IN THE COURT OF APPEALS OF IOWA

No. 9-491 / 08-1711
Filed August 6, 2009

DAVID MARTIN, ANDREA MARTIN, and DAVID MARTIN as Parent and Next Friend of Audrey Martin, David Martin Jr., and Micah Martin,
Plaintiffs-Appellants/Cross-Appellees,

vs.

GRAHAM CROOK, THE HERTZ CORPORATION, HERTZ RENTAL CAR, L.L.C., and FARM BUREAU MUTUAL INSURANCE COMPANY,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Plaintiffs-appellants appeal from a jury verdict in favor of the defendants-appellees in a case involving a collision by the side of a highway. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Martin A. Diaz and Elizabeth J. Craig, Iowa City, for appellants/cross-appellees.

Randy J. Wilharber and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., Des Moines, for appellee Graham Crook.

Angel A. West and Hannah M. Rogers of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellees/cross-appellants The Hertz Corporation and Hertz Rental Car, L.L.C.

Considered by Eisenhauer, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

On Christmas Eve 2004, the Martin family, David, Andrea, and their three children, pulled off a highway in their minivan to help two people whose vehicle was stranded in a ditch. Shortly thereafter, David Martin was seriously injured when a Hertz rental car driven by Graham Crook skidded on the icy highway and struck him. Martin and his wife subsequently sued Crook, The Hertz Corporation, and Hertz Rental Car, L.L.C. on behalf of themselves and their children for negligence. Following a jury verdict for the defendants, the Martins unsuccessfully moved for a new trial. The Martins now appeal, contending the verdict was not supported by the evidence.

The defendants argue there was sufficient evidence that Crook was not negligent. They also maintain that even if the jury verdict cannot stand, the district court should have given legal excuse and sudden emergency instructions, and should have dismissed the bystander emotional distress claims. Additionally, the Hertz companies argue that federal law preempts Iowa's owner liability statute making them vicariously liable for any negligence of Crook.

We reverse and remand because we conclude a new trial is required on the Martins' negligence claims against Crook. However, as discussed below, we also hold that the Hertz defendants should be dismissed from the case based on federal preemption, that the bystander emotional distress claims on behalf of the Martins' children should not have been submitted to the jury, and that the legal excuse and sudden emergency instructions should have been given.

I. BACKGROUND FACTS AND PROCEEDINGS

Based on the trial evidence, a juror could have found the following facts: On December 23, 2004, the Martin family left their Iowa City home to visit family in New Orleans, Louisiana. David and Andrea Martin took turns driving their family minivan. Crook left his Ankeny home that same day to visit a friend in Alabama. Crook, a professional long-distance semi-truck driver, drove a Ford Mustang that he rented from Hertz for the trip.

On the morning of December 24, 2004, the Martins and Crook were both traveling south on Interstate 55 through Arkansas. The skies were clear, but icy patches intermittently covered the road. Andrea drove the Martin family minivan that morning. She described the traffic as light, and did not notice any cars along the side of the road before the accident site. She maintained a speed of about twenty-five miles per hour on the interstate because of the icy conditions.

At about 7:30 that morning, Andrea and David saw a vehicle in the ditch to the right of the road. They noticed two people still inside the stranded vehicle, and decided to pull over to help. Andrea and the children waited inside their minivan along the shoulder while David walked back to the stranded car. The two occupants of the stranded car stepped outside to talk to David as he approached.

Meanwhile, Crook's car was a short distance behind the Martins' minivan. According to his testimony, he varied his speed according to the road conditions, driving as fast as fifty miles per hour when the road was clear and slowing to as little as twenty miles per hour on icy patches. When Crook first saw the stranded car about a half-mile away, he moved into the left-hand lane as a courtesy to

anyone standing outside the stranded car to his right. Several cars were moving on the highway ahead of Crook, and all of them stayed in the right-hand lane at this time. He soon noticed a large sheet of ice covering the highway, and removed his foot from the accelerator and brake pedals to coast across the ice. His speed at this time was between twenty and thirty-five miles per hour.

As Crook neared the stranded car, the vehicles ahead of him also moved into the left-hand lane, either intentionally or because they were skidding. Some of them lost control on the ice and began sliding and zig-zagging.[1] Crook felt he needed to tap the brakes to avoid hitting one of the sliding vehicles ahead of him. When he applied the brakes, he immediately lost control of his car and slid directly into the stranded car and the three individuals standing beside it. One of those individuals died at the scene of the accident. David was seriously hurt and was transported by helicopter to a Memphis hospital for emergency care. Cars continued to slide off the highway until the authorities shut it down because of the icy conditions.

