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COLORADO SUPREME COURT 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202 Certiorari to the Court of Appeals, 2008CA2421 District Court, San Miguel County, 2007CV3 **Petitioner:** RICHARD BEDOR v. **Respondent:** MICHAEL E. JOHNSON	FILED IN THE SUPREME COURT OCT - 3 2011 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk ▲ **COURT USE ONLY** ▲
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ANSWER BRIEF

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.

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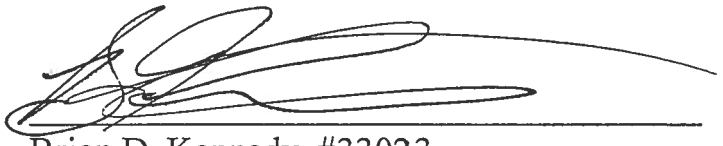

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STATEMENT OF THE ISSUE

The Supreme Court granted Mr. Bedor's Petition for Writ of Certiorari by its Order dated May 16, 2011. The sole issue is:

> Whether the Court of Appeals erred in holding that a driver who loses control of a vehicle in winter conditions, crosses over into the lane of oncoming traffic, and collides with Plaintiff's vehicle is entitled to a "sudden emergency" instruction. *Id.*

Mr. Johnson contends that the trial court did not abuse its discretion by instructing the jury on sudden emergency.

STATEMENT OF THE CASE

This traffic accident giving rise to this litigation occurred January 16, 2004, on Hwy 145 (West Colorado Avenue), approximately two miles west of Telluride in San Juan County. Mr. Bedor brought suit alleging negligence, reckless driving, intoxication, excessive speed, and permanent injury. Mr. Bedor's suit sought compensatory and exemplary damages.

Mr. Johnson presented evidence that refuted all of the claims alleged. Kathey Verdeal, Ph.D., toxicologist, Louis Winkler, M.D., orthopaedist, and Toby Nelson, P.E., testified on Mr. Johnson's behalf. Dr. Verdeal testified that Mr. Johnson was neither intoxicated nor impaired. Dr. Winkler testified that injury

was minor. Mr. Nelson testified that unforeseen ice on Mr. Johnson's portion of the highway caused him to lose control of his Subaru, and to cross into the lane occupied by Mr. Bedor's Jeep.

Trial to a jury was held in August 2008. The jury returned a verdict in favor of Mr. Johnson on Special Verdict Form A, finding that Plaintiff had injuries, damages or losses, that Mr. Johnson was not negligent, and his negligence, if any, was not a cause of Plaintiff's injuries, damages or losses. *Verdict Form A, 21118424.* Mr. Johnson was subsequently awarded costs.

The verdict was affirmed by the Colorado Court of Appeals in an unpublished opinion. *Bedor v. Johnson,* 08CA2421 (Colo. App. 2009). The Court of Appeals' opinion focused on Colorado appellate law addressing sudden emergency, and the conflicting evidence presented at trial.

STATEMENT OF THE FACTS

The accident giving rise to this litigation occurred shortly after 7:00 a.m. on January 16, 2004. Plaintiff testified that the morning "was dark." *August 12, 2008 Trial Transcript,* p. 106, l. 21. "It was early in the morning. It was dark outside." *Id.*, p. 105, ll. 12-13. However, Hwy 145 "was clear. Dry. There was no snow at that time." *Id.,* l. 11. Plaintiff was driving from his condominium at Eider Creek

eastbound into Telluride for breakfast. *Id.,* p. 105. Eider Creek is approximately two to three miles west of Telluride. *August 13, 2008 Trial Transcript,* p. 9. Defendant Johnson also resided in the Eider Creek Condominiums. *August 13, 2008 Trial Transcript*, p. 38. He was driving home from Telluride when the accident occurred. The speed limit on that section of the highway was 45 miles per hour. *Id.*, p. 10, l. 24, *et seq.* However, Plaintiff testified that the highway could actually be safely negotiated at speeds in excess of 45 miles per hour. *Id.,* p. 13.

Mr. Johnson lived in Telluride from 1996 until August 2003, when he moved to Eider Creek. *Id.*, p. 40. Prior to moving west of town, he rarely traveled Hwy 145 during winter.

> Very rarely would I travel. I lived in town in the winter months. I rarely, if ever, travel Hwy 145. Maybe two to three times a winter, between December and March, I will make a trip to Montrose or a trip to Mountain Village during the daytime, but it was very rare. *Id.,* p. 34, ll. 20-22.

Mr. Johnson never observed the suggested ice buildup pattern where the accident occurred. *Id.,* p. 41.

> Q So, the morning of January 16, 2004, at about 7, did you have any reason to believe that there was an ice build-up at that particular portion of the road?

A No, I didn't. *Id.*, ll. 23-25.

He testified that one of his last memories[2] of the morning was that Hwy 145 was clear. *Id.*, p. 47, l. 16, *et seq.*; see also p. 38.

A witness, Brian Ahern, was traveling westbound on Hwy 145 and was one of the first persons to arrive at the accident scene. *Id.*, p. 96-97. Ahern testified that the location of the accident can be dangerous, because of ice buildup which he characterized as "black ice." *Id.*, p. 99, ll. 10-11. According to Ahern, the roadway where the Jeep and Subaru came to rest ". . . was a sheet of ice." *Id.*, l. 25. Mr. Ahern testified that "I got out of the car and I fell right on my -- I fell right on my butt the second I got out of the car." *Id.*, ll. 19-20. He also saw at least one paramedic fall. *Id.*, p. 98. ". . . [T]he person I saw slip was walking out of their vehicle, going out to the center of the road and when they got to the center of the road, they slipped." *Id.*, ll. 24-25. Mr. Ahern's observations of black ice refuted speed calculations presented by Plaintiff's accident reconstructionist. This is discussed below.

[2] Mr. Johnson sustained life-threatening injuries in the accident, including a significant closed-head injury. He was flown by helicopter to St. Mary's Hospital in Grand Junction where he was held for several days. *Id., p. 61, et seq.*

The accident was investigated by Officer John Wontrobski of the Telluride Town Marshal's Office. *August 12, 2008 trial transcript,* p. 4. Officer Wontrobski was contacted at home by dispatch at approximately 7:05 a.m. *Id.*, p. 6. He was picked up by Deputy Hart in a squad car, and driven to the accident scene. *Id.* Wontrobski testified that Deputy Hart drove to the scene at a fairly high rate of speed, with overhead lights and siren in operation. *Id.*, p. 39. According to Officer Wontrobski, the highway was clear. *Id.*, p. 33. In fact, he testified that they encountered no difficulties with road conditions, including loss of traction. *Id.*, l. 25.

Officer Wontrobski further testified that he arrived at the scene approximately 20 minutes post-impact. *Id.*, p. 31, ll. 25, *et seq.* He opined that a section of ice near the spur caused the Subaru to break traction. *Id.*, p. 33.

> Q And that is because it was obvious that the vehicle, that the Subaru had gone into a counterclockwise rotation?
>
> A Correct. *Id.*, p. 34, ll. 2-4.

It was evident that the Subaru broke traction on the ice because it left no skid marks. *Id.*, p. 16. Furthermore, there was consensus among the investigators

(Officer Wontrobski, Steven Knapp, P.E., and Toby Nelson, P.E.) that the ice caused Mr. Johnson to lose control of the Subaru.

Officer Wontrobski testified that there is an uphill-downhill transition on the highway that made it virtually impossible for a westbound motorist to see the ice, particularly at night. *Id.*, p. 41. He testified that there were no warning signs to alert approaching traffic of the ice. *Id.*, p. 40. The officer also testified that a speed reduction for an approaching motorist was unnecessary. "I would say that a reasonably prudent driver does not need to slow down for the ice patch if they kept their wheels in the trough as it were. The space between the three patches of ice." *Id.*, p. 42, ll. 22-24. Thus, the actual speed of the Subaru was not the critical explanation of why Mr. Johnson lost control.

Mr. Steve Knapp testified as an accident reconstructionist on Plaintiff's behalf. *August 12, 2008 trial transcript*, p. 49. Mr. Knapp testified "that the vehicle lost control when it went on top of the ice. . . ." *Id.*, p. 81, l. 18. "When it went out of control . . . it was beginning to spin into a counterclockwise rotation." *Id.*, p. 62, ll. 3-4. The rotation caused the Subaru to enter the eastbound lane. Mr. Knapp opined that Mr. Johnson unsuccessfully took corrective action to mitigate his situation after the Subaru broke traction. *Id.*, p. 86. Mr. Knapp also opined

that the Subaru's speed was 47-63 miles per hour at or about the time it broke traction. *Id.,* p. 63. However, when asked to include the assumption that the westbound lane was icy to the west of the ice strips, as stated by Mr. Ahern in his testimony, Knapp admitted that Mr. Johnson's speed could have been as low as 32.8 miles per hour or as high as 44 miles per hour when he hit the ice.[3] *Id.,* p. 80.

Toby Nelson, P.E. testified as an expert in mechanical engineering and accident reconstruction for Defendant Johnson. *August 14, 2008 trial transcript,* pp. 68-73. Nelson described the location topography which may have caused the ice accumulation. According to Nelson, there was a grove of trees on the south side of Hwy 145. *August 14, 2008 Trial Transcript,* p. 17, et seq. The grove was approximately 1/8 mile in length. It cast a significant shadow on the highway. *Id.* Snowplow activity and freeze-thaw cycles also contributed to the ice buildup in the westbound lane.

Mr. Nelson further testified that the location of the ice was obscured by "a crest on a hill." *Id.,* p. 75, l. 9.

> It is not like you can look a quarter of a mile down and see it on flat surface. You have to be much closer to it, especially at night with your lights, it is going to be

[3] There were three ice strips. *Id.,* p. 13. The vehicles collided to the west of the ice strips. *August 12, 2008 Trial Transcript,* p. 15.

somewhat of a delayed visual observation that there is ice there, unless you are looking specifically. *Id.*, ll. 10-13.

Nelson testified that a motorist traveling 50 miles per hour is moving at approximately 75 feet per second. *Id.*, p. 76. He also testified regarding reaction time and the factors that would delay a motorist's perception of the ice, even if seen. *Id.*, p. 75. At night, the ice, particularly black ice, "is harder to see." *Id.*, p. 77, l. 5.

Nelson testified extensively that the accident investigation yielded insufficient physical evidence to calculate Mr. Johnson's pre-slide speed. *Id.*, pp. 78-84.

