

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

CONSTANCE MARCY, Personal Representative  
of the Estate of RICHARD BRUNO MARCY,

UNPUBLISHED  
January 30, 2001

Plaintiff-Appellant,

v

No. 219644  
Wayne Circuit Court  
LC No. 97-731108-NI

E.J. CARTAGE, INC., EDWARD LEE SELMAN,  
and NSL, INC.,

Defendants-Appellees,

and

GARY MICHAEL LADOUCEUR, TRANSERV  
CORPORATION, and IGOR VASILYEVICH  
BILOUS,

Defendants.

---

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiff Constance Marcy, personal representative of the estate of Richard Marcy, appeals as of right in this wrongful death action. Pursuant to a series of orders, including orders granting summary disposition, dismissing defendants in accordance with the parties' stipulation, and dismissing the remaining claims, this case never went to trial. Marcy challenges the trial court's orders granting summary disposition to certain defendants and denying her motion to amend the complaint. We affirm.

I. Basic Facts And Procedural History

On January 9, 1997, the decedent was driving his car on southbound I-75. Snow, slush, and ice had accumulated on the highway, creating increasingly hazardous road conditions. According to Marcy's theory, driver Gary Ladouceur passed Igor Bilous<sup>1</sup> who was driving slowly

<sup>1</sup> Transerv owned the vehicle Bilous was driving.

in the fast lane. Ladouceur hit a patch of ice, lost control of his vehicle when he hit a barrier, and slid across the highway. Bilous then collided with Ladouceur, which forced Bilous's vehicle across the highway. Edward Selman, who was driving a tractor trailer,<sup>2</sup> was watching the traffic accident as it was happening in his side mirrors, evidently in an attempt to avoid becoming involved. After he saw Bilous's vehicle slide across the highway, he suddenly saw the decedent's red Ford Escort near his truck, and was unable to avoid broadsiding the car, killing the decedent. How or why the red Escort the decedent was driving got that close to Selman's truck is not clear. Marcy suggested that the collision between Bilous and Ladouceur caused the car the decedent was driving to spin out of control. There was no evidence that Selman was speeding or ever lost control of the truck. The police officer who investigated the crash attributed it to an unexpected emergency, i.e., that the road conditions may have caused Ladouceur to lose control of his car in the first place. Nevertheless, the police cited Bilous for failing to use proper care and caution while driving and Ladouceur for careless driving. The police issued no citation to Selman.

Marcy filed suit on behalf of the decedent's estate, alleging that the drivers were negligent and that the two corporations were vicariously liable for the drivers' negligence. The trial court denied summary disposition for Bilous, reasoning that his decision to drive slowly in the fast lane was related to Ladouceur's initial loss of control and, because Bilous's conduct was purposeful, he could not rely on the sudden emergency doctrine to absolve him of liability. The trial court denied summary disposition for Transerv because, it concluded, there was a genuine issue of material fact that existed concerning whether Transerv could be held vicariously liable for Bilous's actions based on an ambiguous contractual arrangement between the two that gave Transerv some form of authority over Bilous's driving procedures. However, the trial court granted summary disposition to Selman, NSL, and Cartage after concluding that the sudden emergency doctrine obviated any negligence by Selman and therefore any vicarious liability, if it existed, by Cartage and NSL.

Marcy moved for rehearing of the trial court's order granting summary disposition. She also moved to amend the complaint to allege a claim against NSL under Michigan's Owner Liability statute.<sup>3</sup> The trial court denied both motions. In response to the motion to amend the complaint, the trial court concluded that amendment would be futile. The parties subsequently stipulated to dismiss the claims against Bilous and Transerv. Finally, the trial court dismissed the remaining claim against Ladouceur with prejudice.

On appeal, Marcy challenges that trial court's order granting Selman, Cartage, and NSL summary disposition pursuant to the sudden emergency doctrine. Further, she claims that the trial court erred when it did not permit her to amend the complaint because doing so was not futile.

---

<sup>2</sup> Evidently, Cartage, which was owned by Selman and his wife, owned the truck and leased it to NSL. Selman was making a delivery or had just made a delivery for NSL at the time of the accident. Whether NSL was Selman's employer at the time of the accident was in dispute in the trial court.

<sup>3</sup> MCL 257.401; MSA 9.2101.

## II. Summary Disposition

### A. Standard Of Review

This Court reviews a trial court's decision to grant summary disposition de novo.<sup>4</sup>

### B. Legal Standard

The trial court did not specify which section of MCR 2.116(C) was the foundation for its decision to grant summary disposition to Selman, Cartage, and NSL. However, from the reasoning in the trial court's opinion and order, we infer that it granted summary disposition to those defendants pursuant to MCR 2.116(C)(10).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.<sup>5</sup> The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.<sup>6</sup> Summary disposition is only appropriate if, after examining all the evidence, there is no factual dispute left to be tried.<sup>7</sup> However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.<sup>8</sup>

### C. Sudden Emergency Doctrine

In *Socony Vacuum Oil Co v Marvin*,<sup>9</sup> the Michigan Supreme Court created the sudden emergency doctrine. This doctrine excuses conduct that would, in other circumstances, be considered negligent because the pressures attendant to an emergency that develops without warning and requires an immediate response deprives even an ordinarily prudent person of the opportunity to take reasonable action to avoid a danger. As the *Socony* Court explained, “[O]ne 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

---

<sup>4</sup> *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

<sup>5</sup> MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

<sup>6</sup> *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

<sup>7</sup> See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

<sup>8</sup> MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

<sup>9</sup> *Socony Vacuum Oil Co v Marvin*, 313 Mich 528; 21 NW2d 841 (1946).