David spent the next few days in the hospital undergoing treatment for his injuries. He was released on December 27, and needed a cane to walk for more than three months after the accident. He also suffered a head injury that caused

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[1] As Crook testified,

> [T]hey were cutting in front too, and as I say, one car did slide, so another one would just move over, and it was—it was a—really a lot going on at the time because . . . when I got closer up, it was actually cars down in the median here and cars coming off the northbound side as well. So there was a lot going on all at once. All of a sudden.
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> . . . .
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> [A]s I come up here, these started—one started sliding this way. Another car there, and they were just—it was mayhem, you know. And it was cars in the median down here and on this south—northbound side they were going off here at the same time as I come up here. I'm just all over the place watching the way the situation just went completely out of hand.

changes in his mood and memory loss. Andrea and the children experienced the shock of seeing David immediately after the accident, and cared for him while he recovered.

David and Andrea filed a civil action against Crook on March 31, 2006, alleging that he had operated his car in a negligent manner, thereby causing David's injuries. Relying on Iowa Code section 321.493 (2005),[2] the Martins also alleged that Hertz was vicariously liable as the owner of the Ford Mustang for Crook's negligence.

The Hertz companies pled an affirmative defense of preemption in their answer. This was based on the Graves Amendment to the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" ("SAFETEA-LU"), which provides:

> An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if-
>
> (1) The owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) There is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

49 U.S.C. § 30106(a). By its terms, the Graves Amendment applies to all actions commenced on or after its August 10, 2005 effective date. *Id*. § 30106(c).[3]

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[2] "[I]n all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the owner, the owner of the motor vehicle shall be liable for such damage." Iowa Code § 321.493(1).

[3] "Notwithstanding any other provision of law, this section shall apply with respect to any action commenced on or after the date of enactment of this section without regard to

The district court struck Hertz's preemption defense, holding that it would be unconstitutional to apply the Graves Amendment to a cause of action that had already accrued when it was enacted. (As noted above, the accident here occurred on December 24, 2004, approximately eight months before Congress passed the Graves Amendment, although the Martins did not sue until March 31, 2006.)

This case was tried to a jury. At the close of the evidence, the district court granted the Martins' motion for directed verdict on the legal excuse and sudden emergency defenses, reasoning that Crook was aware of the icy conditions. As the court put it, "I don't see how, even in looking at the evidence in the light most favorable to the defendants, you can say that this is a situation that's an unforeseen combination of circumstances." Accordingly, the district court refused the defendants' requests for jury instructions on those defenses. The district court also denied the defendants' motion for directed verdict on the bystander emotional distress claims brought on behalf of Andrea and her three children. In addition, the district court once again rejected Hertz's position on federal preemption.

The jury was given a general instruction (No. 12) that negligence

> means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

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whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment." 49 U.S.C. § 30106.

See Iowa Civ. Jury Instructions 700.2. The jury was also instructed as to certain rules of the road, and that violation of any of these rules would amount to negligence. Thus, Instruction No. 14 stated, "A driver must have his or her vehicle under control. It is under control when the driver can guide and direct its movement, control its speed and stop it reasonably fast. A violation of this duty is negligence." Also, Instruction No. 15 stated,

> A vehicle shall be driven on the right half of the road and a driver shall not turn a vehicle from a direct course on a highway unless the movement can be made with reasonable safety. A violation of this law is negligence.

During deliberations, the jury raised a question about a possible inconsistency between the general negligence instruction (No. 12) and the specific rules of the road instructions (Nos. 14-16). Although the question was not preserved as part of the record on appeal, the record shows that the district court advised the jury:

> The jury instructions are not intended to be contradictory. Instruction 12 is the general definition of negligence. Instructions 14, 15, [and] 16 are the specific acts that Plaintiffs allege constitute negligence in this case. You must consider all of the instructions together because no one instruction includes all of the applicable law. Please reread your instructions and continue to deliberate.

Later that afternoon, the jury returned a verdict for the defendants, specifically finding that Crook was not negligent. The Martins filed a motion for a new trial, which the district court denied. The Martins have timely appealed from the district court's ruling on that motion. The Hertz companies have cross-appealed, and both Crook and Hertz have urged us to consider certain arguments in the event we conclude a new trial is necessary.

