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Case Number 160,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JENNIFER PAVIK, DOUGLAS TODD PAVIK, and ASHLEE JEAN REED Plaintiffs Below, Appellants	)	
v.	)	No. 160, 2017
GEORGE & LYNCH, INC., a Delaware corporation; and GEORGE & LYNCH TRUCKING, LLC, a Delaware Limited Liability Company. Defendants Below, Appellees.	)	Court Below – Superior Court of the State of Delaware C.A. No.: S14C-01-006 THG C.A. No.: S14C-04-005 RFS Consolidated

JOINT OPENING BRIEF OF APPELLANTS JENNIFER PAVIK, DOUGLAS PAVIK, AND ASHLEE JEAN REED

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NATURE OF PROCEEDINGS

This case involves the tragic results of a motor vehicle crash in Sussex County, Delaware on a road that was under construction. The crash occurred on August 26, 2012. Ashlee Reed ("Reed") was the driver of the vehicle, and Jacqueline Pavik ("Pavik") was her passenger. Reed was injured; Pavik died. George & Lynch, Inc. ("G&L") was the contractor in charge of construction.[1]

Suit was filed on January 13, 2014.[2] The Plaintiffs below were Pavik's parents, Jennifer Pavik and Douglas Pavik, as well as Reed (collectively, the "Appellants"). G&L was a defendant below and is the party against whom this appeal was taken.[3] After nearly two years of discovery, the parties filed many *in-limine* and dispositive motions. On September 22, 2016, the Superior Court issued an Opinion granting G&L summary judgment.[4] On March 17, 2017, the Superior Court entered a Rule 54(b) Order entering final judgment as to the claims against G&L.[5] Appellants timely appealed. This is Appellants' joint opening brief.

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[1] Out of an abundance of caution, Appellants named George & Lynch Trucking, LLC ("G&LT LLC") as a party to this appeal. G&LT LLC sought summary judgment arguing it was not the entity involved in the project, and G&LT LLC was granted summary judgment. (A67). Appellants do not appeal that ruling and instead focus on defendant George & Lynch, Inc.

[2] A1, A72, A80-117.

[3] *Id.*

[4] A67; Opinion attached as Exhibit A (herein "Opinion").

[5] A70; Rule 54(b) Order attached as Exhibit B (herein "Rule 54(b) Order).

SUMMARY OF ARGUMENT

I. This Court should hold that summary judgment was inappropriate because genuine issues of material fact remained regarding whether G&L breached its legal duty. Under Delaware law and the DelDOT-approved plan, G&L had the duty to exercise judgment to determine whether temporary warning signs should have been used to warn motorists, including Reed, about a change in road surface condition generally and deteriorated road surface conditions that were foreseeable. The DelDOT contract made G&L responsible for in-the-field maintenance of traffic decisions – including using temporary warning signs. G&L mistakenly ceded those decisions to an unaware DelDOT. And Appellants' expert testified that G&L breached the standard of care by failing to acknowledge the known risk of a changed road surface condition and then not warning motorists about that risk. G&L's liability was a matter of factual dispute. The Superior Court's grant of summary judgment was error and should be reversed and remanded.

II. The Superior Court committed legal error by deciding proximate cause on a disputed summary judgment record. The Superior Court found that DelDOT's pothole filling on August 26 "broke any causation link" between G&L's conduct and the crash. Whether DelDOT's pothole work had any role in the crash was a genuinely disputed fact. The Superior Court's proximate causation ruling on summary judgment was improper.

STATEMENT OF FACTS

A. The Crash

It was Sunday night, August 26, 2012 – the penultimate weekend of the summer.[6] Reed and Pavik drove to Ocean City, Maryland to hang out with friends and get ice cream.[7] They were teenagers, rising seniors, who lived between Bethany Beach and Dagsboro, Delaware.[8] Reed was driving and Pavik was her front seat passenger.[9] Their return trip involved driving west on Omar Road.

Only a few miles from home, on Omar Road, Reed lost control of her vehicle and crashed. The speed limit was 50 miles per hour, and she may have been travelling that speed or just above it.[10] Her vehicle lost traction and directional control, left the roadway, and struck multiple trees.[11] Police and medical services responded. Reed was badly injured. Pavik died.[12]

Reed described the events that led to the crash. As she was driving along Omar Road, she saw a deer out of her passenger-side window. The deer was just off the side of the road in the grass, facing towards the road.[13] The deer startled

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[6] A364.
[7] A369.
[8] A363-366, A382, A385.
[9] A370-371.
[10] A389, A400-401.
[11] A375-381.
[12] A86, A397.
[13] A374, A398-399, A403, A417.

Reed, and she worried it would dash into the road.[14] Reed reacted to the sight of the deer by applying her brakes to slow down.[15] She did not slam on her brakes.[16]

At this moment, Reed started to feel gravel under her tires for the first time.[17] Upon pressing her brakes, the back end of the vehicle started to "swish."[18] Due to the loss of friction between the vehicle's tires and the road surface, the vehicle lost directional control and entered a yaw.[19] In a yaw, a vehicle's tires are rolling but sliding sideways. As G&L's expert observed, "a very good driver like a Nascar driver or something could probably recover" but "the average driver is not going to recover from a yaw"[20] Reed graduated from a driver's permit to a full license just a few months before the crash.[21] She tried to recover by turning the opposite way and adding more pressure to her brakes.[22] But Reed's actions did not restore control, the vehicle left the roadway, and it struck multiple trees before coming to rest in the shoulder.[23]

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[14] A403-405, A416.
[15] A377-378, A398-400.
[16] A406.
[17] A373.
[18] A379.
[19] A338-340.
[20] *Id.*
[21] A389-388.
[22] A379, A400, A406.
[23] A375-381, A396, A408.

Reed did not recall observing signs indicating Omar Road was under construction.[24] She would have driven slower if sufficiently warned that Omar Road was under construction and the road surface was abnormal:

> Q. What was it about the signs that caused the accident?
> A.[Reed] I believe there -- if there had been signs, I would have slowed down a lot -- lot longer before the accident happened.
> Q. Okay. Why would you have slowed down?
> A. Because I would have known that there was construction going on. I would have known to slow down. I would have known -- I would have known to go under the speed limit.
> Q. Okay. What kind of signs would you need?
> A. Roadwork ahead.
> Q. And what would you have slowed your speed to?
> A. The proper speed that you're supposed to slow down. If the posted speed is 50, then I would probably slow down to about 40 to see what the road's like; see if it's bad, if it's good. If it's -- if it's bad, I slow down more.[25]

She testified further that, had she been warned that the road surface was not normal and instead was rough, she would have been extra careful:

> Q. If you were aware that there was gravel or that there was a rough road surface, would that cause you to change or lower your speed?
> A. [Reed]. Yes.
> Q. Why?
> A. Because I would have known to be more careful.[26]

Reed was not aware that the condition of Omar Road would suddenly change from the original road surface to a roadway that was under construction and had a different wearing surface.[27]

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[24] A372, A390, A392, A409.
[25] A409-410.
[26] A409-415.

