



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KELLY HALES, an individual, and :
REECE HALES JR., an individual, :
: No. 476,2014
Plaintiffs Below, :
Appellants : Court Below:
: Superior Court in and for Sussex
v. : County, the Honorable E. Scott
: Bradley,
PENNSY SUPPLY, INC. d/b/a : C.A. No. S10C-05-044 ESB
TILCON, a foreign corporation, :
AMY HRUPSA, an individual, THE :
DELAWARE STATE POLICE, and :
THE STATE OF DELAWARE, :
: :
Defendants Below, :
Appellees :
:
:

APPELLANTS' AMENDED OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs below-appellants Reece and Kelly Hales commenced this case on May 28, 2010, alleging damages for personal injuries resulting from a June 23, 2008 motor vehicle accident. Plaintiffs alleged the Defendant below-appellee Pennsy Supply Inc. (d/b/a Tilcon) caused the collision by failing to provide reasonably safe traffic control during its highway construction project.

On September 13, 2013, Defendant moved for summary judgment pursuant to Superior Court Civil Rule 56. After a hearing on March 14, 2014, the Superior Court granted Defendant's motion by letter opinion and order docketed August 6, 2014. Plaintiffs filed their Notice of Appeal on August 29, 2014.

Plaintiffs appeal the Superior Court opinion and order only as it pertains to Defendant below-appellee Pennsy Supply Inc., and also Defendant below-appellee Amy Hrupsa with respect to her status as Defendant Pennsy Supply Inc.'s borrowed servant. Plaintiffs do not appeal the Superior Courts decision pertaining to Defendants below-appellees the State of Delaware and the Delaware State Police.

SUMMARY OF ARGUMENT

1. The Superior Court erroneously concluded that Pennsy's mishandling of crossover traffic at the DR/13 intersection was not negligent as a matter of law. By virtue of its contract with DelDOT, Pennsy assumed a duty to provide all safeguards and take any action reasonably necessary to protect the life, health, and safety of the public while performing construction. Pennsy's traffic control plan inexcusably omitted integral safeguards for handling crossover traffic at the DR/13 intersection where Reece and Kelly Hales were injured. Pennsy never revised its defective plan, and Pennsy's traffic control supervisor failed to inspect the DR/13 traffic control setup and correct the inappropriate direction of crossover traffic from within the DR/13 crossover median. Reece and Kelly Hales were injured because Pennsy failed to provide Walter English with clear and positive guidance, a fundamental principle of traffic control planning. The Superior Court incorrectly considered DelDOT's approval of Pennsy's defective plan as dispositive on the issue of negligence despite the conditional nature of that approval and Pennsy's ongoing duty to correct the plan for omissions, and adjust its operations for actual field conditions.

2. The Superior Court erred in finding that *High v. State Highway Department* controls this case. The contractor in *High* conducted traffic control pursuant to a detour plan that prescribed a traffic control methodology specifically

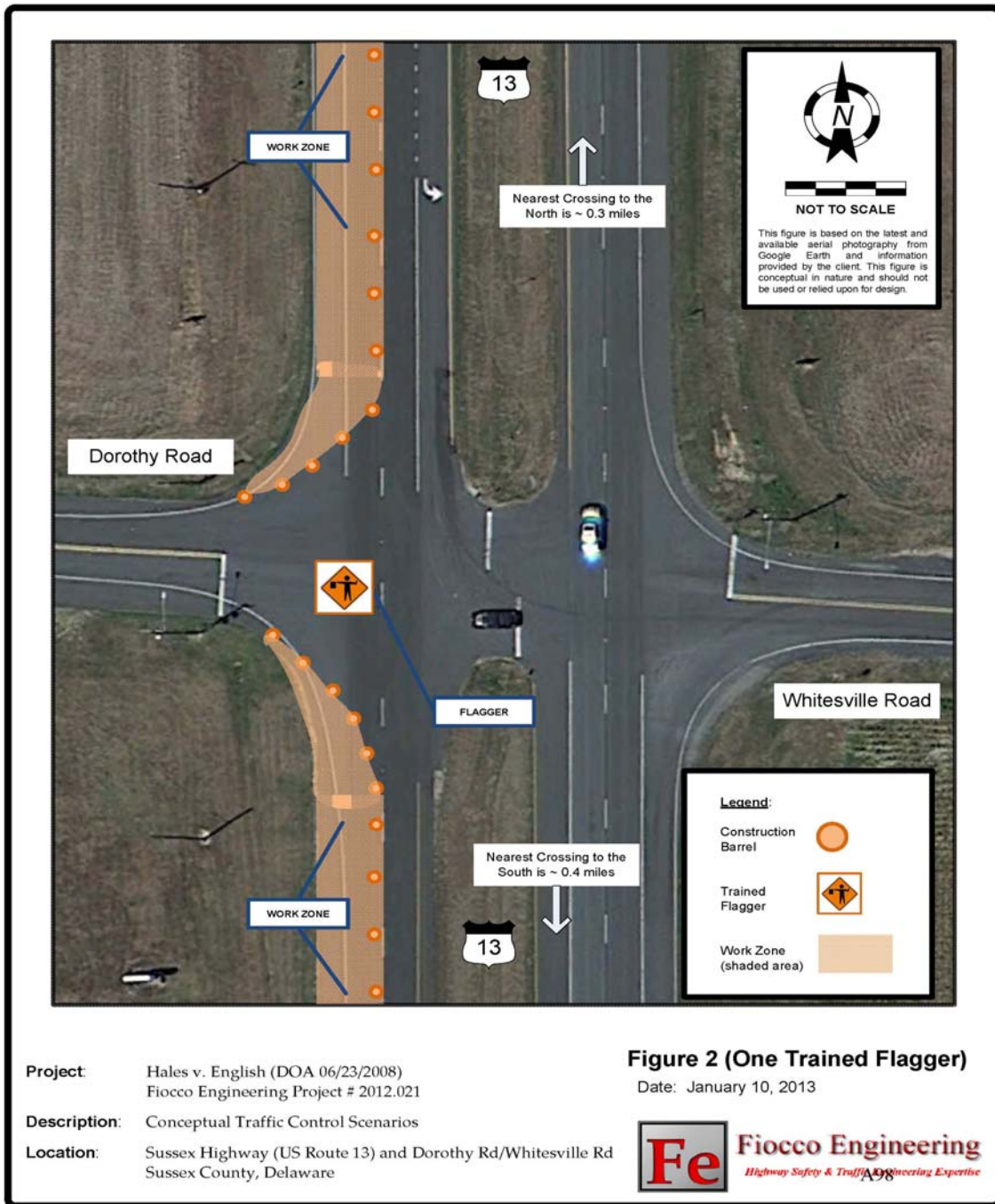
applicable to the stretch of highway where plaintiff was injured. The experts in *High* unanimously agreed that the detour plan complied with the MUTCD and industry standards, and that the contractor followed the plan exactly. In this case, Pennsy's plan did not provide any safeguards for the DR/13 intersection where Reece and Kelly Hales were injured, and the experts do not agree that Pennsy's plan complied with the MUTCD. Even if compliance were assumed, the MUTCD's general guidelines are inadequate to define the standard Pennsy's standard of care for this major road construction operation. *High* is factually inapposite and does not control this case.

