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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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

# APPELLANT'S REPLY BRIEF

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#### a. The Superior Court Erred in Disregarding this Court's Precedent in Which It Has Twice Suggested Contributory Recklessness Was No Longer Viable After the Adoption of Comparative Negligence.

As argued in Appellant's Opening Brief, this Court has twice recognized that contributory recklessness is extinct. The first time was in *Staats v. Lawrence*, 1990 Del. LEXIS 301, at *1 n.1 (Del. 1990). Contrary to Thomas' argument, the statement in Footnote 1 of *Staats* would not have been made – nor would it have made sense – if this Court did not believe that contributory recklessness had been abrogated by 10 Del. C. § 8132 ("Section 8132"). In other words, if this Court believed contributory recklessness survived the passage of Section 8132, this Court would have said that "[b]ecause the accident occurred before Delaware's comparative negligence statute became effective, proof of . . . [contributory negligence] is a complete defense." 1990 Del. LEXIS 301, at *1 n.1. Instead, this Court said, "proof of these defenses", including contributory recklessness, "is a complete defense." *Id.* This Court thus recognized contributory recklessness was extinct.

The second time was in *Trievel v. Sabo*, 714 A.2d 742 (Del. 1998). The fact that the trial judge in *Trievel* analyzed the plaintiff's behavior as comparative negligence rather than contributory recklessness shows that the Superior Court

believed contributory recklessness was extinct. *Trievel v. Sabo*, 1997 Del. Super. LEXIS 128, at *11 (Del. Super. May 2, 1997). Contrary to Thomas' argument, the Superior Court's statement that "the law would [not] permit contributory wantonness" was not *dicta*. *Id.* Because contributory recklessness did not exist, the Superior Court had to rule on the basis of comparative negligence. Likewise, on appeal, this Court affirmed, finding the plaintiff's decedent was comparatively more negligent than the defendant as a matter of law. *Trievel*, 714 A.2d at 746. Given the nature of the facts and posture in *Trievel* and the trial court's necessary statement that the law would not permit contributory recklessness, this Court could have easily (and without engaging in *dicta* of its own) held that contributory recklessness prevented the plaintiff's recovery. Indeed, holding that plaintiff's one percent contributory recklessness would have made for a simpler analysis. But this Court did not do that because it recognized contributory recklessness was dead and buried. The Superior Court's decision should be reversed and remanded.

**b. The Superior Court Erred in Not Following the Public Policy of Delaware to move Away From Rigid Rules Focusing Solely on a Plaintiff's Culpability.**

Resuscitating the dead doctrine of contributory recklessness would similarly resuscitate an "inflexible legal rule the sole focus of which is upon whether the plaintiff was in any way culpable." Yet that is precisely what Thomas asks this Court to do. Throughout Thomas' Answering Brief, Thomas asks this Court to

violate this Court's previous pronouncement of Delaware's public policy. Over thirty-two years ago, this Court made clear that Delaware's public policy is "to ***retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct*** on a case-by-case basis" and away from "an ***inflexible legal rule the sole focus of which is upon whether the plaintiff was in any way culpable*** in not appreciating the hazard created or permitted by the defendant." *Koutoufaris v. Dick*, 604 A.2d 390, 398 (Del. 1992) (emphasis added). Although Section 8132 speaks only of negligence, this Court's pronouncement of Delaware's policy in *Koutoufaris* was broader than cases involving negligence.

Stated another way, in enacting Section 8132, the General Assembly established Delaware's policy that tortfeasors should not receive a windfall and face no responsibility for wrongdoing just because the victim was somewhat to blame (as long as the plaintiff was not more culpable than the defendant(s)). 10 Del. C. § 8132. *Koutoufaris*'s holding that a plaintiff's lower degree of culpability serves as no defense to a defendant's higher degree of culpability is consistent with that policy. *See* 604 A.2d at 398 (correct statement of law that "contributory negligence is not a defense to wanton or reckless conduct"). These rules allow for the "evaluation of the plaintiff's conduct on a case-by-case basis" rather than solely focusing on "whether the plaintiff was in any way culpable in not appreciating the hazard created or permitted by the defendant." *Id*. Contrary to Thomas' argument, it does not

follow that Delaware's public policy allows a potentially reckless defendant to get off scot free because the plaintiff was potentially reckless. As argued in the Opening Brief and below, when the conduct of both the plaintiff and the defendant is reckless, their degrees of culpability should be compared.

