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	
Petitioner: Richard Bedor **Respondent: Michael E. Johnson**	
	COURT USE ONLY
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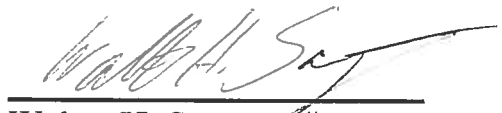
REPLY BRIEF OF RICHARD BEDOR

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 4,274 words.



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THE FACTS

Respondent Michael Johnson has not disputed any statements in petitioner Richard Bedor's opening brief regarding the underlying facts of the case, each statement of which is accurately and fully supported by one or more appropriate record citations. The same, however, cannot be said of factual assertions in Johnson's answer brief, a number of which are either unsupported or contradicted by the record. To avoid unnecessary repetition, and to place Johnson's factual misstatements in context, this reply brief will address such misstatements where they are most pertinent to the argument.

ARGUMENT

As noted, Opening Brief at 18 n.2, the original purpose of the sudden emergency doctrine was "to overcome the harsh effect of the former contributory negligence defense." *Young v. Clark*, 814 P.2d 364, 368 (Colo. 1991). Where a defendant's negligence created a sudden emergency requiring the plaintiff to make a speedy decision among alternative courses of action, a sudden emergency instruction could be used to counter the contention that the plaintiff was contributorily negligent in choosing the wrong course of action when responding to the emergency and was therefore entitled to no recovery. *Davis v. Cline*, 493 P.2d 362, 363-65 (Colo. 1972). Although this Court declined to hold that Colorado's

abolition of contributory negligence warranted abolition of the sudden emergency doctrine, *Young*, 814 P.2d at 368, the sudden emergency instruction remains properly limited to cases in which the jury must determine whether a person, when "confronted with an unanticipated and unforeseeable occurrence calling for immediate action," *Kendrick v. Pippin*, 252 P.3d 1052, 1059 (Colo. 2011), exercised appropriate judgment in responding to the situation under circumstances requiring a "speedy decision." *Young*, 814 P.2d at 365.

As discussed in the opening brief, this was not a proper case for a sudden emergency instruction. First, it was not unforeseeable that Johnson, after scraping the ice off his car and proceeding to drive on a wet roadway on a cold January morning in Colorado ski country, would encounter an ice patch at the very same location in the very same lane where, as he admitted at trial, he "knew" the ice patch existed, had "seen" and "experienced" it before, had observed it "appear" and "disappear" once or twice already that winter, and was "aware" it could "form" there. Opening Brief at 12-16, 21. Second, and perhaps more fundamentally, this case had nothing to do with whether Johnson exercised appropriate judgment in making a "speedy decision" when confronted with an emergency. 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. *Id.* at

16-22. And while Johnson continues to argue that he presented sufficient evidence a jury to find that the accident was not caused by his speeding or intoxication, Answer Brief at 16-19, he still fails to present a basis for a sudden emergency instruction here.

I. The ice patch was not the kind of "unforeseeable" occurrence that might warrant a sudden emergency instruction.

Regarding Bedor's contention that the ice patch was not the kind of "unforeseeable" occurrence that might warrant a sudden emergency instruction, Johnson offers several responses, none of which withstands scrutiny.

A. The record does not support Johnson's claim that he had no reason to know about ice accumulation at this location on the roadway.

Johnson argues that, on the morning of the accident, he had no knowledge or awareness of ice accumulation at this particular point in the roadway, and he claims that he "specifically denied any knowledge of the location's alleged propensity to accumulate ice." *Id.* at 14. Johnson contends that "[t]he 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." *Id.* at 15 (emphasis added). "[T]hat," says

Johnson, "is not enough to prevent the trial court from instructing the jury on sudden emergency." *Id.*

