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Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000897-MR
AND
NO. 2003-CA-000936-MR

JEANNE JUREK and
COMMONWEALTH OF KENTUCKY/
DEPARTMENT OF PERSONNEL — APPELLANTS

v.

APPEALS FROM HART CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
CIVIL ACTION NO. 00-CI-00041

EUGENE HUBBS and
EMERSON ELECTRIC COMPANY — APPELLEES

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, MINTON, and TAYLOR, Judges.

MINTON, Judge: Jeanne Jurek and the Commonwealth of Kentucky/Department of Personnel (Department of Personnel) appeal[1] from a judgment of the Hart Circuit Court in favor of

[1] Originally Jurek and the Department of Personnel filed separate appeals, with each appellant designating the other as an appellee. Jurek's appeal was numbered 2003-CA-000897-MR, and the appeal of the Department of Personnel was numbered 2003-CA-000936-MR. On July 11,

Eugene Hubbs and Emerson Electric Company (Emerson Electric). The civil action arose from a motor vehicle accident in which the tractor-trailer driven by Hubbs struck the car in which Jurek was riding, injuring her severely. As grounds for appeal, Jurek and the Department of Personnel assert that the circuit court committed the following errors: (1) not granting Jurek's motion for a directed verdict regarding Hubbs's alleged violation of a provision of the Federal Motor Carrier Safety Regulations (FMCSR); (2) not permitting Jurek's counsel to question Hubbs about a speeding ticket that he received approximately one month after the accident; (3) admitting into evidence testimony about other motor vehicle accidents that occurred at the same place shortly after the accident at issue; and (4) admitting into evidence Hubbs's statement that he had driven 900,000 miles without an accident. For the reasons stated below, the Court reverses and remands this case to the circuit court for a new trial.

The accident in question occurred on March 11, 1998, between mile markers 67 and 68 on I-65 North in Hart County. Hubbs was driving a loaded tractor-trailer for his employer,

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2003, pursuant to Jurek's motion and the agreement between Jurek and the Department of Personnel to proceed as a single appellant as provided in Kentucky Rules of Civil Procedure (CR) 73.01(3), the Court ordered the two appeals to be consolidated. The Court further ordered that the parties be realigned such that Jurek and the Department of Personnel each be named an appellant in the appeal originally filed by the other.

Emerson Electric, on his dedicated route from Oxford, Mississippi, to Findlay, Ohio. Debbie Bishop was driving a white Chevrolet Lumina owned by the Commonwealth of Kentucky. Riding with her were three passengers, Rhondia Burdine, Gary Grubbs, and Jeanne Jurek. All four were state employees returning to Frankfort after a training session in Bowling Green. On that day, both Hubbs and Bishop had driven through several areas where snow was falling but not sticking to the road; neither had encountered ice. Hubbs said that the snow never significantly impaired visibility, but other witnesses, including Bishop, disagreed. There were miles in between these isolated snow showers in which there was no snow or other precipitation, visibility was normal, and the pavement was clear and dry. They encountered snow again around mile markers 67 and 68. Hubbs testified that this snow did not significantly reduce visibility, but Bishop and others testified otherwise.

The collision between Bishop and Hubbs was part of a multiple vehicle accident that occurred in part because of ice. Bishop and Hubbs were in the right lane with Bishop somewhat ahead of Hubbs. The van immediately in front of Bishop began fishtailing then slid off the road onto the right shoulder. The car in front of her, which had been obscured by the van, was either stopped in the right lane or moving so slowly that it appeared to be stopped. Rather than hit the van off on the

right shoulder, or be hit by a faster-moving vehicle which she saw approaching in the left lane,[2] Bishop remained in the right lane and tried to slow down as much as possible. She struck the car ahead in a low-speed collision.[3] She and her passengers were shaken but uninjured. However, Bishop's Lumina then went sideways into the left lane at a 90-degree angle to oncoming traffic, directly into the path of Hubbs. His tractor-trailer struck the Lumina near the left rear door area where Jurek was seated. She suffered serious and permanent injuries. Other details concerning the accident will be developed below as necessary.