3. The Superior Court erroneously concluded that Cpl. Hrupsa was not Pennsy's borrowed servant. Pennsy paid a fee to Delaware State Police to borrow Cpl. Hrupsa for assistance with traffic control on its construction project. Pennsy had a contractual right and obligation to direct where it required Cpl. Hrupsa's assistance, and Cpl. Hrupsa testified she typically reports to a construction foreman for direction. The Haleses were injured in a collision caused by Cpl. Hrupsa's misplacement in the DR/13 crossover median. Pennsy had the right to direct Cpl. Hrupsa's placement in its construction work zone, and with respect to her misplacement, Pennsy must be considered Cpl. Hrupsa's specific employer and held vicariously liable for the harm caused thereby.

STATEMENT OF FACTS

On June 23, 2008, Reece and Kelly Hales were injured in an automobile collision at the intersection of Route 13 and Dorothy Road / Whitesville Road in Laurel, Delaware. (A28 at ¶¶ 11-17.) A motorist named Walter English crashed into the Haleses' vehicle while attempting to navigate a road construction work zone (CWZ) controlled by Pennsy Supply Inc., (d/b/a Tilcon). (A91, A148.) Pennsy is a private contractor hired by the Delaware Department of Transportation to perform road construction on Route 13 in Sussex County. (A35 at ¶ 47.)

Dorothy Road is a two lane crossroad which intersects with southbound Rt. 13. (A97.) At this intersection, (hereinafter "DR/13"), southbound Rt. 13 has a shoulder, two travel lanes, and a turn lane. (*Id.*) The north and southbound lanes of Rt. 13 are separated by a grassy median, except for at the DR/13 intersection. (*Id.*) At that spot, the grassy median is replaced by a small paved crossover median, which allows eastbound traffic on Dorothy Road to cross over Rt. 13. (*Id.*) Dorothy Road traffic entering the DR/13 crossover can either turn left onto northbound Rt. 13, or go straight and head east onto Whitesville Road. (A97; A167 at ll. 6-9.) Traffic approaching the DR/13 intersection from Dorothy Road is controlled by a stop sign. (A104.) There is also a stop sign in the DR/13 crossover median. (*Id.*) The following image depicts the DR/13 intersection:



(A98.)¹

¹The above image is part of Plaintiffs' expert report, which is found in the appendix at A98. The image is intended to serve as a visual aid to show the physical arrangement of the DR/13 intersection. The image is not demonstrative of Pennsy's actual CWZ.

A. Pennsy's Traffic Control Responsibilities

As part of its contract with DelDOT, Pennsy had responsibility for maintaining and controlling traffic during construction. (A58-59.) In general, Pennsy's contract obligated it to provide all safeguards and take any action reasonably necessary to protect the life, health, and safety of the public while performing construction. (*Id.*) Specifically, DelDOT required Pennsy to develop a temporary traffic control (TTC) plan compliant with the Delaware Manual on Uniform Traffic Control Devices (MUTCD)² before beginning work. (A59.) Using diagrams and case illustrations, the MUTCD provides general guidance to traffic control planners on the strategic use of traffic control devices³ for TTC planning. In particular, Chapter 6 of the MUTCD, titled "Temporary Traffic Control," illustrates typical configurations of TTC devices for common applications.

The ultimate goal of a TTC plan is "to provide for the reasonably safe and efficient movement of road users through or around TTC zones" (A77.) When developing TTC plans using the MUTCD, traffic control planners are cautioned that "[j]udgment must be used to apply these guidelines and typical

²The MUTCD is a DelDOT publication whose creation is called for by statutory mandate. *See* 17 Del. C. § 147. The MUTCD catalogues approved traffic control devices for use on Delaware highways and undergoes periodic revisions. At the time of Pennsy's contract, the 2007 version of the MUTCD was in effect. (*See* A89.)

³Traffic control devices include signs, pavement markings, and traffic signals used to conduct the safe and orderly flow of traffic. *See generally* DelDOT, DE MUTCD (2007), *available at* http://deldot.gov/information/pubs_forms/manuals/de_mutcd/2007_demutcd.shtml.

applications, or adjust them to fit individual field site conditions," and "[t]he Delaware MUTCD is not intended to be a substitute for knowledge [or] experience . . . (A76.) Importantly, the MUTCD advises that "[m]odifications of TTC plans may be necessary because of changed conditions or a determination of better methods of safely and efficiently handling road users." (A82.) The MUTCD therefore instructs traffic control planners to carefully and routinely inspect TTC zones to ensure reasonably safe conditions. (*See* A79.) If the TTC plan does not accomplish this goal, then it should be modified accordingly. (*Id.*)

In addition to developing an MUTCD-compliant TTC plan, Pennsy was also required to have an American Traffic Safety Services Association (ATSSA) certified traffic control supervisor on site during the project. (A60.) The traffic control supervisor's sole responsibility was the maintenance of traffic during construction, including accounting for the installation, operation, maintenance, and service of traffic control devices used under the TTC plan. (*Id.*; A76.)

Pennsy's contract also required it to use uniformed, off-duty Delaware State Police (DSP) officers with marked police vehicles to assist with traffic control. (A61.) The contract required Pennsy to give DelDOT's traffic engineer advance notice of the number of traffic officers it needed for each work site, as well as the schedule of hours for when the traffic officers services were required. (*Id.*; A140 at ll. 6-8.) Pennsy also had an obligation "to explain to the officer the project

activities pertaining to where the officer's services are needed." (A61.) For this project, DSP paid the traffic officer's wages, while Pennsy paid DSP a fee for the officer's use. (Pennsy Mot. for Summ. J. at 8; A55 at ll. 9-17.)

B. Pennsy's Temporary Traffic Control Plan

Pennsy's entire TTC plan consisted of submitting three form designs from the MUTCD guidebook. (*See* A65.) The form designs simply list locations of signs, barricades, flagger stations, and advisory vehicles on a hypothetical multilane divided highway. (*See* A67-72.) DelDOT approved the plan with some revisions and the following caveat: "Field conditions may dictate changes to the approved Traffic Control Plan during the project. In the event of field related changes or an omission on the approved plan, the provisions of the Delaware Traffic Control Manual shall prevail." (*Id.*)

Pennsy's TTC plan did not include any specific provisions for TTC at any of the crossroads intersecting Rt. 13 along the road construction project. (A105.) In particular, there were no TTC measures for the DR/13 intersection where Reece and Kelly Hales were injured, and Pennsy never revised its TTC plan to specify TTC measures for the DR/13 crossroad. (A107 at ll. 19-24; A105.)

C. Pennsy Shirks Its Traffic Control Responsibilities

DelDOT hires outside consultants to serve as DelDOT's field agent to inspect a contractor's compliance with its contract during the course of a

construction project. (A62-63.) DeIDOT's consultant has no control over the contractor's construction methods or safety measures, and serves only to assist DeIDOT to determine a contractor's compliance with its contract. (A63-64.) The consultant's contract proclaims, "It is not intended that [DeIDOT] or the consultant assume the [contractor's] sole and absolute responsibility for the safety of the general public, the work force and equipment, and the work site." (A64.) DeIDOT's field agent for Pennsy's project was John Abbott. (A132 at ll. 3-6; A134 at l. 12.) While representing DeIDOT in the field, Abbott's responsibility for inspecting Pennsy's TTC plan was no different than Pennsy's own responsibility to do the same. (A114 at ll. 7-11).

At his deposition, Abbott testified that during the construction project Pennsy would pass off its TTC responsibilities onto him. (*See* A141-43.) This included Pennsy shirking its obligation to instruct flaggers and traffic officers on where to go on the job site. (*See id.*) The following exchange exemplifies Abbott's impression of Pennsy's (d/b/a Tilcon) TTC management:

Q: And when the officers would show up for the day what would they do? Who would they come to? Or how would they know where to go or - -

A: How would they know how to go? How would they know what to do?

Q: As far as where to be and things like that.

A: I'm going to tell the truth. . . . Well, Tilcon passed it off on me. Tilcon, if you want to know the truth is no good period. And I'll leave it at that.

(A141-42.) Abbott explained that since Pennsy could not be bothered, he would have to instruct the flaggers and traffic officers on where to go. (See A142-43.) According to Abbott, Pennsy's ATSSA-certified traffic control supervisor was "certified to get lost now and then" from the jobsite, and Pennsy's project superintendent was gone 98% of the time. (A146-47.)

D. Pennsy's Traffic Control Setup at the DR/13 Intersection.

On June 23, 2008, Corporal (Cpl.) Hrupsa, an off-duty police officer from DSP, arrived at Pennsy's project site to assist with traffic control as a traffic officer. (A151.) After reporting to somebody on the project, Cpl. Hrupsa drove to the DR/13 intersection, got out of her car, and stood in the small DR/13 crossover median to direct traffic. (A152 at p. 43.) At her deposition, Cpl. Hrupsa could not recall what exactly she was instructed to do, but explained that for this kind of job she would usually report to a foreman or construction manager, and she would not simply show up and decide for herself where to begin directing traffic. (A168 at pp. 126-27.)

In the southbound portion of Rt. 13, just north of Cpl. Hrupsa's position, Pennsy's work crew had begun paving and resurfacing the highway. (A152 at p. 43; A155.) The paving operation occupied the Rt. 13 shoulder and first adjacent travel lane, leaving the one southbound lane open for Rt. 13 traffic to travel through Pennsy's work zone. (See A152.) The paving operation made it difficult

for motorists crossing the DR/13 intersection from Dorothy Road to see oncoming Rt. 13 traffic. (*Id.*) From within the DR/13 crossover median, Cpl. Hrupsa guided Dorothy Road traffic across Rt. 13 and into the crossover median. (*Id.*) According to Cpl. Hrupsa, there were no flaggers assisting her with traffic control at the DR/13 crossroad. (A159 at pp. 90-91.)

E. Crash at the DR/13 Crossroad

As Cpl. Hrupsa guided DR/13 crossover traffic, Walter English approached the intersection from Dorothy Road. (A171 at pp. 18-19.) Signaling from within the DR/13 crossover median, Cpl. Hrupsa waved English across. (A153 at p. 49.) English crossed Rt. 13 and entered the crossover median. (A171-72 at pp. 19-22.) He then drove into northbound Rt. 13 without stopping at the stop sign, believing he had been instructed to do so by Cpl. Hrupsa. (*Id.*) As English navigated the work zone, Reece and Kelly Hales were driving north on Rt. 13, approaching the DR/13 crossover median. (A172 at p. 21.) The Haleses were traveling about 50 mph in a truck with a trailer attached. (A91). Thinking Cpl. Hrupsa had waved him past the stop sign, English pulled through the DR/13 crossover and into northbound Rt. 13 just as the Haleses were passing by. (*Id.*) English crashed into the Haleses' trailer, injuring Reece and Kelly Hales. (*See* A148; A30 at ¶¶ 11-17.)

F. The Experts' Opinions on Traffic Control at the DR/13 Crossroad

Following the collision, Reece and Kelly Hales filed suit against Pennsy, alleging English crashed into their trailer because Pennsy failed to properly maintain traffic in its CWZ. (A30 at ¶ 17; A35-36 at ¶¶ 46-50.) Pennsy and the Haleses each retained a traffic safety expert for an opinion on the cause of the June 23, 2008 collision and the reasonableness of Pennsy's TTC setup at the DR/13 intersection.⁴ Both experts prepared reports summarizing their conclusions, and Pennsy's expert provided testimony by deposition.

Both experts agreed Pennsy had ultimate responsibility for providing the safe maintenance of traffic during its road construction project. (A95, 109-10.) Both experts agreed that Walter English did not receive "positive guidance," or clear direction, while traveling through the CWZ, and that this caused Mr. English to crash into the Haleses. (See A118-19, 123; A95.) According to both experts, proper TTC planning provides positive guidance to motorists navigating CWZs. (A118, 121-23; A95.) Pennsy's expert explained that proper TTC planning eliminates situations where motorists might receive conflicting or confusing directions, and both experts agreed that failing to plan for positive guidance is a cause of collisions in CWZ. (*Id.*) According to Pennsy's expert, motorists who

⁴The Haleses retained Joseph M. Fiocco of Fiocco Engineering, and Pennsy retained Joseph A. Filippino of Robson Forensic.

receive a conflict in guidance will follow an unintended path and can cause a collision. (A122-23.)

Both experts agreed that Cpl. Hrupsa should not have been directing traffic from inside the DR/13 crossover median. (A95; A111-12 at ll. 4-11.) Even Pennsy's construction manager, John Vogel, stated he would not expect traffic direction to take place from the median, and would have expected flagger stations in the southbound lanes as well as in the median. (*See* A93.) Pennsy's expert explained during his deposition that he had no knowledge of anyone from Pennsy carrying out an inspection of its TTC setup. (A117.) Pennsy's expert agreed that Pennsy had responsibility for reviewing and inspecting its TTC setup because road CWZs are dynamic. (A117, 123.) The Haleses' expert explained that Pennsy's ATSSA-certified traffic control supervisor should have recognized the inappropriateness of Cpl. Hrupsa's unassisted direction of traffic from the DR/13 crossover median. (A95-96.) The Haleses' expert opined that a reasonable ATSSA-certified traffic control supervisor conducting prudent TTC at the DR/13 intersection would have either (1) closed the DR/13 crossover median; (2) closed access from the DR/13 crossroad and rerouted traffic; or (3) stationed two flaggers at the DR/13 intersection, with a traffic officer present only as a supplemental measure. (A94, 96.)

