Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00913-CV

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BYRON K. CLAY, INDIVIDUALLY and AS REPRESENTATIVE OF THE ESTATE OF AGNES CLAY, ET AL., Appellants

V.

LEMUEL RODNEY COPELAND and MCX TRANSPORT OF TEXAS, INC., Appellees

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On Appeal from the Probate Court No 2
Harris County, Texas
Trial Court Cause No. 288,488-401

O P I N I O N

This appeal is from a take nothing jury verdict in favor of the appellees, Rodney Copeland and MCX Transport of Texas, Inc. (MCX). Appellants, Byron Clay et al., assert that the trial court erred in two ways. First, they assert that the instructions on unavoidable accident and sudden emergency should not have been included in the jury charge. Second, they claim that the evidence was factually insufficient to support the jury's verdict. Because we find sufficient evidence in the record to support the challenged instructions, as well as the jury's

verdict, we affirm the judgment of the trial court.

BACKGROUND

The testimony at trial painted a tragic factual picture. Rodney Copeland, a truck driver employed by MCX Transport, was on his way to work driving a tanker rig owned by MCX. Having delivered his load of gas at the end of the week, Copeland was headed back to work on Monday morning after taking the weekend off. As he headed down Loop 610 traveling in the right-hand lane of the road, he scanned the morning rush hour traffic. The traffic moved at a typical, normal pace. As Copeland neared Clinton Drive, the road rose, fell, and turned in an S-shape. Copeland neared the crest of an overpass when he noticed the car in front of him quickly change lanes to avoid a car that was stopped or barely moving ahead of him and in his lane. This car was stopped in the right-hand lane of traffic without brake lights, emergency flashers, or any other warning devices. Realizing that he could not stop in time, faced with a car directly in front of him, and having no ability to move to the shoulder or the left-hand lane, Copeland stood up on his brake pedal and locked up his brakes in an unsuccessful effort to stop his truck. Copeland's rig slammed into the back of the vehicle, actually rolling on top of it, trapping the sole passenger, Agnes Clay, in the driver's seat of the vehicle.

Copeland exited his truck and put out the fire that had erupted from the gas tank of the Clay vehicle. Copeland and several others attempted to extract Clay from her car, but were unsuccessful in their efforts. Clay was trapped behind the steering wheel, where she eventually died as paramedics attempted to remove her from the wreckage.

At trial, appellees requested and received instructions on unavoidable accident and sudden emergency over appellants' objections. It is from this ruling that appellants now appeal, claiming that appellees were not entitled to an instruction on these issues. We disagree.

APPELLANTS' INSTRUCTION CHALLENGE

The standard of review for a court's charge is whether the trial court abused its

discretion. TEX. R. CIV. P. 277; *Texas Dept. of Human Serv. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). The trial court has wide discretion in submitting jury questions as well as instructions and definitions. *Harris County v. Bruyneel*, 787 S.W.2d 92, 94 (Tex. App.–Houston [14th Dist.] 1990, no writ). If the court commits error, it is reversible only if, when viewed in light of the totality of these circumstances, the error amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment. TEX. R. APP. P. 44.1 (Vernon Pamph. 1999); *Hill v. Winn-Dixie Texas, Inc.*, 849 S.W.2d 802, 803 (Tex. 1992). It is not error, however, for the court to submit instructions that are supported by the pleadings and some evidence. *See Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992).

A. THE UNAVOIDABLE ACCIDENT INSTRUCTION

An unavoidable accident instruction is proper only in certain circumstances when there is evidence that the event was proximately caused by a non-human condition rather than the negligence of any party to the event. *Hill*, 849 S.W.2d at 803. The supreme court has delineated several of the non-human conditions which necessitate this type of instruction, as long as trial testimony shows that they contributed to the event forming the basis of the suit. These explicitly mentioned conditions are cases involving young children who are incapable of negligence, fog, sleet, snow, wet or slick pavement, and obstruction of view. *See Reinhardt v. Young*, 906 S.W.2d 471, 472 (Tex. 1995) (plurality opinion); *Hill*, 849 S.W.2d at 803 (citing *Yarborough v. Berner*, 467 S.W.2d 188, 190-91 (Tex. 1971)).

At trial, appellees raised the issue of obstruction of view. Appellees presented the testimony of several witnesses who stated that Copeland's view of the accident site was obscured because of the structure and elevation of the highway. This testimony established that several overpasses crossing the road, the curvature of the highway immediately prior to the place where Clay's car was stalled, and the placement of her car just past the crest of an incline in the roadway prevented Copeland, as well as other drivers at the scene, from seeing

Clay's car until they were very close to it. One witness testified that she was traveling immediately in front of Copeland and did not notice that Clay's car was not moving until she almost rear-ended it, largely due to the lack of warning lights or brake lights on Clay's car. She testified that she had to swerve her car into another lane to avoid hitting Clay's vehicle and almost struck the Clay vehicle herself.

Even though there was testimony that Copeland and MCX may have been negligent in failing to inspect the brakes, appellees presented evidence showing that this was not a proximate cause of the accident. Appellants' main contention at trial was that the brakes of the truck and trailer were not adjusted properly, causing the truck to brake less efficiently than it normally would. Appellees countered this testimony by showing that most of the brakes were properly adjusted, and all of the brakes locked up when Copeland stood up on the brake pedal. Further evidence showed that once brakes are locked up, they cannot brake any more efficiently. In fact, appellants' own expert witness testified that Copeland would not have been able to stop even if the truck had perfect brakes. The investigating officer also testified that Copeland did everything possible to avoid the accident, and that Copeland's brakes worked properly.

Based on this evidence, we conclude that the trial court did not err in giving this instruction, since it was supported by the pleadings and evidence.

Appellants, however, argue that even if the instruction were supported by evidence, it was unnecessary, confusing, and constituted a comment upon the weight of the evidence. These arguments track the arguments of the dissent in *Reinhardt v. Young*. *See* 906 S.W.2d at 477-480 (Hightower, J., dissenting). Also, the bulk of appellant's arguments apparently stem from a misperception of the plurality's holding in that case.[1]

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[1] This misperception is shared by at least one other appellate court. *See, e.g., Ordonez v. M. W. McCurdy & Co., Inc.*, 984 S.W.2d 264, 272 (Tex. App.–Houston[1st Dist.] 1998, no pet.) (stating that the *Reinhart* plurality found submission of the instruction erroneous); *but see Friday v. Spears*, 975 S.W.2d 699, (continued...)

The *Reinhart* decision was based on facts similar to those in the present case. In that case, the defendant's truck crashed into the plaintiff's car on or near an overpass when the plaintiff's car stopped suddenly. 906 S.W.2d at 472. The defendant contended that the accident occurred on the crest of the overpass, and the incline of the road obscured his view. *Id.* Based on this contention, the trial court submitted an instruction to the jury on unavoidable accident. *Id*. The court did not decide if the instruction was erroneously submitted. *Id*. at 471-72. Rather, the court held that if any error was committed, the error was harmless. *Id*. While the court expressed reservations about the submission of the unavoidable accident instruction in routine negligence cases, it reiterated that the instruction is appropriate under certain circumstances. *Id.* at 472. One of those circumstances was obstruction of view. *Id.* Without deciding if the instruction was appropriate, the court held that any error committed by the trial court's submission was harmless since the evidence exonerating defendant from liability was strong, and the plaintiff failed to object to the sudden emergency instruction, which is logically included in the unavoidable accident instruction. *Id*. at 474. The court also held that nothing in the record suggested the jury based its decision on the unavoidable accident instruction. *Id.*

Here, we have a similar set of circumstances. The appellees presented strong evidence that they were not negligent. Copeland testified that he kept a proper lookout for traffic problems and maintained a proper following distance. Several witnesses testified that the brakes locked up and worked appropriately. The appellants had no direct testimony that the brakes did not work properly before the accident. To prove this point, appellants relied instead on the proposition that since the brakes were improperly adjusted after the accident, they must have been improperly adjusted before the accident. This testimony was countered by appellees' testimony that the accident caused the adjustment problems, since the force applied

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[1] (...continued)
702 (Tex. App.–Texarkana 1998, no pet.) (stating that the *Reinhart* plurality did not find the submission of the instruction erroneous).

to the brakes, as well as the force of impact, damaged the brake system. Appellees contended that this was the cause of the adjustment problems noted by the investigating officer.

