Order

Michigan Supreme Court
Lansing, Michigan

April 22, 2022

Bridget M. McCormack,
Chief Justice

161655

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ARTHUR ORMONDE PRICE, JR.,
Plaintiff-Appellant,

v

SC: 161655
COA: 346145
Saginaw CC: 17-032666-NI

SAMUEL ONEAL AUSTIN and L & B CARTAGE, INC., d/b/a OMNI QUALITY INSPECTION SERVICES,
Defendants-Appellees.

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On November 10, 2021, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, and we REMAND this case to the Saginaw Circuit Court for entry of an order denying the defendants' motion for summary disposition, except on the grounds conceded by the plaintiff, and for further proceedings consistent with this order. The panel majority erred by determining that the defendant-driver's testimony was credible. Although some evidence supported the defendant-driver's testimony, only he could know what happened inside his truck that day or whether he had any reason to suspect that an imminent syncopal episode might warrant certain conduct.[1] When "the credibility of a witness or deponent is crucial, summary judgment should not be granted." *Arber v Stahlin*, 382 Mich 300, 309 (1969);[2] accord *Brown v Pointer*, 390 Mich 346, 354 (1973). Because the

[1] The dissent asserts that "all of the evidence in the case demonstrates that [the defendant-driver] crossed the line because of a sudden emergency . . . ." *Post* at 11. "Demonstrates" goes too far. We agree that the evidence is consistent with a sudden emergency, but it's also consistent with falling asleep at the wheel (thus highlighting the problem with granting summary disposition).

[2] The dissent suggests that *Arber*'s proposition is limited to issues "involv[ing] the defendant's subjective intent." *Post* at 11 n 7. But we have approvingly cited *Arber*'s proposition in *Brown v Pointer*, 390 Mich 346, 354 (1973), a case having no apparent connection to subjective intent. In any event, we see little difference between the denial of the requisite intent for defamation in *Arber* and the denial of responsibility for the

defendant-driver's credibility was crucial to the success of his sudden-emergency defense, summary disposition should not have been granted. The dissent emphasizes that the defendant-driver's testimony leaves no question of fact for trial, see *post* at 12, but as Judge GLEICHER correctly recognized, the fact-finder may determine whether the defendant-driver acted as a "reasonably prudent person would have done under all the circumstances of the accident . . . ." *Szymborski v Slatina*, 386 Mich 339, 341 (1971) (quotation marks and citations omitted; see also *Moning v Alfono*, 400 Mich 425, 435-436 (1977).

We do not retain jurisdiction.

VIVIANO, J. (*dissenting*).

There are two related questions in this case. First, has defendant rebutted the presumption of negligence that attaches due to the fact that the accident at issue occurred when his car crossed over the centerline of the road? Second, if the presumption has been rebutted, is defendant also entitled to summary disposition? The Court of Appeals majority answered both questions in the affirmative, upholding the trial court's grant of summary disposition to defendant. A majority of this Court disagrees on the basis that the jury might disbelieve defendant's testimony, making it inappropriate to find that the presumption has been rebutted and, by extension, to grant summary disposition. While it is true that we must not decide credibility questions at the summary-disposition stage, there is no categorical bar to finding a presumption rebutted or deciding a case as a matter of law in these circumstances. In fact, our caselaw holds that not only can an evidentiary presumption like the present one be overcome by a defendant's own testimony, but that the case can be decided as a matter of law on the very same evidence. Because I believe that defendant has sufficiently rebutted the presumption and that no question of material fact remains, I would affirm the Court of Appeals judgment.

I. FACTS AND GENERAL LEGAL STANDARD

This negligence action resulted from an automobile accident that occurred when defendant Samuel Austin, after experiencing a coughing fit, blacked out and drove his tractor-trailer into the other lane on a two-lane roadway. He had nearly made it to the shoulder of that lane when he hit the car driven by plaintiff, Arthur Price, Jr. Plaintiff filed suit against defendant and others, alleging negligence and gross negligence. Plaintiff offered as proof of negligence defendant's violation of MCL 257.634(1), which requires that "the driver of a vehicle . . . drive the vehicle upon the right half of the

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accident in the present case. In both cases, the denial is self-serving and only the denier is privy to the facts supporting the denial. The determination of what actually happened thus "must be resolved from a study of the witness on the stand . . . ." *Arber*, 382 Mich at 309.

roadway . . . ." This raised a rebuttable presumption that defendant was negligent. See *Zeni v Anderson*, 397 Mich 117, 130-131 (1976). To rebut the presumption, defendant argued that he experienced a sudden emergency. See *White v Taylor Distrib Co, Inc*, 482 Mich 136, 139-140 (2008) (discussing the sudden-emergency exception to presumptions of negligence). Specifically, he claimed that he passed out just before the accident. As proof, he presented testimony from himself, multiple treating physicians, and the responding police officer; GPS evidence; and the lack of skid marks on the road. Defendant further argued that rebutting the presumption meant there were no disputes of material fact, thus entitling him to summary disposition. Plaintiff disagreed that rebuttal would result in summary disposition but provided only bare accusations that defendant was lying about having passed out. The trial court granted defendant summary disposition, finding that plaintiff had failed to demonstrate that there was a genuine issue of material fact concerning whether defendant experienced a sudden emergency. The Court of Appeals affirmed in an unpublished decision, with Judge GLEICHER dissenting.

The party moving for summary disposition has the burden to demonstrate that there is no dispute regarding a fact material to one or more issues. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85 (2016). The movant meets this burden when the lack of dispute "negates an essential element of the nonmoving party's claim." *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996) (quotation marks and citation omitted). Once an essential element is negated, the nonmovant must then " 'come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case.' " *Skinner v Square D Co*, 445 Mich 153, 161 (1994), quoting *Durant v Stahlin*, 375 Mich 628, 640 (1965) (emphasis omitted); see also MCR 2.116(G)(4) ("When a motion under [MCR 2.116](C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial."). When the nonmovant fails to meet this burden, the movant is entitled to summary disposition. *Bank of America*, 499 Mich at 85.

II. ANALYSIS

The threshold question is whether defendant has rebutted the presumption of negligence that arose due to his violation of MCL 257.634(1). In answering this question, however, our caselaw also points to the answer for the second question: the evidence used to rebut the presumption can, in the absence of other evidence raising a genuine issue of material fact, be sufficient to decide the case as a matter of law.

