FILED
DEC 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BUEL LIMING,

Plaintiff-Appellant,

vs.

LAWRENCE DEAN BURKIN and CORNIE VAN DEN BAARD,

Defendants-Appellees.

Filed December 30, 1981

1-305
2-66018

Appeal from Marion District Court - Robert O. Frederick, Judge.

Plaintiff in this negligence action arising out of a traffic accident appeals from a judgment for defendants. Plaintiff asserts the trial court's instruction on the doctrine of sudden emergency should have included a qualification that a sudden emergency could excuse violation of a common law duty, but could not excuse violation of a statutory duty. AFFIRMED.

David S. Wiggins of Williams & LaMarca, Des Moines, for plaintiff-appellant.

Harry Perkins III of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Plaintiff in this negligence action arising out of a traffic accident appeals from a judgment for defendants. Plaintiff asserts the trial court's instruction on the doctrine of sudden emergency should have included a qualification that a sudden emergency could excuse violation of a common law duty, but could not excuse violation of a statutory duty. Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. We affirm.

I.

Plaintiff was struck by defendants' car while jogging on a county road. Defendant Burkin, the driver, testified that when he crested a hill plaintiff was jogging a short distance away in the same lane, and an oncoming car was in the other lane. As soon as the other car passed, Burkin moved into the other lane to avoid plaintiff. Unfortunately, plaintiff took the same action and the accident resulted.

At the close of the trial the court instructed the jury on several theories of liability. One theory was premised on a common law duty while the others were premised on various statutory rules allegedly violated by Burkin. The trial court also gave separate instructions on both legal excuse and sudden emergency, which are set out below.

INSTRUCTION NO. 16

> The defendants claim that if it is found that he violated a statute in the operation of his motor vehicle, that he had a legal excuse for doing so and was, therefore, not negligent. The plaintiff also claims that if he violated a statute in his actions as a pedestrian, that he had a legal excuse for doing so and was, therefore, not negligent.
>
> You are instructed that the burden of proof is upon the party so claiming the legal excuse to establish it by a preponderance of the evidence.
>
> By the term "legal excuse" is meant:
>
> 1. Anything that would make it impossible to comply with the statute.
>
> 2. Anything over which either party had no control which places that party in a position contrary to the provisions of the statute.
>
> 3. When either party is confronted with an emergency not of his own making, and by reason thereof he fails to obey the statute.
>
> If you find that either the defendants or plaintiff has violated a statute as submitted to you in these

> instructions and further find that either the defendants or plaintiff has established a legal excuse for doing so under any one of the three definitions given to you in this instruction, then you should find either the defendants or plaintiff not negligent or [sic] violating the particular statute involved.

INSTRUCTION NO. 17

> When one is confronted with a sudden emergency, not brought about by his own fault, and because thereof is required to act upon the impulse of the moment without sufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as would be required of him if he had time for deliberation. Under such circumstances he is required to act only as an ordinarily careful, and prudent person would act when suddenly placed in a similar position, and if he so acts he would not be negligent.

The jury returned a verdict for defendants and plaintiff appeals from the resulting judgment.

II.

Plaintiff contends the trial court erred by refusing plaintiff's request for an instruction to the effect that a sudden emergency could excuse breaches of common law duties, but not breaches of statutory duties. Plaintiff claims that this error allowed the jury to apply the doctrine of sudden emergency to the alleged statutory violations and thus placed a lesser burden on the defendant, to the prejudice of plaintiff. We disagree.

The doctrine of legal excuse was first applied to the effect of noncompliance with a statute on proof of negligence in Kisling v. Thierman, 214 Iowa 911, 915-16, 243 N.W. 552, 554 (1932), where it was held:

> . . . a court is warranted in saying to the jury that if the defendant failed to observe the standard of care thus fixed by statute, he is guilty of negligence, unless he has shown a legal excuse for failure to observe the requirements of the statue or ordinance, and in case he has shown such legal excuse, he is not guilty of negligence. By the term "legal excuse" is meant:
>
> 1. Anything that would make it impossible to comply with the statute or ordinance.
>
> 2. Anything over which the driver has not control which places his car in a position contrary to the provisions of the statue or ordinance.
>
> 3. Where the driver of the car is confronted by an emergency not of his own making, and by reason thereof he fails to obey the statute.

Instruction 16 modifies the Kisling definition of legal excuse so that it is applicable to both the plaintiff and the defendants in this case. Legal excuse number three, as defined in Kisling, clearly incorporates the common law doctrine of sudden

emergency in its definition of when a person will be absolved from negligence premised upon violation of a statute. Helmick, Effect of Statutory Violations in Automobile Negligence Actions in Iowa, 8 Drake L. Rev. 110, 121 (1959).

We hold as a matter of law that if any legal excuse was available to either party in this case, it was the Kisling legal excuse number 3 as modified in instruction 16. Since this legal excuse was the only excuse that could be correctly applied to the facts of this case, and since it was directly derived from the common law doctrine of sudden emergency, it did not place a lesser burden of proof on the defendant. We find it was not error for the trial court to refuse plaintiff's requested instruction.

AFFIRMED.