SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 4th Floor Denver, CO 80203 (303) 861-1111	FILED IN THE SUPREME COURT MAY 28 2010 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Appeal from: **COLORADO COURT OF APPEALS** Case Number: 08CA1487 On appeal from: **DISTRICT COURT, LARIMER COUNTY** Honorable Stephen J. Schapanski 2007 CV 120	
CHERYL KENDRICK Plaintiff-Appellant-Petitioner **v.** **HOLLY PIPPIN** Defendant-Appellee-Respondent	**COURT USE ONLY**
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APPELLEE'S ANSWER BRIEF

CERTIFICATION OF COMPLIANCE

The undersigned counsel hereby certifies that this "Appellee's Answer Brief" complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The "Appellee's Answer Brief" complies with C.A.R. 28 (g):

> Counsel for Appellee-Defendant-Respondent certifies that the "Appellee's Answer Brief", excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and any addendums, comply with C.A.R. Rule 28 (g) and does not exceed 9,500 words in length (it actually contains less than 8,000 words).

The "Appellee's Answer Brief" complies with C.A.R. 28(k):

> For the party responding to the issue: It contains under a separate heading placed before discussion of the issue, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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II. STATEMENT OF THE ISSUES:

Defendant is satisfied with Plaintiff's statement of the issues presented for review as they are a recitation of the issues announced by this Honorable Court in it's "Order of Court" dated January 11, 2010.

III. STATEMENT OF THE CASE:

It is undisputed that this case arises out of a two car accident which occurred on February 10, 2006, at the intersection of Highway 287 and 37th Street, in Loveland, Colorado. It is undisputed that the accident happened at approximately 6:35 a.m., and both parties were on their way to work. It is undisputed that the Plaintiff was stopped in her car at a red light on 37th Street, facing east in the left hand turn lane. It is undisputed that Defendant was traveling southbound in the right through lane of traffic on Highway 287 approaching the intersection with 37th Street. It is undisputed that Defendant's vehicle came into contact with Plaintiff's vehicle. Most other facts about how the accident occurred were disputed and hotly contested at the jury trial in this matter. After considering all of this disputed evidence, the jury returned a verdict in favor of the Defendant.

A. Statement of Facts Relevant to Sudden Emergency/Res Ispa:

At the time of the accident, Defendant lived in the southern part of Fort Collins, about 4 miles to the north of the intersection where the accident occurred

in this case (E-Record@LNFS#23155397.pp.4 and 25). All other testifying witnesses who came to the scene, either before or after the accident (i.e., Plaintiff, Officer David Roberts and Steve Hendrickson) came from either Loveland or Greeley which is to the south of the accident intersection (E-Record@LNFS#21969641.pp.29 of Officer Roberts testimony, pp.69-71 of Mr. Hendrickson's testimony and pp.60-61 of Plaintiff's testimony). No witness, with the exception of the Defendant, testified as to what the actual weather and road conditions were to the north of the accident scene. The road conditions that Plaintiff, Officer Roberts and Steve Hendrickson faced may have been different than those faced by the Defendant that morning because none of them had been traveling from north to south as Defendant was when the accident occurred. Further, when Mr. Hendrickson and Officer Roberts approached the scene, they had the benefit of knowing that an accident had already occurred and that the intersection was slippery and icy (because they had been told so before coming to the scene). This is information that the Defendant was not privy to prior to the accident. No witness testimony or evidence was offered by the Plaintiff at trial to dispute or rebut the testimony of the Defendant about the condition of the roads that she herself experienced on her way to the accident scene that morning.

Defendant further testified that she grew up in Colorado and learned to drive in Colorado (E-Record@LNFS23155397.pp.27). She testified that she learned to drive on the snow and ice, drove every winter in these conditions for 13 years and felt competent driving in such conditions (E-Record@LNFS23155397.pp.27-28).

According to the police report which was admitted into evidence at trial, and was attached to Appellant's Opening Brief, the accident in this case happened at approximately 6:35 a.m. Defendant left her home at about 6:15 a.m. (E-Record@LNFS#23155397.pp.4). Therefore, it took her about 20 minutes to get from her home to the scene of the accident. This included driving at a safe and legal speed as well as stopping at traffic lights and signs at intersections, etc. Defendant testified that she knew it had been drizzling at her home the night before (E-Record@LNFS23155397.pp.7). Defendant traveled a little over 4 miles from her home to the scene of the accident (E-Record@LNFS23155397.pp.25 & 31).

Defendant testified that when she left her home, she was fully aware of the weather conditions, but found that the roads from her home to the accident scene were not that bad (E-Record@LNFS23155397.pp.7, 29-30). Specifically, during direct examination by Plaintiff's counsel, Defendant testified as follows:

> Q. And you heard Officer Roberts testify that the roads were slick and icy. Isn't that the way it was?