II. STANDARD OF REVIEW

"A new trial is not a matter of right." *Riniker v. Wilson*, 623 N.W.2d 220, 229 (Iowa Ct. App. 2000) (citing *Ort v. Klinger*, 496 N.W.2d 265, 269 (Iowa Ct. App. 1992)). This court gives much deference to the district court's decision on a motion for a new trial, but this decision "must have some support in the record." *Estate of Long ex rel. Smith v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 88 (Iowa 2002) (quoting *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594 (Iowa 1999)). We are hesitant to interfere with a district court's ruling on a motion for a new trial made in response to a jury verdict. *Id*.

The Martins properly preserved three grounds for requesting a new trial. First, the Martins argue that the verdict was unsupported by the evidence. This presents a legal question, which we review for correction of errors at law. *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004). Second, the Martins argue that the jury verdict is so outrageous it shocks the conscience or the court's sense of justice. Third, the Martins argue that the verdict raises the presumption that it was the result of passion, prejudice, or other ulterior motive. The second and third arguments allege that the verdict fails to administer substantial justice; we review these grounds for abuse of discretion. *Id.* at 87-88.

III. ANALYSIS

A. Whether the Verdict Is Supported by the Evidence

The Martins' first argument is that the jury's verdict is not supported by the evidence. It is not disputed that Crook lost control of his car and veered from a direct course on the road, in violation of Iowa Code sections 321.288, 321.297,

and 321.314.[4] Since Crook violated the rules of the road, the Martins argue he must have a legal excuse to avoid liability for negligence. *See Machmer v. Fuqua*, 231 N.W.2d 606, 607 (Iowa 1975) ("Absent legal excuse, a violation of [the law of the road] constitutes negligence per se."). In the Martins' view, no legal excuse existed here because this was not a "sudden emergency" case, as confirmed by the district court's denial of the defendants' request for a sudden emergency instruction and its grant of a directed verdict on that issue. Simply stated, the Martins contend that "the jury did not have sufficient evidence to excuse Crook's negligence."

Both sides urge us to consider *Bannon v. Pfiffner*, 333 N.W.2d 464 (Iowa 1983), although they draw different lessons from that case. In *Bannon*, the parties were driving in opposite directions on an icy highway when Pfiffner applied her brakes. 333 N.W.2d at 465. Pfiffner immediately lost control and slid head on into Bannon, killing both drivers. *Id*. In a negligence action brought by Bannon's estate, the jury found for Pfiffner's estate. *Id.* at 466. The supreme court affirmed the jury verdict, finding substantial evidence that Pfiffner acted as a reasonably prudent person under the circumstances. *Id.* at 471. The supreme court conceded that "[p]erhaps Pfiffner would have stayed on her own side if she had not applied her brakes, but whether this showed lack of reasonable care, under the circumstances, was for the jury to say." *Id.* (citations omitted).

According to the defendants, this case is similar to *Bannon* in that a jury was properly allowed to decide whether an individual's loss of control of a vehicle

[4] As noted, the accident actually took place in Arkansas. However, both the victim and the driver were Iowa residents, this suit was brought in Iowa, and no one disputed the applicability of Iowa law.

on an icy highway was negligent or not. However, the Martins point out that in *Bannon* the district court gave a sudden emergency instruction. The jury was told that Pfiffner's violation of the rules of the road would be excused if the driver was confronted by an emergency not of her own making. *Id*. at 469. Here, by contrast, the district court denied the defendants' request for a sudden emergency instruction, and the Martins contend such an instruction would not have been warranted.

Upon consideration, we believe the jury's verdict of no negligence cannot be sustained based upon the instructions *that were actually given to the jury*. In Iowa, violation of one of the statutory rules of the road amounts to negligence per se, absent a legal excuse. *Jones v. Blair*, 387 N.W.2d 349, 352 (Iowa 1986). Since the district court eliminated the legal excuse defense from the case, there was no basis upon which the jury could have exonerated Crook from a finding of negligence. Accordingly, we believe a new trial should have been ordered.

