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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 REPLY BRIEF OF APPELLANTS JENNIFER PAVIK, DOUGLAS PAVIK, AND ASHLEE JEAN REED

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G&L was paid over $8 Million by DelDOT to be the general contractor on a repaving project using CIPR on Sussex County roads in 2012. G&L knew from prior CIPR repaving jobs that the use of that method included the risk that a milled roadway in the curing process could "ravel," resulting in deteriorated and dangerous road surface conditions. That known and foreseeable risk materialized on August 26, 2012 on Omar Road, where Reed lost control of her vehicle and crashed after encountering loose gravel caused by the raveled roadway that had undergone CIPR three days before. G&L failed to warn about this known risk. Indeed, G&L concedes that none of its employees, including its MOT Supervisor Jesse Davis, even contemplated warning motorists of this risk.

G&L argues it had no duty to warn because neither the DelDOT Contract nor the MUTCD required it to post a temporary warning sign advising motorists about the foreseeable risks of raveling caused by its CIPR work. G&L ignores provisions of the Contract, misconstrues the MUTCD, and misreads Delaware law.

The Contract made G&L responsible for in-the-field maintenance of traffic decisions – including using temporary warning signs. The MUTCD required G&L's MOT Supervisor to use his judgment to decide whether temporary warning signs were appropriate under the circumstances. And, under Delaware law,

because G&L was required to exercise discretion to make in-the-field decisions, it had to do so as a reasonably prudent contractor would under the circumstances.

This Court should hold that: i) G&L had a duty to warn about the known and foreseeable risk of raveling on Omar Road caused by its CIPR work; and ii) that G&L was not prohibited by the Contract, MUTCD, or any other source from meeting its duty by posting a temporary warning sign. With those legal issues determined, only a jury can decide the factual questions bearing on whether G&L breached that duty by acting unreasonably under the circumstances. The Superior Court's grant of summary judgment should be reversed and remanded for trial.

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.

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. It is undisputed that G&L failed to warn about those conditions. And it is

further undisputed that Reed's vehicle lost control on loose gravel caused by raveling on Omar Road, resulting in a crash that injured Reed and killed Pavik.

* * *

G&L contends it had no duty to warn about the known and foreseeable risks of raveling on Omar Road. G&L's many arguments are meritless.

A. The Contract and MUTCD do not cover all possible in-the-field developments.

G&L's lead argument is that the Contract and MUTCD do not require the posting of a temporary warning sign to advise motorists that they would be travelling along a road that had just undergone CIPR. This argument is flawed in two respects.

First, the Contract (including the Specifications) did not attempt to cover every possibility in advance since those documents were prepared months if not years before the work at issue here 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.

The Contract covers various maintenance of traffic requirements, but those requirements are limited to those that could be anticipated and planned before work began. The Contract required elements common to every road construction

job, such as: permanent warning signs, temporary striping, message boards, etc.[1] The Contract also included common procedures for lane closure, road closure, and detours, etc.[2] The Preconstruction Meeting Minutes are the closest we come to a part of the Contract drafted for this particular repaving job. But the requirements listed in that document relate primarily to common issues that arise during performance of CIPR.[3]

The Contract did not attempt to delineate all possible developments relating to the CIPR work, list every option, and direct which option to choose. Rather, as explained in the Opening Brief (pgs. 10-14, 32-34) and *infra* I.B., the Contract delegated to G&L the ongoing responsibility to make in-the-field maintenance of traffic decisions.

Second, the MUTCD does not purport to cover every possible maintenance of traffic scenario with specific dictates. As the MUTCD explains:

> No one set of TTC devices can satisfy all conditions for a given project or incident. At the same time, *defining details that would be adequate to cover all applications is not practical.* Instead, Part 6 displays typical applications that depict common application of TTC devices. The TTC selected for each situation depends on type of highway, road user conditions, duration of operation, physical constraints, and the nearness of the work space or incident management activity to road users.[4]

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[1] *See* OB at 11 (listing requirements with citations to record).
[2] *Id.*
[3] A317-319 (General Discussion).
[4] A326 (MUTCD §6A.01.07).

