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Case Number 476,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KELLY HALES, an individual, and REECE HALES, JR., an individual	:	
	:	No.: 476, 2014
Plaintiffs-Below/Appellants,	:	
	:	Trial Court Below:
v.	:	Superior Court of the State of Delaware for Sussex County
PENNSY SUPPLY, INC., AMY HRUSPA, an individual, DELAWARE STATE POLICE THE STATE OF DELAWARE	:	
	:	C.A. No.: S10C-05-044 ESB
Defendants-Below/Appellees.	:	

DEFENDANT-BELOW/ APPELLEE PENNSY SUPPLY, INC.'S ANSWERING BRIEF

REGER RIZZO & DARNALL LLP

ARTHUR D. KUHL, ESQUIRE (#3405)
1523 Concord Pike, Suite 200
Brandywine Plaza East
Wilmington, DE 19803
(302) 477-7101
Attorney for Appellee Pennsy Supply, Inc.

Dated: December 22, 2014

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NATURE AND STAGE OF PROCEEDINGS

On or about May 28, 2010, Plaintiffs filed this personal injury suit against Walter English, Vance Gregory Morris, Chesapeake Service Solutions, Inc., Pennsy Supply, Inc. (hereinafter "Pennsy Supply"), Traffic Safety and Signs Inc., Trooper Amy Hruspa, the State of Delaware and the Delaware State Police.

On or about December 11, 2012, Walter English, Vance Gregory Morris and Chesapeake Service Solutions, Inc., were dismissed following a settlement.

On or about September 13, 2013, Defendants Pennsy Supply, Traffic Safety and Signs Inc., the State of Delaware, the Delaware State Police and Trooper Hruspa filed Summary Judgment Motions. On or about November 4, 2013, Traffic Safety and Signs Inc., was dismissed as its Summary Judgment Motion was unopposed. After the remaining parties filed responsive briefings, the Superior Court heard oral argument on the Summary Judgment Motions, on March 14, 2014.

On March 28, 2014, Plaintiffs filed additional submission as to the liability of Trooper Hruspa. On April 8, 2014, Defendant Pennsy Supply filed a response to Plaintiff's submissions.

On May 5, 2014, Plaintiffs submitted a motion to extend time for service of the Complaint to the State. The Court granted Plaintiffs' motion, on June 19, 2014. On July 15, 2014, the return of service on the State was filed.

On August 6, 2014, the Superior Court granted summary judgment as to all Defendants.

On August 29, 2014, Plaintiffs filed a Notice of Appeal.

On October 31, 2014, Plaintiffs filed their opening brief and withdrew the appeals against the State and the Delaware State Police. Plaintiffs proceeded with the appeal as to Pennsy Supply, Inc. and apparently Trooper Hruspa, although it is unclear what if anything was appealed as to Trooper Hruspa.

The withdrawal of that portion of the appeal makes the lower court's ruling that Trooper Hruspa had no duty the law of the case, pursuant to the Public Duty Doctrine.

On November 13, 2014, Defendant Pennsy Supply filed a Motion to Affirm the remaining issues on appeal.

On December 16, 2014, the Court denied the Motion to Affirm.

This is Defendant Pennsy Supply's Answering Brief.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly granted Summary Judgment as to Defendant Pennsy Supply as there was no dispute that Pennsy Supply was following a Traffic Control Plan approved by the Delaware Department of Transportation (DelDOT) for use during the road construction as part of a DelDOT contract. Under *High v. State Highway*, Dept., 307 A.2d 799 (Del 1973), it is irrelevant if other Traffic Control Plans were available as the plan that was used was approved by DelDOT. Therefore, the Superior Court correctly dismissed the claims against Pennsy Supply, under the *High* decision.

2. Denied. Superior Court properly followed the *High* decision as it is on point and dispositive as the only relevant fact on this issue is that Pennsy Supply used a DelDOT approved Traffic Control Plan. As the *High* decision is mandatory precedent, the Superior Court correctly applied its holding to the undisputed facts and properly dismissed Pennsy Supply.

3. Denied. Trooper Hruspa cannot be a "Borrowed Servant" as she was an active duty Delaware State Trooper on special duty for traffic control. Pennsy Supply was required by the DelDOT contract to have a uniformed officer with a marked patrol car on-site. Her salary was paid by the Delaware State Police. Pennsy Supply had no control over her specific work duties on-site

and supplied no tools to Trooper Hruspa. Further, Pennsy Supply is clearly not in the business of police work and the special assignment job was temporary.

