

RENDERED: JANUARY 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002047-MR

DONALD LEE MAHANES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 07-CI-011289

MICHAEL R. SHUGARS¹

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Following a jury trial, Donald Lee Mahanes appeals the judgment of the Jefferson Circuit Court entered on October 8, 2009, finding in favor of Michael R. Shugars. On appeal, Mahanes advances two arguments

¹ Nationwide General Insurance Company and American Family Insurance Company were named defendants in the circuit court action but were not named in the Notice of Appeal. All claims against Nationwide were dismissed with prejudice following trial.

regarding the court's instructions. Upon careful review of the record, the briefs, and the law, we affirm.

FACTS

This appeal flows from a car/truck collision that occurred on November 3, 2006, on the Watterson Expressway near the interchange with Interstate 64 in Jefferson County, Kentucky. The collision occurred about 7:00 p.m. as Shugars was returning home after working as a schoolteacher. Shugars admitted causing the collision but alleged he suffered a blackout that caused him to lose control of his car and eventually strike Mahanes' truck. Mahanes claimed personal injuries and property damage as a result of the collision. Shugars asserted the "blackout" defense recognized by Kentucky courts in *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988).

Trial evidence covering two days showed Shugars' blood pressure was 240/136 soon after the crash. He was treated for hypertension, kidney failure and swelling of the brain. The defense argued Shugars had no known history of medical problems or treatment prior to the crash and the accident was unforeseeable. In contrast, Mahanes argued Shugars had experienced insomnia, headaches, nausea, daily vomiting, shortness of breath, and an unexplained thirty-pound weight loss in the weeks prior to the collision and as a result, should not have been driving at the time of the crash.

Jurors found in favor of Shugars. This appeal followed.

LEGAL ANALYSIS

This appeal is limited to two questions regarding the court's instructions. First, Mahanes argues the "blackout" defense instruction was erroneously tailored to Shugars rather than worded in terms of the ordinary person. Shugars responds that the court's instruction is nearly verbatim to the version appearing in John S. Palmore, *Kentucky Instructions to Juries* § 16.60 (4th Ed., 1989), and was therefore appropriate.

Under the "blackout" defense,

where the driver of a motor vehicle suddenly becomes physically or mentally incapacitated without warning, he is not liable for injury resulting from the operation of the vehicle while so incapacitated. However, once a prima facie case of negligence has been made against the defendant he must demonstrate that the sudden illness or incapacity could not have been anticipated or foreseen.

Rogers, 748 S.W.2d at 673, (citing *Lutzkovitz v. Murray*, Del., 339 A.2d 64, 93 A.L.R.3d 321 (1975)). The evidence elicited at trial supported the giving of an instruction on the "blackout" defense. The issue on appeal is whether the instruction given by the court was an accurate statement of the defense.

Mahanes bases his argument on a single reference to the phrase "ordinary and reasonable person" in *Rogers*, which states:

[t]he defense is unavailable where the defendant was put on notice of facts sufficient to cause an ordinary and reasonable person to anticipate that his or her driving might likely lead to the injury of others. The defense is neither available if at the time of the accident the incapacitated driver was violating a statutory duty such as to refrain from driving while intoxicated, or to drive within the posted speed limit.

Rogers does not set forth a sample instruction.

The court instructed the jury as follows:

Do you find from the evidence that Michael Shugars suddenly became incapacitated immediately before the accident, that such incapacity was not reasonably foreseeable by him, and that the accident was a result of such incapacity?

By comparison, Palmore's sample version of the "blackout" defense instruction, which references *Rogers*, reads:

Even though you might otherwise find for P under Instruction ____, if you are satisfied from the evidence that immediately before the accident D suddenly became incapacitated, that such incapacity was not reasonably foreseeable by him, and that the accident resulted from it, you will find for D.

The instruction given by the court was consistent with Palmore's suggested language. Moreover, we note that the comment to Palmore's sample instruction does not reference the ordinary and reasonable person standard. Mahanes has not cited any case wherein an approved "blackout" defense instruction uses the phrase "ordinary and reasonable person" and our search of caselaw has not revealed such an instruction. Therefore, discerning no error, we affirm the court's "blackout" defense instruction as given.

Second, Mahanes argues the trial court erred in not instructing jurors on a driver's duty to maintain ordinary care on the roadway. Shugars argues there was no alleged violation of duty so it was unnecessary to give the requested instruction.

Shugars admitted causing the collision but alleged it resulted from an unforeseen blackout. Because Shugars admitted fault, the court correctly summarized the issue for the jury as an “all or nothing” proposition. If jurors accepted Shugars’ “blackout” defense, they would find for Shugars. If they rejected the “blackout” defense, they would find for Mahanes. Thus, there was no need to instruct jurors on the standard of care to be observed by drivers on the roadway.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Kenneth H. Baker
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael E. Krauser
Louisville, Kentucky