



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

KELLY HALES, an individual and )  
REECE HALES, JR., and individual, )

Plaintiffs-Below, )  
Appellants, )

v. )

PENNSY SUPPLY, INC. d/b/a )  
TILCON, a foreign corporation, )  
AMY HRUPSA, an individual, THE )  
DELAWARE STATE POLICE, and )  
THE STATE OF DELAWARE, )

Defendants-Below, )  
Appellees. )

No. 476, 2014

Court Below-Superior Court  
of the State of Delaware,  
in and for Sussex County

C.A. No. S10C-05-044 ESB

**APPELLEES AMY HRUPSA, THE DELAWARE STATE POLICE AND  
THE STATE OF DELAWARE'S ANSWERING BRIEF**

**STATE OF DELAWARE  
DEPARTMENT OF JUSTICE**

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DATED: December 31, 2014

**TABLE OF CONTENTS**

TABLE OF CITATIONS..... ii

NATURE AND STAGE OF PROCEEDINGS ..... 1

SUMMARY OF ARGUMENT ..... 3

STATEMENT OF FACTS ..... 4

ARGUMENT

    I.    STATE DEFENDANTS DO NOT RESPOND TO APPELLANTS  
          FIRST ARGUMENT AS IT IS NOT APPLICABLE TO STATE  
          DEFENDANTS..... 6

    II.   STATE DEFENDANTS DO NOT RESPOND TO APPELLANTS  
          SECOND ARGUMENT AS IT IS NOT APPLICABLE TO STATE  
          DEFENDANTS..... 7

    III.  THE SUPERIOR COURT PROPERLY FOUND THAT APPELLEE  
          HRUPSA OWED NO DUTY TO APPELLANTS, IRRESPECTIVE OF  
          WHETHER SHE WAS A BORROWED SERVANT OF  
          PENNSY..... 8

CONCLUSION ..... 12

**TABLE OF CITATIONS**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Castellani v. Delaware State Police</i> , 751 A.2d 934, 938 (Del.Super.1999) .....	8
<i>Flamer v. State</i> , 953 A.2d 130, 134 (Del.2008) .....	9
<i>Johnson v. Indian River School Dist.</i> , 723 A.2d 1200, 1203 (Del. Super.1998) .....	8
<i>Johnson v. Indian River School Dist.</i> , 723 A.2d 397 (Del. 1998) .....	8
<i>Ramirez v. Murdick</i> , 948 A.2d 395 (Del. 2008).....	6, 7, 8
<i>Roca v. E.I. du Pont de Nemours &amp; Co.</i> , 842 A.2d 1238, 1242 (Del.2004) .....	9
 <b><u>RULES</u></b>	
DELAWARE SUPREME COURT RULE 14(b)(vi)(3) .....	8

## **NATURE AND STAGE OF THE PROCEEDINGS**

On May 28, 2010, Appellants, plaintiffs-below Reece and Kelly Hales (hereinafter "Appellants" or "Plaintiffs") filed this action alleging damages for personal injuries resulting from a June 23, 2008 motor vehicle accident. C1<sup>1</sup>. The defendants identified in the suit were Walter English, Vance Gregory Morris, Chesapeake Service Solutions, Inc., Pennsy Supply, Inc., Amy Hrupsa, Delaware State Police, and the State of Delaware. C1. Appellants alleged that Amy Hrupsa, the Delaware State Police and the State of Delaware (hereinafter "State Defendants") were negligent and vicariously negligent for Amy Hrupsa's actions in directing traffic on Sussex Highway on June 23, 2008. C7; C11-13.

On or about December 11, 2012, Walter English, Vance Gregory Morris, and Chesapeake Service Solutions, Inc. were dismissed following a settlement. C20-21.

On September 19, 2013, State Defendants filed a motion for summary judgment pursuant to Superior Court Civil Rule 56. C19.

On March 14, 2014, the Superior Court held oral argument on all parties motions for summary judgment. C18.

On August 6, 2014, the Superior Court granted State Defendants' motion by letter opinion and order docketed August 6, 2014. C17.

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<sup>1</sup> State Defendants have designated their Appendix as "C" to avoid confusion as there are two Appellees in this matter.

