IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JOSEPH COLBERT,	:	
	:	C.A. No. K13C-08-018 WLW
Plaintiff,	:	In and For Kent County
	:	
v.	:	
	:	
SHERRY D. THROWER and	:	
KYLE JAMES THROWER,	:	
	:	
Defendants.	:	

Submitted: December 7, 2015
Decided: February 3, 2016

ORDER

Upon Plaintiff's Motion for Partial Summary Judgment.
Denied.

Patrick C. Gallagher, Esquire of Curley Dodge & Funk, LLC, Dover, Delaware; attorney for Plaintiff.

Sarah B. Cole, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorney for Defendants.

WITHAM, R.J.

The issue before the Court is whether Defendant Kyle Thrower ("Thrower") should be precluded from disputing the issues of duty and breach for a collision between him and Plaintiff Joseph Colbert ("Colbert"). Colbert seeks to collaterally estop Thrower from denying negligence and asks for a jury instruction on the issue of negligence per se. Thrower defends by claiming he should not be precluded from disputing liability for the accident based upon the fact that he received a citation for failure to yield the right of way and paid the fine through the Voluntary Assessment Center. For the following reasons, the Plaintiff's motion for partial summary judgment is **DENIED**.

FACTS AND PROCEDURAL HISTORY

On August 19, 2011, Thrower and Colbert were involved in an automobile accident at the intersection of Route 13 and Public Safety Boulevard/River Road. Thrower was traveling northbound on Route 13 and made a u-turn at the intersection in order to travel southbound on Route 13. The responding officer's accident report placed Colbert in the left lane of southbound Route 13 prior to the accident, but both Thrower and Colbert testified at depositions that Colbert was in the right lane of southbound Route 13 when Thrower made the u-turn. At some point during or just after Thrower's execution of the u-turn, Thrower and Colbert collided. As a result of the collision, Thrower received a citation for failure to yield right of way and Colbert received a citation for having no insurance or identification in his possession. Thrower paid the fine for his citation through the Voluntary Assessment Center.

On August 16, 2013, Colbert filed a complaint seeking damages from Thrower.

On November 18, 2015, Colbert filed this motion for partial summary judgment seeking to collaterally estop Thrower from denying negligence and to ask for a jury instruction on the issue of negligence per se.

STANDARD OF REVIEW

Summary judgment will be granted when, viewing all of the evidence in the light most favorable to the nonmoving party, the moving party demonstrates that "there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[1] This Court shall consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in determining whether to grant summary judgment.[2] When material facts are in dispute, or "it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances," summary judgment will not be appropriate.[3] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[4]

DISCUSSION

It is within the General Assembly's power to "substitute its enactments for the general negligence standard of conduct required of a reasonable person."[5] "It has

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[1] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (citing *Benge v. Davis*, 553 A.2d 1180, 1182 (Del. 1989)); *see also* Super. Ct. Civ. R. 56c.

[2] Super. Ct. Civ. R. 56c.

[3] *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797, 802 (6th Cir. 1957)).

[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[5] *Toll Bros., Inc. v. Considine*, 706 A.2d 493, 495 (Del. 1998).

been long settled in this State that the violation of a statute or ordinance enacted for the safety of others is negligence in law or negligence per se."[6] "The basic concept of negligence per se is to ease the requirements of proving negligence if a party inflicts harm that the General Assembly attempted to alleviate by legislative enactment."[7] However, "[a] finding of negligence does not, *ipso facto*, translate to or include a finding of proximate cause."[8] The issue of proximate cause is ordinarily a question of fact to be determined by the trier of fact.[9] Thus, notwithstanding a finding of negligence per se, "it is the fact finder who will ultimately determine who is at fault or the degree of fault for each party."[10]

A necessary requirement for finding negligence per se is that the defendant did in fact violate the statute. Delaware courts have allowed the application of offensive collateral estoppel to prevent a defendant who enters a guilty plea from relitigating the issues necessary for guilt in a subsequent civil proceeding.[11] In *M.G. Bancorporation, Inc. v. Le Beau* the Supreme Court of Delaware stated "[t]he test for applying the collateral estoppel doctrine requires that (1) a question of fact essential to the judgment (2) be litigated and (3) determined (4) by a valid and final judgment."[12] However, there are instances where the use of offensive collateral

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[6] *Sammons v. Ridgeway*, 293 A.2d 547, 549 (Del. 1972).

[7] *Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 16 (Del. 2013).

[8] *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. 1995).

[9] *Id.* at 830.

[10] *Cunningham v. Outten*, 2001 WL 428687, at *2 (Del. Super. Mar. 26, 2001).

[11] *Fisher v. Beckles*, 2012 WL 3550497, at *2 (Del. Super. July 2, 2012).

[12] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999).

estoppel may be unfair to the defendant. As noted in *Parklane Hosiery Co., Inc. v. Shore*, a defendant who is sued for small or nominal damages may have little incentive to defend.[13] "This Court has previously noted that under modern law the decision of whether a criminal conviction can be conclusive as to a question of fact in a civil case rests in the sound discretion of the court, particularly in cases involving offensive collateral estoppel."[14]

There are many cases in which a litigant has been collaterally estopped from relitigating the issues necessary to prove guilt of a criminal charge. In *Petrella v. Alexander*, the defendant pled guilty to failure to yield right of way. In the ensuing civil case, the plaintiff sought partial summary judgment on the issue that defendant's negligence proximately caused the plaintiff's damages.[15] Based on the guilty plea, the court found the defendant could not deny he was negligent and that the collision occurred at that time, and thus granted partial summary judgment with respect to negligence.[16]

In *Cunningham v. Outten*, the defendant was found guilty in the Court of Common Pleas of inattentive driving.[17] The plaintiff then filed a civil suit in this Court and sought partial summary judgment on the issue of liability. This Court noted that a determination of liability consists of more than guilt or negligence, and

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[13] *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330 (1979).

[14] *Cunningham*, 2001 WL 428687, at *1.

[15] *Petrella v. Alexander*, 1991 WL 236921, at *1 (Del. Super. Nov. 8, 1991).

[16] *Id.* at *2.

[17] *Cunningham*, 2001 WL 428687, at *1.

that liability was not an issue before the Court of Common Pleas. The Court found the doctrine of collateral estoppel applied to the case only insofar as it showed the defendant was negligent in violating a statute and denied the motion for partial summary judgment on the issue of liability. However, the Court did note that the plaintiff would be entitled to a jury instruction on negligence per se.[18]

In *Murrey v. Shank*, the plaintiff was prevented from challenging a ticket for traveling at an unsafe speed after pleading guilty to the charge because the issue was barred by collateral estoppel.[19] The court noted that "[a] guilty plea is considered a full litigation of guilt of the criminal charge."[20] The court further stated that "[c]ollateral estoppel prevents a litigant who pled guilty and was convicted by a court [from challenging] the conviction in a subsequent civil trial."

In *Cunningham*, the defendant was found guilty after a formal trial. In *Petrella* and *Murrey* the defendants entered a guilty plea. A plea of guilty is defined as "[a] confession of guilt in open court."[21] Before accepting a guilty plea for a class B misdemeanor, an unclassified misdemeanor, or a violation for which no imprisonment will be imposed, a court must ensure that the defendant understands the nature of the charge and the maximum possible penalty.[22] Moreover, a court must ensure there is

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[18] *Id.*

[19] *Murrey v. Shank*, 2011 WL 1415023, at *1 (Del. Super. Apr. 13, 2011).

[20] *Id.*

[21] Black's Law Dictionary 1037 (5th ed. 1979).

[22] Super. Ct. Crim. R. 11(c) states in pertinent part:
No plea of guilty or nolo contendere shall be accepted to a class B misdemeanor, an unclassified misdemeanor or a violation for which no sentence of imprisonment will

a factual basis for the judgment.[23] These safeguards are required to be followed by all courts.[24] In each of these cases, the defendant was found guilty after a formal trial or after the defendant entered a plea of guilty which, because of the aforementioned safeguards, is considered a full litigation of guilt. Thus, these cases met the criteria for collateral estoppel under the Supreme Court of Delaware's guidelines in *M.G. Bancorporation*. Based on these factors, collateral estoppel was appropriate in the foregoing cases, and the defendants were in fact estopped from challenging the resulting guilty verdicts in subsequent civil litigation.

However, there are cases where an admission of guilt has not collaterally estopped a litigant from contesting negligence. In *Merkins v. Nichols*, the defendant was involved in a collision after driving through a safety zone.[25] A citation was issued, the "defendant paid the voluntary assessment and evidence of his guilty plea was admitted in evidence."[26] The plaintiff filed a claim for injuries but the jury found for the defendant.[27] In a motion for a judgment notwithstanding the verdict or a new

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> be imposed unless the court is satisfied that the defendant understands the nature of the charge and the maximum possible penalty provided by law.

