



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEITH M. SCHUELLER,

Plaintiff-Below,
Appellant,

v.

BRETT CORDREY et al.,

Defendants-Below,
Appellees.

*
*
*
*
*
*
*
*
*
*
*
*

Case No. 485, 2017

Court Below: Superior Court -
New Castle County
Case No.: N14C-10-201EMD

APPELLANT'S CORRECTED OPENING BRIEF

Dated: February 21, 2018

Stephen P. Norman, Esquire (#4620)
The Norman Law Firm
30838 Vines Creek Road, Unit 3
Dagsboro, DE 19939
(302) 537-3788
snorman@thenormanlawfirm.com

Attorney for Keith M. Schueller

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
NATURE OF PROCEEDINGS	1
SUMMARY OF ARGUMENT	2
STATEMENT OF FACTS	3
ARGUMENT	7
I. The Trial Court Erred in Concluding That Schueller Failed to Carry His Burden of Proof	7
A. Question Presented	7
B. Scope of Review	7
C. Merits of the Argument.....	8
i. Use of the Shovel.....	8
ii. Time Between Boyer Losing Sight of the Chase and the Shooting.....	11
iii. The Shooting	13
CONCLUSION.....	20
CERTIFICATE OF COMPLIANCE	
TRIAL COURT’S JUDGMENT AND RATIONALE	

TABLE OF CITATIONS

Cases	Page
<i>1001 Jefferson Plaza P'ship, L.P. v. New Castle Cty. Dep't of Fin.</i> , 1997 WL 913498 (Del. Super. Ct. Dec. 22, 1997)	17
<i>Brown v. United Water Del., Inc.</i> , 3 A.3d 272 (Del. 2010)	18
<i>Goode v. Bayhealth Med. Ctr., Inc.</i> , 931 A.2d 437 (Del. 2007)	19
<i>Hecksher v. Fairwinds Baptist Church, Inc.</i> , 115 A.3d 1187, 1199 (Del. 2015)	18
<i>Hunt ex rel. DeSombre v. State, Dep't of Safety & Homeland Sec., Div. of Del.</i> <i>State Police</i> , 69 A.3d 360 (Del. 2013)	18
<i>Jardel Co., Inc. v. Hughes</i> , 523 A.2d 518 (Del.1987)	18
<i>Levitt v. Bouvier</i> , 287 A.2d 671 (Del. 1972)	7, 8, 20
<i>RBC Capital Mkts., LLC v. Jervis</i> , 129 A.3d 816 (Del. 2015)	7
<i>Schueller v. Cordrey</i> , 2017 WL 3635570 (Del. Super. Ct. Aug. 23, 2017)	8, 10, 11, <i>passim</i>
<i>Tennessee v. Garner</i> , 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)	17
Statutes	
Delaware Constitution art. I, § 6	1
Delaware Code, 11 Del. C. § 222(4)	9

NATURE OF PROCEEDINGS

The Plaintiff, Keith M. Schueller (“Schueller”), initiated this case with a Complaint filed in the Superior Court for New Castle County on October 22, 2014. The Complaint alleged claims against State Trooper Brett Cordrey (“Cpl. Cordrey”), the State of Delaware, and the Department of Public Safety—Division of State Police, for battery, negligence, gross negligence, intentional infliction of emotional distress, and a claim under Art. I, sec. 6 of the Delaware Constitution stemming from an incident in which Cpl. Cordrey shot Schueller in the back while attempting to effect an arrest. A motion for summary judgment granted by the trial court removed both the claim for negligence and the arising under the Delaware Constitution. The remaining claims proceeded to a bench trial lasting from February 20, 2017 to February 24, 2017. On August 23, 2017, the Superior Court issued its decision in which it held that Schueller had failed to carry his burden with respect to each claim. Schueller challenged this ruling in a Notice of Appeal filed with this Court on September 19, 2017.

SUMMARY OF ARGUMENT

- I. The Superior Court erred in concluding that Schueller failed to carry his burden with respect to his allegations. This error resulted from factual findings concerning Cpl. Cordrey's shooting of Schueller which were not supported by the record evidence.

STATEMENT OF FACTS

On February 19, 2013, Cpl. Cordrey shot Schueller squarely in the back. *See* A231:18-A232:3; *see also* A301 at 23:23-24:14 (the trial court confirms with both parties that both sides agree that Schueller was shot in the back). A series of poor decisions led up to this shooting. For his part, Schueller's Jeep had been towed and he had made calls to find out where his vehicle was located. A362:8-10. Having discovered its location, Schueller foolishly took his vehicle back by entering through a hole in the tow yard fence and driving his Jeep back through it. A362:10-13. As a result, Schueller was wanted on a felony warrant on February 19, 2013, in connection with these actions. A541:19-A542:2.

By radio communication, a fellow Trooper informed Cpl. Cordrey that he was following Schueller and Cpl. Cordrey joined in the pursuit. A544:19-545:11. When Cpl. Cordrey activated his lights and sirens, Schueller did not stop his vehicle but instead accelerated in an attempt to flee. A369:2-9. Schueller's vehicle ultimately struck another vehicle at an intersection. A370:3-6. Schueller then exited his vehicle and continued to flee on foot through a nearby cornfield. A371:9-18.

In an attempt to close the distance between himself and Schueller, Cpl. Cordrey drove into the field after him. A547:12-16. Cpl. Cordrey drove into the

field, jumping from his cruiser and pulling his TASER out once he was within 20 feet of Schueller. A547:19-548:6. As Schueller continued running from Cpl. Cordrey, he picked up a shovel positioned near a goat bar. A374:19-23. Schueller was dragging the shovel behind as he continued to flee from Cpl. Cordrey. A61:13-A62:6. At one point, Schueller lifted the shovel for a matter of seconds as he looked over his shoulder to check the location of the pursuing trooper. A62:6-18. Even as he did so, Schueller continued to move as fast as he could away from Cpl. Cordrey. A62:8-11.

Attempting to catch his breath, Schueller came to a stop, bent over, and placed his hands on his knees. A64:21-A65:1. Cpl. Cordrey alleges that he halted his pursuit and attempted to deploy his TASER when Schueller stopped. A555:15-A556:3. Schueller, however, began running away again and Cpl. Cordrey's attempt to utilize his TASER was unsuccessful. A556:5-12. A third-party eye witness, Kelly Boyer ("Boyer"), noted that the officer holstered his TASER and moved forward as if to arrest Schueller before Schueller began fleeing again. A66:4-6. Boyer noted that before Cpl. Cordrey returned to his pursuit, he drew his firearm from the opposite side of his body from where he had placed his TASER. A71:15-A72:8.

At this point, the chase took Schueller and Cpl. Cordrey behind some bushes and out of the Boyer's sight. A73:8-14. Mere seconds after she lost sight of the

chase, Boyer heard a gunshot. A75:22-A76:3. Schueller and Cpl. Cordrey dispute what occurred once they disappeared from Boyer's sight. Schueller asserts that he continued to flee from Cpl. Cordrey and that as he attempted to step over some debris in his path, he was shot in the back. A333 at 152:17-153:3; A334 at 155:22-156:12; A335 at 158:7-9.

Cpl. Cordrey claims that as he approached, Schueller stopped and turned around to face him. A559:19-23. Cpl. Cordrey further claims that he was still holding his TASER and pointing it at Schueller. A560:1-2. It is at this point that Cpl. Cordrey says he first noticed that Schueller had the shovel in his possession. A560:2-3. Schueller was, according to Cpl. Cordrey, "violently flailing about with [the] shovel like a crazy person," A561:9-11, while "moving around in, you know, in the same general area." A561:17-18. At this point, Cpl. Cordrey maintains that he transitioned from his TASER to his firearm and began screaming at Schueller to put the shovel down and get on the ground. A561:23-A562:4. After a time that "felt like forever," Cpl. Cordrey asserts that he shot Schueller while aiming at Schueller's chest. A565:22-A566:9.

