Supreme Court, State of Colorado Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case Number: 08CA2421	FILED IN THE SUPREME COURT AUG 19 2011 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Petitioner: Richard Bedor **Respondent: Michael E. Johnson**	
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OPENING BRIEF OF RICHARD BEDOR

CERTIFICATE OF COMPLIANCE

I hereby certify that this 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 brief complies with C.A.R. 28(g).

It contains 5,039 words.

The brief complies with C.A.R. 28(k).

It contains, under a separate heading, a concise statement of the applicable standard of review with citation to authority and, where required by C.A.R. 28(k), a citation to the precise location in the record where the issue was raised and ruled upon.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the court of appeals erred in holding that a driver who loses control of a vehicle in winter driving conditions, crosses over into the lane of oncoming traffic, and collides with plaintiff's vehicle is entitled to a "sudden emergency" instruction.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court below.

This is a personal injury case arising out of an automobile accident in which the vehicle of respondent Michael Johnson, headed westbound, crossed the center line and struck the vehicle of petitioner Richard Bedor, headed eastbound. At trial, a jury found that Bedor suffered injuries, damages, or losses, but that Johnson was not negligent. Bedor appealed, asserting that the trial court erred by instructing the jury on the doctrine of sudden emergency. In an unpublished opinion, the court of appeals affirmed.

B. Statement of Facts.

1. The Accident.

On the morning of January 16, 2004, petitioner Richard Bedor was driving his Jeep Wrangler eastbound on West Colorado Avenue, a two-lane roadway, just

outside the Town of Telluride. (Trial Management Order, 20786697 at 2.)[1] It was dark outside, and it was cold. (08/12/2008 Transcript at 6:13, 105:13.)

At approximately 7:05 a.m., Bedor saw two headlights of a vehicle coming toward him. (08/12/2008 Transcript at 106:21-25; Trial Management Order, 20786697 at 2.) Suddenly, the two headlights curved to the right, as if the vehicle were about to go across the road. (08/12/2008 Transcript at 107:1-2.) Bedor braked, coming to almost a complete stop. (*Id.* at 107:4-12.) The oncoming vehicle turned counterclockwise, crossed over into Bedor's lane, and continued to skid sideward toward Bedor at what he described as "an incredible rate of speed" and "well in excess of sixty miles an hour." (*Id.* at 108:3 – 109:12.) The vehicle, a Subaru station wagon, slammed into the front of Bedor's Jeep. (*Id.* at 7:2-3, 109:14-15.) Bedor suffered numerous injuries and incurred substantial medical costs. (*Id.* at 114:10 – 148:24.)

The driver of the Subaru was respondent Michael Johnson. (08/13/2008 Transcript at 32:25 – 33:3.) According to Johnson, he had been out drinking with friends the previous evening, had consumed approximately five pints of beer and

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[1] There appears to be no official CD-ROM of the electronic record. Citations to electronically-filed documents in the record are by document title, LexisNexis transaction number record, and, where appropriate, page or exhibit number. Citations to trial transcripts are by date and page:line.

two large shots of whiskey, and had driven to a friend's house afterward before heading back home that morning. (*Id.* at 37:10 – 38:5, 46:2-4, 51:1-8, 82:5-16.) Blood drawn from Johnson at St. Mary's Hospital over four hours after the accident showed a blood alcohol level of .032 percent. (08/12/2008 Transcript at 29:8-15.)

2. The Litigation.

Bedor filed this action against Johnson for negligence and negligence per se (Complaint, 13403656), and the case proceeded to trial by jury. At trial, it was undisputed that the accident occurred when Johnson's westbound Subaru broke traction on an icy stretch of the roadway, spun counterclockwise, crossed into the eastbound lane, and collided into Bedor's Jeep. (08/12/2008 Transcript at 17:24 – 19:11; Pl. Ex. 1) All witnesses from the Telluride area, including Bedor, Johnson, and the investigating officer, testified that an ice "patch" regularly forms on that particular portion of the westbound lane during the winter. (08/12/2008 Transcript at 24:24 – 25:21, 99:20 – 100:6; 08/13/2008 Transcript at 38:20 – 39:4, 48:8-16, 99:6-11.) Johnson specifically acknowledged that he had both "seen" and "experienced" the ice patch earlier that winter, and "was aware of the possibility of an ice patch" in the westbound lane, although "[t]he ice patch wasn't there every day in the winter months." (08/13/2008 Transcript at 38:20 – 39:4, 48:8-16.) According to Johnson, "this ice patch kind of comes and goes depending on the

