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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20190374
Barnes County District Case No. 02-2018-CV-00087

DUANE SCHROEDER AND LYNAE SCHROEDER, PARENTS OF BROOKE SCHROEDER, AND LYNAE SCHROEDER AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BROOKE SCHROEDER,

Plaintiffs and Appellants,

v.

STATE OF NORTH DAKOTA,

Defendant and Appellee.

APPEAL FROM THE JUDGMENT ENTERED ON OCTOBER 2, 2019
BY THE DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT,
BARNES COUNTY, STATE OF NORTH DAKOTA

THE HONORABLE MARK T. BLUMER, DISTRICT JUDGE

BRIEF OF PLAINTIFFS/APPELLANTS

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STATEMENT OF THE CASE

[¶1] Plaintiffs, Duane Schroeder and Lynae Schroeder, parents of Brooke Schroeder, and Lynae Schroeder as Personal Representative of the Estate of Brooke Schroeder, initiated this action against the Defendant, the State of North Dakota, alleging that the State's negligence and gross negligence lead to Brooke Schroeder's death. In particular, they allege that the State plowed snow against the north guardrail of eastbound I-94 effectively negating all protection provided by the guardrail and then failed to remove the snow bank. The State moved for summary judgment arguing that it was immune from liability under various immunities contained in N.D.C.C. § 32-12.2-02. Plaintiffs' opposed that motion.

[¶2] In an order dated October 2, 2019, the District Court concluded that public duty immunity and snow and ice immunity, contained in N.D.C.C. § 32-12.2-02, protected the State from any liability in this matter. App. p. 68. Notice of Entry of Judgment was filed on October 3, 2019. App. p. 69. By Notice of Appeal, dated December 2, 2019, Plaintiffs' appealed the District Court's decision arguing that no immunity applies and that the trial court erred in its order granting summary judgment. App. p. 70.

STANDARD OF REVIEW

[¶3] This Court has long recognized the well-established standard of review of a District Court's decision to grant summary judgment.

> [Summary judgment] is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of

> law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Great W. Cas. Co. v. Butler Mach. Co., 2019 ND 200, ¶ 7, 931 N.W.2d 504, citing Krenz v. XTO Energy, Inc., 2017 ND 19, ¶ 17, 890 N.W.2d 222. The District Court, below, interpreted the immunity statute contained in N.D.C.C. § 32-12.2-02. According to this Court, the interpretation of a statute is a question of law, fully reviewable on appeal. Schmidt v. Gateway Cmty. Fellowship, 2010 ND 69, ¶ 14, 781 N.W.2d 200.

STATEMENT OF THE FACTS

[¶4] On January 8, 2017, Brooke Schroeder was traveling east on I-94 when she approached the bridge crossing over 109th Ave. in Barnes County. As she approached the bridge, she, apparently, drifted to the left onto the shoulder of the road. At that point, her car struck a snow bank/ramp piled against the guardrail on the north, or right, side of the bridge. Instead of striking the guardrail and deflecting back onto the road, the snow bank acted as a ramp and Ms. Schroeder's car launched over the guardrail, into the air, and the car landed on its roof on the far side of 109th Ave., below. Ms. Schroeder died as a result of injuries suffered in the accident.

[¶5] After this wrongful death action was initiated, the State brought a motion for summary judgment asserting immunity. Boiled down, the State's factual contention is that the bank/ramp was created some 14 days prior to the accident when a significant snow event occurred. Then, the State asserts, the bank/ramp was hardened by the application of

salt and chemicals that were thrown onto the bank/ramp while cleaning the driving lanes. The legal argument by the State is that these facts dictate that the State is immune from suit under N.D.C.C. § 32-12.2-02.

[¶6] During discovery, the Schroeders conducted depositions of two separate DOT employees, Keith Nelson and Matthew Maresh, that were involved in maintenance of I-94 before and after the accident. The two employees had plenty of relevant information regarding the creation and failure to remove the bank/ramp. It is the Schroeders' contention that this testimony takes the immunity statute out of play in this situation.

[¶7] According to Keith Nelson, the district supervisor of the crew at the time of the accident, the bank/ramp was created by the Department of Transportation's (State's) employees. App. p. 13. He acknowledged that the bank/ramp negated the safety purpose of the guard rail and created a dangerous situation for the travelling public. App. p. 12. It was his opinion that the bank/ramp was created, primarily, as a result of plows throwing snow against the guardrail. App. p. 16. He claims the bank/ramp had been hardened by a combination of wind and chemicals. App. p. 30. Despite the fact that he was the district supervisor and he knew of the bank/ramp, and knew of its dangers, he did not closely inspect the snow bank prior to the accident to assess its characteristics. App. p. 14. He claims, instead, to know from experience that the bank/ramp was hard. Id. He did acknowledge that he, actually, had no idea when, or if, the bank/ramp became too hard to plow. App. p. 31. His explanation for knowing the bank was hard was, simply, the fact that the snow bank/ramp existed. App. p. 28. Effectively, it was his opinion that his men would have moved the snow bank/ramp if they could have done so. Id. Ultimately, it was

his testimony that the fact that the bank existed at the time of the crash meant that it was too hard to be moved, yet he had no, actual, supporting facts. Id.

[¶8] Of note, Mr. Nelson had no part in creating the snow bank/ramp as he operated a "right wing" plow and his clearing duties involved the right driving lane of I-94. App. p. 15. The "right wing" plow operated by Mr. Nelson was the only "right wing" plow used on this section of I-94. App. p. 23. The left lane, and the guardrail at issue, would have been cleared by a "left wing" plow. Id. At the time of the accident, the district had two "left wing" plows and they were operated by two separate employees. App. p. 23, 29.

[¶9] Of note, Mr. Nelson admitted that the right guardrail, the rail he was responsible for, was clear at the time of the accident. App. p. 18, 26. He also acknowledged that he had been able to run very close to the right guardrail and that there was no bank/ramp near the guardrail. Id. In fact, the investigating officer even believed that the right rail had been mechanically snow blown before the accident. App. p. 32. Mr. Nelson also admitted that he did not have any idea when the last time, prior to the accident, that the left guard rail had been cleared. App. p. 19. He just knew that it was not clear at the time of the accident. Id. In fact, he has no evidence that the two "left wing" plows ever cleared up to the guardrail during the weeks prior to the accident, nor did he have any idea how long the snow bank had been to the top of the guardrail. App. p. 25, 27. He even acknowledged that the very fact that the right guardrail was clear meant that it was possible to clear the left guardrail as well. App. p. 20. He did indicate that there may be extenuating circumstances (such as wind) that could impact the left rail but could not say, definitively, that wind impacted the left rail in this case. App. p. 21, 22.

[¶10] In awarding summary judgment, the District Court made a number of factual findings that contradict the testimony of Mr. Nelson. For example, the court stated that the "conditions that led to the formation of the snowbank…started on December 25, 2016." App. p. 62-63. That finding is not consistent with Mr. Nelson's testimony that he does not know when the bank/ramp began to form. App. p. 31. The court also stated, "the members of the department's crew indicated that a solid ridge of ice had formed, and they could not plow the snowbank off the guardrail without damaging the guardrail, the plow, or both." App. p. 63. This finding is, again, against the actual testimony of Mr. Nelson, who said that he believed the snow bank/ramp was hard but had no actual evidence of such fact. App. p. 14.

[¶11] The Schroeders also took the deposition of Matthew Maresh, another employee of the district that ran one of the "left wing" plows at issue. App. p. 33. He, like Mr. Nelson, testified that he knew that the bank/ramp existed prior to the accident, and he knew that the condition was dangerous to the traveling public. Id. He, like Mr. Nelson, also had no idea when the guardrail had last been cleared before the accident. App. p. 42. He also had never walked to bank/ramp before the accident to determine if it was too hard to remove. Id.

[¶12] Despite this testimony, the District Court not only found that the snow by the guardrail was hardened, but also, "the Department's crew continued to plow snow up to the guardrail over the next days (before the accident) because of drifting snow and additional weather." App. p. 63. This finding, as before, was not supported by the evidence presented. The actual testimony was that neither employee knew when the bank/ramp began to form and did not, actually, know the bank/ramp was hard. App. p. 28, 43, 35, 36.