The record contradicts Johnson's assertions. Although Johnson may not have been certain that the ice patch would be present on that particular morning, and may not have discerned any "specific pattern" according to which the ice patch appeared, disappeared, and reappeared from day to day, *id.* at 14, he did not "specifically den[y] any knowledge of the location's alleged propensity to accumulate ice," as Johnson falsely states. *Id.* Rather, Johnson admitted at trial that he "knew that that ice patch existed," had "seen" and "experienced" it before, had observed it "appear" and "disappear" once or twice already that winter, and was "aware of the possibility of an ice patch that may or may not form in the westbound lane":

> Q: So, in the winter season of 2003 until January 16, 2004, you would go over West Colorado Avenue where the ice patch was every day.
>
> A: That is correct. That I would travel that section of road every day with the exception of where the ice patch is. The ice patch wasn't there every day in the winter months.
>
> Q: Well, is it your testimony that you never saw that ice patch during the winter beginning in 2003 through January 16, 2004?
>
> A: No, that is not correct.
>
> Q: So, when did you see it before January 16, 2004?

A: I would say it appeared – you know, 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. I would guess that it appeared and disappeared once or maybe twice. This was maybe the second time that it had appeared that winter.

Q: So, prior to January 16, 2004, you knew that that ice patch existed.

A: I – yeah, I had experienced it before.

. . .

Q: [Y]our testimony today is that prior to the [sic] January 16, 2004, you knew that ice patch existed. Correct?

A: Could exist, yes.

. . .

Q: It is true, is it not, Mr. Johnson, that prior to January 16, 2004, you were aware of an ice patch on West Colorado Avenue in the westbound lane?

A: I was aware of the possibility of an ice patch that may or may not form in the westbound lane.

Q: Isn't it true, Mr. Johnson, that prior to January 16, 2004, you had seen an ice patch in the westbound lane of West Colorado immediately to the west of the intersection with Mill Creek Road?

A: I had seen an ice patch, yes.

(08/13/2008 Transcript at 38:16 – 39:16, 48:8-16.)

Johnson's actual testimony, then, contradicts his contention that "[t]he *most* that can be said is that he was *generally* aware that snow or ice might *theoretically*

exist on *any* road at *some* point." Answer Brief at 15 (emphasis added); *cf. Kendrick* 252 P.3d at 1070 (Eid, J., dissenting) ("It is virtually always the case that a driver is *generally* aware of the possibility that an emergency situation could arise." (emphasis added)). Johnson's admitted awareness of the "possibility of an ice patch that may or may not form in the westbound lane" was not merely a "general" awareness of the "theoretical" existence of ice or snow at some random point on a hypothetical road, but rather was very specific awareness of this particular ice patch, based on his having actually "seen" and "experienced" it already at this particular point in this particular lane of this particular road during this particular winter.

B. The record does not support Johnson's claim that he did not anticipate the ice patch on the morning of the accident.

In addition to contending that he had no knowledge or awareness of ice accumulation at this location, Johnson also claims that he did not anticipate the ice on the morning of the accident. According to Johnson:

- He "testified that he did not anticipate or expect there to be ice." Answer Brief at 15.
- He "testified that one of his last memories of the morning was that Hwy 145 was clear." *Id.* at 4.

- He "testified that the roads were clear," and "[h]e 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." *Id.* at 15.
- He "testified . . . that he was surprised and that he was faced with a sudden emergency which ended in a collision." *Id.* at 9.

Each of those statements is false. Here is Johnson's actual trial testimony:

> Q: Mr. Johnson, it's true, is it not, that you have absolutely no recollection of the accident or anything that happened that morning? That is the morning of January 16, 2004.
>
> A: It is correct to say that I have no recollection of the accident itself or anything that happened just before or after the accident. I have a fuzzy memory of waking up. I have a good memory scraping ice off of my car, which is one of the last things I remember. I remember driving by the high school, which is definitely the last thing I remember. I don't remember the accident.

(08/13/2008 Transcript at 34:11-18.) Contrary to Johnson's current claims, he never testified about road conditions that morning, never testified about whether he anticipated or expected ice, and never testified about being surprised when he actually encountered the ice. Johnson is simply making all of that up.[1]

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[1] Regarding road conditions, Johnson testified that he recalled that he had stated in a deposition that he remembered that the road was clear, but he also acknowledged that he had previously stated that he had "absolutely no recollection of the accident or anything that happened that morning." (08/13/2008 Transcript at 34:24 – 35:1, 47:16 – 48:3.) At trial, Johnson did not testify about the road conditions on the

C. Contrary to Johnson's assertions, there was no testimony that road conditions made it "virtually impossible" to anticipate the ice patch.

