FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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BETTY BANNON, as Administrator of the Estate of **GAIL A. WARD**,

Plaintiff-Appellant,

vs.

FRANCIS X. PFIFFNER, Executor of the Estate of **ANN FRANCES PFIFFNER**,

Defendant-Appellee.

Filed November 29, 1982

2-316
2-67903

Appeal from Buchanan District Court - T. H. Nelson, Judge.

Plaintiff appeals from judgment entered on a jury verdict for defendant in this wrongful death action arising from an automobile accident, claiming the trial court erred: 1) in instructing the jury on the doctrine of sudden emergency by which it could find that defendant's decedent's violation of the rules of the road was legally excused due to slippery road conditions which allegedly caused the accident, and 2) in failing to sustain her motion for a directed verdict. REVERSED AND REMANDED.

Donald R. Breitbach and Randal J. Nigg of Reynolds, Kenline, Breitbach, McCarthy, Clemens, McKay & Nigg, Dubuque, Iowa, for plaintiff-appellant.

Michael J. Coyle of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, Iowa, for defendant-appellee.

Heard en banc.

Plaintiff, Betty Bannon, appeals from judgment entered on a jury verdict for defendant, Francis X. Pfiffner, in this wrongful death action arising from an automobile accident. Plaintiff claims the trial court erred in instructing the jury on the doctrine of sudden emergency by which it could find that defendant's decedent's violation of the rules of the road was legally excused by slippery road conditions which allegedly caused the accident. Plaintiff also claims error in trial court's denial of her motion for a directed verdict. Since this action was tried at law, our review is on assigned errors. Iowa R. App. P. 4. We reverse and remand.

Plaintiff, administrator of the estate of her decedent, Gail A. Ward, filed this action on September 4, 1980. In her petition, she alleged that on January 4, 1980, her decedent was driving west on Highway 20 in Black Hawk County when the eastbound car driven by defendant's decedent, Ann Frances Pfiffner, crossed the center line, causing the collision resulting in their deaths. Plaintiff alleged that the accident was proximately caused by the negligence of defendant's decedent in failing to have proper control of her vehicle, traveling too fast for the conditions existing at the time (the road was covered with sleet and freezing rain which had been falling that day), and in other particulars.

Jury trial was held on October 6, 1981. The deposition testimony of John Keefe, the Black Hawk County deputy sheriff who investigated the accident, was read into the record. According to that testimony, the accident occurred at approximately 5:00 p.m. By that time Highway 20 was ice-covered; in fact, he testified that the road was "completely iced up" at 4:30 p.m. that day and that the traction was very poor. Jeffrey Cross, who was a witness to the accident, testified that it was overcast and becoming dark, and that light snow mixed with freezing rain was falling before and at the time of the accident. He also stated that the traffic was fairly heavy at that time. Cross also testified that he was driving behind defendant's decedent's car which in turn was following a van.

Immediately before the accident, the van drove off the highway onto the shoulder and then got back on the road. This happened two or three times. After the van returned to the road the last time, Cross saw defendant's decedent's brakelights go on, at which point her car crossed the center line and collided with the car driven by plaintiff's decedent. This sequence of events was largely confirmed by another witness, Leonard Cameron, who was driving behind Cross. Although Cameron did not see defendant's decedent's brakelights go on, he did testify that the immediate area where the accident occurred was much more slippery than the rest of the road. This contrasted with Deputy Keefe's testimony which indicated that all of Highway 20 in that area was ice covered and that he did not notice any major difference in the degree of slipperiness. Cameron, however, did testify that the weather conditions had worsened around 4:00 p.m., approximately one hour before the accident.

At the close of trial, plaintiff made a motion for directed verdict, alleging that the record indicated that defendant's decedent was negligent as a matter of law and that the only issue for jury determination was the amount of damages. This motion was overruled. Plaintiff objected to Jury Instruction 13A which submitted the issue of legal excuse to the jury in these terms:

> Defendant claims that, if it is found Defendant's decedent violated the law by failing to have her vehicle under control or failing to drive to the right of the center line, then the unexpected slipperiness of the highway surface created a sudden emergency which constituted a legal excuse for any such violation.
>
> You are instructed that the burden of proof is upon Defendant to establish the claim of legal excuse by the greater weight of the evidence. As applied to this case, the term "legal excuse" means any condition not of the driver's own making, which could not reasonably be anticipated and which caused the driver to violate the law.
>
> If you find that Defendant has established by the greater weight of the evidence that there was a