A. It was not that way up until I got to this intersection. From my house, it had been pretty clear on the road."
(E-Record@LNFS23155397.pp.7)

Defendant testified that she went through at least seven or eight stop signs or intersections from the time she left her house up to the accident scene (E-Record@LNFS23155397.pp.30-31). She also testified that she had to make approximately 4 or 5 turns at corners or intersections on the trip from her home to where the accident occurred (E-Record@LNFS23155397.pp.30-31). At no time between her home and the accident intersection did Defendant experience any problems slowing, stopping, starting, slipping or sliding due to adverse road conditions (E-Record@LNFS23155397.pp.31-32). During the course of her approximate four mile trip from her home to the accident scene, her car would slow, turn, handle, respond, start and stop as usual in response to her commands without sliding or losing control (E-Record@LNFS23155397.pp.31-32). During her entire trip, she was traveling at what she felt was a reasonably safe speed for the conditions, keeping up with traffic, as she approached the green traffic light at the intersection where the accident happened (E-Record@LNFS23155397.pp.32).

When Defendant's traffic light changed from green to yellow, Defendant applied her brakes as she had done numerous times that morning, thinking she would come to a safe stop at the light. Defendant was not going in excess of the

speed limit when she hit her brakes because she knew the speed limit got slower after she went through the accident intersection (E-Record@LNFS23155397.pp.11). Defendant estimates she was going about 40 mph in a 45 mph zone (E-Record@LNFS23155397.pp.11). However, on this occasion, instead of gripping the road, the tires on Defendant's car began to slide (E-Record@LNFS23155397.pp.8). Realizing the unexpected emergency situation she was now confronted with, she thought she might not be able to stop prior to entering the intersection. Therefore, Defendant quickly noted that there were no cars present in the right turn lane next to her, or in the westbound lane of 37th Street (E-Record@LNFS23155397.pp.9-13). Defendant attempted to steer her car in a westerly direction rather than slide through the intersection and encounter a possible head-on or T-bone collision from other traffic entering the intersection perpendicular to her. (E-Record@LNFS23155397.pp.9-13). The result of this emergent maneuver was that Defendant's car turned slightly to the right but was unable to fully make the right turn onto eastbound 37th Street due to the unexpectedly icy conditions (E-Record@LNFS23155397.pp.9-13). Defendant's vehicle went up onto a slightly elevated concrete median separating the eastbound and westbound lanes of 37th Street, near where Plaintiff was stopped in her car. Defendant's car nearly came to a rest on top of the concrete median. However, the

vehicle slid off the median and the driver's side of Defendant's car scraped against and came to rest adjacent to the driver's side of Plaintiff's vehicle (E-Record@LNFS23155397.pp.33-34). The impact did not cause Plaintiff's car to move from her resting position within the left hand turn lane (E-Record@LNFS23155397.pp.34) and (E-Record@LNFS21969641.pp.62-63 of Plaintiff's testimony). Afterwards, the driver's sides of both cars were in contact with each other so that neither party could get out of their own driver's side doors (E-Record@LNFS23155397.pp.34).

The accident was investigated at the scene by Loveland police officer David Roberts. Officer Roberts did not see the accident occur (E-Record@LNFS21969641.pp.44 of Officer Roberts testimony). It is important to note that on cross examination by Defense counsel, Officer Roberts testified as follows:

> Q. If somebody drove four or five miles before they got to the intersection, they stopped at four or five stoplights, negotiated even more turns, didn't have any problems controlling their vehicle, didn't have any problems stopping, didn't slide, it would be reasonable for that person to assume as they approached this particular intersection that they would probably stop at that one, too, correct?
> A. Correct.
> Q. If instead, they started sliding on ice, that person would find themselves in a sudden unexpected emergency situation, wouldn't they?
> A. Given the situation, yes, sir.
> (E-Record@LNFS21969641.pp.45-46 of Officer Roberts testimony).

Further, Officer Roberts testified that upon sliding into the intersection, it was reasonable for Defendant to try and turn her car to the right up 37th Street in an attempt to avoid a collision with other cars in the intersection (E-Record@LNFS21969641.pp.48-49 of Officer Roberts testimony).

Plaintiff argues that she should get a new trial because Defendant can point to no evidence other than her own testimony that there was any unusual or unexpected condition justifying a sudden emergency. However, there is no requirement, burden, or obligation on the part of the Defendant to put forth corroborative evidence or testimony.

It is Plaintiff's burden to prove her case. Plaintiff had ample opportunity to cross examine Defendant at trial, and present evidence to the jury to prove her case. In almost every disputed negligence case, the parties testify about what they experienced or observed regarding in the accident, without corroborative evidence, and the jury determines what they think happened. Plaintiff has not cited a single case or authority that supports plaintiff's unfounded theory that corroborative evidence is necessary to support Defendant's position about what happened in this case. That is because there is no such law.

