RENDERED: OCTOBER 5, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

DISCRETIONARY REVIEW GRANTED BY KENTUCKY SUPREME COURT:
MARCH 12, 2008 & APRIL 16, 2008
(FILE NO. 2007-SC-0795-D & 2008-SC-0204-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001692-MR
&
NO. 2006-CA-001814-MR

ELAINE T. HENSON; ST. PAUL FIRE
AND MARINE INSURANCE COMPANY — APPELLANTS/CROSS-APPELLEES

APPEAL & CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 03-CI-007021

DAVID KLEIN — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

---

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

MOORE, JUDGE: Elaine T. Henson appeals from a judgment and jury verdict that dismissed her personal injury lawsuit against David Klein. On appeal, Henson contends that the trial court erred when it instructed the jury regarding the sudden emergency doctrine and erred when it failed to instruct the jury that she had the right-of-way. Out of an abundance of caution, Klein has filed a cross-appeal regarding the trial court's decision that the investigating officer's testimony and report were admissible. Because the evidence supported the jury instructions, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case revolves around a collision between two personal water crafts, one ridden by Henson and the other ridden by Klein. Prior to the accident, Henson worked for a construction company based in Louisville, Kentucky. Henson's employers owned a houseboat and two personal water crafts that they kept at Lake Cumberland in the southern part of the Commonwealth. As an employee of the construction company, Henson was responsible for entertaining clients. For this purpose, Henson accompanied her employers, along with a number of clients, to Lake Cumberland to spend a weekend on her employers' houseboat. At the time, Henson was dating Klein, and she had invited him as well.

While at the lake, Henson and Klein were each riding her employers' personal water crafts.[2] After riding about an hour, the couple decided to return to the

[2] The personal water craft referred to in this case were manufactured by Sea-Doo. A personal water craft is a recreational water craft on which the rider sits rather than riding inside like a boat. Personal water craft use an inboard engine that drives a pump jet that provides both propulsion and steering.

houseboat. As they approached the houseboat, Klein's personal water craft collided with Henson's vessel. Henson sustained serious injury as a result of the accident, and she subsequently filed suit against Klein in the Jefferson Circuit Court.

Eventually, Henson's case proceeded to a jury trial. At trial, Elmer Knable, the only eyewitness to the accident, testified via deposition. At the time of the accident, Knable was standing on the top rear deck of the houseboat, approximately fifty yards away from where the accident occurred. According to Knable, he was facing the direction of the accident and was able to clearly observe Henson and Klein as they approached for at least 150 yards prior to the accident. At his deposition, Knable estimated that the personal water crafts were traveling between 30 and 35 miles per hour and that both were traveling at the same rate of speed. Knable testified that, as Henson and Klein approached, Henson was in front and Klein was approximately ten to fifteen yards behind her and offset approximately ten feet to Henson's left. According to Knable, immediately before the collision, Henson turned her personal water craft to the left and abruptly stopped. As Henson turned left, she looked over her shoulder at Klein and yelled something. According to Knable, after Henson stopped in front of Klein's still-moving vessel, Klein had approximately two seconds to react. Upon cross-examination, Knable testified that he observed Klein lean his body to the left while turning the personal water craft's handlebars to the left in an attempt to avoid the collision. Klein's trial counsel asked Knable, "If Elaine Henson had been going straight and she stopped her [personal water craft], would [Klein's] position to her left allowed him to drive past

her without hitting her?" In response, Knable testified that Klein would have had enough room to pass her.

