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IN THE COURT OF APPEALS OF INDIANA

DANIEL J. GLASER, as Parent and Next Friend of DANIEL ALSPACH,

Appellant-Plaintiff,

vs.

MICHELLE HITTIE,

Appellee-Defendant.

No. 02A03-0604-CV-153

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0401-CT-22

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Daniel J. Glaser ("Glaser"), as Parent and Next Friend of Daniel Alspach n/k/a Daniel Glaser ("Danny"), appeals a judgment entered upon a jury verdict in favor of Appellee-Defendant Michelle Hittie ("Hittie") in a negligence action. We affirm.

Issue

Glaser presents three issues for review, which we consolidate and restate as a single issue: whether the trial court abused its discretion in instructing the jury.

Facts and Procedural History

On March 15, 2003, Glaser was at his Fort Wayne home, caring for his six-year-old child Danny and three other children: Kasey, age eleven, Kara, age ten, and Darren, age six. After lunch, the children asked to go to a park located across the street from Glaser's home. Glaser accompanied the children as they crossed Lake Avenue, proceeding from Glaser's driveway rather than from the nearest intersection. Glaser instructed them "to stay together and be careful and stay over there." (Tr. 187.) He then returned to work in his garage.

Danny played in a creek in the park, and got his shoes wet. He took off his shoes and started toward his house. Hittie's vehicle was in the eastbound lane of Lake Avenue, stopped for a red light at the intersection of Lake Avenue and Reed Road. When the light turned green, Hittie proceeded forward, but saw Danny in her peripheral vision. It appeared that Danny was about to enter the street, some distance from the intersection. Hittie slowed her vehicle, almost coming to a complete stop. She then observed Danny back up and return to the side of the road. Hittie proceeded forward. When a westbound vehicle driven by Tom Sherman ("Sherman") passed him, Danny ran behind the vehicle and into the street. He was

struck by Hittie's vehicle, sustaining significant injuries.

On January 20, 2004, Glaser, as parent and next friend of Danny, filed a complaint against Hittie. A jury trial commenced on February 28, 2006. On March 2, 2006, the jury found in favor of Hittie. Glaser now appeals.

Discussion and Decision

A. Standard of Review

In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions. Willis v. Westerfield, 839 N.E.2d 1179, 1189 (Ind. 2006). The trial court has discretion in instructing the jury, and we will reverse upon one of the last two issues only when the instructions amount to an abuse of discretion. Id. Here, there is a dispute as to whether the evidence of record supported the pedestrian duty instructions and the sudden emergency instruction.[1] As such, we review the trial court's decision to give the challenged instructions for an abuse of discretion.

An erroneous instruction is grounds for reversal only where we conclude that, given the totality of the instructions, the opponent's substantial rights were adversely affected. Lovings v. Cleary, 799 N.E.2d 76, 79 (Ind. Ct. App. 2003), trans. denied.

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[1] Glaser also claims that Final Jury Instruction 31 incorrectly states the law because Glaser's fault cannot be imputed to Danny to reduce any recovery by Danny under Indiana's Comparative Fault Act, and that the jury should have been instructed that it was required "to return a verdict for Daniel Alspach (provided it finds that Ms. Hittie was at fault) regardless of the percentage of fault of Daniel Glaser." Appellant's Br. at 14. However, he did not object upon this basis at trial. At trial, he objected as follows, "Your honor, we object to [Final Jury Instruction 31] to the extent that it contemplates and comports with the giving of but one Plaintiff Verdict Form in the presence of two Plaintiffs." (Tr. 406.) It is well-settled that a party may not present one ground for an objection at trial and assert a different one on appeal. Burge v. Teter, 808 N.E.2d 124, 128 (Ind. Ct. App. 2004).

B. Analysis

The trial court instructed the jury that fault could not be assessed against Danny. However, the trial court also gave a series of instructions on the duties of pedestrians, as follows:

> COURT'S FINAL JURY INSTRUCTION NO. 23
> Every pedestrian crossing or using a public street has a duty to exercise the care an ordinarily prudent person would use, under the same or like circumstances. The failure to exercise such care is negligence.
>
> COURT'S FINAL JURY INSTRUCTION NO. 25
> At the time of the occurrence being considered in this case, Indiana Code § 9-21-17-5 provided as follows: A pedestrian may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. If you find from a preponderance of the evidence that any party violated this ordinance on the occasion in question, and the violation was without excuse or justification, such conduct would constitute fault to be assessed against that party.
>
> COURT'S FINAL JURY INSTRUCTION NO. 26
> At the time of the occurrence being considered in this case, Indiana Code § 9-21-17-15 provided as follows: Except as otherwise provided in this chapter, a pedestrian upon a roadway shall yield the right of way to all vehicles upon the roadway. If you find from a preponderance of the evidence that any party violating this statute on the occasion in question and the violation was without excuse or justification, such conduct would constitute fault to be assessed against that party.
>
> COURT'S FINAL JURY INSTRUCTION NO. 27
> At the time of the occurrence being considered in this case, Indiana Code § 9-21-17-7 provided as follows: A pedestrian crossing at a roadway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield to the right of way to all vehicles upon the roadway. If you find from a preponderance of the evidence that any party violated this statute on the occasion in question and the violation was without excuse or justification, such conduct would constitute fault to be assessed against that party.

(Tr. 521-25.)

Glaser claims that these instructions were not "pertinent to the issues that were before the jury" because Danny was presumed incapable of contributory negligence and thus his compliance with the law governing pedestrians was irrelevant. Appellant's Br. at 20. Hittie concedes that Danny's fault was irrelevant.[2] However, she contends that the evidence demonstrated that Glaser failed to supervise his son to ensure compliance with the duties of pedestrians; thus, the instructions were relevant to permit the jury to assess Glaser's fault.

We consider instructions a whole, and not in isolation. Lovings, 799 N.E.2d at 79. Each party is entitled to an instruction that supports his or her theory of the case, when there is some evidentiary support for the theory. Id. at 78.

Here, the evidence established that Glaser guided Danny and the other children across the street without first proceeding to the intersection. This behavior modeled for Danny was not in compliance with the applicable pedestrian statutes. Moreover, Glaser failed to directly supervise Danny after leaving him in the park. Accordingly, the instructions on duties of pedestrians informed the jury of the duty incumbent upon Glaser as a parent having responsibility to supervise Danny's pedestrian activities. They were relevant to assist the jury in determining Glaser's fault.

Glaser also challenges, as unsupported by the evidence, the "sudden emergency" instruction given by the trial court:

COURT'S FINAL JURY INSTRUCTION NO. 20

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[2] In Indiana, children under the age of seven are conclusively presumed incapable of contributory negligence. See Creasy v. Rusk, 730 N.E.2d 659, 662 (Ind. 2000).

> A person confronted with a sudden emergency, not of his or her own making and without sufficient time to deliberate, is not held to the same accuracy of judgment as one who had time to deliberate. Accordingly, a person is not at fault if he or she exercises such care as an ordinarily prudent person who [sic] exercise[s] when confronted with a similar emergency. If you find from the evidence that a sudden emergency confronted the Defendant and that she responded as a reasonably prudent person would have when faced with the same or similar emergency, then you may not find the Defendant at fault.

(Tr. 520-21.)

Each collision involves an "emergency" but this does not necessarily mean that a "sudden emergency" instruction is appropriate. Lashbrooks v. Schultz, 793 N.E.2d 1211, 1214 (Ind. Ct. App. 2003), certiorari dismissed. The sudden emergency doctrine recognizes that a reasonable person who is innocently deprived of time to consider his or her actions does not always exercise the same accuracy of judgment as one who has had the opportunity for reflection. Id. at 1213.