B. Statement of "Facts" Relevant to Jury Misconduct:

There are no facts to support Plaintiff's claim of juror misconduct. The only purported "evidence" of the claimed misconduct is the unsupported, unsubstantiated, inadmissible hearsay affidavit of a trial observer hired by Plaintiff's counsel to observe the trial and talk to the jurors after the verdict. Although Plaintiff was free to do so, no testimony, affidavit or sworn statement was elicited from any juror on this topic and presented to the trial court for review. Ms. Goetl was not on the jury, and was not a part of the deliberations. Even if it is assumed that the contents of Ms. Goetl's affidavit are true (which is not admitted), it is clear (as analyzed by the Court of Appeals) that the jury did not consider any evidence or facts outside of what was actually presented at trial. No new facts were brought into the deliberations that were not testified to or presented during trial. There was no extraneous evidence utilized by the jury. The jury heard the factual evidence during the trial about how the accident happened, deliberated upon those facts using their past experiences, general knowledge, and beliefs, and arrived at a verdict. They appropriately considered the admitted evidence within the framework of the instructions given to them, as they were charged to do.

IV. SUMMARY OF THE ARGUMENT

A. Sudden Emergency:

There was an abundance of evidence presented to this jury that supported Defendant's argument and trial theory that she was presented with a sudden emergency which caused the accident in this case. Defendant was an experienced driver in winter conditions. She was aware of drizzle the night before the accident, and that the roads might be an issue. She knew she needed to drive cautiously. However, when she left her home, she negotiated numerous turns, stops, starts and other driving maneuvers, all without incident. She did not slip, slide, fish-tail, or in any way lose control of her car from the time she left her home more than 4 miles from the accident scene, until the light changed from green to yellow on her that morning. In this emergency situation, she quickly decided to try and turn right onto a side street to avoid striking other cars that might be entering the intersection. Unfortunately, because of the unexpectedly icy conditions, she could not fully complete the turn, and lightly bumped into Plaintiff's stopped car.

The investigating officer did not see the accident. He arrived at the scene knowing that an accident had already occurred. He acknowledged that under the circumstances presented to Defendant at the time of the incident, she was faced with a sudden emergency.

There is absolutely no requirement at all that Defendant's competent first hand eyewitness testimony be corroborated by other witnesses. The jury was

instructed, without objection, that the number of witnesses is not determinative of any fact at issue in the case. The jury was free to believe, or disbelieve any testimony they heard from the stand, including that of the Defendant. It is clear that the jury believed the Defendant's testimony, and disbelieved other evidence presented by Plaintiff. This is their prerogative, and in fact, their role.

Based on the evidence presented at trial, the trial Court had no alternative but to give the sudden emergency instruction. To not give it, under the facts and circumstances presented by the evidence in this case, would have been error. As such, the Court of Appeals did not err in upholding the trial Court's decision to give the "sudden emergency" jury instruction.

Plaintiff baldly asserts that the sudden emergency doctrine is unfair, misused, questionable and/or misunderstood, in spite of it being part of Colorado law for more than 60 years. Its application to the facts of this case will not in any way turn negligence law upside down as argued, any more than it has in the significant number of times it has been applied in cases for more than 6 decades. The trial court correctly determined the issue should go to the jury (E-Record@LNFS21969641pp.51-57 of court rulings), and the Court of Appeals did not err in agreeing with that decision.

B. Res Ispa:

Plaintiff has the burden of proving her case by a preponderance of the evidence. She did not meet her burden in the eyes of the jury. Numerous instructions were given to this jury about the burden of proof, the definition of negligence, reasonable care, negligence per se, driver duties, etc. Yet, Plaintiff claims that not having a "presumption" instruction, which she was not entitled to under the facts and circumstances of this case, was the difference. The jury was appropriately and adequately instructed on their duties during deliberation. Plaintiff basically wants this Court to tell her that she can avoid her burden of proof entirely, and place the burden of proof on the Defendant. While that might be desirable, it is not the law. The Court of Appeals did not err in upholding the district court's decision to not give the "Res Ipsa" jury instruction under the facts and circumstances of this case.

C. Jury Misconduct:

There is no credible, competent, reliable or admissible evidence before this Court of jury misconduct, and no new trial is warranted on these grounds. The Court of Appeals did not err when it affirmed the district court's decision.

V. ARGUMENT

A. Under the facts and circumstances of this case, the Defendant was entitled to the "Sudden Emergency" jury instruction:

1. Standard of Review:

Defendant-Appellee agrees with Plaintiff's statements concerning the standard of review. The trial court has discretion to determine the form and style of the instructions to be given to the jury and a trial court's decision will not be overturned absent an abuse of discretion. *Woznicki v. Musick*, 119 P.3d 567 (Colo.App. 2005).

