IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT SCOTT McKINLEY and DEBORAH McKINLEY,	:	
Plaintiffs Below, Appellants,	:	No. 465, 2012
v.	:	APPEAL FROM DECISION OF THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, C.A. NO. N10C-09-192 PLA
MICHELE CASSON,	:	
Defendant Below, Appellee /Cross-Appellant.	:	

APPELLEE's ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE AND STAGE OF PROCEEDINGS

Plaintiffs Deborah and Robert S. McKinley brought this action on September 24, 2010 as to a motor vehicle accident of October 3, 2009, asserting that Robert sustained bodily injuries as a result of the accident. Plaintiff Deborah McKinley, who was not involved in the accident, brought a loss of consortium claim.

On September 27, 2011, Plaintiffs issued a Notice of Records Deposition to Defendant's physician. Defense counsel received a copy of the subpoena on October 5, 2011, at which point Plaintiffs were already in possession of Defendant's medical records. Defendant responded by filing a motion for protective order and to exclude evidence of Defendant's medical history. Plaintiffs filed a response on November 17, 2011. On December 5, 2011, after hearing oral argument, the Trial Court granted the motion for a protective order.

On February 17, 2012, the Defendant filed a motion for summary judgment, to which the Plaintiffs filed a response on March 14, 2012. The Trial Court denied the motion for summary judgment without oral argument by written decision on March 20, 2012.

On May 25, 2012, Defendant filed a motion in *limine* to allow testimony from Brandon Thomas regarding witness statements. Plaintiffs responded on June 4, 2012. On May 29, 2012, Defendant filed a motion in *limine* to exclude references to Defendant's medications. Plaintiffs filed a response on June 7, 2012. Plaintiffs filed a motion in *limine* on June 1, 2012 to exclude references to motorcycle helmet use and mitigation of damages. Defendant filed a response on June 8, 2012.

After hearing oral arguments on the motions during the pre-trial

conference, the Court decided to allow Mr. Thomas' testimony, decided to exclude evidence of Defendant's medications and denied the motion to exclude references to helmet use as to mitigation of damages.

This case was heard by a jury starting on August 6, 2012 and ending on August 8, 2012. The jury heard testimony from Plaintiffs, Defendant, Corporal Robert Downer, Jr., Donald Lee Morris, Jr., Terry Casson, Brandon Thomas, Corporal Edward J. Sebastianelli, and John B. Townsend, III, M.D. The jury determined that Defendant was not negligent in a manner which proximately caused the accident and thus did not address the questions as to whether Plaintiff's negligence caused the accident or the amount of his damages.

On August 23, 2012, Plaintiffs filed their Notice of Appeal. Defendant filed a Cross-Appeal on August 31, 2012. On October 15, 2012, a briefing schedule was issued, which provided that Plaintiffs' Opening Brief and Appendix were due on November 12, 2012. The briefing schedule further provided that Defendant's Answering Brief was due 30 days after the Plaintiffs filed their Opening Brief. On November 12, 2012, Plaintiffs filed their Opening Brief and Appendix. This is Defendant Below, Appellant's Answering Brief on Appeal and Cross-Appellant's Opening Brief of Cross-Appeal.

SUMMARY OF ARGUMENT

1. Denied. The Trial Court properly granted Defendant's motion for a protective order after determining that Defendant's unrelated medical records sought by Plaintiffs were protected by physician-patient privilege and thus beyond the scope of discovery in this case.

2. Denied. The Trial Court acted within its discretion by excluding at trial reference to Defendant's medication, finding that the prejudicial effect outweighed any arguable probative value.

3. Denied. The Trial Court acted within its discretion in granting Defendant's Motion in *Limine* and allowing Brandon Thomas to testify regarding statement of witnesses which he included in his report and became part of Plaintiff's record at Christiana Hospital, as these statements fell within the present sense impression exception and medical treatment exception to the hearsay rule.

4. Denied. The Trial Court acted within its discretion in denying Plaintiffs' Motion in *Limine* to exclude references to Plaintiff's decision to not wear a motorcycle helmet as the decision was a secondary assumption of the risk.

5. Denied. The Trial Court properly issued a jury instruction on the assumption of risk as it was proper given Plaintiffs' knowledge of the risk and his decision to encounter the risk even though the risk was out of proportion to any possible advantage.

6. Denied. The Trial Court acted within its discretion by permitting Trooper Downer to testify about damage and accident mechanics in a non-expert capacity in response to a speculation objection and Plaintiffs waived an objection claiming he was

testifying as an expert because it was not presented below.

7. The Trial Court improperly denied Defendant's Motion for Summary Judgement as there were no factual issues as to whether Plaintiff was more negligent than Defendant.

COUNTER-STATEMENT OF FACTS

Plaintiff drove his motorcycle into the rear of Defendant's car on October 3, 2009 at approximately 10:00 p.m. on northbound Route 896 about one tenth of a mile beyond Bethel Church Road near the base of the Summit Bridge. (A-203,207,209,210; B-29) A motorist would drive around a bend and come to the area where construction was located. (A-209) Orange barrels caused a driver to move over because two lanes went into one lane at the approach to the bridge, with a cement median between the north and southbound lanes. (A-205,209; B-30) A vehicle could pull to the shoulder where the accident occurred but on the bridge, there was no shoulder. (A- 205,209)

Plaintiff does not remember the accident. He remembers losing at poker, driving on Route 896 and then waking up in the hospital (A-193) It was dark when he left the poker game. (A-200) Trooper Downer investigated the accident assisted by Corporal Sebastianelli. (A-203; B-14) Terry Casson is the ex-husband of Defendant. (A-232) Defendant is a 37 year old receptionist who dined with a friend and planned to take Route 1 northbound but accidently went south over the St. George's bridge. (A-243)

Bridges made her anxious but she is not claustrophobic and had no trouble with construction zones. (A-248) She phoned her ex-husband who told her she could not get home without driving over a bridge. (A-243) She asked him to direct her to the Summit Bridge, with which she was more comfortable as it was smaller and shorter, and she continued to talk to him until the accident occurred. (A-244-245).

Mr. Casson was at FrightLand with their daughter when they got a

call from Defendant asking about another way to get home. (A-233) He directed Defendant to the Summit Bridge which was not out of her way and stayed on the phone with Defendant up to the accident.(A-233, 237) Mr. Casson said Defendant was fine driving over bridges if someone was talking to her. (A-232)

When she mentioned construction, he said she could pull over and he would get her, but she said she was fine. (A-233-234) They talked until Defendant screamed into the phone that someone hit her and the phone went dead. (A-234) He had no idea what had happened. (A-237) He tried to reach Defendant, called 911 and drove to the scene. (A-234) He spoke with Defendant before he arrived, learned someone ran into the back of her and she was fine. (A-234)

Defendant said it was dark and foggy near the bridge, she noticed construction on her approach and saw a vehicle to her rear.(A-244, 245) She was going 40 mph in a Trail Blazer with her lights on and came across orange cones with reflectors where the two northbound lanes went into one. (A-244) The lanes merged into the left lane, so she slowed down and became nervous, so looked for an opening on the right side to pull over. (A-245) Defendant did not recall whether or not she used a turn signal but said she slowed, going about 5 to 10 mph when she began to pull over and felt a thump, she told Mr. Casson someone hit her and ended the call. (A-245) The front of her vehicle was on the right closed portion of the road. (A-245)

Defendant checked on the Plaintiff, who was lying in the road and did not respond to her questions. (A-245 -246) She was "freaking out" and in complete shock because a man and woman, who said she was a

nurse, told her not to touch him. (A-246) She later saw Plaintiff sit up, give his name and say he lived in Newark. (A-246) She did not ask the bystanders if they saw the accident. (A-246) She did not think she might gets sued and would need witnesses. (A-247)

Defendant testified she did not tell Trooper Downer that she stopped suddenly at the foot of the bridge or that she slammed on her brakes. (A-246) She said bridges make her very nervous, the lanes were getting tight and she was pulling over to get out of harm's way when she got hit. (A-246) She had anxiety but did not recall whether she told him she had an anxiety attack. (A-246)

Donald Morris, a New Castle County paramedic responded to the accident. (A-217-218) There were a large number of vehicles around and the patient was lying within a few feet of the center median. (A-219) A first responder was holding his neck and there was another ambulance at the scene. (A-219) Someone pointed out slight damage to the SUV at the scene and he said it is helpful to know the mechanism of an accident. (A-220) Plaintiff was thrown without wearing a helmet, was confused at the scene, and Mr. Morris worried about a potentially life threatening head injury. (A-221)

His partner wrote their report. (A-222) He did not remember asking an EMT to ask bystanders how the accident happened but said he might ask an EMT to get information about what part of the vehicles made contact and if anyone knew their estimated speed. (A-222) Speed information is important because the faster the speed, the greater the damage to the occupants can be. (A-223) He asked an EMT to drive the paramedic vehicle to the hospital while he rode in the ambulance. (A-

223) He did not know whether his partner asked Mr. Thomas to get the information noted in the EMT report. (A-223)

Brandon Thomas, an EMT for Middletown Fire Company, arrived at the scene by ambulance, wearing a uniform with "EMS" on the shirt. (A-225) Private ambulance personnel had come upon the scene before he arrived and placed a collar on the Plaintiff, who had blood on his face and hands and was not able relate what happened. (A-225-226) One of the three paramedics on the scene asked him to see what happened. (A-226) He asked at least two bystanders if anyone had seen anything since the patient could not tell him. (A-226, 231) He was told:

> ...the patient had driven into the back of a car. The car was moving slowly at about 10 miles per hour. The patient wasn't moving much faster on his motorcycle.
>
> * * *
>
> He drove into the back of the car and fell off of the motorcycle and both were moving at a slow rate of speed. (A-226)
>
> * * *
>
> He laid on the ground and did not move...It was reported that he was not wearing a helmet." (A-227)

Mr. Thomas did not write down exactly what was said but wrote what was told to him, including everything to the best of his ability.(A-230-231) He took notes while talking to them which were shredded. (A-231) He prepared a report as soon as possible as he is required to complete it within four hours of the accident. (A-225)

His report then became a part of the Christiana Care patient care record to be used for medical treatment purposes. (A-227-228) It was important to accurately record everything because it was a picture of the scene for hospital staff to use to treat the patient accordingly. (A-228) Mr. Thomas went to the bystanders, told them he was an EMT and asked if anyone knew what happened and they told him.

(A-229) The discussion did not take more than four minutes. (A-230) He described all of the detail in his report accurately. (A-229-230)

Mr. Thomas could not identify the bystanders by sex, race or number although he said he spoke to them at the right side of the northbound lane. (A-229-230) He did not look at the vehicles because he did only as directed, to avoid freelancing and causing another accident. (A-229, 231) He did not know if he was able to tell the paramedics what he learned. (A-227) He drove the paramedics' truck to the hospital that night and then shared the information he obtained from the bystanders with the doctors at the hospital. (A-227).

Corporal Sebastianelli testified about the components of a typical investigation of an accident. (B-32-35) It involves looking for skid or other marks on the road although he could not recall whether there were any. (B-32) An officer typically should also ask around to see if there were any witnesses. (B-35) He said he was certain there were witnesses to the accident but did not know if their identities were known. (B-36) The officer typically will also go to the hospital to check on the condition of any injured victims. (B-37) He prepared no report and did not speak to the Defendant. (B-14-15,41)

Trooper Downer, the investigating officer, started as Delaware State Police Officer in September of 2007. (A-202-203) He claimed a present recollection of the accident and prepared a report that day which did not mention any other officer at the scene. (A-204, 208) He did not think it was a particularly serious accident and did no specialized investigation. (A-209) Downer did not review his report before testifying at trial. (A-207)

When asked about the lighting conditions, Downer said his memory was that it was during the day. (A-204) On cross-examination, after reviewing his report, he said the accident happened at night, at 9:53 p.m. (A-210) Corporal Sebastianelli, who also testified by memory said the accident occurred in the daytime. (B-31)

Two officers arrived before Downer, and Plaintiff had been taken to the hospital, conscious and alert but with a head injury (A-205-206) Downer spoke to Defendant who was very upset and told him she had a fear of bridges, she started to panic, called her ex-husband to calm her down and stopped at the foot of the bridge. (A-206) He did not report what Defendant said to him word for word. (A-211).

An officer told Mr. Casson that Defendant was upset because of the trauma of the accident. (A-238) He did not tell the officer that Defendant stopped suddenly. (A-235) He did not tell either officer that Defendant had a panic disorder although he did say she had a fear of or was uncomfortable about bridges. (A-236)

Downer testified Defendant said she stopped abruptly at the foot of the bridge but he did not ask how fast she was going when she stopped. (A-211) He did not know if she was going 35 mph or 10 mph when she stopped and he did nothing to determine how far the Plaintiff was behind her before the accident. (A-212) He had no memory of seeing skid marks indicating Plaintiff had done anything to try to come to a sudden stop and his report did not mention them. (A 212)

Downer identified the point of impact as being 16 feet east of the west edge of the road, which was the edge of the southbound side of the road. (A-210) He agreed that the west edge of the southbound

lane to the right of two southbound lanes, the left of which was closed off by barrels. (A-210) He did not know if he might have measured from the west side of the northbound lane such that the accident would have occurred in the right northbound lane. (A-210) He said his mistake was in not being more detailed and he could not recall from which side he measured. (A-210)

Downer saw the motorcycle on its side in the roadway, which he remembered because it was a nice motorcycle and he thought Casson's vehicle was on the far right shoulder, beyond the orange barrels, when he arrived. (A-206,211) Sebastinelli said the motorcycle was laying on its left side. (B-34-35) Morris said the motorcycle was closer to the center line between the two lanes. (A-223)

