**[J-22-2020]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**WESTERN DISTRICT**

**SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.**

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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 |

**OPINION**

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

Pennsylvania tort law recognizes that sometimes injurious accidents are not caused by carelessness, but because events conspire to create a situation so urgent and unexpected that the person alleged to be blameworthy had little or no practical opportunity to avert the harm. When the evidence suggests that such "sudden emergencies" may have played a role in a case, the presiding judge may instruct a jury that, should it determine that such an emergency contributed to the accident, it should assess the defendant's performance commensurately. But since the advent of the automobile, Pennsylvania law also has imposed a heightened standard of care upon drivers to exercise particular vigilance when it is reasonably foreseeable that a pedestrian will cross their path, particularly at intersections. The case now before us involves such a scenario. Citing darkness, an obstructed view, and a want of evidence of any overtly careless

behavior by the driver, the trial court in this case charged the jury on sudden emergency—the pedestrian's ostensibly abrupt appearance in front of the driver mere moments before impact. We hold that the trial evidence failed to establish a foundation for that instruction here. The decision to charge the jury on sudden emergency was prejudicial error in this case, and the plaintiff is entitled to a new trial.

In the Borough of East Pittsburgh, Center Avenue, running east-west, forms a T intersection with Route 30, which runs north-south. The stem of the T runs west from the intersection, and across Route 30 from that stem. At the top of the T, there is a bus stop. Just southwest of the intersection there is a gas station. The intersection is signaled, but the only artificial light in the vicinity of the intersection is cast by the gas station and its sign.

Just before 6:00 a.m. on March 8, 2016, Francis Graham crossed Route 30 from the southwest corner of the intersection to the bus stop, intending to catch a local bus to downtown Pittsburgh, where he planned to board a Greyhound bus to Cleveland. After arriving at the bus stop, he realized that he did not have exact fare, so he decided to cross the highway to the gas station to get change. There was a pedestrian signal, but Graham did not activate it. Instead, observing that the signal for cross-traffic was red, and after confirming that oncoming traffic from the south was stopping for the signal,[1] Graham, who was wearing dark clothing, began his crossing in the marked crosswalk at an ordinary rate of speed.

[1] Graham testified that traffic approaching from that direction often came around the curve immediately south of the intersection at relatively high speed, requiring extra caution to ensure that none of the northbound traffic would fail to observe the red light and proceed through the intersection during Graham's crossing.

As Graham crossed, Larry Check was approaching the intersection on Route 30 from the north. From Graham's perspective as he crossed the highway, Check was traveling in the farthest of four lanes, but Graham did not see him during the first part of his crossing. Another car, driven by Joseph Millach, waited southbound in the third lane for the signal to change. The signal turned green when Graham had reached or was somewhat past Route 30's centerline, at least partially obscured from Check's view by Millach's car as Check rolled toward the intersection on Millach's right side. Check was slowing for the signal, but the light turned green before he stopped, and Check began to accelerate, passing Millach and entering the intersection at between fifteen and thirty miles-per-hour.[2] On the far side of the intersection, in the fourth lane from the bus stop, Check struck Graham with his car. Check testified that he applied the brakes as quickly as he could upon seeing Graham, but that he first saw Graham at a distance of only seven to ten feet. Check was unsure whether he began braking before or just after he struck and severely injured Graham with the left-front portion of his car. Graham testified that he did not see Check's car until just before it struck him.

Graham filed a negligence suit against Check, and the case was tried before a jury. Over Graham's objection, the trial court granted Check's request to include the sudden emergency doctrine in its jury charge, instructing the jury as follows:

> In this case, Check claims he is not liable for Graham's harm because he faced a sudden emergency and responded reasonably according to the circumstances. In order to establish this defense, Check must prove to you all of the following:

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[2] Although testimony varied somewhat regarding Check's pace as he passed Millach and when he collided with Graham, at trial Check testified that he accelerated into the intersection and struck Graham at as much as thirty miles-per-hour. *See infra* n.45.

> 1. Check faced a sudden emergency requiring immediate responsive action.
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> 2. Check did not create the sudden emergency.
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> 3. Check's response to the sudden emergency was reasonable under the circumstances.
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> 4. Check must prove that defense by a preponderance of the evidence.[3]

Aside from this instruction, the substantive portion of the trial court's charge provided only the general definition of negligence,[4] the outlines of contributory negligence and apportionment of liability under comparative negligence principles,[5] and the following instruction regarding the right-of-way at signaled intersections:

> 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 [*sic*] the signal is exhibited.[6]

The jury returned a defense verdict, the trial court denied Graham's post-trial motions, and Graham appealed to the Superior Court.

Graham argued there that the trial court erred in charging the jury on the sudden emergency doctrine because Check was familiar with the road, Graham was in the crosswalk at an intersection, and Check had a duty to anticipate the presence of a

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[3] *See Graham v. Check*, 909 WDA 2018, 2019 WL 1276313, at *3 (Pa. Super. Mar. 19, 2019) (memorandum) (quoting Notes of Testimony, 4/2-5/2018, at 382-83 (hereinafter "N.T.")). This instruction was taken verbatim from PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 13.230.

[4] *See* N.T. at 367-70.

[5] *See id.* at 370-73; 42 Pa.C.S. § 7102 ("Comparative negligence").

[6] N.T. at 381-82.

pedestrian in a crosswalk. In short, Graham argued that Check experienced nothing that a reasonably prudent driver would not have anticipated, so that any sudden emergency necessarily was of Check's own creation, disqualifying him from the benefit of the instruction.