Jurek filed a complaint against Hubbs and Emerson Electric[4] on March 1, 2003, alleging a variety of claims. On May 2, 2000, the Department of Personnel, which had paid workers' compensation benefits to Jurek, was permitted to intervene. The Department of Personnel's complaint adopted by reference Jurek's allegations against Hubbs and Emerson Electric

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[2] Bishop could not recall what type of vehicle was approaching on her left. She only remembered that it was moving faster than her vehicle.

[3] As evidence of the minimal impact of this initial collision, the air bag(s) did not deploy.

[4] Jurek also named other defendants. Because these defendants were dismissed prior to trial and are not involved in this appeal, we need not address them.

and raised no new allegations against them.[5] A jury trial was conducted in Hart Circuit Court on February 24-26, 2003. At the conclusion of Jurek's proof, the circuit court directed a verdict in favor of Emerson Electric on the allegation of negligent entrustment and on the allegations of negligent screening, hiring, training, and supervision. The trial court further directed a verdict in favor of Hubbs on the allegation of gross negligence, leaving the allegation of negligence on the part of Hubbs as the only issue to be decided by the jury. The only remaining allegation against Emerson Electric concerned vicarious liability. The circuit court denied Jurek's motion for a directed verdict on the allegation that Hubbs had violated the FMCSR. Instead, the circuit court presented that issue to the jury by including among Hubbs's specific duties the duty to comply with applicable provisions of FMCSR. The jury returned a unanimous verdict in favor of Hubbs, thereby dismissing all remaining allegations pleaded by Jurek against Hubbs and Emerson Electric. Jurek filed a motion for new trial, which was subsequently denied. Jurek and the Department of Personnel then

[5] Jurek and the Department of Personnel had identical interests at trial against Hubbs and Emerson and again on appeal. Therefore, this Court shall refer to the plaintiffs at trial and now appellants collectively as "Jurek." Likewise, because Hubbs and Emerson Electric have identical interests on appeal and shared representation, we shall refer to them collectively as "Hubbs."

filed timely separate appeals which were later consolidated as noted above.

DENIAL OF DIRECTED VERDICT ON FMSCR CLAIM

Jurek asserts that the circuit court erred in denying her motion for directed verdict concerning the allegation that Hubbs violated the FMSCR. These regulations govern the operation of commercial motor vehicles in the United States. To the extent that they establish a standard of care higher than the law, ordinances, or regulations of a particular state jurisdiction, a commercial driver must comply with the FMSCR.[6] Jurek asserts that Hubbs violated the following provision:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated.[7]

To consider Jurek's allegation, it is necessary to provide further details concerning the accident. When there was no precipitation and the road was dry and clear, Hubbs drove 64 miles per hour (mph); when he encountered snow, he would slow

[6] 49 Code of Federal Regulations (C.F.R.) § 392.2.

[7] 49 C.F.R. § 392.14.

to 50 mph, even though the snow was not yet sticking to the roadway. He did not try to contact anyone by CB or other means to learn the condition of the interstate and the weather to his north. In fact, he had his CB turned off. Just before the accident, he saw snow falling for the first time since Horse Cave and slowed from 64 mph to 50 mph. Skidding vehicles and brake lights about one-quarter mile ahead of Hubbs alerted him to icy conditions. Hubbs began stab braking to bring his truck to a stop.[8] He moved to the left lane because he did not think he would be able to stop in time to avoid hitting the vehicles stopped in the right lane, and he could not get off on the right shoulder without hitting other vehicles. Hubbs continued stab breaking and succeeded in slowing his vehicle to approximately 30 mph. He first testified that it took him about a minute to slow to 30 mph but later said that it was probably closer to 20 seconds. He managed to keep his vehicle in the left lane, despite the tendency of his trailer to want to slide right whenever he applied the brakes.[9] Hubbs was almost past the area where he had originally noted the stopped vehicle in the right lane and the van that slid off on the right shoulder when the

[8] Stab breaking is a technique in which a tractor-trailer driver alternately steps on the brakes and then eases up on the brakes. It is designed to slow or stop a tractor-trailer without locking up the brakes on the trailer, which could result in jack-knifing the vehicle.

[9] The trailer's tendency to slide to the right was due to both the ice and to the banking of the road.

white Lumina driven by Bishop slid sideways directly in front of his tractor-trailer. It was so close that he could only see the car's white roof, and he had three seconds or less to react. He tried to turn into the median, but, before he could do so, he struck the Lumina, knocking it into the median. To keep from hitting the car again, Hubbs continued on briefly in the left lane before pulling off in the median.

