

SUPREME COURT OF KENTUCKY

NO. 2007-SC-000795-DG
NO. 2008-SC-000204-DG

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COURT OF APPEALS OF KENTUCKY

NO. 2006-CA-1692

ELAINE T. HENSON, *et al.*

APPELLANTS/CROSS-APPELLEES

vs.

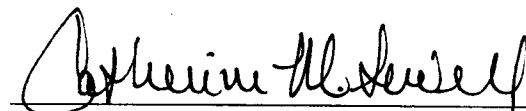
DAVID KLEIN

APPELLEE/CROSS-APPELLANT

**SUPPLEMENTAL BRIEF FOR APPELLEE AND
CROSS-APPELLANT, DAVID KLEIN**

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Supplemental Brief for Appellee and Cross-Appellant, David Klein was served by mailing a true copy hereof to Brian E. Clare, 600 West Main Street, Suite 300, Louisville, KY 40202; Judson F. Devlin, FULTON & DEVLIN, 165 Brownton Place, 2000 Warrington Way, Louisville, KY 40222; Hon. Barry L. Willett, Judge, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, KY 40202; and Mr. Sam Givens, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601-9229, on this the 5th day of November, 2009.



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STATEMENT OF PURPOSE OF BRIEF

On October 8, 2009, this Honorable Court entered an Order requesting supplemental briefs and set this matter for an oral argument. The purpose of this brief is to advise this Court why the “sudden emergency doctrine” should be retained in Kentucky and why jury instructions in appropriate cases should include a separate instruction on the “sudden emergency doctrine” in addition to the general comparative negligence instruction.

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FN 4 citation:

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ARGUMENT

THE SUDDEN EMERGENCY DOCTRINE AND JURY INSTRUCTION SHOULD BE RETAINED IN KENTUCKY

The seminal case on sudden emergency doctrine in Kentucky is the Supreme Court's opinion in *Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004). In *Regenstreif*, the Kentucky Supreme Court readopted the sudden emergency doctrine which had been previously abolished in *Bass v. Williams*, 839 S.W.2d 559 (Ky. App. 1992). Specifically, the court addressed and thoroughly analyzed whether the sudden emergency doctrine should remain viable in light of Kentucky's adoption of comparative negligence in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984). The Court found that the sudden emergency doctrine was not subsumed by comparative negligence. *Id.* at 5. Accordingly, *Bass v. Williams* was overruled to the extent that it had abolished the doctrine in Kentucky. The Court declared:

The core principle of comparative negligence is that [o]ne is liable for an amount equal to his degree of fault, no more and no less. The sudden emergency doctrine necessarily complements this principle in those particular cases where additional circumstances alter the way in which one's degree of fault should be determined. We find no friction between comparative negligence and the sudden emergency doctrine, and therefore, we conclude that the *Bass* Court erred in abolishing the doctrine on this ground. *Id.* at 6

In so holding, the Supreme Court rejected the policy concerns of the *Bass* court which had been that this doctrine was confusing, prejudicial, and lessened the dictate of "direct proportion to fault." *Bass, supra* at 564. The *Bass* Court further believed that a sudden emergency instruction was not necessary as the emergency situation was

implicitly covered by the general negligence instruction. The Supreme Court disagreed and stated that the doctrine was merely an expression of the reasonably prudent person; it noted that the law requires no more from an actor than is reasonable to expect in the event of an emergency. *Regenstreif, supra* at 5. The Supreme Court thought it proper that a jury be told "how it is to allocate fault and apportion damages when the conduct of the person in question is that of an 'ordinarily prudent person' when faced with an emergency situation." *Id.* The Court acknowledged that such a doctrine served the purpose of explaining to a jury how to judge allegedly negligent conduct of a person (plaintiff or defendant) who is suddenly confronted with an emergency situation that does not allow time for deliberation. *Id.* at 4. The Court carefully noted that the doctrine does not excuse fault but rather qualifies the duties expected of a reasonably prudent person in such an emergency and that henceforth, the emergency situation would be just another factor for a jury to consider when finding fault. *Id.* at 5.

