

STATE OF MICHIGAN
COURT OF APPEALS

NICOLE ELIZABETH WASSON,

UNPUBLISHED

Plaintiff-Appellant,

v

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

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

Defendants-Appellees.

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

BANDSTRA, J. (dissenting).

I respectfully dissent because, in my view, the majority has improperly invaded the province of the jury. When the question presented on appeal is whether a defendant is entitled to a “sudden emergency” instruction, an appellate court accepts the facts as they are “on favorable view of the evidence and inferences therefrom” to the defendant. *Vander Laan v Miedema*, 385 Mich 226, 229; 188 NW2d 564 (1971); *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964). Defendant testified that he was traveling at about thirty-five to forty miles per hour when he came around a curve in the road and plaintiff’s vehicle was just “there,” stopped too close to avoid the collision. Defendant did not remember seeing either plaintiff’s brake lights or turn signal. This was consistent with the account he gave to his mother shortly after the accident. Although plaintiff adduced evidence contradicting defendant’s testimony, viewing the record in the light most favorable to defendant, a jury may have reasonably concluded (as this jury apparently did) that defendant was confronted by an emergency not due to his own misconduct, SJI2d 12.02, comment (d), and “that the potential peril had not been in clear view for any significant length of time, and was totally unexpected,” *Vander Laan*, *supra* at 232. Accordingly, we should not conclude that the trial court’s giving of the “sudden emergency” instruction was an abuse of discretion. *McKinney*, *supra* at 418-420 (where the defendant driver had crested a hill “shortly before” rear-ending a driver stopped in the roadway ahead, a “sudden emergency” instruction was appropriate); *Luidens v 63rd Dist Ct*, 219 Mich App 24, 27; 555 NW2d 709 (1996) (“The determination whether an instruction is accurate and applicable to a case is in the sound discretion of the trial court.”).

We should not decide the “sudden emergency” question as a matter of law when there are legitimate questions of fact on central issues like the location of the accident and the operation of warning lights. Apparently, the jury decided these questions in favor of defendant at trial and the majority is wrong in deciding them in plaintiff’s favor on appeal.

/s/ Richard A. Bandstra