STATE OF MICHIGAN

COURT OF APPEALS

CARL MENNARE, JR.,

Plaintiff-Appellee,

and

FAY MARIE MENNARE,

Plaintiff,

v

BRETT DANIEL RAMSDEN,

Defendant,

and

CHARTER TOWNSHIP OF LANSING,

Defendant-Appellant.

UNPUBLISHED
August 12, 2014

No. 315182
Ingham Circuit Court
LC No. 11-000242-NI

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant, Charter Township of Lansing, appeals as of right a judgment in favor of plaintiff, Carl Mennare, Jr., following a jury trial in this case involving the vehicle exception to the governmental immunity act, MCL 691.1405.[1] We affirm.

In February 2011, plaintiff brought this lawsuit pursuant to MCL 691.1405, alleging negligent operation of a governmentally owned and operated police vehicle which resulted in plaintiff sustaining bodily injury. Plaintiff averred that, in March 2009, he was driving down a

[1] Both defendant Brett Ramsden and plaintiff Fay Mennare were dismissed from this lawsuit prior to trial; thus, we refer to Mennare as "plaintiff" and the Charter Township of Lansing as "defendant."

street when an on-duty police officer, Brett Ramsden, backed out of his private driveway in a police vehicle, directly in front of plaintiff's vehicle, causing a collision. Plaintiff alleged that he sustained a traumatic brain injury resulting in a serious impairment of body function from the collision.

Thereafter, defendant filed a notice of nonparty at fault under MCR 2.112(K), alleging that Ramsden's neighbor, Deborah Wisdom, was a proximate cause of the accident because she failed to appropriately maintain a hedge located partially in the right-of-way and the hedge obstructed Ramsden's ability to see oncoming traffic. Plaintiff filed a motion to strike defendant's notice, arguing that Wisdom had no right of possession over the right-of-way where the hedge was located, took no affirmative act of control over the property, and did not create or increase the alleged hazard. The trial court agreed with plaintiff and granted his motion to strike, holding that Wisdom did not create or increase the alleged hazard. Although she trimmed the hedge from time to time, such actions actually reduced or eliminated the hazard.

Subsequently, at a June 20, 2012 pretrial conference, the trial court granted defendant's request for an independent medical examination (IME) of plaintiff by Dr. Harvey Ager, a psychiatrist, contingent on it being conducted prior to the July 16, 2012 trial date. When Dr. Ager was unable to schedule the examination, defendant scheduled plaintiff for an IME on June 27, 2012 with Dr. Elliot Wolf, a psychiatrist. However, on that date, Dr. Wolf was unavailable to conduct the examination and it was cancelled. Thereafter, because of scheduling conflicts, the trial court postponed the July 16, 2012 trial date to a date in November 2012. Then defendant requested that plaintiff agree to an IME conducted by Dr. Ager, and plaintiff denied the request. Subsequently, defendant filed a motion to compel the IME. The trial court denied the motion, holding that the case had been pending for a significant period of time, the case evaluation was completed, numerous pretrial hearings had been conducted, a previous trial date was postponed on the day the trial was scheduled to commence, and trial was scheduled for November 2012.

On November 26, 2012, a six-day jury trial began. Ramsden testified that on the day of the accident, while on duty and with the permission of the police department, he stopped at his house to let his dog out. While attending to his dog, he saw a vehicle driving down his street at a high rate of speed. Intending to follow the vehicle, Ramsden began backing down his driveway but he did not activate his lights because he wanted to pace the subject vehicle first. When Ramsden entered the westbound lanes, plaintiff's vehicle collided with the right front passenger tire of the police vehicle. Ramsden testified that he did not see plaintiff's vehicle before the collision because a neighbor's hedge obstructed his vision with regard to vehicles traveling westbound on his street. He had lived at this property for six months. Ramsden believed that he made the best observation he could under the circumstances, but acknowledged that the accident was his fault.