The defendants argue that the Martins waived this ground for a new trial by failing to object to Instruction No. 12, the general negligence instruction. (In fact, Instruction No. 12 was among the Martins' proposed instructions.) In the defendants' view, Instruction No. 12 gave the jury an avenue for absolving Crook from negligence even if he had violated one of the rules of the road. If that is what the jury did, according to the defendants, the Martins have only themselves to blame. We do not agree with this line of reasoning, however. Although the combination of Instruction No. 12 and Instruction Nos. 14-16 could have confused the jury, and in this case apparently did, the instructions are not inherently incompatible. Instruction No. 12 provides a general definition of

negligence, and Instruction Nos. 14-16 provide specific examples of negligence per se. A juror could, and hopefully would, understand that if negligence per se had been proven, that would obviate the need to consider whether general negligence had been proved.

In light of our conclusion that the trial court should have granted a new trial because the verdict was not supported by the evidence, we need not reach the second and third grounds raised by the Martins for a new trial.

B. Whether the Legal Excuse and Sudden Emergency Instructions Should Have Been Given

Since we are remanding this case for a new trial, this brings us to the question whether the defendants should have been granted jury instructions on legal excuse and sudden emergency—and whether these instructions should be given on retrial, assuming the evidence is similar.[5] The district court reasoned that Crook knew of the icy conditions, so there was no sudden emergency. Just as "a driver heading west near sunset can expect to be faced with the sun's rays," *Vasconez v. Mills*, 651 N.W.2d 48, 55 (Iowa 2002), the Martins maintain that Crook could have expected the highway to be slippery.

In *Bannon*, the supreme court spoke of "two main situations that may exist with respect to icy highways":

> In one situation the icy condition is general, and the driver must be taken as 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

[5] Hertz has cross-appealed the denial of these instructions. Crook has not cross-appealed, but has joined in Hertz's arguments. We agree with Crook that a cross-appeal was not necessary. *Johnston Equip. Corp. of Iowa v. Indus. Indem.*, 489 N.W.2d 13, 16 (Iowa 1992). The defendants won a complete victory below, and are not seeking to expand or alter the scope of that victory.

> requires "an unforeseen combination of circumstances" but the element of unforeseeability is missing . . . .
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> 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, 333 N.W.2d at 469-70.

We agree with the Martins and the district court that this case does not resemble the second situation described above. However, it is not quite like the first situation either. Accepting Crook's testimony as true, he did not "proceed in normal fashion notwithstanding the ice." Rather, he slowed down and took precautions, but felt he had to brake suddenly when several cars in front of him lost control and started zig-zagging back and forth. In short, we believe it was for the jury to decide whether Crook's violation of the rules of the road was excused by an unforeseen combination of circumstances, including not just the sheer ice on the road but the behavior of the other vehicles in front of him. *See Beyer v. Todd*, 601 N.W.2d 35, 39 (Iowa 1999) ("Whether a party is faced with a sudden emergency is ordinarily a question for the jury."). Viewing the evidence in the light most favorable to Crook, this case is not analogous to *Vasconez*, where the defendant continued to proceed at the posted speed limit despite being partially blinded by the sun's glare, or *Beyer*, where the traffic stopped suddenly on a busy road. Rather, Crook's situation might be considered similar to that of a driver reacting to a deer that bounded onto a winter road at night. *See Mosell v. Estate of Marks*, 526 N.W.2d 179, 182 (Iowa Ct. App. 1994) (finding reversible error in failure to give sudden emergency instruction).

When the district court granted the Martins' directed verdict on sudden emergency and refused to give the defendants' requested instructions on this issue, it observed:

> I'm understanding what the defense is, that [Crook] did everything he could and he exercised reasonable care and he was driving at a reasonable speed and he had control and he had a proper lookout.
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> And so I think you can still argue that all to the jury, and they will have to decide whether he was or was not at fault.

We have sympathy for this point of view. In other words, if one could go back to first principles, it might make sense to allow each side to argue their case to the jury, and allow the jury to decide the basic negligence question, without having their decision-making process boxed in by categories such as "negligence per se" and "sudden emergency." It is somewhat ironic that in motor vehicle cases, where the typical juror has a great deal of experience, jurors are seemingly given less leeway. However, like the district court, we must follow the precedents as they are. We hold that that the jury should have been instructed on the legal excuse and sudden emergency defenses to any potential violations of the rules of the road.

