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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT SCOTT McKINLEY and DEBORAH McKINLEY, h/w, Plaintiffs Below, Appellants, vs. MICHELE CASSON, Defendant Below, Appellee.	)	No.: 465, 2012 COURT BELOW: Superior Court of Delaware New Castle County C.A. No.: N10C-09-192 (PLA)

PLAINTIFFS BELOW, APPELLANTS' OPENING BRIEF ON APPEAL

KIMMEL, CARTER, ROMAN & PELTZ, P.A.
Matthew M. Bartkowski, Esquire
(Delaware Bar ID #3236)
56 W. Main St., Plaza 273, 4th Floor
Post Office Box 8149
Newark, Delaware 19714
(302) 565-6100/Fax: (302) 565-6101
Attorney for Plaintiffs Below,
Appellants

Dated: 11/19/2012

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NATURE OF THE PROCEEDINGS

This action arises out of a motor vehicle accident that occurred on October 3, 2009, in which the Plaintiff, Robert S. McKinley, sustained serious bodily injuries. Plaintiff, Deborah McKinley, sustained the loss of her husband's consortium.

Plaintiffs filed a complaint in the Superior Court on September 24, 2010. The Defendant's answer was filed on November 5, 2010.

The Defendant filed a motion for protective order and to exclude evidence of the Defendant's medical history on November 14, 2011. Plaintiffs filed a response to the Defendant's motion on November 17, 2011. The Trial Court granted the Defendant's motion for a protective order on December 5, 2011.

The Defendant filed a motion for summary judgment on February 17, 2012. The Plaintiffs filed a response to the Defendant's motion for summary judgment on March 14, 2012. The Trial Court denied the Defendant's motion by written decision on March 20, 2012.

Prior to the pre-trial conference, the parties filed three motions in *limine*. The Defendant filed a motion on May 25, 2012 to allow testimony from Brandon Thomas regarding witness statements. The Plaintiffs filed a response on June 4, 2012. After hearing argument at the pre-trial conference, the Trial Court granted the Defendant's motion on July 2, 2012.

The Defendant also filed a motion in *limine* to exclude references to Defendant's medications. That motion was filed on May 29, 2012. The Plaintiffs' response was filed on June 7, 2012. Again the Trial Court granted the Defendant's motion at the pre-trial conference on

July 2, 2012. The Plaintiffs filed a motion in *limine* to exclude references to motorcycle helmet use and mitigation of damages on June 1, 2012. The Trial Court denied the Plaintiffs' motion on July 2, 2012 after hearing argument at the pre-trial conference.

A jury trial in the Superior Court occurred on August 6 through August 8, 2012. The jury found that the Defendant was not negligent in a manner which proximately caused the accident on October 3, 2009.

Plaintiffs filed their Notice of Appeal to this Court on August 23, 2012. The Defendant filed a Cross-Appeal on August 31, 2012. A briefing schedule was issued on October 15, 2012 settling forth a deadline for the Plaintiffs' Opening Brief and Appendix on November 12, 2012.

SUMMARY OF THE ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR A PROTECTIVE ORDER FOR THE DEFENDANT'S MEDICAL RECORDS WHEN SHE PLACED HER MEDICAL CONDITION IN ISSUE BY EXPLAINING HER ACTIONS TO THE POLICE OFFICER THAT SHE HAD AN ANXIETY ATTACK AND SHE TAKES PRESCRIPTION MEDICATION FOR HER FEAR OF BRIDGES.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE DEFENDANT'S MOTION IN *LIMINE* TO EXCLUDE REFERENCES TO HER MEDICATION AT TRIAL SINCE THE INFORMATION WAS MORE PROBATIVE THAN ANY PREJUDICE TO THE DEFENDANT AND WOULD HAVE IMPEACHED HER CREDIBILITY AT TRIAL.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE DEFENDANT'S MOTION IN *LIMINE*, ALLOWING BRANDON THOMAS TO TESTIFY REGARDING STATEMENTS OF BYSTANDERS WHICH WAS CONTAINED IN HIS REPORT SINCE SUCH STATEMENTS ARE HEARSAY AND DO NOT FIT WITHIN ANY EXCEPTION TO THE HEARSAY RULE.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE PLAINTIFFS' MOTION IN *LIMINE* TO EXCLUDE REFERENCES TO THE PLAINTIFFS' LACK OF USE OF A MOTORCYCLE HELMET AND THE MITIGATION OF DAMAGES AS HE IS NOT PROHIBITED BY LAW FROM WEARING A HELMET PURSUANT TO 21 *DEL.C.* §4185.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN ISSUING A JURY INSTRUCTION ON ASSUMPTION OF THE RISK DUE TO THE PLAINTIFFS' LACK OF USE OF A MOTORCYCLE HELMET AT THE TIME OF THE ACCIDENT WHEN THE INSTRUCTION WAS AN IMPROPER STATEMENT OF THE LAW AND COULD ONLY CONFUSE THE JURY.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE POLICE OFFICER TO PROVIDE THE JURY HIS OPINION OF THE MECHANISM OF THE ACCIDENT WHEN HE HAD NOT BEEN ADMITTED AS AN EXPERT IN ACCIDENT RECONSTRUCTION.

STATEMENT OF THE FACTS

This case involves a motor vehicle accident that occurred on October 3, 2009. The accident occurred on northbound Summit Bridge Road, .1 miles north of Bethel Church Road. (A-304) It occurred at the foot of Summit Bridge on the south side. (A-304) At the time of the accident, the bridge was undergoing construction. (A-205) As one would approach the bridge northbound, the two lanes were bottled-necked into one lane. (A-205) There was one lane for northbound traffic across the bridge. (A-205) There were construction signs and orange and black barrels in the area warning of the construction. (A-205) The Defendant recalled that there were construction barriers on both sides of the road. (A-250) The Defendant also recalled seeing concrete barriers and orange cones. (A-250, A-251) It was dark and foggy at the time of the accident. (A-246) As one is traveling up Summit Bridge Road coming up to the bridge, there are trees and forest on either side of the roadway. (A-230) The accident occurred in a rural area. (A-230)

Unfortunately, the Plaintiff does not remember the accident at all. (A-193) The next memory that he recalls after the accident was waking up in the hospital. (A-193) There was no dispute that the Plaintiff sustained a head injury from the motor vehicle accident. (A-184) The Plaintiff suffered a subdural hematoma, intracranial bleeding, as well as cranial contusion. (A-288) He required a craniotomy to relieve the pressure on the side of the brain. (A-289). A catheter was used after surgery to measure the pressure within the brain. (A-290) He had several complications in the hospital,

including respiratory failure which required a tracheostomy. (A-291) He was hospitalized for a month then transferred to a rehabilitation facility. (A-293) Unfortunately he had developed deep venous thrombosis, a clot in one of the deep vessels of his legs. (A-293) He was returned to the rehabilitation facility until January 4, 2010. (A-295) He also developed a fungus infection in his back. (A-296) The Plaintiff also underwent two surgical procedures to his shoulders to repair tears in his rotator cuffs. (A-298)

Paramedic, Donald Morris, responded to the accident on October 3, 2009. (A-218) He recalled that the Plaintiff was lying in the roadway within a few feet of the center median. (A-219) His head was facing more towards Summit Bridge. (A-219) His feet were more to the south. (A-219) He recalled that the SUV involved in the accident in front of the Plaintiff, slightly north of the Plaintiff. (A-220) There was a first responder holding the Plaintiff's head in case of a neck injury. (A-219) He recalls that the motorcycle was in the vicinity off to the right. (A-220) At the scene, Mr. McKinley was very confused and had repetitive questioning, didn't know where he was, didn't know when it was, didn't know what was going on. (A-221)

The accident was investigated by troopers from the Delaware State Police. The first officers to arrive were Cpl. Shaklee and Cpl. Sebastianelli. (A-205) The officer who investigated the accident was Cpl. Robert Downer. (A-204) Trooper Downer received his training at the Police Academy but did not receive any additional advanced level of crash reconstruction. (A-203) He was not admitted as an expert in accident reconstruction at trial. As part of his investigation, he

spoke to the driver of the SUV involved in the accident who was the Defendant. (A-206) When he spoke to her, the Defendant told him that she has a fear of bridges for which she takes prescription medication. (A-151) She further explained that she was approaching the bridge; she started to panic and called her ex-husband to calm her down. (A-150). She had an anxiety attack. (A-150) She basically slammed on her brakes and that is when the crash happened. (A-132)

When Trooper Downer arrived at the accident scene, the Plaintiff's motorcycle was laying in the roadway on its side. (A-206) He was able to determine the point of impact occurred in the roadway right in the lane. (A-207) He determined the point of impact based on the location of the bike and debris in the roadway where he motorcycle was. (A-207) The location of the vehicles was consistent with the Defendant's explanation of the cause of the accident. (A-207) Trooper Downer did not recall any witnesses who stated that they observed the accident. (A-207)

The Defendant testified that she is very uncomfortable driving over bridges. (A-243) Going over bridges makes her anxious. (A-248) On the night of the accident, she was at a friend's house having dinner. (A-243) She was planning to go home when she accidentally took Route 1 south instead of north. (A-243) She called her ex-husband since she wanted to go over a bridge that made her feel comfortable if she could not go home without avoiding a bridge. (A-248) Her ex-husband was in the same vicinity and he offered for her to get off the route, park her car and he would then drive her home. (A-236) Instead, the Defendant's ex-husband directed her to travel

from Route 1 to Summit Bridge Road. (A-248) During this entire time, she is on her cellphone talking with her ex-husband with the phone to her ear. (A-248) The Defendant continued to drive towards the Summit Bridge with her ex-husband providing directions. (A-248) She did not recall observing any construction warning signs. (A-249) She was not expecting that construction was going to take place in that area as she was heading towards the bridge. (A-248) As she approached the bridge, she saw the construction area. (A-244) At that time, her ex-husband indicated to her that if she wanted to, she could pull over and he would come pick her up. (A-249) She recalls that when she was coming through the construction, it was dark and foggy. From what she remembers, there were construction barrels on both sides of her. (A-250) She saw concrete barriers and construction cones as she approached the bridge. (A-250) As she was approaching Summit Bridge, she did not recall putting on her turn signal. (A-251) She does not recall putting on her hazard lights. (A-251) She was driving with one hand (A-251) and the construction barrels were five to ten feet apart. (A-252) She stated that she slowed down and was traveling at five to ten miles an hour when she felt a thump. (A-245) According to the Defendant, she was driving with one hand and she was able to navigate her vehicle off the roadway in between the barriers. (A-251) (A-252) She was not sure if the Plaintiff followed her into the construction area thinking that was the road she was going down. (A-252) There were no cars in front of the Defendant prior to the accident. (A-251) After the accident, the Defendant confirmed that she spoke to a police officer at the scene of the accident. (A-251)

At her deposition, she denied telling the police officer that she takes medication for her fear of bridges. (A-158) She went on to deny that she takes medication for her fear of bridges. (A-159) At the trial, she admitted that she told him that she had a fear of bridges. (A-251) She denied telling the officer that she had an anxiety attack. (A-251) She denied telling that she abruptly stopped at the foot of the bridge. (A-251)

Brandon Thomas is an EMT with Brandywine Fire Company who responded to the accident. (A-225) Mr. Thomas' unit was dispatched to the scene at 9:53 p.m. (A-228) His unit arrived at the scene at 10:01 p.m. (A-228) Mr. Thomas assisted in back boarding the Plaintiff and placing him into the ambulance unit at 10:05 p.m. (A-230) Oxygen was administered to the Plaintiff at 10:08 p.m. (A-230) Mr. Thomas is not sure if he assisted in giving oxygen or if it was the paramedics, but it was an even chance that he handled it. (A-231) Mr. Thomas testified that he spoke to some bystanders at the request of the paramedics. (A-226) Mr. Thomas testified that he spoke to these bystanders somewhere between one and four minutes. (A-230) Mr. Thomas could not tell whether there were two bystanders or more. (A-231) It could have been as many as twelve bystanders that she spoke with on the night of the accident. (A-231) They did not tell him where the vehicles were coming from or how long they had seen the vehicles prior to the accident. (A-230) They did not tell him whether anything was blocking their view of the accident. (A-230) He did not know the names of the bystanders. (A-229) He could not tell if they were male or female, or whether they were African-American,

Caucasian or Hispanic. (A-229) He could not tell where they were standing when he spoke to them. (A-229) He could not tell where the bystanders were at the time of the accident. (A-229) The only information indicating that the bystanders saw the accident was from Mr. Thomas who said, "One guy – well, from what I was informed by them, they had witnessed the accident." (A-128) Mr. Thomas stated that bystanders explained to him that:

> "The patient drove into the back of the car. The car was moving slowly, about ten miles per hour, per the bystanders. The patient was not moving much faster than the motor vehicle." (A-226).

The information from the bystanders was not an exact statement from any of the bystanders. (A-231) It is an explanation of the information. (A-231) The statements were not a direct quote from the bystanders. (A-231)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR A PROTECTIVE ORDER FOR THE DEFENDANT'S MEDICAL RECORDS.

A. Question Presented

Did the Trial Court abuse its discretion in granting Defendant's Motion for Protective Order and requiring the Plaintiffs to return any medical records obtained the to Defendant? (preserved at A-15)

B. Standard and Scope of Review

While motions in *limine* are reviewed for abuse of discretion, the Superior Court applied an interpretation of *Delaware Rules of Evidence, Rule* 503 to undisputed facts. *Secreast v. State*, 1996, Lexis 213. Accordingly, the issue of the application of the privilege is subject to *de novo* review. *See Tackett v. State Farm Fire & Cas. Ins. Co., 1995 Del. LEXIS 57.*

C. Merits of the Argument

Under *Superior Court Civil Rule* 26(c)

> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court…may make any order which justice requires to protect a party or person from annoyance, embarrassment, impression or undue burden of expense…"

The doctor/patient privilege is a statutorily created right that does not exist in common law. *Hollenbacher vs. Bryant*, 1943 LEXIS 9; *Division of Social Services vs. Shippen*, 1981 Del. Fam. Ct. LEXIS 54 *Aff'd; Betty J. B. vs. Division of Social Services*, 1983 LEXIS 433. Such privilege exists in the State of Delaware pursuant to *Delaware Uniform Rules of Evidence*, 503. There have been several exceptions to the rule. Under *Rule* 503(d) (3):

> "There is ***no privilege*** under this rule for a communication relevant to an issue of the physical, mental or emotional condition of the patient in ***any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense***, or, after the patient's death, in a proceeding in which the party relies upon the condition as an element of the party's claim or defense." (emphasis added)

This case involves a motor vehicle accident that occurred on Route 896 near the bottom of Summit Bridge Road in Middletown, Delaware. (A-304) The accident occurred when the Defendant abruptly stopped her motor vehicle on the roadway causing the male Plaintiff, who was traveling directly behind the Defendant, to strike the rear of her vehicle. (A-150)

After the accident, the Defendant spoke was interviewed by investigating police officer, Trooper Robert Downer. (A-251) The Defendant explained her actions on the date of the accident by telling the police officer that she has a fear of bridges for which she takes medication. (A-151) She further stated that she was northbound on Summit Bridge Road approaching the Summit Bridge when she had an anxiety attack. (A-150, 151) Because of the nature of the accident and because of the Defendant's behavior, Trooper Downer started asking the Defendant questions about whether she was on medication. (A-27) The Defendant did confirm that she was on medication. (A-27) The Trooper did not recall whether the Defendant stated that she had taken medication recently or not. He then went through a little routine that he uses in looking for driving under the influence where he started to ask her questions about her medications. (A-27) He believed that he asked her to recite the alphabet. (A-27) By telling

the investigating officer shortly after an accident that she has a fear of bridges for which she takes prescription and she had an anxiety attack, she has placed her medical condition into issue. She was relying upon that condition as an element of claim in order to explain to the police officer her particular actions on the day of this accident.

This accident occurred in the dark on Summit Bridge Road. (A-230) It was foggy at the time; the right hand lane of Summit Bridge Road was closed due to construction. (A-230) This occurred in a rural area. (A-230) Drivers usually do not stop abruptly or even slow down to a crawl on a roadway given these particular circumstances. Because of the nature of the accident, the Defendant had to provide an explanation to the police officer as to why she had stopped her vehicle on the roadway approaching a bridge when the lane to her right was closed due to construction. The Defendant defended her actions by indicating that she had medical condition for which she takes medication which would explain why she stopped abruptly in the roadway.

At her deposition, the Defendant changed her version of the cause of the accident. She disputed most of the statements that she previously provided to the police officer. She denied telling the police officer that she takes prescription medication for her fear of bridges. (A-158) She denied telling the police officer that she had an anxiety attack indicating that she really didn't know what an anxiety attack is like. (A-159) She denied telling the police officer about her medical condition after the accident. Defendant

testified that she experiences anxiety as a side effect of the medication that she takes for epilepsy. (A-159) According to the Defendant, her physician, Dr. Sommers, prescribed Valium for her anxiety. (A-31) She denied taking this anxiety medication for her fear of bridges. (A-38) She was adamant that she takes anti-anxiety medication only if she was going on an airplane or if she has trouble sleeping. (A-32) She did admit that she has a fear of bridges. (A-37)

The Courts in Delaware have previously addressed the issue of the physician-patient privilege regarding criminal cases. *State v. Shields*, 1990 Del. Super., LEXIS 471, family law, *Betty J.B. v. Division of Social Services*, 1983 LEXIS 433, insurance claims, *Crowhorn v. Nationwide Mutual Insurance Co.*, 2002 Del. Super., LEXIS 178. This is a case of first impression where a defendant, in a personal injury case, placed her medical condition into issue as part of her claim.

By denying her prior statements to the police officer that she has a medical condition which caused her actions on the day of the accident, the Plaintiffs are entitled to investigate to determine which version of the Defendant's diverse statements were more accurate. That could only be confirmed by inspecting her medical records. Her conflicting testimony regarding her medical condition becomes a crucial issue in this case regarding causation of this accident.

It was essential for the Plaintiffs to be able to obtain a copy of the Defendant's medical record for a number of reasons. It was

important to determine whether, in fact, the statements that the Defendant made to the police officer were accurate versus the denials that she made regarding her use of prescription medications, especially for her fear of bridges. It is also important to determine the extent of her treatment for anxiety, including but not limited to, her fear of bridges. It was also necessary to determine the extent of the Defendant's diagnosis and treatment for anxiety. This is important to the Plaintiffs given the Defendant's description to the police officer that she had an "anxiety attack" at the time of the accident. Given that the Defendant denied that she had taken any prescription medication for her fear of bridges prior to the accident, it was relevant to determine whether her physician required that she take such medication before proceeding over a bridge. Her conflicting testimony has made her medical condition a crucial issue in determining causation of this accident, a fundamental requirement in the Plaintiffs' case. The denial of Plaintiffs' efforts to investigate the very medical condition that Defendant put into play unfairly prejudices the Plaintiffs and denies Plaintiffs the right to pursue their case.

The Plaintiffs subpoenaed the records from Dr. Sommers who prescribed the Defendant's anti-anxiety medication. (A-42) Plaintiffs did not request the records of any of the other doctors who treated the Defendant. This was not a case of a "fishing expedition" where the Plaintiffs requested records from any and all physicians who treated the Defendant. The inquiry was limited to the physician who

prescribed the anti-anxiety medication to the Defendant. There was no intent to harass or embarrass the Defendant.

The mere fact that the Defendant changed her story, and denied making these statements to the jury, does not change the fact that she placed her medical condition in issue. The Plaintiffs are entitled to obtain her medical records under *Rule* 503(d) (3).

The Trial Judge abused her discretion in barring the Plaintiffs from obtaining the medical records of the Defendant.

II. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION IN *LIMINE* TO EXCLUDE REFERENCES TO HER MEDICATION AT TRIAL

A. Question Presented

Did the Trial Court abuse its discretion by granting the Defendant's Motion to Exclude References to her Medication at Trial? (preserved at A-144)

B. Standard and Scope of Review

The decision of a trial judge to admit evidence after balancing its prohibitive value against its prejudicial affect represents an exercise of discretion which will not be disturbed on appeal absent a showing of abuse of discretion. *Firestone Tire & Rubber Co. v. Adams*, 1988 Del. LEXIS 155.

C. Merits of the Argument

As stated in the previous argument, the Plaintiffs were entitled to obtain the medical records of the Defendant's treating neurologist since her medical condition was a central issue for determination in this case. Based upon the Defendant's statements to the investigating police officer and her conflicting testimony at her deposition, these records were relevant and portions of these records should have been admissible at the trial.

The Defendant's anxiety was clearly one of the significant issues in the case. At trial, the Defendant downplayed her level of anxiety on the day of the accident. She testified that she did start to get nervous when she was approaching the bridge and she wanted to look for an opening to pull over. (A-245) She testified that she slowed down and was traveling at five to ten miles per hour when she felt a thump and she pulled over. (A-245) At trial, the Defendant testified that

she told Trooper Downer that she gets very nervous about bridges with the way it was that night. It was dark, foggy and the lanes were getting very tight and squeezing together; she was getting nervous so she pulled over to get out of harm's way, pulled over and that's when she felt the thump. (A-246) When asked whether she told Trooper Downer that she had an anxiety attack, she said, "I probably told him I had anxiety." (A-246) Her testimony before the jury regarding her anxiety level was significantly different from that what she told Trooper Downer following the accident. (A-150), (A-151) The jury did not have the opportunity to evaluate the full extent of her anxiety level. The jury was confronted with two completely different versions of the accident; Ms. Casson's, version that she was able to slow her vehicle and turn off into a construction zone versus her statements to the police officer that she takes medication for her fear of bridges; had an anxiety attack and slammed on her brakes. (A-246) (A-36)

As a result of the Trial Court's Order, the Defendant's records were returned and could not be made part of the Plaintiffs' Response to the Defendant's Motion to Exclude Reference to the Defendant's medical condition. It is Plaintiffs' counsel's argument that the records would have contradicted the Defendant's testimony regarding her prescription for medication for her fear of bridges. If the Plaintiffs had such information or were able to introduce it at trial, it would have demonstrated that the Defendant had a condition with anxiety and was prescribed anti-anxiety medication for her fear of bridges. Such evidence would have contradicted the Defendant's testimony and affected her credibility before the jury.

Moreover, as the jury was presented with two versions of the Defendant's statements, the credibility of the police officer versus the Defendant became a key factor in the case. If the Defendant was prescribed anti-anxiety medication for her fear of bridges, that fact would confirm her statement to the police officer and provide the jury with compelling evidence of her anxiety related to her fear of bridges. The jury would be more likely to believe that the Defendant did have an anxiety attack and did slam on the brakes of her car, abruptly stopping her vehicle, if they knew that she was prescribed medication due to her fear of bridges.

Furthermore, the information contained in the medical records was important as to the credibility of the Defendant versus Trooper Downer. Pursuant to the Trial Court's Order, Trooper Downer was denied the opportunity to testify that the Defendant admitted to him that she takes a prescription for her fear of bridges. (A-158) The jury was prevented from learning of the Defendant's admission that she took medication specifically due to her fear of bridges. They were denied the opportunity to discover that her testimony at her deposition was in stark contrast to that which was contained in her medical records and the statements that she made to the police officer at the scene of the accident. If the jury had learned that the Defendant was, in fact, prescribed medication for her fear of bridges, Trooper Downer's credibility would be enhanced since that evidence would have been consistent with his testimony regarding the Defendant's statement immediately after the accident. Conversely, if the Defendant denied that she was prescribed medication for her fear

of bridges; her credibility could have been impeached when confronted by her medical records. Defendant's counsel argued in her closing statement that the Defendant's testimony was credible since Plaintiffs' counsel did not "Show her her deposition and say she said something difference in the past." (A-262) If the police officer was permitted to testify that the Defendant admitted to him that she takes medication for her fear of bridges, the Plaintiffs would have had the opportunity to confront the Defendant to prove that she had, in fact, said something different in the past.

Since the Defendant placed her medical condition in issue, the evidence is relevant and any potential prejudice to the Defendant would have been clearly outweighed by the probative value. *Delaware Rules of Evidence, Rule* 401 states:

> "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence."

Delaware Rules of Evidence, Rule 403 states:

> "Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

The Trial Judge abused her discretion by denying the Plaintiffs the opportunity to present the jury evidence of the Defendant's use of prescription medication.

III. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION IN *LIMINE* ALLOWING BRANDON THOMAS TO TESTIFY REGARDING THE HEARSAY STATEMENTS OF BYSTANDERS.

A. Question Presented

Did the Trial Court abuse its discretion by allowing Brandon Thomas to testify about statements that were made by bystanders who allegedly witnessed the accident? (preserved at A-114)

B. Standard and Scope of Review

The decision of a trial judge could admit evidence after balancing its prohibitive value against its prejudicial affect represents an exercise of discretion which will not be disturbed on appeal absent a showing of abuse of discretion. *Firestone Tire & Rubber Co. v. Adams*, 1998 Del. LEXIS 155.

C. Merits of the Argument

Under *Delaware Uniform Rules of Evidence*, 801(c), hearsay is a statement other than one made by the declarant who will testify at the trial or hearing offered in evidence to prove that the truth of the matter is asserted.

Brandon Thomas is an EMT who responded to the accident on October 3, 2009 through his employment with the Middletown Fire Company. In responding to the scene, Mr. Thomas was asked by the New Castle County Paramedics to obtain some information regarding the accident, such as how fast each person was going, whether they were wearing protective equipment, seatbelts, helmet, airbags, if the patient was conscious. (A-128) In his report, Mr. Thomas provided the history that he obtained: "The patient is a 55 yr. old male. Bystanders explained that the patient has driven into the back of a car. The car was moving slowing about 10 m.p.h. The patient did not move much faster

on his motorcycle. He drove into the back of the car and fell off the motorcycle. He then lay on the ground and did not move. It was reported that he was not wearing a helmet. There was not one noted at the scene. The patient has repetitive questions. He does not know where he is or what is happening." (A-126)

In her Motion, the Defendant requested that the Trial Judge allow these so-called "statements" from the bystanders into evidence at trial. In support of this request, the defense argued that this information is hearsay but falls under the presence sense impression exception pursuant to *Delaware Rules of Evidence*, 803(1). Presence sense impression under *D.R.E,* 803(1) is defined as: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." The requirements of *DRE* 803(1) are met if the declarant "personally perceives the event described; the declarant (is) an explanation or description of the event, ***rather than a narration and a declaration and the event described (are) contemporaneous.***" (emphasis added) Contemporaneous statements do not have to occur at precisely the same moment in time as the event, but must occur shortly thereafter in response to the event. *Green v. St. Francis Hospital*, 202 Del. LEXIS 136. At trial Mr. Thomas testified somewhat similar to his testimony in his discovery deposition. With regard to the bystanders, he could not provide the names of the bystanders. (A-229) He could not tell the jury whether they were male or female. (A-229) He could not tell their race; whether they were African-American, Caucasian, or Hispanic. (A-229) He also could not remember how many

bystanders he spoke to. (A-229) He could not tell where they were standing when he spoke to them, other than on the side of the road. (A-229) He could not tell the jury where the bystanders were at the time of the accident. He could not tell whether one of the parties were one of the bystanders. (A-229) There may have been two and it could have been as many as twelve. (A-231)

The first requirement of *D.R.E,* 803(1) requires the declarant to personally perceive the events. There is no reliable evidence that any of the alleged bystanders had actually witnessed the accident. The only evidence came from Mr. Thomas who stated, "One guy -- well, from what I was informed by them, they had witnessed the accident." (A-128) There was no corroboration from any other witness nor testimony that any bystanders had witnessed the accident. In this case, it was important to determine whether, if anything, a possible witness had observed. The accident occurred in the dark. (A-246) The weather was foggy. (A-246) The accident occurred on Summit Bridge northbound at the base of the bridge. (A-304) There were no cars in front of the Defendant prior to the accident. (A-141) The road was down to one lane and there were construction barriers and cones in the area. (A-205) Since there was a limited area of unobstructed view of the accident scene, it is essential to know the location of any witness to determine whether or not they could have seen a portion or the entire incident. While there is no general *per se* requirement of independent corroboration for a statement to be admitted under the present sense impression, independent corroboration may be required in some cases to determine whether the statement was contemporaneous or

whether the declarant perceived the event. *Warren v. State*, 2001 LEXIS 210. There was no absolute evidence to corroborate as to whether any of the bystanders had actually even witnessed the accident. Even Mr. Thomas could not confirm whether any bystanders personally perceived the accident. He could merely testify that they told him they saw the accident. (A-128)

Mr. Thomas could not identify one specific person he could attribute the information in his report. At trial, he testified that the statements were not a direct quote from the bystanders but an explanation. (A-231) If they were direct quotes, they would have been in quotations in his report. (A-231) If the statement is attributable to more than one person, it does not meet the requirement of *D.R.E.*, 801(1) which requires that the declarant personally perceived the event. A "declarant" is defined under *Delaware Uniform Rules of Evidence, Rule* 801(b) as a "person who makes a statement", not a group of people. The fact that the statements of the bystanders cannot be attributed to one declarant, it cannot meet the requirement of *Rule* 803(1).

The second requirement is that the declaration is an explanation or description of the event rather than a narration. *Green*, at pg. 5. Mr. Thomas indicated that there was not a direct quote from any of the bystanders. (A-231) It was merely an explanation ***of all*** of the bystanders. (emphasis added) This is merely Mr. Thomas' compilation of the statements given by two to twelve people. We cannot tell whether any of the statements of the bystanders provided to Mr. Thomas are reliable since this is a narration summarized and clearly by Mr.

Thomas not a direct quote from any specific bystander. This is a clear violation of rule.

The third requirement is that the declaration and the event are contemporaneous. This accident occurred on 9:53 p.m. (A-228) Mr. Thomas arrived at the scene some eight minutes later at 10:01 p.m. (A-228) Mr. Thomas assisted the paramedics back boarding the Plaintiff at 10:05 p.m. (A-230) Oxygen was then administered to the Plaintiff at 10:08 p.m. (A-230) If Mr. Thomas had interviewed the bystanders immediately after back boarding the Plaintiff, this would have occurred twelve minutes after the accident. (A-231) Mr. Thomas could not recall if he administered the oxygen or the paramedics. (A-230) If Mr. Thomas administered the oxygen to the Plaintiff, the interviews would have occurred fifteen minutes after the accident occurred. (A-230) The rationale behind the present sense impression exception is that "Spontaneous statements describing an event are 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, Id.* Since the statements were obtained between twelve and fifteen minutes after the accident by two to twelve individuals who cannot be identified and their location at the time of the accident are unknown, their "statements" are inherently unreliable. Mr. Thomas also testified that the maximum time of his investigation was four minutes, and if he administered oxygen, then it would have been only one minute. (A-230) This further calls into question whether the statements are reliable as to the description of the accident. Without the ability to cross-

examine the bystanders, no one can determine what, if anything was actually witnessed.

The statement of Mr. Thomas that he attributed to the bystanders was unfairly prejudicial to the Plaintiff and in violation of *Delaware Uniform Rules of Evidence, Rule* 403. Any probative value was outweighed by the prejudice to the Plaintiffs. The Trial Judge abused her discretion in allowing this testimony and evidence.

IV. THE TRIAL COURT ERRED IN DENYING THE PLAINTIFFS' MOTION TO EXCLUDE REFERENCES TO THE PLAINTIFF'S LACK OF USE OF MOTORCYCLE HELMET

A. Question Presented

Did the Trial Court abuse its discretion by not excluding references to the lack of motorcycle helmet use by the Plaintiff and by not wearing a helmet while riding his motorcycle at the time of the accident? (preserved at A-89)

B. Standard and Scope of Review

The decision of a trial judge could admit evidence after balancing its prohibitive value against its prejudicial affect represents and exercise of discretion which will not be disturbed on appeal absent a showing of abuse of discretion. *Firestone Tire & Rubber Co. v. Adams*, 1988 Del. LEXIS 155.

C. Merits of the Argument

Delaware law requires a safety helmet to be possessed by a motorcycle rider, but not worn by any rider over the age of eighteen. Title 21, *Del.C.* §4185 does not require an affirmative duty to wear the safety helmet.

The Court in *Piché v. Nugent*, 436 F.Supp. 2d 193 (D. ME. 2006), it was held that the absence of an affirmative duty to wear a helmet while riding a motorcycle without evidence either party anticipated injury, failure to wear a helmet may not be treated as comparative negligence under Maine common law. *Id* at 201. Also for mitigation of damages, there must be a showing that the injured party could have realistically lessened the injury prior to impact. *Id* at 204.

