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Case Number 473,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEITH D. PUGH,	)	
	)	
Plaintiff Below,	)	
Appellant	)	C.A. No. 473,2014
v.	)	
	)	
SCOTT SLOVER,	)	On Appeal From Superior
	)	Court of the State of Delaware
Defendant Below,	)	In and For New Castle County
Appellee	)	C.A. No. 09C-07-255 MMJ

APPELLANT'S OPENING BRIEF

corrected

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NATURE AND STAGE OF THE PROCEEDINGS

The Complaint in this matter was filed on July 28, 2009. The Complaint alleged that the plaintiff, Keith D. Pugh ("Mr. Pugh"), an innocent and uninvolved motorist, was injured on July 31, 2007 when the defendant, Wilmer E. Davis ("Davis") was being pursued by Delaware State Police Officers. It was further alleged that while Davis was being pursued the defendant, Scott Slover ("Slover") set out on the side of the road Davis was traveling a tire deflation device known as "Stop Sticks", which he later deployed by pulling them into the path of Davis. The defendant Davis swerved in an attempt to avoid the Stop Sticks, striking them, losing control of his vehicle, striking Mr. Pugh's vehicle traveling in the opposite direction. Mr. Pugh suffered severe injuries to his left leg. The defendant, Davis, never answered the Complaint, never appeared in any of the pre-trial proceedings, nor at the trial of this matter.

During discovery the Delaware State Police Officer who was pursuing Mr. Davis, Gregory Rash, was voluntarily dismissed by the plaintiff. The defendant Joseph Aube was also voluntarily dismissed by the defendant. When it was learned his only involvement was as the investigating Delaware State Police Accident Reconstructionist.

The allegations against the remaining Delaware State Police Officer, defendant Slover, was subject to the provisions of 10 Del. C. §4001(3), the State

Tort Immunity Act, requiring the plaintiff to demonstrate the defendant Slover acted with gross or wanton negligence.

The Court denied the Defendant's Motion for Summary Judgment on April 24, 2014 (Dk-110, A36). After further pretrial matters the dispute proceeded to trial on June 14-19, 2014. The jury returned a verdict in favor of the defendant Slover (Dk-144, A27).[1] The jury found against the non-appearing defendant, Wilmer Davis, and in favor of Mr. Pugh. (Id.).[2]

Subsequent to the verdict the plaintiff filed a Motion for a New Trial (Dk-145), which was denied by Memorandum and Order, dated August 13, 2014 (Dk-148, A30. (Attached to this Brief as an Exhibit.)

A Notice of Appeal to this Court was filed with this Court on August 28, 2014 (A23). This is the Appellant, Plaintiff Below's Opening Brief.

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1 During the course of the deliberations Juror No. 8 was excused (A119), and the parties agree to a verdict by a Jury of eleven.

2 Davis was served (Dl-40) but never answered or otherwise appeared.

SUMMARY OF ARGUMENT

1. The defendant, Corporal Scott Slover, testified that he "absolutely" acted after "*carefully and thoughtfully*" considering the situation before, and then deciding to deploy the "Stop Sticks", in the path of a fleeing suspect.
2. The defendant, Slover, conceded that he had a straight one-quarter mile clear unobstructed view in the direction of an admitted innocent uninvolved motorist, the plaintiff, Mr. Pugh, coming downhill, towards Slover, in the opposite direction from the fleeing suspect, while at the same time denying he saw Mr. Pugh.
3. The defendant's designated accident reconstructionist agreed that the Plaintiff, Mr. Pugh, would have been in clear view of the defendant, Slover, for minimally twenty (20) seconds, before Slover deployed the Stop Sticks.
4. The defendant's designated accident reconstructionist agreed that *but for* the deployment of the Stop Sticks the fleeing suspect would not have swerved to avoid them and thus the deploying of the Stop Sticks was a contributing factor to the accident.
5. The defendant, Slover, had previous training in the proper use of and deployment of a tire deflation device known as "Stop Sticks".
6. The defendant, Slover, at the Delaware State Police Academy, had acted as an instructor for cadets in the proper use of Stop Sticks.

7. The defendant Slover testified that even if he had seen the innocent uninvolved plaintiff, Mr. Pugh, he would not have been deterred from deploying the Stop Sticks.

8. Such a deployment of the Stop Sticks would have been in violation of the Delaware State Police Policy, Rules and Regulations, the manufacturer's training materials, and warnings, as well as the applicable standard of care for police officers, all of which constituted a "gross deviation" from that standard.

9. In acting after "*carefully and thoughtfully*" considering his actions the defendant exhibited an "I don't care" attitude when he testified that he would not have been deterred from deploying the Stop Sticks, even if he had, although testifying he had not, seen the innocent uninvolved plaintiff, who had been in plain view for a quarter of a mile for minimally twenty seconds

10. The Delaware State Police designated 30(b)(6) witness testified that the defendant Slover "*...would have been in violation" (of the Delaware State Police Policies).*

11. No emergency situation existed under Delaware law, and generally recognized principles, since the defendant had a "few minutes" during which

time he "*carefully and thoughtfully*" considered his actions before deploying the Stop Sticks.

12. An instruction for "Actions taken in Emergency" was not warranted by the evidence and by erroneously giving an Emergency Instruction, disregarding the applicable law requiring an absence of time to *reflect*, the Court gave the jury means and cause to reach an improper verdict, which was against the great weight of the evidence.

STATEMENT OF RELEVANT FACTS

What Are Stop Sticks?

Stop Sticks are manufactured for stopping vehicle pursuits (PX-5, p. 3, A83). They are designed to be placed and then deployed in front of a fleeing vehicle to cause the vehicle's tires to deflate (PX-5, p. 5 A85). They are attached to a cord and placed "as far as possible from the road..." and then "deployed" (pulled), "...at the last possible moment..." into the path of the pursued vehicle. (Id., A87). They are typically placed in advance of a police chase so that they are set up in advance of the chase so that an officer can deploy the Stops Sticks on the side of the road with a rope running across the road and then pull them out as the cars come near. (Baranowski II-7-8, A199-200). In using them the most important consideration is safety for the officers and "...safety to the uninvolved general public." (Id.).

The Accident

On July 31, 2007 the plaintiff, Keith Pugh, was driving westbound on Old Baltimore Pike, Route 273 in New Castle County (Slover I-135, A188). He was traveling downhill (Pugh I-30, A155; PX-1, A58) at approximately forty to forty-five (40-45) mph. (Pugh I-57, A160). As he went down the hill he saw two police vehicles chasing another vehicle eastbound, downhill, from the opposite direction

(Slover 103, A173). He saw the vehicle being chased, the lights and sirens and thought something bad was going to happen (Pugh I-57, A160).