While the shooting itself is disputed, the aftermath is not. Schueller was shot in his back and, as he fell to the ground, landed on his back. A301 at 23:23-24:14; A566:21-A567:1. As a result of the shooting, Schueller has gone through

an extensive recovery process and continues to suffer the after effects. *See* A336 at 165:19-184:15.

ARGUMENT

I. The Trial Court Erred in Concluding That Schueller Failed to Carry His Burden of Proof

A. Question Presented

Whether the trial court erred by reaching factual conclusions which are not supported by the record. The question presented was preserved by means of the Notice of Appeal challenging the trial court's decision after trial. A612-A613.

B. Scope of Review

The review of a decision after a bench trial considers both the law and the facts. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972); *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 857–58 (Del. 2015). For such cases, this Court has “the authority to review the entire record and to make its own findings of fact in a proper case.” *Levitt*, 287 A.2d at 673. This authority includes a duty “to review the sufficiency of the evidence and to test the propriety of the findings below.” *Id.* This standard does not mean that a reviewing court will simply disregard the findings of the lower court. If the findings turn on a question of credibility, the findings will be approved on review. *Id.* Similarly, if there is sufficient evidence to support the trial court's findings, the judgment will be affirmed. *Id.* If, however, “the findings below are clearly wrong and the doing of justice requires

their overturn,” then the reviewing court is “free to make contradictory findings of fact.” *Id.*

C. Merits of the Argument

The trial court explained its decision by noting that “[a]fter all of the evidence had been presented, the Court remained unable to determine when and how Mr. Schueller had turned when Cpl. Cordrey shot him.” *Schueller v. Cordrey*, 2017 WL 3635570, at *12 (Del. Super. Ct. Aug. 23, 2017).¹ This finding of fact, that Schueller turned when Cpl. Cordrey shot him, is one in a series of factual findings made by the court regarding the chase and shooting which are not supported by the record. The first of these unsupported findings concerns Schueller’s grabbing the shovel as he fled from Cpl. Cordrey.

i. Use of the Shovel

The trial court found that “Mr. Schueller picked up a shovel near a goat barn as he ran for the tree line” and that as it was being utilized by him, “the shovel constituted a dangerous instrument.” *Id.* at *10, ¶¶ 27-28. The trial court did not define what it meant by a dangerous instrument, but in a criminal context, Delaware has defined the term as meaning “any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or

¹ A copy of the court’s decision is included at the end of this brief in accordance with Sup. Ct. R. 14(b)(vii).

threatened to be used, is readily capable of causing death or serious physical injury.” 11 Del. C. § 222(4).

The eyewitness to the chase, however, testified that after he picked up the shovel, Schueller spent most of his time merely dragging it behind him as he continued to move away from Cpl. Cordrey. A62:4-6. This testimony was consistent with Cpl. Cordrey’s noting that he did not even realize that Schueller had the shovel in his hands as he was running through the field. *See* A560:2-3. It was also corroborated by another officer on the scene who never saw Schueller threaten Cpl. Cordrey. *See* A319 at 94:10-14 (the Trooper, like Cpl. Cordrey, did not even know that Schueller was carrying the shovel behind him). Dragging a shovel behind him as he continued to run away from Cpl. Cordrey, Schueller was hardly utilizing the shovel in a way that was likely to cause serious physical harm.

While Boyer testified that she told police officers that she believed the shovel was intended to be a weapon, A109:23-A110:3, she based that conclusion not on any observation of Schueller using the shovel as a weapon but “just from what I saw and how thing had unfolded; *that he was running from the police.*” A110:5-6 (emphasis added). Boyer also testified that at one point, Schueller raised the shovel for “a matter of seconds” and appeared to be “waiving it at the officer.” A63:1-9. Even this motion could not be viewed as an attempt to use the shovel to cause harm, however, because Boyer was quite clear that as Schueller was

“waiving” the shovel, he continued to try to get further away from Cpl. Cordrey. A63:5-9.

When Schueller finally stopped running, he still did not attempt to engage Cpl. Cordrey by using the shovel. Instead, Boyer explained that Schueller dropped the shovel and placed his hands on his knees as Cpl. Cordrey came closer. A70:1-11. When Schueller next touched the shovel, it was once again just dragging behind him as he ran away from Cpl. Cordrey. A70:12-18.

The only testimony offered that could possibly be construed as an attempt to use the shovel to cause physical harm is Cpl. Cordrey’s testimony of the actual shooting itself when he claims that Schueller violently flailed the shovel “like a crazy person.” A561:17-18. The court seemingly appears to credit this testimony. *See* 2017 WL 3635570, at *10, ¶¶ 38-41. This testimony concerns the actual shooting, however, and the trial court explained that while Cpl. Cordrey’s testimony with respect to the earlier part of the chase is “supported by the MVR from his vehicle and the testimony of several fact witnesses, especially the testimony of Ms. Boyer,” 2017 WL 3635570, at *9, the court found that Cpl. Cordrey had a “lack of memory with respect to the actual shooting.” *Id.* The court went so far as to find that “Cpl. Cordrey does not seem to remember exactly what happened when he pulled the trigger on his firearm or exactly what Mr. Schueller was doing at that point in time.” *Id.*

Based upon this determination, the only credible evidence² that the court could have relied upon to make the determination that shovel was utilized as a dangerous instrument was the testimony of Boyer that consisted of Schueller either (1) dragging the shovel harmlessly behind him, (2) “waiving” the shovel for a few seconds as he continued to try to get further away from Cpl. Cordrey, or (3) taking his hands off the shovel and placing them on his knees as Cpl. Cordrey drew close enough to have actually utilized the shovel in a dangerous manner. None of these facts support the court’s conclusion.

ii. Time Between Boyer Losing Sight of the Chase and the Shooting

The court is not clear on how many seconds passed between the time when Boyer losing sight of Schueller and Cpl. Cordrey and the time when she heard a shot ring out, describing it only as “a short time.” *Id.* at *10. In a footnote, however, the court explains that “Ms. Boyer testified that the gunshot happened 5–10 seconds after she lost sight of Cpl. Cordrey and Mr. Schueller. In her deposition, Ms. Boyer testified that the gunshot happened 3–4 seconds after she

² While the court also noted that “[d]uring the Trial, Mr. Schueller testified that he kept the shovel so as to prevent Cpl. Cordrey from arresting him,” 2017 WL 3635570, at *10 n.35, the court could not have given much weight to such a statement because it found that Schueller was not a credible witness and that, accordingly, it placed “little, to no, value on Mr. Schueller's testimony.” *Id.* at *9.

lost sight of Cpl. Cordrey and Mr. Schueller.” *Id.* at *10 n.36.

This note, however, does not accurately reflect the testimony provided at trial. When asked about the time lapse, Boyer initially only observed that she thought she had previously said between five and ten seconds. 76A:5-9. At that time, her previous deposition was used to refresh her memory as to how long she had actually previously said: approximately between three and four seconds. A78:7-19. While on cross examination, Boyer conceded that it could have been “around five seconds . . . give or take a second,” A118:16-21, Boyer never hedged to the point of doubling the amount of time between when she lost site of the chase and when she heard the gunshot.

Far from extending the time between the disappearance and the shooting, the court was presented with evidence that during an interview on the date of the shooting, Boyer actually told investigators that she heard the gun shot a second after Cpl. Cordrey disappeared from her sight. A132:6-22. At another point, Boyer also admitted that her memory about the events was better on the day of the shooting when she gave her statement to the investigators. A109:5-9.

