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

(Tort: Non-Motor Vehicle)

(Assigned to the Honorable Linda Miles)

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

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

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.
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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.
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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.

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