Jurek does not dispute that Hubbs reduced his speed from 64 mph to 50 mph when he encountered snow immediately before the accident. However, she asserts that pursuant to 49 C.F.R. § 392.14, once he recognized the changeable weather and knew that he could encounter snow again, Jurek should have driven at a reduced speed even when the immediate weather was fine and the road was clear. She asserts that this obligation to drive at a reduced speed continued until he received confirmation from a third party via CB or other means that the road and weather ahead were clear. Jurek asserts that the fact that Hubbs was unable to bring his tractor-trailer to a complete stop before the accident is proof that he was traveling too fast at 64 mph given the changeable weather. Therefore, she asserts that she was entitled to a directed verdict on the allegation that Hubbs violated 49 C.F.R. § 392.14.

The standard for a directed verdict was set forth in Lewis v. Bledsoe Surface Mining Company, as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these functions being reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must decide whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"[10] If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.[11]

When the evidence, including any reasonable inferences from it, is taken in the light most favorable to Hubbs as the prevailing party, it is clear that there was sufficient evidence to support the jury's verdict in Hubbs's favor on the issue of the alleged violation of the FMCSR. 49 C.F.R. § 392.14 requires a driver to reduce his speed when hazardous driving conditions, such as snow or ice, exist. Notwithstanding Jurek's interpretation, it does not state an affirmative duty to drive at a reduced speed

[10] NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988) (citation as in original).

[11] Ky., 798 S.W.2d 459, 461-62 (1990) (some citations omitted).

indefinitely when the snow or ice disperses until receiving confirmation from a third party that the weather ahead is similarly clear. There was sufficient evidence for the jury to agree with Hubbs, who stated, "just cause [sic] it snowed for a mile don't [sic] mean you've got to stay slow for 500" miles. Therefore, we affirm the circuit court's denial of Jurek's motion for a directed verdict.

ADMISSIBILITY OF POST-ACCIDENT SPEEDING TICKET

Jurek also asserts that the circuit court erred in barring inquiry into a speeding ticket which Hubbs received approximately one month after the accident for driving 73 mph in the same tractor-trailer. Jurek sought to use this evidence to impeach Hubbs regarding a statement made during his discovery deposition that he knew that he was going 64 mph prior to the accident because that was as fast as his truck would go due to its governor. In response to Hubbs's motion *in limine* to prevent this line of inquiry, the circuit court ruled that evidence of the speeding ticket would not be relevant or admissible unless Hubbs testified at trial about the governor. At trial, when called as a witness by Jurek, Hubbs testified that he knew his speed was 64 mph before the accident by his speedometer. When asked if the speedometer was the only way that he knew his speed, Hubbs responded that that was the only

way he could be sure. When Hubbs later testified on his own behalf, he again stated that he knew he was going 64 mph by his speedometer. When asked if he had stated in his deposition that "that's all my truck will run," referring to 64 mph, Hubbs agreed that the statement sounded accurate. In a bench conference, Jurek then moved to introduce the speeding ticket but was overruled. Jurek properly preserved the issue through avowal testimony. On avowal, Hubbs agreed that he said in his deposition that his truck would not go faster than 64 mph. He also admitted that he received a speeding ticket for going 73 mph in a 55 mph zone, approximately one month after the accident while driving the same truck. Hubbs stated that he disputed the ticket, however. He conceded that he was going faster than the 55 mph speed limit but disputed that he was driving 73 mph.

The circuit court based its decision on lack of relevance. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of that action more probable or less probable than it would be without the evidence."[12] Relevance is a determination resting largely within the

[12] Kentucky Rules of Evidence (KRE) 401.

discretion of the trial court.[13] This Court will not disturb a lower court's discretionary ruling on appeal, absent an abuse of discretion.[14] Given Hubbs's uncontroverted testimony that he had already slowed from 64 mph to 50 mph and again to 30 mph when Bishop's Lumina slid directly in front of his truck, the issue of exactly how he knew his earlier speed of 64 mph seems collateral. This is especially true since Jurek's counsel seemed to have adopted Hubbs's assessment that he was going 64 mph as fact at trial. Jurek's counsel told the jury in opening statements that the evidence would show that Hubbs was traveling 64 mph prior to the accident. And again, in his closing arguments, he stated that shortly before the accident Hubbs was driving "64 mph, as fast as [his] truck could go."[15] Under these circumstances, we cannot say that it was an abuse of discretion for the circuit court to have excluded any questions concerning the post-accident speeding ticket. Even if it were an error, we note that it would be harmless error under the standard noted below. Therefore, we affirm the circuit court's ruling on this issue.