Also contrary to Thomas' argument in her Answering Brief, Plaintiff has been advocating for the comparison of Northan's culpability to Thomas' culpability from the beginning. In Plaintiff's Response to Motion for Summary Judgment of Defendant Kelly Thomas, Plaintiff argued "Thomas drove recklessly on March 7 by driving under the influence of alcohol." (JA0462). After explaining why contributory recklessness should not apply, Plaintiff argued that, "[a]t a minimum, the degrees of culpability should be submitted to a jury to resolve factual disputes, including whether Northan was reckless." (JA0467.) Then the issue was addressed at oral argument:

> THE COURT: Okay. If we make the assumption at this point that both your client was reckless and Ms. Thomas was reckless, if I make that assumption, does your client's reckless conduct bar his claims.
>
> MR. GALLAGHER: No.
>
> THE COURT: Why not?
>
> MR. GALLAGHER: Your Honor, the comparative negligence statute, and I will not argue that the word reckless appears in that statute . . . but I think that the pronouncements from the Delaware Supreme Court and what this Court has done in numerous cases shows that

everyone has been operating under the assumption for 30-ish years . . . that comparative negligence

* * *

abrogated the common law of contributory recklessness.

THE COURT: Mr. Ransom made the argument to me on that that I would have to stand on my head in interpreting the comparative negligence statute to reach that conclusion. As I said to him, I probably read it at least ten times trying to figure out whether it applied here, and it didn't seem to on its face apply. Don't I have to – if it's clear on its face, isn't that what I have to apply?

MR. GALLAGHER: If it's unambiguous, you don't get into construction.

THE COURT: Right.

MR. GALLAGHER: I agree with that. But – and I want – the most important case on this issue is the *Staats* case. It went up on appeal. There is a footnote in the very beginning, and they're talking about there were numerous defenses that the defendants had asserted, and one of them was contributory recklessness.

* * *

MR. GALLAGHER: These defenses – so applying to contributory negligence, contributory recklessness, and maybe even a primary assumption of the risk as well, these defenses were complete defenses because the motor vehicle collision occurred prior to the adoption of the comparative negligence statute.

THE COURT: And you read that to say that they're not now complete defenses?

MR. GALLAGHER: Yes, Your Honor.

> THE COURT: Isn't that a little bit of a broad reading of that footnote?
>
> MR. GALLAGHER: Well, I don't think so, if you look at what else was said in other cases.
>
> Then in the *Koutoufaris* decision, the Supreme Court made this statement that the comparative negligence statute was a retreat from a system of inflexible and unforgiving rules.
>
> THE COURT: Right. I agree with that. I think it was.
>
> MR. GALLAGHER: It focused solely on the culpability of the plaintiff. So since then, they have then started talking – the Supreme Court has talked about comparative fault, not just comparative negligence, but they adopt the moniker comparative fault.
>
> THE COURT: And you read that to mean it includes, of course, comparative recklessness?
>
> MR. GALLAGHER: Yes, because fault includes all degrees of culpability, not just negligence.

(JA526-29.) Plaintiff's counsel went on to reference the *Jackson* and *Bishop* cases, both of which were in discussed in Plaintiff's Response to Motion for Summary Judgment of Defendant Kelly Thomas. (JA530; *see also* JA466-67.) Significantly *Jackson* involved denial of summary judgment when the culpabilities of plaintiff and defendant differed in kind. *Jackson v. Thompson*, 2000 Del. Super. LEXIS 413, at *6, 8 (Del. Super. Oct. 12, 2000). *Bishop* involved denying summary judgment where both parties' conduct could be deemed reckless. *Bishop v. Progressive Direct*

*Ins., Co.*, 2016 Del. Super. LEXIS 632, at *1 (Del. Super. Dec. 15, 2016). The exchange continued:

> THE COURT: Well, you read these cases in such a way that you tell me that the courts are now saying that this statute covers these, but where does it say in the statute? I have a little bit of trouble making that leap when I don't see anything in the statute and I don't see any of the cases which say: Oh, yes, this says contributory negligence, but we think it covers all degrees of fault using that language. Where is it in the statute?
>
> MR. GALLAGHER: It's not in the statute. I concede that.
>
> * * *
>
> But I think that in how we proceed – how – we being the Delaware Courts and the State has proceeded since then. It's been used to assume all levels of fault not just negligence.

