

IN THE COURT OF APPEALS OF IOWA

No. 9-617 / 89-542

FILED

FEB 22 1990

CLERK SUPREME COURT

MARGARET FREDERICK,

Appellant,

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vs.

**KEVIN R. CARLSON; F & W SYSTEMS COMPANY, INC.; and
ESTHER M. MILLER**

Appellees.

Appeal from the Iowa District Court for Polk County,
Theodore H. Miller, Judge.

In this negligence suit arising from a traffic accident, the jury returned a verdict in favor of the defendants. Plaintiff has appealed from the resulting judgment and contends the district court erred in its instruction on the doctrine of legal excuse due to sudden emergency. **AFFIRMED.**

Robert A. Nading II, Ankeny, for the appellant.

Gale Juhl and William Werger of Moraine, Burlingame, Pugh, Juhl & Peyton, West Des Moines, for the appellee Miller.

Douglas A. Haag of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for the appellees Carlson and F & W Systems.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

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Margaret Frederick was a passenger in a car driven by Esther Miller. While driving on Interstate 35, Miller encountered a severe dust storm which greatly obscured her vision. She slowed nearly to a stop, and her car was then struck from the rear by another car. Passenger Margaret Frederick was injured in the collision.

Frederick later filed the present negligence action against Miller and against the driver (Carlson) and owner (F & W Systems) of the other car. Her action specified five allegations of negligence against the defendants. A jury returned a verdict for the defendants, and Frederick has appealed from the resulting judgment.

Frederick contends the district court erred in its instruction on the doctrine of legal excuse due to sudden emergency. Frederick contends the district court erred by giving only an abstract definition of the doctrine without indicating to which specifications of negligence the defense would apply and by failing to specify what factual circumstances supported the defense. Our review is for the correction of errors at law. Iowa R. App. P. 4.

Legal excuse is a doctrine which allows a person to avoid the consequences of a particular act or type of conduct which would otherwise be considered negligent by showing a justification for it. Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986); City of Cedar Rapids v. Moses, 223

N.W.2d 263, 268-69 (Iowa 1974). Our supreme court has recognized four categories of legal excuse, see City of Cedar Rapids, 223 N.W.2d at 269, one of which encompasses an individual confronted by an emergency.

An "emergency" requires an unforeseen combination of circumstances, Bannon v. Pfiffner, 333 N.W.2d 464, 470 (Iowa 1983), which call for immediate action. Bangs v. Keifer, 174 N.W.2d 372, 374 (Iowa 1970). To establish the defense of sudden emergency, a defendant must establish: (1) an emergency existed; (2) the emergency was not directly or indirectly his fault; and (3) in response to the emergency, the defendant acted as a reasonably prudent person would have acted under similar circumstances. Johnson v. Junkmann, 395 N.W.2d 862, 865 (Iowa 1986); Miller v. Eichhorn, 426 N.W.2d 641, 644 (Iowa App. 1988). It has been recognized that the sudden emergency doctrine is a reiteration of the reasonable person standard. Miller, 426 N.W.2d at 645.

Our supreme court has specified three concerns which must be addressed when instructing a jury on the defense of legal excuse. An instruction must set forth only those bases of legal excuse which are supported by the evidence; it must indicate to which specifications of negligence it applies; and it must specify what factual circumstances support a claim of sudden emergency. Jones, 387 N.W.2d at 353-54.

Plaintiff claims the trial court's instruction was defective with regard to the latter two requirements set out in Jones. In Jones, the plaintiff alleged seven specifications of negligence against the defendant, but the jury instructions did not indicate as to which of the seven the defense of sudden emergency could apply. A review of instruction number twenty-six reveals the trial court judge in this case instructed the jury the defense of sudden emergency was applicable to all of the specifications of negligence made against the defendants:

You should consider separately whether either or both of the Defendants are excused from negligence, if any, as applies to all the specifications of negligence. (Emphasis added.)

No error occurred with respect to instructing the jury as to which specifications of negligence the defense of sudden emergency could apply.

Plaintiff also claims the instruction failed to specify what factual circumstances supported the claimed sudden emergency defense. She questions what emergency defendant Carlson claimed as a legal excuse--Ms. Miller's stopped vehicle or the blowing dust? An examination of instruction twenty-six reveals the trial court did specify the factual basis upon which the defense of sudden emergency was based.

Defendants Kevin Carlson, F & W Systems and Esther Miller claim a legal excuse because a windstorm caused a severe blowing of dirt which, in turn, obstructed the vision of Kevin Carlson and Esther Miller.

Unlike the instruction in Jones, which merely set forth

the abstract definition of legal excuse, instruction twenty-six specified the factual circumstances upon which defendants' sudden emergency defense was predicated. We find no error with regard to this aspect of the instruction.

Plaintiff argues if defendant Carlson could have slowed his rate of speed or stopped his car in order to avoid the collision, his negligence should not be excused. We note that her concerns are encompassed within the sudden emergency instruction given to the jury. The jury was instructed that defendants had the burden to prove the existence of an emergency and to prove they conducted themselves as ordinary careful people would when suddenly placed in a similar position. If the defendants' conduct was not reasonable under the circumstances, the jury would have been foreclosed from applying the defense of sudden emergency. Whether one has established the defense is a question for the jury. Jones, 387 N.W.2d at 352.

Plaintiff argues the jury should have been instructed defendant Carlson had to establish by a preponderance of the evidence that a reasonable person could not have stopped or slowed his vehicle to a reasonable speed or kept a proper lookout. Instruction twenty-six required defendant Carlson to prove the existence of a sudden emergency and that his conduct was that of an ordinary careful person in a similar position. Implicit within this

instruction was the burden upon defendant Carlson to prove that under the circumstances a reasonable person could not have avoided the collision. No further instruction like that suggested by plaintiff was necessary. See generally Bangs, 174 N.W.2d at 375 (sudden emergency defense is subject to reasonably-prudent person test and defendant is not required to prove he could have done nothing "practicable" to have avoided the accident).

Finally, plaintiff's brief suggests the sudden emergency defense was not applicable to the failure to keep a proper lookout or the failure to drive at a speed which enables one to stop at an assured clear distance. Plaintiff cites no authority for this position and offers no persuasive reasons for adoption of such a position. If this argument is really a disguised attack on the sufficiency of the evidence to sustain a jury's finding of a sudden emergency, then it should be characterized as such and properly raised on appeal.

AFFIRMED.