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[13] Glens Falls Ins. Co. v. Ogden, Ky., 310 S.W.2d 547, 549 (1958).

[14] *See* Tumey v. Richardson, Ky., 437 S.W.2d 201, 205 (1969).

[15] Punctuation added.

ADMISSIBILITY OF ACCIDENT-FREE DRIVING HISTORY

Jurek also asserts that the circuit court erred by permitting Hubbs to testify about his unblemished truck-driving record. Hubbs testified on direct that he had driven approximately 900,000 miles for Emerson Electric and had never had an accident. Hubbs's counsel referred to this testimony twice during closing. He called 900,000 accident-free miles "pretty good evidence" that Hubbs knew his job and knew what he was doing. Then later, just a minute or so before going over instructions on how to fill out the verdict forms, he declared that "Mr. Hubbs is a responsible driver, an accident-free driver for 900,000 miles. That's pretty close to a million ...."[16] He went on to urge that this record was one reason why it would be wrong to hold Hubbs liable for Jurek's injuries.

KRE 404(a) sets forth a general prohibition against the use of character evidence to show propensity, stating in relevant part: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion ...." KRE 404(a) is subject to several exceptions; however, none applies to the present civil litigation.

> There is no explicit mention of character evidence for civil cases in KRE 404,

[16] Punctuation added.

> although the text of the provision plainly requires exclusion of such evidence. The provision begins with a general rule against the use of character evidence for substantive purposes, adopts two exceptions for criminal cases, and says nothing about exceptions for civil cases.[17]

Regarding the admissibility of character evidence in civil litigation for the purpose of showing action in conformity therewith on a particular occasion, the drafters of KRE 404 unequivocally stated, Rule 404 "eliminates the possibility of using such evidence in civil litigation, except to reflect on the credibility of the witnesses."[18]

Hubbs's testimony about his accident-free driving record is evidence of his carefulness. Evidence of a character for carefulness or carelessness for the purpose of showing actions in conformity with that character is inadmissible.[19] The only purpose for which this evidence was offered was to prove that Hubbs acted in conformity with his character for carefulness on March 11, 1998, as shown when his attorney cited

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[17] Robert G. Lawson, The Kentucky Evidence Handbook § 2.15[5] (4th ed. 2003).

[18] Evidence Rules Study Committee, Kentucky Rules of Evidence—Final Draft 24 (Nov. 1989).

[19] *See also* Lawson, § 2.15[5], noting that despite the fact that there are no Kentucky cases predating the adoption of KRE regarding the admissibility of carefulness or carelessness, "such evidence was covered by the general rule of exclusion and was widely if not universally regarded as inadmissible."

it as pretty good evidence of Hubbs's competence at his job and a reason why it would be wrong to hold him liable for the accident. As character evidence intended to show action in conformity on a particular occasion, the testimony about Hubbs's driving record should not have been admitted at trial, pursuant to KRE 404.

Having concluded that the circuit court committed error, we must determine whether this error was harmless. The standard for harmless error is as follows:

> C.R. [sic] 61.01 provides that the court at every stage of the proceeding must disregard any error which does not affect the substantial rights of the parties. While this rule is primarily for the guidance of trial courts, this court, since the adoption of the new rules and before, ... has accepted it as a rule for guidance and will not reverse or modify a judgment except for error which prejudices the substantial rights of the complaining party.[20]

In determining whether reversal is warranted, this Court must judge each case on its unique facts.[21] An isolated instance of improper argument, for example, is seldom deemed prejudicial.[22] But, "when it is repeated and reiterated in colorful variety by

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[20] Davidson v. Moore, Ky., 340 S.W.2d 227, 229 (1960).