This lack of time between when Boyer lost sight of Cpl. Cordrey and his shooting of Schueller is important given the events which the court believes occurred prior to the shooting itself. To begin with, when Boyer lost sight of

Schueller, Cpl. Cordrey was still lagging behind. A73:7-18; A120:19-23. Accordingly, Cpl. Cordrey must have spent at least some of the time after Boyer lost sight of the chase in finally catching up with Schueller. Once he finally caught up, Cpl. Cordrey detailed an extended exchange between himself and Schueller. Schueller was allegedly moving around erratically, thereby frightening Cpl. Cordrey, *see* A620 at 00081:03-A621 at 00083:07, and Cpl. Cordrey was screaming at Schueller³. A622 at 00086:17-00087:05. The time necessary for Cpl. Cordrey to catch up and have this exchange, coupled with the court's findings as to the shooting itself, are simply not supported by the record.

iii. The Shooting

The trial court determined, as it must have given the lack of any evidence to the contrary, that Cpl. Cordrey shot Schueller in the back. 2017 WL 3635570, at *10, ¶ 45. The court suggested, however, that “[n]either Mr. Schueller nor Cpl. Cordrey have provided a reasonable explanation for how exactly Mr. Schueller got shot in the back.” *Id.* at *10, ¶ 46. While a variety of expert testimony was offered, the court found that “the expert witnesses only helped the Court realize that without credible facts surrounding the actual shooting, the Court cannot actually know what happened near the shed when Cpl. Cordrey shot Mr.

³ Despite hearing the Cpl. Cordrey's earlier commands to Scheuller, A60:15-20, Boyer does not appear to have heard Cpl. Cordrey before the shooting. See A75:22-A76:4.

Schueller.” *Id.* at *8. The court’s lack of “credible facts” stems from its determination that (1) Schueller was not a credible witness, *Id.* at *9, and (2) that Cpl. Cordrey’s was incredible as to the shooting itself due to his lack of memory as to what precisely happened. *Id.*

While the court’s credibility determinations excluded both Schueller’s and Cpl. Cordrey’s testimony, it did not leave the court with no facts regarding the actual shooting. First, and most importantly, the court was presented with undisputed evidence that Schueller was shot in his back. The court was also provided with evidence that the entry wound on Schueller’s body was measured at only 1.1 inches from his midline base. A299 at 15:20-16:2. This measurement, Schueller’s expert Dr. Bauer explained, “essentially tells us that Mr. Schueller’s back was fairly square to the bullet.” A299 at 16:3-10. This expert also explained how these measurements allow the court to know to what degree Schueller’s body was rotated at the time he was shot. A300 at 21:13-16; A348-A349 (images taken of Schueller’s body with measurement notations).

Dr. Bauer then explained to the court that based upon these measurements, it was not physically possible for Schueller to have been in the midst of a swing that turned his body 180 degrees from a position initially facing Cpl. Cordrey. A302 at 26:12-27:1. The court did not find fault with any of the measurements taken,

instead noting only that it did not find Dr. Bauer's testimony⁴ "of much help in determining what actually happened on February 19, 2013." 2017 WL 3635570, at *8.

Instead of relying on the facts presented to it, however, the court determined that Schueller turned when Cpl. Cordrey shot him squarely in the back. This conclusion is particularly baffling given that neither Schueller nor Cpl. Cordrey suggested to the court that Schueller turned when he was shot in the back. In the lead up to the shooting, the portion of Cpl. Cordrey's testimony that the court appeared to find credible, Cpl. Cordrey explained that Schueller was facing him and he was "flailing" the shovel. A561:9-11. In a video deposition played for the court, however, Cpl. Cordrey offered further explanation as to what he claims Schueller was doing.

Cpl. Cordrey maintained that Schueller and he were facing each other directly with their bodies squared off of each other. A618 at 00065:04-07. When moving the shovel, Cpl. Cordrey claims that Schueller swung the shovel with it positioned "like a Ninja would, over top his head." A619 at 00066:23-00067:01. When asked to demonstrate, Cpl. Cordrey reiterated that the shovel remained over Schueller's head, and that while he was "swinging it around in every direction," his

⁴ The court also found Cpl. Cordrey's expert, Dr. Desmoulin, to be unhelpful with regard to his testimony regarding "various possible ways that Mr. Schueller got shot and ended up in his final position on the ground." 2017 WL 3635570, at *8.

body did not turn and he continued to look directly at Cpl. Cordrey. *Id.* at 00077:09-00078:15. Cpl. Cordrey's testimony regarding the position and movement was underscored by a witness for the Plaintiff who noted the presence of great many physical impediments at the scene which would have made it physically impossible to fully swing a shovel above one's head while turning 180 degrees. *See* A179:13-A180:14. In short, no fact witnesses testified that Schueller turned.⁵

An expert witness called by Cpl. Cordrey testified to the possibility of Schueller turning 180 degrees while swinging the shovel as a means to explain how he ended up on the ground after he was shot. *See* A599 at 29:15-A600 at 30:1. That witness made clear, however, that his conclusion was based upon a swing that exposed Schueller's back to Cpl. Cordrey. A603 at 43:8-11. Whether such a swing could possibly result in a particular resting position, however, in no way creates any factual witnesses to counter those produced by both sides which explained that no such swing took place.

Accordingly, the court had no evidence in the record upon which it could base its conclusion that Schueller turned when Cpl. Cordrey fired his weapon. *See*,

⁵ Though his testimony was disregarded by the Court, Schueller also did not suggest that he turned at any point, testifying instead that he was facing away from Cpl. Cordrey the entire time aside from a few looks over his shoulder as he ran. *See* A333 at 151:2-7.

e.g., *1001 Jefferson Plaza P'ship, L.P. v. New Castle Cnty. Dep't of Fin.*, 1997 WL 913498, at *2 (Del. Super. Ct. Dec. 22, 1997) (rejecting an assessment that “neither party advocated and is wholly unsupported by any of the evidence presented”). Instead, he was left with evidence of two possibilities: (1) Schueller was facing Cpl. Cordrey when he was shot or (2) Schueller had his back to Cpl. Cordrey when he was shot. Given the undisputed evidence that Schueller was shot in the back, the latter of these options is logically more likely than the former.⁶ This conclusion is supported by the physical evidence of the shooting and what the court deemed credible evidence regarding Schueller’s behavior throughout the chase. *See, e.g.*, A61:13-A62:11 (Schueller had his back to Cpl. Cordrey and was attempting to flee).

The court’s unsupportable conclusion regarding Schueller turning ultimately determined the case for the trial court. With respect to the claim for battery, for example, the court concluded that “Cpl. Cordrey did not use excessive or unnecessary force under the circumstances present on February 19, 2013.” 2017 WL 3635570, at *11. If Schueller did not turn, however, and had his back to Cpl. Cordrey in a continued attempt to flee the scene, then there can be little doubt that the deadly force used by Cpl. Cordrey was excessive. *See Tennessee v. Garner*,

⁶ The trial court correctly noted that Schueller’s burden was only to prove that a fact was more likely than not. 2017 WL 3635570, at *3.

471 U.S. 1, 11, 105 S. Ct. 1694, 1701, 85 L. Ed. 2d 1, 9–10 (1985) (“It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”). Even Cpl. Cordrey’s witnesses concede that shooting Schueller in the back as he is fleeing would be unreasonable force. A512:15-A513:3. Moreover, the court recognized that “[i]f . . . Cpl. Cordrey used excessive and unnecessary force to make the arrest of Mr. Schueller, then the Court [must] return a verdict for Mr. Schueller.” 2017 WL 3635570, at *5.

The use of such force, despite years of recognition that it is excessive and unjustified, is therefore an “‘extreme departure from the ordinary standard of care’ that ‘signifies more than ordinary inadvertence or inattention.’” *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1199 (Del. 2015) (defining gross negligence) (footnotes omitted) (quoting *Brown v. United Water Del., Inc.*, 3 A.3d 272, 276 (Del.2010); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del.1987)). Moreover, it would defy reason to suggest that simply shooting someone in the back is not extreme and outrageous “‘conduct that exceeds the bounds of decency and is regarded as intolerable in a civilized community.’” *Hunt ex rel. DeSombre v. State, Dep’t of Safety & Homeland Sec., Div. of Del. State Police*, 69 A.3d 360,

367 (Del. 2013) (quoting *Goode v. Bayhealth Med. Ctr., Inc.*, 931 A.2d 437 (Del. 2007)).

CONCLUSION

The trial court determined that Schueller was not a credible witness. Instead of merely disregarding his testimony, however, the court appears to have concluded that any evidence offered which supported his version of the shooting could also be disregarded. As a result, the court reached factual conclusions which were unsupported by the record evidence, physically impossible, or, in the most extreme example, were based upon facts which neither side advocated. While recognizing the need for judicial restraint, this Court has still held that “when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact.” *Levitt*, 287 A.2d at 673. For the foregoing reasons, the Plaintiff-Appellant, Keith M. Schueller, respectfully requests that this Court reverse the trial court’s August 23, 2017 decision and remand the case for consideration of damages.

Respectfully submitted,

/s/ Stephen P. Norman
Stephen P. Norman, Esquire (#4620)
The Norman Law Firm
30838 Vines Creek Road, Unit 3
Dagsboro, DE 19939
(302) 537-3788
snorman@thenormanlawfirm.com

Attorney for Keith M. Schueller

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the typeface requirement of Sup. Ct. R. 13(a)(i) and the type-volume limitations of Sup. Ct. R. 14(d)(i). It was prepared in Times New Roman 14-point typeface and contains 4,023 words, which were counted by Microsoft Word 2013, the word processing program used to prepare this document.

Date: February 21, 2018

/s/ Stephen P. Norman
Stephen P. Norman, Esquire

2017 WL 3635570

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Keith M. SCHUELLER, Plaintiff,

v.

Brett CORDREY, individually and in his capacity as a Delaware State Trooper, the State of Delaware, and the Department of Public Safety—Division of State Police,
Defendants.

C.A. No.: N14C–10–201EMD

|
August 23, 2017

Attorneys and Law Firms

Stephen Norman, Esq., The Norman Law Firm, Dagsboro, Delaware. Attorney for Plaintiff Keith M. Schueller.

Michael F. McTaggart, Esq., Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for Defendants Brett Cordrey, the State of Delaware, and the Department of Public Safety—Division of State Police.

DECISION AFTER TRIAL

Eric M. Davis, Judge

I. INTRODUCTION

*1 The civil action involves three claims by Plaintiff Keith Schueller against Defendants Brett Cordrey (“Cpl. Cordrey”), the State of Delaware (the “State”), and the Department

of Public Safety—Division of State Police:¹ (i) battery, (ii) gross negligence, and (iii) intentional infliction of emotional distress.² Mr. Schueller is asserting his claims against Cpl. Cordrey both individually and in Cpl. Cordrey’s capacity as a Delaware State Trooper. This is the Court’s decision after trial, including the findings of fact and conclusions of law. For the reasons set forth below, the Court returns a verdict in favor of the Defendants on all of Mr. Schueller’s claims.

II. THE TRIAL

The Court held a five-day trial in this civil action from February 20, 2017 through February 24, 2017 (the “Trial”).³ The Court then had both parties submit their closing arguments in written form, receiving the final post-trial paper on or about May 12, 2017.

WITNESSES

During the Trial, the Court heard from and considered testimony from the following witnesses:

Kelly Boyer—fact witness called by Mr. Schueller

David Balash—expert witness proffered by Mr. Schueller

R. Paul McCauley, Ph.D.—expert proffered by Mr. Schueller

Jeremy Bauer, Ph.D.—expert proffered by Mr. Schueller

Cpl. Lewis Briggs—fact witness called by Mr. Schueller

Keith Schueller—plaintiff and fact witness called by Mr. Schueller

Cpl. Michael Maher—fact witness called by the Defendants

Emanuel Kapelshon—expert witness proffered by the Defendants

Melissa Steele—fact witness called by the Defendants

Cpl. Brett Cordrey—defendant and fact witness call by the Defendants

Geoff Desmoulin, Ph.D.—expert proffered by the Defendants

All the witnesses testified on direct and were available for cross-examination.

EXHIBITS

The parties entered numerous exhibits for the Court to consider in deliberating on Mr. Schueller's claims. Mr. Schueller had the following exhibits admitted:

Pl. Ex. a: Transcribed interview of Cpl. Cordrey (February 19, 2013);

Pl. Ex. b: Transcribed interview of Cpl. Briggs (February 19, 2013);

Pl. Ex. c: Delaware State Police Firearm Services Report;

Pl. Ex. d: Medical records and invoices for Mr. Schueller from Beebe Medical Center;

Pl. Ex. e: Medical records and invoices for Mr. Schueller from Christiana Care;

*2 Pl. Ex. f: Medical records and invoices for Mr. Schueller from Delaware Department of Corrections;

Pl. Ex. g: Medical records and invoices for Mr. Schueller from Delaware Basic Life Support;

Pl. Ex. h: Medical records and invoices for Mr. Schueller from Coastal Therapeutic Services;

Pl. Ex. i: Medical records and invoices for Mr. Schueller from Lawall Prosthetic and Orthotic, Inc.;

Pl. Ex. j: Medical records and invoices for Mr. Schueller from Aquacare of Lewes, DE;

Pl. Ex. k: Medical records and invoices for Mr. Schueller from Mid-Atlantic Family Practice;

Pl. Ex. l: Medical records and invoices for Mr. Schueller from Orthopedics of Southern Delaware;

Pl. Ex. m: Medical records and invoices for Mr. Schueller from Pivot Physical Therapy;

Pl. Ex. n: Medical records and invoices for Mr. Schueller from Delaware Neurosurgical Group, P.A.;

Pl. Ex. o: Medical records and invoices for Mr. Schueller from CNMRI, P.A.;

- Pl. Ex. p: Sussex County EMS Report (February 19, 2013);
- Pl. Ex. q: Delaware State Police Incident Offense Report (Agency Report No.: 12–01116);
- Pl. Ex. r: X-ray image showing bullet location—P000236;
- Pl. Ex. s: X-ray image—P000237;
- Pl. Ex. t: X-ray close up—P000238;
- Pl. Ex. u: Video of area of shooting (thumb drive);
- Pl. Ex. v: Medical Images of Mr. Schueller;
- Pl. Ex. x: Images utilized by Jeremey Bauer, Ph.D.;
- Pl. Ex. y: Photos of Shooting Scene and Evidence (compilation);
- Pl. Ex. z: Photos of Shooting Scene and Evidence (Norman);
- Pl. Ex. aa: Photos of Keith Schueller;
- Pl. Ex. bb: Notes of Sgt. Maher (Measurements);
- Pl. Ex. cc: Taser Download Report;
- Pl. Ex. dd: Delaware State Police Use of Force Procedure;
- Pl. Ex. ee: Delaware State Police Use of Force Policy;
- Pl. Ex. ff: Photo of overview of property with witness notations;
- Pl. Ex. ii: Expert Report of Guy Fried, M.D.;
- Pl. Ex. kk: Life Care Plan and Report for Keith Schueller by Alex Karras;
- Pl. Ex. ll: Shovel;
- Pl. Ex. mm: Clothing worn by Mr. Schueller on February 19, 2013 (in Court’s possession);
- Pl. Ex. oo: Photo of general area of incident;
- Pl. Ex. pp: First Recovery Medicaid Invoice;
- Pl. Ex. qq: Delaware Health and Social Services Medicaid Invoice;

Pl. Ex. rr: Marked photograph of Cpl. Cordrey deposition exhibit;

Pl. Ex. ss: Mohan report—LS—DYNTA;

Pl. Ex. Pr5: X-ray of Mr. Schueller—side view; and

Pl. Ex. Pr6: X-ray of Mr. Schueller—front view.

The Defendants had the following exhibits admitted:

Def. Ex. 1: Large Shovel;

Def. Ex. 2: Mr. Schueller's cargo pants from February 19, 2013;

Def. Ex. 3: Mr. Schueller's sneakers from February 19, 2013;

Def. Ex. 4: Mr. Schueller's shirts from February 19, 2013;

Def. Ex. 5: Cpl. Cordrey's spent bullet casings;

Def. Ex. 6: Cpl. Cordrey's spent Taser cartridge;

Def. Ex. 7: Delaware State Police Crime Scene Video;

Def. Ex. 8: Binder of exhibits containing —

(a) Call for Service Report, DSP 1–14,

(b) Evidence Case Report, DSP 100,

(c) Sgt. Marvel Evidence Report, DSP 101–02,

(d) Beebe Hospital Report, DSP 288–89,

(e) Taser Download, DSP 163–78,

(f) Robin Karns Life Care Plan, May 3, 2106,

(g) DSP Scene Photos—2/1/13 and 3/8/16,

(h) Photos from Mr. Schueller Deposition,

(i) Mr. Schueller Deposition Exhibit #12—Plaintiff's Answers to Interrogatories;

***3** Def. Ex. 9: Department of Corrections SCI Video;

Def. Ex. 10: Video recorded during Mr. Schueller's visit to crime scene in March 2014;

Def. Ex. 11: Redacted version of newspaper article, M. Steele, Use of Deadly Force Raises Questions, Cape Gazette, June 14, 2013;

Def. Ex. 12: MVR from Cpl. Cordrey's vehicle of February 19, 2013 Police Chase;

Def. Ex. 13: May 31, 2016 report from Dr. Harry Schwartz, Moss Rehab; and

Def. Ex. 14: Slide presented during testimony of Dr. Desmoulin.

During trial, the Court took in three Court Exhibits. These are: (i) Mr. Schueller's Video Deposition (pages 57–58); (ii) Video deposition of Cpl. Cordrey (redacted); and (iii) Article from Cape Gazette dated June 14, 2013.

III. APPLICABLE LAW⁴

The Court will be applying the following general and specific legal principles:

BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE⁵

In a civil case, the burden of proof is by a preponderance of the evidence. Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes the Court believe that something is more likely true than not. Preponderance of the evidence does not depend on the number of witnesses. If the evidence on any particular point is evenly balanced, the party having the burden of proof has not proved that point by a preponderance of the evidence, and the Court must find against the party on that point.

In deciding whether any fact has been proved by a preponderance of the evidence, the Court may consider the testimony of all witnesses regardless of who called them, and all exhibits received into evidence regardless of who produced them.

In this particular case, Mr. Schueller must prove all the elements of his claims by a preponderance of the evidence.⁶

EVIDENCE—DIRECT OR CIRCUMSTANTIAL⁷

Generally speaking, there are two types of evidence from which a jury may properly find the facts. One is direct evidence—such as the testimony of an

eyewitness. The other is indirect or circumstantial evidence—circumstances pointing to certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the Court find the facts from all the evidence in the case: both direct and circumstantial.

EVIDENCE EQUALLY BALANCED⁸

If the evidence tends equally to suggest two inconsistent views, neither has been established. That is, where the evidence shows that one or two things may have caused the injury: one for which Cpl. Cordrey was responsible and one for which Cpl. Cordrey was not. The Court cannot find for Mr. Schueller if it is just as likely that the injury was caused by one thing as by the other.

*4 In other words, if the Court finds that the evidence suggests, on the one hand, that Cpl. Cordrey is liable, but on the other hand, that Cpl. Cordrey is not liable, then the Court must not speculate about the suggested causes of Mr. Schueller's injury; in that circumstance the Court must find for Cpl. Cordrey.⁹

MULTIPLE DEFENDANTS¹⁰

The Court notes that there are several Defendants in this case. Some may be liable while others are not. The Court will engage in a fair consideration of all of the Defendants arguments and defenses. If the Court finds against one Defendant, that shouldn't affect the Court's consideration of other defendants.¹¹

INTENTIONAL CONDUCT DEFINED¹²

Intentional conduct means conduct that a person undertook with a knowing desire or with a conscious objective or purpose.

RECKLESS CONDUCT DEFINED¹³

Reckless conduct reflects a knowing disregard of a substantial and unjustifiable risk. It amounts to an "I don't care" attitude. Recklessness occurs when a person, with no intent

to cause harm, performs an act so unreasonable and so dangerous that he or she knows, or should know, that harm will probably result.¹⁴

WILLFUL AND WANTON CONDUCT DEFINED¹⁵

Willfulness indicates an intent, or a conscious decision, to disregard the rights of others. Willfulness is a conscious choice to ignore consequences when it is reasonably apparent that someone will probably be harmed.

Wanton conduct occurs when a person, though not intending to cause harm, does something so unreasonable and so dangerous that the person either knows or should know that harm will probably result. It reflects a foolhardy “I don’t care” attitude.¹⁶

STATE TORT IMMUNITY—NEED FOR GROSS OR WANTON NEGLIGENCE¹⁷

Under Delaware law, no damages may be recovered against the State or any State officer or employee if the claim arose because of the performance of an official duty that was conducted in good faith for the benefit of the public. There is an exception to this rule, however, if the public officer or employee acted with gross or wanton negligence. Gross or wanton negligence refers to conduct of such a nature or degree that it constitutes a gross deviation from what a reasonable, ordinary person would do in the same situation. For Mr. Schueller’s claims to fall within this exception to sovereign immunity, Mr. Schueller must prove that the Defendants acted with gross or wanton negligence.¹⁸

BATTERY¹⁹

***5** Battery consists of the intentional and unpermitted contact upon the person of another which is harmful or offensive. If the Court finds that Cpl. Cordrey intentionally, and without Mr. Schueller’s consent, made contact with Mr. Schueller in a harmful or offensive way, then Cpl. Cordrey is liable for battery.²⁰

USE OF FORCE IN LAWFUL ARREST²¹

A citizen has a duty to cooperate with the directions of a peace officer attempting to make a lawful arrest. If resisted, the officer may use such force as is reasonably necessary to

make the arrest. If the Court finds that Cpl. Cordrey used excessive and unnecessary force to make the arrest of Mr. Schueller, then the Court will return a verdict for Mr. Schueller. If the Court finds, however, that Cpl. Cordrey used reasonable and necessary force to make the arrest of Mr. Schueller, then the Court will return a verdict for Cpl. Cordrey.²²

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS²³

If a person intentionally or recklessly causes severe emotional distress to another by extreme and outrageous conduct, that person is liable for the emotional distress and for any bodily harm that results from the distress.²⁴

Extreme and outrageous conduct goes beyond all possible bounds of decency and would be regarded as atrocious and utterly intolerable in a civilized community. Emotional distress includes all highly unpleasant mental reactions, including fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry. Severe emotional distress is so extreme that no reasonable person could be expected to endure it. The law will intervene only where the distress is so severe that no reasonable person could be expected to endure it. In this regard, the intensity and the duration of the distress are factors to be considered in determining its severity.²⁵

If the Court finds that Cpl. Cordrey's conduct was outrageous and extreme and that this conduct caused Mr. Schueller to suffer severe emotional distress, then the Court must find Cpl. Cordrey and/or the Defendants liable for damages.

CREDIBILITY OF WITNESSES—WEIGHING CONFLICTING TESTIMONY²⁶

Here, the Court is the sole judge of each witness's credibility. That includes the parties. The Court considers each witness' means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witnesses' biases, prejudices, or interests; the witnesses' manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

If the Court finds the testimony to be contradictory, the Court may try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if the Court cannot do this, then it is the Court's duty and privilege to believe the testimony that, in the

Court's judgment, is most believable and disregard any testimony that, in the Court's judgment, is not believable.

PRIOR SWORN STATEMENTS²⁷

*6 If the Court finds that a witness made an earlier sworn statement that conflicts with witness's trial testimony, the Court may consider that contradiction in deciding how much of the trial testimony, if any, to believe. The Court may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact or a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation made sense to the Court.

The Court's duty is to decide, based on all the evidence and the Court's own good judgment, whether the earlier statement was inconsistent; and if so, how much weight to give to the inconsistent statement in deciding whether to believe the earlier statement or the witness's trial testimony.

PRIOR INCONSISTENT STATEMENT BY WITNESS²⁸

A witness may be discredited by evidence contradicting what that witness said, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

The Court will determine whether a witness has been discredited, and if so, to give the testimony of that witness whatever weight that the Court think it deserves.

EXPERT TESTIMONY²⁹

The parties presented expert witnesses during the course of the Trial. Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience.

In weighing expert testimony, the Court may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors previously mentioned for weighing the testimony

of any other witness. Expert testimony should receive whatever weight and credit the Court thinks appropriate, given all the other evidence in the case.

