



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 : Court Below:
 : Superior Court in and for Sussex
 v. : County, the Honorable E. Scott
 : Bradley,
 PENNSY SUPPLY, INC. d/b/a : C.A. No. S10C-05-044 ESB
 TILCON, a foreign corporation, AMY :
 HRUPSA, an individual, THE :
 DELAWARE STATE POLICE, and :
 THE STATE OF DELAWARE, :
 :
 Defendants Below, :
 Appellees :

**APPELLANTS' REPLY BRIEF, IN RESPONSE TO APPELLEES, AMY
HRUPSA, THE DELAWARE STATE POLICE AND THE STATE OF
DELAWARE'S ANSWERING BRIEF**

DOROSHOW, PASQUALE,
KRAWITZ & BHAYA

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DATED: 1/15/2015

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
ARGUMENT	1
I. THE SUPERIOR COURT ERRONEOUSLY CONCLUDED THAT APPELLEE HRUPSA OWED NO DUTY TO APPELLANTS BASED ON ITS ERRONEOUS FINDING THAT SHE WAS NOT A BORROWED SERVANT.....	1
CONCLUSION	3

TABLE OF CITATIONS

CASES

PAGE

<i>Volair Contrs., Inc. v. AmQuip Corp.</i> , 829 A.2d 130 (Del. 2003)	1-2
--	-----

ARGUMENT

I. THE SUPERIOR COURT ERRONEOUSLY CONCLUDED THAT APPELLEE HRUPSA OWED NO DUTY TO APPELLANTS BASED ON ITS ERRONEOUS FINDING THAT SHE WAS NOT A BORROWED SERVANT.

Plaintiffs appeal the Superior Court opinion and order only as it pertains to Defendant below-appellee Pennsy Supply Inc., and also Defendant below-appellee Amy Hrupsa with respect to her status as Defendant Pennsy Supply Inc.'s borrowed servant. Plaintiffs do not appeal the Superior Courts decision pertaining to Defendants below-appellees the State of Delaware and the Delaware State Police.

In her capacity as a borrowed servant of Pennsy Supply, any negligence on the part of Cpl. Hrupsa would be imputed to Pennsy Supply under a theory of *respondeat superior*. The common law borrowed servant doctrine focuses on the relationship between employer and employee. Volair Contrs., Inc. v. AmQuip Corp., 829 A.2d 130, 134 (Del. 2003). Under the common law, an employee of one party can temporarily become the employee of another in the performance of certain services. Id. If a jury finds an employee to be a borrowed servant of a specific employer, that specific employer is liable for the negligence of the employee on a *respondeat superior* basis, because the employer would have control over the activities of the employee. Id.

To determine the employer at the time of the negligent act, the trier of fact needs to determine if the employee was “acting in the business of and under the direction of the general employer or the specific employer.” Id. The Volair Court further explains that “it is not important whether or not [the employee] remains the employee of the general employer as to matters generally.” Id.

Pennsy was paid for maintaining traffic and was required to have a certified traffic control specialist at the construction site (A-58-59). By contract, Cpl. Hrupsa was to *assist* with controlling and/or maintaining traffic (A61). Additionally, Pennsy was required to explain to Cpl. Hrupsa the project activities pertaining to where her services were needed (A61). The undisputed dynamics of the relationship between Appellee Hrupsa and Pennsy demand the application of the borrowed servant doctrine by a jury. Any application of this doctrine logically leads to a determination that Appellee Hrupsa was indeed a borrowed servant of Pennsy.

Appellants argue that Pennsy is liable for the negligence of its borrowed servant, Hrupsa, for the specific acts for which she was borrowed. If Hrupsa is found by a jury to be the borrowed servant of Pennsy, rather than the employee of the general employer, State Defendant Appellees, Pennsy could be liable for her negligence on a *respondeat superior* basis because Pennsy had control over Hrupsa’s specific activity of directing traffic.

CONCLUSION

For the reasons set forth above, Appellants, Kelly Hales and Reece Hales, Jr., respectfully request that this Honorable Court reverse the decision of the Superior Court.

DOROSHOW, PASQUALE,
KRAWITZ & BHAYA

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