2. Argument:

The concept of sudden emergency has been recognized in Colorado for more than 60 years as a valid principle bearing upon alleged negligent conduct that may be attributed to one who finds himself confronted with an emergency choice. See generally, *Denver-Los Angeles Trucking Co. v. Ward*, 164 P.2d 730 (Colo. 1945), *Ridley v. Young*, 253 P.2d 433 (Colo. 1953) and *Stewart v. Stout*, 351 P2d 846 (Colo.1960). It is not something new or novel. It is not misunderstood or misused. The doctrine is simple, clear and concise, and it is well established law in Colorado. It is enumerated in "stock" jury instruction *CJI-Civ. 9:11*, which was given to the jury in this case as Instruction # 21 (E-Record@LNFS20054288). Namely;

> "A person who, through no fault of his or her own, is placed in a sudden emergency, is not chargeable with negligence if the person exercises that degree of care which a reasonable person would have exercised under the same of similar circumstances".

This jury instruction is based on a long line of Colorado cases, including, but not limited to, *Hesse v. McClintic*, 176 P.3d 759 (Colo. 2008); *Carlson v. Ferris*, 58 P.3d 1055 (Colo.App. 2002); *Young v. Clark*, 814 P.2d 364 (Colo. 1991); *Colwell v. Mentzer Investors, Inc*. 973 P.2d 631 (Colo.App. 1998); *Vu v. Fouts*, 924 P.2d 1129 (Colo.App. 1996); *Kielsmier v. Foster*, 669 P.2d 630 (Colo.App. 1983); *Tracy v. Graf*, 550 P.2d 886 (Colo.App. 1976); *Cudney v. Moore*, 428 P.2d 81 (Colo. 1967); *Stewart v. Stout*, 351 P.2d 846 (Colo. 1960); *Ridley v. Young*, 253 P.2d 433 (Colo. 1953); *Denver-Los Angeles Trucking Co. v. Ward*, 164 P.2d 730 (Colo. 1945). See also *Restatement (Second) of Torts, Section* 296(1).

The sudden emergency doctrine recognizes that a person confronted with sudden or unexpected circumstances calling for immediate action is not expected to exercise the judgment of one acting under normal conditions. *Hesse v. McClintic*, supra, citing *Young v. Clark*, supra. The doctrine does not, however, automatically insulate drivers confronted with an emergency from negligence. *Hesse v. McClintic*, supra. An emergency does not impose a lesser standard of care on the person caught in the situation; it is simply one circumstance to be considered in determining whether the individual responded as a reasonably prudent person would have under the circumstances. *Hesse v. McClintic*, id. Thus, the jury is informed that a person may be found negligent if his or her actions are

deemed unreasonable under circumstances, even if those circumstances included an emergency. *Hesse v. McClintic*, id.

The Colorado Supreme Court has long held that whether there was an emergency and whether the course of conduct chosen under the circumstances was reasonable are questions of fact to be determined by the trier of fact. *Hesse v. McClintic*, id; see also *Davis v. Cline*, 493 P.2d 362 (Colo. 1972). This is in line with the broader rule that the question of whether a person was negligent, that is, whether she breached her duty of care by acting unreasonably under the circumstances, is ordinarily a question of fact for the jury. *Hesse v. McClintic*, id. It is for the jury to decide whether a sudden emergency exists, and whether Defendant acted reasonably. *Hesse v. McClintic*, id.

When instructing the jury in a civil case, the court shall use such instructions as are contained in Colorado Jury Instruction (CJI) as are applicable to the evidence and the prevailing law. *C.R.C.P. Rule 51.1 (1).* The sudden emergency instruction is an evidentiary guideline under which the jury applies the prudent person rule in evaluating the evidence of negligence. *Carlson v. Ferris*, supra; *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo.App. 1983); *Davis v. Cline*, supra; *Cudney v. Moore*, supra. The instruction may be properly given where competent evidence is presented that a party was confronted with a sudden

or unexpected emergency not of that party's own making. *Carlson v. Ferris*, supra; *Colwell v. Mentzer Investments, Inc.*, supra; *Vu v. Fouts*, supra; *Young v. Clark*, supra; *Davis v. Cline*, id; *Cudney v. Moore*, id; *Daigle v. Prather*, 380 P.2d 670 (Colo. 1963); *Stewart v. Stout*, id; *Ridley v. Young*, id. The trial court has a duty to instruct the jury on sudden emergency when it is requested by a party and the request is supported by competent evidence of the existence of a sudden emergency. *Colwell v. Mentzer Investments, Inc.*, supra; *Vu v. Fouts*, supra; *Davis v. Cline*, supra. Likewise, the sudden emergency instruction is proper where there is evidence presented at trial to support that theory of defense. *Tracy v. Graf*, supra; *Cudney v. Moore*, supra; see also *Hetrick v. Dame*, 536 P.2d 1153 (Colo.App. 1975).