weather patterns, the temperature, how much maintenance is being applied to the road out there." (*Id.* at 38:24 – 39:1.)

The investigating officer testified that, as one travels the road, the ice patch is "obvious," and would be visible to a "reasonably prudent" westbound driver. (08/12/2008 Transcript at 25:22 – 26:4.) According to the officer, the ice "patch" consisted of three strips of packed ice and snow about two inches thick on the morning of the accident, with each strip about two feet wide and sixty yards long, running down the westbound lane, so drivers of westbound vehicles would ordinarily just keep the wheels of their vehicles on the ice-free areas between the strips. (*Id.* at 18:5 – 19:5, 25:1-5.) The officer said that a "reasonably prudent driver [would] not need to slow down for the ice patch if they kept their wheels in the trough . . . [t]he space between the three patches of ice." (*Id.* at 42:22-24.) Here, however, it appeared that Johnson drove his vehicle onto the ice and broke traction with the road, after which his vehicle spun out of control and into the eastbound lane. (*Id.* at 17:24 – 18:2, 19:9-11.)

The investigating officer testified that, on the morning of the accident, it was snowing lightly. (*Id.* at 6:13.) "The road surface condition was wet, but traction was overall . . . pretty good." (*Id.* at 6:16-17.)

There was considerable testimony about whether Johnson was intoxicated at the time of the accident. Johnson testified that, although he believed that it would have been unsafe for him to drive after the evening of drinking, he did not feel intoxicated or impaired when he left his friend's house to go home in the morning. (08/13/2008 Transcript at 51:9-21.) Johnson's expert toxicologist, however, acknowledged that, based on (1) the amount of alcohol that Johnson admitted to consuming, (2) the rate at which alcohol would have been eliminated from his blood, and (3) the alcohol levels in his blood over four hours after the accident, he would have been legally impaired when he got into his car just minutes before the accident, if not at the precise moment of the accident itself. (*Id.* at 84:5-12, 94:8-12.) Johnson's expert also acknowledged that (1) if Johnson had just one beer more than he admitted, he would have been intoxicated at the time of the accident with a blood alcohol level of .082 (*id.* at 85:7-14, 94:13-15); (2) if the expert's assumptions about the timing of Johnson's drinking were changed to later in the evening, his blood alcohol level at the time of the accident would have been higher (*id.* at 90:17-22); and (3) another expert's estimate of Johnson's blood alcohol level of .1 at the time of the accident, if accurate, would indicate that Johnson was intoxicated at the time of the accident, since such a level of alcohol would have a "significant effect on anyone" (*id.* at 88:16 – 89:2, 94:20-22).

There was also considerable testimony about whether Johnson was driving at an excessive speed as he approached the ice patch. The posted speed limit was forty-five miles per hour. (08/12/2008 Transcript at 33:9-10.) Bedor testified that Johnson's vehicle was heading toward him at a speed "well in excess of sixty miles an hour." (*Id.* at 108:3 – 109:12.) Bedor's accident reconstructionist calculated the vehicle's speed when it lost traction at somewhere between forty-seven and seventy miles per hour. (*Id.* at 63:8-12, 82:3-20.) Johnson's accident reconstructionist declined to provide an opinion about whether Johnson was driving over the speed limit or at an excessive speed, stating that he believed that there was insufficient evidence upon which to base such an opinion. (08/14/2008 Transcript at 86:1 – 88:15.)