Plaintiff testified that the driver and passenger airbags in his vehicle deployed as a result of the impact with the police vehicle, and the driver's side airbag hit him on the tip of the nose, knocked his glasses off, and caused his head to slam backward into the car seat. Although plaintiff testified that he thought he had lost consciousness for a second or two, his wife testified that he did not. Plaintiff did not report being injured at the time and an ambulance was not called. However, the day after the collision, plaintiff began to get headaches and experience confusion. While at work a couple of days later, he had a headache that he described as an eight

on a scale of one to ten. He reported to his supervisor that the lights and noises in the factory were disrupting his ability to work. On March 18, 2009, because plaintiff continued to experience severe headaches, he sought consultation with his family physician, Dr. Jami Newman, a board certified family physician.

Dr. Newman eventually diagnosed plaintiff with a traumatic brain injury, concussion, and post-concussive syndrome. Dr. Newman testified that, although plaintiff's CAT scan and MRI were negative, neither test can detect microscopic injuries to the brain—including shearing injuries to neurons—that are common with traumatic brain injuries, concussions, and post-concussive syndrome. However, a large bleed on the brain was ruled out. Dr. Newman further testified that plaintiff experienced daily severe headaches, photophobia, phonophobia, problems focusing, light-headedness, confusion, poor memory, blurred vision, nausea, and insomnia despite her treatments with various medications. During the course of her treatment, Dr. Newman referred plaintiff to: (1) Dr. Edward Cook, a neuropsychologist, (2) the Hope Network, an organization that specializes in traumatic brain injuries, and (3) the Origami Brain Injury and Rehabilitation Center (Origami), a traumatic brain injury treatment center. Dr. Newman testified that, based on the information reported by plaintiff, as well as her "objective findings [from] viewing him as a patient" and the tests she conducted, there was no question in her mind that plaintiff suffered a traumatic brain injury as a result of the collision. Further, there was no indication that plaintiff was malingering or had any interest in secondary gain. And plaintiff was compliant with all of her recommendations for rehabilitation. Dr. Newman did not expect that plaintiff's headaches would ever resolve.

Medical treatment providers to whom Dr. Newman referred plaintiff also testified. In particular, Dr. Roy Meland, a medical doctor and board certified psychiatrist at Origami, as well as the medical director of the brain injury rehabilitation program at Hope Network, testified that he treated plaintiff through Origami, seeing him several times in 2009, 2010, and through June 2011. Dr. Meland testified that he was qualified to diagnose and treat physical brain injuries and he determined that plaintiff suffered a traumatic brain injury during the automobile collision; that is, plaintiff's brain was physically injured. Dr. Meland diagnosed plaintiff with traumatic brain injury, concussion, post-concussive syndrome, and post-traumatic stress disorder. Various medications were prescribed for symptom management and those symptoms included chronic headaches, insomnia, difficulties with focus, attention, and short-term memory, fatigue, balance issues, as well as light and sound sensitivities. There was minimal improvement and plaintiff was determined to be totally and permanently disabled from employment. Plaintiff's treatment with Origami was terminated in June 2011, and he was transferred for palliative care through Hope Network, where Dr. Meland continued to treat plaintiff through the date of this trial. Dr. Meland testified that he did not expect plaintiff's problems to resolve and that he saw no indication that plaintiff was malingering or interested in secondary gain.

Dr. Margaret Fankhauser, a medical doctor and expert in the area of brain injury as well as physical medicine and rehabilitation, testified that she was the medical director at Origami and had been for about 13 years. In that capacity, Dr. Fankhauser reviewed patient records to determine whether prospective patients were appropriate for Origami's program and then she managed the patient's rehabilitation team. Plaintiff was treated by a number of professionals through Origami's program and received physical therapy, cognitive perceptual motor retraining, psychiatric medical treatment, vocational services, speech pathology, and psychological therapy.

Dr. Fankhauser testified that, after review of all of the records, she determined that plaintiff suffered a traumatic brain injury, a concussion, and had post-traumatic stress disorder as a consequence of the automobile collision. She further testified that his injuries were permanent and constituted a serious impairment of his ability to lead a normal life. Despite treatment, many of the short-term and long-term goals were not met and there was no realistic expectation that plaintiff would be able to meet those goals. Dr. Fankhauser testified that she saw no indication that plaintiff was malingering or interested in secondary gain.

