**IN THE COURT OF APPEALS OF IOWA**

No. 1-63 / 99-1680
Filed April 27, 2001

FILED
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CLERK SUPREME COURT

**VALERIE FOSTER,**
Plaintiff-Appellee,

**vs.**

**CASSANDRA STRUTZ,**
Defendant,

**and**

**VINCE ANKRUM,**
Defendant-Appellant.

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**CASSANDRA STRUTZ and VINCE ANKRUM,**
Third-Party Plaintiffs,

**vs.**

**BENJAMIN D. RUGGLES,**
Third-Party Defendant.

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Appeal from the Iowa District Court for Hamilton County, Dale E. Ruigh, Judge.

Appellant Vince Ankrum appeals from an adverse verdict in a personal injury action. **REVERSED AND REMANDED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Stephen M. Terrill of Terrill & Martens Law Offices, Ames, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

**STREIT, P.J.**

A victim of an assault was found liable for damages suffered by a bystander. He claims the jury should have been instructed on the sudden emergency doctrine and the bystander's comparative fault. We reverse and remand for a new trial.

***I. Background Facts & Proceedings.***

Valerie Foster sustained horrific injuries to her right foot in an unusual incident in July 1996. That evening three vehicles of young people stopped at a parking lot in Jewell: an S-10 pickup occupied by Foster and two other young women, a Citation occupied by three to five young men, and a Cavalier occupied by Vince Ankrum and Cassandra Strutz.[1] The Cavalier, which was somewhat between the other vehicles, apparently was five to ten feet away from the Citation and thirty feet from the S-10. It was facing the Citation.

Two or three of the young men from the Citation approached Ankrum as he was sitting in the front passenger seat of the Cavalier. Heated words were exchanged, punches may have been thrown, and one of the young men attempted to pull Ankrum through the car's open window. Ankrum pulled Strutz down towards his lap as the altercation erupted. Strutz stepped on the gas pedal, and somehow the car was shifted from drive into reverse. The car careened backwards toward the S-10. Foster, who had been standing beside the pickup with the two other young women, attempted to pull herself into the back of the pickup. Her foot was crushed between the car and the pickup.

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[1] Ankrum owned the car; Strutz was driving it with his permission.

Foster sued Ankrum and Strutz. Ankrum and Strutz, in turn, filed a third-party petition naming one of the young men from the Citation as a third-party defendant. The jury found the third-party defendant was not negligent and attributed fifty-five percent of the total negligence in the case to Ankrum, the passenger, and forty-five percent of the total negligence to Strutz, the driver. It also found Foster had sustained $289,576 in damages. The trial court denied defendants' motion for a new trial.

Ankrum appeals. He claims the trial court erred in failing to instruct the jury on the sudden emergency doctrine and Foster's comparative fault. He also claims the trial court erred in failing to grant a new trial because of excessive damages.

***II. Jury Instructions.***

We review the trial court's determinations concerning the aforementioned jury instructions for correction of errors at law. Iowa R. App. P. 4; *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 604 (Iowa 1998). "As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 539 (Iowa 1996). "Parties to lawsuits are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record." *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). "Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion." *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). "Error

in giving or refusing jury instructions does not merit reversal unless it results in prejudice." *Vaughan*, 542 N.W.2d at 539.

**A. Sudden Emergency Doctrine.**

Ankrum and Strutz requested the following sudden emergency instruction:

> Strutz claims that if you find that she violated the law in the operation of the vehicle, she had a legal excuse for doing so because she was confronted with a sudden emergency and, therefore, is not negligent. A sudden emergency is a combination of circumstances that calls for immediate action or a sudden or unexpected occasion for action. A driver of a vehicle who, through no fault of her own, is placed in a sudden emergency, is not chargeable with negligence if the driver exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances.

*See* I Iowa Civ. Jury Instructions 600.75 (1993).

