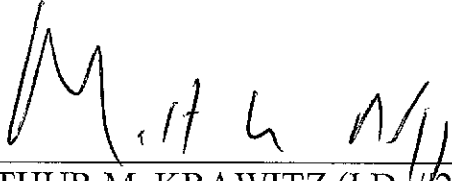


IN THE SUPREME COURT OF THE STATE OF DELAWARE

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' REPLY BRIEF, IN RESPONSE TO APPELLEE, PENNSY
SUPPLY, INC.'s d/b/a TILCON, ANSWERING BRIEF**

DOROSHOW, PASQUALE,
KRAWITZ & BHAYA

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DATED: 1/6/15

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ARGUMENT

I. THE SUPERIOR COURT ERRONEOUSLY CONCLUDED THAT PENNSY WAS NOT NEGLIGENT AS A MATTER OF LAW.

Pennsy asks this Court to conclude that it was not negligent as a matter of law because:

- (1) its Traffic Control Plan was approved by DelDOT; and
- (2) it incorrectly states that the plaintiffs are asking this Court reverse its ruling in High v. State Highway Dep't., 307 A.2d 799 (Del. 1973), a position not advanced in their opening brief. (The High decision will be addressed in Part II of this reply brief).

A. Pennsy's Traffic Control Plan

Pennsy's position is that once DelDOT approves a Traffic Control Plan for a road construction project, the contractor is immunized from any analysis of its actions in the field including whether it met its contractual obligations and whether it met the applicable standard of care required during construction.

Pennsy was required to do more than submit a set of three form designs to be stamped by DelDOT (A65). Pennsy makes no mention of its contractual duty to provide all safeguards and take any action reasonably necessary to protect the life, health and safety of the public during construction (A58-59). Pennsy, echoing the Superior Court ruling, focuses solely on the plaintiffs' alleged failure to show a

deviation from the plan submitted to DelDOT – the plan which was devoid of virtually any detail relating to the issue before this Court. (Ans. Br. at 13).

The plaintiffs contend that the Traffic Control Plan was defective upon submission – an argument dismissed by Pennsy as “Monday morning quarterbacking.” (Ans. Br. at 12). The plaintiffs proffered expert testimony supporting their contentions (A117-118, 121-123). Even ignoring the opinions of the plaintiffs’ expert, it is instructive that Pennsy did not acknowledge the testimony of its own expert. Rather than address the testimony of its expert, Mr. Filipino, Pennsy simply argues its own unsupported opinions.

B. Mr. English Did Not Receive Positive Guidance

A critical factual issue is whether Mr. English received “clear” or “positive” guidance when he entered the intersection or whether any guidance he received created confusion about whether he was being waved through the stop sign by Cpl. Hrupsa or he was to obey the stop sign (A95). Pennsy dismisses this issue by stating that “nothing is more clear or direct than an established stop sign”. (Ans. Br. at 14). The problem with Pennsy’s unsupported claim is that not only did the plaintiffs’ expert opine that Mr. English did not receive positive guidance, Pennsy’s expert offered a near identical opinion (A118-19, 123; A95). Pennsy’s position about the clarity provided by the stop sign is clearly contradicted by its own expert’s testimony. Pennsy’s expert, Mr. Filipino, testified that Mr. English

did not get positive guidance (A123); that proper planning includes the elimination of confusion and conflicts that could be experienced by motorists; and that crashes in construction work zones can be attributed to the absence of foresight and anticipated hazards when planning for the maintenance of traffic (A121). In addition, Mr. Vogel, Pennsy's construction manager, would not have expected traffic to have been directed from the median. (A93). The testimony from both Pennsy's expert and construction manager definitively show that Mr. English was not safely directed through the construction work zone, resulting in the crash that injured Mr. and Mrs. Hales.

At a minimum, the record evidence shows the existence of genuine issues of material fact requiring reversal of the Superior Court's opinion.

II. THE SUPERIOR COURT ERRONEOUSLY CONCLUDED THAT THIS COURT'S RULING IN HIGH V. STATE HIGHWAY DEPARTMENT DOES NOT CONTROL THE FACTS OF THIS CASE.

Pennsy incorrectly characterizes the plaintiffs' position by stating that the plaintiffs agree that High v. State Highway Dep't., 307 A.2d 799 (Del. 1973) is controlling and that the plaintiffs are asking this Court to reverse its ruling in High. Neither point is accurate.

As stated previously, the plaintiffs recognize the prevailing logic that underlies the High ruling – where several acceptable methods of accomplishing a task exist, so long as a chosen course of conduct is acceptable, it is irrelevant that there were equally acceptable alternative methods that could have avoided the harm that occurred. High, 307 A.2d at 804.

The critical distinction between this case and High is that the High Court considered facts where the consensus of all experts was that the contractor complied with the MUTCD. High, 307 A.2d at 803. In sharp contrast, both of the experts in this case, including Pennsy's expert, express the opinion that Pennsy violated several fundamental MUTCD principles, such as failure to provide positive guidance to Mr. English as his vehicle entered the crossover (A118-19, 123; A95).

