

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000187-MR

KIM CARROLL

APPELLANT

v.

APPEAL FROM ELLIOTT CIRCUIT COURT  
HONORABLE REBECCA K. PHILLIPS, JUDGE  
ACTION NO. 06-CI-00027

REUBEN J. WRIGHT; ANTHEM  
HEALTH PLANS OF KENTUCKY,  
INC.; AND MATTHEW KEETON D/B/A  
MATTHEW KEETON TRUCKING

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: KELLER AND LAMBERT, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: Kim Carroll appeals from a judgment of the Elliott Circuit Court that was entered following a jury trial. The jury found that Reuben Wright, an employee of Matthew Keeton Trucking, did not act negligently when

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

the truck he was driving struck Carroll's car, and caused her personal injuries. The sole issue on appeal is whether the trial court erred in allowing the jury to be instructed on the "sudden emergency" doctrine.

The accident occurred on the afternoon of September 27, 2005. Kim Carroll was driving north on Highway 7, a two-lane roadway in Elliott County. Reuben Wright, who was driving a tractor trailer owned by Matthew Keeton Trucking, was heading south. He approached a blind curve that is closely followed by an intersection at Hogg Camp Road. At the intersection, one southbound vehicle had stopped, waiting to turn left. A driver in a pickup truck had stopped behind that vehicle. When Wright rounded the curve and saw the two vehicles stopped at the intersection, he slammed on his brakes and steered to the right to avoid hitting them. His brakes locked, leaving one hundred feet of skid marks. Although he avoided a collision with the vehicles in the southbound lane, his trailer swung out into the northbound lane, where it struck the car driven northbound by Kim Carroll, who had just passed the intersection of Hogg Camp Road. Carroll sustained serious injuries to her legs in the accident.

Carroll filed suit in Elliott Circuit Court against Reuben Wright and Matthew Keeton Trucking for negligent maintenance and operation of the tractor trailer causing the accident. A jury trial was held on December 4, 2007. The jury was instructed on the sudden emergency doctrine. It returned a verdict on liability in favor of Wright. This appeal followed.

Carroll argues that the trial court erred in including the sudden emergency qualification in the jury instructions. She claims that the doctrine is inapplicable to the facts of this case. The appellees argue that the issue was unpreserved because, although Carroll made a motion for a directed verdict, she failed to make any post-verdict motions to set aside the verdict, for a new trial, or for judgment notwithstanding the verdict.

Kentucky Rules of Civil Procedure (CR) 51(3) provides that

[n]o party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

The record shows that Carroll’s counsel tendered jury instructions to the court, and also extensively argued his objections to the inclusion of the sudden emergency qualification. This is confirmed by the trial court’s judgment, which states that “[t]he parties argued their various instructions and tendered instructions as is shown in the official record of the case.” No further action was required on the part of Carroll’s counsel, especially since tendered instructions alone are generally deemed sufficient to preserve an issue for appellate review. *See* CR 59.06 (“Allegations of error, otherwise properly preserved, in respect to rulings, orders or instructions of the court need not be presented in a motion for a new trial in order to be preserved for appellate review”) and *Surber v. Wallace*, 831 S.W.2d 918, 920 (Ky. App. 1992), (“If the offered instructions clearly present a party’s position, no

further action is required”). The appellees also claim that the appellant approved the instruction given to the jury, and that she is essentially appealing from her own instructions; our review of the record does not support this contention.

The appellees have also argued that the appellant’s brief should be stricken for failing to comply with Kentucky Rules of Civil Procedure (CR) 76.12(14)(c)(v), which requires citations to the record indicating where alleged errors are preserved. We find, however, that the appellant’s brief contains adequate citations to enable this Court to conduct a meaningful review of the arguments presented.

In *Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004), the Kentucky Supreme Court revived the doctrine of sudden emergency, which it defined as follows:

The common-law doctrine of “sudden emergency” attempts to explain to a jury how to judge the allegedly negligent conduct of a person, plaintiff or defendant, who is suddenly confronted with an emergency situation that allows no time for deliberation. The sudden emergency doctrine does not excuse fault; it defines the conduct to be expected of a prudent person in an emergency situation. In *Harris v. Thompson* [497 S.W.2d 422 (Ky. 1973)], our predecessor court noted the purpose for including the sudden emergency qualification in instructions:

[W]hen a defendant is confronted with a condition 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.* (Emphasis in original) (citations omitted).

In the case before us, the pertinent portion of the jury instructions set forth the normal standard of care, and then added the sudden emergency qualification of those duties:

It was the duty of Reuben Wright, while driving the motor vehicle owned by the Defendant, Matthew Keeton Trucking, to exercise ordinary care for the safety of other persons using the highway. This general duty includes the following specific duties:

To keep a lookout ahead for other vehicles and obstacles in front of him or to his rear, or so near his intended line of travel as to be in danger of collision;

To keep his vehicle under reasonable control;

To drive on the right hand side of the highway;

To drive at a speed no greater than was reasonable and prudent, having regard for the traffic and for the condition and use of the highway, and not exceeding 55 mph;

To keep his vehicle in reasonable operating condition.

