STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1821

Gloria Santizo,
as Trustee for the Heirs and Next of Kin of
Margarita Mazariegos,
Appellant,

vs.

Elmer Garcia Bravo,
as Personal Representative of the Estate of
Amado Garcia Santizo, et al.,
Respondents.

Filed June 3, 2008
Affirmed
Stoneburner, Judge

Nobles County District Court
File No. 53CV051129

David R. Von Holtum, Malters, Shepherd & Von Holtum, 727 Oxford Street, Box 517, Worthington, MN 56187-0517 (for appellant)

Richard Dale, Suite 204, 4009 West 49th Street, Sioux Falls, SD 57106-5221 (for respondents)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant, trustee for the heirs and next of kin of a passenger who was killed in a one-vehicle accident, challenges the district court's denial of a motion for judgment as a matter of law on the issue of liability and for a new trial on damages. Appellant argues that (1) the district court abused its discretion by instructing the jury on the emergency rule; (2) the district court erred by failing to grant judgment as a matter of law based on prima facie evidence of the driver's negligence; (3) the damages award was so inadequate as to indicate prejudice; and (4) the district court abused its discretion by denying appellant's request to continue the trial. We affirm.

FACTS

Appellant Gloria Santizo is the trustee for the heirs and next-of-kin of Margarita Mazariegos, who was killed in a one-car accident on Interstate #90 (I-90) in December 2004. Mazariegos was a passenger in a car driven by respondent Remos Toledo. The owner of the vehicle, respondent Amado Garcia Santizo, was also a passenger who was killed in the accident. Respondent Elmer Garcia Bravo is the personal representative of the estate of Amado Garcia Santizo.

At trial, appellant called as a witness a driver who had been following the Santizo vehicle westbound on I-90. The witness testified that he encountered ice at the scene of the accident and that he thought that it "probably caught everybody off guard." Although he had been following the Santizo vehicle, nothing about the vehicle attracted his attention until it had spun almost 180 degrees and appeared to be coming toward him.

The vehicle left the road, slid sideways through a ditch, vaulted over a culvert, flipped several times in the air, and landed on its passenger side on the opposite side of the ditch bank. The vehicle bounced and hit the ground two more times before coming to rest on its roof, 72 feet north of the westbound pavement edge. Although respondents did not assert the existence of an emergency condition as an affirmative defense in their answer to appellant's complaint, they requested an instruction on the emergency rule in their request for jury instructions filed approximately four months prior to trial.

One week before the trial, appellant moved for a continuance based on appellant's counsel's concern that he would not be able to finish the trial due to back pain. The trial had already been continued for several months at appellant's counsel's request due to appellant's absence from the country. Respondents opposed a second continuance and the district court denied the motion.

A few days before the trial, appellant moved for summary judgment on liability. The district court denied the motion based on its conclusion that a factual issue existed about whether the ice was an isolated, unexpected condition or was "a ubiquitous universal condition that morning." The district court noted that if the evidence showed the latter, it would likely grant judgment as a matter of law in favor of appellant on liability, but the district court wanted to hear the evidence.

Based on evidence at trial, the district court granted respondents' request for an instruction on the emergency rule. The jury found that the driver was not negligent. The jury found damages in the amount of $200,000. Appellant moved for a new trial or, in the alternative, for "judgment notwithstanding the verdict" (*See comment following* Minn.

R. Civ. P. 50.04 (renaming such motions "judgment as a matter of law")) on the issue of liability and a new trial on the issue of damages. The district court denied the motion, and this appeal followed.

D E C I S I O N

Appellant first argues that the existence of an emergency is an affirmative defense that is waived if not asserted in pleadings. Determining whether a defense is an affirmative defense is a question of law reviewed de novo. *Loppe v. Steiner*, 699 N.W.2d 342, 346 n.2 (Minn. App. 2005).