As found by the Court of Appeals, the question of whether there is an emergency and whether the course of conduct taken by a party, under the circumstances, is reasonable and prudent is a question of fact and, thus, is a jury issue. *Kielsmier v. Foster*, 669 P.2d 630 (Colo.App. 1983); citing; *Davis v. Cline*, supra and *Philips v. Monarch Recreation Corp.*, supra. In some cases, it may not be clear whether a sudden emergency was caused by the negligence of the party claiming the sudden emergency. *Carlson v. Ferris*, supra. If a factual dispute exists as to whether the driver was placed in a sudden emergency through any fault

of her own, the issue should be submitted to the jury. See, *Carlson v. Ferris*, id.; *Young v. Clark*, supra.

When faced with such a factual dispute the jury is entitled to determine whether the driver contributed to creating the emergency or merely reacted to it. *Carlson v. Ferris*, supra. Even when the court instructs the jury on sudden emergency, the question of whether the course of conduct chosen by the party under the circumstances is reasonable and prudent is a question of fact to be determined by the trier of fact, as is the question of whether there is an emergency. *Colwell v. Mentzer Investors, Inc.*, supra; *Vu v. Fouts*, supra; *Stewart v. Stout*, supra; *Tracy v. Graf*, supra. Without a sudden emergency instruction the jurors may improperly charge a driver with negligence in reacting to an emergency because they were not instructed to consider whether the driver's conduct was prudent under the emergency circumstances. *Carlson v. Ferris*, supra.; See also *Young v. Clark*, supra; *Davis v. Cline*, supra.

Plaintiff correctly cites to *Young v. Clark*, 814 P.2d 364 (Colo.1991) as a controlling decision regarding the application of the sudden emergency doctrine in Colorado. The Supreme Court's holding in the *Young* case clearly supports the trial court's giving of the sudden emergency instruction in this case. The defendant in *Young* claimed sudden emergency when a car driven by an unknown

driver changed lanes abruptly causing cars to stop suddenly, resulting in the defendant striking the rear of plaintiff's car. The plaintiff alleged the defendant caused the collision due to a lack of attention and failure to maintain a safe distance from plaintiff's car. The Supreme Court agreed with the trial court's giving of the sudden emergency instruction stating, "The factual dispute as to whether Clark was at fault for causing the accident was therefore appropriately submitted to the finder of fact. Indeed, under CJI-Civ. 9:11, the jury's application of the sudden emergency doctrine is explicitly conditioned on a finding that the actor was not placed in a perilous predicament through no fault of his or her own". Young v. Clark, id at 367. The Court went on to cite the *Restatement (Second) of Torts Sec. 296 (1)* wherein it states that the sudden emergency doctrine applies where, "the sudden emergency is created in any way other than by the actor's own tortious conduct, as where it is created by the unexpected operation of a natural force ...". The *Young* court further refused to abolish the sudden emergency doctrine in Colorado, as Plaintiff in this case is asking this Court to do.

The Court of Appeals in this case found sufficient competent evidence that Defendant was confronted with a sudden emergency. Defendant testified that she had lived her whole life in Colorado, had extensive experience in driving in snow and ice, traveled the same route to work every day and was familiar with the traffic

patterns of the route. Immediately prior to the accident, she left her home which was located to the north of the accident scene, drove approximately 4 miles over a period of about 20 minutes, stopped numerous times at traffic signals, made several turns at intersections, started from a stop several times and never once spun, slid, skidded, lost control or experienced a situation where her car failed to do what she wanted it to do on her command. She was traveling within the speed limit on a state highway in her 4 wheel drive pickup when she was confronted with a traffic light that changed from green to yellow. She applied her brakes fully expecting to stop for the signal. However, for the first time that morning, defendant unexpectedly experienced the black ice on the road that caused her car to slide. She was not traveling that fast. She quickly determined that if she did enter the intersection, she might hit other cars entering the intersection causing an accident. She reacted by noticing that nobody was to her right, and that if she could make a right turn onto 37th Street, she may avoid danger. When she turned her wheel, the car moved to the right, but the ice did not allow for the car to fully make the turn. As a result, she went up onto the median and slid off of it and into the plaintiff's car. The impact was minor.

