IN THE COURT OF APPEALS OF IOWA

No. 3-140 / 12-1192
Filed April 24, 2013

DENNIS H. HAGENOW and
ROSALEE A. HAGENOW,
Plaintiffs-Appellants,

vs.

BETTY L. SCHMIDT,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

Dennis and Rosalee Hagenow appeal from a judgment entered in favor of the defendant, Betty Schmidt, in this personal injury action. **REVERSED AND REMANDED.**

James W. Carney and George W. Appleby of Carney & Appleby, P.L.C., Des Moines, for appellants.

Samuel C. Anderson of Swisher & Cohrt, P.L.C., Waterloo, for appellee.

Heard by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Dennis and Rosalee Hagenow appeal from a judgment entered in favor of the defendant, Betty Schmidt, in this personal injury action arising from a vehicle collision. The Hagenows contend the district court abused its discretion in failing to exclude Schmidt's treating physician's opinion testimony. They also argue the trial court included a jury instruction on sudden emergency that was not warranted by the evidence. We reverse and remand for a new trial because there was no basis to instruct the jury on the sudden medical emergency defense.

I. Background Facts and Proceedings.

On November 10, 2008, a vehicle driven by Betty Schmidt ran into the rear of Dennis Hagenow's vehicle as he was stopped at an intersection for a red light.

Dr. Ivo Bekavac examined Schmidt on November 11, 2008, one day after the collision. In his report to the referring physician, Dr. Daniel Miller, Dr. Bekavac reported that it was his impression that Ms. Schmidt had experienced an "[a]cute right occipital infarct, etiology is either large vessel intracranial ischemic disease versus embotic event." As a result of the infarct, or stroke, Schmidt does not see anything in what would normally be the left half of her visual field: this medical phenomenon is termed homonymous hemianopia. Bekavac stated in 2008, "It is not clear whether this event happened before or after the accident."

The Hagenows filed a personal injury action against Schmidt on November 1, 2010, alleging Schmidt was negligent in the operation of her vehicle and her negligence caused damage to the Hagenows. In her answer, Schmidt denied she was negligent and asserted she had experienced a sudden medical emergency providing legal excuse for the collision.

The district court entered a scheduling order requiring that all written discovery should be served no later than ninety days before the May 1, 2012 trial and all depositions completed no later than sixty days before trial. The scheduling order also imposed deadlines on expert designations requiring the plaintiffs to have their designations on file 210 days before the trial, and the defendant to have her designations on file 150 days before trial. Trial was set for May 22, 2012.[1]

On February 14, 2011, the Hagenows served on Schmidt expert witness interrogatories and a request for production of documents. Schmidt served her answers to the discovery requests on April 6, stating she expected to call as an expert witness, her treating physician, Dr. Ivo Bekavac. Schmidt indicated there were no expert reports at that time, and the response would be supplemented if and when reports were obtained.

On February 1, 2012, Schmidt filed a motion for summary judgment, attached to which was an affidavit by Dr. Bekavac. The affidavit reads as follows:

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[1] Although the trial was set for May 22, 2012, by the scheduling order, the trial actually began on May 1, 2012.

I, Ivo Bekavac, M.D., Ph.D., being first duly sworn on oath do depose and state that I am a medical doctor licensed to practice medicine in the State of Iowa. I am a board certified neurologist who has practiced with Cedar Valley Medical Specialists, P.C. since August of 1998. A true and accurate copy of my Curriculum Vitae is attached hereto and marked Exhibit A.

I was the neurologist who treated Betty L. Schmidt following a November 10, 2008 automobile accident she was involved in at the intersection of Cedar Heights Drive and University Avenue in Cedar Falls, Iowa. According to the ambulance records, the accident was called in at 1:30 p.m., the ambulance arrived at the scene at 1:38 p.m., left the scene at 1:48 p.m. and arrived at Sartori Hospital Emergency Room at 1:54 p.m. Ms. Schmidt was admitted to the Sartori Hospital Emergency Room at 1:58 p.m. See ambulance records attached hereto and marked Exhibit B and the Sartori Hospital Emergency Room records attached hereto and marked Exhibit C.