Furthermore, as the Superior Court correctly pointed out, "given the nature of police work, I would think it highly unusual that a police agency would allow a private contractor to control the activities of a police officer." A-050.

The Superior Court properly found that Trooper Hruspa was not a borrowed servant and properly dismissed Pennsy Supply.

As Plaintiffs have now dropped their appeals as to the State of Delaware and Delaware State Police, the posture of the case has now changed. The dismissal of the State appeals, results in the lower court ruling that the Public Duty Doctrine applies is now settled and is the law of the case not subject to review.

While it is not clear if the appeal as to Trooper Hruspa is still maintained, any actions by Trooper Hruspa are still covered by the Public Duty Doctrine.

Therefore, even if Plaintiffs "Borrowed Servant" claim is valid, Trooper Hruspa would still be an employee of the Delaware State Police and violated no duty to the Plaintiffs, claim, making the "Borrowed Servant" claim moot as no duty to the Plaintiffs attached.

STATEMENT OF FACTS

The relevant facts are undisputed. This litigation arises from a motor vehicle accident that occurred, on June 23, 2008, at the intersection of Route 13 and Dorothy Road/Whitesville Road in Sussex County, Delaware, on an area of highway where road construction was being performed. Dorothy Road becomes Whitesville Road after crossing Route 13. While Plaintiffs refer to the project as "complex" the reality is that was a simple repaving project. B-001. The project was routine and nothing on the scale of the I-95/Route 1 interchange project or the I-95/Route 202 interchange project or the I-495 partial bridge collapse projects.

Pennsy Supply was the general contractor performing road repaving pursuant to a contract between Pennsy Supply and the Delaware Department of Transportation ("DelDOT"). B-002.

Pursuant to the contract between Pennsy Supply and DelDOT, Pennsy Supply was required to create a traffic control plan. B-012. Pennsy Supply was required by the DelDOT contract to have a uniformed officer with a marked patrol car equipped with a full light bar, radar or other speed measuring device, and radio communication. The police officers had to be employees of a city, county or state police department. B-017.

Trooper Hruspa's salary was paid by the Delaware State Police. B-028. Plaintiff incorrectly contends that the Trooper was off duty. Rather, Trooper

Hruspa was on duty, paid over-time by the state and considered to be employed on special duty assignment. B-024, B-072. On this particular occasion a different Trooper had actually signed up for that special duty assignment but had a conflict and asked Trooper Hruspa to take the assignment. B-024-026.

Trooper Hruspa testified she was not aware of the identity of the contractor for the project. B-100.

Pennsy Supply was responsible for submitting a proposed traffic control plan to DelDOT, which was reviewed and approved with four modifications. B-005.

John Abbott ("Abbott") was the DelDOT engineer's representative and inspector on the job. He testified that it was his job to make sure that the traffic control plan complied with the Delaware Manual on Uniform Traffic Control Devices (hereinafter "MUTCD"). B-119.

Likewise, the number of flaggers and police officers to be used on any given traffic plan must be approved by DelDOT. B-017.

On this particular jobsite, Abbott testified that he had the final say with regard to the number of police officers or flaggers to have on site at any given time B-120.

Abbott further testified that he decided where police officers and flaggers were placed at an intersection or crossroad at each work site. B-129. Abbott

testified that the police officers would come to him and he would tell them where to go for assignments. B-132.

Abbott testified that traffic control by police officers was part of their police training with the Delaware State Police. B-135. Per the contract, police officers were required to use their authority to control the traffic to ensure the safety of the workers and the public. B-134.

Further, Abbott specifically confirmed that Pennsy Supply had an American Traffic Safety Services (hereinafter "ATTSA") certified specialist on the project. B-136-B137.

To support their claims of negligence, Plaintiffs retained a liability expert, Joseph Fiocco ("Fiocco") who opines that Pennsy Supply was negligent in only three areas. Specifically Plaintiffs contend that Pennsy Supply:

(a) should have submitted a traffic plan that closed Dorothy Road;

(b) should have had an additional flagger in the median; and

(c) failed to provide an ATSSA certified traffic control supervisor in the design and implementation of the traffic control plan.

B-148.

The collision, at issue, occurred when a vehicle operated by Co-Defendant Walter English was on Dorothy Road and approached the Route 13 intersection. At this time, construction was occurring on the southbound lanes with lane restrictions in place for the shoulder and right lane through the Dorothy Road intersection. B-

043 & B-055-056. No construction or lane restrictions were present in the northbound lanes. B-074. A stop sign was present in the median to control traffic crossing or entering the northbound lanes from the median. B-163.

Trooper Hruspa was the Delaware State Trooper was handling traffic control for the construction site as special duty assignment. B-024. Trooper Hruspa was positioned to direct traffic in the southbound lanes of Route 13 at Dorothy Road B-033. A second officer, Trooper Bishop, was located close by. His patrol was car a couple car lengths south of Dorothy Road B-157, B-160. He heard but did not see the collision. B-157.

According to Co-Defendant English, Trooper Hruspa allowed a line of southbound Route 13 to proceed south of Dorothy Road while he was stopped at the intersection. Thereafter, she walked into the southbound lanes of Route 13 to allow English to cross the southbound lanes and into the median. B-163. English failed to stop for the stop sign in the median and continued onto northbound Route 13. B-164.

Co-Defendant English testified he thought he was being waved through the southbound lanes, the median and the second stop sign on the far side of the median. B-164. It is not clear why English misinterpreted the Trooper's signal to move across the southbound lanes as an instruction to disregard the stop sign in the median. As this intersection provided a clear view of northbound traffic, B-166, it

is equally unclear why English would have pulled out when the large Hales vehicle pulling a trailer would have been very close, B-167-168, since the collision with the rear of the trailer occurred in the left lane. B-163.

The only dispute in the facts is whether Co-defendant English disregarded a stop sign or whether Trooper Hruspa waved English through the stop sign. This question of fact has no bearing on this motion or the liability of Pennsy Supply.

Co-Defendant English was dismissed following a settlement and the Superior Court granted a Summary Judgment Motion filed by the State Defendants. In doing so, the Court ruled that under the "Public Duty Doctrine", there was no duty owed to the Plaintiffs by the State. This decision was appealed and then dropped as to the State and Delaware State Police. Trooper Hruspa was not mentioned as a party against whom the appeal was withdrawn so her current status as a party to this action is unclear.

ARGUMENT

I. THE SUPERIOR COURT WAS CORRECT IN RULING PENNSY SUPPLY INC., WAS NOT NEGLIGENT AS A MATTER OF LAW

A. Question Presented

Did the Superior Court properly grant Pennsy Supply Summary Judgment Motion based on Pennsy Supply following a DelDOT approved Traffic Control Plan?

B. Standard and Scope of Review

Defendant agrees that a decision on a Summary Judgment Motion is reviewed *de novo* for errors of law. *Sullivan v. Mayor of Elsmere*, 23 A.3d 128 (Del. 2011).

C. Merits of Argument

Plaintiff's first claim against Pennsy Supply is that Pennsy Supply was negligent in designing a work zone traffic control plan that caused Co-Defendant English to disregard the stop sign and strike the Plaintiffs' trailer. There is no dispute that the implemented Traffic Control Plan was approved by DelDOT and there is no evidence that it was not implemented.

Plaintiff seeks to revisit a scenario and overturn long-standing precedent of the Delaware Supreme Court. In *High v. State Highway Dep't, 307 A.2d 799* (Del. 1973), the Delaware Supreme Court reversed a decision of the Superior Court. The

High Court held that a contractor, as a matter of law, cannot be negligent for the implementation of a traffic control plan, if the traffic control plan utilized by the contractor was approved and constructed in accordance with uniform guidelines. *Id.* The Court found that no issue of negligence was presented to be resolved by the jury. *Id.*

In formulating this opinion, the *High* Court relied on the principle set forth in *Di Filippo v. Preston*, 173 A.2d 333 (Del. Super. 1961), which involved a medical malpractice case where the Court held that a surgeon's decision to follow one of two accepted surgical procedures could not be the basis of a charge of negligence when the operation was unsuccessful.

This theory of non-liability finds support in other jurisdictions as well. In *Loconti v. Creede*, 1991 N.Y. App. Div. Lexis 160 (Jan. 10 1991), the Court affirmed a summary judgment decision in favor of a highway contractor in personal injury suit in which the contractor was alleged to be at fault for negligence in building highway in a dangerous and defective manner because the State Department of Transportation approved all work contractor did and proved that the work was performed according to Department of Transportation regulations. The Appellate Division of the Supreme Court of New York held that the Plaintiff could not prove a *prima facie* case of negligence holding:

> A contractor is justified in following plans and specifications he has contracted to follow unless they are so defective that a

> builder of ordinary prudence would be put on notice that such plans, if followed, would not produce the object he was being paid to provide.

