knew that her alleged violation of MCL 257.660a would be at issue at trial. Under these circumstances, plaintiff consented to the issue of her violation of MCL 257.660a being tried or, at the very least, the question whether plaintiff violated MCL 257.660a did not prejudice plaintiff in maintaining her action against defendants. See MCR 2.118(C)(1) and (2).

And plaintiff's argument that defendants failed to present any facts to support the claim that plaintiff violated MCL 257.660a is without merit. Even plaintiff's testimony establishes that she did not stay as close as practicable to the right-hand edge of 14 Mile Road. Plaintiff testified that she naturally moved to the left lane and that she believed the minivan would go between her and Dadow. She admitted that nothing prevented her from speeding up or slowing down so that she could ride single file with Dadow. The testimony of defendant, Penny, and Dadow also supported a finding that plaintiff violated MCL 257.660a.

Plaintiff also claims on appeal that the verdict was against the great weight of the evidence. We disagree.

Because plaintiff did not move the trial court for a new trial, the issue is not preserved for our review. *Hyde v Univ of Mich Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997). We review this unpreserved claim for plain error affecting plaintiff's substantial rights. See *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

In deciding whether the verdict was against the great weight of the evidence, we must determine whether the overwhelming weight of the evidence favors plaintiff. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). We may not substitute our judgment

[4] MCL 257.660a generally requires a bicyclist on a highway to remain as close as practicable to the right-hand edge of the road.

for that of the jury unless the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id*. Questions of witness credibility are for the jury. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 519; 679 NW2d 106 (2004).

The jury's verdict that defendant was not negligent was not against the great weight of the evidence. The evidence supported a finding that defendant acted reasonably and was confronted with a sudden emergency. Defendant moved the minivan into the left lane to pass plaintiff and Dadow when the minivan was approximately 100 yards behind them. Although defendant intended to pass them at a speed of 40 miles per hour, the speed was not unreasonable. The speed limit on the road was 55 miles per hour, there was no other traffic on the road, plaintiff and Dadow were teenagers, and they were aware of the minivan's presence. In addition, there was evidence from the testimony of defendant, Penny, and Dadow that plaintiff's movement into the left lane and into the minivan's path of travel was sudden and unexpected. The evidence does not preponderate so heavily against the jury's finding that defendant was not negligent that it would be a miscarriage of justice to allow the verdict to stand.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter