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THE SUDDEN EMERGENCY DOCTRINE AS APPLIED IN SOUTH CAROLINA

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I. INTRODUCTION

It is not necessary to resort to legal terminology to ascertain the meaning of an emergency. The word itself connotes "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action."[1] Application of this definition to the law of negligence has resulted in the implied criteria that in an emergency there must not be time for deliberate discretion or judgment.[2] It should also be noted that the definition of emergency includes the element of suddenness. In that regard, perhaps, the common reference to "sudden" emergency is somewhat redundant. On the other hand, the common title aptly serves to impress upon those who utilize it the most essential element of the doctrine—that of an unforeseen and unexpected event.[3]

The law recognizes that when one is confronted with an emergency situation requiring immediate action, the actor should not be held to the same standard of care as one who has time to reflect upon what he does or does not do.[4] Accordingly, a separate standard, known generally as the sudden emergency doctrine,[5] is used to judge one who acts in the face of an emergency. From a historical standpoint the doctrine is deeply imbedded in South Carolina law.[6] While the South Carolina Supreme Court has

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1. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 474 (College ed. 1964).

2. Baker v. Shockey, 92 Ga. App. 443, 88 S.E.2d 741, *rev'd on other grounds*, 212 Ga. 106, 90 S.E.2d 654 (1955). *See also* 65 C.J.S. *Negligence* § 17(d) (1966).

3. *See* 29A C.J.S. *Emergency* (1965); 2 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 102.27 (3d ed. 1965).

4. "In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action." RESTATEMENT (SECOND) OF TORTS § 296 (1965).

5. It is also known as the doctrine of imminent peril, the rule of sudden peril, or simply as the emergency doctrine. *See* Gillespie, *The Sudden Emergency Doctrine*, 36 MISS. L. J. 392 (1965).

6. The doctrine has its origins in English law. *See* Jones v. Boyce, 171 Eng. Rep. 540 (N.P. 1816). One of the first reported cases in South Carolina was Mitchell v. Charleston Light & Power Co., 45 S.C. 146, 160, 22 S.E. 767, 772 (1895) in which the court spoke in terms of a "situation of peril."

never delineated the criteria of the sudden emergency doctrine, a practical application envisons these six elements: (1) an emergency must have actually or apparently (from the standpoint of the one asserting the doctrine) existed; (2) the emergency must not have been reasonably anticipated; (3) the emergency must not have arisen from the actor's own negligent conduct; (4) the actor must have been faced with deciding between two or more courses of action; (5) there must not have existed time for reflective judgment upon which course to follow; (6) once the emergency was perceived the actor must have exercised such care as a reasonably prudent person would have exercised under the same circumstances.

II. ELEMENTS OF THE SUDDEN EMERGENCY DOCTRINE

Actual or Apparent Existence of an Emergency. The basic premise of the doctrine is that an emergency actually or apparently exists. If there has been no showing of an emergency situation, the trial judge should refuse an instruction regarding the doctrine.[7] The question becomes more complex when evidence of an emergency is in dispute. Generally, when there is evidence of an emergency, the question should be submitted with proper instructions to the jury.[8] On the other hand, when the evidence is undisputed that an emergency did exist, it is proper for the court to so hold as a matter of law.[9]

South Carolina courts have placed a reasonable interpretation on what constitutes an emergency. For example, emergencies were found to exist when a child on a coaster wagon suddenly entered the highway from behind an embankment,[10] when the brakes of an automobile failed and it collided with a tree,[11] and when a child riding a bicycle fell beneath the wheels of a moving bus.[12] On the other hand, the court held that an emergency did not exist when an employer directed his employee to operate

7. Hice v. Dobson Lumber Co., 180 S.C. 259, 185 S.E. 742 (1936) in which there was no showing of "pressing necessity."

8. Shockey v. Baker, 212 Ga. 106, 90 S.E.2d 654 (1955); McVey v. Whittington, 248 S.C. 447, 151 S.E.2d 92 (1966); Southern Passenger Motor Lines v. Burks, 187 Va. 53, 46 S.E.2d 26 (1928).