Id. citing *Ryan v Feeney & Sheehan Bldg. Co.*, 145 N.E. 321 (N.Y. 1924).

Likewise, in the case *sub judice*, there is no evidence that the traffic control plan was not followed by Pennsy Supply. Furthermore, here as in the *High* case, the traffic control plans submitted by Pennsy Supply were approved by DelDOT.

The number of flaggers and police officers at the work site was approved by DelDOT. Further, Abbott testified that it was his decision, not Pennsy Supply's as to the location of the flaggers and police officers.

Plaintiffs' expert, Fiocco, opines that Pennsy Supply should have followed a *different* traffic control plan and closed Dorothy Road and/or retained additional flaggers are moot and constitute "Monday morning quarterbacking" which was specifically rejected by the *High* Court. Plaintiff cites to nothing in the record to suggest that DelDOT would have even approved any of the road closure options posited by Fiocco. Contrary to Fiocco's opinion, Abbott specifically testified that Pennsy Supply had an ATSSA certified specialist on-site. B-136.

It was not Pennsy Supply's responsibility to train Corporal Hruspa to do her job. Abbott specifically testified that the contract indicated that the only direction to be given to Corporal Hruspa was that she was expected to use her authority to control the traffic to ensure the safety of the workers and the public. The training

for such duties was given to Corporal Hruspa by the Delaware State Police and not Pennsy Supply.

Further, Delaware applies the common law rule that no one has a duty to anticipate another's negligence. *Hudson v. Old Guard Ins. Co.*, 3 A.3d 246, 250 (Del. 2010). This principle was emphasized in, *Coale v. Rowlands,* 1998 Del. LEXIS 468, 3-4 (Del. Dec. 9, 1998). Thus, since there is no duty to anticipate another's negligence to the extent Plaintiffs argue Pennsy Supply should have used a different traffic control plan based on a duty to anticipate a driver's negligent disregard for a stop sign, that argument must also fail.

The fact remains that the traffic control plan utilized by Pennsy Supply was approved by DelDOT and constructed in accordance with uniform guidelines. The number of flaggers and police officers at the work site were approved by DelDOT, and supervised by Abbott, the DelDOT representative on site. Since Pennsy Supply followed the plan, and Plaintiffs only argument is that Pennsy Supply could have submitted a different plan, Plaintiffs' claims fail as a matter of law.

Plaintiffs argument that the Traffic Control Plan was defective from inception is nothing more than a restatement of their theory that a different plan should have been selected, an argument that was rejected by the *High* decision.

Even a claimed defect in the approved traffic plan—namely, that the plan failed to address crossover traffic—is incorrect. The approved plan addressed

intersections, crossovers and indicated that "additional traffic control devices shall be erected as directed by the engineer [Abbott]." B-008. There are no facts that any additional traffic control devices were directed by Abbott, other than the placement of Trooper Hruspa. Therefore, the placement of a trooper at this intersection in accordance with the approved plan addressed and eliminated any so called defect.

Plaintiffs also seeks to create a defective plan theory by claiming that Co-Defendant English did not receive clear direction. In doing so, Plaintiffs ignore a stop sign—nothing is more clear or direct than an established stop sign. There is no evidence that DelDOT would have approved a Traffic Control Plan that would have resulted in the detours and road closures needed to avoid any traffic being faced with the stop sign.

Plaintiffs argue that Co-Defendant English's receipt of allegedly unclear direction somehow making the approved traffic plan defective. Plaintiff ignores the fact that English's decision to disregard a stop sign does not necessarily imply that he was provided vague instruction. Rather, English did not follow the direction of the clearly erected stop sign after he was given permission by the Trooper to cross the southbound lanes after the Trooper stopped the southbound traffic.

Absent from Plaintiffs' argument is any awareness that the collision was caused by Co-Defendant English's failure to stop at the stop sign before heading

into the traffic lanes of northbound Route 13 and not because the Traffic Control Plan somehow misdirected traffic in a dangerous manner. This was a routine lane closure for the repaving with a trooper on-site to stop and or direct traffic across the southbound lanes of Route 13 as needed in accordance with an approved Traffic Control Plan.

Thus, the *High* analysis is as applicable in this case, now, as it was when it was first decided. Pennsy Supply used a Traffic Control Plan approved by DelDOT and, thus, no negligence may attach simply due to other possible traffic control plans, submitted in retrospect by Plaintiffs, which were never approved by DelDOT. Particularly when, as here, a traffic control plan was submitted to DelDOT, modified by DelDOT, approved by DelDOT, and DelDOT had an engineer (Abbott) on site to direct any necessary changes.

