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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001538-MR

CHARLOTTE REGENSTREIF AND
CARA REGENSTREIF — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 98-CI-02335

LINDA O. PHELPS — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF AND SCHRODER, Judges; and MARY COREY, Special Judge.[1]

KNOPF, JUDGE: Charlotte and Cara Regenstreif, mother and daughter, appeal from a judgment of the Fayette Circuit Court, entered May 26, 2000, dismissing their complaint against Linda O. Phelps. The Regenstreifs seek damages from Phelps for personal injuries and property loss allegedly caused by Phelps's negligent operation of her automobile. Following a trial in May 2000, the jury returned a verdict for Phelps, and the trial court entered judgment in accordance with that verdict. The Regenstreifs

[1]Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

contend that they received an unfair trial, one marred by the improper admission of certain evidence and by an incorrect jury instruction. Although the Regenstreifs have identified matters of genuine concern, we are convinced that the trial court's errors, if any, were harmless. Accordingly, we affirm.

The auto accident giving rise to this litigation occurred about 8:15 on the morning of February 7, 1996. Charlotte was taking Cara to school and had just backed her car from the garage onto the quiet, subdivision street that fronts their house in Lexington. Their path lay around a gentle curve to their left and up a slight incline. They had barely begun going forward when a car traveling in the opposite direction came around the curve, moved over onto their side of the street, and drove straight toward them. Charlotte testified that she immediately came to a stop and sounded her horn. There was little time to do anything else. In a very few seconds the on-coming car collided head-on with theirs.

Phelps, the driver of the other car, testified that she had been on her way to another home in the subdivision, where she worked as a nanny. The morning had been cold, but she had experienced no trouble driving during the trip from her home in Versailles to Lexington. She had turned into the subdivision, as she had done many times before, without noticing anything unusual about the street. As she entered the curve above the Regenstreifs' property, however, she felt her car begin to slide to her left. She applied her brakes and attempted to steer the

car back to the right, but it had continued sliding down the incline straight into the Regenstreifs' car.

The Regenstreifs alleged that Phelps had been driving too fast; Phelps contended that she had come upon black ice. In support of their claim, the Regenstreifs testified that their car had been "totaled" and that both of them had felt a terrific jolt upon impact and had suffered significant injuries. Charlotte testified that the ground and road had not seemed in the least bit icy. Phelps testified that her speed had been no more than ten miles-per-hour. Her car, she claimed, had incurred almost no damage. And the road, she said, had proved after the accident to be almost too slippery to walk upon.

The case thus presented a classic issue for the jury. With respect to Phelps's alleged negligence, the trial court instructed the jury as follows:

> INSTRUCTION NO. 3
> It was the duty of the Defendant, Linda O. Phelps, in driving her automobile to exercise ordinary care for the safety of other persons using the highway, and this general duty included the following specific duties:
> (a) To keep a lookout ahead;
> (b) To have her automobile under reasonable control;
> (c) To drive at a speed no greater than was reasonable and prudent, having regard for the traffic and for the conditions of the roadway, insofar as it was known to her or in the exercise of ordinary care should have been known to her, and not exceeding the speed limit;
> (d) To exercise ordinary care generally to avoid collisions with other vehicles on the roadway; and
> (e) To drive and keep her automobile on the right hand side of the roadway.
> All of these duties are subject, however, to this qualification: that if immediately before the accident the Defendant encountered

> a sudden emergency by the presence of ice on the surface of the roadway and if the emergency thus presented was not caused or brought about by any failure of the Defendant to perform her duties as set forth above, then the Defendant was not required thereafter to adopt the best possible course in order to avoid the apparent danger but was required to exercise only such care as the jury would expect an ordinary prudent person to exercise under the same conditions and circumstances.

Asked to decide whether Phelps had breached any of these duties, the jurors unanimously found that she had not. Insisting that this instruction was prejudicially flawed, the Regenstreifs appeal.

The Regenstreifs contend that the trial court erred by including in the instruction the last paragraph, the so-called sudden emergency qualification. They note that in Bass v. Williams,[2] another case involving a collision on the plaintiff's side of an allegedly icy road, this Court overturned a judgment for the defendant, based on a similar instruction, and held that "it is error to instruct the jury on a sudden emergency theory."[3] The court noted the often-expressed criticism that the emergency instruction can be redundant and that it risks over-emphasizing evidence favorable to the defendant.[4] The court also worried that the sudden emergency instruction, one of many mitigating devices to have evolved during the era of contributory

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[2]Bass v. Williams, Ky. App., 839 S.W.2d 559 (1992).

[3]*Id.* at 563.