C. Whether the Bystander Emotional Distress Claims Should Have Been Submitted to the Jury

Crook and the Hertz companies also argue that the emotional distress claims of Andrea Martin and the Martin children should have not have been submitted to the jury. The supreme court has summarized the elements for a bystander's claim of negligent infliction of emotional distress as follows:

> 1. The bystander was located near the scene of the accident.
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> 2. The emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the

> accident, as contrasted with learning of the accident from others after its occurrence.
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> 3. The bystander and the victim were husband and wife or related within the second degree of consanguinity or affinity.
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> 4. A reasonable person in the position of the bystander would believe, and the bystander did believe, that the direct victim of the accident would be seriously injured or killed.
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> 5. The emotional distress to the bystander must be serious.

Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981).

Andrea and the Martin children clearly satisfy three of these elements. At the time of the accident, they were in the family minivan beside the interstate highway about ten to fifteen feet past the stranded vehicle, making them sufficiently close to the scene of the accident to meet the first element. *See id.* Also, husband-wife and parent-child relationships fall within the third element. *See id.* Regarding the fourth element, Andrea testified that she was afraid the children would see David die. The children also showed a fear David would die by crying while they waited inside the minivan. David's bleeding, exposed bone, and initial unconsciousness all support a reasonable belief that he would die or be seriously injured, especially since Andrea knew another individual died after the collision. Crook and Hertz do not challenge recovery for negligent infliction of emotional distress on any of these grounds.

Instead, Crook and Hertz contend that elements two and five were missing—"sensory and contemporaneous observance" and "serious emotional distress." Andrea testified at trial concerning her perceptions at the time:

> I'm looking up in the mirror, and I see a red car in the rear-view mirror, and I see debris coming off of the car, and the car is spinning a circle and at the same instance, I see what I think is my husband running past our van, and I throw the car in park, and I said, "Wow, kids. Look. That car just wrecked right by where your father was." Because in that instant I'm thinking the car went off

> the road and they would have been standing there seeing this car go off the road. So the children and I are all looking out the back window, and then I said to the kids, "I don't see your dad. Where is your dad?" And there we were, like, there's no one standing there.
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> . . . .
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> I go behind my vehicle to look for where my husband is, and I see him parallel to our minivan on his back in the snow.
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> . . . .
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> So I run over to him, and I get down on the ground next to him, and his legs are twisted like a pretzel on the ground. His arms are just straight down to his side. His eyes are open, but they're like black. There's no one there. They're just staring straight up in the sky. And his lips are going in and out like he can't get air. They're just—like it's just struggling to get air in. And I looked up and all three of our children are running across the snow where they see me kneeling by their father. So I jumped up and told them they had to get back into the vehicle, that they couldn't come over and see him because at this point the front of his head from above his eye into his eyebrow and up in his hairline is completely back. There's blood coming out, and you can see his skull bone. And with that look in his eye with him being unconscious and not being able to get breath, I didn't want the children to see him if he would pass at that moment.

As Andrea Martin later testified, she did not see the actual impact of Crook's car striking her husband. Only when she turned to look for David and did not see him did she realize he had been hit by the car. "And then that's when it connected to me that I hadn't seen him running past me. I saw him flying past us."

We agree with the district court that Andrea Martin's testimony presents a jury issue on whether she had a sensory and contemporaneous observance of the accident. Andrea Martin was there; she saw part of the accident as it was occurring; and she saw her husband right after he had been struck by the car. Her failure to immediately "process" what she was seeing does not defeat her claim as a matter of law.

The defendants argue that "[r]ealizing what had happened after the fact, even if it is immediately after the fact, without knowing what exactly transpired and who was involved is not enough to permit recovery for emotional distress." We think that approach draws too fine a line. It is sufficient for us that Andrea Martin perceived at least some of the accident as it was happening and almost immediately realized her husband was one of the victims. Iowa law requires a "contemporaneous observance of the accident," *see Barnhill*, 300 N.W.2d at 108, not necessarily of the *entire* accident. This is not a case, as in the Iowa authorities cited by the defendants, where the person making a bystander claim arrived after the accident had occurred. *See Moore v. Eckman*, 762 N.W.2d 459, 462-63 (Iowa 2009) (denying a bystander claim when a mother arrived immediately after her son fell and hit his head on pavement); *Fineran v. Pickett*, 465 N.W.2d 662, 663-64 (Iowa 1991) (denying a bystander claim when family members arrived at the scene of a motorcycle accident two minutes after the collision); *Oberreuter v. Orion Indus., Inc*., 342 N.W.2d 492, 494-95 (Iowa 1984) (denying mother's emotional distress claim when she was neither a witness nor a bystander to the electrocution accident). In short, we think Andrea had sufficient "visceral participation in the event" to present a jury question on this element. *See Oberreuter*, 342 N.W.2d at 494.

