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***Re: Pasternak v. Lindsay  
C.A. No. 98C-06-009-JRS  
Defendant's Motion in Limine. DENIED***

Dear Counsel:

This matter was tried to a jury on July 24 and 25, 2000, before The Honorable William T. Quillen. The jury returned a verdict for the defendant and plaintiff moved for a new trial. Judge Quillen granted the motion for new trial upon concluding that certain legal errors had occurred during the course of the trial. Among the issues addressed, but not decided, by Judge Quillen was the admissibility of the testimony of James F. Gestwicki, an expert witness called by the plaintiff to testify regarding standards of care for emergency vehicle operators. Judge Quillen urged his successor

to reconsider the admissibility of Mr. Gestwicki's testimony and, if admissible, the scope of such testimony. The instant motion in limine is the vehicle through which the Court will follow Judge Quillen's wishes.<sup>1</sup>

The case involves a motor vehicle collision which occurred on U.S. Route 40 at its intersection with Beckswood Drive on June 1, 1997. The plaintiff was traveling eastbound on U.S. Route 40. The defendant, a fire policeman, was traveling in the westbound shoulder of Route 40 en route to an emergency. The right shoulder of Route 40 becomes a right turn lane some distance east of the intersection with Beckswood Drive. The collision occurred as Ms. Pasternak attempted to make the left turn from Route 40 onto Beckswood Drive. Although traveling in the right turn lane, the defendant's vehicle proceeded through the intersection striking the passenger side of plaintiff's vehicle.

The defendant acknowledged that he was traveling approximately 35-40 miles per hour at the time of the collision. He was operating his own pickup truck which

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<sup>1</sup>Judge Quillen specifically stated that the "law of the case" should not apply to his decision regarding the admissibility of Mr. Gestwicki's testimony. *See Pasternak v. Lindsay*, Del. Super., C.A. No. 98C-06-009-WTQ, Quillen, J. (Aug. 21, 2000)(Letter Op. at 3).

was equipped with blue flashing lights. The vehicle was not equipped with audible signals (e.g. a siren), but was equipped with a horn.

The case was tried against the back drop of 21 *Del. C.* § 4106 (“Section 4106) which provides, in relevant part:

(a) The driver of an authorized emergency vehicle when responding to an emergency call . . . may exercise the privileges set forth in this section but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may: (1) park or stand, irrespective of the provisions of this chapter; (2) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;<sup>2</sup> (3) exceed the speed limits so long as the driver does not endanger life or property;<sup>3</sup> (4) disregard regulations governing direction of movement or turning in specified directions.

(c) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of audible or visual signals meeting the requirements of this title....

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<sup>2</sup>There was no traffic control device at the intersection of U.S. Route 40 and Becks Woods Drive.

<sup>3</sup>The defendant was not traveling in excess of the posted speed limit.

(d) The driver of an emergency vehicle is not liable for any damage to or loss of property or for any personal injury or death caused by the negligent or wrongful act or omission of such driver except acts or omissions amounting to gross negligence or willful or wanton negligence so long as the applicable portions of subsection (c) have been followed. The owner of such emergency vehicle may not assert the defense of governmental immunity in any action on account of any damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of such driver or owner.

(e) Authorized emergency vehicles within the meaning of this chapter mean vehicles of a . . . fire police officer.

The application of this statute in this case leads to certain undisputed conclusions. First, the exemptions set forth in Section 4106 (b) are available to the defendant because he was operating an emergency vehicle and was “making use of visual signals” e.g., flashing lights, at the time of the accident.<sup>4</sup> Second, the only exemption applicable to the accident is the one set forth in Section 4106 (b)(4) which would permit the defendant to “disregard regulations governing direction of movement or turning in specified directions.” There was no traffic control signal at the intersection and the defendant was not speeding. Third, the defendant was

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<sup>4</sup>See Section 4106 (c) & (e). See also *Green v. Millsboro Fire Co., Inc.*, Del. Super., 385 A.2d 1135, 1140 (1978), *Aff'd in part and rev'd in part*, Del. Supr., 403 A.2d 286 (1979)(observing that “there apparently are no legally established standards for the warning lights on emergency vehicles”).