Mr. Casson said when he arrived, Defendant's vehicle was behind barrels on the right shoulder. (A-235) There were no cement barricades where the accident occurred but barrels kept people from driving in the right through lane. (A-239) He said the motorcycle was lying on its left side, the driver was in an ambulance that was pulling away as he arrived and there were two officers at the scene. (A-235)

Plaintiff said the right front of his motorcycle was damaged in the accident. (A-200) Downer said the damage to the motorcycle was to the right front fender. (A-208) Defendant's SUV had minor damage on his report and he could not identify the damage was on Defendant's vehicle on the pictures. (A-208) Defendant showed a slight, very light, white marking on the photograph of the vehicle's rear. (A-247)

Downer said he was not aware that an EMT had talked with witnesses at the scene and no one told him he or she witnessed the

accident. (A-213) When asked if he went to look for witnesses, he said two other officers were already at scene, the medics had left, traffic was shut down and he was taking the report, cleaning up and getting the road back open. (A-213) The officers at the scene were experienced, so he assumed they would ask for witnesses. (A-213)

Downer said Plaintiff was not wearing a helmet, sustained a facial head injury and broken ribs and was to be admitted overnight for observation according to the investigating officer. (A-211) He did not learn until later that Plaintiff required surgery the night of the accident because of swelling to the brain. (A-211) He did not remember if he went to the hospital to check on Plaintiff that night, which is normal procedure. (A-211)

During his discovery deposition, Trooper Downer said he asked Defendant if she had taken any medication that day to determine whether she was under the influence. (A-27) He said she told him she took something for depression or some psychotropic medication. (B-2) Downer's report said Defendant took prescription medication for a fear of bridges. (B-4) In Defendant's discovery deposition, she was asked whether she took medication. (A-33-35; B-63) Defendant testified that she takes Topamax and Keppra medications daily to treat epileptic seizures. (B-59-60, 63-64).

Defendant stated that she had a prescription for Valium for anxiety, which is a side-effect of the seizure medication although she did not take Valium on the day of the accident. (B-60-61, 62-65). She does not take Valium to treat a fear of bridges or when she drives and only uses it for airplanes. (B-60, 63-65, 66) She said she did not

have an anxiety attack that night. (B-67).

Plaintiff had a prior motorcycle accident in 1992 with a head injury and surgery. (A-191,196). He was in the hospital for three and a half weeks and had to be in an outpatient rehabilitation facility for about three months. (A-191) The plaintiffs were aware of the risk of head injury resulting from failure to wear a helmet and chose to accept that risk. (A-191-192, 197) Mrs. McKinley testified that they always wear helmets. (A-191) Mr. McKinley had another motorcycle accident in 2008 which he did not disclose in his discovery answers. (A-197)

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY GRANTING DEFENDANT'S MOTION FOR A PROTECTIVE ORDER HAVING DETERMINED THAT THE DEFENDANT'S MEDICAL RECORDS SOUGHT BY PLAINTIFFS WERE PRIVILEGED.

A. Question Presented

Whether the Trial Court abused its discretion in granting Defendant's Motion for a Protective Order having concluded that Defendant's unrelated medical records subpoenaed by Plaintiffs directly from Defendant's treating physician were protected by physician-patient privilege, thus beyond the scope of discovery.

B. Standard and Scope of Review.

A trial court is entitled to a great deal of discretion in applying and interpreting discovery rules. *Monsanto Company v. Aetna Casualty and Surety Company, et al.* 1990 Del. Super. LEXIS 430, at * 3 (referencing *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986)). Granting a protective order rests within the sound discretion of the trial court, and is not to be disturbed absent an abuse of discretion. This "occurs when a court has...exceeded the bounds of reason in view of the circumstances, or...so ignored recognized rules of law or practice so as to produce injustice." *Wilson v. Montague*, 19 A.3d 302, 2011 Del. LEXIS 229, at *5-6 (Del. 2011) (citations omitted). In reviewing an exercise of discretion, this Court may not substitute its own notions of what is proper where the trial judge based the decision "upon conscience and reason, as opposed to capriciousness or arbitrariness." *Sammons v. Doctors Emergency Services, P.A.*, 913 A.2d 519, 528 (Del. 2006) (citation omitted).

While the Trial Court's decision to enter a protective order to prevent discovery of privileged medical records will be reviewed for an abuse of discretion, the Trial Court's ruling as to the application of privilege is subject to *de novo* review. *Secrest v. State of Delaware,* 679 A.2d 58, 61-62 (Del. 1996).

C. Merits of the Argument.

Plaintiff's motorcycle rear-ended the Defendant's SUV. Defendant did not claim she had any medical condition which caused the accident or excused her from liability. Thus, it was not relevant to the jury's determination of negligence. Evidence that Defendant said she had a fear of bridges was raised throughout the trial.

Plaintiffs had Trooper Downer testify that Defendant said she had an anxiety attack and used that to cross-examine Defendant. The jury did not need information about Defendant's medication to decide whether or not it believed she had an anxiety attack and stopped suddenly, or whether she was pulling off the road when she was hit.

Plaintiffs' argument appears to be that they had the right to obtain Defendant's medical records solely to cross-examine her and bolster the testimony of Trooper Downer. They have provided no legal support that would permit them to obtain privileged information under those circumstances.

Plaintiffs claim Defendant put her medical condition at issue when explaining her actions to the investigating officer by saying she had a fear of bridges for which she takes prescription medication. That contention is inaccurate and without foundation. Downer asked Defendant whether she had taken any medication to determine whether

she was under the influence of any drug and she answered his question. Neither the officer nor Defendant testified that Defendant volunteered any medication use as a defense to the accident. Answering a police officer's questions about medication does not put a medical condition at issue in litigation.

Plaintiffs also argue Defendant was giving causes of the accident in her testimony. She was not giving legal opinions or defenses as to the cause of the accident. When confronted by the Trooper, examined by Plaintiffs' counsel and testifying at trial, Defendant just answered questions about her actions before the accident. Her counsel objected to questions about her medical status during her deposition on the basis of privilege after allowing some initial questions which appeared designed to determine whether any medication use affected her ability to testify.

Plaintiffs also argue, without authority, that Defendant denied her statements to the officer about medication so they should be able to obtain her records for cross-examination purposes. Downer's report, based upon a minimal investigation including inaccurate information about the accident location and the plaintiff's injuries, among other inaccuracies, is being heralded as providing an exact report of Defendant's statements on the night of the accident. Downer also testified from his memory of what he was told, telling the jury the accident happened during daylight. Given all of Downer's mistakes, use of a flawed report to claim a Defendant put her medical condition as issue cannot pass legal muster. Defendant's medical condition was not injected into this litigation by anyone other than Plaintiffs.

Two weeks after Defendant's deposition, Plaintiffs' counsel subpoenaed Defendant's medical records and Defendant immediately moved for a protective order.[1] In view of the procedural/notice deficiencies of the subpoena, and the narrow time frame between service and compliance by the physician, Defendant did not have time to move to quash and a Rule 26(c) motion was her only option.