By Mr. Alvillar:

Q What type of information would you need to have to come up with that speed estimate?

A I would need reliable reasonable information to answer the question what is a coefficient of friction and answer the question what is the deceleration rate ending up with a combination of a drag coefficient. I don't know that number. I don't know either one of those numbers, and the testimony is ice, snow, water, and to come up with this percentage rate we need to know what the vehicle is doing all the way down here. How the tires are turned. Whether there is braking. Whether there is no braking. How far it is sideways. Things like that and we don't have that. We don't have any tire marks. We

> don't have any skid marks. We have nothing. *Id.*, p. 86, l. 22, *et seq.*

This testimony refuted Mr. Knapp's calculation of excessive speed. *Id.*, p. 83 ("So, I don't know what his speed was up here. I will tell you it makes really no difference whether he started sliding at the beginning or the end of ice, because that ice is slick." *Id.*, ll. 15-16.) Nelson also established that the highway transition crest made it virtually impossible for Mr. Johnson to have timely perceived the ice, particularly because of the darkness. *Id.*, p. 75. The difficulty in perceiving the black ice that dark morning was underscored by Mr. Ahern's site observations.

In short, Mr. Johnson elicited not only competent but compelling evidence of a sudden emergency. Hwy 145 was dry, as Johnson approached the location of impact. The ice was obscured by the darkness of the 7:05 a.m. January morning and the hill transition. Johnson testified that he did not know ice was present or would be present, that he was surprised and that he was faced with a sudden emergency which ended in a collision. At Johnson's request, the jury was instructed concerning sudden emergency. After deliberation, jurors concluded that Defendant was not negligent.

SUMMARY OF THE ARGUMENT

Mr. Johnson presented evidence that he was unaware of the ice buildup at the location of the accident and that he was surprised by the sudden change in conditions. The road had been clear prior to the point of the accident. Johnson operated his Subaru at a reasonable speed, perhaps as low as 32.8 miles per hour. However, when he hit the ice, his vehicle spun out of control. Johnson presented evidence that he was faced with a choice. He could have done nothing, or he could have tried to maneuver to avoid the collision. In an emergency situation, he attempted to take corrective action and collided with Plaintiff's vehicle. Under those circumstances, the trial court did not abuse its discretion in instructing the jury on sudden emergency.

Plaintiff contends that, because Mr. Johnson had some general awareness that ice could form, the sudden emergency instruction should not have been given. This argument should be rejected, because it ignores existing case law and because it would limit the application of the sudden emergency doctrine in Colorado in such a way as to render it meaningless. The sudden emergency instruction serves an important purpose by assisting jurors in evaluating liability in situations where

a reasonable person cannot be called upon to exercise calm, reasoned judgment, and it should be retained.

Plaintiff also contends that the sudden emergency instruction should not have been given, because the unexpected ice did not force Mr. Johnson to make a quick decision. That argument is contradicted by the evidence. Plaintiff's expert testified that Johnson lost control while attempting to take corrective action. Johnson's expert testified that Johnson could have done nothing and that doing nothing might have been the better course. Based upon that evidence, it was clearly proper to provide the jury with guidance in applying the reasonable person standard. The decisions of the trial court and the Court of Appeals should be affirmed.

ARGUMENT

The trial court did not err in instructing the jury on the sudden emergency doctrine.

1. Standard of Review.

The trial court's instruction on sudden emergency should be reviewed for abuse of discretion. *Andersen v. Lindenbaum,* 160 P.3d 237, 240-241 (Colo. 2007); *Fishman v. Kotts,* 179 P.3d 232, 235 (Colo. App. 2007). "A reviewing court can conclude that the trial court abused its discretion only if the trial court's

ruling is manifestly arbitrary, unnecessary or unfair. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242, 1251 (Colo. 1994). "In assessing whether a trial court's decision is manifestly unreasonable, arbitrary or unfair, we ask not whether we would have reached a different result but, rather, whether the trial court's decision fell within a range of reasonable options." *E-470 Public Highway Authority v. Revenig,* 140 P.3d 227, 230-31 (Colo. App. 2006), cited in *Freedom Colo. Info., Inc. v. El Paso County Sheriff's Dept.,* 196 P.3d 892, 899 (Colo. 2008).

2. It was appropriate to instruct the jury on sudden emergency, because Mr. Johnson was unaware of the ice buildup at the location of the accident; the ice presented a true emergency.

The undisputed testimony was that Hwy 145 was clear of ice, with the exception of the location of the grove where the collision occurred. This was the testimony of Officer Wontrobski, Mr. Bedor, Mr. Ahern and Mr. Johnson. See *August 13, 2008 Trial Testimony,* p. 47, l. 21 and p. 48, l. 3, p. 97 and p. 38. Johnson testified that between 1996 and August of 2003 he lived in Telluride. *Id.,* p. 40. In August 2003, he moved to the Eider Creek Condominiums. Johnson was employed in town where he worked 3-4 days per week. *Id.* He normally worked the 3:00 p.m. - 11:00 p.m. shift. Johnson would normally drive to town in the winter months between 10:00-11:00 a.m. in order to ski. This hour gave the

location of the ice sufficient time to melt, because of the sunrise before his arrival. Johnson testified that he very infrequently drove the highway in the early morning. Simply put, he was unfamiliar with the alleged pattern of ice accumulation at the accident scene. Johnson testified that he never observed the alleged pattern. *Id.*, p. 41.

