

Exhibit 1

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

REBECCA BEASLEY, individually as the
surviving spouse of ORVILLE THOMAS)
BEASLEY III, and as personal representative)
of the ESTATE OF ORVILLE THOMAS)
BEASLEY III; and ORVILLE THOMAS)
II and ANNA ELIZABETH BEASLEY,)
husband and wife, and parents of ORVILLE)
THOMAS BEASLEY III.)

Plaintiffs,)

v.)

JOHN C. STUART and JANE DOE)
STUART, a married couple; JOHN and)
JANE DOES I-V; BLACK & WHITE)
CORPORATIONS VI-X; and ABC)
PARTNERSHIPS XI-XV;)

Defendants.)

CASE NO. CV2010-050624

**PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: DEFENDANT'S NEGLIGENT
INFLICTION OF EMOTIONAL
DISTRESS**

(Tort: Non-Motor Vehicle)

(Assigned to the Honorable Linda Miles)

Plaintiff Rebecca Beasley by and through undersigned counsel, file this Motion for Partial Summary Judgment pursuant to Arizona Rules of Civil Procedure, Rule 56, regarding Plaintiff's claim for negligent infliction of emotional distress. Plaintiff is entitled to judgment as there is no genuine issue of material fact concerning Plaintiff's claim for negligent infliction of emotional distress which requires Plaintiff to: (1) witness the injury of a closely related person; (2) suffer mental anguish which manifests as a physical injury, and; (3) be in the zone of danger subjecting claimant to an unreasonable risk of bodily harm created by Defendant.

On January 29, 2008, Rebecca Beasley witnessed Mr. Stuart shoot and kill her husband, Thomas Beasley, in the middle of an intersection, only a few feet in front of her, after Mr. Stuart

1 had subjected the Beasleys to threats and violent aggression while driving on a Scottsdale road.
2 Defendant caused the death of Rebecca Beasley's husband which, in turn, resulted in Mrs.
3 Beasley's mental anguish manifested as extreme shock, pain, prolonged grief, loss of sleep,
4 emotional agitation, disturbance, anger and fear stemming not only from the her husband's death,
5 but also from the fear for her own safety which she experienced from Mr. Stuart's actions.

6 This Motion is supported by the following Memorandum of Points and Authorities, the
7 evidentiary record before this Court, and the pleadings, deposition testimony, and responses which
8 have been exchanged to date.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. Summary Judgment Standard of Review**

11 Summary judgment should be granted if the facts produced in support of the claim or
12 defense have so little probative value, given the quantum of evidence required, that reasonable
13 people could not agree with the conclusion advanced by the proponent of the claim or defense.
14 *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *Andrews v. Blake*, 205
15 Ariz. 2326, 69 P.3d 7 (2003). The inquiry in summary judgment cases, as in directed verdict cases,
16 is whether reasonable jurors applying the law to the facts could reach but one conclusion. *Hill-*
17 *Schafer Partnership v. Chilson Family Trust*, 165 Ariz. 469, 472, 799 P.2d 810, 813 (1990).

18 **II. Relevant Background Facts**

19 On the evening of January 29, 2008, Thomas and Rebecca Beasley traveled west on
20 Pinnacle Peak Road in Scottsdale, Arizona. (SOF 1). At the same time on that day, John Stuart,
21 speeding and passing several cars, passed and cut off the Beasley's vehicle. (SOF 2). The cars
22 then came to a stop at a red light at the intersection of Tatum Road and Pinnacle Peak Road. (SOF
23 3). Thomas Beasley stopped at the left-hand turning lane, preparing to head south on Tatum, and
24 John Stuart stopped his vehicle at the right side of the Beasley's car. (SOF 4).

25 Stuart then began shouting insults out his window at the Beasleys. (SOF 5). He made
26 vulgar comments and hand gestures to the Beasley's. *Id.* Stuart then turned his vehicle into the
intersection in front of the Beasley's car, preventing them from exiting the turning lane or moving

1 in any direction to get away from Stuart's vehicle. (SOF 6). At this time, Thomas Beasley got out
2 of the car and started toward Stuart's vehicle. (SOF 7). Stuart maneuvered his vehicle back and
3 forth three times toward Thomas Beasley, as if threatening to strike Mr. Beasley or his car. (SOF
4 8). Mr. Beasley continued walking toward Stuart's vehicle when Stuart reached for his handgun.
5 (SOF 9). Upon seeing the gun, Mr. Beasley raised his hands in the air and began to walk
6 backwards slowly, attempting to return to his car and his wife. (SOF10). John Stuart then fired a
7 fatal shot at the un-armed Thomas Beasley and raced away, leaving Rebecca Beasley with her
8 dying husband. (SOF 11, 12). At the time of the incident, Rebecca Beasley experienced many
9 emotions including fear, extreme shock, pain, grief, emotional agitation, and anger. (SOF 13).
10 Since the shooting, she has experienced the same emotions as well as prolonged grief, loss of sleep,
11 and other disturbances. (SOF 14).

12 **III. Legal Argument**

13 **a. There is No Genuine Issue of Material Fact Regarding Plaintiff's Claim of** 14 **Negligent Infliction of Emotional Distress.**

15 A claim for negligent infliction of emotional distress requires the plaintiff "(1) witness an
16 injury to a closely related person, (2) suffer mental anguish manifested as physical injury, and (3) be
17 within the zone of danger so as to be subject to an unreasonable risk of bodily harm created by the
18 defendant." *Keck v. Jackson*, 122 Ariz. 114, 116, 593 P.2d 668, 670 (1979); *Pierce v. Casas Adobes*
19 *Baptist Church*, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (1989) (In their claim for negligent infliction
20 of emotional distress after the injury of their son, plaintiffs experienced emotional distress after finding
21 out about the accident and watching their son cope with injuries).

22 Here, because Rebecca Beasley watched her husband die at the hands of John Stuart, she
23 experienced and continues to experience great emotional distress caused by being a couple of feet from
24 the shooting, and by her own involvement in the altercation which lead to Thomas Beasley's death.

25 Defendant's conduct toward Rebecca Beasley resulted in her fear, extreme shock, pain,
26 grief, emotional agitation, and anger as well as prolonged grief, loss of sleep, and other
disturbances. For these reasons, and because Mrs. Beasley meets the requirements for the claim of

1 negligent infliction of emotional distress under Arizona law, this Motion for Summary Judgment
2 should be granted.

3 **i. Plaintiff Rebecca Beasley Witnessed an Injury to a Close Relative**

4 A claimant who witnesses the injury of another must be a close relative of the
5 injured/deceased. *Keck v. Jackson*, 122 Ariz. at 116, 593 P.2d at 670. John Stuart shot Thomas
6 Beasley while Mrs. Beasley watched from their car. She was only a few feet behind Thomas when
7 he was shot by John Stuart. (Exhibit. 5, John C. Stuart Dep. at 41). Mrs. Beasley, wife of Thomas
8 Beasley, watched the shooting of her husband as it happened a few feet from her view. Therefore,
9 she witnessed an injury to a close relative which satisfies this element of her claim.

10 **ii. Plaintiff Rebecca Beasley Suffered Mental Anguish Manifested as Physical Injury**

11 In holding that injury does not have to be the direct result of the impact which caused the
12 mental anguish, the *Keck* court expanded the principle that mental anguish must be manifested as
13 physical injury to be compensable. *Id.* Further, mental anguish manifested as physical injury can be
14 temporary fright, nervous shock, nausea, grief, rage, and humiliation. *Monaco v. Health Partners of*
15 *Southern Arizona*, 196 Ariz. 299, 302, 995 P.2d 735, 739 (Ariz. App. 1999). In *Monaco*, a case of
16 medical malpractice resulting in a patient's increased risk for leukemia, the Court of Appeals of
17 Arizona held "Arizona cases and the Restatement make it clear that a physical injury, as well as a long-
18 term physical illness or mental disturbance, constitutes sufficient bodily harm to support a claim of
19 negligent infliction of emotional distress." 196 Ariz. at 303, 995 P.2d at 740. The Court of Appeals of
20 Arizona reasoned that a physical manifestation does not need to be an injury such as an ulcer, but can
21 include any of the following: temporary fright, nervous shock, nausea, grief, rage, and humiliation. *Id.*
22 at 302, 739 (citing to Restatement §436A comment (c)).

23 Rebecca Beasley has suffered fear, extreme shock, pain, grief, emotional agitation, and
24 anger as well as prolonged grief, loss of sleep, and other disturbances. (SOF 13, 14). Because this
25 mental anguish has manifested itself in the form of lack of sleep and feelings of physical pain from
26 her loss, these experiences are the type considered manifestations of physical injury in *Monaco*.