According to the emergency room records, as Ms. Schmidt was lying on a cart in the emergency room at 3:07 p.m., she reported having lost the left half of her vision out of both eyes. She had a CT-scan of her head, without contrast, at 3:15 p.m. at which time she reported feeling dizzy. At 4:10 p.m. she reported having a "hum dinger of a headache" to nurses. An MRI of her head, without contrast, was performed at 4:44 p.m. See Sartori Emergency Room records attached hereto and marked Exhibit C. The radiologist interpreting the CT-scan and MRI was somewhat equivocal as to whether or not Ms. Schmidt had suffered a stroke. I later personally interpreted both the CT-scan and the MRI and it is my professional medical opinion, made to a reasonable degree of medical certainty, that from reviewing the MRI and CT-scan, that Ms. Schmidt had suffered an acute right occipital ischemic infarct. An ischemic infarct is the type of stroke where blood does not get to an area of the brain. The occipital region of the brain has a lot to with one's vision. A stroke in this area would explain the loss of vision complained of by Ms. Schmidt.

The loss of vision suffered by Ms. Schmidt from the middle of her eye to the left was diagnosed by ophthalmologist, Dr. Daniel M. Miller, M.D. the following day as left homonymous hemianopia. This refers to an absence of vision on one side of the visual world in each eye. This is a problem caused by the brain and not the eye. See Dr. Miller's records dated 11/11/08 attached hereto and marked Exhibit D. This is a condition most commonly caused by infarct (stroke) in the occipital region of one's brain. It is because of this diagnosis by Dr. Miller that he referred Ms. Schmidt to see me at 1:00 p.m. that very day.

> When I saw Ms. Schmidt on November 11, 2008, she underwent another CT-scan of the head without contrast. See the cat-scan report dated November 11, 2008 attached hereto and marked Exhibit E. This scan very clearly showed that on November 10, 2008, Ms. Schmidt had suffered an acute ischemic infarct in the right occipital lobe of her brain. It is customary for a CT-scan to not clearly reveal a stroke until 24 hours after the occurrence of a stroke. It is my professional opinion, to a reasonable degree of medical certainty, that Ms. Schmidt suffered an acute right occipital infarct (stroke) on November 10, 2008.
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> In my correspondence to Dr. Miller summarizing my examination and findings (see attached hereto and marked Exhibit F), I state that, "it is not clear whether this event happened before or after the accident," because there is no way to know with 100% certainty as to when on November 10, 2008 the actual stroke occurred. However, it is my belief, from the information available to me, that the stroke most likely preceded the accident. . . .
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> In conclusion, it is my professional opinion to a reasonable degree of medical certainty that Ms. Schmidt suffered an acute right occipital infarct on November 10, 2008, and that it is more probable than not that the stroke occurred immediately preceding the automobile accident.

On March 2, 2012, the Hagenows moved to exclude testimony of Dr. Bekavac, contending it constituted a "late disclosure of Dr. Bekavac's new opinions," which "requires the Plaintiff to retain an independent medical examiner to review the records of Defendant, the affidavit of Dr. Bekavac, and to proffer expert testimony in an extremely short period of time."

On March 5, 2012, the Hagenows identified a rebuttal expert, Dr. David Friedgood, a board-certified neurologist. They also filed a resistance to the motion for summary judgment and a cross-motion for summary judgment on the issue of liability.

A hearing on the motion to exclude Dr. Bekavac's testimony was held on March 21, and on April 12, 2012, the court denied the motion to exclude the

testimony.[2] The court offered the plaintiffs additional time to prepare for trial, which was rejected.

The Hagenows' subsequent motion to exclude the expert testimony of Dr. Bekavac was denied, as were the cross-motions for summary judgment. The court noted that each party had an expert with differing opinions as to when Schmidt suffered her stroke: Dr. Bekavac opined the stroke occurred prior to the accident; Dr. Friedgood opined the stroke occurred as a result of or after the collision.

At trial, the Hagenows objected to the jury instructions regarding circumstantial evidence, sudden medical emergency, and legal excuse. The district court overruled the objections. The jury returned a verdict for Schmidt.

The Hagenows now appeal, contending the district court erred in failing to exclude the expert testimony of Dr. Bekavac and in instructing the jury on sudden medical emergency. Because we find the second issue dispositive, requiring a new trial, we need not address whether the defendant's expert disclosure was timely.

II. Scope and Standards of Review.

We review the Hagenows' claim that the legal excuse jury instructions were not supported by the evidence for correction of errors at law. *Rowling v. Sims*, 732 N.W.2d 882, 885 (Iowa 2007).

