

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**STATE OF DELAWARE,** )  
 )  
 Plaintiff, )  
 v. ) Case No's: 1010010795 &  
 ) 1010010780  
**DEBORAH A. KENNEY,** )  
 )  
 Defendant, )

Date Submitted: August 10, 2011  
Date Decided: August 31, 2011

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**MEMORANDUM OPINION**

Trial in the above captioned matter took place on Wednesday, August 10, 2011 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence<sup>1,2</sup> and sworn testimony<sup>3,4</sup> the Court reserved decision. This is the Court's Final Decision and Order.

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<sup>1</sup> State's Exhibits: 1) Delaware State Police Chemical Test Report, 2) Delaware Health and Social Services Driving Under the Influence (DUI) Laboratory Report, and 3) FDA Supp 29 Approved labeling test 4.5.10 Medication Guide Ambien Tablets (*zolpidem tartrate*).

<sup>2</sup> Defendant's Exhibits: 1) Deborah A. Kenney Medical Diagnostic Test Results and 2) Dr. Lisa Leschek-Gelman's Clinical Notes on Deborah A. Kenney.

<sup>3</sup> State's Witnesses: Peter Fournier (victim), Margaret Fournier (victim), Officer Corporal Joseph Gardner (Delaware State Police), and Jessica Smith, Chief Forensic Toxicologist (Delaware Office of the Chief Medical Examiner).

<sup>4</sup> Defense's Witnesses: Bill Smith (husband of Deborah A, Kenney), Deborah A. Kenney (defendant), and Dr. Lisa Leschek-Gelman, General Neurologist: emphasis in epilepsy and sleep medicine (Christina Health Care Systems)

The defendant Deborah A. Kenney (“Kenney”) was charged in Case Number 1010010795 with four (4) traffic violations filed by the Attorney General with the Clerk of the Court on or about October 15, 2010: 1) Driving a vehicle under the influence of drug in violation of 21 Del. C. §4177(a) , 2) Failed to remain within a single lane in violation of 21 Del. C. §4122(1), 3) Leaving the scene of property collision accident in violation 21 Del. C. §4201(a), and 4) Failure to report a collision involving alcohol or drugs in violation of 21 Del. C. §4203(a)(3). In addition to the above charges Kenney was also charged in case number 1010010780 with two (2) violations on or about October 15, 2010: 1) Failure to remain within a single lane in violation of 21 Del. C. 4122, and (2) Driving on the wrong side of the roadway when roadway has 4 or more lanes in violation of 21 Del. C. §4114.

### **The Facts**

The court finds the relevant facts as follows. Deborah A. Kenney (“Kenney” or (“defendant”)) is an operating room registered nurse at Chester-Crozer Hospital in Pennsylvania. Kenney has been a nurse for 38 years. Kenney at the time of the accident as set forth in the Charging documents was under the care of her primary care physician for ten (10) years, Dr. Matthew Cohen (“Dr. Cohen”), and was prescribed and regularly taking the following medications: Norvasc, Lisinopril, Cymbalta, Celebrex, and Lyrica. Kenney was also prescribed and was periodically taking Ambien (Zolpidem) and Benadryl (Diphenhydramine). Kenney has been prescribed Ambien for three (3) years and would take Ambien on the nights that she was not “on-call” for open heart surgery.

On the night of October 14, 2010, Kenney was not “on-call.” On or about 8:00pm Kenney took her prescribed Ambien. According to Kenney’s husband, Bill Smith (“Smith”), Kenney is regularly in bed by 10:00pm, and would wake up regularly a little after 5:00am and

then leave for work at 6:00am. Kenney would arrive at work on October 15, 2010 at 6:30am. There was no testimony or evidence presented in the record contrary to Smith's testimony.

On October 15, 2010, Kenney started work at 7:00am and worked till 3:15pm. Kenney's duty this day was to "scrub-on" and assist a surgeon in an open heart surgery for a patient that needed multiple coronary artery bypass grafts. Kenney left work after approximately eight hours and fifteen minutes (8:15) because she was "a little tired". When Kenney left work the open heart surgery was still taking place. Another surgical team member covered for her. While leaving work Kenney called her husband from her cell phone in her car between 3:15pm and 3:30pm. Smith was talking to Kenney her cell phone "cutoff".