9. O'Kelly v. Barbes, 223 N.C. 282, 25 S.E.2d 750 (1943); Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964); Watson v. Aiken, 243 S.C. 368, 133 S.E.2d 833 (1963); Porter v. Cook, 196 S.C. 433, 13 S.E.2d 486 (1940).

10. Watson v. Aiken, 243 S.C. 368, 133 S.E.2d 833 (1963).

11. Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966).

12. Porter v. Cook, 196 S.C. 433, 13 S.E.2d 486 (1940).

a ripsaw in an unsafe manner to fill an order for wood carved in a certain form.[13]

It should be noted that on at least one occasion, an opposing party has judicially conceded the existence of an emergency. In *Elrod v. All*[14] the plaintiff guest brought an action against defendant host for injuries arising out of an automobile accident in which the defendant collided with a tree in an effort to avoid striking a third party. The plaintiff set forth in her pleadings that the defendant was faced with an emergency when a third party drove into the defendant's lane of travel. The South Carolina Supreme Court unanimously held that the plaintiff was bound by allegations in her pleadings and, finding no actionable negligence, reversed in favor of the defendant. The clear lesson to be learned from *Elrod*, is that care should be taken not to concede the existence of any element of the doctrine when defending against it.

The Emergency Must Not Have Been Reasonably Anticipated.

It could well be argued that if an emergency were anticipated, it would cease to be an emergency.[15] Nevertheless, when one engages in an activity in which certain emergencies are likely to arise, he must be prepared to meet them.[16]

Problems in this regard arise most commonly when children suddenly attempt to cross a highway, oblivous to oncoming traffic. South Carolina has followed the salutary rule that a motorist is not liable for injuries received by a child who enters a highway so abruptly that the motorist has no time to stop or swerve from his path.[17] But one recent case casts doubt upon the blanket application of this rule.

13. Hice v. Dobson Lumber Co., 180 S.C. 259, 185 S.E. 742 (1936).

14. 243 S.C. 425, 134 S.E.2d 410 (1964).

15. Sowizral v. Hughes, 333 F.2d 829 (3d Cir. 1964). *See also* Weaks v. South Carolina State Highway Dep't, 159 S.E.2d 234 (S.C. 1968) in which the trial judge's ruling excluding evidence which sought to duplicate the accident, but did not take into account "emergency conditions" was upheld.

16. Kuist v. Curran, 116 Cal. App. 2d 404, 253 P.2d 681 (1953); Baltimore Transit Co. v. Prinz, 215 Md. 398, 137 A.2d 700 (1958) (slowing down of car traveling in middle lane of multiple lane highway); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.12, at 940 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33 (3d ed. 1964).

17. Watson v. Aiken, 243 S.C. 368, 133 S.E.2d 833 (1963); Gunnels v. Roach, 243 S.C. 248, 133 S.E.2d 757 (1963); Williams v. Clinton, 236 S.C. 373, 114 S.E.2d 490 (1960); Critzer v. Kerlin, 231 S.C. 315, 98 S.E.2d 761 (1957); Porter v. Cook, 196 S.C. 433, 18 S.E.2d 486 (1940); *see* 2A D. BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 1498 (Perm. ed. 1951); 7 AM. JUR. 2d AUTOMOBILES & HIGHWAY TRAFFIC § 450 (1963); 60 C.J.S. *Motor Vehicles* § 396(b) (1949).

In *Herring v. Boyd*, [18] the defendant's automobile struck the deceased, a four year old child, when the child suddenly entered the roadway from behind a parked car. The defendant was driving well under the thirty-five miles per hour speed limit, which was posted with the warning, "Children Playing." There was some evidence of defective brakes on the defendant's automobile. Nevertheless, the South Carolina Supreme Court, in affirming a judgment for the plaintiff, said that

> where the driver of a vehicle knows, or should know, that children may reasonably be expected to be in, near, or adjacent to the street or highway, he is under a duty to anticipate the likelihood of their running into or across the roadway in obedience to childish impulses, and to exercise due care under the circumstances for their safety.[19]

Whether by sympathy for the plaintiff or design in modifying the general rule, the court has placed the element of anticipation into the emergency doctrine as applied in South Carolina. The extent to which the element will be considered as controlling in the future is a matter of conjecture. However, it is safe to conclude that reasonable anticipation of an emergency situation will ultimately be raised by an opposing party to prevent the application of the sudden emergency doctrine.