Edward Cook, who has a Ph.D. in psychology and is board certified in "neuropsychology and in the test and measurements," performed neuropsychological testing on plaintiff in 2009 after Dr. Newman diagnosed plaintiff with a concussion and post-concussive syndrome. The testing included general ability testing (like IQ testing), as well as cognitive, motor, and sensory testing to determine brain performance. Cook concluded from the testing that plaintiff had post-traumatic stress disorder and evidence of a concussion. There was no evidence that plaintiff was not doing his best during the testing series, and no indication of malingering or interest in secondary gain. Plaintiff was retested in 2011 using mostly the same tests. There was more clear evidence of the traumatic brain injury, and plaintiff continued to have post-traumatic stress disorder, as well as an organic mood disorder related to the brain injury.

In response to plaintiff's injury evidence, defendant presented the testimony of Bradley Axelrod, who has a Ph.D. in clinical psychology. Axelrod testified that plaintiff was referred to him in August 2011 for a neuropsychological evaluation and Axelrod saw plaintiff "for approximately an hour, where I performed a clinical interview with him." Plaintiff also completed questionnaires and approximately three hours of face-to-face tests with a staff member. Axelrod testified that he did not find that plaintiff was suffering from post-traumatic stress disorder and, from a neuropsychological viewpoint, a diagnosis of post-concussive syndrome was not "consistent with what I saw in an individual who was functioning as well as he was." Rather, Axelrod testified, plaintiff was "an individual who was experiencing a lot of emotional distress. And the distress is expressed in terms of physical discomfort, headaches, pain, [and] preoccupation with health concerns and so on." Further, plaintiff was not disabled from working. However, on voir dire examination, Axelrod testified that, because he is not a medical doctor, he cannot make medical diagnoses or prescribe medications like a physician. On cross-examination, Axelrod also testified that, because he is not a physician, he had no opinion as to whether plaintiff suffered an actual physical injury to his brain. When asked if he was in a better position to render an opinion as opposed to Dr. Newman who testified that plaintiff suffered a physical traumatic brain injury, Axelrod testified: "Again, I wouldn't argue with that conclusion reached by another clinician. I'm saying in my assessment [plaintiff] performed in the average to high average range in all cognitive areas." When asked: "And you have no opinion that you would give as to [plaintiff's] medical condition, correct?" Axelrod responded: "Would be outside of my area of expertise."

After defendant rested its case, plaintiff moved for a directed verdict on the issues of negligence, bodily injury, serious impairment of a bodily function, and proximate cause. That is, plaintiff argued, there was no question of fact that Ramsden was at fault for the collision and there was no legally sufficient excuse in that regard. Further, three medical doctors, as well as a neuropsychologist, similarly and consistently testified that plaintiff suffered a "bodily injury," which was an actual physical injury to his brain, that constituted a serious impairment, and was

caused by the collision. The physicians' testimony was not refuted by Axelrod, defendant's expert, who admitted that whether physical injury occurred to plaintiff's brain was outside of his expertise.

In response to plaintiff's motion, defendant argued that there was a question of fact as to whether Ramsden's violation of MCL 257.652 (failing to yield the right-of-way) was excused because the neighbor's hedge interfered with his line of sight. Defendant also argued that there was a question of fact as to whether plaintiff suffered a "bodily injury" under MCL 691.1405 because Axelrod testified that plaintiff had an emotional psychogenic condition, rather than an actual physical injury to his brain. Further, Axelrod testified that plaintiff was not disabled from working.

The trial court concluded that plaintiff was entitled to a directed verdict on the issue of negligence, holding that there was no question of fact that Ramsden was at fault for the collision because he failed to yield the right-of-way and the circumstances in this case did not present a legally sufficient excuse. Further, Ramsden's actions in driving the vehicle the way he did was the proximate cause of plaintiff's injuries. And plaintiff's medical opinion testimony was unrefuted by competent evidence—plaintiff suffered an injury to his head, specifically his brain, in the collision and that injury constituted a serious impairment of a bodily function. The trial court noted that Axelrod testified that he was not competent to render a medical diagnosis because he was not a medical doctor. Accordingly, only the issue of damages was submitted to the jury. Thereafter, defendant raised the claim that, in cases of post-traumatic stress disorder, there must be an objectively manifested physical injury to the brain. The trial court noted that this was not a post-traumatic stress disorder case; rather, it was a brain injury case.