> Q And you have now had an opportunity to see a pattern. Am I correct in that assessment?
>
> A That is correct.
>
> Q So, the morning of January 16, 2004, at about 7:00, did you have any reason to believe that there was an ice buildup at that particular portion of the road?
>
> A No, I didn't. *Id.*, ll. 20-25.

Thus, the ice buildup on Hwy 145 that caused the Subaru to break traction and enter the oncoming lane was not known and not reasonably foreseeable to Mr. Johnson. *Scott v. Matlack, Inc.*, 39 P.3d 1160, 1166 (Colo. 2002).

The suggestion that others may have been aware of the location's alleged propensity to accumulate ice does not support the conclusion that Mr. Johnson actually knew or should have known of the propensity. *Lombard v. Colorado Outdoor Education Center, Inc.*, 187 P.3d 565 (Colo. 2008) (discussing actual and constructive knowledge in context of premises liability statute); see also *Brighton*

Pharmacy, Inc.[4] *v. Colorado State Pharmacy Board,* 160 P.3d 412 (Colo. App. 2007) ("The phrase 'should have known' has historically been used in conjunction with 'know' or 'knowledge' to create an objective standard to avoid denial of apparent facts or intentionally induced ignorance." *Id.* at 418). Johnson specifically denied any knowledge of the location's alleged propensity to accumulate ice. This testimony was supported by the testimony of Nelson and Officer Wontrobski, who agreed that the ice was very difficult to see at night because of the hill transition. The jury had the opportunity to evaluate that testimony, and the jury was properly instructed on witness credibility. C.J.I 4th (Civil) 3:16.

Defendant presented competent evidence that he was not aware of ice in the location of the accident, that he was not aware of a specific pattern of ice forming there and that the ice would have been difficult to see at the time of the collision. That is consistent with the proper giving of the sudden emergency instruction.

Even if we assume, as Plaintiff does, that Mr. Johnson was generally aware that ice could form in the vicinity of the accident site, the sudden emergency instruction was nevertheless proper. In *Young v. Clark*, 814 P.2d 364 (Colo.

[4] This case is cited in *Lombard, supra.*

1991), this Court rejected the idea that general awareness that a hazard could exist renders a sudden emergency instruction inappropriate. *Id.* at 366-67. Here, Johnson testified that the roads were clear. He had driven some distance and had not experienced ice on the road the day of the accident at any time prior to the time of the collision. Johnson also testified that he did not anticipate or expect there to be ice. The most that can be said, knowing that the accident took place near Telluride, Colorado in a winter month, is that Johnson was generally aware that snow or ice might theoretically exist on any road at some point. Applying the reasoning in *Young*, that is not enough to prevent the trial court from instructing the jury on sudden emergency. *Id.*

3. *Kendrick v. Pippen* did not Change the requirements for instructing a jury on sudden emergency.

Plaintiff seems to suggest that this Court altered the requirements for giving the sudden emergency instructions in its recent decision, *Kendrick v. Pippin*, 252 P.3d 1052 (Colo. 2011). Mr. Bedor is mistaken. In the *Kendrick* opinion's discussion of sudden emergency, this Court began by reciting the requirements for giving the sudden emergency instruction set forth in *Young*. *Id.* at 1059. The Court also gave examples of situations which it had previously concluded could constitute a sudden emergency. *Id.* At no point in the opinion did the Court adopt

a different test or in any way restrict the application of the sudden emergency doctrine. The Court simply concluded that, under existing decisional law, Defendant was not entitled to a sudden emergency instruction.

Pippen testified that she knew it had been drizzling the night before the accident. She also testified that she drove her vehicle in four-wheel-drive the morning of the accident, because she knew that there could be ice. There was testimony from other witnesses that the roads on which Pippin drove before the collision were slushy. The Court concluded, "Pippin's testimony demonstrates both that she specifically expected icy roads and intersections that morning and that she modified her driving in anticipation of encountering slick and icy conditions." *Id.* at 1060. Under those circumstances, the Court felt it was an abuse of discretion for the trial court to have instructed the jury on sudden emergency. *Id.* Nothing about Kendrick makes the trial court's decision here improper. As will be discussed in more detail below, the facts here are easily distinguishable from those in *Kendrick*.

4. Defendant presented ample evidence that the emergency and the eventual accident were not the result of any fault on Johnson's part.

Plaintiff contends that, even if there were an unexpected change in road conditions, the trial court erred in giving the sudden emergency instruction,

because Johnson created the situation by speeding and by being under the influence of alcohol. The problem with Plaintiff's argument is that Johnson presented contrary evidence at trial, making issues of speed and alleged intoxication fact questions for the jury but not making it an abuse of discretion to instruct the jury on sudden emergency. While Plaintiff may be unhappy that the jury found Johnson's testimony and the testimony of Johnson's experts credible, that is not grounds for reversal.

Plaintiff and Defendant presented substantial evidence concerning Johnson's speed. Johnson's accident reconstructionist, Nelson, testified that calculation of Johnson's approach speed was impossible, because there was no physical evidence. *August 14, 2008 Trial Transcript,* p. 86, l. 22, *et seq.* Plaintiff's expert, Knapp, calculated a speed. However, he admitted under cross-examination that Mr. Johnson's approach speed could have been between 32.8 miles per hour and 44 miles per hour, if he gave credence to Mr. Ahern's testimony that severe, icy conditions existed in the general area where the vehicles collided. *August 12, 2008 Transcript,* p. 80.