ARGUMENT

A. The Superior Court erroneously concluded that Pennsy was not negligent as a matter of law despite record evidence showing Pennsy's TTC plan failed to comply with the MUTCD and industry standards.

1. First Question Presented

Did the Superior Court err by concluding that Pennsy was not negligent as a matter of law where record evidence showed Pennsy failed to develop an acceptable TTC plan and failed to routinely inspect and correct the plan to provide for the safe maintenance of traffic at the DR/13 intersection? (A47-48; A184-85.)

2. Scope of Review

This Court conducts *de novo* review of the Superior Court's grant of summary judgment, independently reviewing the record "to determine whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law." *DaBaldo v. URS Energy & Constr.*, 85 A.3d 73, 77 (Del. 2014) (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

3. Merits of Argument

To prove a claim of negligence, a plaintiff must show by a preponderance of the evidence that the defendant failed to meet its legal standard of care, thereby proximately causing harm to Plaintiff. *Jones v. Crawford*, 1 A.3d 299, 302 (Del.

2010). "The standard of care required of all defendants in tort actions is that of a reasonably prudent man," and "[t]he details of the standard, of necessity, must be formulated in each particular case in the light of its peculiar facts." *Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1367 (Del. 1977) (quoting *Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 245 (Del. 1961)). When moving for summary judgment on the issue of negligence, the defendant must demonstrate that no rational trier of fact could determine a material fact in plaintiff's favor. *See Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

By virtue of its contract with DelDOT, Pennsy voluntarily assumed a duty to provide all safeguards and take any action reasonably necessary to protect the life, health, and safety of the public while performing construction. (A58-59.) This included developing and implementing an MUTCD-compliant TTC plan, providing a competent ATSSA-certified traffic control supervisor, incorporating DSP traffic officers, and routinely inspecting the construction work zone to provide for the safe maintenance of traffic disrupted by the construction project. The Superior Court viewed Pennsy's responsibilities through an extremely narrow lens, accepting Pennsy's contention that it was obligated to do nothing more than select a few diagrams from the MUTCD and submit them to DelDOT for approval. The Superior Court focused solely on Plaintiffs' failure to show where Pennsy deviated from its DelDOT-approved plan. (A48.) The Superior Court's analysis

missed the mark, as it is Plaintiffs' contention that Pennsy's plan was defective from inception. The Superior Court should have considered whether Pennsy's traffic control plan actually complied with the applicable standards for traffic control planning, and should have also considered whether Pennsy performed its contractual undertakings in a reasonable manner.

Pennsy had ultimate responsibility for the safe maintenance of traffic during its construction project. (A109-10; *see also* A64.) To facilitate that objective, Pennsy had an obligation to develop a temporary traffic control plan (TTC) compliant with the Delaware Manual on Uniform Traffic Control Devices (MUTCD) prior to starting construction on Rt. 13. When developing a TTC plan, the MUTCD requires a level of detail proportionate to the project's complexity and sufficient for all parties on the project to understand before they occupy the construction work zone (CWZ). (*See* A78.) According to the MUTCD, the fundamental objective of proper TTC planning is providing motorists with clear and positive guidance as they traverse the CWZ. (A77, 79.) Pennsy's expert explained that the concept of "positive guidance" is imperative for avoiding scenarios where motorists encounter confusing or conflicting direction, which is a recognized cause of collisions in CWZs. (A121-23.)

As the party responsible for safe maintenance of traffic, Pennsy was required to have an ATSSA-certified traffic control supervisor on site. (A60, 76.) The

ATSSA-certified traffic control supervisor's sole responsibility was the maintenance of traffic during construction. According to both the MUTCD and Pennsy's expert, Pennsy's traffic control supervisor had a duty to carefully and routinely monitor the CWZ to ensure effective and reasonably safe TTC measures were in use. (A79.) As explained by the MUTCD, "Modifications of TTC plans may be necessary because of changed conditions or a determination of better methods of safely and efficiently handling road users." (A82.) If the TTC setup did not meet that standard, then Pennsy needed to revise its plan accordingly. (A79.)

Looking at Pennsy's TTC plan, it is clear Pennsy made no effort to plan or articulate the manner by which it would provide positive guidance to motorists traveling through the DR/13 intersection. The plan does not even acknowledge the existence of the DR/13 intersection, and Pennsy's own expert confirmed there were no specific provisions in place to mitigate traffic disruption caused by a CWZ at the DR/13 intersection. (A105; A107-08.) This deficiency should have been obvious to Pennsy and its ATSSA-certified traffic control supervisor once construction began and Pennsy attempted to implement its TTC plan. Upon making that discovery, Pennsy had a duty to revisit the TTC plan and correct the deficiency. (A79, 82.) There is no evidence in this case showing Pennsy ever revised its defective plan before embarking on TTC operations at the DR/13

intersection. (A107-08.) Nobody on Pennsy's project referring to Pennsy's bare bones plan would have known what the proper TTC setup should have been for the DR/13 intersection, including Pennsy's traffic officer, Cpl. Hrupsa.

According to both the MUTCD and Pennsy's own expert, Pennsy's traffic control supervisor had a duty to carefully and routinely inspect the TTC setup to ensure reasonably safe and efficient traffic movement. (A79; A117, 123.) Pennsy's expert agreed Cpl. Hrupsa was likely directing traffic from the wrong spot, and Pennsy's construction manager, John Vogel, explained he would have expected flagger stations in the southbound lanes as well as in the median. (A93; A111-12.) The Haleses' expert explained that a reasonable ATSSA-certified traffic control supervisor would not have allowed Cpl. Hrupsa to control traffic from inside the DR/13 crossover median alone and without flagger assistance. (A95-96.) Although it is not clear to whom Cpl. Hrupsa reported when she arrived at Pennsy's job site, it was Pennsy that had ultimate responsibility for the safe maintenance of traffic. Yet, as Pennsy's expert confirmed, the record presents no evidence that Pennsy discharged its responsibility to inspect and correct the TTC setup at the DR/13 intersection. This is not surprising, considering Abbott's testimony that Pennsy's project superintendent was gone 98% of the time, and Pennsy's traffic control supervisor would "get lost" from the job site. (A146-47.)