In our most recent decision involving the sudden emergency doctrine, this Court described the doctrine as follows:

> The sudden emergency doctrine . . . is available as a defense to a party who suddenly and unexpectedly finds him or herself confronted with a perilous situation which permits little or no opportunity to apprehend the situation and act accordingly. The sudden emergency doctrine is frequently employed in motor vehicle accident cases wherein a driver was confronted with a perilous situation requiring a quick response in order to avoid a collision. The rule provides generally, that an individual will not be held to the "usual degree of care" or be required to exercise his or her "best judgment" when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the doctrine. The rule recognizes that a driver who, although driving in a prudent manner, is confronted with a sudden or unexpected event which leaves little or no time to apprehend a situation and act accordingly should not be subject to liability simply because another perhaps more prudent cause of action was available. Rather, under such circumstances, a person is required to exhibit only an honest exercise of judgment. The purpose behind the rule is clear: a person confronted with a sudden and unforeseeable occurrence, because of the shortness of time in which to react, should not be held to the same standard of care as someone confronted with a foreseeable occurrence. It is important to recognize, however, that a person cannot avail himself of the protection of this doctrine if that person was himself driving carelessly or recklessly.[7]

The burden of establishing a sudden emergency lies with the party asserting it.[8] The Superior Court thus has held that, "where the evidence leaves some doubt as to whether

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[7] *Levey v. DeNardo*, 725 A.2d 733, 735-36 (Pa. 1999) (quoting *Lockhart v. List*, 665 A.2d 1176, 1180 (Pa. 1995)).

[8] *See Chadwick v. Popadick*, 159 A.2d 907, 909 (Pa. 1960).

an emergency situation existed," the matter must be resolved by a jury.[9] Nonetheless, "if the emergency itself could have been avoided by the exercise of reasonable care . . . that doctrine cannot be invoked."[10]

Counterposed against this doctrine in the context of a pedestrian strike is the bedrock principle that a driver bears a heightened duty of care relative to pedestrians crossing at intersections.[11] Thus, we have held:

> It is the duty of the driver of a motor vehicle at all times to have his car under control, and having one's car under control means having it under such control that it can be stopped before doing injury to any person in any situation that is reasonably likely to arise under the circumstances. A pedestrian has the right of way at an intersection. The driver of a vehicle is under a duty to anticipate the presence of a pedestrian at an intersection and control his vehicle so that no harm will result. Motorists are under a duty to exercise a very high degree of care at intersections. They must be able to stop at the slightest sign of danger.[12]

"At street crossings drivers must be highly vigilant and maintain such control that they can stop their cars on the shortest possible notice. It is the highest duty of motorists. The

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9 *Drew v. Work*, 95 A.3d 324, 330 (Pa. Super. 2014) (quoting *Buchecker v. Reading Co.*, 412 A.2d 147, 155 (Pa. Super. 1979)).

10 *Downer v. Rymorowicz*, 154 A.2d 179 (Pa. 1959).

11 As suggested in our above recitation of the trial court's instruction, that court did not charge the jury regarding this principle, notwithstanding that the court alluded generally to a driver's obligation to "yield the right-of-way to . . . pedestrians lawfully within the intersection or an adjacent crosswalk." N.T. at 381. Graham does not challenge the court's decision in this particular, but because we are obligated to evaluate the instruction as a whole, *see Levey*, 725 A.2d at 735, and because this case hinges upon the burden of care imposed upon the driver, we must evaluate the fitness and effect of the sudden emergency instruction in the context of the jury charge taken as a whole.

12 *Lane v. Samuels*, 39 A.2d 626, 627 (Pa. 1944) (cleaned up) (citing *Sweet v. Rounds*, 36 A.2d 815 (Pa. 1944); *Maselli v. Stephens*; 200 A. 590 (Pa. 1938); *Goodall v. Hess*, 172 A. 693 (Pa. 1934); *Galliano v. E. Penn Elec. Co.*, 154 A. 805 (Pa. 1931); *Johnston v. Cheyney*, 146 A. 551 (Pa. 1929); *Gilles v. Leas*, 127 A. 774 (Pa. 1925)).

pedestrian has the right of way."[13] "[I]t is the presence of the intersection, not the position of someone therein, which determines the care required of the approaching drivers. This duty applies whether it is a dead-end intersection or a complete intersection."[14]

The Superior Court in this case correctly observed that, when confronted with a question concerning a motorist's negligence in striking a pedestrian, the operative question "is not whether a motorist saw the pedestrian before impact, but whether the motorist *should* have seen the pedestrian before impact."[15] The court continued, "[t]hus, while a motorist has a duty to look out for a pedestrian who may be crossing at an intersection, he also may benefit from the sudden emergency doctrine if the pedestrian appears in a crosswalk in such a fashion that it presents an emergency to the motorist."[16] The court then reviewed the events described above, and determined that the sudden emergency jury instruction was warranted because the evidence created a question of fact as to whether Graham "suddenly appeared" before Check. Accordingly, the Superior Court found that the trial court did not err or abuse its discretion in so charging the jury.

Graham sought review in this Court, contending that the Superior Court erred in upholding the trial court's jury charge. We granted allowance of appeal to determine whether the trial court "erroneously relieve[d] the defendant motorist of his legal duty to a visible pedestrian in a crosswalk?"[17]

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13 *Smith v. Wistar*, 194 A. 486, 487 (Pa. 1937).

14 *Zernell v. Miley*, 208 A.2d 264, 265-66 (Pa. 1965).

15 *Graham*, 2019 WL 1276313, at *3 (citing *Forsythe v. Wohlfarth*, 209 A.2d 868, 870-71 (Pa. Super. 1965)) (emphasis added).

16 *Id.* at *3.

17 *Graham v. Check*, 218 A.3d 386 (Pa. 2019) (*per curiam*).

A trial court should charge the jury only as to legal principles for which there is some factual foundation in the record.[18]

> In examining jury instructions, our scope of review is limited to determining whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. 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. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled . . . . In reviewing a trial court's charge to the jury we must look to the charge in its entirety. Because this is a question of law, this Court's review is plenary.[19]

"[I]t is not the function of the trial court in charging a jury to advocate, but rather to explain the principles of law which are fairly raised under the facts of a particular case so as to enable the jury to comprehend the questions it must decide."[20]

Even when we find error in a jury charge, we grant relief only when we determine that the error was prejudicial to the objecting party.[21] "The harmless error doctrine underlies every decision to grant or deny a new trial. . . . [T]he moving party must demonstrate . . . that she has suffered prejudice from the mistake."[22] We have employed the phrase "probably misled" in describing prejudice,[23] observing that "the standard of

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18 *See Levey*, 725 A.2d at 735.

19 *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1069-70 (Pa. 2006) (cleaned up).

20 *Lockhart*, 665 A.2d at 1179.

21 *Price v. Guy*, 735 A.2d 668, 670 (Pa. 1999).

22 *Grove v. Port Auth. of Allegheny Cty.*, 218 A.3d 877, 888 (Pa. 2019).

23 *Price*, 735 A.2d at 670-71 ("Error will be found where the jury was probably misled by what the trial judge charged or where there was an omission in the charge which amounts to a fundamental error." (footnote omitted)); *accord Grove*, 218 A.3d at 887-88 (quoting *Stewart v. Motts*, 654 A.2d 535, 540 (Pa. 1995)) ("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.").

review for a faulty jury charge must be expressed in terms of probabilities, as there is simply no way to determine whether a jury was, in fact, misled."[24] When an appellate court finds prejudicial error, the proper remedy is the award of a new trial.[25]

According to materially undisputed trial testimony, when Check crossed the stop bar—the bold line designating where the driver should stop when the signal is red—he had pulled abreast of Millach, whose car then no longer obscured Check's view. Thus, Graham argues, had Check been appropriately vigilant, he would have had an unobstructed view of Graham at a distance of no fewer than the fifty-four feet separating the stop bar at the intersection from the opposite crosswalk. But Check testified that he did not see Graham until he was seven to ten feet away, far too late to prevent the collision. While the lower courts accepted this assertion, among other things, as sufficient grounds to charge the jury on a sudden emergency, Graham argues that these two undisputed points militated *against* giving the instruction, and that the trial court erred and abused its discretion in departing from the long line of cases that have recognized and reinforced the heightened duty drivers owe to pedestrians who have the right of way and that limit the circumstances in which a driver will have recourse to the sudden emergency doctrine.

Check, like the lower courts, relies primarily upon the fact that, in the moments before he struck Graham, he was following the law and not driving carelessly. He entered

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[24] *Price*, 735 A.2d at 671 n.4; *cf. Grove*, 218 A.3d at 900 (Saylor, C.J., dissenting) ("[The prejudice inquiry] shouldn't be an onerous one. Where appellate courts cannot express confidence that an outcome would have been the same in the absence of a preserved trial error, the courts ought to be more receptive to the position that errors are prejudicial.").

[25] *See Passarello v. Grumbine*, 87 A.3d 285, 296 (Pa. 2014).

the intersection at a speed well below the posted limit and with the signal in his favor, and his attention was not diverted from the road ahead. Far from creating the emergency, he was "unexpectedly and suddenly confronted with the appearance of Graham in his lane of travel."[26] Check thus contends that evidence of record provided support for each of the factors that a jury must find to determine that a driver was confronted with a sudden emergency.

With regard to the first factor required to establish a sudden emergency, the question is whether the driver "faced a sudden emergency requiring immediate responsive action." Check argues that "testimony elicited at trial proved that Graham walked right in front of Check's vehicle," and that "all the evidence demonstrates that Graham was within Check's assured clear distance when he entered Check's lane."[27] Regardless of whether Check first saw Graham at a distance of fifty-four feet or at a distance of seven to ten feet, his sudden appearance left Check insufficient time to brake or to take evasive action.[28]

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[26] Brief for Check at 11.

[27] *Id*. at 12. The "assured clear distance ahead" rule, derived from the common law, has been codified in the Vehicle Code. *See* 75 Pa.C.S. § 3361 ("Driving vehicle at safe speed") ("No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. . . .").

[28] The expert testimony in this case relied implicitly upon the premise that braking was always Check's only option. In turn, this entailed detailed, competing opinions regarding visibility, speed, distance, and reaction times specifically with respect to braking. Wholly absent was any discussion of whether, if Check had seen Graham at a distance of fifty-four feet, he might have swerved to avoid Graham and, also to that point, whether the reaction time necessary to detect the necessity of braking and to move one's foot to the brake pedal is similar to the reaction time required to turn the steering wheel, which the driver already has in his grasp.

The second requirement of the doctrine is that the party invoking it "did not create the sudden emergency." Here, Check observes that the trial evidence established that an alert driver would still require at least a second and a half after observing Check to begin braking, and that during that brief period a car traveling at twenty to twenty-five miles-per-hour would travel those fifty-four feet, closing the distance to Graham before braking commenced. Check then focuses upon what he calls Graham's "many ill-considered decisions," including his failure to activate the pedestrian signal, and his failure to observe Check's approach and adjust the pace of his crossing accordingly.[29] "The totality of the evidence," Check argues, "demonstrated that [Graham] was not looking, was not hurrying, and was in effect practically loitering in the crosswalk as Check's vehicle entered the intersection."[30]

As to the third factor, Check argues that his response to events—or his failure to respond before the collision—was reasonable. In effect, Check asserts that the surrounding circumstances, in particular Graham's decisions and movements, made the collision inevitable, through no fault of Check's own.

Check offers little supporting case law, instead narrowly disputing Graham's treatment of a pair of cases, only one of which was decided by this Court, which also is the only one of the two that squarely addresses the sudden emergency doctrine.[31] That case arguably is the most analogous case to the one now before us, so we begin there.

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29 Brief for Check at 14-15.

30 *Id.* at 15-16.

31 The first of these, discussed at length below, is *Maselli v. Stephens*, 200 A. 590 (Pa. 1938). The other, which played heavily into the Superior Court's decision but has little relevance to our analysis, is the Superior Court's own decision in *Forsythe*, 209 A.2d 868. That case involved a car-pedestrian collision at an intersection, and the court opined

In *Maselli*, the plaintiff crossed a road at an intersection. The road's center section was paved, and the pavement was bracketed by gravel shoulders. Before leaving the curb, the plaintiff checked for traffic in both directions and observed none. When she reached the edge of the paved strip, she again saw no traffic, and she repeated that operation with the same result when she reached the road's mid-point. But as she neared the far curb of the road, the defendant struck her with his vehicle. The collision happened after dark, but the intersection was illuminated by an overhanging light across the street from the point of the collision. The defendant was driving approximately twenty-five miles-per-hour when he entered the intersection, and his low-beam headlights illuminated the road before him to a distance of about thirty feet. He testified that he first saw the plaintiff when she was ten to fifteen feet ahead of him, and that his speed and proximity to the plaintiff when he first saw her left no time to avoid striking her with his car.

