**[J-22-2020] [MO: Wecht, J.]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**WESTERN DISTRICT**

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| FRANCIS G. GRAHAM, | : | No. 42 WAP 2019 |
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| Appellant | : | Appeal from the Order of the |
| | : | Superior Court entered March 19, |
| | : | 2019 at No. 909 WDA 2018, |
| v. | : | affirming the Judgment of the Court |
| | : | of Common Pleas of Allegheny |
| | : | County entered June 13, 2018 at |
| LARRY CHECK, | : | No. GD-16-020645. |
| | : | |
| Appellee | : | SUBMITTED: April 21, 2020 |

## DISSENTING OPINION

**JUSTICE DOUGHERTY** **DECIDED: DECEMBER 22, 2020**

The majority concludes the trial court's jury instruction regarding the sudden emergency doctrine was an error sufficiently severe to require a new trial. In reaching this conclusion, the majority re-weighs the evidence presented at trial and concludes the evidence, in its view, did not warrant the jury instruction. In addition, the majority goes beyond the question presented to "circumscribe" the use of the sudden emergency doctrine as a defense in the absence of a request to do so, or even advocacy on the point. *See* Majority Op. at 24-25 n. 53. As I disagree on both matters, I respectfully dissent.

The Court granted review of this narrow issue:

> When the Superior Court affirmed the trial court's jury instruction concerning the sudden emergency doctrine, did the court erroneously relieve the defendant motorist of his legal duty to a visible pedestrian in a crosswalk?

*Graham v. Check*, 218 A.3d 386 (Pa. 2019) (*per curiam*). As indicated in the question we accepted, our role here is limited to determining if there was prejudicial error in the jury instruction. The parties properly limited their advocacy to this question and neither party requested this Court to determine the continued viability of the sudden emergency doctrine.

The majority nevertheless goes beyond the question and arguments to decide *sua sponte* the sudden emergency doctrine is no longer a viable defense in the Commonwealth. *See* Majority Op. at 19 ("this case give[s] us cause and occasion to underscore that the sudden emergency doctrine should not be understood as a 'defense' in the common sense, and we find it ill-advised to use the word 'defense' in sudden emergency instructions in future cases, notwithstanding that the term features in the current suggested standard jury instruction."). The majority states its new rule is prospective in nature, and then simultaneously determines the factual record in this case did not warrant the instruction in any event. *See Id*. at 24 ("The evidence in this case left no reasonable basis upon which a jury could have found a sudden emergency. The trial court was incorrect in charging the jury otherwise."). These two holdings — (1) the sudden emergency doctrine is no longer a viable defense; and (2) the evidence was insufficient to support a jury instruction about the defense — undermine each other. If the instruction was improper because the record did not support it in this case, I fail to see the need to go further on the present record and briefing to hold a sudden emergency no longer provides a defense to any negligence claim brought in Pennsylvania.

Moreover, on the merits of the appeal actually before the Court, I disagree that the record did not support the trial court's decision to give an instruction on the sudden

emergency doctrine. Although the majority purports to apply the relevant scope and standard of review, it ultimately opts against providing any meaningful discussion of the trial court's exercise of discretion in charging the jury.

My review reveals the parties presented conflicting evidence of how the accident happened, and whether there was a sudden emergency. Graham's evidence at trial indicated he was visible in the crosswalk from fifty-four feet away and a reasonable motorist would have been able to see him and stop in a timely manner. Graham claims on this basis that Check's failure to anticipate a pedestrian in the intersection, and react in a manner to avoid hitting him, demonstrates Check breached his duty of care. Graham thus argues here that there was no "sudden emergency," the trial court erred in providing this jury instruction, and it was "**likely** the jury used the sudden emergency charge to ultimately find that Check was not negligent." Appellant's Brief at 25 (emphasis added).

Check's evidence at trial contradicted Graham's theory. Check and his witnesses testified he acted reasonably as he approached the intersection, and due in part to the presence of another vehicle driven by Joseph Millach in the lane next to him blocking his view, he was confronted by Graham's sudden appearance. Check presented unrebutted testimony that he had never previously encountered pedestrians in that intersection at that time in the morning, and there was insufficient lighting in the intersection. *See* N.T., 4/2/18 at 92. Millach himself also testified that at the time of the accident it was dark and cloudy, and Graham was very difficult to see because he was wearing dark clothing. *See id*. at 53, 57-58 & 72. Millach further testified he saw Graham only because he arrived at the intersection before Check did, while the traffic light was red. Millach explained Check

did not have the same view because he arrived at the intersection later, moving through the intersection after the traffic light turned green. *See id*. at 72.