MEASURE OF DAMAGES—PERSONAL INJURY³⁰

If the Court does not find that Mr. Schueller has sustained his burden of proof, the Court will return a verdict for the Defendants. If the Court finds that Mr. Schueller is entitled to recover for damages proximately caused by the incident, the Court should consider the compensation to which Mr. Schueller is entitled.

The purpose of a damages award in a civil lawsuit is just and reasonable compensation for the harm or injury done. Certain guiding principles must be employed to reach a proper damages award. First, damages must be proved with reasonable probability and not left to speculation. Damages are speculative when there is merely a possibility rather than a reasonable probability that an injury exists. While pain and suffering are proper elements on which to determine monetary damages, the damages for pain and suffering must be fair and reasonably determined and may not be determined by a fanciful or sentimental standard. The damages must be determined from a conclusion about how long the suffering lasted, the degree of suffering, and the nature of the injury causing the suffering.

If the Court finds for Mr. Schueller, the Court will award to him the sum of money that in the Court's judgment will fairly and reasonably compensate him for the following elements of damages that are found to exist by a preponderance of the evidence:

- *7 (1) compensation for pain and suffering that he has suffered to date;
- (2) compensation for pain and suffering that it is reasonably probable that Mr. Schueller will suffer in the future;
- (3) compensation for permanent impairment;
- (4) compensation for reasonable and necessary medical expenses incurred to date;
- (5) compensation for reasonable and necessary medical expenses that it is reasonably probable that Mr. Schueller will incur in the future;
- (6) compensation for loss of earnings suffered to date; and
- (7) compensation for earnings that will probably be lost in the future.³¹

In evaluating pain and suffering, the Court may consider its mental as well as its physical consequences. The Court may also consider such things as discomfort, anxiety, grief, or other mental or emotional distress that may accompany any deprivation of usual pleasurable activities and enjoyments.

In evaluating impairment or disability, the Court may consider all the activities that Mr. Schueller used to engage in, including those activities for work and pleasure, and you may consider to what extent these activities have been impaired because of the injury and to what extent they will continue to be impaired for the rest of his life expectancy.

The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering or impairment, nor does it require that any witness should have expressed an opinion about the amount of damages that would compensate for such injury. The award should be just and reasonable in light of the evidence and reasonably sufficient to compensate Mr. Schueller fully and adequately.

IV. DISCUSSION

The Court heard from a number of witnesses—both fact and expert. Before detailing the findings of fact and conclusions of law, the Court is going to address the credibility and effectiveness of the witnesses.

CREDIBILITY OF WITNESSES

The Court finds that Kelly Boyer, Cpl. Lewis Briggs, Cpl. Michael Maher, and Melissa Steele are credible witnesses. The testimony of these fact witnesses was supported by other evidence in the Trial (either by other witnesses, the MVR, photographs or post incident videos). The Court considered each of these witness' means of knowledge and strength of memory. The Court also recognized their strength of memory and opportunity to observe events. The Court also finds that their testimony was reasonable and responsive during the Trial. In addition, the Court observed their manner and demeanor on the stand while testifying. Importantly, Ms. Boyer and Ms. Steele carry no bias or interests in the outcome of the Trial. Ms. Boyer was at the scene of the incident, working at a nearby stable. Ms. Steele is a reporter for the Cape Gazette who interviewed Mr. Schueller soon after the February 19, 2013 shooting. The Court recognizes that Cpl. Briggs and Cpl. Maher bring a bias and an interest in the outcome of the Trial because of

their affiliation with Cpl. Cordrey as Delaware State Troopers. While recognizing this, the Court still found Cpl. Briggs and Cpl. Maher to be credible witnesses given their demeanor on the stand while testifying and their responsiveness to the questions posed to them by the parties' counsel.

***8** As for the expert witnesses, the Court finds that the expert witnesses only helped the Court realize that without credible facts surrounding the actual shooting, the Court cannot actually know what happened near the shed when Cpl. Cordrey shot Mr. Schueller. The various experts—all good at what they do—provided different conclusions on the same facts. Moreover, the parties failed to impress upon the Court that any one expert should be disregarded entirely as compared to another expert.

David Balash is a forensic expert called by Mr. Schueller. Among other things, Mr. Balash testified about his conclusions regarding the scene of the incident, the gunshot and the holes it created in Mr. Schueller's clothing, the entry wound, and that the facts support Mr. Schueller's facts regarding the incident—(i) that Mr. Schueller's torso was not moving much at the time of the shot and (ii) that Mr. Schueller was not facing Cpl. Cordrey when Cpl. Cordrey shot Mr. Schueller. Mr. Balash agreed that the shovel constituted a deadly weapon.

Paul McCauley and Emanuel Kapelshon were called as experts on police practices and use of force. Dr. McCauley testified on behalf of Mr. Schueller, and Mr. Kapelshon testified on behalf of the Defendants. Dr. McCauley opined that, based on his review of the facts and assumptions, Cpl. Cordrey was not justified in using deadly force—that Cpl. Cordrey created a danger zone by advancing on Mr. Schueller and Cpl. Cordrey should have de-escalated the situation and waited until back-up arrived. Dr. McCauley also testified that Mr. Schueller was not a danger to the public as he was evading arrest and not trying to harm others.³² Not surprisingly, Mr. Kapelshon testified that, upon his review of the facts and with his assumptions, Cpl. Cordrey was justified in the use of deadly force. The Court finds the testimony of both Mr. Kapelshon and Dr. McCauley to be credible; however, the Court finds that the testimony of Mr. Kapelshon to be more helpful. As will be discussed below, the Court does believe find that a shovel can be a dangerous weapon and that a person actively resisting arrest while carrying that shovel poses a threat to officer and public safety. Moreover, the Court does not find it credible that a Delaware State Trooper should just follow a shovel toting person who is resisting arrest while that person goes about populated areas.³³

The parties also presented expert witness on accident/injury reconstruction and kinesiologist—Geoffrey Desmoulin and Jeremy Bauer. Dr. Bauer, a rebuttal expert to Dr.

Desmoulin, testified on behalf of Mr. Schueller. The Court previously limited Dr. Bauer's testimony to that of biomechanics. Dr. Bauer concluded that the evidence supported Mr. Schueller's testimony that he was walking away from Cpl. Cordrey when he was shot. Dr. Desmoulin provided expert testimony on various possible ways that Mr. Schueller got shot and ended up in his final position on the ground. The Court did not find that these two experts were of much help in determining what actually happened on February 19, 2013.

*9 The Court finds that Cpl. Cordrey provided credible testimony up and until the time of the shooting. Cpl. Cordrey's testimony is supported by the MVR from his vehicle and the testimony of several of the fact witnesses, especially the testimony of Ms. Boyer.³⁴ The Court found Cpl. Cordrey's demeanor on the witness stand to be good. Moreover, the Court notes that Cpl. Cordrey answered questions directly and did not attempt to avoid answering difficult questions. The Court, however, finds fault with Cpl. Cordrey's lack of memory with respect to the actual shooting. Cpl. Cordrey does not seem to remember exactly what happened when he pulled the trigger on his firearm or exactly what Mr. Schueller was doing at that point in time. The Court must consider the strength of memory of a witness and that witness' opportunity to observe. Cpl. Cordrey just does not know how Mr. Schueller got shot in the back. This is not helpful to the factfinder.

Finally, the Court finds that Mr. Schueller is not a credible witness. Mr. Schueller has provided various accounts of the facts of the incident. Moreover, Mr. Schueller's testimony at trial (and in depositions) is not supported by the testimony of other fact witnesses. The Court noted that Mr. Schueller was evasive on the witness stand when responding to difficult questions. Mr. Schueller's testimony regarding his interaction with Ms. Steele was particularly troubling. Finally, Mr. Schueller was active in his addiction at the time of the incident and this may have affected his ability to actually remember the events as those events happened—*i.e.*, his strength of memory. The Court places little, to no, value on Mr. Schueller's testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On February 19, 2013, by his own admission, Mr. Schueller was suffering from a relapse after 6.5 years of sobriety.
2. Mr. Schueller is physically a big man. On February 19, 2013, Mr. Schueller was employed as a plumber's helper but had been a physical trainer in Delaware and Maryland. Mr. Schueller was, notwithstanding his relapse, in good physical condition.