(JA531-32.) Therefore, the issue of comparing the culpabilities of Northan and Thomas, including if they were both reckless, was squarely before the Superior Court.

Because the public policy of Delaware does not favor inflexible rules focusing solely on the culpability of the plaintiff, the Superior Court's decision doing precisely that should be reversed and remanded.

**c. The Superior Court Erred in Requiring Section 8132 to be Ambiguous Before Effecting Its Remedial Purpose.**

When the language and intent of a statute is clear, a court does not need to strictly construe a statute in derogation of the common law. *MCI Telecomms. Corp.*

*v. Wanzer*, 1990 Del. Super. LEXIS 222, at *26 n.8 (Del. Super. June 19, 1990). But if a court decides to construe a statute in derogation of the common law strictly, "one of the most common exceptions to the principle that a statute in derogation of the common law is to be read strictly is that a statute viewed to be remedial in nature is entitled to a liberal construction." *Id.*[1]

The Superior Court initially said Section 8132 was clear on its face and did not cover reckless conduct, but it went on to say, "Second, under Delaware law, statutes in derogation of common law must be strictly construed. To the extent I have to interpret the statute, I construe it strictly to exclude any reference to recklessness." (Mem. Op. & Order, June 12, 2024, at 8.) The Superior Court rejected Plaintiff's argument that remedial legislation should be given a liberal interpretation and concluded, "Because the comparative negligence statute is a statute in derogation of common law, and clearly and unambiguously speaks only of negligence, its meaning cannot be twisted to include recklessness . . . " (*Id.* at 9.) The Superior Court thus erred in failing to apply the exception to the rule that statutes in derogation of the common law are strictly construed.

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[1] In *MCI Telecomms.*, the Court found the indemnification statute was plain and unambiguous and thus without need for construction. 1990 Del. Super. LEXIS 222 at *25-26. But the Court nevertheless went on to reject the plaintiff's argument to strictly construe the statute as it was in derogation of the common law because the rule for the liberal construction of remedial statutes is an exception to the former rule. *Id.* at *26 n.8.

Northan conceded at oral argument in the Superior Court that the general rule is that if a statute is unambiguous, construction of the statute does not begin. (JA527-28.) But context, like facts, matters. Northan's "concession" occurred in the midst of the discussion that is cited *supra* in Section I.b. As the full context shows, Northan argued that while that general rule exists, Delaware Courts, since *Staats*, have proceeded as though contributory recklessness was abated by the adoption of Section 8132.

Moreover, the liberal application of remedial statutes is not "statutory construction" in the traditional sense of that phrase.[2] By way of example, much litigation has arisen about the application of the Delaware Savings Statute, 10 Del. C. § 8117 ("Savings Statute"). Inevitably, Delaware Courts have applied or construed the Savings Statute liberally because it is remedial in nature. *See, e.g., Leavy v. Saunders*, 319 A.2d 44, 46 (Del. Super. 1974). Importantly for present purposes, the Superior Court noted that the ***forerunner of the Savings Statute "was even construed to extend to cases which did not come within the language of the statute***. . . . The object of the statute is to mitigate against the harshness of the defense of statute of limitations." *Id.* (internal citations omitted).

[2] Perhaps "application" or "interpretation" are better words than "construed" in the context of remedial statutes.

In *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964), the issue before this Court was whether the Savings Statute allowed for a plaintiff to refile his or her case within that statute's grace period when a decision dismissing his case had been ***affirmed*** on appeal. The statute expressly stated a plaintiff could so refile when his or her prior case had been "reversed on appeal." *Id.* at 925. The Court concluded that the language of the statute notwithstanding, the statute was "designed to allow a plaintiff . . . one year to file a second cause of action following a final judgment adverse to his position if such judgment was not upon the merits of the cause of action." *Id.* at 926. Noting the liberal application of remedial statutes, the Court also concluded that the first action's abatement due to insufficient service of process, although not expressly specified within the Saving Statute, still fell within the provisions of the Savings Statute. *Id.* at 927. In sum, in applying the Savings Statute to achieve its remedial purpose, this Court in *Gosnell* allowed the Savings Statute to apply even though the facts were (a) contrary to the words of the statute and (b) not within the express scope of the statute. Similarly, in *Reid v. Spazio*, 970 A.2d 176, 181-82 (Del. 2009), this Court extended *Gosnell*'s application of the Savings Statute to conclude that discretionary appeals, which were also not in the text of the Savings Statute, tolled the grace period contained in the Savings Statute. *Id.* at 181-82.

