

stituted a public nuisance. Consequently, the trial court properly enjoined ABC Books from continuing such violation.

1389 III. CITY'S REFUSAL TO ISSUE MECHANICAL AMUSEMENT DEVICE PERMITS

[18] Under the Lincoln Municipal Code's chapter 5.12, ABC Books is required to secure an annual permit from the city clerk in order to operate its mechanical amusement devices, i.e., picture arcades. The relevant sections of the chapter provide:

5.12.020 Permit required. No person shall display for use or permit to be used any [mechanical amusement device, e.g., picture arcade] without first securing a permit therefor and paying an occupation tax thereon. . . .

. . . .

5.12.160 Revocation of permit. If at any time any permittee, or a managing officer thereof, if the permittee is a corporation, firm, partnership, or association, or the person in charge of or managing the operation of such machines is not of good moral character, or is convicted of violating any of the provisions of this chapter or any laws against gambling, the city council may forthwith revoke such permit.

. . . .

5.12.190 Expiration of permit. Each permit shall expire on, and shall be renewed by, the thirty-first (31st) day of May following the date of issuance.

Lincoln Mun.Code §§ 5.12.020, 5.12.160, and 5.12.190 (1986).

The record shows that in 1986 and the preceding years, ABC Books annually applied for and received permits to operate its picture arcades, that is, its fully enclosed video and 8-millimeter film booths. In 1987 and 1988, however, the city clerk refused to issue permits to ABC Books on grounds that ABC Books had been convicted of violating chapter 5.12 and remained in continuous violation thereof. When the city brought this action to have ABC Books permanently enjoined from operating its picture arcades in violation of chapter 5.12,

ABC Books counterclaimed by requesting that the city clerk be enjoined from refusing to issue permits to ABC Books. The trial court denied ABC Books' counterclaim. On appeal, ABC Books contends that the trial court erred in failing to issue an injunction against the city clerk.

1390The record shows that ABC Books was convicted three times in 1986 of violating the provisions of chapter 5.12. Further, the record shows that subsequent to its three convictions in 1986, ABC Books continued to operate its picture arcades in violation of chapter 5.12. Consequently, when ABC Books requested permits in 1987 and 1988, the city clerk refused to issue the permits. Under § 5.12.160, a single violation of chapter 5.12 constitutes a ground for revoking a mechanical amusement device permit. The continuous violation of chapter 5.12 constitutes a proper ground for refusing to issue an annual permit. Thus, the trial court properly denied injunctive relief to ABC Books.

The judgment of the district court is in all respects affirmed.

AFFIRMED.



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238 Neb. 390

1390 Mae E. McCLYMONT, Appellant,

v.

Lloyd A. MORGAN, Appellee.

No. 89-352.

Supreme Court of Nebraska.

June 14, 1991.

Motorist brought action for injuries sustained in collision, allegedly caused when oncoming vehicle swerved into motorist's lane. The District Court, Kearney County, Stephen Illingworth, J., entered judgment on jury verdict in favor of driver of oncoming vehicle, on his counterclaim,

and motorist appealed. The Supreme Court, Hastings, C.J., held that: (1) evidence supported jury's verdict, and (2) independent sudden emergency instruction was not warranted.

Affirmed.

1. Trial ⚡142

Directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from evidence.

2. Trial ⚡141

Trial court should direct verdict as matter of law only when facts are conceded or undisputed.

3. Automobiles ⚡244(10)

Evidence tending to show that accident occurred completely on defendant motorist's side of highway and that defendant never crossed center line supported jury's verdict in favor of defendant on his counterclaim, arising from collision at intersection with oncoming vehicle.

4. Appeal and Error ⚡999(1), 1001(1)

Jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to jury from which it could find for successful party.

5. Appeal and Error ⚡1032(3)

In order to establish as error trial court's refusal to give requested instruction, appellant is under threefold burden to show that he or she was prejudiced by court's refusal, that tendered instruction is correct statement of law, and that instruction is applicable to evidence in case.

6. Negligence ⚡12

Sudden emergency doctrine may be invoked where there exists sudden emergency not of actor's own making, alternative courses of action from which to choose are present, and there is need for instant decision.

7. Negligence ⚡139(1)

Instruction on sudden emergency doctrine is nothing more than specific statement of general rule that standard of care

is that care reasonably careful person would exercise under similar circumstances; giving of sudden emergency instruction singles out one aspect of general standard of care and may give it, doctrine of sudden emergency, undue emphasis and may unduly emphasize one party's argument regarding certain part of standard of care.

