STATE OF MICHIGAN

COURT OF APPEALS

EMAD HANA BAJJU and AMAL BASHA,

Plaintiffs-Appellants,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and LAURA CHRISTENE BROWN,

Defendants-Appellees.

UNPUBLISHED
February 5, 2013

No. 307365
Macomb Circuit Court
LC No. 2009-001046-NI

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

In this third-party automobile negligence action, plaintiffs appeal as of right from a jury verdict in favor of defendants. We affirm.

In March 2008, plaintiff Emad Bajju[1] was in his Ford Explorer driving on I-696 towards Royal Oak when he had to stop because of excess traffic. Defendant Laura Brown, in her Chevrolet Impala, hit plaintiff's Explorer from behind. Plaintiff testified that he blacked out after the impact and that he now experiences neck and elbow problems, numbness in his hand, and serious memory problems that have affected his work. At one point, plaintiff testified that Brown said to him after the accident, "I'm sorry. My fault." However, when asked later whether Brown admitted to fault, plaintiff testified, "She said: I'm sorry, you know. She told me: I'm sorry. Are you okay? That is what I heard from her."

Brown testified that on the date in question, she was driving on I-696 towards the Somerset Collection mall and "thought to [herself that] traffic seem[ed] to be moving pretty smoothly considering [that] it [was] snowing." She stated that the snow was sticking on the grass but not on the expressway, although the expressway was wet. When asked if she "saw that the traffic [was] stopped in front of you," she replied:

[1] Amal Basha's claim is derivative; for clarity, this opinion will hereinafter employ the singular term "plaintiff."

> No, no. Because it was going around the curve. As I started right around the curve that is when I noticed the traffic had stopped and I slammed on my brakes. Then I started pumping them and that wasn't helping. I pushed again and things locked and I just kept going.

Brown stated that after the accident she was crying and was concerned that the accident might have injured plaintiff. She admitted that she takes prescription psychiatric drugs for depression and to aid in sleeping but stated that she had been taking them for ten years without problems in her driving ability. She denied being distracted by anything, such as food or drink, at the time of the accident.

Brown testified that she was driving approximately 40 miles an hour on the day in question, because of the weather. She stated that she thought she "was using more than ordinary care because I was going on the slower side." She stated that she thought there must have been black ice because she could not think of any other explanation for why her car did not stop before hitting plaintiff's vehicle. Brown stated, however, that she was at fault for the accident because "[m]y car hit his. . . . I rear ended him."

After closing arguments and jury instructions, the jury retired to deliberate. Afterwards, plaintiff's counsel mentioned a motion for a directed verdict and asked the court, "when do you want to hear motions[?]" The court stated, "After the break." Subsequently, the jury reached a verdict, finding no negligence on the part of Brown. The jury left the courtroom, and plaintiff's counsel asked, "what about the directed verdict motions and the motion for judgment notwithstanding?" The court answered, "Both denied." Counsel stated:

> Judge, I was going to ask you for direct [sic] verdict on negligence, injury, proximate cause and damages. I was going to ask you to set aside the jury verdict based upon it being against the great weight of the evidence and ask you to enter a verdict for $150,000.

The court answered, "Motion denied." This appeal followed.

Plaintiff argues that the trial court erred in failing to entertain the motion for a directed verdict. This essentially presents a question of law, and we review questions of law de novo. *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010).

Plaintiff points to the fact that, after plaintiff rested, the court stated, "All motion [sic] are taken under advisement." Plaintiff suggests that this statement foreclosed discussion of his directed-verdict motion. However, it is difficult to understand how this statement by the trial court could have foreclosed plaintiff from raising a directed-verdict motion, because the appropriate time for *plaintiff's* motion was at the end of *defendants'* proofs. Indeed, MCR 2.516 states:

> *A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion.* If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury,

> even though all parties to the action have moved for directed verdicts. [Emphasis added.]