Recently, in Willis, the Indiana Supreme Court explained this doctrine:

> In a negligence cause of action, the sudden emergency doctrine is an application of the general requirement that one's conduct conform to the standard of a reasonable person. The emergency is simply one of the circumstances to be considered in forming a judgment about an actor's fault. The doctrine was developed by the courts to recognize that a person confronted with sudden or unexpected circumstances calling for immediate action is not expected to exercise the judgment of one acting under normal circumstances. See W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 33 at 196 (5th ed.1984). The basis of the doctrine is that "the actor is left 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. Under such conditions, the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no reasonable person could possibly have made after due deliberation." Id. In Indiana, a defendant seeking a sudden emergency instruction must show that three factual prerequisites have been satisfied: 1)

> the defendant must not have created or brought about the emergency through his own negligence; 2) the danger or peril confronting the defendant must appear to be so imminent as to leave no time for deliberation; and 3) the defendant's apprehension of the peril must itself be reasonable. Sullivan v. Fairmont Homes, Inc., 543 N.E.2d 1130, 1137 (Ind. Ct. App. 1989), trans. denied.

839 N.E.2d at 1184-85.

The second prerequisite for the giving of the sudden emergency instruction, i.e., that the danger confronting the defendant must appear imminent, includes the necessity of the actor perceiving the emergency. See Collins v. Rambo, 831 N.E.2d 241, 246 (Ind. Ct. App. 2005). Glaser argues this prerequisite is not satisfied because Hittie perceived no danger and "no evidence was presented that Ms. Hittie had time to react upon realizing that [Danny] was running into her lane of traffic." Appellant's Br. at 7. In reliance upon Lashbrooks, he contends that because no evidence indicated Hittie was able to act or fail to act, the giving of the sudden emergency instruction was an abuse of discretion.

Lashbrooks v. Schultz involved an accident after a van driven by Schultz hydroplaned in high winds, spun to the right, and rolled into a ditch such that its rear stuck out into the roadway. A van driven by Lashbrooks collided with the right rear corner of Schultz's van, causing personal injuries. 793 N.E.2d at 1212. In considering whether the jury was properly instructed on the sudden emergency doctrine, a separate panel of this Court was confronted with an issue characterized as "not whether there is evidence that Schultz faced a sudden emergency, but rather whether there is evidence that she was able to respond to it." Id. at 1215. As the evidence demonstrated that Schultz had no control over her van after it was

blown off the road, there was no evidence that she was able to act or fail to act, and the sudden emergency instruction was not relevant to the issues before the jury. Id. at 1214-15.

The instant case is distinguishable. Although, according to expert testimony, Hittie had only "about three-fourths of a second" to react to Danny's presence in the roadway (Tr. 299.), she maintained control of her vehicle, braked, and steered to the right in an "attempt to take evasive action." (Tr. 296.) Expert witnesses, Dr. John Wiechel and Officer Anthony Maze, each testified that Hittie swerved to the right. Unfortunately, impact was not avoided by this maneuver. Nevertheless, Hittie was entitled to have the jury instructed that it should evaluate her reaction in light of the sudden emergency with which she was confronted.

Moreover, even if Hittie had so little time to perceive danger and react to it that the sudden emergency instruction was largely irrelevant, instructional error is grounds for reversal only where it appears that the jury's verdict could have been predicated upon such an instruction. Lashbrooks, 793 N.E.2d at 1214. Here, there was no evidence upon which the jury could predicate fault attributable to Hittie. It is uncontroverted that Hittie had the right-of-way and that she was observing the speed limit. Glaser initially suggested that Hittie failed to maintain a proper lookout for Danny; however, undisputed evidence showed that, after Danny turned away from the road and returned to the gravel, Sherman drove westbound past Danny, obstructing Hittie's view. Danny then darted out from behind Sherman's vehicle. Officer Maze, who was trained in accident reconstruction techniques, opined that Hittie was not at all responsible for the collision. No other testimony or documentary evidence challenged his opinion. Because the jury could not properly find Hittie to be negligent based upon the evidence of record, a superfluous sudden emergency instruction

would at most be harmless error.

Conclusion

In light of the foregoing, Glaser has not established that the trial court abused its discretion in instructing the jury.

Affirmed.

RILEY, J., and MAY, J., concur.