The defendant argued that the plaintiff was contributorily negligent, which, were it established, would have been a complete bar to recovery under the law at that time. Defendant sought a variation on the sudden emergency instruction—"A driver of a vehicle is not bound to anticipate unexpected acts of persons not in their path of travel placing themselves there"—but the trial court denied the request.[32] This Court found no error:

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broadly that "[w]hether a driver's failure to discover the presence of the deceased in time to avoid the accident was due to a lack of due care, or whether . . . lack of opportunity to so observe because the deceased suddenly appeared in front of the driver, presents an issue of fact to be determined by the jury under proper instructions." *Id.* at 871. But what the court did not do in that case was comment upon what instructions would be "proper" under that circumstance. Graham never asked the court to take the question of due care from the jury's purview entirely. He challenges only the trial court's decision to issue a sudden emergency instruction. Accordingly, *Forsythe* has little to say on the narrow question before us.

[32] *Maselli*, 200 A. at 591.

> There is no testimony in the record to support [the defendant's] assertion that [the] plaintiff stepped into the path of his oncoming automobile. On the contrary, the defendant admits that he failed to see plaintiff until she was well within the intersection, and past the macadam portion of the highway. If he had been on the alert and had exercised the degree of care required of motorists at intersections, he would have observed her presence there in sufficient time to avoid striking her. The fact that he had failed to see her at any time until she appeared immediately in front of his car, and that he had entered upon the intersection without reducing speed, although it was dark and his vision was restricted to a range of thirty feet ahead, convince us that not only did he fail to approach the crossing with the necessary watchfulness, but that he showed a reckless disregard for the safety of pedestrians lawfully upon the crossing.[33]

The ways in which this case echoes *Maselli* are self-evident, and it is upon these resonances that Graham relies.

Check labors mostly in vain to distinguish *Maselli*. He is correct, of course, that in this case there was a visual obstruction that delayed Check's ability to see Graham, but no similar physical obstruction in *Maselli*. Moreover, in *Maselli*, the plaintiff repeatedly checked for traffic as she crossed, while Graham did not. And finally, the *Maselli* intersection was illuminated by a street light, while the intersection in this case was illuminated only by the ambient light cast by the gas station.

But there are critical details in *Maselli* that resist Check's efforts to distinguish that case. Although there was no visual obstruction in *Maselli* akin to Millach's car in this case, the *Maselli* Court nonetheless assumed that the driver had only limited visibility consistent with the thirty-foot range of his headlights—and this in spite of the presence of one streetlight on the opposite corner from the plaintiff's crossing. And far from finding that this required a sudden emergency instruction or militated in the defendant's favor, this Court specifically cited limited visibility in observing that the defendant "fail[ed] to

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[33] *Id*. at 591-92.

approach the crossing with the necessary watchfulness," and "showed a reckless disregard" for the safety of the lawfully-crossing pedestrian. In this Court's estimation, the various factors limiting the defendant's field of view did not render him less blameworthy. Rather, his failure to adapt to them made him more so.

Check's emphasis on the fact that Graham, unlike the victim in *Maselli*, failed to check for cross-traffic as he crossed the road is immaterial. Whether Graham might have avoided harm had he been more attentive to traffic bears only upon the question of his contributory negligence, not upon what standard should be applied in assessing Check's alleged failure to exercise reasonable care. To determine whether the evidence clearly demonstrated that any emergency was foreseeable and thus was a consequence of Check's own conduct entails examining only what can be gleaned regarding Graham's movement toward and then into Check's lane of travel, which is unaffected by where Graham cast his gaze as he crossed the highway. As a driver approaching an intersection, Check's obligation to be vigilant existed independently of Graham's own putative failure to be more watchful. While Graham's alleged carelessness is relevant to his share of responsibility for his harm, only his movement across the intersection bears upon the applicability of the sudden emergency doctrine, which by its nature must be assessed from the perspective of the party invoking it.

The standard instruction administered in this case calls for the jury to ask whether the party in question "create[d] the 'sudden emergency.'" But this Court, problematically, has cast the question of "*creating*" the sudden emergency as, itself, an inquiry into negligence: "The rule applicable here is that negligence may not be implied where one, because of the shortness of time in which to form judgment *in an emergency not created*

*by his negligence*, fails to act in the most judicious manner."[34] It is difficult to read this as anything but tautological: the sudden emergency doctrine's proponent will be granted the benefit of the instruction, which aims to affect the jury's measure of the alleged negligence, only if he or she did not *negligently* create the emergency—the proponent is not negligent if he or she was not negligent.

Observing this analytic difficulty, some courts have determined that the introduction to the law of modern principles of comparative fault and the apportionment of liability have rendered the sudden emergency doctrine obsolete.[35] The theory is that contemporary standards provide an independently sufficient rubric for juries to allocate liability between a plaintiff and defendant based upon their relative responsibility for the harm under all the circumstances, from which a specialized instruction can only detract.[36]

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[34] *Noll v. Marian*, 32 A.2d 18, 19 (Pa. 1943) (emphasis added); *see Polonofsky v. Dobrosky*, 169 A. 93, 93-94 (Pa. 1933) (citing *Wilson v. Consolidated Dressed Beef Co.*, 145 A. 81 (Pa. 1929)) (same); *see also Lockhart*, 665 A.2d at 1180 ("[A] person cannot avail himself of the protection of this doctrine if that person was himself driving carelessly or recklessly.").

[35] *Amicus Curiae* The Pennsylvania Association for Justice has submitted a thoughtful brief in support of Graham, in which it presents detailed arguments and authorities in favor of abolishing the sudden emergency doctrine entirely. While we review case law and commentary to that effect as a way of advancing the law of Pennsylvania, we decline at this time to rule so expansively. Graham himself has not sought such a broad ruling, and we lack party advocacy on that wider question. Our consideration of any frontal attack on the doctrine must await a more suitable case.