Plaintiff did not present any evidence to dispute the condition of the roads from Defendant's home to the point of the accident. The only evidence submitted

was that it was generally snowy, icy and cold at the accident intersection, and to the south of the accident intersection. This evidence was elicited from the officer, the Plaintiff, and Plaintiff's boss, all of whom arrived at the scene from the south, and all who came to the scene after being told that there had been an accident and that the intersection was slick with black ice. No evidence was elicited about the state of the roads to the north where Defendant came, except from the Defendant. If Plaintiff had evidence to refute Defendant's testimony that she did not expect the road to be slick at the accident scene, she could have presented it. She didn't present any such evidence. That is because there was no such evidence. Had Defendant testified that she slid out of control, fish-tailed, failed to stop at intersections and then testified that she did not expect this intersection to be slick, Plaintiff may have a credible argument. However, that is not the case in this factual scenario currently before the Court.

Plaintiff attempts to play to this Court's sympathies and fears by arguing that application of the Sudden Emergency Doctrine to auto accident cases in Colorado subjects all motorists to unwarranted risks. However, that is simply not true. The sudden emergency jury instruction is only allowed to be given **"IF"** facts exist to support a defendant's position or argument. If no facts exist to support an emergency, the instruction cannot be given. Further, when the sudden emergency

instruction is allowed, it is not given in a vacuum, or in lieu of other instructions. It is given with instructions such as duty of care, negligence, negligence per se, reasonableness, etc. If the jury finds that the Defendant acted unreasonably, caused the purported emergency, or that no emergency existed, they are instructed to find against the Defendant. It is all fact specific on a case by case basis, and not subject to the broad sweeping generalizations argued by Plaintiff in her moving papers.

As instructed, the jury could have found Defendant negligent, or not, based on the evidence presented. As instructed, the jury could have found Defendant created or caused the emergency by her own actions. As instructed, the jury could have found that no emergency existed. The jury was instructed that if they found that Defendant was negligent, or that she created the emergency through her own actions, or that there was no emergency, they should find in favor of the Plaintiff, and against the Defendant. After hearing all the evidence and deliberating upon it, they determined the factual questions in Defendant's favor.

After deliberating, they obviously found Defendant's testimony about how the accident occurred, and her actions on that date, to be both competent and persuasive. If the jury would have found Defendant's testimony to be unbelievable and her actions unreasonable, they were told that they should find her negligent.

Defendant did not "simply claim sudden emergency" as asserted by Plaintiff. She presented an abundance of evidence and testimony to support her valid and appropriate defense of sudden emergency.

The Court of Appeals was correct when they found that the district court properly instructed the jury on sudden emergency in light of Defendant's testimony. With the state of the evidence, the trial court had no choice but to give the sudden emergency instruction. Failure to do so under these disputed facts would have been error. Therefore, the district court did not abuse its discretion in giving the proffered sudden emergency instruction and the Court of Appeals was correct in affirming that decision. This Court should affirm the Court of Appeals.

B. Under the facts and circumstances of this case, Plaintiff was not entitled to a "Res Ipsa" instruction:

1. Standard of Review:

Defendant agrees with Plaintiff's statements concerning the standard of review. The trial court has discretion to determine the form and style of the instructions to be given to the jury and a trial court's decision will not be overturned absent an abuse of discretion. *Woznicki v. Musick*, 119 P.3d 567 (Colo.App. 2005). Review of post-trial motions are for an abuse of discretion. *School Dist. No. 12 v. Security Life of Denver Ins. Co.*, 185 P.3d 781, 786-87 (Colo. 2008). An abuse of discretion is established only where the trial court's

ruling is manifestly arbitrary, unreasonable, or unfair. *Wark v. McClellan*, 68 P.3d 574, 578 (Colo. App. 2003).

2. Argument:

Defendant incorporates her arguments stated in the "sudden emergency" section referenced above as if fully set forth herein. Plaintiff's claim against Defendant is grounded in negligence. It was plaintiff's burden to prove her claim by a preponderance of the evidence. Defendant did not have the burden of disproving plaintiff's claim.

As pointed out by the Court of Appeals, Plaintiff's proposed/tendered "res ipsa" jury instruction was derived from CJI-Civ. 4th 11:12 and *Iacino v. Brown*, 121 Colo. 450, 217 P.2d 266 (1950). This instruction is only to be given in cases involving rear-end collisions. The accident in this case was clearly and undisputedly not a rear-end collision. Plaintiff has cited no authority for the instruction to be given in any case in which a vehicle strikes a stationary vehicle. Citing the case of *Bettner v. Boring*, 764 P.2d 829 (Colo. 1988), the Court of Appeals opinion discussed the fact that the res ipsa instruction is not even appropriate in all rear-end collisions. In *Bettner*, this Court found that the district court did not abuse it's discretion in refusing a res ipsa instruction in a rear-end collision case because (1) an instruction on such a presumption is appropriate only

when both vehicles are located on the road or on the shoulder, were in relatively close proximity to each other, and ***were facing the same direction***, and (2) ***a cause other than the defendant's negligence was not sufficiently eliminated by the evidence in the case*** (emphasis added).