The plaintiffs are not asking this Court to overrule High; the plaintiffs' position is that the holding in High is limited to the facts of that case. In High, the

factual evidence and the consensus of expert opinion raised no issue as to whether the contractor complied with the MUTCD – those facts steeply distinguish High from the case at bar.

Even if this Court attached no weight to the concession by Pennsy's expert that Mr. English did not receive positive guidance as his vehicle entered the crossover, there is an additional issue which precludes the application of High as a basis for dismissal of the plaintiffs' claims. 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 during the construction (A58-59).

Pennsy had an opportunity to explain how it discharged its contractual obligations to the public and how it met the applicable standard of care and chose not to do so. Pennsy simply points out that DelDOT stamped its plans; that someone else, Mr. Abbott, positioned Cpl. Hrupsa (even though Pennsy contractually had that responsibility) and that it was then solely Cpl. Hrupsa's job to control traffic crossing Route 13 whether one person could safely perform that task or not. Pennsy's interpretation of the facts render its contract with the State near meaningless.

By contract, Pennsy was responsible for maintaining traffic on the road during construction (A59); Pennsy was required to have an American Traffic Safety Services Association certified traffic control supervisor on the project with

the sole responsibility of maintenance of traffic (A60); Pennsy had the responsibility to explain to Cpl. Hrupsa where her services were needed (A61); and, as echoed in the consultant's contract, had the sole and absolute responsibility for the safety of the general public. (A64). There are triable issues of fact concerning whether Pennsy properly maintained traffic; whether its certified traffic control supervisor properly executed his duties (or was even present) on the day of this collision; and whether Pennsy conveyed any direction to Cpl. Hrupsa.

Pennsy considers it significant that Cpl. Hrupsa waved about a dozen vehicles through the crossover without incident before the collision injuring Mr. and Mrs. Hales. (Ans. Br. at 17). It is for the trier of fact to determine whether this collision, which occurred after relatively few motorists made it safely through the construction work zone, was caused by Pennsy's negligence.

If this Court adopts Pennsy's position, little protection would be afforded to Delaware motorists who encounter construction work zones. A road contractor that promises to take any action reasonably necessary to protect the life, health and safety of the public must do more than get approval of an undetailed traffic control plan, rely on DelDOT's consultant/field agent to assign a State Trooper to a general location in the construction work zone and then hope that no motorist is injured as a State Trooper attempts to perform a task that may very well have been impossible to carry out in a manner that was safe for motorists.

III. IN ARGUING THAT CPL. HRUPSA WAS NOT A BORROWED SERVANT OF PENNSY, PENNSY HAS BLURRED THE DISTINCTION BETWEEN CPL. HRUPSA'S STATUS AS A STATE TROOPER AND HER ROLE IN THE MAINTENANCE OF TRAFFIC ON THIS PROJECT.

The plaintiffs do not contend that Pennsy controlled Cpl. Hrupsa in any aspect other than how her actions fit within Pennsy's responsibility for maintenance of traffic. It is undisputed that Pennsy was required to explain to Cpl. Hrupsa the project activities pertaining to where her services were needed (A61). Cpl. Hrupsa's placement at the time of this collision and how her placement fit into Pennsy's overall plan for maintenance of traffic is central to this dispute. By contract, Cpl. Hrupsa was to assist with controlling and/or maintaining traffic (A61), not to formulate the overall maintenance of traffic plan.

It is inconsistent with Pennsy's contract to conclude that Pennsy discharged its duties if it had in fact simply directed Cpl. Hrupsa to a particular intersection. Pennsy curiously claims that it had no further responsibility "because it lacks expertise in traffic control" (Ans. Br. at 25), despite the fact that Pennsy was paid for maintaining traffic and was required to have a certified traffic control specialist present.

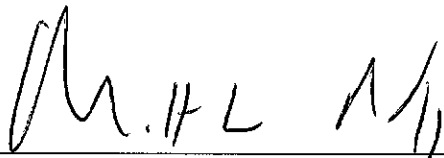
Pennsy has made no showing that Cpl. Hrupsa is not a borrowed servant under Richardson v. John T. Hardy & Sons, 182 A.2d 901 (Del. 1962) – in this case Pennsy had the right to control Cpl. Hrupsa's placement and to control

whether Cpl. Hrupsa had any necessary assistance. Cpl. Hrupsa's function on this project was as a part of Pennsy's overall scheme for the maintenance of traffic on the project. If in fact Cpl. Hrupsa was negligent in any manner, such negligence should be imputed to Pennsy. The issue is not whether Pennsy had the right to direct Cpl. Hrupsa's full range of law enforcement responsibilities as a State Trooper – Cpl. Hrupsa was a borrowed servant because Pennsy had the right and the obligation to direct where Cpl. Hrupsa was required. Pennsy is responsible for any negligence related to the utilization and placement of Cpl. Hrupsa on this construction project.

CONCLUSION

For the reasons set forth above, Appellants, Kelly Hales and Reece Hales, Jr., respectfully request that this Honorable Court reverse the decision of the Superior Court.

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