

SUPREME COURT OF KENTUCKY

NO. 2007-SC-000795

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COURT OF APPEALS OF KENTUCKY

NO. 2006-CA-1692

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ELAINE T. HENSON  
AND  
ST. PAUL FIRE AND MARINE  
INSURANCE COMPANY

MOVANTS

VS.

DAVID KLEIN

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RESPONDENTS

**BRIEF OF THE MOVANTS, ELAINE HENSON  
AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY**

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**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of this Brief was served by mailing a true copy hereof to Peter J. Sewell, Esq., One Riverfront Plaza, 401 West Main Street, Suite 1800, Louisville, Kentucky 40202, and to the Hon. Barry L. Willett, Judge, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202, and Mr. Sam Givens, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601-9229, on this the 30<sup>th</sup> day of ~~October~~<sup>October</sup>, 2007.

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## INTRODUCTION

The case before the Court is a negligence action involving a collision between two personal watercrafts where the lead boat and passenger were struck by the trailing boat. The Trial Court instructed on "sudden emergency" and the Movant believes such instruction constitutes reversible error.

**STATEMENT CONCERNING ORAL ARGUMENT**

The Movant believes Oral Argument would be beneficial to the Court in achieving a full understanding of the facts of the case. The application of the “sudden emergency” doctrine, post comparative fault, and in the context of a personal watercraft collision, presents many issues which oral argument will help to sort out.

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## STATEMENT OF THE CASE

The case before the Court involves the collision between two personal watercrafts on Lake Cumberland. In August of 2002, Movant, Elaine Henson, was operating the lead boat. The Appellee, David Klein, was operating the boat that, from the rear, struck Henson in the head causing serious personal injury.

Henson and Klein were, at the time, friends. They were spending the weekend on a houseboat on the lake with friends and work customers. In the roughly ten minutes before the collision they were making their way back to the houseboat, all the while with Henson in the lead and Klein following. For the bulk of this return ride Klein had kept a safe distance between his Personal Watercraft and Henson's. As they neared the houseboat he closed the gap.

### **Facts of the Collision:**

Henson was traveling at 30-40 m.p.h. en route back to the houseboat. (Trial Tape 2, 9:22:30-32). As she neared the boat, roughly 150 feet away, she let off of the gas of the personal watercraft, and looked over her left shoulder to yell back to Klein. As she did this her boat began to slow and turn to the left. It had not even turned its full length before it, Henson's personal watercraft, and she, were struck violently by Klein's personal watercraft. (Trial Tape 2, 9:27:00-59).

Shortly before the collision Klein had closed the distance between their personal watercrafts. He too was traveling at a speed of 30-40 m.p.h. (Trial Tape 2, 9:22:30-37). He, Klein, positioned his personal watercraft 35 feet behind Henson and about 10 feet off set to her left. (Knable, Trial Tape 2, 9:25-9:26:34). This close position created the only danger for these two boats.

At this crucial time Klein was traveling approximately 50 feet per second. (Trial Tape 2, 9:50-10:07). Personal watercrafts have no brakes, no outdrive in the water to cause drag, and further compounding their danger, when the gas is let off there is no steering.

Henson's entire case is now and always has been that Klein was following too close given the speed. He was too close because he did not have time to perceive, react and avoid when she decided to stop.

Henson did not know how close Klein was to her when she attempted to stop. Klein conversely, was aware of his dangerous position and more importantly, was aware that Henson did not know he was so close. (Klein, Trial Tape 2, 10:24:00).

Unfortunately, and the Movant believes erroneously, the Trial Court determined that these facts supported a "sudden emergency" instruction. With the instruction, the Trial Court essentially told the jury that in the eyes of the Court, Klein was doing nothing wrong when Henson decided to stop. Consequently, it was then for the jury to decide if his attempt to avoid was reasonable or unreasonable. Henson's claim of negligence was never about the avoidance decision. It was always about the decision to create such a danger by following too close. Common sense tells us that if Klein had been 100 feet back and 50 feet offset, this collision would not have occurred. <sup>1</sup> (Capt. Steve Owens, Trial Tape 2, 13:49:20).

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<sup>1</sup> Testimony of retired Captain Steve Owens, Kentucky Department of Fish and Wildlife: Captain Owens testified that 100 feet back and 50 feet offset is "reasonable" and same definition of reasonableness has been adopted by PWIA (Personal Watercraft Industry Association) and NABSA (National Association of Boating Safety Administrators) in their respective model legislation regarding safe operation of personal watercraft.

## ARGUMENT

The movant asserts two separate errors regarding the Court's Instructions to the jury.

