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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.**	C. A. No: 90,2014 Court Below: Superior Court of the State Of Delaware in and for Kent County C.A. No: K11C-03-037 JTV

DEFENDANT/APPELLANTS' WILLIAM BAKER AND BESTFIELD HOMES, LLC'S ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPEAL

Weber Gallagher Simpson Stapleton Fires & Newby, LLP

BY: /s/Mary E. Sherlock
Mary E. Sherlock, Esquire, ID #: 2228
19 S. State Street, Suite 100
Dover, Delaware 19901
302-346-6377
Attorney for Appellees William Baker and Bestfield Homes

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NATURE AND STAGE OF THE PROCEEDINGS

This lawsuit arises out of a May 6, 2009 automobile accident in which the liability of Defendant, William Baker was strongly disputed. Plaintiff Pauline F. Daub, originally only sued Defendant Samuel G. Daniels (A-28-30) and then, a day before the two year statute of limitations ran, filed suit against William Baker (hereinafter "Baker") and his employer, Bestfield Homes, LLC,[1] (hereinafter "Bestfield") (A-31-33) In addition to denying all allegations of negligence the affirmative defenses of sudden emergency and unavoidable accident were raised in Baker and Bestfield's Answer to the Complaint. (B-2)

On August 18, 2011 the Superior Court, below, consolidated these two cases for all purposes including trial. (A-4)

Following a five day jury trial the jury returned a unanimous verdict in favor of Defendants Baker and Bestfield finding, by a preponderance of the evidence, that this May 6, 2009 automobile accident was the result of a sudden emergency. (A-180 & 181)

The jury also unanimously found that Co-Defendant Samuel G. Daniels was not negligent in a manner proximately causing injury to Pauline F. Daub. (A-180-181)

[1] Bestfield Homes, LLC was named under a vicarious liability theory since William Baker was undisputedly operating his vehicle in the course and scope of his employment.

On May 30, 2014 Plaintiff's counsel filed a Renewed Motion for Judgment as a Matter of Law against Baker and Bestfield and a Motion for New Trial against all Defendants.

On June 10, 2014 counsel for Baker and Bestfield filed a response in Opposition to Plaintiff's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial.

On September 30, 2013 President Judge Vaughn issued two separate Opinions denying Plaintiff's post-trial Motion for Judgment as a Matter of Law, as to Baker and Bestfield, and post-trial Motion for New Trial as to all Defendants. (These September 30, 2013 Orders are attached to Plaintiff's Opening Brief)

On January 24, 2014 President Judge Vaughn partially granted Co-Defendant Daniels' post-trial Motion for Costs which was filed on May 30, 2013 and submitted for decision on November 13, 2013.

On February 21, 2014 Plaintiff filed a Notice of Appeal from President Judge Vaughn's two September 30, 2013 post-trial Orders.

On July 3, 2014 Plaintiff filed her Opening Brief and Appendix.

On July 30, 2014 Defendants were granted a thirty-day extension to file their Answering Briefs and Appendixes.

This is Defendants Baker and Bestfield's Answering Brief in Opposition to Plaintiff's Appeal.

STATEMENT OF FACTS

This lawsuit arises out of a May 6, 2009 automobile accident that occurred at approximately 6:30 a.m., on a weekday, in the left-hand lane of U.S. Route 1 just north of the Scarborough Road entrance ramp in Dover.

The facts of this automobile accident are not complex and the vast majority of the facts were not in dispute at trial.

The only witnesses to testify about the facts surrounding this automobile accident were Pauline F. Daub, Samuel G. Daniels and William Baker. No independent eye witness to the accident was called to testify. The investigating police officer did not testify and no expert witness was ever retained by the Plaintiff.

As Plaintiff admits in her Opening Brief Baker was traveling within the posted speed limit of 65 mph for U.S. Route 1 and there was no evidence and/or testimony to the contrary. In fact, no allegation of traveling in excess of the speed limit on the part of Baker was presented to the jury.

A total of four allegations of negligence against Baker were presented and argued to the jury. Two of the allegations were statutory violations and the other two were common law violations. (A-173-174)

The first common law violation was that Baker failed to maintain his vehicle under proper control. There was simply no evidence presented at trial to support

that Baker didn't at all times maintain his employer's Astro van under control even under the harrowing circumstances surrounding the sudden emergency unfolding before him.

When the blue vehicle that Mr. Baker was following in the left lane suddenly swerved to the right lane leaving Samuel Daniels' tailgate approximately 50 feet in front of him, in the left lane, he braked and attempted to drive over the tailgate but his wheels struck the tailgate causing it to go airborne. (A-173) Baker never lost control of his van. In fact, at all times he maintained control of the van. Baker's Astro van never collided with another vehicle on the roadway and he was able to bring the van to a controlled stop on the right hand shoulder. (A-125)

The second common law allegation of negligence was that Baker failed to take appropriate evasive action to avoid striking the tailgate that suddenly appeared approximately 50 feet ahead of him in the left-hand lane. Plaintiff's counsel never specifically argued exactly what "evasive action" Baker was supposed to take.

The undisputed evidence at trial was that there was steady traffic in the right lane that precluded Baker from moving into the right lane. (B-48) Neither Plaintiff nor Samuel G. Daniels disputed Baker's testimony that traffic in the right lane precluded him from taking evasive action by changing to the right lane. Baker testified that he could not drive to the left because it was an unimproved grass median and his vehicle would have spun out of control. (B-48) Pauline F. Daub

median and his vehicle would have spun out of control. (B-48) Pauline F. Daub collaborated Baker's testimony testifying that the grass median was wet and that she felt it was unsafe to swerve to the left. (B-9)

After William Baker's tires struck the tailgate and it went airborne and struck a utility truck in the right lane and then struck Pauline Daub's windshield Baker testified he was able to pull over to the right shoulder. (B-40) Baker explained to the jury that the reason he was able to pull over to the right shoulder of U.S. Route 1, after striking the tailgate, was that all of the traffic behind them on the highway, at that point in time, had come to a stop allowing him to get over. (B-61)

The first statutory allegation presented to the jury was that Baker operated his Astro van in a careless or imprudent manner without due regard for conditions then existing in violation of 21 Del. C. § 4176 (a). (A-174)

Again the undisputed evidence was that it was a clear morning without precipitation and the roadway was dry. In fact, there weren't any unusual conditions regarding the roadway or the traffic until the sudden emergency that was created when Samuel Daniels' tailgate suddenly and without warning fell off his 1992 pick-up truck in the left hand lane of U.S. Route 1.

The second statutory allegation presented to the jury was that Baker was following the blue vehicle in front of him too closely in violation of 21 Del. C. §

4123 (a). The exact distance Baker was traveling behind the blue vehicle in front of him as they traveled north in the left lane of U.S. Route 1 that morning was never put into evidence. Neither he nor anyone else ever measured the distance. (A-151) Baker felt he was a safe distance from the blue car in front of him. (A-151) No one testified Baker was following the blue vehicle in front of him too closely. Baker's testimony was he was at least 2 car lengths about 30 to 50 feet behind the blue vehicle in front of him (A-121) when the car in front of him swerved to avoid striking the tailgate. He only had split seconds to make a decision. (A-122) He initially thought what was lying in the left-hand lane was a piece of plywood. (A-122)

Pauline F. Daub testified Baker wasn't driving erratically or out of the ordinary before he struck Samuel Daniel's tailgate. (B-8) Pauline Daub was driving right behind Baker, in the left-hand lane, and agreed there was traffic in the right lane precluding her movement to the right lane. Ms. Daub did not testify that Baker was following the blue vehicle in front of him too closely.

Samuel Daniels testified he didn't know if there was traffic in the right lane precluding Baker from swerving to the right lane. (B-28) However, he testified there was too much oncoming traffic for him to simply run out into the highway and pick up his tailgate. (B-26).

Samuel G. Daniels testified that after he pulled his pick-up truck over to the right shoulder he was about 1,500 to 2,000 feet from the tailgate. In his prior deposition testimony he estimated he was 300 yards away from the tailgate. (B-25) He testified he backed up maybe 20 – 30 feet and parked and started walking back towards the tailgate on the right shoulder. (A-97-98) As he walked he observed 7 – 9 cars avoid the tailgate by moving to the right lane. (A-98) Mr. Daniels never testified that William Baker was following the vehicle in front of him too closely to avoid his tailgate. Samuel Daniels' testimony did not refute Pauline Daub and Baker's testimony that at that point in time there was traffic precluding Baker from moving to the right lane. In the end Mr. Daniels testified that Baker could not have done anything to avoid the tailgate. (B-30)

Baker agreed with Pauline Daub's counsel, at trial, that he has heard of the "rule of thumb" that a driver should leave one car length between the front of his car and the rear of the vehicle he is following. (A-121) There is no Delaware motor vehicle statute that enunciates this "rule of thumb". Plaintiff's counsel may have meant to say one car length for every 10 mph but that is not what is stated in the record. (A-121) Irregardless the "rule of thumb" was simply conjecture and counsel's argument that Baker was following the blue vehicle in front of him too closely prior to it swerving into the right lane. Counsel's characterizations of Baker's driving as "tailgating" and violating motorist "rules of thumb" were all

presented to the jury in the form of argument and theory to support that Baker was negligent in following another vehicle too closely and that negligence was the proximate cause of this accident. There was simply no evidence and/or testimony to support such argument.

No one testified at trial that Baker was "tailgating" the blue vehicle in front of him prior to it swerving to the right lane. The only reference to "tailgating" on the part of Baker that the jury heard was from Pauline Daub's attorney. As the jury was properly instructed, at the close of the evidence, Plaintiff's counsel's argument was simply not evidence or facts to be considered by the jury on determining whether Baker was negligent. (B-149)

DEFENDANTS WILLIAM BAKER AND BESTFIELD HOMES, LLC'S SUMMARY OFARGUMENTS

I. **DENIED** – The trial court did not commit reversible error in denying Pauline F. Daub's post-trial Motion for Judgment as a Matter of Law because there was insufficient evidence to find Baker negligent per se and/or to take the issue of his negligence from the jury.

ARGUMENT I – The trial court's denial of Plaintiff's Post-Trial Motion for Judgment as a Matter of Law, under Superior Court Rule 50 (b) as to William Baker and Bestfield Homes, LLC should be affirmed.

II. **DENIED** – There was more than sufficient evidence for the jury to conclude that under the facts of this accident a sudden emergency not of Baker's making was created by the sudden dropping of Samuel Daniels' tailgate in Baker's lane of travel on U.S. Route 1 and that Baker was not negligent.

ARGUMENT II – The trial court did not abuse its discretion in denying Plaintiff's Post-Trial Motion for New Trial as to the jury's verdict in favor of William Baker.

III. **DENIED** – The trial court did not abuse its discretion and prejudice Pauline F. Daub by allowing Baker to testify he was maintaining a similar distance as other vehicles, from the vehicle in front of him since the issue of whether Baker was following too closely, under 21 Del. C. § 4123 (a) is determinative, in part, by the conduct of other vehicles and traffic on the highway.

ARGUMENT III – The trial judge did not abuse his discretion in allowing William Baker's testimony about his following distance.

IV. DENIED – The trial court did not err in refusing to instruct the jury on the "assured clear distance rule" since, as a matter of law, it does not apply when a sudden emergency is asserted or on 21 Del. C. § 4168 (a) & (b).

ARGUMENT IV – The trial court did not err in refusing to give Plaintiff's requested jury instructions on assured clear distance rule and 21 Del. C. § 4168 (a) & (b).

V. DENIED – It was not reversible error to ask the jury, on the Special Jury Verdict Form, to first determine if this accident was the result of a sudden emergency as to Baker since the jury was previously instructed that sudden emergency meant an emergency not of Baker's making or negligence.

ARGUMENT V – The trial judge did not abuse his discretion in regard to using Special Jury Interrogatory #1.

VI. DENIED – There is no factual and/or legal basis regarding Pauline F. Daub's arguments, either standing alone or collectively, for the court to grant her a new trial.

ARGUMENT VI – There was neither reversible error nor cumulative error, below, requiring a new trial.

ARGUMENT I

QUESTION PRESENTED

SHOULD THE TRIAL COURT'S DENIAL OF PLAINTIFF'S POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW, UNDER SUPERIOR COURT CIVIL RULE 50 (b), AS TO DEFENDANTS WILLIAM BAKER AND BESTFIELD HOMES, LLC, BE AFFIRMED?

A. SCOPE OF REVIEW

This Court reviews de novo the denial of a Motion for Judgment as a matter of law. CitiSteel USA, Inc. v. Connell, Ltd.Pshp Lara Bros. Div. Del. Supr., 758 A.2d 928, 930 (2000) If the Court decides that a reasonable person could decide the facts as the jury did, the Court will follow the jury's findings of fact. CitiSteel, Id and Eustice v. Rapport, Del. Supr. 460 A.2d 507 (1983).

B. ARGUMENT

Plaintiff's argument is that based strictly on the trial testimony of Defendant Baker the trial court erred in not finding Baker negligent per se for following the vehicle in front of him too closely, hence, precluding Baker from raising the affirmative defense of sudden emergency.

As President Judge Vaughn, below, stated: "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." (Citing Burgos v. Hickok, Del.

Supr., 695 A.2d 1141 (1997) "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." (citing Delaware Elec. Corp., Inc. v. Pitts, 633 A.2d 369 (1993). (Daub v. Daniels, 2013 WL 5460160 (Del. Super.) (attached to Plaintiff's Opening Brief)

Judge Vaughn first reviewed the "Following Too Closely" statute, set forth in the Delaware Motor Vehicle Code, 21 Del. C. § 4123 (a) that Plaintiff asserted Baker violated. The Superior Court, below, accurately pointed out that a finding that a driver violated that particular 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. Daub v. Daniels, 2013 WL 5460160 (Del. Super.) (citing 21 Del. C. § 4123 (a)) "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." Daub v. Daniels, 2013 WL 5460160, (Del. Super.)

In other words, the Following Too Closely statute doesn't delineate specifically what constitutes following another vehicle too closely. Whether a motorist is following another vehicle too closely ultimately depends on many factors including the speed of other vehicles on the highway, traffic conditions and highway conditions. 21 Del. C. § 4123 (a)

In this case Baker never made contact with any other vehicles on the roadway. Plaintiff did not testify that Baker was following the vehicle in front of him too closely. Co-Defendant Samuel G. Daniels did not testify that Baker was following the vehicle in front of him too closely. There was no "admission" by Baker that he was following the vehicle ahead of him too closely as Plaintiff repeatedly argues in her Opening Brief.

The only evidence was that Baker estimates his speed was between 60 and 65 miles per hour on U.S. Route 1 and he was traveling approximately one or two car lengths behind the vehicle in front of him. After the vehicle swerved into the right lane he saw Samuel Daniels' tailgate, for the first time, lying on the road, approximately 30 – 50 feet ahead of him. (B-36)

Plaintiff chose not to call an accident reconstructionist, biomechanical engineer or any other expert at trial to use Mr. Baker's testimony in order to extrapolate how much time he had to react, based on normal human reaction time, etc. The time over distance calculations by Plaintiff's counsel were simply offered to the jury as argument not as fact or evidence. It was certainly within the jury's discretion to reject Plaintiff's counsel's argument that Baker was following the vehicle in front of him too closely in light of all the facts and circumstances surrounding this accident.

Plaintiff's remaining argument for why the trial court should have found Baker negligent per se is that he allegedly acknowledged "the rule of thumb" that a driver should leave one car length for each 10 mph of speed when following another vehicle. (Pg. 15 of Plaintiff's Opening Brief) Plaintiff does specifically reference the trial record in regard to this argument.

Although that may have been what Plaintiff's counsel intended what the jury actually heard was: "Mr. Baker have you ever heard of the rule of thumb that a driver should leave one car length between the front of his car and the rear of the vehicle he is following?" (B-36)

Even if the rule of thumb was accurately articulated it is a concept not a legal obligation and it is not intended to be scientifically or legally accurate as the trial judge correctly stated. Daub v. Daniels, 2013 WL 5468160 (Del. Super.)

In the alternative had Judge Vaughn determined that Baker was negligent per se for purportedly admitting under oath that he did not follow a "rule of thumb" such a ruling would have been reversible error.

Judge Vaughn simply did not err in denying Plaintiff's post-trial Motion for Judgment as a matter of law against Baker.

Plaintiff also asked the trial judge to conclude that Baker was negligent as a matter of law because, in contrast to the vehicle in front of him, he was unable to safely swerve around the tailgate.

Judge Vaughn correctly opined that control of one's motor vehicle on the highway falls under a common law negligence theory in Delaware, subject to a reasonable prudent man standard and is not a stand alone common law duty. Daub v. Daniels, 2013 WL 5460160 (Del. Super.) The Motion for Judgment as a matter of law was correctly denied on this basis as well.

Baker testified that when the vehicle in front of him abruptly swerved to the right lane he could not avoid the tailgate by moving into the right lane because there were cars in that lane. (B-48-49) Plaintiff also collaborated Baker's testimony and there was no rebuttable testimony or evidence. (B-9) Baker 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. (B-48) Plaintiff collaborated Baker's testimony, in this regard, as well.

Judge Vaughn correctly ruled: "Viewing the facts in a 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." Daub v. Daniels, 2013 WL 5460160 (Del. Super.)

Whether two car lengths away was "following too closely", in violation of 21 Del. C. § 4123 (a) was a question of fact entirely within the province of the jury to determine under the circumstances.

Finally, Plaintiff argues that the affirmative defense of sudden emergency was foreclosed to Baker, as a matter of law, because it was his own alleged prior negligence that produced the sudden emergency.

Plaintiff cites no Delaware case law to support her argument. Plaintiff relies upon and cites the Restatement (Second) of Torts, Prosser on Torts and five (5) cases from other jurisdictions that are all factually distinguishable and, remarkably, provide a solid factual and legal basis for why the sudden emergency defense was appropriate in this case.

Delaware's Sudden Emergency jury instruction, as set forth in the Delaware Pattern Jury Instructions, is taken from dicta contained in Dadds v. Pennsylvania R. Co., Del. Supr., 251 A.2d 559, 560-561 (1969) and Panaro v. Cullen, Del. Supr., 185 A.2d 889 (1962). These two Delaware Superior Court cases correctly recite the law in Delaware as to sudden emergency and that is the law that the jury was properly instructed on in this case. (B-167)

The trial judge did not err in instructing the jury on the sudden emergency doctrine given the facts and evidence in this case. The sudden emergency in this case was the fact Samuel Daniels' tailgate suddenly and unexpected fell off his pick-up truck in the left lane of U.S. Route 1. The facts of this automobile accident are a classic text book example of a sudden emergency situation not created by

Defendant Baker and not of his making. None of the cases cited by Plaintiff are remotely analogous to the facts of this case.

In Kudrna v. Comet Corp, Mont. Supr., 572 P.2d 183 (1977), relied on by Plaintiff, the Court held the emergency doctrine should not apply when a Defendant is faced with "....no more than an everyday traffic problem for which he should have been prepared...."Id. Plaintiff's counsel is not even suggesting that what Baker encountered that morning on Route 1 was an "everyday traffic problem for which he should have been prepared".

Similarly, in Collins v. Rambo, Ind. App., 831 N.E. 2d 241 (2005) relied on by Plaintiff, the court pointed out: "We stress that the sudden emergency doctrine was designed for these situations that are unexpected... That vehicles would stop quickly in a lane of traffic should not be outside the realm of a reasonable person's comprehension." Id.

In Dadds v. Pennsylvania R. Co., Id. The railroad company argued the sudden emergency rule was inapplicable because Plaintiff's own negligence was the cause of the emergency – namely her stopping her vehicle too close to the railroad tracks which it argued should have constituted negligence as a matter of law. The Delaware Supreme Court disagreed pointing out that the "sudden emergency" was caused by the stalling of Ms. Dadd's motor an occurrence not traceable to any negligence on her part." Id.

By similar analogy the "sudden emergency" in this case was the tailgate on Mr. Daniels' pick-up truck falling onto the left lane of Route 1 – an occurrence not caused or traceable to any negligence on the part of Baker.

The Delaware case of Miglino v. Adkins, Del. Super. 1991 WL 269924 (attached hereto as Exhibit "A") is far more analogous to the facts of this case than any case cited by Plaintiff in her Opening Brief. In Miglino the Defendant driver was southbound in the right lane of I-95 near the Route 202 merge. The Defendant got into the left lane when he observed a car broken down in the left hand shoulder sticking out into the left lane. Plaintiff, as did others, had observed the disabled vehicle and had stopped in the left-hand lane of I-95. "Adkins testified, without contradiction, that he rounded a curve within the speed limit was confronted by the surprise of vehicles stopped in the left lane of a busy interstate highway and could not safely change lanes to avoid colliding with Plaintiff's vehicle. Defendant's version of the facts, which the jury may freely adopt as the truth, would certainly present a case of unavoidable accident and confrontation by a sudden emergency". Miglino, Id.

Judge Steele, in response to a Motion for Judgment Notwithstanding the Verdict, pursuant to Rule 50 (b) and Motion for New Trial, pursuant to Rule 59, ruled he did not err in instructing the jury on sudden emergency. "There is a reasonable factual basis for a jury to conclude the Defendant acted as a reasonable

prudent person under the circumstances of this case, that the sudden emergency confronting the Defendant was not caused by any act or omission on his part thereby lowering his standard of care or that the accident was unavoidable." Miglino, Id.

The facts of this case similarly supported the assertion of sudden emergency as an affirmative defense and sudden emergency instruction to the jury. As in Miglino, supr. The trial judge, in this case, did not err in instructing the jury using the standard Pattern – instruction for Actions Taken in Emergency. (B-167)

Plaintiff's argument is similar to Plaintiff's argument in Lloyd v. Great Coastal Express, Inc., 2001 WL 880090 Del. Super. (attached hereto as Exhibit "B") the Court, in Lloyd, pointed out the mere fact there was a collision between Defendant Thorpe's truck and Plaintiff's vehicle and that Thorpe was less than 400 – 500 feet behind Plaintiff did not mean he acted unreasonably or was following too closely. Thorpe played no role in the sudden emergency created ahead of him on the highway and had no duty to anticipate any other driver's negligence. The Superior Court denied Plaintiff's Motion for New Trial.

Similarly, Baker's estimate of his distance from the vehicle in front of him was only an estimate and there was no evidence that Baker's distance from the vehicle in front of him was a proximate cause of him striking the Daniels' tailgate and "but for" a greater distance he could have avoided striking the tailgate.

For all the reasons asserted herein the Superior Court's denial of Plaintiff's post-trial Motion for Judgment as a Matter of Law should be affirmed.

ARGUMENT II

QUESTION PRESENTED

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S POST-TRIAL MOTION FOR NEW TRIAL AS TO THE JURY'S VERDICT IN FAVOR OF WILLIAM BAKER?

A. SCOPE OF REVIEW

This Court's reviews for an abuse of discretion the denial of a Motion for New Trial. Amalfitano v. Baker, Del. Supr. 794 A.2d 575, 577 (2001); Storey v. Camper, Del Supr., 401 A.2d 458, 465 (1974)

B. ARGUMENT

Historically, this State's courts have exercised their power to grant a new trial with caution and extreme deference to the findings of a jury. A court will not set aside a jury's verdict unless "the evidence preponderates so heavily against the jury verdict that no reasonable juror could have reached the result" Amalfitano, Id. (quoting Storey v. Camper, Id.)

Plaintiff's first contention is that the evidence at trial preponderates so heavily against Baker on the issue of sudden emergency that a new trial should have been ordered by the trial court to prevent injustice and as a matter of fairness.

In support of this argument Plaintiff claims the evidence consists of Defendant Baker's own admissions about his speed and distance from the tailgate when the blue car swerved into the right lane and his awareness of the rule of thumb for keeping a distance of one car length for every ten miles per hour of speed. (Plaintiff's Opening Brief pp. 27 & 28)

As reiterated in Defendant Baker and Bestfield's response to Argument I Baker, at all times, was estimating his speed and his distance from the blue vehicle in front of him before it swerved into the right lane. He did not measure the distance. (B-58) Baker certainly didn't admit to speeding and, in fact, there was absolutely no evidence offered at trial that he was speeding. The only testimony about Mr. Baker's speed was his own estimate of 60 – 65 mph and Plaintiff's testimony that Mr. Baker was just keeping up with the flow of traffic that morning on Route 1. (B-7 and B-8)

Mr. Baker estimated he was 1 – 2 car lengths behind the blue vehicle in front of him before it suddenly swerved into the right lane. (B-36) There is no evidence that, given the road and traffic conditions on U.S. Route 1 on May 6, 2009 at 6:30 a.m., that Baker was following the blue vehicle in front of him too closely. No party, witness, investigating police officer or expert witnessed testified that Baker's distance behind the blue vehicle in front of him was too close for existing road and traffic conditions.

On cross-examination Plaintiff's counsel got Baker to acknowledge that he had heard of the "rule of thumb" of keeping one car length behind a vehicle. (B-36) Thirty to fifty feet is more than one car length. This general "rule of thumb" is not law; it is not binding legal authority and it is not negligence per se as correctly pointed out by the trial court in Daub v. Daniels, 2013 WL 5467497.

Plaintiff argument is that the jury should have found against Baker solely because of his good faith estimate as to his speed and distance behind the blue vehicle in front of him without giving any support and weight to all of the other evidence and testimony in this case including, but not limited to, the fact the Plaintiff was right behind Baker and she testified she only had seconds to react to the tailgate coming towards her. (B-8) In addition, after the blue vehicle swerved into the right lane it left only 50 feet in front of Baker to react. Baker's view of the tailgate was undisputedly blocked by the blue vehicle in front of him.

Samuel Daniel previously testified he was 300 yards away when he observed 7 to 9 vehicles swerve to the right of the tailgate but, at trial, he changed his testimony to 1,500 to 2,000 feet. (B-17) Mr. Daniels did not testify that Baker was following the vehicle in front of him too closely or that Baker had room to swerve to the right lane when the blue vehicle swerved to the right lane.

Baker's good faith estimate of his speed and distance as he traveled in the left hand lane of U.S. Route 1 at 6:30 a.m. on May 6, 2009 is simply not

"overwhelming evidence" and is simply not an admission of any negligence on his part.

There was more than sufficient evidence upon which the jury in this case could have concluded that Baker was faced with a sudden emergency not of his own making and not created by his own negligence in reaching its verdict, in Baker's favor.

Baker was faced with a sudden emergency not of his own making when Samuel Daniels' approximately 2' by 6' tailgate fell off his pick-up truck into the left lane of Route 1. A tailgate falling off a pick-up truck in the left-hand lane of U.S. Route 1 is undeniably, undisputedly, a sudden unexpected random "out of the ordinary" event.

Once the vehicle in front of Baker swerved to the right lane in front of him given the traffic to his right, given the unimproved median to his left and all the other traffic and highway conditions there was more than ample evidence for a jury to conclude that Baker acted, under the circumstances, as a reasonably prudent driver and that this accident was the result of a sudden emergency.

Plaintiff also argues the trial judge committed reversible error, requiring a new trial, when he instructing the jury on sudden emergency because of the "overwhelming evidence" that Baker's own prior conduct placed him in the

situation of peril. Plaintiff's argument is misplaced and not supported by the facts of this case or the cited case law.

The "situation of peril" was created when the 2' by 6' tailgate suddenly and without warning dropped into the left lane of U.S. Route 1. But for the tailgate there would not have been any emergency or any situation of peril.

The cases cited by Plaintiff are not factually analogous to the emergency situation created by the Daniels' tailgate that Baker was faced with. In Kudrna v. Comet Corp., Id. a tractor-trailer was driving in the right lane and the driver admitted he could see a stalled truck in his lane of travel for approximately 1700 feet yet the driver chose not to even attempt to change lanes until he was 400 to 500 feet away colliding with a vehicle in the opposite lane of travel. Needless to say the facts in Kudrna, Id. are vastly different than the facts in the case sub judice. In Kudrna the Court found that the emergency doctrine should not apply when a Defendant is faced with "....no more than an everyday traffic problem for which he should have been prepared...." Kudrna, Id.

Plaintiff also relies on Posas v. Horton, Nev. Supr. 228 P.3d 457 (2010). The dicta in Posas, Id. also supports the sudden emergency instruction to the jury in the case sub judice.

In Posas, all of the drivers were in stop and go traffic when the vehicle in front of Defendant stopped suddenly to avoid a woman jaywalking pushing a

stroller across the street in the middle of traffic. In Posas the Defendant driver, in contrast to Baker, admitted "Yeah obviously I was following too close. I rear-ended her...you know, I made a mistake".

The Court in Posas pointed out that the Defendant driver was faced "with an obstacle that normally arises in driving situations – the car in front of her stopped to avoid hitting a pedestrian" in contrast to what Baker was faced with.

Finally, the court, in Posas pointed out that the emergency must affect the actor in order to obtain a sudden emergency instruction. The doctrine is only applicable to the party facing the emergency – such as Baker in this case. Posas, Id.

Collins v. Rambo Ind. App. 831 N.E. 2d 241 (2005) another case relied on by Plaintiff was an intersection accident where the Defendant rear-ended the Plaintiff who stopped for an oncoming vehicle. "We stress that the sudden emergency doctrine was designed for those situations that are unexpected....that vehicles would stop quickly in a lane of traffic should not be outside the realm of a reasonable person's comprehension." Collins, Id.

A 2' by 6' tailgate suddenly appearing 30 - 50 feet ahead of you, straddling the left lane of U.S. Route 1, northbound, as you head to work at 6:30 a.m. is an unexpected situation. The facts of this case are a classic law text book example of sudden emergency.

Plaintiff relies on Grieco v. Koperna, 1990 WL 1098711 (Del. Super.) a Delaware case with far less compelling facts in which the Court did not grant a new trial based on any error in instructing the jury on the emergency doctrine. In Grieco there were allegations of inattentive driving and speeding in contrast to this case. The facts and law in Grieco simply do not support granting Plaintiff a new trial in this case.

Finally, Plaintiff contends that she is entitled to a new trial because the trial Court committed prejudicial irreversible error in using the standard Delaware Pattern Jury Instruction for "Actions Taken in Emergency" (B-167) as opposed to her counsel's submitted instruction which reiterated the allegations of negligence and added "assured clear distance rule".

The cases cited by Plaintiff are neither factually nor legally on point. In Scullion v. Hackworth, Del. Supr. 199 A.2d 563 (1964) a new trial was granted because the trial court improperly instructed the jury that it could not find against the Defendant even if they found the Defendant had, in fact, violated City of Wilmington speeding or ordinances.

In Lutzkovitz v. Murray, Del. Supr., 339 A.2d 64 (1975) the trial court failed to instruct the jury that it is Defendant's burden to show that a sudden attack or physical illness is unanticipated and unforeseen when claiming unavoidable accident.

For purposes of this appeal the issue is whether Judge Vaughn abused his discretion in using the Delaware Pattern Jury Instruction for Actions Taken in Emergency as opposed to Plaintiff's counsel's tailored instruction.

Plaintiff's counsel submitted a tailored sudden emergency instruction but never formally objected, on the record, to the instruction read to the jury. An exception, on the record, at the conclusion of the jury instructions, were also never made. (B-111-112)

Judge Vaughn noted in his opinion that re-asserting Plaintiff's assertions about why Baker was not entitled to the sudden emergency defense was neither required nor proper. Citing Zimmerman v. State, Del. Supr., 565 A.2d 887, 890 (1984) The primary purpose of the jury instructions is to instruct the jury as to the principles of law which they are applying in deciding the factual issues before them. Judge Vaughn properly ruled that every legal instruction does not need to be tailored by including the opposing parties' contentions. Judge Vaughn properly held that the sudden emergency instruction that he gave was a correct statement of the law and it was not misleading. Daub v. Daniels, 2013 WL 5467497

None of the cases cited by Plaintiff support that giving Delaware Pattern

Jury Instruction on Actions Taken in Emergency[2] was erroneous, as a matter of law, requiring the setting aside of the jury's verdict and granting of a new trial.

For all the reasons stated herein the trial Court's denial of a new trial should be affirmed.

[2] The Pattern Instruction was slightly modified by Judge Vaughn by adding that the Defendant has the burden of proof on this defense.

ARGUMENT III

QUESTION PRESENTED

DID THE TRIAL JUDGE ABUSE HIS DISCRETION IN ALLOWING WILLIAM BAKER TO TESTIFY THAT HIS FOLLOWING DISTANCE WAS THE SAME AS OTHER VEHICLES ON THE HIGHWAY THAT MORNING?

A. SCOPE OF REVIEW

A trial judge's decision to admit or exclude evidence is reviewed to determine whether the Court's ruling was an abuse of discretion. Brown v. Liberty Mutual Co. Inc., Del. Supr., 774 A.2d 232 (2001) Since Judge Vaughn's evidentiary ruling did not involve a question of law the de novo standard of review does not apply.

B. ARGUMENT

This argument is entirely premised on the fact that one of Plaintiff's allegations of negligence against Baker was that he was negligent per se for allegedly violating 21 Del. C. § 4123 (a) of the Delaware Motor Vehicle Statute which states: "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" 21 Del. C. § 4123 (a).

As the trier of fact the jury, below, was charged with determining whether Baker violated the statute and was, consequently, negligent as a matter of law.

The statute, itself, calls for the jury to determine what was a reasonable and prudent distance for Baker to be following the vehicle in front of him given the speed of the other vehicles on the highway that morning and given the traffic and highway conditions that morning 21 Del. C. § 4123 (a).

Plaintiff argues next that it was an abuse of discretion and/or reversible error for Judge Vaughn to allow Baker's counsel to elicit how his distance from the vehicle in front of him compared to the other vehicles on the highway that morning. The fallacy of Plaintiff's argument is that 21 Del. C. § 4123 (a) does not set a fixed standard of care regarding what constitutes following another vehicle too closely.

Implicit in Plaintiff's argument is that somehow Baker had conceded that he was following the blue vehicle in front of him too closely and his counsel was trying to elicit testimony from him that everybody else on the highway that morning was following too closely in violation of 21 Del. C. § 4123 (a).

Neither Baker nor his counsel ever admitted and/or conceded that he was following the blue vehicle in front of him too closely and/or that he violated 21 Del. C. § 4123 (a).

The specific question that was objected to was: "How did your distance compare with the other vehicles around you on the highway that morning?" (B-58) Baker's response, after the objection was overruled, was: "I believe it was the same". (B-60)

Judge Vaughn overruled the objection because whether or not Baker was following too closely in violation of the statute was ultimately a question of fact for the jury to determine given the existing traffic and highway conditions; the speed and spacing of other vehicles on the highway was relevant. (B-59-60) Furthermore, Plaintiff's counsel had already elicited testimony from Samuel Daniels that he observed other vehicles swerving around his tailgate so Plaintiff had already introduced evidence of the conduct of other drivers on the highway that morning. (B-59)

Plaintiff cites no case on point to support her position on this issue. In fact, her reference to Prosser and Keeton on the Law of Torts, §36 at 220 (5th ed 1984) supports Baker. The specific Delaware motor vehicle statute, at issue, 21 Del. C. § 4123 (a) in fact does not set a fixed standard for what constitutes following another vehicle too closely. 21 Del. C. § 4123 (a) on its face makes it clear that the factual determination of whether a driver is following another vehicle more closely than is reasonable and prudent is subjective and determinative based on "....the speed of

other vehicles and the traffic upon and the condition of the highway." 21 Del. C. § 4123 (a)

Given the specific language of the specific motor vehicle statute, in question, Judge Vaughn did not abuse his discretion, as the trial judge, in allowing the question and certainly allowing this one question and response did not constitute reversible error.

ARGUMENT IV

QUESTION PRESENTED

DID THE TRIAL COURT ERR IN NOT GIVING PLAINTIFF'S PROPOSED INSTRUCTION ON SPEEDING UNDER 21 DEL. C. § 4168 (a) + (b) AND THE PLAINTIFF'S PROPOSED "ASSURED CLEAR DISTANCE" RULE?

A. SCOPE OF REVIEW

This Court reviews de novo the trial court's decision to issue or not issue a challenged jury instruction. Corbitt v. Tatagari, Del. Supr., 804 A.2d 1057, 1062 (2002); Chrysler Corp v. Chaplake Holdings, Ltd, Del Supr., 822 A.2d 1024 (2003).

B. ARGUMENT

(A) 21 Del. C. § 4168 - Plaintiff alleged in her Complaint and her counsel attempted to argue at trial that Baker was negligent per se for allegedly violating 21 Del. C. § 4168 (a) & (b). (A-157 & 158)

To be negligent per se for violating 21 Del. C. § 4168 (a) one has to be found to have driven on a highway at a speed greater than reasonable or prudent without regard to actual and potential hazards then existing and failed to control one's speed as necessary under the circumstances. To be negligent per se for

violating 21 Del. C. § 4168 (b) one has to be found to have driven at an inappropriate speed when a special hazard existed.

There simply was no evidence offered at trial that Baker's speed was a factor in regard to his striking Mr. Samuel Daniels' tailgate as it lay in the left lane of U.S. Route 1. Baker estimated his speed at 60 – 65 mph when he saw the vehicle in front of him swerve into the right lane. (B-36)

Mr. Daniels did not comment on Baker's speed. Pauline Daub testified that Baker's speed was normal. When asked by Baker's counsel what "normal" meant she said, well, pretty well keeping up with the flow of traffic". (B-22 & 23) Plaintiff certainly did not testify that, as she drove behind him, Baker was traveling at an unsafe speed under existing conditions.

No one, including an investigating police officer or expert witness testified that if Baker had been traveling "x" miles per hour he could have avoided Mr. Daniel's tailgate.

Having heard all the evidence and testimony Judge Vaughn correctly characterized the Plaintiff's case, at the conclusion of the trial, based on the evidence proffered to the jury, as a following-too-closely case. Plaintiff's counsel even stated, during the Prayer Conference, "....a large focus of the case has been on the distance that Mr. Baker was following the vehicle he was trailing on the highway...." (A-72) Plaintiff's counsel's argument was that the alleged act of

following another vehicle too closely was the type of "hazard" intended in 21 Del. C. § 4168 (a) & (b). However, if Plaintiff's counsel's argument was accepted as true than in every case with a following too closely allegation one would have to give these speeding sections of the Motor Vehicle Code as well.

Both subsections of 21 Del. C. § 4168 that Plaintiff's counsel wanted read to the jury, as charges against Baker, contain the word "hazard". The "hazard" in this case was the 2' x 6' tailgate that had just seconds before dropped onto the left lane of Route 1.

Baker's counsel pointed out that under the facts of this case the qualifying language set forth by the Delaware Supreme Court in Hudson v. Old Guard Ins. Co., Del. Supr., 3 A.3d 246 (2010) was necessary and appropriate. In Hudson, supra. a 12 year old on a bicycle suddenly entered the highway and the motorist struck the bicyclist. "Section 4168 requires motorist to account for potentially hazardous vehicles or conveyance 'on or entering the highway'. Delaware tort law has long imposed a duty on motorist to use reasonable care, drive at a reasonable rate of speed under the circumstance, and slow or stop to avoid imminent danger regardless of the posted speed limit. Motorists, however, need not slow down in anticipation of danger that has not yet become apparent". Hudson, Id.

Baker did not see the 2' x 6' tailgate in his lane of travel because the vehicle in front of him was blocking it. There was no evidence at trial that Baker knew or

was aware that the tailgate was in his lane of travel prior to that moment when the blue vehicle in front of him swerved to the right lane.

Plaintiff's counsel's argument was that at all times that morning Baker's speed should have been such that he could anticipate foreign objects in his lane of travel before he saw or was aware of them. The Delaware Supreme Court, in Hudson, supra made it clear that is not the law. In summary, Judge Vaughn correctly felt the evidence of trial did not support 21 Del. C. § 4168 (a) & (b) being given to the jury. However, if these speed sections were going to be read to the jury he properly ruled the qualifying language by the Delaware Superior Court in Hudson v. Old Guard Insurance, should be read so the jury understood a motorist speed requirements when faced with a sudden hazard, such as a foreign object in the highway or a 12 year old boy on a bicycle. There is no duty to slow down until the danger (hazard) has become apparent. Hudson, Id.

Given the lack of any evidence that Baker's speed was a proximate cause of him traveling over and striking Samuel Daniels tailgate coupled with the fact Baker's view of the tailgate in the left lane of the highway was obscured by the blue vehicle in front of him. Judge Vaughn did not err in refusing to read 21 Del. C. § 4168 (a) and (b) to the jury absent the qualifying language used in Hudson v. Old Guard, Id.

(B) Assured Clear Distance Rule - Plaintiff requested that the jury be instructed that it is the duty of every motorist to drive at a speed that assures there is a "clear distance" between his motor vehicle and the one in front of him. (A-162) Plaintiff relied on Staker v. McSweeney, Del. Super. 185 A.2d 892 (1962).

No Delaware motor vehicle statute contains an "assumed clear distance rule" and there is no such Delaware Pattern Jury instruction.

The Court in Staker, Id. pointed out that the clear distance rule has no application where an emergency has been created. Staker, Id. (citations omitted). In Staker the Defendant did not rely upon the emergency doctrine. "I also agree that the rule should not be applied to the determent of progress or the orderly and expeditious movement of traffic upon the highway." Staker, Id.

In Staker the Plaintiff had brought her vehicle to a stop behind a line of approximately ten cars which were waiting for a traffic light on Route 273, in a heavy fog that limited visibility to about fifteen feet, when she was struck in the rear by Defendant. The facts of Staker are not remotely analogous to the facts of this case.

The trial Court did not err in refusing to give the "assumed clear distance rule" requested by Plaintiff given the fact: (1) Delaware does not have any such statutory requirement; (2) the rule seems to apply only when a driver's visibility is limited; (3) the rule has no application where a sudden emergency has been

created; (4) in contrast to Staker a sudden emergency was asserted, as an affirmative defense, by Baker.

(C) Common Law Duty to Inspect Vehicle - This sub-argument is not addressed to Baker.

(D) Effect of Admissions; Jury's Right to Draw Inference - The trial Court properly refused to read Plaintiff's tailored Jury Instructions on "Statements Against Interest – Admissions by Parties" and "Evidence – Direct, Indirect and Circumstantial" on the basis (1) they were not the Delaware Pattern Instructions on these elements of the law; (2) the additional language suggested by Plaintiff could confuse or mislead the jury and (3) the additional language suggested by Plaintiff was close to a commentary on the facts of the case. (A-78-84)

Both at trial and for purposes of this appeal Plaintiff provided no case law to support her proposed Jury Instructions which deviated from the Pattern Instruction. Moreover, Plaintiff has provided no case law to support her argument that Judge Vaughn erred in failing to give her proposed jury instructions on Admissions Against Interest and Indirect or Circumstantial Evidence.

As it relates to Baker his good faith estimates of his speed and distance behind the vehicle in front of him before it swerved to the right lane were his best recollection not true admissions against interest as Plaintiff characterizes Baker's testimony. Baker never admitted he was negligent; he never admitted he violated a

motor vehicle statute; he never admitted he followed another vehicle too closely; he never admitted he was tailgating another vehicle. Similarly, any failure to abide by a "rule of thumb" does not, as a matter of law, subject Baker to civil liability so as to constitute an admission of interest as contemplated under D.U.R.E. 804 (b)(3).

Plaintiff's counsel was not precluded and did argue at trial that Baker's testimony and prior deposition testimony supported and/or proved that he was negligent in following too closely. Baker's testimony, however, was certainly not an admission of fault and/or liability.

Similarly, instructing the jury or direct, indirect or circumstantial evidence as the Pattern Jury Instructions allow is certainly proper. However, Judge Vaughn did not err in refusing to alter this Pattern Instruction with the additional languages: "In this connection, you are also entitled to draw and rely upon reasonable inferences that flow from the evidence presented." A-171)

Plaintiff cites no case law which would allow a jury to be charged on "inferences". In fact, it would be improper and erroneous for a jury to base its verdict not on fact – (either direct, indirect or circumstantial) but rather simply on its own inferences drawn from the facts.

Plaintiff throughout the course of this case has mixed and intertwined "fact" versus "argument". Plaintiff's counsel was not precluded from arguing that an

inference to be drawn from Baker's testimony was that he was following the vehicle in front of him too closely before it swerved into the right lane. The jury, of course, was at liberty to accept or reject that argument.

Judge Vaughn did not err in not giving these two jury instructions for the reasons given in the trial transcript. (B-115-116; B-56-58)

(E) Tailored Emergency Doctrine - Finally, Plaintiff argues it was reversible error, entitling her to a new trial because the trial judge failed to reiterate all of the allegations of negligence against Baker in the "Actions Taken in Emergency" Jury Instruction. (A-166)

Judge Vaughn properly refused to use the Plaintiff's tailored proposed jury instruction on "Actions Taken in Emergency" noting it went beyond the Pattern. (A-72) Baker's counsel's position was that by reiterating all of the allegations of negligence against Baker in the Action Taken in Emergency it gave Plaintiff one more bite of the apple after the jury was specifically instruction on the Plaintiff's allegations or changes of negligence against Baker. (A-177) By reiterating Plaintiff's allegations in the Actions Taken in Emergency instruction it would have unfairly given undue weight to these allegations of negligence.

Plaintiff cites no case law to support her proposition that it is prejudicial error not to recount all of Plaintiff's allegations of negligence when instructing the jury on an affirmative defense such as sudden emergency.

Once again Plaintiff's allegations and theories of negligence against Baker simply were not evidence or facts in the case.

Judge Vaughn did not err and did not abuse his discretion by giving the Delaware Pattern Jury Instruction for Actions Taken in Emergency. (A-178) The instruction as given, was fair, impartial and an accurate summary of the law of sudden emergency in Delaware.

ARGUMENT V

QUESTION PRESENTED

DID THE TRIAL JUDGE ABUSE HIS DISCRETION IN USING THE JURY VERDICT FORM, SUBMITTED ON BEHALF OF WILLIAM BAKER AND BESTFIELD HOMES, LLC WHICH REQUIRED THE JURY TO DETERMINE IF THIS ACCIDENT WAS THE RESULT OF A SUDDEN EMERGENCY AS TO WILLIAM BAKER?

A. SCOPE OF REVIEW

The Scope of Review of the form and substance of the Jury Verdict Form is abuse of discretion. Asbestos Litigation Pusey Trial Group v. Owens-Corning Fiberglass Corp., Del. Supr., 669 A.2d 108, 113 (1995)

B. ARGUMENT

Clearly, given two individual Defendants and multiple issues raised a Jury Verdict Form or Special Interrogatories was appropriate. During the Prayer Conference William Baker's counsel discussed submitting a revised Jury Verdict Form and Samuel Daniel's counsel submitted her own Jury Verdict Form. Plaintiff's counsel undisputedly never submitted his own Jury Verdict Form for the trial Court's consideration. To the extent Plaintiff did not submit her own Jury Verdict Form or Special Interrogatories she has waived her right to object to the Special Interrogatories used by the trial Court below.

The morning after the Prayer Conference, moments before closing arguments, Plaintiff's counsel advised the Court he did not object to the Jury Verdict Form submitted by Samuel Daniel's counsel but did object to Baker's counsel's proposed Jury Verdict Form because it placed the affirmative defense of sudden emergency first. (A-139) Plaintiff's counsel never submitted his own proposed Jury Verdict Form. Furthermore, he never raised the argument below, that Question #1, "Do you find by a preponderance of the evidence that this accident was the result of a sudden emergency as to Defendant Baker?" was incomplete or deficient. (A-140) "And the reason we object to the one from Ms. Sherlock is because it puts the affirmative defenses first, when in the logical process of things, it should be the finding of negligence." (A-140)

Judge Vaughn responded that Samuel Daniels' counsel's suggested Jury Verdict Form did not even address Baker's affirmative defenses and Plaintiff's counsel agreed. (A-140)

On appeal, for the first time Plaintiff is not only objecting that the affirmative defense Interrogatory was out of sequence but also suggesting it was substantively deficient as written. Plaintiff did not make this objection during the trial, below, and did not bother to submit her own proposed Jury Verdict Form or alternative language for Interrogatory #1.) Since the issue was not presented below, this Court will only reverse it if the trial judge's use of the Jury Verdict Form and

Interrogatory #1 constituted plain error. Del. Supr. Ct. R. 8; Beebe Med. Ctr., Inc. v. Bailey, Del. Supr., 913 A.2d 543 (2005)

Judge Vaughn, as a matter of law, did not abuse his discretion or commit plain error in using the Jury Verdict Form in question. Judge Vaughn's rationale was: (1) It is less confusing to have the jury consider the issue of sudden emergency before Baker's negligence since if they actually rule in his favor on the affirmative defense its tantamount to a finding that there's no negligence; (2) It is more confusing to ask if Baker was negligent and then ask if the accident was the result of a sudden emergency and (3) if the jury found William Baker negligent and then found sudden emergency or unavoidable accident applied it could result in an inconsistent verdict. (A-139 – A-144)

The Actions Taken in Emergency instruction read to the jury, below, expressly stated the emergency situation must not be of the person claiming the defense's making and must not be created by his own negligence. (A-178)

The jury instruction on this case, Actions Taken in Emergency, was accurate and not misleading.

The jury verdict sheet, likewise, was not erroneous and it was sequentially logical for the jury in determining the issue of negligence on the part of William Baker.

ARGUMENT VI

QUESTION PRESENTED

PLAINTIFF HAS NOT ASSERTED ANY REVERSIBLE ERROR, LET ALONE CUMULATIVE ERROR, BY THE TRIAL COURT THAT PREJUDICED HER AND DENIED HER A FAIR TRIAL BELOW.

A. SCOPE OF REVIEW

Since Plaintiff did not present a cumulative error argument below; this claim is reviewed for plain error. Supr. Ct. R. 8, Torres v. State, Del Supr., 979 A.2d 1087 (2009)

B. ARGUMENT

As previously indicated this case is one with relatively uncomplicated facts many of which were not in dispute. The facts of the accident supported the affirmative defenses of sudden emergency and unavoidable accident on the part of William Baker given the fact Samuel Daniels' 2' by 6' tailgate suddenly and unexpectedly fell off his pick-up truck into the left lane of Route 1 on May 6, 2009 at approximately 6:30 a.m.

The facts of this May 6, 2009 automobile accident pose a classic sudden emergency defense. It was completely within the province of the jury to accept Baker's testimony that when the blue vehicle in front of him swerved to the right lane he was faced with a sudden emergency not of his making.

The only testimony at trial was the testimony of the three individual parties. Given the limited evidence and testimony at trial a reasonable jury certainly could have concluded that this May 6, 2009 automobile accident was the result of a sudden emergency not of Baker's making and Judge Vaughn properly concluded there was no basis, as a matter of fact and law, for disturbing the jury's verdict in favor of Baker.

Since the express language of the following too closely motor vehicle statute, 21 Del. C. § 4123 (a) requires a motorist to take into consideration existing road and traffic conditions it was not prejudicial error for Judge Vaughn to allow Baker to testify he was leaving the same following distance as other vehicles on the highway that morning.

Judge Vaughn did not abuse his discretion in not allowing Plaintiff's submitted jury instructions on sudden emergency, admission by parties or inferences to be drawn from the evidence since all of these submitted instructions were either reiterating Plaintiff's allegations of negligence against Baker or argument. Plaintiff's counsel provided no factual and/or legal basis for deviating from the trial court's use of Delaware's Pattern instructions on sudden emergency. The evidence at trial did not support instructing the jury on admission by parties or inferences to be drawn from the evidence. Finally, Judge Vaughn did not abuse his discretion in using the only Jury Verdict Form submitted to him that included the

affirmative defenses of sudden emergency and unavoidable accident. It was not only logical and reasonable to ask the jury to first determine if the affirmative defenses of sudden emergency and unavoidable accident applied to Baker but also less likely to result in an inconsistent verdict.

As a matter of law there was no prejudicial reversible error by the trial judge in this case which would entitle Plaintiff to a new trial.

CONCLUSION

For all the reasons stated herein there was no reversible error committed by the trial judge, below, necessitating a new trial. Plaintiff's appeal, as a matter of law, should be denied.

Respectfully submitted,

BY: /s/Mary E. Sherlock
Mary E. Sherlock, Esquire, ID #: 2228
Weber Gallagher Simpson
Stapleton Fires & Newby, LLP
19 S. State Street, Suite 100
Dover, DE 19901
302-346-6377
Attorney for Defendants William Baker
and Bestfield Homes, LLC Below/appellees

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