[36] Former Chief Justice Flaherty once expressed misgivings about the practice of artificially increasing or diminishing a party's duty of care:

> We are not insensible to the argument that the concept of degrees of care suffers from some of the same infirmities as the concept of degrees of negligence, viz., the difficulty of instructing the jury on the precise meaning of these terms and the difficulty of even being able to define the terms ourselves, at least in the abstract. It has been ably argued, for instance, that there is, in fact, no difference between reasonable care and the highest practicable care:

The Mississippi Supreme Court, for example, has explained:

> The hazard of relying on the doctrine of "sudden emergency" is the tendency to elevate its principles above what is required to be proven in a negligence action. Even the wording of a well-drawn instruction intimates that ordinary rules of negligence do not apply to the circumstances constituting the claimed "sudden emergency." . . . In this Court's opinion, the same rules of negligence should apply to all circumstances in a negligence action and these rules of procedure adequately provide for instructions on negligence. This Court indicated its disfavor of the 'sudden emergency' doctrine as early as 1951 in the case of *Jones v. Dixie Greyhound Lines*, 50 So.2d 902 (Miss. 1951), where it was said:
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> > The emergency rule is not an exception to the general rule requiring reasonable care. The existence of an emergency is simply one of the circumstances contemplated by the normal standard of care, in seeking to ascertain whether the defendant acted as an ordinarily prudent and careful person would have done under the same circumstances. Where an actor is confronted with a sudden emergency, the law does not require of him more than it is

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> > [B]etween care as great as reasonable prudence requires and care as great as is practicable, no one but a juryman is authorized to say that there is any difference at all. In an Illinois case, it was said that carriers whose employees "have to act in a sudden emergency" are to be judged "by the standard of what a prudent person would have been likely to do under the same circumstances." If in an emergency it is only practicable to take reasonable care, is it not also true that where there is time to deliberate it is only reasonable to take all practicable care? Is it ever practicable to use more care than one reasonably can; or is it ever reasonable to use less? Would a thoughtful and conscientious man take less care than it was reasonably practicable to take? Is justice or policy satisfied with less? If the answer to these questions is no, then there is no difference between the two modes of instruction [reasonable care and the highest practicable care] . . . .
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> Frederick Green, *High Care and Gross Negligence*, 23 ILL. L. REV. 4, 10 (1928). Another way to make this argument might be to say that where it makes sense to take any care at all, the care that should be taken will depend upon the circumstances (*e.g.*, the risks, the precautions available, the costs of such precautions), and, therefore, there is no such thing as slight care, or ordinary care, or great care in the abstract.

*Ferrick Excavating & Grading Co. v. Senger Trucking Co.*, 484 A.2d 744, 749-50 (Pa. 1984) (citation modified).

> reasonable to expect of him under the circumstances which confront him. Although the actor cannot be held to the same standard of conduct as one who has had an opportunity to reflect, this does not mean that any different standard is to be applied in an emergency. The conduct required is still that which is reasonable under the circumstances.[37]

The court went on to quote the Oregon Supreme Court to similar effect, and various courts and commentators have made similar observations.[38]

A majority of jurisdictions nonetheless retain the sudden emergency doctrine in some form.[39] In *Ebach v. Ralston*, the Supreme Court of North Dakota explained:

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[37] *Knapp v. Stanford*, 392 So.2d 196, 198-99 (Miss. 1980) (cleaned up).

[38] *See id*. at 199 (quoting *Jones v. Mitchell Bros. Truck Line*, 511 P.2d 347 (Or. 1973)) ("The usual instructions on negligence sufficiently cover what a reasonably prudent person would do under all the circumstances, including those of a sudden emergency." (cleaned up)); *see generally* Scott Andrew Irby, Case Note, Wiles v. Webb*: The Abrupt End of the Sudden Emergency Doctrine in Arkansas*, 51 ARK. L. REV. 833 (1998) (surveying jurisdictions and cases criticizing and/or abolishing the sudden emergency doctrine as incompatible with a comparative fault approach); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 9, Reporters' Note to cmt. c (noting several state supreme courts that have rejected giving emergency instructions in favor of "a more general instruction that looks to the conduct of the reasonably careful person in all the circumstances"; others that "have sharply restricted the instruction's use," citing *Herr v. Wheeler*, 634 S.E.2d 317, 320 (Va. 2006) (retaining the doctrine but urging courts to use "particular care when determining whether to grant a sudden emergency instruction because . . . it has the tendency to afford a jury an easy way of avoiding instead of deciding the issue made by the evidence in the case" (cleaned up)); and citing *Herr*, *supra*, in which the Court held that an emergency instruction may not be employed "when the emergency condition is one that could have been anticipated" (quotation from the Reporters' description)).

[39] *See Moran v. Atha Trucking, Inc.*, 540 S.E.2d 903 (W.V. 1997) (surveying jurisdictions that have abolished the sudden emergency instruction in favor of a pure comparative negligence standard; or retained it subject to cautionary notes that it should be used sparingly (and/or never in automobile cases); or preserved as an apt *complement* to comparative negligence); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 9, Reporters' Note to cmt. c (observing that "a majority of courts have continued to accept the practice of instructing on emergency," and collecting cases). In our survey of decisional authorities, *Moran*'s review of the state of the tort law as of 1997 appears especially thorough.

> The rationale for the standard of ordinary care under the circumstances of an emergency is well established for negligence actions. Yet, we share some of the concerns of courts that have criticized the use of a separate sudden emergency instruction in negligence actions.[40] Those criticisms are underscored in automobile accident cases when there is reason to believe a sudden emergency may have been created by a driver's negligent failure to anticipate common driving experiences. As Prosser and Keeton on Torts at § 33 suggest[s], under present day traffic conditions, an automobile driver must be prepared for the sudden appearance of obstacles and persons on highways and at intersections.
>
> However, we believe carefully drafted instructions about a driver's standard of ordinary care under the circumstances of an emergency, coupled with instructions about the driver's standard of ordinary care before the emergency arose, give adequate guidance to the jury and latitude to the parties to argue that a sudden emergency may have been caused by the driver's lack of prior care and should have been anticipated. Carefully drafted instructions about these situations direct a jury to assess fault for deviations from the negligence standard of ordinary care under emergency circumstances and are consistent with the assessment of fault under comparative negligence.[41]

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[40] Here, the court cited *Weiss v. Bal*, 501 N.W.2d 478 (Iowa 1993); *Templeton v. Smith*, 744 P.2d 1325 (Or. App. 1987); *DiCenzo v. Izawa*, 723 P.2d 171 (Haw. 1986); *Gagnon v. Crane*, 498 A.2d 718 (N.H. 1985); and *Bayer v. Shupe Bros. Co.*, 576 P.2d 1078 (Kan. 1978).