1 Therefore, Mrs. Beasley's mental anguish is the requisite manifested physical injury under
2 *Monaco*.

3 John Stuart also admits to her emotional distress in his answers to Mrs. Beasley's
4 complaint. Stuart admits that Rebecca Beasley experienced shock, mental anguish, emotional
5 distress, and physical illness. (Exhibit. 6), Defendant's Answer at 31-32, ¶ 34, 36, 37 (hereinafter
6 "Answer").

7 34. Denied. Plaintiff's criminal acts caused Plaintiff to experience, hangover, shock
8 and mental anguish.

9 36. Denied. Plaintiff's criminal acts caused Plaintiff's emotional distress, and
10 Plaintiff's continued disavowing of the truth is destroying Plaintiff's body, as doing evil
11 things to innocent people often does. Plaintiff would be better served by telling the truth
12 and facing what she has done to her own life and how her issues with alcohol eventually
13 led to her husband's death.

14 37. Denied. All of Plaintiff's emotional distress and physical illnesses are a direct result
15 of Plaintiff's heinous and criminal activity and Plaintiff's unwillingness to face the truth
16 and face the consequences of her heinous acts. Plaintiff should consider telling the truth, if
17 she can remember anything from that night, as the "soul cleansing" may heal her.

18 Plaintiff's ongoing life built on lies to conceal her guilt will probably continue to erode her
19 health.

20 In his deposition, Defendant also did not deny that his actions caused either accidental or
21 intentional fright in Mrs. Beasley. Exhibit. 7. John C. Stuart Dep. at 20-21. Therefore, Defendant
22 has admitted Rebecca Beasley meets the requisite level of mental anguish manifested as physical
23 injury and the issue is not in dispute to create a genuine issue of material fact.

24 **iii. Plaintiff Rebecca Beasley was within the zone of danger which subjected her to an
unreasonable risk of bodily harm created by the defendant.**

25 In *Keck*, witnessing a car crash was enough to place the Plaintiff in the zone of danger
26 which subjects a person to unreasonable risk of bodily harm included suffering caused while in the
presence of the injury or harm which was directly created by the defendant. 122 Ariz. at 116, 593

1 P.2d at 670. In a more recent case, *State Farm Mutual Auto Insurance Co. v. Connolly*, a woman
2 was “nearby and witnessed the accident” when her sister was fatally injured after being struck by a
3 pickup truck and the “zone of danger” requirement of the *Keck* test was not disputed. *State Farm*
4 *Mut. Auto. Ins. Co. v. Connolly*, 212 Ariz. 417, 418, 132 P.3d 1197, 1198 (Ariz.App. 2006).

5 Because Rebecca Beasley’s witnessing of her husband’s shooting is in line with *Keck* and
6 *State Farm*, she was in the zone of danger such that she was subject to the unreasonable risk of
7 bodily harm created by John Stuart. Additionally, the nature of Stuart’s actions – wielding a gun in
8 public, shooting an unarmed man while he retreats with his arms in the air, and lunging his vehicle
9 to threaten people – are the type of actions that naturally create an unreasonable risk of bodily
10 harm. Thus, Defendant’s actions created an unreasonable risk of bodily harm to Plaintiff, Mrs.
11 Beasley as she was a part of the altercation which incited John Stuart to violence and could
12 reasonably have been targeted for such an unprovoked attack. Mrs. Beasley was in the zone of
13 danger such that she would be subject to an unreasonable risk of bodily harm created by the
14 Defendant because she experienced fear for her own safety in the presence of a man with a
15 handgun. The shooting of her husband caused her to fear that she could also be shot by Defendant,
16 a man who shoots and kills without provocation.

17 Additionally, Mrs. Beasley was in the zone of danger and was subjected to an unreasonable
18 risk of bodily harm created by Defendant. In his deposition and his Answer to Mrs. Beasley’s
19 complaint, Stuart does not dispute Mrs. Beasley’s presence in the zone of danger. Exhibit. 7. John
20 C. Stuart Dep. at 20-21, Exhibit. 6. at ¶ 33-37. Defendant also failed to deny in his deposition that
21 he intended subject Mrs. Beasley to any risk of harm or that Mrs. Beasley suffered harm from his
22 actions. *Id.* at 21. Therefore, there is no genuine issue of material fact regarding whether Rebecca
23 Beasley was in the zone of danger at the time John Stuart caused her emotional distress and no
24 disputed issue as to whether Defendant subjected Mrs. Beasley to unreasonable risk of bodily harm
25 which he created.

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IV. Conclusion

Plaintiff's negligent infliction of emotional distress claim should be granted summary judgment. There is no genuine issue of material fact for the court to adjudicate. And, because Mrs. Beasley meets all the criteria for each of the elements required by Arizona law in her claim for negligent infliction of emotional distress, Plaintiff, Rebecca Beasley respectfully requests that this Court grant this motion for summary judgment.

RESPECTFULLY SUBMITTED this 8th day of October, 2010

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ORIGINAL of the foregoing electronically filed this 8th day of October, 2010 with:

Clerk of Court
Maricopa Superior Court
Northeast Regional Center
18380 N. 40th Street
Phoenix, AZ 85032

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The Honorable Linda Miles
Maricopa Superior Court
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Exhibit 2

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

REBECCA BEASLEY, individually as the
surviving spouse of ORVILLE THOMAS)
BEASLEY III, and as personal representative)
of the ESTATE OF ORVILLE THOMAS)
BEASLEY III; and ORVILLE THOMAS)
II and ANNA ELIZABETH BEASLEY,
husband and wife, and parents of ORVILLE)
THOMAS BEASLEY III.,)

Plaintiffs,)

v.)

JOHN C. STUART and JANE DOE)
STUART, a married couple; JOHN and)
JANE DOES I-V; BLACK & WHITE)
CORPORATIONS VI-X; and ABC)
PARTNERSHIPS XI-XV;)

Defendants.)

CASE NO. CV2010-050624

**PLAINTIFF'S SEPARATE
STATEMENT OF FACTS IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: DEFENDANT'S NEGLIGENT
INFLECTION OF EMOTIONAL
DISTRESS**

(Assigned to the Honorable Linda Miles)

(Oral Argument Requested)

Plaintiff Rebecca Beasley, by and through undersigned counsel, hereby file this separate
Statement of Facts in support of her Motion for Partial Summary Judgment Regarding Plaintiffs'
Claim for Negligent Inflection of Emotional Distress pursuant to Arizona Rules of Civil Procedure
Rule 56(c)(2):

1. On the evening of January 29, 2008, Thomas Beasley, driver, and Rebecca Beasley,
passenger, traveled westbound on Pinnacle Peak Road, Scottsdale, Arizona. (Exhibit 1, Affidavit

1 of Rebecca Beasley, dated October 6, 2010; Exhibit 2, Report of Officer Paul Dalton at 1-8, dated
2 January 29, 2008).

3 2. At the same time on that day, John Stuart, speeding and passing several cars, passed and
4 cut off the Beasley's vehicle. (Exhibit 1; Exhibit 2 at 8-9).

5 3. The cars then came to a stop at a red light at the intersection of Tatum Road and
6 Pinnacle Peak Road. (Exhibit 2 at 8-9).

7 4. Thomas Beasley stopped at the left-hand turning lane, preparing to head south on
8 Tatum, and John Stuart stopped his vehicle at the right side of the Beasley's car. (*Id.*).

9 5. Stuart then began shouting insults out his window at the Beasleys. He made vulgar
10 comments and hand gestures at Thom and Rebecca Beasley. (*Id.* at 8).

11 6. Stuart then turned his vehicle into the intersection in front of the Beasley's car,
12 preventing them from exiting the turning lane or moving in any direction to get away from Stuart's
13 vehicle. (*Id.*).

14 7. At this time, Thomas Beasley got out of the car and started toward Stuart's vehicle. (*Id.*
15 at 8-11.).

16 8. Stuart maneuvered his vehicle back and forth three times toward Thomas Beasley as if
17 threatening to strike. (Exhibit 1; Exhibit 3 Report of Officer Raymond Roe's interview of witness
18 Stacey Strachan at 1, dated January 30, 2008.)

19 9. Mr. Beasley continued walking toward Stuart's vehicle when Stuart reached for his
20 handgun. (*Id.*).

21 10. Upon seeing the weapon Thomas Beasley slowly walked backwards with his hands in
22 the air in an attempt to return to his vehicle and his wife. (Exhibit 1; Exhibit 4. Report of Officer
23 Raymond Roe's interview of witness Bailey Polcher at 1, dated January 30, 2008.)

24 11. John Stuart then fired a fatal shot at the un-armed Thomas Beasley. (Exhibit 1; Exhibit
25 2 at 11.)

26 12. Stuart raced away, leaving Rebecca Beasley with her dying husband. (Exhibit 1;
Exhibit 3 at 1.)

1 13. At the time of the incident, Rebecca Beasley experienced many emotions including fear,
2 extreme shock, pain, grief, emotional agitation, and anger. (Exhibit 1).

3 14. Since the shooting, she has experienced the same emotions as well as prolonged grief,
4 loss of sleep, and other disturbances. (*Id.*).

5 RESPECTFULLY SUBMITTED this 8th day of October, 2010

6 **DOYLE LAW GROUP**

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8 John C. Doyle, Esq.

9 Jonathan L. Sullivan, Esq.

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19 Phoenix, AZ 85032

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5 *Attorney for Defendant*

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7 By: /s/ Jennelle DeAtley

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Jennelle DeAtley

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837712. Title: Plaintiffs Separate Statement of Facts in Support of Plaintiffs Motion for Partial Summary Judgment Re Defendants Negligent Infliction of Emotional Distress / Type: Statement Of Facts

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Document(s) Filed:

1. Title: Plaintiffs Separate Statement of Facts in Support of Plaintiffs Motion for Partial Summary Judgment Re Defendants Negligent Infliction of Emotional Distress / Type: Statement Of Facts

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6 SUPERIOR COURT OF ARIZONA
7 COUNTY OF MARICOPA

8 REBECCA BEASLEY, individually as the
9 surviving spouse of ORVILLE THOMAS
10 BEASLEY, III, and as personal
11 representative of the ESTATE OF ORVILLE
12 THOMAS BEASLEY, III; and ORVILLE
13 THOMAS, II and ANNA ELIZABETH
14 BEASLEY, husband and wife and parents of
15 ORVILLE THOMAS BEASLEY, III,

16 Plaintiffs,

17 vs.

18 JOHN C. STUART and JANE DOE
19 STUART, a married couple; JOHN and
20 JANE DOES I-V; BLACK & WHITE
21 CORPORATIONS VI-X; and ABC
22 PARTNERSHIPS XI-XV,

23 Defendants.

No. CV2010-050624

**DEFENDANT STUART'S
RESPONSE TO PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT RE
NEGLIGENT INFLICTION OF
EMOTIONAL DISTRESS**

(Oral Argument Requested)

(Assigned to the Honorable Linda
Miles)

19 Plaintiffs' Motion for Partial Summary Judgment should be denied for three
20 separate reasons, each sufficient on their own to support a denial of Plaintiffs' dispositive
21 motion. First, Plaintiffs' negligent infliction of emotional distress claim is barred by
22 A.R.S. § 12-711 as there is evidence Mr. Beasley was intoxicated at the time of his death
23 and that his intoxication was a cause of his death. Second, Plaintiff's negligent infliction
24 of emotional distress claim is barred because there is evidence that Mr. Beasley's
25 dangerous behavior on the night of the incident was willful and wanton and that such
26 behavior was a cause of his death. Third, because there is evidence of Mr. Beasley's

1 comparative fault, it fundamental error to grant summary judgment on Plaintiffs'
2 negligence claim. Stuart's Response is more fully supported by the following Memoranda
3 of Points and Authorities.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 On the evening of January 29, 2008, Thomas Beasley and Rebecca Beasley were
7 traveling westbound on Pinnacle Peak Road, Scottsdale Arizona. At the same date and
8 time, Mr. Stuart was driving an FJ Cruiser traveling westbound on Pinnacle Peak Road.
9 See Defendant Stuart's Separate Statement of Facts ("SSOF"), ¶¶ 1-2.

10 The westbound traffic on Pinnacle Peak Road stopped at a red traffic light at the
11 intersection of Tatum Road and Pinnacle Peak. *Id.* At that time, Mr. Beasley began to
12 yell insults at Mr. Stuart, perhaps as a result of Mr. Stuart passing Mr. Beasley's vehicle
13 earlier. SSOF, ¶ 3. Eventually Mr. Beasley exited his vehicle and walked over to the
14 driver's side window where Mr. Stuart was sitting in his stopped vehicle. SSOF, ¶¶ 3-9.
15 Although Mrs. Beasley begged her husband not to approach Mr. Stuart, as he was "very
16 mad," Mr. Beasley left his vehicle and charged Mr. Stuart's vehicle and escalated their
17 angry exchange. SSOF, ¶¶ 4-5.

18 Ms. Cantrell and Mr. Spade, a witness in a vehicle directly behind Mr. Stuart's
19 vehicle, saw Mr. Beasley approach Mr. Stuart, observed an angry exchange, and saw Mr.
20 Beasley reach in through Mr. Stuart's window. SSOF, ¶¶ 11-14. Stacey Strachan, a
21 witness parked on the opposite side of the intersection, observed what appeared to be Mr.
22 Beasley attempting to open Mr. Stuart's driver's side door while the two men fought.
23 SSOF, ¶ 10.

24 During their fight, Mr. Beasley attempted to punch Mr. Stuart, strangle him and
25 pull him out of his car. SSOF, ¶¶ 11-12. Mr. Beasley then threatened to kill Mr. Stuart
26

1 and led Ms. Cantrell to believe that Mr. Beasley would have killed Mr. Stuart if he had not
2 been shot. SSOF, ¶ 13. During the ensuing altercation, Mr. Beasley was killed by a
3 discharged gun. When Mr. Beasley was shot by the gun, he was “within an inch” of Mr.
4 Stuart’s vehicle. SSOF, ¶¶ 15-16.

5 According to the Maricopa County Medical Examiner’s Report, Mr. Beasley’s
6 blood alcohol level was .19% at the time of his death. SSOF, ¶ 17. Mr. Beasley’s wife
7 admitted that he had been drinking alcohol at Greaswood Flats just before he attacked Mr.
8 Stuart. SSOF, ¶ 18. Toxicology expert, Williams Joe Collier, opined to a reasonable
9 degree of toxicological probability that at the time of his death, Mr. Beasley’s body
10 contained 10.64 ounces of 100 proof alcohol and that he was still absorbing alcohol at the
11 time he was shot. SSOF, ¶ 20.

12 It is Mr. Collier’s opinion to a reasonable degree of toxicological probability that
13 Mr. Beasley’s level of intoxication would have caused him to experience impaired
14 judgment causing him to make foolish and risky decisions. SSOF, ¶ 22. It is also Mr.
15 Collier’s opinion, to a reasonable degree of toxicological probability, that Mr. Beasley’s
16 level of intoxication would cause him to experience exaggerated emotional states, easily
17 transforming garden variety anger into uncontrollable rage. SSOF, ¶ 24.

18 **II. ARGUMENT**

19 A Motion for Summary Judgment shall not be granted if there are any facts which
20 “establish a genuine issue of material fact or otherwise preclude summary judgment in
21 favor of the moving party.” Ariz. R. Civ. P. 56(c)(2). Motions for summary judgment
22 must be viewed in the light most favorable to the opponent. *Prince v. City of Apache*
23 *Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

1 A. Pursuant to A.R.S. § 12-711, A Jury May Find Mr. Beasley's Legal
2 Intoxication At The Time He Assaulted Mr. Stuart, Bars Plaintiffs'
3 Claim.

4 A.R.S. § 12-711 states:

5 In any civil action, the finder of fact may find the defendant not
6 liable if the defendant proves that the claimant or, if the claimant is
7 an heir or the estate of a deceased person, the decedent was under
8 the influence of an intoxicating liquor or a drug and as a result of
9 that influence the claimant or decedent was at least fifty per cent
10 responsible for the accident or event that caused the claimant's or
11 decedent's harm.

12 *Id.*

13 When Mr. Beasley left his SUV to attack Mr. Stuart after the men began arguing
14 from their vehicles, he was described by several witnesses as visibly angry. SSOF, ¶¶ 3-
15 10. According to the Maricopa County Medical Examiner's Report, Mr. Beasley had a
16 blood alcohol level more than double the legal limit to drive. According to Mr. Collier, a
17 person as intoxicated as Mr. Beasley was at that moment, would be expected to behave
18 with little inhibition, impaired judgment, and while experiencing exaggerated emotional
19 states. SSOF, ¶¶ 22-24. Ms. Cantrell confirmed that Mr. Beasley was so angry when he
20 approached their vehicle, that she described his anger as "rage" that must have been fueled
21 by either drugs or alcohol because it was so extreme. SSOF, ¶ 19.