Consistent with Millach's testimony regarding Check's limited view, Check testified he did not see Graham in the intersection until Graham was seven to ten feet in front of his car, and then he slammed on the brakes immediately, but was unable to stop. *See id.* at 95. The evidence presented at trial also established Check was operating his vehicle at a range of ten to eighteen miles per hour, well below the speed limit, as he moved through the intersection on the green light. *See id*. at 67-69; *see also* N.T., 4/3/18 at 185-187 (mechanical engineer expert testified Check was decelerating at the time of impact with a speed of fourteen to eighteen miles per hour). Additionally, the accident reconstruction expert concluded that, regardless of the distance Check was from the intersection "based on the factors in this case, [Check] would not have been able to reasonably detect, identify and stop his vehicle in order to prevent the impact with Mr. Graham." Videotaped Deposition of Andrew Rentschler, Ph.D., 3/23/18 at 63-64 (played at trial N.T., 4/3/18 at 168). Check's expert further opined: "Mr. Graham did not safely cross the intersection. Had he either waited for the pedestrian light or made sure that he started to cross the intersection when the light . . . just turned red, then he would have had sufficient time to pass the intersection without any vehicular traffic on the roadway." *Id*. at 64.[1]

[1] There was conflicting evidence regarding the exact rate of speed at which Check entered the intersection, but it is undisputed that he was driving under the speed limit. Check further testified he was "traveling within a speed so that [he could] stop within the range of his headlights." N.T. at 102. Check informed the police at the scene that he believed he was travelling at a rate of fifteen to twenty miles per hour at the time of the accident, and then upon later reflection, he stated he may have been going faster, twenty-

Based on the foregoing evidence, *i.e.*, that a moving pedestrian suddenly interjected himself in front of his vehicle, leaving him with little or no time to react, Check submits the jury was properly charged on sudden emergency. *See* Appellee's Brief at 18-19, *citing*, *Fitsko v. Gaughenbaugh*, 69 A.2d 76, 78 (Pa. 1949) (whether motorist's failure to see pedestrian in time to avoid collision "was due to a lack of due care or to a lack of opportunity because [the pedestrian] suddenly ran in front of" motorist's car was issue of fact to be determined by jury under proper instructions, including sudden emergency doctrine); *Forsythe v. Wohlfarth*, 209 A.2d 868, 871 (Pa. Super. 1965) (whether sudden emergency existed is question for jury).

We are "obligated to apply an abuse of discretion standard in reviewing a trial court's denial of a motion for a new trial, and may overturn the trial court's determination only if that court abused its discretion." *Grove v. Port Authority of Allegheny Cty*, 218 A.3d 877, 887 (Pa. 2019) (quotation and citation omitted). "[T]he trial court has broad discretion in phrasing the [jury] instructions, so long as the directions given 'clearly, adequately, and accurately' reflect the law." *Id*., *quoting Commonwealth v. Lesko,* 15 A.3d 345, 397 (Pa. 2011). "Error in a charge is sufficient ground for a new trial, if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue." *Grove*, at 887-88 (quotation and citation omitted).

In the present case, the trial court charged the jury in relevant part as follows:

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five to thirty miles per hour. *Id.* at 112-114. It is, of course, "the fact-finder's province to weigh the evidence, determine the credibility of witnesses, and believe all, part, or none of the evidence submitted." *Commonwealth v. Cooper*, 941 A.2d 655, 662 (Pa. 2007). In this case, the jury found Check was not negligent, and we may not disregard those findings given their support in the record. *See K.H. v. J.R.*, 826 A.2d 863, 875 (Pa. 2003) (jury verdict may not be disturbed simply because there is conflicting evidence or because court would have reached a different conclusion).

