STATE OF MICHIGAN

COURT OF APPEALS

JAMES BILLS,

Plaintiff-Appellant/Cross-Appellee,

v

EINER S. THORLUND, III,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
September 9, 2003

No. 236825
Montcalm Circuit Court
LC No. 98-000034-NI

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff James Bills, whose vehicle was hit by defendant's vehicle during an automobile accident occurring late at night at an icy intersection, appeals as of right from a jury verdict finding no cause of action against defendant Einer Thorlund, III. Defendant cross-appeals the trial court's overruling of defendant's objections regarding plaintiff's opening statement and regarding the denial of a defense rebuttal witness. We affirm.

Plaintiff first argues that the trial court erred by failing to direct a verdict for plaintiff on the issue of liability. Specifically, plaintiff contends that an instruction with regard to the "sudden emergency" defense was not warranted and that therefore defendant presented no valid defense to plaintiff's lawsuit. We disagree. We review de novo a trial court's decision to grant or deny a motion for a directed verdict. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party." *Id*. "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Id*. It is for the jury to decide witnesses' credibility. *Clery v Sherwood*, 151 Mich App 55, 64; 390 NW2d 682 (1986).

The sudden emergency doctrine, which is used to excuse the violation of a traffic statute, requires a situation that is "'unusual or unsuspected.'" *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971), quoting *Barringer v Arnold*, 358 Mich 594, 599; 101 NW2d 365 (1960). Unusual means that the situation "varies from the everyday traffic routine confronting the motorist[,]" such as a "phenomenon of nature." *Vander Laan*, supra at 232. "Unsuspected" refers to "a potential peril within the everyday movement of traffic" that is unexpected. *Id*.

Here, the black ice encountered by defendant could be considered unsuspected and thus warrant the giving of the sudden emergency instruction. See *Vsetula v Whitmyer*, 187 Mich App 675, 680-681; 468 NW2d 53 (1991), and *Young v Flood*, 182 Mich App 538, 543-544; 452 NW2d 869 (1990). Defendant stated that he checked the roads by pumping his brakes about three-quarters of a mile from the intersection in question and that the roads were not slippery at all. Defendant was traveling about ten miles an hour below the speed limit when he started braking for a stop sign and lost control of his truck, hitting plaintiff's vehicle. The law enforcement vehicle responding to the scene and coming from the same direction as defendant also slid into the intersection where the accident occurred. Defendant therefore presented sufficient evidence to negate the inference of negligence – including that a law enforcement vehicle hit the same patch of black ice that defendant did. The trial court properly instructed the jury with respect to the sudden emergency doctrine, reasonable minds could differ on the issue of liability, *Meagher*, *supra* at 708, and the trial court properly denied plaintiff's request for a directed verdict.

Despite *Vsetula* and *Young*, plaintiff argues that the sudden emergency defense was inapplicable in this case under *Moore v Spangler*, 401 Mich 360, 383; 258 NW2d 34 (1977). We disagree. Indeed, we conclude that the implication in *Moore* that the sudden emergency defense can never apply to icy roads during Michigan winters, see *Moore*, *supra* at 383, is obiter dicta and therefore not binding under the rules of stare decisis. See, generally, *Dressel v Ameribank*, 468 Mich 557, 568 n 8; 664 NW2d 151 (2003). By contrast, *Vsetula* and *Young* are applicable to the issue at bar and indicate that the trial court did not err in giving the sudden emergency instruction.