That provision of the MUTCD, in particular the emphasized sentence, makes it clear that the MUTCD is not an exhaustive catalog of all possible choices. That provision also shows that selecting the best application of temporary traffic control methods (including warning signs) depends on many factors and circumstances.

G&L's arguments about MUTCD application are meritless. G&L's primary argument is that Appellants' claims fail because the MUTCD does not contain a specific requirement to place a "Rough Road" or "Loose Gravel" warning sign on a CIPR-curing road when leaving the worksite for the weekend.[5] As explained above, this argument is a red herring because the MUTCD is not intended to list requirements for all possible scenarios. Rather, the MUTCD depicts common applications against which the contractor must compare its specific scenario and then exercise its judgment.

G&L also argues that Appellants' claims fail because their expert did not opine that G&L violated a specific MUTCD requirement. G&L faults Appellants' expert for only stating that an additional warning sign was "consistent" with the MUTCD. G&L's argument is not supported by any direct authority. Appellants are not pursuing a *per se* negligence theory. And, as explained above, the MUTCD

[5] AB at 16 ("The DeMUTCD contains no specific requirements about placing signs on a temporary road surface"); AB at 20 ("If the authors of the MUTCD believed that such signs were necessary, it would say so in the manual."); AB at 26 ("Plaintiff have not identified any provision of the MUTCD which requires warning signs to be installed because someone has reason to believe that a pothole may form.").

does not have requirements for every scenario. Appellants' expert's opinion is based on the concept that an additional warning sign would be consistent with the MUTCD and a proper exercise of judgment. G&L breached its duty by failing to exercise any judgment at all about warning of the risks it created on Omar Road.

Finally, G&L makes the straw-man argument that accepting Appellants' position would mean that G&L had to place warning signs for months along all 46 miles of road under construction, thereby contravening the MUTCD's guidance to avoid using too many signs.[6] That greatly misstates Appellants' position. As G&L points out, the CIPR curing process takes about a week.[7] That means posting one sign for a week where CIPR is curing – not a burdensome amount of signs.

In summary, Appellants contend that G&L was negligent by failing to place a warning sign at the beginning of the 1-mile stretch of Omar Road where it had most recently performed CIPR work. The MUTCD calls for the contractor to exercise judgment when using warning signs.[8] Appellants' factual and expert evidence show that G&L failed to exercise that judgment (either at all, or in a negligent manner). Therefore, G&L failed to warn motorists including Reed of a

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[6] AB at 17.
[7] AB at 5.
[8] 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.

foreseeable risk, resulting in the crash. G&L did not squarely address this argument in its brief and instead relies upon misdirection.

B. G&L, not DelDOT, was delegated the responsibility to make in-the-field maintenance of traffic decisions.

The Contract made G&L responsible for daily performance of the maintenance of traffic plan, including in-the-field decisions, on the roads where it was performing CIPR. The Specifications required G&L to "keep the section of the Project being used by public traffic in a condition that safely and adequately accommodates traffic."[9] To maintain safety, G&L was required to "furnish, *erect*, and maintain barricades, drums, *warning signs*, delineators, striping, and flaggers" per the MUTCD.[10]

G&L admits that the above-quoted Contract sections make G&L responsible for the safety of the traveling public traversing the roads it was repaving.[11] But G&L argues that the specific section of the Contract that required G&L to have a specifically-certified individual onsite at all times to make in-the-field traffic decisions actually *absolves* G&L from that exact responsibility.

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[9] A279 (Specifications 104.09).

[10] A279 (Specifications 104.09) (emphasis added).

[11] G&L argues that Appellants' allegation that G&L "was ultimately responsible for all of maintenance of traffic issues" was not supported by citations to the record. AB at 32. Appellants' Opening Brief, pages 11-14, discusses G&L's responsibility in detail with many record citations.