[¶13] Of note, during Maresh's deposition, the Schroeders learned that the district actually had at least one Bobcat - possibly two Bobcats at the time of the accident. App. p. 33, 37. Mr. Maresh, and all the men on the crew, knew how to operate the Bobcat(s). App. p. 37. He also testified that the Bobcat(s) had front end loaders which could be used to remove ice and snow debris and, in fact, could have been used to clear the guardrail at issue. App. p. 38. In fact, the undersigned took Mr. Maresh through the procedure that would have been required to remove the snowbank with the Bobcats, and he agreed that it would have taken, at most, 3 or 4 men only 3 or 4 hours to close the lane and clear the guardrail at issue. App. p. 39. Despite that, it was not done. Mr. Maresh also acknowledged that the district had authority to hire contractors to complete the removal and it would have taken them no more men and no time. App. p. 40, 41.

[¶14] Despite the relative simplicity acknowledged by Mr. Maresh, and contrary to the evidence provided, the District Court found "the Department indicates that removal of such a condition (the snowbank) is a complex process that requires extra crew to block the road and special equipment." App. p. 63. Again, this finding of fact is against the evidence actually in front of the court from Mr. Maresh. App. p. 39.

[¶15] During his deposition, Mr. Maresh also acknowledged some problems with his affidavit submitted in support of the State's motion for summary judgment. Specifically, in paragraph 11 of his affidavit, it states that he made "multiple passes as close to the guardrail where the accident occurred as safely possible and attempted to clean the snow as close to the guardrail as safely possible. However, the mixture was solid ice under the new drifting snow and I felt my wing catch, so I was not able to safely remove it without damage equipment or the guardrail/infrastructure." Mr. Maresh, of course, did not draft

this affidavit. App. p. 43. In his deposition, Mr. Maresh admitted that the statement was not based on his, actual, memory or fact. App. p. 34, 35. Instead, he stated that it is his practice or habit to clear the guardrail when he is able. Id. Here, he admitted that he could not, actually, remember the details surrounding the bank/ramp before the accident, much less any efforts to clear the guard rail. App. p. 35, 36. In fact, he had no specific recollection of the condition of the bank/ramp in the days leading up to the crash. App. p. 37.

[¶16] Similarly, Mr. Maresh acknowledged that paragraph 7 of his affidavit was not accurate. Specifically, he has no specific recollection of the snow or blowing conditions that existed on the driving lanes of I-94 after the December 25-26 snow storm despite what is set out in the first sentence of paragraph 7 of his affidavit. App. p. 44-45. Instead, it was his assumption that there were blowing conditions and that assumption was based solely upon the weather reports. App. p. 45. Likewise, he had no specific recollection to support the second sentence contained in paragraph 7 of his affidavit that suggests he recalls new drifts forming on the roadway, despite the affirmative statement in his affidavit. App. p. 46.

[¶17] Despite these inaccuracies in the affidavit, the District Court found, in its order, that the department employees "could not plow the snowbank off the guardrail without damaging the guardrail, the plow, or both." App. p. 63. As before, this factual statement was contrary to the actual testimony by the very individual that did the work on the left side of I-94 (Mr. Maresh).

[¶18] Perhaps, most importantly, in its decision, this District Court stated the snowbank was formed next to the guardrail beginning on December 25, 2016. App. p. 62 - 63. There

is no actual evidence on record to support this notion. In fact, both Mr. Nelson and Mr. Maresh admitted that they had no idea when the bank had begun to form and when it got to the top of the guard rail. App. p. 35.

LAW AND ARGUMENT

I. Whether the District Court Erred in Finding that Summary Judgment was not Appropriate as there are Multiple Factual Disputes.

[¶19] The role of the trial court judge on a motion for summary judgment is well-established. Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can be reasonably be drawn from the undisputed facts, or if the only issues to be resolved are questions of law. Riemers v. State, 2007 ND 3 ¶ 4, 738 N.W.2d 906. The party seeking summary judgment has the burden of showing there are no genuine issues of material fact, and the moving party is therefore entitled to judgment as a matter of law. Good Bird v. Twin Butte School Dist., 2007 ND 103 ¶ 5, 733 N.W.2d 601, 605. In considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. Anderson v. Selby, 2005 ND 126 ¶ 7, 700 N.W.2d 696, 699. According to this Court, when the trial court mistakenly fails to find inferences in favor of the non-moving party it is error and the matter should be remanded. Everett Drilling Ventures v. Knutson Flying Service, 338 N.W.2d 662, 664 (N.D. 1983).

