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Case Number 160,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JENNIFER PAVIK AND DOUGLAS TODD PAVIK,	) No.: 160, 2017
Plaintiffs,	) Court Below-Superior Court of the State of Delaware
v.	) C.A. No.: S14C-01-006 THG
GEORGE & LYNCH, INC., a Delaware Corporation; and GEORGE & LYNCH TRUCKING, LLC, a Delaware Limited Liability Company, et al.,	) C.A. No.: S14C-04-005 RFS) CONSOLIDATED MATTERS
Defendants.	
ASHLEE JEAN REED,	
Plaintiff,	
v.	
GEORGE & LYNCH, INC., a Delaware Corporation; and GEORGE & LYNCH TRUCKING, LLC, a Delaware Limited Liability Company, et al.,	
Defendants.	

ANSWERING BRIEF OF APPELLEE GEORGE & LYNCH, INC.

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Dated: June 21, 2017

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I. NATURE OF PROCEEDINGS

On January 13, 2014, Jennifer Pavik and Douglas Pavik filed a Civil Action Complaint in Sussex County in an attempt to receive compensation for the death of their daughter Jacquelyn Pavik in an automobile accident. Named in the lawsuit were Ashlee Reed, the driver of the vehicle. Because Ashlee Reed was 16 years old at the time of the accident, the Paviks also sued Ashlee's father, Alan Reed because Mr. Reed signed for Ashlee's license and is jointly liable for her conduct under 21 Del.C. 6104. The accident happened on a road that was undergoing construction. As a result, Plaintiff's also named the Delaware Department of Transportation, (DelDOT), private engineers hired by DelDOT, the general contractor, George & Lynch, Inc., the sub-contractor responsible for the actual road reclamation project, E.J. Breneman and two other sub-contractors who assisted in implementing the traffic control plan. Ashlee Reed filed her own civil action which made essentially identical claims against DelDOT and the construction and engineering defendants. The actions were consolidated.

At the close of discovery, Plaintiffs entered into a settlement agreement with E.J. Breneman. A series of Motions for Summary Judgment and Motions in Limine were filed on March 10, 2016. The trial judge held oral argument on only the cross motions for Summary Judgment related to the claims against

George & Lynch, Inc. Following oral argument, on September 21, 2016, Summary Judgment was entered in favor of George & Lynch, Inc. No request for an interlocutory appeal was made.

As a result of the ruling and the Plaintiffs' decision not to oppose motions for summary judgment filed by other parties, the only issues which remained to be resolved were the Pavik's claims against Ashley and Alan Reed, and George & Lynch, Inc.'s contractual claims against E.J. Breneman. On January 9, 2017, rather than proceed to trial on these remaining issues, Plaintiffs requested that final judgment be entered pursuant to Superior Court Civil Rule 54(b) on the Order granting Summary Judgment. *B 0134.* George & Lynch, Inc. opposed the request, arguing that an appeal would be rendered moot if Ashlee Reed's conduct was found to be the sole cause of the accident or if the damages figure contained in any verdict for the plaintiffs was at or below the amount of the Plaintiffs' settlement with E.J. Breneman. *B 0144.* On March 17, 2017, the Trial Court granted Plaintiffs' Motion and entered final judgment against Plaintiffs in favor of George & Lynch, Inc. and stayed the remaining claims pending appeal. This appeal followed.

II. SUMMARY OF ARGUMENT

I. DENIED. Summary Judgment was appropriate because George & Lynch, Inc. did not breach a duty of care by failing to erect a temporary traffic control device when it stopped working on Friday afternoon. First, neither DelDOT, the contract nor DeMUTCD required a sign to warn motorists they would be travelling along a road that had just undergone cold in place recycling. Second, no conditions existed on the roadway on Friday when the road was reopened to traffic which would have justified a "rough road" or "loose gravel" sign. Third, warning signs are not required for conditions that might develop. Fourth, no cause of action exists under Delaware law when a General Contractor follows the maintenance of traffic plan approved by DelDOT. Fifth, no cause of action exists under Delaware law based upon discretionary choices made when implementing the DeMUTCD. Sixth, DelDOT, not George & Lynch, Inc. had the discretionary authority to place additional warning signs along the highway.

II. DENIED. Summary Judgment was appropriate because DelDOT assumed control over the roadway on Sunday afternoon, made repairs, then reopened the road to the general public without any additional warning signs. These actions broke any causal link to the actions of George & Lynch, Inc. Friday afternoon. Since George & Lynch's legal duties are created by its contractual relationship with DelDOT, the question of whether DelDOT's subsequent actions

could act as an intervening and superseding act relieving George & Lynch from any alleged breach of its contractual duty of care can be determined as a matter of law. Plaintiffs' assertions that no warning signs were required on Sunday afternoon when DelDOT left or that the section of road DelDOT had been working on was not the cause of the accident are factual issues but they are not material. The conclusion that DelDOT's failure to put a warning sign on the road Sunday afternoon was either not a breach of the duty of care or not the cause of the accident bars any claims based on the action of George & Lynch Friday afternoon.

