STATE OF MICHIGAN

COURT OF APPEALS

MARTY LIGGETT,

Plaintiff-Appellant,

v

JEAN BUTTERFIELD,

Defendant-Appellee.

UNPUBLISHED
February 23, 2001

No. 221946
Cass Circuit Court
LC No. 96-000078-NO

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals by of right from a judgment of no cause of action entered on a jury verdict. We reverse and remand for a new trial.

I

Plaintiff contends that the trial court erred by instructing the jury on the sudden emergency defense. We agree.

The determination whether a jury instruction is applicable under the facts of a case and accurately states the law is within the discretion of the trial court. *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993).

The court instructed the jury as to MCL 324.80145; MSA 13A.80145 as follows:

> [A] person operating or propelling a vessel upon the waters of this state shall operate it in a careful and prudent manner, and at such a rate of speed so as not to endanger unreasonably the life or property of any person. A person shall not operate any vessel at a rate of speed greater than will permit him or her in the exercise of reasonable care to bring the vessel to a stop within the assured clear distance ahead. A person shall not operate a vessel in a manner so as to interfere unreasonably with the lawful use by others of any waters. If you find that the defendant violated this statute before or at the time of the occurrence, you may infer that the defendant was negligent.

The court then read SJI2d 12.02:

> However, if you find that the defendant used ordinary care and was still unable to avoid the violation because she was confronted by an emergency not due to her own misconduct, then her violation is excused. If you find that the defendant violated this statute, and that the violation was not excused, then you must decide whether such violation was a proximate cause of the occurrence.

In order for a court to give a requested jury instruction, sufficient evidence must be presented to warrant the instruction. *Wincher v Detroit*, 144 Mich App 448, 456; 376 NW2d 125 (1985). This Court held in *Dennis v Jakeway*, 53 Mich App 68, 74; 218 NW2d 389 (1974), that a party seeking to invoke the sudden emergency doctrine must be aware that he is being confronted with a sudden emergency.

In other words, the doctrine applies only in situations where

> a **defendant** is confronted with a "sudden emergency"—something "unusual or unsuspected"—and the situation is not of his own making, **he actually observes the sudden emergency, comprehends that a sudden emergency is occurring** and then uses ordinary care and is not able to avoid the collision . . . . [White, Michigan Torts (2d ed), § 3:13, pp 194-195 (emphasis added).]

In this case, in order for defendant to be entitled to a sudden emergency instruction, she was required to show that she realized that there was a swimmer directly in her path and about to be hit and that she reacted to that sudden emergency. However, defendant's undisputed testimony was that "[she] did not see Marty Liggett swimming," and she did not realize that she hit him until she heard the resulting thump. Additionally, Ryan Pointer, who was skiing behind defendant's boat at the time, testified that in dropping the tow rope, he "caused" defendant to turn the boat so that it only struck a glancing blow to plaintiff. This testimony establishes that defendant was unaware of plaintiff's presence and only turned the boat as a reaction to Pointer's actions.

Accordingly, this evidence is insufficient to show that defendant turned the boat away from plaintiff because she was aware that she was "confronted by" an emergency situation. Because defendant has failed to make the requested showing that she reacted to the sudden emergency of plaintiff's presence, we find that the trial court abused its discretion in instructing the jury on the sudden emergency instruction.

Because we find that the sudden emergency instruction was erroneously given, we must next decide whether the error was harmless. [1] Instructional error is harmless unless it results in an "error or defect" in the trial such that failing to set aside the verdict would be "inconsistent with substantial justice." *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985). The structure of the verdict form makes it impossible to ascertain whether the jury was influenced by the improper instruction. Accordingly, we conclude that failure to set aside this verdict would be inconsistent with substantial justice. Therefore, we reverse and remand for a new trial on the merits.

II

Plaintiff also contends that the trial court abused its discretion in denying plaintiff's motion for new trial based on the allegation that the jury verdict was against the great weight of the evidence. We need not address this contention in light of the dispositive nature of our ruling on plaintiff's first issue.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey

[1] We reject plaintiff's argument that the sudden emergency instruction erroneously allowed jurors to base their decision regarding defendant's negligence on a finding of contributory negligence by plaintiff. The sudden emergency doctrine operates to excuse the negligence of a defendant based on how abruptly he or she is confronted with "unusual" or "unsuspected" circumstances. Although the doctrine's requirement that the circumstances must not be of defendant's own making will sometimes require the trier of fact to look to the actions of others involved in the situation, the focus does not shift away from defendant's culpability.