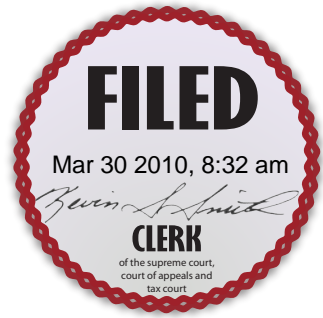


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TIJUANA TUCKER,)
)
Appellant-Defendant,)
)
vs.)
)
MOTORISTS MUTUAL INSURANCE)
COMPANY,)
)
Appellee-Plaintiff.)

No. 22A05-0908-CV-438

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Glenn G. Hancock, Judge
Cause No. 22E01-0810-PL-1046

March 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

This appeal stems from a three-vehicle accident involving appellant Tijuana Tucker, Brittany Spellman, and Deann Burns. Tucker appeals from a verdict in favor of Motorists Mutual Insurance Company (MMIC), a subrogee of its insured, Burns, in Burns's negligence action against Tucker. Tucker presents the following restated issue for review:

1. Did the trial court err in refusing to instruct the jury on the doctrine of sudden emergency?

MMIC presents the following restated issues on cross-appeal:

2. Did the trial court err in failing to take judicial notice of the distance a vehicle will travel at a given speed and to so instruct the jury?
3. Did the trial court err in admitting into evidence only two pages of the six-page accident report?

We affirm.

At about 12 p.m. on October 27, 2006,¹ Burns was driving her van on Green Valley Road in New Albany, Indiana. Burns was driving between Spellman and Tucker, with Spellman in front of Burns and Tucker following behind Burns. A heavy rain was falling at the time. Thinking she had missed the turn into her work, Spellman suddenly applied her brakes. Traveling behind Spellman, Burns applied her brakes when she saw Spellman's brake lights but was unable to avoid a collision. Burns crashed into the rear of Spellman's car. Tucker was travelling two car lengths behind Burns at approximately twenty-five miles

¹ MMIC's appellate brief indicates that the accident occurred on October 26, as does the complaint for damages filed by Tucker. Tucker's brief, however, indicates that the accident occurred on October 27. The portions of the trial transcript included in the appellate materials, including the official crash report, also reflect that the accident occurred on October 27.

per hour immediately before Spellman applied the brakes. Tucker was unaware that there was a vehicle traveling in front of Burns. When Tucker saw Burns's brake lights illuminate, she (Tucker) applied her brakes and turned her steering wheel to the left but was unable to avoid colliding with the rear of Burns's vehicle. As a result of the collision, Tucker's car was damaged on the front passenger side, while the rear of Burns's van suffered damage in an amount stipulated by the parties to be \$2,620.19.

MMIC paid \$2,723.70 to its insured, Burns, for repairs to the rear of Burns's vehicle. On October 7, 2008, MMIC, as subrogee of Burns, filed a complaint for damages against Tucker seek reimbursement for the amount of Burns's claim, plus the amount of Burns's deductible, for a total of \$2,908.70. MMIC alleged that the damage to Burns's vehicle was caused by Tucker's negligent operation of her vehicle.

Trial was held on July 13-14, 2009. At trial, Tucker asked the court to read the following "sudden emergency" instruction to the jury:

Tijuana Tucker claims she was not negligent because she acted with reasonable care in an emergency situation. Tijuana Tucker was not negligent if she proves the following by a preponderance of the evidence:

1. She was confronted with a sudden emergency;
2. The emergency was not of her own making;
3. She did not have sufficient time to deliberate; and
4. She exercised such care as an ordinarily prudent person would exercise when confronted with a similar emergency, even if it appears later that a different course of action would have been safer.

Appellant's Appendix at 13. MMIC objected to the proposed instruction, and the trial court did not give the instruction. The jury allocated 30% of the fault to Burns and 70% to Tucker. The jury determined that the total amount of damages to Burns's van was \$2,620.19, and thus entered an award of \$1,834.19 (i.e., 70% of \$2,620.19) in favor of MMIC.

1.

