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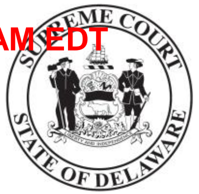

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

REPLY BRIEF OF PLAINTIFF-BELOW, APPELLANT

I. BARRY GUERKE, ESQUIRE, BAR I.D. 360
PARKOWSKI, GUERKE & SWAYZE, P.A.
116 W. Water Street
P.O. Box 598
Dover, DE 19903-0598
(302) 678-3262
Attorneys for Plaintiff-Below/Appellant

DATED: September 26, 2014

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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. MERITS

Defendant Baker's claims that he never lost control of his work van are unsupportable in law and fact because of the definition of control found in the Delaware pattern jury instruction drawn from earlier case law:

> "A driver must keep a vehicle under proper control. This means that the vehicle must be operated at such a speed…that the driver can…steer safely by objects…on the highway…" A-175; State v. Elliot, 8 A.2d 873,876 (Del.O.&T.1939) ("control means…to guide it safely by objects on the highway…")

Defendant Baker's operation was such that he could not guide it by the tailgate on the highway because of his speed and his closeness to the blue car he was following when the tailgate was revealed. Hence, by definition, lack of control.

Defendant Baker contends unabashedly that Plaintiff never specifically identified what evasive action Defendant Baker was supposed to take, when, in truth, Plaintiff introduced undisputed testimony that between 7-9 vehicles ahead of the Baker work van were able to swerve to the right to avoid striking the tailgate in the roadway. The evasive action to be taken by Defendant Baker was clearly moving to the right "to steer safely by objects…on the highway…", as these other vehicles did.

Simply because Defendant Baker says there was "undisputed" evidence at trial there was a steady stream of traffic in the right lane does not make it true or accurate. If that were so, how did the 7-9 vehicles ahead, including the blue car he was following at a distance of only 1-2 car lengths at 60-65 mph, safely swerve into the right lane to avoid contact with the tailgate? Defendant Baker's own testimony also belies that statement because he stated as soon as he struck it, he "…shot right over into the right shoulder." A-125. This could not have been done if there had truly been traffic in the right lane.

Counsel for Defendant Baker attempts to impeach in a self-serving way his admissions about speed and distance by saying the "exact distance" was never put into evidence and "neither he nor anyone else ever measured" it. His statements of speed and distance constitute admissions against interest under D.R.E. 804(b)3. The speed over distance calculations submitted to the jury based on Defendant

Baker's own sworn admissions cannot be casually dismissed out of hand as merely argument of counsel. These are mathematical computations that any jury could perform on paper or on their cell phone calculator. Using his own admissions at trial, Defendant Baker left himself only .34 seconds to observe and react following at a distance of 30 feet at 60 mph and only .31 seconds following at a distance of 65 mph at 30 feet. Even giving him the benefit of his own larger estimate of 50 feet behind, he still only allowed himself considerably less than 1 second to observe and react when the tailgate was revealed - .57 seconds at 60 mph and .52 seconds at 65 mph.

These facts can lead to but one conclusion that he was negligent *per se* for following too closely and that this negligence contributed to the creation of the putative emergency, thereby disqualifying him from its insulating application. The cases from other jurisdictions cited in Plaintiff's opening brief stand for the proposition that even without specific criteria in the following too closely statute[1], there are circumstances where following too closely is so clear as to support a finding thereof as a matter of law either by summary judgment, directed verdict, JNOV, rendering inapplicable the sudden emergency doctrine because the actor contributed to its creation.

[1] Such as the posted speed limit statute or statute requiring one must park within 12 inches from the curb, etc.