22 There is further testimony from a number of witnesses that, enraged by their
23 argument, Mr. Beasley reached in through Mr. Stuart's car window and began assaulting
24 him and threatened to kill him. SSOF, ¶¶ 11-14. Ms. Cantrell will testify Mr. Beasley
25 would have killed Mr. Stuart if something had not stopped him. SSOF, ¶ 13. The
26 investigating homicide detective, Detective Paul Dalton, will further testify that he
 believes Mr. Beasley was at least as much at fault for leaving his vehicle and engaging in a
 fist fight with Mr. Stuart as Mr. Stuart would be if he shot Mr. Beasley. SSOF, ¶¶ 25-26.

1 To further corroborate this conclusion, at least two witnesses testified that when
2 Mr. Beasley was shot, he was still very close to the FJ Cruiser, "within inches of it."
3 SSOF, ¶¶ 15-16.

4 It is undisputed that Mr. Beasley was extremely intoxicated at the time he attacked
5 Mr. Stuart. Ms. Cantrell and an expert toxicologist, Mr. Collier, will corroborate that Mr.
6 Beasley's anger toward Mr. Stuart did and would be expected to escalate to full blown
7 rage under the influence of such a high level of alcohol. SSOF, ¶¶ 19, 22-24. It will also
8 be corroborated by multiple witnesses that it was Mr. Beasley, not Mr. Stuart, who
9 initiated the fight by leaving his SUV, under protest by his wife, and starting a physical
10 fight with Mr. Stuart through the window of Mr. Stuart's car. SSOF, ¶¶ 22-26. There is
11 eye witness testimony Mr. Beasley would have killed Mr. Stuart if he had not been
12 stopped. There is, therefore, enough evidence for a jury to find that Mr. Beasley was at
13 least 50% at fault for his death by shooting. A jury could, therefore, find Plaintiffs' claim
14 for negligent infliction of emotional distress to be barred pursuant to A.R.S. § 12-711.
15 Therefore, summary judgment in favor of Plaintiffs is improper as a fact question exists as
16 to whether Plaintiffs' claim is barred.

17 B. Mr. Beasley's Willful and Wanton Conduct Is A Bar to Recovery of
18 Damages.

19 A plaintiff whose conduct is in reckless disregard of his or her own safety is barred
20 from recovery against a defendant whose reckless disregard of the plaintiff's safety is a
21 legal cause of the plaintiff's harm. Conduct is wanton if an individual intentionally does or
22 fails to do an act, knowing or having reason to know of facts which would lead a
23 reasonable man to realize that his conduct not only created an unreasonable risk of harm to
24 another but involved a high degree of probability that such harm would result.

25 Mr. Beasley became intoxicated well above the legal limit to drive and got behind
26 the wheel of his vehicle. He engaged in a verbal shouting match with Mr. Stuart from

1 their respective vehicles. Under verbal and physical protest from his wife, he left his car
2 and approach Mr. Stuart's car and began to assault Mr. Stuart. Mr. Beasley had reason to
3 know his aggressive and violent behavior not only created an unreasonable risk of harm
4 but involved a high degree of probability that such harm would result. *Williams v. Thude*,
5 180 Ariz. 531, 885 P.2d 1096 (App.1994), *approved and explained in Williams v. Thude*
6 (*Williams II*), 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997). A jury is allowed to weigh
7 this evidence to determine whether Mr. Beasley's willful and wanton conduct bars any
8 claim brought on his behalf for negligent infliction of emotional distress. Summary
9 judgment is inappropriate for that reason.

10 **C. Mr. Beasley's Comparative Fault Must Be Decided By A Jury.**

11 Negligence cases, even where the facts are uncontroverted, have been found
12 inappropriate for summary judgment. *Mast v. Standard Oil Co. of California*, 140 Ariz. 1,
13 5, 680 P.2d 137, 141 (1984); *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, 953 P.2d 168,
14 170 (1998). Certainly, "Summary judgment should not be granted when there is an issue
15 of fact, nor where there is the *slightest doubt* as to the facts." *Lujan v. MacMurtie*, 94
16 Ariz. 273, 277, 383 P.2d 187, 189 (1963) (emphasis added). Even where the material facts
17 are "uncertain," as Plaintiffs will no doubt argue, summary judgment should be denied.
18 *Boozar v. Arizona Country Club*, 102 Ariz. 544, 548, 434 P.2d 630, 634 (1968).

19 In fact, the Arizona Constitution requires that where there is evidence of
20 comparative fault, as there is in this case, the cause of action must be decided by a jury.
21 Article XVIII, § 5 of the Arizona Constitutional requires that the defense of comparative
22 negligence be left to the jury. *Id.*; A.R.S. § 12-2505(A); *Gunnell v. Arizona Public*
23 *Service, Co.*, 202 Ariz. 388, 394, 46 P.3d 399, 405 (2002); *See Williams v. Thude*, 180
24 Ariz. 531, 885 P.2d 1096 (App.1994), *approved and explained in Williams v. Thude*
25 (*Williams II*), 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997). The "jury is the sole
26

1 arbiter of fact and law as to the defenses of contributory and comparative negligence.”
2 *Gunnell*, 202 Ariz. at 394, 46 P.2d at 405; *Williams II*, 188 Ariz. at 260, 934 P.2d at 1352.
3 It is “not only error but has been held to be fundamental error” to grant summary judgment
4 when there is evidence of a comparative fault defense. *Gunnell*, 202 Ariz. at 394, 46 P.2d
5 at 405.

6 There is ample evidence of Mr. Beasley’s comparative fault in this matter. To
7 recover on an action for negligent infliction of emotional distress, Plaintiffs must prove
8 Mr. Stuart was negligent and that his negligence caused Mrs. Beasley’s claimed emotional
9 distress. That Mr. Beasley was legally intoxicated, chose to attack Mr. Stuart through the
10 driver’s side window of Mr. Stuart’s own car, threatened to kill Mr. Stuart, and tried to
11 strangle him are all material facts that support a conclusion that Mr. Beasley, not Mr.
12 Stuart, was at fault for his death. Even if Plaintiffs dispute these facts, they are still fact
13 questions for a jury to decide. Summary judgment is improper when there are material
14 facts at issue. *Id.*

15 **III. CONCLUSION**

16 This Court may not grant summary judgment in favor of Plaintiffs for three reasons.
17 First, there is evidence sufficient for a jury to find that Plaintiffs’ claim is barred by A.R.S.
18 § 12-711. Second, there is evidence sufficient to find that Plaintiffs’ claim is barred by
19 Mr. Beasley’s willful and wanton conduct. Third, it is fundamental error to grant
20 summary judgment where there is evidence of a fact question. For all these reasons, the
21 court must deny Plaintiffs’ claim for negligent infliction of emotional distress.

22 DATED this 23rd day of December, 2010.

23 ALLEN & LEWIS, PLC

24 By /s/Shannon M. O’Connell

25 Robert K. Lewis

Shannon O’Connell

26 Attorneys for Defendants

ALLEN & LEWIS, PLC

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2010, I electronically filed the foregoing document with the Court and mailed a copy this same date to the following:

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Jonathan L. Sullivan
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Attorneys for Plaintiffs

By /s/ Jamie Tanner

Exhibit 4

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10 Attorneys for Defendants

6 SUPERIOR COURT OF ARIZONA
7 COUNTY OF MARICOPA

8 REBECCA BEASLEY, individually as the
9 surviving spouse of ORVILLE THOMAS
10 BEASLEY, III, and as personal
11 representative of the ESTATE OF ORVILLE
12 THOMAS BEASLEY, III; and ORVILLE
13 THOMAS, II and ANNA ELIZABETH
14 BEASLEY, husband and wife and parents of
15 ORVILLE THOMAS BEASLEY, III,

16 Plaintiffs,

17 vs.

18 JOHN C. STUART and JANE DOE
19 STUART, a married couple; JOHN and
20 JANE DOES I-V; BLACK & WHITE
21 CORPORATIONS VI-X; and ABC
22 PARTNERSHIPS XI-XV,

23 Defendants.

No. CV2010-050624

**DEFENDANT STUART'S
SEPARATE STATEMENT OF
FACTS**

(Assigned to the Honorable Linda
Miles)

19 Defendant John Stuart ("Mr. Stuart") respectfully submits his Separate Statement of
20 Facts in opposition to Plaintiffs' Separate Statement of Facts:

21 1. On January 29, 2008 Mr. Stuart was driving an FJ Cruiser westbound on
22 Pinnacle Peak Road toward Tatum Road in Scottsdale. Cynthia Cantrell was a passenger
23 in the vehicle. See Affidavit of Cynthia Cantrell, dated December 7, 2010 attached as

24 **Exhibit 1, ¶¶ 1-2.**

25 2. When Mr. Stuart stopped the FJ Cruiser at the red traffic light at Tatum
26 Road, a white SUV was in the left hand turn lane. The driver of the white SUV, identified

1 as Orville Thomas Beasley, III ("Mr. Beasley"), began to yell from his car at Mr. Stuart.
2 Exhibit 1, ¶ 3.

