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**SUPREME COURT OF KENTUCKY
NO. 2007-SC-000795**

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**COURT OF APPEALS OF KENTUCKY
NO. 2006-CA-1692**

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

MOVANTS

VS.

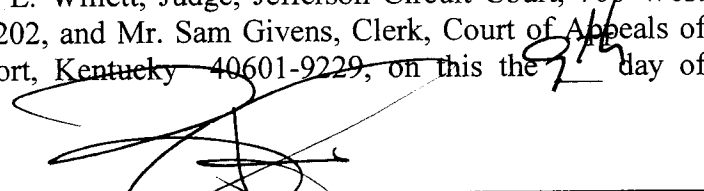
DAVID KLEIN

RESPONDENTS

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

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 9th day of November, 2009.


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INTRODUCTION

The case at bar presents an excellent demonstration of why the “sudden emergency” doctrine should be abolished in the state of Kentucky. This Court has granted the Movants’ Motion for Discretionary Review and now seeks supplemental Briefs on the question of whether the doctrine should be abolished. It should. The objective of the “sudden emergency” doctrine is met with the accepted definition of “ordinary care”. Post adoption of comparative fault principles, the application of the “sudden emergency” doctrine has only served to muddy the water of jury analysis.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION -i-

ARGUMENT 1

 A. The objective of the “sudden emergency doctrine” is met with the standard “ordinary care” instruction. The only thing gained with the “sudden emergency” instruction is confusion. 1

Blair v. Eblen, 461 S.W.2d 373 (Ky. 1970) and Rogers v. Kasdan, 612 S.W.2d 136 (Ky. 1981) 1

Brown v. Todd, 425 S.W.2d 737 (Ky. 1968). 1

 Henson v. Klein; The Case at Bar 2

Robinson v. Lansford, 222 S.W.3d 242 (Ky.App. 2006) 3

Robinson, supra, at page 4 4

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Myhaver v. Knutson, 942 P. 3rd 445 (Ariz. 1997) 4

 Restatement (Second) of Torts § 206 cmt.b. 4

 Jefferson L. Lankford & Douglas A. Blaze, The Law of Negligence in Arizona § 3.5(1) 5

 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §33 at 197 (5th ed. 1984) 5

Myhaver v. Knutson @ 451. 5

Myhaver v. Knutson, supra @ 451 6

 B. If the doctrine is to be maintained it must not be applied unless the Trial Court finds, as a matter of law, that the party seeking its protection was not negligent prior to the “sudden emergency”. 6

 Wiles v. Webb, 329 Ark. 108, 946 S.W.2d 685 (1997) 7

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ARGUMENT

- A. The objective of the “sudden emergency doctrine” is met with the standard “ordinary care” instruction. The only thing gained with the “sudden emergency” instruction is confusion.

The practicing lawyer’s bible, so to speak, on Jury Instruction is Palmore’s, Kentucky Instructions to Juries. The publication is in its Fifth Edition and recently revised by Donald P. Cetrulo, J.D. Consistent throughout Palmore’s negligence instructions is the definition of ordinary care. It is as follows:

Ordinary care; defined.

“Ordinary care” means such care as the jury would expect an ordinarily prudent person to exercise under similar circumstances.

Blair v. Eblen, 461 S.W.2d 373 (Ky. 1970) and Rogers v. Kasdan, 612 S.W.2d 136 (Ky. 1981).

Historically, the sudden emergency doctrine has been included in the body of a negligence instruction as a qualifier. Again, citing Palmore, at section 16.49, the “sudden emergency” doctrine is suggested as follows:

All of these duties (the specific duties pertaining to ordinary care as listed previously in the instruction) being subject, however, to this qualification: that if immediately before the accident a dog (or child) near the side of the road made a sudden and unexpected movement as if to enter the street in the path of these approaching automobiles at a point so close that it appeared to be in the exercise of reasonable judgment that he was in imminent danger of running over the dog (or child), and if the emergency thus presented was not caused or brought about by any failure by D to perform his duties as above set forth, he was not thereafter required to adopt the best course possible in order to avoid the apparent danger but which required to exercise only such care as the jury would expect an ordinarily prudent person to exercise under the same condition and circumstances.

Brown v. Todd, 425 S.W.2d 737 (Ky. 1968).

At the end of the analysis, the jury is back to the exact language of the definition of ordinary care. The last sentence of the instruction on “sudden emergency” concludes; ...**was required to exercise only such care as the jury would expect an ordinarily prudent person to exercise under the same condition and circumstances.**” Thus, the “sudden emergency doctrine” does not incorporate a different duty on the actor it merely highlights for the jury that the emergency circumstances do not allow deliberate time to respond. In essence, it is a reminder to the jury to determine prudent conduct in the context of an emergency circumstance. It would appear that it would be the job of counsel during argument to emphasize the circumstances, instead of the trial Court giving undue prominence to the potential situation faced by the actor.