[¶20] The District Court, here, failed to view the facts in the proper light and failed to make reasonable inferences in a favor to the Schroeders. In reality, it did the opposite. As set out in the Statement of Facts (above), the District Court made a number of factual

findings that, actually, contradicted the evidence. Surely, a contradiction cannot amount to giving the reasonable inference to the Schroeders. In reality, the District Court should have found, or at least inferred, that the snow bank/ramp was not hard, no one had an idea when the bank/ramp begun to form, that the bank was easily removable, and that the bank/ramp could have been cleared by a left-wing plow while the driving lanes were cleared. Here, the District Court failed to recognize and apply the basic tenants of a summary judgment when it failed to give the reasonable inferences to the Schroeders and the matter should be remanded with direction that there are material questions of fact that preclude summary judgment.

II. Whether the District Court Erred in Its Finding that Public Duty Immunity is Inapplicable to This Action.

[¶21] The State is immune from liability under the Legislature's adoption of the public duty doctrine. N.D.C.C. § 32-12.2-02(3)(f) provides:

> 3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:
>
> f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:
>
> (1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.
>
> (2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.
>
> (3) Providing or failing to provide law enforcement services in the ordinary course of a state's law enforcement operations.

[¶22] In its decision, the District Court concluded that because the State has a statutory duty to keep its highways in "good and safe condition" under N.D.C.C. § 24-03-02, the public duty doctrine protects the State from any negligence in its efforts to clear snow. In

reaching that conclusion, the District Court ignored the recognized limits of the public duty doctrine and the express intent of the Legislature to avoid reestablishing the sovereign immunity doctrine.

[¶23] Public duty immunity, as applied by the District Court here, is overly broad and unwieldy. If the District Court's opinion stands, virtually any time the State would have any obligation to undertake activity, it also would have immunity from any negligence that occurred while undertaking that activity. That, of course, cannot be the purpose of the immunity statute as sovereign immunity was abolished decades ago. Bulman v. Hulstrand Const. Co., 521 N.W.2d 632, 639 (N.D. 1994).

[¶24] For example, using the logic applied by the District Court, if a state employee is driving to a meeting, across town, and rear-ends a vehicle while approaching a stop light the State is immune because the travel is a public duty and any incidental negligence is immune. In order to avoid such an absurd result, this court must discern what public duty immunity is designed to cover.

[¶25] The immunity statute, itself, defines a number of specific public duties that are designed to be covered by public duty immunity, such as inspecting, licensing, or failing to act with respect to public health and safety, sentencing, parole, and law enforcement operations. Nothing in the statute suggests it is intended to cover road maintenance, much less removal and remediation of snow and ice. Of course, if the legislature intended to include snow and ice removal and remediation, within the definition of a public duty, it was free to do so. The fact that they failed to include that activity speaks volumes. That is particularly true in light of the fact that there were numerous cases on the record that already established liability on public entities for snow and ice activity. See e.g., Fast v.

State, 2004 ND 111, 680 N.W.2d 265. What speaks at an even greater volume is that the snow and ice immunity is already, specifically contained and defined in the very same statute. Allowing the public duty immunity to "swallow up" the snow and ice immunity is directly against the "accepted precept of statutory interpretation that the specific controls the general." Boumont v. Boumont, 2005 ND 20, ¶ 15, 691 N.W.2d 278, 283.

[¶26] The Schroeders contend that this Court should define the scope of the public duty immunity to only those matters in which the State has a unique governmental duty to its citizens. It should not apply to a duty that everyone (State employees and citizens alike) shares; that is to avoid creating and maintaining an unreasonably dangerous condition.

A. Public Duty Immunity is Inapplicable Because Everyone has a Duty to Avoid Creating Unreasonably Dangerous Hazards.

[¶27] In its opinion, the District Court equated snow removal with highway maintenance and, then, indicated that activity is protected by public duty immunity. In support, the District Court cited N.D.C.C. § 24-03-02 for the proposition that the State has a public duty to maintain the highway system. That, however, should not be the end of the analysis.