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[2] The district court relied on Iowa Rule of Civil Procedure 1.508(1)(a)(1)-(3) and 1.508(3) in determining the opinion evidence was not untimely.

III. Discussion.

The Hagenows contend the court erred in instructing the jury because there was insufficient evidence of sudden medical emergency. When reviewing a claim that an instruction was not supported by substantial evidence, we view the evidence in the light most favorable to the party seeking the instruction. *Id.*.

A violation of a statutory duty—such as Schmidt's failure to stop at the red light—constitutes negligence per se, absent a legal excuse. *See id*. ("A violation of a statutory duty constitutes negligence per se, absent a legal excuse.").

> The legal excuse doctrine allows a person to avoid the consequences of a particular act or type of conduct by showing justification for acts that otherwise would be considered negligent.
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> There are four categories of legal excuse:
>
> (1) anything that would make it impossible to comply with the statute or ordinance;
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> (2) anything over which the driver has no control which places the driver's motor vehicle in a position contrary to the provisions of the statute or ordinance;
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> (3) where the driver of the motor vehicle is confronted by an emergency not of the driver's own making, and by reason of such an emergency, the driver fails to obey the statute; and
>
> (4) where a statute specifically provides an excuse or exception.

Id. It is error to instruct a jury on a category of legal excuse not supported by the evidence. *Id.*

The Hagenows contend the instructions given by the district court were not supported by the evidence because, they argue, the evidence does not prove that Schmidt's stroke occurred before the accident and that the circumstances did not require action by the driver.

The district court instructed the jury in Instruction No. 20:[3]

> Betty Schmidt claims that if you find that she violated the law in the operation of her vehicle, she had a legal excuse for doing so because of a sudden medical emergency and, therefore, is not negligent. "Legal excuse" means that someone seeks to avoid the consequences of his or her conduct by justifying acts which would otherwise be considered negligent. The burden is upon Betty Schmidt to establish as a legal excuse:
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> 1. That Betty Schmidt had no control over the sudden medical emergency she alleges occurred which placed her vehicle in a position contrary to the law.
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> 2. That her failure to obey the law when she was confronted with a sudden medical emergency was not a circumstance of her own making.
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> If you find that Betty Schmidt has violated the law as submitted to you in other instructions, and that she has established a legal excuse for doing so under either of the two definitions set forth above, then you should find that Betty Schmidt was not negligent for violating the particular law involved.

The instruction correctly states two categories of the law of legal excuse. *See id.* (noting four categories of legal excuse).

Because there was testimony, albeit disputed testimony, that Schmidt experienced a stroke depriving her of her left visual field before the accident, we

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[3] This instruction is based on Iowa Civil Jury Instruction 600.74, which reads:

> (Name) claims that if you find that [he] [she] violated the law in the operation of [his] [her] vehicle, [he] [she] had a legal excuse for doing so because (excuse) and, therefore, is not negligent. "Legal excuse" means that someone seeks to avoid the consequences of [his] [her] conduct by justifying acts which would otherwise be considered negligent. The burden is upon (name) to establish as a legal excuse:
>
> 1. Anything that would make complying with the law impossible.
>
> 2. Anything over which the driver has no control which places [his] [her] vehicle in a position contrary to the law.
>
> 3. Failure to obey the law when the driver is confronted with sudden emergency not of [his] [her] own making.
>
> 4. An excuse or exception provided by the law.
>
> If you find that (name) has violated the law as submitted to you in other instructions, and that [he] [she] has established a legal excuse for doing so under any one of the four definitions set forth above, then you should find that (name) was not negligent for violating the particular law involved.

believe an instruction as to legal excuse was warranted by the evidence—if Schmidt was unable to see Hagenow's vehicle, it would have been impossible or beyond her control to have stopped behind him. *Cf. id.* at 885-86 (discussing legal excuse of impossibility but finding the defendant had failed to prove that it was impossible to see around pile of snow). However, the type of legal excuse warranted by the evidence was not included in the instructions given.