Emergency Must Not Arise from Actor's own Negligent Conduct. This element carries one step further the rationale of the previously discussed element of anticipation of the emergency. In the element of anticipation of an emergency, there is no tortious conduct on the part of the actor such as speeding,[20] driving with defective brakes,[21] following too closely,[22] or refusing to yield the right of way.[23] Thus, application of the sudden emergency doctrine does not lower the standard of care due others prior to the emergency's arising.[24]

18. 245 S.C. 284, 140 S.E.2d 246 (1965).

19. *Id.* at 290, 140 S.E.2d at 249. *See also* Barton v. Griffith, 253 F. Supp. 774 (D.S.C. 1966).

20. Brunson v. Gainey, 245 N.C. 152, 95 S.E.2d 514 (1956).

21. *See* Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966) in which plaintiff alleged that defendant operated a motor vehicle which had defective brakes.

22. Miller v. Cody, 41 Wash. 2d 775, 252 P.2d 303 (1953).

23. Tyson v. Shoemaker, 83 Ga. App. 33, 62 S.E.2d 586 (1950).

24. Dobbins v. Seaboard Air Line R.R., 108 S.C. 254, 93 S.E. 932 (1917). *See also* Becker v. Hasebroock, 157 Neb. 353, 59 N.W.2d 560 (1953); Sarnak v. Cehula, 393 Pa. 5, 142 A.2d 204 (1958).

The general rule is that one cannot avail himself of the sudden emergency doctrine if the emergency was created by one's own tortious conduct. [25] The South Carolina courts have uniformly followed this reasoning. Thus, in *Grier v. Cornelius*, [26] the South Carolina Supreme Court held that it was proper for the trial judge to instruct the jury both on the law that violation of the brake statute[27] was negligence per se and on the sudden emergency doctrine. There the plaintiff was a passenger in an automobile operated by the defendant. The brakes failed, and the plaintiff was injured in a subsequent collision with a tree. Acknowledging that the jury could have determined that the brake statute had not been violated prior to the sudden failure of the brakes, the court approved of the instructions to the jury. The trial judge had prefaced his instruction on sudden emergency with instructions that the emergency must not have been brought about by the negligence of the one claiming the "sudden emergency."

The Actor Must Be Faced with Deciding Between Two or More Courses of Action. The sudden emergency doctrine presupposes a mistake of judgment in the face of pressing necessity. The doctrine will isolate one from liability for not making the wisest choice as long as the choice made was that which a reasonably prudent person would have made under the same or similar circumstances.[28] Thus, this element begins with the assumption that the actor is aware of the emergency situation. Clearly, one not aware of an emergency situation would not be faced with choices of action. Likewise, when there is no choice of action, the sudden emergency doctrine is not a proper defense.[29]

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25. Fetzer v. Rampley, 81 Ga. App. 806, 60 S.E.2d 757 (1945); Boykin v. Bissette, 260 N.C. 295, 132 S.E.2d 616 (1963); Connelly v. Southern Ry., 249 S.C. 363, 154 S.E.2d 569 (1967); Dobbins v. Seaboard Air Line R.R., 108 S.C. 254, 93 S.E. 932 (1917); Douglass v. Southern Ry., 82 S.C. 71, 62 S.E. 15 (1908); Braxton v. Flippo, 183 Va. 839, 33 S.E.2d 757 (1945).

26. 247 S.C. 521, 148 S.E.2d 338 (1966).

27. *See* S.C. CODE ANN. §§ 46-561, *et seq.* (safe braking mechanisms on motor vehicles).