**I. IT WAS ERROR TO INSTRUCT THE JURY ON "SUDDEN EMERGENCY" WHEN BOTH PARTIES, ARGUABLY, FAILED IN THEIR RESPECTIVE DUTIES TO EXERCISE ORDINARY CARE.**

The "sudden emergency" doctrine is an age old common law doctrine. Kentucky, as well as most other comparative negligence states, continues to apply the doctrine. Regenstreif v. Phelps, 142 S.W.3<sup>rd</sup> 1, (Ky. 2004). However, the application of comparative fault principles and the doctrine of "sudden emergency" creates great confusion. A bright line rule is needed. The doctrine is well articulated in 60 A C.J.S., Motor Vehicle, §716, it reads:

Under the sudden emergency doctrine, when a driver of an automobile is confronted with a sudden emergency brought about by the negligence of another and not by his or her own negligence, and is compelled to act instantly to avoid a collision or an injury, that driver is not guilty of negligence if he or she makes such a choice as a person of ordinary prudence placed in a like position might make, even though that was not the wisest choice.

On the other hand, where the motorist created the emergency through his or her own negligence, he or she cannot avoid liability for an injury on the ground that his or her acts were done in the stress of emergency. Thus for example, a trailing driver cannot claim the benefit of sudden emergency doctrine where his or her failure to pay attention to vehicles in front of him created an emergency situation, causing a collision with a lead driver. CJS Motor Vehicle 716.

Thus, for the doctrine to apply certain conditions must be met. First, the situation must truly involve a sudden emergency.

**A. Was there truly an emergency? "Occurrence" versus "emergency," a significant distinction.**

This component requirement to the application of the doctrine is thoroughly discussed in the C.J.S. The article includes the following:

CJS §520 - What constitutes an emergency?

In order for the emergency doctrine to apply, it must be clear that an emergency existed, and every unexpected occurrence does not constitute a sudden emergency. If the driver had an opportunity to exercise his or her deliberate judgment between alternate courses to pursue, no emergency arises in a legal contemplation...

Likewise, there must be an unforeseen circumstance or an unexpected happening or a hazard which could not reasonably be anticipated. So the doctrine of imminent peril is properly applied only in cases where an unexpected physical danger is presented so suddenly as to deprive the driver of his or her power of using reasonable judgment.... Where there is ample time and space to avoid an accident, the sudden emergency doctrine does not apply. CJS §520.

The distinction between "emergency" and "occurrence" is more than just semantics. A sudden occurrence is a reasonably anticipated action. That definition fits this case.

David Klein was specifically following Elaine Henson back to the houseboat. She did not appear from between cars nor did she run out in front of him like a child or animal. Subjectively, he was not prepared for her to let off the gas and turn to him and yell his name. But, that action should have been anticipated by him. Her decision, as the lead vehicle, to stop, for whatever reason, must always be anticipated and, more importantly, planned for. The driver trailing should always allow a safe following distance so that he or she has the ability to perceive and react to the lead vehicle's stopping. If the trailing driver has not left enough room to stop then he has failed in his duty and, as the example above points out, he should not be allowed to argue "sudden emergency". Henson's decision to stop was a subjective unexpected occurrence as to Klein but not a "sudden emergency".

II. **THE CASE OF ROBINSON V. LANSFORD, 222 S.W.3d 242 (Ky.App. 2006) IS STRIKINGLY SIMILAR TO THE CASE BEFORE THIS COURT.**

This October 27, 2006 opinion of the Court of Appeals dealt with strikingly similar facts. A trailing driver struck the lead vehicle after the lead vehicle stopped quickly. The Trial Court instructed on sudden emergency and the Court of Appeals reversed and ordered a new trial. In so doing it held:

The common law doctrine of “sudden emergency” attempts to explain to a jury how to judge the allegedly negligent conduct of a person, plaintiff or defendant, who is suddenly confronted with an emergency situation that allows no time for deliberation. The doctrine should be applied if it changes or modifies a duty that would have been incumbent on a Plaintiff or a defendant in the absence of emergency. However, we believe that “this case does not present a sudden emergency only a sudden occurrence” as the evidence does not indicate that Lansford took any action as a result of encountering an emergency, such as swerving into another lane of traffic or running onto the shoulder or median of the roadway. Rather, Lansford was “presented with a sudden occurrence that may have resulted in his inability to avoid the collision regardless of his previous exercise of ordinary care. Robinson, supra @ page 3.