At the December 5, 2011 hearing on that motion, the Trial Judge employed a balanced and reasoned analysis and asked for the good faith basis and the "reasonable relatedness" to warrant a subpoena for Defendant's privileged medical records since Defendant's physical condition was not an issue in the case. The Trial Court stated that credibility is not enough to delve into someone's private medical records when her physical condition was not in issue, nor would it "prove whether she is lying or not." (A-56, 57). If the witness told two different stories that rendered her "highly impeachable", and whether she was prescribed medication was "irrelevant" to the outcome. (A-58-59). The Plaintiffs had sufficient information to test her credibility on any inconsistencies in her statements.

No legal standard requires a person to take medication to address a fear. Plaintiffs did not offer any expert or other proof about

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[1] Plaintiffs deposed Defendant on September 12, 2011. By September 27, 2011, Plaintiffs issued a Notice of Records Deposition to Defendant's physician, Dr. Sommers. The Notice failed to specify whose records were being subpoenaed, nor was a copy of the subpoena attached. On October 4, 2011, Defense counsel requested a copy of the subpoena. Plaintiffs' counsel delivered a copy of the subpoena to defense counsel on October 5, 2011, which revealed that Defendant's records were being sought. By then, however, Plaintiffs' counsel stated he had the records. Defendant did not have time to move to quash. Her only remedy was to move for a protective order and demand the return/destruction of the privileged records.

whether Defendant should take medicine for any anxiety and how that would have made a difference as to how this accident happened. (A57-58) The Court held that without an expert, Plaintiffs were going to ask the jury to speculate on the issue. (A56-57).

The Court employed a reasoned and balanced analysis prior to the ruling. While this issue is a matter of first impression for Delaware, other courts have reached similar results. In *Carrion v. The City of New York,* cited *infra,* the court held that even when a party's physical condition was at issue, which was not the case here, "a party does not waive the doctor-patient privilege merely by being forced to defend an action..." and must affirmatively assert a condition to excuse conduct rather than simply deny plaintiffs' allegations. *Carrion,* 2002 U.S. Dist. LEXIS 5991 at *5-6 (S.D. NY Apr. 8, 2002) (citing *Dillenbeck v. Hess,* 536 N.E.2d 1126 (1989)).

Superior Court Civil Rule 26(c) provides that a trial court may enter a protective order regulating discovery "for good cause shown" to protect a party or person from "annoyance, embarrassment, oppression, or undue burden of expense." Del. Super Ct. Civ. R. 26(c). A protective order will be considered where the conditions exceed those which are inherent in any civil litigation. *Ramada Inns Inc. v. Drinkhall,* 490 A.2d 593, 598-99 (Del. Super. 1985). The requested relief must be supported by a particularization demonstrating that such relief is warranted. *Id.* at 599.

Plaintiffs cite no authority to show that they ever had any legal standing to subpoena Defendant's privileged medical records. Their argument is both legally and factually flawed. Delaware law does not

permit litigants to utilize subpoenas as a discovery tool to obtain otherwise privileged information. Del. Super. Ct. Civ. R. 45(d)(2). Medical records are considered privileged information and protected from disclosure unless the person's medical condition is at issue as an element of their claim or defense in a proceeding. Delaware Rule of Evidence ("D.R.E.") 503(d); *State of Delaware v. Joseph Shields*, 586 A.2d 655, 657-58 (Del. Super. Ct. 1990).

Delaware's physician-patient privilege embodied in D.R.E. 503 prohibits the disclosure of communications between a patient and her physician as to patient's physical, mental or emotional condition. It may not be circumvented without a "precise and compelling show of need." *State v. Wynn*, 1994 WL 476125, at *3 (Del. Super. Ct. 1994).

While the claimant bears the burden to establish the elements necessary to invoke the privilege, *Secrest*, 679 A.2d at 62, it is the burden of the party seeking discovery of privileged records to show a reasonable relatedness to the case. *Konstantopoulos v. Westvaco Corp.*, 1991 U.S. Dist. LEXIS 17760, at *8 (D. Del. Dec. 13, 1991). Merely defending a lawsuit does not permit discovery of these records. *Carrion*, 2002 U.S. Dist. LEXIS 5991, at *4-6.

As Defendant never asserted any affirmative defense implicating her medical condition to waive that privilege, did not assert it excused her conduct and only responded to questions from the police officer at the scene as to whether she had taken any medication, the Trial Judge properly protected Defendant's medical records and avoided the risk of jury speculation. The decision below should be affirmed.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY EXCLUDING REFERENCE AT TRIAL TO DEFENDANT'S PRESCRIPTION MEDICATION FINDING THAT THE PREJUDICIAL EFFECT OUTWEIGHED ANY ARGUABLE PROBATIVE VALUE.

A. Question Presented

Whether the Trial Court abused its discretion in granting Defendant's Motion *In Limine* to preclude testimony as to Defendant's prescription medication having previously found that Plaintiffs lacked any theory of probative value or causal relevance of the Defendant's medical history to any element in the underlying case.

B. Standard and Scope of Review.

This Court reviews evidentiary rulings by a trial judge to admit or exclude evidence on relevancy grounds under an abuse of discretion standard. *Farmer v. State,* 698 A.2d 946, 948 (Del. 1997)

C. Merits of Argument

Plaintiffs claim the Trial Court erred by granting Defendant's motion *in limine* to preclude them from introducing any evidence at trial of Defendant's prescription medication, taken or not taken, where the trial judge previously had ruled that said medication had no causal relevance to the issues being litigated. Because Plaintiffs' proffered purpose for this evidence failed to meet the threshold requirements as to materiality and probative value, the Trial Court properly ruled the evidence improper, and thus inadmissible at trial.

Defendant has addressed most of the arguments Plaintiffs make in this argument in the response to the previous argument and will not reiterate them here. It is Defendant's contention that improperly

obtained privileged medical records cannot be used solely because Plaintiffs claim they are needed to impeach Defendant's testimony.

Delaware Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." DRE 401. "Evidence which is not relevant is not admissible." DRE 402.

Under Delaware law, "relevancy is determined by examining the purpose for which evidence is offered." *Farmer*, 698 A.2d 946 at 948 (citation omitted). That purpose must "accommodate the concepts of materiality, *i.e.*, be of consequence to the action, and probative value, *i.e.*, advance the likelihood of the fact asserted." *Id.* at 948 (citation omitted). Evidence may be deemed material if disclosure of said evidence would render the outcome of the trial different. *Id.* at 1058. A "determination of relevancy under DRE 401 and unfair prejudice under DRE 403 are matters within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion." *Mercedes-Benz of North America, Inc. v. Norman Gershman's Things to Wear*, 596 A.2d 1358 at 1366 (Del 1991).

