EFiled: Nov 18 2024 02:48PM EST
Filing ID 75029361
Case Number 271,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEWARD L. NORTHAN, JR.,	)	
	)	
Appellant-Plaintiff Below,	)	Case No. 271, 2024
	)	
v.	)	Court Below: Superior Court of
	)	the State of Delaware
KELLY THOMAS and	)	
RUSSELL TRAVIS HOVATTER,	)	C.A. No.: S23C-03-006 CAK
	)	
Appellees-Defendants Below.	)	

CORRECTED ANSWERING BRIEF OF APPELLEE-DEFENDANT BELOW KELLY THOMAS

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NATURE OF PROCEEDINGS

On March 7, 2023, plaintiff Stewart L. Northan, Jr. filed his complaint alleging that defendants Kelly Thomas and Russel Hovatter were negligent in causing a March 7, 2021 accident involving the Thomas vehicle and a motorcycle operated by the plaintiff's decedent son, Stewart L. Northan, Jr. and that their negligence caused the death of the decedent. In her answer, Defendant Thomas denied negligence proximately causing the accident and asserted the affirmative defense of contributory recklessness on the part of the decedent.

The parties agreed to limited discovery so that a motion for summary judgment could be filed on the issue of contributory recklessness as a complete bar to recovery. Following depositions of key witnesses, Thomas on January 30, 2024 filed her motion for summary judgment. Plaintiff filed a response on March 18, 2024 and Thomas filed her reply on March 28, 2024. On April 10, 2024, Hovatter filed a joinder in Thomas' motion.

On May 30, 2024, the court below heard oral argument, and on June 12, 2024, the court below issued its memorandum opinion and order, granting summary judgment in favor of defendants based on contributory recklessness as a complete bar to recovery.

SUMMARY OF ARGUMENT

1. Denied. Delaware law recognizes any degree of contributory recklessness as a bar to a claim of negligence or recklessness. Delaware's comparative negligence statute whether strictly construed as a statute in derogation of the common law or liberally construed as a remedial statute clearly and unambiguously applies to negligence and comparative negligence only and therefore must be applied as written. As conceded by plaintiff, absent ambiguity the Court cannot construe the statute to affect a perceived public policy. Further, negligence and recklessness involve different levels of culpability, proof and legal consequence and therefore are not susceptible to a comparative analysis under Delaware law and this Court has expressly stated that recklessness falls outside of the comparative negligence statute.
2. Denied. The Superior Court correctly determined that decedent conduct in operating a motorcycle in excess of 140 miles per hour on a public highway when other vehicles were present was reckless as a matter of law. Because there are no genuine issues of material fact, the court below did not violate plaintiff's right to a trial by jury.
3. Denied. Plaintiff is correct that the court-below did not address intervening, superseding cause in its Memorandum Opinion and Order. The issue,

however, was addressed at argument where the Superior Court questioned whether it is reasonably foreseeable that a vehicle might change lanes or pull out from a side road. Further, in determining whether an intervening act is a superseding cause, the focus is whether the resulting harm is reasonably foreseeable from the initial tortious conduct. There is no doubt that operating a motorcycle at speed in excess of 140 miles per hours on a 55 mile per hour roadway when other vehicles are present poses a foreseeable and substantial risk of injury or death. No reasonable juror could conclude otherwise. Because the eventual harm was reasonably foreseeable, any negligence or recklessness on the part of Thomas could not be a superseding cause.

4. Denied (as to the *amicus* brief). The amicus brief makes arguments that are duplicative of arguments in the opening brief, arguments not raised below, arguments not supported by the record and arguments contrary to Delaware law. It therefore should not be considered by the Court.

STATEMENT OF FACTS

This case stems from a March 7, 2021 collision which occurred when plaintiff's decedent son, Stewart Northan III, while operating a racing motorcycle[1] at a speed in excess of 140 miles per hour collided with the right rear of defendant Kelly Thomas' vehicle as she was crossing from a stop at Route 13 in Delmar, Delaware. (JA359:14-17, JA101:20-23, JA71:12-17)[2] The speed limit on Route 13 is 55 miles per hour. (JA72:21-24)

Because a fatality was involved, the Delaware State Police Crash Investigation Unit conducted an accident reconstruction and determined from video and witness accounts that Kelly Thomas stopped for the stop sign at Allens Mill Road and waited for traffic to pass before she began to cross the southbound lanes of Route 13. (JA77:1 -JA79:20, JA84:3 - JA85:21, JA147:1 - JA148:19)*;* (JA411:5-16) The State Police reconstruction determined that decedent's motorcycle was traveling southbound on Route 13 at over 140 mph just prior to striking the right rear of the Thomas vehicle which was almost through the left (farthest) lane of Route 13, i.e., the right lane and part of the

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[1] The motorcycle had an extended rear swing arm (to help keep the front end down when accelerating), a drag slick rear tire, a nitrous oxide tank (to enhance speed) and several other modifications. *(*JA96:13-JA101:15)

[2] The parties have submitted a joint appendix for the Court's ease of reference. References to "(JA_:_)" refer to the Joint Appendix page and line number.

left lane were clear. (JA77:1 - JA79:20, JA81:4-22, JA85:7 - JA86:8, JA90:15-JA91:17, JA102:1-12) The reconstruction determined that co-defendant Hovatter's vehicle was traveling southbound at a speed of just over 94 mph in the right lane and did not strike the Thomas vehicle. (JA129:21-23) Initially, the motorcycle was farther away than the Hovatter vehicle and overtook it before striking the Thomas vehicle. (JA87:18 - JA88:6)

