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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 REPLY BRIEF

Gary W. Aber, (DSB #754)
One Customs House
704 King Street, Suite 600
P.O. Box 1675
Wilmington, DE 19899
(302) 472-4900
Attorney for Appellant
gaber@gablawde.com

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I. DEFENDANT'S ADMISSION THAT HE HAD TIME TO *CONSIDER* HIS ACTIONS CONCEEDES NO EMERGENCY EXISTED WHEN HE MADE HIS DECISION TO DEPLOY THE STOPSTICKS

The antithesis of an emergency is time to reflect and consider a situation before choosing a course of action. The defendant admitted that his actions were "...all carefully and thoughtfully to end this event." (Slover I-117-18, A184-85). The defendant's Answering Brief attempts to disavow that admission and characterize it as only a response to an "open ended question" (DB-16). The defendant was not merely affirming words in a question, but adopting them for his own. Notwithstanding that statement Defendant stated "...he did consider what he was doing." (DB-16). The statements clearly indicate the defendant was not reacting quickly, suddenly, impulsively, or instinctively. Rather he thought about his plan of action, had time to survey traffic in both directions and wait for the pursuit to reach him, and then decide whether or not to obey the policies and procedures of the Delaware State Police, and actually deploy the StopSticks.[1]

A. <u>Defendant's Concession He Had "Time To Consider"</u>: Time to consider is the functional equivalent of "...time for reflection", which is the standard by which an emergency has been measured under the Delaware law (PB-

[1] The defendant, in his argument, relies on facts not from the trial transcript but references matter from his deposition (DB-5). This is of course improper at this stage.

26), citing Panaro v. Cullen, 185 A.2d 889, 891-92 (Del. 1962)(one requirement for emergency is it must occur "...without time for reflection"); Shum v. Minor, 1993 WL 385108, at *2 (Del. 1993), 633 A.2d 371 (Table)(A principle for the existence of an emergency situation is that a driver is required to act "...without time for reflextion [sic]...". Burks v. Granholm, 2000 WL 1611082 *3 (Del. Super. 2000) define an emergency as one where an actor is confronted with a situation where the law does not hold the actor to the high standard of care "...as it would if she had more *time to consider* what to do to avoid the emergency.")(denying a plaintiff's motion in limine to bar the emergency defense). Similarly, the Court in Panaro, 185 A.2d, at 891 used the language "more *time to consider* what to do to avoid the emergency" in analyzing whether an emergency did or did not exist. One of the earliest cases dealing with emergency likewise used the definitional phrase "without time to consider" in determining when there is or is not an emergency, Lynch v. Lynch, 195 A. 799, 804 (Del. Super. 1937).

The defendant's attempt to avoid his agreement that he "carefully and thoughtfully considered his actions by limiting it to merely an admission that he considered them renders the claim of an emergency as a nullity. It was error to give the instruction.

B. Defendant's Equating Emergency Instructions Proves The Point:

The defendant's arguments focused on the very error by the Trial Court in giving

its Emergency Instruction. The defendant attempts to convert plaintiff's argument into focusing on Superior Court Civil Patterns Instruction Section 10.6: "Actions Taken in Emergency-Motor Vehicles", claiming that the Court did not give the motor vehicle instruction but rather gave its companion instruction defendant tries to escape it erroneously requested instruction.

The defense is correct that the Court did not give the motor vehicle instruction. But, what the defendant misses is the fact that the motor vehicle emergency instruction properly defines an emergency by referring to "sufficient time and opportunity to consider what the best course of action would be". By definition the instruction given, at the defendant's behest, and which the defendant drafted, (A284), makes no reference whatsoever to sufficient time to consider as an element to be focused upon in defining an emergency. An emergency is one where the defendant's actions are excused because of lack of sufficient time to reflect/consider his action Panaro. Rather the instruction drafted by the defendant and given by the Court left the jury to its own speculation as to what was the definition of an "emergency". The defendant's arguments illustrate profoundly that point, by comparing the two instructions.

C. Defendant's Argument Negligence Equals Emergency: Defendant attempts to excuse their request for an Emergency Instruction by equating it to the Negligence Instruction (DB-18-19). If the defendant is correct in his analysis that

the Negligence Instruction and Emergency Instruction are equivalent then their request for an Emergency Instruction was not necessary.

The reality is that the defendants went to great length to request the Emergency Instruction, drafting it overnight (A116) so the Court could give it when it concluded the jury instructions the next morning. The defendant's argument of equivalency is belied by their insistence on the Emergency Instruction rather than relying upon what they claim to be the equivalent negligence instruction

D. Defendant's Authorities Are Inapplicable: Defendant' authorities are to case in which there was clearly and emergency, and the actor did not have time to reflect or consider his actions, or are factually inapplicable to defendant's situation where he had significant time to consider his plan of action.

The defendant's reliance upon the Restatement of Torts 2d, § 296 is misplaced. There, §296(1) requires that for an emergency to exist the actor must be required to make a "rapid decision". Here, defendant not only admitted that he had the StopSticks in place for a "couple of minutes", but by the defendant's own concession that he had time to "consider" his actions demonstrates that the Restatement support the inappropriateness of the emergency Instruction. The commentary to §296 requires the actor to have to make a "speedy decision between alternative courses of action". Restatement of Tort 2d § 296, Comment (b).

DeGregorio v. Malloy, 52 A.2d 196, 197 (Pa. 1947), held that a police officer who was trying to direct a truck with a seriously injured passenger, who had blood all over going through heavy wartime traffic was excused from his own negligence in riding on the running boards of the truck as he was guiding it through the war time traffic. Buchecker v. Reading Co., 412 A.2d 147 (1979) is clearly distinguishable. There, the emergency was caused by a train crossing a highway that the Court found the train could not be observed until an instant before impact. The Court acknowledged that the one-fourth of a mile that the defendant claimed gave the decedent ample time to stop was inapplicable because the view of the train was not possible until an instant before the collision. Buchecker, 412 A.2d at 155. The Court cited its own previous decision holding that the time the hazard was in view was critical. Here, defendant can offer no explanation why he could not have seen Pugh's vehicle during the one-quarter mile of unobstructed view (Slover I-104, A174).

The defendant's reliance on Woiknoris v. Woirol, 245 N.W. 2d 579, 582 (Mich. Ct.Capp.1976) actually supports the plaintiff. There the Court held that although a defendant may be entitled to an instruction where the evidence would permit a jury to conclude an emergency existed, in that case the Court found that there was no evidence to support a sudden emergency instruction.

Joy v. Bell Helicopter Textron, Inc., 99 F.2d 549, 559 (D.C.Cir. 1993) is equally inapplicable since the Court found that the giving of the sudden emergency instruction was "inappropriate", but found it to be harmless error. 99 F.2d at 599. In the present case, the emergency instruction was the cornerstone of the defendant's entire case, that Slover's actions could not have been negligent because he was faced by an emergency situation. In Joy, as contrasted to the present case the Court defined what an emergency was, as one where "...the time available to (defendant) to recognize and evaluate these alternatives..." The instruction given in this case, (A284), in no way defined what was an emergency, but left it to the jury to speculate how that term would be defined.

II. THE DEFENDANT'S REQUEST FOR AN EMERGENCY INSTUCTION MISLED THE COURT BY NOT CONFORMING IT TO THE FACTS OF THE CASE.

The defendant's claim that the instruction was appropriate is contrary to the Delaware Law and Jury Instructions. A Trial Court is obligated to properly apply the law to the specific facts of the case. Beck v. Haley, 230 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). "Jury instructions must be adapted to the factual situation of each trial and conform to the evidence. *Probst v. State,* 547 A.2d 114, 120 (1988)." Dixon v. State, 673 A.2d 1220, 1227 (Del. 1996). The defendant does not, and cannot dispute these principles.

The emergency instruction drafted by the defendant and given at the defendant's behest was improper in two respects. First, it was contrary to the law since the defendant, by his own admission, had time to "carefully and thoughtfully" plan his potential deployment of the Stop Sticks. As the defendant conceded (DB-16), the defendant had time to *consider* his actions. That is he had time to reflect upon his actions. This negated any right to or need for an emergency instruction.