Tucker contends the trial court erred in refusing to give her tendered sudden emergency instruction. In reviewing whether a trial court correctly gave or refused to give a tendered instruction, we consider whether: “1) the instruction correctly states the law; 2) the evidence in the record supports giving the instruction, and 3) the substance of the instruction is covered by other instructions.” *Simmons v. Erie Ins. Exchange*, 891 N.E.2d 1059, 1064 (Ind. Ct. App. 2008) (quoting *Hoosier Ins. Co. v. N.S. Trucking Supplies, Inc.*, 684 N.E.2d 1164, 1173 (Ind. Ct. App. 1997)). In evaluating the sufficiency of evidence supporting an instruction, we “look only to that evidence most favorable to the appellee and any reasonable inferences to be drawn therefrom.” *Id.* (quoting *Antcliff v. Datzman*, 436 N.E.2d 114, 122 (Ind. Ct. App. 1982)). We review such decisions for an abuse of discretion. *Simmons v. Erie Ins. Exchange*, 891 N.E.2d 1059.

Pursuant to the doctrine of sudden emergency, a person faced with a sudden and unexpected situation in which he or she must act immediately “is not expected to exercise the judgment of one acting under normal circumstances.” *Willis v. Westerfield*, 839 N.E.2d 1179, 1184 (Ind. 2006). This is because a person confronted with a sudden emergency has

“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.” *Id.* (quoting W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 33 at 196 (5th ed. 1984)). The doctrine of sudden emergency “does not excuse fault, but rather defines the conduct to be expected of a prudent person in an emergency situation.” *City of Terre Haute v. Simpson*, 746 N.E.2d 359, 367 (Ind. Ct. App. 2001), *trans. denied*. A party must demonstrate the presence of the following conditions in order to be entitled to a sudden emergency instruction: (1) The party’s own negligence must not have created or brought about the emergency; (2) the imminence of the emergency must have left the party no time for deliberation; and (3) the party’s apprehension of the emergency must itself have been reasonable. *Willis v. Westerfield*, 839 N.E.2d 1179.

We begin our analysis by identifying the precise nature of the claimed sudden emergency that confronted Tucker. *See Collins v. Rambo*, 831 N.E.2d 241 (Ind. Ct. App. 2005). Although the sudden slowing or stopping of Spellman’s vehicle began the causal chain of events that led to Tucker’s collision with the rear of Burns’s vehicle, Tucker testified that she was not aware there was a vehicle in front of Burns at the time. Therefore, the sudden emergency that confronted Tucker was the sudden braking of Burns’s vehicle.

The first element of sudden emergency is that the actor must not have created or brought about the emergency through his or her own negligence. By all accounts, it was raining hard at the time of the accident. The street on which the accident occurred, Green

Valley Road, was lined primarily with residences in this general vicinity. The traffic on Green Valley Road was described as normal – neither light nor heavy. Burns testified that she was traveling at 30-35 m.p.h., the upper end of that range being the posted speed limit at that location. Tucker, on the other hand, testified that she was going 25 m.p.h. Tucker estimated that she was traveling approximately twenty feet behind Burns’s vehicle when Burns applied her brakes, although Tucker acknowledged she “could have been a little closer.” *Transcript* at 39. Tucker’s testimony indicates that she was paying attention to the traffic ahead of her at the time of the accident and applied her brakes immediately upon seeing Burns’s brake lights (“I remember her suddenly hitting her brake lights and I slammed on my brakes and I remember just sliding into her”). *Id.*

In summary, Tucker knew it was raining hard at the time and that the road surface therefore was slick, she saw Burns abruptly apply her brakes as soon as it happened, she responded immediately to the sight of Burns’s brake lights by slamming on her own brakes, and yet she struck Burns’s vehicle with enough force that Burns’s vehicle received more than \$2500 in damage and Tucker’s vehicle sustained approximately \$3500 in damage. In these facts, we can find no evidence that Tucker “maintained an appropriate distance and speed” under the circumstances, i.e., that her own negligence did not create the circumstances leading to her collision with Burns’s vehicle. *See Collins v. Rambo*, 831 N.E.2d at 247 and cases cited therein. Because there was no evidence to establish the first element of the sudden emergency doctrine, the trial court did not err in refusing to instruct the jury in that

respect. *See Collins v. Rambo*, 831 N.E.2d 241.