3 3. After Mr. Stuart and Mr. Beasley exchanged angry words from their
4 respective vehicles, Ms. Cantrell observed Mr. Beasley exit his vehicle and charge the FJ
5 Cruiser in a rage. Exhibit 1, ¶¶ 3-5.

6 4. Mrs. Beasley, Mr. Beasley's wife and a passenger in their white SUV, will
7 confirm that Mr. Beasley became "upset and opened his door" to get out of their SUV.
8 Mrs. Beasley told the Police she "grabbed Tom [her husband] and told him 'No! No! No!.'
9 He told her to let go of him" and he left their SUV to confront Mr. Stuart in the FJ Cruiser.
10 Phoenix Police Department Report #2008-80169255, dated 1/30/2008, pp. 8-9, attached as
11 **Exhibit 2**; [Defendant will supplement this citation with relevant portions of Rebecca
12 Beasley's deposition transcript when it has been transcribed].

13 5. Mrs. Beasley further told Police she had to try to restrain her husband from
14 leaving their SUV to go after Mr. Stuart, describing her husband as "mad, really mad."
15 Exhibit 2.

16 6. Mr. Beasley was demonstrably angry as he walked in front of the SUV
17 toward the Mr. Stuart's car window. Exhibit 1, ¶¶ 5.

18 7. Joshua Spade, the driver of a vehicle stopped directly behind Mr. Stuart's FJ
19 Cruiser at the intersection of Pinnacle Peak and Tatum Road also observed the fight
20 between Mr. Beasley and Mr. Stuart. Deposition of Joshua Spade, p. 12, l. 1-3, attached as
21 **Exhibit 3**.

22 8. Mr. Spade confirmed Mr. Beasley exited his SUV and approached Mr.
23 Stuart's vehicle at the driver's side window and that Mr. Beasley was walking more
24 aggressively than normal and appeared to be angry and agitated as he approached Mr.
25 Stuart's FJ Cruiser. Exhibit 3, p.16, ll. 5-14, p. 17, ll. 9-15.
26

1 9. Stacey Strachan was also a witness to Mr. Beasley and Mr. Stuart's
2 altercation. Ms. Strachan was sitting in the driver's side of her vehicle at the intersection
3 of Pinnacle Peak and Tatum Road traveling eastbound when she observed Mr. Beasley, on
4 the other side of the intersection, exit his white SUV to approach the driver's side of the FJ
5 Cruiser. Deposition of Stacey Strachan, p. 10, ll. 3-24., p. 13, ll. 7-25; attached as Exhibit
6 4.

7 10. Ms. Strachan observed Mr. Beasley and Mr. Stuart engage in a verbal
8 argument and then observed Mr. Beasley reach for what appeared to her to be the handle
9 of the driver's side door of the FJ Cruiser to try to open it. Exhibit 4, p. 21, ll. 2-14.

10 11. After Mr. Beasley confronted Mr. Stuart at his car door window, Ms.
11 Cantrell observed Mr. Beasley attempt to punch Mr. Stuart several times through the
12 driver's side window while Mr. Stuart blocked the punches. Exhibit 1, ¶ 7.

13 12. Ms. Cantrell observed Mr. Beasley attempting to break Mr. Stuart's arm,
14 strangle Mr. Stuart, and pull him out of the FJ Cruiser. Mr. Stuart tried to pull Mr.
15 Beasley's hands off of his throat. Exhibit 1, ¶¶ 8-10.

16 13. Ms. Cantrell heard Mr. Beasley threaten to kill Mr. Stuart and Cynthia
17 Cantrell. Ms. Cantrell believed that Mr. Beasley would have killed Mr. Stuart if he were
18 not stopped. Exhibit 1, ¶¶ 11-12.

19 14. Mr. Spade confirmed that Mr. Beasley reached into Mr. Stuart's FJ Cruiser
20 through the driver's side window and appeared very angry while doing so. It appeared to
21 Mr. Spade that Mr. Stuart tried to open his driver's side door to get out of the vehicle,
22 presumably away from Mr. Beasley, but was unable to do so. It was at this point that Mr.
23 Spade observed Mr. Beasley was shot. Exhibit 3, p. 18, ll. 21-25; p. 19, ll. 2-8; p. 23, l. 2-
24 11.

25 15. Ms. Cantrell also observed a firearm in Mr. Stuart's FJ Cruiser discharge and
26

1 saw Mr. Beasley shot while he was within an inch of the FJ Cruiser. Exhibit 1, ¶ 13.

2 16. Ms. Strachan will also confirm that when she observed what looked like
3 sparks and sounded like the pop of a gun, Mr. Beasley was standing "close" to the FJ
4 Cruiser. Exhibit 4, p. 29, ll. 5-13.

5 17. According to the Maricopa County Examiner's Autopsy Report Case # 08-
6 00640, 1/31/2008, prepared by Robert E. Lyon, D.O., Mr. Beasley had a blood alcohol
7 concentration of .19% at the time of his death. Maricopa County Medical Examiner's
8 Report, Case # 08-00640, 1/31/2008, prepared by Robert E. Lyon, D.O., attached as
9 Exhibit 5.

10 18. Mrs. Rebecca Beasley, Mr. Beasley's wife, admits that Mr. Beasley had
11 consumed alcohol at Greasewood Flats, the bar from which they were on their way home.
12 Exhibit 2; [Defendant will supplement with relevant portions of Rebecca Beasley's
13 deposition transcript].

14 19. Ms. Cantrell will confirm that Mr. Beasley's rage appeared to be fueled by
15 either intoxication or drugs. Exhibit 1, ¶ 5.

16 20. Toxicologist, William Joe Collier, holds the opinion to a reasonable degree
17 of toxicological probability that Mr. Beasley had 10.64 oz of 100 hundred proof alcohol in
18 his body at the time of death. See Affidavit of William Joe Collier, 12/21/2010, attached
19 as Exhibit 6, ¶¶ 5-7.

20 21. It is Mr. Collier's opinion to a reasonable degree of toxicological probability
21 that Mr. Beasley consumed anywhere from 12.65 to 15.68 oz of 100 hundred proof
22 alcohol, depending upon the time he began drinking, to achieve a blood alcohol
23 concentration of .19%. Exhibit 6, ¶ 9a-e.

24 22. It is Mr. Collier's opinion to a reasonable degree of toxicological probability
25 that Mr. Beasley's level of intoxication would have caused him to experience impaired
26

1 judgment, resulting in foolish and risky decision-making. Exhibit 6, ¶ 10.a.

2 23. It is Mr. Collier's opinion to a reasonable degree of toxicological probability
3 that Mr. Beasley's normal inhibitions would be severely reduced or eliminated as a result
4 of his intoxication. Exhibit 6, ¶ 10.b.

5 24. It is Mr. Collier's opinion to a reasonable degree of toxicological probability
6 that Mr. Beasley's level of intoxication would have caused him to experience exaggerated
7 emotional states. For example, if Mr. Beasley was angry, his anger would quickly turn to
8 rage under the influence of all the alcohol he consumed. Exhibit 6, ¶ 10.c.

9 25. Homicide Detective Paul Dalton investigated Mr. Beasley's death and
10 concluded that Mr. Beasley was partially at fault for his death. Deposition of Detective
11 Paul Dalton, p. 133, 18-25; p. 134-135, l. 4, attached as Exhibit 7.

12 26. With respect to fault, Detective Dalton testified: "So it's kind of--you know?
13 Is it his fault? Yeah. He came out of the car and he's now dead. Is it Stuart's fault? Yes,
14 he shot an unarmed man. So where do we go from here?" Exhibit 7, p. 134, ll.23 - p.
15 135, ll 1-4.