Defendant Baker tries to make much out of the transcript Q & A regarding Defendant Baker's admission that he was aware of the following too closely rule of thumb. Everyone in that courtroom knew what the rule of thumb was, the judge, counsel, the jury and especially Defendant Baker who acknowledged he was aware of it but when asked if he followed it on the day in question responded "Apparently not." A-121. The Plaintiff had been granted special permission by the lower court during the conference dealing with the various motions *in limine* to refer to the rule of thumb because the court knew everyone was familiar with it. AR-6 – 7.[2]

Although Defendant Baker did not in so many words admit he was following too closely, his statements of speed and distance clearly do. When a driver is traveling at 60-65 mph at a distance of only 30-50 feet leaving approximately ½ second or less to observe or react to an object revealed ahead when the car he is following swerves to the right, is not the following driver following too closely in violation of the statute, thereby committing negligence *per se*? Positing the question leads inexorably to the affirmative answer.

[2] The trial court declined to allow Plaintiff to examine Defendant Baker about the "three second rule" used to determine if a person is following too closely as found in the Delaware DMV Drivers Manual. AR-3 – 5. Counsel for Defendant Baker even acknowledged the "rule of thumb" for following too closely was part of her driver education class. AR-6

If the facts are changed only slightly, it is easily seen that the emergency was not that the tailgate was on the highway but was created by Defendant Baker's speed and short following distance when it was revealed to him. If we assume a pothole that may have taken months or longer to create, being revealed on the road ahead of him instead of the tailgate, it is quickly realized that the focus on the tailgate as the emergency is a mere red herring by Defendant Baker.

The cases cited by Defendant Baker are distinguishable. In Miglino v. Adkins, 1991 WL 269924 (Del.Super.) the testimony of defendant Adkins was entirely exculpatory and uncontradicted that when he rounded the curve within the speed limit he was confronted by the surprise of vehicles stopped in the left hand lane of the busy interstate and could not safely change lanes to avoid collide with plaintiff's vehicle. Unlike here, there was no evidence that Adkins was following too closely or was otherwise guilty of negligence *per se,* therefore the emergency doctrine was applicable.

Similarly, in Lloyd v. Great Coast Express, Inc., 2001 WL 880090 (Del.Super.) the collision between plaintiff and defendant was the last event in a chain that began when another defendant suddenly attempted to cross several lanes of I-95 and I-295, collided with a tractor trailer causing it to slam on its brakes, skid, jackknife and strike a light pole which fell across two lanes of I-295. Defendant traveling behind plaintiff, observed these events, saw plaintiff brake and

attempted to avoid hitting plaintiff's vehicle by moving to the right and braking but as he did so, clipped the rear of plaintiff's vehicle with his left front. Unlike the case *sub judice*, the testimony there as to the distance between the vehicles was unclear. Under those facts, the court said there was little question that the sudden multiple lane change was the proximate cause of the accident resulting in the sudden emergency being the collision with the vehicle which in turn caused the light pole to break and fall on I-295. Defendant's conduct played no role on the creation of the sudden emergency; not so here.

This Court reviews *de novo* the trial court's decision to deny a post-trial motion for judgment as a matter of law. If under any reasonable view of the evidence the jury could not have found for Defendants Baker/Bestfield, the lower court's ruling must be reversed. Accordingly, this Court should find denial of the Plaintiff's renewed motion for judgment as a matter of law as to Defendants Baker/Bestfield on the issue of sudden emergency doctrine reversible error, as Defendant Baker was negligent as a matter of law by following too closely and failing to maintain his vehicle under proper control creating 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. MERITS

Our system of justice mirrors our system of government: At various stages in the process there are opportunities for checks and balances to assure that in the end the proper and just result is achieved. In the civil court system these exist, for example, in the form of the trial court being able to foreclose a jury error by entering summary judgment or directing a verdict before or after the jury decides and finally, through the appellate process where mistakes by the trial judge and jury are correctable resulting in a remand for a new trial. Plaintiff respectfully submits that here both the jury and the lower court got it wrong. The facts and inferences to be drawn from those facts overwhelmingly point here to the conclusion that both Defendants were negligent causally contributing to Plaintiff's injuries: (1) Defendant Baker's clear admissions of speed and distance supporting following too closely, lack of control and driving too fast for conditions and (2) for

Defendant Daniels, the fact that tailgates don't just fall off pickups in the absence of driving an unsafe vehicle in violation of the mandates of two separate statutes or in the absence of a breach of a common law duty to exercise reasonable care in the inspection of a motor vehicle to the extent that one is charged with notice of everything that such an inspection would disclose. That these two defendants presented at the jury trial as likeable, grandfatherly-type gentlemen should not entitle them to defense verdicts nor be proper and sufficient grounds for the jury to excuse or ignore their negligence. Conversely, a plaintiff should not lose a jury trial because she may not be as articulate or presentable as a broadcaster on the evening news. A jury trial is not a beauty contest. Serious consequences arise from jury verdicts, real life consequences. Outside considerations such as that fair compensation for damages might be high where the Defendants in court appear to be men of modest means should not militate toward a no liability verdict to protect them. These are not matters that are ordinarily verifiable after a jury verdict but when the verdict returned does not square with the facts or is otherwise awry or amiss, that they influenced the jury verdict cannot be excluded, requiring greater scrutiny of the asserted errors to assure justice is rightly served.

Motions for a judgment as a matter of law and a new trial present the lower court, as well as this Court on appeal, opportunities to right a jury's incorrect result. In the absence of a constitutional proscription against double jeopardy on

the civil side, jury nullifications should not be allowed to stand. Miscarriages of justice are correctable. This is a case where this Court should exercise its reviewing authority to correct a manifest injustice.

Some jurists at both the trial and appellate level adhere to an unspoken philosophy that if a jury trial proceeds, the judge will not actively intervene to correct a manifest injustice. This approach holds that where the jury speaks, the result itself is, by definition, justice. This philosophy is too inflexible, however, and undermines the judicial system's carefully crafted set of checks and balances. See e.g., Hugg v. Torres, 1993 WL 189492 (Del.Super.) rev. Hugg v. Torres, 637 A.2d 827 (Del.1993) (TABLE), 1993 WL 557946 (Del.). The verdict in this case leaves one scratching one's head in disbelief. The facts were there; the inferences were there; the supporting law was there but the result is entirely incongruent.

Here, the evidence, including inferences, truly preponderated so heavily against the jury verdict of no liability that a reversal and remand are necessary in order to avoid a manifest injustice. More than sufficient facts and legal grounds have been asserted to support such action.

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. MERITS

Defendants Baker/Bestfield completely misapprehend the nature and effect of application of the principles of negligence *per se*. Where negligence *per se* is involved, there is no need to reference what a reasonable man would have done under similar circumstances because the standard of conduct is taken over by the court from that fixed by the legislature and jurors have no authority to relax it. Martin v. Herzog, 126 NE 814 (N.Y.1920). The essence of Justice Cardozo's famous holding is distilled in the following quote at 816:

> "Jurors have no dispensing power, by which they may relax the duty that one traveler on the highway owes under the statute to another. It is error to tell them that they have."

This is a long standing principle drawn from the common law that is so widely accepted as to become hornbook or black letter law in and of itself. See, e.g., Keeton, et.al., Prosser and Keeton on the Law of Torts, §36 at 228 (5th Ed. 1984); 57A Am. Jur. 2d, Negligence §686 at 670 (2008) (where negligence *per se* applies, it is error for the court to permit the jury to take into account the usual reasonable-person standard.) Thus, in Casey v. Russell, 188 Cal. Rptr. 18,21 (Cal.App.1982) it was asserted on appeal that even though defendants failed to obey the applicable motor vehicle statute, if they were otherwise behaving in a reasonable manner, the violation of a statute did not constitute negligence. "In other words, the jury could have found that generally law-abiding people of ordinary prudence do not sound their horns on blind curves, or would have driven in the middle of the road (***i.e., nobody observes the statute***) and that defendants were therefore not negligent." *Id.* at 21 (emphasis supplied). In rejecting this proposition, the court said this would simply be an application of the ordinary reasonable person standard of negligence without consideration of the effect of the statute and its violation constituting negligence *per se*. It was held that where the statute is adopted as the standard of care, that is, negligence *per se* applies, it is error for the court to permit the jury to apply the usual reasonable person standard. *Id.* In common law tort cases, so long as reasonable minds can differ, the responsibility for determining whether a person's conduct is negligent is vested with the jury. But when the legislature has

addressed the issue of what conduct is appropriate, the judgment of the legislature, as the authoritative representative of the community, takes precedence over the views of any one jury. In Restatement (Third) of Torts (discussion draft April 5, 1999) dealing with §12, Statutory Violations as Negligence *Per Se*, under *Comment c. Rationale*, it is said:

> "'Negligence per se' is the strong majority rule among American jurisdictions, which have accepted Justice Cardozo's famous holding in Martin v. Herzog, 126 N.E. 814 (N.Y.1920). Among the majority are...Sammons v. Ridgeway, 293 A.2d 547 (Del.1972);..."

To be sure, an easy illustration is where a motorist is traveling at 75 mph on State Route 1 in Delaware where the speed limit is 65 mph. Speeding under those circumstances is negligence *per se* because it violates the statute permitting the posted speed limit. Counsel may not ask the speeder, "How did your speed compare to other motorists?" to excuse his own violation of the statute. What other motorists do is irrelevant. Jurors must apply the standard of the statute as negligence *per se*. To give them the opportunity to apply a reasonable man standard negates the effect of negligence *per se* and defeats the purpose of the doctrine.

What the trial court did here was allow the jury to apply the standard of what others were doing in the vicinity of where the incident occurred, as opposed to limiting them to applying the statutory standard. It does not matter, for example,

that the standard of the statute is not something that is precisely defined or measurable like a speed limit. It is plain, prejudicial error to permit the jury to apply the reasonable man standard by comparing the conduct of the actor with conduct of other persons on the highway at the same time where the standard is negligence *per se.* Here, not only was the question repeated, "How did your distance compare with the other vehicles around you on the highway that morning?" to which Defendant Baker replied, "I believe it was the same," but the prejudice was compounded when it was argued in defense counsel's summation that Defendant Baker 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 around him that morning. "In applying a negligence *per se* standard, the fact finder need determine only whether the defendant committed the act and if such conduct caused the plaintiff's damages. The jury is precluded from finding that the defendant may escape liability even though he acted reasonably under the circumstances," Toll Bros., Inc. v. Considine, 706 A.2d 493,498 (Del.1998) relying on Martin v. Herzog, *supra*; cited with approval in Wilmington Country Club v. Cowee, 747 A.2d 1087,1095 n.27 (Del.2000).

There are a number of questions that every personal injury trial attorney, regardless of which side of the "v" he or she is on, knows can never be asked at trial. On the plaintiff's side, counsel may not ask a question that elicits a response

indicating the defendant has insurance coverage. Blatz v. Wilson, 170 A. 808,810-811 (Del.Super.1933) (in the absence of an admonition to disregard the evidence, new trial granted). On the defense side, counsel may not inquire whether the seatbelt of the injured plaintiff was being used. Lipscomb v. Diamiani, 226 A.2d 914 (Del.Super.1967) (seatbelt usage not a permissible affirmative defense). Nor may defense counsel refer in opening or closing to a collision as a "fender-bender" or offer photographs showing minimal vehicular damage. Davis v. Maute, 770 A.2d 36 (Del.2001) (in absence of immediate limiting instruction, new trial was warranted). Where there is an assertion of negligence *per se*, defense counsel asking defendant whether other drivers in the vicinity were operating their vehicles in the same manner falls into this category. Since there was no such limiting instruction here because the trial court actually ***overruled*** Plaintiff's objection, a reversal and remand are appropriate.

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. MERITS

Incredibly, Defendants Baker/Bestfield argue that speed of his work van is not relevant and not a factor in the incident. In truth, speed is an essential element of the liability equation here. Because Defendant Baker was within the speed limit does not end the inquiry because without input on speed, we cannot calculate how many feet per second Defendant Baker was traveling or the amount of time he had to observe and react to the tailgate when revealed. For instance, if he was traveling between 10-20 miles per hour, he would have been in compliance with the one car length per 10 miles per hour rule of thumb. Similarly, if he had been traveling at 30 miles per hour, he would have been covering 44 feet per second and still would have had only .68 (30/44) of a second to observe and react to the tailgate appearing before him at a distance of 30 feet behind.

Defendant Baker chose to follow the blue car at a distance of 1-2 car lengths. That was the circumstance that required him to control his speed, i.e. slow down,

as required by 21 Del.C. §4168(a). The distance he chose to follow the blue car created the special hazard which required him to drive at an appropriate (reduced) speed as commanded by 21 Del.C. §4168(b). No doubt had he complied with either of these statutory mandates, he would have had sufficient time to swerve to the right, or take other evasive action to avoid striking the tailgate in the roadway, as did the other 7-9 vehicles in front of him according to undisputed testimony. In the same sense, this renders Hudson v. Old Guard Ins., Co., 3 A.3d 246 (Del.2010) distinguishable. The contention in that case by plaintiff was that the defendant should have slowed down upon seeing the children off on the side of the roadway with minor plaintiff riding a bicycle. This Court simply said that the motorist need not slow down in anticipation of danger that has not yet become apparent. The problem with Defendant Baker's conduct here is that the danger was, in fact, evident as the risk of following a vehicle in front at a distance of only 1-2 car lengths at a speed of 60-65 mph is a circumstance creating a special hazard requiring an adjustment of speed per statute, if not an obvious and outright recipe for disaster.

Defendants Baker/Bestfield's focus on the lack of testimony from an expert[3], the police officer[4], Plaintiff or some other witness[5] that Defendant Baker's speed was unsafe is wholly misplaced. No such testimony is necessary especially where by Defendant Baker's own admissions the jury is provided more than sufficient information to infer it was very unsafe. When the immutable laws of physics are applied to his admissions of speed and distance only one conclusion is possible, that he was traveling too fast for conditions thereby creating the hazard which ultimately led to the incident and Plaintiff's injuries. This is yet another reason why the lower court should have given the jury an instruction including the effect of admissions and the jury's right to draw inferences from the facts, as was noted by the trial judge in his ruling denying Defendant's directed verdict.

Defendants Baker/Bestfield claim the assured clear distance rule is inapplicable because they assert the emergency doctrine. As applied in Staker v.

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[3] It has long been held under Delaware law that where an issue is a matter of common knowledge and experience and expert testimony will not assist them in understanding the facts or evidence, expert testimony is unnecessary. See, e.g., Ward v. Shoney's, Inc., 817 A.2d 799,803 (Del.2003); Delmarva Power & Light v. Stout, 380 A.2d 1365,1368 (Del.1977).

[4] Such police officer testimony would constitute an inadmissible lay opinion. Alexander v. Cahill, 829 A.2d 117,121 (Del.2003).

[5] Inadmissible lay opinion testimony under D.R.E. 701.

McSweeney, 185 A.2d 892 (Del.Super.1962), the assured clear distance rule requires that when the view of a driver of an automobile is obstructed for any reason the speed should be so reduced that the car can be stopped or evasive action taken within the distance the driver can see ahead. Notwithstanding some critical comments about the doctrine, Judge Wright said "...where application of the rule in the proper case serves justice well, it would seem just as wrong not to invoke it as to do so in a circumstance where the result is injustice." *Id.* at 894. Although the defendant in Staker did not assert the emergency doctrine, to hold that the assured clear distance rule does not apply here simply because it is asserted albeit with an improper foundation, because in both fact patterns the drivers' speeds precluded them from taking effective evasive maneuvers. There, it was a speed of 30 mph where dense fog limited visibility to about 15 feet. Here, it was following the blue car at a distance of 1-2 car lengths at a speed of 60-65 mph leaving markedly insufficient time to observe and react when the tailgate was revealed ahead. To hold the rule applicable in Staker but not applicable here would be to exalt form over substance and draw a distinction without a difference. Judge Wright ruled "I have no doubt that defendant's actions constitute negligence as a matter of law," granting the motion for summary judgment. So it is here.

For the lower court not to identify why Defendants' claim of the emergency doctrine was misplaced because Plaintiff contended it was created by his own

negligence in following too closely, failing to allow an assured clear distance and not maintaining sufficient control of his vehicle to guide it safely around objects on the highway, violates the rule that a trial court has the duty in jury instructions to apply the law specifically to the facts and not charge the jury in mere abstracts.[6] See e.g., Beck v. Haley, 239 A.2d 699,702 (Del.1968). This is especially so where Defendants Baker/Bestfield claimed the emergency was created by Defendant Daniels whose tailgate fell onto the roadway. That a defendant may act reasonably after he has created an emergency with which he is confronted, does not insulate him from liability for his prior conduct as is pointed out by the Restatement (Second) of Torts §296 (1965) quoted on page 17 of Plaintiff's Opening Brief.

Although Defendant Daniels did not address in Argument IV the trial court's failure to charge on the common law duty to conduct a reasonable inspection of one's vehicle, it was addressed in his brief in Argument II where he incorrectly claimed the "only support" Plaintiff offered was a Maine case from 1939 and a Pennsylvania case from 1936. These two authorities were carefully selected to establish the existence of a general common law duty because they predated enactment of the uniform motor vehicle code and were predicated on non-statutory compilations of case law: Restatement (First) of Torts §307 (1934) and a treatise

[6] The trial court tailored the pattern instruction on emergency by adding language that the Defendant had the burden of proof on the affirmative defense. AR-8.

identified as Huddy, Automobile Law[7]. Moreover, both decisions emanate from the highest court in each respective jurisdiction, one a contiguous sister state and the other a fellow state on the east coast. The trial court's suggestion that Plaintiff could argue the duty to conduct a reasonable inspection under the general definition of negligence, is woefully inadequate without a specific instruction from the court and ignores the rule that a trial court must submit all issues affirmatively to the jury and may not ignore a requested jury instruction applicable to the facts and the law of the case. Alber v. Wise, 166 A.2d 141,143 (Del.1960).

Instead of confusing or misleading the jury, Plaintiff's proffered supplemental instruction addressing the effect of Defendants' admissions and the jury's right to draw inferences was critical to the jury's proper understanding and analysis of the evidence which consisted almost entirely of admissions made by both Defendants and inferences to be drawn therefrom, as noted by the trial court when denying Defendants' motions for a directed verdict. It would have informed them that they were not bound by Defendant Baker's self-serving statement that he thought he was traveling a safe distance behind the blue car, conspicuously

[7] Although the exact title of this evidently well regarded treatise is unknown, it appears to have been cited and relied upon by Delaware courts since at least 1915 and as late as 1954. Lamanna v. Stevens, 93 A. 962,963 (Del.Super.1915); Roach v. Parker, 107 A.2d 798,800 (Del.Super.1954).

inconsistent and incredible in the face of his admissions about his speed and the distance he was following, matters of importance to Plaintiff's case. Since tailgates don't just fall off, the jury could similarly infer a defect in the tailgate or how it was attached to the truck was an observable condition that Defendant Daniels knew or should have known. If the lower court did not feel the language of the tendered instruction was appropriate it is not relieved of the duty to apply the law to the facts because of the perceived deficiency. Beck v. Haley, 239 A.2d 699,702 (Del.1968). It is the duty of the trial court to submit all issues affirmatively to the jury with such application of the law to the evidence as will enable the jury intelligently to perform its duty. *Id.* at 702. This was not done here.

That the lower court perceives a plaintiff's claim as one sort of action is legally insufficient grounds to foreclose instructing the jury on plaintiff's alternative theories of liability. North v. Owens-Corning Fiberglass Corp., 704 A.2d 835,838 (Del.1997). Here, the lower court believed the case against Defendants Baker/Bestfield as only following too closely and against Defendant Daniels as only the statutory claims of operating an unsafe vehicle when Plaintiff presented facts as well as instructions on alternative theories which were refused. To do so constitutes prejudicial error, warranting reversal and remand for 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. MERITS

Argument V in the Answering Brief of Defendants Baker/Bestfield is rife with inaccuracies and misunderstandings.

There is no requirement that a party must submit a special verdict form of his/her own in order to be able to sustain an objection to a counterpart form submitted by an opposing party and Defendant Baker/Bestfield cite no cases or other legal authorities in support of that proposition. Just as there is no requirement that a party submit a jury charge on a given topic, as a predicate to be able to object to a charge tendered by an opposing party on that topic it would be illogical to apply a different rule to the special verdict form. That the Plaintiff never submitted her own special verdict form did not amount to a waiver of her right to object to that of Defendants Baker/Bestfield.

While the verdict forms were discussed at the prayer conference, Defendants Baker/Bestfield requested leave of the lower court to submit a second or substitute form which the court allowed. A-85. At no point thereafter until before the jury was called back in before closing arguments did the trial court call upon the parties for comments about the verdict form. When the issue was addressed at that time, Plaintiff advised the court there was no objection to the form submitted by Defendant Daniels but the form submitted on behalf of Defendants Baker/Bestfield was objectionable. A-139 – 144.

Jury instructions and questions posed in the special verdict form are inextricably intertwined and the standard of review applicable to both is abuse of discretion. Plaintiff tendered tailored jury instructions on actions taken in a sudden emergency that stated Plaintiff's contentions that Defendants Baker/Bestfield were not entitled to the protection of the doctrine because the emergency was of Defendant Baker's own making, 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 around objects on the highway. A-76 – 78. The lower court sustained the Defendants' objection noting the additional language

went beyond the pattern instructions on the affirmative defense[8]. A-76 – 77. Thus, the lower court had already rejected Plaintiff's position that when the jury was charged on the emergency doctrine, it should be advised of Plaintiff's specific assertions as to why it did not apply. To state that objection again, in addition to the objection based on the sequence of the jury interrogatories, would have been meaningless because the trial court had previously ruled it would not go in that direction. The point being that if it were reversible error for the trial court not to include in the emergency doctrine jury charge the reference to the acts of Defendant Baker that contributed to the creation of the emergency under which he claimed refuge, then it would also constitute reversible error not to identify those elements in the questions propounded on the special verdict form. The reverse is also true: if not error to not identify the negligent acts asserted by Plaintiff as causing the emergency in the emergency instruction, it would likewise not be error to leave them out of the language posed in the special verdict form.

The fact remains that in the logical progression of questions on liability a jury must approach, the first question is "Has the plaintiff satisfied the burden of proof showing negligence?" Then, if so, whether the defendant has satisfied the burden of proof on the affirmative defense of existence of an emergency not of his

[8] However, the trial court did modify the pattern charge. See n.6 above.

own creation. That was not done here. After five days of a jury trial it presented an escape hatch for the jury to cut its deliberations short and go home.

Where deficiencies in the jury charge are carried forward in the special verdict form and they undermine the jury's ability to perform its duties intelligently in returning a fair and just verdict, the lower court must be reversed. 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). So if the jury instruction on the emergency doctrine without specific reference to the acts alleged by Plaintiff of Defendant Baker to have created the emergency were "fatally misleading", then the jury interrogatory without reference to those acts was also "fatally misleading" and a new trial will be granted. B-H, Inc. v. "Industrial America", Inc., 253 A.2d 209,215 (Del.1969).

ARGUMENT VI

QUESTION PRESENTED

Do not the several errors identified in previous arguments in Plaintiff's 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. MERITS

Defendants Baker/Bestfield claim that because Plaintiff's cumulative error argument was not raised below, it is now considered here only for plain error, which is a much stricter standard than either *de novo* or abuse of discretion review. In so doing, Defendants demonstrate a misunderstanding of what this Court ruled in Robelen Piano Co. v. DiFonzo, 169 A.2d 240,248 (Del.1961) and Wright v. State, 405 A.2d 685,690 (Del.1979).

First, all of the errors identified in the preceding arguments by Plaintiff in her Opening Brief were raised in the court below. As such, they were presented to the trial court for its consideration initially and are not being raised on this appeal for the first time.

Second, the classic quotation from Robelen Piano identifies the proper focus of the inquiry where the issue of the ***cumulative effect*** of error is raised.

> "Without stating whether or not, in our opinion, any one of these errors ***standing alone carries with it sufficient prejudice*** to require the award of a new trial, we are of the opinion that ***cumulatively they amount to prejudice*** and, consequently, a new trial must be awarded." Robelen Piano Co. v. DiFonzo, 169 A.2d 240,248 (Del.1961) (emphasis supplied).

Thus, the analysis of the Court where cumulative error is raised is directed to the quantum of the prejudice. Some error may be harmless and is therefore not *per se* reversible. Under cumulative error scrutiny, where there exist multiple errors and it cannot be said with certainty that any one standing alone carries with it such prejudice as to merit a reversal, but the cumulative prejudice does, a new trial will be awarded. Plaintiff is not here acknowledging that the arguments and issues raised on this appeal are insufficiently prejudicial to warrant reversal, but simply conceding *arguendo* that if that is how this Court views them, then certainly taken cumulatively there is sufficient prejudice to warrant reversal and remand for a new trial. Assessing the cumulative effect of multiple errors is yet another point in the civil process where a check and balance exists to correct an erroneous result below. Accordingly, as in Robelen Piano, if this Court cannot clearly say any one of the errors raised on appeal standing alone carried sufficient prejudice to merit a new trial, this Court may still find that cumulatively the effect is to demonstrate sufficient prejudice that a new trial must be awarded.

CONCLUSION

For the foregoing reasons and cited authorities, as well as the reasons and authorities cited in Plaintiff's Opening Brief, this case should be reversed and remanded for a new trial.

Respectfully Submitted,

PARKOWSKI, GUERKE & SWAYZE, P.A.

BY:

I. BARRY GUERKE, ESQUIRE (#360)
116 West Water Street
P.O. Box 598
Dover, DE 19903
(302) 678-3262
Attorney for Plaintiff Below/
Appellant

DATED: September 26, 2014

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

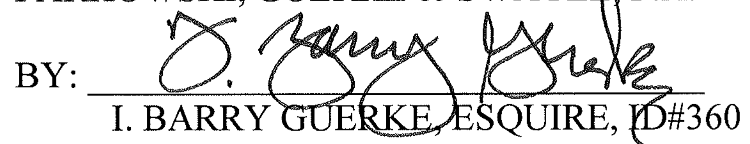
CERTIFICATE OF SERVICE

I certify that on September 26, 2014, I caused a copy of the foregoing Reply Brief of Plaintiff-Below, Appellant to be served on the following counsel through electronic filing:

Miranda Clifton, Esquire
Law Office of Cynthia G. Beam
131 Continental Drive, Suite 407
Newark, DE 19713
Attorney for Defendant Below,
Appellee, Samuel G. Daniels

Mary Sherlock, Esquire
Weber, Gallagher, Simpson,
Stapleton, Fires & Newby, LLP
19 S. State Street, Suite 100
Dover, DE 19901
Attorney for Defendants Below,
Appellees, William Baker and
Bestfield Homes, LLC

PARKOWSKI, GUERKE & SWAYZE, P.A.

BY: 

I. BARRY GUERKE, ESQUIRE, ID#360
116 West Water Street
P.O. Box 598
Dover, DE 19903
(302) 678-3262
Attorney for Plaintiff-Below, Appellant