STATE OF MICHIGAN

COURT OF APPEALS

NICOLE ELIZABETH WASSON,

Plaintiff-Appellant,

v

JAMES DOUGLAS WESTWOOD, JAMES DOUGLAS WESTWOOD II, and LINDA B. WESTWOOD,

Defendant-Appellees.

UNPUBLISHED
August 15, 1997

No. 192463
Eaton Circuit Court
LC No. 92-000752-NI

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

In this personal injury action arising out of an automobile accident, plaintiff appeals as of right a judgment in favor of defendants. The lower court's judgment was entered following a jury verdict finding defendant James Douglas Westwood II (defendant)[1] not negligent for the collision. We reverse and remand for further proceedings.

Plaintiff testified that on August 26, 1989, she was traveling eastbound on a two lane highway in Eaton County when she stopped and activated her turn signal to make a left turn. While plaintiff was waiting for traffic to clear, she heard squealing tires and observed a truck "coming up really fast" from behind. Although plaintiff tried to accelerate away from danger, the full size pick-up truck driven by defendant struck the rear end of plaintiff's vehicle. Plaintiff's witnesses testified that the accident site was between 640 and 680 feet beyond a curve in the road.

Defendant testified that the point of impact was closer to the curve than plaintiff's witnesses claimed and that the accident occurred because, after rounding the curve at approximately thirty-five to forty miles per hour, he momentarily took his eyes off the road and when he looked ahead, plaintiff's vehicle was just "there." Defendant does not recall whether plaintiff's brake lights or turn signal were activated.

At the close of proofs, plaintiff made motion for a directed verdict on the issue of defendant's negligence, arguing that defendant had offered no evidence of a "sudden emergency" to counteract the

effects of defendant's statutory violations, MCL 257.402; MSA 9.2102 (rear-end collision), and MCL 257.627; MSA 9.2327 (failure to assure the clear distance ahead). The trial court denied plaintiff's motion, stating only that there was sufficient evidence for the jury to resolve the factual issues in defendant's favor. Over plaintiff's objection, the trial court read to the jury the standard jury instruction regarding the defense of sudden emergency, SJI2d 12.01.

On appeal, plaintiff contends that the proofs did not warrant an instruction on the defense of sudden emergency. We agree. MCL 257.402; MSA 9.2102, establishes a rebuttable presumption that a driver rear-ending another vehicle is negligent. *Petrosky v Dziurman*, 367 Mich 539; 116 NW2d 748 (1962); *Garrigan v LaSalle Coca-Cola Bottling Co*, 362 Mich 262, 263; 106 NW2d 807 (1961). Similarly, a violation of the assured-clear-distance statute, MCL 257.627; MSA 9.2327, creates a rebuttable presumption of negligence. *Zeni v Anderson*, 397 Mich 117; 243 NW2d 270 (1976); SJI2d 12.01.

Presumptions of negligence may be rebutted by some possible excuses. See 2 Restatement of Torts, 2d, § 200A, p 33. In the present case, the only excuse asserted by defendant is the defense of "sudden emergency." In *Walker v Rebeuhr*, 255 Mich 204, 206; 237 NW 289 (1931), the Supreme Court summarized the sudden emergency defense as follows:

> One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence.

"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 *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971), our Supreme Court held that:

> To come within the purview of this rule the circumstances attending the accident must present a situation that is "unusual or unsuspected." *Barringer v Arnold*, 358 Mich 594, 599; [101 NW2d 365] (1960).
>
> The term "unusual" is employed here in the sense that the factual background of the case varies from the everyday traffic routine confronting the motorist. Such an event is typically associated with a phenomenon of nature. A classical example of the "unusual" predicament envisioned by the emergency doctrine is provided by *Patzer v Bowerman-Halifax Funeral Home*, [370 Mich 350; 121 NW2d 813 (1963)], wherein the accident occurred in an Upper-Peninsula blizzard.
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> "Unsuspected" on the other hand connotes a potential peril within the everyday movement of traffic. To come within the narrow confines of the emergency doctrine as "unsuspected" it is essential that the potential peril had not been in clear view for any

> significant length of time, and was totally unexpected. A good example of this can be seen in *McKinney v Anderson, supra*, where defendant rear-ended a plaintiff's car which had stopped while pushing a disabled vehicle on the highway. Coming over the crest of a hill, defendant first saw plaintiff's taillights when he was over 400 feet away. However, defendant did not clearly see the peril of plaintiff's stopping until he was about 100-200 feet away, at which point it was too late to avoid a collision under the circumstances. Furthermore, the failure of the plaintiff to signal that he was stopping, coupled with the surrounding darkness, made the subsequent peril totally unexpected to the defendant.

See also *Vsetula v Whitmyer*, 187 Mich App 675, 681; 468 NW2d 53 (1991), quoting *Amick v Baller*, 102 Mich App 339, 341-342; 301 NW2d 350 (1980).

In the present case, defendant's sudden emergency defense rests primarily on his contention that the collision was unavoidable because plaintiff's vehicle was stopped too close to a curve in the road. However, it is "not unusual" for vehicles to stop on two-lane highways while awaiting the opportunity to turn left. Nor is the situation "totally unexpected" as the phrase is explained in *Vander Laan, supra*. Indeed, contrary to the unusual circumstance of encountering a person pushing a disabled vehicle shortly after cresting a hill of a darkened eight-lane highway, see *McKinney, supra* at 418-419, it is within the regular, everyday movement of traffic to encounter vehicles waiting to turn left into a driveway connected to a residential section of a two-lane highway. Especially where defendant was familiar with the area and knew the road ran along a residential area, defendant should simply have manipulated the curve at a speed at which he could control his vehicle and avoid vehicles stopped beyond his sightline. Defendant failed to sustain his burden of producing evidence of a sudden emergency.

Accordingly, after reviewing the facts in a light most favorable to defendant, see *Farris, supra* at 480, we conclude that the trial court abused its discretion in issuing SJI2d 12.01. See *Hill v Wilson*, 209 Mich App 356, 357-361; 531 NW2d 744 (1995); *Spillers v Simons*, 42 Mich App 101, 106; 201 NW2d 374 (1972). Because there was no evidence to support defendant's sudden emergency defense, there was no evidence to rebut the presumptions of negligence established by defendant's violation of the assured-clear-distance statute, MCL 257.627; MSA 9.2327, and the rear-end statute, MCL 257.402; MSA 9.2102. Therefore, the trial court erred in refusing to direct a verdict for plaintiff on the issue of defendant's negligence. See *Gordon v Hartwick*, 325 Mich 534, 541; 34 NW2d 61 (1949); *Hill, supra*.

Finally, plaintiff contends that the trial court erred in failing to rule on plaintiff's motion in limine to prohibit evidence of a prior accident and settlement which occurred two months before the accident. We find no error in the trial court's decision to take the matter under advisement until the issue arose at trial. Plaintiff mooted this issue by introducing the complained of evidence in her opening statement.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff being the prevailing party may tax costs pursuant to MCR 7.219.

/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald

[1] Defendants James Douglas Westwood and Linda B. Westwood are named only insofar as they were the registered owners of the vehicle driven by defendant James Douglas Westwood II. Thus, all references hereinafter to a singular "defendant" are to defendant James Douglas Westwood II, unless otherwise indicated.