> slippery condition on the surface of the highway which could not reasonably have been anticipated in the exercise of ordinary care, and if you shall further determine that Defendant has established by the greater weight of the evidence that such condition created a sudden emergency which alone caused the driver of Defendant's car to so violate the law, then Defendant is excused from any such violation that you may have found.
>
> However, if you find that Defendant has failed to so establish (1) that an unusually slippery condition existed on highway [sic]; (2) that such condition could not reasonably have been anticipated in the exercise of ordinary care; and (3) that such condition was the sole cause of the driver losing control of her vehicle or her traveling to the left of the center line of the road, then Defendant shall have failed to establish a legal excuse for any such violation of the law that you may have found.

This objection too was overruled. After the jury returned a verdict for defendant, plaintiff filed unsuccessful motions for judgment notwithstanding the verdict, alleging that his earlier motion for directed verdict should have been sustained, and for a new trial on the issue of damages. This appeal followed.

Plaintiff presents one contention: the trial court erred in instructing the jury on sudden emergency and legal excuse; plaintiff was therefore entitled to a directed verdict on the issue of liability. "An emergency has been variously defined as (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." Young v. Hendricks, 226 Iowa 211, 215, 283 N.W. 895, 898 (1939). The following language is found in Boge v. Jack Link Truck Line, Inc., 200 N.W.2d 544, 548 (Iowa 1972):

> The relevant sudden emergency rule is well stated in an annotation at 80 A.L.R.2d 5, 43:
>
> > That a motorist is placed in a situation of peril by suddenly and unexpectedly coming upon or encountering * * * a slippery place in the road or pavement may warrant or require the giving of an instruction on the emergency rule.

> Where the peril from slipperiness is not sudden and unexpected, the doctrine is unavailable.

We agree with plaintiff that the slipperiness which caused the accident in this case cannot be considered to have been "sudden or unexpected." It is uncontroverted that, for at least an hour before the accident occurred, freezing rain and sleet had been falling, making the roads very icy and slippery. Defendant's decedent, therefore, must be charged with knowledge of the condition of the roads and consequently was "responsible for the control of [her] car while driving on the ice and was required to use care commensurate with the dangerous condition of the highway." Young, 226 Iowa at 216, 283 N.W. at 898. See also Brown v. Guiter, 256 Iowa 671, 678, 128 N.W.2d 896, 901 (1964).

We are not convinced by defendant's argument that the sudden emergency consisted of coming onto an especially slippery part of the road. An analogous argument was presented and rejected in Boge, 200 N.W.2d at 548:

> In this case defendant Fox knew, expected and predicted the peril in ample time to take precautions to avoid it. Defendants in effect contend the sudden emergency doctrine is nevertheless apposite because he had not previously skidded and did not know precisely when and where he would. However, it is sufficient that he had known for a long time road conditions including the place the accident happened were perilous. [citations]
>
> One cannot ignore known danger and then claim resulting disaster was sudden and unexpected simply because its exact time and place were not predicted. [citations]

Likewise in this case, we believe that defendant's decedent was aware of the poor driving conditions due to the icy roads and was required to adjust her driving habits accordingly so as to be able to react safely to the van's veering off and on the highway.

Since the facts of this case do not present a sudden emergency to serve as a legal excuse as defined by our cases, it was reversible error for the trial court to

present this question to the jury in Instruction 13A. From the record, it appears that there was no other outside causative factor leading to the accident. It is undisputed that defendant's decedent's car went across the center line and collided head on with plaintiff's decedent and that this was the proximate cause of the accident. Since we have determined that the legal excuse doctrine is inapplicable in this case, we believe this to be one of those exceptional cases where the issue of negligence may be determined as a matter of law; here, on the part of defendant's decedent. See Iowa R. App. P. 14(f)(10). Plaintiff was therefore entitled to a directed verdict in her favor and to a determination of damages.

The judgment of the trial court is reversed and remanded for the limited purposes of entering a directed verdict for plaintiff on the issue of negligence and of making a finding of damages sustained by plaintiff.

REVERSED AND REMANDED.