B. The Project – Repaving Omar Road using CIPR.

The Delaware Department of Transportation ("DelDOT") had contracted with G&L to perform a repaving project on Sussex County roadways in 2012. The project included Omar Road, which at the time of the crash was being repaved. The repaving project involved a technique called cold-in-place recycling ("CIPR"), and G&L hired E.J. Brenneman ("EJB") to perform the CIPR work.

CIPR is a unique paving technique that involves milling an existing roadway, mixing the recycled roadway with emulsified asphalt and cement, and then reapplying as a recycled base layer.[28] Once a roadway has undergone CIPR, it is in a rough, course condition for several days until it cures and then receives a final coat of asphalt paving. Under the proper circumstances, a roadway undergoing CIPR may be re-opened to traffic before the final coat is applied.[29]

i. G&L's prior experience with CIPR "raveling."

The use of CIPR presents certain risks. One of those risks is "raveling" – a dangerous condition that occurs when the rough CIPR recycled base layer loses its integrity and compaction and starts to break apart. This causes the formation of loose gravel, depressions, potholes, and ruts.[30] A deteriorated road surface with those conditions can result in vehicles losing control because it adversely affects

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[27] A372, A390, A392, A409.
[28] A543-544, A498-499.
[29] A557, A498-499.
[30] A542-543, A498-499.

the tire-to-road friction dynamic – the tires' grip is lessened which greatly diminishes the driver's control.[31]

G&L had prior experience with raveling while using CIPR. Raveling occurred during G&L CIPR paving jobs located on State Route 20 between Dagsboro and Roxana in 2008, and again on State Route 404 between Bridgeville and Georgetown in 2011.[32] Then, as part of the 2012 Sussex County repaving project that included Omar Road, G&L experienced raveling and the deterioration of CIPR on Indian Mission Road, only months before Pavik was killed.[33]

G&L knew from experience that a roadway subjected to heavy traffic, excessive rainfall, and limited sunlight is highly susceptible to deterioration and raveling.[34] Multiple G&L employees testified that those conditions directly impacted the curing time of CIPR, causing it to be susceptible to deterioration.[35]

For G&L, raveling was a concern for *cost*, not safety. This was memorialized in a letter sent to DelDOT by G&L's Executive Vice President, Chris Baker – just one week after Pavik was killed.[36] Baker testified that the letter's purpose was *not* to address safety and the substantive problems G&L had

[31] A571, A498-499.
[32] A438-440.
[33] A357-358.
[34] A354-359, A441-447.
[35] *Id.*
[36] A516-517.

experienced with CIPR to eliminate future raveling issues.[37] Rather, the letter's purpose was to inform DelDOT about the *cost* of CIPR raveling – that using CIPR in areas with high traffic, limited sunlight, and moisture issues led to raveling requiring repairs that in turn increased project costs.[38] Baker testified that any future CIPR paving contracts that included areas susceptible to raveling would need to be priced accordingly. Baker testified that his letter was intended to "better position" G&L so that "it was going to be favorable to us in the conditions the work took place under and the price we were going to get paid for it."[39]

ii. Raveling on Omar Road.

G&L was on notice that conditions on Omar Road were favorable for raveling. G&L employees testified that Omar Road was heavily travelled, especially on weekends, because it is a primary route from inland to the beach.[40] And G&L employees knew that the section of Omar Road where the Reed vehicle lost directional control was heavily wooded with a significant tree canopy that limited sunlight.[41] Heavy traffic and limited sunlight made the likelihood of raveling on Omar Road foreseeable. To make matters worse, beginning on August 22 (four days before the crash) forecasts began predicting significant rainfall for

[37] A448-453.
[38] *Id.*
[39] *Id.*
[40] A353-358.
[41] *Id*.

the weekend.[42] With Omar Road already primed for raveling, the predicted heavy rainfall all but guaranteed that raveling would occur.

G&L employees testified that they did not do anything differently when applying CIPR to Omar Road – despite G&L's extensive experience with deteriorating CIPR and raveling issues with the same environmental factors that existed on Omar Road.[43] Specifically, G&L did not take any precautions to prevent raveling on a roadway it knew would experience heavy traffic over the August 25-26 weekend and was in a heavily shaded area.[44] What's more, G&L ignored the weekend weather forecasts, with employees describing the forecasts as irrelevant simply because they do not work on weekends.[45] G&L took no precautions to mitigate or warn of an almost certain raveling event.

At the time of the crash on August 26, raveling had occurred in the area of Omar Road where the Reed vehicle lost directional control.[46] Corporal Jay Burns of the State Police Collision Reconstruction Unit reported that the "area that was re-surfaced appeared to be extremely rough and deteriorating creating an unstable

[42] A525-527.
[43] A454-457.
[44] *Id.*
[45] A338-340, A360-361.
[46] A542-543, A498-499.

driving surface" and that he observed "large depressions and scattered gravel."[47] DelDOT employees also testified that raveling had occurred.[48]

Appellants' collision reconstruction expert testified that the raveling on Omar Road caused Reed's vehicle to lose control. Reed encountered a deteriorated portion of the road where the tires' grip was substantially reduced, so when Reed applied her brakes the vehicle reacted by yawing and Reed could not recover.[49]

C. The Contract and Specifications.

G&L and DelDOT entered into a contract regarding the Sussex County re-pavement project, which included the work on Omar Road (the "Contract"). The Contract is well over one hundred pages long, and it covers in detail a plethora of topics.[50] The Contract required G&L to abide by a variety of incorporated documents, including: the Delaware Standard Specifications for Road and Bridge Construction, August 2001; supplemental specifications, special provisions; plan notes; the bid proposal; and other addenda (collectively, the "Specifications").[51]

G&L was delegated essentially all of DelDOT's normal responsibilities for the roads upon which it was working. Per the Specifications, G&L had "the sole and absolute responsibility for the work and to provide for the protection and

[47] A520-524. Corporal Burns confirmed his report at his deposition. A418-420.
[48] A422-425.
[49] A491-494.
[50] A118-253.
[51] A254-319.

safety of" the public.[52] Likewise, G&L was required to maintain the work until completion, such that its maintenance of the work "shall be performed every day continuous, and effective with adequate equipment and forces to keep the roadway and structures in a satisfactory condition."[53]

i. G&L, not DelDOT, was in charge of the maintenance of traffic.