Johnson asserts that the investigating officer at the accident scene, John Wontrobski, and Johnson's retained accident reconstructionist, Toby Nelson, testified that road conditions made it "virtually impossible" to anticipate the ice patch. According to Johnson:

- 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." Answer Brief at 6.
- Nelson "established" that it was "virtually impossible for Mr. Johnson to have timely perceived the ice, particularly because of the darkness." *Id.* at 9.

Those assertions are completely false. First, contrary to Johnson's assertion that Officer Wontrobski testified that it was "virtually impossible for a westbound motorist to see the ice," Officer Wontrobski actually testified that the ice patch was "obvious" and would be visible to a "reasonably prudent driver":

Q: And as you travel the road, is the ice patch obvious?

A: Yes.

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morning of the accident, and his only observation about ice that morning was that he had "a good memory scraping ice off of [his] car." (08/13/2008 Transcript at 34:15-16, 47:16 – 48:3.)

Q: And so, you can see it as you drive west?

A: Yes.

Q: And you can see it as you drive east?

A: Yes.

Q: And would the ice patch be visible to a reasonably prudent driver?

A: Yes.

(08/12/2008 Transcript at 25:2 – 26:4.) Moreover, although Officer Wontrobski agreed with Johnson's attorney that "when it is dark, that ice is not going to be as obvious as it might be to someone in the daytime" (*id.* at 41:15-17), he disagreed with the attorney's suggestion that the slight change of grade on the roadway would prevent a westbound driver from seeing the ice patch in the dark:

Q: So, now am I correct that as one is approaching the ice, traveling westbound, the road goes slightly up and then slightly down – makes a transition downward?

A: Yes, there is a slight crest of a hill.

Q: So, as a motorist is approaching it, the ice, if it is dark, the headlights will be up and then it won't be until the last moment when they go down on the ice. Is that way of the roadway [sic]?

A: I don't think the crest is so severe that the headlights would be off the road surface.

(*Id.* at 41:4-10.)

Nor did Nelson, Johnson's retained expert, "establish" that it was "virtually impossible" for Johnson to see the ice patch, as Johnson falsely states. Rather, Nelson simply suggested that a driver's "visible observation" of the ice might be "somewhat" delayed by the slight crest of a hill:

> Q: In the daylight, as you approach the area where the ice was, how far back are you before you can see that spot where the ice would have been?
>
> A: I don't have a number. Like I said, you are approaching a crest of a hill, and so, where the ice was is somewhat obscured by the crest. It is not like you can look a quarter of a mile down and see it on flat surface [sic]. You have to be much closer to it, especially at night with your lights, it is going to be somewhat of a delayed visual observation that there is ice there, unless you are looking specifically.

(08/14/2008 Transcript at 75:7-13.)

Moreover, contrary to Johnson's repeated assertions, *see, e.g.,* Answer Brief at 8, Nelson did not testify that there was "black ice" at the accident site and did not offer an opinion about the visibility of black ice. Indeed, when Johnson's attorney sought Nelson's opinion about the visibility of black ice, Bedor's attorney objected, since Officer Wontroski had testified that the ice patch, on the morning of the accident, consisted of three parallel strips of packed ice and snow about two inches thick (08/12/2008 Transcript at 18:5 – 19:5), and there was no evidence regarding the existence of any black ice on the roadway that morning. Without waiting for a ruling on the objection, Johnson's attorney acknowledged his error:

Q: And obviously, at night it is going to be more difficult to see black ice on the road than it would be in the day time, wouldn't it?

Mr. Rhodes: Objection to the – use of the phrase black ice. No testimony about that.

Mr. Alvillar: I will rephrase that question.

The Court: Okay.