As a matter of law, a claim against Pennsy Supply cannot stand and the Superior Court decision must be affirmed.

II. SUPERIOR COURT'S RELIANCE ON 40 YEAR OLD DELAWARE SUPREME COURT PRECEDENT

A. Question Presented

Did the Superior Court err in applying the *High v. State Highway Dept.* holding to the case at bar?

B. Standard and Scope of Review

Defendant agrees a decision on a Summary Judgment Motion is reviewed *de novo* for errors of law. *Sullivan v. Mayor of Elsmere*, 23 A.3d 128 (Del. 2011).

C. Merits of Argument

The Supreme Court decision in *High v. State Highway Dept.* is 307 A.2d 799 (Del. 1973) is controlling authority that the Superior Court was obligated to follow and apply to the case *sub judice*.

As noted earlier, the *High* decision provides protection for a contractor in following an approved Traffic Control Plan.

Although Pennsy Supply followed a DelDOT approved Traffic Control Plan, Plaintiffs seek to bypass the *High* decision by arguing that the approved plan was not compliant with the Delaware Manual on Uniform Traffic Control Devices (hereinafter "MUTCD"). Plaintiffs offer no evidence as to how or why DelDOT would have approved a supposedly flawed plan, with the only basis for such an allegation is that other Traffic Control Plans were available.

Plaintiff also argues that the plan approval also included a caveat that "field conditions" may dictate changes to the Approved Traffic Control Plan during the project. In the event of field related changes or an omission on the approved plan, the provision of the Delaware Traffic Control Manual shall prevail. B-007, B-009, B-011.

However, there is no evidence that any such change or omission was needed or existed. There was no vehicle breakdown, no emergency or any other potentially hazardous condition in the vicinity that would have prompted any such change. The mere presence of a crossover did not require any special actions. In fact, Trooper Hruspa testified she waved "a dozen or so" vehicles through the intersection without incident that morning, prior to the collision between Co-Defendant English and the Plaintiffs. B-045, B-123. Thus, there was no special "field conditions" that developed that would have even triggered the need to consider a change.

Plaintiffs attempt to argue that the mere presence of a median and crossover somehow invalidate the approved plan. However, it is impossible to argue that DelDOT, in reviewing a traffic control plan for a repaving project which it initiated, did not realize that a median and intersections would be present, when the traffic plan itself referenced side road intersections. Moreover, the plan included

allowance for Traffic Engineer Abbott to establish or erect additional controls as needed. B-008.

Plaintiffs' theory would be required where the machinery involved in the actual paving process block that side road for some period of time. However, at the time of this particular accident, no paving was underway at Dorothy Road. Thus, the only traffic change was the closure of the right lane on southbound Route 13 which did not require any unusual maneuvering for vehicles to cross the southbound lanes of Route 13 from Dorothy Road. While routine traffic backups may result, this was addressed as Trooper Hruspa was on-site to stop southbound traffic to allow Dorothy Road traffic to cross the southbound lanes, and to stop Dorothy Road traffic from interfering with southbound Route 13 traffic.

Again Plaintiffs only claim is that a traffic plan different from the approved traffic plan could have been used.

Given the heavy traffic flow on Route 13 in the summer months it is certainly reasonable that DelDOT would not have required the closure of intersections and the closure of entire lanes of Route 13 for a routine repaving project. Plaintiff cites to nothing in the record that any such hypothetical plan would even have been approved.

The bottom line is that Pennsy Supply was following an approved DelDOT Traffic Control Plan. When a contractor is following an approved Traffic Control

Plan, the fact that other possible plans could have been implemented cannot be the basis for a negligence claim.

Plaintiffs do not dispute that the *High* decision is controlling. Rather, Plaintiffs apparently request the Court to overturn *High*, to establish a new standard that permits a party to second guess a DelDOT approved plan and impose a new "moving target" standard of care.

In sum, the Superior Court properly followed and applied the *High* decision by finding as a matter of law that Pennsy Supply was not negligent for following the DelDOT approved plan or implementing a different plan. Therefore, the Superior Court decision should be affirmed.

III. TROOPER HRUSPA IS NOT A BORROWED SERVANT

A. Question Presented

Did the Superior Court err in ruling as matter of law that Trooper Hruspa was not Pennsy Supply's "Borrowed Servant?"