Plaintiff further contends that because defendant admitted that he knew that the intersection *could* be icy, the sudden emergency defense was inapplicable. Again, we disagree. Indeed, while knowledge of potential icy conditions by the defendant can weigh against giving the sudden emergency instruction in cases involving a violation of the "assured clear distance" statute (MCL 257.627[1]), see *Young*, *supra* at 543, and *Morrison v Demogala*, 336 Mich 298, 302-303; 57 NW2d 893 (1953), the instant case involved not the assured clear distance statute but the stop sign statute (MCL 257.611[1]). Similar to the situation at issue in *Young*, we conclude that defendant's sudden hitting of an icy patch could excuse his violation of the stop sign statute in this case, even though he may have been aware of the *possibility* of ice on the roads. See, generally, *Young*, *supra* at 543-544. The icy patch could be deemed unsuspected despite the general slippery road conditions. *Id.* The trial court properly determined that the sudden emergency doctrine could be applied to a violation of the stop sign statute.

Plaintiff additionally argues that the trial court erred by concluding that the stop sign statute and the assured clear distance statute are to be treated differently in terms of applying the sudden emergency defense. Evidently, the court concluded that if the instant case involved the assured clear distance statute, the sudden emergency defense would be inapplicable, but that if it involved the stop sign statute, the sudden emergency defense *would* apply. Plaintiff contends that the sudden emergency defense should be applied equally to both the assured clear distance statute and the stop sign statute. We disagree. *Young*, *supra* at 543, makes clear that violations of the assured clear distance statute are treated differently from violations of other statutes because the assured clear distance statute specifically states that a person must have "due regard to . . . any other condition then existing . . . . ." MCL 257.627(1). Courts have therefore "held

that failure to stop in the assured clear distance was not excused by hitting an icy spot because the drivers had reasons to suspect icy spots and adjust their speed to be able to stop." By contrast, the stop sign statute, MCL 257.611(1), does not direct drivers to take into account "any other condition" and we therefore conclude that it is treated differently when the sudden emergency defense is considered. See, generally, *Young, supra* at 543 (dealing with a violation of the statutes requiring a driver to keep his or her vehicle on the right half of the roadway). The trial court correctly held that this case involved the stop sign statute and that the sudden emergency defense applied. See, generally, *Young, supra* at 543-544.

Defendant further contends that the trial court should have concluded that the assured clear distance statute applied to this case. However, the Supreme Court has noted that the rule of assured clear distance does not come into being until there is a visible object in the road in front of the driver. *Nass v Mossner*, 363 Mich 128, 131-132; 108 NW2d 881 (1961); see also *Barner v Kish*, 341 Mich 501, 505-507; 67 NW2d 693 (1954). Here, defendant was approaching an intersection with a stop sign and was not reacting to some other visible object in the road. We conclude that although plaintiff's vehicle was traveling toward the intersection, it was not a visible object on the road in front of defendant's vehicle such that the assured clear distance statute applied. *Barner, supra* at 506. The trial court properly refrained from giving the jury an instruction on the assured clear distance statute.

Finally, plaintiff argues that the trial court erred in giving a supplemental jury instruction because that instruction suggested to the jury that the sudden emergency defense applied not only to the inference of negligence arising from the statutory violation but also to any general negligent conduct committed by defendant. However, there is no indication that defendant raised this same objection below. Accordingly, appellate review is precluded unless manifest injustice would result from our failure to review this issue. *Joba Construction Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 639; 329 NW2d 760 (1982).

We find that no manifest injustice would result from our failure to review the issue. In giving the challenged supplemental instruction, the court stated, "I'll read you *another* version of [SJI2d] 12.02" (emphasis added). SJI2d 12.02 deals with excusing the violation of a statute.[1] Therefore, it was clear from context that the supplemental instruction was directed toward excusing the statutory violation and not toward negligence in general. Moreover, in giving the supplemental instruction, the court specifically noted that "the question was, *the negligence of running a stop sign*" (emphasis added). Accordingly, the instruction as a whole conveyed the proper message to the jury, see *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), and reversal is unwarranted.

Because the jury ruled in defendant's favor and we uphold that ruling today, we need not consider the issues defendant raises on cross appeal.

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[1] Although the transcripts provided to this Court are incomplete, plaintiff admits on appeal that the court originally instructed the jury in accordance with SJI2d 12.02.

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Donald S. Owens