[4]*See* Myhaver v. Knutson, 942 P.2d 445 (Ariz. 1997); Jeffrey F. Ghent, "Modern Status of Sudden Emergency Doctrine," 10 ALR 5th 680 (1993); Dan B. Dobbs, *The Law of Torts,* § 131 (2001).

negligence, did not harmonize with the then fairly new rule of comparative fault.[5] "It is our opinion," wrote the court,

> that the instruction has a quality to it that diminishes the duties of the defendant-driver, . . . and is in violation of the "direct proportion to fault" concept in Hilen.[6]

It is difficult to view the trial court's disregard of Bass as anything but error. Even if the court erred, however, we are convinced that, in this instance, the error was harmless.

In Shewmaker v. Richeson,[7] a case that considered a defendant's right to an express instruction addressing his theory that the plaintiff's acts were the "sole cause" of any injury, the former Court of Appeals explained that "the purpose of instructions,"

> is to submit the applicable law relating to the issues in the controversy for the guidance of the jury in arriving at a just and proper verdict. . . . The objective is to present an issue or issues in a form intelligible to the jury. . . . The overriding test is whether the issues are submitted accurately and adequately.
> . . .
> The right to an affirmative instruction on defendants' theory of the case is most frequently encountered in criminal cases. . . . As a general rule if the principal instruction submits the Commonwealth's theory in readily understandable language and its **negative** completely and adequately covers the defense, the defendant is not entitled to an

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[5]*But cf.* Moran v. Atha Trucking, Inc., 540 S.E.2d 903 (W.Va. 1997) (explaining the view, apparently now the majority view, that, although there is reason for caution, the sudden emergency idea is not necessarily incompatible with the idea of comparative fault).

[6]Bass v. Williams, 839 S.W.2d. at 563-64 (citing Hilen v. Hays, Ky., 673 S.W.2d 713 (1984)).

[7]Shewmaker v. Richeson, Ky., 344 S.W.2d 802 (1961).

> affirmative instruction. . . . This same principle properly may be applied in civil cases.
> . . .
> There is another possible objection to giving a separate instruction on the theory of the defense which has been adequately covered by an instruction fixing the conditions of liability. That is, it may violate our rule against giving undue prominence to certain facts and issues.
> . . .
> Upon reconsideration of the matter we have concluded that this defense [the "sole cause" defense] is not an affirmative one which necessitates a separate instruction. If the issue is (as it normally will be) properly and adequately presented by the principal or primary instruction, the defendant is not entitled to an additional instruction thereon. (The defenses of "accident" and "sudden emergency" may fall in the same category. See Summers v. Spivey's Adm'r, 241 Ky. 213, 43 S.W.2d 666, and Agee v. Hammons, Ky., 335 S.W.2d 732 . . . .)[8]

Thirty years prior to Bass, therefore, and before the advent of comparative fault, our high court had indicated that a sudden-emergency instruction was inappropriate if the primary instruction regarding the defendant's duties adequately presented the issue.

But what if the issue is not adequately presented by the primary instruction? The Court faced that situation in Harris v. Thompson.[9] In that case, the defendant's automobile had slid off a highway and struck two pedestrians. Denying any negligence, the defendant claimed that his loss of control of his vehicle had been occasioned by a patch of ice of which he had had

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[8]Shewmaker v. Richeson, Ky., 344 S.W.2d 802, 806-07 (1961) (citations omitted; emphasis in original).

[9]Harris v. Thompson, Ky., 497 S.W.2d 422 (1973).

no notice. The trial court embodied this theory in a separate, sudden-emergency-like instruction, and the jury returned a verdict for the defendant. On appeal, the plaintiff argued that the separate instruction had been improper.

The former Court of Appeals again acknowledged the principle that a defendant's denial of one or more of the conditions upon which liability is predicated in the primary instruction did not call for a separate instruction on that issue. In this case, however, the primary instruction had expressed the defendant's duty to remain on his side of the road in absolute terms. Because the defendant did not deny having crossed to the wrong side of the road, and because his duty not to do so was not, in fact, absolute, he was entitled to have the instructions clarify that duty's limits. The trial court's having given a separate sudden-emergency instruction did not, therefore, amount to reversible error.

It would have been better practice, however, the Court continued, simply to have qualified the primary instruction. A suitable sudden-emergency qualification was less apt than a separate instruction to emphasize unduly the defendant's point of view. And, of course, no qualification should be included when the primary instruction accurately incorporated any relevant limits to the defendant's duty. "The proper criterion [to determine whether an instruction should be expressly qualified]," the Court concluded, "is whether any of the specific duties set

forth in the instruction would be subject to exception by reason of the claimed emergency."[10]

As noted above, in Bass v. Williams, this court went further and held that sudden-emergency instructions, whether offered separately or as a qualification of a primary instruction, do not comport with comparative-negligence principles and thus ought not to be employed. Phelps insists, rightly, that this court was not authorized to overrule Harris and other high-court precedent approving such instructions and, of course, the court did not purport to do so. The Bass court merely held that under a comparative negligence regime, wherein trial courts are to endeavor to set forth both parties' duties as accurately as possible in primary instructions, the need for a sudden-emergency instruction should not arise. If the primary instruction does not meet that standard, however, then a Harris-like accommodation is not necessarily a prejudicial error.

