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Case Number 473,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEITH D. PUGH,	)
	) C.A. No. 473, 2014
Plaintiff-Below,	) Court Below: Superior Court
Appellant,	) of Delaware, New Castle County
	) C.A. No. 09C-07-255-MMJ
v.	)
WILMER DAVIS,	)
SCOTT SLOVER,	)
Defendants-Below	)
Appellee	)

APPELLEE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATED: December 15, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

On July 28, 2009, Plaintiff-Below Appellant Keith D. Pugh ("Appellant" or "Plaintiff" or "Pugh") filed a complaint against defendants Wilmer E. Davis, Joseph Aube, Greg Rash, Scott Slover, and GEICO Insurance Company in Superior Court. Prior to trial, plaintiff agreed to the voluntary dismissal of defendants Aube, Rash, and GEICO.

On April 24, 2014, the Superior Court denied defendant Slover's motion for summary judgment.

The case was tried before a jury from June 16, 2014 through June 19, 2014. Defendant Davis did not appear for trial or otherwise participate in the proceedings in this case.

The jury returned a verdict against defendant Davis in the amount of $250,000 and in favor of defendant Slover on June 19, 2014. Appellee's Appendix B-327 (hereinafter "B-"). Plaintiff moved for a new trial on July 31, 2014 and the trial court denied the motion on August 12, 2014. *Pugh v. Davis*, 2014 WL 4057772 (Del. Super. 2014). Plaintiff filed a timely appeal on August 28, 2014.

This is Appellee Scott Slover's Answering Brief.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court's jury instruction on emergency was a correct statement of the law and supported by the record evidence in the case. The instruction as given merely required the jury to consider whether defendant Slover acted as a reasonable and prudent person under the circumstances, which was a correct statement of the law, if there was or was not an emergency. In addition, any error in the Superior Court's instruction was harmless as the jury instruction merely tracked the trial court's negligence instruction on the standard of care.[1]

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[1] Appellant's Opening Brief contains a twelve part "summary" of his argument, with items 1-10 containing factual assertions and references to testimony, not legal arguments. This portion of the Opening Brief is contrary to DEL. SUP. CT. R. 14(b)(iv) which provides that the summary of the argument must address the "legal propositions upon which each side relies." None of these "arguments" in items 1-10 are actually part of Appellant's "Argument" listed in the Table of Contents, or listed in the "Argument" Section of the Brief on page 24. Slover will respond to the factual averments and references to testimony in Appellant's summary of argument in the Statement of the Facts in this brief.

STATEMENT OF FACTS[2]

Defendant Scott Slover has been a State trooper for sixteen years. (V-I, 86; B-119). He is a trained instructor in Stop Sticks. (V-I, 87; B-120). Corporal Slover was trained on Stop Sticks at the Delaware State Police ("DSP") Training Academy as part of a four hour program. (V-I, 120; B-139). Stop Sticks are one version of a tire deflation device. (V-I, 89; B-121). The purpose of the stop sticks is to disable a vehicle, not to make the tires explode. (V-I, 121-22; B-140-41). The small quills in the Stop Sticks slowly cause the air in the tire to deflate. (V-I, 122; B-141).

On July 31, 2007, Corporal Slover was in the area of Route 273 and Old Baltimore Pike and responded to a report that he heard over the radio from Trooper Rash. (V-I, 97, 124; B-125, 142). Slover had heard that Trooper Gregory Rash had tried to stop a Nissan Altima and that the vehicle had struck vehicles operated by Trooper Rash and Trooper Waibel, and was trying to run them over. (V-I, 124; B-142). He advised communications that he was going to deploy the stop sticks. (V-I, 98; B-126). Slover decided to use the stop sticks because the fleeing driver, later identified as defendant Wilmer Davis, had already tried to strike two police officers,

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[2] The facts are set forth in the light most favorable to defendant Slover as the prevailing party at trial. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co.*, 866 A.2d 1, 7 (Del. 2005).