Pennsy had an obligation to develop a TTC plan that was of sufficient detail for all parties on the construction project to understand before occupying the CWZ. Instead, Pennsy's plan lacked any TTC provisions for the DR/13 intersection, leaving Cpl. Hrupsa, and whoever instructed her, in the dark about what should be the appropriate TTC setup. A reasonable ATSSA-certified traffic control supervisor would have overcome the plan's deficiency by conducting routine field inspections and adjusting the TTC setup to fit field conditions. In the opinion of the Haleses' expert, the TTC plan for the DR/13 intersection should have either (1) closed the DR/13 crossover median; (2) closed access from the DR/13 crossroad and rerouted traffic; or (3) stationed two flaggers at the DR/13 intersection, with a traffic officer present only as a supplemental measure. (A94, 96.) Unfortunately for Reece and Kelly Hales, Pennsy provided a feckless traffic control supervisor who was either gone from the DR/13 CWZ on June 23, 2008, or not competent to recognize the existing TTC setup's defectiveness. Unsurprisingly, Pennsy failed to accomplish the fundamental principle of effective TTC: providing motorists with positive guidance. It is undisputed that Walter English did not receive clear direction while traveling through the DR/13 CWZ, and this failure caused Walter English to crash into the Haleses' trailer. (*See* A116, 118-19, 123; A95.)

The Superior Court held that the MUTCD "set[s] forth the applicable standard by which Pennsy's actions must be judged." (A48.) Even if such a

narrow construction of Pennsy's standard of care is correct, the Superior Court failed to consider the MUTCD in its entirety, and instead took DelDOT's approval of Pennsy's plan as synonymous with MUTCD compliance. (*See* A48.) As noted by DelDOT's field agent, John Abbott, "The manual is like anything else. It's [not]⁵ perfect. When you go out in the field or whatever you're doing, things change." (A126 at ll. 16-18.) The Superior Court's ruling ignores evidence proffered by the Haleses showing Pennsy failed to plan for crossover traffic at the DR/13 intersection where this collision occurred; failed to revise its plan even after establishing a CWZ at the DR/13 intersection where the problem of crossover traffic was obvious; and then failed to have its traffic control supervisor inspect and correct the TTC setup that left Cpl. Hrupsa alone in the crossover median to direct traffic.

The Superior Court's review of Pennsy's conduct stopped at DelDOT's conditional approval of Pennsy's TTC plan, obliterating Pennsy's ongoing duty to revise the plan for omissions, and to provide reasonably safe traffic control under actual field conditions. The Superior Court's holding is contrary to both the MUTCD guidelines and the concept that negligence is measured in light of the specific circumstances of a particular case.

⁵John Abbott's testimony reads "The manual is like anything else. It's perfect. When you go out in the field or whatever you're doing, things change." Considering the context and parlance of Abbott's entire statement, the Appellants submit that the absence of the word "not" in the phrase "It's perfect," represents an uncorrected transcription error.

B. The Superior Court erroneously concluded that this Court's ruling in *High v. State Highway Department* controls the facts of this case.

1. Second Question Presented

Did the Superior Court err by concluding this Court's ruling in *High v. State Highway Department* applied to the facts of this case where the parties' experts agreed that Pennsy's temporary traffic control plan failed to comply with industry standards and fundamental MUTCD principles? (A48; A182-84.)

2. Scope of Review

"This Court reviews de novo a trial court's grant of a motion for summary judgment, both as to the facts and the law." *DaBaldo v. URS Energy & Const.*, 85 A.3d 73, 77 (Del. 2014).

3. Merits of Argument

This Court's decision in *High* recognizes that several acceptable methods of accomplishing a task may exist, but so long as the chosen course of conduct was acceptable, it is irrelevant that there were equally acceptable alternative methods that could have avoided the harm that occurred. *See High v. State Highway Dep't*, 307 A.2d 799, 804 (Del. 1973). In the context of a motorist's claim that he was injured by a road construction contractor's traffic control operations, the contractor is not negligent if it conducted traffic control by faithful adherence to an acceptable TTC plan. *See id.* An acceptable TTC plan is one that complies with the MUTCD and industry standards, and includes safeguards against obvious risks of harm to

motorists. *See id.* at 803-04. Therefore, to succeed in a motion for summary judgment on the injured motorist's claim, the road construction contractor must demonstrate that no material issue of fact exists as to both the TTC plan's acceptability and the contractor's faithful adherence to it. *See id.*

In *High*, the State Highway Department (now DelDOT)⁶ hired a general contractor, Eastern States Construction Company, to reconstruct a portion of the Governor Printz Boulevard north of Wilmington. *High*, 307 A.2d at 801. The project required Eastern States to close a segment of the two southbound lanes on Governor Printz Boulevard and dedicate one of the two northbound lanes to receive southbound traffic. *Id.* at 801. The Highway Department required Eastern States to develop a TTC plan to manage traffic disrupted by the construction project. *See id.* at 803. Using the MUTCD, Eastern States created a TTC plan specifying a method for detouring traffic during construction. *Id.* The plan called for erecting barricades, painting double-yellow lane markings, and placing advisory signs such as "detour," "slow," and "do not pass" throughout the length of the detour. *Id.* The Highway Department reviewed Eastern States's plan and approved it after making some revisions, whereupon Eastern States erected the detour according to the approved plan. *High*, 307 A.2d at 803.

⁶The Delaware State Highway Department became the Department of Highways and Transportation in 1970, and was then transformed into the Department of Transportation in 1976. *See* 60 Del. Laws ch. 503 (1976); 57 Del. Laws ch. 671 ¶ C (1970).

During construction, a motorist named Robert High died in a head-on collision while driving through the detour. *Id.* at 801. High's widow brought a wrongful death suit against the Highway Department and Eastern States. *Id.* at 803. At trial, High's expert attacked the method used to detour traffic, testifying the detour plan should have incorporated a guardrail and additional advisory signs, among other things. *Id.* Nevertheless, High's expert conceded that the method for detouring traffic prescribed by the approved plan complied with the MUTCD. *High*, 307 A.2d at 803. Granted this concession, the Highway Department moved for summary judgment, which the trial court denied. *Id.* at 801, 803.

On appeal, this Court reversed, emphasizing that the parties' experts had agreed that the approved plan prescribed a method for detouring traffic which complied with the MUTCD. *Id.* at 803-04. In the absence of evidence showing the Highway Department "[omitted] obvious safeguards for the protection of the public," this Court deemed High's call for additional safeguards irrelevant to the issue of negligence. *Id.* at 803. This Court observed that the defendants had employed a method of detouring traffic which High's expert agreed was acceptable *ex ante*, and only unacceptable *ex post facto* because another method, also acceptable, would have avoided the fatal collision. *See High*, 307 A.2d at 804. This Court held that "if there are two acceptable courses of action for the achievement of the same purpose, it is not negligence on the part of a defendant to

pursue one rather than the other." *Id.* The only remaining question pertinent to the issue of negligence was whether Eastern States did in fact detour traffic in the manner prescribed by the plan. Finding no evidence suggesting Eastern States had failed to follow the detour plan exactly, this Court ruled that High failed to present an issue of negligence. *Id.*

