Affirmed and Opinion filed June 21, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01221-CV

JACKY W. LAKEY, Appellant

V.

RONNIE B. CAULEY, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 95-52247

O P I N I O N

Jacky W. Lakey sued Ronnie B. Cauley after a traffic accident. Trial was to a jury, which found that Lakey's negligence proximately caused the accident and that Cauley was not negligent. The trial court entered a take-nothing judgment in favor of Cauley. In thirteen points of error, appellant argues the evidence was insufficient to support the jury's findings and complains about the admission of a state trooper's testimony on causation and the trial court's handling of the venire. We affirm.

This case presents the rare instance where the facts are largely undisputed; it is the

legal effect which is to be given those facts which is in dispute. *See, e.g., Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627 (Tex. 1967); William Powers Jr. and Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 522-523 (1991)(explaining *Fisher).* In a nutshell, appellant contends there is (or should be) no legal rationale to excuse running into a stationary object on the shoulder of the road.

On the night of March 17, 1994, Lakey pulled over to help a stranded motorist on the shoulder of a dark farm-to-market road in Leon County. Appellant pulled his vehicle nose-to-nose with the disabled vehicle so that his headlights would illuminate the car's engine compartment; consequently, the headlights were facing into oncoming traffic on the road. Appellee was driving down the dark road and was blinded by the headlights from appellant's car. Thinking that an oncoming vehicle was in his lane, appellee took evasive action, steering onto the shoulder of the farm road, and collided with the rear of the disabled vehicle. The collision forced the disabled vehicle into appellant, injuring him.

EXPERT TESTIMONY

In his first point of error, appellant contends the trial court erred in permitting the investigating officer, Department of Public Safety trooper Ronald Wood, to testify as an expert about causation. We believe the trial court did not abuse its discretion in permitting Wood to so testify. We will address this point first because its resolution will bear directly on resolution of appellant's sufficiency points.

Whether a witness is qualified to offer expert testimony is a matter committed to the trial court's discretion. *United Blood Services Inc. v. Longoria*, 938 S.W.2d 29, 31 (Tex. 1997). The trial court must determine if the putative expert has "knowledge, skill, experience, training, or education" that would "assist the trier of fact." See TEX. R. EVID. 702. The burden of establishing an expert's qualifications is on the offering party; that party must establish that the expert's expertise goes to the very matter on which he or she is to give an opinion. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). We gauge abuse

of discretion by whether the trial court acted without reference to any guiding rules or principles. *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

Wood had been a trooper for more than twenty years at the time of the accident and had attended DPS's accident reconstruction school and advanced pedestrian and cyclist accident reconstruction school. By the time of trial, Wood was the accident reconstructionist for his region and had attended several other advanced accident reconstruction training programs.

In *Sciarrilla v. Osborne*, 946 S.W.2d 919 (Tex. App.–Beaumont 1997, pet. denied), the trial court was faced with a complaint that a DPS trooper who had been on the job only five months could not qualify as an expert witness. The court nevertheless permitted the trooper to testify, and the court of appeals found that the trial court had not abused its discretion because the trooper had attended a specialized accident reconstruction school. *Id.* at 922-923. Here the case is not nearly as close. We find the trial court did not abuse its discretion in admitting Trooper Woods' testimony and overrule appellant's first point of error.

SUFFICIENCY ISSUES

In his second through fifth points of error appellant challenges the sufficiency of the evidence to support the jury's findings that his negligence proximately caused the accident and that appellee's negligence did not contribute.

Appellant's challenge is to the jury's answer to Question No. One, which read:

Did the negligence, if any, of those named below proximately cause the occurrence in question?

Answer "Yes" or "No" for each of the following:

JACKY W. LAKEY YES

RONNIE B. CAULEY NO

Moreover, here the controlling answer is the jury's determination that appellee was not negligent; if this finding stands, the jury's finding that appellant was negligent is immaterial, and appellant's fourth and fifth points of error do not come into play. We will therefore focus on whether the evidence supported the jury's answer as to appellee's negligence. We believe that it does.