had shown he was dangerous and needed to be taken into custody before he could injure anyone. (V-I, 125; B-143). Slover believed that defendant Davis had committed serious offenses against the DSP officers and was a risk to the public if he was not taken into custody. *Id.* Corporal Slover selected a location on the road that gave him a good sight distance, and from which he could see equally well in each direction. (V-1, 116, 131; B-136, 147). Prior to deploying the Stop Sticks, Corporal Slover did not see plaintiff's vehicle even though he did look for other vehicles in the area. (B-127, 129, 130, 133, 136, 144, 145, 154). Slover saw no other vehicles in the area. Corporal Slover was able to see Corporal Rash traveling down Old Baltimore Pike in pursuit of defendant Davis. (V-I, 102; B-128). Corporal Slover deployed the Stop Sticks by placing them on the opposite shoulder and then letting out the line across the road so he could pull them into the road when the vehicle came to that point. (V-I, 126-27; B-144-45). Corporal Slover had followed his training in placing the Stop Sticks on the road. (V-I, 130; B-146).

Slover did see Davis' vehicle approach the area and saw Trooper Rash in pursuit. (V-I, 137; B-148). Corporal Slover pulled the Stop Sticks out into the road at the last second so Mr. Davis would not be able to swerve around the Stop Sticks. *Id.* The deployment requires split second timing. (V-I, 138; B-149). Davis swerved real

quick to the right and his driver's side tire hit the Stop Sticks. Davis then swerved to the left, went sideways, and went up the road and struck what was later identified as plaintiff's Nissan Pathfinder. *Id.* The first time that Corporal Slover observed plaintiff's vehicle was at the time of the collision with defendant Davis. (V-I, 105; B-131). Slover approached the accident scene and observed that Davis' tire still had air in it. (V-I, 93, 139; B-122, 150). The stop sticks deflate a tire at a slow pace. It takes twenty to thirty seconds to deflate a tire with the Stop Sticks. (V-I, 94-95; B-123-24).

Corporal Slover testified in deposition that if he had seen another vehicle, Delaware State Police policy would not necessarily preclude the use of stop sticks as the policy does not require no vehicles on the road to use the Stop Sticks. (V-I, 105; B-131). Corporal Slover did not anticipate the target vehicle striking another vehicle because he could not anticipate what another operator was going to do. (V-I, 106; B-132). Corporal Slover did not recall Davis's exact speed when he hit the stop sticks. (V-I, 111-112; B-134-35). He stated that an excessive speed would probably be 20 miles over the speed limit. (V-I, 112; B-135).

When Slover was trained by the Stop Sticks instructor, he was never told that the use of Stop Sticks was prohibited when there were cars in the opposite side of the road. (V-I, 142; B-151). Corporal Slover's actions also complied with the DSP Tire

Deflation policy (B-85, 98-103). He believed that: i) there was a basis to arrest the suspect; ii) the suspect failed to comply with the command of the police; iii) the suspect ignored the police warnings; iv) the stop sticks were deployed in a good site location; v) there was degree of concealment; v) the location was not a curved road, was not a steep embankment, or exit ramp, there was no road construction, and no heavy traffic. (V-I, 142-44; B-151-53). Corporal Slover was also not aware of any DSP policy that barred the use of stop sticks when there was a vehicle in the opposite lane of traffic. (V-I, 144; B-153). Corporal Slover's intent in using the stop sticks was to bring Wilmer Davis's actions to a safe conclusion. (V-I, 145; B-153a). Slover was not able to control what Davis was doing or what Davis was going to do when he approached the stop sticks. (V-I, 145; B-153a).

Corporal Rash was the police officer who first observed Davis's Nissan Altima in the area of the Sparrow Run neighborhood on Pulaski Highway. (V-III, 67-68; B-220-21). The vehicle had a fictitious tag and Corporal Rash followed Davis into a Wawa parking lot. Davis then drove off after he saw Rash activate his emergency lights. (V-III, 68; B-221). Davis fled to Salem Church Road and Rash pursued with lights and sirens. Corporal Rash communicated with the DSP Recom communications system during the police chase. (V-III, 69-70; B-222-23). During the course of the

chase, Corporal Waible arrived to provide assistance. Davis struck Corporal Waible's car and then struck Corporal Rash's car. (V-III, 70-72; B-223-25). After the Waible collision, Corporal Rash had exited his car to arrest defendant Davis but the suspect drove into Rash's driver's side door and pinned Rash's leg against the car door. (V-III, 72; B-225). Davis then drove off down Salem Church Road toward Old Baltimore Pike. (V-III, 73; B-225). During the chase, Davis had become aggressive in his driving, running a red light and almost hitting a dump truck. (V-III, 75; B-227). As Davis approached the stop sticks, Rash saw Davis drive in an "S" like pattern where he first went on the right shoulder and then lost control. (V-III, 76; B-228). Traffic conditions were very light and Corporal Rash did not see any traffic in the opposite direction as Davis approached the stop sticks. (V-III, 76-77, 105-06; B-228-29, B-239-40). After Davis went past the stop sticks, he collided with another vehicle. Several seconds passed after Davis passed the stop sticks and when the collision occurred. (V-III, 77; B-229). Davis did not stop at the location of the stop sticks but drove several hundred feet past the point of Corporal Slover's location. (V-III, 104; B-238). Corporal Rash's chase of Davis lasted for approximately 3.8 miles. (V-III, 84; B-236).

Corporal Waible's vehicle was struck when she drove in front of the Davis car

on Salem Church Road in an effort to block it. (V-III, 109-10; B-241-42). Corporal Waible was traveling behind Corporal Rash's vehicle as defendant Davis approached the stop sticks and swerved. (V-III, 112; B-243). She did not recall seeing any other traffic at that time. (V-III, 112-13; B-243-44).

During Corporal Rash's testimony, the defense played the Recom tape which was moved into evidence as defendant's exhibit #2. (V-III, 78, B-230). The transcript of the tape was admitted at trial as defense exhibit #3. (B-71-79). A duplicate copy of the Recom tape admitted at trial is provided as a CD exhibit to the Appellee's Appendix. (B-329). The time stamps on the Recom tape show the time of the Corporal Rash description of the collision at approximately the 3:22-4:12 mark. *Id.* Slover does not advise that he had the stop sticks until approximately 4:51 mark, or 39 seconds later. *Id.* The collision between the plaintiff and defendant Davis is reported at approximately 5:22, or 31 seconds later. *Id.*

Corporal Joseph Aube was called as a plaintiff witness but also testified as an expert for the defense on the cause of the accident. Corporal Aube is assigned to the collision reconstruction unit and is specially trained to investigate the most serious collisions. (V-II, 89, 111-12; B-190, 195-96). Aube was called to investigate this incident involving the plaintiff and defendant Davis. Plaintiff Pugh was travelling

west on Old Baltimore Pike. (V-II, 92; B-191). Corporal Aube testified that Pugh's visibility would depend on his location on the road as well as the timing and speed of when Pugh was on the road.[3] (V-II, 93, 95; B-192-93). Aube found that defendant Davis swerved to avoid the stop sticks and then crossed the center line and went into the plaintiff's side of the road. (V-II, 100; B-194). Aube did interview Davis after the accident. Davis stated in part, that "he did not do anything wrong so he was not going to stop." (V-II, 118; B-197). Corporal Aube prepared an accident diagram showing the path of the Davis vehicle and the subsequent intersection. (V-II, 122; Defendant's Ex. 6 and 7; B-198; B-81-84). Aube found no facts that prevented Davis from staying on the shoulder once he swerved but found Davis chose to turn his wheel back to the left and went out of control. (V-II, 137-38; B-203-04). Aube concluded that Davis tried to evade the stop sticks and continued to drive after he hit the stop sticks. He travelled at least 300 feet after contacting the stop sticks. Aube opined that this was two to three times the distance needed to stop, even from a reported speed of 50 to 60 miles per hour. (V-II, 129; B-199). Aube concluded that

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[3] Defendant Slover contested plaintiff's theory that Pugh's vehicle would have been visible for at least twenty seconds before impact. Plaintiff's calculation was based on the measurement of distance from Corporal Slover's location at the foot of the hill to the top of hill. However, the testimony at trial was that Pugh never actually travelled to Corporal Slover's location but had stopped several hundred feet short of it. (B-238, B-296).

Davis then lost control of his vehicle and crossed the center line, which resulted in the accident. *Id.* Aube opined that Davis' flight caused the accident, and that the stop sticks did not cause Davis to lose control of the vehicle. (V-II, 130; B-200). Davis's conduct was the primary contributing circumstance that caused the accident. (V-II, 141; B-205). Corporal Aube testified that, in his experience, it is possible for a vehicle to be driven considerable distances even after striking stop sticks. (V-II, 131-32; B-201-02).

