RENDERED: MAY 25, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001591-MR

LORETTA MAGGARD
AND HENRY MAGGARD — APPELLANTS

v. — APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 06-CI-00376

KENNETH W. PORTWOOD
AND UNKNOWN VEHICLE
OPERATOR — APPELLEES

OPINION AND ORDER
AFFIRMING AND
DENYING MOTION TO STRIKE BRIEF
AND DISMISS APPEAL

** ** ** ** **

BEFORE: COMBS AND MOORE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

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[1] Senior Judge Joseph E. Lambert 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: Loretta Maggard[2] and Henry Maggard appeal the judgment of the Boyle Circuit Court after the jury returned a defense verdict for Kenneth W. Portwood[3] in an automobile accident case. The jury determined that Portwood had not breached any duty when operating his motor vehicle and thus was not liable for the damages Maggard sustained in the parties' automobile collision. On appeal Maggard argues that the trial court committed error by giving a sudden emergency instruction. Finding no error, we affirm.

I. PROCEDURAL AND HISTORICAL BACKGROUND

Before we consider reviewing the merits of this case, we must dispose of a pending motion to strike Maggard's brief and to dismiss the appeal for failure to comply with Kentucky Civil Rule (CR) 76.12. Portwood rightfully points out to the Court that Maggard's brief does not comply with a number of formatting requirements under CR 76.12(4), including, *inter alia,* wrong margin sizes. The more troubling aspect of the formatting deficiencies is that this is the second brief submitted by Maggard after an earlier motion panel of this Court[4] struck Maggard's brief but denied a then pending motion to dismiss the appeal. The Court ordered Maggard to file "a brief in substantial compliance with CR 76.12 that complies with the typewriting format of CR 76.12(4)(a)." Nonetheless, Maggard's brief is still deficient in the formatting requirements although she was

[2] Although both Loretta and Henry Maggard are Appellants, the references in the opinion to "Maggard" are to Loretta Maggard, who was personally injured in the automobile accident.

[3] The Unknown Driver noticed in the Notice of Appeal apparently has never been identified.

[4] Judges Combs, Thompson and VanMeter.

ordered to adhere to the requirements of CR 76.12. However, (1) because even if the brief complied with the formatting requirements of CR 76.12, it would not exceed the page limitations in that rule; and (2) because it can be loosely construed as in substantial compliance with the CR 76.12, we will not strike the brief and dismiss the appeal on this basis. However, counsel for Maggard should not take the leniency of the Court as a license to further ignore the civil rules-- or more importantly-- an order of this Court. Moreover, had the prior order of the Court stated that failure to comply with that order *shall result in dismissal of the appeal*, the Court would have done so.

Next, regarding the pending motion, Portwood correctly points out that Maggard fails to cite where she preserved at the trial court level the issue on appeal. Portwood also presented this argument to the prior panel of the Court which reviewed the previous motion to strike and dismiss the appeal. The prior panel of this Court ordered Maggard to comply with the CR 76.12 regarding a statement of preservation of the issues on appeal and allowed her to file a new brief. Nonetheless, Maggard's present brief fails to state how the alleged errors are preserved or whether they were preserved, in violation of this Court's prior order and CR 76.12(4)(c)(v).

It has long been the rule that it is not the burden of the Court to search the record to find proof of an appellant's claims or to try to otherwise locate where the issues are preserved. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky.2003). Under such circumstances, we are authorized to strike the brief

entirely, refuse to consider those claims that do not comply with the rule, or review the non-compliant allegations of error for manifest injustice rather than considering them on the merits. *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky.App.2006); *Elwell v. Stone*, 799 S.W.2d 46, 47–48 (Ky.1990). Given that Maggard was already once ordered to comply with this requirement, we are inclined to simply strike the brief and dismiss the appeal. However, given that the record in the matter is brief and given our discretion for the failure to comply with CR 76.12(4)(c)(v), we leniently review the legal issue raised for manifest error and urge counsel for Maggard in future cases to heed much more carefully the orders of this Court and the civil rules. We do however, decline to review the second issue raised by Maggard, which lacks a preservation statement and is strictly a factual issue that was resolved by the jury.

The only legal issue presented by Maggard is whether the trial court erred by giving the jury an instruction on the sudden emergency doctrine. Although Portwood and Maggard present contrary versions of how the automobile accident occurred in which Maggard was injured, the factual resolution of their versions is clearly one for the jury.