III. COUNTERSTATEMENT OF FACTS

In 2012, The Delaware Department of Transportation (DelDOT) decided to repave over 45 miles of roads in Southern Delaware. DelDOT decided that it would employ a paving process known as cold in-place recycling (CIPR) for this project. CIPR involves milling out the top 2-3 inches of existing pavement, immediately combining the ground-up pavement with additional binding materials and then placing the recycled material back on to the road surface. The road surface is then compacted. Once tests have confirmed the new road surface is properly compacted, it can be opened to vehicular traffic. *See Contract Specifications. A137-A147.* The recycled surface is level with the existing road surface and has the appearance and feel of a finished road.

To extend the life of the road surface, a final coat of pavement would be applied over the CIPR roadway. The customary practice is to wait for the CIPR surface to "cure" or fully harden before applying the final topcoat layer. This practice was incorporated into the contract in question. *A139.* The curing process can take 7-10 days based on a variety of factors. CIPR is marketed by companies such as E.J. Breneman and selected by government entities such as DelDOT because the road can be opened to traffic without restriction during the curing phase.

George & Lynch was the successful bidder on the project.[1] George & Lynch entered into a contract with DelDOT on March 2, 2012. *B0001.* E.J. Breneman was the subcontractor who performed the cold in place recycling.[2] One of the roads to be reclaimed was Omar Road in Frankford, Delaware. The work on Omar Road involved a section of road just under five miles in length. *A308.* Work on Omar Road began on August 14, 2012. *B0011.*

All road construction projects include provisions to protect the public and workers from traffic accidents. The Manual on Uniform Traffic Control Devices (MUTCD) is a nationally recognized guide describing the design and implementation of traffic control devices. The manual specifically addresses signage during road construction projects. Delaware has adopted its own version of this manual, the DeMUTCD. The contract between George & Lynch had a specific Maintenance of Traffic Rider which indicated how the contractor was to implement the DeMUTCD. *A 222-226.*

The Maintenance of Traffic Rider provided:

> 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.
> *Maintenance of Traffic Rider, A 222.*

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[1] Unsure of the correct corporate name, Plaintiff also brought suit against "George & Lynch Trucking, LLC." The claims against that entity were dismissed in the Orders granting Summary Judgment. Plaintiff is not challenging the ruling dismissing the claims against George & Lynch Trucking, LLC.

[2] Plaintiff settled with E.J. Breneman prior to the Motions for Summary Judgment being filed. Plaintiffs' claims that the road conditions were caused by poor workmanship or the failure of the subcontractor to account for environmental conditions when reclaiming the road were resolved by the settlement and abandoned.

> 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 Engineer. 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 devises. Also required is the daily maintenance 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 ATSSA Traffic Control Supervisor shall serve as the liason with the Engineer concerning the maintenance of traffic.
>
> *Maintenance of Traffic Rider, A 222.*

DelDOT approved the Maintenance of Traffic Plan. *A 306.* Under the MOT plan, prior to any work on Omar Road commencing, "permanent" warning signs had to be placed at the beginning and end of the construction zone and along every side street which said "Construction 1500, 1000 or 500 Feet Ahead" and "End Construction." The final decision on signage was to be "made by DelDOT Safety Officer." *See Pre-Construction Meeting Minutes A 317. Photographs of permanent signs B 0116-0118.*

The contract itself identified two standard applications (Cases) from the DeMUTCD for sign configuration while roadwork was taking place on Omar Road. *A 313.* One addressed the use of flaggers, Case 6, the other described what to do if the road was closed: Case 15. *Engineering Contract Specifications, A 313.*

DeMUTCD A 324-325. These configurations were to be used while roadwork was being performed. Roadwork was restricted to Monday-Friday between 8:00 am and 4:00 pm. *A 313.* The work on Omar Road was accomplished by limiting traffic to one lane with the use of flaggers pursuant to Case 6.

The DelDOT contract had very specific requirements on what had to be done at the end of any work day. The contract required:

> Maintenance of Traffic Rider:
>
> ...All ruts and potholes shall be filled with TRM (temporary roadway material) as soon as possible but no later than the end of each work day. ..if temporary elimination of a drop off hazard cannot be accomplished then the area should be properly marked and protected with temporary traffic control devices....
>
> ...At the end of each day's operation and before traffic is returned to unrestricted roadway use, temporary striping shall be utilized when the existing pavement is milled and hot mix will not be placed the same day or more than a single course of hot mix is to be place or permanent roadway striping cannot be placed....
>
> *DelDOT contract, A 222. See also A309.*

Although the contract specified that the roadways must be reopened to drivers after the CIPR process was completed but prior to the final coat of pavement, the contract did not require George & Lynch to leave up any of the temporary signs that had been used earlier in the day or to put up *any* signs indicating that the motorists would be on a reclaimed road prior to the application of the final coat. Brad Saborio, Group Engineer II for DelDOT, overseeing capital

construction projects including those involved in this case, testified with regards to signage:

> Q. Okay. What if—what if it's a roadway like Omar Road, where it's received cold in-place recycling but it hasn't—you know, but the final coat of paving is not scheduled to occur until some days later? What, if any, temporary signs can be sued for a roadway in that condition?
>
> A. In that condition nothing is required. When it's returned to normal traffic configuration at the end of the day, ***no signage other than the permanent warning signs are required.***

Saborio dep, p. 52 B0025,. Emphasis added.

Wayne Massey, DelDOT's construction area supervisor overseeing the work being done on this project, conducted a post-accident investigation which concluded that all required warning signs were in place at the time of the accident:

> Q. And did your after-the-fact investigation reveal any deviation from those signage requirements in the contract in the MUTCD?
>
> A. No.

Massey dep, p. 45. B0039.

DelDOT did not alter the signage requirements even after this accident. *Massey dep. p. 56-57. B 0040-0041.*

From August 14-20, 2012, work crews re-paved the shoulders and widened the roadway of Omar Road using the CIPR process. *See DelDOT progress reports B 0011-0019.* After this work was completed, drivers on Omar Road were travelling

in lanes that were partially cured CIPR roadway and partially the original road surface. Work on the main driving lanes on Omar Road began on August 21, 2012.

According to Joseph Forst, a DelDOT inspector, the normal practice was to inspect the road on a daily basis to look for any raveling and other issues then address the problem before the end of the work day. *Forst dep. p. 41-42, B0130.*[3] The role of the DelDOT inspector is to make sure that the road is back to specifications before turned back to public use. *Masey dep., p. 43-44. B 0038.* Inspectors would open the road and observe traffic traveling along it to look for areas that may be too wet or too dry. *Forst dep. p. 101, B0132.* The DelDOT inspector's logs did not note any raveling problems on Thursday or Friday before the accident. Had there been any problems with the driving surface which needed to be addressed, they would have been recorded in the log. *Exhibit 6, Massey Dep, p. 44-45. B0038-0039.* After the accident, Wayne Massey spoke with the inspector to confirm that there were no problems with the road when it was opened to traffic on Friday. *Exhibit 6, Massey dep, p. 54, 62-63, B0040, B 0041.* The work of the DelDOT inspectors was also inspected by DelDOT safety inspectors. *Forst dep, p. 129 B0133.*

[3] Mark Price, the inspector hired by DelDOT to oversee the work on Omar Road, died prior to suit being filed.

The automobile accident forming the basis of this lawsuit happened in the Westbound lane of Omar Road between West Road and Jones Road. This section of road had undergone CIPR on Thursday, August 23, 2012. *Progress Reports. B0018.* The Eastbound lane underwent the process on Friday, August 24, 2012. *Progress Reports B0019.* At the end of each day, temporary striping was placed on the road and all of the temporary signs related to closing down one lane and the use of flaggers were removed. The permanent construction signs remained in place at the end of each day. DelDOT's inspectors on August 23 and 24 allowed the road to be reopened without any additional signs being erected. *Request for Admissions directed to Engineering Defendants. R 0060-0061.* No evidence exists on the record that there was anything wrong with the road surface on Omar Road at the end of the day on the 23rd and 24th. *Nawn dep. p.446. B 0110.* The contractors who placed the temporary striping after the work had been completed did not notice anything in particular about the road that appeared dangerous: The road looked like any other road. *Marino Deposition, p. 89 B 0124.* DelDOT did not require any temporary signs to be erected at the end of the work day on Thursday or Friday, August 23 and 24, 2012. *Saborio dep. p. 52, B 0025, Massey dep. p. 45. B 0039.*

The contract specifications limited the days and hours George & Lynch was to work on the road. *Specifications to contract, p. 37.* A 313. *DelDOT Standard*

Specifications 101.91, 108.03. A 268, B 0009. In addition, through its standard specifications, DelDOT retained for itself the duty to inspect and monitor the road on nights and weekends. This was done through DelDOT's Traffic Maintenance Center ("TMC") which collected reports from citizens (emergency and non-emergency calls), police and other official employees as well as through its own inspections of the road following the severe thunderstorms the night before. *Saborio deposition p. 86, B 0028, Massey deposition, p. 28, B 0035.*

Prior to commencement of the project, George & Lynch submitted to DelDOT an employee contact list for several George & Lynch employees. *B 0002.* George & Lynch was required to keep its work site safe during working hours. During off hours, George & Lynch was only obligated to "be prepared to make repairs as needed after normal working hours in the case of an emergency." *DelDOT Standard Specifications 107.7 (amended 1/23/2008). B 0010.*

On Saturday August 25, 2012, a severe thunderstorm struck Southern Delaware. By noon on Sunday, DelDOT had received reports through the TMC from local citizens and the State Police that potholes had formed on Omar Road between West Road and Jones Road. Through an internal DelDOT error, George & Lynch was never called by DelDOT to make repairs to Omar Road. *See Plaintiff's Answers to Request for Admissions. B0112-0113, DelDOT memo B 0004-0007, and Massey deposition, p. 20-21. B 0033-0034.*

Because DelDOT did not contact George & Lynch, DelDOT decided to do the work to repair Omar Road itself. On the afternoon of Sunday, August 26, 2012, DelDOT dispatched a crew to Omar Road which filled the potholes with cold patch, packed down the materials then swept the loose gravel on to the shoulder. *DelDOT memo B 0004-0007.* After the completion of work, no warning signs were erected by DelDOT to alert motorists driving along Omar Road that potholes had just been repaired or otherwise alert drivers to the condition of the road. The only signs on Omar Road were the permanent signs alerting motorists that they were entering a construction zone.

At approximately 11 pm on Sunday, August 26, 2012, Ashlee Reed was driving west on Omar Road with Jacquelyn Pavik in the passenger seat. Ms. Reed, an inexperienced driver, was travelling in excess of the speed limit along a wet road at night. The vehicle crossed the intersection with West Road and then went through the section of road where the road surface raveled and DelDOT had filled potholes. After passing through this section of the road, Ms. Reed saw a deer to her left on the shoulder and lost control of the vehicle. While spinning ninety degrees counterclockwise, the vehicle went off the road to the left. The vehicle then struck a tree 210 feet away from where she first lost control. The force of the impact instantly killed the passenger, Ms. Pavik. Plaintiffs believe that loose gravel caused by the road raveling was what caused the vehicle to spin.

Plaintiff's liability expert, John Nawn, P.E. offered multiple opinions in this case. Originally, he concluded that the road raveling was due to the negligence of the subcontractor, EJ Breneman. *Nawn Report B. 0091, Deposition, p. 399-402, B 0108.* After the Plaintiff settled with EJ Breneman, John Nawn issued a supplemental report indicating that the actions of EJ Breneman in putting down a temporary road surface were not the cause of the accident. *B 0105.* Although John Nawn has stated that he would have put up a warning sign, at no time in his deposition nor in his report could he site to a specific provision in the DeMUTCD that required such a sign. Nawn could only state with certainty that a sign would have been "consistent" with the DeMUTCD. *B0103-0104.*

IV. ARGUMENT

A. The Decision of the Superior Court Should be Affirmed Because George & Lynch did not have a Duty to Erect a "Caution Rough Road" or "Caution Loose Gravel" Sign on Friday, August 24, 2012.

1. Counterstatement of Questions Presented

Was Summary Judgment appropriate when neither Plaintiffs nor their expert could identify any requirement by DelDOT or the DEMUTCD that a sign must be erected warning motorists they will be driving on a temporary roadway?
Suggested Answer: YES.

Was Summary Judgment Appropriate when neither Plaintiffs nor their expert could identify any specific condition of the roadway that existed on Friday night that would have required the use of a warning sign?
Suggested Answer: YES

Was Summary Judgment appropriate when the theory of liability is based upon the discretionary authority of a DelDOT engineer to have placed an additional warning sign on the highway during a construction project?
Suggested Answer: YES

2. Standard and Scope of Review

Defendant agrees a decision on a Summary Judgment Motion is reviewed de novo for errors of law. *Sullivan v. Mayor of Elsmere*, 23 A.3d 128 (Del. 2011).

3. Merits of Argument

a. No Duty Existed Under Contract or Law to Place Temporary Warning Signs Along the Road the Friday Afternoon before the Accident.

Appellants allege three acts of negligence against George & Lynch. Two of the three acts of negligence address whether or not George & Lynch had the authority to put up any additional signs. These allegations are moot if the Plaintiffs cannot establish that the failure to erect a warning sign Friday afternoon was a breach of the duty of care.

The DeMUTCD contains no specific requirements about placing signs on a temporary road surface. Since there was no detour of traffic involved for the work on Omar Road, the contract required George & Lynch to use the standard applications identified by DelDOT in the contract. Every DelDOT engineer and supervisor has testified that there were no violations of the contract or DeMUTCD by George & Lynch. *See Massey dep. p. 45, B 0039, Saborio dep p. 52, B 0025, Request for Admissions, Engineers R 0114-0115.* In fact, Plaintiff has agreed to dismiss the claims against the engineers who were required to make sure all warning signs required by the contract and DeMUTCD were in place. As a matter of law, George & Lynch did not violate the contract or MUTCD by not having additional warning signs.

Warning signs are to be used only when necessary. The DeMUTCD advises against the overuse of warning signs: "The use of warning signs should be kept to a minimum as the unnecessary use of warning signs tends to breed disrespect for all signs." *DeMUTCD Section 2C.02 (02). A 320.* Placing "Rough Road" or "Loose Gravel" signs along a roadway that does not have any loose gravel or is similar in condition to the original road surface would cause motorists to begin disregarding said signs. In theory, if for the entire summer George & Lynch had placed "Loose Gravel" and "Rough Road" signs along the 46 miles of roads that where undergoing CIPR, an expert could opine that too many signs were used. That expert then could allege that the drivers in the area had stopped noticing the signs, giving them no warning about any specific road raveling problems that existed on Omar Road. For this reason, the MUTCD directs that the erection of a temporary sign be done based on the judgment of an engineer. *DeMUTCD 2C.02. A 320.*

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. *High v. State Highway Dep't*, 307 A.2d 799, 1973 Del. LEXIS 356, (De 1973). In *High*, a traffic control plan had been prepared by the contractor, submitted for approval, and approved by DelDOT. While the plan complied with the DeMUTCD, Plaintiff sought to introduce an expert opinion that through the

exercise of discretionary authority under the DeMUTCD, additional warnings should have been provided. The Court held that a claim for negligence cannot be made against DelDOT for choosing one plan over another. The Court then added that since the contractor was following the plans approved by DelDOT, no action could be made against the contractor.

This case is indistinguishable from *High*. In *High*, DelDOT had the authority to utilize more signs and enact greater safety measures when implementing the DeMUTCD maintenance of traffic plan. Plaintiffs contend that these new signs would have been consistent with the DeMUTCD. The Plaintiff in *High* referenced the discretionary authority afforded DelDOT under the DeMUTCD as a basis for imposing a duty of care. Nevertheless, the Court held there was no breach of a duty of care. Plaintiffs make the same argument in this case: Attempting to impose a duty of care to install additional signs that fall under the discretion of an engineer implementing a maintenance of traffic plan.

Plaintiffs attempt to distinguish *High* on the theory that it was George & Lynch, not DelDOT, that had the discretionary authority. This argument does not justify the reversal of the Trial Court. Initially, Plaintiffs' argument overlooks the fact that the Court in *High* found that DelDOT had not violated a common law duty to the general public in choosing one plan over another. *Id* at 804. The Court went out of its way to state that the decision was based upon general negligence

principles, not any deference given to public officials making discretionary decisions. *Id.* As long as the warning sign was an option to be exercised at the discretion of an engineer, a claim cannot be based upon the decision to not place the sign along the road. *High* bars any claims that try to rely upon discretionary functions under the DeMUTCD.

This principle was recently affirmed in *Hales v. English,* 2014 Del.Super.LEXIS 3468, (Del.Super. Aug 6, 2014) *aff'd sub nom. Hales v. Pennsy Supply, Inc.*, 115 A.3d 1215 (Del. 2015). In *Hales*, DelDOT had approved a traffic control plan using flaggers. Plaintiff submitted an expert report that stated that the plan as implemented violated the DeMUTCD. Specifically, Plaintiff alleged that an additional flagger or stop sign should have been erected to make sure that people could safely traverse the intersection. The alleged violation, though, fell into the category of the discretionary aspects of the DeMUTCD. The Court held that because the contractor was following the instructions of the DelDOT engineer and had not deviated from the plan, no claim for negligence could be made against the contractor.

These cases all stand for the proposition 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. If DelDOT wanted the signs suggested by Nawn on all CIPR roadways, DelDOT would have included

that in the contract. If the authors of the MUTCD believed that such signs were necessary, it would say so in the manual. DelDOT did not require such signs before or after the accident. To this day, DelDOT and the engineers tasked with the obligation of enforcing the contract and DeMUTCD confirm that all of the required signs were in place. *See Massey dep. p. 45, B0039, Saborio dep p. 52, B 0025, Response to Request for Admissions, Engineers. B 0114-0115.* The claim that more signs consistent with the MUTCD should be erected is not actionable.

Plaintiffs attempt to distinguish these cases based on the ruling of the Delaware Superior Court in *Patton v. 24/7 Cable Co., LLC* 2016 Del.Super LEXIS 43 (2016). The *Patton* decision, though, is easily distinguishable. In *Patton*, the Plaintiff alleged that the Defendants had begun construction and altered the roadway without notifying DelDOT. *Id at *11.* Plaintiff's expert also opined by reviewing the contract that the wrong DeMUTCD maintenance of traffic "case" had been applied in the field. The Court supplemented that argument by quoting the Case sections cited in the contract and noting that they all contained a provision requiring additional signs where another road intersects the construction zone. *Id at *14.* Because Patton's expert was able to use the contract specifications and point to a specific provision of the DeMUTCD which was violated, the case could

go to the jury.[4] In contrast, George & Lynch did follow the correct traffic management "case" while doing the work on Omar Road. DelDOT specifically stated in the contract what had to be done to reopen the road to traffic. While Plaintiff's expert recommended and opined that more warning signs should have been erected ***consistent*** with the DeMUTCD during non-working hours, at no time did he ever point to any specific language of the contract or DeMUTCD requiring one be erected.

Plaintiffs' reliance upon *Thurmon v. Kaplin*, 1999 Del.Super. LEXIS 288, 1999 WL 1611327 (Del.Super 1999) is also unavailing. In *Thurmon*, while the Court did note that a contractor does have a general duty to the riding public, it tempered that holding by noting that any such duty is subject to the ruling in *High* that the contractor can rely on DelDOT's discretionary decisions. The Court in *Thurman* did not rule on that issue because the record was not developed. *Id* 1999 Del.Super LEXIS at *2, n. 6. In this case, George & Lynch did create a record of how planning decisions were made during non-working hours. DelDOT required that the roads remain open with no alterations to the flow of traffic. DelDOT required the roads be restriped. The only warning signs in place during non-working hours were the permanent ones alerting motorists of an upcoming construction zone. The plans and specifications did not call for the temporary signs advocated by

[4] The case was also going to the jury because a factual question existed on whose backhoe had been positioned next to the roadway obstructing the view of the driver trying to cross over the construction zone.

Plaintiff's expert. George & Lynch had no duty to erect the warning signs. The decision should be affirmed.

b. Plaintiffs' Expert Never Provided a Valid Opinion that the MUTCD or Contract was Violated

Plaintiffs contend that the accident was due to the failure to erect additional temporary warning signs when the road was reopened to traffic on Friday. Plaintiff's expert, John Nawn, P.E. opined that at the end of each work day, George & Lynch should have placed new "Construction 500, 1000, 1500 feet ahead" signs so that the drivers would be warned of a change from the original road surface to a temporary one. He also initially opined that the MUTCD required the use of "Rough Road" "Loose Gravel" or "Uneven Pavement" signs along the temporary road. When asked the foundation for his opinion, Nawn testified:

Q. Does the MUTCD make any specific reference to cold in place recycling?

A. No Sir.

Q. Is there any way, by reading the MUTCD, that you would know what to do on a road during the curing phase in cold in place recycling?

A. Well, yes, if the road conditions are sufficiently rough or loose gravel was present, then, yes, you should use those signs.

Q. If loose gravel is not present, should you put down a caution loose gravel sign?

A. No.

Q. If the road is not rough should you put down a rough road sign?

A. No.

Nawn dep, p. 444. B 0110.

Q. Do you have any idea what the road surface was like on Thursday Night?

A. On Thursday night, no sir.

Nawn dep, p 446. B0110.[5]

Q. And are you aware of any writings or documentation anywhere that indicate that during the curing phase of a cold in place recycled road that a rough road sign should always be used?

A. Specifically related to CIPR, no.

Nawn dep, p. 448. B 0111.

After being deposed and receiving Defendant's expert report, Nawn issued a supplemental report where he refined his conclusions:

> The need for warning sign(s) to alert road users such as Ashlee Reed of changed road surface conditions was ***consistent*** with the provisions of the Manual on Uniform Traffic Control Devices. (p 10 of 11)
>
> George & Lynch failed to provide warning signs, ***consistent*** with the requirements of the contract with the Delaware Department of Transportation and the provisions of the Manual on Uniform Traffic Control Devices.

Nawn Rebuttal report. B 0103-0104,

Despite Plaintiffs' arguments, there exists no evidence that George & Lynch violated any requirement of the DeMUTCD or the DelDOT engineers. Instead Plaintiff seeks to impose a higher duty of care by giving the court jurisdiction over

[5] In his supplemental report, John Nawn, P.E. claimed that the defense expert's opinion's about whether signs should have been placed was without foundation because he was not there at the end of the work day. *Nawn rebuttal, page 5 of 11. R 0042.* This opinion is fatal to Nawn's report as well and independently would justify the entry of summary judgment.

any discretionary duty under the DeMUTCD. This cause of action is not recognized by the Delaware Courts. *High, supra, Hale, supra.*

c. No Duty Exists to Erect Warning Signs for Conditions that Might Develop

Even if they cannot establish that the road conditions Friday night required a warning sign, Plaintiffs seek to get to the jury on the basis that they can point to specific factors which indicate George & Lynch knew it was more likely that the road would unravel in this area. The factors include that it might rain over the weekend, the road was in a shaded area and it was a heavily traveled road. Plaintiffs argue that George & Lynch should have put up a warning sign on Friday afternoon because it was likely something might happen to the road on Saturday night following the thunderstorms that were in the forecast. Plaintiffs have not identified any provision of the MUTCD which requires warning signs be installed because someone has reason to believe a pothole may form.[6]

The law does not require a store to put up a "caution wet floor" sign because the weather man says it might rain. The law does not require restaurants to put up similar signs because someone might spill a drink on the floor. The duty to warn is based on conditions that exist, not conditions that might develop. *Short v. Wakefern Food Corp.*, 2000 Del. Super. LEXIS 58, 12-13 (Del. Super. Ct. Mar. 14, 2000) (Liability based upon foreseeable risk of defective condition developing does not exist in Delaware) .

[6] There do exist warning signs for possible hazards, a "Deer Crossing" warning is one of them. Ironically, even though the driver lost control of her vehicle after seeing a deer on the side of the road, Plaintiffs have not alleged that a "Deer Crossing" warning sign should have been in place.

Even if a duty of care would exist, the Plaintiff has not provided sufficient details to indicate that George & Lynch's prior experiences with CIPR were enough to predict what would have happened that weekend. George & Lynch employees described only a few isolated incidents prior to this event. Ironically, despite arguing throughout the brief that the forecast of rain made it foreseeable that the road would ravel, Plaintiffs filed a Motion in Limine to bar the Defense experts from stating that the rain and water run-off from the 100 year thunderstorm was the cause of the road raveling. *A 0056, 0064.* Plaintiff's expert even concluded that had the subcontractor had properly performed the CIPR, the road would not have raveled and the accident would not have happened. *Nawn dep. p. 402. B 0108.* No literature has been cited to support the conclusions Plaintiffs wishes the jury to draw from the anecdotal evidence given by George & Lynch employees.

B. The Decision of the Trial Court Should be Affirmed Because DelDOT Undertook the Responsibility to Respond to Deteriorating Road Conditions Over the Weekend thus Relieving George & Lynch of any Residual Duty of Care.

1. Counterstatement of Question Presented

Should the decision of the Trial Court be affirmed because the act of DelDOT in inspecting, repairing and reopening the road on Sunday Afternoon without installing any warning signs barred any claim that George & Lynch failed to erect warning signs on Friday Afternoon.

2. Standard and Scope of Review

Defendant agrees a decision on a Summary Judgment Motion is reviewed de novo for errors of law. *Sullivan v. Mayor of Elsmere*, 23 A.3d 128 (Del. 2011).

3. Merits of Argument

The Appellant Brief addresses the Trial Court's conclusion that DelDOT's decision to work on the road on the Sunday afternoon before the accident constituted a superseding intervening action which relieved George & Lynch of any duty of care.[7] Plaintiffs' argue that this is a factual issue that should go to the jury. Plaintiffs' argument does not take into consideration that the intervening/superseding issue was not strictly one of legal cause. The actions of

[7] Plaintiffs originally attempted to argue that despite the clear contractual language to the contrary, George & Lynch, Inc. had an independent duty to inspect the roads over the weekend. This argument was rejected by the Superior Court and abandoned by the Plaintiffs on appeal.

DelDOT over the weekend determined the legal duties of George & Lynch under the contract with DelDOT.

Plaintiff s do not contend that the road conditions on Friday night required a "rough road" or "loose gravel" sign. Plaintiffs contend that a warning sign should have been put up because it was foreseeable that dangerous conditions would develop. If those conditions developed, then the "rough road" and "loose gravel" signs erected earlier in the week would actually be warning motorists of conditions that existed. As discussed above, one cannot establish a duty to put up a warning sign based on what might happen. The duty to warn is based on actual conditions that exist.

It is not disputed that a section of Omar Road had deteriorated Saturday night after the storm. The undisputed facts were that DelDOT was the only Defendant to have observed the roads on Sunday. The decision on whether a warning sign should have been placed was made by DelDOT and DelDOT alone. DelDOT's knowledge of the altered road condition made the decision to not erect a warning sign on Friday night based on what might happen over the weekend moot.[8] A decision had to be made by DelDOT on whether or not the road conditions on Sunday required a sign to be left behind when repairs were done. Since George &

[8] Because of the settlement with EJ Breneman, no claim is being made by Plaintiffs that the road conditions were the result of any negligence in how the road was reclamated.

Lynch was not a part of that decision making process, there was no duty of care which it could have breached.

The Appellants' brief erroneously looks to the actual acts of the DelDOT workers repairing the potholes as the intervening/superseding act. Because of the contractual relationship, the intervening/superseding act was DelDOT not calling George & Lynch on Sunday to inspect and repair Omar Road. *See Nawn Transcript, p. 84, B0106, (DelDOT had one duty upon finding pothole: Notify George & Lynch).* George & Lynch's duty was to be available should DelDOT need it. That duty was fulfilled. Since DelDOT knew of the changed road conditions and did not call George & Lynch, George & Lynch cannot be charged with a breach of a duty of care if the road conditions were not properly addressed. See *Brown, v. F.W. Baird, L.L.C* 956 A.2d 642; 2008 Del. LEXIS 58 (2008). (Snow removal contractor did not breach duty of care when property owner failed to request services to remove condition that caused plaintiff to fall) See also *Pfeiffer v. Acme Mkts.*, 1999 Del. Super. LEXIS 266 (Del. Super. Ct. May 11, 1999) (An agreement to put salt down once does not impose a duty to come back when ice may have refrozen); *Patton v. Simone*, 1993 Del. Super. LEXIS 25 (Del. Super. Ct. Jan. 25, 1993) (Although an elevator repair company has a duty to make repairs as requested by the owner, that does not extend to a duty to make the elevator code compliant).

Plaintiffs' arguments in opposition to the intervening/superseding cause defense strengthen the decision granting Summary Judgment. First, if the road conditions which existed after DelDOT repaired the road on Sunday afternoon did not merit a "loose gravel" or "rough road" sign, then one clearly was not required on Friday afternoon. Second, if conditions did not exist on Sunday afternoon which justified a "loose gravel" or "rough road" sign, the Plaintiff cannot prove that it was reasonably foreseeable that the storm on Saturday night would damage the road, requiring the installation of "loose gravel" or "rough road" signs on Friday. Third, if the accident was not caused by the deteriorated portion of the roadway repaired by DelDOT because the driver lost control of her vehicle 170 feet beyond this portion of the road, then the Plaintiff cannot show any link between the roadwork and the accident. Every argument that DelDOT's actions were not the cause of the accident supports the argument that George & Lynch was not negligent.

C. DelDOT Retained Control Over Discretionary Changes to the MOT Plan

1. Counterstatement of Question Presented

Should the decision of the Trial Court be affirmed when the clear language of the contract indicates that the role of the MOT supervisor and George & Lynch was to follow the instructions of the DelDOT engineers supervising the work?
Suggested Answer: Yes.

2. Standard and Scope of Review

Defendant agrees a decision on a Summary Judgment Motion is reviewed de novo for errors of law. *Sullivan v. Mayor of Elsmere*, 23 A.3d 128 (Del. 2011).

3. Merits of Argument

In the Appellant Brief, Plaintiffs attempt to argue that the MOT Supervisor used by George & Lynch was not qualified for his position and was not doing his job. Plaintiff then alleges that George & Lynch was ultimately responsible for all maintenance of traffic issues. These arguments, which make no reference to the record or Plaintiff's own expert reports, are pure hyperbole and do not create any issues of fact to justify reversing the Trial Court decision.[9]

Appellants' suggestion that general language which requires the presence of a Maintenance of Traffic Supervisor makes George & Lynch, Inc. responsible for all maintenance of traffic issues is refuted by the specific language of the contract

[9] Even if these arguments were true, they do not establish negligence unless the Plaintiffs establish that there was a breach of the duty of care in the implementation of the MOT plan. The *High* decision dismissed claims against DelDOT rendering moot Plaintiff's argument on whose responsibility it was to make discretionary decisions.

which spells out that duty. "[W]here general language follows an enumeration of persons or things, by words of particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1265 (Del. 2004).

As noted by Appellant, at the work site, George & Lynch was to have a maintenance of traffic supervisor who knows how to implement the traffic control plan pursuant to the specifications of the DeMUTCD. To be certified in this role, DelDOT requires a person to take a one day class and pass a written exam. This person's job is to implement the traffic control plan. This person is not an engineer. He is not authorized by the DeMUTCD or Contract to change the maintenance of traffic plan. Although Appellants express shock that the MOT supervisor was a "yes man" following the directives of DelDOT, the contract clearly states that was his job:

> 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***.
> *Maintenance of Traffic Rider, DelDot Contract p. 98. A 0222 (Emphasis added)*
>
> 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 Engineer.*** 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 devises. Also required is the daily maintenance 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 ATSSA Traffic Control Supervisor shall serve as the liason with the Engineer concerning the maintenance of traffic.
>
> *Maintenance of Traffic Rider, DelDot Contract p. 98. A 222. (Emphasis added)*

The contract does not require the MOT Supervisor to be an engineer. Plaintiffs' argument that the MOT Supervisor was permitted/required to make engineering decisions about the MOT plan is not supported by the contract. Whether site conditions at the end of the day justify leaving a temporary sign overnight is an engineering decision. DelDOT had engineers overseeing this project who were required to approve any signs being left overnight. Each of these engineers stated that no sign was to be left up overnight. *See Massey dep. p. 45, B0039, Saborio dep p. 52, B 0025.*

To supplement its own engineers in the field, DelDOT hired other engineers, A. Morton Thomas and KCI Technologies, to monitor the work and ensure compliance with the contract. A. Morton Thomas and KCI Technologies were named as co-defendants by Plaintiff. A. Morton Thomas and KCI Technologies

were there to ensure that the contract was followed and to direct George & Lynch's MOT Supervisor as needed.

The DelDOT managers in charge were Wayne Massey and Brad Sabario. They were the only ones who could approve the erection of a temporary sign overnight. Both of them repeatedly stated that no temporary sign was needed when work was concluded on Friday night. *See Massey dep. p. 45, B 0041, Saborio dep p. 52, B 0025.* Most tellingly, DelDOT never altered its signage requirements for the project in the days and weeks following this incident, even after DelDOT completed its own accident investigation. *Massey dep, p. 57, B 0041.*

Plaintiffs have also advanced a fallback argument that even if George & Lynch could not have erected the sign, George & Lynch could have asked DelDOT for a sign to be erected. Plaintiffs, though, cannot point to any information which George & Lynch possessed that DelDOT did not. *See Albert Strauss dep, p. 46-47, B 0121, Saborio dep p. 40, 44-46, B 0022-0024, Massey dep, p. 85 B 0043.* As noted by the Trial Court, there was nothing about the road surface Friday night which justified a sign being installed. No evidence exists to suggest that on Friday DelDOT would have authorized a warning sign when one was not required, particularly since DelDOT elected not to install any signs on Sunday morning after they completed the repairs.

V. CONCLUSION

George & Lynch, Inc. requests that the decision of the Superior Court granting Summary Judgment be affirmed.

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Date: June 21, 2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JENNIFER PAVIK AND DOUGLAS TODD PAVIK, Plaintiffs, v. GEORGE & LYNCH, INC., a Delaware Corporation; and GEORGE & LYNCH TRUCKING, LLC, a Delaware Limited Liability Company, et al., Defendants.	) No.: 160, 2017) Court Below-Superior Court of the State of Delaware) C.A. No.: S14C-01-006 THG) C.A. No.: S14C-04-005 RFS) CONSOLIDATED MATTERS
ASHLEE JEAN REED, Plaintiff, v. GEORGE & LYNCH, INC., a Delaware Corporation; and GEORGE & LYNCH TRUCKING, LLC, a Delaware Limited Liability Company, et al., Defendants.	

CERTIFICATE OF SERVICE

I, Louis J. Rizzo, Jr., Esquire, hereby certify on this 21st day of June, 2017 that a true and correct copy of the Answering Brief of Appellee George & Lynch, Inc. and Appendix to Answering Brief of Appellee George & Lynch, Inc. were served via File & Serve Xpress Electronic Filing upon the following:

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