Plaintiff Keith Pugh did recall being injured in an auto accident on July 31, 2007. (V-I, 28, 32; B-105, 109). Pugh was driving a Nissan Pathfinder on Old Baltimore Pike (V-I, 29-30; B-106-07) and saw two police officers chasing another car. Pugh believed an officer lying on the ground was pointing a gun. (V-I, 31; B-108). Pugh pulled to the side of the road where he was eventually struck by a Nissan Altima operated by Davis. (V-I, 32; B-109). Pugh had only a vague recollection of some of the events after the accident. (V-I, 35; B-110). Pugh testified that he had no physical activity for six months after the accident. (V-I, 61-62; B-111-12). Plaintiff's medical records did show that he was off crutches within two months of the accident (V-1, 64; B-113), was able to attend a professional football game within three months of the accident (V-1, 69-70; B-114-15), and could ride an exercise bike and walk on a

treadmill during this period while at physical therapy. (V-1, 66-67, 70-71; B-115-18).

The testimony of plaintiff's tire deflation expert James Baranowski was not "uncontradicted" as asserted in Appellant's Opening Brief, at *18. The defendant did not stipulate to the training or opinions of this expert. Mr. Baranowski was subject to cross-examination and his lack of training was attacked along with the bases for his opinions. (V-II, 40-67; B-161-88). Specifically, Mr. Baranowski received only one hour of training on a tire deflation device (V-II, 19, 53, 57, 63; B-158, 174, 178, 184) and he was not sure if he was trained on Stop Sticks or a different model known as Stinger Spikes. He testified that Sergeant Slover did not properly deploy his Stop Sticks because an accident happened. (V-II, 38; B-160). His testimony was inconsistent on whether the stop sticks should be deployed when there was only a limited amount of traffic present or no traffic. (V-II, 9, 50-51; B-157, B-171-72). While testifying to dangers associated with the use of Stop Sticks, Mr. Baranowksi agreed that the Pennsylvania State Police and numerous police departments around the country have used the device since the 1990s and it is a valuable device. (V-II, 58-59; B-179-80). Stop Sticks have been used to stop trucks and buses. *Id.* Mr. Baranowski agreed that the device is designed to allow for a controlled loss of air with the tires deflating in about 20 to 30 seconds. (V-II, 60; B-181).

Plaintiff's argument that Mr. Baranowski's testimony was "uncontradicted" was also contrary to the trial court's final instructions on expert witnesses. The jury was instructed that expert testimony was to receive whatever weight and credit that the jury found appropriate. (V-III, 133; B-261).

Over a defense objection (V-III, 18-19; B-209-10), Delaware State Police Lieutenant Cox was permitted to testify as a plaintiff's witness and answer a number of factual assumptions and hypothetical questions about possible violations of DSP policies by Corporal Slover assuming certain factual events were true. (V-III, 24, 26; B-212-13). Lt. Cox had no training in the use of stop sticks. (V-III, 31; B-215). Lt. Cox was only somewhat familiar with the underlying events of this accident and had previously testified only as a Rule 30(b)(6) witness at deposition. Lt. Cox testified that, under DSP policies, Sgt. Slover should have known if there were other motorists in the area. (V-III, 30; B-214). Lt. Cox also agreed that the actions of Sergeant Slover did not violate any DSP policy. (V-III, 33-35; B-216-18).

At the close of the defense case, counsel read into the record the fact that Davis pled guilty to the charge of Assault Second Degree for recklessly causing serious physical injury to Keith Pugh by colliding with his vehicle. (V-III, 114; B-245).

I. THE SUPERIOR COURT'S EMERGENCY INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW AND ANY ERROR IN GIVING THE INSTRUCTION WAS HARMLESS.

Question Presented

Whether the Superior Court instruction regarding "emergency" was a correct statement of the law, and, if not, whether any error was harmless?

Standard and Scope of Review

This Court reviews a claim of error in jury instructions *de novo*. *Guy v. State*, 913 A.2d 558, 563 (Del. 2006) (citing *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006); *Ayres v. State*, 844 A.2d 304, 309 (Del. 2004)). When a party claims error in a jury instruction, "reversal is only appropriate 'if the alleged deficiency in the jury instructions undermined ... the jury's ability to intelligently perform its duty in returning a verdict.'" *Guy*, 913 A.2d at 568 (quoting *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983)).

Merits of Argument

Defendant Slover requested an Emergency Instruction in his proposed jury instructions. (B-29, B-47). This proposed jury instruction was based on the Superior Court Civil Pattern Instruction 10.6. (B-70). The Pattern Instruction 10.6 contains two pattern instructions-a general instruction and a specific instruction for use when the

defendant is operating a motor vehicle. Pugh's counsel did object to this instruction. After discussions with counsel, the trial court modified the proposed instruction by adding additional language. The Emergency Instruction as modified by the trial court and read in the final charge provided:

> 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.

(V-IV, 58, B-324).

Superior Court had a factual basis to give this Emergency Instruction. Under Delaware law, "a party does have the unqualified right to have the jury instructed with a correct statement of the substance of the law." *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991) (citing *Flamer,* 490 A.2d at 128). The record evidence consisted of testimony given by Sergeant Slover, Corporal Rash and Corporal Waibel who were involved in some degree in the pursuit of Davis. The Recom tape was also played at trial and the transcript was admitted as part of the defense exhibits. (B-329). This evidence showed that the police were faced with a serious incident involving a dangerous, noncompliant driver, Wilmer Davis. The police were not faced with a

routine traffic stop or pursuit. The Recom Tape contained statements from Corporal Rash that Davis had tried to run over and possibly seriously injure the officers and that defendant Davis had just turned on to Old Baltimore Pike. *See* Recom Transcript at *3-4 (B-74-75).

This evidence is contrary to plaintiff's argument that Corporal Slover was not faced with an emergency from defendant Davis attempting to injure the police. Corporal Slover was faced with an unplanned, unexpected event involving a fleeing suspect who presented a danger to the officers involved in the chase, to Slover who was trying to stop the vehicle, and to the public. *See generally Porter v. Osborn*, 546 F.3d 1131, 1139 (9th Cir. 2008) (high speed chases "are inherently emergency situations"). The actual Recom tape admitted and played at trial shows that Trooper Rash advised assisting units that he had been struck and that Davis was taking the light at Old Baltimore Pike approximately around the 3:39-4:12 mark. (B-329). Defendant Slover did not report that he had the stop sticks until approximately 4:47, and the accident is reported at approximately 5:15 on the tape. The testimony also demonstrated that Sergeant Slover only had a split second to react and deploy his stop sticks once Davis was in the area where the deflation device was used. (V-I, 138, B-149).

The trial court, in denying the motion for new trial, correctly found that:

> 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. Trooper Rash states "he just tried to run me over." Shortly thereafter, Corporal Slover advises that he placed the Stop Sticks.

Pugh, 2014 WL 4057772, at *2. On this record, there was a sufficient evidentiary basis to support the Emergency Instruction given by the trial court.

Pugh now relies on a portion of Corporal Slover's testimony to argue that Slover acted carefully and thoughtfully and could not have been responding to an emergency. Appellant's Op. Br. at *10-11. A fair reading of Corporal Slover's testimony and the plaintiff's counsel's open-ended question is that the officer was simply responding that he did not act out of the emotion of the moment, but did consider what he was doing. (V-I, 117-18, B-137-38). This testimony does not bar the giving of the trial court's Emergency Instruction.

The Emergency Instruction given by the trial court was also consistent with the RESTATEMENT (SECOND) OF TORTS § 296 which provides for consideration of a "sudden emergency" when "rapid decision is a factor in determining the reasonable character of his choice of action." *See Heidbreder v. Northampton Township Trustees*, 411 N.E.2d 825, 828 (Ohio Ct. App. 1979) (police officer who tried to stop fleeing car

by shooting at driver was entitled to emergency instruction despite factual dispute over conditions under which officer fired weapon); *DeGregorio v. Malloy*, 52 A.2d 195, 197 (Pa. 1947) (police officer who rode on side of car in effort to assist injured passenger was responding to emergency circumstance). *See also Woiknoris v. Woirol,* 245 N.W.2d 579, 582 (Mich. Ct. App. 1976) (defendant entitled to an instruction on the emergency doctrine when there is any evidence that would permit the jury to find an emergency existed within the rule); *Buchecker v. Reading Co.*, 412 A.2d 147, 155 (Pa. Super. Ct. 1979) ("[W]here the evidence leaves some doubt as to whether an emergency situation existed, wholly independent of and not created by the plaintiff's own acts of negligence or recklessness, it is incumbent upon the trial [court] to submit the issue to the jury for its determination.").