Mr. Alvillar: And I did mis-speak. The strips of ice in question that were described by Officer Wontrobski.

(08/14/2008 Transcript at 76:17-24.)[2]

In sum, there was no testimony that it was "virtually impossible" for Johnson to see the ice patch. Quite the opposite. The testimony was that the ice patch was obvious and visible to a reasonably prudent driver. And even if the ice patch was not as obvious at 7:05 a.m. as it might be later in the day, and even if the ice patch could not be seen from as far away as it could have been seen if the grade of the roadway had been completely flat, Johnson was still required to drive in such a manner as to be able to react to visible road conditions. *Ridenour v. Diffee*, 297 P.2d 280, 283 (Colo. 1956) (it was negligence as a matter of law for defendant

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2 Brian Ahern, an acquaintance of Johnson who arrived at the scene shortly after the accident, testified that "[a]nybody who has lived here for awhile they [sic] know that that [sic] a spot on the highway where there is black ice" (08/13/2008 Transcript at 99:9-11), but there was no testimony that black ice was involved in this case.

to drive at night in such a manner that he could not stop in the distance within which objects ahead were visible).

D. Johnson offers no coherent standard of foreseeability by which the ice patch was unforeseeable.

In his opening brief, Bedor quoted this Court's holding that foreseeability "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." *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 48 (Colo. 1987) (quoting 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 18.2, at 658-59 (2d ed. 1986)) (internal quotation marks omitted). Bedor argued that, under the circumstances here, the ice patch – which was already known to Johnson and was obvious and visible to a reasonably prudent driver – could not reasonably be considered unforeseeable to Johnson. Opening Brief at 12-16.

In his answer brief, Johnson does not dispute that, 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); *see also, e.g., Kendrick*, 252 P.3d at 1059 (discussing application of sudden emergency instruction where party was "confronted with an unanticipated and unforeseeable occurrence calling for immediate action"). Nor does Johnson dispute that the ice patch was foreseeable under the test set forth by

this Court in *Taco Bell*. Answer Brief at 27 ("Defendant has never argued that ice on the road was "so utterly unforeseeable that he owed no duty," or "so utterly unforeseeable as to destroy duty").

Instead, Johnson argues that *Taco Bell*'s foreseeability standard, which was used in that case in determining whether a restaurant had a duty to take reasonable measures to protect patrons from injuries caused by the criminal acts of unknown third persons, does not apply to the question of whether to give a sudden emergency instruction. *Id.* at 27-28. Johnson concedes that he "owed Mr. Bedor a duty to operate his vehicle with reasonable care in an effort to avoid injuring Bedor." *Id.* at 27. But, Johnson contends, the foreseeability standard for application of the sudden emergency doctrine "must" be different from the foreseeability standard for imposition of a duty. *Id.* at 28. Otherwise, says Johnson, "the instruction could never properly be given," because "[i]f 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." *Id.*

Johnson's argument reflects confusion about the nature of a tort duty as well as the proper application of the sudden emergency instruction. In *Taco Bell*, this Court was not concerned about a landowner's general duty to exercise reasonable care to make the premises safe for those who enter them, but rather was addressing

whether that well-established duty encompassed the more specific duty of a particular restaurant owner to take reasonable measures to protect patrons from injuries caused by the criminal acts of unknown third persons. *Taco Bell*, 744 P.2d at 46-51. In holding that the restaurant owner had such a duty, this Court found, as a matter of law, that the risk of injury caused by such criminal acts of unknown third persons was foreseeable under the particular circumstances of the case. *Id.* at 48-49.

Similarly, this case does not raise any issue about whether Johnson had a general duty to drive carefully, or whether it is generally foreseeable that one may encounter hazards while driving. The pertinent question is whether ice on the road on this particular morning was foreseeable to Johnson in light of, among other things, Johnson's awareness of this specific ice patch and the visibility of the ice to any reasonably prudent driver. Johnson has not disputed that the ice patch was foreseeable under the *Taco Bell* standard, nor has Johnson articulated any alternative standard of foreseeability for this Court to apply here.