1. Legal Sufficiency

Appellant's first argues "there is no evidence to support the jury's answer that appellee's negligence did not proximately cause the occurrence in question." When the party having the burden of proof appeals from an adverse fact finding in the trial court, the points of error should argue that the issue was established as a matter of law, or that the jury's finding was against the great weight and preponderance of the evidence. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). We will therefore treat this point as a complaint that appellee's negligence was established as a matter of law. In such a case, we examine the record for evidence that supports the jury's finding, while ignoring all evidence to the contrary. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). If there is no evidence to support the jury's answer, the entire record must be examined to see if the contrary proposition is established as a matter of law. *Id.*[1]

We find there was ample evidence adduced at trial to support the jury's answer. Trooper Wood's testimony showed that appellant's headlights were on the "bright" setting,

[1] Our initial review will still include the entire record, but for the limited purpose of insuring that all favorable evidence, including inferences fairly derivable from the entirety of the record, is included. *See* William V. Dorsaneo III, *Judges, Juries and Reviewing Courts*, 53 SMU L. REV. 1497, 1505 (2000).

and that the headlights were shining down the road at oncoming traffic. Wood said this was the single biggest factor contributing to the accident. Appellee also testified that he was blinded by appellant's headlights, that he thought he was facing an oncoming car in his lane, and that he took evasive action which resulted in this collision. Because there is some evidence in the record supporting the jury's finding, appellant's complaint fails to clear the first hurdle in the *Sterner* analysis.

Appellant contends that *Red Ball Motor Freight v. Arnspiger*, 449 S.W.2d 132 (Tex. App.—Dallas 1969, no writ) dictates a different result. We disagree. *Arnspiger* also involved a collision between a moving car whose driver became confused by the headlights of a vehicle pulled to the side of the road. However, neither party in *Arnspiger* presented police or expert testimony as to causation. The court in *Arnspiger* specifically limited its analysis to "the facts and circumstances as presented here." *Id.* at 138. We are therefore satisfied that the situations are factually distinguishable.

Appellant's second point of error is overruled.

2. Factual Sufficiency

Appellant next contends that the jury's finding is against the great weight and preponderance of the evidence. This complaint concedes conflicting evidence on an issue but contends that the evidence against the jury's action is "so great as to make the finding erronous." *Raw Hide Oil & Gas v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied). We must weigh all of the evidence in the case and set aside the verdict and remand the cause for a new trial if we find that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. *In re King's Estate*, 244 S.W.2d 660, 661, 150 Tex. 662, 664-665 (Tex. 1951). In applying this standard, we must be mindful that a jury was not convinced by a preponderance of evidence; consequently, we are not entitled to reverse merely because we conclude that the evidence preponderates the other way. *See Herbert v. Herbert*, 754 S.W.2d 141, 144

(Tex. 1988). Such reversal should be reserved for cases in which the jury's actions "shock the conscience," are so contrary to the record "as to be clearly unjust," or which "clearly indicate bias." *Pool v. Ford Motor Corp.*, 715 S.W.2d 629, 635 (Tex. 1986).

Appellant's argument once again is not with the facts but with the way those facts are viewed. He notes that appellee collided with a stationary object on the side of the road and argues that any jury finding which does not assign liability against appellee in this situation is clearly unjust. We are not convinced. The jury could easily have seen this as a case where appellant created a dangerous situation, and that the accident complained of was the tragic consequence of that dangerous situation. The evidence supports this conclusion. We therefore overrule appellant's third point of error.

Because of our disposition of appellant's third and fifth points of error, it is unnecessary to consider his second and fourth points of error.

JURY CHARGE ISSUES

In appellee's seventh through eleventh points of error he complains that the trial court erred in including, or in some cases not including, instructions in the jury charge. Rule 277 of the Rules of Civil Procedure requires a trial court to submit "such instructions and definitions as shall be proper to enable the jury to render a verdict." Rule 278 goes on to impose some limits. Submission of instructions is limited to those issues "raised by the written pleadings and the evidence." TEX. R. CIV. P. 278. And when the complaint is the failure to submit an instruction, our ability to reverse a verdict is limited to those instructions which were submitted to the trial court in writing and in substantially correct form. *Id.*

The trial court has considerable discretion in deciding what instructions are necessary and proper in submitting issues to the jury. *State Farm Lloyds Ins. Co. v. Nicolau*, 951 S.W.2d 444, 451-452 (Tex. 1997)(citing *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974)). The trial court is granted considerably more latitude in submitting

instructions than it is granted in submitting questions. *Harris v. Harris*, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied). Our review is, therefore, under an abuse of discretion standard. *Nicolau*, 951 S.W.2d at 451.

Points of error seven through ten concern jury instructions which were requested but not submitted; point of error eleven concerns a jury instruction which was submitted over appellant's objection. The two sets of instructions conflict. We therefore will consider, first, whether the trial court erred in submitting the instruction it did, and second, whether the trial court erred in not submitting the requested instructions.