The trial court's Emergency Instruction was also a correct statement of Delaware law. The final instruction given by the Court did not tell the jury that defendant Slover was faced with an emergency situation, but rather left that issue up to the jury to decide. The instruction also contained the rather non-controversial legal statement that, **if** Slover was confronted with an emergency, his conduct would have to be judged in light of the conduct of a reasonably trained law enforcement officer. *See Joy v. Bell Helicopter Textron, Inc.,* 999 F.2d 549, 559 (D.C. Cir. 1993) (sudden emergency

instruction left it open to the jury to decide if defendant was responsible for accident; instruction elaborates on common law standard of reasonable care for an actor under constraints of severe and unanticipated conditions). The instruction held Slover to a standard higher than that of an ordinary person, and instead required the jury to review his conduct in light of his position as a police officer.

This Emergency Instruction was, in all practical respects, no different than the Court's instruction on Negligence. The trial court instructed the jury as follows on the definition of negligence:

> Negligence is the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances. That standard is your guide.

(V-III, 126; B-254). Pugh did not object to this Negligence instruction. The language of the Negligence instruction is almost identical to the language in the Emergency instruction:

> Negligence is the lack of ordinary care; that is, the absence of the kind of care a **reasonably prudent and careful person would exercise in similar circumstances**. (B-254). [Negligence Instruction].
>
> ***
>
> 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.**
> (V-IV, 58, B-324). [Emergency Instruction] (emphasis added in both instructions).

Both the Negligence Instruction and the Emergency Instruction are consistent with Delaware law. *See Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 554 (Del. 2006) (standard of case for defendant in tort action is that of a "reasonably prudent" person); *Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1367 (Del. 1977) (applying "reasonably prudent man" standard of care in tort case); *Robelen Piano Co. v. DiFonzo*, 169 A.2d 240, 244 (Del. 1961) (standard of care in tort action is that of a "reasonably prudent man"). Moreover, the Emergency Instruction as revised by the trial court simply instructed the jury that it should consider the circumstances faced by Corporal Slover in assessing his conduct including whether those circumstances may have been emergent in nature. The trial court's Emergency Instruction was proper under the analysis and reasoning of the United States Court of Appeals for the Fifth Circuit in *Martin v. City of New Orleans*, where it stated:

> The doctrine of sudden emergency does not invoke a different standard of care than that applied in any other negligence case. The conduct required is still that of a reasonable person under the circumstances. The emergency is merely a circumstance to be considered

> in assessing the actor's conduct. W. PROSSER, LAW OF TORTS, Ch. 5 § 33 at pp. 168-70 (1971). As the Louisiana Court of Appeals has explained, "This characterization lends little or nothing to the determination of negligence and in no way modifies the standard tests. Sudden emergency is certainly no absolute defense and we must still ask the question: 'Was the conduct in question reasonable under the circumstances?' At most, reference to 'sudden emergency' serves to emphasize 'under the circumstances.'"

678 F.2d 1321, 1325 (5th Cir. 1982) (citations omitted). The trial court's Emergency Instruction in the instant case did not alter or in any way reduce the standard of care to which Corporal Slover was held or by which the jury was to consider the evidence. The Emergency Instruction also did not alter the burden of proof or otherwise act as an affirmative defense. Even if the jury did not find that Slover was faced with an emergency, the jury would still be required to consider Slover's conduct to determine whether he acted as a reasonably prudent officer under the circumstances. *See Bullock v. State*, 775 A.2d 1043, 1056 n. 47 (Del. 2001) ("A trial court's charge will not serve as grounds for reversible error if it is 'reasonably informative and not misleading, judged by common practices and standards of verbal communication.'").