28. Forgy v. Schwartz, 262 N.C. 185, 136 S.E.2d 668 (1964); Schlose v. Hallman, 255 N.C. 686, 122 S.E.2d 513 (1961); Porter v. Cook, 196 S.C. 433, 13 S.E.2d 486 (1940); Barkshadt v. Grisham, 120 S.C. 219, 112 S.E. 923 (1922); Douglass v. Southern Ry., 82 S.C. 71, 62 S.E. 15 (1908); Mitchell v. Charleston Light & Power Co., 45 S.C. 146, 22 S.E. 767 (1895).

29. *See* Southern v. Cudahy Packing Co., 160 S.C. 496, 159 S.E. 32 (1931) in which defendant asserted the theory of unavoidable accident as well as that of sudden emergency.

There Must Not Exist Time for Reflective Judgment. The sudden emergency doctrine is not applicable to one who, when confronted with an emergency, has the opportunity to reflect upon a course of conduct to follow.[30] If the opportunity to reflect upon alternatives is present, the actor should be judged in the light of ordinary circumstances. South Carolina courts have followed this general rule.[31]

Normally, whether there is an opportunity to reflect is a question of fact for the jury to decide. The South Carolina Court recognized as much in *Melton v. Ritch.* [32] There the plaintiff sought to recover damages for injuries received in a collision with the defendant's automobile when the defendant was attempting to avoid a collision with a third party. The trial judge ruled as a matter of law that the defendant was confronted with a sudden emergency when faced with the third party vehicle approaching his automobile from the opposite direction on the wrong side of the road. The defendant veered to the left and collided with a truck driven by the plaintiff. There was testimony that a passenger in the defendant's vehicle perceived the danger and warned the defendant several times to alter his course and pull onto the right shoulder of the highway. In reversing the case, the state supreme court concluded that it was a question for the jury whether the defendant should not have recognized the danger earlier. Impliedly, the decision questioned whether the defendant did not have the opportunity to reflect upon available choices of action in the emergency confronting him. Recent South Carolina cases have followed this reasoning, holding that the emergency must compel the actor to react "instantly."[33]

Due Care Must Have Been Exercised Once the Emergency Is Perceived. Once the emergency is perceived the actions of the one placed in an emergency are not free of scrutiny. Therefore, he cannot act recklessly or unreasonably in attempting to avert

30. Brock v. Avery Co., 99 Ga. App. 881, 110 S.E.2d 122 (1959); Stripling v. Calhoun, 98 Ga. App. 354, 105 S.E.2d 923 (1958) (opportunity for "mature reflection" considered).

31. *E.g.*, Melton v. Ritch, 231 S.C. 146, 97 S.E.2d 509 (1957), which is the next case to be discussed.

32. *Id.*

33. McVey v. Whittington, 248 S.C. 447, 151 S.E.2d 92 (1966).

the emergency and the emergency doctrine will not protect him if he does.[34]

The law is clear that the existence of an emergency is merely one facet of the light in which the actor's conduct is judged. Other courts speak in terms of a lower standard of care in an emergency,[35] but in South Carolina the test remains one of what "a man of reasonable prudence would do under the circumstances."[36]

Likewise, acts in an emergency are not to be judged by hindsight, but rather by what knowledge the actor possessed at the time of the emergency.[37] Justice Cardozo succinctly expressed this concept prior to his elevation to the United States Supreme Court:

> Errors of judgment, however, would not count against him, if they resulted from the excitement and confusion of the moment. The reason that was exacted of him was not the reason of the morrow. It was reason fitted and proportional to the time and the event.[38]

Assuming that the wisest choice was not made by the actor, he will not be held liable so long as he meets the "prudent man" test. Here the question turns to whether the choice made was so hazardous that the ordinarily prudent man would not have made it under similar circumstances.