G&L excerpted The "Maintenance of Traffic – All Inclusive" section in its brief and bolded certain provisions, as depicted below:

> Any, and all, control, direction, management and maintenance of traffic shall be performed in accordance with the requirements of the Delaware MUTCD, notes on the Plans, this specification, and **as directed by the Engineer**....
>
> When, specified by a note in the Plans, the Contractor shall be required to have an American Traffic Safety Services Association (ATSSA) certified Traffic Control Supervisor on the project. The authorized designee must be assigned adequate authority, by the Contractor, to ensure compliance with, the requirements of the Delaware MUTCD and provide remedial action **when deemed necessary by the Traffic Safety Engineer or the District Safety Officer**. The ATSSA certified Traffic Control Supervisor's sole responsibility shall be the maintenance of traffic throughout the project. This responsibility shall include, but is not limited to, the installation, operations, maintenance and service of temporary traffic control devices. Also required is the daily maintenance of a log to record maintenance of traffic activities, i.e., number and location of temporary traffic control devices; and times of installation, changes and repairs to temporary traffic control devices. The ATTSA Traffic Control Supervisor shall serve as the liaison with the Engineer concerning the Contractor's maintenance of traffic. The name, contact number and certification for the designated Traffic Control Supervisor shall be submitted at or prior to the pre-construction meeting. The cost of the ATSSA certified Traffic Control Supervisor shall, be incidental to this item.[12]

G&L isolates those bolded provisions and argues that G&L's MOT Supervisor may only act as directed by the engineer. According to G&L: 1) G&L's MOT Supervisor was only expected to be a "Yes-man" for DelDOT; and 2) the MOT Supervisor was not permitted to exercise his own judgment about how to implement the MUTCD to changing circumstances. G&L misreads the Contract by focusing too narrowly on the bolded portions about the engineer.

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[12] AB at 33-34 (emphasis supplied by G&L).

The Contract is clear that the MOT Supervisor is supposed to act *on his own* in addition to acting pursuant to the engineer's direction. The first excerpt requires G&L to maintain traffic in "accordance with the requirements of the Delaware MUTCD, notes on the Plans, this specification, *and* as directed by the Engineer...."[13] The use of the conjunctive "and" shows that G&L is required to apply the MUTCD and the Contract, as well as follow the direction of the engineer. In other words, the engineer's direction *supplements* the MUTCD and Contract. Then, the second excerpt reinforces the fact that the MOT Supervisor is required to exercise his own judgment and not limit his actions to only what the engineer directs. Just like the first excerpt, the use of the conjunctive "and" shows the MOT Supervisor has more than one responsibility: "to ensure compliance with the requirements of the Delaware MUTCD *and* provide remedial action when deemed necessary by the Traffic Safety Engineer or the District Safety Officer."[14] This interpretation is supported by the fact that the MOT Supervisor must hold a particular certification and be delegated "adequate authority" to meet his "sole responsibility" – the maintenance of traffic throughout the project including installing, operating, maintaining, and servicing temporary traffic control devices.

G&L's interpretation of the "Maintenance of Traffic – All Inclusive" section improperly isolates certain provisions instead of reading the section as a whole as

[13] Emphasis added.
[14] Emphasis added.

required. Under G&L's interpretation, DelDOT required the MOT Supervisor to hold a certain certification and be delegated authority to carry out important tasks, just so he can simply be a vessel for orders of the engineer. In the same vein, why would DelDOT require that the MOT Supervisor be onsite at all times when he could only act at the direction of the engineer? Embracing G&L's interpretation would impermissibly render those specific requirements surplussage.

Other parts of the Contract confirm that the engineer's role in maintenance of traffic decisions was limited. Per the Specifications, the engineer's role was limited to administration, not supervision. "The Engineer 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 for the work."[15] 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."[16] Indeed, the DelDOT employees G&L contends directed G&L's MOT Supervisor were not even certified in the MUTCD.[17]

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[15] A283 (Specifications, 105.01).
[16] A283 (Specifications, 105.02).
[17] A487-488, A472-473, A428, A432-433.

In sum, G&L's MOT Supervisor had to not only follow the direction of the DelDOT engineer, he also had to exercise his own judgment regarding the application of the MUTCD to the maintenance of traffic issues that developed in the field and needed action.

C. DelDOT did not prohibit the use of temporary warning signs overnight.

G&L argues that DelDOT – through the Contract or practice – prohibited the use of temporary warning signs overnight. At the very least, there is a genuine issue of fact on this point.

A distinction must be drawn between permanent and temporary warning signs. There is no question that the Contract controlled the issue of permanent warning signs. The Preconstruction Meeting Notes stated that permanent warning signs were to be deployed at certain intervals on affected roads, and that the DelDOT safety officer made the final decision on permanent signs.[18]

The issue of temporary warning signs is more nuanced. On the one hand, there are the temporary warning signs used *during active construction*. On the other hand, there are temporary warning signs used *to warn about risks created by the construction*. Under the Contract, warning signs used during active construction had to be removed from the right of way at the end of the day.[19] That

[18] A317 (Preconstruction meeting minutes, ¶22, General Discussion).
[19] A318 (Preconstruction meeting minutes, ¶22, General Discussion).

makes sense because there is no reason to leave up a "Flagger" or "Lane Closed" sign when there is no active work. The specific risk posed by the active work was gone, so no warning was necessary.

But there is nothing in the record to support G&L's position that temporary warning signs used *to warn about risks created by the construction* are prohibited. This is explained in the Opening Brief, pages 15-16. The MUTCD implies that temporary warning signs should remain when needed and appropriate.[20] DelDOT employees testified that temporary warning signs may be left in place overnight and when no work is occurring if the situation warrants it; such as the "Bump" sign as well as signs to warn of road surface deterioration.[21] The Contract does not explicitly address leaving up temporary warning signs overnight, but a section addressing pavement drop-offs indicate such signs are called for in that scenario.[22]

G&L counters this evidence by playing up the testimony of two DelDOT employees who stated that no other signage was required on Omar Road to warn motorists that the roadway was undergoing CIPR.[23] But this misses the point.

The question in this case is not whether the Contract or MUTCD "required" the use of a temporary warning sign to warn motorists of foreseeable raveling of Omar Road over the weekend of August 25-26. The issue is whether the Contract

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[20] A330 (MUTCD §6B-3.09).
[21] A474-482, A434-436.
[22] A224 (Contract MOT All Inclusive).
[23] AB at 8-9, 20.

and MUTCD permitted such an action – they did – and whether G&L actually exercised its judgment in a reasonable manner under the circumstances when considering whether to deploy such a sign – it did not.

In sum, there is a genuine issue of material fact on this point. At the very least, the record does not support a finding that, as a matter of law, there was a prohibition on the use of temporary warning signs overnight to advise of risks from the CIPR process. Only a jury can decide whether G&L's failure to post a warning sign to warn of a known risk was a breach of the standard of care as described by the parties' experts.

D. The duty to warn requires G&L to consider foreseeable developments and not just the conditions present when work ended on Friday afternoon when G&L left Omar Road for the weekend.

G&L contends that it had no duty to erect a warning sign to advise motorists of conditions that were not present on Friday afternoon but were likely to develop over the weekend of August 25 and 26.[24] According to G&L, "the duty to warn is based on conditions that exist, not conditions that develop."[25]

G&L's constricted view of the duty to warn is wrong. The single case cited by G&L does not support its argument. In *Short v. Wakefern Food Corp.*,[26] the Superior Court denied the plaintiff's motion for a new trial in a storekeeper slip-

[24] AB at 25-26.
[25] AB at 26.
[26] 2000 WL 303451 (Del. Super.).

and-fall case after the jury found that the defendant was not negligent. The plaintiff was unable to specify the hazard on the floor near the salad bar upon which she slipped, and therefore she was unable to persuade the jury that the defendant had notice of any defect. With the plaintiff having lost all of her other arguments, she cited to a Hawaii case that permitted a slip-and-fall claim without proof of notice if the defendant's "mode of operation" creates a reasonably foreseeable slip-and-fall risk.[27] The Superior Court rejected this argument as waived, untimely, and not supported by Delaware law. The *Short* case has no bearing on the issues presented in this appeal.

General negligence principles require an actor to warn about a known risk resulting from his conduct that is not currently present but whose development is reasonably foreseeable. "If the actor's conduct has created or continued a situation which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being or animal or the subsequent operation of a natural force, the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable."[28] The actor is required to know the normal propensities of people and operations of nature in the location where he is conducting himself.[29] If that knowledge would lead a

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[27] *Id.* at *4.
[28] RESTATEMENT (SECOND) OF TORTS § 302 (1965) cmt. d.
[29] *Id.*

reasonable person to "recognize a particular action of a human being or animal or a particular operation of a natural force as customary or normal, *the actor is required to anticipate and provide against it.*"[30] "The actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should realize as likely to be dangerous to others in the event of such customary or normal act or operation."[31]

Applying those principles here, G&L owed Appellants a duty to anticipate and warn about the dangerous conditions that were probable to develop on Omar Road over the weekend as a result of the situation created by G&L days before when performing CIPR work. G&L's CIPR work on Thursday and Friday may have been "harmless" in the sense that it was safe to drive on Omar Road soon after the CIPR surface was applied. But, after Omar Road had undergone CIPR, it was certainly "capable of being made dangerous to others by some subsequent action" by humans (heavy traffic) and nature (heavy rain and poor sunlight). G&L was aware of those risks from earlier CIPR projects, and it knew the characteristics of the traveling public and environmental conditions on Omar Road. Therefore,

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[30] *Id.* (emphasis added).

[31] *Id.* This general principle that an actor must anticipate and mitigate reasonably foreseeable risks, even if those risks are not immediately present, has been specifically applied in premises liability cases. *See Furek v. Univ. of Del.*, 594 A.2d 506, 508, 521-22 (Del. 1991) (holding that university has duty to protect or warn students, as its invitees, against negligent or criminal acts of third persons); *cf. Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716 (Del. 1981) "[O]ne's duty encompasses protecting against reasonably foreseeable events.").

because G&L knew or should have known that heavy traffic and moisture issues were "customary or normal" on Omar Road at the time, and that those risks could make the CIPR-paved roadway dangerous, G&L was "required to anticipate and provide against it." Viewing the facts in the light most favorable to Appellants, a reasonable jury could easily conclude that G&L negligently failed to warn of the dangerous conditions likely to develop from its CIPR work.[32]

E. G&L may be held liable for its own discretionary decisions.

Appellants argue that two key principles can be synthesized from the *High*, *Thurmon*, *Hales*, and *Patton* cases. 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.[33] The second principle is that a contractor with decision-making authority may be held liable for its in-the-field decisions.[34] Applied here, G&L failed to "exactly follow" the DelDOT approved plan by ceding its maintenance of traffic responsibilities to an unaware DelDOT; and G&L failed to exercise, or

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[32] G&L notes with supposed irony that warning signs for possible hazards exists, including "Deer Crossing" signs. AB at 26, n.6. Indeed, the MUTCD contains many such signs: "Bridge Ices Before Road"; "Slippery When Wet"; "Road May Flood"; etc. (A321). With signs for most conceivable hazards available, the public has come to expect that a road contractor will warn of foreseeable risks posed by their work. Here, a "Rough Road" or "Loose Gravel" sign (A321) was necessary to warn of the foreseeable risk created by G&L's CIPR work.

[33] *High v. State H'way Dep't.*, 307 A.2d. 799, 804 (Del. 1973); *Patton v. 24/7 Cable Company, LLC*, 2016 WL 6272552 at *2-4 (Del. Super.) (*Patton I*); *Hales v. English,* 2014 WL 12059005, at *2 (Del. Super.).

[34] *Thurmon v. Kaplin*, 1999 WL 1611327, at *3 (Del. Super.); *Id.* at *3, n.4; *Patton I*, 2016 WL 6272552 at *3.

negligently exercised, its decision-making on the in-the-field decision of whether to post a warning sign advising motorists of the known risks of its CIPR work.

G&L only takes issue with the second principle that a contractor with decision-making authority can be held liable, contending that a contractor may not be held liable for its discretionary decisions. According to G&L, "Delaware law does not recognize a cause of action against a contractor or DelDOT based upon a discretionary decision on whether a warning sign should be used."[35] G&L further contends that "the General Contractor is required to erect all signs specifically required by the DeMUTCD plus those which the DelDOT engineer, in its discretion, directs be installed."[36] G&L is wrong.

G&L's position is based primarily on a misreading of *High*. In *High*, the alleged negligent activity occurred at the planning stage when DelDOT revised and approved the traffic plan. There was no evidence that the contractor failed to follow the approved plan, which called for setting up permanent traffic control devices and did not give the contractor any discretion to take additional steps. Here, Appellants do not take issue with the DelDOT-approved plan. Rather, Appellants contend that G&L failed to "exactly follow" that plan during the implementation stage. DelDOT wisely delegated maintenance of traffic responsibilities to G&L, who was required to have an MUTCD-certified individual

[35] AB 17.
[36] AB 19.

on-site daily, so that it could use its knowledge and awareness of each day's work to make in-the-field decisions about traffic safety. Appellants have shown that G&L did not follow that critical part of the plan because G&L failed to utilize warning signs approved by the MUTCD to advise motorists of the known risks of G&L's CIPR work. *High*'s holding that DelDOT's discretionary choices in the planning stages are protected should not be extrapolated to insulate the contractor from liability regarding judgment calls during implementation of the traffic plan.

Similarly, G&L tries to shoehorn its conduct into *High*'s reasoning that choosing between two acceptable options cannot be negligence. This rule assumes that the party considered the acceptable options and made a determination to proceed with a particular choice. But G&L did not make a "decision ... to follow one of two accepted [traffic safety] procedures."[37] G&L neither recognized that it was the party responsible for making a decision, nor did it consider and determine what acceptable steps were available. G&L simply ignored this responsibility all together. This rule does not apply to G&L here.

G&L misstates the holdings of the other cases. According to G&L, the *Hales* court granted summary judgment to the contractor because the alleged negligence was a discretionary act. To the contrary, the contractor was not liable because it did what the DelDOT plan specifically required – hire a police officer to

[37] *High*, 307 A.2d at 804.

direct traffic; the contractor had no control or discretion over that aspect of traffic control. As for *Thurmon*, G&L ignores the Court's holding that the contractor could be held liable it the jury found that a "reasonable, prudent contractor would have closed the right turn lane for the protection of the general public"[38] – an in-the-field discretionary decision. Regarding *Patton*, G&L disregards the point that summary judgment is inappropriate when the experts disagree on whether the contractor properly interpreted and applied the MUTCD.

Accepting G&L's view would insulate road contractors from tort liability in almost all cases. G&L argues that the law "bars any claims that try to rely upon discretionary functions under the DeMUTCD."[39] But the MUTCD is replete with non-mandatory guidance for the contractor to consider and apply depending on the circumstances – i.e. discretionary decisions.[40] Decisions based on that guidance must be subject to review for negligence. Otherwise contractors could freely disregard most of the MUTCD with impunity, jeopardizing public safety.

Appellants do not, as G&L claims, seek to impose a "higher duty of care" and have this Court rewrite the MUTCD.[41] Rather, Appellants seek to hold G&L accountable for its failure to act as a reasonably prudent contractor in accord with the MUTCD's guidance when performing its in-the-field traffic safety duties.

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[38] *Thurmon*, at *3.
[39] AB 19.
[40] A320-337 (excerpts of MUTCD chapters 2 and 6).
[41] AB 24-25.

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.

Appellants argue that the Superior Court erred when it granted summary judgment by making the factual finding that DelDOT's pothole filling on August 26 "broke any causation link" between G&L's conduct and the crash.[42]

G&L does not defend the Superior Court's improper factual findings regarding proximate causation on summary judgment. Nor does G&L disagree with the statements of law that causation and intervening superseding cause are almost always jury issues. And G&L concedes that Reed's vehicle began to lose control on a portion of Omar Road that had not been worked upon by DelDOT.

Instead, G&L tries to transform the Superior Court's factual findings into a legal ruling. G&L argues that DelDOT's actions over the weekend determined G&L's legal duties at that point in time. G&L contends that, when DelDOT became aware of the deterioration of the stretch of Omar Road where G&L had performed CIPR just 72 hours before, and further when DelDOT failed to summon G&L and instead dispatched a work crew to patch potholes, "[t]he decision on whether a warning sign should have been placed was made by DelDOT and DelDOT alone."[43] G&L's novel argument is without merit.

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[42] OB at 39-42.
[43] AB at 29.

G&L's argument is not supported by the Contract. DelDOT's role and scope of responsibility for after-hours work is limited to "making repairs" in an emergency if DelDOT cannot reach G&L.[44] There is nothing in the Contract that makes DelDOT responsible for taking over the worksite to perform work beyond repairs or to post warning signs. In contrast, G&L had "the sole and absolute responsibility for the work and to provide for the protection and safety of" the public.[45] 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."[46] G&L was delegated essentially all of DelDOT's normal responsibilities for Omar Road while DelDOT only had to make limited repairs if it could not reach G&L. DelDOT's limited pothole repair work did not relieve G&L of its overall responsibility.

The case law G&L cites as support actually undermines its position. G&L cites three cases where an independent contractor was dismissed because it had met its contractual obligations or its obligations were not triggered.[47] The common

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[44] B0010 (Specifications 107.07).
[45] A282-283 (Specifications, 104.14).
[46] A292 (Specifications, 105.13).
[47] AB at 30 (citing *Brown v. F.W. Baird LLC*, 956 A.2d 642 (Del. 2008); *Pfeiffer v. Acme Mkts.*, 1999 WL 1611270 (Del. Super.); *Patton v. Simone*, 1993 WL 19595 (Del. Super.)).

ruling in those cases was that the independent contractor's legal duty was defined, and confined, by its contract. G&L cites these cases in an attempt to narrow its duty to only be available if contacted by DelDOT over the weekend. But that view is flawed for two reasons. First, those cases are distinguishable because the independent contractor did not create the risk in question (snow, ice, and a faulty elevator); whereas here G&L was the party that *created* the risk the needed mitigating (a deteriorating roadway). Second, G&L is more like the property owner in those cases, with DelDOT more like the independent contractor. The Contract delegated G&L the general responsibility over Omar Road, with DelDOT having only a limited obligation to make repairs over the weekend. DelDOT's limited obligation does not relieve G&L of its duty to keep Omar Road safe including warning about reasonably foreseeable risks created by its CIPR work.

In summary, DelDOT's limited actions over the weekend when it made pothole repairs did not relieve G&L of it general responsibility to keep Omar Road safe. G&L had a duty to warn of the reasonably foreseeable risks created by its CIPR work, separate and apart from it duty to respond if contacted by DelDOT over the weekend. G&L's effort to transform the Superior Court's improper factual findings on causation into a defensible legal ruling should be rejected.

CONCLUSION

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

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