At trial, Henson's counsel called Klein as a witness. While on the stand, Klein insisted that he had been following Henson at a safe distance. According to Klein's testimony, after he and Henson had ridden the personal water crafts for approximately an hour, they decided to go back to the houseboat. Henson went ahead of Klein. Within a short amount of time, Klein caught up with Henson. Klein testified adamantly that he matched Henson's speed and that he rode behind and to the left of Henson. According to Klein, during the trip back to the houseboat and before the collision, Henson looked over her shoulder a couple of times, so Klein reasoned that she knew where he was. Klein testified that, immediately prior to the collision, Henson looked over her left shoulder and yelled, "David." Klein insisted that, simultaneously, Henson made an abrupt turn to the left, cutting across his path. Klein testified that, prior to the accident, he and Henson were traveling approximately 20 to 25 miles per hour, and he insisted that they were slowing down as they approached the houseboat. According to Klein's testimony, he was traveling somewhere between 30 and 45 feet behind Henson, immediately prior to the collision, and was offset approximately 15 to 20 feet to Henson's left. Later, during Klein's testimony, he stated that, while following Henson back to the houseboat, he never intended to overtake her. Furthermore, he emphasized that he was, at no time, directly behind Henson, and he testified, in his opinion, that a turning vessel was required to give way to a vessel that was holding its course. He insisted that Henson failed to maintain a

steady course, and he stated that, prior to the accident, he did not observe anything that would have caused or required Henson to make an abrupt 90 degree turn into his path. According to Klein, prior to Henson's abrupt turn, she failed to give any signal that she intended to change her course. In addition, Klein testified that, after Henson had cut in front of him, he tried to avoid her by turning left.

After the evidence concluded, the trial court instructed the jury on the law of the case, including the legal duties that applied to both Klein's and Henson's conduct at the time of the accident. In the instruction regarding Klein's duties, the trial court included language addressing the sudden emergency doctrine. After being instructed on the law and after deliberating, the jury found in Klein's favor.

After the verdict had been delivered, Henson filed a motion for a new trial pursuant to Kentucky Rule of Civil Procedure (CR) 59.01. In her motion, Henson argued that the trial court erred when it instructed the jury on the sudden emergency doctrine. According to Henson, the sudden emergency doctrine did not apply to her case because there was no "sudden" emergency and the doctrine is only available to a party when the party exercises ordinary care. According to Henson, Klein did not exercise ordinary care; in fact, he acted negligently by following her too closely. According to Henson, because Klein had followed too closely, he did not give himself ample opportunity to avoid Henson when she stopped in front of him.

In addition to arguing against the use of the sudden emergency doctrine, Henson argued that the trial court should have instructed the jury that, at the time of the

collision, she had the right-of-way. According to Henson, Kentucky Administrative Regulations provide that when a lead vessel is being overtaken by a trailing vessel, the lead vessel always has the right-of-way. Because Henson was operating the lead vessel, she reasoned that she had the right-of-way, and the jury should have been so instructed.

After the trial court denied Henson's motion for a new trial, Henson brought this present appeal. As previously mentioned, Klein, although he prevailed at trial, brought a cross-appeal.

II. STANDARD OF REVIEW

In the Commonwealth, trial courts are required to instruct the jury on the whole law of the case including "instructions applicable to every state of the case deducible or supported to any extent by the [evidence]." *Taylor v. Commonwealth,* 995 S.W.2d 355, 360 (Ky. 1999). Additionally, we consider any alleged errors regarding jury instructions to be questions of law; thus, we review such assignments of error *de novo*. *Hamilton v. CSX Transportation, Inc.,* 208 S.W.3d 272, 275 (Ky. App. 2006).

III. ANALYSIS

A. THE SUDDEN EMERGENCY DOCTRINE

According to the Supreme Court of Kentucky, the sudden emergency doctrine, which is a creature of common-law, exists as a guide for juries to evaluate the allegedly negligent conduct of a party, whether plaintiff or defendant, who suddenly encounters an emergency leaving the party with no time to carefully consider the situation. *Regenstreif v. Phelps,* 142 S.W.3d 1, 4 (Ky. 2004). In other words, when a