In *Farmer v. State*, cited *infra*, the Delaware Supreme Court found that the State could not use a handgun found in the defendant's apartment unless it could link the weapon to the crime with which the defendant was charged, as it was not probative of a criminal act and would create jury speculation. Here, no causal link was established by Plaintiffs between any potential medication use and the accident. Thus, reference to Defendant's medication is irrelevant to causation

as there no proffer that medication, whether taken or not taken, would have made the cause of the accident more or less probable.

The trial judge was troubled as to the procedural deficiencies by acquisition of the records and echoed the concerns discussed in *Farmer* regarding lack of causal relationship. At the pre-trial conference, Plaintiffs' counsel could not in good faith say that the medication was related in any way to the accident.

To prevail on this appeal, Plaintiffs not only have to show that the Trial Court's evidentiary ruling was erroneous, but that a "substantial right" of the Plaintiffs was affected. Plaintiffs fail on both fronts. Plaintiffs do not provide any arguable basis that their substantial rights were affected by that discretionary ruling. *Mercedes-Benz of North America, Inc., et al.*, 596 A.2d at 1365.

Accordingly, the Trial Court correctly held that credibility is far too tenuous a connection where (1) Defendant's medical records were improperly obtained; (2) the records were protected by physician-patient privilege; (3) no expert would testify that taking medication would have altered the outcome, or that the failure to take medicine proximately caused the accident; and, most importantly, (4) the risk of unfair prejudice to this Defendant exceeded any *de minimus* probative value. The Trial Court's decision to grant Defendant's motion *in limine* to preclude mention of Defendant's prescription medication must be affirmed.

III. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY GRANTING THE DEFENDANT'S MOTION IN *LIMINE* ALLOWING BRANDON THOMAS TO TESTIFY REGARDING STATEMENTS MADE TO HIM BY WITNESSES TO THE ACCIDENT, WHICH WERE RECORDED IN HIS EMT REPORT.

A. Questions Presented

Whether the Superior Court abused its discretion in granting Defendant's Motion in *Limine*, allowing Brandon Thomas to testify regarding statements made to him by witnesses to the accident, which were recorded in his EMT report.

B. Standard and Scope of Review.

This Court reviews evidentiary rulings by a trial judge to admit or exclude evidence on relevancy grounds under an abuse of discretion standard. *Farmer v. State*, 698 A.2d 946, 948 (Del. 1997)

C. Merits of the Argument

The Trial Court acted within its discretion in granting Defendant's Motion in *Limine* and allowing Brandon Thomas ("Thomas"), an EMT for Middletown Fire Company to testify regarding statements made to him and recorded in his written report, which was prepared for the purposes of medical treatment.

Thomas testified that, while wearing his EMT uniform, he asked at least two bystanders if anyone had seen the accident, so the emergency responders would be better able to treat the Plaintiff. (A-223, 226, 228, 231). He took notes of that information and included it in his report, which he completed soon after the accident. (A 231, 225). Thomas' report became part of Plaintiff's Christiana Care record. (A-229). This information was not obtained for any other reason than the treatment of Plaintiff. (A-228).

The statements provided to Thomas from the witnesses fall within the present sense impression exception to the hearsay rule. Present sense impression statements are admissible as they are considered to be trustworthy "because the declarant has no time to fabricate the statements and because there is less concern that the statements reflect a defect in the declarant's memory." *Warren v. State*, 774 A.2d 246, 252 (Del. 2001)." With the short period of time between the accident and the statements, they are inherently trustworthy as there was insufficient time to fabricate a story or for the declarant's memory to fade.

Pursuant to Delaware Rule of Evidence 803(1), "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event of condition, or immediately thereafter," is considered to be an admissible exception to the hearsay rule. D.R.E. 803(1). The present sense exception is met when the statement is an explanation rather than narration of the event which was personally perceived by the declarant and is provided within a short period after the event. *Warren v. State*, 774 A.2d 246, 251-2 (Del. 2001). In *Warren*, the Delaware Supreme Court addressed whether statements were a narration and found that as the declarant related her account of recent events, "with little embellishment or extraneous commentary" the recordings were not a narration, and admissible under the present sense exception. *Id.* at 252-3.

Similarly, in the present case, Thomas spoke with individuals about fifteen minutes after the accident, who related a description of what they had just witnessed to assist in treating an injured driver.

The statements were promptly obtained, were not embellished and did not demonstrate any manner of creating a deliberate story. (A-124). The statements instead were reports given to Thomas from the bystanders, with no extraneous information included. (A-226-7)

The *Warren* Court held that statements made within ten to twenty minutes after an event may be admissible as present sense impressions. *Warren*, 774 A.2d at 253. Plaintiffs argue that the statements cannot be considered contemporaneous as they occurred at most fifteen minutes after the accident occurred. That time frame is proper within the present sense impression exception, as the statement "need not be precisely contemporaneous with the triggering event." *Id.* at 253.

Plaintiffs have asserted that as the identity of the declarants is unknown, independent evidence, to corroborate if the bystanders witnessed the accident, is necessary. The present sense impression exception, does not require the declarants's identity to be known and the declarant does not need to be available for trial. D.R.E. 803.

The Court has also found that challenges "to the credibility of the witness who heard the statements goes to the weight to be accorded to that evidence by the jury not to its admissibility." *Green v. St. Francis Hosp. Inc.*, 791 A.2d 731, 736 (Del. 2002). In *Green*, the witness testified to statements that she heard from a declarant who had personally perceived the event and described it in a statement. *Id.* The witness only recalled hearing this statement a few years after the event. *Id.* The Court found that the statements were admissible because they met the elements for the present sense exception to the hearsay rule. *Id.* The Court further found the determination of

credibility of the witness who was testifying regarding the hearsay statement, was in the jury's purview, but it did not affect the admissibility of the statements. *Id.*

Thomas said the individuals he spoke with stated that they had witnessed the accident. (B-55-56). Plaintiffs' claim, contrary to Delaware law, that because there is no absolute evidence that the declarants witnessed the event, there must be an independent corroboration that they actually perceived the event. In *Green*, even self-serving statements were admitted, although there was no evidence that the declarant had actually witnessed the event. *supra* at 735.

Similar to *Green*, here, Thomas asked the bystanders if they had seen what happened, and recorded their responses. The witnesses had no stake in the outcome. This testimony is more than sufficient to establish the declarants perceived the event. Further, as held in *Green*, it was for the jury to determine the appropriate weight to give the statements after they heard the Plaintiffs' cross-examination of Thomas regarding his knowledge of the declarants. The challenge was to the credibility of the witness who heard the statements, not the admissibility of the statements, and therefore it is for the jury to determine the weight to be given to the statements. *Id.*

Thomas' testimony regarding the statements he heard from witnesses to the accident falls within the present sense impression exception to the hearsay rule. The statements were made soon after the accident, were made by individuals who identified that they had seen the accident, and were descriptions of what those individuals had seen. As the statements comply with the requirements of the present

sense exception, any issues regarding the credibility of Thomas and his recollection of those statements is a proper question for the jury. These statements, however, were properly admitted.