Mr. Pugh immediately slowed down to less than five (5) mph. and pulled onto the shoulder. (Pugh I-30-31, A155-56). As he was pulling over off to the right he saw another vehicle pulled off the roadway and a police officer lying on the ground pointing what he thought was a gun (Pugh I-31, A156). At the same time he saw a black SUV in front of him. (Pugh I-30, A155). The black SUV sped up and passed the officer on the ground, as Pugh slowed to get off the road (Pugh I-31-32, A156-57). As Mr. Pugh pulled over onto the shoulder he saw the vehicle being chased, with two police vehicles in pursuit, approaching him and he then heard a loud bang, which he thought was a gunshot (Pugh I-32, A157). He then saw the pursued car coming towards him and braced himself for the accident (Id.) As the vehicle struck him he immediately felt pain and could not get out of the car because the dashboard was smashed onto both legs (Pugh I-32-33, A157-58). [3]

The pursuit of the suspect's vehicle began on northbound Salem Church Road (Rash III-70, A267) when suspect's vehicle collided with another police

[3] Mr. Pugh suffered a commuted fracture of his left thigh bone, or femur, meaning it was shattered into more than two pieces (Dellose T-27, A140) which his treating surgeon characterized as a "pretty severe injury" (Id.) Treatment of that injury required inserted of a rod through the femur with three screws, one at the top and two at the bottom, to secure and hold the rod in place (Dellose T-20-21, A138-39). Those foreign metal objects still remain inside Mr. Pugh's bones (Dellose T-42, A141)(The testimony of Mr. Pugh's treating physician, Steven Dellose, M.D., was presented by video tape, and became a part of the record.

officer's vehicle (Rash III-71, A268). When Officer Rash, a State Police Officer, exited his vehicle and tried to apprehend the suspect, driven by Davis, the suspect vehicle struck Rash's Driver's side door (Rash III-72, A269).[4] Rash, under direct questioning stated that he requested Stop Sticks be deployed to aid in apprehending Davis (Rash III-73, A270). Under cross-examination Rash admitted that the RECOM tape, of the events did not show him making such requests (Rash III-91, 95, A277, 278). Rash agreed that the pursued vehicle's speed fluctuated (Rash III-71, A268, but was increasing as it almost collided with a dump truck at the red light on Old Baltimore Pike (Rash III-75, A271. As the pursued vehicle traveled eastbound, downhill on Old Baltimore Pike Rash saw it swerve as it approached the Stop Sticks (Rash III-76, A272.[5] Another Officer Waible was also following

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[4] Defendant agreed that it would have taken Mr. Pugh less than a couple of minutes to travel the one-quarter mile in which he had a clear view (Slover I-152-153, A191-92), but Slover claims he never Mr. Pugh's vehicle (Slover I-155, A193), until after the pursued vehicle, continuing eastbound, swerved, lost control and struck Mr. Pugh's vehicle (Slover I-105 & I-155, A193) Defendant could offer no explanation for not seeing Mr. Pugh (Id.)

[5] The defendant was allowed to show and question Rash about a helicopter video (DX-13, III-79, A273) taken approximately one month before the trial tracing the pursued vehicle path on Salem Church Road, before it turned westbound on Old Baltimore Pike, (Rash III-82-83, 89, A274-75, 276). Plaintiff objected to the "up the road" incidents, taken seven (7) years after the accident, as irrelevant, since the events were out of view of the defendant, prior to defendant's deployment of the Stop Sticks and as such, the video was not relevant to defendant's duty and failure to ensure that no innocent uninvolved bystanders were in the zone of danger (Pretrial, pp. 9-10, A51-52). The Court had previously ruled that as to Davis's guilty pleas to charges for actions occurring "up the road" (T-15-16, A126-27) were not relevant with regards to the defendant, Slover's decision to deploy the

Rash westbound on Old Baltimore Pike (Waible III-112, A282). She also saw the suspect's vehicle swerve to avoid the Stop Sticks and the accident occur (Id.).

Earlier, Corporal Scott Slover ("defendant")[6] was on patrol when he heard on the radio about a vehicle being chased by two officers (Slover I-91, A167). He was traveling westbound on Old Baltimore Pike, pulled into 195 Old Baltimore Pike and parked his car (Id.). In doing so, he was at the bottom of a hill, in a valley with there being a downward road on each side of him (Slover I-98, A170). After he stopped his car he advised Communication that he would be deploying Stop Sticks, but did not get his Supervisor's approval (Id.), as required by the Policy. (PX- 3, DSP103, A73). Slover had a quarter of a mile clear view in each direction (Slover I-101, A171), and there was nothing to obstruct his view. This allowed him to see the other officers coming eastbound, in the opposite direction (Slover I-102, A172). Slover monitored the roadway for a couple of minutes before deploying the Stop Sticks in front of the pursued vehicle (Slover I-152-53, A191-92). However, he claimed he did not see Pugh traveling in the opposite direction towards the police chase vehicles, despite the quarter mile unobstructed clear view (Slover I-104, A174). The defendant testified he did not anticipate the pursued

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Stop Sticks. (T-21-22, A132-33), if plaintiff's expert limited himself to the actual deploying of the Stop Sticks into the path of the Davis vehicle. Plaintiff's expert so limited his testimony.

[6] Slover had been a State Police Officer for 16 years, and at the time of the accident was a Corporal (Slover I-86, A162).

vehicle, swerving to avoid the Stop Sticks, losing control and striking another vehicle, because he did not see Mr. Pugh's vehicle (Slover I-106, A176). He could give no explanation why he did not see Pugh's vehicle coming straight down Old Baltimore Pike despite an unobstructed view for one-quarter (1/4) of a mile (Slover I-107-08, A177-78). Nevertheless, he waited until the last moment to deploy the Stop Sticks in order to prevent the pursued vehicle from swerving to avoid them (Slover I-148-49, A189-90).

The defendant, Slover, confirmed that he had time to reflect upon his actions in deploying the stop sticks before doing so:

> **"Q. Did you react with careful, thoughtful consideration in this matter?**
>
> **A. Absolutely.**
>
> Q. Did what happened up the road influence you at all?
>
> A. Can you define up the road.
>
> Q. The event that led to this chase developing, did those events give you energy or process in deciding to deploy the stop sticks other than the need to stop the person?
>
> A. Yes – maybe I'm not understanding your question.
>
> Q. Let me rephrase.
>
> Were you reacting emotionally to the events happening up the road or were you reacting carefully and thoughtfully considering all facts?
>
> A. Considering all facts, no, no emotions, **it was all carefully and**

thoughtfully to the end of this event.
(Slover I-117-118, A184-85) (emphasis added.)

After the collision Mr. Pugh's vehicle ended up over on the grass on the north side of the roadway, facing the southerly direction (Aube II-139, A238).

The Required Clear View of Innocent, Uninvolved Motorists

Before deploying Stop Sticks the officer must have a clear view of both the suspect's vehicle and traffic coming from the opposite direction so as to prevent injuries to innocent bystanders (Baranowski II-35, A216).[7] The policies of the Delaware State Police require an officer who is deploying Stop Sticks to have a good line of sight so as to see vehicles, such as Mr. Pugh's which was coming down the road. (Cox III-28, A28).[8]

It is uncontradicted that the defendant had such a clear view. The defendant admitted that he had a clear view in each direction, to his left (Slover I-101, A171), his right (Id. at 131, A187, and that Mr. Pugh would have been coming down the road for a quarter of a mile (Slover I-153, A192). The defendant admitted that there was nothing blocking his view (Slover I-102-03, 155, A172-73, 193). The defendant claimed he looked for innocent uninvolved motorists, such as Mr. Pugh, who would be in the zone of danger. (Slover I-103-104, A173-74). Defendant

[7] Mr. Baranowski was an expert testifying on behalf of the Plaintiff (See: n. 11, infra.)

[8] Lieutenant Cox was a 30(b)(6) witness designated by the DSP to testify on the DSP Policies (A37).

stated that he did see the chasing officer, Rash, coming in the opposite direction (Slover I-102-103, A171-72). Rash agreed that the defendant would have had a clear view for a quarter of a mile in each direction (Rash III-98, A281). Nonetheless, the defendant claimed he never saw Mr. Pugh's vehicle, in the zone of danger, until the suspect's vehicle collided with him. (Id.)

Delaware State Police Procedures and Policies Required Consideration for Innocent Uninvolved Persons

The Delaware State Police ("DSP") policies and procedures require officers deploying Stop Sticks to comply with those policies and their warning (Cox III-26).[9] Those policies instruct that pursuits create extreme hazards to innocent bystanders (Cox III-25, A241), and this must always be considered (Id.). The provisions of the Stop Stick Policies (PX-3, A73) must be followed in accordance with the Division's Pursuit Policy (PX-2, A62) (Cox III-26, A242).

The DSP Rules & Regulation required the defendant to have a clear sight line so he could see vehicles coming in both directions, both the pursued vehicle and innocent motorists, such as Mr. Pugh. (Cox III-28, 244). This is important since the deployment of Stop Sticks, pursuant to the DSP Policies, create an inherently dangerous situation (Cox III-27-28, A243-44). In order to make a

[9] Lieutenant Matthew Cox was designated by the Delaware State Police, pursuant to a 30(b)(6) Notice of Deposition and a *Subpoena* to testify concerning the policies and procedures involving Pursuits (DSP Pursuit Policy, PX-2, A62) and Stop Sticks (DSP Stop Stick Policy, PX-3, A73). Lieutenant Cox was familiar with those policies (Cox III-25, A241).

proper decision of whether to use the Stop Sticks an officer has to know ***and see*** any innocent uninvolved motorist (Cox III-37, A248) (emphasis added).

Accordingly, it would be incumbent upon Slover to be cognizant of, acknowledge, and consider the fact that there were other vehicles on the roadway and then weigh the hazards (Cox III-27, A243). The defendant should have made certain that there were no uninvolved motorists coming from the opposite direction before he deployed the Stop Sticks (Cox III-30, A246). Cox agreed that Mr. Pugh would be in Slover's sight for at least twenty seconds (Cox III-39-40, A, A248-49).

It is to be expected that persons being pursued would take evasive action (Cox III-29-30, A245-46). In this case despite a speed limit of 45 mph., the suspect was traveling as much as 60 mph., which would be excessive (Cox III-28, A244). The Stop Sticks Policy instructions (PX-5, A81) warn that the pursued vehicle may take evasive actions or make unpredictable maneuvers when confronted with a "deflation" device, such as Stop Sticks (Cox III-29-30, A245-46). The defendant should have anticipated that potential (Cox III-30, A246). The defendant was responsible for making certain that there were no uninvolved innocent motorists coming from the opposite direction *before* he deployed the Stop Sticks (Cox III-30). The purpose of the DSP policy requirement, to have a good sight line, is so both the pursued vehicle and uninvolved innocent motorists can be seen before the deployment of Stop Sticks (Cox III-36, A247).

To be unaware of other vehicles in the vicinity traveling the opposite direction would be a *violation of the Delaware State Police rules, policies and procedures.* (Cox III-30, A246). If the defendant did not see Pugh he was not acting in accordance with the DSP Policies and: *"He would have been violation"* (of those policies)(Cox III-41-42, A250-51).

The Delaware State Police Pursuit Policy requires that:

> "(A)pprehension is to be constantly weighed against the likelihood of serious physical harm or death to the trooper or third parties. (PX-2, DSP 110, A72).

Slover admitted to knowledge of that rule, (Slover I-115-16).

Defendant's Training In And Knowledge of the Use of Stop Sticks

The defendant agreed he was familiar with and had knowledge of the DSP Pursuit Policy (Slover I-89, A165; PX-2, A62), as well as the Delaware State Police Stop Sticks Policy. (Id.) (PX-3, A73).

Slover was not only familiar with Stop Sticks generally (Slover I-88, A164) but he had acted as an instructor training new Delaware State Police Cadets in the use of Stop Sticks (Slover I-87, A163). Thus he was familiar with the Stop Stick Manufacturer's Lesson Plan used in such training. (Slover I-88, A164; PX-5, A81). When he trained the Cadets/Students he saw and instructed using the warnings contained in the Lesson Plan. (Slover I-90, A166, PX-5, A81),

The Lesson Plan supplied by the manufacturer contained many warnings:

> "...Safety is always the most important factor. Suspects can abruptly swerve, stop, or otherwise maneuver their vehicles in an unexpected manner while attempting to avoid Stop Sticks." (PX-5, at p. 5, A85).
>
> "...Under some circumstances tire deflation can increase the possibility that a driver may lose control of the vehicle and crash, resulting in SERIOUS or FATAL injuries." (Id.)
>
> "...Use **EXTREME CAUTION** when: Pursuits reach EXCESSIVE SPEEDS; suspects have an increased risk of losing control of the vehicle if tires are deflated while driving upon normal highway speeds." (Slover I-111, . PX-5, at p. 6, A86)[10]
>
> "...A person deploying a Stop Stick:...Must be able to safely observe the target vehicle and *other traffic*."(Id.)(Itlaics Added.)

The Lesson Plan contained a copy of a warning label attached to the Stop Sticks:

> "...Deflating tires increases the risk a driver may lose control of the vehicle resulting in SERIOUS or FATAL injuries." (PX-5, p. 10, A90).

The DSP Pursuit and Stop Stick Policies (PX-2, A62); and PX-3, A73) also instructed on the safety procedures to be followed by officers deploying the Stop Sticks, such as the defendant. In doing so the Stop Stick Policy makes its provisions subject to and in accordance with the Pursuit Policy (Cox III-25-26, A241-42), (PX-3, DSP 116, A74).

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[10] Slover agreed with that warning (Slover I-111, A180). Plaintiff's expert, James Baranowski, agreed that a speed of 50 to 60 mph. in a 45 mph. zone, where the pursuit vehicle was traveling would be an excessive speed (Baranowski II-28, A210). This should have been a concern to the defendant, as testified to by Lieutenant Cox, the Delaware State Police's 30(b)(6) witness to interpret its policies (Cox III-28-30, A244-46).

