

COMMONWEALTH OF MASSACHUSETTS

A P P E L L A T E   D I V I S I O N

WESTERN DISTRICT

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RONALD GIBBONS,  
Plaintiff/Appellee

v.

CHARLES E. NICHOLS,  
Defendant/Appellant

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ON APPEAL FROM A JUDGMENT OF  
THE DISTRICT COURT DEPARTMENT

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BRIEF OF THE DEFENDANT/APPELLANT,  
CHARLES E. NICHOLS

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## I. QUESTIONS PRESENTED

A. Whether the Court's judgment against the Defendant should be modified to reflect a set off for the Plaintiff's receipt of settlement proceeds from a co-tortfeasor.

B. Whether the Court erred in denying the Defendant's request for a ruling of law that the evidence warranted a finding that the Defendant was not negligent.

C. Whether the Court erred in denying the Defendant's request for a ruling of law that the evidence warranted a finding that the Defendant reacted appropriately when confronted by a sudden emergency not of his own making.

D. Whether Court's judgment for the Plaintiff should be vacated and this case remanded for a new trial.

## II. STATEMENT OF THE CASE

### A. **Overview**

This is a motor vehicle tort case involving a two-vehicle collision at an intersection. The report fully and accurately sets forth the evidence offered at trial by the three witnesses who testified. Each witness gave a slightly different account of how this accident occurred, but there is no dispute among them that the two vehicles collided in a perpendicular fashion. The Defendant's vehicle was traveling south and the vehicle occupied by the Plaintiff was traveling west. The Defendant had the right of way as his direction of travel was free traffic control devices; the vehicle traffic on the road traveled by the vehicle occupied by the Plaintiff was controlled by a stop sign.

The report likewise acknowledges a stipulation was offered on the record that the Plaintiff received a settlement from a co-tortfeasor in the amount of \$20,000.

**B. Facts which could be found by a rational factfinder**

From the evidence offered at trial, a rational factfinder could believe that prior to the accident the Defendant was operating his pickup truck on Route 75 traveling south at a speed of 40 miles per hour. An appreciable distance in front of him, he saw a panel truck enter Route 75 from his right. Upon observing the panel truck, the Defendant slowed his speed to 35 miles per hour. The panel truck turned and began traveling north on Route 75. The Defendant's vehicle and the panel truck then passed each other in opposite lanes. Then, "instantaneous" with the panel truck clearing the Defendant's view of the northbound side of the roadway, he was presented with the Jaskulski vehicle right in front of him. He reacted by applying his brakes and steering to the left, but was unable to avoid a collision with Jaskulski's vehicle.

Based on other testimony and reasonable inferences deriving therefrom, the factfinder could conclude that Mr. Jaskulski failed to see the Defendant's vehicle approaching when he looked before leaving a stopped position on a side street leading in to Route 75. The factfinder could conclude that Jaskulski was negligent for leaving a place of safety and venturing into an area of danger at a time when it was unsafe to do so. Hence, a sudden emergency was created by Mr. Jaskulski's operation. A trier of fact could conclude that

given the short reaction time afforded to the Defendant and the evasive action which he was able to take, that his conduct measured up to what would be expected of a person of ordinary competence acting under similar circumstances, and that he was not negligent.

### III. ARGUMENT AND AUTHORITY

#### A. **The Court's Judgment should be modified to reflect Plaintiff's receipt of previous payments**

Upon prejudicial error shown, among its other powers the Appellate Division may modify rulings that have been entered. G.L. c. 231, §108; Mass.R.Dist./Mun.Cts.P. 64(i). Claiming to be aggrieved from the Trial Court's denial of his post-trial motions to amend the findings and judgment, or for a new trial,<sup>1/</sup> the Defendant requests the Appellate Division to order that this case be returned to the Trial Court with the instruction that "the judgment is vacated, and a new finding and judgment shall enter against the Defendant to reflect (and set-off for) the Plaintiff's receipt of a previous settlement from a co-tortfeasor in the amount of \$20,000."

The Defendant submits that this action is necessary to correct a state of affairs caused by (i) the Plaintiff's pre-trial receipt of \$20,000 from a settlement with a co-tortfeasor, and (ii) the trial judge's general finding that the Plaintiff's damages totaled \$13,000. Like a general verdict

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1. The request for a new trial was interposed so that the judgment could be opened for further consideration by the Court of the Defendant's prayer to take account of the Plaintiff's previous settlement. See W.C. Flanagan, Trial Practice, 43 Mass. Practice §421, at 402.

slip, the general findings form did not permit the Court to telescope the Defendant's liability to pay the Plaintiff. It made a finding on liability (for the Plaintiff against the Defendant), and made a finding on the singular sum that would fairly and fully compensate the Plaintiff for his damages (\$13,000). However, the Judgment which issued failed to account for the Plaintiff's pre-trial settlement.

The so-called Contribution Among Joint Tortfeasors Act, G.L. c. 231B, §4(a), provides in part that a release given by one tortfeasor to a plaintiff shall not discharge other tortfeasors, "but it shall reduce the claim against the others to the extent of any amount stipulated by the release . . . ." Those words have been construed to mean what they say: that the Plaintiff's claim against non-settling defendants is reduced by the amount of a co-tortfeasor's settlement. Boston Edison Co. v. Tritsch, 370 Mass. 260, 265 (1976); Framingham Union Hospital, Inc. v. Travelers Insurance Company, 744 F.Supp. 29, 34 (D.Mass. 1990).

An important policy goal of G.L. c. 231B, §4 is to ensure that a plaintiff suing multiple tortfeasors does not receive remuneration in excess of his actual damages. Stuart v. Brookline, 412 Mass. 251, 258 (1992), quoting cases. Given the general finding in this case that the amount necessary to fully and fairly compensate the Plaintiff for his damages was \$13,000, and that he has already collected \$20,000 from a co-tortfeasor, it would fly in the face of this policy to let the trial court's judgment stand.

By the filing of its post-trial motions, the Defendant gave the trial justice the opportunity to modify his finding as to damages. Through amended findings, the judge could have altered his finding to show that the amount necessary to fully and fairly compensate the Plaintiff for his damages was not \$13,000, but was \$33,000, and ordered that judgment should issue in the appropriate amount after adding prejudgment interest, subtracting the \$20,000 settlement, and adding costs. See Harvey v. Essex Bancorp, Inc., 25 Mass. App. Ct. 323, 326 (1988) (interest is to be calculated on the gross damages, i.e. prior to the reduction of settlement proceeds).

There is no indication in the Court's general findings or in the report that the Court's finding of damages in the amount of \$13,000 took into consideration (and reduced for) the previous settlement. Indeed, all indications are otherwise. Not only did the general finding unambiguously demonstrate that the Plaintiff's total damages were \$13,000, but pre-judgment interest was calculated on \$13,000 (and not \$33,000). If the gross damages had actually been \$33,000, the Plaintiff would have been awarded pre-judgment interest on that higher amount. Harvey, supra.

In sum, the trial court judgment erroneously failed to reduce its judgment by the amount of co-tortfeasor's settlement, and intervention by the Appellate Division is appropriate to correct this error.

**B. There was sufficient evidence to permit a finding that the Defendant was not negligent**

"A warrant request raises the issue of the sufficiency of the evidence by seeking the determination that a finding in favor of the requesting party is legally permissible given all the evidence adduced at trial, notwithstanding the eventual assessment of the weight and credibility of such evidence or the judge's final decision in the case." Mastercraft Wayside Furniture Co. v. Sightmaster Corp., 332 Mass. 383, 388 (1955); Bresnick v. Heath, 292 Mass. 293, 298 (1935). If there is evidence in the record which would permit the trial judge, or any other hypothetical fact finder, to make a finding for the requesting party, a warrant request should be allowed. Strong v. Haverhill Elec. Co., 299 Mass. 455, 456 (1938).

The Defendant submits that the evidence in the report is sufficient to permit a fact finder to find he was not negligent, and therefore the Court's denial of the Defendant's request for ruling that "the evidence warrants a finding that the Defendant was not negligent" constituted error. See Moran v. Tello, 47 Mass. App. Dec. 62, 68 (1971).

"Where there is a collision of vehicles at the intersection of streets the due care of plaintiffs and the negligence of defendants are generally questions for determination of the fact finding tribunal." Gibbons v. Denoncourt, 297 Mass. 448, 450 (1937), quoted in Hebard v. O'Brien, 34 Mass. App. Ct. 912, 913 (1993). See generally, E. Martin and E.F. Hennessey, Automobile Law and Practice, 11 Mass. Practice §582, at 424-425 (and cases cited therein).

The effect of denying a "warrants" request is to rule that the requesting party has submitted no evidence upon which, as a matter of law, a finding could be based. Bresnick v. Heath, supra. The question, therefore, is: whether the facts of this case were so extraordinary that the Defendant must be adjudged negligent as a matter of law? Stated otherwise: if the factfinder believed the Defendant's testimony and credited all other evidence favoring him, was the factfinder nonetheless required to find that the Defendant was negligent? The Defendant respectfully submits that based on the facts of this case the answer to both questions is a resounding "no."

The Defendant submits that this case posed questions of fact and therefore it was error to rule that the Defendant was negligent as a matter of law. It is rare that the merits of a negligence action can be decided as a matter of law. Hebard v. O'Brien, supra at 913. See Foley v. Matulewicz, 17 Mass. App. Ct. 1004, 1005 (1984); J.F. Moriarty, The Law of Summary Judgment in Massachusetts, at 43 (Flaschner Jud. Inst. 1990).

The existence of this evidence, whether ultimately believed or rejected by the trial judge, entitled the Defendant (i) to the allowance of his warrant requests nos. 1 and 5, "or (ii) to findings of facts showing that the requested ruling became irrelevant." Bresnick v. Heath, supra at 298-299; Rock-Ola Mfg. Corp. v. Music & Telev. Corp., 339 Mass. 416, 422 (1959). As noted in the report, there were no special findings of fact pursuant to Mass.R.Dist./Mun.Cts. P. 52(a). Hence, there was no clarification demonstrating the legal existence of

evidence in the Defendant's favor was irrelevant given the court's factual acceptance of the credibility and dispositive weight of contradictory evidence introduced by the Plaintiff. See Liberatore v. Framingham, 315 Mass. 538, 544 (1938); Richards v. Gilbert, 336 Mass. 617, 618 (1958).

In DiGesse v. Columbia Pontiac Co., Inc., 369 Mass. 99 (1975), Justice Quirico described two methods by which a trial judge may deny a "warrants" request, even though credible evidence has been submitted on the issue in question, and still be upheld on appeal. Neither method -- making special findings of fact or disposing of the request in such a way as to clearly indicate the request was immaterial -- was utilized in this case. Id., at 102-103. See M.G. Perlin and J.M. Connors, Handbook of Civil Procedure in the Massachusetts District Court, §12.5, at 240 n. 26.

Since "there is nothing in the report to establish that, despite his unexplained denial of the <Defendant>'s warrant requests, the trial judge properly recognized and considered all evidence which warranted a finding in the <Defendant>'s favor," the trial court's judgment must be vacated and this action returned to the Springfield Division for a new trial. Cooperstein v. Turner Brothers Construction, Inc., 1992 Mass. App. Div. 249, 252.

C. **There was sufficient evidence to permit a finding that the Defendant reacted appropriately when confronted with a sudden emergency**

The Defendant's testimony at trial, taken together with other evidence that was offered and such reasonable inferences as may be permitted, make this case one that could be found to fall within the classic parameters of the "sudden emergency" doctrine. See P.B. Kelly, 12 Blashfield Automobile Law and Practice §438.6, at 228 (1977) (a driver confronted with a hazard in his normal driving lane is a classic case for application of "sudden emergency" doctrine). Therefore, it constituted error to deny the Defendant's request for ruling that the evidence warranted application of the "sudden emergency" doctrine.

The standard of care in an emergency is measured by the nature of the emergency, and permits the conduct of someone reacting to an emergency to be mistaken yet not negligent. J.R. Nolan, Tort Law, 37 Mass. Practice §212, at 358-359 (West 1989). The law allows the factfinder, in gauging the reasonable character of the one's choice of action, to consider that the actor is confronted with a sudden emergency which requires rapid decision. The standard is only whether the defendant's response or reaction measured up to that of a person of ordinary competence acting under similar circumstances. Newman v. Redstone, 354 Mass. 379, 383 (1968).

As stated above, the trial court's unexplained denial of the Defendant's "warrants" request for a ruling of law on an issue for which sufficient evidence had been offered, otherwise

unpalliated, is prejudicial error for which the appropriate remedy is to vacate the judgment and return this cause for a new trial in the Springfield Division.

IV. CONCLUSION

Based on all the foregoing, the Defendant respectfully requests (i) that the judgment below be vacated, and a new finding and judgment enter against the Defendant to reflect (and set-off for) the Plaintiff's receipt of a previous settlement from a co-tortfeasor in the amount of \$20,000, or, alternatively, (ii) that the judgment below be vacated and this cause returned to the Springfield Division for a new trial.

CHARLES E. NICHOLS,  
Defendant

By \_\_\_\_\_  
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APPELLATE DIVISION  
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  )  
CHARLES E. NICHOLS,                )  
Defendant/Appellant                )

CERTIFICATE OF SERVICE

I, John B. Stewart, counsel for the Defendant/Appellant, Charles E. Nichols, pursuant to Mass.R.Dist./Mun.Cts.P. 64(f), hereby file the original and seven (7) copies of the "Brief of the Defendant/Appellant" and five (5) copies of the report as allowed by the trial justice; copies of same have been served by first class mail, postage prepaid this date to Robert Danie, counsel for the Plaintiff/Appellee herein, and Kimberly Davis Crear, counsel for the Defendant, Michael Jaskulski.

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