A. THE PRESUMPTION AND REBUTTAL

In Michigan, a presumption is merely a procedural device that shifts the burden of producing evidence to the party against whom the presumption operates. *Widmayer v*

Leonard, 422 Mich 280, 286 (1985). It dissolves when that party presents sufficient evidence. The presumption can be rebutted "by a showing on the part of the party violating the statute of an adequate excuse under the facts and circumstances of the case." *Zeni*, 397 Mich at 129-130. One such excuse is a sudden emergency, which "applies 'when a collision is shown to have occurred as a result of a sudden emergency not of the defendants' own making.' " *White*, 482 Mich at 139-140, quoting *Vander Laan v Miedema*, 385 Mich 226, 231 (1971). A sudden emergency must be " 'totally unexpected.' " *White*, 482 Mich at 140, quoting *Vander Laan*, 385 Mich at 232. We have held that "a sudden, unexpected blackout could present a sudden emergency sufficient to rebut the statutory presumption." *White*, 482 Mich at 140.[3]

In order to overcome presumptions analogous to the one in this case, we have required the evidence to be "clear, positive, and uncontradicted . . . ." *Krisher v Duff*, 331 Mich 699, 706 (1951). *Krisher* provides a thorough explanation of this rule and how it relates to whether a case can be decided as a matter of law. The defendants in *Krisher* were brothers, one of whom borrowed the other's car. *Id*. at 702. The law imposed a presumption that the borrowing was with the owner's consent and the question was whether the trial court properly instructed the jury on the standard for rebutting the presumption. *Id*. at 702, 704.

In explaining why a high level of proof was required for overcoming this presumption, we specifically noted that the defendant would often be the only one with relevant evidence. *Id*. at 706. "The presumption," we said, "is given more weight," i.e., is harder to overcome, "because of the dangerous instrumentality involved and the danger of permitting incompetent driving on the highway; and because the proof or disproof of consent or permission usually rests *almost entirely with the defendants*." *Id*. (emphasis added). Continuing, we emphasized that "[t]he defendant owner frequently may be the only witness and not disinterested." *Id*. This factor "operate[d] to make this a stronger presumption," requiring a greater degree of evidence to rebut. *Id*. at 707, see also *id*. at 708 (" 'The difficulty of showing the consent of the owner except by evidence of facts

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[3] The presumption in *White* arose from a violation of MCL 257.402(1), which provides in relevant part that "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, . . . the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence." Although the statute that was violated in the present case, MCL 257.634, does not contain an express provision for a presumption, our caselaw does not require this in order for the presumption to arise. See *Zeni*, 397 Mich at 130 ("[O]ver a 65-year period, cases concerning the effect in a negligence action of violation of the statute requiring vehicles to keep to the right side of the road have almost consistently adopted a rebuttable presumption approach, even though the language of the statute is not written in terms of a presumption.").

and circumstances, where the owner and the driver may be the only persons who can directly testify that no consent was given to drive the car, has a distinct bearing on the construction of the statutory presumption here involved.' ") (citation omitted).

Despite the fact that the defendants might provide the only relevant evidence, successful rebuttal is still possible. "Such rebuttal may be accomplished on the testimony of the defendants alone, if such testimony is clear, positive and uncontradicted." *Id*. at 708. To be sure, "if some doubt has been cast on the credibility of the defendants or their witnesses, so that their evidence is not clear, credible and convincing, it is proper to submit the issue . . . to the jury." *Id*. at 709. And in this regard, "[t]he credibility of the evidence brought forth by defendants may be affected by the manner in which witnesses testify, if they are not disinterested witnesses." *Id*. Nevertheless, the mere fact that the rebuttal evidence comes from the defendants alone is not enough—as we noted again, "[i]t has been held that uncontradicted evidence given by defendants alone is sufficiently clear, positive and credible to rebut the presumption" if no "doubt has been cast on the testimony . . . ." *Id*. at 710.

B. THE PRESUMPTION AND JUDGMENT AS A MATTER OF LAW

At this point, *Krisher* explained the relationship between the presumption and the disposition of the case as a matter of law. The process described above "is entirely a determination as to whether or not the defendants have met the burden of going forward with the evidence . . . ." *Id*. at 710. Thus, the initial determination is whether the presumption has been overcome. *Id*. "If it has been overcome," then the question is "whether or not the plaintiffs can prove all the issues of the case . . . by a preponderance of the evidence." *Id*. In other words, the presumption dissipates and the question becomes the normal one: is there a genuine issue of material fact left for the fact-finder to adjudicate? Cf. *Klat v Chrysler Corp*, 285 Mich 241, 248 (1938) (noting that after the presumption was overcome, "[t]he failure of plaintiff to proceed with rebuttal evidence made it incumbent upon the trial judge as a matter of law to direct a verdict in favor of defendants").

This framework from *Krisher* reflects the nature of the sudden-emergency doctrine. To prove his case here, plaintiff must show that defendant acted negligently, i.e., did not act like a reasonably prudent person under the circumstances. See *Antcliff v State Employees Credit Union*, 414 Mich 624, 631-632 (1982) ("In a negligence action, . . . the standard of care required is always the care which a person of reasonable prudence would exercise under the circumstances as they existed."). The sudden-emergency doctrine "is a 'logical extension of the "reasonably prudent person" rule,' and as such is not an affirmative defense." *Szymborski v Slatina*, 386 Mich 339, 341 (1971), quoting *Baker v Alt*, 374 Mich 492, 496 (1965) (some quotation marks omitted). "An affirmative defense is one that does not challenge the 'merits of the plaintiff's claim'; that is, it 'seeks to foreclose the plaintiff from continuing a civil action for reasons unrelated

to the plaintiff's prima facie case.' " *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 507 Mich 272, 304-305 (2021) (citation omitted). Accordingly, a sudden-emergency argument attacks the element of the prima facie case requiring the plaintiff to prove that the defendant acted negligently. A defendant would therefore not be liable if he or she could prove that his or her vehicle crossed onto the wrong side of the road because of an unexpected fainting or blackout. See *Soule v Grimshaw*, 266 Mich 117, 119 (1934) ("The trial court properly charged that defendant had no right to drive on the wrong side of the highway; that he was not liable if he fainted or became unconscious immediately prior to the accident, so the passing of his automobile to the wrong side of the highway was not his voluntary act.").[4]