Henson v. Klein; The Case at Bar

The case at bar demonstrates the confusion associated with the application of this doctrine. As cited in Movants’ original brief, the Movant was just ahead of the Respondent, both on personal watercrafts, on Cumberland Lake. The Movant’s argument has always been that the Respondent was in too close proximity, given his speed, such that he did not have adequate time to react and avoid the Movant when she attempted to stop her personal watercraft. The trial Court accepted the Respondent’s argument that this was a case for a “sudden emergency” instruction. In essence, the Respondent was arguing that the personal watercraft of Henson, which he was following, presented as a “sudden emergency” when she decided to stop. When the trial Court instructed on “sudden emergency”, the focus of the jury, presumably, was then on the conduct of the Respondent only **after** the Movant attempted to stop. The conduct prior, of placing himself in such close proximity, was pushed to the distant sidelines in terms of the analysis of the jury. With it went any analysis regarding the failure to exercise ordinary care by

the Respondent in so placing himself in that close proximity. If the jury had simply been instructed on the respective ordinary care duties of both, then the entirety of the factual contributions to the accident would have been evaluated and properly weighed.

As part and parcel of that analysis, each party would have been judged simply by whether they acted as the jury would expect an ordinarily prudent person to act under like or similar circumstances. An instruction such as that, the ordinary care instruction, would have produced a verdict that would have been fair and equitable.

The Court, in Robinson v. Lansford, 222 S.W.3d 242 (Ky.App. 2006), grappled with these same issues. In Robinson the Court dealt with a party who was following too closely and yet sought the protection of the "sudden emergency" instruction. 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."¹ 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*

¹ 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."

failure to meet one of those duties caused the accident. (Emphasis added)
(Robinson, supra, at page 4).

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.

Other jurisdictions have engaged in similar analysis. Some, as reflected below, have abandoned the doctrine. Others have decided to retain it but grapple with applying it. The Arizona Supreme Court in Myhaver v. Knutson, 942 P. 3rd 445 (Ariz. 1997), discussed the issues as follows:

Consideration of a sudden emergency is, of course, not a separate doctrine but only a part of the determination of what is reasonable care under the circumstances.

The law does not require of the actor more than it is reasonable to expect of him under the circumstances which surround him. Therefore, the court and jury in determining the propriety of the actor's conduct must take into account the fact that he is in a position where he must make a speedy decision between alternative courses of action and that, therefore, he has no time to make an accurate forecast as to the effect of his choice. The mere fact that his choice is unfortunate does not make it improper even though it is one which the actor should not have made had he had sufficient time to consider all the effects likely to follow his action.
Restatement (Second) of Torts § 206 cmt.b.

Commentators on Arizona's negligence law have described the problem and the present state of our law as follows:

Conceptually, the emergency doctrine is not an independent rule. It is merely an application of the general standard of reasonable care; the emergency is simply one of the circumstances faced. Arguably, giving a separate instruction on sudden emergency focuses the jury's attention unduly on that aspect of a case. The

Arizona Supreme Court has expressly declined to decide the question of the propriety of a separate emergency instruction. Jefferson L. Lankford & Douglas A. Blaze, The Law of Negligence in Arizona § 3.5(1).

The Arizona Court Myhaver went on to discuss:

A similar distinction is made by the leading commentators on negligence law, noting that a further qualification which must be made is that some:

“emergencies” must be anticipated, and the actor must be prepared to meet them when he engages in an activity in which they are likely to arise. Thus, under present day traffic conditions, any driver of an automobile must be prepared for the sudden appearance of obstacles and persons in the highway, and of other vehicles at intersections, just as one who sees a child on the curb may be required to anticipate its sudden dash into the street, and his failure to act properly when they appear may be found to amount to negligence. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §33 at 197 (5th ed. 1984).

Sudden appearances and similar common emergencies, such as cars that fail to stop at controlled intersections, are often not true *sudden* emergencies. Thus, in cases such as *Rosen*, neither instruction is appropriate. If the sudden emergency instruction is to be given at all, it should be reserved for the true emergency.

Prosser agrees, stating that it is often the case that “[d]espite the basic logic and simplicity of the sudden emergency instruction, it is all too frequently misapplied on the facts or misstated in jury instructions.” KEETON, *supra* § 33 at 197. As a result, some states hold that the instruction should never be given. *See, e.g., DiCenzo v. Izawa*, 68 Haw. 528, 723 P.2d 171 (1986); *Knapp v. Stanford*, 392 So.2d 196 (Miss. 1980); *McClymont v. Morgan*, 238 Neb. 290, 470 N.W.2d 768 (1991). Other states do not require the instruction be given, leaving it to the trial judge's discretion. *See, e.g., Compton v. Pletch*, 580 N.E.2d 664 (Ind. 1991); *Hallett v. Town of Wrentham*, 398 Mass. 550, 499 N.E.2d 1189 (1986); *McCorvey v. Utah State Dept of Transp.*, 868 P.2d 41 (Utah 1993); *Bentley v. Felts*, 248 Va. 117, 445 S.E.2d 131 (1994). *cite to Myhaver v. Knutson @ 451.*

The Arizona Chief Justice, Zlaket, rendered a concurring opinion but in practical terms took the position that the doctrine should be abandoned. Zlaket reasoned:

I am puzzled by the majority's desire to perpetuate a jury instruction that is admittedly of marginal value but has such enormous potential for harm. In my opinion, today's decision prolongs a decades-old controversy surrounding the "sudden emergency" doctrine and provides little added guidance to Arizona's trial judges. While my colleagues' attempt to narrow the use of the instruction is laudable, I would eliminate it altogether and bring to a close the chapter on this anomalous subject.