party encounters an emergency or a situation that “he has had no reason to anticipate and has not brought on by his own fault, but which alters the duties he would otherwise have been bound to observe, then the effect of that circumstance upon these duties must be covered by the instructions.” *Harris v. Thompson,* 497 S.W.2d 422, 428 (Ky. 1973). Whether the trial court should qualify a party's duties by including sudden emergency language in its instructions “does not depend upon whether the particular circumstance might be characterized in common parlance as a ‘sudden emergency,’ but whether it changes or modifies the duties that would have been incumbent upon [the party] in the absence of that circumstance.” *Id*. “The proper criterion is whether any of the specific duties set forth in the instruction would be subject to exception by reason of the claimed emergency.” *Id*. The sudden emergency doctrine is not an affirmative defense that has to be pled; instead, it concerns what a party's duties are “under each state of facts inferable from the evidence[.]” *Id*. The doctrine does not excuse a party of his fault nor does it effect a plaintiff's burden of proof. *Regenstreif,* 142 S.W.3d at 4; *Harris,* 497 S.W.2d at 428. The doctrine attempts to define the conduct that one would expect from a prudent person faced with an emergency situation. *Regenstreif,* 142 S.W.3d at 4.

The sudden emergency doctrine is a deceptively simple concept. If a party encounters an emergency, then he is only expected to act as a reasonable, prudent person would under the same emergency circumstances. However, in practice, the application of the doctrine has not been so simple. In an effort to better understand the doctrine, we turn to the case law to see under what various circumstances courts have applied it.

In reviewing the case law, we first turn to *Brown v. Todd,* 425 S.W.2d 737 (Ky. 1968). In *Brown*, appellant and appellee were both traveling in the same direction along a two-lane highway. *Id*. at 738. Appellant was driving the lead car, and appellee was following between 100 and 150 feet behind. *Id*. At trial, appellant claimed that a large dog had darted onto the shoulder of the road in front of his vehicle. *Id*. In an effort to avoid hitting the dog the appellant thought was going to cross the road in front of him, he slammed on his brakes, suddenly decelerating. *Id*. As a result, appellee's vehicle collided with the rear of appellant's vehicle. *Id*. At trial, appellee claimed that appellant failed to give an adequate signal regarding his sudden deceleration and/or stop. *Id*.

After hearing the evidence, the jury found for the appellee, and, on appeal, appellant argued that he was entitled to a sudden emergency instruction. *Id*. The *Brown* Court concluded that the sudden emergency doctrine should not be limited only to vehicles or other objects that actually occupied the traveled part of a highway. *Id*. at 739. According to the *Brown* Court, "a swooping airplane or a falling boulder could conceivably create an emergency for a motorist. So could a roving animal." *Id*. The *Brown* Court held that, based on the evidence, appellant was entitled to an instruction on the sudden emergency doctrine. *Id*. at 740.

Subsequent to *Brown*, the High Court addressed the sudden emergency doctrine again in *Harris,* 497 S.W.2d 422. In *Harris*, appellee, while traveling along a two lane highway before sunrise, encountered a patch of ice, lost control of his vehicle and struck two pedestrians. *Id*. at 424. One pedestrian was killed, and the other was

severely injured. *Id*. A lawsuit was filed against appellee, and the case proceeded to a jury trial. *Id*. In a unanimous verdict, the jury found in appellee's favor.

On appeal, the *Harris* Court reversed the judgment and remanded for a new trial. *Id*. at 431. In its opinion, the *Harris* Court extensively discussed the purpose of the sudden emergency doctrine, as set forth above, and it concluded that appellee should have received an instruction containing sudden emergency language. *Id*. at 428. According to the *Harris* Court, a sudden emergency instruction was necessary

> because by not remaining on the right side of the road [appellee] violated a specific duty unless the exceptional circumstance of the ice on the road had the effect of relieving him from it. Had the accident taken place in his own lane of travel, or on the right side of the highway, it would not have been necessary, because then the unexpected presence of the ice would have amounted to no more than a condition bearing upon the question of whether the accident resulted from a failure on his part to comply with the more generalized duties of ordinary care.

Id. Therefore, the *Harris* Court concluded that, under the facts and case law, the presence of ice on a highway could justify the use of sudden emergency language in an instruction regarding the duties a defendant owed to a plaintiff. *Id*.