Additionally, Pennsylvania has mandated a sufficiently similar safety helmet provision as both Delaware and Maine. Title 75

Pa.C.S.A. §3525 requires motorists to equip a safety helmet at all times unless the rider is a) a person 21 years of age or older who has been licensed to operate a motorcycle, or b) a person 21 years of age or older who has completed a motorcycle safety counsel. In *Beiber v. Nache*, 2012 WL 727631 (M.D. Pa). After determining the Plaintiff lacked an affirmative duty to equip a safety helmet while riding a motorcycle, the Court ruled that the Defendant may not introduce evidence of the lack of helmet unless they have evidence causally connecting the Plaintiff's injuries to the failure to wear a helmet.

In the case at bar, the Defendant did not produce a single expert to state that the Plaintiff's injuries could be linked to the presence or absence of a helmet. Since there was no affirmative duty on the part of the Plaintiff to wear a helmet, and no expert to testify that the Plaintiff's injuries were enhanced to a specific degree by his failure to wear a helmet, that evidence should have been excluded.

The Legislature in Delaware enacted the *Seat Belt System Safety Act*. 21 *Del.C.*, Chapter 48. Under 21 *Del.C.* §4802(a)(1), drivers of motor vehicles are required to wear a properly adjusted and fastened seat belt which meets the applicable Federal Motor Vehicle Safety Standards. Section 4802(b) excludes motorcycles from the Act. Even though the use of seat belts under the Act is mandatory, Section 4802(i) holds that:

> "Failure to wear or use an occupant protection system shall not be considered evidence of either comparative or contributory negligence in any civil suit or insurance claim adjudication arising out of any motor vehicle accident. Nor shall failure to wear or use an occupant protection system be admissible as evidence in the trial of any civil action or insurance claim adjudication."

Even though motorists are required to wear their seat belt, the Legislation decided that they should not be punished in a civil suit for failing to utilize a seat belt. Conversely, the Trial Judge chose to punish the Plaintiff by admitting into evidence his lack of use of a helmet when he was entitled to do so under Delaware Law. In determining whether such evidence was relevant, the Trial Judge stated:

> "But the jury can certainly know that he was, may I use the word, 'foolish' enough to be riding a motorcycle without a helmet."

Obviously any probative value of the admission of the evidence to show that the Plaintiff was "foolish" was outweighed by the prejudicial effect for the Plaintiff. Clearly, it is reasonable to assume that such impermissible evidence prejudiced the Plaintiffs and their prosecution of their case.

The Trial Judge abused her discretion in allowing the evidence to be admitted to the jury.

V. THE TRIAL COURT ERRED IN ISSUING A JURY INSTRUCTION ON THE ASSUMPTION OF RISK BECAUSE THE PLAINTIFF DID NOT WEAR A MOTORCYCLE HELMET AT THE TIME OF THE ACCIDENT.

A. Question Presented

Did the Trial Court abuse its discretion by issuing an instruction to the jury on the assumption of risk? (preserved at A-215, A-253)

B. Standard and Scope of Review

A jury instruction challenged on appeal is subject to *de novo* review. *Chrysler Corp. v. Chaplake Holdings, Ltd.,* 2003 Del. LEXIS 269. The Supreme Court of Delaware will review specifically, "a jury instruction challenged on appeal to determine 'whether the instruction correctly stated the law and enabled the jury to perform its duty.'" *Id. citing Russell v. K-Mart Corp.,* 2000 LEXIS 380.

C. Merits of the Argument

Delaware law divides assumption of risk into two categories: (1) primary assumption of risk and (2) secondary implied assumption of risk. *Koutoufaris v. Dick,* 1992 LEXIS 102. Primary assumption of risk is implicated when the plaintiff expressly consents "to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone." *Storm v. NSL Rockland Place,* 2005 Del. Super., LEXIS 432. This explicit waiver relieves the defendant of all legal duty and prevents a change of negligence.

Secondary implied assumption of risk is generally implicated "where the plaintiff's conduct in encountering a known risk may itself be unreasonable, because the danger is out of proportion to the advantage which he is seeking to obtain." *Id.* The defense does not

relieve the defendant of legal duty to a plaintiff. *Id.* The conduct of the plaintiff is instead considered a form of comparative negligence and his recovery is dependent upon the relative fault of fact-finder attributes to him. *Id.* The doctrine of second assumption of risk is completely subsumed by the principles of comparative negligence. *Id.* The degree of fault is generally a question of fact to be determined by the jury. *Spencer v. Wal-Mart Stores East, LP.*, 207 LEXIS 273. Delaware Courts generally allow secondary assumption of risk to be pled as part of a contributory negligence defense, but to avoid confusion during the trial; the Court will strike the separate defense of assumption of risk and instead direct the parties to refer to all evidence as in support of the defense of contributory negligence. *Fell v. Zimath,* 1989 LEXIS 416.

There are two persuasive cases from other jurisdictions that are on point with the issue in this case. *American Jurisprudence Proof of Facts* 2d on the Negligence Operation of Motorcycles states:

> "[a]s a general rule, assumption of risk does not figure as a defense in motorcycle accident cases. The facts in such cases do not usually indicate an intelligent and deliberate choice on the part of a motorcyclist to assume a known risk, although attempts have been made to argue that a motorcyclist's fail to use protective gear indicates such a choice."