The duties of both Robinson and Lansford, with respect to ordinary care were given and essentially not criticized. It was the qualifying of those duties with the “sudden emergency” instruction that created the reversible error. The Court held:

We reject Lansford’s interpretation of the jury instruction because it is contrary to the plain language of Instruction No. 2 which specifically stated that “all of these duties of Defendant being subject, however, to this qualification that if immediately before the accident Plaintiff’s automobile suddenly and unexpectedly came to a stop in front of Defendant’s automobile, and if the emergency presented was not caused or brought about by any failure of the Defendant with his duties as above set forth, Defendant was required to exercise only such care as the jury would expect an ordinarily prudent person to exercise under the same conditions or

circumstances.”<sup>2</sup> Thus the jury was required to excuse Lansford from violating any of the specific duties in subsection (a), (b), (c), and (d) of this instruction if it believed Lansford encountered a sudden emergency, even though upon Lansford’s encountering this emergency, he was required to exercise ordinary care under those conditions. *This approach creates a situation where Lansford’s failure to exercise ordinary care before the occurrence of the emergency would be, as long as he did not cause the emergency, excused by the emergency even if his failure to meet one of those duties caused the accident.* (Emphasis added) (Robinson, supra, at page 4).

The very same result occurred in this case. Klein’s failure to follow at a safe distance was excused by the “sudden emergency” instruction even though his failure caused the accident. Instead of assessing Klein’s failure to keep a safe following distance the Court required the jury to only evaluate the Klein’s decisions after presented with the “emergency” of Henson’s attempt to stop. Because he was so close, and traveling at such a speed, he had no opportunity to avoid. In his dangerous position there was no time for deliberate thought, only reflex. The doctrine is clearly designed to not place blame when reflex under emergency is all that is involved, and not, such as here, where an operator is dangerously tailgating. That is precisely why this case was not a case for the sudden emergency instruction.

The Robinson Court continued the analysis:

The language in this instruction is extremely confusing and places the emphasis on the qualification of Lansford’s duty at the wrong point....A correct comparative negligence instruction should have made no reference to an emergency and should have read similar to the following: Robinson, supra @ p. 5.

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<sup>2</sup>

The Trial Court instructed the jury in this case with essentially the same language. “All of the above duties being subject to this qualification: that if immediately before the accident the Defendant was suddenly and unexpectedly confronted with an emergency by Plaintiff turning her personal watercraft into the path of Defendant’s approaching watercraft, and if such emergency was not brought about by any failure on his part to perform the duties above set forth, he was not thereafter required to adopt the best course possible in order to avoid the impending danger but was required to exercise only such care as the jury would expect an ordinarily prudent person to exercise under the same conditions and circumstances.”

**A. A “sudden emergency” instruction presupposes that, and is only available when, the defendant is exercising ordinary care.**

As a second requirement for application of the doctrine the Trial Court must find that Klein was otherwise acting within the standard of care when Henson decided to stop. *“The point is that the defense of sudden emergency presupposes that, and is only available when, the Defendant is exercising ordinary care.”* Brown v. Wilson, 401 S.W.2<sup>nd</sup> 77 (Ky. 1977). By instructing on “sudden emergency”, ordinary care of Klein was presupposed by the Trial Court. In essence, Klein was awarded a Directed Verdict regarding his conduct prior to the “emergency”. He was not, however, entitled to one. If anything, his conduct was negligent as a matter of law. The facts of his speed, his position, the function of the personal watercraft were not in dispute. The proof is in the pudding, as they say. If Klein had been far enough back then he would have avoided a collision. Because he was too close at that speed he couldn’t avoid the collision. Henson was merely bringing her craft to a stop in order to communicate with Klein. Because boats don’t stop like cars her stop must be conceded to be a normal stop. There is no other way for it to occur. In the end, the question of whether Klein was acting prudently was, at a minimum, a question for the jury.

**B. The bright line threshold for application of the sudden emergency doctrine should be a directed verdict finding of an absence of fault on behalf of the party seeking the protection of the doctrine.**

The purpose of the sudden emergency doctrine is to put the reaction to a sudden situation into the context of reasonableness. The doctrine begins with the sudden situation and then attempts to excuse what would otherwise be negligence (i.e. crossing the center line and causing a collision with an innocent third party) if the reaction was reasonable. The reaction is all that is analyzed.

Consider the following example. A driver is speeding 45 mph in a 25 mph zone and a dog runs into the street from the curb. The speeding driver has no time to stop and instinctively veers

left and crosses the centerline causing a collision with another vehicle. That driver may have reacted reasonably when confronted with the dog, but his own negligence,( i.e. his speed), caused or at least substantially contributed to the collision. That driver should not get the protection of the sudden emergency doctrine when his own negligence contributed to the collision dynamic.

The above situation, like the case at bar, is best sorted out with a traditional ordinary care instruction. The jury should consider and decide the extent to which his speed was a breach of his ordinary care duty and whether same was a substantial factor in causing the injury. In this case, the jury should have been given ordinary care instructions for both and fault allocated by traditional comparative fault rules.

