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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAULINE F. DAUB, Plaintiff-Below, Appellant, v. SAMUEL G. DANIELS, WILLIAM BAKER and BESTFIELD HOMES, LLC, Defendants-Below, Appellees.	)	No. 90, 2014 Court Below: Superior Court of the State of Delaware in and for Kent County C.A. No.K11C-03-037 JTV

OPENING BRIEF OF PLAINTIFF-BELOW, APPELLANT

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DATED: July 3, 2014

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NATURE OF THE PROCEEDINGS

This is a claim for personal injuries that arose on May 6, 2009 when the inadequately secured tailgate of the 17 year old pickup truck of Defendant Daniels fell off into the left or passing lane of State Route 1 northbound north of Dover where Defendant Baker, as agent for Defendant Bestfield Homes, ran over it (notwithstanding that between 7-9 cars were able to safely move to the right to avoid striking it before he did), causing it to flip up into the air hitting the car operated by Plaintiff Daub and penetrating her windshield resulting in injuries.

The motion for summary judgment filed by Defendants Baker/Bestfield Homes was denied by the trial court December 26, 2012. Daub v. Daniels, 2012 WL 6846320 (Del.Super.).

A five day jury trial in the Kent County Superior Court before President Judge Vaughn started Monday, May 13, 2013 and ended Monday, May 20, 2013 when the jury answered interrogatory number 1: "Do you find by a preponderance of the evidence that this accident was a result of a sudden emergency as to Defendant Baker?" "Yes" and, then skipping to interrogatory number 4 as instructed by the jury verdict form: "Do you find that Defendant Samuel G. Daniels was negligent in a manner proximately causing injury to Plaintiff Pauline F. Daub?" "No."

At the close of her case in chief, Plaintiff Daub moved for judgment as a matter of law as to Defendants Baker/Bestfield Homes regarding their affirmative

defense of sudden emergency because Baker contributed to the creation of the putative emergency which was denied by the Court. A-47, 56-58. The motion for directed verdict on behalf of Defendant Daniels was likewise denied, with the Court saying *inter alia* "...tailgates don't just fall off of vehicles. A jury can ***infer*** that the defect in the tailgate was an observable condition and that the defendant knew or should have known of the defect." (emphasis supplied) A-59. Defendants Baker/Bestfield Homes also moved for a directed verdict which was denied by the trial court saying *inter alia* "...a jury could ***infer*** he was following too closely and if he had been following at a more reasonable and prudent distance, he would have had a greater reaction time, he could have avoided running over the tailgate. Some other vehicles successfully moved around the tailgate on either the left or the right mostly on the right and Mr. Baker moved to the right after running over it." (emphasis supplied) A-48, 49-53, 60.

At the close of all evidence Plaintiff Daub renewed her motion for judgment as a matter of law which was again denied by the Court. A-86-88.

Following the jury's defense verdict, Plaintiff Daub filed motions renewing her motion for judgment as a matter of law against Defendants Baker/Bestfield Homes and for a new trial against all Defendants. These were denied by the Court in two written opinions dated September 30, 2013, copies of which are attached to

this brief. Daub v. Daniels, 2013 WL 5460160 (Del.Super); Daub v. Daniels, 2013 WL 5467497 (Del.Super.)

Defendant Daniels filed a post-trial motion for costs that Plaintiff opposed but requested that it be deferred pending the court's decision on Plaintiff's two motions. By decision dated January 24, 2014 (copy attached to this brief), the Court granted in part and denied in part the motion for costs reducing the original amount sought ($4,774.50) to $1,324.50. With the entry of that Order, judgment on the jury verdict was entered and this appeal ensued.

STATEMENT OF FACTS

Defendant Daniels was driving his then 17 year old 1992 GMC pickup truck with its original tailgate northbound on State Rte. 1 in the left or passing lane on May 6, 2009 going to work at approximately 6:30 a.m. A-92-94, 107-108. The concrete road is two lanes in each direction separated by grass median with an improved shoulder on the right. A-94. Just north of the Scarborough Road Exit, north of Dover, Defendant Daniels heard a "boom" as his tailgate fell off, struck the back bumper, then the ground causing him to look in his mirror when he saw his tailgate sliding down the highway. A-94-97. As Defendant Daniels was walking on the shoulder back to the tailgate lying in the middle of the left (passing) lane, he observed between 7-9 cars that were traveling in the left lane that were able to slow down and move to the right to go around it safely without any problems. A-94-98. The last vehicle he observed safely maneuver around the tailgate was a little blue car. A-99. Notwithstanding that he drives trucks professionally, has a CDL with endorsements for doubles/triples and tankers, attends truck safety refresher courses every couple of years and is a safety supervisor at his place of employment, Defendant Daniels admitted that he never really makes any formal inspection of his personal pick-up, didn't check it on the morning of the incident, does not check it every day and the last time he looked at it was 3-4 days before the incident occurred. A-90-92, 102-105. Defendant Daniels also admitted that the owner of a vehicle has

an obligation to assure that it is properly maintained, that only he did the maintenance on his truck, and that operators have the responsibility to make sure things like a tailgate are properly secured when they go out on the road, agreeing that if the tailgate had been properly secured it would not have fallen off. A-102. Defendant Daniels further admitted that since there had been no use or inspection of the tailgate for 3-4 days before the incident he would have no idea whether it was loose, broken or not properly latched at the time the incident occurred. A-102, 105.[1] He knew the police were giving him a ticket because his tailgate was improperly secured to his pick-up. A-100-102.

Traveling immediately behind the little blue car was the white Astro work van driven by Defendant Baker owned by his employer, Defendant Bestfield Homes, headed to work in Odessa. A-120. The speed limit there was 65 mph and at trial

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[1] Plaintiff originally brought suit only against Defendant Daniels. The intent was to settle that case for the $15,000 minimum policy limits then pursue an underinsured motorist ("UIM") claim against Plaintiff's own carrier, believing that Defendant Daniels' policy limits were insufficient to fully compensate her for her injuries. When the UIM carrier was advised of this shortly before the running of the two year statute of limitations, the UIM carrier said it would not accept the UIM claim without exhaustion of coverage for Mr. Baker who was listed in the police report as a witness only. A-115, 116, 118. A separate suit was then filed against Defendants Baker and Bestfield Homes which was later consolidated with the suit against Daniels.

Defendant Baker admitted he was traveling 60-65 mph although at another point he testified that he and the cars around him were all going 65 mph. A-121, 126. Baker admitted that he was traveling only 1-2 car lengths behind the little blue car following at a distance of approximately only 30-50 feet. A-121. Defendant Baker admitted he was aware of the rule of thumb that a driver should leave one car length between the front of his vehicle and the rear of the vehicle he is following for each ten miles per hour and that he was not doing that when the blue car in front of him swerved to the right to avoid hitting the tailgate. A-121. When it was revealed in front of him, Defendant Baker admitted he "...had split seconds to make a decision." A-122. He applied his brakes briefly but he let up on them as he ran right over the top of the tailgate with all four tires. A-122, 123. In his side view mirror, Defendant Baker saw the tailgate flip up into the air after he ran over it, glance off a utility truck in the right lane and is not sure if it hit the ground first or Plaintiff Pauline Daub's Chevrolet Monte Carlo first. A-124, 125, 130. After he ran over the tailgate, Defendant Baker said his work van "...shot right over into the right lane onto the right shoulder". A-125.

At the above time and place, Plaintiff Pauline Daub was on her way to work at the Smyrna Rest Area from her home in Felton in the left lane of Route 1 northbound. A-128, 129. She was traveling at about 65 mph up to 6 car lengths behind the work van driven by Defendant Baker. A-131, 137. "[A]ll of a sudden...,"

Plaintiff Daub observed this object flying through the air coming straight toward her vehicle. A-132. She gripped the wheel and jerked her body to the left, hitting the driver's door hard with her left shoulder and side[2], when the tailgate caught the hood of her car first then came straight into the windshield penetrating it after which it flipped over the top of her vehicle. A-132-136.

Plaintiff Daub alleged Defendant Daniels was proximately negligent because he drove his vehicle on the highway when it was in such an unsafe condition as to endanger any person in violation of 21 Del.C. §4355(a) and 21 Del.C. §2115(6); he failed to assure the tailgate was properly secured and affixed so as not to fly off his vehicle; he failed to properly inspect the tailgate to discover the dangers and defective condition that would permit the tailgate to fly off his truck; and he failed to properly maintain the tailgate so it would not fly off into the path of following motorists.

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[2]Plaintiff alleged serious and permanent neck injuries including a herniated disc a C5-6 confirmed by MRI that resulted in her missing 5 months of work and being referred by her neurosurgeon to an interventional spine specialist for facet injections and radiofrequency nerve ablations. A-109, 110-113. Based on her treating doctors' opinions that she would need to manage her symptoms with ongoing injectional treatments, Robert Minnehan, Ph.D., Plaintiff's expert economist, provided a range of future medical expenses between $673,000 (lifetime- 38.9 years of life expectancy) and $418,000 (until retirement age) reduced to present value. A-35-46.

Plaintiff Daub alleged Defendant Baker and through the admitted agency, Defendant Bestfield Homes, was proximately negligent in that he was following too closely in violation of 21 Del.C. §4123(a); he failed to maintain his vehicle under proper control, including operating it at such a speed and with such attention that he could steer safely by objects on the highway; he operated his vehicle in a careless or imprudent manner without due regard for conditions then existing in violation of 21 Del.C. §4176(a); and he failed to take appropriate evasive action to avoid striking the tailgate in the highway and causing it to flip up into Plaintiff's vehicle and windshield causing her injuries.

Defendant Daniels defended on the basis that he was not negligent. Defendants Baker/Bestfield Homes claimed, *inter alia,* the affirmative defense of sudden emergency. Comparative negligence was not asserted against Plaintiff.

After a five day trial, in less than 40 minutes the jury returned a defense verdict on liability finding Defendants Baker/Bestfield exonerated by the sudden emergency doctrine and Defendant Daniels not negligent. A-146-149, 180.

SUMMARY OF ARGUMENT

I. The lower court committed reversible error in denying Plaintiff's renewed post-trial motion for judgment as a matter of law with regard to the affirmative defense of sudden emergency because by Defendant Baker's own uncontradicted admissions he contributed to the creation of the very emergency under which he claims protection. Specifically, Defendant Baker admitted he was traveling 60-65 mph following the vehicle ahead only at a distance of 1 to 2 car lengths and was a mere 30-50 feet from the tailgate when he first saw it lying in the roadway as the car he was following successfully swerved to the right to safely avoid striking it. At 30 feet behind at 60 mph, Defendant Baker left himself only .34 (30/88) of a second to observe and react. At 65 mph at 30 feet he had only .31 (30/95.333) of a second. Giving him the benefit of his own 50 foot estimate, Defendant Baker still allowed himself considerably less than a second to observe and react when the tailgate was revealed before him - .57 (50/88) of a second at 60 mph and .52 (50/95.333) of a second at 65 mph.

II. The evidence preponderated so heavily against the Defendants on the jury verdict of no liability that no reasonable jury could have reached that result, warranting a new trial. Two separate statutes in the motor vehicle code established the duty of all persons ***not*** to drive a vehicle on a highway which is in such an unsafe condition as to endanger any person (21 Del.C. §4355(a) and 21 Del.C. §2115), a

violation of which constitutes negligence *per se*. The evidence comes from Defendant Daniels himself in the form of admissions: he was operating his 17 year old pickup truck with its original tailgate when it fell off and started to slide down the highway. He was the owner of the pickup and the only one that maintained it, doing all of the work himself. He admitted he knew an owner of a vehicle had an obligation to make sure it was properly maintained and further that it was the operator's responsibility to make sure things like the tailgate were properly secured before the pickup went out on the road. By training, professional background and employment, Defendant Daniels knows trucks, knows safety and knows truck safety. Even so, he never formally inspected the tailgate and had not even looked at it "at least 3 or 4 days" before the accident when it fell off. He could offer no explanation why the tailgate fell off and could not even say whether the tailgate was loose, broken or not properly latched on the day in questions. He knew he was getting a ticket because the tailgate was improperly secured. Notwithstanding a request by Plaintiff, the trial court refused to instruct the jury on the common law duty to inspect one's vehicle with reasonable care to the extent that one is charged with notice of everything that such inspection would disclose, leaving only Plaintiff's naked assertion without the support of law behind it. The jury's verdict of no negligence in response to interrogatory #4 flies in the face of the explicit uncontradicted admissions of Defendant Daniels resulting in a miscarriage of justice.

As to Defendants Baker/Bestfield Homes, the unrefuted admissions of Defendant Baker regarding speed (60-65 mph) and distance behind the little blue car (30-50 feet) plainly established by the great weight of the evidence that he causally contributed to the creation of the sudden emergency under which he claimed protection. No reasonable jury could have found his conduct not negligent under the circumstances. Cases from other jurisdictions have granted a directed verdict or JNOV on the defense contention that sudden emergency doctrine shielded a defendant from liability where there was overwhelming evidence, as here, that the Defendant driver was following too closely, thereby reducing the time to observe and react.

III. The lower court abused its discretion by allowing Defendant Baker to elicit highly prejudicial testimony over Plaintiff's objection that other drivers in the vicinity of the incident were also following too closely, notwithstanding Plaintiff's clear reliance upon the standard of negligence *per se* established in 21 Del.C. §4123(a), the following too closely statute. Violation of a statute enacted for the safety of others as such the following too closely statute may not be excused by showing others violate the statutory standard.

IV. The lower court erred in refusing to instruct the jury on Plaintiff's alternative theories of liability with respect to both Defendants (Baker: violation of 21 Del.C. §4168; failure to leave an assured clear distance between the front of his

vehicle and the car he was following and Daniels: violation of common law duty to inspect his vehicle before taking it out onto the road) as well as to the effect of Defendants' admissions and inferences to be drawn from facts.

V. It was reversible error for the trial court to place the affirmative defense of sudden emergency out of sequence at the top of the special jury verdict form regarding Defendants Baker/Bestfield Homes without including language identifying the specific conditions limiting its application, to wit: that the emergency must not be of the making of the person claiming its protection.

VI. The several errors identified in the preceding arguments cumulatively amount to prejudice sufficient to grant a new trial, even conceding *arguendo*, no one error standing alone would be sufficiently prejudicial to require a new trial.

ARGUMENT I

QUESTION PRESENTED

Did not the lower court commit reversible error in denying Plaintiff's motion for judgment as a matter of law with regard to the affirmative defense of sudden emergency because by Defendant Baker's own uncontradicted admissions he created the emergency under which he claimed refuge? The issue is preserved in the lower court's post-trial decision in Daub v. Daniels, 2013 WL 5460160 (Del.Super.).

A. SCOPE OF REVIEW

This Court reviews *de novo* the Superior Court's decision to deny a post-trial motion for judgment as a matter of law. Chrysler Corp. v. Chaplake Holdings, Ltd., 822 A.2d 1024, 1032 (Del.2003). If under any reasonable view of the evidence the jury could not have found for the nonmoving party, the trial judge's ruling must be reversed. Volkswagen of America, Inc. v. Costello, 880 A.2d 230, 233 (Del.2006).

B. ARGUMENT

Plaintiff renewed her motion after trial pursuant to Superior Court Civil Rule 50(b) on the grounds that there was no legally sufficient evidentiary basis for a

reasonable jury to find for Defendants Baker/Bestfield Homes under the emergency doctrine, as was indicated by the jury's answer to question #1 on the verdict form.[3]

That Defendant Baker created the very emergency under which he seeks shelter from liability by following too closely and failing to maintain proper control of his vehicle, among other negligent acts, is supported by his own admissions and not disputed by any other testimony or evidence. Defendant Baker testified he was traveling 60-65 mph following the vehicle ahead only at a distance of 1 or 2 car lengths and was only 30-50 feet from the tailgate when he first saw it as the car in front of him successfully swerved to the right to safely avoid striking it. No other witness testified to the contrary, let alone provided any information about the distance Defendant Baker was behind the car he was following. At 60 mph the Baker work van was traveling 88 feet per second. At 65 mph it was covering 95 1/3 feet per second. Defendant Baker's testimony of the distance he was following the small blue car moments before the accident occurred is internally consistent in this regard. At 30 feet behind at 60 mph, he left himself only .34 (30/88) of a second to observe and react to the tailgate appearing before him. At 65 mph at 30 feet he had even less time - .31 of a second (30/95.333). Giving him the benefit of his own 50 foot

[3] Do you find by a preponderance of the evidence that this accident was the result of a sudden emergency as to Defendant Baker? ANSWER: YES A-180.

estimate, he still allowed himself considerably less than a second to observe and react when the tailgate was revealed before him - .57 of second (50/88) at 60 mph and .52 of a second (50/95.333) at 65 mph.[4] All of this is in the context that he acknowledged the rule of thumb that a driver should leave one car length for each 10 mph of speed when following another vehicle, a rule he admitted he was not in compliance with at the time.

Not only did Defendant Baker fail to meet his burden of proof on the defense of sudden emergency, uncontradicted evidence from his own mouth establishes that he was negligent *per se* by violating the following too closely statute[5] and he was

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[4] It is well settled that no weight is to be given to testimony that opposes the laws of nature or is irreconcilable with immutable laws of physics. Wright & Miller, Federal Practice and Procedure: Civil 3d §2527, pp. 444-445 (2008); see also, General Motors Corp v. Dillon, 367 A.2d 1020, 1024 (Del. 1976). Thus, Baker's later testimony that he had two seconds to react would have made him following at a distance of between 176 feet (at 60 mph) and 192 1/3 feet (at 65 mph), at least 10 car lengths back whether one uses an average car length of 15 feet or 17-18 feet. The point is if Defendant Baker had actually had two seconds, unquestionably he would have been able to slow and go around the tailgate like the 7-9 vehicles ahead of him did, according to Defendant Daniels' testimony.

[5] 21 Del.C. §4123(a), the following too closely statute provides:

further negligent in failing to properly control[6] his vehicle so as to be in a position to safely guide it around objects on the highway, i.e. the tailgate. So ***before*** the tailgate was even revealed to him as the car in front safely swerved to avoid it, Defendant Baker was as a matter of law operating his vehicle negligently.[7] No reasonable jury could find otherwise on the facts presented.

"The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

[6] "Control means management or government and the phrase 'under proper control' as applied to the operation of a vehicle on a public highway, means operation at such speed and with such attention to its mechanism and power as will enable the driver to stop it with a reasonable degree of quickness or within a reasonable distance, ***or to guide it safely by objects on the highway***, this dependent always on the existing circumstances and the likelihood of danger to others on the highway." State v. Elliott, 8 A.2d 873, 876 (Del.O.&T.1939) (emphasis supplied).

[7] Violation of a statute enacted for the safety of others is negligence *per se* or negligence as a matter of law. Violation of the following too closely statute is negligence even in the absence of a rearend collision. Darmento v. Pacific Molasses Company, 615 NE 2d 1012,1014 (N.Y.1993). The following too closely statute generally protects all users of the highway, not just the preceding vehicle and its occupants. The statute imposes a duty owing not only to the preceding car but all other cars and persons who are causally affected by the negligence of following too closely. Northland Insurance Co. v. Avis Rent-A-Car, 215 N.W. 2d 439,442 (Wisc.1974).

The Restatement (Second) of Torts §296(2) (1965) entitled "Emergency" posits this point clearly:

> "The fact that the actor [Defendant Baker] is not negligent ***after*** the emergency has arisen does not preclude his liability for his tortious conduct which has produced the emergency." (bracketed material and emphasis supplied)

Comment d. to §296 of the Restatement (Second) of Torts entitled "*Prior Tortious Conduct*" provides:

> "Where the emergency itself has been created by the actor's own negligence or other tortious conduct, the fact that he has then behaved in a manner entirely reasonable in light of the situation with which he is confronted does not insulate his liability for his prior conduct. Such liability is not precluded by the fact that he has acted reasonably in the crisis which he has himself brought about. It is not his reasonable conduct in the emergency which makes him liable, but his prior tortious conduct creating the emergency..."

Therefore, Defendant Baker cannot validly claim he was confronted with a sudden emergency where the undisputed facts demonstrate it was through his own prior negligence that the supposed emergency was created.

It is a question of law whether there is sufficient evidence to go to the jury and where a defendant has contributed to the creation of the putative sudden emergency by his own conduct of following too closely, the affirmative defense is foreclosed to him as a matter of law. Accordingly, where defendant truck driver paid no attention to a stalled truck until he was so close he could not stop without rear-ending it and

then chose to pull into the oncoming lane to try to pass the stalled vehicle, the truck driver was negligent for following too closely thereby creating his own emergency in Kudrna v. Comet Corporation, 572 P.2d 183 (Mont.1977).[8] The issues on appeal included whether the trial court should have directed a verdict against defendant or should have granted the motion for JNOV or for a new trial on the sudden emergency doctrine. Citing the following too closely statute, the court agreed with plaintiff that defendant was negligent as a matter of law and was not entitled to the benefit of the emergency he created himself since he was so close he could not stop without rear-ending plaintiff. In support of its ruling, the court quoted from Prosser, Law of Torts, 170 §33 (4th ed. 1971) that not only can the defendant not claim the benefit of the sudden emergency doctrine if he contributes to the creation of that emergency, but:

> "A further qualification [to the sudden emergency rule] which must be made is that some 'emergencies' must be anticipated, and the actor must be prepared to meet them when he engages in an activity in which they are likely to arise. Thus under present day traffic conditions, ***any driver of an automobile must be prepared for the sudden appearance of obstacles...in the highway******". (Footnotes omitted, bracketed material and emphasis supplied)

This formulation was brought forward in Keaton, *et al.,* Prosser and Keeton on the Law of Torts, 197 §33 (5th ed. 1984). The Montana Supreme Court held since

[8] Superseded on other grounds by statute. Reed v. Little, 680 P.2d 937 (Mont.1984). There is no assertion of Plaintiff Daub's comparative negligence in this case.

defendant was negligent as a matter of law the trial court should have directed a verdict because defendant's negligence, which started by defendant's own conduct in following too closely, caused the asserted sudden emergency. So it is here with the conduct of following too closely and lack of proper control by Defendant Baker. The Prosser quote is equally applicable to the case at bar. See also, Transport Indemnity Company v. Page, 406 P.2d 980 (Okla.1965) where the court ruled in a similar case that sudden emergency did not apply where the first in a string of three eastbound trucks stopped at the entrance to a narrow bridge to allow the oncoming plaintiff sufficient clearance to pass. The second truck was able to stop behind the first but the third could not; he attempted to pass and collided with the plaintiff's oncoming vehicle. The Oklahoma Supreme Court rejected the contention that the maneuver of the third truck was excused because of the sudden emergency caused by the stopping of the preceding trucks noting that:

> "...truck #3 by virtue of its own acts, i.e. following too closely, failing to maintain a proper lookout and failing to maintain a proper speed...had placed himself in a position where he could not stop within the assured clear distance ahead." *Id.* at 983.

Similarly, in Posas v. Horton, 228 P.3d 457 (Nev.2010) the jury verdict in favor of defendant based on the sudden emergency doctrine was reversed where it was determined that the defendant had been following too closely as a matter of law, thereby creating the emergency in the first place. Defendant's own testimony that she was following too closely precluded the application of the defense, as Defendant

Baker's own testimony here must as well. Likewise, in Collins v. Rambo, 831 N.E.2d 241 (Ind.App.2005) a defense verdict based on the sudden emergency doctrine was reversed on appeal where the evidence was defendant was following plaintiff very closely, defendant was the only vehicle in the line of turning traffic that collided when a van cut in notwithstanding defendant's testimony that she would not have been able to stop, even if she had been following further back.[9]

A like result was reached in Templeton v. Smith, 744 P.2d 1325 (Ore.App.1987) review den. 749 P.2d 1182 (Ore.1988) (TABLE) where the court held the following defendant was not entitled to the benefit of the sudden emergency doctrine where the defendant said she was following plaintiff but glanced in her rearview mirror momentarily and when she looked forward again plaintiff had stopped but defendant was unable to avoid the collision. The court noted the only "emergency" was when the forward car stopped more abruptly than expected which defendant should have anticipated possibly happening anyway under the circumstances of ordinary driving, quoting the above passage from Prosser and Keaton, (5th ed.). The court reversed and remanded.

[9] This is the functional equivalent here of Defendant Baker's self-serving conclusory statement that he believed he was following at a safe distance.

Here, Defendants Baker/Bestfield Homes had the burden of proof on the affirmative defense of sudden emergency. In cases involving shifting burdens of proof, the test for the sufficiency of the evidence is that the movant is entitled to judgment as a matter of law if, with respect to any important issue on which the non-movant has the burden of proof, such as here with the sudden emergency defense, no reasonable jury could find that the non-movant met the burden of proof. Wright & Miller, *supra* §2524, pp. 363-364. For these reasons, this Court should find denial of the Plaintiff's renewed motion for judgment as a matter of law as to Defendant's Baker/Bestfield Homes on the issue of sudden emergency doctrine reversible error, as Baker was negligent as a matter of law causing the putative emergency.

ARGUMENT II

QUESTION PRESENTED

Did not the evidence preponderate so heavily against the Defendants on the jury verdict of no liability that no reasonable jury could have reached that result, warranting a new trial? The question is preserved by the lower court's post-trial decision in Daub v. Daniels, 2013 WL 5467497 (Del.Super.).

A. SCOPE OF REVIEW.

This Court reviews the grant or denial of a new trial on an abuse of discretion basis: where the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result a new trial will be granted. Storey v. Camper, 401 A.2d 458, 465 (Del. 1979).

B. ARGUMENT

In general, Civil Rule 59 gives the trial judge ample power to prevent what the judge considers to be a miscarriage of justice. It is the judge's right, and indeed duty, to order a new trial if it is deemed in the interests of justice to do so. So important is this, the court may act either on a motion by a party or on its own initiative, *sua sponte*. Courts will grant new trials where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. See generally, Wright & Miller, Federal Practice and Procedure: Civil 3d

§2803, pp. 59, 60 (2008). The trial court is empowered under Rule 59 to order a new trial as a matter of fairness and to prevent injustice, including situations where the trial court's instructions to the jury were inadequate or incorrect or the verdict was the result of an error in the application of the appropriate rules of law. Wyatt v. Clendaniel, 320 A.2d 738, 740 (Del.1974). Thus, on weight of the evidence motions, the trial judge may grant a new trial where the verdict in the court's view is at least against the great weight of the evidence and a reasonable jury could not have reached that result. Storey v. Camper, 401 A.2d 458,465 (Del.1979)

(A) As to Defendant Daniels. The jury found Defendant Daniels was not negligent in a manner proximately causing injury to the Plaintiff by answering "no" on question 4 of the interrogatories to the jury.[10] Plaintiff submits this verdict was so against the great weight of the evidence that no reasonable jury could render that verdict such that if the verdict were allowed to stand, it would amount to a miscarriage, if not travesty, of justice. Two separate statutes in the motor vehicle code establish the duty of all persons *not* to drive a vehicle on any highway which is in such an unsafe condition as to endanger any person.[11] Because both of these

[10] 4. Do you find that Defendant Samuel G. Daniels was negligent in a manner proximately causing injury to Plaintiff Pauline F. Daub? ANSWER: NO. A-180.

[11] 21 Del.C. §4355(a) provides in part that it is an offense…

statutes are enacted for the safety of others, a violation constitutes negligence *per se* or negligence as a matter of law. These statutes do not require knowledge, scienter or intent. They are strict liability penal statutes. If a vehicle is driven on a highway in such an unsafe condition as to endanger any person, it is a violation of either statute. The language is mandatory and has the same effect as the speeding laws or the DUI statute; that is, a person cannot say they were not aware they were speeding or not aware they were over the legal alcohol limit to avoid being guilty of negligence as a matter of law by violating either of those two motor vehicle statutes. The evidence supporting that Defendant Daniels was in violation of either or both of these unsafe condition statutes is undisputed and comes from the lips from Defendant Daniels himself. He was operating his 17 year old pickup truck that had the original tailgate when he heard a "boom" and viewed in his rearview mirror the tailgate fall off, striking his bumper falling onto the highway. He admitted he was

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"...for any person to drive...on any highway any vehicle...which is in such unsafe condition as to endanger any person...".

In addition, 21 Del.C. §2115 provides in relevant part:

"No person shall:

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(6) Drive or move...on any highway any vehicle...which is in such unsafe condition as to endanger any person..."

the owner of the pickup and he testified he was the only one that maintained it - he did all of the work on it himself. Defendant Daniels admitted that he knew an owner of a vehicle has an obligation to make sure it's properly maintained and further that it is a motor vehicle operator's responsibility to make sure things like the tailgate of his 17 year old pickup truck were properly secured before the truck goes out on the road. Defendant Daniels holds a CDL, takes refresher courses every couple of years including on safety subjects and he is employed as a safety supervisor for a big contractor. So Defendant Daniels knows trucks, he knows safety and he knows truck safety. Even so, Defendant Daniels testified that the last time he checked the tailgate was "at least 3 or 4 days" before the accident when it fell off of his truck. In fact, Defendant Daniels admitted that he doesn't really check or inspect it at all, he simply uses it and that was the last time he had occasion to use it before it fell off. Defendant Daniels could offer no explanation as to why the tailgate fell off his truck. He acknowledged, however, that since it was at least 3 or 4 days previous to it falling off that he last used it, he could not say whether the tailgate was loose, broken or not properly latched on the day in question. Defendant Daniels knew he was getting a ticket because the tailgate was improperly secured to his truck[12] and the testimony in the form of admissions from Defendant Daniels himself, uncontradicted as it is,

[12] It was later determined that the ticket may not have charged the correct violation. A-61-66.

preponderated so heavily against the jury verdict in his favor on the issue of negligence that a reasonable jury simply could not have reached the result.

In this connection, the trial court read to the jury the Plaintiff's contentions including not only the violations of 21 Del.C. §4355(a) and 21 Del.C. §2115(6) that he drove his vehicle which was in such an unsafe condition as to endanger another person but also that he failed to properly secure and affix the tailgate to his vehicle so it wouldn't fly off, failed to properly inspect the tailgate to discover a dangerous or defective condition and failed to properly maintain it. Although the court identified the statutory charges of negligence directed to Defendant Daniels in the instructions, no instruction whatsoever was given regarding the duties of an owner/operator to inspect his vehicle for safety before taking it out on the roadway. The common law imposes a duty apart from statute on one operating a motor vehicle on a public highway to see that it is in reasonably good condition and properly equipped, so that it may at all times be controlled and not become a source of danger to its occupants or other travelers. Dostie v. Lewiston Crushed Stone Co., 8 A.2d 393 (Me.1939). The owner or operator of a motor vehicle must also exercise reasonable care in the inspection of the motor vehicle and is charged with notice of everything that such inspection would disclose. *Id.* at 395. Such common law duty was also recognized in Delair v. McAdoo, 188 A.181 (Pa.1936). At trial, Plaintiff requested a jury instruction on such common law duty. However, the Court declined

and as a result there was no instruction whatsoever on the law to support Plaintiff's naked allegations of a breach of the duty to properly inspect, maintain and otherwise assure that the tailgate was properly secured and duly affixed to his vehicle so as not to fly off and create a hazard to following motorists, including Plaintiff. Plaintiff invokes the power of this Court to order a new trial as a matter of fairness to prevent a miscarriage of justice where the jury instructions were not just inadequate or incorrect but non-existent as to this duty.

(B) As to Defendants Baker/Bestfield Homes. Because the evidence preponderates so heavily against the verdict in favor of Defendant Baker on the issue of the defense of sudden emergency a new trial should be ordered to prevent an injustice and as a matter of fairness. As pointed out above, as with the evidence against Defendant Daniels, the evidence against Defendant Baker consists of his own admissions about his speed, and the distance he was following the vehicle ahead before the tailgate was revealed to him on the highway when the blue car he was following succeeded in swerving to the right to avoid striking it, as Defendant Daniels said he observed 7 to 9 other vehicles do before Defendant Baker struck it causing it to fly up and ultimately smash into the windshield of Plaintiff's vehicle. The distance covered and the analysis of the time Defendant Baker had to observe and react to the tailgate are set forth in Argument I and will not be repeated here. Suffice it to say here under Defendant Baker's own testimony of speed and distance,

by his own conduct he left himself significantly less than one second to observe and react to the tailgate. However, in addition to this factual testimony from Defendant Baker supporting that his own negligence *per se* in violating the following too closely statute and the common law control requirement, Defendant Baker admitted he was fully aware of the rule of thumb that provides that persons should allow one full car length for each ten miles per hour of speed he is traveling behind another vehicle and further that his conduct violated this rule. Plainly, "...on review of all the evidence, the evidence preponderates so heavily against the jury verdict [that the accident was the result of a sudden emergency as to Defendant Baker not of his own making] that a reasonable jury could not have reached the result." Storey v. Camper, 401 A.2d 458,465 (Del.1979) (bracketed material supplied and citations omitted).

The cases cited and discussed in Argument I above also support the proposition that Defendant Baker was not entitled to an instruction on sudden emergency because of the overwhelming evidence supporting that his own prior conduct placed him in the situation of peril. On its way to ruling that the trial court should have granted the directed verdict or JNOV on the defense contention that the sudden emergency doctrine shielded him from liability, the court also noted that it was reversible error to give the defendants' proffered sudden emergency jury instruction in view of the "overwhelming" evidence that the defendant truck was negligent at the time of impact. Kudrna v. Comet Corporation, *supra*. In Posas v.

Horton, *supra*, the Nevada Supreme Court found it was an abuse of discretion to give the sudden emergency jury instruction because the defendant's own testimony supported that she was following too closely and thus created the emergency herself. Citing Kudrna v. Comet Corporation, *supra*, the Arizona Supreme Court in Tansy v. Morgan, 604 P.2d 626 (Ariz.1979) held the trial court erred in giving defendant's requested instruction on sudden emergency because the only aspect of a situation that was "sudden" was defendant's realization that plaintiff's car was stopped ahead and that he was too close to avoid collision, reversing a defense verdict below. And on appeal from a defense verdict in Collins v. Rambo, *supra,* the Indiana Court of Appeals reversed saying that since there was no evidence that the defendant maintained an appropriate distance and speed from the plaintiff's vehicle, a sudden emergency instruction was not supported, noting that the error in giving the sudden emergency jury instruction was not harmless error.

In Grieco v. Koperna, 1990 WL 1098711 (Del.Super.), the parties collided while traveling in opposite directions around a curve on a narrow, winding wet roadway. The impact occurred in Grieco's lane but Koperna contended he was not negligent because he acted reasonably when confronted with an emergency. There was no claim of contributory negligence. After a jury verdict for defendants, the court granted a new trial even assuming it may not have been error to instruct the jury on the emergency doctrine because the jury's conclusion that Koperna was not

negligent was against the great weight of the evidence in the case. The court noted that had Koperna maintained a proper lookout he would have seen the headlights of the Grieco vehicle approaching and, having regard to the potential hazards then existing, Koperna should have driven at a speed that would have enabled him to slow down or stop without sliding on the wet roadway. Thus, even if this Court deems it was not error to instruct the jury on the emergency doctrine, it may still nevertheless grant a new trial against Defendants Baker/Bestfield Homes where the great weight of the evidence fails to support a verdict for the defense.

The trial court instructed the jury with language tracking the Delaware Pattern Jury Instruction on sudden emergency. Plaintiff, however, tendered a charge on emergency that was more tailored to the specific facts of the case, and less of an abstract proposition. The additional paragraphs the Plaintiff included in her proposed emergency charge are as follows:

> "However, Plaintiff asserts that Defendants Baker and Bestfield Homes, LLC are not entitled to the protection of the emergency doctrine because the emergency was of Defendant Baker's own making and created by his own negligence, primarily following too closely, failing to allow an assured clear distance between the front of his vehicle and the vehicle he was following and not maintaining sufficient control of his vehicle to guide it safely by objects on the highway.
>
> To be entitled to this defense, Defendant Baker and Bestfield Homes, LLC must prove to each and every element by a preponderance of the evidence as I have previously defined that for you." A-166.

These paragraphs specifically identify what conduct the Plaintiff contends take the case out of the sudden emergency doctrine, i.e. primarily following too closely, failing to allow an assured clear distance between the front of his vehicle and the vehicle he was following and not maintaining sufficient control of his vehicle to guide it safely by objects on the highway. It also explained that Defendants Baker and Bestfield Homes had to prove each and every element of the sudden emergency doctrine by a preponderance of the evidence as previously defined for the jury in the instructions.

Scullion v. Hackworth, 199 A.2d 563 (Del.1964) was an auto accident case tried on the defenses of unavoidable accident and emergency resulting in a defense verdict. On appeal, this Court reversed and ordered a new trial holding that there was evidence that the defendant had violated traffic regulations as to speed and slowing for an intersection and that the jury could have found the defendant's inability to stop and thus avoid impact after he first saw the plaintiff or should have seen her, was a direct result of his speed, and therefore it was error to give an instruction which not only did not include that situation but, on the contrary, told the jury that it could not base the verdict for plaintiff upon speed counts if the defendant was unable to stop after he first saw or should have seen the plaintiff. Particularly with reference to the negligence *per se* allegations against defendant, the parallels to the situation in the case *sub judice* as to Defendants Baker/Bestfield Homes are

manifest. Scullion supports awarding a new trial in favor of Plaintiff against Defendants Baker/Bestfield Homes here. See also, Hartford Fire Ins. Co. v. Lefler, 135 N.W.2d 88 (Iowa1965) where a new trial granted to Plaintiff by the trial judge was affirmed where the sudden emergency instruction was too abstract and incomplete thereby possibly confusing the jury. Compare, Lutzkovitz v. Murray, 339 A.2d 64 (Del.1975) where, on appeal, this Court noted the duty of the trial judge to tailor its instructions to the jury to the applicable facts (there unavoidable accident), holding the limited instruction given by the trial court constituted reversible error. So it is here. See also, Kudrna v. Comet Corporation, *supra,* where the court discussed application of the assured clear distance rule in the context of holding that the trial court should have directed a verdict against the defendants on liability, not allowing them the benefit of the sudden emergency doctrine where their violation of the following too closely statute created the peril in the first place.

ARGUMENT III

QUESTION PRESENTED

Did not the lower court abuse its discretion by allowing Defendant Baker to elicit testimony that other drivers in the vicinity of the incident were also following too closely, notwithstanding Plaintiff's reliance upon the standard of negligence *per se* established in 21 Del.C. §4123(a)? The issue is preserved in the transcript by Plaintiff's objection which the trial court overruled. A-151-153.

A. SCOPE OF REVIEW

A trial judge's decision to admit or exclude evidence is reviewed for abuse of discretion. Spencer v. Wal-Mart Stores East, LP, 930 A.2d 881, 886 (Del.2007). If the decision turns on a question of law, however, this Court reviews *de novo*. McKinley v. Casson, 80 A.3d 618,622 (Del.2013).

B. MERITS

Notwithstanding a keen awareness that a major focus of Plaintiff's negligence case was directed to Defendant Baker's negligence *per se* by following too closely in violation of 21 Del.C. §4123(a), Defendant Baker's counsel asked him this question on direct examination: "How did your distance compare with the other vehicles around you on the highway that morning?" A-151-153. Plaintiff duly

objected requesting a sidebar at which Plaintiff argued that one of the statutory violations that Plaintiff was alleging was following too closely and the concern was that Defendant Baker was about to elicit testimony that he was doing the same thing that everybody was doing, the problem being that violation of a statute enacted for the safety of others is negligence *per se* and it doesn't matter whether other people do it or not - it is simply not allowed. Because it is negligence *per se*, the jury is not permitted to think it is not negligence because everybody does it. That others follow too closely on Route 1 during morning traffic does not excuse Defendant Baker from following too closely on this occasion. That is the point of negligence *per se* v. common law negligence - whether other people are following too closely is irrelevant and does not exonerate a defendant's conduct. The trial court overruled Plaintiff's objection and the question was re-read to the jury to which Defendant Baker responded, "I believe it was the same." A-151-153. The error was compounded when counsel for Defendant Baker argued in her summation: "He [Defendant Baker] testified last Thursday that he felt he was a safe distance behind the vehicle in front of him, ***and he was at a comparable distance with all the other vehicles in front of him that morning***." (emphasis supplied) A-155. The highly prejudicial admission of that evidence and the reinforcing argument by defense counsel in closing convey to the jury the mistaken and improper notion that if

everyone violates a statute enacted for the safety of others, it is excusable, when in law it is not.

The negligence *per se* doctrine developed at common law and it has long been recognized that a legislative body may substitute its enactments for the general negligence standard of conduct required of a reasonable person. Toll Brothers, Inc. v. Considine, 706 A.2d 493,495 (Del.1998) (internal citations omitted). As noted in Keeton, *et al.*, Prosser and Keeton on the Law of Torts, §36, at 220 (5th ed. 1984) "When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard of care for ***all*** members of the community, from which it is negligence to deviate." (emphasis supplied; footnote omitted). Thus, a finding of a violation of such statute "Stamp[s] the defendant's conduct as negligence, with all of the effects of common law negligence, but with no greater effect." *Id.* at 230 (footnote omitted). The point is that the standard of conduct is taken over by the court from that fixed by the legislative enactment and jurors have no authority to relax it, as by comparing it to what other people do, i.e. it is still negligence *per se* even if others violate the statutory standard. *Id.* at 230. The error in admitting the question and answer would also have confused the jury regarding the application of the sudden emergency doctrine that applies only where the emergency is not caused or contributed to by the conduct of the person claiming protection of the doctrine, i.e. Defendant Baker here. The faulty reasoning

would be: "if everyone follows too closely, therefore it is not negligence, then he is entitled to the protection of the sudden emergency doctrine," which would be legally incorrect. Plaintiff requests this Court to find this erroneous admission of evidence to be reversible error warranting a new trial.

The offending question and answer compounded by the closing argument turns on a question of law involving the nature and effect of negligence *per se*. Allowing the question and answer eviscerates the essence of negligence *per se*, which cannot be excused simply by showing everyone violates the standard. The clear implication of allowing the question and answer over Plaintiff's objection is that because Defendant Baker's distance behind the blue car was comparable to the following distances of other vehicles in the vicinity, it excuses the violation and also necessarily exonerates him under the affirmative defense of sudden emergency. Whether viewed as an abuse of discretion or *de novo* because the admission of the evidence turns on a question of law, it constitutes reversible error warranting a new trial.

ARGUMENT IV

QUESTION PRESENTED

Was it not error for the trial court to refuse to instruct the jury on Plaintiff's alternative theories of liability against both Defendants and on the effect of their admissions and inferences to be drawn? The issues are preserved by Plaintiff's objections and rulings in the transcript. A-67-74, 76-84, 144a-144g.

A. SCOPE OF REVIEW

This Court reviews *de novo* the trial court's refusal to instruct the jury as it does the trial court's decision to issue a challenged instruction. Chrysler Corporation v. Chaplake Holdings, Ltd., 822 A.2d 1024, 1034 (Del.2003); North v. Owens-Corning Fiberglas Corp., 704 A.2d 835, 837, 838 (Del.1997).

B. MERITS

Plaintiff submitted evidence supporting multiple theories of liability regarding both Defendants. As to Defendant Baker, Plaintiff requested and was given jury instructions on following too closely and control, the latter including that the operator of the vehicle must be able to safely guide it around obstacles on the roadway. In addition, however, Plaintiff submitted evidence and jury instructions on safe reasonable speed as required by 21 Del.C. §4168 and the assured clear distance rule as set forth in Staker v. McSweeney, 185 A.2d 892 (Del.Super.1962)

both of which were rejected by the court. A-67-74. Regarding Defendant Daniels, Plaintiff submitted evidence and jury instructions on statutory violations and the common law duty of an operator to properly inspect his vehicle before taking it out on the road, the latter of which was denied by the court. A-144a-144g. Finally, the court denied Plaintiff's proffered charges on the effect of admissions by the parties and the jury's right to draw inferences from the facts. A-79-84.

(A) 21 Del.C. §4168 – In her initial complaint against Defendant Baker/Bestfield Homes, Plaintiff Daub asserted he was negligent *per se* by violating both subsections of 21 Del.C. §4168[13]. Plaintiff contended that Defendant Baker drove his vehicle on a highway at a speed greater than reasonable and prudent under

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[13] (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and without having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care.

(b) The driver of every vehicle shall, consistent with the requirements of subsection (a) of this section, drive at an appropriate speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

the conditions without having regarding to the actual and potential hazards then existing, failing to control his speed as necessary under the circumstances in violation of 21 Del.C. §4168(a) and that he failed to drive at an appropriate speed when a special hazard existed in violation of 21 Del.C. §4168(b). Throughout the trial, Plaintiff adduced evidence to support her position that Defendant Baker was driving too fast for conditions that he had insufficient time and distance to observe and react when the tailgate was revealed on the roadway in front of him when the blue car swerved, particularly in view of the unrefuted testimony that 7-9 vehicles ahead of him were observed successfully moving to the right to safely avoid striking it. At the conclusion of the trial, Plaintiff duly submitted jury instructions that included the allegations of violation of both subsections of §4168 of Title 21. A-158.

At the prayer conference, Defendant Baker wanted to add modifying language to the proffered charge for subsection (a) that stated that motorists, however, need not slow down in anticipation of danger that has not yet become apparent, in response to which Plaintiff argued that the potential hazard is always there where one does not have enough time to observe and react – the very kind of thing that the statute was designed to prohibit. The trial judge said, "I think, basically, you've got a following too closely case, you know, if you really put it at its core ..." A-72. The trial court went on to say that the requested language in §4168 was just a

reformulation of following too closely, putting Plaintiff to the unfair choice that the entire requested instruction comes out or goes in with the added language. A-71-75. To avoid confusion and misleading the jury, Plaintiff opted that it went out but should not have been put to the choice in the first place.

(B) Assured Clear Distance Rule – Plaintiff tendered a jury instruction referred to in the common law as the assured clear distance rule as supported by Staker v. McSweeney, 185 A.2d 892 (Del.Super.1962), to the effect that if the jury found Defendant Baker was driving at a speed which did not assure that there was a safe distance between his vehicle and the auto in front, then the jury may find Defendant Baker negligent. In Staker, defendant was traveling about 30 mph through heavy fog which limited her visibility to about 15 feet. Plaintiff moved for summary judgment on the issue of liability asserting the assured clear distance rule that required an operator of a motor vehicle to drive at a speed to allow a stop within the assured clear distance ahead. Notwithstanding that its application in other situations may not be appropriate, the court said a reduced speed under the circumstances was not only required by statute[14] "...but also by the plain fact that her method of operation was such that by the time she observed an object in front of her and in her path she would be physically incapable of stopping to avoid colliding

[14]Then 21 Del.C. §4125(b), precursor to 21 Del.C. §4168(b).

with it, regardless of the quantity or quality of warning devices displayed by such object." *Id.* at 894. Summary judgment was granted to plaintiff. Defendant Baker objected, citing language in the decision that it did not apply where an emergency has been created, noting that emergency was Defendant Baker's affirmative defense. The court sustained Defendant Baker's objection declining to give the instruction, even with language suggested by Plaintiff to the effect that if a genuine emergency not created by Defendant's own negligence existed then the assured clear distance rule did not apply. A-67-71.

(C) Common Law Duty to Inspect Vehicle – As to Defendant Daniels, Plaintiff brought to the court's attention that only the statutory charges requiring motorists not to operate on a highway any vehicle that was in such unsafe condition as to endanger any person[15] were given without reference to any common law or non-statutory duties. Plaintiff provided copies of decisions from the highest courts in Pennsylvania and Maine standing for the proposition that a common law duty exists for an operator of a motor vehicle on a public highway to see that it is in reasonably good condition and properly equipped so that it may at all times be controlled and not become a source of danger to its occupants or other travelers and the owner must exercise reasonable care in the inspection of the motor vehicle and

[15]21 Del.C. §2115 and 21 Del.C. §4355(a)

is charged with notice of everything that such an inspection would disclose. Delair v. McAdoo, 188 A.181 (Pa.1936); Dostie v. Lewiston Crushed Stone Co., 8 A.2d 393 (Me.1939), both of which cited the Restatement (First) of Torts §307 (1934) and a treatise identified as Huddy, Automobile Law. Without an instruction on the duty to make a reasonable inspection, Plaintiff's contentions to that effect were unsupported, i.e. naked. After a brief recess, the Court denied Plaintiff's request for such an instruction. A-144a-144g.

(D) Effect of Admissions; Jury's Right to Draw Inferences – With the vast bulk of Plaintiff's liability evidence constituting admissions made by both Defendants and with the trial court noting and denying the motions for directed verdict submitted by each Defendant that, as to Defendant Daniels, "A jury can ***infer*** that the defect in the tailgate was an observable condition and that the Defendant knew or should have known of the defect," (emphasis supplied) [A-59] and as to Defendant Baker, "...a jury could ***infer*** he was following too closely and if he had been following at a more reasonable and prudent distance, he would have had a greater reaction time, he could have avoided running over the tailgate," (emphasis supplied) [A-59], Plaintiff proffered supplemental jury instructions entitled "Statements Against Interest, Admissions by Parties" and "Evidence: Direct, Indirect or Circumstantial" that included language: "In this connection, you are also entitled to draw and rely upon any reasonable inferences that flow from the evidence

presented." A-169-171. Both Defendants objected to the language regarding inferences as not being part of the pattern instruction and it was declined by the court. A-79, 80. In support, Plaintiff stated that the supplemental instruction on "Statements against Interest and Admissions by Parties" was submitted so the jury would understand that statements both Defendants made when examined using their depositions were not just for impeachment purposes but had a substantive effect as admissions of a party to the litigation. Both Defendants objected. The court said it thought it might confuse or mislead the jury so declined to give the instruction as there was no pattern one covering the subject. A-83, 84.

(E) Tailored emergency doctrine - Finally, Plaintiff tendered jury instructions on actions taken in a sudden emergency that departed from the pattern instructions in that it contained statements that it was the contention of Plaintiff that Defendants Baker/Bestfield Homes were not entitled to the protection of the emergency doctrine because the emergency was of Defendant Baker's own making and created by his own negligence, primarily following too closely, failing to allow an assured clear distance between the front of his vehicle and the vehicle he was following and not maintaining sufficient control of his vehicle to guide is safely around objects on the highway. A-76-78. Defendants objected, noting the additional language went beyond the pattern instructions on the affirmative defense, with which

the lower court agreed, refusing to charge beyond what was contained in the pattern instructions on each defense. A-76-77.

(F) Discussion - A trial court may not refuse to instruct the jury on claims that have been pleaded and upon which evidence has been presented. North v. Owens-Corning Fiberglass Corp., 704 A.2d 835,838 (Del.1997). A trial court must submit all issues affirmatively to the jury and may not ignore a requested jury instruction applicable to the facts and law of the case. *Id.* citing, Alber v. Wise, 166 A.2d 141,143 (Del.1960). Where the trial court perceives of a case that it is of one sort or nature and declines to instruct the jury on plaintiff's alternative theories, a legal determination is made that this Court reviews *de novo*. North v. Owens-Corning Fiberglas Corp., *supra* at 838. In North the claim was perceived as a failure to warn but when plaintiffs requested an instruction that defendant had a duty to properly package and another that defendant had a duty to substitute a safer, alternative product, the court refused both on the basis that it deemed it was a duty to warn case, not improper packaging or duty to change product claim. This Court reversed on appeal. Here, the trial court perceived the case against Defendants Baker/Bestfield as only following too closely and as against Defendant Daniels as only the statutory claims of operating an unsafe vehicle when in fact, facts were presented as well as instructions on these alternative theories were offered by Plaintiff but refused.

This Court has noted that while the Pattern Jury Instructions reflect the collective effort of several distinguished jurists and practicing attorneys and are a valuable resource for the bench and bar, they do not necessarily represent the definitive, conclusive statement of law applicable to various fact patterns on that topic and are always subject to review. Spencer v. Goodill, 17 A.3d 552,556 (Del.2011); see also, Russell v. K-Mart Corp., 761 A.2d 1, 4 (Del.2000). A trial court has the duty in jury instructions to apply the law specifically to the facts and not charge the jury in abstracts; an abstract statement of law contained in a jury charge is inadequate. Beck v. Haley, 239 A.2d 699,702 (Del.1968). In this connection, the trial court is not relieved of the duty to apply law properly to the facts because of any deficiency in an instruction requested by a party. *Id.* at 702. The duty of the trial court in this regard as stated in Island Express v. Frederick, 171 A.181 (Del.1934) and quoted in Beck, *supra* at 702 is as follows:

> "It is the duty of the trial courts to submit all the issues, both the cause of action and the defense, affirmatively to the jury, and with such application of the law to the evidence as will enable the jury intelligently to perform its duty..."

Particularly where the instructions go to the heart of a party's contentions as to liability that involve a close question, it is prejudicial error to so charge the jury requiring a new trial. Beck, *supra* at 702. With regard to the instructions identified above, the same reasoning applies here entitling Plaintiff to a new trial.

ARGUMENT V

QUESTION PRESENTED

Was it not reversible error for the trial court to place the affirmative defense of sudden emergency out of sequence at the top of the special verdict form and without including language identifying the specific conditions limiting its application? Issues are preserved in the transcript through Plaintiff's objections and the lower court's rulings. A-85, 139-144, 180.

A. SCOPE OF REVIEW

The jury verdict form is reviewed by the same standard as that of jury instructions, for an abuse of discretion. The lower court must be reversed if deficiencies in the jury charge, carried forward in the special verdict form, undermined the jury's ability to perform its duties intelligently in returning a verdict. Asbestos Litigation Pusey Trial Group v. Owens-Corning Fiberglass Corp., 669 A.2d 108, 113 (Del.1995); see also, Culver v. Bennett, 588 A.2d 1094, 1098, 1099 (Del.1991)

B. MERITS

Defendants Baker/Bestfield Homes tendered to the court jury interrogatories that placed the affirmative defense of sudden emergency doctrine out of sequence at the top of the decision tree. In answer to jury interrogatory #1: "Do you find by a

preponderance of the evidence that this accident was a result of a sudden emergency as to Defendant Baker?", the jury checked "Yes". A-180. Defendants Baker/Bestfield Homes conceded this was an affirmative defense on which they had the burden of proof. A-85, 141. Affirmative defenses are a matter of confession and avoidance. Superior Court Rule 8(c). For example, the affirmative defense of comparative negligence is never reached unless the jury first finds the plaintiff has established proximate negligence. With regard the affirmative defense of sudden emergency, the defendant seeking shelter of that doctrine has the burden of proving the emergency is not of his own making.

Elsewhere in this brief, Plaintiff argued it was error for the court to give the emergency charge without specifically tailoring it to the particular facts of this case. With regard to the jury verdict form submitted by Defendants Baker/Bestfield Homes, Plaintiff objected on the grounds that to do so as the first question in the decision tree would be out of sequence and would mislead the jury and confuse it. A-139-141. In supporting their submission, expressly observed by the trial court to be "...sort of the reverse order," [A-143] Defendants Baker/Bestfield Homes asserted that if the jury ruled in their favor on the affirmative defense, they would never reach the question of their negligence. At the heart of the Plaintiff's case against Defendants Baker/Bestfield Homes was that he was following too closely and driving too fast for conditions such that he did not have sufficient time to observe

and react when the tailgate was revealed to him on the road when the car he was following only one or two car lengths behind, swerved to avoid it as had the 7-9 motorists ahead of him who did. The confusion to the jury would be the absence of the conditions under which the doctrine would not apply, which would mislead them into thinking that he could avoid liability even if he contributed to the creation of the emergency himself. The correct view of Plaintiff's evidence, argument and tendered jury instructions was that it was the compressed amount of time and distance that caused the so-called emergency upon which Defendant Baker relied, that Defendant Baker himself created which established that he was proximately negligent.

Not only was this affirmative defense taken out of sequence and made first of the jury interrogatories but also it did not contain the limiting language that Plaintiff requested in the jury instruction on emergency doctrine or that was found elsewhere in the court's instructions that the emergency situation must be "...not of his own making and not created by his own negligence,..." These limiting conditions were critical to the jury's proper application of the sudden emergency defense because of the focus of the facts and argument clearly demonstrating that Defendant Baker had no time to take any evasive action. Without the qualifying conditions being stated in the jury interrogatory, the jury could easily mistakenly conclude that because he had no time to react, he was not negligent and therefore was not be liable.

In Asbestos Litigation Pusey Trial Group v. Owens-Corning, 669 A.2d 108 (Del.1995), an action alleging decedents died as a result of lung cancer resulting from exposure to asbestos-containing insulation products, the jury found defendants negligent proximately caused the deaths, awarding compensatory damages but also determined that a substantial percentage of the decedents' lung cancer damages was attributable to cigarette smoking. The Superior Court had reduced the compensatory damage rewards by a percentage the jury attributed to cigarette smoking as per the jury verdict form. On appeal, this Court held that the trial court erred by not submitting the issue of contributory negligence to the jury before allowing it to assess a percentage against damages. Because the attribution of negligence to the plaintiff is a condition precedent to a proportionate reduction in the damages the plaintiff would otherwise receive, this Court reversed and remanded, stating that the deficiencies in the instructions, carried through in the jury verdict form, undermined the jury's ability to perform its duty intelligently in returning the verdict. So it is here.

Where erroneous jury instructions result in erroneous interrogatories to the jury, the jury verdict based upon them will be reversed and the case remanded for a new trial. Culver v. Bennett, 588 A.2d 1094 (Del.1991); see also, B-H, Inc. v. "Industrial America", Inc., 253 A.2d 209, 215 (Del.1969) where instruction and jury interrogatory based thereon were "fatally misleading," a new trial was granted.

ARGUMENT VI

QUESTION PRESENTED

Do not the several errors identified in previous arguments in this brief cumulatively amount to prejudice sufficient to award a new trial? The issues and rulings are preserved by the various references identified in the previous individual arguments.

A. SCOPE OF REVIEW

Without stating whether or not any one error standing alone carries with it sufficient prejudice to require an award of a new trial, this Court may find that cumulatively such errors amount to prejudice and, consequently, a new trial will be awarded. Robelen Piano Co. v. DiFonzo, 169 A.2d 240, 248 (Del. 1961); *see also*, Wright v. State, 405 A.2d 685, 690 (Del. 1979).

B. MERITS

This Court has held both civilly and criminally that where there are several errors in a trial, it will weigh the cumulative effect and impact to determine whether they constitute prejudicial, and therefore reversible error, warranting a new trial. Robelen Piano Co. v. DiFonzo, *supra* at 248; Wright v. State, *supra* at 690. Without conceding that any of Plaintiff's foregoing assignments of error is not sufficiently

prejudicial as to warrant a new trial standing alone, Plaintiff submits that the nature and extent of the errors noted bring this case squarely within this rule.

Plaintiff has raised substantial issues regarding denial of her motion for judgment as a matter of law that Defendants Baker/Bestfield Homes were not entitled to the benefit of the defense of sudden emergency, that she should be granted a new trial because no reasonable jury could have found for Defendants on liability, that the trial court erred in admitting prejudicial evidence that other drivers follow too closely notwithstanding Plaintiff's assertion of negligence *per se* for violating 21 Del. C. §4123(a), that the lower court erred in refusing to instruct on Plaintiff's alternative theories of liability as to all Defendants, further refusing to charge concerning the effect of admissions by parties where virtually all of the evidence against both Defendants came in that form and the right of the jury to draw inferences when that was a major part of Plaintiff's claims, and finally, that the jury interrogatories were out of normal sequence and failed to include limiting language that the defense of sudden emergency was only available if Defendant did not contribute to its creation, thereby undermining the jury's ability to perform its duties intelligently. Surely, even if no one issue standing alone can be identified as requiring reversal, the cumulative effect was such that reversal and remand for new trial are required to avert a miscarriage of justice.

CONCLUSION

Based upon the foregoing arguments and cited authorities, it is clear that prejudicial error was committed in the trial below requiring reversal and remand for a new trial.

Respectfully Submitted,

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware

Pauline F. Daub, Plaintiff,
v.
Samuel G. Daniels, William Baker, and Bestfield Homes, LLC., Defendants.

C.A. No. 11C–03–037 JTV | Submitted: June 10, 2013 | Decided: September 30, 2013

Upon Consideration of Plaintiff's Motion for New Trial. **DENIED**

Attorneys and Law Firms

I. Barry Guerke, Esq., Parkowski, Guerke & Swayze, Dover, Delaware. Attorney for Plaintiff.

Miranda D. Clifton, Esq., Law Office of Cynthia G. Beam, Newark, Delaware. Attorney for Defendant Daniels.

Mary E. Sherlock, Esq., Weber, Gallagher, Simpson, Stapleton, fires & Newby, LLP, Dover, Delaware. Attorney for Defendants Baker and Bestfield Homes.

Opinion

OPINION

VAUGHN, President Judge

***1** The plaintiff, Pauline Daub, moves for a new trial in this personal injury action involving a motor vehicle accident after a jury found that the defendants, Samuel Daniels, William Baker, and Baker's employer, Bestfield Homes, LLC,[1] were not negligent.

FACTS

The basic facts of this case were stated by this Court in its previous order denying Mr. Baker's motion for summary judgement:

> On May 6, 2009 at around 6:30 a.m., Samuel Daniels was driving northbound in the left lane of Route 1 when the tailgate of his pickup truck fell off of his vehicle. Daniels testified that after he pulled his vehicle over to retrieve the tailgate from the road, he saw seven to nine vehicles swerve into the right lane to avoid hitting the tailgate. Baker, who was traveling several vehicles behind Daniels, testified that he was traveling one or two car lengths behind the vehicle in front of him. When that vehicle swerved into the right lane, Baker saw the tailgate lying on the road approximately 30 to 50 feet in front of him. Baker testified that he could not avoid hitting the tailgate, because there was traffic in the right hand lane, and he could not swerve onto the shoulder because he would have lost control of his vehicle. As a result, Baker ran over the tailgate, traveling between 60 and 65 miles per hour. The tailgate flew into the air and struck the plaintiff's windshield and then hit a truck operated by Brad Garthwaite, who were also traveling northbound on Route 1. Daniels and Garthwaite testified that traffic was "light" that morning, and Garthwaite testified that he did not see any other vehicles on the road at the time of the incident other than the four vehicles involved in the accident.[2]

After a trial, the jury ultimately determined that Mr. Baker was not negligent because the accident was the result of a sudden emergency caused by Daniels' fallen tailgate and that Mr. Daniels was not negligent in a manner proximately causing injury to the plaintiff.[3]

The plaintiff now moves for a new trial pursuant to Superior Court Civil Rule 59 as to all of the defendants.

DISCUSSION

Superior Court Civil Rule 59(a) states in pertinent part that "[a] new trial may be granted as to all or any of the parties, and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court."[4] In considering a motion for a new trial, there is a presumption that the jury verdict is correct.[5] The jury's verdict should be set aside only "when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand."[6] As the Delaware Supreme Court noted, "[t]his standard gives recognition to the exclusive province of the jury as established by the Delaware Constitution, while preserving the separate common law function of the motion for a new trial where all of the evidence can be reviewed from the unique viewpoint of the trial judge."[7]

Mr. Daniels

***2** The plaintiff contends that she is entitled to a new trial as to Mr. Daniels for two reasons: first, the jury's verdict was against the great weight of the evidence because Mr. Daniels violated two motor vehicle statutes, and therefore, he was negligent as a matter of law; second, the Court erred when it failed to give the jury a separate instruction that the owner or operator of a vehicle has a common law duty to inspect his or her vehicle before taking it out on the roadway. For the reasons that follow, I find that the plaintiff's claims are without merit.

The plaintiff's first contention is that the jury's verdict was so against the great weight of the evidence that no reasonable jury could render such a verdict and that allowing the verdict to stand would amount to a miscarriage of justice. This is so, the plaintiff contends, because the jury was instructed on two motor vehicle statutes—21 *Del. C.* § 4355(a) and 21 *Del. C.* § 2115—that impose a duty on all drivers not to drive a vehicle that is in such an unsafe condition as to endanger any person. Those statutes, the plaintiff contends, are strict liability laws which Mr. Daniels violated when his tailgate fell from his truck while driving on Route 1. Thus, the plaintiff contends, Mr. Daniels was negligent *per se* and the jury verdict should be set aside because it was against the great weight of the evidence.

I agree that § 4355(a) and § 2115 are strict liability statutes. In *Hoover v. State,*[8] the Delaware Supreme Court answered the certified question of whether 21 *Del. C.* § 4176A, regarding the Operation of a Vehicle Causing Death, was a strict liability law or whether the state of mind provisions of 11 *Del. C.* § 251(b) applied to § 4176A. There, the Court held that § 4176A was a strict liability law because "a violation of section 4176A is an offense defined by a statute (the Motor Vehicle Code) other than the Criminal Code and the General Assembly's intent to impose strict liability for deaths proximately caused by a moving violation of the Motor Vehicle Code 'plainly appears' in both the unambiguous language of the statute and its legislative history."[9] Similarly, because the statutes at issue here unambiguously reflect the intent of the legislature not to otherwise provide a requisite mental state for committing the offenses, Sections 4355(a) and 2115 are strict liability statutes.

While the plaintiff argued a theory that the tail gate had been tied on with bailor twine or some such similar twine or rope, there was evidence to rebut that argument; and apart from the plaintiff's argument, there was little or no evidence to explain how it came to be that the tailgate fell off. Under these circumstances, in the absence of any further evidence explaining the condition of the truck before the tailgate fell off, I am not persuaded that I should disturb the jury's finding that Mr. Daniels conduct did not amount to a violation of the statutes or that such negligence was not a proximate cause of her injuries.

The plaintiff's second contention as it relates to Mr. Daniels is that the Court should have, but did not, give the jury a separate instruction that the owner or operator of a vehicle has a common law duty to inspect his or her vehicle before taking it out on the roadway. The plaintiff cites a Maine case from 1939 and a Pennsylvania case from 1936 to support her proposition that such a common law duty exists.[10] She contends that the failure to give such a warning was in error and "could have confused or mislead [sic] the jury on Defendant Daniels [sic] duties and liability."

***3** Mr. Daniels contends that 21 *Del. C.* § 4355(a) and 21 *Del. C.* § 2115, which were read to the jury, "theoretically encompassed, if not exceeded, the purpose that an additional instruction of the duty to inspect would have accomplished."

I continue to hold the view that there is no common law duty in this state for an owner or operator of a vehicle to conduct an inspection of his or her vehicle before taking it out on the roadway that requires the giving of an instruction on the point. There is no applicable traffic statute. Because there is no applicable motor vehicle statute, I continue to hold the view that the plaintiff was not entitled to a specific instruction on duty to inspect and

that the issue was appropriately covered by the general negligence instruction.

Mr. Baker and Bestfield Homes, LLC

The plaintiff makes four contentions with regard to her motion for new trial as to Mr. Baker.

First, the plaintiff contends that "the evidence preponderates so heavily against the verdict in favor of Defendant Baker on the issue of the defense of sudden emergency a new trial should be ordered to prevent an injustice and as a matter of fairness." As she did in her motion for judgment as a matter of law, the plaintiff contends that Mr. Baker was negligent as a matter of law in following the vehicle in front of him too closely in violation of 21 *Del. C.* § 4123(a) and for failing to maintain proper control of his vehicle. She also contends that "Defendant Baker was not entitled to an instruction on sudden emergency because of the overwhelming evidence supporting that his own prior conduct placed him in the situation of peril." The Court, however, addressed these claims in its order denying the plaintiff's motion for judgment as a matter of law, and it again finds that the plaintiff's contentions are not persuasive for the reasons stated in that order.

Next, the plaintiff contends that the Court's jury instructions were inadequate because the Court used the pattern sudden emergency jury instruction rather than the plaintiff's proposed instruction, which allegedly was "more tailored to the specific facts of the case, and less of an abstract proposition," and identified what conduct the plaintiff believed disentitled Mr. Baker from benefitting from the sudden emergency defense.

Mr. Baker contends that although the plaintiff did submit a proposed instruction with the additional language, she did not object to the Court's use of the pattern sudden emergency jury instruction, and that the pattern jury instruction nonetheless was not improper or erroneous.

The Delaware Supreme Court has held that "jury instructions must give a correct statement of the substance of the law and must be 'reasonably informative and not misleading.' "[11] However, the jury instructions do not need to be perfect, and "a party does not have a right to a particular instruction in a particular form."[12] "In evaluating the propriety of a jury charge, the jury instructions must be viewed as a whole."[13]

The plaintiff's proposed sudden emergency jury instruction included the following language: "Plaintiff asserts that Defendants Baker and Bestfield Homes, LLC are not entitled to the protection of the emergency doctrine because the emergency was of Defendant Baker's own making and created by his own negligence, primarily following too closely, failing to allow an assured clear distance between the front of his vehicle and the vehicle he was following and not maintain sufficient control of his vehicle to guide it safely y objects on the highway."

***4** The Court finds that the pattern sudden emergency jury instruction is an accurate statement of law and that the plaintiff's proposed instruction that included her assertions about why Mr. Baker was not entitled to the sudden emergency defense was not appropriate. "The primary purpose of jury instructions is to define with substantial particularity the factual issues, and clearly to instruct the jury as to the principles of law which they are to apply in deciding the factual issues involved in the case before them."[14] The jury instructions in this case described the basic facts of the case[15] and the contentions of the parties.[16] The instructions then instructed the jury on the law to be applied to the facts, including the sudden emergency defense. I find that it is not necessary to tailor every particular legal instruction with the parties' contentions. The jury, after hearing the evidence and the closing arguments of the parties, was capable of applying the law to the facts in this case. Considering the jury instructions as a whole, the Court finds that the sudden emergency instruction was a correct statement of law and it was not misleading.

The plaintiff's third contention is that the Court erred in not using her verdict form, which asked the jury to determine whether Mr. Baker was negligent in a manner proximately causing the injury to the plaintiff before asking the jury to determine whether he was excused from liability under the sudden emergency defense. The plaintiff contends that making the sudden emergency defense the first question on the jury verdict form "unduly emphasized that defense," and thus, the plaintiff is entitled to a new trial.

Mr. Baker contends that there is no legal basis to order a new trial based on the order of the jury verdict form, and the verdict form given to the jury in this case was logical and sensible. He also contends that the plaintiff failed to offer her own proposed verdict form and failed to renew her objection after the jury retired to consider its verdict, and thus, waived her right to challenge the order of the jury verdict form at this time.

I find that the order of the jury verdict form in this case

did not unduly emphasize the sudden emergency defense and was not otherwise misleading or confusing. The jury was presented the evidence and arguments of the parties at trial and was given legally accurate jury instructions and interrogatories. The jury was free to determine that the accident did not result from a sudden emergency, but rather, was caused by the negligence of Mr. Baker. To the contrary, however, the jury clearly determined that Mr. Baker was not negligent because the accident resulted from a sudden emergency and he acted reasonably under the circumstances. Therefore, I find that the plaintiff's claim is unpersuasive.

Lastly, the plaintiff contends that it was in error for the Court not to instruct the jury on the "assured clear distance rule." Under that rule, the operator of a motor vehicle is required to drive at a speed that would allow a stop within the assured clear distance ahead.[17] The assured clear distance rule, however, "has no application where an emergency has been created."[18] As mentioned, the jury clearly indicated that the "accident was the result of a sudden emergency as to Defendant Baker."[19] Accordingly, I find that all of the plaintiff's contentions are persuasive.

CONCLUSION

For the foregoing reasons, I find that the plaintiff's motion for new trial as to all defendants is ***denied***.

IT IS SO ORDERED.

Footnotes

1 I will refer to Mr. Baker and Bestfield Homes, LLC collectively as "Mr. Baker" because Bestfield Home's liability was vicarious through its employee, William Baker

2 *Daub v. Daniels,* 2012 WL 6846320, at *1 (Del.Super.Dec. 26, 2012) (footnote omitted).

3 *See* Jury Verdict Sheet.

4 Super. Ct. Civ. R. 59(a).

5 *Mills v. Telenczak,* 345 A.2d 424, 426 (Del.1975).

6 *Burgos v. Hickok,* 695 A.2d 1141, 1145 (Del.1997).

7 *Id.*

8 958 A.2d 816 (Del.2008).

9 *Id.* at 820.

10 *Dostie v. Lewiston Crushed Stone Co.,* 8 A.2d 393 (Me.1939); Delair v. McAdoo, 188 A. 181 (Pa.1936).

11 *Corbitt v. Tatagari,* 804 A.2d 105 7, 1062 (Del.2002) (quoting *Cabrera v. State,* 747 A.2d 543, 544 (Del.2000)).

12 *Id.*

13 *Culver v. Bennett,* 588 A.2d 1094, 1096 (Del.1991).

14 *Zimmerman v. State,* 565 A.2d 887, 890 (Del.1989).

15 *See* Jury Instructions, at 5.

16 *Id.* at 6–9.

17 *Staker v. McSweeney,* 185 A.2d 892, 893 (Del.Super.1962).

18 *Id.* at 894 (citing *Panaro v. Cullen,* 185 A.2d 889 (Del.1962)).

19 Jury Verdict Sheet, Question 1. *See also Fernandez v. Davis,* 1991 WL 113607, at *3 (Del.Super. June 4, 1991), *aff'd,* 608 A.2d 726 (Del.1991) ("It is clear from the verdict that the jury believed the plaintiff was so obscured by darkness, bad weather and his dark clothing to have been invisible to a motorist operating his vehicle with due care.").

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware

Pauline F. Daub, Plaintiff,
v.
Samuel G. Daniels, William Baker, and Bestfield Homes, LLC., Defendants.

C.A. No. 11C–03–037 JTV | Submitted: June 10, 2013 | Decided: September 30, 2013

Upon Consideration of Plaintiff's Motion for Judgment as a Matter of Law. **DENIED**

Attorneys and Law Firms

I. Barry Guerke, Esq., Parkowski, Guerke & Swayze, Dover, Delaware. Attorney for Plaintiff.

Miranda D. Clifton, Esq., Law Office of Cynthia G. Beam, Newark, Delaware. Attorney for Defendant Daniels.

Mary E. Sherlock, Esq., Weber, Gallagher, Simpson, Stapleton, fires & Newby, LLP, Dover, Delaware. Attorney for Defendants Baker and Bestfield Homes.

Opinion

ORDER

VAUGHN, President Judge

***1** Upon consideration of the plaintiff's Motion for Judgment as a Matter of Law, the defendants' opposition, and the record of the case, it appears that:

1. The plaintiff, Pauline Daub, renews her Motion for Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50(b) against defendants William Baker and Baker's employer, Bestfield Homes, LLC,[1] after a jury found that Mr. Baker was not negligent in this personal injury action involving a motor vehicle accident because the accident was the result of a sudden emergency.

2. The basic facts of this case were stated by this Court in its previous order denying Mr. Baker's motion for summary judgement:

> On May 6, 2009 at around 6:30 a.m., Samuel Daniels was driving northbound in the left lane of Route 1 when the tailgate of his pickup truck fell off of his vehicle. Daniels testified that after he pulled his vehicle over to retrieve the tailgate from the road, he saw seven to nine vehicles swerve into the right lane to avoid hitting the tailgate. Baker, who was traveling several vehicles behind Daniels, testified that he was traveling one or two car lengths behind the vehicle in front of him. When that vehicle swerved into the right lane, Baker saw the tailgate lying on the road approximately 30 to 50 feet in front of him. Baker testified that he could not avoid hitting the tailgate, because there was traffic in the right hand lane, and he could not swerve onto the shoulder because he would have lost control of his vehicle. As a result, Baker ran over the tailgate, traveling between 60 and 65 miles per hour. The tailgate flew into the air and struck the plaintiff's windshield and then hit a truck operated by Brad Garthwaite, who were also traveling northbound on Route 1. Daniels and Garthwaite testified that traffic was "light" that morning, and Garthwaite testified that he did not see any other vehicles on the road at the time of the incident other than the four vehicles involved in the accident.[2]

3. At the close of trial, Mr. Baker requested that the Court give a sudden emergency jury instruction due to Mr. Baker's sudden encounter of Mr. Daniels' fallen tailgate while driving on Route 1. That pattern jury instruction, which was derived from the Delaware Supreme Court's decisions in *Dadds v. Pennsylvania R. Co.*[3] and *Panaro v. Cullen,*[4] stated:

> When a person is involved in an emergency situation not of his own making and not created by his own

negligence, that person is entitled to act as a reasonably prudent person would under similar circumstances.

Therefore, if you find that Defendant Baker was operating his vehicle in a reasonably prudent manner and was faced with a sudden emergency situation, then I instruct you that Defendant Baker was not required to act as a reasonable person who had sufficient time and opportunity to consider what the best course of action would be, but instead that he was required only to react as a reasonable person would under the circumstances.

*2 The burden of proof as to this defense is upon the defendant.

4. Ultimately, the jury determined that Mr. Baker was not negligent because the accident was in fact the result of a sudden emergency caused by Daniels' fallen tailgate.[5]

5. The plaintiff now renews her Motion for Judgment as a Matter of Law against Mr. Baker, contending that Mr. Baker was not entitled to the sudden emergency jury instruction because he created the emergency and was negligent as a matter of law in following the vehicle in front of him too closely in violation of 21 *Del. C.* § 4123(a) and for "failing to maintain proper control of his vehicle."

6. To support her claim, the plaintiff points to Mr. Baker's testimony that he was driving between 60 and 65 miles per hour on Route 1; he was traveling approximately one or two car lengths behind the vehicle in front of him; and he saw Mr. Daniel's tailgate for the first time lying on the road approximately 30 to 50 feet ahead of him when the vehicle in front of him swerved into the right lane to avoid hitting the tailgate. In addition, the plaintiff contends that "Baker acknowledged the 'rule of thumb' that a driver should leave one car length for each 10 mph of speed when following another vehicle, a rule he admitted he was not in compliance with at the time." Because Mr. Baker created the emergency and negligently operated his vehicle as a matter of law before he saw Mr. Daniels' fallen tailgate, the plaintiff contends, Mr. Baker could not avail himself of the sudden emergency jury instruction.

7. In response, Mr. Baker contends that the question of whether he was following the vehicle in front of him too closely in violation of 21 *Del. C.* § 4123(a) was a question of fact for the jury to decide. Because a reasonable jury could find that Mr. Baker was traveling at a "reasonable and prudent distance" behind the vehicle in front of him, Mr. Baker contends, the jury verdict should not be set aside.

8. Superior Court Civil Rule 50(b) provides a mechanism that allows the non-prevailing party to have the jury verdict set aside and to secure a judgment in the plaintiff's favor.[6] When deciding a motion for judgment as a matter of law, the Court does not weigh the evidence or pass on the credibility of the witnesses; but rather, it views the evidence in the light most favorable to the non-moving party and, drawing all reasonable inferences therefrom, determines if a verdict may be found for the party having the burden.[7] In order to find for the plaintiff in this case, the Court must find that there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-movant.[8] Thus, "the factual findings of a jury will not be disturbed if there is any competent evidence upon which the verdict could reasonably be based."[9]

*3 9. Viewing the facts in the light most favorable to the non-moving party, the Court cannot find that Mr. Baker caused the emergency or was negligent as a matter of law. As mentioned, the evidence presented at trial shows that Mr. Baker was driving between 60 and 65 miles per hour and he was traveling approximately one or two car lengths behind the vehicle in front of him. When he saw that vehicle swerve into the right lane, Mr. Baker saw the tailgate lying on the road approximately 30 to 50 feet ahead of him before he ran over the tailgate.

10. Delaware's Following Too Closely statute states in pertinent part: "[t]he driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."[10] In this Court's previous order denying Mr. Baker's motion for summary judgment, I stated that "[g]iven the fact that the Following Too Closely statute calls for a factual determination of what constitutes a 'reasonable and prudent' distance, considering the speed of other vehicles, traffic conditions, and the condition of the highway, granting summary judgment would be inappropriate under these facts." For that same reason, I cannot say as a matter of law that Mr. Baker was following the vehicle in front of him too closely. Moreover, the fact that Mr. Baker agreed that he did not follow the "rule of thumb" that a driver should leave one car length behind the vehicle in front of him for each 10 miles per hour that he is traveling is not determinative, because that concept is not a *legal* obligation, but rather, it is "a general principle regarded as roughly correct but not intended to be scientifically [or legally] accurate."[11]

11. The plaintiff also contends that Mr. Baker "fail[ed] to maintain proper control of his vehicle," and alleges that Mr. Baker was negligent as a matter of law in not guiding his vehicle around the tailgate. The plaintiff relies on a

1939 case, *State v. Elliott,*[12] which involved a jury instruction in an involuntary manslaughter case to suggest that there is a stand alone common law duty to maintain proper control of one's vehicle. I find that there is no such stand alone duty; rather, the defendant could only have been found liable under a simple common law negligence theory for failing to act as a reasonably prudent person would under the circumstances or under a negligence *per se* theory for violating certain traffic violations under Title 21 of the Delaware Code. That said, I find that there was sufficient evidence produced at trial to find that Mr. Baker was not negligent as a matter of law for failing to avoid the tailgate. Mr. Baker testified at trial that he could not have avoided the tailgate by moving into the right hand lane because there were cars in that lane. He also testified that he could not have safely swerved into the median because it was not improved and he would have lost control of his vehicle. Accordingly, I find that Mr. Baker was entitled to the sudden emergency jury instruction and that there was a sufficient evidentiary basis for a reasonable jury to find that he was not negligent under the circumstances.

12. Therefore, the plaintiff's Motion for Judgement as a Matter of Law is ***denied.***

IT IS SO ORDERED.

Footnotes

1 I will refer to both defendants collectively as "Mr. Baker" because Bestfield Home's liability was vicarious through its employee, William Baker.

2 *Daub v. Daniels,* 2012 WL 6846320, at *1 (Del.Super.Dec. 26, 2012) (footnote omitted).

3 251 A.2d 559 (Del.1969).

4 185 A.2d 889 (Del.1962).

5 *See* Jury Verdict Sheet.

6 *Burgos v. Hickok,* 695 A.2d 1141, 1144 (Del.1997).

7 *Mumford v. Paris,* 2003 WL 231611, at *2 (Del.Super.Jan. 31, 2003).

8 *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 245 (Del.2001).

9 *Delaware Elec. Co-op., Inc. v. Pitts,* 633 A.2d 369, 1993 WL 445474, at *1 (Del. Oct. 22, 1993).

10 21 *Del. C.* § 4123(a).

11 Merriam–Webster Online Dictionary, defining "rule of thumb," *http://www.merriam-webster.com/dictionary/ruleöfthumb.*

8 8 A.2d 873 (Del. O. & T.1939).

EFiled: Jan 24 2014 03:37PM EST
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Case No. K11C-03-037 JTV

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PAULINE F. DAUB,	)	
	)	C.A. No. K11C-03-037 JTV
Plaintiff,	)	
	)	
v.	)	
	)	
SAMUEL G. DANIELS, WILLIAM BAKER, and BESTFIELD HOMES, LLC.,	)	
	)	
	)	
Defendants.	)	

Submitted: November 13, 2013
Decided: January 24, 2014

I. Barry Guerke, Esq., Parkowski, Guerke & Swayze, Dover, Delaware. Attorney for Plaintiff.

Miranda D. Clifton, Esq., Law Office of Cynthia G. Beam, Newark, Delaware. Attorney for Defendant Daniels.

Mary E. Sherlock, Esq., Weber, Gallagher, Simpson, Stapleton, fires & Newby, LLP, Dover, Delaware. Attorney for Defendants Baker and Bestfield Homes.

Upon Consideration of Defendant Daniels' Motion for Costs
GRANTED in Part
DENIED in Part

VAUGHN, President Judge

Daub v. Daniels, et al.
C.A. No. K11C-03-037
January 24, 2014

ORDER

Upon consideration of defendant Samuel Daniels' Motion for Costs, plaintiff Pauline Daub's opposition thereto, and the record of the case, it appears that:

1. Plaintiff Pauline Daub filed suit against defendants, Samuel Daniels, William Baker, and Baker's employer, Bestfield Homes, LLC. (collectively, "Defendants"), seeking damages for personal injuries suffered in an auto accident. On June 24, 2011, defendant Daniels tendered a Rule 68 offer of judgment to the plaintiff in the amount of $15,000. The plaintiff did not accept this offer. The case proceeded to a jury trial on May 20, 2013, and the jury rendered verdicts in favor of the Defendants.

2. Defendant Daniels now seeks reimbursement from the plaintiff for the following costs pursuant to Superior Court Civil Rules 54(d) and 68: $3,300 for the video deposition of Robert Keehn, M.D.; $1,150 for a no show fee from David Stephen, M.D., P.A.; and $324.50 in filing fees.

3. The plaintiff contends that this Court should exercise its discretion and limit the amount of costs awarded to defendant Daniels because the plaintiff was totally innocent and blameless in this accident; the plaintiff deserved a full explanation of the accident; the plaintiff incurred and will continue to incur significant medical expenses for the injuries that she sustained in the accident; the plaintiff's financial hardship has impelled her to file bankruptcy; and the Court should take into account the disparate financial positions between the plaintiff and

the entity that ultimately paid for these costs–Nationwide Insurance.

4. As to the specific costs, the plaintiff contends that Dr. Keehn's $3,300 video deposition fee is too high because the trial deposition lasted only one hour and was inconsistent with his sworn testimony about his charges; that Dr. Keehn's testimony was not particularly complicated or technical; and payment for Dr. Keehn's testimony is not authorized because the bill was not from him but was from IMED, which is a Maryland clearinghouse for IME doctors. The plaintiff contends that Dr. Stephens' $1,150 no show fee should be denied because it does not fall within the category of trial costs; that the defendant filed a notice of examination on April 10, 2012 for an IME by Dr. Stephens to take place nine days later; that plaintiff's counsel emailed defense counsel indicating that although a court order under Rule 35 was needed for an IME like this to take place, plaintiff's counsel would cooperate if defense counsel provided certain information; and that defense counsel took no further action to pursue an IME by Dr. Stephens. Lastly, the plaintiff contends that it would be unfair to force the plaintiff to pay the $324.50 in filing fees because the supporting documentation is an internal computer printout from defense counsel as opposed to the actual itemized billing from Lexis/Nexis.

5. Pursuant to Rule 54(d), "costs shall be allowed as of course to the prevailing party upon application to the Court within (10) days of the entry of final judgment unless the Court otherwise directs."[1] Additionally, once a defendant makes

[1] Super. Ct. Civ. R. 54(d).

an offer of judgment in accordance with Rule 68, "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."[2] Determining when costs are awarded and when they are not is a matter of judicial discretion.[3]

6. The court frequently utilizes the advice of the Medico-Legal Affairs Committee of the Medical Society of Delaware when determining the appropriate amount of fees to award for medical experts.[4] The current reasonable fee for a deposition lasting up to two hours is $1,371 - $2,741.[5] The deposition of Dr. Keehn was less than two hours. I award defendant Daniels $1,000 for the video deposition of Dr. Keehn.

7. The request for a Stephens' no-show fee is denied. The procedure for obtaining a physical examination of the plaintiff was not followed.

8. While the Lexis/Nexis filing fees are difficult to read, I am satisfied that they are all associated with this case. The requested amount of $324.50 will be

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[2] Super. Ct. Civ. R. 68.

[3] *Donovan v. Delaware Water and Air Res. Comm'n,* 358 A.2d 717, 723-24 (Del. 1976).

[4] *Noel v. Rodriguez,* 2013 WL 6917135, at *3 (Del. Super. Nov. 26, 2013) (citing *Bond v. Yi,* 2006 WL 2329364, at *3 (Del. Super. Aug. 10, 2006)).

[5] There has been a negligible decrease in the consumer price index from September 2013 to December 2013. *Compare* Bureau of Labor Statistics, U.S. Dep't of Labor, http://www.bls.gov/news.release/archives/cpi_10302013.htm (Medical Care, September 2013 Unadjusted Index: 457.458) *with* Bureau of Labor Statistics, U.S. Dep't of Labor, http://www.bls.gov/news.release/cpi.t01.htm (Medical Care, December 2013 Unadjusted Index: 457.296).

allowed.

9. Therefore, recovery of costs in the amount of $1,324.50 is awarded.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAULINE F. DAUB, Plaintiff-Below, Appellant, v. SAMUEL G. DANIELS, WILLIAM BAKER and BESTFIELD HOMES, LLC, Defendants-Below, Appellees.	)	No. 90, 2014 Court Below: Superior Court of the State of Delaware in and for Kent County C.A. No.K11C-03-037 JTV

CERTIFICATE OF SERVICE

I certify that on July 3, 2014, I caused a copy of the foregoing Opening Brief of Plaintiff-Below Appellant and Appendix thereto to be served on the following counsel via Lexis Nexis File & Serve:

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