The facts in *Harris* were relatively simple; however, the facts in *City of Louisville v. Maresz,* 835 S.W.2d 889 (Ky. App. 1992), the next case we review, are more complicated. Joe Mooney, one of the appellants and a police officer for the City of Louisville, was responding to an accident in the westbound lane of Interstate 64, east of the Cochran Tunnel. *Id*. at 890-891. As Mooney approached the tunnel, he was traveling in the left lane. *Id*. at 891. Five to six car-lengths directly behind Mooney in the same

lane, appellee was approaching the tunnel as well. *Id*. As Mooney was slowing down to pull onto the left shoulder of the highway, appellee's vehicle stuck the rear of Mooney's vehicle. *Id*. Appellee filed suit against Mooney and the City of Louisville. *Id*. At trial, an eyewitness testified that he observed Mooney's brake lights activate at least 100 yards before the collision while appellee's brake lights did not activate until the last instance. *Id*. When the trial court instructed the jury regarding appellee's duties, it included language regarding the sudden emergency doctrine. *Id*. After deliberations, the jury found Mooney and the City of Louisville to be 95% at fault.[3] *Id*.

After discussing the basic law regarding the sudden emergency doctrine, the *Maresz* Court determined that the case did not involve a *sudden emergency*; rather, it involved a *sudden occurrence*. *Id*. According to the evidence, Mooney acted suddenly when he decelerated, but

> there is no evidence whatsoever that appellee . . . when presented with this sudden occurrence, chose a course of conduct which appeared at the time to have been the safest course, which now appears not to have been the best or wisest choice, and which resulted in injury. In short, there is no evidence that appellee . . . in responding to the sudden occurrence acted in such a way that he could be held negligent because of his response, thus he has no need for the sudden emergency instruction. [Appellee] was, however, presented with a sudden occurrence that may have resulted in his inability to avoid the collision with appellant Mooney's vehicle regardless of his previous exercise of ordinary care.

[3] The jury found appellee to be 5% at fault.

Id. at 893 (citations omitted). Although the *Maresz* Court held that the trial court erred when it instructed on the sudden emergency doctrine, it ultimately determined that the error was harmless. *Id*. at 894.

Next, we consider *Regenstreif,* 142 S.W.3d 1. On an early February morning, appellee, while traveling through a subdivision, lost control of her vehicle, crossed the center line and collided head on with appellant's vehicle. *Id*. at 2-3. Appellant filed suit against appellee for negligence. *Id*. At trial, appellee testified that she had hit a patch of unseen ice and lost control of her vehicle. *Id*. In fact, it was not until after the accident that appellee had realized that she had encountered ice on the road. *Id*. In addition to appellee's testimony, the investigating officer testified that when she arrived on the scene, her cruiser skidded on the ice as well. *Id*. Based on this evidence, the trial court included language regarding the sudden emergency doctrine in the instruction regarding appellee's duties. *Id*. The jury ultimately found in appellee's favor. *Id*.

On appeal, appellant argued that with the advent of comparative negligence, the trial court erred when it instructed the jury regarding the sudden emergency doctrine. *Id*. at 3-4. The Supreme Court of Kentucky reasoned that the sudden emergency doctrine was not subsumed by comparative negligence. *Id*. at 5. According to the High Court, in a comparative negligence case, the sudden emergency doctrine helps a jury regarding the allocation of fault and to determine if a party who encountered an emergency situation act as an ordinarily prudent person when faced with

the emergency. *Id*. "With the adoption of comparative negligence, the sudden emergency doctrine is now only a factor in the total fault analysis." *Id*. Ultimately, the Supreme Court affirmed the jury's verdict in appellee's favor. *Id*. at 6.