The district court instructed the jury on the legal excuse of sudden medical emergency.[4] The sudden emergency doctrine excuses a defendant's failure to obey statutory law when confronted with an emergency not of the defendant's own making. *See Weiss v. Bal*, 501 N.W.2d 478, 480 (Iowa 1993). 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; (3) a sudden or *unexpected occasion for action*, exigency, pressing necessity." *Bangs v*. *Keifer*, 174 N.W.2d 372, 374 (Iowa 1970) (emphasis added). This is consistent with the common understanding of an emergency. *See* American Heritage College Dictionary 458 (4th ed. 2004) (defining "emergency" as "[a] serious situation or occurrence that happens unexpectedly and demands immediate action"). In *Foster v. Ankrum*, 636 N.W.2d 104, 106 (Iowa 2001), the court noted that a sudden emergency requires an "*instantaneous response*," or "something fairly close." (Emphasis added.)

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[4] The instruction is a correct statement of the law, though we note that our supreme court has expressed criticism of the doctrine of sudden emergency. *See Foster v. Ankrum*, 636 N.W.2d 104, 107 (Iowa 2001); *Weiss v. Bal*, 501 N.W.2d 478, 480 (Iowa 1993).

In Instruction No. 19, which is Iowa Civil Jury Instruction No. 600.75, the jury was informed:

> A sudden emergency is an unforseen combination of circumstances that *calls for immediate action* or a sudden or unexpected *occasion for action*. A driver of a vehicle who, through no fault of her own, is placed in a sudden emergency, is not chargeable with negligence if the driver exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances.

(Emphasis added.)

Schmidt's defense arises from the claim that she was unaware she had a stroke and was unaware she had lost half her visual field; thus, due to no fault of her own she did not see the Hagenow vehicle. Significantly, Schmidt neither took action nor reacted to the emergency she faced. Thus, this claim does not fit within the explanation of a "sudden emergency" as instructed.[5]

We recognize that it is generally a question for the jury to decide whether a party was faced with a sudden emergency. *Weiss*, 501 N.W.2d at 481. But, if Schmidt did not know she had a stroke or lost a portion of her visual field, what action was called for under the circumstances? As stated by one legal commentary with respect to the applicability of the sudden emergency doctrine:

> As with the requirement that the actor had sufficient time to make a decisional act in response to the peril, this requirement appears to be grounded in the assumption that the sudden emergency doctrine is intended to relieve an actor of liability where he has acted in response to a perceived peril and has made a choice which in

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[5] We do note that our supreme court has stated that a sudden heart attack may constitute a sudden medical emergency. *See Weiss*, 501 N.W.2d at 482 (holding that the defense of sudden emergency should not have been submitted because the case did not involve a sudden emergency such as, among other things, a sudden heart attack).

> hindsight may be regarded as unwise or ill-considered, but which was not unreasonable or imprudent under the stress of surrounding circumstances. *Where the actor has not made a decisional act in response to peril, either because he was unaware of the peril, or where he perceived the peril but did not have time to react to it, the doctrine logically has no application.*
>
> In some courts, these requirements of awareness of the peril and time to react to it are stated somewhat differently. It is said to be a requirement that before the sudden emergency rule may be invoked in a negligence action, at least in motor vehicle cases, the negligence which is charged must concern management and control. The rationale is that the emergency instruction is designed to relieve an actor who is confronted with an emergency from being labeled negligent in connection with his manner of management and control. *If the actor was never confronted with an emergency decision because he never recognized that an emergency existed, no choice was made, and he cannot invoke the doctrine because the charge of negligence does not go to his management and control of a situation.*

8 Am. Jur. Proof of Facts 3d 399 § 13 (emphasis added) (footnotes omitted).

We conclude the sudden medical emergency instructions given to the jury were neither applicable nor supported by the evidence, and may have misled the jury. *See Rowling*, 732 N.W.2d at 886 (reversing and remanding for new trial where court instructed on legal excuse of impossibility where evidence did not support instruction). Consequently, the district court erred in instructing the jury on the sudden emergency doctrine. *See Anderson v*. *Webster City Cmty*. *Sch*. *Dist*., 620 N.W.2d 263, 268 (Iowa 2000) ("Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized."). We further conclude this error was prejudicial, as it may have resulted unjustifiably in the finding of no fault. We accordingly reverse the judgment in this matter, and remand for a new trial.

In light of the reversal, we need not address the plaintiffs' claims concerning the timing of the disclosure of the expert witness as it is unlikely to recur.

REVERSED AND REMANDED.