The other cases cited in Plaintiff's Opening Brief for the proposition that remedial statutes are interpreted or applied liberally even without ambiguity are not

as easily distinguishable as Thomas would lead the Court to believe. *Young v. Joyce*, 351 A.2d 857, 859 (Del. 1975), liberally applied Delaware's Consumer Fraud Act to imply a private right of action where the statute was silent as to a private cause of action. To put it bluntly, this Court created a private cause of action where none was expressly provided. *Id.*

In *In re Estate of Klingaman*, 128 A.2d 311, 313 (Del. 1957), this Court had to determine whether "illegitimate" children could inherit their mother's inheritance after their mother died. The trial court interpreted the relevant statutes narrowly concluding an "illegitimate" could not so inherit. *Id.* Concluding that the rule of construction providing that statutes in derogation of the common law should be narrowly construed was "of little aid in modern times," this Court rejected the application of that rule. *Id.* This Court decided to "effectuate as far as reasonably possible the announced intention of the legislature to relax the harshness of the common law." *Id.* Thus, even though the statutes were in derogation of the common law, the statutory definition of "heirs" was interpreted broadly to allow for the inheritance. *Id.*

In *Del. Tire Ctr. v. Fox*, 411 A.2d 606, 607 (Del. 1980), this Court held that a worker's suicide was compensable under workers' compensation despite a statute saying that an employee forfeited such compensation "because of his wilful intention to bring about the injury of death to himself or of another." *Id.* (*quoting* 19 Del. C.

§ 2353(b)). Because "'the industrial accident was the precipitating factor that triggered the deceased's suicide'", the suicide was compensable even though it was a volitional act. *Id.* (internal citations omitted). Thus, to achieve the remedial purpose of the workers' compensation law, this Court ruled a suicide compensable despite a statute providing a suicide forfeits such compensation. *Id.*

In *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256 (Del. 2011), this Court liberally applied a statute allowing victims of child sexual abuse to revive claims otherwise barred by the statute of limitations. The statute provided that the employer of an abuser could be held liable "'*only if there is a finding of gross negligence on the part of the legal entity*.'" *Id.* (*quoting* 10 Del. C. § 8145(b) (emphasis in original)). The trial court, applying the language of the statute, concluded that if the entity's conduct was reckless or intentional, the entity could not be liable. *Id.* This Court rejected that analysis, applied the statute liberally, and held that gross negligence was the floor rather than the ceiling for the conduct of the entity. *Id.* at 1257. Again, this Court allowed additional conduct to fall within a remedial statute despite that statute's ostensibly limiting language.

Thomas claims the *Sheehan* Court's rationale was based upon avoiding an absurd result. (Ans. Br. at 19.) Interestingly, the word "absurd" (or anything similar) does not appear anywhere in the *Sheehan* decision. But an absurd result would occur here if the Superior Court's ruling is allowed to stand. That would mean Delaware

law allows a drunken driver to get off scot free when a plaintiff was even one percent reckless. Such an outcome would lead to a slippery slope as to what constitutes reckless conduct (especially as a matter of law) as well as open the flood gates of litigation such that every defendant in every motor vehicle collision can try to argue that the plaintiff was somehow reckless. Such a result is the exact opposite of the Delaware public policy announced in *Koutoufaris* "to retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct on a case-by-case basis" and away from "inflexible legal rule the sole focus of which is upon whether the plaintiff was in any way culpable in not appreciating the hazard created or permitted by the defendant." 604 A.2d at 398.

Succinctly, Section 8132 sought to remedy the harshness of the common law's inflexible focus on whether a plaintiff was in any way culpable. As a remedial statute, it should be applied liberally to allow for the comparison of different degrees of culpability, including when both are arguably reckless.