Johnson, who was also injured in the accident, claimed to have no recollection of the accident or anything that happened just before or after the accident. (*Id.* at 34:14-15.) He testified that he had a "fuzzy memory of waking up" that morning and a "good memory" of scraping ice off his car before driving. (*Id.* at 34:15-16.) The last thing that he remembered before the accident was driving by a high school. (*Id.* at 34:16-17.) He had no recollection of his driving speed leading up to the accident, although he told the investigating officer that he "usually" kept

his speed under fifty miles per hour (five miles per hour over the speed limit) on that portion of the roadway. (08/12/2008 Transcript at 39:3-4.)

Over Bedor's objection (08/15/2008 Transcript at 3:4-18; Plaintiff's Objection to Defendant's Tendered Jury Instructions, 20385213), the jury was given the following "sudden emergency" instruction:

> 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 reasonably careful person would have exercised under the same or similar circumstances.

(Jury Instruction No. 23; Defendant's Proposed Jury Instruction No. 24, 20369621.)

The jury found that Bedor suffered injuries, damages, or losses, but that Johnson was not negligent. (Special Verdict Form A, 21118424.) Bedor moved for judgment notwithstanding the verdict, arguing that Johnson had failed to rebut the presumption of negligence. (Plaintiff's Motion for Post-Trial Relief Pursuant to Rule 59, 21579899). The trial court denied the motion (Minute Order, 21900754 & 21905278), and awarded costs of $34,616.73 against Bedor (Order, 23512377).

In an unpublished opinion, the court of appeals affirmed. *Bedor v. Johnson*, Case No. 08CA2421 (Colo. App. Nov. 19, 2010) (hereinafter, "Slip op."). Relying heavily on its recent decision in *Kendrick v. Pippin*, 222 P.3d 380 (Colo. App. 2009), *rev'd*, 252 P.3d 1052 (Colo. 2011), the court held that the jury was properly

given a "sudden emergency" instruction, since "[a] party is entitled to have a sudden emergency instruction submitted to the jury where competent evidence is presented that the party was confronted with a sudden or expected [sic] occurrence not of the party's own making," and "[n]o matter how improbable or unreasonable the contention, a defendant is entitled to an appropriate instruction upon the hypothesis that it might be true." Slip op. at 3-4 (citations and alterations omitted). After his petition for rehearing was denied, Bedor petitioned for certiorari review in this Court.

On May 16, 2011, one week after reversing the court of appeals in *Kendrick*, this Court granted Bedor's petition for certiorari on the propriety of the sudden emergency instruction.

SUMMARY OF ARGUMENT

The trial court erred when it instructed the jury on the sudden emergency doctrine. This Court has found sufficient evidence to justify an instruction on sudden emergency where a party was "confronted with an unanticipated and unforeseeable occurrence calling for immediate action." *Kendrick*, 252 P.3d at 1059 (citing cases). Here, however, the allegedly unanticipated and unforeseeable occurrence was nothing more than Johnson's encounter with a patch of ice on a cold January morning at precisely the same location, in the very same westbound

lane of the very same roadway, where he had "seen" and "experienced" it before, where he "knew" it existed, and where he was "aware" it could "appear," "disappear," and "form" again.

Moreover, even if one could reasonably describe the ice patch as unforeseeable, the sudden emergency instruction was improper, since the sudden emergency doctrine applies only to a person's exercise of judgment in choosing among alternative courses of action after being placed in a sudden emergency. Here, by his own admission, Johnson's "theory of the case" was that the ice patch caused his vehicle "to go *out of control* and into the oncoming lane of traffic," so "entry into the eastbound lane was *unavoidable*." Answer Brief at 14, *Bedor v. Johnson*, Case No. 08CA2421 (Colo. App. July 24, 2009) (emphasis added). The sudden emergency doctrine does not apply where, as here, no evidence is presented to show that, when confronted with the alleged emergency situation, the defendant had the opportunity to exercise the kind of hurried but reasonable choice between alternative courses of action that the sudden emergency doctrine is designed to protect.

ARGUMENT

The trial court erred when it instructed the jury on the doctrine of sudden emergency.