Moreover, the *Taco Bell* standard of foreseeability is not inconsistent with the sudden emergency doctrine, as Johnson contends. Rather, if it is determined that the party was, in fact, "confronted with an unanticipated and unforeseeable occurrence calling for immediate action," *Kendrick*, 252 P.3d at 1059, the sudden

emergency doctrine would then apply to the issue of whether the party exercised appropriate judgment in responding to the "unanticipated and unforeseeable occurrence" in light of the need for a "speedy decision." *Young*, 814 P.2d at 365. In other words, the sudden emergency doctrine does not address whether the party exercised reasonable care or took appropriate measures to protect against unanticipated and unforeseeable occurrences, but rather informs the factfinder's determination as to whether the party, upon being confronted with such an unanticipated and unforeseeable occurrence, exercised appropriate care in choosing how to respond.

II. The sudden emergency doctrine does not apply where, as here, there is no dispute about whether the defendant exercised reasonable judgment in choosing among alternative courses of action after being placed in the alleged "sudden emergency."

Even if one could reasonably describe the ice patch as unforeseeable, the jury should not have been instructed on the sudden emergency doctrine. As Bedor has discussed, Opening Brief at 16-22, 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. *See, e.g., Young*, 814 P.2d at 365 ("[t]he basis of the special rule is merely that the actor . . . *must make a speedy decision*," and "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") (emphasis added)); *Collins*, 831 N.E.2d at 248 ("[i]n 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 [sudden emergency] doctrine was meant to apply."); *Rustin v. Smith*, 657 A.2d 412, 415 (Md. App. 1995) (sudden emergency instruction inapplicable where "the evidence indicates that, once [defendant] lost control, the vehicle was wholly uncontrollable").

Johnson has two response. First, Johnson simply denies that the sudden emergency doctrine applies only to a person's exercise of judgment in choosing among options after being placed in a sudden emergency. Answer Brief at 19-21. Johnson, however, fails to cite a single authority in support of his contention, and fails to address any of the numerous contrary authorities cited by Bedor. *See* Opening Brief at 17-20.

Second, Johnson asserts that the evidence at trial showed that he was, in fact, "actually faced with a choice" when his vehicle began to slip on the ice, and that he "actually did . . . try unsuccessfully to take corrective action and to mitigate his

situation after the Subaru broke traction." Answer Brief at 21. According to Johnson: "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." *Id.* at 22.

Johnson is mistaken. The sudden emergency doctrine does not apply merely because a party, after losing control of his vehicle, "reacts" in some way that is ineffective to avoid collision and injury. Rather, the doctrine applies, if at all, only where the reasonableness of the party's choice of a response to the alleged emergency is at issue. *See, e.g., Stewart v. Stout*, 351 P.2d 847, 848 (Colo. 1960) (where defendant's truck struck plaintiff's car from behind after both plaintiff and defendant attempted to turn to the side of the road to avoid other cars ahead, trial court permissibly found that defendant, when confronted with a sudden emergency, had chosen a reasonable course and acted as a person of ordinary prudence would act under the circumstances).

Here, the issue was not whether Johnson exercised reasonable care in choosing among alternative courses of action *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 and losing traction, 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 wet and snow-covered surfaces, (3) he had already "seen" and "experienced" the ice patch that winter at that very same location in the westbound lane, (4) he was admittedly "aware" of the possibility that he would encounter the ice patch again after scraping the ice off his vehicle and heading westward on that cold January morning, and (5) the ice patch was "obvious" and "visible" to a "reasonably prudent" driver heading westward. In such a case, the sudden emergency instruction does not apply and should not be given. *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).

CONCLUSION

This case was not about whether Johnson exercised appropriate judgment in choosing how to respond to an unanticipated and unforeseeable occurrence.

Rather, it was about whether Johnson was drunk, speeding, inattentive, or otherwise negligent as he headed toward a known ice patch on a cold January morning. Because the sudden emergency instruction had no place in such a case, the judgment of the court of appeals should be reversed, and the case remanded for retrial.

Respectfully submitted this 14th day of November 2011.

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