The Thomas vehicle and the lead up to the collision were caught on video. Using the video and other information, the reconstruction determined that when Ms. Thomas began to pull out, the motorcycle was over ¼ of mile away and at his speed covered twice the distance a vehicle would cover traveling at 70 miles per hour. (JA140:1 - JA146:17)

Kayla Fleming, who is involved in drag racing at the track and who knew the decedent, was a passenger in the Hovatter vehicle. (JA333:10 - JA334:15) She was in the rear passenger seat. (JA341:20-23)

According to Ms. Fleming, Kelly Thomas crossed the entire right lane and stopped while her vehicle was still partially in the left lane. (JA370:21 - JA371: 2) Per Ms. Fleming, the crossover is laid out in an unusual way. (JA370:11-JA370:20; JA372:15 -JA372:23) Rather than being straight across, the layout requires a vehicle operator to have to come more into the

southbound lane to get into the northbound lane which she described a hazard and idiotic. (JA370:12; JA372:23)

Just before the Metal Shop, a business in the area, she heard the bike from way behind. (JA342:7-12) She heard him "get on it,", i.e., going from a slower speed to "full throttle". (JA342:9-10, JA344:17-21.) She could not only hear it but was watching him as well. (JA345:1-6) She saw Ms. Thomas start to inch out and noted that the decedent who was quite a distance behind them, really was not going that fast when Ms. Thomas began to pull out. (JA346:3 - JA348:21) She was clear that when Ms. Thomas began to pull out, the decedent's motorcycle was a considerable distance behind them and was not going that fast. After Ms. Thomas started to pull out, for reasons that are not clear to her, the motorcycle then suddenly accelerated to what she described as full throttle. (JA346:3 - JA348:21)

According to Ms. Fleming, the decedent had been doing "pulls" before the collision. (JA356:18-22); (JA119:17-23) She described a "pull" as going down to a lower speed and then basically you "launch it.", the equivalent of being at the racetrack running the quarter mile, i.e., going from a dead stop to full throttle to get from point A to point B in the shortest amount of time possible. (JA349:1 - JA350:24) She estimated Mr. Northan's speed at

somewhere between 130 and 150 miles per hour, if not more, at the time of the collision. (JA359:14-21)

Lynn Twilley, who was behind Thomas, testified that Ms. Thomas was almost three quarters of the way across the southbound lanes of Route 13 before Northan's motorcycle suddenly appeared. (JA427:4- 15) She observed the decedent traveling in the fast lane at an excessive speed and taking no evasive action, clipping the left corner of rear bumper of Thomas' vehicle. (JA433:1-20)

Ms. Thomas acknowledged to the police that she had consumed beer earlier in the day but she was under the legal limit and was not charged.[3] (JA103:22 - JA105:22, JA212:20 - JA213:7)

[3] Appellant inadvertently states that that Appellee's blood alcohol content was .6%. The record reflects that the results of the blood draw came back with a blood alcohol content of .06%. (JA212:4-6)

ARGUMENT

I. SUPERIOR COURT CORRECTLY DETERMINED THAT COMPARATIVE NEGLIGENCE STATUTE IS UNAMBIGUOUS AND CANNOT BE READ TO ABROGATE CONTRIBUTORY RECKLESSNESS.

A. Question Presented.

Whether the Superior Court correctly determined that Delaware's comparative negligence statute unambiguously applies only to negligent conduct and that there is nothing in the statute abrogating the common law doctrine of contributory recklessness which involves a higher level of culpability, proof and legal consequences. (JA17-JA24)

B. Scope of Review.

The scope of review of the grant of a motion for summary judgment is *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). The Court views all facts in the light most favorable to the non-moving party and will adopt the factual findings of the court below unless clearly wrong. *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 833 (Del. 1992). In resolving questions of law, the Court will determine whether the court below erred in formulating or applying legal precepts. *Id.* In deciding questions of statutory construction, the Court must determine whether the court below erred as a matter of law in formulating or applying legal principles. *Leatherbury v.*

Greenspun, 939 A.2d 1284, 1288 (Del. 2007); *Delaware Ins. Guar. Ass'n v. Christiana Care Health Services, Inc.*, 892 A.2d 1073, 1076 (Del. 2006) (quotations omitted).

C. Merits of Argument.

There is no dispute that prior to enactment of Delaware's comparative negligence statute in 1984, any contributory recklessness on the part of a plaintiff operated as a complete bar to a claim of negligence or recklessness. *Staats by Staats v. Lawrence*, 582 A.2d 936, 1990 WL 168242 (Del. Oct. 3, 1990); *Wagner v. Shanks*, 194 A.2d 701, 707 (Del. 1963).

Delaware's comparative negligence statute, 10 *Del. C. §* 8132, whether strictly construed as a statute in derogation of the common law or a remedial statue is clear and unambiguous in addressing only negligence and comparative negligence and therefore cannot be expanded under the guise of construction to include recklessness or contributory recklessness which involve different levels of culpability, proof and legal consequences. *See Leatherbury v. Greenspan*, 939 A.2d 1284, 1288 & 1293 (Del. 2007) (well-settled that unambiguous statutes are not subject to judicial interpretation . . . and court may not engraft upon a statute language which has clearly been excluded therefrom).

In *Koutoufaris v. Dick*, the Court expressly found that recklessness falls outside the comparative negligence statute. *Koutoufaris v. Dick*, 604 A.2d 390, 398-399 (Del. 1992). Accordingly, the court below properly concluded that the comparative negligence statute unambiguously includes only negligence claims and cannot be twisted or expanded to include claims of recklessness. Therefore, the judgment of the court below should be affirmed.

The remainder of this brief addresses plaintiff's arguments and the amicus arguments seriatim.

i. This Court has never suggested that contributory recklessness is no longer a viable defense and to the contrary has recognized negligence and recklessness involve different levels of culpability, proof and legal consequence and therefore cannot be applied on a comparative basis.