**d. The Superior Court Erred in Failing to Note the Evolution of the Delaware Courts' Approach to Comparative Fault.**

This Court recognized that tort law changed after Section 8132 was enacted. *Helm v. 206 Mass. Ave., LLC*, 107 A.3d 1074, 1080 (Del. 2014). For example, following the enactment of Section 8132, "the distinction between primary and secondary assumption of risk became meaningful." *Id.* The former relieves the defendant of any duty to the plaintiff while the latter is subsumed within Section

8132's comparison of fault. *Id.* Thus, Section 8132, as *Koutoufaris* recognized, showed a legislative policy shift away from an inflexible focus on whether a plaintiff was in any way culpable. 604 A.2d at 398. In so doing, contributory recklessness was abated. *Trievel*, 714 A.2d at 746; *Staats*, 1990 Del. LEXIS 301, at *1 n.1. Delaware Courts got the message and followed suit as argued more fully in the Opening Brief.

Thomas argues that because primary assumption is still a duty-relieving doctrine and operates as a complete bar to a plaintiff's claim, contributory recklessness, which operated as a complete bar, must still exist. That flawed argument misses the key difference between primary assumption and contributory recklessness. Delaware law is well settled that "primary assumption of risk is implicated when the plaintiff expressly consents 'to relieve the defendant of an obligation toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.'" *Helm*, 107 A.3d at 1080 (internal citations omitted). It is "a bargained-for, agreed-upon shifting of the risk of harm" and relieves the defendant of any duty to the plaintiff. *Id.* As *Helm* explains, it most often arises in the context of people getting injured at sports events or engaging in dangerous activities such as bungee jumping. *Id.* at 1081. Thus, contrary to Thomas' argument, *Helm* does not evince that "Delaware courts continue to recognize the distinction between different levels of activity, mental state, and risk"

nor does *Helm* show that "not all conduct has been subsumed within the comparative negligence statute." (Ans. Br. at 22.) *Helm*'s discussion of primary assumption of the risk shows that when a plaintiff expressly agrees to take a risk – such as when a waiver or release is signed or is included in a ticket to an event – the defendant is relieved of liability. Primary assumption of the risk turns not on a plaintiff's culpability but on a plaintiff's agreement. Thus, primary assumption of the risk is fundamentally different than contributory recklessness with its focus solely on a plaintiff's culpability.

Thomas correctly points out that *Jackson*, *Bishop*, and *Hufford v. Moore*, 2007 Del. Super. LEXIS 367 (Del. Super. Nov. 8, 2007), all denied summary judgment because there were disputes of fact about the parties' degrees of culpability. (Ans. Br. 23-24.) But all three involved cases where Delaware Courts denied summary judgment so a jury ***could determine and compare differing degrees of culpability***. *Bishop*, 2016 Del. Super. LEXIS 632, at *4-8; *Hufford*, 2007 Del. Super. LEXIS 367, at *6-7 (plaintiff's gross negligence versus defendant's recklessness); *Jackson*, 2000 Del. Super. LEXIS 413, at *4, 7 (plaintiff's recklessness and defendant's negligence). Admittedly the issue of contributory negligence was not raised, but that is likely because everyone except Thomas knew it was a dead doctrine.

*Bishop* is particularly salient. 2016 Del. Super. LEXIS 632. The plaintiff rear-ended another vehicle. *Id.* at *2. The plaintiff contended he hit the other vehicle

because the defendant's insured, in a fit of road rage, pulled over in front of the vehicle that plaintiff struck and slammed on its brakes. *Id.* The defendant sought summary judgment on the ground of duty and the plaintiff's contributory culpability. *Id.* at *4. The plaintiff moved for summary judgment on the basis he was not reckless in a collision. *Id.* at *4-5. Both motions were denied due to disputes of fact, primarily regarding whether the defendant's insured's road rage incident occurred. *Id.* at *5. But the Superior Court noted that "[t]hose facts also impact whether Plaintiff's comparative fault bars him from recovery." *Id.* at *7. It concluded that if the defendant's insured was reckless, that could "potentially make Plaintiff's comparative fault irrelevant." *Id.* at *7-8. That last sentence is significant because if the defendant's insured was reckless, the plaintiff could recover. But it also suggests if both were reckless, their comparative fault would be compared. Again, if defendant or the Court believed contributory recklessness existed, as Thomas contends, the plaintiff's one percent recklessness would have been the death knell for the case. But no one argued that for the simple reason that contributory recklessness had been abated.

