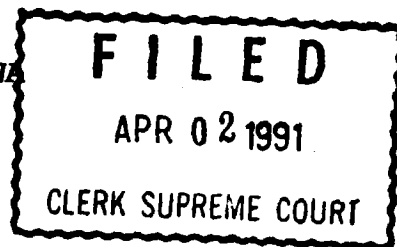


IN THE COURT OF APPEALS OF IOWA

No. 1-29 / 90-837



BERNICE McCOY and HAROLD C. McCOY, Husband and Wife,

Appellants,

vs.

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LAVERN EARL LEWIG and D & L COMPANY, INC.,

Appellees.

Appeal from the Iowa District Court for Bremer County,
Jack W. Frye, Judge.

Plaintiffs challenge the submission of a jury instruction on the sudden emergency doctrine. **REVERSED AND REMANDED.**

Gary J. Boveia of Boveia Law Office, Waverly, for appellants.

Samuel C. Anderson and Stephen J. Powell of Swisher & Cohrt, Waterloo, for appellees.

Heard by Oxberger, C.J., Schlegel and Habhab, JJ.

OXBERGER, C.J.

On September 25, 1987, Lavern Lewig was driving a van owned by D & L Company, Inc. and following Bernice and Harold McCoy in their automobile. Bernice was driving the McCoy vehicle which was following a semi-tractor trailer which in turn was following another automobile. The vehicles were all traveling at approximately 55 miles per hour, maintaining a steady speed and distance between each other.

As the line of traffic approached a hill with a marked no passing zone, a blue sports car came up behind Lewig's van. The sports car then proceeded to pass the vehicles in the no passing zone. The sports car successfully executed the maneuver, but both Mrs. McCoy and Lewig were frightened by the potentially dangerous move.

While the car passed him, Lewig took his foot off the gas and momentarily watched it. Mrs. McCoy braked her car which swerved toward the center line. Lewig looked up, saw her swerve, and then turned his van to the right as he braked. The McCoy car then moved back to the right and Lewig's van struck the car in the rear.

The investigating officer issued a traffic citation to Lewig for following too closely. Lewig pled guilty and paid the \$37.00 fine. At trial, Lewig testified he pled guilty because he felt it would be less costly than contesting the ticket.

The McCoy's then instituted this action against the defendants alleging several counts of negligence. The trial court, over the plaintiff's objection, submitted an instruction to the jury on the sudden emergency doctrine. The jury found for the defendants. The plaintiffs then moved for a new trial. The trial court denied the motion and the plaintiffs appealed.

The plaintiffs advocate abolition of the sudden emergency doctrine in light of the adoption of comparative fault. They argue the sudden emergency doctrine is inappropriate in ordinary automobile accident cases because it tends to be argumentative, unnecessary, confusing and over-emphasizes unfairly a portion of the evidence. Additionally, the plaintiffs contend the instruction gives juries the impression a driver is excused from the ordinary standard of care when an emergency exists.

Additionally, the plaintiffs contend that the facts presented at trial did not provide a basis for submission of an instruction on the sudden emergency doctrine. The plaintiffs argue Lewig was faced with a situation which drivers routinely encounter and therefore the sudden emergency doctrine did not apply.

We review this matter for correction of errors at law. Iowa R. App. P. 4. Findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

To give a proposed instruction, the theory or cause must have been pleaded or properly litigated. Gunnison v. Torrey, 216 N.W.2d 361, 364 (Iowa 1974). The evidence must be sufficient to warrant submission to the jury. Id. The trial court must give the evidence the most favorable construction it will reasonably bear in favor of the party urging submission. Id.

All issues which are pled and for which there is substantial support in the evidence must be submitted. It is error not to do so, just as it is error to submit those which do not conform to both these conditions.

Seaway Candy, Inc. v. Cedar Rapids YMCA, 283 N.W.2d 315, 316 (Iowa 1979) (citing Mora v. Savereid, 222 N.W.2d 417, 419 (Iowa 1974)).

It is the trial court's duty to instruct with reasonable fullness on the pleaded issues which have evidentiary support. A mere abstract definition of the law having no application to the facts is insufficient. The giving of instructions which are conflicting and confusing is reversible error.

Hartwig v. Olson, 158 N.W.2d 81, 88 (Iowa 1968).

Jury Instructions are considered as a whole. McCracken v. Edward D. Jones & Company, 445 N.W.2d 375, 382 (Iowa App. 1989)(citation omitted). The trial court may phrase instructions in its own words so long as the instructions fully and fairly inform the jury of the issues and applicable law. Id.

The elements of the sudden emergency doctrine are:
(1) the driver is confronted with a sudden emergency,

(2) the emergency was not created by the driver's own negligence, (3) the driver conducted himself or herself as a reasonable person in a similar emergency. Miller v. Eichhorn, 426 N.W.2d 641, 644 (Iowa App. 1988)(citing Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986)). Iowa has retained the sudden emergency doctrine even with the adoption of comparative fault. Id. (authority omitted).