In *Porter v. Cook*,[39] the question was whether the driver of a bus acted unreasonably in not slackening his speed when an eleven-year-old boy on a bicycle crashed into the side of the bus. In affirming a nonsuit in favor of the defendant, the supreme court said:

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34. Consolidated Gas, Elec. Light & Power Co. v. O'Neill, 175 Md. 47, 200 A. 359 (1938). *But see* Douglass v. Southern Ry., 82 S.C. 71, 62 S.E. 15 (1908) which casts doubt on this general statement by approving use of whatever means were "apparently necessary" for the plaintiff to extricate himself from an emergency situation.

35. Goolsbee v. Texas & N.O.R.R., 150 Tex. 528, 243 S.W.2d 386 (1951).

36. Young v. Livingston, 247 S.C. 385, 147 S.E.2d 624 (1966); Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964); Porter v. Cook, 196 S.C. 433, 13 S.E.2d 486 (1950).

37. *See generally* James, *The Qualities of a Reasonable Man in Negligence Cases*, 16 Mo. L. Rev. 1 (1951).

38. Wagner v. International Ry., 232 N.Y. 176, 177, 133 N.E. 437, 438 (1921).

39. 196 S.C. 433, 13 S.E.2d 486 (1940).

> [S]peculate and theorize as we may as to what course of conduct might have been wisest and safest for the defendant, Cook, to have followed in order to avoid doing injury to the boy, the fact remains that if this case had been submitted to the jury it would have left the issue of negligence wholly dependent upon the doctrine of chance and not upon actual proof.[40]

One case which required no speculation is *Melton v. Ritch*.[41] There the defendant's passenger several times pointed out an alternate course to the defendant in order to avoid a collision with approaching vehicles. Reversing a directed verdict for the defendant, the supreme court noted that "the question of whether such a person exercised due care under the circumstances is ordinarily one of fact for the jury."[42] Were it not for the fact that the defendant's passenger disagreed with his choice of action, the rationale of *Porter* would have been controlling. Instead, this was an unusual case in which two persons faced the same emergency and differed in choices of action. Quite properly, it was left to the jury to resolve the question of reasonableness.

III. INSTRUCTIONS TO THE JURY.

An instruction covering the doctrine of sudden emergency should not be given when the issue is not reasonably raised.[43] The issue can be raised by concession in the opposing party's pleadings,[44] by direct evidence presented at trial,[45] or by circumstantial evidence.[46] Once raised, the issue must be instructed upon and submitted to the jury if more than one reasonable inference can be drawn from the evidence.[47] However, if the trial judge determines in light of all the evidence that there is

40. *Id.* at 437, 13 S.E.2d at 488.

41. 231 S.C. 146, 97 S.E.2d 509 (1957).

42. *Id.* at 152, 97 S.E.2d at 513.

43. Hice v. Dobson Lumber Co., 180 S.C. 259, 185 S.E. 742 (1936).

44. Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964).

45. McVey v. Whittington, 248 S.C. 447, 151 S.E.2d 92 (1966); Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966); Young v. Livingston, 247 S.C. 385, 147 S.E.2d 624 (1966); Green v. Sparks, 232 S.C. 414, 102 S.E.2d 435 (1958); Melton v. Ritch, 231 S.C. 146, 97 S.E.2d 509 (1957).

46. Brogdon v. Northwestern R.R., 141 S.C. 238, 139 S.E. 459 (1927).

47. Atlantic Greyhound Corp. v. Eddins, 177 F.2d 954 (4th Cir. 1949); McVey v. Whittington, 248 S.C. 447, 151 S.E.2d 92 (1966); Ray v. Simon, 245 S.C. 577, 140 S.E.2d 575 (1965); Wynn v. Rood, 228 S.C. 577, 91 S.E.2d 276 (1956).

no other reasonable inference but that the actor was confronted with a sudden emergency and exercised due care in meeting it, he should grant a directed verdict in favor of the party asserting the emergency doctrine.[48]