In addition, while the Trial Court found that these statements fell within the present sense impression exception, if this Court should disagree, any error would be harmless as these statements are also admissible pursuant to Delaware Rule of Evidence 803(4), statements made for purposes of medical diagnosis of treatment.[2] Below, the Trial Court also considered the fact that the statements were recorded and obtained for the purposes of medical treatment. (A-174). Delaware Rule of Evidence 803(4) provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external course thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible as an exception to the hearsay rule.

In *Gates v. Texaco, Inc.*, 2008 Del. Super. LEXIS 441 (Del. Super. March 20, 2008), the Court found that statements made by the declarant regarding his contact with benzene were admissible pursuant to the medical treatment exception, as the statements were made to the treating physician for the purposes of medical treatment. *Id.* The Court considered the fact that the statements made by the declarant

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[2] *See Warren*, 774 A.2d 246, finding that it was harmless error to admit statements under the present sense impression when the statements were admissible under another exception to the hearsay rule.

may not have been accurate, however, as they were made for the purposes of the treatment, they were admissible. *Id.*

Thomas was directed to determine how the accident occurred in order to treat the Plaintiff. (A-226). Thomas then created a report after the accident, which became part of the Christiana Care patient record to be used for medical treatment purposes. (A-227-228). He did so wearing an EMT uniform and identifying himself as an EMT. (A-225, 229). He considered it very important to accurately include the statements for proper hospital treatment of the Plaintiff. (A-228).

Accordingly, the statements provided were for the purposes of treatment as they went to the general character of the cause. The two emergency medical responders who testified at trial identified that it is helpful in treating a patient to know the speeds that the vehicles were traveling or how the vehicles made contact. (A-223-4, 226). These statements fall within the medical treatment exception and are inherently trustworthy because they were made for the purposes of medical treatment. *Gates* 2008 Del. Super. LEXIS 441 at 22. Therefore, the statements were properly admitted as they fall within the statements for the purposes of medical treatment exception to hearsay.

Further, the statements fall within the residual hearsay exception of Delaware Rule of Evidence 807, which provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the court determines that: (A) The statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can

> procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. D.R.E. 807

In the present case, the manner in which the accident occurred was a material issue. Given that the investigating police officer failed to speak with or identify the witnesses and Plaintiff does not have any recollection of the accident, statements from witnesses provide more probative value than any other evidence that came be obtained. Further, the interest of justice is served by the admission of these statements. The jury heard the testimony of Thomas and his responses to Plaintiffs' counsel's questions regarding the identity of the declarants. It was within the jury's purview to determine the weight of the statements; however, it was important that the jury know that those statements existed.

Defendant has also met the requirement for the statements to be admitted under D.R.E. 807. Defendant filed a Motion in *Limine*, seeking to admit these statements, by the motions in *limine* deadline, which provided the Plaintiffs with sufficient notice in advance of trial as required by the rule.

In the alternative, if the Court should find that the statements were not admissible pursuant to the hearsay exceptions, the statements should be admitted for the purposes of addressing Trooper Downer's credibility. (A-174).

Given that Plaintiffs' case was based upon a statement that Trooper Downer recalls the Defendant making to him, Trooper Downer's credibility was very important. The statements made by bystanders

that they witnessed the accident and that they saw the vehicles slowing down and not stopping directly contradicts that of Trooper Downer. Thus, the statements are not offered for the truth of the matter asserted, but instead demonstrate a credibility issue for Trooper Downer who stated that there were no witnesses to the accident, while Thomas found that there were at least two. (A-207, 213, 226, 231). The statements affecting Trooper Downer's credibility are also important as a jury may attribute more credibility to a police officer's testimony, given his office and position. Accordingly, the statements were admissible as they go to the credibility of Trooper Downer.

IV. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY DENYING PLAINTIFFS' MOTION IN *LIMINE* TO EXCLUDE EVIDENCE REGARDING PLAINTIFFS' FAILURE TO WEAR A HELMET.

A. Questions Presented

Whether the Superior Court abused its discretion in denying Plaintiffs' Motion in *Limine* to exclude evidence regarding Plaintiff's failure to wear a helmet.

B. Standard and Scope of Review.

This Court reviews evidentiary rulings by a trial judge to admit or exclude evidence on relevancy grounds under an abuse of discretion standard. *Farmer v. State*, 698 A.2d 946, 948 (Del. 1997)

C. Merits of the Argument

Evidence of Plaintiff's failure to wear a helmet pertained only to Plaintiff's assumption of the risk of an injury in an accident and did not pertain to the liability issues. Since the jury determined that Defendant' was not negligent in a manner which proximately caused the accident, this argument is not ripe on appeal and need not be considered. (A-278)

Delaware law has established that secondary assumption of risk is where a plaintiff's conduct in encountering a known risk is itself unreasonable, because the danger of the risk "is out of proportion to the advantage which he is seeking to obtain." *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 882-3 (Del. Super. 2005).

Despite Plaintiffs' assertion, secondary assumption of risk does not require that an individual have an affirmative duty. The doctrine for secondary assumption of risk only requires that the individual know of a risk, decide to take the risk, and that the risk is not

proportional to any advantage that could be obtained. In *Patton v. Simone*, 626 A.2d 844 (Del. Super. 1992), the Court found that the jury could determine that the plaintiff had assumed the risk of falling down an elevator shaft when he worked around the elevator shaft without a door or gate. *Id.* at *22.

In *Spencer v. Wal-Mart Stores E., LP*, 930 A.2d 881 (Del. 2006), the Court allowed a jury to consider whether the plaintiff secondarily assumed the risk, when she walked through a stream of water created by melting snow and then fell. *Spencer*, 930 A.2d at 886. That plaintiff had knowledge of the parking lot and decided not to walk on the sidewalk despite the risk which the Court stated allowed a jury to determine whether the plaintiff assumed the risk. *Id.*

Here, Plaintiff had been involved in a prior motorcycle accident in 1992, which resulted in a head injury with significant treatment. (A-191, 196). Both Plaintiffs testified they were aware of the risk of a head injury resulting from failure to wear a helmet, and both accepted this risk.[3] (A-191-2, 196-7). They did so because they like to feel the wind, they were only traveling short distances, and they were not required to by law. (A-191, B-76) Plaintiff even testified that he must be more careful when operating a motorcycle than an automobile and he now always wears an helmet. (A-202,193). His expert Dr. Townsend, testified that typically there is reduced injury when an individual wears a helmet. (A-340) Given that Plaintiff had specific

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[3] The Delaware Legislature was also aware of the risk of riding a motorcycle without a helmet as the proposes of 21 *Del. C.* § 4185 "is to protect motorcyclists and their passengers from head injuries." *State v. Brady*, 290 A.2d 322, 323 (Del. Super. 1972).

knowledge of the risk associated with operating a motorcycle without a helmet, the jury should hear that he encountered that risk knowingly.