8. Trial ⚡295(1)

All jury instructions given must be read together, and if, taken as whole, they correctly state law, are not misleading, and adequately cover issues supported by pleadings and evidence, there is no prejudicial error necessitating reversal.

9. Negligence ⚡139(1)

As general rule, giving of independent sudden emergency instruction is not warranted in negligence action; overruling *Bedke v. Kucera*, 200 Neb. 380, 263 N.W.2d 830.

10. Automobiles ⚡246(21)

In action for injuries sustained in motor vehicle collision, independent sudden emergency instruction was not warranted, though motorist complained that oncoming vehicle suddenly swerved into her lane of traffic, where jury instructions as whole discussed standard of care and were not misleading, and motorist was free to argue to jury that emergency situation existed, which allowed jury to assess motorist's actions according to what reasonably prudent person would have done under similar circumstances.

Syllabus by the Court

1. Directed Verdict. A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence. A trial court should direct a verdict as a matter of law only when the facts are conceded or undisputed.

2. Verdicts: Juries: Appeal and Error. A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury from which it could find for the successful party.

3. Jury Instructions: Proof: Appeal and Error. In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a three-fold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.

4. Negligence: Jury Instructions. In the past it has been said that the sudden emergency doctrine may be invoked where (1) there exists a sudden emergency not of the actor's own making, (2) alternative courses of action from which to choose are present, and (3) there is a need for instant decision. However, an instruction on such doctrine is nothing more than a specific statement of the general rule that the standard of care is that care a reasonably careful person would exercise *under similar circumstances*. The giving of a sudden emergency instruction singles out one aspect of the general standard of care and may give it, the doctrine of sudden emergency, undue emphasis and may unduly emphasize ¹³⁹¹one party's argument regarding a certain part of the standard of care.

5. Negligence: Jury Instructions: Case Overruled. As a general rule, the giving of an independent sudden emergency instruction is not warranted in a negligence action, and to the extent that *Bedke v. Kucera*, 200 Neb. 380, 263 N.W.2d 830 (1978), holds otherwise, it is overruled.

Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright & Harder, P.C., Kearney, for appellant.

Graten D. Beavers, of Knapp, Mues, Beavers & Luther, Kearney, for appellee.

HASTINGS, C.J., and BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, Chief Justice.

Mae E. McClymont appeals from a jury verdict in the amount of \$75,000 rendered in favor of Lloyd A. Morgan, the defendant, on his counterclaim. Plaintiff McClymont assigns as error generally the judg-

ment in favor of defendant, the failure of the trial court to direct a verdict in favor of the plaintiff, and the failure to give plaintiff's proposed instruction on the sudden emergency doctrine. We affirm.

This lawsuit arose out of an automobile accident which occurred on March 1, 1987, on Highway 44 at its intersection with River Road one-half mile south of Kearney, in Kearney County. Highway 44 runs north and south. River Road comes from the west and makes a T-intersection with the highway. On the east side of the highway is a driveway.

The plaintiff was driving her automobile north on the highway. The defendant was driving his vehicle south. According to the plaintiff, she observed the vehicle driven by Morgan suddenly swerve into her lane of travel with his left turn signal on. In an attempt to avoid an accident with Morgan, McClymont swerved her vehicle to the left, but was unable to avoid a collision. The vehicles collided near the center of the roadway, with the point of impact being approximately 6 inches west of the centerline in Morgan's lane of travel.

Also present at this intersection, heading south and in the ¹³⁹²process of making a right-hand turn onto River Road, was a pickup truck towing a boat and driven by Dick Skiles. Morgan, who testified by way of deposition because of his illness, said that as he approached the Skiles truck, which was partially on the shoulder, he pulled his vehicle into the lane occupied by McClymont in order to pass the truck. He said that as he started to pass the truck and boat, the boat was sticking out from the shoulder onto the roadway approximately 2 feet. He admitted that he did not see the McClymont vehicle until he began crossing back into the southbound lane and that there was no reason why he could not have seen it earlier, and also acknowledged that he gave a left-hand turn signal as he passed the pickup and boat.

Skiles, the driver of the pickup that was turning west onto River Road, testified that immediately prior to the accident he was approximately 150 yards from the in-

tersection and he pulled onto the shoulder of the road. He said when the Morgan vehicle passed his pickup, his pickup and boat were completely on the shoulder of the road and the Morgan vehicle remained completely in the southbound lane.