B. Standard and Scope of Review

Defendant agrees a decision on a Summary Judgment Motion is reviewed *de novo* for errors of law. *Sullivan v. Mayor of Elsmere*, 23 A.3d 128 (Del. 2011).

C. Merits of Argument

1. Borrowed Servant

Plaintiff argues that Trooper Hruspa is the borrowed servant of Pennsy Supply thus making Pennsy Supply liable under the doctrine of *respondeat superior*.

Whether Pennsy Supply may be vicariously liable for Trooper Hruspa's actions depends upon whether Pennsy Supply and Trooper Hruspa were in a master-servant or employer-employee relationship, and whether Trooper Hruspa was acting within the scope of that employment at the time of the accident. Pennsy Supply cannot be held vicariously liable for her actions if Trooper Hruspa was working as an independent contractor.

Delaware recognizes §220 of the Restatement (Second) of Agency as an authoritative source for defining the master-servant relationship. While §227 of the

Restatement addresses borrowed servant, it adopts the elements of §220 to define the master-servant relationship in assessing whether an individual is a "borrowed servant". The Restatement (Second) of Agency §220 states that the following non-exclusive "matters of fact" are to be considered in deciding whether the actual tortfeasor is a servant or an independent contractor:

> (a) the extent of control, which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

Cumpston v. McShane, 2009 Del. Super. LEXIS 191, 5-6 (Del. Super. Ct. May 15, 2009)(citations omitted).

The uncontroverted facts in this case show that there was no master-servant relationship between Pennsy Supply and Trooper Hruspa. The only factor that weighs in favor of a borrowed servant is (j) as Pennsy Supply was in business. No other factor applies as is outlined below, *ad seriatim*:

(a) Pennsy Supply had no control over her work duties on-site. By all accounts Trooper Hruspa was at the intersection at the direction of State Inspector Abbott testified he decided where police officers and flaggers were placed in an intersection or crossroad on the work site. B-129. He further testified that he would attempted to have the final say as to the number of police officers and flaggers on scene at each work site. B-119-120.

(b) At all relevant times, Trooper Hruspa was employed by the Delaware State Police. Her salary and benefits were paid by the Delaware State Police. There is no question that Trooper Hruspa is engaged police work which is a particular and distinct occupation from road paving.

(c) Abbott specifically testified that the contract indicated that the only direction to be given to Trooper Hruspa was that was that she were expected to use her authority to control the traffic to ensure the safety of the workers and the public. Any direction given to the polices officers was by Abbott, as the DelDOT engineer representative. B-132-133.

(d) The specialized training for traffic control was given to Trooper Hruspa by the Delaware State Police and not Pennsy Supply. B-097-096.

(e) There is no evidence that Pennsy Supply provided Trooper Hruspa with her uniform, patrol car, radar, light bar, weapons, or any materials commonly used by on duty state troopers in the exercise of police duties.

(f) Trooper Hruspa was filling in for another Trooper and was only on-site the morning of the incident.

(g) At all relevant times, Trooper Hruspa was employed by the Delaware State Police. Her salary was paid by the Delaware State Police B-024, who would submit an invoice to the contractor, who would then bill DelDOT for the cost plus 5 percent. B-017.

(h) Pennsy Supply is clearly not in the business of police work.

(i) Neither Pennsy Supply, Trooper Hruspa, nor the State has indicated that anyone intended to create a master-servant relationship between the troopers tasked to the jobsite and Pennsy Supply. Trooper Hruspa testified she was there in the capacity as a Delaware State Trooper. She was unaware of who the contractor (her alleged borrowing employer) was on the project. B-100.

The contract itself required the presence of a city, county, or state police officer. The contract required that all traffic control be performed either by Pennsy Supply "organization" (employees) or totally by subcontractors. B-013. As Pennsy

Supply contracted with TSS, Inc., for traffic control, B-169, and was required to have police officers on-site, it is clear that the State did not contemplate that the police officers would be Pennsy Supply employees in any manner. The forced imposition of Trooper Hruspa as a borrowed servant and Pennsy Supply employee would violate that provision.

In addition, the utilization of active duty police officers required by the State to be on-site creates additional barriers to the imposition of the Borrowed Servant doctrine. As the Superior Court noted, "given the nature of police work, I would think it highly unusual that a police agency would allow a private contractor to control the activities of a police officer." A-050.

As Plaintiffs have only met one of the Restatement of Agency §220 requirements for Trooper Hruspa to be considered a "Borrowed Servant", the lower court was correct in granting Pennsy Supply Summary Judgment on that issue.