The Stop Stick Policy warns against the very hazards which the defendant faced with and created, where suspects may react to two tire deflation devices by:

> "...sudden speed decreases, ***evasive action***, or unpredictable maneuvers on the part of the suspect vehicle coming in contact with the tire deflation device." (PX-3, DSP 120-21, A78-79)(italics added)

The DSP Pursuit Policy (PX-2, A62) provides additional warnings that pursuits:

> "...may result in a continuing condition of **extreme hazard to people involved and innocent bystanders or motorists.**" (PX-2, DSP 100, A62) (emphasis in Original)

And:

> **"If the pursuit continues, the risk to you or *innocent bystanders* must be considered."** (Id.) (Emphasis in the Original)(italics added)

The apprehension of a suspect:

> "...is to be constantly weighed against the likelihood of serious physical harm or death to the trooper or ***third parties***."(Px-2, DSP 110, A72)(emphasis & italics added).

The defendant admitted that what happened in this accident was exactly against what the Lesson Plan warned against (Slover I-114, A181).

Despite DSP Policies Requiring It, Defendant Did Not Consider the Dangers to Mr. Pugh, or His Presence On The Roadway

The defendant testified that he gave no consideration, before he deployed the Stop Sticks, to vehicles coming in the opposite direction into the zone of danger

(Slover I-103-04, A173-74. He gave no consideration to Pugh, despite the fact that he had a quarter of a mile clear unobstructed view in Pugh's direction and claimed he did not see Pugh. (Id.). Even if he had seen Mr. Pugh the defendant testified that he did not know if that would not have deterred him from pulling or using the Stop Sticks (Slover I-105, A175), because he claimed that nothing in the training or policies states there have to be no vehicles on the roadway (Id.). The DSP Stop Stick Policy (PX-2, DSP 119-120, A77-78) instructs to anticipate that pursued vehicles may take sudden evasive action (Slover I-117, A184). Slover agreed, however, that the Delaware State Police policies required him to give consideration, for safety, of other vehicles on the roadway (Id.).

The defendant gave no consideration to the potentially dangerous situation he faced. He claimed, despite the DSP Policy requiring it (Slover I-105, A175), that he did not anticipate the suspect vehicle *swerving to* avoid the Stop Sticks (Slover I-109, A179). However, he was aware of the potential of a swerve, testifying that he waited until the last moment to deploy the Stop Sticks because he did not want to give the pursued vehicle time to *swerve to* avoid the Stop Sticks. (Slover I-148-49, A189-190). Other testifying DSP officers agreed that an officer deploying Stop Sticks must consider that the pursued vehicle would swerve to avoid the sticks (Rash III-96-97, A279-80). Even if the defendant had considered Mr. Pugh's presence he testified that he would not have been deterred because, despite

his training he did not expect the pursued vehicle to strike Mr. Pugh's vehicle. (Slover I-106, A176).

All of the defendant's training prepared him to anticipate the pursued vehicle would swerve, lose control, and cause serious injury (Slover I-149, A180). The Stop Stick Manufacturer's Lesson Plan, upon which Slover was trained (PX-5, A81), stated there would be unexpected maneuvers by pursued vehicles, but the defendant did not consider that training (Slover I-111, A180). The DSP Stop Stick Policy (PX-3, DSP115, A73 required consideration be given to possible serious injuries to third parties (Slover I-116, A73). Defendant disregarded and gave that no consideration to the predictable actions of the pursued vehicle. (Slover I-118-19, A185-86)

The defendant conceded, that what he was trained might happen, to consider, to worry about, was exactly what happened to Mr. Pugh. (Id.) Mr. Pugh suffered serious injuries when the defendant disregarded the pursued vehicle swerved as weaned to avoid the Stop Sticks, lost control, and struck Mr. Pugh's vehicle. (Id.)

The Uncontradicted Testimony of Plaintiff's Expert

The uncontradicted testimony of plaintiff's expert witness demonstrated Slover violated DSP Rules, Policies & Procedures, the Stop Stick Manufacturer's warnings, and the standard of care for the deployment of deflation devices, such as

Stop Sticks. (Baranowski II-35, 39-40, A216, 218-19).[11] An officer deploying Stop Sticks must make absolutely sure that there are no vehicles coming in the opposite direction, or into the zone of danger. (Baranowski II-69, A220). Since the DSP policies envision the use of Stop Sticks with their use dependent on "safety, safety, safety. (Baranowski II-71-72, A221-22). Just as an officer should not use a firearm into a crowd they should not use a Stop Stick in the presence of an innocent uninvolved motor vehicle because of its known danger. (Baranowski II-69, A220). Mr. Baranowski's analysis is based on his impression that motor vehicles constitute a two to three thousand pound weapon hurtling down the road, and if there is loss of control, which is very high with the Stop Sticks, other innocent motor vehicles on the roadway must be considered. (Baranowski II-9, A201). The most important consideration in using the Stops Sticks is safety for the

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[11] James E. Baranowski was a former sargent, and Station Commander with the Pennsylvania State Police (Baranowski II-4-5, A196-97). He was a Training Officer for recruits (Baranowski II-5-6, A197-98) (Id.) and was familiar with deflation devices such as Stop Sticks. (Baranowski II-7, A199) As a part of his supervisory responsibilities he would supervise the deployment of deflation devices by his subordinates, and as a State Police Commander he would review all patrol pursuits for southwestern Pennsylvania. (Baranowski II-20-22, A204-06) In doing so it was part of his job duties to determine the appropriateness of the use of Stop Sticks and, if they were safely used, and if they should have been deployed in the first instance. (Baranowski II-23, A207).

Defendant's expert witness was excluded from testifying after a Daubert hearing. (III-62-63, A265-66). The Court had earlier denied, at the Pretrial, Plaintiff's Motion in Limine to Exclude (A53). However, after a Motion for Reargument was filed (Dk-125) during the trial the Court held a Daubert Hearing (III-49-61, A252-64) and found he was not qualified (III-62, A265).

uninvolved general public. (Baranowski II-8, A200).

An officer deploying Stop Sticks must consider the possibility of a pursued vehicle swerving to avoid them and cannot simply disregard the potential risk of a pursued vehicle doing so. (Baranowski II-17-18, A202-03).

The standard of care for deploying Stop Sticks is that the officer must have a clear view of the suspect vehicle and traffic in the opposite direction, since safety is the number one concern (Baranowski II-23, A207). The officer must be concerned about the safety of unsuspecting innocent motorists on the roadway at all times. (Baranowski II-25, A208).

The manufacturer's Lesson Plan emphasized that the use of such devices increases the possibility that a driver may lose control and cause serious or fatal injuries (PX-5, p. 5 & 10, A85 & 90). (Baranowski II-25-26, A208-09).

The Pursuit Policy and the Stop Stick policy are integrally connected (Baranowski II-30, A212). Together the policies require that anyone deploying Stop Sticks must give *consideration* to innocent bystanders, and absolutely consider motorists traveling on the opposite direction since the policies warn against sudden unexpected maneuvers by suspects being pursued and unprotected maneuvers. (Baranowski II-31-33, A213-215); (PX-3, DSP119, A77).

The defendant was not in compliance with the standard of care for the deployment of Stop Sticks. (Baranowski II-35, 38, A216, 217). He did not give any consideration to innocent bystanders in the presence of a two or three thousand pound weapon going down the road. (Baranowski II-35, A216). He was unaware of the other vehicle in the roadway, in clear view, coming from the opposite direction (Id.), despite being in the clear line of sight. The defendant absolutely disregarded his training, instruction, and policies, and failed to give due regard to uninvolved innocent motorists (Baranowski II-38, A217). This was evident from Slover's statement that even if he had seen Mr. Pugh that would not have deterred him from deploying the Stop Sticks, when doing so the defendant demonstrated no concern for someone in Mr. Pugh's situation (Baranowski II-38-39, A217-218).

To a reasonable degree of probability regarding compliance with police standards the defendant *grossly* deviated from the standard of care for safety of the innocent (Baranowski II-39, A217). It is a gross deviation of police standards to use Stop Sticks without giving consideration to whether there are other vehicles and innocent motorists in the zone of danger. (Baranowski II-72, A222).

Defendant's Expert Conceded Defendant's Deployment of Stop Sticks Was a Contributing "But For" Cause of Mr. Pugh's Injuries

The defendant's designated Corporal Joseph Aube, who investigated this accident because it involved the State Police (Aube II-90, A224), as an expert

witness in accident reconstruction (Pre-Trial, p. 11, A53).[12] Corporal Aube is employed by the Delaware State Police and assigned to the Collision Reconstruction Unit. (Aube II-89, A223).

The purpose of Corporal Aube's investigation was to determine why the accident happened (Aube II-97, A227). During so he did not question, nor was he concerned as to why the defendant did not see Mr. Pugh's vehicle (Aube II-95-96, A225-26). In doing his investigation Corporal Aube interviewed Corporal Slover, but he never asked him why he did not see Mr. Pugh's vehicle (Aube II-95, A225). Moreover, Corporal Aube did not even think that whether defendant could see the Pugh vehicle was important or whether it came into the defendant's mind before the accident (Aube II-96, A226). He did not consider any factor other that the driving of Davis (Aube II-96-97, A226-27).

Aube did conclude that nothing Mr. Pugh did contributed to the accident (Aube II-96-97, A226-27), since he was coming from the opposite direction and was an innocent bystander (Aube II-96-97, A227-28).

Corporal Aube agreed that the deployment of the Stop Sticks, by the defendant, was a contributing factor in causing the pursued vehicle to swerve, resulting in it striking Mr. Pugh's vehicle. (Aube II-109-10, A231-32).

In spite of his placing blame on the pursued vehicle's attempt to avoid the

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[12] The plaintiff had also listed Corporal Aube as an adverse witness (Pre-Trial p. 10, A52).

Stop Sticks he agreed that *but for* the presence of the Stop Sticks there were no other facts of which he knew that caused the pursued vehicle to swerve. (Aube II-109, A231). As a result he agreed that the deployment of the Stop Sticks were a contributing factor in making Davis collide with and strike Mr. Pugh's vehicle. (Aube II-109-110, 135, A231-32). Under cross-examination the defendant's attorney was able to have his own expert testify that the pursued vehicles fleeing and trying to evade the Stop Sticks was the primary cause (Aube II-129, A233). Corporal Aube also admitted when Davis was driving straight down Old Baltimore Pike he had not lost control until he encountered the Stop Sticks (Aube II-131-133, A234-36), and as such the deployment of them was a contributing cause.

During his testimony Aube conceded he uses mathematical calculations in accident reconstructions and many times calculates how long it takes someone to travel a certain distance (Aube II-106, A228). In this case he agreed that given the fact that Slover stated he had a quarter of a mile unobstructed clear view (Slover I-101, A171) that someone, such as Mr. Pugh, traveling a quarter of a mile and slowing down would have taken at least twenty (20) seconds to travel that quarter of a mile, and if he was slowing down, even longer (Aube II-108, A230).[13]

[13] There are 5,280 feet in a mile, a quarter of a mile has 1,380 feet, a vehicle travels 1.47 feet per second at 1 mph. Someone traveling 45 mph. is travels 66.15 feet in one second. It would take someone traveling 45 mph. just under 20 seconds to travel a quarter of a mile, and if that person were traveling the same distance, and

ARGUMENT

THE COURT COMMITTED ERROR BY GIVING AN EMERGENCY INSTRUCTION WHEN THE DEFENDANT HAD ADMITTED HAVING TIME TO REFLECT ON HIS ACTIONS, AND THE INSTRUCTION WAS NOT WARRANTED BY THE SPECIFIC FACTS FOR THIS DEFENDANT

(A) **QUESTION PRESENTED:** Was there evidence sufficient to support an Emergency Instruction where the defendant had time to carefully and thoughtfully consider performing a task for which he had received special training. These issues were preserved during an untranscribed jury prayer conference, and on the record at III-136, (A282A), arguing that there was no emergency situation and the defendant was trained for the task that he performed. The issue was further made a part of the record on the final day of the trial IV-62, (A285).

(B) **SCOPE OF REVIEW:** The legal adequacy of an instruction is subject to a *de novo* review. General Motors Corp. v. Grenier, 981 A.2d 531, 541 (Del. 2009); Spencer v. Wal-Mart Stores East, LP, 930 A.2d 881, 885 (Del. 2007). However, the standard of review of the sufficiency of evidence to warrant a requested instruction is abuse of discretion; *McNally v. Eckman,* 466 A.2d 363, 370 (Del.Supr., 1983).

(C) **MERITS OF ARGUMENT:** A Trial Court is obligated to properly

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slowing down to 5 mph. they would take longer than 20 seconds to travel that unobstructed clear view and distance (Aube II-107-108, A177-78).

apply the law to the specific facts of the case. Beck v. Haley, 239 A.2d 699, 702 (Del. 1968). An abstract statement of the law is insufficient. (Id.) "Implicit in every jury instruction is the fundamental principle that the instruction applies to the specific facts of a particular case…". Bullock v. State, 775 A.2d 1043, 1053 (Del. 2001). The Court failed to instruct the jury or provide any guidance as to what constituted an *emergency,* that they should focus on whether or not the defendant had time to "reflect" on the situation, leaving them to speculate, That error was further compounded by language in the instruction focusing on the events "up the road", between the fleeing suspect and other officers. The instruction diverted the jury's attention from the defendant Slover's conduct and not to what he faced. This allowed the jury to focus on the wrongful conduct of the fleeing suspect "up the road" This was exactly the basis of the plaintiff's objections (III-136).