Minn. R. Civ. P. 8.03 contains a non-exclusive list of defenses that must be pleaded affirmatively and provides that "any other matter constituting an avoidance" must be pleaded affirmatively. Minn. R. Civ. P. 8.03. A failure to plead an affirmative defense waives that defense. *Minn.-Iowa Television v. Watonwan T.V. Improvement Ass'n.*, 294 N.W.2d 297, 305 (Minn. 1980). The relevant factors for indentifying whether a particular defense is an affirmative defense under this rule are surprise and fairness. *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989) (citing commentaries to the identical federal rule). In determining whether surprise or fairness are key factors in a particular defense, Minnesota courts have considered (1) whether the defense, if accepted by the court, will defeat a plaintiff's claim such that plaintiff should be given notice and the opportunity to argue why a claim should not be completely barred, *id.*; (2) whether the defense involves a fact-specific inquiry that requires preparation or discovery, *id.*; *Loppe*, 699 N.W.2d at 347; and (3) whether the relevant information "is within the control of one party or that one party has a unique nexus with the issue in

question and therefore that party should bear the burden of affirmatively raising the matter," *Snyder*, 441 N.W.2d at 788 (quotation omitted).

The emergency rule was articulated in *Johnson v. Townsend*, 195 Minn. 107, 110, 261 N.W. 859, 861 (1935), as follows:

> [O]ne suddenly confronted by a peril, through no fault of his own, who in the attempt to escape does not choose the best or safest way, should not be held negligent because of such choice unless it was so hazardous that the ordinarily prudent person would not have made it under similar conditions.

The supreme court has stated that the emergency rule "is merely a particular application of the reasonable care test and operates only to relieve a driver from liability for errors in judgment which the ordinarily prudent [person] might make under similar circumstances." *Brady v. Kroll*, 244 Minn. 525, 530, 70 N.W.2d 354, 358 (1955).

Although the emergency rule has been referred to as an "affirmative defense," several other states have held that, because it is merely an application of the reasonable care test, it is not a defense that must be affirmatively pleaded. *See e.g.*, *Willis v. Westerfield*, 839 N.E.2d 1179, 1185-86 (Ind. 2006) (determining that although the proponent of the sudden-emergency doctrine bears the burden of proof, it is not an affirmative defense that requires initial pleading); *McCann v. State Farm Mut. Auto. Ins. Co.*, 483 So.2d 205, 211 (La. Ct. App. 1986) (holding that the sudden-emergency doctrine is not an affirmative defense that must be specifically pleaded in defendant's answer), *review denied*, 486 So.2d 734-35 (La. 1986); *Vahdat v. Holland*, 649 S.E.2d 691, 693-94 (Va. 2007) (stating that the sudden-emergency doctrine does not constitute an affirmative defense).

Based on the criteria set out in *Snyder* and *Loppe*, we conclude that a defense that ice on the road created an emergency does not present issues of surprise or fairness sufficient to require waiver if not contained in the pleadings. In any action involving an automobile accident, the condition of the road and a driver's response in encountering that condition is relevant information that a plaintiff will develop in formulating a claim of negligence. "Where the roadway has been icy or wet and slippery, the question of negligence has been held to be for the jury," and "[i]t may not be negligent to fail to anticipate localized road conditions." *Brager v. Coca-Cola Bottling Co. of Fargo*, 375 N.W.2d 884, 887 (Minn. App. 1985).

Because the record is clear that, months before trial, respondents asserted the relevance of the road conditions to the determination of negligence and requested an instruction on sudden emergency caused by ice, it is disingenuous of appellant to suggest surprise or unfairness as a result of the instruction. We conclude that, in this case, the existence of an emergency caused by suddenly encountered ice was not an affirmative defense that was waived by respondents' failure to include it in their answer.

Appellant, who did not object to the emergency-rule instruction at trial, argues on appeal that the district court committed fundamental error by instructing the jury on the emergency rule because there was no evidence in the record concerning the driver's response to an emergency. "Fundamental errors of law in jury instructions are reviewable on appeal so long as they have been assigned as errors in the motion for new trial." *Lewis v. Equitable Life Assur. Soc'y of the U.S.*, 389 N.W.2d 876, 885 (Minn. 1986). Error in a jury instruction is likely to be considered fundamental if the error

destroys the substantial correctness of the entire jury charge, results in a miscarriage of justice, or leads to substantial prejudice of a party. *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

The party who seeks the benefit of the emergency rule has the burden of proving the existence of an emergency not caused by his or her negligence. *Sabasko v. Fletcher*, 359 N.W.2d 339, 343 (Minn. App. 1984), *review denied* (Mar. 21, 1985). In this case, appellant does not dispute that there is evidence in the record of icy conditions at the scene of the accident sufficient to meet this burden.