Likewise, in applying the *Richardson v. John T. Hardy & Sons*, 182 A.2d 901 (Del. 1962), decision to the case at bar, the issue was who had the right to control the activities of Trooper Hruspa in the specific manner of how she waved Co-Defendant English across the southbound lane of Route 13 is crucial.

It is clear that the only control that Pennsy Supply had was on what part of the road work was to be performed. It was the DelDOT engineer representative

Abbott who decided exactly where the Trooper would be needed, and it was Trooper Hruspa who decided how to traffic control at that location. No one from Pennsy Supply directed the trooper on the specific manner of waving traffic.

Plaintiffs want to compare the facts in *Richardson*, to the case at bar, and equate hiring a backhoe and operator to dig a trench, to Pennsy Supply being required to have an on duty officer on site to direct traffic. The problem with this analysis is that in *Richardson,* it was the borrowing employer that directed the borrowed employee. Specifically, the borrowing employer controlled and directed where the backhoe operator should place the dirt, which was the act that caused the injury in that case.

The *Richardson* court made it clear that the actual operation of the backhoe would still be imputed the general employer, but it was the negligent act of directing the dirt placement that gave the operator the borrowed servant status.

In the case at bar, Pennsy Supply did not specifically instruct Trooper Hruspa as to which vehicles to let through, when to allow traffic to cross Route 13, how to direct vehicles or even she should stand. DelDOT required Pennsy Supply to have a police officer on-site to direct traffic and Abbott decided how to deploy the traffic control assets. There were simply no instructions given to "control or direct" Trooper Hruspa by Pennsy Supply. Furthermore, no further instructions were required by the paving company because it lacks expertise in traffic control

which was likely the point of having a trained police officer present in the first place.

The only information Pennsy Supply could offer was what part of the road was scheduled to be paved. Trooper Hruspa's mere presence at the correct location did not cause any injury. Therefore, any actions by the Trooper would only be imputed to her general employer, the Delaware State Police. However, as argued next, there is no liability as it is now the law of the case that the Trooper had no duty to breach.

In sum, as the undisputed facts only lead to the conclusion that Trooper Hruspa was not a "Borrowed Employee" the Superior Court decision should be affirmed.

2. Ramifications of Plaintiffs Argument if Accepted

Given the prevalence of police officer and state trooper presence at state road construction project work site, it is worth noting that Plaintiffs cite to no case law in Delaware or in other jurisdictions in which an on duty police officers working at a road construction site have been considered employees, borrowed or otherwise, of the contactor.

It is not a minor issue for Plaintiffs to seek such a designation. The far reaching implications are varied and numerous, including, worker's compensation

issues for the officers if injured on these special duty assignments and increased cost for state-sponsored roadway projects.

Moreover, granting private contractor employer authority over police officers could call into question the officers authority to act as police officers while on these kinds of special duty assignments, including, authority to arrest or issue valid citations. Additionally, there would be a concern over whether the contractor could order the officers to take certain police action.

Again, the Superior Court rightly recognized some of these issues, by noting "given the nature of police work, I would think it highly unusual that a police agency would allow a private contractor to control the activities of a police officer." B-50.

Therefore, the Superior Court decision that Trooper Hruspa was not a "Borrowed Servant" should be affirmed.

3. Borrowed Servant Analysis Is Now Moot With The Dismissal Of The State Defendants

As Plaintiffs have now withdrawn their appeal as to the State of Delaware and the Delaware State Police, the posture of the case has changed. While Plaintiffs argue that Trooper Hruspa was a borrowed servant of Pennsy Supply, Plaintiffs make no attempt to argue that she was not also still an employee of the Delaware State Police.

While it is unclear whether Plaintiffs maintain their appeal as to Trooper Hruspa, no arguments were raised in their opening brief concerning the "Public Duty Doctrine" ruling. This, along with the dismissal of the State appeals, results in an abandonment of those issues on appeal. Furthermore, given the above, the lower court's ruling that the Public Duty Doctrine applies is now settled as the law of the case, and thus not subject to appellant review.

With the application of the "Public Duty Doctrine" established, any actions by Trooper Hruspa are still covered by the "Public Duty Doctrine" as she was still a state employee at the time and thus barring the claim even if Plaintiffs original "Borrowed Servant" claim was valid, as she had no duty to the Plaintiffs.

In *Richardson v. John T. Hardy & Sons*, 182 A.2d 901 (Del. 1962), this Court noted that, "a loaned employee may become the specific employer's employee while at the same time remaining, generally speaking, the employee of him who loans his services." *Id.* at 902 *citing* Restatement of Agency 2d §227.