The sudden emergency doctrine is thus relevant both to the presumption and to the ultimate merits of the dispute. *Krisher* bears this out. There, in stating that the testimony of the defendant "alone" could rebut the presumption, we indicated that such testimony could also "justify the court in taking the case away from the jury and directing a verdict in favor of the defendant." *Krisher*, 331 Mich at 708; see also *id*. at 710 ("It has been held that uncontradicted evidence given by defendants alone is sufficiently clear, positive and credible enough to rebut the presumption and justify a directed verdict for the defendant."). We cited multiple cases for this proposition. One was *Christiansen v Hilber*, 282 Mich 403 (1937), in which it was observed that we had rejected the argument that simply because a jury might disbelieve testimony opposing a presumption, a directed verdict should not enter. See *id*. at 407, discussing *Union Trust Co v American Commercial Car Co*, 219 Mich 557, 559 (1922) (rejecting the plaintiff's argument that "the jury might not have accepted the testimony, and plaintiff [therefore] could have prevailed" based on the presumption). In such a case, " '[i]t would [be] an idle ceremony, under the evidence, to have submitted the case to the jury, for the direct, positive and uncontradicted evidence presented an issue of law for the court and not an issue of fact for the jury.' " *Christiansen*, 282 Mich at 407, quoting *Union Trust*, 219 Mich at 560. Because the unimpeached witness's testimony was uncontradicted, it " 'should be credited and have the effect of overcoming a mere presumption.' " *Christiansen*, 282 Mich at 409 (citation omitted). *Christiansen* applied this to a case in which the evidence opposing the presumption came from the defendant's own testimony. The testimony there met the standards for overcoming the presumption *and* we held that the trial court did not err by directing a verdict for defendant as a matter of law. *Id*. at 410.

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[4] It must be emphasized, of course, that proving a sudden emergency does not automatically entitle the defendant to judgment as a matter of law. The fact-finder "is permitted to consider the emergency as one of the circumstances relevant in determining whether the actor behaved reasonably." 1 Dobbs, Hayden, & Bublick, The Law of Torts (2d ed), § 142, p 445. But as *Soule* shows, if the defendant loses consciousness and is not otherwise negligent, this sudden emergency could justify a verdict for the defendant.

Another case cited by *Krisher* is *Brkal v Pletcher*, 311 Mich 258 (1945). There, the defendant's testimony was not impeached or contradicted by opposing evidence. *Id.* at 260-261. It was, therefore, sufficient to overcome the presumption *and* require a directed verdict. *Id.*; see also *Wehling v Linder*, 248 Mich 241 (1929) (holding that a defendant's testimony corroborated by the record and otherwise uncontradicted was sufficient to overcome the presumption and require a directed verdict against the plaintiff).

The United States Supreme Court has taken this very approach to directed verdicts. The Court has recognized that, while the jury is to assess credibility, "this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view it is open to doubt." *Chesapeake & O R Co v Martin*, 283 US 209, 216 (1931). This is true even when the testimony at issue comes from an interested witness. *Id.* at 216-217. The mere fact that the witness has an interest that might otherwise call the testimony into doubt is not enough to bar a directed verdict "[w]here . . . the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising or suspicious . . . ." *Id.* at 218.

A directed verdict is directly analogous to the motion for summary disposition under MCR 2.116(C)(10) that was filed in the present case. Although the fact-finder is charged with resolving factual disputes, "when no fact question exists, the trial judge is justified in directing a verdict." *Caldwell v Fox*, 394 Mich 401, 407 (1975). Like a motion under MCR 2.116(C)(10), "[a] motion for a directed verdict challenges the sufficiency of the evidence." *Barnes v 21st Century Premier Ins Co*, 334 Mich App 531, 550 (2020). As such, " '[t]he test with respect to a motion for summary disposition brought under MCR 2.116(C)(10) is essentially the same in regard to a motion for a directed verdict . . . .' " *Id.* at 550-551 (citation omitted).[5] The primary difference is that the motion for directed verdict comes at the close of the evidence offered by the opposing party. See MCR 2.516. Consequently, the caselaw indicating that a defendant's testimony overcoming the presumption can also entitle the defendant to a directed verdict is relevant to whether that same testimony could justify granting a motion for summary disposition under MCR 2.116(C)(10).

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[5] See Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 Nw U L Rev 774, 800-801 (1983) (arguing that the approach used by the United States Supreme Court in the directed-verdict context should apply to the summary-disposition context).

This Court's caselaw above is therefore on point and provides the appropriate rules and framework for deciding the present case. If defendant's testimony is clear, positive, and uncontradicted, then it overcomes the presumption. If the same evidence negates an element of plaintiff's prima facie case, and plaintiff has not proffered any evidence calling into question defendant's credibility, defendant is entitled to summary disposition. Finally, under the caselaw above, defendant here is not precluded from either overcoming the presumption or obtaining a judgment as a matter of law simply because the supporting evidence consists of the defendant's testimony concerning events of which the defendant has peculiar knowledge.

C. CREDIBILITY AND SUMMARY DISPOSITION

The majority here and the Court of Appeals dissent do not grapple with the above caselaw. Instead, they rely on the general principle that credibility determinations are for the jury. To be sure, the jury is the appropriate body for deciding upon credibility, *if* credibility is at issue. See *Franks v Franks*, 330 Mich App 69, 90 (2019) (noting that a nonmoving party cannot defeat a motion for summary disposition based on "the mere possibility that a jury might disbelieve an essential witness" and that "the nonmoving party must identify evidence that puts the affiant's or the deponent's credibility at issue to avoid summary disposition"). And while a witness's interest in the case or testimony on matters known only by the witness can be a basis for questioning his or her credibility—thus creating a triable issue, see *id*.—the caselaw above demonstrates that a defendant's testimony can nevertheless entitle the defendant to judgment as a matter of law. See *Krisher*, 331 Mich at 708. Indeed, the high level of proof necessary to overcome the presumption is necessitated precisely because the defendant has unique knowledge of the events. *Id*. at 706.