Surprisingly, South Carolina courts have been silent on the question of whether the trial judge must, under appropriate circumstances, define for the jury the concept of "sudden emergency." Some jurisdictions hold that it is error not to define sudden emergency adequately for the benefit of the jury.[49] It is submitted that a strong argument could be advanced in support of the proposition that the South Carolina trial judge should be required to define sudden emergency as part of their instruction of the jury.[50]

A general definition of sudden emergency and one acceptable in the context of South Carolina judicial decisions is at follows:

> I charge you that a sudden emergency is a sudden and unexpected event or combination of circumstances which calls for immediate action without giving time for the deliberate exercise of judgment or discretion, and which could not have been foreseen by a reasonably prudent man under the same or similar circumstances.[51]

Naturally, any definition of sudden emergency should be tailored to the factual conditions existing in each case.[52] The trial judge should likewise relate the instruction to the theories advanced by either side.[53]

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48. Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964).

49. Gulf M. & O.R.R. v. Withers, 247 Miss. 123, 154 So. 2d 157 (1963) in which the court held that an adequate instruction must define and describe the sudden emergency, stating the facts which a jury might decide warranted a finding of sudden emergency.

50. *But see* Hutchinson v. City of Florence, 189 S.C. 123, 200 S.E. 73 (1939) which held it was not error not to define "contributory negligence." Other cases would seem to require definitions, especially if requested. Kirven v. Kirven, 162 S.C. 162, 160 S.E. 432 (1931); Nohrden v. Northeastern R.R., 59 S.C. 87, 37 S.E. 228 (1900).

51. *See* Gillespie, *The Sudden Emergency Doctrine*, 36 MISS. L. J. 406 (1965). *See also* 2 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 102.26 n.67 (3d ed. 1965).

52. *See* Annot, 80 A.L.R.2d 5 (1961).

53. Ramer v. Hughes, 131 S.C. 490, 127 S.E. 565 (1925) in which the court held that an instruction was not fatally defective for failure to include, as a condition of its applicability, the fact that the emergency must have been caused by the act of the party invoking the rule, in view of a preceding instruction.

When confronted with a situation in which the emergency doctrine is asserted as a defense to primary negligence, the following instruction should be requested:

> I charge you that if you find that the defendant was confronted with a sudden emergency brought about by the negligence of another and not by his own negligence and he is compelled to act instantly to avoid injury to himself and/or those to whom he owes a duty of care, he is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make, even though he did not make the wisest choice.[54]

An approved instruction in a case in which the emergency doctrine is asserted as a bar to contributory negligence is as follows:

> Now, I charge you that on the question of contributory negligence, if you believe from the evidence that the plaintiff was confronted with a sudden peril not arising from his own fault, then he may act in the manner which the emergency seems to require for the purpose of avoiding injury to himself without being guilty of contributory negligence, provided he acted as one of his age and of his capacity, discretion, knowledge and experience would ordinarily have acted under the same or similar circumstances.[55]

IV. CONCLUSION

It is evident that the sudden emergency doctrine is a useful legal weapon in the arsenal of the South Carolina negligence practitioner. Given appropriate factual situations, the doctrine can be utilized by either the plaintiff or defendant. Its dual usage may be likened to a two-edged sword, warning those who unsheath it to be proficient in its use. Proficiency would require that one seeking the use of the doctrine plead it affirmatively, while one defending against the doctrine take care not to concede the existence of an emergency in pretrial pleadings. Efforts at trial should be in the direction of minimizing or eliminating

54. Weaks v. South Carolina State Highway Dep't, 159 S.E.2d 234 (S.C. 1968); Porter v. Cook, 196 S.C. 433, 13 S.E.2d 486 (1940); *cited with approval in* Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964); McVey v. Whittington, 248 S.C. 447, 151 S.E.2d 92 (1966).

55. Young v. Livingston, 247 S.C. 385, 147 S.E.2d 624 (1966).

the following: (1) any contention that an emergency did not exist; (2) any contention that the emergency was the result of a client's negligence; (3) any arguable alternative that there was time for reflective judgment; (4) any contention that the client, once the emergency was perceived, did not exercise such care as a reasonably prudent person would have exercised under the same circumstances.