The Supreme Court listed examples of sudden emergencies, both nature-induced as well as person-induced: patch of ice; darting animals; darting children; swooping airplanes; falling boulders. An emergency situation has further been defined in Kentucky as existing when the person encountering the emergency takes evasive action such as swerving into another lane of traffic or into a median to avoid the unexpected danger. *Robinson v. Lansford*, 222 S.W.3d 242 (Ky. App. 2006). In essence, when a sudden emergency exists (that should not be anticipated and is not created by the person seeking protection of the doctrine) this person owes the duty expected of an ordinarily prudent person in the emergency situation. *Regenstreif, supra* at 4. Appellee/Cross-

Appellant, Klein believes that the *Regenstreif* Court thoroughly addressed the viability of the sudden emergency doctrine, and that there is no compelling reason to reject this reasoning at this time.¹

As in Kentucky, even after the wide adoption of comparative negligence, a strong majority, twenty-eight foreign jurisdictions, have retained the sudden emergency doctrine and the practice of separate sudden emergency jury instructions.² An additional eight jurisdictions have retained the doctrine but encourage its use in only rare situations.³ Of these eight, some states like Montana and Wyoming, do not allow application of this doctrine to “ordinary” motor vehicle accidents, and some states incorporate the concept of sudden emergency into the comparative negligence instructions. *See, Simonson v. White*, 713 P.2d 983 (Mont. 1986); *Roberts v. Estate of*

¹ Recent unpublished appellate decisions in Kentucky have merely applied the doctrine to fact-specific situations and have not addressed the underlying rationale for the doctrine.

² Ala.-*Waters v. Williams*, 821 So.2d 1000 (Ala. Civ. App. 2001); Colo.-*Hesse v. McClintic*, 176 P.3d 759 (Colo. 2008); Conn.-*Puchalsky v. Rappahahn*, 774 A.2d 1029 (Conn. App. 2001); Fla.-*Vantran Industries, Inc. v. Ryder Truck Rental, Inc.*, 955 So.2d 1118 (Fla. App. 1 Dist. 2006); Ga.-*Torres ex re Torres v. Tandy Corp.*, 592 S.E.2d 111 (Ga. App. 2003); Ind.-*Willis v. Westerfield*, 839 N.E.2d 1179 (Ind. 2006); Iowa.-*Vasconez v. Mills*, 651 N.W.2d 41 (Iowa 2002); La.-*Loyd v. Lancer Ins. Co.*, 999 So.2d (La. App. 2 Cir. 2009); Ky.-*Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004); Maine.-*Coyne v. Peace*, 863 A.2d 885 (Me. 2004); Md.-*Rustin v. Smith*, 657 A.2d 412 (Md. App. 1995); Mass.-*Hallett v. Wrentham*, 499 N.E.2d 1189 (Mass. 1986); MI.-*White v. Taylor Distributing Co., Inc.*, 739 N.W.2d 132 (MI. App. 2007); NH.-*Breagy v. Stark*, 642 A.2d 329 (NH 1994); NC.-*Sobczak v. Vorholt*, 640 S.E.2d 805 (NC App. 2007); ND.-*Ebach v. Ralston*, 510 N.W.2d 604 (ND 1994); NY.-*Khan v. Canfora*, 874 N.Y.S.2d 243 (NY App. Div. 2. Dept. 2009); Ohio.-*Hatala v. Craft*, 847 N.E.2d 501 (Ohio App. 7 Dist. 2006); Okla.-*Carnes v. White*, 511 P.2d 1101 (Okla. 1973); Pa.-*Carpinet v. Mitchell*, 853 A.2d 366 (Pa. Super. 2004); RI.-*Maglioli v. J.P. Noonan Transportation, Inc.*, 869 A.2d 71 (RI 2005); SC.-*Clark v. Cantrell*, 529 S.E.2d 528 (SC 2000); Tenn.-*Olinger v. University Medical Center*, 269 S.W.3d 560 (Tenn. Ct. App. 2008); Tex.-*Jordan v. Sava, Inc.*, 222 S.W.3d 840 (Tex. App. Houston Dist. 2007); Utah.-*McCorvey v. Utah State Dept. of Transportation*, 868 P.2d 41 (Utah 1993); Va.-*Hancock-Underwood v. Knight*, 670 S.E.2d 720 (Va. 2009); Wash.-*Kappelman v. Lutz*, 217 P.3d 286 (Wash. 2009); Wis.-*Totsky v. Riteway Bus Service, Inc.*, 607 N.W.2d 637 (Wis. 2000).