16 DATED this 23rd day of December, 2010.

17 ALLEN & LEWIS, PLC

18
19 By /s/ Shannon O'Connell
20 Robert K. Lewis
21 Shannon O'Connell
22 Attorneys for Defendants
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ALLEN & LEWIS, PLC

CERTIFICATE OF SERVICE

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I hereby certify that on December 23, 2010, I electronically filed the foregoing document with the Court and mailed a copy this same date to the following:

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By /s/ Jamie Tanner

Exhibit 5

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8 *Attorneys for Plaintiff*

9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
10 IN AND FOR THE COUNTY OF MARICOPA

11 REBECCA BEASLEY, individually as the
12 surviving spouse of ORVILLE THOMAS)
13 BEASLEY III, and as personal representative)
14 of the ESTATE OF ORVILLE THOMAS)
15 BEASLEY III; and ORVILLE THOMAS)
16 II and ANNA ELIZABETH BEASLEY,)
17 husband and wife, and parents of ORVILLE)
18 THOMAS BEASLEY III.)

19 Plaintiffs,)

20 v.)

21 JOHN C. STUART and JANE DOE)
22 STUART, a married couple; JOHN and)
23 JANE DOES I-V; BLACK & WHITE)
24 CORPORATIONS VI-X; and ABC)
25 PARTNERSHIPS XI-XV;)

26 Defendants.)

CASE NO. CV2010-050624

PLAINTIFF'S REPLY IN SUPPORT OF
HER MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE: DEFENDANT'S NEGLIGENT
INFLICTION OF EMOTIONAL
DISTRESS

(Tort: Non-Motor Vehicle)

(Assigned to the Honorable Linda Miles)

19 Plaintiff Rebecca Beasley, by and through undersigned counsel, files this Reply in Support
20 of Her Motion for Partial Summary Judgment. Plaintiff is still entitled to summary judgment as
21 Defendant's Response fails to present evidence of a genuine issue of material fact. Defendant's
22 Response doesn't dispute the facts supporting Plaintiff's claim. Defendant's Response only argues
23 that Thomas Beasley contributed to his own death. This interaction ignores that Defendant's use of
24 a concealed weapon to kill Mr. Beasley when he was retreating and unarmed is a superseding event
25 that removes any question of contributory fault. As a result, summary adjudication in favor of
26 Plaintiff is warranted.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. Standard For Responding To A Motion For Summary Judgment.**

3 The *Orme School* case is instructive as to when evidence presented in opposition to a motion
4 for summary judgment is insufficient. According to *Orme School*, a motion for summary judgment
5 should granted if the facts produced in support of the claim or defense have so little probative
6 value, given the quantum of evidence required, that reasonable people could not agree with the
7 conclusion advanced by the proponent of the claim or defense. *Orme School v. Reeves*, 166 Ariz.
8 301, 309, 802 P.2d 1000, 1008 (1990). Evidence that provides a “scintilla” or creates the “slightest
9 doubt” can still be insufficient to withstand a motion for summary judgment. *Id.*

10 When the moving party presents sworn proof of specific facts negating the adverse party's
11 pleadings, the adverse party must respond with proof of specific facts showing a genuine issue of
12 fact for trial. *Portonova v. Wilkinson*, 128 Ariz. 501, 502, 627 P.2d 232, 233 (1981). The opposing
13 party must show that evidence is available which justifies going to trial, the evidence must based
14 on personal knowledge and must be admissible at trial. *Id.* Affidavits based on otherwise
15 inadmissible hearsay are insufficient to counter sworn statements based on personal knowledge. *Id.*

16 **II. Relevant Background Facts**

17 Defendant has not refuted Plaintiff's Statement of Facts that state: upon seeing the gun, Mr.
18 Beasley raised his hands in the air and began to walk backwards slowly, while attempting to return
19 to his car and his wife (Plaintiff's SOF 10); that Defendant fired a fatal shot at the un-armed
20 Thomas Beasley and raced away, leaving Rebecca Beasley with her dying husband (Plaintiff's
21 SOF 11, 12); that at the time of the incident, Rebecca Beasley experienced many emotions
22 including fear, extreme shock, pain, grief, emotional agitation, and anger (Plaintiff's SOF 13); and,
23 that since the shooting, she has experienced the same emotions as well as prolonged grief, loss of
24 sleep, and other disturbances. (Plaintiff's SOF 14).

25 Additional facts that have been discovered since Plaintiff's Motion, including: that Mr.
26 Beasley was a minimum of one foot, four inches from Mr. Stuart's car door when he was shot
(SOF 41), and that when Defendant was taken into police custody after the shooting Defendant did

1 not display any evidence of being physical contacted by Mr. Beasley. (SOF 42).

2 **II. Interactions In Support of Motion For Summary Judgment.**

3 **A. Defendant Has Not Disputed The Basic Elements of Plaintiff's Claim For Negligent**
4 **Infliction of Emotional Harm.**

5 Defendant's Response did not dispute Plaintiff's Statement of Facts or provide conflicting
6 evidence to Plaintiff's Statement of Facts as required by Ariz.R.Civ.Pro. Rule 56(c)(2). Due to the fact
7 that Defendant did not, and likely can not, refute Plaintiff's Statement of Fact Defendant they should
8 be deemed admitted. Plaintiff requests that the Court enter Plaintiff's Statement of Facts as admitted to
9 the record. Defendant's failure to directly rebut Plaintiff's Motion warrants summary adjudication.

10 **B. Defendant's Use Of A Concealed Weapon To Kill Mr. Beasley Is A Superseding Event**
11 **That Removes Any Question of Mr. Beasley's Alleged Contributory Fault.**

12 Defendant argues that summary judgment is inappropriate by alleging that Mr. Beasley
13 contributed to his own death. However, this interactions is unsupported given the facts of this case.
14 Defendant's use of a concealed weapon to kill Mr. Beasley while he was retreating represents a
15 superseding event, or intervening cause, that removes any question of contributory negligence.

16 In Arizona, if "an injury is produced by an intervening and superseding cause, even though the
17 original negligence may have been a substantial factor in bringing about the injury, the original
18 actor is not legally responsible therefor" because the necessary proximate causation is lacking.
19 *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 438-39, 153 P.3d 1064, 1067-68 (Ariz. Ct. App.
20 2007).

21 "An 'efficient intervening cause' is an independent cause that occurs between the original act
22 or omission and the final harm and is necessary in bringing about that harm." *Barrett v. Harris*, 207
23 Ariz. 374, 378, ¶ 11, 86 P.3d 954, 958 (App.2004). The Arizona Supreme Court explained in
24 *Ontiveros*, that an intervening cause breaks the chain of proximate causation only if it is a
25 superseding cause:
26

1 The policy of the law on questions of intervening and superseding cause has
2 evolved to the rule that the original actor is relieved from liability for the final
3 result when, and only when, an intervening act of another was unforeseeable by a
4 reasonable person in the position of the original actor and when, looking
5 backward, after the event, the intervening act appears extraordinary. *Ontiveros v.*
6 *Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (Ariz. 1983).

7 The "definition of a reasonably foreseeable event is an event that might 'reasonably be
8 expected to occur now and then, and would be recognized as not highly unlikely if it did suggest
9 itself to the actor's mind.'" *Tellez v. Saban*, 188 Ariz. 165, 172, 933 P.2d 1233, 1240 (App. 1996).

10 Causation is generally a question of fact for the jury unless reasonable persons could not conclude
11 that a plaintiff had proved this element. *Petolicchio v. Santa Cruz County Fair & Rodeo Ass'n, Inc.*,
12 177 Ariz. 256, 262, 866 P.2d 1342, 1348 (1994).

13 Here, Defendant has the burden of establishing material fact that Mr. Beasley contributed to his
14 own death. In this case such an allegation ignores that Defendant used a concealed firearm, which was
15 solely in Defendant's control, to kill Mr. Beasley, who was unarmed and retreating at the time he was
16 shot. Defendant's inexplicable use of a concealed weapon to kill an unarmed retreating man represents
17 a superseding event that removes any allegation of contributory negligence. Mr. Beasley's conduct
18 could not have been willful and wanton when Defendant inexplicably used deadly force during a non-
19 physical verbal interaction. As further discussed below, given the facts of this case no reasonable juror
20 could believe Defendant's story.