Plaintiff argues that two decisions by this Court have recognized that contributory reckless was abrogated by enactment of the comparative negligence statute in 1994. Neither of the cases cited by plaintiff supports plaintiff's argument. In *Staats by Staats v. Lawrence*, 582 A.2d 936, 1990 WL 168242 (Del. Oct. 3, 1990), the Court simply made the observation that because the accident in that case occurred before enactment of the comparative negligence statute, proof of contributory negligence, wantonness or assumption of the risk would operate as a complete defense. The Court made no

pronouncement about the outcome had the accident happened after enactment of the comparative negligence statute and there would have been no reason for it do so.

Plaintiff argues that because this Court in *Trievel v. Sabo* did not comment on *dicta* by the trial judge, that somehow amounts to an implicit acknowledgment by this Court that the trial judge's passing comment constitutes controlling Delaware law. *Trievel v. Sabo*, 714 A.2d 742, 1998 WL 463179 (Del. Aug. 3, 1998). In *Trievel*, the Court agreed with the trial court that the evidence of Trievel's negligence in crossing on a bicycle in front of an oncoming vehicle was overwhelming and that any negligence on the part of the driver was minimal at best, warranting judgment for the defendant as a matter of law. As such, there was no need for the Court to comment on whether Trievel's conduct amounted to recklessness and, if so, whether that recklessness would act as a bar. The fact that the Court did not comment on *dicta* by the trial judge has no precedential value. Thus, neither of these cases supports plaintiff's argument.

ii. The Superior Court correctly determined that the comparative negligence statute is clear in addressing comparative negligence only and therefore is not susceptible to a more a more liberal, expansive reading based on "public policy".

Addressing plaintiff's "public policy" argument, the court below observed that the comparative negligence statute uses the terms "negligent" or "negligence" at least six times with no mention of "willful, wanton or reckless conduct". *Northan v. Thomas*, 2024 WL 2974271 *3 (Del. Super. June 12, 2024). The Superior Court further observed that negligence and recklessness involve different levels of culpability, proof and legal consequence and that if the General Assembly wanted the statute to include recklessness it would have been easy enough for it to do so.[4]

The court below further determined that as a statute in derogation of the common law, the comparative negligence statute must be strictly construed. *Id*. at *4 (citing *Gibson v. Keith*, 492 A.2d 241, 247 (Del. 1985); *Colonial School Bd. v. Colonial Affiliates, NCCEA/DSEA/NEA*, 449 A.2d 243,247 (Del. 1982); *Mumford v. Robinson*, 231 A.2d 477, 479 (Del. 1967)) .

Regarding plaintiff's argument that the comparative negligence statute should be interpreted broadly as a remedial statute, the Superior Court correctly

[4] Plaintiff concedes this point in his brief, stating "Plaintiff concedes that a plaintiff's lower degree of comparative culpability, such as negligence, is not a defense to a higher degree of defendant's culpability, such as recklessness. . . . *Opening brief* at p. 15 (citations omitted).

found that "liberal construction has its limits." *Id*. at *4. Quoting this Court's decision in *Leatherbury v. Greenspun*, the court below observed:

> It is well-settled that unambiguous statutes are not subject to judicial interpretation. "If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court's role is limited to an application of the literal meaning of those words." Accordingly, the first step in any statutory construction requires [a Court] to examine the text of the statute to determine if it is ambiguous. Under Delaware law, a statute is ambiguous if: first, it is reasonably susceptible to different conclusions or interpretations; or second, a literal interpretation of the words of the statute would lead to an absurd or unreasonable result that could not have been intended by the legislature.

Id. at *4 (quoting *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007)). At argument below, plaintiff conceded, "If it's unambiguous, you don't get to construction." (JA527:17-JA528:3)

In support of his public policy argument, plaintiff relies on *Koutoufaris v. Dick*, which addresses at length whether section 343A of the Restatement (Second) of Torts constituted an impermissible duty limiting provision. *Koutoufaris v. Dick,* 604 A.2d 390, 394-398 (Del. 1992). In finding that the adoption of the comparative negligence statute signaled a legislative intent to retreat from a system of inflexible and unforgiving rules in favor of evaluation on a case-by-case basis, the Court in *Koutoufaris* made two important observations. *Id*. at 398. First, the Court observed the legislative intent is that

"where *negligence* is reflected in the conduct of both parties, liability, and consequent recovery, [are to] be determined proportionately." *Id*. (emphasis added). Second, the Court was careful to note that its holding that section 343A is not the appropriate duty standard was limited to cases of the secondary assumption of the risk type and that in a primary assumption of the risk situation, "a plaintiff's conduct might well constitute a complete bar to recover[y], as a matter of law, even in a comparative negligence jurisdiction." *Id*. These two observations make clear that the Court's analysis and comments on legislative intent were limited to the issue of duty and concepts of comparative negligence. Stated differently, the Court in discussing application of section 343A made no pronouncement regarding contributory recklessness.

To the contrary, in addressing a separate jury instruction issue, the Court in *Koutoufaris* expressly found that recklessness falls outside the comparative negligence statute. *Koutoufaris*, 604 A.2d 390, 398-399 (Del. 1992). In *Koutoufaris*, the trial court dismissed a punitive damage claim but still gave an instruction on recklessness:

> However, I instruct you that contributory negligence is not a defense to wanton or reckless conduct, therefore, even if you find the plaintiff was contributorily negligent, if you further find that the defendants acted in a wanton or reckless manner, then your verdict should still be for the plaintiff.