Appellant argues that the trial court's Emergency Instruction was barred by this Court's decision in *Panaro v. Cullen*, 185 A.2d 889 (Del. 1962), but that case is distinguishable. In *Panaro*, the trial court instructed that if the driver was "suddenly confronted" with an emergency situation, then she would not be held to the same high

standard of care and if she acted reasonably, would be entitled to judgment in her favor. *Id.* at 891-92. This instruction was akin to a complete, affirmative defense and certainly required the jury to apply a reduced standard of care applicable to the defendant. The trial court's instruction here did not direct the jury to hold Slover to a lesser standard of care and did not provide Slover with an affirmative defense.

Pugh also relies on *Shum v. Minor*, 1993 WL 385108 (Del. 1993). In *Shum*, the emergency doctrine jury instruction, like in *Panaro*, provided for a reduced standard of care for the driver and stated that the driver could not be charged with negligence if his condition of peril was created by the negligence of another. *Id.* at *1. Again, this emergency instruction was substantially different than that used in Pugh's case. The Court in *Shum* did state that the emergency instruction was proper because it met the requirements for the doctrine, namely "the emergency asserted may not be one of the defendant's own making, and that the defendant's conduct must be judged by a reasonable person standard applied to the emergency situation as the jury finds it to be." *Id* at *2 (citing *Panaro*, 185 A.2d at 891-92). Under the holding in *Shum*, the trial court had a proper basis to give the emergency instruction-i) the emergency was not of the defendant's own making and ii) the defendant's conduct was judged under a reasonable person standard as amended in the charge given by the Court.

Pugh appears to argue that Superior Court erred in giving the Emergency Instruction because there was no evidence that Corporal Slover had a sufficient time to react to the situation. Pugh's argument appears to be a challenge to what would have been the Superior Court Civil Pattern Instruction § 10.6 for Actions Taken In Emergency-Motor Vehicles; however, the trial court did not give this instruction as it only applies to situations where the defendant is operating a motor vehicle. The trial court's instruction complied with the approved Superior Court Civil Pattern Instruction § 10.6 for Actions Taken In Emergency. (B-70).

Pugh cites cases from other jurisdictions addressing factual situations where the emergency instruction or standard of care was reduced for the defendant. *See* Appellant Op. Br. at *28-30. These cases, like *Panaro*, are distinguishable from the limited instruction given in Pugh and are not controlling. *Marri v. New York Transit Auth.*, 963 N.Y.S.2d 736, 737 (N.Y. App. Div. 2013) (bus driver who was required to make a quick decision in response to sudden traffic condition may not be negligent under emergency doctrine); *Tarnavska v. Manhattan and Bronx Surface Transit Operating Auth.*, 966 N.Y.S.2d 171 (N.Y. App. Div. 2013) (bus driver entitled to summary judgment and complete defense as a matter of law under emergency doctrine); *McKee v. Evans*, 551 A.2d 260, 272-73 (Pa. Super. Ct. 1988) (sudden

emergency is a complete defense to a defendant who responds in reasonable fashion to perilous situation not of his own doing).

Pugh also contends the trial court's Emergency Instruction was deficient because it did not mention that Corporal Slover had been trained in the use of tire deflation devices. Appellant's Op. Br. at *30. The Emergency Instruction did specifically address the training issue. The trial court instructed the jury to consider Corporal Slover's conduct in light of what a reasonably prudent trained law enforcement officer would have done under those circumstances (emphasis added). (B-324). Contrary to Pugh's argument, the trial court required the jury to consider the reasonableness of Corporal Slover's conduct in light of his status as a police officer and his training.

Pugh incorrectly asserts that the events "up the road" were not relevant. Appellant's Op. Br. at *31-34. Pugh argues that the trial court had ruled at a pretrial teleconference that the events "up the road" were irrelevant and that plaintiff's expert would only be allowed to testify to the appropriateness of Corporal Slover's use of the Stop Sticks immediately before the time that Davis approached the deflation device. *Id.* at 32-33. The narrow issue before the trial court at the pretrial teleconference was whether Slover would be permitted to admit the specific crimes that Davis committed against Troopers Rash and Waibel prior to Corporal Slover's use of the Stop Sticks.