The investigating officer's testimony suggested that it would have been reasonable for a person to travel at significant speed on the road leading up to the

scene of the accident. Indeed, Officer Wontrobski testified that his driver sped to the accident scene with siren and overhead lights activated. The police cruiser encountered no difficulties, and did not break traction.

Plaintiff's expert, Knapp, testified that ice caused the Subaru to break traction. *August 12, 2008 Trial Testimony,* p. 61. "My understanding -- yes, I believe my understanding is that he broke traction on the ice." *Id.,* p. 80, ll. 24-25; see also *Id.,* p. 81, l. 18. Mr. Knapp's opinion was supported by the testimony of Mr. Bedor, who stated: "Well [the Subaru] turned counterclockwise and slid sideways across into my lane and struck me in my lane as I had almost stopped." [5] *Id.,* p. 108, ll. 5-6. Thus, ample evidence existed, if believed by jurors, that a sudden emergency –unexpected ice, rather than excessive speed, caused the accident.

Plaintiff has also suggested that the collision was the result of Defendant being intoxicated. Again, Johnson presented evidence contradicting that assertion. See *Trial Testimony 8/12/08*, page 80, ll. 4-5, page 33, ll. 9-10, page 33, ll. 11-13; *Trial Testimony*, 8/14/08, page 86, ll. 15-20; *Trial Testimony* 8/13/08, page 79, ll. 19-21, page 81, ll. 9-13, page 93, ll. 20-24. Johnson's toxicology expert, Dr.

[5] Mr. Johnson's closed-head injury rendered him amnesic. *August 13, 2008 Trial Transcript,* p. 34.

Verdeal, testified that the EMT and Telluride Medical Clinic records did not give any indication that Mr. Johnson was intoxicated. *Trial Transcript* 8/13/08, page 59, ll. 9-20. Dr. Verdeal further testified that a blood serum alcohol reading of 32 mg/dl (Mr. Johnson's blood serum alcohol reading at St. Mary's Hospital and Medical Center) is equivalent to a whole blood alcohol level of 0.024 to 0.029, which is well below the impaired range. *Trial Testimony 8/13/08*, page 79, ll. 19-21, page 81, ll. 9-13; *see* C.R.S. §42-4-1301. Dr. Verdeal specifically opined that Mr. Johnson was not impaired by nor under the influence of alcohol at the time of the accident. *Trial Testimony 8/13/09*, page 93, ll.20-25, page 94, ll. 1-3. Based upon Dr. Verdeal's testimony, there was sufficient evidence for the jury to conclude that Defendant was not impaired by alcohol at the time of the collision. Thus, it was not an abuse of discretion to instruct the jury on sudden emergency.

5. A decision is not necessary for the sudden emergency instruction to be given. However, in this case, Johnson was forced to make an immediate decision concerning what action to take once his vehicle lost traction.

Mr. Bedor also argues that it was error to give the sudden emergency instruction because Mr. Johnson was not faced with a choice between various, discrete alternatives once he lost traction on the ice. Plaintiff is mistaken.

The trial court here gave the standard sudden emergency instruction, which states:

> 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. CJI-Civ. 9:11.

Neither the instruction nor the sudden emergency doctrine necessarily require that a defendant faced with a sudden emergency be faced with a discrete set of choices in the context of the emergency situation. Rather, as this Court has previously held, the sudden emergency doctrine simply 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." *Kendrick*, 252 P.3d at 1059, citing *Young*, 814 P.2d at 365. Once instructed on the doctrine, the jury must decide whether there was a sudden emergency and, if so, to take into account the emergency when determining whether the party's conduct was reasonable under the circumstances. *Id.* In other words, the sudden emergency instruction tells jurors to look at the conduct of a party in an emergency as a whole and to ascertain whether that conduct was reasonable. Contrary to what Plaintiff suggests, a discrete choice among identifiable options is

not essential. Thus, even if Defendant here was not faced with a specific choice in the context of confronting ice and losing traction, it was not an abuse of discretion for the trial court to give the instruction.

Of course this argument is academic, because the evidence offered at trial showed that Johnson was actually faced with a choice. When he began slipping, he had to decide whether to attempt corrective action and, if so, what specifically to do. Brake? Turn the wheel? Accelerate? Plaintiff's and Defendant's experts testified about what Johnson actually did once he hit the ice and lost traction and discussed at least one alternate course of action. Defendant's accident reconstruction expert, Nelson, testified that Defendant could have done nothing when he lost traction and that doing nothing might actually have been the better choice for Mr. Johnson. *August 14, 2008 Trial Transcript,* p. 82. ("You could nothing, which sometimes is the very best thing you can do." *Id.*, ll. 14-15.) Plaintiff's expert, Mr. Knapp, opined that what Defendant actually did was to try unsuccessfully to take corrective action and to mitigate his situation after the Subaru broke traction. *Id.,* p. 86.