> A person acts in a wanton or reckless manner when he or she is aware of and consciously disregards a substantial and unjustifiable risk to the rights or the safety of another.

Id. at 399-400. Plaintiff challenged the instruction on appeal based on the trial court's prior ruling that punitive damages were no longer in the case. This Court found that a jury instruction if not misleading will be upheld, that the instruction in question immediately followed an instruction on the comparative negligence statute "and is not, in itself, an incorrect statement of the law" and that the jury was "correctly advised" that even if guilty of contributory negligence to a level greater than the defendants, plaintiff could nonetheless recover if defendant's conduct was found to be reckless." *Id*. at 399 (citation omitted). Thus, contrary to plaintiff's argument, the Court in *Koutoufaris* expressly found that recklessness falls outside of the comparative negligence statute.[5]

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[5] In the present case, the court below succinctly observed:

> *Koutoufaris v. Dick* presented the reverse of the parties' posture in this case: plaintiff asserted that defendants were reckless, and defendants argued that plaintiff was contributorily negligent. The trial court gave a jury instruction to the effect that plaintiff could still recover even if contributorily negligent if it found defendants acted recklessly. On appeal, our Supreme Court found the jury instruction to be a correct statement of the law. This observation by the Court is significant because it is a clear expression that "recklessness" falls outside of the comparative negligence statute.

Plaintiff makes the novel argument that where both parties are reckless, they should be compared under the comparative negligence statute. First, that argument was not raised below. *Del. Supr. R.* 8 (only questions fairly presented to the trial court may be presented for review); *Hsu v. Citibank South Dakota, N.A.*, 2007 WL 2051614 at *1 (Del. July 19, 2007) (Court will not consider issues not raised in court below). Second, there is no reading of the comparative negligence statute which would permit such a result.

Finally, the case law cited by plaintiff from other jurisdictions in support of the argument that competing recklessness claims should be addressed on a comparative basis is contrary to long-standing Delaware law which applies "contributory" recklessness, i.e., under Delaware law any recklessness on the part of the plaintiff is a complete bar to recovery. *Staats by Staats v. Lawrence, supra; Wagner v. Shanks, supra*.

As such, the court properly determined that the statute, whether construed strictly or liberally, is clear on its face and absent ambiguity is not

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Northan v. Thomas, 2024 WL 2974271 (Del. Super. June 12, 2024) (footnotes omitted).

subject to the expansive interpretation suggested by the plaintiff on public policy grounds.

iii. The Superior Court correctly determined that even with liberal construction, the comparative negligence statute absent ambiguity or absurd result cannot be twisted to include recklessness.

Plaintiff next argues that the Superior Court erred in requiring section 8132 to be ambiguous before effecting its remedial purpose. As noted above, plaintiff conceded during argument below, "If it's unambiguous, you don't get to construction." (JA527:17-JA528:3)

Regardless, plaintiff's argument that the Superior Court erred in strictly construing the comparative negligence statute ignores the fact that the Superior Court also considered a liberal construction of the statute, as discussed above, finding that even liberal construction has its limits and that absent some ambiguity or an absurd result, the statute must be applied as written. *Northan v. Thomas*, 2024 WL 2974271 *4 (Del. Super. June 12, 2024).

The cases cited by plaintiff do not change the analysis. In *Young v. Joyce*, the only issue was whether there was a private right of action under the statute at issue which was silent on that point. *Young v. Joyce*, 351 A.2d 857, 859 (Del. 1975). Noting the remedial nature of the statute, the Court found that there was an implied right. Though not expressly stated, it is obvious that the

statute by its silence was ambiguous on the issue, i.e., reasonably susceptible to different conclusions or interpretations.

In *In re Klingaman's Estate*, the Court found that the use of the term "heir" in the statute was broad enough to cover the relief sought so there was no need to find ambiguity. *In re Klingaman's Estate,* 128 A.2d 311, 313 (Del. 1957).

In *MCI Telecommunications Corp. v. Wanzer*, the court found that the indemnification sought was consistent with the statute at issue. *MCI Telecommunications Corp. v. Wanzer*, 1990 WL 91100 * 8 fn. 8 (Del. Super. June 19, 1990).

In *Reid v. Spazio*, the savings statute was silent on whether it applied to a discretionary appeal. *Reid v. Spazio*, 970 A.2d 176, 181-182 (Del. 2009). Noting the remedial nature of the statute, the Court found that the statute was broad enough to cover the relief sought. *Id*. Again, though not expressly stated, the statute by its silence was ambiguous on the issue, i.e., susceptible to different interpretations. Importantly, in addressing the issue the Court noted that while the statute at issue was remedial in nature and to be liberally construed, "a court may not graft additions or limitations onto [a] statute 'under

the guise of construction". *Id*. at 181. Apropos to the present case, "recklessness" cannot be grafted onto the comparative "negligence" statute.

In *Sheehan v. Oblates of St. Francis de Sales*, the issue was that a strict construction of the statute would have led to an absurd result contrary to Delaware law. *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256-1257 (Del. 2011).

In *Delaware Tire Center v. Fox*, the Court, based on factual findings below, determined that an act did not fall within a statutory provision that would preclude worker's compensation benefits. *Delaware Tire Center v. Fox*, 411 A.2d 606 (Del. 1980).

In *Gosnell v. Whetsel*, the Court found while defendant argued certain limiting provisions of the savings statute, other provisions of the statute could be read broadly enough to permit the second action filed. *Gosnell v. Whetsel*, 198 A.2d 924, 927 (Del. 1964). Thus, there was no need to find ambiguity because the statute could be read to permit the relief sought.