A. Standard of Review and Preservation of Error.

An appellate court reviews a trial court's decision to give a particular jury instruction for abuse of discretion. *Kendrick*, 252 P.3d at 1059. A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Id.* This issue was preserved for appellate review by Bedor's objection to the trial court's sudden emergency instruction. (08/15/2008 Transcript at 3:4-18; Plaintiff"s Objection to Defendant's Tendered Jury Instructions, 20385213; *see also* Brief in Support of Plaintiff's Motion for Summary Judgment and a Determination of a Question of Law, 19896621 at 7-8; Reply in Support of Judgment as to Liability, 20370472 at 2-3.)

B. Discussion.

As this Court has observed, "[t]he sudden emergency doctrine was developed by the courts to recognize 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 circumstances." *Young v. Clark*, 814 P.2d 364, 365 (Colo. 1991); *Kendrick*, 252 P.3d at 1059 (quoting *Young*). "The doctrine does not 'impose a lesser standard of care on a person caught in an emergency

situation; the individual is still expected to respond to the situation as a reasonably prudent person under the circumstances.'" *Kendrick*, 252 P.3d at 1059 (quoting *Young*, 814 P.2d at 365). Rather, "[t]he basis of the special rule is merely that the actor is left no time for adequate thought, or is reasonably so disturbed or excited that the actor cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess." *Young*, 814 P.2d at 365 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 33, at 196 (5th ed.1984) (hereinafter *Prosser and Keeton*)). "Under such circumstances, the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no reasonable person could possibly have made after due deliberation." *Id.*

"[W]here competent evidence is presented that a party was confronted with a sudden or unexpected occurrence not of the party's own making," this Court has approved the use of a sudden emergency instruction. *Id.* at 369; *Kendrick*, 252 P.3d at 1059. However, "an instruction should not be given to the jury unless there is evidence introduced to support that instruction." *Young*, 814 P.2d at 367 (quoting *Converse v. Zinke*, 635 P.2d 882, 889 (Colo. 1981) (internal quotation marks and alterations omitted)); *Kendrick*, 252 P.3d at 1059 (quoting *Young*).

This Court has found sufficient evidence to justify an instruction on sudden emergency in several cases where a party was "confronted with an unanticipated and unforeseeable occurrence calling for immediate action." *Kendrick*, 252 P.3d at 1059 (citing cases). An occurrence is not unforeseeable, however, simply because it has not yet happened, *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 48 (Colo. 1987), or because a party lacks notice of a specific time or manner in which it may take place. *Id.* Rather, "foreseeability is based on common sense perceptions of the risks created by various conditions and circumstances," *id.*, and "includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct," *id.* (quoting 3 F. Harper, F. James, & O. Gray, *The Law of Torts* § 18.2, at 658-59 (2d ed. 1986)) (internal quotation marks omitted). For purposes of the sudden emergency doctrine, "foreseeable events are not emergencies, and thus should not merit the giving of a sudden emergency instruction." *Collins v. Rambo*, 831 N.E.2d 241, 249 (Ind. App. 2005) Moreover, "some 'emergencies' must be anticipated, and the actor must be prepared to meet them when he engages in an activity in which they are likely to arise." *Prosser and Keeton* § 33, at 197.

Here, the evidence did not support an instruction on the sudden emergency doctrine. Even if Johnson presented sufficient evidence to create a jury issue

regarding his excessive driving speed and level of alcohol intoxication or impairment at the time of the accident, he did not present sufficient evidence that he was confronted with the kind of unanticipated and unforeseeable occurrence contemplated by the sudden emergency doctrine.