It makes sense that summary disposition cannot be denied based on the mere possibility the jury would disbelieve a defendant. A bright-line approach would almost always preclude summary disposition because an appellate court could find an issue of credibility in nearly every case that comes before it. See, e.g., 10A Wright, Miller, & Kane, Federal Practice & Procedure (4th ed), Civil, § 2726 (noting that a court is "usually . . . able to find an issue of credibility lurking in the cases brought before that court"). This state of affairs "would cripple the summary [disposition] procedure" and overload courts with cases in which a trial is not necessary. *Id*.; see also *Hoard v Roper Hosp, Inc*, 387 SC 539, 549 (2010) ("One may not, however, avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. This argument, if accepted, would render summary judgment obsolete . . . ."). If the record contains enough other evidence that would make it possible to find a contradiction in the witness's testimony if one existed, and yet none can be found, then the fact that the jury might disbelieve the witness should not bar summary disposition. *State of Mind*, 78 Nw U L Rev at 802. Thus, even when the relevant evidence is in the knowledge or control of the movant, "if all the evidence appears to have been disclosed, ostensibly the movant's

credibility is less in doubt and the court, in deciding whether to grant the motion, simply may consider the opposing party's lack of knowledge as a factor, which, when weighed with all the other circumstances in the case, may preclude summary judgment." 10A Federal Practice & Procedure, Civil, § 2726.

In explaining these basic principles, the United States Supreme Court has noted that while the movant bears the burden, "the plaintiff[-nonmovant] is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Anderson v Liberty Lobby, Inc*, 477 US 242, 256 (1986). "This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." *Id.* at 257.[6] Thus, as one court has observed, when the motion for summary disposition rests at least in part upon the movant's own affidavits or testimony, summary disposition is appropriate if the testimony is not "inherently incredible" or suspect, the averments are uncontradicted, and there appears to be no need for cross-examination. *Kidd v Early*, 289 NC 343, 370 (1976) ("We hold that summary judgment may be granted for a party . . . on the basis of his own affidavits (1) when there are only latent doubts [i.e., doubts that stem from the witness's interest as the movant] as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition [and] failed to point to specific areas of impeachment and contradiction . . . , and (3) when summary judgment is otherwise appropriate."); cf. *Hoard*, 387 SC at 549 (the fact that the jury might discredit the movant's testimony is not a reason to deny summary disposition).

This is nothing more than a straightforward application of the principle that the nonmovant cannot preclude summary disposition based on nothing more than "unsupported assumptions and speculation." *Lum v Koles*, 426 P3d 1103, 1109 (Alas, 2018) (quotation marks and citations omitted). As this Court has stated, " '[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.' " *Lowrey v*

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[6] In a case predating *Anderson*, the Supreme Court indicated that opinion testimony, even if uncontradicted, cannot be used as the basis for granting a motion for summary disposition because that evidence is subject to the jury's assessment of credibility. *Sartor v Arkansas Natural Gas Corp*, 321 US 620, 627-628 (1944). But it has been observed that much of the movant's evidence in that case "consisted of expert opinion which, unlike uncontradicted lay testimony, the jury is not required to believe." *State of Mind*, 78 Nw U L Rev at 804. Moreover, the movant's own documentary evidence contradicted its affidavits supporting its motion for summary judgment. *Id.*; see also *Sartor*, 321 US at 626 (noting that the testimony offered in support of the motion for summary judgment before a second trial had been rejected by the jury at the first trial and was inconsistent with the jury's findings in that trial).

LMPS & LMPJ, Inc, 500 Mich 1, 7-8 (2016), quoting *Maiden v Rozwood*, 461 Mich 109, 121 (1999).

D. APPLICATION

Applying this law to the present case, I would hold that defendant has presented clear, positive, and uncontradicted evidence to overcome the presumption against him and, further, that because there is no genuine issue of material fact left for the jury on the issue of defendant's negligence, defendant is entitled to summary disposition. Given that discovery has occurred, we are not bound to conclude that the jury could disbelieve defendant simply because some of the evidence was within his control and he had an interest in his testimony. See *Anderson*, 477 US at 251; *Kidd*, 289 NC at 370. Defendant admitted that his truck crossed the center of the highway, in violation of MCL 257.634. In support of his sudden-emergency claim, defendant testified that while driving he passed out because of a sudden medical issue, waking up only after the accident when a witness began shaking him and yelling at him.

All the evidence gathered through discovery supports that testimony. The police report indicated that defendant said he passed out, causing his vehicle to cross over the centerline. The medical records from his hospital stay immediately following the accident match his deposition testimony. The records also show that he had similar episodes numerous times while at the hospital. The doctors diagnosed him has having suffered a sudden or acute syncopal episode. The subsequent investigation of the accident also bore out defendant's description of events. There were no skid marks that would demonstrate that defendant had been alert and attempting to apply the brakes. Moreover, GPS records indicated that the truck did not slow down until it went off the road and traveled 60 to 70 feet into a cornfield.

Given this record, it is apparent that defendant has produced clear, positive, and uncontradicted evidence sufficient to overcome the presumption. Once the presumption dissolves, the question becomes whether there is a question of material fact for the jury to decide. The evidence defendant produced attacks the element of plaintiff's prima facie case requiring plaintiff to demonstrate that defendant failed to exercise reasonable care under the circumstances. In response, plaintiff has done nothing more than offer the mere possibility that the jury would discredit defendant's testimony. Plaintiff has given no reason for the jury to do so and has pointed to no additional evidence that would call into question the corroborating evidence.

It is true, as the Court of Appeals dissent noted, that even after dissolution of the presumption, an inference of negligence might arise from the fact that defendant crossed the centerline. See *Widmayer*, 422 Mich at 289 ("Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced.").

But the inference still "must be weighed against the rebutting evidence." *Id*. And in the present case, a jury could not reasonably infer negligence from the mere crossing of the line—all of the evidence in the case demonstrates that he crossed the line because of a sudden emergency and not any negligence on his part.