Secondly the defendant's drafted and submitted jury instruction focused not

on the situation faced by the defendant but rather on events that took place out of his sight, miles away, and significant time passed while the defendant considered his plan of action. That is the instruction did not conform to the facts.

Defendant's instruction based the emergency instruction of actions faced by individuals other than the defendant, and did not constitute the factual situation faced by the defendant, at the site of the deployment of the Stop Sticks. The instruction told the jury to decide whether the defendant was faced with an emergency, without defining an emergency. Equally important the instruction told the jury to determine if there was an emergency by misdirecting him to facts that occurred up the road, well before the defendant was confronted by the Davis' vehicle.

It is important to note that the defendant's briefing does not attempt in any portion of it to argue that the defendant obeyed or conformed his actions to the various Delaware State Police Policies and Procedures involved in this case, neither its pursuit policy (PX-2)(A62), nor the Delaware State Police Tire Deflation Device Policy (PX-3)(A73). The entire thrust of the defense in the Court Below, and its arguments in this Court are focused on the events up the road, faced by Officers Rash and Waibel, not faced by the defendant.

Defendant attempts to avoid the incriminating testimony of Lieutenant Cox, the Delaware State Police designated 30(b)(6) witness, as to the meaning and

application of the Delaware State Police Rules and Regulations on pursuit and deflation devices (A37)(DB-12). Not only is the fact that Lieutenant Cox appeared at his deposition under the supervision of, and represented by, defense counsel, but Lieutenant Cox agreed that he was qualified to testify on the appropriate use of Stop Sticks (III-35, B-218). Defendant's argument that Cox agreed that the defendant did not violate the Delaware State Police Policies (DB-12) flies in the face of Cox's testimony that the defendant violated the policies when he did not see Mr. Pugh. (Cox III-30, 41-42, A246, A250-51).

Finally, defendant's arguments to attempt to rationalize his failure to see Mr. Pugh contradicts his concession that he selected a position with "good sight distance" in each direction, for which he can see equally well (DB-4). However, the defendant offered no explanation as to why he did not see Pugh's oncoming vehicle if he had looked but did not see (DB-4). Although this Court must view facts in favor of the defendant, it does not have to consider facts that do not comport with physical reality. There is no physical explanation why the defendant could not have seen Mr. Pugh where he was in plain view for over twenty seconds.

Defendant attempts to extrapolates that the RECOM tape demonstrated that the defendant's verbal advice of the setup of the StopSticks, 31 seconds after the collision up the road (DB-8) is conclusive evidence that the defendant only had **31**

seconds to *consider* whether and/or how to deploy the Stop Sticks.[2] Of course, that leads to the obvious question: How can the defendant claim he did not see Mr. Pugh within that 31 seconds, when it was agreed, by the defendant's expert, that Mr. Pugh would have taken less than that amount of time, 20 seconds, to travel the one-quarter mile over which the defendant had a clear view (Aube II-108, A230).

[2] This argument is of course contrary to defendant's own testimony that he was monitoring the roadway for a couple of minutes (A192).

CONCLUSION

For the reasons stated herein, the Judgment of the Superior Court should be reversed, and the matter be remanded for a new trial, to be conducted without an emergency instruction.

Respectfully Submitted,

Gary W. Aber, (DSB #754)
704 King Street, Suite 600
P.O. Box 1675
Wilmington, DE 19899
(302) 472-4900
Attorney for Appellant
gaber@gablawde.com

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached Appellant/Plaintiff Below's Reply 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 by File&ServeXpress, hand delivery and electronic mailing, on January 13, 2015 to:

Michael F. McTaggart, Esquire
Lynn A. Kelly, Esquire
Department of Justice
820 N. French Street
Wilmington, DE 19801
Attorneys for Defendant Below, Appellee Scott Slover

/s/ Gary W. Aber
Gary W. Aber, Esquire (DSB #754)
One Customs House
704 King Street, Suite 600
P.O. Box 1675
Wilmington, DE 19899
(302) 472-4900
Attorney for Plaintiff Below, Appellant
gaber@gablawde.com