1. <u>The Defendant Was Not Confronted With An Emergency</u>: An emergency is by definition a sudden or "unexpected" situation or event.[14] There was not an emergency, given the defendant's admission that he had "a couple of minutes" to "carefully and thoughtfully" monitor the road way before he deployed the Stop Sticks, given that the defendant's was trained for just such an eventuality. By his own admission defendant had a couple of minutes from the time he placed the Stop Sticks on the far side of the road and the pulling/deploying them into the

[14] The Oxford Dictionary:
(http://www.oxforddictionaries.com/definition/english/emergency

path of the oncoming Davis vehicle. That time was as required by the Delaware State Police ("DSP") Rules, Regulations and Policies, (PX-3, ¶!V.C.1, A73). It is Undisputed the defendant had ample time to *reflect* and "sufficient time" to select the proper location for the placement of the Stop Sticks before their deployment.

The Court, over the objections of the plaintiff, gave an instruction (IV-58, A284), requested and authored by the defendant (A116) titled: "Actions Taken In Emergency" (A152). That instruction focused on "...when Defendant Davis attempted to injure police officers and fled from the officers" (IV-58, A284). There was no evidence that Davis attempted to injure Slover![15]

2. **The Delaware Law of Emergency:** The giving of the *emergency instruction* was erroneous, as a matter of law. The *seminal* case describing the requirements for an *emergency instruction* was this Court's decision in Panaro v. Cullen, 185 A.2d 889, 891-892 (Del. 1962). The Court found that there are two basic requirements for an *emergency instruction.* First, the emergency must not be of defendant's own making. Secondly, the emergency must occur "...without time for *reflection*" (italics added). That rule was reiterated thirty years later in Shum v. Minor, 1993 WL 385108, 633 A.2d 371 (Table) (Del.Supr. 1993). The Court, in

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[15] The emergency described in the defendant's proffered instruction was not the one faced by the defendant, but referred to the one faced by Trooper Rash. When the plaintiff objected to testimony about events "up the road" the trial Court held that they were only relevant if plaintiff's expert testified beyond the actual deployment of the Stop Sticks. (See: n. 5, supra.)

its Order, found that: "The Emergency Doctrine Jury Instructions articulated by the trial court were not an erroneous statement of law." Shum, Id., at *2. The approved quoted the two prerequisites for a *emergency* instruction as: "...when a driver is required to act suddenly in the face of imminent danger not in his own making *and* without time for reflexion [sic]...". Shum, Id. at *1 (italics added).

It was the uncontradicted evidence that the defendant had more than ample opportunity to *reflect* on the situation and to plan and decide if, how, and when he was going to deploy the Stop Sticks. The defendant testified that from the time he placed the Stop Sticks on the far side of the road until he pulled them in front of Davis's vehicle he had "a couple of minutes" to wait, more than enough time to, as defendant described to "carefully and thoughtfully" consider, if he was going to deploy the Stop Sticks. In the DSP Policy for Deflation Device Policy "Stop Sticks", (PX-3; A73), the policy specifically requires the deployment officer provide himself "sufficient time" for deployment. An emergency instruction is dependent upon the party claiming an emergency not having time to *reflect*. By definition the DSP Policy requires adequate time for *reflection*. The State Police "Use of Tire Deflation Devices 'Stop Sticks' " (PX-3, A73), requires that:

> "The member deploying the device will be in safe and predetermined location ***in sufficient time*** for proper deployment." (PX-3: ¶IV.B.1.a, A77)(emphasis supplied)

The conflict between the evidence and the law of emergency, justifying an Emergency Instruction is obvious. The defendant was required to have sufficient time before deploying the Stop Sticks. An emergency situation justifying an emergency instruction requires just the opposite, that the situation arise "...without time for reflection". Panaro v. Cullen, 185 A.2d, at 891-892 (Del. 1962).

3. Generally Accepted Principles of What Constitutes an "Emergency": An emergency situation has been generally defined and held to require the party claiming an emergency must not have had time to reflect upon the event. Some Courts have characterized an emergency defense as one requiring a *rapid decision.*

> "In determining whether conduct is negligent toward another, the fact the actor is confronted with a sudden emergency which requires *rapid decision* is a factor in determining the reasonable character of his choice of actions." Restatement of Torts, 2d, §296 (italics added).

In Henson v. Klein, 319 S.W.2d 413, 420 (Ky. 2010) the Kentucky Supreme Court traced the history of the emergency doctrine under Kentucky law. It noted that the doctrine originated where a person was "...compelled to choose *instantly* what to do..." (Id. at 420) (italics added). The Court found the doctrine was properly applied in a boating accident. In Coyne v. Peace, 863 A.2d 885, 889 (Me. 2004) the Court found an emergency instruction was proper because defendant had to "react quickly" to an unanticipated accident, citing the Restatement's "rapid" language. In the present case, Slover did not have to react quickly, instantly, or rapidly to a situation for which he was trained, anticipated and planned. Rather,

Slover testified he acted carefully, and with "thoughtful consideration" to the events (Slover I-117, 118, A185). In McKee v. Evans, 551 A.2d 260, 272 (Pa. Super. 1988), the court reversed a judgment for injured parties, finding that an emergency instruction had been improperly given. A review of the history in Pennsylvania for the premise of the law of emergency the court found that the premise of such an instruction was a situation that "...permits no opportunity to access the danger...". (Id. at 272), or was a situation that "...must come about suddenly without warning,, and . . . occur(s) spontaneously without time for deliberate reflection." (Id., at p. 273-74). The Court concluded the underpinnings of the "...emergency doctrine is the necessity of making a split-second decision because of an impending exigency." (Id., p. 278).

The requirements for an emergency instruction were well explained for two different claims that were analyzed in one case by the West Virginia Supreme Court in Moran v. Atha Trucking, Inc., 540 S.E. 2d 903 (W.Va. 1997). The Court stated it discouraged the use of the emergency instruction stating it should be: "...given rarely, in instances of truly *unanticipated* emergencies which leave a party little or no time for reflection..." (Id. at 914). In the first case, the Court held that an emergency instruction was properly not given where it was inapplicable since: "An essential element of the sudden emergency doctrine is that a party not have time for *reflection*." (Id. at 915) (italics added). The Court held that the

instruction was properly withheld since the motorist seeking the instruction had "...several seconds, to consider options for avoiding (the accident)...". (Id. at 915). In the second case the Court held that the emergency instruction was properly given where the Court found the defendant motorist, as he testified: "...he did not even have time to think!". (Id. at 916).

Thus, it is well recognized that to warrant the given of an emergency instruction it must be shown that the party shielding his actions must act without "time for reflection". Marri v. New York City Transit Authority, 963 N.Y.S.2d 736, 737 (N.Y.A.D. 2013); Tarnavska v. Manhattan & Bronx Surface Transit Operating Authority, 966 N.Y.S.2d 171, 171-172 (N.Y.A.D. 2013).

The Court in giving the instruction made no mention of the fact that Slover had been trained specifically and extensively to handle and deal with these very situations. Where a defendant is invoking the emergency defense and was:

> "...engaged in an occupation requiring special training and skill . . . (that) should have been explained in connection with the charge of an emergency, if a charge on the subject was given." Lackmann v. Pennsylvania Greyhound Lines, 160 F.2d 496, 501 (4th Cir. 1947).