The one factual assertion the majority seems to rely upon is the assertion that "only he could know what happened inside his truck that day . . . ."[7] But as can be seen above, this is plainly incorrect. Other evidence also demonstrates what happened, including the medical records, the GPS records, and the physical evidence of the accident

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[7] The majority has not cited any caselaw for the proposition that a party's exclusive knowledge of the facts precludes summary disposition. The Court of Appeals has indicated that such an approach *might* apply. See *Franks*, 330 Mich App at 90-91 ("To the extent that this Court's decisions seem to apply an absolute exception to the application of summary disposition premised on the mere possibility that a jury might disbelieve an essential witness, . . . the application of that rule is limited to those situations in which the moving party relies on subjective matters that are exclusively within the knowledge of its own witness and those in which the witness would have the motivation to testify to a version of events that are favorable to the moving party."). But *Franks* did not trace this rule back to any caselaw from this Court. See *id*., citing *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 630 (2007), aff'd 482 Mich 136 (2008) (describing this rule but not citing authority for it, having earlier cited a similar but slightly distinct rule from *Wilmington Trust Co v Manufacturers Life Ins Co*, 624 F2d 707, 709 (CA 5, 1980) ("Here, . . . the disputed fact is (1) within the exclusive knowledge of the movant, whose supporting evidence is (2) subjective in character, and (3) upon whom the burden of persuasion rests."). And even if this represents a correct rule, it does not apply in cases like the present one, in which the testimony is uncontradicted and corroborated by evidence outside the defendant's control.

The majority also cites *Arber v Stahlin*, 382 Mich 300, 309 (1969), emphasizing that defendant's testimony here is "crucial" to his case. *Arber* required a determination of whether the defendants acted with actual malice, meaning they published information knowing it to be false or recklessly disregarding whether it was false. *Id*. at 308. In such a case, we said that "[t]he determination of actual malice depends on more than a mere denial[.]" *Id*. at 308-309. Instead, the issue of actual malice could only be "resolved from a study of the witness on the stand, his interest or lack of interest in the case, his role in the publication of the alleged libel, and the many other factors making up the issue of credibility." *Id*. at 309. The issue therefore involved the defendant's subjective intent. Even so, we did not suggest that summary disposition was inappropriate when the testimony was crucial *and* uncontradicted *and* corroborated by all the other evidence. Such circumstances are, however, directly covered by our caselaw on presumptions and directed verdicts, which shows that judgment as a matter of law can be appropriate based on the defendant's testimony.

(specifically the lack of skid marks and the truck's resting place far in the cornfield). All of that circumstantial evidence supports defendant. Nothing in it, or anything else plaintiff has produced, contradicts defendant's recitation of what occurred.[8]

Consequently, there is no genuine issue of material fact for the jury to decide.[9]

III. CONCLUSION

The trial court did not err by granting summary disposition to defendant in this case. Defendant has presented clear, positive, and uncontradicted evidence to overcome the presumption that he was negligent. Although some of that evidence comes in the form of his testimony, plaintiff has not provided evidence calling that testimony into doubt. The evidence that has been produced all supports defendant's testimony. Consequently, there is no question of fact left for the jury and defendant is entitled to summary disposition. In concluding otherwise, the majority today relies on the possibility that the jury will disbelieve defendant even though it has no reason to do so. This conclusion disregards a century of our caselaw holding that a defendant's testimony can overcome a presumption and justify judgment as a matter of law. I fear that today's majority order will make it impossible for defendants relying on their own testimony to obtain summary disposition even when all of the other evidence supports that testimony.

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[8] The majority goes on to say that only defendant "could know . . . whether he had any reason to suspect that an imminent syncopal episode might warrant certain conduct." There has been some mention that defendant had experienced cardiac issues in the past, years before the accident. But there is no evidence that he had ever experienced a syncopal episode. Moreover, he had been medically certified to drive multiple times before the accident and there had been no driving incidents. Thus, there can be no argument that defendant had any reason to suspect he would black out or that he acted unreasonably in deciding to drive that day.

[9] The majority attempts to distract the reader from the lack of evidence favoring plaintiff by saying that the record is "consistent" with many different occurrences, such as defendant's having fallen asleep. But this resort to "consistency" means very little in these circumstances. The evidence is also "consistent" with an out-of-body experience or alien abduction. But there is no evidence tending to prove such events. And similarly, there is no affirmative evidence of defendant's having fallen asleep apart from the medical emergency. Tellingly, plaintiff does not even make this argument or point to any evidence that would give rise to such an inference. Instead, this conjecture about what might have happened—even in the absence of any affirmative proof—has been gratuitously supplied by the majority, which now seems to require rebuttal not only of the presumption of negligence, but of any other theoretically possible but unproven explanations for the events in question.

As a result, the majority's order has the potential to clog our courts with unnecessary trials. For these reasons, I respectfully dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 22, 2022

Clerk

t0419

STATE OF MICHIGAN

COURT OF APPEALS

ARTHUR ORMONDE PRICE, JR.,

Plaintiff-Appellant,

v

SAMUEL ONEAL AUSTIN and L & B CARTAGE, INC., doing business as OMNI QUALITY INSPECTION SERVICES,

Defendants-Appellees.

UNPUBLISHED
April 30, 2020

No. 346145
Saginaw Circuit Court
LC No. 17-032666-NI

Before: O'BRIEN, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

In this third-party no-fault action, plaintiff appeals by delayed leave granted[1] the order granting summary disposition under MCR 2.116(C)(10) in favor of defendants on the basis of the sudden emergency doctrine. We affirm.

I. FACTUAL BACKGROUND

This case arises out of an automobile accident that occurred on April 1, 2014, at approximately 8:00 p.m. in Richland Township, Michigan. Defendant-driver, Samuel O'Neal Austin, was driving a tractor-trailer in the eastbound lanes of M-46, a two-lane roadway with no median, in the scope and course of his employment with defendant L & B Cartage, Inc., doing business as Omni Quality Inspection Services. Suddenly, defendant-driver experienced a severe coughing fit and blacked out, causing the semi to cross over into the westbound lanes of M-46. The semi had made it almost to the westbound shoulder when it collided with plaintiff's vehicle. The semi came to its final resting place in a corn field several feet from the highway. Both drivers sustained injuries in the accident: defendant-driver was taken by ambulance to Covenant

[1] See *Price v L & B Cartage, Inc*, unpublished order of the Court of Appeals, entered March 27, 2019 (Docket No. 346145).

HealthCare Hospital in Saginaw, Michigan, and plaintiff was airlifted to Ascension St. Mary's Hospital in Saginaw, Michigan.