Viewing the evidence in the light most favorable to Ankrum and Strutz,[2] we find the trial court should have instructed the jury on the sudden emergency doctrine. *See Weiss v. Bal*, 501 N.W.2d 478, 481 (Iowa 1993). First, substantial evidence supports the claim Ankrum and Strutz were confronted with a sudden emergency. Sudden emergency has been defined as follows: "(1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; (3) a sudden or unexpected occasion for action, exigency, pressing necessity." *Bangs v. Keifer*, 174 N.W.2d 372, 374 (Iowa 1970). Strutz testified that, as she and Ankrum drove through Jewell, she recognized the Citation full of young men as her friend's car and

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[2] Strutz has not appealed. However, because the jury was instructed Ankrum—as owner of the Cavalier Strutz was driving—was liable for any damages caused by Strutz's negligence, we will discuss Ankrum's claims on appeal in reference to both Ankrum's and Strutz's conduct. *See* Iowa Code § 321.493(1) (1995).

assumed they wanted "to hang out." She further testified that when she and Ankrum stopped at the parking lot the young men "stormed over" to Ankrum's side of the Cavalier and "[t]hey all started yelling." Ankrum likewise testified "[a]ll of the sudden about three to five guys jumped out of the car, and three of them came over to my side" and that they "came up and started swinging at me in the car." One of the young men testified this altercation with Ankrum lasted "[p]robably ten to fifteen seconds" before the Cavalier got put into reverse. Although the trial court found "[t]he circumstances which confronted Ms. Strutz and Mr. Ankrum developed over a period of at least a few minutes," substantial evidence supports the claim Ankrum and Strutz were confronted with unforeseen circumstances necessitating immediate action. *See Papenheim v. Lovell*, 530 N.W.2d 668, 671 (Iowa 1995) ("Evidence is not insubstantial merely because it would have supported contrary inferences.").

Second, substantial evidence supports the claim Ankrum and Strutz did not create the above-discussed emergency by their negligence. A sudden emergency instruction should not be given where a person's "conduct created the emergency [and] the emergency did not create the conduct to be excused." *Weiss*, 501 N.W.2d at 482. Here, however, Strutz assumed the young men in the Citation merely wanted to "hang out." Ankrum testified he had no reason to think the driver of the Citation had a grudge against him and he did not know the young men who were yelling at him and attacking him. At least one of these young men testified they initiated the altercation with Ankrum. Substantial evidence thus supports the claim Ankrum and Strutz were confronted with a sudden emergency through no fault of their own.

Finally, substantial evidence supports the claim Ankrum and Strutz conducted themselves as reasonably careful persons would have in a similar situation: They fled. Foster argues "[r]easonably careful persons do not 'freak,' 'panic,' drive in reverse without looking, disregard pedestrians, and drive with their head in the passenger's lap." In hindsight, if Ankrum and Strutz had had more time to assess the situation or if they had been more calm, perhaps they could have checked their rearview mirrors, made sure the Cavalier was not in reverse before accelerating, and cautiously driven away from the melee at the parking lot. We are not prepared, however, to prescribe as a matter of law the reasonable course of conduct of persons confronted with impending physical violence. We will not, therefore, find as a matter of law that reasonable persons being attacked in a car would not choose—as Ankrum and Strutz chose—to hastily flee for safety without taking the precautions normally required of drivers. This is a task best performed by a jury. Substantial evidence thus supports the submission of a sudden emergency instruction.

In the alternative, Foster argues Ankrum and Strutz were not prejudiced by the trial court's failure to instruct the jury on the sudden emergency doctrine because of the conventional negligence instruction given by the court. This instruction stated, in part, the following: "'Negligence' is doing something a reasonable person would not do under similar circumstances or failing to do something a reasonable person would do under similar circumstances." *See* I Iowa Civ, Jury Instructions 700.2 (1990). "[T]he sudden emergency doctrine is [thus] merely an expression of the reasonably prudent person standard of care." *Weiss*, 501 N.W.2d at 481. However, the supreme court has also indicated a

conventional negligence instruction is not sufficient for all negligence cases. *See id.* Given the unusual circumstances of this case, the jury would have been "aided by a succinct and narrowly drafted instruction that [told] it [Ankrum and Strutz are] held only to the standard of reasonable care under the circumstances posed by the emergency." *See id.* Ankrum and Strutz were prejudiced by the trial court's failure to instruct the jury on the sudden emergency doctrine; the instruction should have been submitted.[3]

**B. Comparative Fault.**

Ankrum and Strutz also sought submission of two specifications of Foster's alleged negligence. Specifically, they requested the following instruction:

> The defendants claim that the plaintiff was at fault in the following particulars:
> a. Negligence
> . . .
> The defendant must prove both of the following propositions:
> 1. The plaintiff was at fault. In order to prove fault, the defendants must prove Valerie Foster was negligent in one or more of the following ways:
> a. In failing to exercise reasonable care for her own safety.
> b. By participating in a joint enterprise.
> 2. The plaintiff's fault was a proximate cause of plaintiff's damages.