Appellant's challenge is to the lack of any evidence about the driver's response to the emergency. The investigation officer testified that there was no indication that the driver had been speeding or had been driving in a reckless or endangering manner prior to the accident. But circumstantial evidence indicates that once the vehicle hit the ice, the driver lost control of the vehicle. Under these circumstances, we conclude that giving the emergency-rule instruction did not constitute fundamental error. The evidence supports an instruction to the jury that it could consider the driver's loss of control in the context of sudden icy conditions in its deliberations about whether the driver was negligent.

Appellant asserts that the evidence established prima facie negligence by the driver such that the district court erred in failing to grant judgment as a matter of law to appellant on the issue of liability. We review the denial of a motion for judgment as a matter of law de novo. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). We must affirm denial of such a motion if "there is any competent evidence reasonably tending to sustain the verdict." *Id.* Unless a reviewing court is "able to determine that

the evidence is practically conclusive against the verdict, or that reasonable minds could reach but one conclusion against the verdict," the district court's order denying a motion for judgment as a matter of law should stand. *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975).

In a civil action, violation of a traffic statute constitutes prima facie evidence of negligence. Minn. Stat. § 169.96(b) (2006). Appellant asserts that there was evidence that the driver violated Minn. Stat. § 169.14, subds. 1, 3 (2006) (prohibiting a driver from driving at a speed greater than is reasonable and prudent under the conditions; requiring a driver to be responsible for becoming and remaining aware of actual and potential hazards existing on the highway; and requiring reduction in speed when special hazards exist) and Minn. Stat. § 169.18, subd. 6(a) (2006) (requiring driver to drive only in the direction designated on a one-way road). We disagree with appellant that the evidence was sufficient to demonstrate any driving conduct in violation of these statutes that was not caused by the suddenly encountered icy conditions. We find no merit in appellant's assertion that violation of traffic laws that occurred after the driver encountered the ice entitled appellant to judgment as a matter of law on the issue of liability.

Appellant argues that the district court erred by failing to grant a new trial on the issue of damages. " [I]f a jury's conclusion that a defendant is not liable is supported by credible evidence, the jury's determination of inadequate damages to a plaintiff does not warrant a new trial." *Hernandez by Hernandez v. Renville Pub. Sch. Dist. No. 654*, 542 N.W.2d 671, 675 (Minn. App. 1996), *review denied* (Mar. 28, 1996). In this case, even if

the damages were inadequate, the jury's determination that the driver was not negligent is supported by the evidence such that a new trial is not warranted.

Appellant also argues that the district court abused its discretion by denying his pre-trial motion for a continuance due to counsel's debilitating back pain. "[W]hether to grant or deny a continuance is within the sound discretion of the district court, and its decision will not be reversed unless it has abused its discretion." *Dunham v. Roer*, 708 N.W.2d 552, 572 (Minn. App. 2006), *review denied* (Mar 28, 2006). On appeal, the critical question in evaluating the denial of a continuance "is whether a denial prejudices the outcome of the trial." *Jones v. Jones*, 402 N.W.2d 146, 150 (Minn. App. 1987).

In this case, the district court noted on the first day of trial that appellant's counsel was in discomfort as a result of back pain, but counsel did not repeat the request for a continuance, did not request a recess, and did not suggest that his legal performance was affected by the problem. It is noble of counsel to, post-verdict, suggest that his back pain may have interfered with his performance, but counsel has not pointed to anything in the record that would support a conclusion that he failed to adequately represent his client. It is unlikely that such experienced counsel would have failed to call the district court's attention to the issue if, at the time of trial, counsel had felt that his condition was prejudicing his client. On this record, we cannot conclude that the district court's denial of a continuance was an abuse of discretion.

Affirmed.