In *High*, it was the experts' consensus, and not the Highway Department's approval, *per se*, which led this Court to conclude the detour plan was acceptable as a matter of law. In this case, the Superior Court confused DelDOT approval with expert consensus. Nothing in the record suggests the parties' experts agreed on Pennsy's compliance with the MUTCD. To the contrary, testimony from Pennsy's own expert shows Pennsy violated several fundamental MUTCD principles on temporary traffic control, such as failing to provide positive guidance and failing to plan for DR/13 crossover traffic. Furthermore, the Superior Court's conclusion ignores evidence showing DelDOT granted Pennsy only conditional approval of its plan. Stamped on every TTC diagram Pennsy submitted for approval is the following caveat: "Field conditions may dictate changes to the approved Traffic Control Plan during the project. In the event of field related changes or an omission on the approved plan, the provisions of the Delaware Traffic Control Manual shall prevail." (A68, 70, 72.) Even if DelDOT had provided Pennsy with a definitive seal of approval, *High* nevertheless requires

review of the approved plan for omission of obvious safeguards for the protection of the public. *See High*, 307 A.2d at 803. Had the Superior Court conducted that analysis, it would have found that Pennsy failed to include any TTC provisions for DR/13 crossover traffic, and indeed omitted the very existence of the DR/13 intersection. In its strain to apply *High* to this case, the Superior Court reached the impossible conclusion that Pennsy faithfully executed a plan which never existed.

Assuming, *arguendo*, that Pennsy's traffic control plan did comply with the MUTCD, this Court's ruling in *High* should not be read to mean that compliance with the MUTCD alone makes Pennsy's plan acceptable as a matter of law. Pennsy voluntarily assumed a duty to provide all safeguards and take any action reasonably necessary to protect the life, health, and safety of the public while performing construction. For Pennsy's major road construction operation, the MUTCD's general guidelines and boilerplate case illustrations are inadequate to define the standard by which Pennsy must discharge its assumed duties.

Industry standards are "probative of what conduct is reasonable under the circumstances," but they are not controlling. *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 554 (Del. 2006). "In each case the question comes down to what a reasonable man would have done under the circumstances," and "[i]n close or doubtful cases . . . that question is to be determined by the jury." *Di Fonzo*, 169 A.2d at 245. The MUTCD provides general guidance to traffic control planners on

the strategic use of traffic control devices using form diagrams and case illustrations.⁷ It is the MUTCD's general guidance which makes it a universal starting point for traffic control planners, but its universality makes it less useful for defining reasonable conduct under more complex scenarios. Road construction work zones present dynamic environments requiring constant reevaluation, making it impractical for the MUTCD to specify all possible applications of temporary traffic control devices. (A77; *see* A117.) Rather, the MUTCD depicts typical applications, leaving traffic control planners to adapt and define them for their particular project. (*See* A77.) The MUTCD itself cautions, "No one set of TTC devices can satisfy all conditions for a given project or incident," and therefore "[j]udgment must be used to apply these guidelines and typical applications, or adjust them to fit individual field site conditions" (A76-77.)

To the extent *High* is read to mean that compliance with the MUTCD alone made Eastern States's conduct acceptable, that holding must be limited to the facts of that case. *High* involved a simple lane detour involving signs, markings, and barricades to control traffic. *See High*, 307 A.2d at 803. For that limited operation, the MUTCD by itself may have been adequate to define a construction contractor's standard of care. In comparison, DeIDOT hired Pennsy to manage a complex road construction project that involved a moving CWZ which affected

⁷*See generally* DE MUTCD, *supra* note 3, at ch. 6 (2007) (Temporary Traffic Control).

multidirectional traffic patterns and required use of barricades, flaggers, traffic officers, an ATSSA-certified traffic control supervisor, and a field representative from DelDOT to orchestrate traffic control. Given the complexity of Pennsy's project and the nature of its assumed duties, it is inappropriate to conclude, as a matter of law, that adherence to the MUTCD alone satisfies the standard of care owed by Pennsy.

C. The Superior Court erroneously concluded that Cpl. Hrupsa was not a borrowed servant because the record evidence shows Pennsy had the right and obligation to direct where it required Cpl. Hrupsa's assistance.

1. Third Question Presented

Did the Superior Court err by holding Pennsy does not have *respondeat superior* liability for Cpl. Hrupsa's misplacement in the DR/13 crossover median where record evidence shows Pennsy had the contractual right and obligation to direct where it required Cpl. Hrupsa's assistance? (A49-50; A186-88.)

2. Scope of Review

"This Court reviews de novo a trial court's grant of a motion for summary judgment, both as to the facts and the law." *DaBaldo*, 85 A.3d at 77.

3. Merits

Delaware recognizes the legal concept of *respondeat superior*, which imputes vicarious liability upon an employer for the negligent acts of its employees, provided the negligent act falls within the scope of that employee's employment. *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427, 432 (Del. 1965). Delaware also recognizes that an employee may be the employee of more than one employer concurrently, in which case *respondeat superior* liability is assigned by operation of the borrowed servant doctrine. *See Richardson v. John T. Hardy & Sons, Inc.*, 182 A.2d 901, 903 (Del. 1962). Under the borrowed servant doctrine, an employee whose employer temporarily loans her to a second employer to

perform specific services may become an employee of the second employer for the purpose and scope of the specific services she was loaned to perform. *Id.* at 902. Whether a borrowed servant relationship exists is a question of fact for the jury that cannot be readily resolved through summary judgment motion. *Volair Contractors, Inc. v. AmQuip Corp.*, 829 A.2d 130, 135-36 (Del. 2003). The reference point and starting inquiry for a borrowed servant analysis is identifying the negligent act alleged. *See Richardson*, 182 A.2d at 903. This Court has explained the analysis as follows:

What is important to determine is, with respect to the alleged negligent act in question, whether or not he was acting in the business of and under the direction of the general or the specific employer. . . This is almost always determined by which employer has the right to control and direct his activities in the performance of the act allegedly causing the injury, and whose work is being performed. *Id.*

The case of *Richardson v. John T. Hardy & Sons, Inc.*, illustrates the borrowed servant analysis. Kenneth Richardson worked for a plumbing company, and he was hired by a home builder to install a sewer line connection for a house under construction. *Richardson*, 182 A.2d at 902. Installing the sewer line required Richardson to dig a trench running from the house to the street. *Id.* Richardson's employer did not have the necessary equipment to dig the trench, so Richardson rented a backhoe from John T. Hardy & Sons. *Id.* Hardy & Sons provided a backhoe and furnished one of its employees, Benjamin Maddix, to operate it. *Id.* Hardy & Sons paid Maddix's wages but collected a rental fee from