...”<sup>10</sup> Only if the emergency arises because of the defendant’s negligence does this doctrine not apply, allowing liability to exist if negligence is proven.<sup>11</sup>

As the facts of published case law indicate, with the uncertainties of travel made all the more perilous when there are poor surface conditions or visibility,<sup>12</sup> it is not surprising that the sudden emergency doctrine developed from automobile negligence cases.<sup>13</sup> When there are unusual or unanticipated traffic conditions, such as extreme weather or ice, even experienced drivers may be faced with situations they can neither control nor avoid because they arise suddenly.<sup>14</sup> Of course, these special perils are different from the dangers motorists should be prepared to encounter safely on a highway.<sup>15</sup>

In this case, the danger Selman encountered on I-75 fits squarely within the sudden emergency doctrine. Though the weather made traveling conditions hazardous, Ladouceur decided that Bilous was driving too slowly and passed him. As Ladouceur moved into another lane, he allegedly hit a patch of ice, which is in and of itself a road condition that may fall under the sudden emergency doctrine if unexpected.<sup>16</sup> Only because Ladouceur hit the ice did he careen across the highway, ultimately causing the accident with Bilous and disrupting traffic in a way that caused Selman to strike the decedent’s car. Selman did not put this chain of events into action by acting negligently. There is no reason to believe he should have expected to see two other vehicles close to him on the roadway spin out of control and crash, with a third vehicle losing control and spinning in front of him. As we see it, Selman was forced to react quickly and to the best of his ability given the snow, slush, and ice.

Even if hindsight were the appropriate perspective on this issue, and it is not,<sup>17</sup> the record does not explain what Selman could have done differently under those circumstances. The decedent’s car was out of control. This case would be wholly different if Selman had been in Ladouceur’s place and had precipitated the crash by acting, at least arguably, in a negligent fashion, given the slower speeds and care with which motorists must drive on slippery roads.

---

<sup>10</sup> *Id.* at 546, quoting Huddy on Automobiles, 8th ed, at 359.

<sup>11</sup> *Id.*

<sup>12</sup> See *Martiniano v Booth*, 359 Mich 680, 683-687; 103 NW2d 502 (1960) (jury properly determined that driver was not negligent for driving on wrong side of road as a result of skidding on wet, slippery, snowy road); *McKinney v Anderson*, 373 Mich 414, 418-420; 129 NW2d 851 (1964) (crest of hill and darkness made it impossible for motorist to see that another vehicle had stopped in the road until it was too late to avoid a crash).

<sup>13</sup> See *Walker v Rebeuhr*, 255 Mich 204, 205-206; 237 NW 389 (1931).

<sup>14</sup> See *Vsetula v Whitmyer*, 187 Mich App 675, 681; 468 NW2d 53 (1991).

<sup>15</sup> See *Hill v Wilson*, 209 Mich App 356, 358-359; 531 NW2d 744 (1985) (sudden emergency doctrine did not apply because motorists should expect other drivers to stop suddenly during rush-hour traffic).

<sup>16</sup> See *Young v Flood*, 182 Mich App 538, 543; 452 NW2d 869 (1990).

<sup>17</sup> See *Maddux v Donaldson*, 362 Mich 425, 428; 108 NW2d 33 (1961).

Marcy also explicitly concedes on appeal that Bilous and Ladouceur caused the accident, not Selman. There may be other cases in which the cause of an accident and whether it should have been anticipated are in dispute, making trial necessary. However, this is not such a case given Marcy's theory that there was a sudden emergency and any arguably negligent actions Selman made took place after that emergency arose. Accordingly, we conclude that the trial court correctly applied the sudden emergency doctrine to the facts in the record.

### III. Amending The Complaint

#### A. Standard Of Review

We review this issue for an abuse of discretion, because whether to grant or deny a motion to amend a complaint is entrusted to the trial court's discretion.<sup>18</sup>

#### B. Futility

Within the trial court's discretion to grant or deny a motion to amend a pleading exists the discretion to deny such a motion because it would make no difference to the plaintiff's potential for success; in other words, amendment would be futile.<sup>19</sup> In this case, amending the complaint to plead an additional claim against NSL under MCL 257.401; MSA 9.2101 would have made no difference to the potential for recovery.<sup>20</sup> While MCL 257.401; MSA 9.2101 clearly makes vehicle owners liable for negligence committed by drivers who have the owner's express or implied consent to drive the vehicle, the sudden emergency doctrine precluded a conclusion that Selman committed negligence. With no negligent conduct from which to derive NSL's liability based on its alleged ownership of the truck, the trial court properly exercised its discretion to deny the motion.

Moreover, we note that Marcy does not ask for reversal and remand solely because the trial court erroneously denied the motion to amend the complaint. Thus, we have no reason to disturb the trial court's disposition of this case based on its decision on this issue.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck  
/s/ Patrick M. Meter

---

<sup>18</sup> See *Romska v Opper*, 234 Mich App 512, 521; 594 NW2d 853 (1999).

<sup>19</sup> See *Horn v Dep't of Corrections*, 216 Mich App 58, 65; 548 NW2d 660 (1996).

<sup>20</sup> Marcy asserts without explanation that there is some additional evidence indicating that NSL did not merely lease the truck Selman was driving, but actually had some ownership interest in it.