

IN THE COURT OF APPEALS OF IOWA

No. 6-529 / 05-0947
Filed November 16, 2006

DEVIN W. ROWLING,
Plaintiff-Appellant,

vs.

JANE LOUISE SIMS,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Plaintiff appeals a jury verdict for defendant in this tort suit arising out of
an automobile accident. **AFFIRMED.**

Thomas G. Ross of Thomas G. Ross Law Office, Des Moines, for
appellant.

Kenneth R. Munro of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des
Moines, for appellee.

Heard by Huitink, P.J., and Vogel, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

On December 19, 2000, at about 5:00 in the evening, Devin Rowling was driving eastbound on Grand Avenue in Des Moines. Jane Sims was leaving her place of employment, which was on the south side of Grand Avenue, at about the same time. Sims testified there was a large snow bank next to the street, where snow had been deposited by snow plows. She stated that due to the large snow bank, she could not see traffic coming from the west on Grand Avenue when she was close to Grand Avenue. From a vantage point slightly back from the street, she could see headlights coming down the road, and she tried to gauge the right time to enter the street.

Sims pulled out onto Grand Avenue directly in front of the vehicle driven by Rowling. Rowling's car struck Sim's car on the driver's side. Both Rowling and Sims were injured. Rowling filed the present suit, alleging Sims was negligent in failing to operate her vehicle in a safe manner and in failing to yield the right of way.

The case was tried to a jury. Sims requested an instruction on the doctrine of legal excuse, claiming it was impossible for her to yield to oncoming traffic because she could not see the traffic due to the snow bank. Rowling objected to the instruction. The district court determined the evidence supported giving the instruction on legal excuse.¹ The jury returned a verdict for defendant. The court denied Rowling's post-trial motions. He now appeals.

¹ The following instruction was given on legal excuse:

II. Standard of Review

Our standard of review concerning alleged error with regard to jury instructions is for correction of errors at law. Iowa R. App. P. 6.4; *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 325 (Iowa 1997).

III. Merits

A. Rowling contends the district court should not have instructed the jury on legal excuse because Sims never pled the affirmative defense of legal excuse. Rowling first raised this issue in his post-trial motions. The district court noted Rowling had not raised this issue during the trial, and concluded Rowling had waived it. Whether or not Rowling waived the issue, there was no requirement for Sims to plead the doctrine of legal excuse in order for an instruction on that doctrine to be given. See *Graber v. City of Ankeny*, 616 N.W.2d 633, 642 n.2 (Iowa 2000) (“The legal excuse doctrine need not be pled, so long as it is raised as some point during the trial.”); *Pieper v. Harmeyer*, 235 N.W.2d 122, 130 (Iowa 1975) (“At the outset it is well settled the legal excuse doctrine may be considered and instructed upon if warranted by substantial affirmative evidence, even though not pled.”).

The defendant claims that if you find that if she violated the law in operating her motor vehicle by failing to yield to oncoming traffic when entering a street from a driveway that she had a legal excuse for doing so because she could not see oncoming traffic, and therefore, was not negligent in this respect. “Legal excuse” means someone seeks to avoid the consequences of her conduct by justifying acts which would otherwise be considered negligent. The burden is upon the defendant to establish as a legal excuse that it was impossible for her to yield to oncoming traffic because she could not see oncoming traffic.

If you find that the defendant did violate the law by failing to yield to oncoming traffic as defined in Instruction No. 12, and that she has established that it was impossible for her to do so, then you should find that the defendant was not negligent for failing to yield to oncoming traffic. This instruction follows the wording of Iowa Civil Jury Instruction 600.74 (1986).

B. Rowling also claims the legal excuse instruction was not supported by the evidence. He contends there was no credible evidence that it was impossible for Sims to yield to oncoming traffic. We review jury instructions to decide if they are a correct statement of the law and are substantially supported by the evidence. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). Error in giving a particular instruction does not warrant reversal unless the error is prejudicial to the party. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999).

The doctrine of legal excuse permits the jury to excuse a defendant's failure to obey statutory law under certain circumstances.² *Weiss v. Bal*, 501 N.W.2d 478, 480 (Iowa 1993). Legal excuse includes anything that would make it impossible to comply with a statute or ordinance. *Meyer v. City of Des Moines*, 475 N.W.2d 181, 185 (Iowa 1991). The term "impossible," as used in the legal excuse doctrine, should not be given a narrow, literal construction. *Id.* at 186. In the legal excuse doctrine, the term "impossible" is construed to mean "not reasonably practicable." *Id.* (quoting *Sylvia v. Pennock*, 253 Iowa 779, 784, 113 N.W.2d 749, 753 (1962)).