Peter Fournier ("Peter") and his wife Margaret Fournier ("Margaret"), ("Fournier's"), were on their way from Doylestown, Pennsylvania to North Carolina to visit their son in college. While they were driving south on I-495, just south of the merger between I-95 and I-495, Kenney merged into the driver's side of the Fournier's motor vehicle. Although Peter, who was driving, tried to swerve to avoid contact, Kenney hit his car on or around the driver side mirror. Because traffic was heavy Peter was unable to immediately pull over to the emergency lane. While Peter was waiting for a safe opportunity to pull over Kenney merged behind the Fournier's car. Kenney then rear-ended the Fournier's car, and pushed it down I-495.<sup>5</sup> After this contact Peter "sped up" and created some distance between his car and Kenney's. Kenney then sped up again and rear-ended the Fournier's car for a second time, pushing the Fournier's car into the median guardrails. The Fournier's car stopped against the guardrail. Kenney then drove her car into the passing lane on the right hand side of the Fournier's car and stopped. In total Kenney struck the Fournier's car three times.

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<sup>5</sup> It was not exactly clear how far Kenney's car pushed the Fournier's car down I-495.

Peter then exited his car through the driver side window. His car door was blocked by the guardrail, and he therefore attempted to make contact with Kenney. When Peter approached Kenney's car, he noticed that she was slumped over. Peter tried to obtain Kenney's attention by banging on her window and "yelling at her". Kenney did not respond, other than to lift her head up look and slump back down.

After approximately seven minutes Kenney then drove away in her motor vehicle. Corporal Joseph Gardner ("Corporal Gardner"), an Officer of the Delaware State Police, responded to the incident and arrived on-scene at or about 4:10pm. From this point onward Corporal Gardner was in-charge of the investigation. During the investigation Corporal Gardner learned that Kenney was involved in a second accident on Philadelphia Pike. Corporal Gardner additionally learned that Kenney had been transported from the Philadelphia Pike accident scene to Wilmington Hospital.

At or about 6:30pm on October 15, 2010, Corporal Gardner met with and spoke to Kenney at Wilmington Hospital. Kenney cooperated fully with Corporal Gardner in answering his questions. Corporal Gardner noted that Kenney was highly concerned about the victim's welfare in the two accidents. Corporal Gardner testified that Kenney was unable to recall any event from the time she left the parking lot at Chester-Crozer Hospital until she woke up at Wilmington Hospital. Kenney has been unable to recall this event to date.

Based upon his investigation, Corporal Gardner suspected that Kenney might have been driving under the influence of drugs. He requested a phlebotomist to draw Kenney's blood and have the tested and a phlebotomist kit. The results of the testing<sup>6</sup> were negative for alcohol and positive for 87 ng/ml of Ambien (zolpidem) and 69 ng/ml Benadryl (Diphenhydramine) in her

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<sup>6</sup> All testing was properly conducted within the rules and procedures for such testing.

system. No evidence was presented as to what the significance of these levels or what effects these levels would have on a person.

**Testimony of Jessica Smith at trial.**

Jessica Smith, (“Smith”) Lab Manager II of the Office of the Chief Medical Examiner provided testimony at trial. She received a Bachelor’s Degree in 2003 in Biology from Michigan State and a Master’s Degree in Forensic Chemistry. Smith is a Forensic’s Chemist and is a Lab II and has been employed for the past seven (7) years at the Chief Medical Examiner’s office. She testified she looked at the lab reports and toxicology chemistry in this case because she is a toxicology and phonemic externist and expert in this field.

Smith supervises staff at the Medical Examiner’s office and reviews all toxicology reports and certifies these reports on behalf of the State, including DUI toxicology reports. She reviews all data after they are prepared by the staff and looked at certified records F100668. That document was received into evidence and she also reviewed the AIIR Report. She found Benadryl in the lab results, which could cause the defendant to be sleepy. When questioned by the State as to actual Benadryl readings set forth in State’s Exhibit No. 2 and whether these toxicology reports for Benadryl could have caused the defendant to driving under the influence, Mr. Mauer raised a legal objection. The objection was that he was not supplied the facts and/or summary the of opinions of the State’s expert pursuant to his Court of Common Pleas Rule 16 Discovery Request. After legal argument on the issue, the State, in lieu of expert testimony of Smith’s analysis of the Benadryl toxicology reports, counsel stipulated the State would move into evidence without objection an internet site summary which detailed the effects of Benadryl. The State agreed to forego any formal expert testimony on interpretation or extrapolation of the

amount of Benadryl and the toxicology report for the defendant and/or any expert testimony on the issue of whether it caused a Driving Under the Influence conviction.