As it turned out, plaintiff did not in fact move for a directed verdict at the close of defendants' proofs but instead raised the motion *after the jury had retired to deliberate*. Under these circumstances, even assuming, arguendo, that the trial court refused to entertain plaintiff's motion, we would find no error requiring reversal.

However, the trial court did in fact address plaintiff's belated motion, stating that the motion was denied. Plaintiff contends that the motion should have been granted. We review de novo a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We must view the evidence and legitimate inferences in the light most favorable to the nonmoving party. *Id.*

Plaintiff relies on MCL 257.627(1) and MCL 257.402(a). MCL 257.627(1) (the "assured-clear-distance" statute) states:

> A person operating a vehicle on a highway shall operate that vehicle 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. A person shall not operate a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead.

MCL 257.402(a) states:

> In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence. This section shall apply, in appropriate cases, to the owner of such first mentioned vehicle and to the employer of its driver or operator.

Plaintiff argues that Brown violated both statutes and thus was clearly negligent.

Citing *Jackson v Coeling*, 133 Mich App 394, 399; 349 NW2d 517 (1984), and other cases, plaintiff states that the weather could not be used as a defense[2] in the present case because Brown was required to take weather conditions into account during her driving. In *Jackson*, the Court did indeed state that "[t]he existence of weather conditions affecting the road surface

[2] We note that the jury was not instructed with regard to the formal "sudden emergency" defense (see *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 [1964]) but was instead given standard "negligence" instructions and an instruction based on MCL 257.627(1).

cannot be an excuse for violating a statute [such as MCL 257.627] which requires a driver to take just those conditions into account in regulating her speed." *Jackson*, 133 Mich App at 399.

However, the Michigan Supreme Court, in *Patzer v Bowerman-Halifax Funeral Home*, 370 Mich 350, 353; 121 NW2d 843 (1963), stated:

> The statute (assured clear distance) must be reasonably construed. A literal reading thereof would compel us to say that in every case of collision the statute has been violated by the mere fact of collision alone. The driver has either been going too fast, or, if driving at a reasonable speed, has permitted his attention to wander and thus has not perceived the obstruction in time to stop. Such literal interpretation would make the driver an insurer against any collision in which he might become involved. We cannot assume that the legislature intended such a result. The situations under which collisions occur are infinite in complexity and variety, and, to accomplish justice in particular cases, we have been forced to create a number of exceptions to the statutory edict. [Internal citations and quotation marks omitted.]

The *Patzer* Court went on to hold that despite a violation of the assured-clear-distance statute in that case, the triers of fact were nonetheless entitled to consider the weather conditions. *Id*. at 357. The Court stated, in part:

> The foregoing review foretells [the] conclusion that the question of negligence as charged against defendants was properly for jury consideration and determination. That the driver of the ambulance did not have an assured clear distance ahead when he approached and struck the Patzer car must be taken for granted. That his conduct amounted to actionable negligence, the weather having altered and affected—this is on favorable view of course—customary safety measures, cannot be judge-declared on review of plaintiff's said motion. We hold instead that the circumstances were such that the triers of fact had a right to find, but perforce were not obliged to find, that the ambulance driver proceeded through the swirl according to the ever circumstantially variable standard of due care. The question is controlled as it usually is by the circumstances of whatever action or inaction the accuser would have branded as negligence. *Id*.

In *Zeni v Anderson*, 397 Mich 117, 132; 243 NW2d 270 (1976), the Court discussed the assured-clear-distance statute[3] and stated that any presumption of negligence under the statute may be overcome. The Court stated that the "range of acceptable excuses" is not limited to "sudden emergencies" because the statute must be reasonably construed. *Id*. at 132-133. The *Zeni* Court cited with strong approval *Lucas v Carson*, 38 Mich App 552; 196 NW2d 819 (1972). *Zeni*, 397 Mich at 133. In *Lucas*, 38 Mich App at 558, the Court stated:

[3] The *Zeni* Court indicated that MCL 257.627 and MCL 257.402 should be viewed similarly in terms of potential defenses. *Zeni*, 397 Mich at 133-134.