The passenger in the Skiles pickup, Larry Trompke, testified that he heard a car horn honk as they were on the shoulder of the road. Trompke saw the Morgan vehicle pass the pickup and saw the McClymont vehicle, which he thought to be making a left turn onto River Road before the collision. Trompke, like Skiles, testified that no portion of the Morgan vehicle went into the northbound lane as it was passing the pickup.

The officer who investigated the accident testified that the point of impact was approximately 6 inches west of the centerline of the highway.

Richard Large, a consulting engineer and accident reconstructionist, opined that the Morgan vehicle was totally in the northbound lane just prior to the time of impact for approximately six-tenths of a second.

Generally, the plaintiff's first three assignments of error can be summarized as claiming that the court erred in failing to grant her motions for directed verdict on her operative petition and on the counterclaim of the defendant, which motions were made at the close of all the evidence.

[1-4] 1393A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence. A trial court should direct a verdict as a matter of law only when the facts are conceded or undisputed. *Youngs v. Potter*, 237 Neb. 583, 467 N.W.2d 49 (1991).

Suffice it to say, the evidence supported a conclusion that the accident occurred completely on the defendant's side of the highway and that defendant never did cross the centerline. There was sufficient evidence to support the jury's verdict.

A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury from which it could find for the successful party. *Youngs v. Potter, supra*.

[5] We consider next the plaintiff's claim that the court erred in refusing to give her requested instruction on sudden emergency. In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a three-fold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

[6, 7] In the past, this court has held that where evidence is presented which could, if accepted by the jury, give rise to application of the sudden emergency rule, an instruction on that rule is proper. See *Bedke v. Kucera*, 200 Neb. 380, 263 N.W.2d 830 (1978).

The sudden emergency doctrine may be invoked where (1) there exists a sudden emergency not of the actor's own making, (2) alternative courses of action from which to choose are present, and (3) there is a need for instant decision. *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985).

The trial court found in this instance that it was not clear from the evidence presented that there was a sudden emergency.

However, we need not pursue that point. NJI2d 3.09 recommends no instruction on sudden emergency should be given. The comments to NJI2d 3.09 suggest that such an instruction is nothing more than a specific statement of the general rule that the standard of care is that care a reasonably 1394careful person would exercise under similar circumstances. Those comments go on to explain that under such a general instruction relating to the standard of care, the circumstance of an emergency may be argued to the jury regardless of whether a specific instruction on sudden emergency is given.

The problem with giving the sudden emergency instruction is that it singles out one aspect of the general standard of care and may give it, the doctrine of sudden emergency, undue emphasis and may un-

duly emphasize one party's argument regarding a certain part of the standard of care.

[8-10] The jury was instructed that negligence is doing something which an ordinary, prudent person would not have done *under similar circumstances*, or failing to do something which an ordinary, prudent person would have done *under similar circumstances*, and that drivers are negligent if they do something a reasonably careful driver *in the same situation* would not have done or fail to do something a reasonably careful driver *in the same situation* would have done. All the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991).

The jury instructions as a whole discussed the standard of care and were not misleading. The plaintiff was free to argue to the jury that an emergency situation existed which allowed the jury to assess plaintiff's actions according to what the reasonably prudent person would have done under similar circumstances.

The giving of an independent sudden emergency instruction is not warranted in a negligence action, and to the extent that *Bedke v. Kucera*, *supra*, holds to the contrary, it is overruled.

The judgment of the district court was correct and is affirmed.

AFFIRMED.



238 Neb. 395

¹³⁹⁵NU-DWARF FARMS, INC., a
Nebraska Corporation,
Appellant,

v.

STRATBUCKER FARMS, LTD., a
Nebraska Limited Partnership, et
al., Appellees.

No. 89-369.

Supreme Court of Nebraska.

June 14, 1991.

Landowner brought action against neighboring landowner seeking injunction to require removal of obstruction from drainage ditch. The District Court, Washington County, Darvid D. Quist, J., denied relief, and landowner appealed. The Supreme Court, Caporale, J., held that: (1) when landowner substitutes permanent artificial drainageway crossing his or her own land for a natural one obstructed by that landowner, landowner impresses the artificial drainageway with a servitude in favor of the land drained thereby, and (2) mere fact that land through which easement runs is later subdivided does not destroy the easement.

Reversed and remanded.

1. Judgment ⇌185(6)

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from any material fact and the movant is, as a matter of law, entitled to judgment.

2. Appeal and Error ⇌934(1)

When reviewing motion for summary judgment, Supreme Court views evidence in light most favorable to party opposing motion, and gives that party the benefit of all reasonable inferences deducible from that evidence.