To say that the sudden emergency instruction should be confined to "the case in which the emergency is not of the routine sort produced by the impending accident but arises from events the driver could not be expected to anticipate," *ante* at 291, 942 P.2d at 450, is not helpful. In fact, while that language does little more than track the instruction itself, it is likely to spark a new round of endless debate about the differences between the "routine" and the unexpected.

Moreover, today's resolution fails to address the essential flaw in the instruction—that it overemphasizes and tends to accord independent status to what is but one of many elements in every negligence analysis. If drivers cannot "be expected to anticipate" certain events, they are by definition free from negligence. Standard instructions, particularly when supplemented by oral argument of counsel, should be more than sufficient to convey this idea without having a trial judge specifically suggest that one party might be excused because he or she faced an "emergency."

Much has been written on this subject. Nothing more need be said. I simply agree with those jurisdictions that have discarded the sudden emergency instruction as unwise and unnecessary. I am also unpersuaded by the majority's attempt to distinguish this charge from the "sudden appearance" instruction that we rejected in *Rosen*.

However, because the instruction in question has not yet been specifically disapproved in Arizona, and appears to have been harmless under the particular facts of this case, I am unwilling to say that the trial judge abused his discretion. I therefore concur in the result. *Myhaver v. Knutson*, *supra* @451.

- B. **If the doctrine is to be maintained it must not be applied unless the Trial Court finds, as a matter of law, that the party seeking its protection was not negligent prior to the "sudden emergency".**

The confusion manifests when a jury is asked to analyze, simultaneously, the conduct of an actor within the confines of both "ordinary care" and "sudden emergency". If, the Trial Court finds, as a matter of law, that the actor seeking the protection of the "doctrine" has not violated any ordinary care duties prior to the "emergency" then, the confusion would be eliminated. The Instruction, then, would simply provide a specific context for the jury to weigh the decision and action of the party once confronted with the "emergency". Such a retention would alleviate the confusion but still be unnecessary.

The Supreme Court of Arkansas worked its way through this analysis and ultimately abandoned the "sudden emergency" doctrine.² However, subsequent to Wiles, the Court dealt with a case that predated the effective date of the Wiles. The Court went through an extensive analysis which we incorporate below:

II. The Sudden Emergency Instruction

For its next argument on appeal, the railroad asserts that the trial court erred when it gave the Sudden Emergency instruction which states:

A person who is suddenly and unexpectedly confronted with danger to himself or others not caused by his own negligence is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation. AMI Civ. 3rd 614.

In Wiles v. Webb, 329 Ark. 108, 946 S.W.2d 685 (1997), we recently **abolished** the use of the **Sudden Emergency** instruction in all *future* cases because we found that the instruction was inherently confusing. The Wiles holding applies prospectively only, and thus is inapplicable to cases, such as this one, that were tried before the Wiles decision was handed down on June 16, 1997. In these "pre-Wiles" cases, we will apply the old rule that the Sudden Emergency instruction may not be given where there is any evidence that the party requesting the instruction was negligent in creating the emergency situation. Thomson v.

² Wiles v. Webb, 329 Ark. 108, 946 S.W.2d 685 (1997).

Littlefield, 319 Ark. 648, 893 S.W.2d 788 (1994); Druckenmiller v. Cluff, 316 Ark. 517, 873 S.W.2d 526 (1994).

CONCLUSION

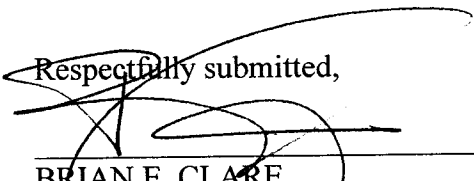
Chief Justice Lambert, in his dissent in Regenstreif v. Phelps, 142 S.W.3d 1, (Ky. 2004), was prophetic, at least as it pertains to the Robinson case and the one at bar. He said:

“A simple jury instruction apportioning fault eliminates any need for the sudden emergency instruction. In negligence cases, instructions are designed to apportion between or among the parties. Such apportionment obviously permits a determination that a party had no fault whatsoever. **The sudden emergency doctrine is simply unnecessary and will disserve the fact-finding process.** Regenstreit, supra, at 8.

The proof of the “disservice to the fact finding process” is demonstrated in the number of cases working their way through our appellate Courts and those of our sister states. Again, the objective of the “sudden emergency” doctrine is achieved with an “ordinary care” instruction. The continued desire to make sure the jury understands that one party was limited by an “emergency” is confusing and unnecessary.

By not trusting the jury to appreciate the circumstances faced, we distort the fact-finding process.

Respectfully submitted,


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