> Vehicular traffic facing a circular green signal may proceed straight through or turn right or left, unless a sign at such place prohibits either such turn except that vehicular traffic, including vehicles turning right or left, shall yield the right-of-way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time of the signal is exhibited.
>
> That's Pennsylvania law.
>
> If you find that Larry Check violated this law, you must find that Larry Check was negligent.
>
> If you find that Larry Check did not violate this law, then you must still decide whether Larry Check was negligent because he failed to act as a reasonably careful person would have under the circumstances established by the evidence in this case.
>
> In this case, Larry Check claims he is not liable for Francis Graham's harm because he faced a sudden emergency and responded reasonably according to the circumstances.
>
> In order to establish this defense, Larry Check must prove to you all of the following:
>
> 1. Larry Check faced a sudden emergency requiring immediate responsive action.
>
> 2. Larry Check did not create the sudden emergency.
>
> 3. Larry Check's response to the sudden emergency was reasonable under the circumstances.
>
> Larry Check must prove that defense by a preponderance of the evidence.
>
> That is also Pennsylvania law.

N.T., 4/5/18 at 381-383 (providing standard jury instruction on Sudden Emergency, PA-SSJI (Civ), § 13.230). There is no dispute that the charge as given aligns with Pennsylvania's standard jury instructions on the duty of a motorist to yield to a pedestrian in an intersection or adjacent crosswalk, and the sudden emergency doctrine. The court specifically instructed the jury that if they found Check did not properly yield to a pedestrian in the intersection or adjacent crosswalk, they "must find that Larry Check was negligent." *Id*. at 382. The jury, after hearing these instructions, found Graham was not negligent based on the evidence presented to them.

The majority does not engage these circumstances in the context of the applicable standard of review. The majority offers instead its alternative view that there is no sudden emergency when a pedestrian "departs the curb with the signal in his favor, moves at an ordinary pace within a crosswalk at a busy intersection, and is struck when he has crossed three of four lanes at a steady pace". Majority Op. at 24. Essentially, the majority holds on the basis of its own fact finding that the trial court erred in charging the jury on the sudden emergency doctrine.[2]

In addition to making alternative findings and conclusions in violation of the applicable standards of review, the majority answers a different question than the one we allowed. We need only determine whether, on the present record, the sudden emergency instruction was properly given. But the majority recasts the issue before the Court as

[2] For example, the majority credits Graham's testimony that he was visible to Check at a distance of fifty-four feet. *See* Majority Op. at 10 & n. 28. However, Check, his experts, and Millach all testified Graham was visible to Check only as Check approached the intersection, a distance of seven to ten feet. In addition, despite the evidence presented that Check was driving ten to eighteen miles per hour, the majority concludes the facts do not support a sudden emergency because Check was driving at a faster rate of twenty-five miles per hour. *See id*. at 22. Further, the majority disregards the evidence presented by the accident reconstruction expert who opined that, regardless of the distance Check was from the intersection or the rate Check was driving, under the circumstances, Check was unable to see Graham and stop his vehicle in time to prevent impact. *See* Videotaped Deposition of Andrew Rentschler, Ph.D., 3/23/18 at 63-64 (played at trial, N.T. 4/3/18 at 168). The majority thus implicitly rejects the jury's verdict as if it were "so contrary to the evidence as to shock one's sense of justice" and not simply based on conflicting evidence the jury resolved in favor of Check. *See, e.g.*, *Armbruster v. Horowitz*, 813 A.2d 698, 703 (Pa. 2002) ("new trial should be granted only in truly extraordinary circumstances, *i.e.*, 'when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.'"), *quoting Commonwealth v. Brown*, 648 A.2d 1177, 1189 (Pa. 1994) (emphasis and additional citations omitted).

whether the sudden emergency doctrine is a viable defense at all, and proceeds to decide this new question instead.

On the question before us, my review of the record reveals no prejudicial error to warrant a new trial. After being properly charged, the jury specifically answered the first question on the verdict slip — "Was [appellee], Larry Check, negligent?" — in the negative. As a result of this initial determination, the jury did not answer any additional questions on the verdict slip. The jury was extensively charged on negligence generally as well as the duty of motorists to yield the right-of-way to pedestrians within an intersection or in an adjacent crosswalk as well as the sudden emergency doctrine, and we cannot discern on what specific basis the jury found Check was not negligent. As I would not venture to abrogate the sudden emergency doctrine in this case, and I find no error in the decision to deny a new trial on this record, I would affirm the Superior Court.[3] Justice Baer joins the opinion.

[3] Given the fact-bound nature of this case, and that the petition for allowance of appeal presented matters of error correction only, in my view, appeal was improvidently granted.