IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

KEITH JOHNSON	:	
v.	:	JULY TERM, 199
	:	NO. 3261
CITY OF PHILADELPHIA and ERIC BULLOCK	:	

Myrna Field, J. May 15, 2001

OPINION OF THE COURT

Plaintiff, Keith Johnson, appeals from this court's order dated February 9, 2001, denying his motion for post-trial relief. For the following reasons, the motion was properly denied, and judgment entered on February 13, 2001, in favor of the defendants, City of Philadelphia and Eric Bullock, should be affirmed.

This cases arise out of a motor vehicle accident which occurred on July 28, 1997. Defendant Eric Bullock, a Philadelphia police officer, was on duty and responding to an emergency call from a fellow officer in need of assistance. Officer Bullock was in a marked police car with both its flashing lights and siren on. Plaintiff, Keith Johnson, was driving eastbound on Clearfield Street, approaching 27th Street, and had a green light. Officer Bullock was traveling south on 27th Street. At the intersection of 27th and Clearfield Streets, Mr. Johnson's car was broadsided by the police car. Evidence was presented that Mr. Johnson was under the influence of controlled substances at the time of the accident. On September 5, 2000,

after five days of trial, the jury returned a defense verdict, having attributed 55% of the causal negligence to Mr. Johnson and 45% of the causal negligence to Officer Bullock.

Plaintiff timely filed a post-trial motion seeking to have the negligence apportionment disregarded and to secure the jury's total assessed damages of $78,100. Plaintiff's sole argument is that the court erred in its instructions to the jury with regard to the standard to be applied to the officer's conduct; specifically that the question of comparative negligence should not have been submitted to the jury. Defendants responded that the charge and jury questions were correct, but that even if they were not, the proper remedy would not be to mold the verdict, but to grant a new trial. On February 9, 2001, plaintiff's motion was denied. Furthermore, we agree with defendants that had the motion been granted, the only remedy which would have been available to the plaintiff would have been a new trial.

To be granted a new trial based on an erroneous charge, a plaintiff must show that the trial court either abused its discretion or committed an error of law that controlled the outcome of the case. Stewart v. Motts, 539 Pa. 596, 654 A.2d 535 (1995). The charge will be found adequate unless: 1) the issues are not made clear to the jury; 2) the judge's instructions palpably misled the jury; or 3) there is an omission in the charge which amounts to fundamental error. Id. In addition, in determining the adequacy of a charge, an appellate court must review the trial court's jury instructions in their entirety. Wilson v. Anderson, 616 A.2d 34, 36, 420 Pa. Super. 169 (1992).

In order to determine the propriety of the charge, it is necessary to examine three controlling statutes. The first is the Political Subdivision Tort Claims Act, 42 Pa. C.S.A, § 8541, et seq. The act waives sovereign immunity for negligent acts which would be actionable at

common law under eight limited circumstances. The exception applicable in this case is found in 42 Pa.C.S.A. § 8542 (b)(1) which permits an action based on the negligent operation of any motor vehicle in the possession or control of a local agency. It is undisputed that Officer Bullock was operating a marked police car in the course of his employment, hence the exception applies.

Having determined that defendants Bullock and the City of Philadelphia can be held liable for the negligent operation of a motor vehicle, it is necessary to determine what constitute "negligence" in the operation of an emergency vehicle. The Vehicle Code provides in relevant part:

> **§ 3105. Drivers of emergency vehicles**
>
> (a) General rule.--The driver of an emergency vehicle, when responding to an emergency call..., may exercise the privileges set forth in this section, but subject to the conditions stated in this section.
>
> (b) Exercise of special privileges.--The driver of an emergency vehicle may:
>
> ....
>
> (2) Proceed past a red signal indication or stop sign, but only after slowing down as may be necessary for safe operation, except as provided in subsection (d).
>
> (3) Exceed the maximum speed limits so long as the driver does not endanger life or property, except as provided in subsection (d).
>
> (4) Disregard regulations governing direction of movement or turning in specified directions.
>
> (c) Audible and visual signals required.--The privileges granted in this section to an emergency vehicle shall apply only when the vehicle is making use of an audible signal and visual signals meeting the requirements and standards set forth in regulations adopted by the department, except that an emergency vehicle operated as a police vehicle need not be equipped with or display the visual signals....
>
> (e) Exercise of care.--This section does not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons.

75 Pa.C.S.A. § 3105. In the instant matter, evidence was presented to establish that Officer Bullock was responding to an emergency call and did have his lights and siren on. Consequently, he was authorized under this statute to proceed through an intersection through a red light as long as, consistent with paragraph (e), he drove "with due regard for the safety of all persons." Thus, in order to determine whether Officer Bullock was negligent, the jury had to be instructed as to what constituted "due regard for the safety of all persons." In other words, what constitutes "negligence" in an emergency situation.

Both parties have cited Junk v. East End Fire Dept., 262 Pa. Super. 473, 396 A.2d 1269 (1978), wherein the court stated:

> (N)egligence is lack of due care under the circumstances. In a case involving the emergency vehicle doctrine... due care and negligence become questions of degree. What may be negligence in driving a vehicle down a street under normal circumstances may not be negligence under the extreme circumstances presented by an emergency situation. While simple negligence is not recklessness, negligence in an emergency situation is recklessness. The various provisions of the emergency vehicle doctrine make clear that to prove an operator of such a vehicle liable, the plaintiff must prove more than simple negligence. What he or she must prove is negligence under circumstances constituting an emergency that is, recklessness.

396 A.2d, at 1273, 262 Pa.Super., at 482-2 (footnote omitted). Thus, the standard of care is unique for an a emergency vehicle; the driver is given substantially more latitude in the operation of his vehicle.

The third statute which must be examined in conjunction with the above two is the Comparative Negligence Act which provides:

> (a) General rule.--**In all actions** brought to recover damages **for negligence** resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery

> is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

42 Pa.C.S.A. § 7102 (emphasis added). Plaintiff argues that the court erred in applying this statute to the instant matter because the jury found, following the court's instruction in accordance with Junk, that Officer Bullock had been reckless. Relying on Krivijanski v. Union Railroad Co., 357 Pa. Super 196, 515 A.2d 933 (1986), plaintiff argues that comparative negligence is inapplicable. The Krivijanski court held that where willful and wanton misconduct is involved, comparative negligence should not be applied because the tort feasor's action are "something different from negligence,...not merely in degree but in kind and evincing a different state of mind on the part of the tort feasor." 357 Pa. Suer, at 203, 515 A. d., at 936. Essentially, plaintiff argues that "recklessness" is the same thing as "wanton and willful misconduct." Plaintiff is incorrect.

These statutes and the cases discussed herein, demonstrate that there are many gradations of culpable conduct. Although "recklessness" in the context of the emergency vehicle doctrine is more than mere negligence, it does not rise to the level of "wanton and willful misconduct," thereby negating the applicability of the comparative negligence act. Furthermore, if recklessness under the emergency vehicle doctrine was found not to constitute a form of negligence, than the defendants herein would be immune from suit, as the waiver of sovereign immunity discussed above applies only to negligent acts.

In summary, sovereign immunity is waived only when a motor vehicle has been negligently operated. The emergency vehicle act permits the driver of an emergency vehicle greater leeway in its operation when confronted with an emergency situation and correspondingly the plaintiff's burden becomes more difficult to achieve. The comparative negligence act applies

to all negligence actions. Thus, the court properly charged the jury that they had to find that Officer Bullock was reckless in order to find him liable, and the comparative negligence statute was correctly applied.

For all of the above reasons, plaintiff's post trial motion was properly denied. Judgment as entered on February 13, 2001, in favor of the defendants should be affirmed.

By the Court:

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Myrna Field, J.