³ Alaska.-*Lyons v. Midnight Sun Transportation Services, Inc.*, 928 P.2d 1202 (Alaska 1996); Ariz.-*Myhaven v. Knutson*, 942 P.2d 445 (Ariz. 1997); Hawaii.-*DiCenzo v. Izawa*, 723 P.2d 171 (Hawaii 1986); Mont.-*Simonson v. White*, 713 P.2d 983 (Mont. 1986); NJ.-*Leighton v. Sim*, 591 A.2d 985 (NJ Super. A.D. 1991); SD.-*Meyer v. Johnson*, 254 N.W.2d 107 (SD 1977); W.Va.-*Moran v. Atha Trucking, Inc.*, 540 S.E.2d 903 (W.Va. 1997); Wyo.-*Roberts v. Estate of Randall*, 51 P.3d 204 (Wyo. 2002).

Randall, 51 P.3d 204 (Wyo. 2007); *Moran v. Atha Trucking, Inc.*, 540 S.E.2d 903, 914 (W.Va. 1997). Finally, there are eight jurisdictions which have abolished the sudden emergency doctrine and believe that any sudden emergency will be covered by the “standard of ordinary care under all circumstances” instruction.⁴ *See, e.g.*, *Bjorndal v. Weitman*, 184 P.3d 1115 (Or. 2008); *Dunleavy v. Miller*, 862 P.2d 1212 (N.M. 1993); *McClymont v. Morgan*, 470 N.W.2d 768 (Neb. 1991). Appellee/Cross-Appellant Klein submits that Kentucky’s current retention of the sudden emergency doctrine is well-reasoned, and that Kentucky should remain among the majority of jurisdictions which continue to find the sudden emergency doctrine viable in this modern age.

In these majority jurisdictions like Kentucky, which conclude that the sudden emergency doctrine is still relevant, the underpinnings for the doctrine originated from English common law. The doctrine was first adopted in England in 1816 in *Jones v. Boyce*, 1 Stark. 493, 171 Eng. Rep. 540 (N.P. 1816) and in this country in 1839 in *Stokes v. Saltonstall*, 38 U.S. (13 Pet.) 181, 10 L.Ed. 115 (1839). *Moran, supra* at 907. Both cases involved stage coach incidents in which a party perceived danger in the driver’s actions and leapt from the coach sustaining injuries to avoid the peril. The issue was whether the injured party could proceed with his action or be barred by contributory negligence. The courts promulgated the sudden emergency doctrine (as it

⁴ Ark.-*Wiles v. Webb*, 946 S.W.2d 685 (Ark. 1997); Ill.-*Culp v. Olive*, 195 N.E.2d 729 (Ill. App. 1964); Kansas-*Bayer v. Shupe Bros. Co.*, 576 P.2d 1078 (Kan. 1978); Miss.-*Whiddon v. Smith*, 822 So.2d 1060 (Miss. App. 2002); Mo.-*Cowell v. Thompson*, 713 S.W.2d 52 (Mo. App. E.D. 1986); Neb.-*McClymont v. Morgan*, 470 N.W.2d 768 (Neb. 1991); NM-*Dunleavy v. Miller*, 862 P.2d 1212 (NM 1993); Oregon-*Bjorndal v. Weitman*, 184 P.3d 1115 (Or. 2008).