See also Ct. Com. P. Crim. R. 11(c); J.P. Ct. Crim. R. 11(c)

[23] Super Ct. Crim. R. 11(f) ("Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty or nolo contendere, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the judgment."). *See also* Ct. Com. P. Crim. R. 11(f); J.P. Ct. Crim. R. 11(f).

[24] *State v. Casto*, 375 A.2d 444, 448 (Del. 1977).

[25] *Merkins v. Nichols*, 1991 WL 18103, at *1 (Del. Super. Feb 6, 1991).

[26] *Id.*

[27] *Id.*

trial, the plaintiff argued that the "guilty plea" conclusively established the defendant's negligence, but the court held the admission was simply evidence to be considered by the jury.[28] The court noted that "[in] this case, the jury apparently accepted the defendant's explanation that he paid the small fine as a matter of convenience, not because he believed that he was guilty."[29]

In *White v. Clark*, the defendant was given a ticket for disregarding a traffic control device and paid the fine by voluntary assessment.[30] At the time of the accident the defendant was driving into extreme sun glare and had reduced her speed to as slow as 25 miles per hour.[31] Although she testified that she paid the fine because the light was in fact red, the jury was instructed that the voluntary assessment was an admission against her, but was not conclusive proof of negligence.[32]

In *Merkins* and *White*, the defendants paid their fine by voluntary assessment. Voluntary assessment is defined in 21 *Del. C.* § 709(b) as "the process set forth in this section by which a driver may voluntarily remit payment of a Title 21 violation without having to appear in a court." Thus, the defendants did not appear in court and therefore did not receive the benefit of the procedural safeguards demanded in *State v. Castro* or the benefit of adjudication by an impartial fact finder. As a result, neither defendant was collaterally estopped from challenging a finding of negligence.

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[28] *Id.* (citing *Boyd v. Hammond*, 187 A.2d 413, 416 (Del. 1963)).

[29] *Id.*

[30] *White v. Clark*, 1998 WL 960735, at *1 (Del. Super. Dec. 16, 1998).

[31] *Id.*

[32] *Id.*

In the case *sub judice*, the defendant mailed a fine to the Voluntary Assessment Center. In support of his motion, Colbert cites 21 *Del. C.* § 709(i)(1) which states that "[p]ayment of the prescribed fine, costs and penalty assessment is an admission of guilt, a waiver of the right to a hearing, and a complete satisfaction of the violation." The theory being advanced by Colbert is that because Thrower's payment of the fine through the Voluntary Assessment Center is an admission of guilt, Thrower is collaterally estopped from "denying negligence (duty and breach) for the collision." Colbert claims Thrower had a "full and fair opportunity" to challenge the citation and to request a hearing under 21 *Del. C.* § 709(f), but failed to do so. However, as the foregoing cases illustrate, there is a difference between entering a plea of guilty and an admission of guilt.

Because Thrower paid the fine by voluntary assessment, he was not afforded the procedural safeguards that he would have been afforded had he entered a plea of guilty in a court of law. Thus, he was not afforded the same protections offered to the defendants in *Petrella*, *Murrey*, and *Cunningham*. Thrower's situation is more analogous to the defendants in *Merkins* and *White*. Depositions revealed that the responding officer has no recollection of the actual events of the day of the accident and must rely on his accident report. That accident report shows that Colbert was in the left hand lane when the collision occurred. Both Colbert and Thrower testified that Colbert was in the right hand lane as he approached the intersection. Given the facts presented along with the discrepancy in the accident report, it is possible that Thrower may have paid by voluntary assessment as a matter of convenience, or

because a fine paid by voluntary assessment is required to be a minimum fine,[33] or because he did in fact fail to yield the right of way. That, however, is a question for the jury.

CONCLUSION

Because Thrower paid his fine by voluntary assessment, he was not afforded those certain standards and safeguards demanded by *Castro*. In addition, there exists a discrepancy between the responding officer's report and the testimony at deposition of both Colbert and Thrower. The grant of offensive collateral estoppel is left to the discretion of the courts. In this case, it appears that the grant could prejudice the defendant. Therefore, the Plaintiff's motion for partial summary judgment is **DENIED**. Whether the plaintiff is entitled to a jury instruction on negligence per se will be deferred until trial.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[33] 21 *Del. C.* § 709(g) states "[t]he penalty for offenses for which a voluntary assessment payment is made shall be the minimum fine for each specific offense charged and fines shall be cumulative if more than 1 offense is charged."