> Whereas, at one time, the application of the statute (assured clear distance) was strictly construed and applied . . . , recent cases indicate that the statute must be reasonably construed and exceptions to the statutory edict have been created to accomplish justice, including bringing the assured clear distance rule to qualification by the test of due or ordinary care, exercised in the light of the attending conditions.
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> * * *
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> *Since there was at least some evidence that defendant driver was operating her vehicle in a reasonable and prudent manner prior to the accident*, the question of whether or not defendant violated one or both of these statutes [MCL 257.627 and MCL 257.643] was properly a factual one for the jury to resolve. [Emphasis added.]

Patzer and *Zeni*, as Supreme Court cases, obviously take precedence over the Court of Appeals opinions cited by plaintiff.[4]

Given the Supreme Court precedent cited above, we find that granting a directed verdict to plaintiff would not have been appropriate. Brown provided evidence that she was operating her vehicle slowly because of the weather conditions and that she was not distracted. She stated that she thought there must have been black ice because she could not think of any other explanation for why her car did not stop before hitting plaintiff's vehicle. This was not an unreasonable inference. She stated that she thought she "was using more than ordinary care because I was going on the slower side." As in *Patzer*, 370 Mich at 357, "the circumstances were such that the triers of fact had a right to find, but perforce were not obliged to find, that [plaintiff] proceeded through the [conditions] according to the ever circumstantially variable standard of due care."

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[4] Plaintiff does cite two post-*Zeni* Supreme Court cases in his appellate brief: *White v Taylor Distributing Co*, 482 Mich 136; 753 NW2d 591 (2008), and *Moore v Spangler*, 401 Mich 360; 258 NW2d 34 (1977). These cases deal with the sudden-emergency doctrine, but, as noted, a defense in this case is not limited to sudden emergencies. See *Zeni*, 397 Mich at 132-133. In a reply brief, plaintiff cites *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78; 393 NW2d 356 (1986), but this case simply discusses, in general, when a presumption of negligence should apply based on a statute. See *id*. at 87. Even if negligence per se existed here, we find that defendants presented sufficient evidence to rebut the presumption. Finally, we note that in *Poplawski v Huron Clinton Metropolitan Authority*, 78 Mich App 644, 654; 260 NW2d 890 (1977), the Court of Appeals limited *Zeni* to its own facts. Even assuming that this limitation by the *Poplawski* Court is pertinent for *our* purposes, we note that *Poplawski* is a 1977 case and is not binding on us under MCR 7.215(J)(1).

Plaintiff additionally argues that the jury verdict was against the great weight of the evidence. Plaintiff once again argues that the trial court failed to entertain his motion concerning this issue. However, MCR 2.611(A)(1)(e) states that a new trial may be granted if a verdict is against the great weight of the evidence, and MCR 2.611(B) states that "[a] motion for a new trial made under this rule or a motion to alter or amend a judgment must be filed and served within 21 days after entry of the judgment." There is simply no evidence on the record that plaintiff moved for a new trial. Plaintiff's counsel merely stated, in part, "I was going to ask you to set aside the jury verdict based upon it being against the great weight of the evidence . . . ." Accordingly, the trial court did not err, as plaintiff argues, by failing to entertain plaintiff's motion.

The court did, however, reply "[m]otion denied" in response to plaintiff's counsel's statement. Assuming, for purposes of argument, that plaintiff raised a proper motion, a denial was the correct response.[5] A verdict may be overturned on a "great weight" basis only if it was "manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (internal citation and quotation marks omitted). "The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it." *Id*. Given the evidence that Brown was operating her vehicle with due care, the verdict was not against the great weight of the evidence.

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter

[5] We note that we review for an abuse of discretion a grant or denial of a properly-preserved motion for a new trial based on the great weight of the evidence. *King v Taylor Chryler-Plymouth*, 184 Mich App 204, 210; 457 NW2d 42 (1990)