[41] *Ebach v. Ralston*, 510 N.W.2d 604, 610 (N.D. 1994)(cleaned up). Some jurisdictions restricting but not abolishing the use of the instruction have either discouraged it or circumscribed it significantly. *See Lyons v. Midnight Sun Transp. Servs., Inc.*, 928 P.2d 1202, 1206 (Alaska 1996) ("We believe that the sudden emergency doctrine is a generally useless appendage to the law of negligence. . . . Thus, barring circumstances that we cannot at the moment hypothesize, a sudden emergency instruction serves no positive function. . . . Therefore, we hold that it should not be used unless a court finds that the particular and peculiar facts of a case warrant more explanation of the standard of care than is generally required."). With respect to *Ebach* and this case generally, we note that several jurisdictions have held that the risks of the sudden emergency doctrine render it categorically inappropriate in the context of automobile cases. *See, e.g., Bjorndal v. Weitman*, 184 P.3d 1115, 1121 (Or. 2008) ("[T]he emergency instruction, at least as used in vehicle accident cases, misstates the law of negligence by introducing an inquiry resting whether a person has made the 'wisest choice,' rather than focusing on whether the person used reasonable care . . . ." (footnote omitted)); *Simonson v. White*, 713 P.2d 983, 989 (Mont. 1986) ("There is no reason for this instruction to ever be given in an automobile accident case. It adds nothing to the established law applicable in any negligence case, that due care under the circumstances

These currents in the law, these other jurisdictions' cautionary notes, and the circumstances of this case give 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 jury instructions in future cases, notwithstanding that the term features in the current suggested standard instruction.[42] Properly understood, the doctrine of sudden emergency does not offer a defense. To be sure, the presence of an emergency may be extraordinary enough to merit separate mention. Even so, it remains only one among the panoply of surrounding circumstances that a jury must take into account in assessing the reasonableness of each party's actions or omissions. To treat the sudden emergency doctrine as a defense can only diminish the imperative centrality in negligence of the question whether a party exercised the care of a reasonably prudent person under all of the circumstances presented.

This case reveals a considerable tension between granting a motor vehicle operator the sudden emergency instruction and the heightened vigilance that the law long has imposed upon drivers to remain wary of pedestrians even at less traveled

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must be exercised. 'The circumstances' include[] the pressure and split-second decision-making which accompanies the crisis prior to some automobile accidents.").

[42] As set forth above, the Pennsylvania Bar Institute's Suggested Standard Civil Jury Instruction 13.230 begins, "In order to establish this *defense*, [defendant] must prove to you all of the following" (emphasis added). Incidentally, the Subcommittee Note to that instruction begins: "The subcommittee had earlier recommended that no instruction on the sudden emergency doctrine be given and that the jury should simply be told to determine whether the person being charged with negligence acted reasonably under the circumstances." PA. SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS 13.230, Subcomm. Note. But the subcommittee goes on to observe that Pennsylvania courts have approved the instruction and that it continues to be used, a proposition it supports by citing this Court's decision in *Levey*.

intersections, as well as the duty of a driver not to drive at a speed that exceeds his ability to stop within the range of his vision. This tension is cast into sharp relief by the precariousness of Check's theory of this case. For one thing, Check simultaneously maintains that Graham's lack of urgency in crossing the intersection contributed to his harm,[43] while also maintaining that Graham "suddenly interjected himself" into Check's path.[44] For another, Check sought to establish at trial that he was traveling at a speed toward the higher end of the range testified to by the parties and experts,[45] an uncommon

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[43] *See* Brief for Check at 15 ("Graham was in no hurry to cross the intersection"), 16 ("[Graham] was in effect practically loitering in the crosswalk . . . .").

[44] *See id*. at 19 ("Pennsylvania law is clear that a jury charge on the defense of sudden emergency is proper when a moving pedestrian *suddenly interjects themselves in front of a vehicle* . . . ." (emphasis added)).

[45] At trial, Check acknowledged that he initially told police that he believed he was traveling fifteen to twenty miles-per-hour at the time of the collision. Later, however, he revised his estimate upward to twenty-five to thirty miles-per-hour. *See* N.T. at 111-13. Indeed, Check's attorney acknowledged this anomaly for what it was in his closing argument. *Id*. at 333 ("It's kind of strange [*sic*] case, because we have the defense arguing that they were actually going—he was actually going faster than the plaintiff say [*sic*].."). In light of Check's own representations, the Dissent's assertion that the trial evidence "established Check was operating his vehicle at a range of ten to eighteen miles-per-hour" is questionable at best. Diss. Op. at 4. To support this declaration, the Dissent cites the equivocal, lay testimony of Millach, *see* N.T. at 67-69 (agreeing with Check's cross-examining attorney that he "believe[d] that Mr. Check decided he would have been going 10 to 15 miles an hour"), and Graham's expert witness, who testified, based upon a slew of assumed facts, that Check was traveling at fourteen to eighteen miles-per-hour *at the point of impact*. *See id.* at 186. Check, notably, testified that he was traveling at a significantly greater speed *and* that he was still accelerating as he entered the intersection. *See id*. at 100 (Check: "Then I think I hit the accelerator and maybe got up to about 30 or so right at the impact.").

In any event, the absence of dispute that Check was traveling below the forty-five mile-per-hour speed limit, *see* Diss. Op. at 4 n.1, is of little relevance because the speed limit does not bear on whether Graham exercised due care by operating his vehicle such that he could stop it "before doing injury to any person in any situation that is reasonably likely to arise under the circumstances." *Lane*, 39 A.2d at 627; *cf. Skalos v. Higgins*, 449 A.2d 601, 606 (Pa. Super. 1982) ("[C]ompliance with law or administrative regulation relieves the actor of negligence *per se*, but it does not establish as a matter of law that

posture for a defendant accused of having driven through an intersection negligently, inasmuch as excessive speed in the circumstances often is ventured as a factor in *finding* negligence.