Although not binding on us, we find persuasive the court's well-reasoned opinion in *Chester v. Mustang Manufacturing Co*., 998 F.Supp. 1039 (N.D. Iowa 1998). In that case, the plaintiff came upon her husband after a bucket on a skid loader unexpectedly dropped, pinning her husband between the bucket and the skid loader's frame. *Chester*, 998 F.Supp. at 1046. The court denied the

defendant's motion for summary judgment on the negligent infliction of emotional distress claim, reasoning that the plaintiff "arrived at the accident scene while her husband was still imperiled from the circumstances of the accident." *Id*. at 1050. Here, we have a similar situation in that Andrea Martin directly perceived some but not all of the "accident." Additionally, she was on the scene when the accident occurred.

However, we do not believe the record would allow a finding that the Martin children contemporaneously observed the accident. They were watching a movie in the minivan at the time of the accident. They did not notice that anything had happened until Andrea exclaimed that Crook's car had just crashed where David was standing. Their perceptions of the event did not commence until they saw their injured father lying in the snow after the fact. Accordingly, we hold that their negligent infliction of emotional distress claims are barred under the *Oberreuter* line of precedents.

Crook and Hertz also challenge the fifth element, that the emotional distress to the bystander must be serious. *See Barnhill*, 300 N.W.2d at 108. In *Barnhill*, the supreme court held that Barnhill's testimony concerning pain in back and legs, dizziness, and difficulty sleeping satisfied this element and could constitute serious emotional distress. *Id*. Similarly, Andrea testified to severe headaches, nightmares, and forgetfulness following the accident. She consulted her family doctor who referred her to a neurologist regarding the memory problems. Following a brain scan, she was advised her problems were the result of stress rather than some other condition. As Andrea testified regarding the nightmares, "I would close my eyes, and I would just see my husband laying in

this snow with his head open and his eyes just black and empty." We agree with the district court that Andrea Martin's testimony is sufficient to present a jury question on the serious emotional distress element. However, as with the second element, we believe that the record did not support submission of the children's claims to the jury. They did not testify, and there is insufficient evidence that they suffered serious emotional distress.

D. Federal Preemption of Iowa's Owner Liability Law

Hertz argued vigorously below that the claims against it were preempted by the Graves Amendment to SAFETEA-LU. 49 U.S.C. § 30106. That federal legislation provides that an owner engaged in the business of renting motor vehicles, which is not itself negligent, shall not be liable under state law by reason of being the owner of the vehicle for harm to persons or property arising out of the operation of the vehicle during the rental period. *Id*. § 30106(a). It applies to all claims brought on or after August 10, 2005, the enactment date of the legislation, "without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment." *Id.* § 30106(c).

The district court agreed that the Graves Amendment by its terms preempts Iowa Code section 321.493. However, it rejected Hertz's defense on the theory that it would violate due process to apply the Graves Amendment retroactively to a case such as this, where the cause of action arose prior to August 10, 2005. In particular, the court cited *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457 (Iowa 1989), and *Veasley v. CRST International, Inc*., 553

N.W.2d 896 (Iowa 1996), for the proposition that a legislature may not eliminate causes of action by legislation once they have accrued.

The problem with the district court's analysis is that *Thorp* and *Veasley* involved Iowa legislation, not federal legislation. Federal legislation is the supreme law of the land, *see* U.S. Const. art. VI, unless it violates the U.S. Constitution. The U.S. Constitution does not preclude Congress from eliminating a tort cause of action by legislation, even if that cause of action has already accrued and even if (unlike here) a lawsuit was already pending. *In re TMI*, 89 F.3d 1106, 1113 (3rd Cir. 1996) ("Under the United States Constitution . . . a pending tort claim does not constitute a vested right."); *Hammond v. United States,* 786 F.2d 8, 12 (1st Cir. 1986) ("Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting Section 2212 and retroactively abolishing her cause of action in tort."). For example, in *Kopec v. City of Elmhurst*, 193 F.3d 894, 903 (7th Cir. 1999), the U.S. Court of Appeals for the Seventh Circuit held that Congress could constitutionally amend the Age Discrimination in Employment Act to bar suits against state and local governments on a retroactive basis going back three years:

> Kopec contends that application of the 1996 amendment to his suit, which of course he filed before Congress reinstated the exemption, deprives him of due process, in contravention of the Fifth Amendment. . . .
>
> Application of the 1996 amendment to this case, notwithstanding the apparent unfairness, does not violate Kopec's due process rights. The Supreme Court long ago confirmed that Congress has the authority "to effect a change in the law and to make that change controlling as to pending cases." *Deck v. Peter Romein's Sons, Inc*., 109 F.3d 383, 386 (7th Cir.1997), citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2

> L.Ed. 49 (1801). So long as retroactive application of the change is rationally related to a legitimate legislative purpose, the constraints of due process have been honored. *Deck*, 109 F.3d at 387-88 (collecting cases).

Not surprisingly, the Graves Amendment has been applied repeatedly by courts around the country to preempt causes of action that arose before August 10, 2005. *See, e.g., Garcia v. Vanguard Car Rental USA, Inc*., 540 F.3d 1242 (11th Cir. 2008); *Green v. Toyota Motor Creditcorp*., 605 F.Supp.2d 430 (E.D.N.Y. 2009); *Berkan v. Penske Truck Leasing Canada, Inc*., 535 F.Supp.2d 341 (E.D.N.Y. 2008); *Johnson v. Agnant,* 480 F.Supp.2d 1, 6 (D.D.C. 2006) (rejecting a constitutional challenge and holding: "this Court previously held that a federal statute eliminating a cause of action on its effective date survived constitutional muster—even when already filed and pending claims were dismissed as a result."); *Tocha v. Richardson*, 995 So. 2d 1100, 1101 (Fla. Ct. App. 2008) (noting that the trial court had rejected an argument that the Graves Amendment could not constitutionally be applied to a cause of action that arose in 2003).

The Martins raise an alternative argument that their claims are preserved by the Graves Amendment's savings clause, which preserves state laws "imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle." *See* 49 U.S.C. § 30106(b). According to the Martins, Iowa Code section 321.493 is such a "financial responsibility" law, since it makes owners financially responsible for the negligence of their lessees. We disagree. The operative language requires the law to impose financial responsibility *standards for the privilege of registering*

and operating a motor vehicle. 49 U.S.C. § 30106(b). Section 321.493 is not such a law.[6] Indeed, the Martins' interpretation of section 30106(b) would essentially nullify the preemptive force of section 30106(a). Accordingly, the Martins' argument has not been accepted in other jurisdictions, and we do not accept it here. *See Garcia,* 542 F.3d at 1247-48 ("If we construe the Graves Amendment's savings clause as appellants wish, it would render the preemption clause a nullity."); *Meyer v. Nwokedi*, 759 N.W.2d 426, 430-31 (Minn. App. 2009) (holding that Minnesota's vicarious liability law is preempted and noting that "Meyer's argument fails to consider the entire text of the savings clause. Only certain financial responsibility laws are preserved by the Graves Amendment's savings clause").[7]

Lastly, the Martins argued below that the Graves Amendment exceeded Congress's authority under the Commerce Clause. *See* U.S. Const., art. I § 8. On appeal, they urge us not to reach that argument because the district court did not rule on it. However, in the event we do reach that argument, they advise us they are withdrawing it. The Martins do not dispute that the preemption defense is properly before us. We do not believe the district court's determination of a purely legal issue that is part and parcel of that defense is a prerequisite to our

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[6] As the district court pointed out, Iowa Code chapter 321A is Iowa's financial responsibility statute in the sense in which the Graves Amendment uses that term. It is entitled "Motor Vehicle Financial Responsibility" and, among other things, requires owners and operators to prove ability to respond in damages for liability to certain minimum dollar limits. *See Jolas v. State Farm Fire & Cas. Co*., 505 N.W.2d 811, 812 (Iowa 1993); *Walker v. Am. Family Mut. Ins. Co.*, 340 N.W.2d 599, 601 (Iowa 1983).