Appellees also presented evidence to show that if the brakes were out of adjustment, this problem did not proximately cause the accident. Both the investigating officer and the appellees' expert testified that perfectly adjusted brakes would have been unable to stop the truck in time.

Because of the strong case presented by the appellees at trial, we can find no evidence in the record to show that the jury relied on the unavoidable accident instruction. Thus, there is no evidence that the inclusion of the instruction on unavoidable accident was calculated and probably did cause the rendition of an improper judgment.

B. THE SUDDEN EMERGENCY INSTRUCTION

Further, the charge contained an instruction on sudden emergency, which also was supported by the evidence. Though appellants objected to this instruction at trial and claim here that its inclusion was also erroneous, we find that the trial court did not abuse its discretion in including the instruction in the jury charge.

An instruction on sudden emergency is appropriate if there is evidence that (1) the emergency arose suddenly, (2) unexpectedly, (3) was not caused by the act or omission of the defendant, and (4) the negligence of the defendant, if any, occurred after the emergency arose without giving that person time to deliberate. *See Oldham v. Thomas*, 864 S.W.2d 121, 126 (Tex. App.—Houston [14th Dist.] 1993), *aff'd in part, rev'd in part on other grounds*, 895 S.W.2d 352, 360 (Tex.1995). The sudden emergency doctrine is not applicable where a defendant is deemed negligent for either failing to maintain a proper distance from the preceding vehicle, or failing to keep a proper lookout. *DeLeon v. Pickens*, 933 S.W.2d 286, 294 (Tex. App.–Corpus Christi 1996, writ denied). When the evidence conflicts as to whether the defendant's actions prior to the "emergency" arose were suspect, however, the inclusion of an instruction on emergency is not erroneous. *Id.*

Here, appellants presented evidence to establish that Copeland was following too closely and failed to maintain a proper lookout. This testimony was controverted by Copeland, the investigating officer, and the witness in the car immediately preceding Copeland's vehicle. Other testimony established that the presence of Clay's vehicle stopped or moving slowly in traffic moving at posted speed limits during rush hour was unexpected, unforeseeable, and was not caused by Copeland's negligence. Based on the record, appellees presented sufficient evidence to warrant the trial court's inclusion of the sudden emergency instruction.

Even if the instruction was submitted in error, we find nothing to support appellants' contention that the instruction was calculated to and probably did cause the jury to render an improper verdict, especially in light of the appellees strong case that Copeland and MCX were not negligent. Accordingly, we overrule appellants' first point of error.

APPELLANT'S FACTUAL SUFFICIENCY OF THE EVIDENCE CLAIM

Appellant also asserts that the trial court erred by entering judgment on the jury verdict when the evidence was factually insufficient to support the jury verdict. We disagree.

When reviewing a factual sufficiency challenge to the evidence supporting the jury's verdict, we must examine all of the evidence in the record, both supporting and contrary to the judgment. *Plan-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989); *Russell v. City of Bryan*, 919 S.W.2d 698, 705 (Tex. App.–Houston [14th Dist.] 1996, writ denied). After considering and weighing all of the evidence, we will sustain the challenge only if the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust. *Cain v. Bayed*, 709 S.W.2d 175, 176 (Tex. 1986); *Russell*, 919 S.W.2d at 705.

A close reading of the record reveals that ample evidence supports the jury's verdict in this case. Though appellants contended that Copeland's brakes were functioning improperly before the accident, the jury was provided with more than enough evidence to disregard this testimony and conclude that the brakes functioned properly before the accident. Further, the

only witness who testified that Copeland did not maintain a proper following distance or keep a proper lookout was the appellant's expert who did not witness the accident. The jury was free to disregard this testimony as well and believe the eyewitnesses who testified to the contrary. Finally, there was also evidence in the record sufficient to support the jury's finding that MCX was not negligent. Accordingly, we do not find the jury's verdict to be so against the great weight and preponderance of the evidence as to be manifestly unjust. We overrule appellant's second issue and affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed December 23, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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