



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

<b>CONCORD SQUARE ASSOCIATES,</b>	)	
<b>LLC, a limited liability Company</b>	)	
	)	
<b>Defendant Below,</b>	)	<b>No. 417, 2014</b>
<b>Appellant/Cross Appellee,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>KEVIN A. BROKUS,</b>	)	<b>ON APPEAL FROM THE</b>
	)	<b>SUPERIOR COURT OF</b>
<b>Plaintiff Below,</b>	)	<b>THE STATE OF</b>
<b>Appellee/Cross Appellant.</b>	)	<b>DELAWARE</b>
	)	<b>C.A. No.: N12C-01-098 JAP</b>

**CROSS APPELLANT'S REPLY BRIEF ON APPEAL**

**WEIK, NITSCHKE, DOUGHERTY & GALBRAITH**

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## NATURE OF PROCEEDINGS

This is the Reply Brief of Cross-Appellant, Kevin A. Brokus, on appeal stemming from the trial court *sua sponte* ordering a new trial. The trial court found that the first jury's apportionment of negligence was "contrary to the great weight of the evidence and justice would miscarry if allowed to stand..."<sup>1</sup>

In Cross-Appellant's Opening Brief, he argued that the trial court abused its discretion when it *sua sponte* ordered a second trial, as it was solely for the jury to decide the percentage of negligence of the parties based on the evidence presented. Moreover, the Court did not provide any factors that it considered in concluding that the first verdict was against the great weight of the evidence presented.

In response to Cross-Appellant's arguments, Concord Square has alleged that if its appeal is denied, the trial court's decision granting a new trial should stand, as the first verdict was against the great weight of the evidence.

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<sup>1</sup> Appellee/Cross Appellant's Appendix at B-015.

## ARGUMENT

In essence, Concord Square contends that the Superior Court did not abuse its discretion when it *sua sponte* ordered a new trial.

To grant a new trial, “a trial judge is only permitted to set aside a jury verdict when in his [or her] judgment it is at least against the great weight of the evidence.”<sup>2</sup> “[T]he test is whether the lower Court’s decision exceeded the bounds of reason in view of the circumstances.”<sup>3</sup>

“Under Delaware law, enormous deference is given to jury verdicts.”<sup>4</sup> Trial courts are to yield to a jury’s decision, in the face of a reasonable difference of opinion.<sup>5</sup> A jury award should be set aside only in the rare case where it is “clear that the award is so grossly out of proportion to the injuries suffered as to shock the Court’s conscience and sense of justice.”<sup>6</sup> Concord Square submits that the trial court’s finding that the jury’s apportionment of negligence was against the great weight of the evidence in the first trial was proper.<sup>7</sup>

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<sup>2</sup> *Story v. Camper*, 401 A.2d 458, 465 (Del. 1979).

<sup>3</sup> *Peters v. Gelb*, 314 A.2d 901, 903 (Del. 1973).

<sup>4</sup> *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).

<sup>5</sup> *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973); *Medical Center of Del. v. Loughheed*, 661 A.2d 1055, 1061 (Del. 1995).

<sup>6</sup> *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. 1975) (internal citations omitted).

<sup>7</sup> If a duty was owed to Brokus, Concord Square contends that it acted reasonably under the circumstances. Appellant/Cross-Appellee Br. at p. 13-14. This contention will not be addressed in Cross-Appellant Brokus’s Reply Brief as it would be outside the scope of Cross-Appellant’s Appeal. However, it was addressed in Brokus’s Answering Brief on appeal.

Concord Square relies upon the trial court's statement that "during the course of trial the court ruled that Plaintiff was negligent as a matter of law." The court "belatedly reconsidered its ruling that Plaintiff was negligent as a matter of law." As a result, the lower court believed "counsel had insufficient time to adjust their closing arguments after the court advised them its reconsideration of its rulings." (Appellee/Cross Appellant's Appendix B015-016). Brokus submits that the foregoing are not considered factors in determining the apportionment of negligence between the parties. Moreover, neither the trial court nor Concord Square have provided any support that Concord Square was prejudiced in allowing the case to rightfully proceed to a jury to decide the negligence of the parties, if any.

Delaware law holds that as long as there is a sufficient evidentiary basis for the jury verdict, the verdict should not be disturbed.<sup>8</sup> A trial judge should not overturn a jury verdict, unless after review of all the evidence, the evidence is greatly against the verdict and a reasonable jury would not reach the outcome.<sup>9</sup> Here, a second jury essentially reached the same outcome as the first jury *i.e.*, Concord Square's negligence was far greater than Plaintiff's comparative negligence.

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<sup>8</sup> See, *Camper*, at 465.

<sup>9</sup> *Id.*

Furthermore, the lower court viewed the second trial as a replay of the first.<sup>10</sup> That conclusion further demonstrates that the parties were not prejudiced in this matter as testimony was essentially the same.

In *Helm v. 206 Massachusetts Avenue, LLC*, 2014 WL 7272771 (Del. Dec. 19, 2014), this Court recently held that the degree of comparative negligence of a tenant was a question of fact for a jury to decide and not the trial judge. This Court stated that “under Delaware’s comparative negligence statute the determination of the respective degrees of negligence attributable to the parties *almost* always presents a question of fact for the jury.”<sup>11</sup> Likewise, in this matter it was solely for a jury to decide the degrees of negligence attributable to the parties.

Brokus met his burden of proof in the first trial. The jury agreed and found him 16% comparatively negligent. The trial court found the percentage to be against the great weight of the evidence. A second jury heard essentially the same evidence as the first jury and found Mr. Brokus 25% at fault. The trial court found the apportionment did not shock its conscience.<sup>12</sup>

Brokus agrees with Concord Square that there is no bright-line test. However, trial courts are to yield to a jury’s decision, in the face of a reasonable

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<sup>10</sup> Appellee/Cross Appellant’s Appendix B-025.

<sup>11</sup> *Helm v. 206 Mass. Ave., LLC*, 2014 WL 7272771 (Del. Dec. 19, 2014) (citing *Triebel v. Sabo*, 714 A.2d 742, 745 (Del. 1998) (emphasis added)).

<sup>12</sup> Appellee/Cross Appellant’s Appendix B-025.

difference of opinion.<sup>13</sup> Here, there is only an eight percent difference between the two verdicts. As a result, Brokus submits that the lower court abused its discretion in granting a second trial. The first verdict was supported by the evidence and deference should have been given to that unanimous verdict.<sup>14</sup> Accordingly, Brokus respectfully requests that this Court remand this matter to the lower court to reinstate the first jury's verdict.

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<sup>13</sup> *Castner*, at 193; *Medical Center of Del.*, at 1061.

<sup>14</sup> *Id.*



## **CONCLUSION**

For the reasons set forth above, Appellee/Cross Appellant respectfully requests that this Court enter an Order reversing the decision of the Superior Court to grant a second trial and reinstate the first jury's verdict in this matter.

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