In the present case, the comparative negligence statute uses the terms negligent or negligence six times with no reference to recklessness which involves different levels of culpability, proof and legal consequences. Even under the most liberal construction, there is no ambiguity in the statute and it

cannot be twisted to include something that is conspicuously absent. As the Court observed in Leatherbury, "[this Court does not] sit as a super legislature to eviscerate proper legislative enactments. If the policy or wisdom of a particular law is questioned as unreasonable or unjust, then only the elected representatives of the people may amend or repeal it. Judges must take the law as they find it . . . ." *Leatherbury, supra* at 1292. Thus, the court below, after properly finding that the comparative negligence statute is unambiguous, appropriately declined to twist the language of the statute under the guise of construction.

iv. The Superior Court did not err in choosing not to address in its memorandum opinion and order an ill-conceived argument that Delaware courts have moved toward a comparative fault analysis.

Plaintiff below and in this Court argues that the Delaware courts have moved away from system of comparative negligence to a system of comparative fault. First, it bears mentioning that had the General Assembly intended a system of comparative fault, it would have been a simple endeavor to enact a "comparative fault" statute which it obviously did not do. Second, as addressed at length in defendant Thomas' reply below (JA476 - JA481) and at argument on defendant Thomas' motion for summary judgment (JA503-JA505; JA546-JA549), none of the cases cited by plaintiff support plaintiff's

argument. As discussed above, *Koutoufaris* not only does not support plaintiff's argument but expressly recognizes that comparative recklessness falls outside of the comparative negligence.

Plaintiff reliance on *Helm v. 206 Mass. Ave., LLC*, 107 A.3d 1074 (Del. 2014), is similarly misplaced. Plaintiff argues that by using the general phrase, "comparative fault", rather than continually repeating the phrase, "comparative negligence", in the context of an analysis of the various forms of assumption of the risk, the Court has somehow made a pronouncement on the applicability of contributory recklessness. The concept of contributory recklessness was never raised nor discussed in *Helm* and is contrary to the Court's statement of law in *Koutoufaris, supra*. Further, *Helm* recognizes that even after enactment of the comparative negligence statute, primary assumption of the risk is still the law, eliminating any duty, and therefore operates as a complete bar. According to *Helm*, "[t]he defense of primary assumption of the risk is most often applied in cases of sports-related activities that "involv[e] physical skill and challenges posing significant risk of injury to participants in such activities, as to which the absence of a such a defense would chill vigorous participation in the sporting activity . . . .", including being a spectator at certain sporting events, participating in contact sporting events, bungee jumping or bouncing, operating

a jet ski, other water sports such as tubing or white-water rafting, drag racing and skydiving. *Id*. at 1081 (quotation omitted). Accordingly, *Helm* demonstrates that Delaware courts continue to recognize the distinction between different levels of activity, mental state and risk and gives examples where primary assumption of the risk still applies. In other words, *Helm* makes clear that not all conduct has been subsumed within the comparative negligence statute.

In *Hooven v. Gimelstob*, cited by plaintiff, the Superior Court issued an opinion after a bench trial finding both parties to have been "negligent" and having done so made a single, passing reference apportioning their comparative "fault". *Hooven v. Gimelstob*, 2021 WL 2209849 *2 (Del. Super. June 1, 2021). In *West v. East Coast Property Management, Inc.*, the Superior Court similarly addressed issues of negligence and comparative negligence and made a single, passing reference to comparative "fault". *West v. East Coast Property Management, Inc.*, 2020 WL 7238461 * 1 (Del. Super. Dec. 9, 2020). *Robinson v. Regional Hematology and Oncology, P.A.* similarly involved claims of negligence and comparative negligence and just as with the other cited cases, the Superior Court made a single, passing reference to comparative "fault". *Robinson v. Regional Hematology and Oncology, P.A.*, 2018 WL

2186700 *2 (Del. Super. May 18, 2018). In short, none of these cases "adopt[] the moniker of 'comparative fault'", as argued by plaintiff.

Plaintiff next relies on *Jackson v. Thompson*, 2000 WL 33115704 (Del. Super. Oct. 12, 2000), where it was alleged that the plaintiff acted negligently and recklessly in operating his bicycle on a roadway at night possibly under the influence. It is clear that the Court in *Jackson* was focused on the existence of questions of fact whether the plaintiff was negligent and made virtually no comment on the applicability of contributory recklessness as a complete bar to plaintiff's claim.

Plaintiff cites *Bishop v. Progressive Direct Ins. Co.*, 2016 WL 7242582 (Del. Super. Dec. 15, 2016), where cross motions for summary judgment were denied where both parties alleged recklessness. *Bishop* was a fact intensive case involving an alleged road rage incident. The Court denied summary judgment based on questions of fact whether there was a road rage incident and other fact issues. The Court did not address the effect of contributory recklessness.

Plaintiff also cites *Hufford v. Moore*, 2007 WL 4577384 (Del. Super. Nov. 8, 2007). In *Hufford*, plaintiff alleged that he was being chased by another vehicle driven and occupied by bat wielding assailants. He tried to get

away and in the process lost control and hit a tree. He claimed negligence and recklessness. Nationwide moved for summary judgment arguing that his conduct in driving at a high rate of speed constituted comparative negligence greater than any negligence on the part of the defendants. Nationwide also argued that his actions constituted "gross negligence." The Court, however, found that there were facts to support a finding that defendants too were grossly negligent or even reckless and determined that there were questions of fact precluding summary judgment. Like all the other cases cited by plaintiff, the Court in *Hufford* did not address the legal effect of contributory recklessness. Because none of the cases cited by plaintiff support the argument that the Delaware courts have moved to a system of comparative fault, it was not error for the court-below not to address the argument in its opinion, particularly in view of the clearly worded comparative negligence statute.

Finally, plaintiff argues that three other states with comparative negligence statutes allow a comparison of various forms of conduct. A cursory review of the cited cases shows that all of them are inapposite. It is clear from the case cited by plaintiff that Colorado law materially differs from Delaware law in that Colorado recognizes "simple negligence, gross negligence and

willful and reckless negligence", all forms of "negligence", under Colorado law. *G.E.C. Minerals, Inc. v. Harrison W. Corp.*, 781 P.2d 115, 116 (Colo. App. 1989). Therefore, Colorado law is inapposite. Plaintiff also cites a Mississippi case, *McClellan v. Ill. Cent. R.R. Co.*, 37 So. 2d 738, 452 (Miss. 1948). In that case, the Court allowed comparison of negligence and gross negligence, again both forms of "negligence". As such, Mississippi law is inapposite. Finally, plaintiff cites *Baldwin v. City of Omaha*, 607 N.W.2d 841, 854-855 (Neb. 2000), for the proposition that "plaintiff's recklessness is still compared to a defendant's negligence under the comparative negligence statute". *Op. Brief* at p. 25. To the contrary, while the court below in *Baldwin* recognized that plaintiff's behavior verged on or may have been reckless, it determined that he was 55% comparatively "negligent", barring his recovery. On appeal, the Nebraska Supreme Court agreed with the lower court's assessment and found that it would not disturb the lower court's "findings regarding the relative *negligence* of the parties". *Id*. at 855 (emphasis added).

In short, none of the cases cited by plaintiff support a comparative "fault" analysis in contravention of Delaware's comparative "negligence" statute.

II. SUPERIOR COURT CORRECTLY DETERMINED THAT BASED ON THE OVERWHELMING AND UNCONTRADICTED FACTUAL EVIDENCE THAT DECEDENT WAS RECKLESS AS A MATTER OF LAW.

A. Question Presented.

Whether the Superior Court correctly determined that decedent conduct in operating a motorcycle on a public highway in excess of 140 miles per hour when other vehicles were present was reckless as a matter of law. (JA17 - JA24: JA472-JA481)

B. Scope of Review.

The scope of review of the grant of a motion for summary judgment is *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). Appellee incorporates by reference the standard of review as set forth more fully in section **I.B.**, *supra*.

C. Merits of Argument.

The Superior Court correctly determined that decedent conduct in operating a motorcycle in excess of 140 miles per hour on a public highway when other vehicles were present was reckless as a matter of law. Because there are no genuine issues of material fact, the court below did not violate plaintiff's right to a trial by jury.

Appellant correctly cites Justice Holland's opinion in *Baird v. Owczarek* for the proposition that "factual determinations", i.e., questions of fact, are to be resolved by a jury. *Baird v. Owczarek*, 93 A.3d 1222, 1226-1227 (Del. 2014). Where, however, a motion for summary judgment is filed, the issue is whether there is a *genuine* issue of *material* fact which would warrant resolution by a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) (emphasis added). Factual issues which are irrelevant or are unnecessary are not material. *Id*.

Under Delaware law, where a party seeking summary judgment demonstrates that even when viewing the facts in a light most favorable to the non-moving party, there are no material issues of fact in dispute, summary judgment is appropriate as a matter of law. *Estate of Rae v. Murphy*, 956 A.2d 1266, 1269-1270 (Del. 2008).

Where the facts are clear, Delaware Courts have routinely addressed questions whether specific conduct rises to the level of willful, wanton or reckless conduct. *Estate of Rae v. Murphy*, 956 A.2d 1266 (Del. 2008) (defendant's failure to stop at red light when momentarily distracted did not exhibit wilful and wanton disregard for safety of others and grant of summary judgment on punitive damages affirmed); *Trievel v. Sabo*, 714 A.2d 742 (Del.

1998) (Supreme Court affirmed dismissal at close of plaintiff's case where overwhelming evidence viewed in light most favorable to plaintiff showed that Trievel was responsible for her injuries and no reasonable juror could have found that causal negligence of Sabo was greater than that of Trievel); *Staats by Staats v. Lawrence, 582 A.2d* 936, 1990 WL 168242 (Del. Oct. 3, 1990) (summary judgment on contributory negligence and recklessness affirmed where plaintiff climbed on roof of moving car, fell and was injured); *Maguire v. Leggio*, 280 A.2d 723, 725 (Del. 1971) (where driver "floored" it on wet roadway to estimated 80 mph jury finding of wantonness justified as only reasonably conclusion and directed verdict would have been justified as well); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987) (jury award of punitive damages vacated where facts did not support finding of reckless conduct); *Enrique v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 2215073 (Del. Super. July 16, 2009) (summary judgment on punitive damage claim where no willful or wanton conduct to support); *Loos v. Jackson*, 2024 WL 287118 (Del. Super. Sept. 24, 2024) (summary judgment granted on punitive damage claim where facts did not present genuine issue of material fact on issue of whether conduct was willful and wanton).

In *Estate of Rae v. Murphy*, the evidence showed that Murphy, as he approached an intersection, had turned his head to describe a vehicle operating erratically on the highway to his passenger calling 911. While distracted, Murphy failed to notice that the light ahead of him had turned red, failed to stop and struck the decedent's vehicle. This Court concluded that the trial judge correctly concluded these facts do not rise to the level of willful and wanton conduct necessary to support a punitive damage claim.

In *Staats by Staats v. Lawrence*, *supra*, the plaintiff climbed onto the roof of a car moving 40-45 miles per hour and remained there for several minutes before falling and sustaining serious injury. The driver, Lawrence, four hours after the accident was found to have a blood alcohol content of .06 and was convicted of various driving offenses. The accident occurred before enactment of the comparative negligence statute and Lawrence moved for summary judgment on the grounds that Staats was contributorily negligent and reckless as a matter of law. Summary judgment was granted and this Court affirmed, noting that on the issue of contributory negligence the facts were overwhelming and that Staats' presence on the roof of a moving vehicle constitutes contributory negligence, wanton conduct and assumption of the risk, all of which bar recovery as a matter of law.

In the present case, without citing any supporting case law, Appellant's argument seems to be that what Thomas was doing should somehow affect the determination of whether the decedent was acting recklessly while operating his motorcycle in excess of 140 miles per hour on a public roadway with a 55 mile per speed limit. That, however, is not the standard. In *Staats v. Staats*, the Court observed that contributory recklessness exists when

> a plaintiff, with no intent to cause harm, performs an act which is so unreasonable and dangerous that he either knows or *should have known* that there would be an "eminent likelihood of harm" that may result.

Staats, 576 A.2d 663, 665 (Del. Super. 1990), *aff'd*, *582 A.2d* 936, 1990 WL 168242 (Del. Oct. 3, 1990) (citing *Gushen v. Penn Central,* 280 A.2d 708, 710 (Del. 1971)) (emphasis added). Stated differently, "[a] plaintiff who engages in some overt act that recklessly exposes himself to a known danger is guilty of contributory wantonness." *Id.* As noted by the Court in *Staats* and *Gushen,* the awareness element can be "either actual or constructive". *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987). Any finding of contributory recklessness constitutes a complete defense. *Gushen,* 280 A.2d at 710 (citation omitted).

Whether the defendant was negligent or reckless is not part of the calculus. By way of example, in *Staats v. Staats*, the Court noted that the

defendant driver had a BAC of .06 and was convicted of several driving offenses. Any negligence or reckless on his part, however, did not change the fact that Staats was contributorily negligence and reckless as a matter of law and therefore was barred from recovering.

In short, there are no factual issues for the jury to weigh. The undisputed facts are that the decedent was operating a motorcycle in excess of 140 miles per hour on a 55 public highway where other vehicles were present. If another vehicle changed lanes or pulled from a driveway or side road, at decedent's speed the results would be, and for decedent in fact were, catastrophic. Based on these facts, the only conclusion that any reasonable juror could reach is that the decedent knew or *should have known* that there was an imminent risk of harm from his conduct. Once it is determined that the decedent was contributorily reckless, the plaintiff is barred from recovery, regardless of whether Thomas was negligent as alleged in the complaint or reckless (which is not alleged in the complaint).

In further support of his argument that "the existence of culpability and the degrees of relative culpability are typically questions left to the jury", plaintiff cites cases where there was a question of fact. *Opening Brief* at 31. This simply is not one of those cases.

Finally, it bears mentioning that the court below correctly determined that even under a "comparative" negligence or recklessness analysis, no reasonable juror could conclude that any negligence or reckless on the part of Kelly Thomas was equal to or exceeded the extreme recklessness of the decedent.

Because decedent in operating his motorcycle in excess of 140 miles per hour knew or *should have known* that he was placing himself and others in danger of serious injury or death, the Superior Court correctly determined that there was no genuine issue of material fact, that the decedent was contributorily reckless as a matter of law and that summary judgment was appropriate.

III. SUPERIOR COURT DID NOT ERR IN ADDRESSING PLAINTIFF'S INTERVENING SUPERSEDING CAUSE ARGUMENT ONLY AT ORAL ARGUMENT.

A. Question Presented.

Whether an intervening act can be a superseding cause when the eventual harm was reasonably foreseeable. (JA482:JA483; JA536-JA542)

B. Scope of Review.

The scope of review of the grant of a motion for summary judgment is *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). Appellee incorporates by reference the standard of review as set forth more fully in section **I.B.**, *supra*.

C. Merits of Argument.

Plaintiff is correct that the court-below did not address intervening, superseding cause in its Memorandum Opinion and Order. The issue, however, was addressed at argument where the Superior Court questioned whether it is reasonably foreseeable that a vehicle might change lanes or pull out from a side road. (JA537, JA542-543). To the extent that there was any error, it was harmless.

In *GMC Ins. Agency v. Margolis Edelstein*, the Court held that in determining whether an intervening act is a superseding cause, the focus

is whether the resulting harm is reasonably foreseeable from the initial tortious conduct. *GMC Ins. Agency v. Margolis Edelstein*, 2024 WL 4440459 at *10 (Del. Oct. 8, 2024) (citing *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir. 1933)). *Johnson* is instructive. In that case, the defendant failed to properly clean flammable material from a barge creating the risk of a fire or explosion if, for example, someone were to smoke in the area or work with an open flame, all of which are reasonably foreseeable acts. *Id*. at 195-196. Instead, the barge was hit by lightning. The court in that case concluded that the whether the lightning strike was foreseeable was immaterial. *Id*. at 196. Instead, the question is whether the risk of a fire from the initial act was foreseeable and because the risk of fire was foreseeable, the lightning strike, while an intervening act, was not a superseding cause. *Id*. at 196-197.

The Court in *GMC Ins. Agency v. Margolis Edelstein* also observed:

> In *Stucker*, the defendant sent the plaintiff, a ten-year-old boy, on an errand to deliver merchandise about eight city blocks distant from the defendant's store. While making the delivery, the plaintiff was struck by a motor vehicle that was negligently driven on the wrong side of the street. The defendant argued that the motorist's negligent driving "constituted an independent, intervening proximate cause that broke the causal chain linking the defendant's ... negligence with the injury[.]" In rejecting that

> argument, the Court focused on the defendant's exposure of the plaintiff to harm and the foreseeability of that harm and not the precise action that caused the harm.

*GMC Ins. Agency v. Margolis Edelstein, supra at * 12 (citing Stucker v. American Stores Corp.,* 170 A. 230 (Del. 1934)).

There is no doubt that operating a motorcycle at speed in excess of 140 miles per hours on a 55 mile per hour roadway when other vehicles are present poses a foreseeable and substantial risk of injury or death. No reasonable juror could conclude otherwise. Because the eventual harm was reasonably foreseeable, any negligence or recklessness on the part of Thomas could not be a superseding cause.

IV. *AMICUS* BRIEF IS DUPLICATOUS OF APPELLANT'S ARGUMENTS AND ARGUES MATTERS NOT RAISED BELOW, NOT SUPPORTED BY THE RECORD AND CONTRARY TO DELAWARE LAW.

A. Question Presented.

Whether the Court should consider *amicus curie* arguments that are duplicative of arguments in the opening brief and arguments which were not raised below, are not supported by the record and are contrary to Delaware law.

B. Scope of Review.

The scope of review of the grant of a motion for summary judgment is *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). Appellee incorporates by reference the standard of review as set forth more fully in section **I.B.**, *supra*.

C. Merits of Argument.

First, the *amicus* brief's argument that the grant of summary judgment deprived plaintiff of his right to a trial by jury is duplicative of arguments already asserted by appellant and those arguments are addressed above. In short, the right to trial by jury is to address questions of fact. Where the facts can only lead to one conclusion, there is no right to a trial by jury. In the present case, the only conclusion that any reasonable juror could reach is that the decedent knew or *should have known* that operating his motorcycle as

described throughout this brief carried a significant risk of injury or death to himself and others and that in doing so he was contributorily reckless, barring any recover as a matter of law.

Second, the issues raised by the *amicus* brief, including arguments about decedent's mental state, human cognition, modern behavioral science, "over-optimism bias", "availability heuristic", "short-cut heuristic", "hindsight bias", "denominator blindness" and the impact of serial reckless acts, etc. were not raised below. *Del. Supr. R.* 8 (only questions fairly presented to the trial court may be presented for review); *Hsu v. Citibank South Dakota, N.A.*, 2007 WL 2051614 at *1 (Del. July 19, 2007) (Court will not consider issues not raised in court below). Further, those issues were not raised in the opening brief. *Jarden LLC v. Ace American Ins. Co.*, 2021 WL 5296824 at n.9 (Del. Nov. 10, 2021) (Court has denied motions for leave to file *amicus* brief which raised arguments not raised in opening brief) (citations omitted).

Third, the *amicus* brief cites various law review and other publications in support of its "public policy" arguments on mental state and human cognition. None of these publications are a part of the record, none of the factual conclusions argued by *amicus curie* based on these publications are supported by the record and there are no facts in the record to support the *amicus*

arguments regarding decedent's mental state or human cognition generally. *See Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1207 (Del. 1997) (materials not offered into evidence are not part of record on appeal).

Moreover, most if not all of this argument appears geared toward decedent's subjective mental state, attempting to create a fact issue on the factually unsupported theory that perhaps he *personally* did not appreciate the risk of harm. His subjective mental state, however, is not the standard in Delaware. Instead the standard is what he knew [subjective] or "*should have known"* [objective], *Staats v. Staats*, 576 A.2d 663 at 665 (citing *Gushen v. Penn Central,* 280 A.2d 708, 710 (Del. 1971)) (emphasis and bracketed language added). In other words, the awareness element can be "either actual or constructive". *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987). In short, decedent's actual mental state and anything that may have affected it from a neuropsychological point of view is immaterial where he constructively *should have known* that his conduct posed a significant risk of injury or death to himself or others.

Finally, the *amicus* brief, in an attempt to create an ambiguity, argues that "at the time the General Assembly passed the Comparative Negligence statute, the *concept of recklessness was generally equated with that of gross*

negligence." *Proposed Amicus Brief at* p. 5 (emphasis added). Again, this argument was not raised below. Further, in 1956, almost 30 years before the comparative negligence statute was enacted, this Court, in *McHugh v. Brown*, discussed at length the distinction between negligence, gross negligence, willful and wanton conduct. *McHugh v. Brown*, 125 A.2d 583, 585-586 (Del. 1956). Again, in 1970, almost 15 years before enactment of the comparative, the Superior Court in *Hazewski v. Jackson*, clearly stated that wantonness and gross negligence are separate and distinct. *Hazewski v. Jackson*, 266 A.2d 885, 886 (Del. Super. 1970). Accordingly, there is no merit to this argument.

Based on the foregoing, the Court should disregard *amicus* brief, and the grant of summary judgment in favor of defendants should be affirmed.

CONCLUSION

In conclusion, the Superior Court properly determined that the comparative negligence statute is unambiguous in addressing only negligence and cannot be read to include contributory recklessness. No reasonable juror could conclude that decedent's conduct in operating a motorcycle at over 140 miles per hour on a public roadway with other vehicles present was anything other than reckless conduct barring recovery as a matter of law and therefore summary judgment was appropriate.

Similarly, the only conclusion a reasonable juror could make is that decedent in doing so knew or should have known of the substantial likelihood that his conduct would result in significant injury or death to himself or others. Therefore, any negligence or recklessness on the part of defendant as a matter of law could not be a superseding cause.

Finally, even if comparative recklessness applied, this is one of those rare cases where a reasonable juror could come to only one conclusion, that the extreme recklessness of the decedent far outweighs any conduct on the part of the defendant. For all these reasons, summary judgment was appropriate the grant of summary judgment on behalf of both defendants should be affirmed.

Respectfully submitted,

/s/ *Donald M. Ransom*

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