is still defined today) in terms of the prudent person's conduct in light of the emergency, to ameliorate the harshness of contributory negligence. While the doctrine originated to aid plaintiffs, defendants have also utilized it especially to ameliorate the harshness of the negligence *per se* rule based upon statutory violations. In fact, the Kentucky Supreme Court noted that in cases involving sudden emergencies, without an emergency qualification, the defendant's failure to adhere to statutory duties will always result in liability. *Regenstreif, supra* at 6. Thus, the doctrine benefits both plaintiffs and defendants, a fact emphasized by the *Regenstreif* Court: "Significantly, the doctrine explains to the jury the standard of conduct expected of defendants *and* plaintiffs who act under the stress of an emergency situation." *Id.* at 5.

This common law doctrine was codified in the *Restatement 2d of Torts*, §296 in 1965: "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." *Comment (b)* then explicates that:

The law does not require of the actor more than it is reasonable to expect of him under the circumstances which surround him.... 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.

The *Restatement 2d of Torts* §296, adopted by Kentucky courts, provides Kentucky and the majority of other jurisdictions retaining sudden emergency today with support for the position that sudden emergency remains viable. *See e.g., Regenstreif, supra* at 6;

Coyne v. Peace, 863 A.2d 885, 889 (Me. 2004); *Moran, supra* at 914.

Kentucky is not alone in declaring that the sudden emergency doctrine has not been subsumed by comparative negligence. See e.g., *Regenstreif, supra*; *Coyne, supra*. Other courts like Kentucky have determined that sudden emergency instructions are still needed as the general negligence instructions cannot sufficiently encompass an emergency. See e.g., *Coyne, supra* at 888; *Hancock-Underwood v. Knight*, 670 S.E.2d 720 (Va. 2009). In fact the Virginia Supreme Court, in 2009, declared why the sudden emergency instruction was still needed: “It adds new considerations to the negligence equation. A person confronted with a sudden emergency must ‘act as an ordinarily prudent person would have done under the same or similar circumstances.’ This additional requirement is not addressed in the general negligence instruction....” *Hancock-Knight, supra* at 726. The Indiana Supreme Court also explained the need for the sudden emergency doctrine:

The basis of the doctrine is that ‘the actor is left no time for adequate thought, or is reasonably so disturbed or excited that the actor cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess. Under such conditions, the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect....’

Willis v. Westerfield, 839 N.E.2d 1179, 1184 (Ind. 2006). The Indiana court then cited to *Regenstreif* with approval and reiterated that the doctrine, “expresses the notion that the law requires no more from an actor than is reasonable to expect in the event of an emergency.” *Id.* at 1185.

In sum, the majority position is based upon the common-sense concept that the

law is not willing to impose upon a party in an emergency the duty to make a cool and reasoned decision. It is recognized that a jury should be able, upon proof of an emergency, to evaluate whether the party in an emergency situation acted reasonably and as an ordinary person would when presented with that emergency. Appellee/Cross-Appellant asserts that without the instruction, the jury would be left to guess as to the effect of the emergency situation, *i.e.*, is the emergency circumstance sufficient to either not find fault or to reduce a party's fault. Appellee/Cross-Appellant does acknowledge that counsel may explain the effect of an emergency in closing argument, but without a specific instruction, the jury may still be confused as to the weight to be given an emergency in the fault analysis. Additionally, and as recognized by the *Regenstreif* Court, without a sudden emergency instruction a party who violates a statutory duty will always be liable, and the jury will have no recourse but to find fault against that party. The needed instruction merely gives the jury permission to consider the emergency as another factor to consider "in the total fault analysis." *Regenstreif, supra* at 5.