[21] Stanley v. Ellegood, Ky., 382 S.W.2d 572, 575 (1964).

[22] *Id.* *See also* Murphy v. Cordle, 303 Ky. 229, 197 S.W.2d 242, 244 (1946).

an accomplished orator its deadly effect cannot be ignored."[23] Such is the case here.

The improperly admitted evidence went toward Hubbs's carefulness, a central issue in the negligence claim. Nevertheless, Hubbs's testimony about his driving record alone might have been considered harmless error. However, Hubbs's attorney twice stressed this improperly admitted evidence in closing argument, even calling it a reason why the jury should not hold Hubbs liable. Notably, this was almost the last thing counsel said during his closing argument before turning to the minutiae of how to fill out the verdict forms. The timing of this statement increased its possible prejudicial effect. Given these facts, we cannot describe the admission of Hubbs's testimony about his accident-free driving record and his counsel's subsequent references to it as harmless error. Therefore, we reverse the circuit court's ruling on this matter.

ADMISSIBILITY OF OTHER MOTOR VEHICLE ACCIDENTS

Jurek also asserts that the circuit court erred in admitting testimony concerning other motor vehicle accidents that occurred at approximately the same time and place. Jurek filed a motion *in limine* to exclude this evidence. The circuit court ruled that evidence of other accidents at approximately

[23] Stanley, 382 S.W.2d at 575.

the same time and location was admissible to show the icy condition of the road.[24] Hubbs's counsel first set the stage for this testimony, stating in his opening statement that there were a dozen or more vehicles involved in accidents at approximately the same time and place as the accident at issue. Every fact witness[25] was asked about other accidents which occurred in the minutes after the accident at issue on the same stretch of northbound I-65. Jurek's counsel promptly objected to the first few references to other accidents but was overruled on each occasion. Each of these witnesses recalled seeing at least one or more vehicles involved in an accident, including vehicles which slid or veered off the road without colliding with another vehicle. Two witnesses recalled that one of the accidents even involved an ambulance. Captain Hardin of the Kentucky State Police, who handled the accident involving Hubbs and Jurek, initially stated that he could not really speak about the other accidents since other agencies handled them, indirectly acknowledging these accidents' existence. Hardin did estimate, however, that there were probably more than ten vehicles involved in one type of accident or another at this

[24] The circuit court did, however, restrict such evidence to accidents which occurred in the northbound lanes of I-65.

[25] The witnesses asked about other accidents were Bishop, Burdine, Grubbs, Hubbs, and Captain Hardin, *infra*. Jurek has little memory of the relevant time period due to her injuries.

scene. In closing arguments, Hubbs's counsel repeated Hardin's estimate of the number of other accidents on the same stretch of interstate around the same time of the collision involving Jurek and Hubbs.

Both Jurek and Hubbs agree that the controlling case regarding the propriety of introducing other accidents which occurred proximately in time and place to an accident at issue is Harris v. Thompson.[26] The circuit court also based its ruling permitting the introduction of the other accidents into evidence on Harris. We agree that Harris is the controlling case. However, under the law as established in that case, we hold that the testimony concerning other accidents was inadmissible. The Harris case concerned an automobile which slid out of control on an isolated patch of ice on an otherwise dry road, striking two pedestrians.[27] The driver of the vehicle introduced evidence of three other automobile accidents that occurred in the same location within two hours of the accident at issue.[28] The appellants objected on the grounds that the other accidents were not shown to have occurred under similar conditions, such as speed, as the accident at issue.[29] Kentucky's highest court

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[26] Ky., 497 S.W.2d 422 (1973).

[27] *Id.* at 424.

[28] *Id.* at 428-29.