47 *Am.Jur. Proof of Facts* 2d 127, §2, *See Rodgers v. Frush*, (1970) 257 Md 233, 262 A.2d 549, 40 *A.L.R.* 3d 847 (argument that motorcyclist's failure to wear protective helmet constituted assumption of risk rejected). In *Mayes v. Paxton,* the Supreme Court of South Carolina affirmed the trial judge's rejection of the defenses of contributory negligence and assumption of risk as insufficient insofar as they were

based on the plaintiff's failure to wear a helmet. 437 *S.E.*2d 66 (S.C. 1993). The trial judge reasoned the plaintiff's "decision to ride without a helmet does not imply his consent that motorists are relieved of the duty to use reasonable care towards him." *Id.* at 70. South Carolina has a helmet law that is similar to that of Delaware in that a helmet is not required unless the person is under a certain age, 19 in Delaware and 21 in South Carolina. *S.C. Code Ann.* §56-5-3660 (1991); 21 *Del.C.* §4185(b). The South Carolina Court held that the failure to wear a helmet does not constitute contributory negligence and that because there was no statutory duty to wear a helmet; the Court refused to extend a judicial penalty for those exempted. 437 *S.C.2d* at 70; *See Keaton v. Pearson,* 292 S.C. 579, 358 S.E. 2d 141 (1987) (declining to impose a duty to wear seatbelts when not statutory required); *Kealoha v. County of Hawaii,* 74 Haw. 308, 844 P.2d 670 (1993) (the majority of jurisdictions have ruled against instituting a common law duty requiring motorcycles to wear protective headgear).

The Trial Court erred in issuing a separate jury instruction that the Defendant has alleged that the Plaintiff voluntarily assumed the risk when he drove a motorcycle without his helmet. (A-275) The instruction was confusing and completely unnecessary. It asked the jury to penalize the Plaintiff for not wearing a helmet when he is legally entitled to do so.

VI. THE TRIAL COURT ERRED IN ALLOWING THE POLICE OFFICE OFFICER TO TESTIFY REGARDING HIS OPINION OF THE MECHANISM OF THE WHEN HE HAD NOT BEEN ADMITTED AS AN ACCIDENT RECONSTRUCTION EXPERT.

A. Question Presented

Did the Trial Court abuse its discretion in allowing the police officer to give an opinion on the mechanism of the accident when he was not an accident reconstruction expert? (preserved at A-208)

B. Standard and Scope of Review

The decision of the Trial Judge to admit evidence after balancing its prohibitive value against its prejudicial affect represents an exercise of discretion which will not be disturbed on appeal absent a showing of abuse of discretion. *Firestone Tire & Rubber Co. v. Adams*, 1988 Del. LEXIS 155.

C. Merits of the Argument

Trooper Downer testified as the investigating officer of the accident in question. (A-202) While he has worked for the Delaware State Police since 2007, he has not received any advanced training in accident reconstruction. (A-203) He was not offered into evidence as an expert in accident reconstruction. During the trial, Trooper Downer was presented photographs of the Plaintiff's motorcycle. (A-208) He was asked for the location of the damage to the motorcycle in the photographs. (A-208) He was then asked to give his opinion whether it appeared that the Plaintiff had hit more on the right front side rather than straight on frontal impact. (A-208) Upon an objection for speculation, the Trial Court indicated that the police officer was testifying as a police officer who investigated the accident. (A-208) The Trial Judge felt that it was appropriate for

him to be able to answer the question. (A-208) Later in his testimony, Trooper Downer was told the Defendant's expected testimony regarding the accident. He was told that the Defendant will testify that what she was trying to do at the time was to pull off to between these construction barrels into the right lane and that it was as she was doing that she was struck by the Plaintiff. (A-212) Trooper Downer did not recall the Defendant making that statement. (A-212) He was then asked, "Given that scenario, the plaintiff's motorcycle was aimed towards the right. It looks like he struck the rear of the vehicle given the damage to the right side of his bike." (A-212)

Delaware Rule of Evidence 701 states,

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences limits to those opinions or inferences which (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."

A lay witness may only express an opinion when the perception of the witness cannot be communicated accurately and fully without expressing it in terms of opinion. *Lagola v. Thomas*, 205 Del.C. LEXIS 51.

Trooper Downer was not qualified as an expert witness in accident reconstruction. As such, he was not permitted to testify regarding the mechanism of the accident and provide opinions regarding the location of the impact. In response to the question asking for an opinion of the location of the impact, Trooper Downer stated, "From the damage it looks like it's possible that he could have taken an

emergency maneuver to the left to get around, I don't know." (A-212) The Trial Court's ruling was that he was allowed to offer an opinion of the point of impact, based on photographs, since he was testifying as a police officer who investigated the accident. (A-208) The mere fact that Trooper Downer is a police officer does not make him an expert in accident reconstruction. Any opinion was prejudicial which far outweighed any prohibitive value they may have under *D.R.E. Rule* 403. Therefore, the Trial Judge gave the impression to the jury that the police officer was competent to testify regarding his opinion about the mechanism of the accident based upon his role as an investigating police officer, and, therefore, abused her discretion in allowing the testimony.

CONCLUSION

For the foregoing reasons, this Court should reverse the Orders of the Superior Court and remand the case for a new trial.

Respectfully submitted,

KIMMEL, CARTER, ROMAN & PELTZ, P.A.

/s/ Matthew M. Bartkowski, Esquire

Matthew M. Bartkowski, Esquire
(Delaware Bar ID #3236)
56 W. Main St., Plaza 273, 4th Floor
Post Office Box 8149
Newark, Delaware 19714
(302) 565-6100/Fax: (302) 565-6101
Attorney for Plaintiffs Below,
Appellants

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