A minority of eight courts have abolished sudden emergency and declared that an emergency is encompassed within the general negligence instruction and an emergency instruction is not necessary. *See, e.g., Dunleavy v. Miller*, 862 P.2d 1212 (NM 1993); *McClymont v. Morgan*, 470 N.W.2d 768 (Neb. 1991). These minority jurisdictions abolishing sudden emergency do so for a myriad of reasons: excuses a party from ordinary care standard due to emergency; singles out one aspect of general standard of care and emphasizes it; diminishes a party's duties and violates "direct

proportion to fault” concept; confuses a jury and is unnecessary. *Moran, supra* at 911. As noted above, many of the concerns of the minority position were considered by the *Bass* Court in 1992 when it abolished sudden emergency. In 2004, the *Regenstreif* Court found these concerns invalid and declared that sudden emergency had a solid place in the apportionment of fault analysis. Moreover, other majority jurisdictions have addressed and dismissed these concerns, by stating that these problems could be cured by carefully drafting the jury instructions. See e.g., *Ebach v. Ralston*, 510 N.W.2d 604 (N.D. 1994); *Young v. Clark*, 814 P.2d 364 (Colo. 1991). For example, the *Ebach* Court held that the following instruction was proper and did not unduly emphasize the emergency but properly explained the duty of care owed due to the emergency. The approved instruction read, in part:

If a person is suddenly and unexpectedly confronted with an emergency or situation of peril that involves impending danger, or the appearance thereof, ...and is not created by his or her own fault, he or she is not expected, nor required, to use the same judgment and prudence that is required of him or in calmer and more deliberate moments. His or her duty is to exercise only the care that a person of ordinary prudence would exercise in the same situation. If, at that moment, he or she does what appears to him or her to be the best thing to do, and his or her choice and manner of action are the same as might have been followed by a person of ordinary prudence under the same conditions, he or she does all the law requires of him or her....

Id. at 608, 609. This is just one example of a proper sudden emergency instruction, other than the Kentucky instruction set forth in *Palmore, Kentucky Instructions To Juries*, Vol. 2, §16.44 (2009).

The Kentucky patterned jury instructions on sudden emergency first sets forth

the duty to exercise ordinary care and the specific general and specific duties; then the instruction adds that all these duties are subject to the qualification that if immediately before the collision, X suddenly and unexpectedly encountered an emergency (as defined by the specific facts) and the emergency was not brought about by a failure by X to perform these duties, X was not thereafter required "to adopt the best course possible in order to avoid the apparent 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...." *Palmore, supra* at §16.44. Appellee/Cross Appellant, Klein submits that this instruction strikes the correct chord in explaining to the jury how the emergency fits into the fault analysis. Without this sudden emergency instruction in Kentucky, a jury would be left with the general ordinary care instruction, and "ordinary care" would be defined as "such care as the jury would expect an ordinarily prudent person to exercise under similar circumstances." *Palmore, supra* at §14.01. Appellee/Cross-Appellant does not think this general instruction would properly and clearly advise a jury how to consider the evidence and assess fault where the allegedly negligent person encounters a sudden emergency. Without the sudden emergency instruction the jury would be left to decide fault in a vacuum as far as the effect of the emergency. Therefore, Appellee/Cross-Appellant asserts that *Palmore's* sudden emergency instruction remains the better course for Kentucky trial courts to travel when instructing a jury on a sudden emergency.


CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For all the foregoing reasons, Appellee/ Cross-Appellant submits that Kentucky should retain the sudden emergency doctrine as adopted in *Regenstreif v. Phelps*, and that trial courts should continue to instruct juries with a sudden emergency instruction in appropriate cases. Appellee/Cross-Appellant believes that the sudden emergency doctrine remains relevant today as at common law, and Kentucky should remain in the majority of jurisdictions retaining this doctrine.

The relief sought by Appellee/Cross-Appellant is simply that the Court of Appeals decision, that the trial court properly gave a sudden emergency instruction, be affirmed. In the event this Court determines to abolish the sudden emergency doctrine, and reverses and remands this matter, Appellee/Cross-Appellant seeks relief and asks that the trial court's ruling that Officer Richard Waite's opinion testimony on causation was admissible be found to be erroneous under Kentucky law and should be excluded at any new trial.

Respectfully submitted,

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