The relevant facts for reviewing this case for manifest error include that Portwood was driving southbound on the same two-lane roadway on which Maggard was traveling southbound. As Portwood approached an intersection, he observed a full-sized red pickup truck coming out of a subdivision on the opposite side of the road from which Portwood was traveling. Portwood testified that

initially he did not believe that the truck was going to stop at the intersection; so Portwood began to apply his brakes in anticipation that the truck was going to "shoot out" across the road. Portwood indicated that, although the truck entered the northbound lane approximately two feet, the unknown driver of the red truck did in fact stop at the intersection. Thus, Portwood testified that he believed it was safe for him to continue along his course of travel.

Portwood testified that the driver of the red truck then abruptly pulled out and proceeded to turn right into the northbound lane. When doing so, the driver of the red truck crossed the yellow center line into Portwood's lane. Intending to avoid a collision with the red truck, Portwood testified that he navigated his vehicle to the far right of his lane but stayed on the roadway in order to avoid the ditch along the side of the road.

Portwood believed he had missed the red truck but felt the truck "thump" the rear of his vehicle. Cynthia Portwood,[5] who was traveling behind Portwood's vehicle, also testified that she saw the red truck hit the wheel of Portwood's vehicle. Likewise, Deputy Lanham, the responding officer from the Boyle County Sherriff's Department, reported that there was an indication that Portwood's vehicle had been struck.

After the red truck struck Portwood's vehicle, the rear of Portwood's vehicle swung off the roadway and the rear tire of the vehicle caught in a culvert

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[5] Cynthia and Portwood were formerly married but divorced two and-a- half years prior to the trial.

causing it to go into the air and come down on two wheels. Portwood's vehicle left the roadway for approximately thirty-nine feet, crossed the intersecting highway, then traveled approximately eighty-nine feet where he re-entered the roadway before striking Maggard's vehicle in her lane of travel. Portwood testified that, although he attempted to direct the steering wheel and apply the brakes, he did not regain control of his vehicle until his vehicle came to a stop on its side. Maggard sustained physical injuries and damage to her vehicle.

Maggard disagrees with a number of the facts testified to at trial including: whether the unknown driver actually stopped; whether Portwood acted reasonably in believing he could safely continue his course of travel after first seeing the red truck; and whether the red truck actually hit Portwood's truck at all.

The trial court concluded that the evidence supported giving a sudden emergency instruction to the jury. After deliberating, the jury

> unanimously concluded that Portwood did not "fail[] to comply with one or more duties in [the] Instruction [above] and that such failure was [not] a substantial factor in causing the accident[.]"

Maggard claims it was error for the trial court to give the jury a sudden emergency instruction. Finding no manifest error, we affirm.

II. ANALYSIS

A sudden emergency can be defined as "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of

conduct, the actor is not negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency." *Henson v. Klein*, 319 S.W.3d 413, 418 (Ky.2010) (quoting 57 Am. Jur. 2d Negligence §198 (2004)).

A sudden emergency instruction is proper where a party had no reason to anticipate a particular condition, did not cause or bring about the condition, took some sort of action in response to the condition, and the condition "alter[ed] the duties [the party] would otherwise have been bound to observe." *Id*. at 419 (citing *Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky.2004) (italics omitted)); *Robinson v. Lansford*, 222 S.W.3d 242, 245-47 (Ky.App.2006).

Thus, the dispositive question when determining whether a sudden emergency instruction is warranted is not whether the circumstance constituted a sudden occurrence or a sudden emergency, but rather "'whether [the circumstance] changes or modifies the duties that would have been incumbent upon him in the absence of that circumstance.'" *Henson*, 319 S.W.3d at 420 (quoting *Harris v. Thompson*, 497 S.W.2d 422, 428 (Ky.1973)). Furthermore, "[t]he presence of the emergency does not *excuse* the breach of a specific duty; under appropriate circumstances, it can *eliminate* the duty so that the conduct (crossing to the wrong side of the road) is not a breach at all." *Id*. at 421. Thus, it becomes necessary to instruct the jury that the party's duty has been modified. *Id*.

Under the facts outlined above, the trial court did not commit manifest error by concluding that a sudden emergency instruction was warranted. There

was sufficient evidence presented that Portwood was forced to respond quickly to another vehicle entering into his lane. Thus, the sudden emergency instruction was necessary to inform the jury that Portwood's duties were modified if they found his account of the facts to be credible. Once the instruction was given, it was up to the jury to make credibility determinations with respect to each party's and witness's testimony and to determine whether Portwood was in fact confronted with a sudden emergency. *McAlpin v. Davis Construction*, *Inc.,* 332 S.W.3d 741, 743-44 (Ky.App.2011). There is no reason for us to disturb the jury's determination regarding the facts of this matter.

Accordingly, we AFFIRM, and we hereby ORDER that Portwood's motion to strike and to dismiss the appeal is DENIED.

LAMBERT, SENIOR JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

ENTERED: May 25, 2012

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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