We begin with appellant's eleventh point of error, which complains about the following "sudden emergency" instruction:

> When a person is confronted by an "emergency" arising suddenly and unexpectedly, which was not proximately caused by any negligence on his part and which, to a reasonable person, requires immediate action without time for deliberation, his conduct in such an emergency is not negligence or failure to use ordinary care if, after such emergency arises, he acts as a person of ordinary prudence would have acted under the same or similar circumstances.

Appellant complains that this instruction relaxed the standard of care which appellee owed appellant under the law of negligence, and that the evidence did not raise the question of sudden emergency. Appellant is correct in his first argument. The purpose of the sudden emergency doctrine is to excuse conduct which otherwise would be negligence. *Yarborough v. Berner*, 467 S.W.2d 188, 191 (Tex. 1971). The utility of a sudden emergency instruction has long been recognized in this State. *See id.; McDonald Transit Co. v. Moore*, 565 S.W.2d 43, 44 (Tex. 1978). Most recently, in *Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674 (Tex. 1998), the supreme court held that the trial court did not abuse its discretion in submitting a sudden emergency instruction. *Id.* at 676. In light of this, we cannot say that the trial court abused its discretion by including the instruction in this case.

Appellant next complains that the evidence in this case did not raise the issue of sudden emergency. We disagree. The elements of sudden emergency are:

(1) the condition must have arisen suddenly;

(2) it must have arisen unexpectedly;

(3) it must not have been proximately caused by the negligent act or omission of the person whose conduct is being inquired about; and

(4) the conduct which would constitute negligence under ordinary circumstances must have occurred after the emergency arose without giving the person time to deliberate.

Oldham v. Thomas, 864 S.W.2d 121, 126 (Tex. App.—Houston [14th Dist.] 1993, *aff'd in relevant part,* 895 S.W.2d 352 (Tex. 1995).

We are satisfied the evidence raised the issue of sudden emergency. Appellee testified that he thought he was about to have a head-on collision, and that the action he took was his "last chance" to avoid this collision. Because the condition arose from the way appellant positioned his car on the side of the road, appellee did not proximately cause the condition through his own negligence. Appellant's eleventh point of error is overruled.

Appellant next complains that the trial court erred by not submitting his instructions on negligence per se. The requested instructions were as follows:

> With respect to the conduct of Defendant, Ronnie B. Cauley, you are instructed as follows:
>
> Section 52(a) of Article 6701d, Texas Civil Statutes, provides that a vehicle shall be driven upon the right half of the roadway. Failure to comply with this law is negligence in itself.

> With respect to the conduct of Defendant, Ronnie B. Cauley, you are instructed as follows:
>
> Section 52(a) of Article 6701d, Texas Civil Statutes, provides that the driver of a vehicle shall drive completely within the right half of the roadway and shall not move from such lane until the driver has first ascertained that such movement can be made with safety. Failure to comply with this law is

negligence in itself.

> With respect to the conduct of Defendant, Ronnie B. Cauley, you are instructed as follows:
>
> Section 52(b) of Article 6701d, Texas Civil Statutes, provides that in no event shall the driver of a vehicle pass to the right of another vehicle by driving off the main traveled portion of the roadway. Failure to comply with this law is negligence in itself.

The failure to give these instructions underlies appellant's seventh, eighth and ninth points of error, respectively.

Negligence per se is a tort concept whereby the courts adopt a legislatively imposed standard of conduct as defining the conduct of a reasonably prudent person. *Moughon v. Wolf*, 576 S.W.2d 603, 604 (Tex. 1977). The unexcused violation of a statute constitutes negligence as a matter of law if such statute was designed to prevent injury to the class of persons to which the injured party belongs. *Id.* (citing *Missouri P. R. R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex.1977)).

As a preliminary point, we note that the supreme court has held that a statute which requires a driver to proceed safely imposes on the driver a duty of reasonable care, thus precluding a *per se* instruction. *Knighten*, 976 S.W.2d at 675. The trial court therefore properly refused appellant's instruction on remaining on the right half of the road. We overrule appellant's eighth point of error.

Next, we note that appellant's live pleading at the time of trial had a section entitled "Negligence/Negligence Per Se." Under this section appellant listed violations of TEX. REV. CIV. STAT. ANN. Art. 6701d, §§166(b) and (c); 170; 171;185; 60(a); and 175. Appellant did not list violations of article 6701d, § 52. Because the requested instruction was not supported by the pleadings, we cannot say the trial court abused its discretion in refusing the relevant instructions. Appellant's seventh and ninth points of error are overruled.

