

**SUPERIOR COURT
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
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Decided: May 28, 2004

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Re: *Casey v. Nelson, et al., C.A. 01C-08-029-ESB, consolidated with
Eleneski, et al. v. Nanticoke Homes, Inc., et al., C.A. 01C-12-141-FSS*
Upon Defendants Nelson's and Nanticoke Homes' Post-Trial Motions – DENIED

Dear Counsel:

This decides the alternative, post-trial motions of Defendants Nelson and Nanticoke Homes for judgment notwithstanding the verdict and new trial. After trial, the parties reached a partial settlement, resolving Plaintiffs' claims. The post-trial settlement, however, left open Defendants' dispute over each one's share of liability.

Now, Defendants Nelson's and Nanticoke's arguments for judgment notwithstanding the verdict are:

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The verdict was flawed because the jury found Carroll Smith not negligent, despite his having admitted partial responsibility during cross-examination; and

the court erred in granting Bennett's motion for directed verdict on liability.

Defendants Nelson's and Nanticoke's alternative motion for a new trial alleges six "prejudicial errors" by the court:

- admitting the grand jury's findings and Defendant Nelson's guilty plea to violating a federal regulation;
- allowing Casey's expert, David Stopper, to opine on the visibility of Nanticoke's trailer;
- preventing Nelson's and Nanticoke's expert, Lloyd Patton, from showing photographs from a night visibility study;
- preventing Patton from opining about Bennett's and Smith's negligence;
- sustaining objections to Nelson's and Nanticoke's questioning other experts, Steven Schorr and David Stopper, about Smith and Bennett's liability; and
- giving a curative jury instruction during opening statements about the case's procedural history.

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I.

A. The Accident

As you know, the case concerns a fatal traffic accident on October 14, 2000, at the entrance to the manufacturing facility then owned by the now defunct Nanticoke Homes in Sussex County. It is agreed that Genevieve Eleneski was killed when the car she was riding in, which was being driven by Irene Casey at highway speed, crashed into a stopped, “low boy” trailer owned by Nanticoke Homes. Nanticoke’s driver, Richard Nelson, had left the trailer obstructing the southbound lanes of U.S. 13, in the dark, because he could not maneuver the rig through the partially open entrance gate.

As you also know, it is undisputed that Nanticoke’s safety policy required that Nelson enter Nanticoke’s facility through a different gate, which was intended to prevent collisions like the one that happened. That gate, however, had been locked by someone at Nanticoke. Thus, as Nelson approached the Nanticoke facility, Smith, a guard hired by Bennett, yet trained and supervised by Nanticoke, directed Nelson by radio to the prohibited entrance. Smith misdirected Nelson because Smith believed that the more dangerous gate was open. Technically, Smith’s belief was correct. The dangerous gate was partially open. Had Nelson approached the gate more carefully, he might have passed through it without having to stop on the highway. Maneuvering Nanticoke’s large rig through the partial opening, however, was more than Nelson could manage.

As Smith directed Nelson to the dangerous gate, Nelson knew Nanticoke’s safety policy prohibited him from using that gate. Nevertheless, instead of crossing Rte. 13 safely where he was supposed to and waiting until the proper gate was unlocked, Nelson ignored his company’s safety policy. Then, instead of making certain the dangerous entrance was clear before he turned to cross Rte. 13, Nelson

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made the turn. That decision left Nanticoke's trailer blocking a major highway while Nelson approached the gate on foot to open it wider.

It probably did not help that Nelson had not returned the "low boy" to its shortened length after he had made Nanticoke's delivery earlier in the day. Nelson had dropped off a "double wide," and he neglected to return the trailer from its extended to its contracted position. That meant the trailer was ten feet longer than was necessary on its return trip. Not only was Nelson operating Nanticoke's vehicle in violation of federal regulations, but that made it harder to negotiate the left turn at an angle permitting Nelson to pass through the gate without stopping on the highway. Thus, the trailer's extended length could have contributed to the accident. Moreover, although Nanticoke's trailer had reflective side markings, which probably met then existing federal safety requirements, the side markings were not state-of-the art, nor were they in very good condition.

From a human standpoint, Nelson's errors were predictable. He had put in a long day doing Nanticoke's business in Virginia. It was late. It was the weekend. Shortening the trailer would have taken time. Using the proper gate would have taken even more time. While Nelson's decisions were understandable, they nevertheless were negligent. And they are attributable to Nanticoke. Unfortunately, the consequences of Nelson's simple misjudgments were terrible.

Several motorists avoided the Nanticoke trailer as it blocked one lane of Rte. 13. Casey, an older driver, did not. She slammed into it, broadside. The trial focused largely on liability and whether Casey's passenger, Eleneski, suffered as she died at the scene. While Defendants presented potentially persuasive, expert evidence that Eleneski never knew what hit her, the jury accepted Eleneski's expert's opinion that she survived in agony for a few minutes.

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B. The Trial

During Nelson's and Nanticoke's opening statement, counsel told the jury about the lawsuit originally filed by Casey against all the Defendants. Then counsel told the jury:

A separate lawsuit was filed by Mrs. Eleneski's family. And in that lawsuit, she also sued . . . Nelson and Nanticoke Homes. Her family also sued Carroll Smith and Bennett Security. And, later on, they amended their complaint and they sued Mrs. Casey claiming that she was the cause of this accident, also.

That drew an objection by Eleneski. At sidebar, the court questioned the relevance of the case's procedural history. After some back and forth, trial counsel for Nelson and Nanticoke cut-off the court, mid-sentence, and announced, "Quite frankly, I'm done with this portion." After counsel eventually allowed the court to continue, it ruled:

Well, I'll tell the jury that the procedural history of the case is beside the point. And if [counsel for Nelson and Eleneski] want[s] to repeat your comment about what was admitted, you may do so. That's not objectionable.

The court's ruling, however, did not end the argument. After more back and forth, the court instructed the jury:

Ladies and gentleman of the jury, let me just point out to you that the procedural history of the case is, what papers were filed when is beside the point. It is irrelevant. It has no

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bearing on your deliberations. To the extent that the contents of the papers has a bearing on your decision as you find it to be, you may consider the contents of those papers. But the attorneys are not going to be allowed to present to you how this case was litigated over the years, who filed what papers when.

Nelson and Nanticoke's trial counsel then continued with that portion of his argument, without objection. He quickly outlined the case's procedural history surrounding the complaint and third-party practice. He summed it up by telling the jury, "And that is why I'm telling you, you'll have to consider the conduct of every party in this case, not just my client."

During trial, Nanticoke attempted to rely on Lloyd Patton, the safety expert mentioned above. Patton performed a "night visibility analysis." As best he could, Patton replicated the situation existing on the night of the accident. Then he ran tests to determine the point where Nanticoke's trailer was visible to a driver in Casey's position. Using his observations and standard formulas, Patton concluded that a typical driver following Casey's path, who was paying attention, should have seen the trailer in time to avoid colliding with it. Patton also took 35mm, still photographs and made color slides or prints purporting to show exactly what Casey could have seen reflected in her headlights as she bore down on the stopped rig. Besides the fact that his proffered exhibits were static and their field of view was limited on all three axes, Patton knew nothing about Casey's vision. The court allowed Patton to testify and offer various opinions, but it granted Plaintiffs' motion *in limine*, barring Patton from showing the jury his photographs.

The jury also heard Smith guess that he was partially responsible for causing the accident. The jury, however, also heard that Smith was not responsible for the locked gate and was put in a difficult position by Nanticoke because the gate was

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locked. Smith was not allowed to leave his post and a Nanticoke truck needed to enter the facility. Smith had no clear instruction about what he should do under the circumstances. While Smith was hired by Bennett and there was room to argue whether he could be fired by Nanticoke. There was no room to argue from the evidence, however, that Smith was trained and supervised on the job by Nanticoke.

The court also made various rulings on the admissibility of the parties' experts. Basically, each side tried to limit the other sides' expert opinions. Also, Nelson and Nanticoke tried to elicit expert opinions against Smith and Bennett by other parties' experts, Schorr and Stopper. A transcript of the rulings, including voir dire, has not been prepared. Hence, the court is reluctant to recapitulate its holdings. But an extensive record should be available if further review is necessary.

II.

The court's analysis begins by observing that Nelson's and Nanticoke's current position is weak. The trial and post-trial settlement with Plaintiffs have greatly narrowed the dispute. For example, the trailer's length and its visibility of it had a potentially considerable bearing on Nelson and Nanticoke's liability compared to Casey's. What Casey should have seen and whether she should have slowed and swerved was hugely important when her negligence was disputed. But Casey is out of the picture now and as to the remaining litigants here, those issues are far less important.

Smith's and Bennett's potential liability turns almost entirely on Smith's the undisputed fact that Smith told Nelson to use the prohibited gate and Smith's conscience. Despite Smith's act and his admission, the undisputed facts remain that Nelson knew that he was not supposed to use the prohibited gate. And as a tractor-trailer driver, he knew far better than a night watchman the risk he was running when he crossed Rte.13. Moreover, Smith never told Nelson to leave Nanticoke's trailer across the highway in the dark. That happened because Nelson, who was operating a large and dangerous machine, decided to cross a major highway, at night, without knowing whether he could do it safely.

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Beyond that, it is undisputed that Nanticoke trained Smith and the evidence only supported the conclusion that Nanticoke, rather than Bennett, supervised Smith from day-to-day. The evidence also supported the conclusion that, despite what he had been told about the proper gate to use, Nanticoke put Smith in a position on the night of the accident that Nanticoke had not trained him to handle.

As to Nelson's and Nanticoke's specific claims of error, the court addressed each of them before or during trial. The court relies here on the record it has already made. In hindsight, the court is further satisfied that even if it had made the rulings that Nelson and Nanticoke requested, the outcome at trial would have been the same. While the evidence on damages was seriously contested, the evidence about Nelson's, Nanticoke's, Smith's and Bennett's respective roles and their legal duties were not difficult or complicated.

In final summary, if the evidence left room to argue that Casey played a part in the accident, the evidence against Nelson and Nanticoke was overwhelming. The evidence against Bennett and Smith, however, beyond Smith's erroneous belief that he was to blame, was marginal. The court remains satisfied that the jury's decision placing liability entirely on Nelson and Nanticoke, rather than on Smith and Bennett, was based on a proper record and correct.

For the foregoing reasons, Defendants Nelson's and Nanticoke's post-trial motions are ***DENIED***.

IT IS SO ORDERED.

Very truly yours,

FSS/lah
cc: Prothonotary (Civil Division)