Further, unlike evidence related to a seat belt use, evidence of non-use of a helmet is not inadmissible by statute. The fact that the Seat Belt System Safety Act, specifically provides that evidence regarding the failure to use a seat belt is not admissible, but the helmet statute is silent, demonstrates that the legislature intended there to be a difference between the statutes. The Delaware Legislature is charged with knowing the state of the law. *State v. Adams*, 27 A.2d 401 (Del. Super. 1942).

Based on the secondary assumption of risk doctrine, Plaintiff knew that if he did not wear a helmet he could sustain a significant head injury while operating his motorcycle which was clearly out of proportion to the risk of a head injury. He knew this risk because he had experienced this risk and sustained a significant head injury. Rather than wearing a helmet, Plaintiff determined that the benefit outweighed the risk and he decided to not wear a helmet. After this accident, Plaintiff stated that he now has decided to wear a helmet.

Just as the plaintiff in *Spencer* made a decision to walk through the melted snow and the plaintiff in *Patton* decided to work by an open elevator without a safety guard, Plaintiff decided to operate his motorcycle without a helmet, thereby encountering the risk that he may sustain significant head injury. He assumed this risk for the benefit that he was traveling short distances and because he was not required to wear a helmet by law.

V. THE TRIAL COURT DID NOT ERR BY ISSUING A JURY INSTRUCTION ON ASSUMPTION OF THE RISK AS TO PLAINTIFF'S FAILURE TO WEAR A HELMET AND PLAINTIFFS SUFFERED NO HARM FROM THE INSTRUCTION AS THE JURY DID NOT REACH THE ISSUE OF DAMAGES.

A. Question Presented

The Trial Court did not err in providing a jury instruction telling the jury it could determine whether plaintiff assumed the risk of injury by failing to wear a helmet and, as the jury did not address damages, this instruction caused no harm to Plaintiffs.

B. Standard and Scope of Review.

On appeal, questions regarding jury instructions are subject to *de novo* review. *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002). The Court determines if the jury instruction provides a correct statement regarding the substance of the law. *Id.*

C. Merits of the Argument

The jury instruction at issue stated that Defendant alleged Plaintiff voluntarily assumed a known risk in riding without a helmet which Defendant was required to prove by a preponderance of the evidence. (A-275) The jury was told that if Defendant proved this, "you may take that into account when considering what damages were proximately caused by the accident."[4] *Id.* Thus, the instruction was clear in stating it could only be considered on the damage claims which were not addressed as the jury did not find the Defendant to have been negligent in a manner which proximately caused the accident.

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[4] Further, the instruction was provided after the instruction regarding Plaintiff Deborah McKinley's loss of consortium claim, which further demonstrates that the jury was only to consider the Assumption of Risk if they found that Defendant's negligence caused the accident.

As this jury instruction was not addressed by the jury, any error would be a harmless error.

While any error would be a harmless error, the jury instruction was proper. Secondary assumption of risk is not a complete bar to the Plaintiff's action, it is instead a question of fact to be determined by the jury. *Spencer* 930 A.2d at 886. Further, the question of assumption of risk was placed with the damages instructions, as it was acknowledged that Plaintiff's decision to not wear a helmet was not related to the cause of the accident, but was instead a risk taken with knowledge of the potential damages he could face, not only due to the negligence of others, but also to his own possible negligence.

Plaintiffs assert that the jury instruction was more consistent with primary assumption of risk, which would be a total bar to recovery. A primary assumption of risk instruction, however, would provide that if the jury found that Plaintiff assumed the risk then Plaintiff may not recover. Here, the instruction allowed the jury to take into account Plaintiff's assumption of the risk, if it found that by a preponderance of the evidence that Plaintiff undertook a risk and understood the dangers associated with that risk.

The jury instruction was proper as Plaintiff acknowledged that he understood that operating his motorcycle without a helmet was a risk, and that he appreciated that risk due to his prior injury. The instruction simply told the jury that they were allowed to consider that assumption when determining damages.

VI. THIS ARGUMENT WAS NOT PRESERVED AS REQUIRED BY RULE 8 AND THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY ALLOWING THE OFFICER TO BE QUESTIONED ABOUT DAMAGE TO THE MOTORCYCLE.

A. Question Presented

Whether Plaintiffs may argue this question on appeal as they did not present the question to the Trial Court which did not abuse its discretion in permitting Defendant to question the officer about damage to Plaintiffs' motorcycle and with a response by the officer ending with the phrase "I don't know".

B. Standard and Scope of Review.

This Court reviews evidentiary rulings by a trial judge to admit or exclude evidence on relevancy grounds under an abuse of discretion standard. *Farmer v. State*, 698 A.2d 946, 948 (Del. 1997)

C. Merits of the Argument

Plaintiffs argue that Trooper Downer testified as an expert when he was asked about the location of the damage to the right front fender of the motorcycle and said it may have been consistent with an impact while Plaintiff was moving to the left as opposed to hitting the Defendant's vehicle straight on, but said he did not know. The only objection from Plaintiffs' counsel was that it would cause him to speculate. The Court denied the speculation objection and Downer said that the damage showed Plaintiff possibly made "an emergency maneuver to the left to get around, I don't know". (A-212)

As Plaintiffs did not object by stating the testimony would cause the witness to provide an expert answer when not so qualified, this argument cannot be considered on appeal. *Delaware Supreme Court Rule* 8. No exception to Rule 8 has been stated by Plaintiffs. An objection

is waived on appeal if the contemporaneous objection was based upon different grounds. *Weedon v. State*, 647 A.2d 1078 (Del. 1994).

If the Court considers this objection, Plaintiffs properly quote *DRE* 701 and 702 regarding expert and lay witness testimony. The testimony of Trooper Downer was not intended as expert testimony. The answer to a question regarding damage to the right fender of a motorcycle which had fallen on its left side was a) rationally based upon the perception of Downer; b) helpful to a clear understanding of how the accident occurred; and c) based upon common sense rather than specialized or technical knowledge as permitted by Rule 701.

There was no dispute that Plaintiff struck the rear of Defendant's vehicle and the question went to what part of the motorcycle was involved in the impact. No expert opinion as to the cause of the accident was given to the jury by a witness who answered in a manner favorable to Plaintiffs, by saying Defendant panicked and Plaintiff may have taken an evasive maneuver, although he did not know what Plaintiff did. He told the jury twice in that answer that Defendant said she panicked, stopped abruptly and did not slow down. If anything, the testimony served to allow the Trooper to repeat his statements that inferred his belief that Defendant was at fault.

As the Trial Court ruled upon a speculation objection and was not given the opportunity to provide a ruling on whether the question would cause the Trooper to provide an improper expert opinion, this Argument must fail. Testimony that something possibly could have happened followed by "I don't know" could not have been taken by the jury as improper expert opinion. This Argument must be denied.