Thereafter, closing arguments were made and the jury was instructed, including with regard to noneconomic damages. The jury returned a verdict, awarding plaintiff damages for past and future wage loss, as well as noneconomic damages. Subsequently, plaintiff was awarded case evaluation sanctions. Defendant appeals as of right the final judgment entered in this matter.

First, defendant argues the trial court erred in directing a verdict in plaintiff's favor with regard to whether plaintiff sustained a "bodily injury" under MCL 691.1405 that constituted a "serious impairment of body function" under MCL 500.3135. We disagree.

> The trial court's ruling with respect to a motion for a directed verdict is reviewed de novo. In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. A directed verdict is appropriate only when no factual question exists regarding which reasonable minds may differ. [*Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000) (citations omitted).]

We also review de novo the applicability of governmental immunity and the statutory exceptions to immunity. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

MCL 691.1405, the motor vehicle exception to governmental immunity, provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner. . . .

Our Supreme Court defined "bodily injury," for purposes of the motor vehicle exception to governmental immunity, as "a physical or corporeal injury to the body." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 85; 746 NW2d 847 (2008). Injury to the brain is "bodily injury." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 57; 760 NW2d 811 (2008). In this case, plaintiff presented testimony from his three medical doctors, Drs. Newman, Meland, and Fankhauser, who testified that plaintiff sustained a traumatic brain injury—a physical injury to his brain—as a consequence of the collision. Plaintiff was diagnosed with a concussion, post-concussive syndrome, as well as post-traumatic stress disorder. Defendant failed to present any testimony from a medical doctor which disputed those diagnoses. Defendant's clinical psychologist, Axelrod, clearly testified that he had no opinion as to whether plaintiff suffered an actual physical injury to his brain and that the issue was "outside of my area of expertise." That is, Axelrod could not testify that plaintiff did not, for example, sustain a concussion in the collision and a concussion is a traumatic brain injury. Thus, the trial court properly directed a verdict in plaintiff's favor on the issue whether plaintiff sustained a "bodily injury" for purposes of MCL 691.1405.

Next, we consider whether plaintiff's traumatic brain injury constituted a "serious impairment of body function" under MCL 500.3135. As explained by our Supreme Court in *Hardy v Oakland Co*, 461 Mich 561, 562-566; 607 NW2d 718 (2000), when a governmental entity is being sued for noneconomic damages under the motor vehicle exception to the governmental immunity act, the threshold requirement of showing a serious impairment of body function under the no-fault insurance act must be met.

In *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), our Supreme Court held that to establish a "serious impairment of body function," a plaintiff must show:

> (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living). [*Id*. at 215.]

Defendant argues on appeal that a question of fact existed with regard to the first requirement, the "objectively manifested impairment" requirement. As the *McCormick* Court explained, "the common meaning of 'objectively manifested' in MCL 500.3135(7) is an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *Id*. at 196. "[T]he proper inquiry is whether the *impairment* is objectively manifested, not the *injury* or its symptoms." *Id*. at 197 (emphasis in original). And "when considering an 'impairment,' the focus is not on the injuries themselves, but how the injuries affected a particular body function." *Id*.

In this case defendant argues that, because plaintiff's CAT scan and MRI were negative, plaintiff cannot establish an "objectively manifested impairment." But defendant's argument erroneously requires that the brain *injury* itself—for example the concussion or microscopic shearing injuries to neurons—be visualized or confirmed in some way to meet this requirement. However, consistent with *McCormick*, plaintiff's impairment—his brain impairment—was evidenced by actual symptoms or conditions. See *id*. at 196. That is, for example, the medical evidence included that plaintiff experienced almost constant head pain, nausea, light and noise sensitivities, speech impediments, insomnia, fatigue, balance issues, and difficulties with focus, attention, and short-term memory. Thus, the physical injury to plaintiff's brain clearly affected his brain function. Although defendant's clinical psychologist, Axelrod, testified that his neuropsychological testing did not demonstrate certain cognitive deficits, and thus disputing one symptom of plaintiff's brain injury, Axelrod did not address most of plaintiff's other symptoms or conditions that evidenced his brain impairment. And, again, Axelrod testified that he had no opinion as to whether plaintiff suffered an actual physical injury to his brain because the issue was outside of his area of expertise. Accordingly, the trial court properly concluded as a question of law that plaintiff suffered a serious impairment of body function. See *id*. at 193-194. That is, the trial court properly directed a verdict in plaintiff's favor on the issue whether plaintiff's traumatic brain injury constituted a "serious impairment of body function" under MCL 500.3135.