That position is supported by the Restatement. The commentary to states in determining whether someone, such as Corporal Slover, "...Is to be excused for an error of judgment in a sudden emergency, importance is to be attached to the fact that many activities require that those engaged in them shall have such natural

aptitude or special training as to give them the ability to cope with those dangerous situations..." Restatement of Torts 2nd, §296, Comment (c). The Trial Court would not consider the fact that Corporal Slover received training for the very situation in which he was confronted, before it made a decision to give an emergency instruction (III-136, A252A).

4. **The "Events Up The Road" Were Not Relevant:** The jury instruction, as given by the Court, permitted the jury to decide:

> "...if you find that Corporal Slover was confronted by an emergency situation *when defendant Davis attempted to injure police officers and fled from the officers, you should review* Corporal Slover's conduct in light of what a reasonably prudent trained law enforcement officer would have done under those circumstances." (IV-58, A284). (Italics added)

It is undisputed that Slover was not involved in nor even saw the events that occurred "up the road" when Davis came into physical contact with the police cruisers on Old Capitol Trial. Slover set out the Stop Sticks well down the road on Old Baltimore Pike and his only knowledge of those events was what he heard on the radio/RECOM. He denied that the events that he heard on the radio had any effect on him, since he "carefully and thoughtfully" considered his actions in deploying the Stop Sticks.

No evidence in the matter was presented that a sudden emergency, without time for reflection, was confronted by Defendant Slover. Defendants' claim of

emergency, specifically the instruction requested by the defendant, and given by the Court, all described activities that occurred "up the road" between Davis and Officers' Rash and Waibel. The instruction referenced only the actions between the defendant Davis and Officers' Rash and Waibel defining the emergency situation as having occurred: "*...when defendant Davis attempted to injure police officers and fled from the officers...*" (IV-58, A284). That conduct excluded any actions in front of Corporal Slover. No reference in the instruction was made to what the defendant Slover actually saw and/or physically perceived. There was no evidence that Davis attempted to injure Slover, nor was he fleeing from defendant Slover. The Emergency instruction was referring only to the interactions "up the road" and not to the events involving the defendant Slover.

More importantly, during a teleconference days before the trial (A122) the Court questioned the relevance of Davis's crimes. Davis pled guilty to a charge of assault second degree against Mr. Pugh, but the defendant wanted to offer into evidence Davis's pleas of guilty to assault second degree against the other officers, Rash and Waibel, "further up the road" (T-15, A126).[16] Plaintiff stated that he was not challenging the propriety of the pursuit "up the road" by Rash and/or Waibel (T-16, A127) but challenged the admission of those guilty pleas

as not relevant under D.R.E. 402 & 403. The plaintiff objected to any such "up the

[16] References (T-) are to a teleconference shortly before the trial on June 11, 2014 (A122).

road" conduct as being irrelevant and highly prejudicial (T-18, A129).

The Court in resolving that dispute found that *if* the plaintiff's expert and the plaintiff's evidence restricted itself to Slover's action in pulling the rope to "deploy" the Stop Sticks into the path of Mr. Davis's vehicle the issues, with regard to the guilty pleas for the "up the road" conduct, would not be relevant. (T-21-22, A132-33). Specifically the Court stated:

> "...if the plaintiff limits the testimony to simply that one action, that decision at the moment to deploy the Stop Sticks in alleged disregard of the safety of an oncoming vehicle, if it is truly that circumscribed and that limited, then the fact that he has pled guilty to other events is not relevant -- or, I would say, even if it is relevant, the potential of prejudice outweighs the probative value." (T-23-24, A134-35).

Plaintiff's case strictly limited itself to the actual physical deployment of the Stop Sticks immediately before Davis passed the defendant.

The plaintiff conceded that what was at issue was not the decision to put the Stop Sticks on the other side of the road but rather the negligence in the gross and wanton negligence in pulling the rope and deploying the Stop Sticks in front of Davis's vehicle without giving any consideration to Mr. Pugh's situation or presence. (T-20-21, A131-32). The Court then ruled that if the testimony of plaintiff's expert is "circumscribed" to and limited to "Slover's action in deploying (pulling the Stop Sticks in front of Davis's vehicle) the guilty plea of the other "up the road" incidents was not relevant (T-23-24, A134-35). Plaintiff's expert, James

Baranowski's testimony was so limited his testimony. The charge given by the Court drew the jury's attention to Davis's attempts to injure the police officers "up the road" and was thus improper.

Wanton conduct reflects a conscious indifference to the consequences of one's actions in circumstances where the probability of harm is reasonably apparent, but not intended. Eustice v. Rupert, 460 A.2d 507, 509 (Del. 1983).

> "Wanton conduct occurs when a person, with no intent to cause harm, performs an act so unreasonable and dangerous that he either knows or should know that there is imminent likelihood of harm, which can result. '(citations omitted)'. It is manifest in an 'I don't care' attitude that demonstrates a conscious indifference to the consequence of one's actions '(citations omitted)' Sadler v. New Castle Co., 524 A.2d 18, 23 (Del Super. 1987)." Vannicola v. City of Newark, 2010 WL 5825345 * 10 (Del. Super. 2010)(finding evidence wantonness of a police officer).

Clearly, Slover's actions in not seeing what was clearly there to be seen and admitting if he had he would not have been deterred from deploying the Stop Sticks satisfies the standard required by 10 Del. C. § 4001(3).

5. Defendant's Failure to Follow DSP Policies and His Training Made The Accident One Of "His Own Making": There can be no question that the defendant was fully and completely trained for the very situation which he encountered (p. 13, supra.). His failure to follow his training (PX-5, A81) and the DSP Policies (PX-2, PX-3, A62 & 73) created the circumstances that lead to this accident, and was of the defendant's 'own making", Panaro. at p. 892.

In Carpenter v. Belle Fourche, 609 N.W.2d 751 (S.D. Supr. 2000) the court that the defendant officer was not entitled to an emergency instruction. The Court held an emergency required an element of "surprise" with a "sudden and unexpected" event. The Court further held that where there was sufficient evidence of the police officer's own negligence such evidence would exclude an instruction on an emergency which would "...improperly emphasize the defendant's position." In that case the defendant police officer was following what he thought were two drag racing motorcycles. The evidence showed he was doing sixty miles an hour in a forty-five mile per hour zone and had failed to activate his siren or emergency lights. The plaintiffs were injured when their vehicle turned toward the highway where the officer was pursuing the two motorcyclists. The Court determined that an emergency instruction was improper.

CONCLUSION

For the reasons state herein the Judgment of the Superior court should be reversed, and the matter be remanded for a new trial, without any instruction dealing with an emergency.

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November 21, 2014

EXHIBIT

JURY INATRUCTION: "ACTIONS TAKEN IN AN EMERGENCY"

TRANSCRIPT: (IV-58, A284): EMERGENCY INSTRUCTION

OPINION: AUGUST 12, 2014

10. SPECIAL DOCTRINES OF TORT LAW

ACTIONS TAKEN IN EMERGENCY – General

When a person is involved in an emergency situation not of his own making and not created by his own negligence, that person is entitled to act as a reasonably prudent person would under similar circumstances.