**C. The adoption of the “lane” theory by the Trial Court and the Court of Appeals amounts to preemption of the jury’s responsibility to decide the disputed facts.**

Klein argued at trial that because he was ten to fifteen feet offset he was not “following”, merely running parallel. That argument then extends to the conclusion that she had a “lane” and he had a “lane.” On a body of water that is more than two hundred feet wide at the site where the accident occurred it defies logic and reason to conclude that the lead craft does not have a lane at least as wide as the length of the craft, or sixteen feet. Unfortunately, because there is no specific statute providing guidance on safe proximities between personal watercraft, or pleasure boats for that matter, boaters, and juries are left to define what is safe based upon common sense. That same common sense should support the conclusion that if the trailing boat is in too close proximity to the lead boat to avoid same when the latter attempts to stop, then he is not in safe position. Or, if we must stay within the “lane” discussion, the lane must be wide enough to accommodate safe reaction time. The lane would necessarily be wider at faster speeds. Given that Henson did not even have

space to stop and turn the length of her boat, the “lane” as advanced by Klein was too narrow to be considered safe.

It is far more reasonable to conclude that Klein was following Henson in the same “lane.” A lane in which she should have enjoyed the right of way. They were riding together for enjoyment. They were both returning back to the houseboat at the same time. She was in the lead as they made their way back. He was trailing her. He was thirty to forty-five feet behind her. Logic and reason would never tolerate Klein’s “lane” theory as the “rule of the road” on the water, because to do so would then create the sort of danger that, as in this case, leads to serious physical injury. Boats need more space than cars because there are no designated lanes in the water. Further, boats do not stop with the precision of cars. One operator’s expectations of another on the water are, and should be, vastly different than that of two drivers on the highway. Things are much less controlled on the water. More space is necessary.

Unfortunately, when the Trial Court instructed on “sudden emergency” it told the jury, in so many words, that the “lane” theory was the law of the case. By qualifying the duties of Klein by placing his conduct in the context of “sudden emergency” the jury was instructed to begin their analysis at the point of Henson’s decision to stop. Did Klein react reasonably? That was the only real question for the jury at that point. By focusing on that question the jury was completely ushered away from considering whether Klein was prudent in following so closely.

By applying the sudden emergency doctrine to this case, the Trial Court and the Court of Appeals concluded factually that Klein’s position relative to Henson was safe and reasonable. Certainly, reasonable people could conclude that Klein was not exercising ordinary care in traveling in such close proximity to Henson. Just like the example outlined above, this case would have been best decided by a traditional ordinary care and comparative fault instructions.

**III. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT HENSON,  
AS THE LEAD WATERCRAFT, HAD THE RIGHT-OF-WAY.**

301 KAR 6:030; Section 6, Waterway Traffic, provides that a vessel being overtaken has the right-of-way.

This Court was presented with facts regarding the positions of the two personal watercrafts. These facts, in essence, were not in significant dispute. Henson and retired Captain Steven Owens, Kentucky Department of Fish and Wildlife, characterized the events as an involuntary "overtaking".

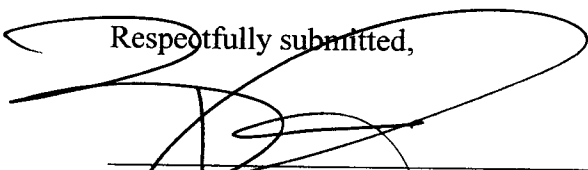
Because of their respective positions, when Henson decided to stop, Klein, because he was too close, did not have time to also stop, therefore, he necessarily would either collide or overtake. If the jury saw the events in that context, then it should have been provided the respective duties of the parties for that same conduct. To deprive Henson of her theory of the case was to assume another interpretation of the facts, which is error. State Farm Mutual Insurance Co. v. Marcum, 420 S.W. 2<sup>nd</sup> 113,121(Ky. 1967).

One craft had the legal right-of-way; the lead craft. The jury needed guidance from the Court as to the respective legal duties. Failure to instruct that Henson had the right-of-way was prejudicial error. The question of right-of-way is a question of law for the Court. Instructions must not leave questions of law to the jury. (McGee v. Gibson, 40 Ky. (1B.Mon.) 105, 106. (1840), as cited in Palmore's Kentucky Instructions to Juries, 4<sup>th</sup> Edition, p. 18.)

CONCLUSION

For all of the reasons detailed above the Appellants, Elaine Henson and St. Paul Fire and Marine Insurance Company, respectfully submit that the Trial Court erred in giving the "sudden emergency" Instruction to the jury. Further, to do so was reversible error and as such they should be granted a new Trial.

Respectfully submitted,



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