Finally, we consider *Robinson v. Lansford,* 222 S.W.3d 242 (Ky. App. 2006). In *Robinson*, both appellant and appellee were driving in the same lane along Interstate 65 in Louisville, Jefferson County, Kentucky. *Id*. at 244. The vehicle traveling in front of appellant suddenly stopped, and appellant struck the rear of that vehicle. *Id*. Because appellant rear-ended that vehicle, appellant's vehicle came to a sudden stop as well. *Id*. Appellee, who was traveling three to four car-lengths behind appellant, was unable to stop his vehicle and struck the rear of appellant's car. *Id*. Subsequently, appellant filed suit against appellee. *Id*. The case proceeded to trial, and the jury found in appellee's favor. *Id*.

On appeal to this Court, appellant argued that the trial court erred when it included language regarding the sudden emergency doctrine in the instruction covering appellee's duties of care. *Id*.

The *Robinson* Court reversed the jury's verdict and remanded for a new trial, holding that the trial court had erred when it instructed the jury on the sudden emergency doctrine. *Id*. at 245-249. First, the *Robinson* Court reasoned that there had not been a *sudden emergency* but a *sudden occurrence* because there was no evidence that appellee took any evasive action due to encountering an emergency. *Id*. at 245. Instead, the sudden occurrence encountered by appellee may have been caused by

appellee's inability to avoid the collision even if he had previously exercised ordinary care. *Id*.

Second, the inclusion of the sudden emergency doctrine in the jury instruction created a situation where the jury could possibly excuse appellee's failure to exercise ordinary care prior to the emergency as long as this alleged failure did not cause the emergency. *Id*. at 247. The *Robinson* Court concluded that

> if the "emergency" referred to in the instruction is the incident that caused [appellant] to suddenly stop, instead of her being stopped in the roadway, then [appellee's] duties would have been limited to only how he acted after he noticed [appellant] being stopped in the roadway. The effect of such an instruction would relieve [appellee] of his portion of fault for causing the accident if his violating of one of his initial duties in sections (a) through (d) contributed to the cause of the accident[.]

Id.

Finally, the *Robinson* Court pointed out that the jury could infer that the emergency referred to in the instruction was not the appellant's sudden stop but was the initial incident that caused her to stop. *Id*. at 248. Thus, the *Robinson* Court concluded that the language in the instruction was extremely confusing and placed "the emphasis of the qualification of [appellee's] duty at the wrong point in time." *Id*.

On appeal, Henson contends that the sudden emergency doctrine simply did not apply to the facts in this present matter. According to Henson, prior to the accident, Klein was following her; thus, she reasons that he was required to have anticipated that she would decelerate and turn left into his path. Furthermore, because Klein was

operating the trailing vessel, he should have followed her at a safe distance so that he had the ability to perceive and react when she stopped her personal water craft. In addition, Henson insists that her decision to stop may have been unexpected, but it did not constitute a *sudden emergency*.

Additionally, Henson insists that the facts in the present matter are so similar to the facts found in *Robinson,* as discussed *supra*, that *Robinson* controls. Based on the facts and the reasoning found in *Robinson*, Henson argues that the sudden emergency instruction in this case allowed the jury to excuse the fact that Klein failed to follow her at a safe distance. Moreover, Henson contends that Klein simply had no opportunity to avoid the collision because he had been following her so closely that he was "dangerously tailgating" her. In other words, Henson contends that the trial court directed a verdict in Klein's favor regarding his conduct prior to the emergency. However, based on the speed that Klein was traveling; his position behind Henson; and the manner in which personal water crafts function, Henson concludes that Klein's conduct prior to the emergency was negligent as a matter of law.

Comparing the facts in the present case to the facts found in *Brown*, *Harris* and *Regenstreif*, we find them easily distinguishable and conclude that those cases offer us little guidance in resolving this matter. However, we note that the facts in the present matter do bear similarity to the facts in *Maresz* and *Robinson*. All three cases involve a collision between two vehicles; however, in both *Maresz* and *Robinson*, the trailing vehicle was directly behind the leading vehicle and the trailing vehicle collided with the

rear of the leading vehicle. In this case, Klein's personal water craft was not directly behind Henson's, and he did not strike the rear of her vessel; instead, he struck the left side of Henson's vessel after Henson had made an abrupt and sharp 90 degree turn, crossing Klein's path and stopping in front of his vessel. More importantly, there was no evidence, in either *Maresz* and *Robinson,* that the trailing vehicle took any action to avoid the accident. In this case, the evidence was that Klein tried to avoid the accident by turning to the left but failed. So we find both *Maresz* and *Robinson* to be factually distinguishable and find that neither control the resolution of this case.