Plaintiff filed suit against defendants, alleging negligence and gross negligence, and seeking non-economic and excess economic damages. Following oral and written discovery, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the sudden emergency doctrine relieved them of liability. The trial court agreed, and in a written opinion and order, granted summary disposition in defendants' favor.

Plaintiff filed a delayed application for leave to appeal the trial court's decision in this court. This Court granted plaintiff's delayed application but limited the appeal "to the issues raised in the application and supporting brief." *Price v L & B Cartage, Inc*, unpublished order of the Court of Appeals, entered March 27, 2019.

II. STANDARD OF REVIEW

> We review a trial court's decision regarding a motion for summary disposition de novo. *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich 1, 5-6, 890 NW2d 344 (2016). A motion for summary disposition brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint," *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768, 887 NW2d 635 (2016), and should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law," *West v Gen Motors Corp*, 469 Mich 177, 183, 665 NW2d 468 (2003).
>
> "The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693, 818 NW2d 410 (2012). The court must consider all of the admissible evidence in a light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29, 772 NW2d 801 (2009). However, the party opposing summary disposition under MCR 2.116(C)(10) "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Oliver v Smith*, 269 Mich App 560, 564, 715 NW2d 314 (2006) (quotation marks and citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Bahri v IDS Prop Cas Ins Co*., 308 Mich App 420, 423, 864 NW2d 609 (2014) (quotation marks and citation omitted). [*Lockwood v Twp of Ellington*, 323 Mich App 392, 400-401; 917 NW2d 413 (2018).]

III. ANALYSIS

On appeal, plaintiff generally contests the trial court's determination that defendants were entitled to summary disposition on the basis of the sudden emergency doctrine. More specifically, plaintiff argues that in the trial court, defendants failed to present clear, positive, and credible

evidence sufficient to overcome the presumption of negligence that arises out of defendant-driver crossing the centerline and colliding head-on with plaintiff's vehicle. We disagree.

> [A] statutory presumption of negligence . . . may be rebutted by showing the existence of a sudden emergency. *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). The sudden-emergency doctrine applies "when a collision is shown to have occurred as the result of a sudden emergency not of the defendants' own making." *Id*., citing *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964). [*White v Taylor Distribution Co, Inc.*, 482 Mich 136, 139-140; 753 NW2d 591 (2008) (*White II*).]

"[A] sudden emergency sufficient to remove the statutory presumption must be 'totally unexpected.'" *Id*. at 140, quoting *Vander Laan*, 385 Mich at 232. "[I]t is essential that the potential peril had not been in clear view for any significant length of time[.]" *Vander Laan,* 385 Mich at 232. Essentially, the sudden emergency doctrine is "a logical extension of the 'reasonably prudent person' standard, with the question being whether the defendant acted as a reasonably prudent person when facing the emergency, giving consideration to all circumstances surrounding the accident." *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 622; 739 NW2d 132 (2007) (*White I*), citing *Szymborski v Slatina*, 386 Mich 339, 341; 192 NW2d 213 (1971).

"When the trial court undertakes to eliminate from the jury's consideration a statutory presumption as a matter of law, at the very least there must be clear, positive, and credible evidence opposing the presumption." *White I*, 275 Mich app at 621-622, citing *Petrosky v Dziurman*, 367 Mich 539; 116 NW2d 748 (1962), and *Szymborski*, 386 Mich at 341, where our Supreme Court concluded that where evidence is less than clear, positive, and credible, the question of whether a statutory presumption can be overcome should be settled by a jury. Indeed, that defendant-driver, who was traveling eastbound crossed the centerline into the westbound lane of travel and struck plaintiff's vehicle as it was rightfully traveling westbound, creates a presumption of negligence. Thus, to be entitled to summary disposition as a matter of law, it is defendants' burden to present clear, positive, and credible evidence that defendant-driver suffered a sudden emergency, totally unexpected and not of his own making, and that he "acted as a reasonably prudent person when facing the emergency, giving consideration to all circumstances surrounding the accident." *White I*, 275 Mich App at 622.

Plaintiff uses the majority of his brief on appeal to highlight what he perceives to be inconsistencies in defendant-driver's statements relating to the symptoms he experienced immediately before blacking out. Indeed, defendant-driver reported slightly different symptoms in the days following the accident. Defendant-driver reported to officers at the scene, and testified in his deposition, that he experienced a violent coughing fit before blacking out. Comparatively, defendant-driver reported to his treating physicians that he felt a twinge in his chest, or crushing chest pain, and then blacked out.

However, what plaintiff fails to appreciate is that defendant-driver consistently maintained that all of his symptoms came on suddenly and with no advanced warning before defendant-driver was rendered unconscious. Moreover, the physical evidence in this case is clear that defendant-driver never applied the brakes: there were no pre-collision skid marks at the scene, and the satellite

GPS log from the semi, indicated that defendant-driver never braked. The physical evidence supports defendant-driver's position that he experienced a sudden medical emergency.

Plaintiff also argues that a reasonably prudent person with defendant-driver's cardiac history would not have been driving a semi. However, defendant-driver had undergone rigorous testing as recently as 2013 in order to recertify his Class A driving endorsement. Additionally, there is no evidence in the record to even suggest defendant-driver had experienced any cardiac symptoms contemporaneously to the accident, or that defendant-driver had ever experienced an episode of sudden unconsciousness.

In sum, defendant-driver presented ample evidence that he experienced some type of syncopal episode while driving without any advance notice, and that he was entitled to rebut the presumption of negligence as a matter of law. In response, plaintiff failed to identify anything in the existing record, or to offer any new evidence, to show that defendant-driver could have done anything differently to avoid the accident that occurred here, or that any genuine issue of material fact remained to submit to a jury. Thus, we conclude that the trial court properly granted summary disposition in favor of defendants on the basis of the sudden emergency doctrine.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Kathleen Jansen

STATE OF MICHIGAN

COURT OF APPEALS

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v

SAMUEL ONEAL AUSTIN and L & B CARTAGE, INC., doing business as OMNI QUALITY INSPECTION SERVICES,

Defendants-Appellees.

UNPUBLISHED
April 30, 2020

No. 346145
Saginaw Circuit Court
LC No. 17-032666-NI

Before: O'BRIEN, P.J., and JANSEN and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

This automobile negligence case arises from a head-on collision between a semi-truck driven by defendant Samuel Austin and plaintiff Arthur Price's Buick. Austin claims that while driving down a straight stretch of two-lane highway, he suddenly began coughing, blacked out, crossed the center line, and struck Price's car. The investigating officer observed no preaccident skid marks attributable to Austin's truck.