2.

MMIC contends the trial court erred in failing to take judicial notice of the distance a vehicle will travel at a given speed, and to instruct the jury to that effect.

Judicial notice is governed by Ind. Rules of Evidence 201(a)(2) and excuses the party having the burden of establishing a fact from the necessity of producing formal proof. *Brown v. Jones*, 804 N.E.2d 1197 (Ind. Ct. App. 2004), *trans. denied*. This rule provides, in relevant part, “A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Evid R. 201(a)(2). Also, the failure to take judicial notice is subject to the harmless error analysis. *See, e.g., Lutz v. Erie Ins. Exchange*, 848 N.E.2d 675 (Ind. 2006).

In this case, MMIC sought judicial notice and an instruction to the effect that a car traveling at 25 m.p.h. traverses 36.67 feet per second. Even assuming for the sake of argument that the trial court should have taken judicial notice of this fact, and assuming it should have so instructed the jury, the failure to do so did not prejudice MMIC. MMIC contends that the failure to instruct the jury as indicated resulted in the jury placing some fault, in this case 30%, on Burns. MMIC contends that absent the instruction about the number of feet a car traveling 25 m.p.h. travels in one second, the “jurors were not presented with information reflecting that a vehicle keeps moving while its driver reacts to a sudden

stop by the vehicle ahead, perhaps requiring an even greater following distance by that driver.” *Appellant’s Brief* at 16. Our review of the evidence convinces us otherwise.

Much evidence was presented regarding the speed Tucker was traveling and how far she was behind Burns’s vehicle when Burns applied her brakes. MMIC did not vigorously dispute Tucker’s claim that she was traveling at 25 m.p.h. and was approximately 20 feet behind Burns’s vehicle at the time. Officer Jack Messer of the City of New Albany Police Department, responded to the accident and completed the form pertaining to the accident. MMIC’s attorney questioned the officer closely about the impact of wet road conditions on stopping distance. The officer acknowledged that “when weather conditions change, people have to make allowances [for] that type of situation.” *Transcript* at 75. Moreover, and more importantly, counsel argued vigorously and thoroughly during closing argument that even assuming Tucker’s speed and distance estimates were accurate, Tucker was following too closely behind Burns under the circumstances, as illustrated from the following excerpt:

The roads were wet, Ms. Tucker was aware that the roads were wet, she was aware it was raining for some period of time and we heard Ms. Spellman get up and testify that she thought she had hydroplaned, the roads were so wet. She did realize that there was something going on that was unusual. All the parties had their headlights on, they were aware that it was, condition that day was more dangerous than most days [sic]. Uh, Ms. Tucker, unfortunately, traveling too closely to the vehicle ahead of her [sic]. We’ve heard that she was going twenty five (25) miles per hour. She was about two car lengths back. I don’t know about when you took driver’s ed or you had a driving vehicle, but I remember when I took driver’s ed the rule, in general, was, you had to be at least one (1) car length back for every ten (10) miles per hour that you were going. And that’s on a good day, when the weather is decent. So, had she been doing that, she would have had to been [sic] at least two and one half (2 ½) car lengths back. And, given the road conditions on that [sic]

particular allowances had to be made for that as well.

* * * * *

I know that Allstate came out with an advertisement recently that talks about the three (3) second rule and you should always have that three (3) seconds between your vehicle and another vehicle ahead of you which would be even really further back than the one (1) vehicle per ten miles an hour distance and these rules basically exist because everybody found out that there was some need to define what the duty of the person to the rear of the other vehicle was because they're the ones that have the responsibility and the best means of controlling whether an accident occurs or not.

Transcript at 118-19 and 124, respectively.