Indeed, Johnson's own testimony established that the ice patch was foreseeable and should have been anticipated. Since 1996, Johnson had been living in Telluride, where he worked as a hotel manager and skied in the winter. (08/13/2008 Transcript at 40:2-20.) In the months leading up to the accident, he had driven "every day" over that section of West Colorado Avenue where the ice patch was. (*Id.* at 38:16-18.) According to Johnson, "[t]he ice patch wasn't there every day in the winter months. . . . [T]his ice patch kind of comes and goes depending on the weather patterns, the temperature, how maintenance is being applied to the road out there." (*Id.* at 38:19 – 39:1.) Johnson acknowledged, however, that the ice patch had already "appeared and disappeared once or maybe twice" that winter. (*Id.* at 39:1-2.) Moreover, Johnson admitted that, prior to the accident, he "knew that that ice patch existed," "had experienced it before," and "was aware of the possibility of an ice patch that may or may not form in the westbound lane." (*Id.* at 39:3-4, 48:8-12.)

The allegedly unanticipated and unforeseeable occurrence, then, was nothing more than Johnson's encounter with a patch of ice on a cold January morning in the very same westbound lane of the very same Colorado mountain highway at the very same location where Johnson had, by his own testimony, "seen" and "experienced" that very same patch of ice earlier during that very same winter. Under the circumstances, Johnson's encounter with a patch of ice, which he admittedly "knew" about and was "aware" could form at precisely the same location where he had seen it before, was foreseeable as a matter of law. *See, e.g., Taco Bell*, 744 P.2d at 49 (injury to patron during robbery at restaurant was foreseeable as a matter of law in light of past robberies at same restaurant)

The court of appeals nevertheless suggested that "issues relating to the foreseeability of the ice patch" were for the jury. Slip op. at 6. According to the court, Johnson "testified that, although he was aware that an ice patch could form near the point in question, on the day of the accident he did not see the ice patch and had no reason to believe that there would be ice on the road, as the road was clear to that point." *Id.* at 5. The record does not support the court's statement. Johnson never testified that he did not see the ice patch, nor did he testify that the road was clear to that point. Rather, as the court itself later acknowledged, *id.* at 14, Johnson testified that he had "no recollection of the accident itself or anything

that happened just before or after the accident" (08/13/2008 Transcript at 34:14-15), and "definitely the last thing [he] remember[ed]" before the accident was driving by a high school (*id.* at 34:16-17). Nor would it have been reasonable for Johnson to assume that he would encounter no ice while driving on wet roads during a light snowfall on a cold January morning in Colorado ski country. Indeed, Johnson testified that "one of the last things [he] remember[ed]" before the accident was "scraping ice" off his car. (*Id.* at 34:15-16.)

Moreover, even if Johnson had testified that he did not see the ice patch, as the court of appeals incorrectly stated, a driver is required to maintain a proper lookout and to see what there is to be seen. *Union Pac. R.R. Co. v. Cogburn*, 315 P.2d 209, 215-16 (Colo. 1957); *Ridenour v. Diffee*, 297 P.2d 280, 282-83 (Colo. 1956). Here, according to the investigating officer at the scene of the accident, the patch of ice was "obvious" and visible to any "reasonably prudent" westbound driver (08/12/2008 Transcript at 25:22 – 26:4), and even if it was not as obvious at 7:05 a.m. as it might be later in the day, or if it became obvious only from a fairly short distance away, Johnson was required to drive in such a manner as to be able to stop in the distance within which it would become visible. *Ridenour*, 297 P.2d at 283 (it was negligence as a matter of law for defendant to drive at night in such

manner that he could not stop in the distance within which objects ahead were visible).

In any event, Johnson's failure to see the ice patch that morning would raise no issue of foreseeability, since Johnson admitted that he "knew" that the ice patch existed, had both "seen" and "experienced" it before, and was "aware" that it could form at that precise location in the westbound lane of that road. A "reasonably thoughtful person" would "take account of" such a risk in guiding his practical conduct. *Taco Bell*, 744 P.2d at 48; *see also, e.g., Sobczak v. Vorholt*, 640 S.E.2d 805, 812-13 (N.C. App. 2007) (that defendant did not see the ice patch before encountering it did not make it unforeseeable, and did not justify an instruction on sudden emergency); *Caristo v. Sanzone*, 750 N.E.2d 36, 38 (N.Y. 2001) (that the defendant had not encountered any other ice patches did not support any reasonable view that the ice upon which defendant lost control of the vehicle was sudden and unforeseen, so "sudden emergency" instruction was improper).