The court read and submitted 31 separate instructions to the jury in this case (E-Record@LNFS20054288). The jury was more than adequately instructed on the claims of the parties (Instruction #2), burden of proof (Instruction #3), probabilities and not possibilities (Instruction #4), direct and circumstantial evidence (Instruction #6), weight of the evidence (Instruction #7), credibility of witnesses (Instruction #10), elements of negligence (Instruction #18), definition of negligence (Instruction #19), reasonable care (Instruction #20), negligence per se (Instruction #23), maintaining a proper lookout (Instruction #25), juror duties (Instruction #28), among others.

A trial judge is obligated to correctly instruct the jury on the law applicable to the case. *Minto v. Sprague*, 124 P.3d 881 (Colo. 2005); *Jordan v. Bogner*, 844 P.2d 664 (Colo. 1993). Whether res ipsa loquitur is applicable is a question of law for the trial court. *Minto v. Sprague* id.; *Zimmer v. Celebrities, Inc*. 615 P.2d 76 (Colo.App. 1980). The doctrine gives rise to a rebuttable presumption of a defendant's negligence. *Minto v. Sprague* id.; *Stone's Farm Supply, Inc. v.*

Deacon, 805 P.2d 1109 (Colo. 1991). To demonstrate that the doctrine is applicable, a plaintiff must introduce evidence which, when viewed in the light most favorable to the plaintiff, establishes that it is more probable than not that: (1) the event is of the kind that ordinarily does not occur in the absence of negligence; (2) responsible causes other than the defendant's negligence are sufficiently eliminated; and (3) the presumed negligence is within the scope of the defendant's duty to the plaintiff. *Minto v. Sprague* id.; *Williams v. Boyle*, 72 P.3d 392 (Colo.App. 2003).

When the facts and circumstances of the occurrence create conflicting inferences, one of due care and one of negligence, the doctrine does not apply. *Minto v. Sprague* id.; *Zimmerman v. Franzen*, 220 P.2d 344 (Colo. 1950). The doctrine also does not apply when a court, viewing all the evidence and inferences in the light most favorable to the plaintiff, does not find that it is more likely than not that the defendant's negligence was the cause of the plaintiff's injury. *Minto v. Sprague* id.; *Holmes v. Gamble*, 655 P.2d 405 (Colo. 1992); *Hamilton v. Smith*, 428 P.2d 706 (Colo. 1967) (holding that when it can be equally inferred that the accident was caused by something other than defendant's negligence, the doctrine does not apply).

As correctly acknowledged by the Court of Appeals, ample evidence was presented at trial to support Defendant's theory that she was presented with a sudden emergency because of the unexpected ice on the road. The Court of Appeals also correctly acknowledged that Plaintiff's evidence did not sufficiently eliminate the possibility that the collision was caused by factors other than Defendant's negligence. The issue of Defendant's negligence was for the jury to decide based on the instructions given. Based on the instructions, the jury could have found the Defendant negligent, but did not do so. Under these facts, the Plaintiff was not entitled to a presumption of negligence resulting in a shift of the burden of proof to the Defendant.

The district court properly refused to submit the res ipsa presumption instruction with the evidence and testimony presented before it at trial. It would have been error had the instruction been given. The ruling of the Court of Appeals, upholding the district court's decision not to give the "res ipsa" jury instruction was correct, and their determination should be affirmed. No new trial is warranted on these grounds.

C. No jury misconduct occurred in this case:

1. Standard of Review:

Defendant agrees with Plaintiff's statements concerning the standard of review. Review of post-trial motions are for an abuse of discretion. *School Dist. No. 12 v. Security Life of Denver Ins. Co.*, 185 P.3d 781, 786-87 (Colo. 2008). An abuse of discretion is established only where the trial court's ruling is manifestly arbitrary, unreasonable, or unfair. *Wark v. McClellan*, 68 P.3d 574, 578 (Colo. App. 2003). The determination of whether prejudice has occurred is within the sound discretion of the trial court and only where that discretion has been abused will a new trial be ordered. *People v. Evans*, 710 P.2d 1167 (Colo.App. 1985).

2. Argument:

The only purported "evidence" of alleged juror misconduct in this case is an unsubstantiated, unsupported hearsay affidavit of a trial observer paid by Plaintiff's counsel to interview the jurors after receipt of an adverse verdict. As such, Defendant maintains that there is no reliable, admissible or appropriate evidence before this court of any juror misconduct at all. There is an absence of even a simple affidavit from the juror at issue about whether this alleged outside influence even occurred or existed at all. In any event, there was no reliable, competent or admissible evidence presented to the trial court upon which to base the granting of an evidentiary hearing or a new trial.