Next, defendant argues that the trial court erred when it instructed the jury on non-economic damages because, pursuant to *Hunter v Sisco*, 300 Mich App 229, 240-241; 832 NW2d 753 (2013), lv gtd 495 Mich 960 (2014), such damages were not allowed under MCL 691.1405. However, first, defendant never raised the issue in the trial court whether noneconomic damages were allowed under MCL 691.1405. Second, defendant did not object to the jury instructions with regard to noneconomic damages either before or after the jury was instructed. Third, defendant did not object to the verdict form which clearly permitted a finding of noneconomic damages. Nevertheless, defendant requests that the holding in *Hunter* be applied retroactively to this case, to the extent that it might apply to bar noneconomic damages, so that the jury determination regarding noneconomic damages is vacated. However, judicial decisions are generally given retroactive effect to pending cases in which the same challenge has been raised and preserved. See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005), quoting *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004); *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006). Defendant never raised this challenge in the trial court. Accordingly, retroactive application of the *Hunter* holding, to the extent it might otherwise apply, is inappropriate in this matter.

Next, defendant argues that the trial court abused its discretion by denying defendant's motion to compel an IME of plaintiff. We disagree.

A trial court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 440; 814 NW2d 670 (2012). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. at 442.

"MCR 2.311(A) provides a trial court with discretion to order a party to submit to a physical or mental examination." *Burris v KAM Transp, Inc*, 301 Mich App 482, 487; 836

NW2d 727 (2013). This case was filed in February 2011. The deadline for defendant to name its expert witnesses was July 15, 2011. After discovery deadlines were extended to February 1, 2012, defendant named Ager as an expert witness on its amended witness list dated January 24, 2012. At a pretrial conference on June 20, 2012, the trial court granted defendant's request to have an IME conducted by Dr. Ager, a psychiatrist, contingent on it being conducted prior to the July 16, 2012 trial date. Because Ager was unavailable during this time period, defendant scheduled an IME for June 27, 2012, with a different psychiatrist, Dr. Elliot Wolf, who was not on defendant's witness list. On the date of the scheduled IME, defendant canceled the IME because Wolf was unavailable. On July 16, 2012, the trial was postponed until November 2012. Defendant then sought an order compelling plaintiff to appear at an IME. On August 22, 2012, the trial court denied defendant's motion, holding that the case had been pending for a significant period of time, the case evaluation was completed, numerous pretrial hearings had been conducted, a previous trial date was postponed on the day the trial was scheduled to commence, and the trial was scheduled for November. Under these circumstances we cannot conclude that the trial court's decision to deny defendant's motion to compel was outside the range of reasonable and principled outcomes.

Next, defendant argues that the trial court erred in striking its notice of nonparty at fault which alleged that a proximate cause of the collision was the conduct of Wisdom, Ramsden's neighbor, who failed to maintain a hedge located in the right-of-way. After de novo review of the question of law whether fault may be apportioned to Wisdom, we disagree. See *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

Defendant argues that, for purposes of the comparative fault statutes, MCL 600.2957 and MCL 600.6304, the jury should have been allowed to allocate fault between defendant and Wisdom; thus, its notice of nonparty at fault under MCR 2.112(K) should not have been stricken. Defendant claims that Wisdom "assumed a duty to maintain the hedge, and by allowing the hedge to grow into a sight obstruction, she feasibly could have been found at fault for the accident." Thus, defendant concedes that, because the hedge was in the right-of-way, Wisdom did not have legal possession and control of the property for purposes of premises liability principles, i.e., establishing a duty. A landowner's duty generally ends at the boundary of her premises. *Stevens v Drekich*, 178 Mich App 273, 276; 443 NW2d 401 (1989). And "proof of a duty *is* required 'before fault can be apportioned and liability allocated' under the comparative fault statutes, MCL 600.2957 and MCL 600.6304." *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 20-21; 762 NW2d 911 (2009) (emphasis in original; citations omitted). That is, if a duty is not owed, the conduct of a nonparty cannot be a proximate cause of the damages sustained by an injured party. *Id*. at 20.

