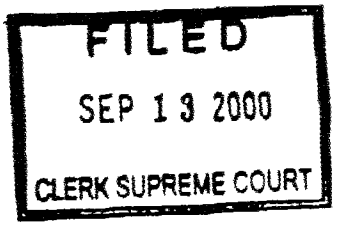
**IN THE COURT OF APPEALS OF IOWA**

No. 0-274 / 99-1546
Filed September 13, 2000




**PHYLLIS SMULL and KENNETH SMULL,**
Plaintiffs-Appellants,

vs.

**WESLEY E. COOPER,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Plaintiffs Phyllis Smull and Kenneth Smull appeal a district court judgment entry, following a jury trial, that found in favor of defendant Wesley E. Cooper in their personal injury action against him. **REVERSED AND REMANDED FOR A NEW TRIAL.**

Michael J. Motto of Carlin, Hellstrom & Bittner, Davenport, for appellants.

Mark A. Tarnow of Bozeman, Neighbour, Patton & Noe, Moline, Illinois, for appellee.

Considered by Mahan, P.J., and Zimmer, J., and Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

**PETERSON, S.J.**

Plaintiffs Phyllis and Kenneth Smull appeal a district court judgment entry, following a jury trial, that denied their claim against defendant Wesley E. Cooper for damages as a result of an automobile accident. They contend the trial court erred (1) by giving a jury instruction on the sudden emergency doctrine when there is no substantial evidence in the record to support it; (2) in failing to grant their motion for a new trial as a result of an irregularity in the proceedings which prevented them from having a fair trial by submitting to the jury an additional instruction which was not read defining sudden emergency, and (3) in instructing the jury on sole proximate cause when there was no substantial evidence to support it. We reverse and remand for a new trial.

On May 29, 1998, at approximately 3:30 p.m., there was an automobile accident between a 1993 Mercury Tracer being operated by Kenneth Smull and in which his wife, Phyllis Smull, was a passenger and a 1982 Ford F-150 pickup truck being operated by Wesley Cooper. The accident happened on Brady Street in Davenport, Iowa, which is a four-lane street. Both parties were driving in the second lane from the right side of the street. The traffic at that time was heavy, and the speed limit is forty-five miles per hour but, at the time of the accident, both parties were driving slower than that. It was a clear day and the pavement was dry.

Approximately two car lengths ahead of the Smull vehicle was an H & W semi-truck in the same lane they were in. Approximately one and one-half car lengths ahead, Kenneth noticed the brake lights on the truck came on and the

truck stopped and he brought his motor vehicle to a stop. The truck stopped because of traffic that had stopped in front of it. Kenneth and Phyllis speculated on why the truck stopped, and then they were hit from the rear by the motor vehicle being driven by Wesley Cooper. At the impact, Kenneth turned his motor vehicle to the left and they came to a stop at the left of the truck, near the rear of the truck.

Cooper had been following the Smull vehicle and noticed traffic was heavy and other motor vehicles on Brady Street were switching lanes. Shortly before the accident, the motor vehicle that was behind him went around him and he glanced at his rearview mirror and when he looked up, he saw the Smull vehicle had stopped. He attempted to stop, however, he struck the Smull vehicle.

Cooper, in his answer to the plaintiffs' petition, asserted the affirmative defense of sudden emergency. The court instructed on that proposition in Instruction No. 22 and Instruction No. 23.

During the hearing on the instructions, prior to submitting the matter to the jury, it was determined the definition of sudden emergency was contained in Instruction No. 22 and Instruction No. 23. Because of this, it was decided Instruction No. 23 would not be used.

When the trial judge finished reading Instruction No. 22 to the jury, he noticed Instruction No. 23 had been included in the instructions and he did not read it. Instruction No. 23, however, was included in the instructions that were given to the jury.

During the deliberations, the jury sent the following question to the trial judge:

> We agree under instruction #15, numbers 1 B & C. We agree this negligence was a proximate cause of damage to plaintiffs. We have not discussed amounts, but believe damage occurred. We also feel Mr. Cooper is excused under the sudden emergency definition #'s 22 & 23.
>
> If we find him to be legally excused by this sudden emergency, do we discuss amounts of damages under #15 #3?

The trial judge answered as follows:

> Please review all of the court's instructions and the verdict forms, including instructions 15, 22, and 23, and the instructions contained therein should answer your questions.

The jury, after further deliberations, returned a verdict in favor of the defendant.

**Discussion.** Our review of a trial court's determination concerning jury instructions is for correction of errors at law. Iowa R. App. 4; *Sheets v. Ritt, Ritt, & Ritt, Inc.*, 581 N.W.2d 602, 604 (Iowa 1998). Parties are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record. *Sonnet v. Warren,* 522 N.W.2d 45, 47 (Iowa 1994). Evidence is substantial enough to support a request in instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Bride v. Heckart,* 556 N.W.2d 449, 452 (Iowa 1996). A reversal will not be granted on the basis of an error in giving or refusing to give a particular jury instruction unless that action results in prejudice to the party complaining about the instruction. *Foggia v. Des Moines-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996).

Sudden emergency has been defined as: (1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency

or complication of circumstances; and (3) a sudden or unexpected occasion for action, exigency, pressing necessity. *Weiss v. Bal,* 501 N.W.2d 478, 481 (Iowa 1993). Whether a party is faced with a sudden emergency is ordinarily a question for the jury, and the evidence is viewed in the light most favorable to the party asserting a sudden emergency existed. *Id.* Comparing the definition of sudden emergency with the facts of this case, we conclude the district court erred in giving the sudden emergency instruction.

The day in question was clear, and the surface of the road was dry. Both the plaintiff and the defendant were forced to quickly apply their brakes in response to a sudden stop in traffic. A sudden stop in traffic on a divided four-lane highway during a busy time of day in heavy traffic is not an uncommon or an unforeseen event on traveled roadways. Statutes of the State of Iowa concerning a driver's duty to keep his or her vehicle under control are found in Iowa Code section 321.288(3) (1997), and the duty to operate a vehicle in such a manner that it can be stopped within the assured clear distance ahead are found in Iowa Code section 321.285, and imply a driver should be prepared for a sudden stop in traffic.

Viewing the evidence in the light most favorable to the defendant, he was faced with an ordinary hazard of driving for which he should have been prepared. It was not a situation in which the sudden emergency doctrine would apply. *Beyer v. Todd,* 601 N.W.2d 35, 39-40 (Iowa 1999). This is not like a situation where a deer bounds onto the road at night directly in front of the driver. *See* Mosell *v. Estate of Marks,* 526 N.W.2d 179, 182 (Iowa App. 1994), or a couch

falling from a pickup truck onto the freeway without warning. *See Reener v. Hill & Williams Bros., Inc.*, 502 N.W.2d 26, 29 (Iowa App. 1993).

The question from the jury indicates they found Cooper was negligent in the operation of his motor vehicle but they found it excused under the doctrine of sudden emergency. The instruction was clearly prejudicial to the plaintiffs.

**Conclusion.** We find the district court committed reversible error by submitting the sudden emergency instruction to the jury, and the matter should be reversed and remanded for a new trial. Because of this holding, we find it is not necessary to address the other issues raised by plaintiffs.

**REVERSED AND REMANDED FOR A NEW TRIAL.**