IN THE COURT OF APPEALS OF IOWA

No. 8-133 / 97-110

ROBIN WARD, Individually and as Next Friend of JEREMIAH WARD, JACOB WARD, JENNIFER LOGAN, and JAMIE LOGAN, Minor Children,

Plaintiff-Appellant,

vs.

DENNIS LAVERN WARD, LINDA G. DRAGOTTO and PHIL DRAGOTTO,

Defendants-Appellees.

FILED
JUN 24 1998

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

The plaintiff appeals an adverse jury verdict on her negligence claim against the defendants for injuries sustained in an automobile accident. **AFFIRMED.**

Richard O. McConville of Coppola, Sandre & McConville, Des Moines, for appellant.

Roy M. Irish of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P., Des Moines, for appellees.

Heard by Cady, C.J., and Huitink, and Vogel, JJ.

CADY, C.J.

Robin Ward appeals an adverse jury verdict on her negligence claim for injuries sustained in an automobile accident. She claims the district court erred by submitting a jury instruction on sudden emergency and admitting opinion testimony regarding fault. We affirm the district court.

The facts giving rise to this case unfolded as Robin and Dennis Ward took their five-year old son, Jeremiah, to see a doctor in Iowa City on February 22, 1994. Jeremiah was in a full body cast following an earlier surgery. Because of Jeremiah's condition, Dennis borrowed a suburban vehicle from Phil and Linda Dragotto to transport him. Dennis and Robin were in the process of a divorce at the time of the incident.

Dennis was driving the vehicle as they left Des Moines. The roads were wet and snow was beginning to fall. As Dennis drove east, it continued to sleet and snow. As the vehicle approached Baxter, several heavy gusts of wind occurred. Near the Baxter exit, the vehicle slid out of control down the embankment and rolled over. Dennis estimated he was traveling at approximately fifty miles per hour at the time of the accident. He believed he encountered a patch of ice, which caused the vehicle to slide. He had not previously encountered ice, although he had reduced his speed due to the weather conditions.

As a result of the accident, Jeremiah received a laceration to his scalp. Robin suffered a broken ankle and bruising. Robin was hospitalized for approximately one week, and Jeremiah was also hospitalized after his cut became infected.

Robin subsequently filed a negligence action against Dennis. Following a jury trial, the jury determined a verdict in favor of Dennis. On appeal Robin maintains the district court erred by: (1) submitting a jury instruction on sudden emergency; and (2) admitting opinion testimony regarding fault.

I. Sudden Emergency

Our review is for correction of errors at law. Iowa R. App. P. 4. Jury instructions are designed to explain the applicable law to jurors so the law may be applied to the facts proven at trial. *See Mosell v. Estate of Marks*, 526 N.W.2d 179, 182 (Iowa App. 1994). Submission of legal issues to the jury that lack support in the evidence is error. *Id.* Conversely, failure to submit issues supported by substantial evidence is error. *Id.* In determining whether the issue of legal excuse was properly submitted to the jury, we construe the evidence in a light most favorable to the party asserting the defense. *See Jones v. Blair*, 387 N.W.2d 349, 352 (Iowa 1986).

A sudden emergency occurs when there exists:

> (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.

Weiss v. Bal, 501 N.W.2d 478, 481 (Iowa 1993). A defendant's failure to obey statutory law when confronted with an emergency not of his or her own making is permitted by the doctrine of legal excuse. *Id.* at 480. When icy weather occurs, we have identified two main situations in the context of sudden emergency:

> In one situation the icy condition is general, and the driver must be taken as being aware of it. If such a driver proceeds in normal fashion notwithstanding the ice and eventually slides on a patch of it, he cannot set up the icy condition as an "emergency." An emergency requires "an unforseen combination of circumstances" but the element of unforeseeability is missing.
>
> In the other situation, although the weather may be inclement, ice has not formed so far as the driver reasonably observes. He proceeds in accordance with conditions as they appear. Suddenly he encounters an unanticipated patch of ice and slides. Normally in this situation the driver may rightly claim that the decision on whether the ice was reasonably foreseeable is for the jury to make.