In Jones v. Blair, 387 N.W.2d at 352, the court described the sudden emergency doctrine as reflecting

the realization that a person who is confronted with an emergency situation is "left no time for thought, or is reasonably so disturbed or excited, that he cannot weigh alternative courses of action, and must make a speedy decision, based largely upon impulse or guess." W. Prosser, The Law of Torts, §33 at 169 (4th ed. 1971). Thus, the person is not held to the same standard of care as one who has had time to reflect before acting.

This court cannot abrogate the sudden emergency doctrine after our supreme court has specifically retained it following the adoption of comparative fault. However, we agree with the plaintiffs that the factual situation of this case did not support the submission to the jury of the instruction on the doctrine.

The facts of the case, reviewed in the light most favorable to Lewig, fail to show he was confronted with a sudden emergency not of his own making. His prior conduct in following too closely, combined with his failure to apply his brakes when he realized the sports car intended to pass at least some of the cars ahead of him, created the

potential for a collision. Had Lewig been further back, he could have stopped to avoid the collision. Drivers are often confronted with a situation where a vehicle attempts to inappropriately pass other vehicles. Lewig should have anticipated Bernice McCoy would slow down to permit the passing vehicle to cut in front of her to avoid an oncoming vehicle. The swerving movement of the McCoy vehicle did not cause the accident. If the McCoy vehicle had remained in the same line of travel, Lewig would still have hit her because he was too close.

Because we find the sudden emergency doctrine does not apply to factual situation of this case, we reverse the judgment and remand for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

Schlegel, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. Since I believe there is substantial evidence to support submission to the jury defendant's affirmative defense of legal excuse, I would affirm the trial court.

Ordinarily, statutory rules of the road constitute negligence per se absent a legal excuse. Kifling v. Thierman, 214 Iowa 911, 915, 243 N.W. 552, 554 (1932). There are four categories of legal excuse, one of which is when a person "is confronted by an emergency not of his own making, and by reason thereof he fails to obey the statute." Id. at 916, 243 N.W. at 554.

It is stated that: "The doctrine of sudden emergency reflects the realization that a person who is confronted with an emergency situation is 'left no time for thought, or is reasonably so disturbed or excited, that he cannot weigh alternative courses of action, and must make a speedy decision, based largely upon impulse or guess.'" Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986), citing with approval W. Prosser, Law of Torts § 33 at 169 (4th ed. 1971).

Ordinarily, whether one is establishing legal excuse is a question for the jury. Jones v. Blair, 387 N.W.2d at 352. In determining whether the issue of legal excuse was properly submitted, we should construe the evidence in the light most favorable to the one asserting the defense. Id. The person who is attempting to assert the defense has

the burden of proving that he or she was legally excused by virtue of the emergency. Id.

When I consider the evidence in the light most favorable to the defendant, I find that sudden emergency was properly submitted. In addition, when I view the evidence in the light most favorable to the defendant, I conclude there was substantial evidence from which the jury could have found the defendant's violation of certain rules of the road were excused by creation of an emergency not of his own making.

The majority has correctly set forth the elements of sudden emergency. I believe there is substantial evidence as it relates to each of those elements. I do not necessarily disagree with some of the comments made by the majority as it relates to those elements, but I am convinced there is sufficient evidence in opposition thereto to generate a fact question for the jury's determination. I would affirm.

As an aside, I note that this is not a comparative fault case. The defendant neither pleaded nor attempted to prove fault. Because the plaintiff was not alleged to be at fault, the common law, rather than statutory comparative fault law, governs her action. The doctrine of legal excuse has been considered and applied by our courts many times. Bangs v. Keifer, 174 N.W.2d 372, 374 (Iowa 1970). Thus, under the common law concept and previous holdings of our supreme court, if there is substantial evidence to

support the doctrine, then it should be submitted to the jury.

As I pointed out, the common law rather than statutory comparative fault law governs this action. Thus, I would pass the question as to whether the sudden emergency doctrine has been or should be abolished in light of the adoption of comparative fault. I have reviewed the cases cited by the majority, and I am not yet convinced that either the supreme court or this court has ruled squarely on this issue. I recognize that in Miller v. Eichhorn, we stated that "Iowa has continued to authorize the instruction [sudden emergency] after the adoption of comparative fault." Miller v. Eichhorn, 426 N.W.2d 641, 644 (Iowa App. 1988). We cited Jones v. Blair and Johnson v. Junkmann, 395 N.W.2d 862 (Iowa 1986), as supporting this proposition. It is true that in the Johnson and Jones cases, sudden emergency was discussed. However, I am unable to tell from the two decisions whether the abolishment of sudden emergency was raised as an issue in view of the comparative fault act.

In view of the above, I would affirm the trial court. Since relief is sought under common law, I would pass the question as to whether sudden emergency in Iowa is yet a viable doctrine in view of the comparative fault act.