Therefore, if you find that Corporal Slover was confronted by an emergency situation when defendant Davis attempted to injure police officers and fled form the officers, you should review Corporal Slover's conduct in light of what a reasonably prudent trained law enforcement officer would have done under those circumstances.

EFiled: Aug 13 2014 10:18AM EDT
Transaction ID 55881881
Case No. 09C-07-255 MMJ

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KEITH D. PUGH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	C.A. No. 09C-07-255 MMJ
WILMER E. DAVIS,	)	
SCOTT SLOVER,	)	
	)	
Defendants.	)	
	)	

Submitted: July 29, 2014
Decided: August 12, 2014

Upon Plaintiff's Motion for a New Trial
DENIED

MEMORANDUM OPINION

Gary W. Aber, Esquire, Wilmington, Delaware, Attorney for Plaintiff

Michael F. McTaggart, Esquire, Lynn A. Kelly, Esquire, Department of Justice, Wilmington, Delaware, Attorneys for Defendants

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This litigation arises from an automobile accident which occurred on July 31, 2007. The Delaware State Police were pursuing a driver, Defendant Wilmer Davis, traveling east on Old Baltimore Pike. Plaintiff Keith Pugh was traveling west at the same time. Defendant Corporal Scott Slover, a member of the Delaware State Police, deployed "Stop Sticks" in an attempt to bring Davis's vehicle to a halt. Davis's vehicle struck the Stop Sticks and subsequently collided with Pugh's vehicle. As a result of the collision, Pugh suffered severe injuries.

Pugh brought an action against Corporal Slover and Davis. Pugh alleged Corporal Slover acted with gross or wanton negligence when deploying the Stop Sticks, so as to be liable under 10 *Del. C.* § 4001. Pugh sought damages from both defendants as joint tortfeasors.

At trial, Corporal Slover requested an emergency instruction in his proposed jury instructions. The instruction was based on Superior Court Civil Pattern Instruction 10.6. The Court modified the instruction, adding additional language. The emergency instruction given to the jury stated:

> 10. SPECIAL DOCTRINES OF TORT LAW
>
> - Actions Taken in Emergency Situations . . . . . § 10.6
>
> **ACTIONS TAKEN IN AN EMERGENCY – General**
>
> When a person is involved in an emergency situation not of his own making and not created by his own negligence, that person is entitled

> to act as a reasonably prudent person would under similar circumstances.
>
> Therefore, if you find that Corporal Slover was confronted by an emergency situation when defendant Davis attempted to injure police officers and fled [from] the officers, you should review Corporal Slover's conduct in light of what a reasonably prudent trained law enforcement officer would have done under those circumstances.

On June 19, 2014, a jury found in favor of Pugh and against Davis in the amount of $250,000. The jury found in favor of Corporal Slover on Pugh's claim of gross and wanton negligence. On July 2, 2014, Plaintiff filed a motion for a new trial pursuant to Superior Court Civil Rule 59(a).

STANDARD OF REVIEW

To warrant granting a motion for a new trial, "the verdict must be manifestly and palpably against the weight of the evidence or for some reason, or combination of reasons, justice would miscarry if it were allowed to stand."[1] Delaware law gives great deference to jury verdicts.[2] "In the face of any reasonable difference of opinion, courts will yield to the jury's decision."[3] When the court considers a motion for a new trial, "there is a presumption that the jury verdict is correct."[4]

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[1] *Broderick v. Wal-Mart Stores, Inc.*, 2002 WL 388117, at *1 (Del. Super.).

[2] *Brittingham v. Layfield*, 2008 WL 4946217, at *3 (Del.).

[3] *Id.*

[4] *Daub v. Daniels*, 2013 WL 5467497, *1 (Del. Super.).

DISCUSSION

Pugh sets forth two bases in support of the grant of a new trial. First, the emergency instruction given to the jury was improper. Pugh argues that Corporal Slover had enough time to reflect on his actions and therefore he was not in an emergency situation. Second, a new trial is warranted because the verdict was against the great weight of the evidence.

Emergency Jury Instruction

As to the first basis, Corporal Slover argues that the emergency instruction was proper. Corporal Slover asserts that he was faced with a serious incident involving a dangerous, noncompliant driver. The Recom tape admitted into evidence at trial documented Trooper Rash advising assisting units that he had been struck, and that Davis was taking the light at Old Baltimore Pike.[5] Trooper Rash states "he just tried to run me over."[6] Shortly thereafter, Corporal Slover advises that he placed the Stop Sticks.[7]

The Court finds that the emergency jury instruction was not improper. The emergency instruction—"*if* you find that Corporal Slover was confronted by an emergency situation . . ."—lets the jury decide if Corporal Slover was confronted by an emergency. Pugh argues that Corporal Slover had time to reflect and

[5] Pl. Op. Br. Ex. 4.

[6] *Id.*

[7] *Id.*

therefore an emergency instruction is inappropriate. However, the Court finds that whether an emergency existed is a disputed question of fact. Pugh's arguments go to the weight the jury gave to the evidence of alleged emergency.

A party has "the unqualified right to have the jury instructed with a correct statement of the substance of the law."[8] The emergency jury instruction is a correct statement of law and does not infringe on Pugh's unqualified right.

Verdict is not Inconsistent with the Evidence

Pugh argues that a new trial is warranted because the verdict goes against the great weight of the evidence. When reviewing a motion for a new trial, the Court views the evidence in the light most favorable to the prevailing party because the verdict was in that party's favor.[9] The Court finds that the evidence, particularly the Recom Tape and Corporal Aube's expert testimony that Davis' evasive driving was a primary contributing factor to the accident, would allow a reasonable jury to find in favor of Corporal Slover.

CONCLUSION

The Court finds that the emergency instruction given to the jury was not improper and does not warrant a new trial. The Court finds that the jury's verdict was not inconsistent with the weight of the evidence.

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[8] *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991); *Flamer v. State*, 490 A.2d 104, 128 (Del. 1984).

[9] *Broderick v. Wal-Mart Stores, Inc.*, 2002 WL 388117, at *1.

THEREFORE, Plaintiff's Motion for a New Trial is hereby **DENIED.**

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEITH D. PUGH,	)	
	)	
Plaintiff Below, Appellant,	)	
	)	C.A. No. 473,2014
v.	)	
	)	
SCOTT SLOVER,	)	On Appeal From Superior
	)	Court of the State of Delaware
Defendant Below, Appellee.	)	In and For New Castle County
	)	C.A. No. 09C-07-255 MMJ

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached Appellant/Plaintiff Below's Opening Brief on Appeal from the Superior Court of the State of Delaware In and For New Castle County C.A. No. 09C-07-255 MMJ and Appendix by File&ServeXpress, hand delivery and electronic mailing, on November 21, 2014 to:

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