[7] The Martins cite one case where our supreme court referred to section 321.493 as "primarily a financial responsibility law." *Scott v. Wright*, 486 N.W.2d 40, 43 (Iowa 1992). But again, the Graves Amendment does not preserve *all* financial responsibility laws, but only those imposing "financial responsibility . . . standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle." Section 321.493 is not that kind of financial responsibility law.

consideration of that issue. In any event, we conclude the Graves Amendment was a proper exercise of Congress's power to regulate activity affecting interstate commerce. *See, e.g., Garcia*, 540 F.3d at 1252-53; *Green*, 605 F.Supp.2d at 435 ("Numerous other courts have considered this issue and are virtually unanimous in upholding the Graves Amendment as a proper exercise of the commerce power given Congress by the Constitution."). We note that in this case, the car in question was rented in Iowa to be used on a trip to Alabama, and the accident occurred in Arkansas. These facts illustrate in microcosm why Congress had the necessary authority under the Commerce Clause to adopt the Graves Amendment.

For the foregoing reasons, we conclude the Martins' claims against the Hertz defendants are preempted by federal law, and therefore we affirm the judgment in favor of those defendants.

IV. CONCLUSION

For the foregoing reasons, we hold: (1) the jury's verdict that Crook was not negligent is not supported by the evidence as applied to the instructions that were given, so a new trial must be held; (2) legal excuse and sudden emergency instructions should be given on remand, assuming that the record regarding Crook's actions is similar to what we reviewed here; (3) the bystander emotional distress claims of Andrea Martin should be submitted to the jury on remand but those of the children should not; and (4) the judgment in favor of the Hertz companies is affirmed in its entirety based on federal preemption.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Eisenhauer, P.J., concurs; Doyle, J., concurs in part and dissents in part.

DOYLE, J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

The majority suggests that on retrial the jury should be instructed on the legal excuse and sudden emergency defenses, assuming the record regarding Crook's action is similar to what we reviewed here. I disagree.

"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." *Rowling v. Sims*, 732 N.W.2d 882, 885 (Iowa 2007) (citations omitted). Legal excuse exonerates a party from liability for negligence per se. *Weiss v. Bal*, 501 N.W.2d 478, 481 (Iowa 1993). There are four categories of legal excuse, including "sudden emergency." *Id*. Sudden emergency was the only legal excuse category advanced by Crook. For the reasons stated below, I do not believe the specific facts presented to us support an instruction on the sudden emergency category of the legal excuse doctrine. Nor do I believe the facts support the other three categories of legal excuse.

To be sure, whether a party is faced with a sudden emergency is ordinarily a question for the jury. *Beyer v. Todd*, 601 N.W.2d 35, 39 (Iowa 1999). But, use of the doctrine has been carefully circumscribed. It has not been extended to excuse "emergencies" that a reasonably prudent driver must be prepared to meet. *Weiss*, 501 N.W.2d at 482. "Sudden emergency" is "(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." *Beyer*, 601 N.W.2d at 39 (citations omitted). When Crook proceeded down the interstate he knew there

were long and short patches of ice on the roadway and that other drivers were travelling the same road. The majority has likened this case to a driver confronted with a deer bounding onto the road at night directly in front of the driver. *See Mosell v. Estate of Marks*, 526 N.W.2d 179, 182 (Iowa Ct. App. 1994). I believe this case is more like being confronted with a sudden stop in traffic on a divided, four-lane highway, during a busy time of the day, or coming upon a stalled vehicle in traffic, or driving into a blinding sunset. *See Vasconez v. Mills*, 651 N.W.2d 48 (Iowa 2002); *Beyer*, 601 N.W.2d at 37; *Mosell*, 526 N.W.2d at 180.

Crook encountered the everyday hazard of driving on an icy interstate. While Crook was required to take immediate action in response to the cars sliding out of control in front of him, such an event does not qualify as an emergency for purposes of submitting a sudden emergency instruction to the jury. *Beyer*, 601 N.W.2d at 39-40. This was not a *Bannon* situation where a driver encounters an unanticipated patch of ice. *See Bannon v. Pfiffner*, 333 N.W.2d 464, 470 (Iowa 1983). Crook should have been prepared for the events that unfolded in front of him.

> [A] person is not entitled to the benefit of the emergency rule if it clearly appears [the person] either had actual knowledge of a dangerous condition or in the exercise of reasonable care could have such knowledge in time to act in relation thereto.

Vasconez, 651 N.W.2d at 54 (citing *Rice v. McDonald*, 258 Iowa 372, 380, 138 N.W.2d 889, 894 (1965)). The facts presented in this case do not qualify as an emergency for purposes of submitting a sudden emergency jury instruction to the

jury. Assuming the record on retrial is similar to what we reviewed here, it would be improper to instruct the jury on legal excuse and sudden emergency.

I concur with the remainder of the majority's opinion.