21 Defendant's use of a concealed weapon is a superseding event based on the fact that the use
22 of the concealed weapon was an independent event that occurred after Mr. Beasley's non-physical
23 verbal interaction with Defendant and after Mr. Beasley's decision to retreat from Defendant. At
24 the time of his death Mr. Beasley was a minimum of one foot, four inches from Mr. Stuart's car.
25 (SOF 41). Thus, there is clear evidence that Mr. Beasley had ended his interaction with Defendant
26 and was walking away from Defendant at the time that he was shot. Additionally, Defendant's use

1 of the concealed firearm was not foreseeable. Mr. Beasley had no prior warning; that Defendant
2 possessed a concealed weapon; that the verbal interaction between he and Defendant was likely to
3 involve deadly force; that Defendant would fire his concealed weapon without warning; or that
4 Defendant would shoot an unarmed retreating man that had not caused Defendant any physical
5 harm. As a result, there are no facts leading up to Defendant's use of the concealed weapon that
6 would have alerted Mr. Beasley that he was contributing to his own death. It was unforeseeable
7 that Defendant would kill Mr. Beasley. A reasonable juror would find it extraordinary that
8 Defendant chose to kill an unarmed retreating man that had not caused Defendant any physical
9 harm. Defendant's use of a concealed weapon to kill Mr. Beasley was a superseding event and
10 eliminates any question of contributory negligence. As a result, Defendant has not met his burden
11 of properly establishing causation for a claim of contributory negligence and therefore Plaintiff's
12 Motion for Partial Summary Judgment is Proper.
13

14
15 **C. Defendant Has Not Presented Any Evidence That He Was Physically Harmed By Mr.
16 Beasley To Justify An Allegation Of Contributory Negligence.**

17 In the event the Court does not consider Defendant's use of a concealed weapon a
18 superseding event, Defendant has still failed to provide admissible facts to support a claim of
19 contributory negligence. For instance, Defendant's Response implies that Mr. Beasley contributed
20 to his own death by causing physical injury to Defendant. However, Defendant lacks any credible
21 evidence to support such an allegation and still ignores that Defendant shot Mr. Beasley while he
22 was retreating. Further, upon being taken into custody, the investigating police office did not find
23 a single mark on Defendant's body to indicate Mr. Beasley actually touched Defendant. (SOF 42).
24 Thus, there is no evidence that Defendant suffered any physical harm.
25

26 Because Defendant can not produce evidence of harm Defendant instead misquotes witness
testimony in a false attempt to create an issue of fact. For example, Defendant alleges that Mr.

1 Spade witnessed Mr. Beasley assault Mr. Stuart. (Defendant's SOF 7). In fact Mr. Spade testified
2 he never saw Mr. Beasley touch Mr. Stuart. (SOF 43). This misrepresentation of Mr. Spade's
3 testimony is disingenuous.

4 Additionally, Defendant implies Ms. Cantrell's affidavit supports the claim of an injury.
5 Ms. Cantrell was a passenger in Defendant's car at the time of the relevant events. According to
6 Ms. Cantrell she witnessed Mr. Beasley in a rage, strangle Defendant, punch Defendant, and then
7 almost break Defendant's arm. (Defendant's SOF 11 & 12). Ms. Cantrell's allegations are of clear
8 and unmistakable extreme physical violence. However, Defendant was injury free when taken into
9 police custody. (SOF 42). The lack of physical evidence to support Ms. Cantrell's claim of
10 extreme violence does not just undermine Ms. Cantrell's statements, it makes her allegations
11 completely unbelievable. No reasonable juror could believe Ms. Cantrell's testimony. She alleges
12 that Mr. Beasley punched, strangled, and almost broke Defendant's arm, but afterwards Defendant
13 didn't have a scratch on his body. Thus, Defendant has failed to provide material evidence that a
14 reasonable juror would believe Mr. Beasley actually caused Defendant any harm. Defendant had
15 no justification for killing an unarmed retreating man who had never caused Defendant harm. A
16 reasonable juror could not come to the conclusion that Mr. Beasley's non-physical verbal
17 interaction with Defendant, where Defendant was never harmed, should end in Mr. Beasley's
18 death. Defendant's decision to take a non-physical verbal interaction to a deadly end was not
19 foreseeable and an extraordinary result. As a result of the above, Defendant's claim of
20 contributory negligence based on any alleged injury is baseless and does not rebut Plaintiff's
21 Motion.
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25 **D. Defendant Improperly Uses Inadmissible Testimony To Rebut Plaintiff's Motion.**

26 Defendant's Response has incorrectly offered several third-party witness statements that are
inadmissible to support his Motion. The statements are from other drivers, Plaintiff, Ms. Cantrell,

1 a police officer, and a toxicologist. First, several witness statements attempt to comment on Mr.
2 Beasley's emotional state, psychology, and/or state of mind. These comments are irrelevant to
3 determining issues of fact regarding contributory negligence. These statements do not make a
4 material fact of contributory negligence more or less likely. As a result, a comment that Mr.
5 Beasley looked angry, doesn't change the fact Mr. Beasley never injured Defendant or that Mr.
6 Beasley was retreating at the time he was shot. Second, it appears that Defendant is improperly
7 asserting witness statements as statements of fact concerning Mr. Beasley's or Defendant's state
8 of mind. The witnesses lack any factual basis to comment on Mr. Beasley's or Defendant's state
9 of mind. As such, Defendant's use of such witness statements is inadmissible. Third, Defendant
10 uses Ms. Cantrell's statement to advance a baseless theory that Mr. Beasley was on drugs.
11 (Defendant's Response, page 4, lines 16-18). There is no foundation such a comment, there has
12 been no physical evidence that Mr. Beasley was on drugs, this statement has been inserted simply
13 to inflame the Court. Fourth, Defendant attempts to use police officer Dalton's deposition
14 testimony as a conclusion of liability. (Defendant's SOF 25-26). Such a comment is irrelevant to
15 creating an issue of material fact and would be inadmissible at trial. Because the above listed
16 statements would not be admissible at trial they can not be used as a basis for opposing Plaintiff's
17 Motion. *Portonova v. Wilkinson*, 128 Ariz. 501, 502, 627 P.2d 232, 233 (1981). This exclusion of
18 inadmissible evidence is important because it demonstrates that Defendant's claims lack material
19 facts. As a result, Defendant has not carried his burden of producing material evidence to rebut
20 Plaintiff's Motion.
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24 Defendant's primary evidence to falsely create an issue of fact is an affidavit by Ms. Cantrell.
25 First, as mentioned above to the degree it attempts to assert Defendant's testimony or state of
26 mind, it is inadmissible. Second, the testimony is irrelevant as Ms. Cantrell did not face the same
environment as Defendant when he shot and killed Mr. Beasley. For example, Defendant was

1 armed with a concealed weapon when he spoke with Mr. Beasley, this is in contrast to Ms.
2 Cantrell who was unarmed. Therefore, Defendant's state of mind or emotional response wouldn't
3 be the same as Ms. Cantrell's as he possessed a concealed weapon. Additionally, Defendant had
4 the ability to end the conversation with Mr. Beasley, by driving away, rolling up the car window,
5 warning Mr. Beasley of a concealed weapon, or warning Mr. Beasley that if the conversation
6 continued deadly force would be used. Ms. Cantrell did not possess similar control over the
7 situation. The above listed differences demonstrate that Ms. Cantrell's statements are irrelevant to
8 determining Defendant's frame of mind or decision making process. It is improper for Defendant
9 to advance Ms. Cantrell's statements as Defendant's statements. It is Defendant's obligation to
10 demonstrate material issue of fact, and such a burden is not met by attempting to replace
11 Defendant's testimony with Ms. Cantrell's. The Court should ignore the affidavit to the extent to
12 attempts to prove/justify Defendant's conduct or prove Defendant's state of mind.
13
14

15 Additionally, there is further evidence that Defendant is attempting to falsely supplant his own
16 testimony with Ms. Cantrell's. Alan Shearer, a former investigator for the Phoenix police
17 department, witnessed Cantrell make statements to the Phoenix Police Department that her
18 previous testimony to police had been coached by Defendant's instructions and guidance. (SOF
19 44). Mr. Shearer's statement underlines that Defendant is presenting Ms. Cantrell's testimony to
20 replace his own. As mentioned above, even if taken as true, Ms. Cantrell's statements do not
21 replace Defendant's testimony for why he fired a concealed weapon killing Mr. Beasley.
22

23 **E. Defendant's Interaction that A.R.S. §12-711 "Bars" Plaintiff's Motion Is Legally and**
24 **Factually Unsupported.**

25 Defendant's Response incorrectly argues that A.R.S. §12-711 "bars" Plaintiff's Motion and
26 requires this matter proceeding to the jury. Defendant's position is an absolute position that A.R.S.
§12-711 applies no matter the facts of a case; this is absurd. Just because an individual is

1 intoxicated does not mean A.R.S. §12-711 applies. In part, A.R.S. §12-711 states that "...as a
2 result of that influence [intoxication] the claimant or decedent was at least fifty per cent
3 responsible for the accident or event that caused the claimant's or decedent's harm." (2010). The
4 issue in this is case is how Mr. Beasley's intoxication contributed to his cause of injury. Here,
5 Defendant has not provided a factual nexus between Mr. Beasley's intoxication and Defendant
6 causing Mr. Beasley's death. Mr. Beasley entered a non-physical interaction with Defendant. Mr.
7 Beasley had no prior knowledge Defendant possessed a concealed weapon, nor did Defendant
8 inform Mr. Beasley of the threat of deadly violence. As a result of the non-physical interaction
9 Defendant inexplicitly and surprisingly shot Mr. Beasley in the head while he was retreating with
10 his hands in the air. Before Mr. Beasley was shot, even if intoxicated, he voluntarily decided to
11 step away from Defendant with his hands in the air. Mr. Beasley's final actions were to remove
12 himself from a dangerous situation. A reasonable juror could not find Mr. Beasley at fault for
13 retreating from a concealed weapon after a non-physical verbal interaction, much less find Mr.
14 Beasley 50% at fault. There is no factual connection between Mr. Beasley's intoxication and the
15 ultimate cause of his death, thus the application of A.R.S. §12-711 is inappropriate.