Even if one could reasonably describe the ice patch as unforeseeable, however, the jury should not have been instructed on the sudden emergency doctrine. As Johnson explained to the court of appeals, his "theory of the case" was that "the ice patch caused the Subaru to go *out of control* and into the oncoming lane of traffic," so "entry into the eastbound lane was *unavoidable*." Answer Brief

at 14, *Bedor v. Johnson*, Case No. 08CA2421 (Colo. App. July 24, 2009) (emphasis added). The sudden emergency doctrine, however, applies only to a person's exercise of judgment in choosing among alternative courses of action *after* being placed in a sudden emergency. *See, e.g., Young*, 814 P.2d at 365 ("[t]he sudden emergency doctrine was developed by the courts to recognize 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 circumstances," and "[t]he basis of the special rule is merely that the actor . . . *must make a speedy decision*" (quoting *Prosser and Keeton*, § 33, at 196) (emphasis added)); *Davis v. Cline*, 493 P.2d 362, 363-64 (Colo. 1972) ("[t]he doctrine of sudden emergency has long been recognized in Colorado as a valid principle bearing upon alleged negligent conduct that may be attributed to one who finds himself *confronted with an emergency choice*," and "[t[he rationale of the doctrine is that in an emergency there is no time for cool reflective deliberation . . . *the situation demands speedy decision*") (emphasis added)); Restatement (Second) of Torts § 296 (1) and cmt. b (1965) ("the fact that the actor is confronted with a sudden emergency *which requires rapid decision* is a factor in determining the reasonable character of *his choice of action*," and "the court and the jury . . . must

take into account the fact that he is in a position where he must make *a speedy decision between alternative courses of action*" (emphasis added)).[2]

Here, the issue before the jury was not whether Johnson exercised reasonable care after being placed in the alleged "sudden emergency" of hitting the ice patch and losing traction and control of his vehicle. Rather, the issue was whether Johnson was driving with reasonable care *before* hitting the ice patch, in light of evidence that (1) he was impaired by alcohol when he got in his vehicle that morning, (2) he was driving over the speed limit on a snowy day and on wet and snow-covered surfaces, (3) he had "seen" and "experienced" the ice patch earlier that winter at that very same location in the westbound lane and knew that it could be there again that morning, and (4) the ice patch was "obvious" and visible to a "reasonably prudent" driver heading westward.

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[2] The original purpose of the sudden emergency doctrine was "to overcome the harsh effect of the former contributory negligence defense whereby a plaintiff's negligence acted as a complete bar to recovery." *Young*, 814 P.2d at 368. Thus, where a defendant's negligence created a sudden emergency requiring the plaintiff to make a speedy decision among alternative courses of action, the plaintiff was entitled to a sudden emergency instruction to counter the defendant's assertion that the plaintiff was contributorily negligent in choosing the wrong course of action when responding to the emergency situation. *Davis*, 493 P.2d at 363-65 (where plaintiff's theory of the case was that she was injured when she chose to drive off the highway and over a curb to avoid a collision with the allegedly negligent defendant, plaintiff was entitled to a sudden emergency instruction in response to defendant's allegation of contributory negligence).

The sudden emergency doctrine does not apply where, as here, "there was no evidence that once his car began to skid, [defendant] had the opportunity to exercise the kind of rational but hurried choice between alternative courses of action which the emergency doctrine is designed to protect." *Oberempt v. Egri*, 410 A.2d 482, 485 (Conn. 1979); *see also, e.g., Bardwell v. McLaughlin*, 520 S.W.2d 277, 278-79 (Ark. 1975) (for the sudden emergency doctrine to apply, "[t]he driver must be aware of the danger in a situation where he has a choice of action"); *Collins*, 831 N.E.2d at 248 (trial court erred in giving sudden emergency instruction; the sudden emergency doctrine "recognizes that the sudden emergency robs the actor of the time to thoughtfully reflect or deliberate *among various choices*. . . . In slamming on her brakes, [defendant] did not make a 'choice,' among several options, that in hindsight was not as prudent as a different choice. No evidence was presented that she could have driven into the lane to the right . . . No evidence was introduced that she could have steered her car to the left. . . . This is not the type of situation to which the doctrine was meant to apply." (emphasis in original)); *Rustin v. Smith*, 657 A.2d 412, 415 (Md. App. 1995) (sudden emergency instruction inapplicable where there was "no evidence that [defendant] had any options, made any decisions, or took any specific action" to avoid collision after he lost control of his car; "[r]ather, the evidence indicates that, once [defendant] lost