Therefore, as Trooper Hruspa remained a State Police employee while directing traffic, and as it is now the law of the case that Trooper Hruspa had no duty to the Plaintiffs under the "Public Duty Doctrine" regardless of whether she was borrowed employee to Pennsy Supply, a Delaware State Police employee, or both. The lack of a duty remains the same and without some liability against Trooper Hruspa, there is no liability to transfer to Pennsy Supply.

It is important to note the difference between an employee being immune from liability from an employee who does not have any duty, and thus no liability to the Plaintiff. Case law suggests that the immunity of an employee does not transfer to immunity to the employer. *See generally Bright v. Cargill*, 837 P.2d 348, (K.A. 1992); *Fields v. Synthetic Ropes*, 215 A.2d 427 (Del. 1965).

However, this issue is not whether any *immunity* of Trooper Hruspa transfers to Pennsy Supply, rather it is whether there was ever a *duty* breached that could result in negligence imputed on an employer. Since Trooper Hruspa never had a duty to Plaintiffs in her actions of directing traffic there cannot be any breach of a duty and, thus, no negligence to be imputed even if the "borrowed servant" claim were to be found valid.

As this issue just arose during the appeal, it could not be addressed by the Superior Court. Nevertheless, it is, still properly before this Court as Supreme Court Rule 8 allows such issues be presented in the "interests of justice."

On this issue, the Court is being asked to review the Superior Court decision, and, by necessity, its impact on the rest of the appeal once the Plaintiffs' withdrew their appeal of the "Public Duty Doctrine." As this issue only developed on appeal, a decision below was not possible and justice requires the Court consider issue along with the lower Court decisions on appeal.

CONCLUSION

The Superior Court properly found, as a matter of law, that since Defendant Pennsy Supply utilized a DelDOT approved Traffic Control Plan, Pennsy Supply cannot be found negligent for the use of that plan pursuant to the *High* decision, and the Superior Court properly followed and applied this precedent.

The Superior Court also properly found that Trooper Hruspa was not a borrowed servant of Pennsy Supply under the criteria set forth in *Richardson v. John Hardy & Sons* and the Restatement 2nd of Agency §§220, 227. As a matter of law, control over the actions of an on duty state trooper cannot be forfeited by the State to a private company.

Finally, the abandonment of the appeal on the Public Duty Doctrine makes the Superior Court decision final and the law of the case. Thus, the "Borrowed Servant" argument is moot as no liability by Trooper Hruspa would exist to impose on Pennsy Supply.

Therefore, the Superior Court decision should be affirmed.

REGER RIZZO & DARNALL LLP

/s/ Arthur D. Kuhl, Esquire
ARTHUR D. KUHL, ESUQIRE (#3405)
1523 Concord Pike, Suite 200
Brandywine Plaza East
Wilmington, DE 19803
(302) 477-7101
Attorney for Appellee/Defendant below
Pennsy Supply, Inc.

Dated: December 22, 2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KELLY HALES, an individual, and REECE HALES, JR., an individual Plaintiffs-Below/Appellants,	:	No.: 476,2014
v.	:	Trial Court Below: Superior Court of the State of Delaware for Sussex County
PENNSY SUPPLY, INC., AMY HRUSPA, an individual, DELAWARE STATE POLICE THE STATE OF DELAWARE Defendants-Below/Appellees.	:	C.A. No.: S10C-05-044 ESB

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify on this 22nd day of December, 2014 that a copy of Defendant Below/Appellee Pennsy Supply, Inc.'s Answering Brief and Appendix to Answering Brief by Defendant Below/Appellee Pennsy Supply, Inc. have been served electronically through File & Serve Xpress upon the following:

Lynn A. Kelly, Esquire
Department of Justice
820 N. French Street
Wilmington, DE 19801

Kyle F. Dunkle, Esquire
Arthur M. Krawitz, Esquire
Debra C. Aldrich, Esquire
Matthew R. Fogg, Esquire
Doroshow, Pasquale, Krawitz & Bhaya
1208 Kirkwood Highway
Wilmington, DE 19805

REGER RIZZO & DARNALL LLP

Dated: December 22, 2014

/s/ Arthur D. Kuhl, Esquire
ARTHUR D. KUHL, ESQUIRE (#3405)
1523 Concord Pike, Suite 200
Brandywine Plaza East
Wilmington, DE 19803
(302) 477-7101
Attorney for Appellee Pennsy Supply, Inc.