When the accident occurred, both parties were required, in the operation of their personal water crafts, to generally exercise ordinary care for the safety of others using the lake, including one another. Recognizing this, the trial court instructed the jury on this general duty regarding both Klein and Henson. Moreover, when the accident occurred in 2002, KRS 235.285(4) required that "[a] personal watercraft or motorboat operated on public waters shall at all times be operated according to the 'Rules of the Road' and in a reasonable and prudent manner so as not to endanger human life, human physical safety, or property." This specific statutory duty applied not only to Klein but also to Henson on the day of the accident, and the trial court instructed the jury on this specific duty regarding both parties. The evidence adduced at trial revealed that Henson and Klein were traveling at the same speed and that Klein was traveling thirty to forty-five feet behind Henson and offset ten to twenty feet to her left. As they approached the houseboat, Henson made an abrupt ninety degree turn to the left, cutting across Klein's

path of travel, and she abruptly stopped her personal water craft in front of Klein's personal water craft. According to the evidence, Henson was aware of Klein's position behind her and his proximity to her, yet she made no attempt to signal him that she intended to change course and made no attempt to ascertain whether she could safely change her course.

As previously stated, a trial court is required to instruct the jury on every theory that is supported by the evidence. *Taylor,* 995 S.W.2d at 360. The evidence adduced at trial was more than sufficient to show that Klein encountered a sudden emergency when Henson abruptly turned and stopped in front of him. This justified the trial court's decision to instruct the jury on the sudden emergency doctrine regarding Klein's duties. Additionally, the evidence supported the trial court's decision to instruct the jury that Henson had the specific duty, as set forth in 301 KAR 6:030 § 6, "not to change the course of her personal water craft without first determining that a course change could be made without risk of collision." Because the evidence supported an instruction regarding the sudden emergency doctrine, we conclude that the trial court did not err when it so instructed the jury.

B. INSTRUCTION REGARDING RIGHT-OF-WAY

In addition to arguing that the trial court erred regarding the sudden emergency doctrine, Henson also argues that the trial court should have instructed the jury that Henson, as operator of the lead vessel, had the right-of-way. Henson points out that a vessel that is being overtaken has the right-of-way. 301 KAR 6:030 § 6.

According to Henson, the accident was an involuntary overtaking situation. Henson argues that because Klein was following her too closely, he did not have time to stop his vessel; thus, he had to either collide with her vessel or overtake it. As an overtaking situation, Henson concludes that she had the legal right-of-way, and the trial court should have so instructed the jury.

We reiterate once again that a trial court is required to instruct the jury on every theory of the case supported by the evidence. *Taylor,* 995 S.W.2d at 360. In other words, if the evidence does not support a particular theory, then the trial court is not required to instruct on that theory. That is the situation here. Henson insists that the trial court should have instructed that she had the right-of-way because the accident occurred during an overtaking situation. However, Henson's own expert testified that the accident was not an overtaking situation. Because the evidence adduced at trial does not demonstrate that the accident occurred during an overtaking maneuver, the trial court did not err when it refused to instruct the jury that Henson had the right-of-way.

C. KLEIN'S CROSS-APPEAL

Recognizing that we may reverse and remand for a new trial, Klein filed a cross-appeal from the trial court's decision that the investigating officer's opinion testimony regarding fault and his investigative report were admissible at trial. However, because we affirm the judgment, we have no need to address Klein's cross-appeal.

Because the evidence adduced at trial supported the trial court's instruction regarding the sudden emergency doctrine, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-APPELLEES:

Brian E. Clare
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT:

Peter J. Sewell
Louisville, Kentucky