The majority affirms summary disposition in favor of Austin on the basis of "the sudden emergency doctrine." In so holding, the majority commits two grave legal errors: it decides that defendant's testimony must be believed, and it misapprehends the function of the sudden emergency defense. I respectfully dissent.

I. GOVERNING LEGAL PRINCIPLES

In every automobile negligence case, the plaintiff must prove that the defendant was negligent. When a defendant's violation of a statute causes an injury, the law bolsters the plaintiff's case by supplying a rebuttable *presumption* that the defendant was negligent. The presumption relieves the plaintiff of the burden of presenting positive evidence of negligence beyond the statutory violation. The defendant is tasked with rebutting the legal conclusion (here, negligence) embedded within the presumption. See *Widmayer v Leonard*, 422 Mich 280, 289-290; 373 NW2d 538 (1985). "If rebuttal evidence is introduced, the presumption dissolves, but

the underlying inferences remain to be considered by the jury[.]" *Ward v Consol Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005). In other words, the inference (here, an inference of negligence arising from Austin's crossing of the center line) maintains evidentiary power. What was once a presumption of negligence becomes an inference of common-law negligence. "[E]ven though facts might be introduced tending to controvert the presumed fact, the presumed fact nonetheless remains as at least a permissible inference for the trier of fact." *Kirilloff v Glinisty*, 375 Mich 586, 588; 134 NW2d 707 (1965).

MCL 257.634(1) requires drivers to operate their vehicles on the right side of the road. A violation of this statute creates a rebuttable presumption of negligence. Accordingly, Price could establish Austin's negligence based solely on the fact that Austin's truck crossed the center line. Austin was entitled to rebut this presumption of his negligence with evidence of an excuse for his negligence; he did so with his sudden emergency claim. *White v Taylor Distrib Co*, 275 Mich App 615, 621; 739 NW2d 132 (2007) (*White I*). Austin alleged that while driving down the road, he had "a really bad coughing spell," "tr[ied] to hit the brakes and . . . get over to the right," but "passed out." He additionally asserted that he unsuccessfully "tried to slow down." This testimony would suffice to rebut the presumption of negligence accompanying Austin's crossing of the center line—if and only if the jury believes it. And contrary to the majority's analysis, even if the *presumption* is successfully rebutted, an inference of negligence remains to be considered by the trier of fact.

II. A JURY MAY DISBELIEVE ANY WITNESS'S TESTIMONY

A critical error permeates the majority opinion. In considering a motion brought under MCR 2.116(C)(10), neither we nor the circuit court may weigh evidence or find facts. The majority does both. By deciding that Austin's coughing story is credible, the majority usurps the province of the jury, substituting two judges in the jury's place.

A bedrock legal principle instructs that "the jury is free to credit or discredit *any* testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001) (emphasis added). This is a very old rule. More than a century ago, the United States Supreme Court explained the underlying concept:

> The jury were the judges of the credibility of the witnesses . . ., and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function. [*Aetna Life Ins Co v Ward*, 140 US 76, 88; 11 S Ct 720; 35 L Ed 371 (1891).]

Michigan's jurisprudence hews to the same legal philosophy. Indeed, a decade before the United States Supreme decided the above-quoted case, our own Justice COOLEY articulated the

identical rule. In *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881), the Supreme Court reversed a directed verdict resting on "undisputed" evidence that "probably ought to have satisfied any one . . . ." Justice COOLEY explained that a jury "may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment." *Id*.

Our Supreme Court reiterated this point in *Yonkus v McKay*, 186 Mich 203, 210-211, 152 NW 1031 (1915):

> To hold that in all cases when a witness swears to a certain fact the court must instruct the jury to accept that statement as proven, would be to establish a dangerous rule. Witnesses sometimes are mistaken and sometimes unfortunately are wilfully mendacious. The administration of justice does not require the establishment of a rule which compels the jury to accept as absolute verity every uncontradicted statement a witness may make.

In *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940), the Supreme Court again acknowledged that "[u]ncontradicted testimony may be disentitled to conclusiveness because, from lapse of time or other circumstances, it may be inferred that the memory of the witness is imperfect as to the facts to which he testified, or that he recollects what he professes to have forgotten." *Id*.

These principles apply equally to defense witnesses. For example, in *Strach v St John Hosp Corp*, 160 Mich App 251, 271; 408 NW2d 441 (1987) (citation omitted), a medical malpractice case, this Court declared that a jury could disregard a physician's unrebutted testimony, reasoning that "a jury may disbelieve the most positive evidence even when it stands uncontradicted, and the judge cannot take from them their right of judgment." Two additional medical malpractice cases make the same point. In *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 89-90; 776 NW2d 114 (2009), and *Martin v Ledingham*, 488 Mich 987, 987-988; 791 NW2d 122 (2010), the defendant physicians testified that they would have acted in a certain manner if provided with information about a patient's condition. Both appellate courts held that a jury was entitled to disbelieve the physicians' testimony, even though it was unrebutted by other evidence. The Supreme Court stated in *Martin*, 488 Mich at 988: "the treating physician's averment that he would have acted in a manner contrary to this standard of care presents a question of fact and an issue of credibility for the jury to resolve." See also *Debano-Griffin v Lake Co*, 493 Mich 167; 828 NW2d 634 (2013); *Soule v Grimshaw* 266 Mich 117; 253 NW 237 (1934); *Ricketts v Froehlich*, 218 Mich 459; 188 NW 426 (1922).

Even the credibility of eyewitness testimony presents a question of fact. *Estate of Taylor by Taylor v Univ Physician Group*, ___ Mich App ___; ___ NW2d ___ (2019) (Docket No. 338801), slip op at 6. See also *Arndt v Grayewski*, 279 Mich 224, 231; 271 NW 740 (1937) (holding that eyewitness testimony "is not conclusive upon the court or a jury if the facts and circumstances of the case are such as irresistibly lead the mind to a different conclusion").