However, defendant contends that, because Wisdom admitted to trimming the hedges on occasion, she assumed a duty with respect to the hedge on the adjacent right-of-way; thus, her actions can be considered a proximate cause of the collision. But the only way that Wisdom's conduct could be deemed a proximate cause of the collision is if: (1) she increased the hazard in the right-of-way by trimming the hedge, (2) she created a new hazard in the right-of-way by trimming the hedge, or (3) she "had a servitude for [her] private benefit" in the right-of-way, by a physical intrusion or otherwise, and her enjoyment of it affected the area's safety. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 132-133 463 NW2d 442 (1990), quoting *Berman v LaRose*, 16 Mich App 55, 57-59; 167 NW2d 471 (1969); see also *Hughes v Detroit*,

336 Mich 457, 466-467; 58 NW2d 144 (1953); *Stevens*, 178 Mich App at 277. There was no evidence of any such conduct. Rather, as the trial court held, Wisdom's act of trimming and maintaining the hedge reduced any hazard the hedge posed in obstructing the view from Ramsden's driveway. Accordingly, the trial court did not err in granting plaintiff's motion to strike defendant's notice of nonparty at fault.

Finally, defendant argues that the trial court erred in directing a verdict in favor of plaintiff on the issue of liability because there was a question of fact as to whether Ramsden's violation of MCL 257.652 (failure to yield the right-of-way) was excused by the neighbor's hedge interfering with Ramsden's line of sight. After de novo review, we disagree. See *Thomas*, 239 Mich App at 643-644.

If a penal statute is adopted as the standard of care in a negligence action, a violation of the penal statute "creates only a prima facie case from which the jury may draw an inference of negligence." *Zeni v Anderson*, 397 Mich 117, 128-129, 143; 243 NW2d 270 (1976). In other words:

> [T]he proper role of a penal statute in a civil action for damages is that violation of the statute which has been found to apply to a particular set of facts establishes only a prima facie case of negligence, a presumption which may 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. [*Id*. at 129-130.]

The person asserting an excuse has the burden of introducing exculpatory proof that "'would clearly explain or excuse his violation of the statute.'" *Id*. at 131-132 n 11 (citation omitted). If a sufficient excuse exists, the appropriate standard of care then becomes that established by the common law, i.e., due care so as not to unreasonably endanger the person or property of others. *Id*. at 143; see also *Hill*, 492 Mich at 660.

The trial court did not err in granting a directed verdict on the issue of Ramsden's negligence because no reasonable juror could conclude that Ramsden's view possibly being blocked justified his failure to yield to plaintiff's vehicle. As our Supreme Court has explained, "[a] driver who proceeds into an intersection without ascertaining whether traffic is approaching on the intersecting street is not excused by the fact that his view, as he approaches the intersection, is obstructed." *MacDonald v Skornia*, 322 Mich 370, 377; 34 NW2d 4 (1948). "[W]hen the view is so obstructed, an ordinary, reasonable, prudent and careful person would stop in a position of safety from which due observation could be made, and look to ascertain to a certainty whether another vehicle is approaching the intersection behind the obstruction." *Id*. at 378.

Even if a reasonable juror could have concluded that the hedge blocked Ramsden's view and provided an "excuse" for Ramsden's violation of MCL 257.652, that would only mean that the appropriate standard of care is "that established by the common law," *Zeni*, 397 Mich at 143, rather than the standard of MCL 257.652. It does not mean that Ramsden's action was therefore non-negligent. And under the common-law standard of care, no reasonable juror could conclude that Ramsden exercised due care so as not to unreasonably endanger the person or property of others by backing out of his driveway when he was unable to see whether another vehicle was

approaching. Accordingly, the trial court did not err in granting a directed verdict on the issue of liability resulting from Ramsden's negligence.

Affirmed. Plaintiff is entitled to tax costs as the prevailing party. See MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens