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Case Number 485,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEITH M. SCHUELLER, Plaintiff -Below, Appellant v. BRETT CORDREY, et al., Defendants-Below, Appellees	)))))))))))	No. 485, 2017 On Appeal from the Superior Court of the State of Delaware in and for New Castle County

APPELLEES' ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATED: March 16, 2018

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NATURE AND STAGE OF PROCEEDINGS

In 2014, Plaintiff Keith Schueller filed suit against the State of Delaware, the Department of Public Safety, Division of State Police, and Delaware State Police officer Brett Cordrey (hereinafter, "State Defendants"), alleging use of excessive force in violation of DEL. CONST. ART. I § 6, battery, intentional infliction of emotional distress, negligence, and gross negligence.[1]

On February 3, 3017, the Superior Court held oral argument on the parties' motions for summary judgment and conducted a pretrial conference. Following supplemental submissions, the lower court entered an order granting State Defendants' motion for summary judgment and denying Plaintiff's motion for summary judgment. The order held that summary judgment was appropriate in State Defendants' favor as to the excessive force and negligence claims.[2]

A five-day bench trial was held on February 20, 2017 through February 24, 2017. The parties submitted written closing statements on April 21, 2017, May 5, 2017, and May 12, 2017. On August 23, 2017, the trial court issued a Decision After Trial ("Decision") in favor of State Defendants on the remaining counts of gross

[1] Appellee's Appendix A19.
[2] *Schueller v. Cordrey*, 2017 WL 568344 (Del. Super. Feb. 13, 2017).

negligence, battery, and intentional infliction of emotional distress.[3] In the Decision, the trial court held that Mr. Schueller was not a credible witness.[4]

Plaintiff did not move for a new trial or move to set aside the verdict. Plaintiff improperly filed a notice of appeal in the Superior Court on September 19, 2017. Plaintiff later petitioned the Superior Court to transfer the appeal to the Supreme Court and filed a notice of appeal and amended notice with the Supreme Court on November 21 and 27, 2017. The lower court ordered the transfer on December 6, 2017.

Appellant/Plaintiff filed his Opening Brief on February 14, 2018. This is the Appellees/State Defendants' Answering Brief.

[3] *Schueller v. Cordrey*, 2017 WL 3635570 (Del. Super. Aug. 23, 2017) ("Decision").
[4] *Id.* at *9. ("Mr. Schueller's testimony at trial (and in deposition) is not supported by the testimony of other fact witnesses. The Court noted that Mr. Schueller was evasive on the witness stand when responding to difficult questions. … The Court places little, to no, value on Mr. Schueller's testimony.").

SUMMARY OF ARGUMENT

Denied. The trial court did not commit error in holding that Plaintiff failed to carry his burden. The trial court's findings of fact are properly and sufficiently supported by the record and the trial court correctly entered judgment in favor of the State Defendants.

STATEMENT OF FACTS

On February 19, 2013, Plaintiff was the subject of an arrest warrant for theft offenses.[5] Plaintiff was a convicted felon.[6] DSP Officers were aware of Plaintiff's recent criminal activity.[7] Plaintiff testified at trial that he was "dealing with substance abuse issues at this time"[8] and he believed he would go to jail if he were arrested due to his prior involvement in retail thefts.[9] In the early afternoon of February 19, 2013, Plaintiff illegally retrieved his vehicle, a Jeep Cherokee, from a tow yard in Lewes, Delaware, by driving it through a hole in the fence of the tow yard.[10]

Cpl. Brett Cordrey and Cpl. Lewis Briggs were separately on duty on February 19, 2013.[11] Shortly after 1:00 p.m., Cpl. Briggs observed the Jeep Cherokee belonging to Plaintiff traveling southbound on state Route 1 in Lewes.[12] Cpl. Briggs confirmed by computer that the vehicle was registered to Plaintiff, and began pursuit of the vehicle on Route 1.[13]

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[5] B02, ¶ a.
[6] A355:16-A359:2.
[7] A541:12-A542:2.
[8] A359:6-9.
[9] A360:4-A361:1.
[10] A361:9-A365:4 15:2-4.
[11] B02, ¶ b & c.
[12] *Id.* at ¶ d; A324 at 115:11-17.
[13] B02, ¶ e.

Cpl. Cordrey was listening via radio and advised that he would assist Cpl. Briggs in the pursuit.[14] Cpl. Cordrey was in the area and joined the pursuit behind Cpl. Briggs.[15] The pursuit was captured on the mobile video recorder in Cpl. Cordrey's car.[16] The officers' pursuit of Plaintiff eventually took them through a residential development.[17] The officers activated their sirens and lights.[18] Plaintiff testified he "wasn't ready to go to jail."[19] Plaintiff increased his speed and took evasive action.[20] Plaintiff's vehicle ultimately struck the side of a SUV that was traveling southbound on Plantations Road.[21]

Immediately following the crash, Plaintiff exited his vehicle and began to run through an adjacent cornfield.[22] Cpl. Briggs exited his vehicle and began a foot pursuit. Cpl. Cordrey remained in his vehicle and continued pursuit across the cornfield.[23] Cpl. Cordrey caught up to Plaintiff, then exited his vehicle in an attempt to take Plaintiff into custody.[24] Plaintiff continued to run away from Cpl. Cordrey.[25]

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[14] B02, ¶ f.
[15] A544:19-A545:11.
[16] B14.
[17] A546:10-13; B14.
[18] Pre-Trial Stipulation at p. 2, ¶ g.
[19] A331 at 144:17-19.
[20] B02, ¶ h; B14.
[21] *Id.* at p. 2, ¶ i.
[22] *Id.* at p. 2, ¶ j; A371:9-12.
[23] B02, ¶ j; A234 at 114:17-115:10.
[24] B02, ¶ k.
[25] *Id.* at ¶ m.

During the pursuit, Plaintiff picked up a shovel and maintained possession of the shovel for the duration of the pursuit.[26] During the foot chase, Cpl. Cordrey gave verbal commands to Plaintiff, telling him to stop.[27] Kelly Boyer, a witness to the initial pursuit, also screamed at Plaintiff to stop.[28] During the foot chase, Plaintiff turned and faced Corporal Cordrey twice.[29] In the first instance, Plaintiff abruptly turned and faced Cpl. Cordrey.[30] Plaintiff and Cpl. Cordrey were approximately 10-15 feet apart at that time and Schueller was holding the shovel to his side.[31] Cpl. Cordrey then discharged his TASER device at Plaintiff, but missed.[32]

After the initial stop, Plaintiff continued running and ended up at a barn in the northwest corner of the property.[33] Plaintiff and Cpl. Cordrey were running "full speed the entire time."[34] As they approached the barn, Plaintiff turned and faced Cpl. Cordrey for the second time.[35] Cpl. Cordrey believed at the time that the area near the barn was a dead end, and believed that was why Plaintiff turned around for

[26] A58:22-A59:1; A553:6-18; B15.
[27] B02, ¶ l; A552:16-A553:5; A560:12-17; A60:15-20; A318 at 92:9-17.
[28] A111:3-A114:1.
[29] A554:7-A555:16 and A559:12-16; A64:21-A66:12.
[30] A555:15-16.
[31] A555:19-20 and A584:18-19.
[32] B02, ¶ n; A556:1-20.
[33] A558:22-A559:7.
[34] A559:12-14.
[35] A559:12-23.

the second time to face Cpl. Cordrey.[36] Plaintiff and Cpl. Cordrey were again 10-15 feet apart and Cpl. Cordrey could not retreat.[37]

Plaintiff had a two-handed grip on the end of the shovel, raised the shovel above himself, and began to swing it around violently.[38] Plaintiff was moving around violently, flailing with the shovel "like a crazy person."[39] Plaintiff's feet and body were moving around and he was not staying in one place.[40] Cpl. Cordrey transitioned from his TASER to his firearm and advised Plaintiff to stop, put down the shovel, and get on the ground.[41] Plaintiff did not respond.[42] Plaintiff continued to flail about and violently swing the shovel.[43]

During this time, Plaintiff had an "inhuman" look in his eyes.[44] Cpl. Cordrey believed "there was no getting through to [Plaintiff]."[45] Cpl. Cordrey testified that

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[36] A559:20-23.
[37] A564:17-A565:11. The testimony at trial was that officers do not have an obligation to retreat. A472:12-15; A278:18-22. Moreover, it would have been dangerous for Cpl. Cordrey to attempt to retreat. A472:12-A473:22 ("[I]t would have been very unsound for him to try to retreat."). *See also* 11 *Del. C.* § 464(b).
[38] A560:4-561:2 ("[I]t was just like he was holding a baseball bat.").
[39] A561:3-19.
[40] *Id.*
[41] A562:1-7.
[42] A563:14-17.
[43] A563:18-21.
[44] A563:21-A564:2.
[45] A564:1-2.

during this time he experienced "the greatest fear I've ever had in my life" and he believed if he did not act something would happen to him.[46]

Cpl. Cordrey focused on Plaintiff's chest and fired his service weapon one time.[47] Plaintiff immediately went to the ground, landing on his back.[48] Plaintiff was shot in the back.[49] Cpl. Cordrey could not recall how Plaintiff landed on the ground but testified, "I looked at him after the shot was fired [and] it was like he was immediately on his back."[50]

Despite their proximity to the scene, neither Cpl. Briggs nor Ms. Boyer witnessed the moments immediately preceding the shooting due to blockage from the tree line around the scene.[51] Cpl. Briggs remained in pursuit, however, and continued running through the tree line and toward the barn after hearing the shot.[52] Cpl. Cordrey was in a two-handed shooting position when Cpl. Briggs arrived at the scene.[53] After Cpl. Briggs arrived on scene, Cpl. Cordrey pointed to the shovel when Cpl. Briggs questioned him regarding Plaintiff's weapon.[54]

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[46] A565:3-6. *See also*, A564:4-16 and A568:13-15 ("I mean, throughout this entire incident, I mean, I was scared.").
[47] A566:4-15. Cpl. Cordrey was complying with standard police practices when he focused on center mass. A496:9-21.
[48] A566:17-A567:1.
[49] B16-17.
[50] A566:A570-217:1.
[51] A71:8-10 and A318 at 92:18-93:3.
[52] A318 at 93:16-A319 at 94:3.
[53] A319 at 94:16-18.
[54] A319 at 97:18-20.

Less than two minutes passed from the time Plaintiff was involved in the collision until he was shot.[55]

[55] B20; A325 at 121:19-A326 at 123:12.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT PLAINTIFF FAILED TO CARRY HIS BURDEN OF PROOF

A. Question Presented

Whether the Superior Court's findings of fact were sufficiently supported by the record to permit a finding that Plaintiff failed to meet his burden of proof.

B. Scope of Review

In order to rule in Plaintiff's favor, the trial court was required to find that Plaintiff proved the elements of each claim by a preponderance of the evidence.[56] The trial court held that Plaintiff did not meet that burden and returned a verdict in favor of the State Defendants.

The trial court's factual findings must be accepted "[i]f they are sufficiently supported by the record and are the product of an orderly and logical deductive process."[57] The trial court's decision should be afforded substantial deference.[58]

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[56] *Patel v. Patel*, 2009 WL 427977, *3 (Del. Super. Feb. 20, 2009) (citing *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967)).

[57] *Levit v. Bouvier*, 287 A.2d 671, 673 (Del. 1972); *Lorenzetti v. Hodges*, 62 A.3d 1224 (Table) (Del. 2013) ("In an appeal from the entry of a civil judgment following a Superior Court bench trial, this Court will uphold the judge's factual findings if they are sufficiently supported by the record and not clearly erroneous, and are the product of an orderly and logical deductive process.").

[58] *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999); *Adams v. Jankouskas*, 452 A.2d 148, 151 (Del. 1982) ("[W]here, as here, the trial court was faced with conflicting testimony, we accord great deference to the findings of the trial judge who heard all the witnesses.").

C. Merits of Argument

Plaintiff details three specific factual findings that he asserts are unsupported by the record. These include: (i) Plaintiff's use of the shovel in an attempt to keep Cpl. Cordrey at bay; (ii) the length of time between when a witness lost sight of the pursuit between Plaintiff and Cpl. Cordrey and when she heard a gunshot; and (iii) the manner in which Plaintiff was shot in the back.

The Decision provides seventy detailed findings of fact and conclusions of law. The Decision, which found plaintiff was not a credible witness,[59] includes a detailed discussion of the evidence presented and analysis of the credibility of the witnesses. While Plaintiff may be disappointed with the Decision, he can point to no true issues with the trial court's analysis or consideration of the evidence. Therefore, this Court should afford the trial court's decision proper deference and affirm the Decision.

i. Use of the Shovel

Plaintiff disputes the following factual finding: "As utilized by Mr. Schueller, the shovel constituted a dangerous instrument."[60]

At the initial stages of the foot pursuit, Plaintiff picked up a shovel and ran toward a tree line.[61] Cpl. Cordrey chased Plaintiff by foot and Plaintiff turned and

[59] Decision at *9.
[60] *See* Decision at *10, ¶ 28; OB at 7-10.
[61] A58:22-A59:1; A553:6-18.

faced Cpl. Cordrey twice.[62] As they approached a barn in the northwest corner of the property, Plaintiff turned and faced Cpl. Cordrey for the second time.[63] With a two-handed grip on the end of the shovel, Plaintiff raised the shovel above himself, and began to swing it around violently.[64] Plaintiff was flailing with the shovel erratically, and Cpl. Cordrey testified that Plaintiff was waving the shovel around "like a crazy person."[65] Given their location on the property and proximity to the barn, Cpl. Cordrey believed that Plaintiff could no longer retreat and Cpl. Cordrey feared for his safety.[66] Cpl. Cordrey had ordered Plaintiff to put down the shovel and get on the ground, but Plaintiff did not comply.[67] The trial court found that "[u]nder the circumstances, Mr. Schueller presented a legitimate threat to the safety of Cpl. Cordrey."[68] The trial court further held that, "[u]nder the circumstances, Mr. Schueller - if he remained at large - presented a legitimate threat to other Delawareans."[69]

In his opening brief, Plaintiff claims the trial court erred in crediting Cpl. Cordrey's testimony regarding Plaintiff flailing the shovel around "like a crazy

[62] B02, ¶ k; A554:7-A555:16; A559:12-16; A64:21-A66:12.
[63] A559:12-23.
[64] A560:4-A561:11.
[65] *Id.*
[66] A559:19-23; A564:13-A565:6.
[67] A560:12-17; A561:20-562:7; A563:14-17.
[68] Decision at *10, ¶ 41.
[69] *Id*. at ¶ 42.

person."[70] In support of this argument, Plaintiff cites to the trial court's finding that Cp. Cordrey had a "lack of memory with respect to the actual shooting."[71] However, the trial court did not find that Cpl. Cordrey's testimony regarding events leading up to the shooting was not credible or lacking authenticity. Rather, the trial court found that Cpl. Cordrey "provided credible testimony up and until the time of the shooting."[72] The trial court properly considered Cpl. Cordrey's statements regarding the foot pursuit and the parties' initial interactions as they reached the barn. As noted in the Decision, "Cpl. Cordrey's testimony is supported by the MVR from his vehicle and the testimony of several of the fact witnesses, especially the testimony of Ms. Boyer. The trial court found Cpl. Cordrey's demeanor on the witness stand to be good. Moreover, the trial court noted that Cpl. Cordrey answered questions directly and did not attempt to avoid answering difficult questions."[73]

While Plaintiff attempts to entirely discredit Cpl. Cordrey's recollection and testimony in the time preceding the actual shooting, this is inconsistent with the trial court's directive. Rather, the trial court could properly consider Cpl. Cordrey's testimony regarding Plaintiff's actions that led to the shooting.

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[70] OB at 10.
[71] Decision at *9.
[72] *Id*.
[73] *Id*.

Moreover, Plaintiff ignores that the trial court also noted that the testimony of Defendants' expert, Emmanuel Kapelshon, was credible and helpful. In discussing Mr. Kapelshon's testimony, the trial court found that "a shovel can be a dangerous weapon and that a person actively resisting arrest while carrying that shovel poses a threat to officer and public safety."[74] Plaintiff's own use of force expert also indicated that a shovel could be a deadly weapon.[75] The testimony of Cpl. Cordrey would also support a finding under Delaware law that Plaintiff's violent use of the shovel constituted either a deadly weapon or a dangerous instrument.[76]

The trial court had sufficient evidence to find that the shovel maintained by Plaintiff during the foot pursuit was a dangerous instrument, or could even meet the definition of a deadly weapon.

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

The trial court found "a short time" passed from the time Ms. Boyer lost sight of Plaintiff and Cpl. Cordrey and when she heard a gunshot. The finding of fact in the Decision states: "Cpl. Cordrey and Mr. Schueller could no longer be viewed by

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[74] Decision at *8; *see also* A510-A518.
[75] A284:18-A285:4.
[76] *See* 11 *Del. C.* § 222(4)(5); *Taylor v. State*, 679 A.2d 449, 454 (Del. 1996) (adopting "use" test to determine if item was being used in manner that could be a deadly weapon). *See also Commonwealth v. Masten*, 2017 WL 1839239, at *3-4 (Pa. Super. Ct. May 5, 2017) (trial court properly found that shovel was used as deadly weapon and that a shovel is defined as a deadly weapon under state law); *State v. Tackett*, 2001 WL 721852, at *3 (Tenn. Crim. App. June 28, 2001) (defendant used shovel as a deadly weapon under Tennessee law).

Ms. Boyer as they went behind some shrubs. After a short time, Ms. Boyer heard a gunshot."[77] Nowhere in the Decision does the trial court attribute a specific period of time between when Ms. Boyer lost sight of the parties and when she heard the gunshot.

Plaintiff appears to contest a description in a footnote of the Decision noting that Ms. Boyer testified to differing amounts of time elapsing between when she lost sight of Plaintiff and Cpl. Cordrey, and when she heard the gunshot.[78] Estimations of time should allow for reasonable margins of error given that these estimations are subjective. The trial court accounted for this when finding that a "short time" passed.

Plaintiff's attempts to pin down a precise number of elapsed seconds are unreasonable. Regardless of the specific time-period that passed from when Plaintiff and Cpl. Cordrey first moved out of her sight to the time when Ms. Boyer heard the gunshot, the events that took place during that time were limited. The parties continued their foot chase a short distance, Plaintiff turned toward Cpl. Cordrey, Cpl. Cordrey advised Plaintiff to stop, Plaintiff did not respond or cease waiving the shovel, and Cpl. Cordrey feared for his safety and fired his service weapon.

Many of these brief events could occur simultaneously. Plaintiff references an "extended exchange" between the parties, but there is no evidence in the record

[77] Decision at *10, ¶3 7.
[78] *See* Decision at *10, fn 36; OB at 10-12.

to support a lengthy exchange. Rather, Cpl. Cordrey simply ordered Plaintiff to stop, put down the shovel, and get on the ground.[79] Plaintiff did not respond to those commands.[80]

Plaintiff also contends that "Cpl. Cordrey must have spent at least some of the time after Boyer lost sight of the chase in finally catching up with Schueller."[81] Yet, trial testimony indicated that the parties were 10-15 feet apart at the time of their final exchange.[82] Cpl. Cordrey did not need to "catch up" to Plaintiff. The impossibility of finding or defining exactly how many seconds elapsed between when the parties passed through the tree line and when Cpl. Cordrey fired his weapon is unnecessary. Speculation about the time is insufficient to raise any doubt as to the sufficiency and soundness of the trial court's findings. Under the deferential standard afforded to the trial court's findings, there is no error in the court's detailed findings on this issue.

iii. The Shooting

The trial court acknowledged that Plaintiff was shot in the back, finding that "[n]either Mr. Schueller nor Cpl. Cordrey have provided a reasonable explanation for how exactly Mr. Schueller got shot in the back."[83]

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[79] A562:1-7.
[80] A563:14-17.
[81] OB at 12.
[82] A564:17-A565:11.
[83] Decision at *10, ¶ 46.

While acknowledging that the trial court found it must disregard the testimony of the only two witnesses to the shooting, Plaintiff takes issue with the trial court's failure to find that Plaintiff was turned away from Cpl. Cordrey at the time of the shooting. In his Opening Brief, Plaintiff states: "While the court's credibility determinations excluded both Schueller's and Cpl. Cordrey's testimony, it did not leave the court with no facts regarding the actual shooting."[84] Plaintiff contends that expert testimony could support a finding that Plaintiff was turned away from Cpl. Cordrey at the time of the shooting.

The trial court received testimony from a variety of experts for both parties. The trial court detailed testimony it received from the expert witnesses on accident/injury reconstruction and kinesiology, Plaintiff's expert Jeremy Bauer, Ph.D., and State Defendant's expert Geoff Desmoulin, Ph.D. The court noted, however, that it "did not find that these two experts were of much help in determining what actually happened on February 19, 2013."[85] Plaintiff ignores this determination while rehashing Dr. Bauer's testimony and contesting that the trial court should have accepted Dr. Bauer's findings.[86] Yet, even if the lower court had credited Dr. Bauer's testimony, it is worth noting that Dr. Bauer agreed that Plaintiff could have been facing Cpl. Cordrey at the time of the gunshot and then turned 180

[84] OB at 14.
[85] Decision at *8.
[86] OB at 13-14.

degrees or made a powerhouse swing such that Plaintiff would end up with a bullet wound in his back.[87]

The trial court also received testimony from each party's expert witness on police practices and use of force.[88] R. Paul McCauley, Ph.D. testified on behalf of Plaintiff, while Mr. Kapelshon testified on behalf of State Defendants. The trial court found "the testimony of both Mr. Kapelshon and Dr. McCauley to be credible; however, the Court [found] the testimony of Mr. Kapelshon to be more helpful."[89] Mr. Kapelshon provided testimony explaining how Mr. Schueller could have been shot in the back:

> Obviously the bullet wound is found to have entered Mr. Schueller's back, but the time it takes the officer to fire that shot, which we've said is about a half a second at best, Mr. Schueller can rotate 180 degrees, whether that's from a swing of the shovel, whether that's just turning to flee, whether that's just turning for any purpose. And the officer who's raising the gun in front of his face who's got the gun in his hands and arms in front of his own eyes very often is not aware that the suspect is turning or some motion the suspect is making while that shot's being fired.[90]

Plaintiff's assertion that the trial court should have found Plaintiff was turned away from Cpl. Cordrey at the moment Cpl. Cordrey pulled the trigger on his weapon is not supported by any uncontroverted testimony. The trial court properly

[87] A308 at 51:17-53:18.
[88] Decision at *8.
[89] *Id*.
[90] A493:21-494:10.

considered the evidence provided but could not determine the precise sequence of events regarding Plaintiff's positioning at the time of the shooting. The trial court deemed Plaintiff was not a credible witness.[91] The trial court found that Cpl. Cordrey was a credible witness, up to the time of the actual shooting.[92] Thus, it was reasonable for the lower court to credit Cpl. Cordrey's testimony that Plaintiff had turned to face Cpl. Cordrey and Cpl. Cordrey believed he shot Plaintiff in the chest.[93]

Additionally, the trial court found that Plaintiff **was** waving the shovel around prior to the shooting.[94] The trial court stated in conclusion that it "remained unable to determine when and how Mr. Schueller had turned when Cpl. Cordrey shot him – *i.e.*, whether Mr. Schueller had turned so as to be arrested, turned to leave, turned while swinging the shovel, or turned to flee just as Cpl. Cordrey aimed and fired his firearm."[95] Plaintiff correctly notes that there is no factual witness to explain that such a swing or turn took place.[96] However, State Defendants' expert, Mr. Kapelshon, provided testimony that could support a finding Plaintiff was turning in the moment preceding the shot.[97]

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[91] Decision at *9.
[92] *Id.*
[93] Decision at *10, ¶¶ 38 and 44.
[94] Decision at *10, ¶ 39.
[95] Decision at *12.
[96] OB at 15.
[97] A493:6-494:10.

Therefore, there is no basis for this Court to disturb the trial court's finding on the shooting, which is supported by the evidence and entitled to deference on appeal.

CONCLUSION

For the arguments set forth in this Answering Brief, State Defendants respectfully submit that the decision of the Superior Court should be affirmed.

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