G&L's responsibilities included the maintenance of traffic. The Specifications required that G&L "keep the section of the Project being used by public traffic in a condition that safely and adequately accommodates traffic."[54] To meet its obligations under the Contract and Specifications, G&L had to follow the Delaware Manual on Uniform Traffic Control Devices (the "MUTCD").[55] G&L was required to "furnish, erect, and maintain barricades, drums, *warning signs*, delineators, striping, and flaggers" per the MUTCD.[56] The Contract includes a section entitled, "Maintenance of Traffic – All Inclusive," that details G&L's general maintenance of traffic obligations. Pursuant to that section, "[a]ny, and all, control, direction, management and maintenance of traffic shall be performed in accordance" with the Contract, Specifications, and MUTCD.[57]

[52] A282-283 (Specifications, 104.14).
[53] A292 (Specifications, 105.13).
[54] A279 (Specifications 104.09).
[55] A222 (Contract MOT All Inclusive), A310 (General Plan Note 7).
[56] A279 (Specifications 104.09) (emphasis added).
[57] A222-223 (Contract, MOT All Inclusive).

The Contract and Specifications delineated many maintenance of traffic requirements that could be anticipated and planned before work began, including:

- Permanent warning signs 1,500', 1,000', 500' and End of Work on side roads leading into and out of work zones;[58]
- Permanent and temporary striping usage;[59]
- Compliance with ADA pedestrian rules;[60]
- Message board placement prior to start of work;[61]
- Worker safety including vest types and cell phone use;[62]
- Drum usage for drop-offs of certain depth;[63]
- Lane closure procedures and specifics, including a requirement to pick up related signs from the right of way each day;[64] and
- Detour and road closure procedures and approvals.[65]

But the Contract and Specifications, despite their length, did not attempt to cover every possibility in advance since those documents were prepared months if not years before the work began. Recognizing this reality, G&L was delegated complete responsibility for the in-the-field decisions that had to be made during the performance of the work.

A critical component of G&L's maintenance of traffic obligations was the requirement that it employ a maintenance of traffic supervisor (the "MOT Supervisor"). G&L was "required to have an American Traffic Safety Services

[58] A317-319 (Preconstruction meeting minutes, ¶22, General Discussion).
[59] A309-311 (General Contract Plan Notes 6 & 10).
[60] A310 (General Contract Plan Note 8).
[61] A317-319 (Preconstruction meeting minutes, ¶22, General Discussion).
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] A223 (Contract, MOT All Inclusive).

Association (ATSSA) certified Traffic Control Supervisor on the project."[66] The MOT Supervisor's "sole responsibility" was "the maintenance of traffic throughout the project" – including "the installation, operations, maintenance and service of temporary traffic control devices."[67] It was expected that the G&L MOT Supervisor would be qualified to interpret and apply the MUTCD in the field.[68]

DelDOT's employees and the Specifications confirmed that G&L, not DelDOT, was responsible for the day-to-day onsite maintenance of traffic.[69] DelDOT employees testified that G&L's responsibilities included checking road surface conditions and taking actions to address problems.[70] In fact, the DelDOT inspectors who administered G&L's work were not certified in the MUTCD.[71] Per the Specifications, DelDOT's role was limited to administration, not supervision. "The Engineer [i.e. DelDOT] is the administrator of the Contract and not a supervisor of the work. All work shall be performed to the satisfaction of the Engineer, but in no case shall the Contractor be relieved of complete responsibility

[66] A222 (Contract, MOT All Inclusive), A311 (General Contract Plan Note 9), A317 (Preconstruction meeting minutes, ¶22, General Discussion, 5th bullet).
[67] *Id.*
[68] A222 (Contract, MOT All Inclusive).
[69] A489-490 A428-431.
[70] A479-481.
[71] A487-488, A472-473, A428, A432-433. At most, the inspectors could bring an issue to G&L's attention and suggest certain steps; but G&L was expected to make the final decision. A430-433.

for the work."[72] Likewise, the inspectors working for the DelDOT engineer "are administrators of the Contract and not supervisors of the work," and "shall in no case act as foreman or perform other duties for the Contractor, nor interfere with the management of the Work by the latter."[73]

ii. G&L had the authority to use temporary warning signs on Omar Road, and G&L was not prohibited from leaving those signs up over the weekend to warn motorists.

G&L had the authority to place temporary warning signs on Omar Road. As the contractor in charge of in-the-field maintenance of traffic decisions, G&L was required to interpret and apply the MUTCD to developing situations.[74] The MUTCD does not attempt to cover every possibility with specific dictates.[75] It instead leaves many decisions to the MOT Supervisor's engineering judgment, including the use of temporary warning signs.[76] Here, G&L was required to evaluate changing conditions, interpret the applicable MUTCD provisions, and exercise judgment as to whether it was necessary to place temporary warning signs on Omar Road to warn motorists of a change in road surface condition or adverse

[72] A283 (Specifications, 105.01).
[73] A283 (Specifications, 105.02).
[74] A222 (Contract, MOT All Inclusive); A310 (General Contract Plan Note 7).
[75] A326 (MUTCD §6A.01.07).
[76] A320 (MUTCD §§ 2C.02 (use of warning signs)), A323 (2C.32.02 & .03 (instructions on using surface condition signs, including Loose Gravel and Rough Road)), A337 (6F.47 (use of special warning signs)), A503-504.

road conditions that were likely to develop over the weekend.[77] This included placing signs warning of "Loose Gravel," "Rough Road," etc.[78]

G&L was not prohibited from leaving warning signs up over the weekend to warn motorists, as confirmed by three sources. First, the MUTCD calls for the removal of temporary warning signs "when they are no longer needed" or are "no longer appropriate" – implying that signs should remain when needed and appropriate.[79] Second, DelDOT employees testified that temporary warning signs may be left in place overnight and when no work is occurring if the situation warrants it.[80] This includes the ubiquitous "Bump" sign, as well as signs to warn of road surface deterioration.[81] Third, the Contract does not explicitly address leaving up temporary warning signs overnight. But, the Contract does specifically cover the oft-occurring problem of pavement drop-offs.[82] If, "[a]t the end of each day's work," the contractor is unable to eliminate a drop-off hazard, then "the area should be properly marked and protected with," among other things, "warning signs."[83] The Contract contemplated use of warning signs overnight to warn of drop-off hazards. And there is no language in the Contract or Specifications that

[77] *Id.* A336 (MUTCD §6F-4 (Warning Signs, Delaware Revision)), A728-729.
[78] *Id.*
[79] A330 (MUTCD §6B-3.09).
[80] A474-482, A434-436.
[81] *Id.*
[82] A224 (Contract MOT All Inclusive).
[83] *Id.*

prohibited G&L from using warning signs overnight in other situations should the MOT Supervisor apply the MUTCD and determine warnings are necessary.