[29] *Id.* at 429.

described the general rule on the admissibility of such evidence as follows:

> Evidence of the occurrence or nonoccurrence of other accidents or injuries under substantially similar circumstances is admissible when relevant to certain limited issues, such as the existence or causative role of a dangerous condition, or a party's notice of such a condition.[30]

Based on the facts of the Harris case, Kentucky's highest court ruled that the evidence of other accidents was inadmissible "because there was no real issue as to whether the patch of ice on an otherwise dry highway constituted a dangerous condition or whether that condition was a causative factor in the accident."[31] The Harris court also stated that there was no contention that the accidents were relevant to the issue of notice. The court concluded that the only purpose of the evidence must have been to show whether the driver of the vehicle that struck the pedestrians was negligent by comparison to other drivers under similar circumstances.[32] The court explained the error in admitting evidence for this purpose:

> [I]n a negligence case the comparison to be made is between the party alleged to have been negligent and that imaginary ideal, the ordinarily prudent person acting under similar circumstances. Without any way to

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30 *Id.*

31 *Id.*

32 *Id.*

> prove or to judge whether another person who did or did not have an accident at the same place and under the same circumstances was himself an ordinarily prudent person, or was above or below average in that respect, we are forced to the conclusion that such evidence cannot be competent on the narrow issue of negligence.[33]

Notwithstanding this holding, the Harris court ultimately determined that the evidence of other accidents was admissible as a curative measure because the trial court had admitted testimony, over objection, of other witnesses who drove across the same stretch of road close to the time of the accident at issue.[34] Each of these witnesses testified that he or she had seen the ice soon enough to slow down and had crossed it without incident.[35] The court deemed that the admission of testimony to the effect that several people safely traversed this section of road opened the door to rebuttal evidence concerning testimony by those drivers who were not so fortunate.[36]

In the instant case, there was no evidence presented to show whether the other accidents which occurred at generally the same time and place as the collision involving Hubbs and Jurek occurred under similar conditions, such as speed, nor

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[33] *Id*.

[34] *Id.* at 429-30.

[35] *Id.*

[36] *Id.* at 430.

whether the other drivers were conducting themselves as reasonably prudent persons. No one testified with any specificity about these accidents, and no one involved in them testified or was even identified. Nevertheless, the circuit court admitted evidence of the other accidents in order to show the icy conditions of the road. As in the Harris case, there was no real issue that there was an isolated section of ice on an otherwise dry road, that this ice posed a hazardous condition,[37] and that it was a factor in the accidents.[38] Hubbs attempts to distinguish this case by pointing out that during the trial, Jurek raised the issue of numerous other possible factors in the accident, such as excessive speed, tiredness, or hunger on his part. Just because Jurek attempted to show that Hubbs was negligent, does not mean that the presence and role of the ice was in dispute. No one disputed the presence of the ice or the danger it posed to drivers. There is no claim that the other accidents were relevant to the issue of notice. Also, unlike in the Harris case, there was no need to introduce the evidence of other accidents as rebuttal. No one testified about

[37] Debbie Bishop testified that when she exited the Lumina after the accident, the ice was so slick that she had to hold onto the car to keep from falling. Similarly, Captain Hardin testified that the road was so slick and icy that he actually fell when exiting his vehicle. Notably, Jurek's counsel concedes that Bishop's and Hardin's testimony on this matter was properly admitted into evidence.

[38] *See Id.* at 429.

safely traversing the icy interstate between mile markers 67 and 68. The only purpose for this evidence was to show that Hubbs was not negligent by comparison to other people who also had accidents on the same stretch of interstate. However, the standard for comparison in a negligence case is to an ordinarily prudent person in similar circumstances.[39] This evidence, which only serves to compare Hubbs's negligence to that of strangers of unknown prudence in unknown circumstances, is not competent on the narrow issue of negligence.

The question then arises whether this error is harmless under the previously-cited standard. The existence of other accidents was a theme carried throughout the trial by Hubbs's counsel from opening to closing. Every fact witness who was competent to testify about the issue testified to seeing at least one or more other vehicles collide or leave the roadway, with Captain Hardin estimating that more than ten vehicles were involved in accidents at that scene. This is not a case in which there was only one brief mention of the improper testimony; it was a pervasive theme throughout the trial. Under these circumstances, we cannot say that this error was harmless. Therefore, we must reverse the trial court's finding with

[39] *Id.*

respect to the admission of evidence of other accidents at approximately the same time and place.

CONCLUSION

We reverse with respect to the circuit court's evidentiary rulings permitting Hubbs to introduce testimony that he had driven 900,00 miles as a truck driver without an accident and to introduce evidence of other accidents which occurred shortly before or after the accident at issue in the same section of I-65 North. We remand this case to the Hart Circuit Court for another trial consistent with this opinion.

ALL CONCUR.

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