It is undisputed that Graham entered the crosswalk when the signal was in his favor, and that he proceeded across the intersection at a more or less ordinary rate of speed. This Court repeatedly has distinguished abrupt or lunging pedestrians from pedestrians proceeding in an orderly fashion.[46] The only evidence of "suddenness" in this case appears to arise from Check's failure to observe Graham until he was nearly upon him. Expert testimony indicated that, had Check been looking in the right direction, Graham would have been visible at a distance of fifty-four feet. It might not be negligence under the circumstances that Check did not see him sooner, but that does not make the situation a sudden emergency, only an unfortunate one.

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due care was exercised."). Nor is it sufficient by itself to say that, in Check's opinion, he was "traveling within a speed so that [he could] stop within the range of his headlights." *See* Diss. Op. at 4 (quoting N.T. at 102). This allusion to the assured clear distance rule is incomplete because that rule demands more of drivers: "No person shall drive a vehicle *at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing*, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. . . ." 75 Pa.C.S. § 3361 (emphasis added); *see Smith v. Wells*, 212 A.3d 554, 559-60 (noting that Section 3361 "prohibits two, distinct forms of illegal driving," driving at an unreasonable speed *under the conditions or* at a speed outstripping the ability to stop within the assured clear distance (emphasis added)).

[46] *See, e.g., Atkinson v. Coskey*, 47 A.2d 156, 162 (Pa. 1946) (distinguishing cases in which a pedestrian was struck "upon stepping down from the curb" rather than in the middle of the road, where his crossing would be visible to an attentive driver); *Di Bona v. Phila. Transp. Co.*, 51 A.2d 768 (Pa. 1947) (same); *cf. Miller v. Gault*, 29 A.2d 71, 74 (Pa. 1942) (Maxey, J., dissenting) (distinguishing "a 'darting out' case where a person suddenly leaves the curb and runs into or ahead of a car" from one in which "the pedestrian, already engaged in making the crossing, was justified in believing that passing motorists would have due regard for her safety").

While expert testimony established that, at that distance and speed, Check would have had very little time to react, that does not necessarily establish a sudden emergency in the narrow fashion in which we have employed that term to describe only unforeseeable events. "[O]n a question of negligence, it is immaterial that the defendant only saw the deceased at or about the time of impact. The test is whether . . . he should have seen the deceased before the impact."[47] This speaks also to speed itself, inasmuch as drivers' ordinary duty requires that they proceed only at a speed that enables an effective response to foreseeable incursions into their paths. That Check was timing the light not at high speed but at roughly twenty-five miles-per-hour does not preclude the possibility that the ensuing "emergency" was entirely of his own making. To suggest that twenty-five miles-per-hour is not high speed begs the question; speed is relative, and any speed that outstrips the driver's ability to respond to foreseeable events is "high" as a matter of settled law.

The lower courts' and Check's reliance upon his presumed good-faith effort to proceed legally and without distraction privileges the good faith of the driver over the application of a reasonably prudent standard. This reasoning suggests that, when someone well-meaning claims surprise, he is entitled to a sudden emergency instruction as a matter of course.[48] That Check was not consulting his phone, proceeding at an exorbitant rate of speed, or violating a traffic signal all may be relevant to a jury's

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47 *Forsythe*, 209 A.2d at 871.

48 *See* Tr. Ct. Op. at 5-6 (citing such factors as the dark night, Graham's dark clothing, Check's long experience with the intersection where he seldom observed pedestrians, Check's headlights being on, and lack of distraction by cellphone or "fiddling with the radio"); *Graham*, 2019 WL 1276313, at *3 (even more minimally citing headlights, lack of distraction, and travel below the speed limit).

assessment of negligence generally, but those factors alone do not dictate whether the emergency was of Check's making.[49] Ordinary negligence assumes an absence of bad intent. Sometimes, good people who mean well make injurious mistakes.

We assess Check's (and the lower courts') reliance upon these factors against the backdrop of applicable principles, to wit: the heightened duty of care required of a driver as he approaches an intersection;[50] the driver's obligation to adjust his speed based upon road conditions, including visual obstructions, to ensure his ability to respond to foreseeable conditions such as a pedestrian crossing in a crosswalk; and the rule that a sudden emergency will not diminish the standard of care when the emergency arises from the actions of the party seeking the benefit of its diminution of the standard of care. On this record, we find it difficult to endorse the conclusion that Check's failure to observe Graham until well after he came into Check's field of view was anything but a self-created

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[49] *Cf. Henry v. Trabosh*, 307 A.2d 446, 448-49 (Pa. Super. 1973) (ruling that compliance with statutory duty does not alone excuse an emergency of defendant's own making arising from his failure to anticipate a foreseeable hazard).

[50] "The driver of a vehicle is under a duty to anticipate the presence of a pedestrian at an intersection and control his vehicle so that no harm will result. Motorists are under a duty to exercise a very high degree of care at intersections. They must be able to stop at the slightest sign of danger." *Lane*, 39 A.2d at 627; *see supra* n.12 and accompanying text (collecting cases). The Dissent correctly observes 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," Diss. Op. at 6, but the right-of-way instruction does not speak to the distinct, heightened duty of care drivers approaching intersections owe to pedestrians under settled law dating back nearly as far as the advent of the automobile. Not only did the jury charge invite jurors to *lower* the duty of care imposed upon Check by virtue of an alleged "sudden emergency," it did so where the evidence strongly suggested that the emergency, if any, was created because Check did *not* approach and enter the intersection at a speed that accounted for the foreseeable presence of a pedestrian in the crosswalk. In this regard, Check's own insistence that, even if he had seen Graham at the earliest possible time he would not have been able to stop soon enough to avoid the impact, works against him.

emergency. This is not to suggest that a pedestrian moving erratically or precipitously cannot occasion a sudden emergency. Nevertheless, it is difficult to envisage a circumstance in which a pedestrian who 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 can present any basis for granting a driver the benefit of the sudden emergency defense.[51] This conclusion accords with our decision in *Maselli*, and with numerous decisions in which we expressed a higher degree of skepticism when pedestrians had been in the roadway for some time rather than having just stepped off the curb.[52] We find nothing in our case law that requires a contrary conclusion.