*See* I Iowa Civ. Jury Instructions 400.6 (1988).

The trial court correctly refused to instruct the jury Foster may have been negligent "[i]n failing to exercise reasonable care for her own safety." "On

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[3] Because Foster is only pursuing common-law negligence claims, only the sudden emergency instruction—not the additional legal excuse instruction—should be submitted to the jury. *See Weiss*, 501 N.W.2d at 480; *see also* I Iowa Civ. Jury Instructions 600.75, cmt. (1993).

negligence claims not involving *res ipsa loquitur*, our procedure requires that a plaintiff identify the specific acts or omissions relied on to generate a jury issue." *Bigalk v. Bigalk*, 540 N.W.2d 247, 249 (Iowa 1995). "Each specification should identify either a certain thing the allegedly negligent party did which that party should not have done, or a certain thing that party omitted that should have been done, under the legal theory of negligence that is applicable." *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 151 (Iowa 1992). Ankrum and Strutz's requested specification merely refers to Foster's alleged failure to "exercise reasonable care." The specification thus would not have adequately advised the jury on how Foster should or should not have acted given the particular circumstances at the parking lot in Jewell. Submitting such a specification would have been an error.

The trial court also correctly refused to instruct the jury Foster may have been negligent "[b]y participating in a joint enterprise." Ankrum and Strutz's requested instruction defining "joint enterprise" states the following:

> A joint enterprise is the pursuit of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request or who lend aid or encouragement to the wrongdoer or ratify and adopt the wrongdoer's act. Such persons involved are equally liable.

Ankrum has not identified any Iowa cases consistent with the particular joint enterprise theory articulated in this instruction. In any event, the theory is not supported by substantial evidence. *See Sonnek*, 522 N.W.2d at 47. Foster was, at best, a willing spectator of the altercation between the young men from the Citation and Ankrum. There is no evidence she participated in the altercation, goaded the young men on in any way, or even had any hard feelings against

Ankrum. Submitting the joint enterprise instruction and specification would also have been an error.

***III. Damages.***

Ankrum claims the damages awarded Foster were excessive. "An award that is flagrantly excessive or unsupported by the evidence may be set aside or altered on appeal." *DeBurkarte v. Louvar*, 393 N.W.2d 131, 139 (Iowa 1986). Foster sustained horrific injuries that left her permanently disabled. Ample evidence supports an award of roughly $290,000. Nothing in the record suggests the jury failed to follow the trial court's instructions to them when they calculated this award. Ankrum's claim is without merit.

***IV. Disposition.***

The trial court properly refused to instruct the jury on Foster's comparative fault. However, it should have instructed the jury on the sudden emergency doctrine. Accordingly, we reverse and remand for a new trial of the liability issues. Damages shall not be retried. *See Powell v. Khodari-Intergreen Co.*, 334 N.W.2d 127, 132 (Iowa 1983) ("When the error in the trial court affects only some of the issues, a new trial may properly be limited to those issues.").

**REVERSED AND REMANDED.**

Hecht, J., concurs; Vaitheswaran, J., concurs in part and dissents in part.

**VAITHESWARAN, J.** (concurring in part and dissenting in part)

I respectfully concur in part and dissent in part. I disagree with the majority's conclusion that the district court should have instructed the jury on the doctrine of sudden emergency. Although our highest court has not disavowed the doctrine as other courts have done, it has acknowledged the doctrine may "unduly emphasize" a single aspect of an ordinary negligence case and may permit a jury "to excuse an actor's conduct when the situation confronting the actor is not uncommon but foreseeable." *Weiss v. Bal*, 501 N.W.2d 478, 481 (Iowa 1993). I believe application of the doctrine to the facts before us raises this concern. When Ankrum and Strutz entered the parking the lot, they knew other young people were there. They also knew the positions of the other cars in relation to theirs and were aware that not all the people were inside their respective vehicles. Under these circumstances, I would conclude Strutz did not exercise reasonable care when she sped backward without first checking her rear view mirror. In *Weiss*, the court was also faced with a parking lot accident. The court stated:

> We are convinced the collision resulted from one or more of the fault concepts alleged—lack of control, excessive speed, failure on the part of the driver or pedestrian to watch out for the other—not from an emergency independent of this conduct. In other words, the conduct created the emergency; the emergency did not create conduct to be excused.

*Id.* at 482. I believe this reasoning applies with equal force here. Accordingly, I would affirm the district court's refusal to instruct the jury on the sudden emergency doctrine.