Thus, the evidence presented to the jury was sufficient for a reasonable person to conclude that Johnson found himself facing a sudden emergency: road

conditions changed without warning. He lost traction. He had to react. He made a choice to try to take corrective action. This was unsuccessful, and Johnson crashed into Plaintiff. That is precisely the sort of circumstance in which the sudden emergency doctrine applies. The trial court certainly did not abuse its discretion in instructing the jury on the doctrine.

6. Sudden emergency is well established in Colorado law, and the facts of this case supported giving the instruction. Therefore the trial court did not abuse its discretion in giving a sudden emergency instruction.

The doctrine of sudden emergency has been established and recognized in Colorado for decades. See *Ridley v. Young,* 127 Colo., 46; 253 P.2d 433 (1953). "This court has approved of giving an instruction on the sudden emergency doctrine where sufficient evidence exists that a party acted in an emergency situation not caused by the party's own negligence." *Young,* 814 P.2d at 369. The unexpected emergency can be caused by a variety of circumstances including failed brakes, an unanticipated failure to yield by another motorist, and, quite specifically, an unseen patch of ice on the highway.

In fact, this Court has previously approved of the application of the sudden emergency doctrine in a case with facts strikingly similar to those in the case at bar. In *Stewart v. Stout,* 143 Colo. 70, 351 P.2d 847 (1960), the parties, who had

been driving on dry roads, approached a hill crest and then curve in the road, when they encountered unexpected ice on the roadway. Plaintiff attempted to pull off the highway, because vehicles to her front encountered difficulty. When she tried to leave the road, she was rear-ended by defendant, who was also attempting to leave the road. This evidence was held sufficient for the trial court to find the accident was caused by a sudden emergency.

The facts here are similar. Just as in *Stewart*, Defendant travelled up to the point of the accident without encountering ice on the roadway. Just as in the *Stewart* case, at the location of the accident here, road conditions changed suddenly. Again, as was the situation in *Stewart*, it was not possible for Defendant to see the ice before he encountered it. And here, just as in *Stewart*, the icy roadway created an emergency situation, leading to an accident. Once Mr. Johnson hit the ice, his vehicle broke traction.

The evidence in the instant case was far different than the facts in *Kendrick v. Pippin*, 222 P.3d 380 (Colo. App. 2009). There, Ms. Pippin had been driving on snowy and slushy roads for blocks. She had her vehicle in four-wheel-drive, because she was concerned the road would be slick. Pippin approached a traffic signal as it turned from green to yellow. She braked, causing her truck to lose

traction on the ice and slide. When she realized she wouldn't be able to stop for the light, she attempted to turn right at the intersection, in order to avoid cross traffic. However, she was unable to complete the intended turn. Her truck crossed the median and collided with Kendrick's vehicle. Over the plaintiff's objection, the trial court instructed the jury on sudden emergency. The Court of Appeals affirmed reasoning that ". . . there was competent evidence that Ms. Pippin was confronted with a sudden emergency." *Id.* at 384. This Court subsequently reversed the Court of Appeals. *Kendrick,* 252 P.3d 1052. This Court noted that Ms. Pippin's testimony revealed an error in the trial court's and the Court of Appeals' reasoning:

> Pippin testified that... she knew that it had been drizzling the night before, and that, because of this, she drove in four wheel drive and at forty miles per hour, below the posted speed limit of forty-five. She stated that, prior to reaching the intersection, the roads were not dry but "pretty clear" and that she had driven about four miles and through seven or eight intersections without sliding or losing control of her vehicle. *Id.* at 1060.

The Opinion also cited the observations of the investigating officer.

> Officer Roberts testified that, due to the overnight snowfall, the road conditions in the area were generally slushy and icy and that the road conditions at the intersection were not unexpected but that '[t]he conditions were pretty much the same everywhere.' *Id.*

Thus, this Court held that ". . . Pippin's trial testimony showed that she anticipated that the roads and intersections would likely be icy that morning and, therefore, encountering ice at the intersection was not sudden or unexpected." *Id.*

In the instant case, Hwy 145 was ice free, except for the three ice strips and black ice observed by Mr. Ahern, near the point of impact. Mr. Johnson presented evidence that he could not see the ice, because of darkness and the transition in the highway. Furthermore, there was no evidence that Mr. Johnson adjusted his operation of the Subaru in any way which might suggest that he anticipated the change in road conditions. The Subaru went out of control, and crossed into the eastbound lane because of a surprising change in road conditions, not negligence. Therefore, the trial court did not abuse its discretion by instructing the jury on sudden emergency.

7. **This Court should not abandon or drastically restrict the application of the sudden emergency doctrine.**

Plaintiff argues throughout his brief that the sudden emergency instruction should not have been given, because ice is a generally foreseeable condition on a Colorado mountain road in wintertime. Bedor refers the Court to its decision in *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987) in support of the notion that foreseeability in the sudden emergency context "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.* at 48. Bedor argues that, because ice on the road is foreseeable within the framework of the *Lannon* decision, it was an abuse of discretion for the trial court to instruct the jury on sudden emergency.