There were facts presented in the present case to show it was not reasonably practicable for Sims to be able to look for oncoming traffic before she pulled out onto Grand Avenue. Sims testified that she attempted to look for traffic before she pulled out, but her view was blocked by a large snow bank. Sims stated that the best she could do was look from some distance back and try

² These circumstances are: (1) anything that would make complying with the law impossible; (2) anything over which the driver has no control which places the vehicle in a position contrary to the law; (3) where the driver is confronted by a sudden emergency; and (4) an excuse or exception provided by the law. *Pieper*, 235 N.W.2d at 130; 1 Iowa Civ. Jury Instruction 600.74 (1986).

to gauge when there was an opening in the traffic, and then pull out when she thought it was safe to do so. Under the legal excuse doctrine, unusually hazardous road conditions may excuse a driver's failure to obey traffic laws that would otherwise constitute negligence per se. *Weiss*, 501 N.W.2d at 481.

We conclude there is substantial evidence in the record to support the district court's decision to instruct the jury on the legal excuse doctrine. Sims testified that due to the snow bank, when the front of her car was even with the lane of the street, she was not able to see up Grand Avenue. She stated a car would have to actually enter Grand Avenue in order to see around the snow bank. In a statement made two days after the accident, Rowling stated, "She pulled out of her place of employment there, and I didn't even see her starting to pull out because it must have been the height of the snow bank too."

On appeal, Rowling has raised some arguments regarding sudden emergency. However, the issue of sudden emergency as a legal excuse was not raised before the district court. Impossibility and sudden emergency are two separate theories of legal excuse. See *Meyer*, 475 N.W.2d at 185 (listing the four types of legal excuse). We believe Rowling has failed to preserve this issue for our review. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (noting appellate courts do not consider issues raised for the first time on appeal).

We note the present case presents a factual similarity to *Rubel v. Hoffman*, 229 N.W.2d 261, 264 (Iowa 1975), where a defendant claimed his failure to stop before pulling into a road was caused by his inability to see around a dirt bank. After discussing the doctrine of sudden emergency, the court ruled the jury should not have been instructed on that type of legal excuse. *Rubel*, 229

N.W.2d at 265. Because the holding in *Rubel* was decided based on the theory of sudden emergency, and not the theory of impossibility, we determine the holding in that case is inapplicable to the factual situation in this case. As we have already stated, impossibility and sudden emergency are two separate theories of legal excuse. See *Meyer*, 475 N.W.2d at 185.

We conclude the district court properly instructed the jury on the doctrine of legal excuse. We affirm the decision of the district court.

AFFIRMED.

Huitink, P.J., concurs; Vogel, J., dissents.

VOGEL, J. (dissenting)

I respectfully dissent. In this situation, defendant's line of sight was blocked by a large snow bank. Nonetheless, she decided to pull out onto Grand Avenue, and cross two lanes of traffic in order to attempt a left hand turn. Her decision to do so violated Iowa Code section 321.321 (1999). The fact that a snow bank obstructed her view to the left, should not have been a legal excuse for her failure to comply with an express statutory requirement of yielding "the right of way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute a hazard" Iowa Code § 321.321; *Deweese v. Iowa Transit Lines*, 256 N.W.2d 428, 430 (Iowa 1934). See also *Florke v. Peterson*, 245 Iowa 1031, 1033-37, 65 N.W.2d 372, 373-75 (Iowa 1975).

Defendant was not in a moving vehicle when she made the decision to cross into traffic, but rather sat in her vehicle and contemplated the situation. This is in stark contrast to the many cases in Iowa law in which the general defense of legal excuse is raised in the context of moving traffic, and situations where split second decisions must be made. See *Florke*, 65 N.W.2d at 373-75 (holding that evidence that the view of the intersection was obscured because corn was 'growing in such a manner as to obstruct the view of a motorist and prevent the identity of the intersection' by an approaching vehicle was not sufficient to submit legal excuse to the jury); *Gibbs v. Wilmeth*, 261 Iowa 1015, 1019-21, 157 N.W.2d 93, 96-97 (Iowa 1968) (holding legal excuse defense properly submitted where evidence showed the defendant had control of her car until her husband awoke and inexplicably grabbed the steering wheel from her,

causing the car to spin out of control); *Silvia v. Pennock*, 253 Iowa 779, 784, 113 N.W.2d 749, 750-51 (1962) (holding legal excuse defense was properly submitted, as the jury could conclude the plowed portion of the street was the only place plaintiff could travel on the road because it was impossible for her to drive over a two-foot snow bank when she tried but was unable to do so.) Therefore, I do not believe the evidence supported submitting Instruction 13 to the jury. I would reverse and remand for a new trial.