control, the vehicle was wholly uncontrollable"). Where, as here, plaintiff's claim is that the defendant was negligent *before* rather than *after* being placed in the so-called emergency, the sudden emergency instruction does not apply and should not be given, since it unduly focuses the jury's attention on the defendant's conduct during a period of time when his exercise of care is not in issue. *See, e.g., Ellwood v. Peters*, 182 So. 2d 281, 284-85 (Fla. App. 1966) (because issue was whether defendant driver was negligent *before* seeing pedestrian crossing street, and not whether driver reacted appropriately *after* seeing pedestrian, driver was not entitled to sudden emergency instruction); *Gagnon v. Crane*, 498 A.2d 718, 720-22 (N.H. 1985) (where the evidence showed no alternatives available to the defendant *after* he realized the emergency situation, the sudden emergency doctrine did not apply and the instruction should not have been given).

This Court has previously declined to abolish the use of the sudden emergency instruction in Colorado. *Compare Young*, 814 P.2d at 368 (rejecting argument that abolition of contributory negligence in favor of comparative negligence warrants abolition of sudden emergency doctrine) *with id.* at 369-72 (Lohr, J., dissenting) ("the prejudice and confusion engendered by the instruction

outweigh its utility").[3] If the instruction is to retain any utility, however, it must be appropriately limited to cases in which the jury is required to determine whether a person, when confronted with a sudden emergency calling for immediate action, exercised appropriate judgment under the circumstances of the emergency.

This is not such a case. First, it was not unforeseeable that Johnson, after scraping the ice off his car and proceeding to drive on a wet roadway in light snow on a cold January morning in Colorado ski country, would encounter an ice patch at precisely the same location where he had "seen" and "experienced" it before, where he "knew" it existed, and where he was "aware" it could "appear," "disappear," and "form" again. Second, this case had nothing to do with Johnson's exercise of judgment after he lost control of his vehicle and began to cross over

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[3] In light of its minimal utility and potential for juror confusion, numerous jurisdictions have either sharply limited the circumstances under which the sudden emergency instruction may be given, strongly discouraged its use, or abolished the instruction altogether. *See generally* Jeffrey F. Ghent, Annotation, Modern Status of Sudden Emergency Doctrine, 10 A.L.R.5th 680 (1993) (collecting cases abolishing, restricting, or discouraging use of sudden emergency instruction); *see also, e.g., Lyons v. Midnight Sun Transp. Servs., Inc.*, 928 P.2d 1202, 1205 (Alaska 1996) (reviewing case law from other jurisdictions, and "disapproving" and "discouraging" the further use of the sudden emergency instruction, which "adds nothing" to the duty of due care and is "potentially confusing"); *Simonson v. White*, 713 P.2d 983, 989-90 (Mont. 1986) (banning the sudden emergency instruction in auto accident cases); *Dunleavy v. Miller*, 862 P.2d 1212, 1214-19 (N.M. 1993) (abolishing the sudden emergency instruction in New Mexico after reviewing authorities from other jurisdictions, including this Court's majority and dissenting opinions in *Young*).

into the eastbound lane toward Bedor's Jeep. Rather, this case was about whether Johnson was drunk, speeding, inattentive, or otherwise negligent as he headed toward the ice patch on that cold January morning. The sudden emergency instruction had no place in such a case.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for retrial.

Respectfully submitted this 17th day of August 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of August 2011, service of the foregoing was effected by placing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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