Plaintiff's argument is flawed and overreaching. *Lannon* dealt with a question of duty; not sudden emergency. Lannon was a customer at a Taco Bell restaurant who was injured during an armed robbery. *Id.* at 43-44. The restaurant had been robbed several times before Lannon was injured (ten times in three years), but Taco Bell did not hire security guards or take other precautions to prevent robberies or to prevent injuries to customers in the event of a robbery. *Id.* at 44. Lannon filed suit against Taco Bell, alleging that the company was negligent. At trial, Taco Bell argued that it owed no duty to protect customers from the consequences of criminal acts committed by unknown third-persons. *Id.* In other words, Taco Bell did not argue that its employees were faced with a sudden emergency; the company argued that it had no obligation whatsoever to act or to refrain from acting in order to avoid harm to Lannon resulting from a robbery. This Court disagreed and concluded that a duty existed, reasoning that,

after ten robberies, the danger of a robbery was reasonably foreseeable. *Id.* at 48-49.

The question of duty with which the Court was faced in *Lannon* is fundamentally different from the question presented here. Determining duty requires a much broader concept of foreseeability. In this case, for instance, there was no question that Mr. Johnson owed Mr. Bedor a duty to operate his vehicle with reasonable care in an effort to avoid injuring Bedor. Defendant has never argued that ice on the road was so utterly unforeseeable that he owed no duty. He has simply argued that the ice on the road constituted a surprise and a sudden emergency, justifying a sudden emergency instruction to guide the jury in evaluating the reasonableness of his conduct. Similarly in *Young*, there was no question that the defendant owed the plaintiff a duty to exercise reasonable care to try to avoid a collision when confronted with a swerving vehicle. *Young*, 814 P.2d 364. In *Stewart* as well, there was no question the defendant owed a duty to other drivers on the roadway and no argument that the ice was so utterly unforeseeable as to destroy duty. *Stewart*, 143 Colo. 71-72. However, the ice and the vehicles having difficulty navigating the ice were unforeseeable enough to warrant a sudden emergency instruction. *Id.*

While both the determination of duty and the determination of whether it is proper to instruct the jury on sudden emergency require some examination of foreseeability, the purpose of the analysis and the relevant standards are necessarily very different. In determining whether a sudden emergency instruction should be given, it is assumed or has already been determined that a duty exists. If there were no duty owed to the plaintiff by the defendant, there would not be any jury question concerning negligence and thus no need to instruct the jury on principles of negligence. See *Greenberg v. Perkins*, 845 P.2d 530, 533-34 (Colo. 1993)(To establish a prima facie case for negligence, a plaintiff must show a legal duty of care on the defendant's part). Thus, in examining whether a sudden emergency instruction is appropriate, it has already been ascertained or conceded that the situation giving rise to the alleged injury was at least sufficiently foreseeable to warrant imposition of a duty. The question of foreseeability in the context of sudden emergency must, therefore, use a different standard. Something must be foreseeable enough to justify imposition of a duty while unforeseeable enough to make an instruction on sudden emergency proper. This makes sense, because sudden emergency does not relate to duty; the doctrine assists jurors in

determining whether, when a duty is owed, a defendant's actions were reasonable under the circumstances. *Young*, 814 P.2d at 366.

Many road hazards, such as unexpected ice, sudden swerving by other motorists, mechanical failures, etc. are things drivers know exist. Most drivers have seen them. On some level they anticipate them, and they try to take them into account in operating their vehicles. These hazards are therefore foreseeable risks associated with operating a motor vehicle, from the standpoint of a determination of duty. *Lannon*, 744 P.2d at 48. It would be inconsistent with established precedent to conclude that a driver confronted with such a situation had no obligation to his or her fellow motorists to try to avoid a collision. At the same time, even a reasonably prudent driver probably would not expect a patch of ice on an otherwise dry road. At any given time, he or she would probably not expect another driver to swerve suddenly. He or she would not expect a sudden brake failure. Even though these risks are reasonably foreseeable in the context of duty, a driver might nevertheless be surprised by these conditions and be left with a need to act quickly and without the opportunity for reasoned reflection. Indeed, this Court has held that each of these hazards can constitute a sudden emergency.

Plaintiff's argument improperly conflates the two analyses with a predictable result. If the trial court were to apply the same foreseeability analysis used in the determination of duty to ascertain whether a sudden emergency instruction should be given, the instruction could never properly be given. If a situation is sufficiently unforeseeable that there is no duty, there would be no need for the instruction, since a defendant in such a situation could not be negligent as a matter of law. On the other hand, if the trial court were to find that the hazard was sufficiently foreseeable to find a duty, it would also be foreseeable enough that the sudden emergency instruction could not be given. Plaintiff's argument, though couched otherwise, seeks the abolition of the entire doctrine.

This Court was presented with that option in the *Young* case and rejected it. This Court refused to abolish or curtail the use of the sudden emergency doctrine, and declared its intention to continue to uphold the propriety of giving the sudden emergency instruction where competent evidence is presented that a party was confronted with a sudden or unexpected occurrence not of the party's own making. The Court stated that the sudden emergency doctrine is a long-established principle of law in this jurisdiction. *Young,* 814 P.2d at 366. See also *Davis v. Cline*, 493 P.2d 362 (Colo. 1972).

Observing that some jurisdictions had denounced the usefulness of the sudden emergency instruction based on a perceived hazard that the doctrine tends to elevate its principles above what is required to be proven in a negligence action, this Court stated that such reasoning was based on "unfounded assumptions about how jurors perceive an instruction explaining the relatively simplistic sudden emergency doctrine." *Young*, 814 P.2d at 367-68. The pattern instruction used by Colorado courts obligates the factfinder to do nothing more than apply the objective "reasonable person" standard to an actor in the specific context of an emergency situation, said the court; it does not operate to excuse fault but merely serves as an explanatory instruction, offered for purposes of clarification for the jury's benefit. *Id.* at 368; CJI-Civ. 9:11.