However, all of these duties are subject to the following qualification:

a. If immediately before this accident, you believe from the evidence that Reuben Wright was suddenly and unexpectedly confronted with a sudden emergency by being confronted with stopped or slowing vehicles, immediately in his lane of traffic, and so close that it would appear to Reuben Wright in the exercise of reasonable judgment, that he was in imminent danger of collision with the stopped or slowing vehicles directly in front of him in his lane of travel, and if this sudden emergency was not caused or brought about by any failure on the part of Reuben Wright to observe the duties

set forth above, he was then not required to adopt the best course possible in order to avoid the apparent danger, but was required only to exercise that care that a juror would expect a reasonable prudent person to exercise under the same circumstances and conditions to avoid the hazard.

Do you believe from the evidence that Reuben Wright, while acting within the course and scope of his employment with Matthew Keeton Trucking, failed to exercise one or more of his duties (subject to the sudden emergency qualification), and that such failure on his part was a substantial factor in causing the collision with Kim Carroll.

The jury, by a majority of 11 to 1, answered “no” to this instruction.

Carroll argues that the sudden emergency instruction was inappropriate in this case, because the condition with which Wright was confronted was one he had every reason to anticipate and was brought about by his own negligence – namely, not heeding the sign warning of an upcoming intersection, and not reducing his speed when entering the blind curve. Carroll does not argue that Wright was negligent in his attempt to avoid hitting the cars that had stopped at the intersection. It is her position that the negligence which caused her injuries occurred before Wright began braking and steering to avoid the stopped vehicles. Had he slowed down before the blind curve, he would not have had to take evasive action to avoid the two cars that were stopped. She argues that the entire situation was one of his own making and therefore not a true emergency.

We agree that Wright was not entitled to a sudden emergency instruction. Although it is disputed in the appellee’s brief, Wright himself testified that there is a sign located before the blind curve indicating an upcoming

intersection. Wright also testified that he knew of the existence of the intersection because he had driven the route on numerous prior occasions. The presence of stopped vehicles waiting to turn was a normal traffic condition that Wright could have anticipated. In our prior case law, it has been held that a large dog darting into the road (*Brown v. Todd*, 425 S.W.2d 737 (1968)) or black ice in the roadway (*Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004)) can qualify as sudden emergencies. We fail to see how vehicles which are legally stopped at an intersection, waiting to turn left, can constitute a “sudden emergency,” even if, as Wright testified, he had never encountered cars stopped at the intersection before.

The jury instructions in this case mirror almost exactly those given in *Robinson v. Lansford*, 222 S.W.3d 242 (Ky. App. 2006). In that case, a motorist, Lansford, rear-ended another motorist, Robinson, who had stopped due to a sudden slowing of traffic ahead. After finding that this factual scenario did not warrant a sudden emergency instruction, the Court explained that the error in including such an instruction was not harmless because the instruction might have qualified Lansford’s duties in an impermissible manner. To be precise, the instructions did not make it clear whether the “emergency” referred to was the initial incident of slowing traffic that caused Robinson to stop, or whether it referred to Robinson actually being stopped in the roadway.

This approach creates a situation where Lansford’s failure to exercise ordinary care before the occurrence of the emergency would be, as long as he did not cause the emergency, excused by the emergency even if his failure to meet one of those original duties caused the accident.

For example, under the trial court's instructions if Lansford violated the duty to keep a lookout and this failure caused the accident by his striking Robinson's vehicle in the rear after it suddenly stopped, Lansford would not be at fault if he exercised ordinary care after seeing Robinson's vehicle stopped because his initial failure to keep a lookout did not cause or bring about the emergency; i.e., the sudden stopping of Robinson's vehicle. In other words, if the "emergency" referred to in the instruction is the incident that caused Robinson to suddenly stop, instead of her being stopped in the roadway, then Lansford's duties would have been limited to only how he acted after he noticed Robinson being stopped in the roadway. The effect of such an instruction would relieve Lansford 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; e.g., not keeping a lookout.

*Robinson*, 222 S.W.3d at 247.

Similarly, in this case, the instructions state that the modified duties associated with a sudden emergency apply if Wright was not responsible for the emergency. But does this "emergency" refer to the vehicles which had stopped to turn left, or to Wright's alleged failure to take proper precautions when entering the blind curve? Obviously, Wright could not have "caused" the cars to stop at the intersection. If that was how the jury interpreted the instructions, however, the jury impermissibly applied the less-stringent "emergency" standard of care.

On the other hand, Carroll was not entitled to a directed verdict. The trial court correctly ruled that the issue of whether Wright had been negligent in failing to slow down before the curve, or whether he was driving too fast in the

first place, was a question for the jury. An ordinary comparative negligence instruction would have been appropriate in this case.

The judgment of the Elliott Circuit Court is reversed, and the case is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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