On August 29, 2014, Plaintiffs filed a Notice of Appeal. C17.

On October 31, 2014, Appellants filed their opening brief with this Court omitting any argument against the State Defendants such that Appellants waived their appeal against them. Appellants assert that they are pursuing this appeal as to Pennsy Supply, Inc. (hereinafter “Pennsy”) and Appellee Hrupsa.

On November 13, 2014, Pennsy filed a Motion to Affirm the remaining issues on appeal.

On December 16, 2014, the Supreme Court denied Pennsy’s Motion to Affirm.

This is State Defendants’ Answering Brief on appeal.

## SUMMARY OF ARGUMENT

1. Not Applicable. Appellants make no argument applicable to State Defendants in this argument.
2. Not Applicable. Appellants make no argument applicable to State Defendants in this argument.
3. Denied. Appellants have waived their appeal as to the State of Delaware and the Delaware State Police and make no argument that the public duty doctrine does not apply to Appellee Hrupsa. Despite Appellants assertion that an appeal has been maintained as to Appellee Hrupsa, Appellants have no legal basis to support that Appellee Hrupsa owed any duty to Appellants.

## STATEMENT OF FACTS

This case results from an automobile accident that occurred on June 23, 2008.

C1-16. On June 23, 2008, Appellants were proceeding northbound on Route 13 in the area of the crossover of Dorothy and Whitesville Road. C3.

On June 23, 2008, Pennsy was the general contractor performing road repaving services on the right southbound lane of Route 13 directly north of the Dorothy Road/Whitesville Road intersection. C8. Dorothy Road is a two lane road that intersects with southbound Route 13. C22. Dorothy Road becomes Whitesville Road after crossing Route 13. C22. There is a paved crossover on Route 13 at the Dorothy Road/Whitesville Road intersection that allows traffic to cross over Route 13 to access the crossroads or to make a u-turn on Route 13. C22. There are stop signs in both directions within the paved crossover of Route 13. C22. In addition, traffic approaching the Route 13 intersection from Dorothy Road is controlled by a stop sign. C22.

Appellee Hrupsa was a Delaware State Police officer working special duty at the time of the accident. C23-24. Appellee Hrupsa was directing traffic from Dorothy Road to cross the left southbound lane of Route 13. C25-29. Walter English, who was operating a van for his employer, Chesapeake Service Solutions, Inc., was stopped on Dorothy Road. C25-29. Cpl. Amy Hrupsa gave a hand signal for Mr. English to cross the left southbound lane of Route 13. C25-29. Mr. English continued through

the median into the northbound lanes of Route 13 where the front of his van struck the right side of a trailer being pulled by Appellants. C25-29.

Walter English testified that he did not stop because he thought he was being waived through the lanes on southbound Route 13, the median and the lanes on northbound Route 13. C30.

On or about December 11, 2012, Walter English, Vance Gregory Morris, and Chesapeake Service Solutions, Inc. were dismissed as defendants. C20-21.

On August 6, 2014, the Superior Court granted summary judgment in favor of State Defendants holding that there was no duty owed to Appellants by State Defendants pursuant to the public duty doctrine. C37-38.



## **ARGUMENT**

- I. STATE DEFENDANTS DO NOT RESPOND TO APPELLANTS FIRST ARGUMENT AS IT IS NOT APPLICABLE TO STATE DEFENDANTS

### **First Question Presented**

Whether the Superior Court properly found that Pennsy was not negligent because Pennsy followed a traffic control plan that followed the Delaware Manual on Uniform Traffic Control Devices (“MUTCD”) which was approved by DelDOT?

### **Scope of Review**

This Court reviews *de novo* a lower court’s ruling granting a motion for summary judgment. *Ramirez v. Murdick*, 948 A.2d 395, 399 n. 16 (Del. 2008).

### **Merits of the Argument**

This argument is not applicable to State Defendants.

II. STATE DEFENDANTS DO NOT RESPOND TO APPELLANTS SECOND ARGUMENT AS IT IS NOT APPLICABLE TO STATE DEFENDANTS

**Second Question Presented**

Whether the Superior Court properly granted summary judgment to Pennsy pursuant to *High v. State Highway Department*, 307 A.2d 799 (Del. 1973)?