The Court also rejected the argument that the sudden emergency doctrine should be abolished because its original purpose, to overcome the harsh effect of the former contributory negligence defense whereby a plaintiff's negligence acted as a complete bar to recovery, was no longer served with the enactment of comparative negligence in the state. *Id.* Finding no friction between the comparative negligence scheme of allocating fault and the sudden emergency doctrine, the Court pointed out that a sudden emergency instruction informs the

jury how to allocate fault and apportion damages when the conduct of the person in question is that of an ordinarily prudent person when faced with an emergency situation. *Id.* Significantly, the doctrine explains to the jury the standard of conduct expected of defendants and plaintiffs who act under the stress of an emergency situation. *Id.*

Finally, the Court failed to see the logic in an argument that the usefulness of the sudden emergency doctrine had been abrogated by C.R.S. § 13-21-111.5, which permitted the factfinder to consider the degree or percentage of negligence or fault of a person not a party to the action in determining the degree or percentage of fault of those persons who are parties to the action. *Young*, 814 P.2d at 368-69. Concluding that the sudden emergency doctrine was compatible with the designation of nonparties provision, the court noted that the pattern sudden emergency instruction contained the requirement that the emergency situation not be of the person's own making, thus allowing for the consideration of a nonparty's negligence or fault. *Id.* at 369. See also, 10 ALR5th 680 at *5(a).

Kendrick v. Pippin did nothing to alter the above analysis. This Court specifically analyzed the sudden emergency doctrine, reiterating the jury instruction. *Kendrick*, 252 P.3d at 1058-59. The outcome in *Kendrick* was

factually driven. Defendant there failed a prong of the test, because she was specifically aware of the slushy and icy conditions and even altered her driving to account for them. *Id.* at 1060. Those facts do not exist in this case and, in any event, nothing about the factual nature of Kendrick or this action supports the proposition that Colorado should break with decades of decisions by this Court and abandon or dramatically restrict the use of the sudden emergency instruction.

Contrary to what Plaintiff suggests, the sudden emergency doctrine and instruction are particularly useful and appropriate in evaluating accidents taking place in the wintertime. We know that winter presents a host of driving hazards. Courts have consistently –and correctly in Defendant's view—held that drivers have a duty to drive safely and in such a manner as to avoid harming fellow motorists, even in those winter conditions. At the same time, commonsense and experience also tell us that, even the most careful driver can be surprised by a sudden change in road conditions or confront another motorist who loses control of his or her vehicle and be faced with the need to take immediate action. Jurors should be informed that they can consider such an emergency situation in evaluating the reasonableness of a person's action.

CONCLUSION

Mr. Johnson had no actual or constructive knowledge of the ice on the highway. His last memory was that the highway was dry. The investigating officer testified that he and Deputy Hart drove to the scene at a relatively high speed with siren and overheads activated without difficulty. Plaintiff testified that the highway was clear of snow and ice. The consensus of the witnesses was that unanticipated ice caused the Subaru to break traction, and spin counterclockwise into the oncoming lane.

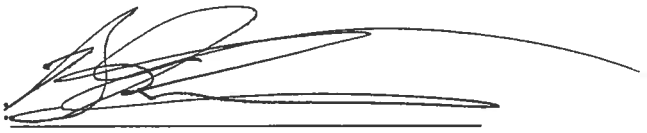
Although Plaintiff argued that Mr. Johnson was driving at excessive speed and/or that he was intoxicated, Defendant presented evidence from his own experts and elicited testimony from Plaintiff's accident reconstructionist during cross-examination that rebutted these contentions. Unanticipated ice, not negligence, caused the accident. Therefore, the Court of Appeals did not err in holding that Mr. Johnson was entitled to a sudden emergency instruction.

Plaintiff's argument concerning foreseeability improperly conflates questions of duty with the determination of whether a condition could constitute an emergency. To apply the same standard to both would effectively eliminate the sudden emergency instruction. This Court has previously rejected calls to abolish

sudden emergency and should do so again. The decisions of the trial court and the Court of Appeals should be affirmed.

Respectfully submitted this 3rd day of October, 2011,

PATTERSON, NUSS & SEYMOUR, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2011, I served a true and correct copy of the foregoing **ANSWER BRIEF** upon:

Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, CO 80202 (Original/plus 10 copies)	☐ ☐ ■ ☐	via U.S. mail, postage prepaid via overnight delivery via hand delivery via electronic filing
Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver CO 80202	■ ☐ ☐	via U.S. mail, postage prepaid via overnight delivery via facsimile
Walter H. Sargent, Esq. Walter H. Sargent, P.C. 1632 N. Cascade Avenue Colorado Springs, CO 80907	☐ ☐ ■ ☐	via hand delivery via electronic filing via U.S. mail, postage prepaid via overnight delivery
San Miguel County District Court 305 West Colorado Avenue P. O. Box 919 Telluride, CO 81435	☐ ☐ ■ ☐ ☐ ☐	via facsimile via hand delivery via electronic filing via U.S. mail, postage prepaid via overnight delivery via facsimile via hand delivery via electronic filing

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