However, the Court of Appeals found it appropriate to consider the paid consultant's affidavit. Even considering the source, the Court of Appeals panel correctly concluded that the affidavit did not demonstrate that extraneous prejudicial information was before the jury in this case.

Instead, the Court of Appeals found that the juror in question used her pre-existing, general knowledge of mathematics to analyze the admitted evidence of relevant locations, distances and the speed of Defendant's vehicle. The panel cited numerous cases (incorporated herein by reference) for the proposition that jurors are entitled to rely on their common sense and experience during deliberations, and that this experience necessarily includes their education, background and professional work. Succinctly, the panel found as follows:

> "Here, the juror in question did no more than apply her generally applicable, pre-existing knowledge to the evidence. She did not introduce any new historical fact, nor is it alleged that she consulted any outside source of information. Therefore, the allegations of the consultant's affidavit did not set forth facts falling within the extraneous prejudicial information exception in Rule 606(b)."

In this case, the juror in question did not do anything other than consider and utilize the evidence that was admitted at trial by way of her general experience and knowledge. No outside or extraneous source or information was used. She did not consult a book, journal, paper, internet, magazine, etc. She used her brain. The only thing she is accused of doing is analyzing the evidence put before her during

the course of the trial. The district court, appropriately using it's discretion, denied an evidentiary hearing, and ruled that no juror misconduct occurred. The Court of Appeals, reviewing the district court's decision on a de novo basis, also analyzed the issue and ruled that no hearing was necessary or warranted, and that no juror misconduct occurred. With the evidence before this Honorable Court, it must also find that no hearing was warranted and that the district court did not abuse it's discretion in it's finding that no juror misconduct occurred in this case.

VI. CONCLUSION:

There was an abundance of evidence presented to this jury that supported Defendant's argument and trial theory that she was presented with a sudden emergency which caused the accident in this case. Defendant was an experienced driver in winter conditions. She was aware of drizzle the night before the accident, and that the roads might be an issue. She knew she needed to drive cautiously. When she left her home, she negotiated numerous turns, stops, starts and other driving maneuvers, all without incident. She did not slip, slide, fish-tail, or in any way lose control of her car from the time she left her home more than 4 miles from the accident scene, until the light changed from green to yellow on her that morning. In this emergency situation, she quickly decided to try and turn right onto a side street to avoid striking other cars that might be entering the intersection.

Unfortunately, because of the unexpectedly icy conditions, she could not fully complete the turn, and lightly bumped into Plaintiff's car.

The investigating officer did not see the accident. He arrived at the scene knowing that an accident had occurred there. He acknowledged that under the circumstances presented to Defendant at the time of the incident, she was faced with a sudden emergency.

There is absolutely no requirement at all that Defendant's competent first hand eye witness testimony be corroborated by other witnesses. The jury was instructed, without objection, that the number of witnesses is not determinative of any fact at issue in the case. The jury was free to believe, or disbelieve any testimony they heard from the stand, including that of the Defendant. It is clear that the jury believed the Defendant's testimony, and disbelieved other evidence presented by Plaintiff. Based on the evidence presented, the trial court had no alternative but to give the sudden emergency instruction. To not give it, under the facts and circumstances presented by in this case, would have been error. The Court of Appeals panel agreed and affirmed the district court's decision. It should not be disturbed by this Court.

Plaintiff has the burden of proving her case by a preponderance of the evidence. She did not meet her burden in the eyes of the jury. Numerous

instructions were given to this jury about the burden of proof, the definition of negligence, reasonable care, negligence per se, driver duties, etc. Yet, Plaintiff claims that not having a presumption instruction, which she was not entitled to under the facts and circumstances of this case, was the difference. The jury was appropriately and adequately instructed on their duties during deliberation. With these instructions, they could have found Defendant negligent. They did not. The district court was correct when it refused the "res ipsa" instruction tendered by the Plaintiff. That decision was affirmed by the Court of Appeals. It should not be disturbed by this Court.

There is no credible, competent, reliable or admissible evidence before this Court of jury misconduct, and no new trial is warranted on these grounds. The juror at issue did not utilize any extraneous or outside source of information during deliberations in this case. She simply used her general knowledge and experience and applied it to the facts of the case and evidence before her. The district court found no basis for an evidentiary hearing or for a new trial based on juror misconduct. The Court of Appeals, reviewing the district court's decision on a de novo basis, agreed with the district court. There is no justification for this Court to come to a different conclusion.

Based on the above, Defendant respectfully requests that this Honorable Court affirm the jury verdict, the rulings of the district court, and the well reasoned opinion of the Court of Appeals.

Respectfully submitted this 28th day of May 2010.

THE UKASICK LAW FIRM

By: _____
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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing "Appellee's Answer Brief" was filed with the Supreme Court via hand delivery and sent via U.S. Mail this 28th day of May, 2010, to:

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