Thomas misreads *Baldwin v. City of Omaha*, 607 N.W.2d 841 (Neb. 2000). Nebraska has a modified comparative negligence statute similar to Section 8132. *See id.* at 850 (*quoting* Neb. Rev. Stat. § 25-21, 185.09 (Reissue 1995)). The trial court, sitting as the trier of fact at trial, found the plaintiff's "conduct was 'so willful

as to suggest recklessness'". *Id.* at 854. The Nebraska Supreme Court expressly stated it could not disagree with the trial court's assessment of the plaintiff's conduct. *Id.* at 855. It then affirmed the trial court's finding that the plaintiff's recklessness was 55% responsible for his injuries while the defendants' negligence was only 45% responsible for the plaintiff's injuries. *Id.* at 849, 855. *Baldwin* could not be clearer that the plaintiff's recklessness was compared to the defendant's negligence.

In short, Delaware Courts and other courts with statutes similar to Section 8132 have evolved to compare differing degrees of culpability.

## II. The Superior Court Erred In Not Submitting the Existence and Degrees of Culpability to a Jury When It Determined Northan Was Reckless As a Matter of Law

Thomas advocates, despite the statement in *Koutoufaris* that Delaware is moving away from inflexible legal rules solely focusing on the plaintiff's culpability, to do just that and apply contributory recklessness without a jury finding Northan reckless. At a bare minimum, the Superior Court should have allowed a jury to determine whether Northan was reckless rather than determining Northan was reckless as a matter of law. At oral argument, the Superior Court acknowledged that people drive fast in Delaware. (JA541.) Thus, a jury of Delawareans should determine the respective degrees of culpability of Northan and Thomas.

Many of the authorities upon which Thomas relies on this point bely its argument. First, this Court has defined recklessness as "a conscious indifference to the rights of others." *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987). Put another way, it is "a conscious indifference to the decision's foreseeable effect." *Id.* at 529. Importantly, it is not "[m]ere inadvertence, mistake, or errors of judgment which constitute mere negligence." *Id.* The "crucial element [of recklessness] involves the actor's state of mind and the issue or foreseeability, or the perception the actor had or should have had of the risk of harm which his conduct would create." *Id.* at 530. It is well recognized that "[w]here a litigant's state of mind is an element of a claim, summary judgment is frequently inappropriate because of its fact-

intensive nature. *See, e.g., Moyer v. Am. Zurich Ins. Co.*, 2021 Del. Super. LEXIS 351, at *10 (Del. Super. Apr. 28, 2021); *accord Jardel*, 523 A.2d at 527. Second, as noted above, *Bishop*, *Hufford*, and *Jackson* all had summary judgment denied because there were disputes of fact about the parties' degrees of culpability. *Bishop*, 2016 Del. Super. LEXIS 632, at *5; *Hufford*, 2007 Del. Super. LEXIS 367, at *7; *Jackson*, 2000 Del. Super. LEXIS 413, at *7. Thus, a jury rather than the Court should determine the parties' degrees of culpability.

Other of Thomas' cases are distinguishable. *Staats* is distinguishable because contributory recklessness applied and the Court only had to find the plaintiff one percent at fault; but, as argued herein, contributory recklessness has been abrogated. 1990 Del. LEXIS 301, at *1 n.1. Moreover, riding on the top of a moving car while drunk is fundamentally different than driving fast. Northan could have slowed down without injury while the drunk man on top of a moving car was inevitably going to fall. In *Maguire v. Leggio*, 280 A.2d 723 (Del. 1971), this Court affirmed the giving of a jury instruction on wantonness. *Id.* at *726. A jury returned a verdict finding the defendant was reckless. *Id.* at *724. Because the issue of judgment as a matter of law was not before the Court, this Court in *dicta* said judgment as a matter of law would have been appropriate on the issue of recklessness. *Id.* at 725. But stating judgment as a matter of law is appropriate after a jury has reached the same

conclusion is a far cry from granting summary judgment when there are disputes of fact.

Some of Thomas authority are inapposite. Thomas argues that courts reaching the conclusion that something was ***not*** reckless means that the superior court could determine that Northan's conduct was reckless. *Estate of Rae v. Murphy*, 956 A.2d 1266, 1268 (Del. 2008); *Jardel*, 523 A.2d at 531; *Loos v. Jackson*, 2024 Del. Super. LEXIS 645, at *14 (Del. Super. Sept. 24, 2004); *Enrique v. State Farm Mut. Auto. Ins. Co.*, 2009 Del. Super. LEXIS 266, at *6-7 (Del. Super. July 16, 2009). But it is far easier to determine facts do not reach the threshold of recklessness than to conclude that facts do reach that threshold. These cases are therefore inapposite to a finding Northan's conduct was reckless as a matter of law.