Several of the cases discussed above arose in the summary disposition context. The same rule applies: when the resolution of a case depends solely on a witness's credibility, summary disposition is inappropriate because a jury question necessarily exists. An appellate court may not

assess credibility or make factual findings when reviewing the propriety of summary disposition. *White v Taylor Distrib Co*, 482 Mich 136, 142-143; 753 NW2d 591 (2008) (*White II*). Furthermore, summary disposition is improper when a trier of fact could reasonably draw an *inference* in the plaintiff's favor:

> It is a basic proposition of law that determination of disputed issues of fact is peculiarly the jury's province. Even where the evidentiary facts are undisputed, it is improper to decide the matter as one of law if a jury could draw conflicting inferences from the evidentiary facts and thereby reach differing conclusions as to ultimate facts. [*Nichol v Billot*, 406 Mich 284, 301-302; 279 NW2d 761 (1979) (citations omitted).]

In this case, the majority's holding rests entirely on its determination that Austin's account of what happened is credible, despite that there were no confirming witnesses. Austin's claim that he coughed, became light-headed, and almost instantly passed out is contradicted by the accident report, which notes that Austin informed the officer that the coughing "may have caused him to pass out." Austin claimed at his deposition that when he began coughing he "tr[ied] to hit the brakes and . . . get over to the right," but none of the physical evidence described by the officer supports that he did either of those things. Austin's medical records contain yet another description of what happened; a physician noted that he experienced "twinging of chest, feeling like he needed to cough. He was bearing down and had a syncopal episode." This recounting did not include the violent coughing that Austin testified to at his deposition. Such inconsistencies matter; in *White II*, 482 Mich at 142, the Supreme Court highlighted that "[d]efendant's inconsistent statements about the cause of his illness create issues of material fact precluding summary disposition."

Are the discrepancies in this case relatively minor? Yes. But they demonstrate that Austin's deposition version of what happened may well have been exaggerated, the coughing magnified, and the efforts to avoid the crash over stated.[1] As the Supreme Court pointed out in *White II*, "if defendant felt ill even a few minutes before he collided with plaintiff, then the emergency may well have been of his own making." *Id*. Ultimately, it is the jury's job to assess whether Austin's story rings true, not this Court's. As this Court has said time and time again, the jury sees, hears, and observes witnesses as they testify, determining whom to believe and who is unworthy of belief. On this ground alone, I would reverse the trial court's grant of summary disposition.

III. THE SUDDEN EMERGENCY

The majority's next error arises from its interpretation and application of the sudden emergency doctrine. Simply by testifying that he suffered a syncopal episode, the majority holds, Austin "was entitled to rebut the presumption of negligence as a matter of law." The majority reasons that Austin is entitled to avoid a trial based on Price's failure to "identify anything in the

[1] The majority construes the physical evidence as supporting Austin's story. The majority ignores that the physical evidence would also support that Austin fell asleep at the wheel or was distracted and lost control of his truck. Both of these potential accident causes are far more common than an unexpected coughing fit leading to a black-out.

existing record, or to offer any new evidence," to show that Austin "could have done anything differently to avoid the accident." The majority misapprehends the function and purpose of the sudden emergency doctrine.

The doctrine of sudden emergency is merely one application of the reasonably prudent person standard; it is not an affirmative defense. *Szymborski v Slatina*, 386 Mich 339, 341; 192 NW2d 213 (1971); *Baker v Alt*, 374 Mich 492, 496; 132 NW2d 614 (1965). An affirmative defense accepts that the plaintiff has established a prima facie case, but seeks to foreclose relief for reasons unrelated to the plaintiff's proofs. See *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). Most affirmative defenses offer the defendant the possibility of a full victory, even if everything the plaintiff claims is true—think of the statute of limitations, release, and immunity granted by law. See MCR 2.111(F)(3).

I repeat and emphasize: sudden emergency is *not* an affirmative defense. It is merely a denial of negligence that, if believed by a jury, operates to rebut a presumption of negligence or to provide an excuse for what would otherwise be negligent conduct. Not every case involving the sudden emergency doctrine implicates a presumption of negligence. When there is no presumption to rebut, the sudden emergency doctrine merely offers a garden-variety defense. As with every defense to a negligence claim, the jury applies an objective standard: did the defendant behave reasonably under the circumstances? The defendant's *opinion* that he behaved reasonably is not determinative, nor is a judge's concurring view. A jury may find a defendant negligent notwithstanding the defendant's sudden emergency claim.

Similarly, when invoked to rebut a presumption of negligence, the sudden emergency doctrine is not a free ticket to summary disposition. Rather, it continues to serve as a factual circumstance relevant to determining whether the defendant acted reasonably. In other words, when a presumption of negligence falls away, the jury must still determine whether the defendant's acts were consistent with the standard of care expected under the circumstances. See *Baker*, 374 Mich at 496 ("In actuality, the doctrine of 'sudden emergency' is nothing but a logical extension of the 'reasonably prudent person' rule. The jury is instructed, as was done here, that the test to be applied is what that hypothetical, reasonably prudent person would have done under all the circumstances of the accident, whatever they were."); *Martin v City of New Orleans*, 678 F2d 1321, 1325 (CA 5, 1982) ("The doctrine of sudden emergency does not invoke a different standard of care than that applied in any other negligence case. The conduct required is still that of a reasonable person under the circumstances. The emergency is merely a circumstance to be considered in assessing the actor's conduct.").[2]

Restatement Torts, 3d, § 9, summarizes the sudden emergency doctrine as follows: "If an actor is confronted with an unexpected emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor's resulting conduct is that of the reasonably careful person." Michigan law is entirely consistent with this approach. Despite that Austin claims to have experienced a sudden emergency, he crossed the center line and failed to

[2] A number of courts have eliminated the sudden emergency doctrine from their common-law toolbox precisely because it is frequently misused. See *Bedor v Johnson*, 292 P3d 924 (Colo, 2013), and the cases collected in footnote 2.

apply his brakes. Did he really have a coughing fit that caused him to pass out? If so, did he act prudently when he began coughing? I don't know, and neither does the majority. I do know that Austin's negligence under the circumstances remains a salient question, and that only a jury is empowered to answer it. Contrary to the majority's view, evidence that Austin was confronted with a sudden emergency does not entitle him to a legal determination that he lacked any fault for the accident. I would reverse the lower court and remand for a jury trial.

/s/ Elizabeth L. Gleicher