18 Additionally, Defendant's justification for the application of A.R.S. §12-711 is improperly
19 supported by an affidavit by Joe Collier, a toxicologist. (Defendant SOF 20-24). Defendant relies
20 on Mr. Collier's affidavit to make inadmissible assumptions regarding Mr. Beasley's behavior.
21 First, Mr. Collier did not personally witness Mr. Beasley's conduct. As a result, to extent Mr.
22 Collier is testifying to events he did not witness the affidavit is inadmissible. Second, the sections
23 of Mr. Collier's affidavit that comment on Mr. Beasley's behavior violates Rule 801(c) as
24 hearsay, and violates Rule 702 regarding expert testimony. Mr. Collier is a toxicologist, his
25 admitted expertise is in "scientific evidence, toxicology, drugs, narcotics, criminalistics and
26 firearm identification". (Defendant SOF Exhibit 6). Mr. Collier has no training, experience, or

1 education to give him the foundation to comment on an intoxicated individual's behavior at a
2 particular blood alcohol level, or what displayed behavior or psychology is certain at a given
3 blood alcohol level. Thus, Mr. Collier's knowledge is appropriately limited to estimating Mr.
4 Beasley's blood alcohol content. Any comment by Mr. Collier remarking on a connection between
5 Mr. Beasley's blood alcohol content to his state of mind, emotional level, psychology, or alleged
6 behavior is outside Mr. Collier's scope of knowledge, and therefore is inadmissible under
7 Ariz.R.Evid. Rule 702. Mr. Collier's testimony only provides evidence that Mr. Beasley's blood
8 alcohol content level, it does nothing to factually connect Mr. Beasley's alleged intoxication with
9 Defendant's use of a concealed weapon to kill Mr. Beasley. Mr. Collier's affidavit does not create
10 a material issue of fact under A.R.S. §12-711, therefore Defendant has still failed to carry his
11 burden and Plaintiff's Motion remains appropriate.
12

13 **IV. Conclusion.**

14 Defendant's Response does not refute the factual or legal basis of Plaintiff's Motion for
15 Partial Summary Judgment. Defendant's Response does not deny he was negligent or reckless in
16 killing Mr. Beasley, instead Defendant argues Mr. Beasley contributed to his own death.
17 However, this position ignores the facts of this case, as Defendant's conduct was a superseding
18 action. Additionally, Defendant's claims are not supported by admissible material evidence. As a
19 result, Plaintiff requests the Court grant Plaintiff's Motion for Partial Summary Judgment.
20

21 Additionally, under Ariz.R.Civ.Pro. Rule 56(d) Plaintiff requests that the Court deem
22 Plaintiff's Statement of Facts be admitted to the record as Defendant has not disputed such facts in
23 his Responsive Motion.
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25 Further, contemporaneously filed with this Motion is a Motion to Partially Strike the
26 Affidavit of Mr. Collier. Plaintiff requests portions of Mr. Collier's testimony that is not
admissible be struck from the record.

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RESPECTFULLY SUBMITTED this 27th day of January, 2011.

DOYLE LAW GROUP

/s/ John C. Doyle, Esq.
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ORIGINAL of the foregoing electronically filed this 27th day of January, 2011 with:

Clerk of Court
Maricopa Superior Court
Northeast Regional Center
18380 N. 40th Street
Phoenix, AZ 85032

COPY of the foregoing distributed by electronic filing this 27th day of January, 2011 to:

The Honorable Linda Miles
Maricopa Superior Court
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Case Number CV2010-050624

Case Summary Beasley, Et.Al. Vs. Stuart / Miles, Linda

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Documents Attached to Filing

Document Title	Document Type
Plaintiff's Reply in Support of Her Motion for Partial Summary Judgment Re: Defendant's Negligent Infliction of Emotional Distress	Reply

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Exhibit 6

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
04/13/2011 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-050624

04/07/2011

HONORABLE LINDA H. MILES

CLERK OF THE COURT
L. Crawford
Deputy

REBECCA BEASLEY, et al.

JOHN C DOYLE

v.

JOHN C STUART

ROBERT K LEWIS

MINUTE ENTRY

Courtroom 106 -- NE

9:01 a.m. This is the time set for Oral Argument regarding Plaintiff's Motion for Partial Summary Judgment Re: Defendant's Negligent Infliction of Emotional Distress. Present on behalf of Plaintiffs Rebecca Beasley, Orville Thomas and Anna Elizabeth Beasley is counsel, John C. Doyle. Defendant John C. Stuart is present and represented by counsel, Robert K. Lewis.

A recording of this proceeding is being made by audio and/or videotape in lieu of a court reporter.

In preparation for oral argument, the Court reviewed the following:

1. Plaintiff's Motion for Partial Summary Judgment Re: Defendant's Negligent Infliction of Emotional Distress, filed October 8, 2010;

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2. Plaintiff's Separate Statement of Facts in Support of Motion for Partial Summary Judgment Re: Defendant's Negligent Infliction of Emotional Distress, filed October 8, 2010;
3. Defendant Stuart's Response to Plaintiffs' Motion for Partial Summary Judgment Re: Negligent Infliction of Emotional Distress, filed December 23, 2010;
4. Defendant Stuart's Separate Statement of Facts, filed December 23, 2010;
5. Plaintiff's Reply in Support of Her Motion for Partial Summary Judgment Re: Defendant's Negligent Infliction of Emotional Distress, filed January 27, 2011;
6. Plaintiff's Separate Statement of Facts in Support of Her Reply in Support of Her Motion for Partial Summary Judgment Re: Defendant's Negligent Infliction of Emotional Distress, filed January 27, 2011;
7. Plaintiff's Motion to Partially Strike Joe Collier's Affidavit, filed January 27, 2011;
8. Defendant's Opposition to Motion to Strike Affidavit of Joe Collier and Motion for Sanctions, filed February 15, 2011;
9. Plaintiff's Reply in Support of Motion to Partially Strike Joe Collier's Affidavit, filed February 22, 2011; and
10. Plaintiff's Notice of Errata of Plaintiff's Motion to Partially Strike Joe Collier's Affidavit, filed January 28, 2011.

Although the Court did not set Plaintiff's Motion to Partially Strike Joe Collier's Affidavit for oral argument today, counsel may argue that Motion if they wish.

Arguments are heard.

IT IS ORDERED taking this matter under advisement.

The Court is advised that discovery is nearly completed. Some expert depositions remain to be taken.

IT IS ORDERED confirming the telephonic Status Conference set on **September 7, 2011 at 8:30 a.m.** (time allotted: 15 minutes). If discovery and private mediation are completed

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early, counsel may jointly contact the Court's Judicial Assistant to request an earlier date for the telephonic status conference.

Counsel confirm that the criminal trial is scheduled to go forward on April 20, 2011.

9:30 a.m. Matter concludes.

LATER:

The Court has re-reviewed the above referenced Motions, Responses and Replies and finds that genuine issues of material fact exist as to the circumstances surrounding the shooting. Accordingly,

IT IS ORDERED denying Plaintiff Rebecca Beasley's Motion for Partial Summary Judgment Re: Defendant's Negligent Infliction of Emotional Distress.

IT IS FURTHER ORDERED denying Plaintiff's Motion to Partially Strike Joe Collier's Affidavit. The Motion is denied for the reason that the Court need not consider at this time whether Mr. Collier's testimony regarding the effect of alcohol on Mr. Beasley is admissible because even without such testimony, there are genuine issues of material fact, which preclude partial summary judgment in Plaintiff's favor on the negligent infliction claim.

IT IS FURTHER ORDERED denying Defendant's Motion for Sanctions.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>.
Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.

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