Finally, *Trievel* is substantively and procedurally distinct. All of the plaintiff's evidence had been presented at trial, and none of the plaintiff's witnesses could implicate the defendant in causing the plaintiff's injuries. 714 A.2d at 746. Thereafter the trial judge granted a motion for directed verdict. *Id.* at 743. This Court noted *Trievel* was "one of those rare cases" where "the evidence requires a finding that a plaintiff's negligence exceeded that of a defendant", making judgment as a matter of law appropriate. *Id.* at 745. Those are not the facts before the Court. Here, independent witnesses implicated Thomas. Fleming said Thomas pulled out in front of the Hovatter vehicle and Northan's motorcycle and then stopped before

reaching the median. (JA341:17 – JA343:18; JA346:3-11; JA369:8 – JA377:12.) Hovatter said Thomas "darted out." (JA110:23 – JA111:8.) Twilley corroborated Thomas applied her brakes before fully crossing the southbound lanes of Route 13. (JA436:10 – JA437:5.) And then, of course, Thomas was likely drunk. (JA103:22 – JA105:10; JA186:20 –JA194:12; JA197:18 – JA198:2; JA201:17 – JA207:2; JA211:21 – JA212:6; JA214:11-18; JA234:12-15; JA304:2-11.) Unlike in *Trievel*, the facts in this case are not clear and are contested. Moreover, regardless of whether contributory recklessness exists, a jury – rather than the Court on summary judgment – should determine the facts regarding liability and causation.

## III. The Superior Court Erred When It Incorrectly Deferred the Issue of Proximate Causation, the Resolution of Which Would Have Precluded Summary Judgment

Resolving all facts in Plaintiff's favor, Thomas' actions would have caused injury or death to Northan regardless of Northan's speed. Relying on *GMG Ins. Agency v. Margolis Edelstein*, 2024 Del. LEXIS 342 (Del. Oct. 8, 2024) (*en banc*), Thomas argues the mechanism of harm is irrelevant if the harm is foreseeable. But *GMG Ins.* was more nuanced than that. This Court in *GMG Ins.* reversed the Superior Court's finding that an affidavit disavowing the affiant's previous testimony was a superseding cause relieving a law firm of malpractice liability. *Id.* at *26-32. This Court relied on Restatement (Second) of Torts § 442B that provides:

> Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

*Id.* at *28 (*quoting* § 442B of Restatement (Second) of Torts). As the Concurrence pointed out, when the act of the intervenor – e.g., Thomas – is not foreseeable and is intentionally tortious ***or criminal***, then the original actor – e.g., Northan – is relieved of liability. *Id.* at *41. The Majority "readily concede[d] that, under § 442B . . . , whether the harm is intentionally caused by the intervening actor is a relevant and potentially dispositive issue." *Id.* at *31. But the Majority said it is only

"dispositive when the intentionally caused harm 'is not within the scope of the risk created by the [initial] actor's . . . conduct.'" *Id.* (internal citations omitted). The Majority determined there were questions of fact about whether the affiant's changed testimony was within the risk created by the defendant' law firm's conduct and reversed the grant of summary judgment. *Id.* at *32.

Here, giving Plaintiff the benefit of all reasonable inferences, Thomas' acts of drinking throughout the day while driving was criminal. While under the influence, she pulled out into traffic. Again, Thomas seeks to escape all responsibility for her reckless and criminal behavior by putting all of the responsibility on Northan for speeding. But Northan could have slowed down without injuring himself or others. And even if Northan had been going the speed limit, Thomas' criminal act would have caused Northan injury or death. Thus, just as in *GMG Ins.*, there are questions of fact for a jury to determine whether Thomas' reckless and criminal conduct was within the risk created by Northan's conduct. Just as in *GMG Ins.*, the Superior Court should be reversed and remanded.

## CONCLUSION

Contributory recklessness is a relic of the past and is at odds with Delaware's policy of moving away from inflexible rules of tort law that focus solely on a plaintiff's culpability. The relative degrees of culpability of Northan and Thomas as well as determinations of causation should be determined by a jury. If both are found to be reckless, then any damages should be apportioned in a manner consistent with Section 8132.

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