As the foregoing reflects, the jury was apprised of Tucker's speed and following distance, as well as the condition of the road. The jury was not compelled to resort to inference to glean the nature of MMIC's counsel's argument; counsel forcefully argued that Tucker was following Burns's vehicle too closely under the conditions and that such was the sole cause of Tucker's collision with Burns's vehicle. Inasmuch as the proximity of the vehicles was primarily expressed in car lengths and stopping distances expressed as a function of car lengths and velocity, we find it highly unlikely the jury's decision would have been different had it been apprised that a vehicle traveling at 25 m.p.h. travels 36.67 feet in one second. Thus, even if the failure to take judicial notice was error, the error was harmless.

3.

Officer Messer completed a six-page accident report. During his testimony, Tucker's counsel sought to admit the report into evidence. MMIC objected on grounds that it (1) constituted hearsay, (2) contained legal conclusions in violation of Rule of Evidence 704(b),

and (3) was cumulative of Officer Messer's trial testimony. Following a discussion, MMIC's counsel agreed to the admission of page six, which contained the diagram of the vehicles, but continued to object to the rest of the report. Over objection, the trial court admitted pages one and six of the police report. To the extent we understand it, MMIC seems to argue alternatively that the trial court erred in admitting the report, or erred in admitting page one of the report, or erred in admitting some of the report without admitting the rest.

Our standard of review for the admissibility of evidence is well established. The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id.* An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id.*

It is well established in the criminal law context that the erroneous admission of evidence is harmless unless it affects the substantial rights of the parties. *See Greenboam v. State*, 766 N.E.2d 1247 (Ind. Ct. App. 2002), *trans. denied*. "Substantial rights of the parties" in this context is measured by the probable impact of the improper evidence upon the trier of fact. *See id.* Thus, we will not reverse because of the erroneous admission of evidence unless the complaining party demonstrates the evidence impacted the decision.

Strack & Van Til, Inc. v. Carter, 803 N.E.2d 666 (Ind. Ct. App. 2004). These principles also apply in civil trials. *See, e.g., Sikora v. Fromm*, 782 N.E.2d 355 (Ind. Ct. App. 2002), *trans. denied*.

We observe first that the appellate materials do not include the portion of the report that was not admitted into evidence, i.e., pages two through five. This makes it impossible for this court to review any argument that requires considering the impact on the jury of admitting only parts of the report rather than the entire report. Whichever argument or arguments MMIC presents here, i.e., whether it challenges the admission of a particular portion of the police report, the entire report, or some but not all of the report, it conceded at trial that “the narrative portion” of the police report was merely cumulative of Officer Messer’s testimony. *Transcript* at 63. Without having the entire report in front of us, we cannot be sure to which page or pages this refers. A party on appeal bears the responsibility to present a sufficient record that supports his claim in order for an intelligent review of the issues. *Miller v. State*, 753 N.E.2d 1284 (Ind. 2001); Ind. Appellate Rules 2 and 27. An appellant waives the right to appellate review without submitting a complete record of the issues for which he claims error. *Miller v. State*, 753 N.E.2d 1284. Therefore, to the extent MMIC presents a challenge that requires a review of pages two through five, inclusive, the argument is waived. *Id.*

This leaves only pages one and six. MMIC did not challenge the admissibility of page six. So far as we can tell, the only portion of page one that conveyed information beyond

undisputed facts of the occurrence was a chart entitled “Driver Contributing Circumstances” listing the vehicles involved that called for Officer Messer to assess fault. In Burns’s column he checked “Following Too Closely” and “Speed/Weather Conditions”. *Table of Evidence*, Exhibit C. In Tucker’s column, he checked only “Speed/Weather Conditions”. *Id.* A review of Officer Messer’s testimony reveals that the contents of this chart were discussed thoroughly. In fact, MMIC’s counsel asked Officer Messer, “And when you prepared this police report, you marked the second vehicle following too closely. Is that right?” *Transcript* at 73. Counsel went on to question the officer as to why he did not record a similar conclusion with respect to Tucker. Therefore, the contents of page one were merely cumulative of Officer Messer’s testimony. Therefore, even if it was error to admit page one, the error was harmless. *See Strack & Van Til, Inc. v. Carter*, 803 N.E.2d 666.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.