Richardson to cover the expense of the backhoe and its operation. *Id.* The rental agreement provided that Maddix would arrive at the jobsite with the backhoe and report to Richardson. *Richardson*, 182 A.2d at 903. Maddix went to the construction site with the back hoe, and Richardson instructed Maddix on where and how deep to dig the trench, and also on which side of the trench to pile the excavated dirt. *Id.* at 902. In the course the trenching operation, Richardson climbed into the trench to remove some rocks. *Id.* While doing so, the trench caved in on Richardson, injuring him. *Id.*

Richardson brought suit against Hardy & Sons by way of their employee, Maddix, alleging the cave-in occurred because Maddix piled the excavated dirt too close to the side of the trench. *Richardson*, 182 A.2d at 901. Hardy & Sons moved for summary judgment, arguing that Maddix was an employee of Richardson with respect to placement of the excavated dirt. *Id.* at 902. The Superior Court agreed and granted Hardy's motion. *Id.* Richardson appealed. Applying the borrowed servant doctrine, this Court affirmed the decision. *Id.* Reviewing the record evidence, this Court concluded it was Richardson who had the right to control and direct Maddix's piling of the excavated dirt, noting that Richardson directed Maddix to excavate in a particular place and manner, and directed Maddix to pile the dirt on a particular side of the trench. *Richardson*, 182

A.2d at 903. The Court also noted that Richardson's contract with Hardy provided that Maddix would report to the work site and take direction from Richardson. *Id.*

The facts of *Richardson* mirror the instant case and call for the same result. Just as the homebuilder contracted with Richardson to install a sewer line, DeIDOT contracted with Pennsy to reconstruct a portion of Rt. 13. To install the sewer line, Richardson needed a backhoe to dig a trench. Similarly, in order for Pennsy to undertake road construction, they required traffic officers to assist with traffic control. Since Pennsy had no traffic officers of their own, Pennsy had to borrow traffic officers from Delaware State Police (DSP), just as Richardson had to borrow the backhoe and operator from Hardy & Sons. Hardy & Sons furnished the backhoe and an operator to Richardson, just as DSP furnished a police car and a uniformed police officer, Cpl. Hrupsa, to Pennsy. Hardy & Sons paid Maddix's wages but charged a rental fee to Richardson for the equipment and its operation. Similarly, DSP paid Cpl. Hrupsa's wages but charged a fee to Pennsy for use of the traffic officer.

Just as Richardson had the right to direct where along the trench Maddix should pile dirt, Pennsy had the contractual right to direct where along the construction work zone Cpl. Hrupsa should conduct traffic. Item 763505 of Pennsy's contract, titled "Traffic Officers," states, "It will be the responsibility of the Contractor to explain to the officer the project activities pertaining to where the

officer's services are needed." (A61.) The record evidence also shows that Cpl. Hrupsa herself would have expected to receive direction from a construction manager or foreman for this kind of assignment. (A168 at pp. 126-28.) In fact, Cpl. Hrupsa agreed she would not just show up with her vehicle and decide for herself where to start directing traffic, (*Id.* at p. 127.), and DelDOT's field representative, John Abbott, agreed that Pennsy was supposed to instruct the traffic officers. (A146.) Cpl. Hrupsa reporting to Pennsy for direction on where to work is precisely the arrangement Richardson had with Hardy & Sons for the backhoe operator.

On the facts of this record, a rational juror could conclude that Pennsy was Cpl. Hrupsa's specific employer. Similar to Maddix's misplacement of dirt causing the cave-in, the Haleses were injured by Pennsy's misplacement of Cpl. Hrupsa in the DR/13 crossover median. Richardson had the right to control and direct where Maddix piled the dirt, and as to that negligent act, Richardson was Maddix's specific employer and responsible for the harm caused by the dirt's misplacement. In this case, Pennsy had the right to direct Cpl. Hrupsa's placement in the construction work zone, and with respect to her misplacement, Pennsy must be considered Cpl. Hrupsa's specific employer and held vicariously liable for the harm caused by her misplacement.

CONCLUSION

For the reasons set forth above, the decision of the Superior Court was in error and should be reversed.

DOROSHOW, PASQUALE,
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/s/ Kyle F. Dunkle

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DATED: November 10, 2014

SUPERIOR COURT
OF THE
STATE OF DELAWARE

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RE: *Hales v. English, et al.*
C.A. No: 10C-05-044 (ESB)

Dear Counsel:

This is my decision on the Motions for Summary Judgment filed by Defendants Pennsy Supply, Inc., and State of Delaware. This case involves a motor vehicle accident that occurred at the intersection of Route 113 and Dorothy/Whitesville Road in Sussex County, Delaware. Pennsy was resurfacing a portion of the southbound lane of Route 113 pursuant to a contract with the Delaware Department of Transportation. Pursuant to the terms of the contract, Delaware State Police Officer Amy Hrupsa was directing traffic at the intersection. Plaintiffs Kelly and Reece Hales were traveling north on Route 113. Walter English was on the Dorothy

Road/Whitesville Road waiting to cross Route 113. Officer Hrupsa waved to English to pull forward. Instead of stopping at the stop sign in the median between the north and southbound lanes of Route 113, English pulled all the way through and crashed into the Hales. The Hales allege that Officer Hrupsa was negligent because she waved to English to proceed into the northbound lanes of Route 113 into oncoming traffic. The Hales allege that Pennsy was negligent because it did not ensure that the traffic could move safely through the construction site. The Hales also allege that Pennsy is responsible for Officer Hrupsa's negligence.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.¹ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.² The Court views the evidence in a light most favorable to the nonmoving party.³ Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the non-moving party

¹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

² *Id.* at 681.

³ *Id.* at 680.

may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.⁴ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.⁵ If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.⁶

Pennsy

Pennsy argues that it is not responsible to the Hales for their damages because (1) its traffic control plan was prepared in accordance with the applicable standards and approved by DelDot, and (2) it is not responsible for Officer Hrupsa's actions.

The Traffic Control Plan

Pennsy had a contract with DelDot to resurface the roadway in the area where the accident occurred. Pursuant to that contract, Pennsy had to prepare a traffic control plan in accordance with the Delaware Manual on Uniform Traffic Control Devices ("MUTCD"). Pennsy prepared a traffic control plan and submitted it to DelDot. DelDot made a few changes to the plan and approved it.

⁴ *Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

⁵ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

⁶ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

Pennsy argues that it was not negligent because it was controlling traffic pursuant to a DelDot-approved traffic control plan that was prepared in accordance with the applicable standards. Pennsy relies on *High v. State Highway Department*⁷ to support its argument. In *High*, the Delaware Supreme Court held that if a contractor is controlling traffic at a construction site pursuant to a DelDot-approved traffic control plan prepared in accordance with the applicable standards, then it cannot be held liable for an action in negligence provided that it was actually following the approved plan.⁸ The Court's rationale for its ruling was that since the contractor was acting in accordance with recognized standards, then it could not be negligent.⁹

The Hales argue that Pennsy negligently prepared the traffic control plan and did not properly execute it in the field. Their specific argument is that Pennsy did not properly address traffic crossing the median. The Hales argue that Pennsy should have (a) closed the median, (2) rerouted traffic from Dorothy Road, or (3) stationed another flagger on Route 113. The Hales also argue that the MUTCD does not adequately define Pennsy's standard of care.