B-15-16. The trial judge did not rule that Pugh's expert could only testify to the activity immediately before defendant Davis struck the Stop Sticks. It was Pugh who was trying to limit the testimony of his expert. (B-22, 24). The trial judge ruled under DRE 403 that Davis' convictions as to Officers Rash and Waibel were inadmissible. (B-23-24).

Pugh sought to present a case to the jury that sanitized Davis' conduct by only focusing on the moment that Davis approached the Stop Sticks. At the same time, Pugh attempted to argue that Corporal Slover should have never used the deflation device. (B-16-18, 21). The jury could not understand how Davis got to the Stop Sticks without hearing the evidence of how he fled from the police. In fact, Corporal Slover testified that he was aware of the fact that defendant Davis had tried to strike Troopers Rash and Waibel. (V-I, 124-25; B-142-43). During cross-examination, Pugh's counsel even asked Corporal Slover if those events had any effect on Slover's conduct. (V-I, 117; B-137). The trial court permitted Troopers Rash and Waibel to testify at trial (B-206-07) and admitted the Recom tape of the event into evidence. (B-218a, B-218b).

Finally, Pugh incorrectly argues that Slover's failure to follow DSP polices and his training made the accident one of "his own making," and argues that the emergency

doctrine should not apply (emphasis added). Appellant's Op. Br. at *34-35. Appellant's argument misstates the legal principle. The question is whether the party relying on the emergency doctrine has engaged in negligent conduct that created or helped to bring about the emergency. *Panaro*, 185 A.2d at 191. There was no evidence at trial that Corporal Slover engaged in any conduct that created the emergency of Davis fleeing from the police, trying to injure or kill police officers, and endangering the public. Corporal Slover testified that his intent was to stop Davis's emergent conduct. (B-153a). Moreover, the jury's verdict found that Davis's negligence proximately caused the injuries to Pugh (question #1) and the jury apportioned 100% of responsibility for the accident to defendant Davis (question #4). (B-327).

The Court's Emergency Instruction was a correct statement of the law and there is no basis for granting a new trial based on this instruction. *See McNally v. State,* 980 A.2d 364, 367 (Del. 2009) (jury instruction is not grounds for reversal unless the "deficiency undermined the ability of the jury 'to intelligently perform its duty in returning a verdict.'").

In the alternative, even if the Court were to find that the Emergency Instruction was error, the instruction was at most harmless error and did not affect the outcome of

the trial. As already stated above, the actual wording of the trial court's Emergency Instruction (B-324) was substantively no different than the trial court's Negligence Instruction. (B-254). Both instructions required that the jury consider the conduct in terms of a "reasonably prudent and careful person under similar circumstances." Pugh suffered no prejudice from the Emergency Instruction. Pugh did not object to the Negligence Instruction at trial and the gist of the Emergency Instruction was no different and did not alter the ability of the jury to intelligently and properly evaluate the evidence and reach a verdict. *Williams v. State*, 98 A.3d 917, 923 (Del. 2014) (Supreme Court will only reverse for alleged deficiency in jury instruction that undermined "jury's ability to 'intelligently perform its duty in returning a verdict.'") (quoting *Smith v. State*, 913 A.2d 1197, 1241-42 (Del. 2006)); *see also Joy*, 999 F.2d at 559 (no possibility that sudden emergency instruction had any adverse effect on the verdict and error was harmless under FED. R. CIV. P. 61).[4]

4. Appellant makes a passing statement in the Opening Brief at page 34 in an attempt to argue that defendant Slover engaged in wanton conduct. This statement is not properly presented to the Court. The Appellant does not separately list this as an Argument, nor does he state the scope of review or list the argument in the Merits of the Argument as required by DEL. SUP. CT. R. 14(b)(vi)(1-3). This argument should be deemed abandoned by the Court. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1265 (Del. 2012) (argument must be fairly presented or will be deemed waived); *Harris v. State*, 2014 WL 3883433, at *2 (Del. Aug. 20, 2014) (*pro se* brief was deficient for failing to state merits of any argument in summary of argument section of opening brief).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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The undersigned certifies that on December 15, 2014, he caused the attached *Appellee's Answering Brief* to be delivered via LexisNexis and U.S. Mail postage prepaid to the following person(s):

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