VII. DEFENDANT FILED A CROSS APPEAL ALLEGING THAT THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS THERE WERE NO FACTUAL ISSUES AS TO WHETHER PLAINTIFF WAS MORE NEGLIGENT THAN DEFENDANT.

A. Question Presented

Whether the Trial Court erred when it denied Defendant's motion for summary judgment as there were no factual issues as to whether plaintiff was more negligent than defendant.

B. Standard and Scope of Review.

The Supreme Court of Delaware reviews a trial court's decision to grant summary judgment *de novo*. *Alvarez v. Castellon*, 2012 Del. LEXIS 564, at *5-6 (Del. Oct. 26, 2012) (citing *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009)). The trial court's decision will be reviewed *de novo* as to both facts and law. *Health Solutions Network, LLC v. Grigor Arsov Grigorov, et al.*, 2011 Del. LEXIS 89, at *3 (Del. Feb. 9, 2011) (citing *LaPoint*, 970 A.2d at 191). On a summary judgment record, this Court is free to "'draw [its] own inferences in making factual determinations and in evaluating the legal significance of the evidence.'" *Id.*

However, the facts of record, including any reasonable inferences to be drawn therefrom, must be viewed in a light most favorable to the nonmoving party. *Health Solutions Network, LLC,* 2011 Del. LEXIS 89, at *3-4 (citing *LaPoint*, 970 A.2d at 191); *Tsipouras v. Szambelak, et al.*, 2012 Del. LEXIS 586, at *4 (Del. Nov. 14, 2012); *Alston v. Alexander*, 2012 Del. LEXIS 384, at *5-6 (Del. July 25, 2012).

C. Merits of the Argument

Plaintiffs' case was built upon a poor investigation by a Trooper with a faulty memory. Trooper Downer came to the scene and made a judgment that a person with a fear should avoid that fear rather than confront it. He decided Defendant should not drive over bridges. (B-5-6) Rather than trying to gather accurate facts at the scene, he focused his attention on perhaps finding Defendant to have been under the influence, as he is known as a DUI officer. (B-3) His report and summary of the information he received were the result of that prejudice.

He chose not to look for witnesses who could have addressed the Defendant's speed before the time of the accident and whether or not she stopped suddenly from a speed of 45 mph or 10 mph or something in between. He did not look at the conduct of Plaintiff driver who had a number of duties to uphold as he drove behind Defendant. His testimony in his deposition made it apparent that he wanted to help Plaintiff rather than Defendant.

The law required that Plaintiff maintain a proper following distance, drive at an appropriate speed according to the hazards on this road, which in this case was a construction zone, and drive at a speed which would allow him to stop without colliding with another vehicle. The fact that he ran into the back of Defendant's vehicle, even if she had made a sudden stop, was proof that he did not uphold those duties. Given the number of duties attributable to Plaintiff, as opposed to those incumbent upon Defendant, summary judgment should have been granted to Defendant.

Should this Court determine that summary judgment should have been granted below, there will be no need to consider the arguments of Plaintiffs on appeal. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Del. Super. Ct. Civ. R. 56(c). When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970).

Further, the non-moving party must do "more than simply show there is some metaphysical doubt as to material facts." *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995). Summary judgment should be granted if the plaintiff cannot establish the elements necessary for negligence. *Mooris v. Theta Vest, Inc.*, 2009 Del. Super. LEXIS 91 (Del. Super. Ct. March 10, 2009).

Here, the facts in the light most favorable to Plaintiffs were that Defendant stopped suddenly before the accident. Defendant filed a Motion for Summary Judgment asserting that even if the jury accepts that as true, the Plaintiff was by law more than 50% at fault for causing this accident and could not recover against the Defendant.

Defendant had a duty to give an appropriate signal before she stopped or to signal her intent to turn for 300 feet. 21 *Del. C.* §4155,(A-272). Plaintiffs' theory of the case was that Defendant stopped suddenly. If the jury accepted that as true, Defendant's brake lights would shine at Plaintiff when she braked. Thus, Plaintiff had warning that Defendant would stop and

she performed the duty imposed upon her by law.

While Plaintiffs did not claim Defendant was moving off the road, if that claim was made, Plaintiffs had no proof that Defendant failed to signal, as the only person who could testify on that issue, the Defendant, could not remember whether or not she did that. Plaintiff, however, had a number of duties to uphold.

Plaintiff was driving a motorcycle on a dark road, approaching a construction zone and a bridge. He had a duty to maintain a reasonable and prudent following distance pursuant to 21 *Del. C.* § 4123(a), to operate a motor vehicle with due regard to the actual and potential hazards then existing and to control the vehicle so as to avoid colliding with another vehicle pursuant to 21 *Del. C.* § 4168(a) and to exercise care and prudence with due regard for the road and traffic conditions then in existence pursuant to 21 *Del. C.* § 4176(a), among other duties.

These duties exist to account for the fact that circumstances may arise to which a driver must react. Traffic ahead may stop suddenly due to an accident or heavy traffic ahead. A vehicle may slow or stop in the road due to vehicle malfunction on an animal or pedestrian in the road. In a construction zone, these possibilities are heightened. A barrel or other piece of construction equipment may fall into the road or traffic may be congested. The law requires motorists to drive with appropriate speed and following distance so as to be able to stop without colliding with another vehicle, should any event require a vehicle to stop.

Here, the parties approached a construction zone and Plaintiff should have increased his following distance and slowed as he approached the narrowed bridge. Defendant's brake lights would have warned him that Defendant was slowing her vehicle but he did not slow accordingly. Instead, the Plaintiff drove into the rear of Defendant's vehicle which demonstrated that he was following too closely and/or driving too fast for the circumstances.

The Court below should have granted summary judgment by finding Plaintiff guilty of negligence *per se* for these violations of law. His failure to exercise prudence while operating his motorcycle was the proximate cause of the accident. Had he maintained an appropriate following distance and speed, even if Defendant came to a complete stop in the road, he should have been able to come to a stop without striking Defendant's vehicle and would not have injured himself.

The Motion for Summary Judgment invited the Trial Court to assume the facts most favorable to Plaintiffs which left no question of fact to be decided by the jury. When comparing the duties of the parties by law, Plaintiff's negligence was greater than that of Defendant.

There was no proof that Defendant failed to uphold her duties or that her conduct was a proximate cause of the accident. Plaintiff's failure to up hold his duties was the proximate cause of the accident by a preponderance of the evidence prior to trial. While summary judgment is not often granted, this was a case in which it was proper.

CONCLUSION

For the foregoing reasons, Appellee requests that this Court overturn the denial of the Motion for Summary Judgment and rule that summary judgment should have been granted below. Further, this Court should affirm the remaining rulings of the Superior Court.

Respectfully submitted,

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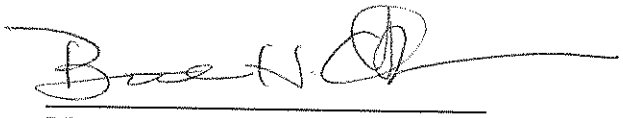

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