**Testimony of Dr. Lisa Leschek-Gelman.**

While in the Hospital Kenney's attending doctor requested a consultation with Dr. Lisa Leschek-Gelman ("Dr. Gelman")<sup>7</sup>. Dr. Gelman is a neurologist, with a practice emphasis in seizures and sleep disorders. Dr. Gelman was consulted because there was concern among her attending doctor that Kenney might have had a seizure<sup>8</sup>.

On or about October 16, 2010, Dr. Gelman reviewed Kenney's medical records and met with Kenney. During Dr. Gelman's interview, Kenney was unable to recall "anything that happened" between leaving her work and arriving at Wilmington Hospital. A CAT scan and an MRI were ordered for Kenney to investigate the possibility of seizures. According to Dr. Gelman and her notes,<sup>9</sup> the CAT scan revealed a "right temporal encephalomalacia,<sup>10</sup>" or a "shrinking of the right temporal lobe of the brain". According to Dr. Gelman this is an area of the brain which is most prone to seizures. The CAT scan also revealed the injury to Kenney's brain is old, but Dr. Gelman was unable to determine the time period when this injury occurred. The results of the MRI testing were "officially read as right temporal lobe encephalomalacia.<sup>11</sup>" Besides the following two test results, Dr. Gelman also asked Kenney if she had any feeling of déjà vu or whole body warmth, or seeing aura's. Dr. Gelman stated that these symptoms are more common with people who suffer seizures. Kenney stated to Dr. Gelman that for the past year she has been having déjà vu daily. Dr. Gelman concluded with a degree of medical certainty that Kenney had

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<sup>7</sup> Dr. Gelman was not retained *per se* to be an expert witness for the defense. Dr. Gelman was one of Kenney's treating physicians during her hospitalization. The Court finds Dr. Gelman's testimony extremely credible and unimpeached.

<sup>8</sup> Dr. Shahnoos Mahdavi's notes dated 10/16/2010 at 10:54am (Defense Exhibit 2 pg 18)

<sup>9</sup> Defense Exhibit 2.

<sup>10</sup> Defense Exhibit 2 pg 2.

<sup>11</sup> Defense Exhibit 2 pg2.

suffered a complex partial seizure, stemming from her right temporal lobe, which lasted the entire time her accident with the Fournier's car occurred and when the second accident on Philadelphia Pike occurred on or around October 15, 2010. In addition, Dr. Gelman stated there was no way for Kenney to know she was going to have a seizure.

According to Dr. Gelman, a person who suffers complex partial seizures would, like Kenney, be able to drive, but would not be able to notice or interact with the cars around them or their environment. In addition, a person's actions during this type of seizure would be involuntary. Dr. Gelman further testified that this type of seizure can last for five (5) minutes, thirty (30) minutes, or one (1) hour. Once the seizure is over the person would be back to their baseline self. They would be perfectly fine, except for the lack of recognition or memory of what had occurred during the seizure. With a degree of medical certainty Dr. Gelman believes that this is what happened to Kenney.

Dr. Gelman testified that neither Ambien (zolpidem) nor Benadryl (Diphenhydramine) could have caused Kenney to have a seizure. Dr. Gelman did testify that Benadryl would have made it easier for a seizure to "breakthrough" or occur, but would not accurately create or cause a seizure. Dr. Gelman went on to state that with or without Ambien and Benadryl in Kenney's system her diagnosis of complex partial seizure would not change. Stated another way, Kenney's seizure on or about October 15, 2010, was not caused by the occurrence of Ambien or Benadryl in her body.

As a result of Kenney's newly discovered medical condition she has had her driving license suspended by the Department of Motor Vehicles for three (3) months. Kenney has since restored her driver's license privileges. Kenney's seizures are currently being treated in an outpatient setting by her primary care physician, Dr. Cohen. Kenney has been prescribed Keppra

to control her seizures. Since the start of this treatment Kenney's doctor has had to increase her Keppra dosage because she has suffered additional seizures.

## I. The Law

By established case law and by statute, the State is required to prove each element of the instant charges beyond a reasonable doubt. 11 Del. C. §301; United States ex rel. Crosby v. Delaware, 346 F. Supp. 213 (D. Del. 1972). A reasonable doubt is "not meant to be a vague, whimsical or merely possible doubt, but such doubt as intelligent, reasonable, and impartial persons honestly entertain after a careful examination and conscientious consideration of the evidence." State v. Matushefske, 215 A.2d 443 (Del. Super. Ct. 1965). To warrant a conviction, all of the evidence, direct and circumstantial, must lead the Court to conclude beyond a reasonable doubt that the defendant committed these offenses.

The Court as trier of fact is the sole judge of the credibility of each fact witness. If the Court finds the evidence presented to be in conflict, it is the Court's duty to reconcile these conflicts, if reasonably possible, so as to make one harmonious story of it all. If the Court cannot do this, the Court must give credit and disregard any portion of the testimony which in the Court's judgment is unworthy of credit. In doing so, the Court takes into consideration the demeanor of the witness, their apparent fairness in giving their testimony, their opportunities in hearing and knowing the facts about which they testify, their opportunities in hearing and knowing the facts about which they testify, and any bias or interest that they may have concerning the nature of the case.

- A. 21 Del. C. §4177: Driving a Vehicle while under the influence or with a prohibited alcohol content; evidence; arrest; and penalties.
  - (a) No person shall drive a vehicle:
    - (1) When the person is under the influence of alcohol;
    - (2) When the person is under the influence of any drug;



- (3) When the person is under the influence of a combination of alcohol and any drug;
- (4) When the person's alcohol concentration is .08 or more; or
- (5) When the person's alcohol concentration is, within 4 hours after the time of driving .08 or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the time of driving .08 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving;
- (6) When the person's blood contains, within 4 hours of driving, any amount of an illicit or recreational drug that is the result of the unlawful use or consumption of such illicit or recreational drug or any amount of a substance or compound that is the result of the unlawful use or consumption of an illicit or recreational drug prior to or during driving.
  - (b) In a prosecution for a violation of subsection (a) of this section:
    - (1) Except as provided in paragraph (b)(3)b. of this section, the fact that any person charged with violating this section is, or has been, legally entitled to use alcohol or a drug shall not constitute a defense.
    - (2)
      - a. No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol prior to or during driving but has only consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .08 or more within 4 hours after the time of driving.
      - b. No person shall be guilty under subsection (a)(5) of this section when the person's alcohol concentration was .08 or more at the time of testing only as a result of the consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any sampling which raised the person's alcohol concentration to .08 or more within 4 hours after the time of driving.
    - (3)
      - a. No person shall be guilty under paragraph (a)(6) of this section when the person has not used or consumed an illicit or recreational drug prior to or during driving but has only used or consumed such drug after the person has ceased driving and only such use or consumption after driving caused the person's blood to contain an amount of the drug or an amount of a substance or compound that is the result of the use or consumption of the drug within 4 hours after the time of driving.
      - b. No person shall be guilty under paragraph (a)(6) of this section when the person has used or consumed the drug or drugs detected

according to the directions and terms of a lawfully obtained prescription for such drug or drugs.

c. Nothing in this subsection nor any other provision of this chapter shall be deemed to preclude prosecution under paragraph (a)(2) or (a)(3) of this section.

- (4) The charging document may allege a violation of subsection (a) of this section without specifying any particular paragraph of subsection (a) of this section and the prosecution may seek conviction under any of the paragraphs of subsection (a) of this section.
- (c) For purposes of subchapter III of Chapter 27 of this title, this section and § 4177B of this title, the following definitions shall apply:
  - (1) "Alcohol concentration of .08 or more" shall mean:
    - a. An amount of alcohol in a sample of a person's blood equivalent to .08 or more grams of alcohol per hundred milliliters of blood; or
    - b. An amount of alcohol in a sample of a person's breath equivalent to .08 or more grams per two hundred ten liters of breath.
  - (2) "Chemical test" or "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between an officer and the person.
  - (3) "Drive" shall include driving, operating, or having actual physical control of a vehicle.
  - (4) "Vehicle" shall include any vehicle as defined in § 101(80) of this title, any off-highway vehicle as defined in § 101(39) of this title and any moped as defined in § 101(31) of this title.
  - (5) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle.
  - (6) "Alcohol concentration of .15 or more" shall mean:

- a. An amount of alcohol in a sample of a person's blood equivalent to .15 or more grams of alcohol per hundred milliliters of blood; or
  - b. An amount of alcohol in a sample of a person's breath equivalent to 20 or more grams per two hundred ten liters of breath.
- (7) "Drug" shall include any substance or preparation defined as such by Title 11 or Title 16 or which has been placed in the schedules of controlled substances pursuant to Chapter 47 of Title 16. "Drug" shall also include any substance or preparation having the property of releasing vapors or fumes which may be used for the purpose of producing a condition of intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.
- (8) "Illicit or recreational drug" as that phrase is used in paragraph (a)(6) of this section means any substance or preparation that is:
- a. Any material, compound, combination, mixture, synthetic substitute or preparation which is enumerated as a Schedule I controlled substance under § 4714 of Title 16; or
  - b. Cocaine or of any mixture containing cocaine, as described in § 4716(b)(4) of Title 16; or
  - c. Amphetamine, including its salts, optical isomers and salt of its optical isomers, or of any mixture containing any such substance, as described in § 4716(d)(1) of Title 16; or
  - d. Methamphetamine, including its salt, isomer or salt of an isomer thereof, or of any mixture containing any such substance, as described in § 4716(d)(3) of Title 16; or
  - e. Phencyclidine, or of any mixture containing any such substance, as described in § 4716(e)(5) of Title 16; or
  - f. A designer drug as defined in § 4701 of Title 16; or
  - g. A substance or preparation having the property of releasing vapors or fumes which may be used for the purpose of producing a condition of intoxication, inebriation, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.
- (9) "Unlawful use or consumption" as that phrase is used in paragraph (a)(6) of this section means that the person used or consumed a drug without legal authority to do so as provided by Delaware law. This Code describes the procedure by which a person may lawfully obtain, use or consume certain drugs. In a prosecution brought under paragraph (a)(6) of this section, the State need not present evidence of a lack of such legal authority. In a prosecution

brought under paragraph (a)(6) of this section, if a person claims that such person lawfully used or consumed a drug, it is that person's burden to show that person has complied with and satisfied the provisions of this Code regarding obtaining, using or consumption of the drug detected.

- (10) "Substance or compound that is the result of the unlawful use or consumption of an illicit or recreational drug" as that phrase is used in paragraph (a)(6) of this section shall not include any substance or compound that is solely an inactive ingredient or inactive metabolite of such drug.

Case law provides that the element of driving may be proven beyond a reasonable doubt by circumstantial evidence. *Coxe v. State*, 281 A.2d 606 (Del. Super. Ct. 1971); *Lewis v. State*, 626 A.2d 1350 (Del. Super. Ct. 1993). However, subsections (a) and (b) of 11 Del. C. §4177 must be read together and defendant must "be found, beyond a reasonable doubt, to have operated a vehicle while under the influence of Alcohol [or Drugs]." 21 Del. C. §4177(a); 11 Del. C. §301.

- B. 21 Del. C. §4122(1): Failed to remain within a single lane. Whenever any roadway has been divided into 2 or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply: (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.
- C. 21 Del. C. §4201(a): Leaving the scene of property collision accident.
- (a) The driver of any vehicle involved in a collision resulting in apparent damage to property shall immediately stop such vehicle at the scene of the collision. Said stop should be made as close to the scene of the collision as possible without obstructing traffic more than necessary. The driver shall immediately undertake reasonable efforts to ascertain whether any person involved in the collision was injured or killed. If such collision resulted in injury or death, the driver shall comply with § 4203 of this title. If, after reasonably ascertaining that there are no injuries or deaths, and if the damaged vehicle is obstructing traffic, the driver of the vehicle must make every reasonable effort to move the vehicle or have it moved so as not to obstruct the

regular flow of traffic more than necessary. If the damage resulting from such collision is to the property of the driver only, with no damage to the person, property of another, or the environment, the driver need not stay at the scene of the collision but shall immediately make a report of the damage resulting as required by § 4203 of this title.

D. 21 Del. C. §4203(a)(3): Failed to report a collision involving alcohol or drugs.

(a) After complying with the requirements of §§ 4201 and 4202 of this title, the driver of any vehicle involved in the following described vehicular collisions shall immediately report such collision to the police agency which has primary jurisdictional responsibility for the location in which the collision occurred:

- (1) When the collision results in injury or death to any person;
- (2) When the collision occurs on a public highway and results in property damage to an apparent extent of \$500 or more; or
- (3) When it appears that any collision involving a driver whose physical ability is impaired as a result of the use of alcohol or drugs or any combination thereof.

E. 21 Del. C. §4114: Driving on the wrong side of the roadway when the roadway has four (4) or more lanes.

(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

- (1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
- (2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;
- (3) Upon a roadway divided into 3 marked lanes for traffic under the rules applicable thereon; or
- (4) Upon a roadway designated and signposted for 1-way traffic.

(b) Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a

left turn at an intersection or into a private road or driveway.

(c) Upon any roadway having 4 or more lanes for moving traffic and providing for 2-way movement of traffic, no vehicle shall be driven to the left of the center line of the roadway, except when authorized by signs or markings designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes, or except as permitted under this section. This subsection shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private road, driveway or highway.

F. 11 Del. C. §242: Requirements for criminal liability in general.

A person is not guilty of an offense unless liability is based on conduct which includes a voluntary act or the omission to perform an act which the person is physically capable of performing.

G. 11 Del. C. §243: Definition of voluntary act.

"Voluntary act" means a bodily movement performed consciously or habitually as a result of effort or determination, and includes possession if the defendant knowingly procured or received the thing possessed or was aware of the defendant's control thereof for a sufficient period to have been able to terminate possession.

## **II. Discussion**

This matter appears largely to be one of first impression for the State of Delaware dealing with the interpretation of the State's driving under the influence statute, 21 *Del. C.* §4177(a) and 11 *Del.C.* §§242; 243. The Court has spent considerable time reviewing case law, the relevant statutes, and secondary sources on this matter. The Court must, in rendering its decision, determine the applicability of the affirmative defense of *involuntary act* as codified in 11 *Del. C.* §§242 & 243 to the facts of the case at bar in a driving under the influence charge as well as Title 21 alleged violations. Specifically the Court must apply §242; §243 of Title 11, to its application to a defendant who has not previously been diagnosed with what could be considered through

expert testimony of a complex partial seizure. The Court however, from its research has found two relevant binding cases on this matter.

In *Gov'ment of the Virgin Islands v. Smith*, 278 F.2d 169 (3rd Cir. 1960), a defendant convicted of involuntary vehicular manslaughter. In this case the defendant argued that the defendant should not be held criminally liable because at the time of the incident he suffered from an epileptic seizure. The Court ordered that the judgment must be reversed and a new trial granted because the trial judge applied an erroneous rule as to the defendant's burden of proof. The Court stated: "The prosecution is required to prove the offense beyond a reasonable doubt and, in so doing, may rely on any applicable presumptions. The defendant, on the other hand, is not required to prove his innocence by a preponderance of the evidence, but only to produce sufficient evidence to raise a reasonable doubt in the minds of the jury." Id. at 173. The Court then goes on to state:

"The final point for discussion is the possibility of criminal responsibility on the part of the defendant ... It has been held that the operator of an automobile who is suddenly stricken by an illness which he has no reason to anticipate but which renders it impossible for him to control the car is not chargeable with negligence. On the other hand it has also been held that an operator of a motor vehicle, unconscious from illness at the time of the accident, may nonetheless be found guilty of criminal negligence in having undertaken to drive the vehicle if he knew at the time that he might black out or lose consciousness while doing so."

Id. at 175.

The second case is *Sanders v. State*, 585 A.2d 117 (Del. 1990). In this case the Delaware Supreme Court discussed the applicability of 11 Del. C. §§ 242 and 243 to the definition of mental illness in 11 Del. C. §401(b). The Court wrote:

"Section 242 call for an evaluation of the nature of a defendant's actual, physical movements, while section 401 governs the mental state that lay behind the defendant's actions. Broadly speaking, section 242 goes to *actus reus*, while section 401 goes to *mens rea*."

Id. at 129. The Court then noted the following examples of *actus reus*:

“If a driver has a heart attack and his car kills someone, the driver is guilty of no crime, because he did not act consciously to cause the death. Other examples of involuntary acts would be reflexes, convulsions, and movements performed during sleep or epileptic seizure[s].”

Id. at 129.

The Court must also note that the defense has set forth in the record expert testimony for this defense through the testimony of Dr. Gelman, who was not *per se* hired by the defense, but was the Doctor who actually treated this defendant at the hospital. The Court found her unrebutted testimony very credible.

Based upon the facts as found by the Court above, case law, and statute the Court finds that Deborah A. Kenney cannot be held criminally liable for the charges against her stemming from her actions on October 15, 2010 as they were involuntary acts, as set forth in 11 Del. C. §§ 242 and 243, brought on by her sudden and unforeseen illness, complex partial seizure, from which she had no previous notice. In short, considering the application of 11 *Del.C.* §§ 242; 243 to the facts of this case, and considering Dr. Gelman’s expert testimony, largely unrebutted, the Court has reasonable doubt, 11 *Del.C.* §301 that all charges were proven beyond a reasonable doubt.

### **Order and Opinion**

A. Case Number 1010010795

Count 1: Driving a vehicle under the influence of drug in violation of 21 Del. C. §4177(a)

– **NOT GUILTY.** The State has failed to prove beyond a reasonable doubt that Deborah A. Kenney was under the influence of any drug as set forth in 21 Del. C. §4177(a) when carefully considering the case law above in applying 11 *Del.C.* §§242; 243. Stated another way, Deborah A. Kenney has raised a



reasonable doubt in the mind of this trier of fact as to her guilt for this charge.

11 *Del.C.* §301.

Count 2: Failed to remain within a single lane in violation of 21 Del. C. §4122(1) - **Not Guilty**. The Court finds Deborah A. Kenney's actions were the result of involuntary acts brought on by a sudden and unforeseeable illness with which she had no previous notice that she might be afflicted. Therefore, Deborah A. Kenney's actions were not voluntary as required by 11 Del. C. §§242 and 243. Because of this finding, the Court cannot find Deborah A. Kenney criminally liable for this charge.

Count 3: Leaving the scene of property collision accident in violation 21 Del. C. §4201(a) - **NOT GUILTY**. The Court finds Deborah A. Kenney's actions were the result of involuntary acts brought on by a sudden and unforeseeable illness with which she had no previous notice that she might be afflicted. Therefore, Deborah A. Kenney's actions were not voluntary as required by 11 Del. C. §§242 and 243. Because of this finding, the Court cannot find Deborah A. Kenney criminally liable for this charge.

Count 4: Failure to report a collision involving alcohol or drugs in violation of 21 Del. C. §4203(a)(3) - **NOT GUILTY**. The Court finds Deborah A. Kenney's actions were the result of involuntary acts brought on by a sudden and unforeseeable illness with which she had no previous notice that she might be afflicted. Therefore, Deborah A. Kenney's actions were not voluntary as required by 11 Del. C. §§242 and 243. Because of this finding, the Court cannot find Deborah A. Kenney criminally liable for this charge.

B. Case Number 1010010780

Count 1: Failure to remain within a single lane in violation of 21 Del. C. 4122- **NOT**

**GUILTY.** The Court finds Deborah A. Kenney's actions were the result of involuntary acts brought on by a sudden and unforeseeable illness with which she had no previous notice that she might be afflicted. Therefore, Deborah A. Kenney's actions were not voluntary as required by 11 Del. C. §§242 and 243. Because of this finding, the Court cannot find Deborah A. Kenney criminally liable for this charge.

Count 2: Driving on the wrong side of the roadway when roadway has 4 or more lanes in

violation of 21 Del. C. §4114- **NOT GUILTY.** The Court finds Deborah A. Kenney's actions were the result of involuntary acts brought on by a sudden and unforeseeable illness with which she had no previous notice that she might be afflicted. Therefore, Deborah A. Kenney's actions were not voluntary as required by 11 Del. C. §§242 and 243. Because of this finding, the Court cannot find Deborah A. Kenney criminally liable for this charge.

**IT IS SO ORDERED** this 31<sup>st</sup> day of August, 2011.

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John K. Welch  
Judge