In this case, for example, as in Harris, a qualifying instruction was rendered necessary because Phelps's duty to remain on the right-hand side of the road was couched in absolute terms. Rather than this formalistic initial instruction followed by a sudden-emergency qualification, however (which purported to qualify "all" of Phelps's enumerated duties even though most of them were suitably qualified to begin with), comparative negligence principles, perhaps, and Bass, more certainly, required an initial instruction to the effect that Phelps had a duty, "to the extent that it was reasonably possible," to keep

[10]*Id.* at 428.

her vehicle under control and on the right-hand side of the roadway.[11] Had this been the initial instruction, then under Harris itself the addition of a sudden-emergency qualification would have been erroneous.

That was not the initial instruction, of course, and the Regenstreifs did not suggest to the trial court that it should be. They did suggest that a small portion of the quoted instruction could be deleted, but the position for which they genuinely argued was that the initial statement of Phelps's duties, including her apparently absolute duty to stay to the right, should not be qualified. That is not what Bass says, however. Just as the Regenstreifs had a right to instructions that did not understate Phelps's duties, Phelps had a right to instructions that did not overstate them. Urged to choose between clearly overstating Phelps's duty, on the one hand, and possibly giving undue emphasis to her defense on the other, the trial court made an appropriate choice. If the trial court erred by disregarding Bass, its error was one of mis-emphasis. Jury instructions that mis-emphasize rather than mis-state the law are deemed harmless absent a sufficient indication that the jury was confused or misled.[12] We are convinced that any error of mis-emphasis here was harmless.

The Regenstreifs also contend that the trial court should not have permitted Phelps's employer and the investigating

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[11] *Cf.* Mudd v. Mudd, Ky. App., 710 S.W.2d 236 (1986) (approving a "when possible" qualification of a defendant's duty to drive on the right-hand side of the highway).

[12] Ruehl v. Houchin, Ky., 387 S.W.2d 597 (1965); City of Louisville v. Maresz, Ky. App., 835 S.W.2d 889 (1992).

police officer to testify concerning problems they each had driving on the road near the accident scene shortly before and shortly after the accident. Both testified that the road had been unusually slick. Phelps's employer, Dr. Piercy, testified that at about 7:30 that morning her car had fish-tailed while she drove up the curve in front of the Regenstreifs' house. She testified that she had been so concerned about the condition of the road that she had tried, albeit unsuccessfully, to call Phelps to warn her. The policeman dispatched to the accident, Officer Langley, testified that, a short time after the accident, as she had approached the scene down the curve, her vehicle went somewhat out of control and slid past the spot at which she had intended to stop.

Noting that, in general, evidence of other accidents under circumstances similar to those attending the defendant's accident is not admissible either to prove or to disprove the defendant's negligence,[13] the Regenstreifs sought to exclude all of this testimony. As with the jury instructions, however, the Regenstreifs overstated their claim.

No less fundamental than the general rule upon which the Regenstreifs rely is the rule that evidence inadmissible for one purpose may yet be admissible for another.[14] In Harris, for example, the court noted that, while similar-occurrence evidence

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[13]Harris, *supra.* The proper comparison is with the "imaginary ideal, the ordinarily prudent person acting under similar circumstances," not with any particular person whose present reflection of that ideal cannot be known. *Id.* at 429.

[14]Zogg v. O'Bryan, 314 Ky. 821, 237 S.W.2d 511 (1951). Robert G. Lawson, *The Kentucky Evidence Law Handbook,* § 1.10(A) (2nd Edition 1984).

is generally inadmissible to prove negligence, it may nevertheless be admitted to prove "certain limited issues, such as the existence or causative role of a dangerous condition, or a party's notice of such a condition."[15] Whether the street was icy at the time of the accident was a material issue in this case. Piercy and Langley were competent witnesses to testify on that issue. Of course, they could have so testified without referring to their own slips and slides. Had the Regenstreifs requested it, they would have been entitled to an admonition or to a ruling limiting this testimony more closely than was done to its valid purpose. They were not entitled, however, to exclude this testimony in its entirety. Because that was their request, the trial court did not err by denying it.[16]

In sum, although it may well be that the Regenstreifs would have been entitled to more modest relief from the trial court than the relief they requested, neither the jury instruction with its sudden-emergency provision nor the testimony by Piersey and Langley that they, too, had had trouble controlling their vehicles near the scene of the accident was subject to the blanket objection the Regenstreifs raised. The error by the trial court, if any, in failing to consider alternatives to the sudden-emergency instruction was harmless. Accordingly, we affirm the May 26, 2000, judgment of the Fayette Circuit Court.

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[15]Harris, 497 S.W.2d at 429.

[16]Webb Transfer Lines, Inc. v. Taylor, Ky., 439 S.W.2d 88 (1968); Department of Highways v. Burns, Ky., 394 S.W.2d 923 (1965); Lawson, *supra,* § 1.20.

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