Bannon v. Pfiffner, 333 N.W.2d 464, 469-70 (Iowa 1983) (citations omitted); *see also Jones,* 387 N.W.2d at 352 (where defendant driver was faced with the unexpected maneuver of plaintiffs' car in turning to the right and then making a left turn off the highway, coupled with the icy conditions, submission of sudden emergency doctrine instruction was proper).

Robin claims the district court erred by submitting the sudden emergency instruction to the jury. Specifically, she maintains the facts of this case fall under the "general icy condition" described in *Bannon* and therefore cannot be considered a

sudden emergency. She asserts Dennis' conduct created the emergency, rather than the road conditions.

In viewing the evidence in the light most favorable to Dennis, we conclude substantial evidence existed from which a jury could have found the accident was excused by an emergency not of his own making. Although it was snowing, Dennis had not encountered any ice or high winds until moments before the accident. We cannot find as a matter of law that the sudden emergency doctrine did not apply. As described in the second type of icy condition in *Bannon*, there was evidence that Dennis had only moments to react to unanticipated surface conditions. Accordingly, we affirm the district court.

II. Opinion Testimony

We review evidentiary rulings for an abuse of discretion. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997). A trial court is generally granted a broad range of discretion in determining the admissibility of evidence. *Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 166 (Iowa App. 1996). We reverse for an abuse of discretion only when such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *McHose v. Physician & Clinic Services, Inc.*, 548 N.W.2d 158, 161 (Iowa App. 1996).

Iowa is committed to a liberal rule that allows opinion testimony if it will aid the jury and is based on special training, experience, or knowledge with respect to the issue in question. *See Hyler v. Garner*, 548 N.W.2d 864, 868 (Iowa 1996). Further,

a witness' ability to testify as an expert is determined in reference to the topic under examination, and the witness must be qualified to answer the particular question propounded. *Id.*

In general, an expert witness is not permitted to state a legal conclusion. *Terrell v. Reinecker*, 482 N.W.2d 428, 430 (Iowa 1992). This rule is modified somewhat if a legal issue is raised in such a way as to become a necessary operative fact. When the legal conclusion is a rule of decision to be applied by the judge or jury in deciding the case, however, it is not a proper subject for expert testimony. *Id.*

Deputy Sheriff Jack Espy was the first law enforcement officer to arrive at the scene of the accident and to conduct an investigation. He later gave testimony regarding the incident in a deposition. The following exchange occurred between Robin's attorney and Deputy Espy during cross examination:

> Q [counsel]: Without knowing how fast he was going, sir, how can you state an opinion that he wasn't driving too fast for the circumstances?
> A [Espy]: The distance he went after he hit the shoulder of the road.

Counsel for Robin objected to prior opinion testimony given by Espy in the deposition indicating he did not believe Dennis was at fault. The trial court excluded this testimony from evidence. However, the trial court determined Espy's answer to the disputed cross examination was not an opinion, but an observation of the distance the vehicle was off the roadway, and, accordingly, allowed the testimony into evidence at trial.

Robin maintains the trial court erroneously allowed the cross-examination testimony. She asserts the question and answer allowed the jury to hear Espy's opinion that Dennis was not driving at an unreasonable speed, thus allowing the jury to infer Dennis was not at fault.

In this case, the question and answer, when taken together, reach a legal conclusion that Dennis was not driving too fast for the circumstances. *Compare Bornn v. Madagan,* 414 N.W.2d 646, 649 (Iowa App. 1987) (expert opinion regarding time and distance in an automobile accident was a proper subject of expert testimony); *with Terrell v. Reinecker,* 482 N.W.2d 428, 430 (Iowa 1992) (witness' statement that a party had failed to yield the right-of-way was a legal conclusion and inadmissible). While the answer alone reveals Espy's observations concerning distance, the question and answer must be considered together.

Although the testimony should not have been admitted, Robin suffered no prejudice from its admission. Taking into consideration the context of the statement with the other testimony, we conclude no prejudice resulted from the admission of the question and answer.

We have considered all of Robin's claims and affirm the district court.

AFFIRMED.