**Scope of Review**

This Court reviews *de novo* a lower court's ruling granting a motion for summary judgment. *Ramirez v. Murdick*, 948 A.2d 395, 399 n. 16 (Del. 2008).

**Merits of the Argument**

This argument is not applicable to State Defendants.

III. THE SUPERIOR COURT PROPERLY FOUND THAT APPELLEE HRUPSA OWED NO DUTY TO APPELLANTS, IRRESPECTIVE OF WHETHER SHE WAS A BORROWED SERVANT OF PENNSY

**Third Question Presented**

Whether the Superior Court properly concluded that Appellee Hrupsa owed no duty to Appellants, irrespective of whether Appellee Hrupsa was a borrowed servant of Pennsy?

**Scope of Review**

This Court reviews *de novo* a lower court's ruling granting a motion for summary judgment. *Ramirez v. Murdick*, 948 A.2d 395, 399 n. 16 (Del. 2008).

**Merits of the Argument**

The Superior Court held that the public duty doctrine applied to State Defendants such that Appellants were not able to meet their burden of proof that State Defendants owed a duty to Appellants. C37-38. The public duty doctrine comes into play when a governmental employee is sued for acts arising out of the performance of his or her job. *Johnson v. Indian River School Dist.*, 723 A.2d 1200, 1203 (Del.Super.1998) *aff'd*, Del.Supr., 723 A.2d 397 (1998). In general, the duty runs to the public at large and not to specific individuals unless certain facts are established. *Castellani v. Delaware State Police*, 751 A.2d 934, 938 (Del.Super.1999) *citing Johnson v. Indian River School District*, Del.Super., 723 A.2d 1200, 1203, *aff'd*, Del.Supr., 723 A.2d 397 (1998). These are:

(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]. *Id.*

In this case, the Superior Court held that State Defendants owed no duty to Appellants because State Defendants did not agree to undertake traffic control just for Appellants. C38. In fact, the Superior Court held that the facts of this case present the perfect example of a duty to the public at large rather than a specific individual. C38. The Superior Court held that the since State Defendants owed no duty to Appellants, State Defendants cannot be held responsible for their damages. C38. Thus, the Superior Court's holding clearly applies to Appellee Hruspa.

In their opening brief, Appellants did not pursue any appeal of the Superior Court's holding that the public duty doctrine applies to State Defendants, including Appellee Hruspa. Pursuant to Supreme Court Rule 14(b)(vi)(3), there can be no argument that Appellee Hruspa has any duty to Appellants. *See Flamer v. State*, 953 A.2d 130, 134 (Del.2008); *See also Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del.2004) (arguments that are not fully and fairly presented in opening briefs are waived and procedurally barred).

Despite this waiver, Appellants assert:

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.<sup>2</sup>

Appellants have no legal basis to support liability against Appellee Hrupsa as there has been no appeal from the Superior Court's holding that Appellee Hrupsa owes no duty to Appellants.

The only alleged basis for liability that Appellants assert in their opening brief is that Pennsy placed Appellee Hrupsa in the wrong location within the construction work zone and that her misplacement caused harm.<sup>3</sup> However, Appellants make no argument that Appellee Hrupsa would be liable for harm caused by her misplacement. Further, Appellants make no argument as to how her misplacement would be an exception to the public duty doctrine. In sum, despite Appellants stated intent to continue the appeal against Appellee Hrupsa, Appellants have set forth no legal basis for this Court to decide that Appellee Hrupsa bears any liability for the accident.

Even if Appellee Hrupsa is found to be a borrowed servant of Pennsy, Appellants cite no law to support how her borrowed servant status would establish liability to her personally. Because Appellants have chosen to accept the Superior Court's ruling that the public duty doctrine applies to Appellee Hrupsa, Appellants have presented no

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<sup>2</sup> See Appellant's Opening Brief, p. 1.

<sup>3</sup> See Appellant's Opening Brief, p. 32.

legal basis to find that Appellee Hruspa owed any duty to Appellants, irrespective of whether Appellee Hruspa is a borrowed servant of Pennsy.

## CONCLUSION

For the foregoing reasons, the award of summary judgment finding that Appellee Hruspa owes no duty to Appellants should be affirmed.

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE

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