In his tenth point of error appellant contends the trial court erred in refusing his requested instruction on appellant's duty to control his vehicle. The requested instruction read:

> With respect to the conduct of Defendant, Ronnie B. Cauley, you are instructed as follows:
>
> The driver of a vehicle shall keep the vehicle under control. "Under control" means that the driver, by the means at his command and by the use of ordinary care, should so lessen the speed of his vehicle or even stop the vehicle if necessary, so as to avoid the danger of a collision without injury to any person or thing he could have reasonably anticipated as probably being on the shoulder of the highway.

The trial court properly refused this instruction. Appellee owed appellant a duty of reasonable care under the circumstances, and this was defined in the jury charge. The charge did not include the phrase "under control." If a requested instruction does not refer to a particular term or issue in the charge, and could only be taken by the jury as applying to the case as a whole, the trial court does not abuse its discretion by refusing that requested instruction. *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696, (Tex. App.—Corpus Christi 1980, writ ref'd n.r.e.); *First State Bank & Trust Co. of Edinburg v. George*, 519 S.W.2d 198, 207 (Tex. App.—Corpus Christi 1975, writ ref'd n.r.e.). The *George* court went on to state:

> The only function of an explanatory instruction in the charge is to aid and assist the jury in answering the issues submitted. The only requirement to be observed is that the trial court must give definitions of legal and other technical terms. Nothing else, however interesting, or, indeed, however relevant to the case in general, which does not aid the jury in answering the issue, is required.

Id.; *see also Harris v. Harris*, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ ref'd n.r.e.). We therefore overrule appellant's tenth point of error.

VOIR DIRE ISSUES

In his twelfth point of error appellant complains about a comment made by the trial

court before the assembled venire. During voir dire, one of the veniremembers stated his understanding that the driver of any vehicle that ran into the rear of another vehicle was automatically at fault. Other members of the venire voiced similar perceptions. After calling counsel to the bench for a conference, the trial court stated:

> [L]adies and gentlemen, after consulting with counsel, I think it's incumbent upon the Court, since I am the one who determines the law in this courtroom, to inform the members of the jury panel that there is no law in the State of Texas that if you hit somebody in the rear you are automatically at fault. There is no statute, there is no law. So I want that to not be considered in this case. And with that we will continue voir dire.

Appellant characterizes this as a "charge of the venire" and contends that this charge was so prejudicial as to constitute a directed verdict in favor of appellee before the trial began. Our record contains no objection to this instruction. Having failed to present this matter to the trial court, and having failed to obtain a ruling, nothing is presented for our review.

In his thirteenth point of error appellant contends the trial court erroneously singled out certain panel members for challenge for cause by defendant. After bringing voir dire to a conclusion, the trial court excused jurors and then began the process of deciding challenges for cause:

> THE COURT: All right, counsel. I think we can agree to some of these. I think No. 1 said the magic words. Do y'all not agree?
>
> [APPELLANT'S COUNSEL]: I disagree.
>
> THE COURT: You what?
>
> [APPELLANT'S COUNSEL]: I disagree.
>
> THE COURT: Well, we'll bring her in. But what about No. 3? . . .

The court continued in this vein, essentially nominating several jurors which in the court's view had rendered themselves vulnerable to a challenge for cause. No juror was struck for cause until that juror was brought back into the courtroom for individual questioning, however. Finally, appellant's counsel objected to the procedure, and the trial court

stopped naming jurors.

The trial court has broad discretion with respect to voir dire. *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). To obtain a reversal, a complaining party must show that the trial court abused its discretion and that the error was calculated to cause and probably did cause the rendition of an improper judgment. TEX. R. CIV. P. 228.

We find that, on this record, appellant cannot show harm. Appellant's objection to the procedure being used by the judge brought immediate remedial action. Appellant did not then object to the jurors previously challenged for cause and did not move for a mistrial. None of the singled-out jurors were kept, or dismissed, without individual questioning by the attorneys. Finally, there is no allegation by appellant that he was prevented from shaping the jury to his liking, either through restrictions on questioning, on the number of strikes allotted, or that the jury pool was somehow tainted. *Cf. Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979). We therefore overrule appellant's thirteenth point of error.

Because of our disposition of appellant's other points of error, we need not consider his complaint about the failure to admit certain affidavits contained in his sixth point of error.

We therefore affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Lee, Cannon, and Draughn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*]Senior Justices Cannon, Draughn, and Lee, sitting by assignment.