⁷ 307 A.2d 799 (Del. 1979).

⁸ *Id.*

⁹ *Id.* at 804.

I have rejected the Hales' arguments. The MUTCD is published by DelDot and is issued to prescribe uniform standards and specifications for all traffic control devices in Delaware.¹⁰ Thus, MUTCD does set forth the applicable standard by which Pennsy's actions must be judged. The Hales have not pointed out any instances where Pennsy deviated in practice from its approved traffic control plan. Instead, the Hales argue that Pennsy should have controlled the traffic in a different manner. This argument was considered in *High* and rejected, with the Court stating "We think it is clear that if there are two acceptable courses of action for the achievement of the same purpose, it is not negligence on the part of a defendant to pursue one rather than the other."¹¹ That is what happened here. Pennsy was following an approved plan. No negligence can follow in such a situation merely because there might have been another way to control the traffic.

Officer Hrupsa

The Hales argue that Officer Hrupsa negligently waved English across the median and into oncoming traffic. The Hales argue further that Pennsy is responsible for Officer Hrupsa's negligence because she was a borrowed servant. Pennsy argues that she was not.

¹⁰ 17 *Del. C.* §§ 101-1903.

¹¹ 307 A.2d at 804.

The borrowed servant doctrine provides:

The general rule is that an employee, with her consent, may be loaned by her general employer to another to perform specific services, and that, in the course of and for the purpose of performing such services, she may become the employee of the specific employer rather than the employee of the general employer. Accordingly, a loaned employee may become the specific employer's employee while at the same time remaining, generally speaking, the employee of him who loans her services.

Whether or not a loaned employee becomes the employee of one whose immediate purpose he serves is always a question of fact, and depends upon whether or not her relationship to the specific employer has the usual elements of the employer-employee status. Fundamentally, it is not important whether or not she remains the employee of the general employer as to matters generally. What is important to determine is, with respect to the alleged negligent act in question, whether or not she was acting in the business of and under the direction of the general or the specific employer. This is almost always determined by which employer has the right to control and direct her activities in the performance of the act allegedly causing the injury, and whose work is being performed.¹²

Pennsy's contract with DelDot required Pennsy to provide off-duty uniformed police officers to direct and control traffic at locations designated by DelDot. The police officers also had to bring a marked police vehicle. Under Pennsy's contract, the police agency with jurisdiction over the area would provide the police officer. Pennsy would in turn pay the police agency. In this case, other than retaining and

¹² *Richardson v. John T. Hardy & Sons, Inc.*, 182 A.2d 901, 902-03 (Del. 1962) (citing Restatement (Second) of Agency §227, cmt. a; 35 Am. Jur., Master & Servant §541).

paying for Officer Hrupsa, it appears that Pennsy did not direct her activities. Instead, that role was undertaken by DelDot. The DelDot inspector for the job testified that he determined where the police officers would be placed on the work site and that the police officers came to him to find out where they were supposed to work. Thus, there seems to be no factual basis to support a conclusion that Officer Hrupsa was loaned out by the Delaware State Police to Pennsy. Indeed, given the nature of police work, I would think it highly unusual that a police agency would allow a private contractor to control the activities of a police officer.

State of Delaware

The State argues that it is not be responsible to the Hales for their damages because (1) it did not owe a duty of care to them, (2) it is immune from suit under 10 *Del. C.* §4001, and (3) Officer Hrupsa was not negligent.

Duty

The State argues that under the “public duty doctrine” it does not owe a duty of care to the Hales. This doctrine provides that when a public entity or employee owes a duty to the public at large rather than a specific individual, no member of the public may pursue a claim against that entity or person unless the claim is based upon

a non-discretionary act or a failure to act.¹³ Where the public entity or employee assumes a specific duty to a specific group, the “public duty doctrine” is inapplicable.¹⁴ To avoid the public duty doctrine, the Hales need to establish the following:

(1) an assumption by the [governmental agency or its agents], through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the [governmental agency or its] agents that inaction could lead to harm; (3) some form of direct contact between the [governmental agency or its] agents and the injured party; and (4) that party’s justifiable reliance on the...affirmative undertaking [of the governmental agency or its agents].¹⁵

The Hales cannot meet their burden of proof. The State did not agree with Pennsy to undertake traffic control just for the Hales. It instead agreed to do this for every member of the public traveling through the area of construction. This is a perfect example of a duty to the public at large rather than to a specific individual. It would be a different situation if the State had agreed to escort the Hales down the road and through the construction area. But that is not the case. Since the State owed no duty to the Hales, it cannot be responsible for their damages.

¹³ *Tilghman v. Delaware State University*, 2012 WL 3860825, at *2 (Del. Super. Aug. 15, 2012) (quoting *Castellani v. Delaware State Police*, 751 A.2d 934 (Del. Super. 1999)).

¹⁴ *Id.* at *4.

¹⁵ *Castellani*, 751 A.2d at 938.

Immunity

The State argues that the Hales' claims against it are barred by 10 *Del. C.* §4001 unless the Hales can prove the absence of any one of the following elements: (1) the action was discretionary in nature, (2) the action was done in good faith, and (3) the action was done without gross or wanton negligence.¹⁶ The immunity provided by §4001 does not apply if the State employee's actions that caused the plaintiff's injuries are ministerial.¹⁷ An act is ministerial if the "act of the official involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act."¹⁸ In this case, Officer Hrupsa was directing traffic. The act of directing traffic, while it does involve some discretion, is so routine that it has been held to be ministerial.¹⁹ Thus, if the State did owe a duty of care to the Hales, then 10 *Del. C.* §4001 would not prevent the Hales' claims from going forward.

Negligence

The State argues that Officer Hrupsa was not negligent. Viewing the evidence

¹⁶ *Stevenson v. Brandywine School Dist.*, 1999 WL 742932, at *2 (Del. Super. July 9, 1999).

¹⁷ *Id.*

¹⁸ *Sussex County, Delaware v. Morris*, 610 A.2d 1354, 1359 (Del. 1992).

¹⁹ *Simon v. Heald*, 359 A.2d 666 (Del. Super. 1976).

in the light most favorable to the Hales, a jury could certainly conclude that Officer Hrupsa did not make her command clear enough so that English did not think that Officer Hrupsa was waving him all the way through the median into the northbound lanes of Route 113. Thus, if the State did owe a duty of care to the Hales, this argument would not prevent the Hales' claims from going forward.

Conclusion

The Motions for Summary Judgment filed by defendants Pennsy Supply, Inc. and State of Delaware are granted.

IT IS SO ORDERED.

Very truly yours,



E. Scott Bradley

ESB/sal

oc: Prothonotary

cc: Counsel