For the foregoing reasons, the trial court erred when it instructed the jury on the sudden emergency doctrine. 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.[53]

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[51] The Dissent contends that this is our "alternative view." Diss. Op. at 7. But it is precisely the view that Check ventures, at least with regard to the dispositive question of whether a reasonable jury could have concluded based upon the evidence that Graham "suddenly interjected" himself in front of Check. *See* Brief for Check at 15 ("Graham was in no hurry to cross the intersection"), 16 ("[Graham] was in effect practically loitering in the crosswalk . . . ."). There is no evidence whatsoever that Graham moved rapidly, abruptly, or erratically into Check's path. Check can't have it both ways.

[52] *See*, *e.g.*, *Fitsko v. Gaughenbaugh*, 69 A.2d 76 (Pa. 1949) (distinguishing cases in which the pedestrian victim's movements were accounted for and ordinary from the instant case in which for want of such evidence there was a question of fact whether the collision occurred "due to a lack of due care or to a lack of opportunity because deceased suddenly ran in front of [the defendant's car").

[53] The Dissent infers that our cautionary note regarding the tendency of the label "defense" to mislead (a concern echoed by many courts and commentators) somehow amounts to the conclusion that "the sudden emergency doctrine is no longer a viable

Having determined that the trial court erred in charging the jury on sudden emergency, we must address prejudice. This requires us to assess the likelihood that, but for the trial court's error, the jury would have returned a different verdict. As noted, the significant risk of prejudice when the sudden emergency instruction is given cannot seriously be disputed.[54] While the party seeking the protection of the doctrine bears the burden of proving the sudden emergency, its effect—its *intended* effect—is to diminish the requisite standard of conduct to such an extent that recovery is highly unlikely.

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defense." Diss. Op. at 2. Thus, the Dissent maintains, we go beyond the case-specific question as to which we granted review. *Id.* at 1-2. This misreads our opinion. It is true that we do not believe the sudden emergency doctrine is a defense, *as such*. But nothing herein bears out the Dissent's claim that we intend to abrogate the sudden emergency *doctrine*. *See id*. at 8 ("As I would not venture to abrogate the sudden emergency doctrine in this case, . . . I would affirm the Superior Court."). We set out to answer a case-specific question concerning the application of the sudden emergency doctrine. We have answered it in those terms. To review an old rule in the context of new facts is the essence of the common law. To constructively refine or circumscribe the rule in doing so is to advance it, not to abandon it.

[54] *See Herr*, 634 S.E.2d 317, 320 (Va. 2006) (encouraging "particular care when determining whether to grant a sudden emergency instruction because . . . it has the tendency to afford a jury an easy way of avoiding instead of deciding the issue made by the evidence in the case" (cleaned up)). The Colorado Supreme Court, which has abolished the doctrine entirely, provided a painstaking analysis of the various ways in which the doctrine may mislead a jury. In particular, such an instruction "(2) does not define the term 'sudden emergency'; (3) implies that sudden emergency situations require a reduced standard of care; and (4) focuses the jury's attention on events that transpired during and after the emergency rather than on the totality of the circumstances." *Bedor v. Johnson*, 292 P.3d 924, 930 (Colo. 2013) (*en banc*). The court further observed that "the sudden emergency instruction can lead the jury to incorrectly apply a less stringent standard of care," and that the jury "might interpret the sudden emergency instruction as an exception to or modification of the previously described general standard of care" and "prejudice the party alleging negligence by misleading the jury to apply a reduced standard of care in sudden emergency situations." *Id.*; *see generally Simonson*, 713 P.2d at 989 ("The [sudden emergency] instruction adds nothing to the law of negligence and serves only to leave an impression in the minds of the jurors that a driver is somehow excused from the ordinary standard of care because an emergency existed.").

Check maintains that the sudden emergency instruction could not have been prejudicial in this case because the jury heard extensive evidence to the effect that Check was not speeding, that he had his headlights on, and that he was not distracted as he approached and drove through the intersection, and because the jury determined in response to the first question on the verdict slip that Check was not negligent. The flaw in this argument is clear. The sudden emergency doctrine speaks directly to the duty and reasonableness of the conduct of the proponent—and indeed, as framed in this case, was presented to the jury as "a defense" in its own right. Any conclusion regarding these considerations necessarily informs an assessment of negligence made after these considerations are introduced. They cannot be disentangled. Perhaps discrete interrogatories would have helped clarify the question of prejudice by providing insight into whether the jury relied upon the sudden emergency doctrine in concluding that Check was not liable.[55] But we have only the jury's finding on the question of negligence, as to which it was *instructed* to consider the prospect that Check faced a sudden emergency not of his own making. Given this uncertainty, and given the potential for prejudice arising from the instruction generally (especially when the instruction characterizes the doctrine as a "defense"), we have good reason to question whether the instruction confused or misled the jury to an extent that it would have reached the same verdict had it not received

[55] The Pennsylvania Association for Justice as *Amicus Curiae* makes a suggestion to this effect in the event that this Court preserves the sudden emergency doctrine. *See Amicus Curiae* Brief for Pennsylvania Association for Justice at 14 ("If the Court does not see fit to eliminate the doctrine in its entirety," the trial court should be directed to supply "appropriate jury interrogatories to ensure that the jury properly applies the doctrine so that the duty to act reasonably under the circumstances is not negated").

such license to measure Check by a different yardstick than would apply without the instruction.[56]

It appears that the trial court blurred the line between what comprises evidence of a sudden emergency and that which militates either against finding Check negligent or for finding Graham contributorily negligent. We discern a reasonable probability that the jury would have held Check to the higher standard and deemed him negligent. Accordingly, we cannot conclude that the error was harmless. Thus, Graham is entitled to a new trial untainted by the sudden emergency instruction.

Accordingly, we reverse the order of the Superior Court affirming the trial court's decision to instruct the jury on the sudden emergency doctrine, and we remand for a new trial.

Chief Justice Saylor and Justices Todd, Donohue and Mundy join the opinion.

Justice Dougherty files a dissenting opinion in which Justice Baer joins.

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[56] *See Grove*, 218 A.3d at 887-88 ("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."); *see also Bjorndal*, 184 P.3d at 1121 ("We therefore conclude that the emergency instruction incorrectly stated the law and was likely to confuse the jury as to the correct legal standard to apply.").