3. Mr. Schueller has previously been convicted of Burglary Third Degree (Virginia in 2007 and Delaware in 2005).
4. Mr. Schueller had engaged in a series of thefts and was, on February 19, 2013, the subject of an arrest warrant for those offenses.
5. Law enforcement agencies were aware of Mr. Schueller's criminal activities.
6. On or about February 18, 2013, Mr. Schueller's Jeep Cherokee was towed to an impound lot in Lewes, Delaware.
7. On February 19, 2013, Mr. Schueller broke into the impound lot by enlarging a hole in the fence. After breaking into the impound lot, Mr. Schueller illegally retrieved his Jeep Cherokee.
8. Law enforcement knew that Mr. Schueller had illegally retrieved his Jeep Cherokee.
9. Cpl. Briggs was on duty on February 19, 2013. Cpl. Briggs spotted Mr. Schueller's Jeep Cherokee and began pursuit of the vehicle on Route 1.
10. Cpl. Cordrey was on duty on February 19, 2013. Cpl. Cordrey responded to a call from Cpl. Briggs and joined in the pursuit of Mr. Schueller.
11. The pursuit of Mr. Schueller entered a residential neighborhood.
12. Cpl. Briggs and Cpl. Cordrey activated their vehicles' lights and sirens.
13. Mr. Schueller began to drive faster and more erratically.
14. A review of the MVR demonstrates that Mr. Schueller drove dangerously through the residential neighborhood.
15. After exiting the neighborhood, Mr. Schueller collided with an SUV that was travelling southbound on Plantations Road.
16. Mr. Schueller then jumped out of his vehicle and ran across a cornfield.
17. Cpl. Briggs exited his vehicle and began running after Mr. Schueller.

18. Cpl. Cordrey arrived and drove into the cornfield after Mr. Schueller.

***10** 19. On February 19, 2013, Ms. Boyer was a certified instructor at a stable adjacent to the cornfield.

20. Ms. Boyer heard a car crash and witnessed Mr. Schueller running across the cornfield.

21. Ms. Boyer saw Mr. Schueller running towards the riding ring and the stable.

22. Children were present at the stable. Ms. Boyer told the teachers and the children to get on the bus and lock the bus's doors.

23. Ms. Boyer watched consistently except when she moved into the stable to warn the children and their teachers.

24. Ms. Boyer could not see all that happened as, at points, trees or shrubs obstructed her view.

25. Mr. Schueller turned away from the stable and ran toward a tree line.

26. Cpl. Cordrey got out of his vehicle and ran after Mr. Schueller.

27. Mr. Schueller picked up a shovel near a goat barn as he ran for the tree line.

28. As utilized by Mr. Schueller, the shovel constituted a dangerous instrument.

29. Cpl. Cordrey drew his Taser. Initially, however, Cpl. Cordrey could not get the Taser to function properly.

30. Cpl. Cordrey stated "stop or I'll tase you."

31. After resetting the cartridge, Cpl. Cordrey fired the Taser at Mr. Schueller. Cpl. Cordrey did not hit Mr. Schueller with the Taser.

32. Mr. Schueller still had the shovel pointed toward Cpl. Cordrey.

33. Mr. Schueller appeared to surrender and Cpl. Cordrey holstered his Taser.

34. At this point, Cpl. Cordrey was 10–15 away from Mr. Schueller.

35. Mr. Schueller maintained possession of the shovel and began running again.³⁵

36. Cpl. Cordrey then pulled out his firearm and began pursuing Mr. Schueller again.

37. Cpl. Cordrey and Mr. Schueller could no longer be viewed by Ms. Boyer as they went behind some shrubs. After a short time, Ms. Boyer heard a gunshot.³⁶

38. After reaching another barn, Mr. Schueller again turned to face Cpl. Cordrey.

39. Cpl. Cordrey believed that Mr. Schueller could no longer retreat and was waiving the shovel around “like a crazy person.”

40. Cpl. Cordrey was in fear for his safety, stating at the Trial that he felt “the greatest fear I’ve ever had in in my life.”

41. Under the circumstances, Mr. Schueller presented as a legitimate threat to the safety of Cpl. Cordrey.

42. Under the circumstances, Mr. Schueller—if he remained at large—presented a legitimate threat to other Delawareans.

43. Cpl. Cordrey shot Mr. Schueller.

44. Cpl. Cordrey believed, at the time, that he shot Mr. Schueller in the chest.

45. In reality, Cpl. Cordrey shot Mr. Schueller in the back.

46. Neither Mr. Schueller nor Cpl. Cordrey have provided a reasonable explanation for how exactly Mr. Schueller got shot in the back.

47. Mr. Schueller was seriously injured and experienced partial paralysis in his legs.

48. Cpl. Briggs did not witness the shooting. Cpl. Briggs heard Cpl. Cordrey ordering Mr. Schueller to stop and heard the shot. At this point, Cpl. Briggs removed his firearm from its holster and radioed out that shots had been fired.

*11 49. Cpl. Briggs witnessed Cpl. Cordrey in a shooting position and Mr. Schueller face down on the ground.

50. Cpl. Briggs order Mr. Schueller to roller over but, due to the partial paralysis, Mr. Schueller could not roll over.

51. Trooper Mapp arrived and helped Cpl. Briggs roll Mr. Schueller over.

52. Cpl. Briggs noticed blood on both the front and back of Mr. Schueller. Cpl. Briggs assumed that Mr. Schueller had been shot in the front of his body.

53. Cpl. Briggs noted that Cpl. Cordrey seemed scared.

54. Mr. Schueller had to be medically evacuated away from the shooting scene.

55. Mr. Schueller suffered painful injuries and some of those injuries are permanent.

56. Mr. Schueller gave an interview to Ms. Steele in April/May of 2013.

57. On June 14, 2013, Ms. Steele published an article in the Cape Gazette regarding the February 19, 2013 shooting. In that article, Mr. Schueller told Ms. Steele that he never touched the shovel. Mr. Schueller told Ms. Steele that his fingerprints will not be on the shovel, and that science and forensics will prove that Mr. Schueller is innocent. Mr. Schueller also claimed that he never faced Cpl. Cordrey, always having his back to Cpl. Cordrey as he attempted to flee.

58. Ms. Steele testified that the quotes attributed to Mr. Schueller in the Cape Gazette were accurate. Ms. Steele also testified that she repeatedly asked Mr. Schueller if he had touched the shovel because she wanted to be sure on that point.

59. Ms. Boyer is a credible witness.

60. Ms. Steele is a credible witness.

61. Cpl. Briggs is a credible witness.

62. Cpl. Maher is a credible witness.

63. Mr. Balash is a credible witness, but the Court does not find his testimony to be

helpful in arriving at certain conclusion of fact regarding the February 19, 2013 shooting.

64. Dr. McCauley is a credible witness. The Court did find some of his testimony helpful but does not agree with his ultimate conclusions that Cpl. Cordrey failed to follow proper police practice regarding the use of force.

65. Dr. Bauer is a credible witness, but the Court does not find his testimony to be helpful in arriving at certain conclusion of fact regarding the February 19, 2013 shooting.

66. Dr. Kapelshon is a credible witness. The Court finds some of his testimony helpful and agrees that Cpl. Cordrey followed proper police practice regarding the use of force.

67. Dr. Desmoulin is a credible witness, but the Court does not find his testimony to be helpful in arriving at certain conclusion of fact regarding the February 19, 2013 shooting.

68. Mr. Schueller has failed to carry his burden of proof that Cpl. Cordrey acted with gross or wanton negligence.

69. Clearly, Cpl. Cordrey committed intentional and unpermitted contact upon the body of Mr. Schueller; however, the Court finds that Cpl. Cordrey did not use excessive or unnecessary force under the circumstances present on February 19, 2013. As such, Mr. Schueller has failed to carry his burden of proof that Cpl. Cordrey committed the tort of battery.

70. Mr. Schueller has failed to carry his burden of proof that Cpl. Cordrey intentionally or recklessly caused Mr. Schueller severe emotional distress by any extreme and outrageous conduct.

V. CONCLUSION

*12 The decision here rests on who carries the burden of proof and the amount of credible evidence supporting Mr. Schueller's claims. After all of the evidence had been presented, the Court remained unable to determine when and how Mr. Schueller had turned when Cpl. Cordrey shot him—*i.e.*, whether Mr. Schueller had turned so as to be arrested, turned to leave, turned while swinging the shovel, or turned to flee just as Cpl. Cordrey aimed and fired his firearm. Mr. Schueller has presented different versions of the

events on a number of occasions. Moreover, the experts were collectively unhelpful in using the forensic evidence to try to determine exactly what happened.

As developed during the Trial, Cpl. Cordrey seems to have been presented with such a dangerous situation that he believed he shot Mr. Schueller in the chest when, in fact, he shot Mr. Schueller in the back. Mr. Schueller clearly presented a danger to Cpl. Cordrey and others. Mr. Schueller was actively resisting arrest and carrying/wielding a shovel. Mr. Schueller engaged in dangerous conduct when trying to escape in his Jeep Cherokee. Moreover, Mr. Schueller refused to surrender despite continual pursuit, almost being tasered and then confronted with a firearm.

Presented with this, the Court made the findings of fact and conclusions of law in Section IV above.

Accordingly, the Court returns a verdict in favor of the Defendants on Mr. Schueller's claims for (i) gross negligence; (ii) battery; and (iii) intentional infliction of emotional distress. Moreover, the Court directs the entry of a final judgment in favor of Defendants on all claims under Rule 54 of the Superior Court Civil Rules.

All Citations

Not Reported in A.3d, 2017 WL 3635570

Footnotes

¹ Cpl. Cordrey, the State and the Department will be collectively referred to as the "Defendants."

² Mr. Schueller originally asserted a claim for negligence and a claim under Article I, Section 6 of the Delaware Constitution. The Defendants moved for summary judgment on those two claims. At the hearing on the Defendants' motion, Mr. Schueller conceded that the Defendants were entitled to summary judgment on the negligence claim. The Court then ruled that Delaware did not recognize a civil claim under Article I, Section 6 of the Delaware Constitution. See Order (i) Granting Defendants' Motion for Partial Summary Judgment and (ii) Denying Plaintiff's Motion for Summary Judgment February 13, 2017.

³ Super. Ct. R. Civ. P. 39(b)

4 Unless otherwise indicated, the Court will consider the reasonable, ordinary person acting under the same or similar circumstances to mean a reasonable law enforcement officer acting under the same or similar circumstances.

5 Taken from Superior Court Civil Pattern Jury Instruction 4.1.

6 *See, e.g., Reynolds v. Reynolds*, Del. Supr., 237 A.2d 708, 711 (Del. 1967)(defining preponderance of the evidence); *Oberly v. Howard Hughes Medical Inst.*, Del. Ch., 472 A.2d 366, 390 (1984)(same).

7 Taken from Superior Court Civil Pattern Jury Instruction 23.1.

8 Taken from Superior Court Civil Pattern Jury Instruction 4.3.

9 *See, e.g., Eskridge v. Voshell*, 1991 WL 78471, **3 (Del. April 7, 1991).

10 Taken from Superior Court Civil Pattern Jury Instruction 5.5.

11 *See Travelers Ins. Co. v. Magic Chef, Inc.*, 483 A.2d 1115 (Del. Super. 1984)

12 Taken from Superior Court Civil Pattern Jury Instruction 5.8.

13 Taken from Superior Court Civil Pattern Jury Instruction 5.9.

14 *See Tackett v. State Farm Fire and Cas. Ins. Co.* 653 A.2d 254, 265–66 (Del. 1995).

15 Taken from Superior Court Civil Pattern Jury Instruction 5.10.

16 *Koutoufaris v. Dick*, 604 A.2d 390, 399 (Del. 1992)(a person acts in a wanton manner when aware of and consciously disregarding a substantial and unjustifiable risk to another’s rights or safety).

17 Taken from Superior Court Civil Pattern Jury Instruction 10.12. *See also 10 Del. C. § 4001(3)*(State immunity); *10 Del. C. § 4011–4013* (1999)(county and municipal tort immunity); *Doe v. Cates*, 499 A.2d 1175 (Del. 1985).

18 Mr. Schueller does not address *10 Del. C. § 4001(3)* in his closing briefs. Mr. Schueller contends that gross negligence is defined as a higher level of negligence

representing an extreme departure from the ordinary standard of care. Mr. Schueller also provides that gross negligence differs from recklessness as recklessness is a conscious indifference to the rights of others by taking action where the risk of harm is foreseeable but the actor consciously takes the risk. Finally, Mr. Schueller contends that the fact finder assess the conduct with a reasonableness standard—“perspective of a reasonable officer on the scene...” See, e.g., Plaintiff’s Closing Brief at 23–24. The Court finds and holds that the result here is the same whether the Court uses Superior Court Civil Pattern Jury Instruction 10.12 or Mr. Schueller’s proposed gross negligence standard.

19 Taken from Superior Court Civil Pattern Jury Instruction 13.2.

20 *Brzoska v. Olson*, 668 A.2d 1355, 1360–61 (Del. 1995).

21 Taken from Superior Court Civil Pattern Jury Instruction 13.4.

22 See, e.g., 11 Del. C. § 467 (2001); *In re Request for Advisory Opinion*, 722 A.2d 307, 311 (Del. 1998); *Petit v. Colmery*, 55 A. 344, 345 (Del. Super. 1903).

23 Taken from Superior Court Civil Pattern Jury Instruction 14.1.

24 See, e.g., *Brett v. Berkowitz*, 706 A.2d 509, 513 (Del. 1998); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 265 (Del. 1995); *Garrison v. Medical Ctr. of Delaware*, 581 A.2d 288, 293 (Del. 1989)

25 See, e.g., *id.*

26 Taken from Superior Court Civil Pattern Jury Instruction 23.9.

27 Taken from Superior Court Civil Pattern Jury Instruction 23.2.

28 Taken from Superior Court Civil Pattern Jury Instruction 23.3

29 Taken from Superior Court Civil Pattern Jury Instruction 23.10.

30 Taken from Superior Court Civil Pattern Jury Instruction 22.1.

31 See, e.g., *Medical Ctr. of Delaware, Inc. v. Lougheed*, 661 A.2d 1055, 1060–61 (Del. 1995); *Jardel Co. v. Hughes*, 523 A.2d 518, 527–32 (Del. 1987); *McNally v.*

Eckman, 466 A.2d 363, 371 (Del. 1983); *Thorpe v. Bailey*, 386 A.2d 668 668–70 (Del. 1978).

³² The Court, as factfinder, disagrees with this assessment. Having viewed the MVR and listened to the witnesses’ testimony, the Court ultimately finds that Mr. Schueller constituted a risk to the public and law enforcement officers. *See* Section IV at ¶¶ 41 and 42.

³³ Dr. McCauley and Mr. Kapelshon may have said it differently but both seemed to agree that the national standard is that an officer does not have the duty to retreat under these circumstances.

³⁴ The Court, as the factfinder, recognized there are some inconsistencies in the testimony of Cpl. Cordrey, Cpl. Briggs and Ms. Boyer. The Court, however, is able to reconcile these inconsistencies to make “one harmonious story of it all.”

³⁵ During the Trial, Mr. Schueller testified that he kept the shovel so as to prevent Cpl. Cordrey from arresting him.

³⁶ At the Trial, Ms. Boyer testified that the gunshot happened 5–10 seconds after she lost sight of Cpl. Cordrey and Mr. Schueller. In her deposition, Ms. Boyer testified that the gunshot happened 3–4 seconds after she lost sight of Cpl. Cordrey and Mr. Schueller.