permitted to proceed straight through the intersection while traveling in a right turn lane under Section 4106 (b)(4), assuming he did so in a manner which was not grossly negligent, willful, or wantonly negligent in violation of Section 4106 (d). In the context of these conclusions, Judge Quillen correctly determined that the issues for the jury were: (1) whether defendant was grossly negligent and, if so; (2) whether defendant's gross negligence proximately caused injury to the plaintiff.<sup>5</sup>

Plaintiff presented the expert testimony of James F. Gestwicki to address the standards of care applicable to operators of emergency vehicles in Delaware. Mr. Gestwicki is a City of Wilmington Police officer who, at the time of trial, was "the

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<sup>5</sup>It is not clear to the Court whether the question of defendant's status as owner of the vehicle, and the corresponding lesser standard of proof (i.e. simple negligence), was addressed by the parties or the Court during the first trial. If it is correct that the defendant owned the vehicle he was operating at the time of the accident, this issue will need to be addressed prior to trial. *See* Section 4106 (d). Moreover, it appears that Judge Quillen's instructions on the law focused on gross negligence as opposed to willful conduct or wanton negligence. From the record, it does not appear that there is any basis to support a contention of willful conduct and this Court doesn't even know what "wanton negligence" means. Accordingly, the Court will likewise focus its instructions on gross negligence if the matter is tried again.

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supervisor in charge of the [department's] traffic division.” In that capacity, Mr. Gestwicki supervised the investigation of collisions involving emergency vehicles.

In addition, Mr. Gestwicki trained City of Wilmington Police officers to operate motor vehicles in emergency situations. In this regard, he authored an instruction manual for use during training. He acknowledged, however, that his instruction manual was not used outside of the City of Wilmington Police Department.

At the time of trial, Mr. Gestwicki had been a police officer for approximately 16 ½ years. In addition to his on-the-job training, which includes the investigation of approximately forty accidents per year involving emergency vehicles, Mr. Gestwicki also has attended two eighty-hour courses in advanced accident investigation and accident reconstruction at the Institute for Police Technology and Management at the University of Northern Florida. Based on his extensive training and experience, the Court is satisfied that Mr. Gestwicki is qualified to address issues relating to the proper operation of emergency vehicles, including standards of care.<sup>6</sup>

Having concluded that Mr. Gestwicki is qualified to offer expert testimony, the Court now turns to the question of whether expert testimony, even from a qualified expert, is appropriate in this case. Specifically, the Court must determine whether expert testimony regarding the standard of care of an emergency vehicle operator “will assist the trier of fact to understand the evidence or to determine a fact in issue....”<sup>7</sup>

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<sup>6</sup>See D.R.E. 702.

<sup>7</sup>*Id.*

Defendant contends that expert testimony is not necessary in this case. According to the defendant, the issues addressed by Mr. Gestwicki -- the appropriate speed at which an emergency vehicle should be traveling when entering an intersection, appropriate audible warnings, etc. -- are matters within the common knowledge of a lay jury. For her part, plaintiff contends that Mr. Gestwicki can assist the jury in understanding the special precautions that must be taken by an operator of an emergency vehicle, and the appropriate role of visual and audible warnings during the operation of emergency vehicles. Absent expert testimony, the jury would be less likely to appreciate the differences between the operation of non-emergency and emergency vehicles. Moreover, plaintiff notes that the defendant himself offered expert opinions during his testimony with respect to the propriety of his conduct in light of his training and experience as an emergency vehicle operator. Plaintiff alleges that it would be unfair to allow defendant to explain his conduct in the context of his advanced training without allowing plaintiff to respond with expert testimony of her own.

The determination of whether to admit expert testimony is committed to the sound discretion of the trial judge.<sup>8</sup> As stated, the Court's function is to determine

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<sup>8</sup>*M.G. Bancorporation, Inc. v. Le-Beau*, Del. Supr., 737 A.2d 513, 522 (1999).



whether the expert's testimony will assist the trier of fact. In this case, the Court concludes that Mr. Gestwicki will assist the trier of fact in understanding the special considerations which must be given by the operator of an emergency vehicle in emergency situations. Emergency vehicles are afforded special privileges on Delaware's highways. They may disregard traffic signals, speed limits and, particularly relevant in this case, lane markings and travel directions. Operators of non-emergency vehicles do not share these privileges. Accordingly, plaintiff may present expert testimony which addresses the standards of care expected of those who operate emergency vehicles (and thereby are privileged to disregard customary rules of the road).

The Court's decision here is supported by decisions in other jurisdictions.<sup>9</sup>

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<sup>9</sup>See e.g. *Smith v. Settle*, Va. Supr., 492 S.E.2d 427, 430-31 (1997)(declining to disturb trial court's admission of expert testimony regarding standards of care for an emergency vehicle operator); *Selkowitz v. County of Nassau*, N.Y. Ct. App., 379 N.E.2d 1140, 1143 (1978):

To be sure, the average juror is quite familiar with the every day rules of the road. These are a matter of common knowledge and therefore the standard of care ordinarily imposed on members of the public in handling common traffic perils neither requires or admits expert clarification. However, the jury in this case was being asked a different question: whether the police officer, by reason of his special training and experience, should have been able to foresee an act to forestall or at least minimize rather than aggravate the obvious danger, given the few split seconds and scant information available to him in choosing an appropriate course of conduct. Most jurors, of course, have never been involved in a high speed chase. And few indeed are familiar with authorized police procedures. . . Under these circumstances, expert testimony was admissible to clarify the proper

These decisions reflect an appreciation for the fact that the operation of an emergency vehicle is not within the common understanding of lay jurors. Expert testimony is appropriate to assist the jury in understanding the appropriate standards of care for emergency vehicle operators.<sup>10</sup>

The Court also is mindful of the fact that plaintiff would, indeed, be disadvantaged at trial if the defendant was permitted to testify regarding his actions, in the context of his advanced training and experience, unrebutted by available

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police practice expected in a given police emergency, despite the fact that no specific departmental rules or formal guidelines prevail and despite the jury's common understanding of driving standards generally. (Citations omitted)

<sup>10</sup>See *Selkowitz*, 379 N.E.2d at 1142 (“In addition, precisely because there is no particularized “emergency law” or specific set of established or even informal rules and regulations detailing the proper role for police vehicles in each unique highway emergency, the testimony of an experienced professional in these matters could only have assisted rather than prejudiced the jury.”)

countervailing expert testimony. What's good for the goose is good for the gander.

And defendant can find little grace in an argument that he alone should be permitted to present expert testimony regarding the appropriate operation of an emergency vehicle. Both sides will be permitted to present their view on this issue, informed by expert testimony.<sup>11</sup>

Finally, the Court will address briefly the scope of Mr. Gestwicki's permitted testimony. It appears from the record that Judge Quillen did not allow Mr. Gestwicki to testify regarding the ultimate question of whether the defendant violated applicable standards of care for emergency vehicle operators. Instead, Mr. Gestwicki was permitted only to identify his criticisms of the defendant; he was not permitted to "take the next step" to opine that the defendant's conduct violated a standard of care. Judge Quillen left the determination of this ultimate issue exclusively to the jury. In his decision on the motion for new trial, however, Judge Quillen urged his predecessor to reconsider this ruling.

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<sup>11</sup>Indeed, in light of the Court's ruling, the defendant also will be permitted to present competent expert testimony regarding standards of care for emergency vehicle operators, assuming he complies the Case Scheduling Order and Rule 26 of the Delaware Superior Court Civil Rules.

The Court is satisfied that Mr. Gestwicki and the defendant's expert, if retained, should be permitted to testify at least to some extent regarding the ultimate issue. Specifically, the Court will allow the experts to testify as to whether or not the defendant violated applicable standards of care regarding emergency vehicle operation.<sup>12</sup> The experts will not, however, be permitted to characterize the defendant's conduct as "negligent", "grossly negligent", "not negligent" or "not grossly negligent." Instead, the jury will be left to make this ultimate determination based on all of the evidence and the Court's instructions on the law.

For the foregoing reasons, defendant's motion in limine is **DENIED**.

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<sup>12</sup>See e.g. *Yankawich v. Wharton*, Del. Supr., 460 A.2d 1326, 1330 (1983)(allowing police officer to testify regarding the ultimate issue of whether defendant operated his vehicle safely in icy conditions).

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**IT IS SO ORDERED.**

Very truly yours,

Joseph R. Slights, III

JRS, III/sb

Original to Prothonotary