D. G&L's negligence leading up to the crash.

G&L was negligent in at least three ways in the days before the crash.

First, G&L's MOT Supervisor, Jesse Davis, was incompetent and did not understand his role. Davis had minimal qualifications for the position and was unable to interpret and apply the MUTCD, as contractually required. Several months before the crash, Davis took a one-day, open-book test on the MUTCD and was then promoted from the paving crew to MOT Supervisor.[84] Davis viewed his role as a yes-man, not a supervisor:

> I want you – I want you to understand something that – and I'm not trying to be smart, but I was just told what to do. I was told to put these signs up on – at this location. And when you say, like, MOT supervisor, all I was in charge was – of was six signs, cones and placement of flaggers. I wasn't in charge of reading this document [the MUTCD] or collecting information from the State or – anything like that.[85]

Davis did not have a copy of the MUTCD with him while he was on site, and he never referenced the MUTCD while he was working on Omar Road.[86] Moreover, Davis had not read the Contract or Specifications.[87]

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[84] A342, A345.
[85] A346.
[86] A343-344.
[87] A344, A347-348.

Second, G&L misunderstood its maintenance of traffic responsibilities and incorrectly believed DelDOT, not G&L, was responsible for many decisions including the placement of temporary warning signs. Davis, G&L's MOT Supervisor, believed that is was not his responsibility to decide if temporary warning signs were necessary. When Davis was asked about applying the MUTCD and using his engineering judgment, he testified that it was DelDOT's responsibility to decide if temporary warning signs were necessary.[88] Other G&L employees shared this mistaken belief.[89]

Davis and his G&L colleagues were wrong. As explained above, the Contract placed G&L, not DelDOT, in charge of interpreting and applying the MUTCD for in-the-field maintenance of traffic decisions.[90] That DelDOT was not the decision-maker regarding maintenance of traffic is made clear by the fact that no DelDOT employee on Omar Road was MUTCD-certified or had a copy of the MUTCD in their vehicle.[91] G&L failed to understand and perform its contractual obligation to be the onsite maintenance of traffic decision-maker.

Third, G&L failed to erect temporary warnings signs on Omar Road to warn motorists, including Reed, of a change in road surface condition or that they would likely encounter deteriorated road conditions over the August 25-26 weekend.

[88] A343-345, A349-350.
[89] A451, 458, A460, A352, A462-469.
[90] A489-490, A478-480, A428-431. *See* A500-502, A507-508.
[91] A487-488, A472-473, A428, A104-105.

Appellants' traffic safety expert opined that G&L breached its standard of care by failing to place temporary warning signs at the conclusion of work on August 24.[92] Appellants' expert testified that the Contract and the MUTCD required temporary warning signs within the repaved area alerting motorists of the change in road surface condition.[93] He also testified that G&L, based on its prior experiences with raveling and the forecast for that weekend, knew or should have known that raveling over the weekend of August 25-26 was foreseeable and thus temporary warning signs should have been used to mitigate that risk.[94]

E. DelDOT's work on Omar Road on August 26 was limited to pothole filling. Reed did not lose control because of the potholes, and DelDOT's work did not address the general deterioration of Omar Road.

During the weekend of August 25-26, DelDOT received complaints about the condition of Omar Road.[95] The DelDOT traffic management center tried to summon G&L to address the complaints, but DelDOT did not have G&L's correct phone number on file.[96] DelDOT dispatched a maintenance crew to "cold patch the potholes" in certain locations on Omar Road.[97]

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[92] A500-506, A514-515.
[93] A503-505.
[94] A509-515.
[95] A470-471, A518-519.
[96] A483a.
[97] A470-471, A518-519.

The extent to which DelDOT's pothole filling led to the crash was disputed. Reed testified that she did not see or hit any potholes on Omar Road.[98] According to DelDOT employees who inspected the site after the crash, the beginning of the yaw marks produced by Reed's vehicle were 157 feet from the end of where the potholes were located.[99] One DelDOT employee walked the roadway area where the crash occurred and did not see any repaired potholes.[100] In any event, the DelDOT crew only performed pothole filling and did not address the other problems with the raveled road including the presence of loose gravel.[101]

F. The Litigation.

Appellants filed suit on January 13, 2014.[102] Appellants sued G&L, EJB, G&L's other subcontractors, and DelDOT. The Paviks also sued Reed and her father, the owner of the vehicle. The Paviks brought wrongful death and survival claims. Reed asserted personal injury claims.

Discovery was very thorough. In addition to written discovery, the parties took over twenty fact depositions. The main parties relied on multiple experts, many of whom were deposed. Trial was scheduled for June 2016.

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[98] A383-384.
[99] A484-486, A426-427.
[100] A422-425.
[101] A518-519.
[102] A1, A80.

In the early spring of 2016, the parties filed many *in limine* and dispositive motions. Briefing was complete by the middle of April 2016. On April 28, 2016, the Court informed that parties that the trial was postponed because of the pending motions.[103] The Court held a status teleconference on May 4, 2016 and decided to schedule oral argument for June 6, 2016.[104]

During the May 4, 2016 teleconference, the Court announced that it was limiting oral argument to only the G&L motion for summary judgment because the Court believed the issue of G&L's legal duty was dispositive.[105] The Court isolated this single issue out of the myriad of factual and legal issues covered in the parties' many motions and briefs which stood "five, six feet high" in chambers.[106] A week later, Appellants moved for permission to file a five-page supplemental brief to expound on that specific legal issue.[107] But the Court denied that motion the next day, stating: "The Court has spent 3 weeks on this. Briefing is over."[108]

Oral argument on G&L's motion for summary judgment was held on June 6, 2016.[109] On September 22, 2016, the Court issued its Opinion granting G&L

[103] A65-66.
[104] A66, A651-664.
[105] A655-656, A662.
[106] A654, A691.
[107] A655-666.
[108] A667.
[109] A668-717.

summary judgment on all of Appellants' claims.[110] The Court also granted DelDOT summary judgment. The Court noted that the Paviks' claims against Reed and her father remained viable.

Appellants filed a motion for the Rule 54(b) Order on January 6, 2017.[111] The Court's grant of summary judgment to G&L was not a final order because the Paviks' claims against Reed and her father remained viable. Appellants argued that the Court should enter a Rule 54(b) order to direct the entry of final judgment on Appellants' claims against G&L – to avoid a wasteful trial on the remaining claim and expedite appellate review of the grant of summary judgment to the key defendant, G&L.

The Court entered the Rule 54(b) Order, over G&L's objection, on March 17, 2017.[112] That order directed the entry of final judgment in G&L's favor on all of Appellants' claims, and expressly determined that there was no just reason for delay of an appeal of that final judgment.[113] On April 11, 2017, Appellants filed a timely notice of appeal of the Rule 54(b) order.[114]

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[110] Opinion.
[111] A718-727.
[112] A70.
[113] Rule 54(b) Order.
[114] A71.

ARGUMENT

I. The Superior Court erred by granting G&L summary judgment. G&L owed a legal duty to Appellants to exercise its own judgment about the use of temporary warning signs, and Appellants produced substantial evidence for a jury to conclude G&L breached that duty.

A. Question Presented.

Did G&L breach its duty to Appellants to make Omar Road safe for vehicle travel by failing to exercise its own judgment about the use of temporary warning signs to warn about a change in road surface condition generally and deteriorated road surface conditions that were foreseeable? This question was raised below in the briefing on G&L's motion for summary judgment, and further expounded upon during oral argument on that motion.[115]

B. Scope of Review.

This Court reviews "the Superior Court's grant of summary judgment *de novo* to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[116]

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[115] A596-602, A619-628, A640-646, A685-701, A706, A709-713.

[116] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (quotations omitted).

C. Merits of Argument.

G&L was the general contractor in charge of Omar Road and was specifically delegated the ongoing responsibility to make in-the-field maintenance of traffic decisions. In that role, pursuant to the Contract and Specifications, G&L's legal duty included the requirement to interpret the MUTCD and exercise judgment to determine whether temporary warning signs should have been utilized on Omar Road as a result of the change in road surface condition generally and foreseeable deteriorated road surface conditions for the weekend of August 25-26, 2012. Appellants have put forth substantial evidence for a jury to conclude that G&L breached that duty, proximately causing Pavik's death and Reed's injuries.

i. G&L's legal duty was defined by the Contract and Specifications.

G&L owed a general legal duty to the traveling public, including Appellants, to act with reasonable care in performing its work on Omar Road.[117] The specifics of G&L's legal duty were defined by the DelDOT Contract and Specifications.

A line of Delaware case law has developed regarding negligence cases involving DelDOT-approved road construction performed by private contractors. A survey of the four key cases is necessary to understand when a contractor may be held liable for its negligent conduct.

[117] *Thurmon v. Kaplin*, 1999 WL 1611327, at *3 (Del. Super. Mar. 25, 1999).

High. The leading case is this Court's decision in *High v. State H'way Dep't.*[118] There, a driver was killed in a head-on collision that occurred in the northbound lane of a dual highway. Normally, the lanes were separated by a grass median, but construction on the southbound lane required the detour of all traffic onto the northbound lane which had been temporarily altered to handle both directions of traffic. The driver's widow sued and claimed that the traffic management plan created by the general contractor and approved by DelDOT was insufficient. It was undisputed that the approved plan was in accord with national standards, but the plaintiff's expert opined that DelDOT should have required a more cautious plan. The approved plan set forth requirements for a detour including signs, barricades, and striping. The plaintiff's expert opined that plan was insufficient and that additional barricades and different signage was needed.[119]

This Court held that DelDOT (which had waived sovereign immunity by statute) could not be liable for exercising its governmental discretion to approve a plan that was among acceptable options.[120] In turn, the Court held that the contractor could not be held liable for following that DelDOT-approved plan.[121]

Most important for this appeal, this Court held that the contractor was not liable "because there is no evidence which [the Court] found to indicate that the

[118] 307 A.2d. 799 (Del. 1973).
[119] *Id.* at 802-803.
[120] *Id.* at 804.
[121] *Id.* at 804.

plan was not *exactly followed*."[122] This holding implies that the contractor may be held liable if it failed to "exactly follow" the DelDOT-approved plan.

Thurmon. The next case is *Thurmon v. Kaplin*,[123] where a motor vehicle accident occurred during non-construction hours on a road undergoing repaving. Some striping had been applied, but the right thru-lane and right turn lane were not marked. A driver in the right thru-lane attempted a right turn but hit a motorcyclist in the turn lane. The motorcycle plaintiff sued, among others, the striping subcontractor and the general contractor. The plaintiff argued that the striping subcontractor should have marked the lanes in question, and further that the general contractor should have closed the right turn lane.[124]

The Superior Court granted summary judgment to the striping subcontractor but denied summary judgment as to the general contractor. Summary judgment was granted to the subcontractor because it followed its contract, and DelDOT had the ultimate responsibility to specify when or where to place striping.[125] However, the Court denied summary judgment regarding the general contractor. The Court ruled that the general contractor owed a legal duty to protect the traveling public and that it had a general duty to act as a reasonably prudent contractor.[126]

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[122] *Id.* (emphasis added).
[123] 1999 WL 1611327 (Del. Super. March 29, 1999).
[124] *Id.* at *1.
[125] *Id.* at *2
[126] *Id.* at *3.

Critical to this appeal, the Superior Court, citing *High*, ruled that the record was incomplete as to whether the DelDOT contract addressed if the general contractor could use its own discretion to close a turn lane if necessary for safety.[127] Therefore, there was a question of fact as to whether "a reasonable, prudent contractor would have closed the right-turn lane for the protection of the general public."[128]

Hales. The third case is *Hales v. English*,[129] where an accident occurred on a road being repaved. The contractor was repaving a part of the southbound lane, and the DelDOT contract required the contractor to hire a police officer to direct traffic at an intersection. The officer waived at a driver to pull forward into the median, but the driver continued through the median into the other lane and crashed into the plaintiffs. The plaintiffs sued and argued that the contractor should have closed the median, rerouted traffic, or hired another flagger.[130]

The Superior Court granted summary judgment to the contractor, relying upon *High*. The plaintiffs could not show that the contractor "deviated in practice from its approved traffic control plan."[131] The approved plan required the contractor to hire a police officer to direct traffic, leaving traffic direction in the

[127] *Id*. at *3, n.6.
[128] *Id.* at *3.
[129] 2014 WL 12059005 (Del. Super. 2014) *aff'd sub nom. Hales v. Pennsy Supply, Inc.*, 115 A.3d 1215 (Del. 2015) (TABLE).
[130] *Id.* at *2.
[131] *Id.*

officer's hands. The contractor fulfilled its only obligation for traffic management. The plaintiffs argued that the contractor should have controlled the traffic using different methods. But the Superior Court ruled that the *High* decision forecloses this argument because DelDOT specified the method of traffic management, and the contractor followed that specification.[132]

Patton. The final case is *Patton v. 24/7 Cable Company, LLC*,[133] which was decided on August 31, 2016 – nearly two months after oral argument in this case and a few weeks before the Superior Court's Opinion was issued.

In *Patton*, a driver in the northbound lane of a highway entered a cross-over to cross the southbound lane into a parking lot. The cross-over was in an area under construction, and there was construction equipment in the cross-over that may have blocked the driver's view of the southbound lane. The driver attempted to cross the southbound lane, but failed to see an oncoming motorcyclist, and a crash ensued. The motorcyclist sued the general contractor and various subcontractors, as well as the other driver.[134]

[132] *Id.* (citing *High*; the *Thurmon* case was not cited).
[133] 2016 WL 6272552 (Del. Super. Aug. 31, 2016) (*Patton I*).
[134] *Patton I*, at *1.

The contractors moved for summary judgment. The Superior Court issued three orders deciding those motions, all of which denied summary judgment.[135]

The order on the general contractor's motion is the most instructive on this appeal. The Superior Court denied the general contractor's motion, ruling that questions of fact remained as to whether the general contractor's actions were "in full compliance" with the contract and MUTCD.[136] In its order, the Superior Court discussed and applied *High*, *Thurman*, and *Hales*.[137] Summary judgment was inappropriate because the general contractor was responsible for the maintenance of traffic at the cross-over intersection, and the experts disagreed over whether the general contractor had properly applied the MUTCD under the circumstances.[138] Moreover, even though DelDOT employees testified that the general contractor complied with the MUTCD, the Superior Court ruled that a jury was required to resolve the dispute of fact regarding MUTCD compliance.[139]

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Two key principles emerge from this line of cases.

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[135] *Patton v. 24/7 Cable Company, LLC*, 2016 WL 4582472 (Del. Super. Aug. 31, 2016) (*Patton II*); *Patton v. 24/7 Cable Company, LLC*, 2016 WL 6272556 (Del. Super. Aug. 31, 2016) (*Patton III*) (denying in part, granting in part).
[136] *Patton I*, at *4.
[137] *Patton I*, at *2-4.
[138] *Patton I*, at *4.
[139] *Patton I*, at *4; *see Patton II*, 2016 WL 4582472 at * 5 (finding that a disputed issue of material fact remained despite DelDOT employees' belief that the subcontractor acted appropriately); *Patton III*, 2016 WL 6272556 at * 5 (same).

The first principle is that a contractor may be held liable if it does not "exactly follow" or "fully comply" with a DelDOT approved plan. A contractor is insulated from liability in a number of circumstances. If DelDOT approves a particular method of traffic control, use of that method cannot be negligence.[140] And if DelDOT chooses a method from multiple options, a plaintiff cannot argue that an alternative method should have been used instead.[141] Further, if a specific detail of traffic control is addressed in an approved plan (requiring or prohibiting it), then a plaintiff cannot argue that a contractor should have deviated from that specification.[142] However, a contractor may be held liable if it fails to "exactly follow" or "fully comply" with a DelDOT approved plan.[143]

The second principle is that a contractor with decision-making authority may be held liable for in-the-field decisions. If DelDOT or another party is the onsite decision-maker, a contractor cannot be liable for following that decision.[144] If, however, a contractor is the designated onsite decision-maker, the contractor may be held liable for in-the-field decisions.[145] Furthermore, when the contractor is

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[140] *High*, 307 A.2d at 804.
[141] *Hales*, 2014 WL 12059005, at *2 (citing *High*, 307 A.2d at 804).
[142] *Id.* at 803-805; *Thurmon*, 1999 WL 1611327, at *1-3.
[143] *High*, 307 A.2d. 799, 804; *Patton I*, 2016 WL 6272552 at *2-4; *Hales*, 2014 WL 12059005, at *2.
[144] *Thurmon*, 1999 WL 1611327 at *1-3.
[145] *Thurmon*, at *3; *Id*. at *3, n.4; *Patton I*, 2016 WL 6272552 at *3; *Patton III*, 2016 WL 6272556, at *5 (ruling that the subcontractor had decision-making authority under the MUTCD for setting up traffic controls, and there was a

required to exercise discretion to make in-the-field decisions, it must do so as a reasonably prudent contractor would under the circumstances in accord with the MUTCD.[146]

ii. G&L failed to "exactly follow" the DelDOT approved plans.

G&L was required to "exactly follow" the Contract and Specifications. Viewing the facts in the light most favorable to Appellants, a genuine issue of material fact remained as to whether G&L had done so. The Superior Court erred by concluding otherwise.

G&L was contractually required to have onsite a MOT Supervisor certified in the MUTCD. This was necessary because DelDOT understood that the maintenance of traffic plan, developed many months before the contract was published for bid, could not be expected to address every potential traffic issue that may arise in the field. Therefore, DelDOT wisely required G&L to employ a MOT Supervisor who was required to be onsite daily (presumably with a copy of the MUTCD) and tasked with understanding interpreting, and applying the MUTCD when necessary. Appellants have produced substantial evidence for a jury to find that G&L failed to follow this critical aspect of the DelDOT-approved plan.

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disputed issue of material fact as to whether the subcontractor exercised that authority reasonably and in compliance with the MUTCD).

[146] *Thurmon*, at *3; *Id*. at *3, n.4; *Patton I*, 2016 WL 6272552 at *3.

First, G&L's supposed MOT Supervisor, Jesse Davis, was incompetent and misunderstood his role. He did not have the MUTCD with him on site, he had not read the Contract or Specifications, and he simply viewed himself as a yes-man for DelDOT instead of the person authorized to make in-the-field decisions based on changing circumstances. The Contract and Specifications clearly required that G&L have a qualified individual onsite to make daily decisions on maintenance of traffic issues. G&L failed to fully comply with the Contract and Specifications by relying upon an incompetent person who did not understand his responsibilities.

Second, G&L misunderstood its maintenance of traffic responsibilities and incorrectly believed DelDOT, not G&L, was responsible for many decisions including the placement of temporary warning signs. G&L's MOT Supervisor and other employees believed that it was not G&L's responsibility to decide if temporary warning signs were necessary. As explained above, the Contract and Specifications placed G&L, not DelDOT, in charge of in-the-field maintenance of traffic decisions. With G&L and DelDOT both believing the other was in charge of in-the-field maintenance of traffic decisions, effectively no one was ensuring this important task was performed. Because G&L incorrectly and improperly ceded its maintenance of traffic responsibilities to an unaware DelDOT, G&L did not fully comply with the Contract and Specifications.

iii. G&L was delegated decision-making responsibility for maintenance of traffic decisions, so it was legally obligated to exercise that responsibility in a reasonably prudent manner in accord with the MUTCD – it failed to do so.

G&L was the contractually designated onsite maintenance of traffic decision-maker. G&L had both the responsibility to interpret and apply the MUTCD and the authority to utilize temporary warning signs to mitigate risks posed by changing circumstances. Viewing the facts in the light most favorable to Appellants, they have produced substantial factual and expert evidence to show that G&L breached that duty. The Superior Court erred by concluding otherwise.

G&L was contractually required to have a MOT Supervisor onsite so that G&L could meet its obligation to perform its work in accordance with the MUTCD.[147] G&L's MOT Supervisor's "sole responsibility" was "the maintenance of traffic throughout the project,"[148] and G&L was required to give the MOT Supervisor adequate authority to make and carry out those in-the-field decisions.[149]

In that role as the contractually designated decision-maker, the MOT Supervisor – and thus G&L – was required to exercise his discretion to make in-the-field decisions in a reasonably prudent manner in accord with the MUTCD.[150] Here, Section 2.02 of the MUTCD, Application of Warning Signs, required the

[147] A222 (Contract, MOT All Inclusive), A311 (General Contract Plan Note 9), A317 (Preconstruction meeting minutes, ¶22, General Discussion, 5th bullet).
[148] *Id.*
[149] A222 (Contract, MOT All Inclusive).
[150] *Thurmon*, at *3; *Id*. at *3, n.4; *Patton I*, 2016 WL 6272552 at *3.

MOT Supervisor to use his engineering judgment to decide whether temporary warning signs were appropriate under the circumstances.[151]

G&L breached its duty as onsite maintenance of traffic decision-maker. Specifically, G&L failed to properly reference, interpret, and apply the MUTCD and exercise judgment to determine whether it was reasonable to erect temporary warnings signs on Omar Road – signs that would warn motorists, including Reed, that they would likely encounter a change in road surface condition generally and deteriorated road surface conditions that were forseeable over the August 25-26 weekend. To begin with, G&L failed to recognize this responsibility, much less attempt to exercise its engineering judgment on this issue. Even assuming G&L properly understood its maintenance of traffic decision-maker role, G&L's actions and omissions breached the standard of care according to Appellants' expert.[152] G&L breached its standard of care by failing to place temporary warning signs. In order to properly alert motorists, the Contract and the MUTCD required temporary warning signs on Omar Road near the change in road surface condition. This was especially so because the nearest permanent sign warning of construction was over

[151] A320 (MUTCD 2C.02), A323 (MUTCD 2C.32 Surface Condition Signs 07 (providing guidance on placement of temporary warning signs indicating hazardous road surface conditions)), A337 (MUTCD 6F.47 (special warning signs may be used based on engineering judgment).
[152] A497-515.

a mile from the crash site.[153] And G&L knew or should have known that raveling over the weekend of August 25-26 was foreseeable and thus the use of temporary warning signs was even more necessary to mitigate that risk.

In summary, viewing the facts in a light most favorable to Appellants, whether G&L met the applicable standard of care was a genuinely disputed issue of material fact thereby precluding summary judgment.[154]

iv. The Superior Court committed three fundamental errors by granting G&L summary judgment.

The Superior Court's decision to grant summary judgment on the issue of G&L's legal duty is fundamentally flawed in at least three respects.

First, the Superior Court made factual findings about DelDOT's control over the placement of warning signs even though a genuine dispute of fact remained on that issue. The Superior Court made multiple statements about DelDOT's alleged control over the placement of warning signs. The clearest example is when the Court ruled: "The bottom line is that DelDOT managed the placement and use of warning signs at the worksite."[155]

But the question of whether, or to what extent, DelDOT had control over the use of warning signs was a genuinely disputed issue of fact. The Superior Court's

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[153] A495-496.

[154] *Patton I*, 2016 WL 6272552 at *4; *Thurmon*, 1999 WL 1611327 at *1-3.

[155] Opinion at 11. Similarly, the Superior Court found that DelDOT made the "final decision" about signs, and that G&L would "need approval from DelDOT" to place additional warning signs. *See* Opinion at 9.

broad statements about DelDOT's supposed control ignores the nuance and detail of the issue. DelDOT controlled the placement of permanent signs per the Contract and Specifications,[156] and DelDOT preferred that signs used during construction be removed when the day's work was finished.[157] However, Appellants' experts – and DelDOT employees – testified that temporary warning signs may be left in place overnight and when no work is occurring if warranted by the situation.[158] In fact, a DelDOT engineer testified that if a contractor knew raveling was likely to occur, that contractor was responsible for mitigating that risk using the methods permitted by the MUTCD.[159]

Therefore, when viewing the record in the light most favorable to Appellants, there is clearly a genuine issue of fact remaining on this issue, such that a jury could find that G&L, not DelDOT, controlled decisions about placing temporary warning signs. The Superior Court erred by ignoring the testimony of Appellants' expert and the DelDOT employees on this point. The Superior Court also erred by accepting G&L's assertion that the testimony of the DelDOT employees supported G&L's view of its legal duty.[160] The exact parameters of

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[156] A317-319 (Preconstruction meeting minutes, ¶22, General Discussion).
[157] A476-477.
[158] A500-505, A514-515, A474-475, A481-482, A434-435.
[159] A479-480.
[160] *See Patton II*, 2016 WL 4582472 at * 5 (finding that a disputed issue of material fact remained despite DelDOT employees' belief that the subcontractor acted appropriately); *Patton III*, 2016 WL 6272556 at * 5 (same).

G&L's responsibility was a disputed issue of fact that required reconciling conflicting testimony – a task for a jury, not a judge.

Second, the Superior Court erred by finding as a matter of law that G&L fully complied with the Contract and Specifications.[161] G&L was required to have its MOT Supervisor onsite daily who was certified in the MUTCD and could interpret and apply its provisions. This person was required to utilize the manual and exercise judgment about the placement of temporary warning signs to address changing circumstances. Whether G&L fully complied with that requirement was a disputed issue of fact. Viewing the facts in the light most favorable to Appellants:

i) G&L's MOT Supervisor was an incompetent yes-man who did not have a copy of the MUTCD and was incapable of interpreting and applying its provisions;
ii) G&L improperly ceded its maintenance of traffic responsibilities to an unaware DelDOT; and
iii) G&L breached the standard of care by failing to recognize the risk of raveling over the August 25-26 weekend and take the simple step of placing a single temporary warning sign on Omar Road to warn motorists of a changed road surface condition or the likely deteriorated road surface.

The Superior Court's conclusion that it was factually undisputed that G&L fully complied with the Contract and Specifications was legal error.

[161] Opinion at 8-9.

Third, the Superior Court incorrectly ruled that Appellants were arguing that the DelDOT-approved plan for Omar Road was deficient.[162] To the contrary, Appellants do not take issue with the sufficiency of the approved plan. For example, Appellants do not contend that a different paving method should have been utilized, that Omar Road should have been closed during the project, or that G&L should have placed four permanent warning signs instead of the three approved by DelDOT.

The correct view of Appellants' argument is that the DelDOT-approved plan specifically delegated in-the-field maintenance of traffic decisions to G&L, and G&L failed to fully comply with that requirement (and had no intention of fulfilling that requirement). Accordingly, the Superior Court erred to the extent it ruled that this case is controlled by the *High* & *Hales* rule – prohibiting the argument that a DelDOT-approved plan should have used different methods of traffic control.[163] Appellants' argument that G&L failed to fully comply with the approved plan is consistent with *High* & *Hales*.

* * *

In summary, the Superior Court erred by granting summary judgment to G&L when genuine issues of material fact remained for a jury to decide. Specifically, it was disputed whether G&L "exactly followed" or "fully complied"

[162] Opinion at 8-9.
[163] Opinion at 8-9.

with the Contract and Specifications, and whether G&L or DelDOT was the decision-maker on placing temporary warning signs. The Superior Court misunderstood Appellants' argument – the DelDOT approved plan was sufficient; the problem was whether G&L understood and met its responsibilities under that plan. Those fact-intensive questions, especially when viewing the facts in a light most favorable to Appellants, should only be answered by a jury and not by the Superior Court on summary judgment.

II. The Superior Court's factual finding that DelDOT's actions "broke any causation link" between G&L's conduct and the crash was not appropriate on summary judgment.

A. Question Presented.

Did the Superior Court improperly make a factual finding on a disputed record regarding whether DelDOT's pothole filling effort on Omar Road caused the crash? This question was raised below in the briefing on G&L's motion for summary judgment, and further explored during oral argument.[164]

B. Scope of Review.

This Court reviews "the Superior Court's grant of summary judgment *de novo* to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[165]

C. Merits of Argument.

The Superior Court erred when it granted summary judgment by finding on a disputed record that DelDOT's pothole filling on August 26 "broke any causation link" between G&L's conduct and the crash.

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[164] A594, A604, A606-607, A629-631, A648, A682, A704-704, A712.
[165] *GMG Capital Investments*, 36 A.3d at 779.

i. Proximate causation is a jury question.

The Superior Court should not grant summary judgment based on the fact-intensive inquiry of proximate cause. "Generally speaking, issues of negligence are not susceptible of summary adjudication."[166] Likewise, "questions of proximate cause except in rare cases are questions of fact ordinarily to be submitted to the jury for decision."[167]

The Superior Court stated its causation ruling in two places in the Opinion. On page 13: "DelDOT's affirmative action to repair Omar Road broke any causation link between [G&L]'s work and Ms. Reed's tragic accident." On page 12-13: "[T]he Court has held that the work that DelDOT did to Omar Road broke any causal connection between the work [G&L] did and Ms. Reed's accident."

The Superior Court committed legal error by finding that any causative link was broken. Whether DelDOT's pothole filling had any role in the crash was a genuinely disputed issue of fact. Reed did not recall encountering any potholes. Numerous witnesses testified that Reed's vehicle lost control on a part of Omar Road where there were no potholes. Viewing the facts in the light most favorable to Appellants, Reed's vehicle lost control because of gravel and other rough road conditions linked to the general deterioration of the road due to raveling, not because of DelDOT's pothole work. The Superior Court's factual finding that that

[166] *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962).
[167] *Id.*

crash was caused by DelDOT's pothole work is neither supported by the facts nor permitted by the applicable standard of review. On this record, the fact-intensive question of causation must be left to the jury. The Superior Court's causation ruling on summary judgment was improper.

ii. Intervening superseding cause is a jury question.

The exact rationale of the Superior Court's causation ruling is unclear. But one interpretation is that the Superior Court found both that DelDOT's weekend pothole work was a cause of the crash and that cause intervened and superseded any causative link to G&L's negligence.

To the extent the Superior Court's causation ruling was based on a finding of an intervening superseding cause, that ruling was legal error. Such a finding can only result from a holistic review of all of the facts by the jury. Superseding causation, like proximate cause, is fact driven and "considerations of foreseeability and what a reasonable person would regard as highly extraordinary and factual questions ordinarily reserved for the jury."[168] A court may only find that a cause is superseding – the sole proximate cause – when reasonable minds cannot differ as to whether the intervening cause is so "abnormal, unforeseeable or extraordinarily negligent."[169] In this case, there were numerous disputes of fact about whether or to what extent DelDOT's weekend pothole filling work contributed to the crash. It

[168] *Duphily v. Delaware Electric Cooperative*, 662 A.2d 812, 830-831 (Del. 1995).
[169] *Id.* at 831.

was error for the Superior Court to conduct that fact-intensive inquiry and resolve the disputed issues of fact on summary judgment.

Likewise, the Superior Court erred if it found that DelDOT's weekend work on Omar Road, even if negligent and a cause of the crash, was *not* foreseeable as a matter of law. A party remains liable even if another party's later negligence contributed to the plaintiff's damages – so long as the second party's negligence was foreseeable.[170] "In order to break the causal chain, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must have been *neither anticipated nor reasonably foreseeable* by the original tortfeasor."[171] Here, it was certainly foreseeable to G&L that DelDOT may negligently repair G&L's work over a weekend, such that G&L is not relieved of its duty to warn of a change in road surface condition or a deteriorated road surface condition. Under the applicable standard of review, the Superior Court could not properly conclude on this record that DelDOT's conduct was "neither anticipated nor reasonably foreseeable."[172] To the extent the Superior Court made that highly factual conclusion in its summary judgment Opinion, that ruling was legal error.

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[170] *Laws v. Webb*, 658 A.2d 1000, 1007-1008 (Del. 1995)
[171] *Duphily*, 662 A.2d at 829 (emphasis added). "The mere occurrence of an intervening cause, however, does not automatically break the chain of causation stemming from the original tortious conduct." *Id.*
[172] *Id.*

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's grant of summary judgment to G&L and remand for a trial.

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