[¶28] Logic and persuasive case law shows that not every duty of the government is intended to be protected as a public duty. Gatlin v. City of Miles City, 2012 MT 302, ¶ 17, 367 Mont. 414, 419, 291 P.3d 1129, 1133. According to the Gatlin court, the public duty doctrine does not protect the government when other generally applicable principles of law create a duty on the government as well as private persons. Id. The public duty doctrine immunity should apply only if the public entity has a unique duty to the general public. Id. It does not apply where the government's duty is the same as every other person under the law. Id. It is the Schroeders' contention that, while the statutes create a duty on the state to maintain its highways, its duty to avoid creating unreasonable hazards, and to remedy

those it creates, arise from general principles of law, meaning that the public duty doctrine does not apply.

[¶29] This argument is supported by the legislative history underlying public duty immunity. When the North Dakota legislature adopted public duty immunity, it retained the statutory language indicating that the State and its employees are liable as if it were a private person. N.D.C.C. § 32-12.2-02(1). Furthermore, the proponents of public duty immunity expressly stated that the proposed legislation was not intended to bring back sovereign immunity. App. p. 54. "We want [government] to have the protection they need—and at the same time we wanted to make sure that we in essence weren't returning to the Sovereign Immunity Doctrine." App. p. 56. Given this intent, the application of the public duty doctrine must be something distinct from the scope of sovereign immunity. If the only consideration is whether the Defendant is a State actor, then the application is little more than a return to sovereign immunity. That basic precept is also supported by this Court's opinion that there is a "reasoned reluctance to apply a doctrine that results in a duty to none where there is a duty to all." Ficek v. Moaken, 2004 ND 158, ¶ 21, 685 N.W.2d 98 (citation omitted).

[¶30] There is also North Dakota Supreme Court case law supporting the Plaintiffs' position. According to the North Dakota Supreme Court, any person, private or public, would be liable for snow removal that creates an unreasonably dangerous hazardous condition. Fast v. State, 2004 ND 111, ¶ 12, 680 N.W.2d 265, 270. Since the Fast court specifically stated that this duty applies to everyone - public and private – it logically takes the creation of our unreasonably dangerous condition out of the potential realm of public duty immunity. Here, it is the Schroeders' contention that the State has a duty to avoid

creating unreasonably hazardous conditions on its highways, just as it does on its university sidewalks, as was the case in Fast.

[¶31] Similarly, while analyzing an immunity question, this Court cited to numerous cases in other jurisdictions that have found that the State may be liable if it has knowledge that it created a hazardous condition but took no measures to alleviate the danger. Skjervem v, Minot State Univ., 2003 ND 52, ¶¶ 14-17; 658 N.W.2d 750,753-754. Admittedly, this Court did not need to adopt those cases as the resolution did not require adaption. Id. at ¶17. Nonetheless, the extensive citation and block quotations suggests, strongly, that this Court approved of the underlying concepts. More importantly to this case, the logic is sound and directly in compliance with the obvious purpose of the immunity statute at play. In this case, unlike Skjervem, the evidence is clear that the State's employees knew of the ramp/bank and knew it was a hazard to the travelling public.

[¶32] Here, if public duty has any application, it applies only to those duties uniquely placed on the government that are not, also, placed upon a private person. To find otherwise would directly frustrate N.D.C.C. § 32-12.2-02(1) which indicates that the State is liable under circumstances in which an individual person would be liable. The case at hand pertains to snow and ice removal and remediation. In North Dakota, all persons, as well as the State, have a duty in their snow removal effort to avoid and prevent unreasonably dangerous hazards. Fast v. State, 2004 ND 111, ¶ 12, 680 N.W.2d 265, 270.

[¶33] The District Court, in its' decision, held the State cannot be liable for creating unreasonably hazardous conditions as long as the employees were performing duties associated with their public duty. To reach that conclusion, the District Court ignored North Dakota caselaw and the legislative intent of the public immunity doctrine. The issue of

whether knowingly creating an unreasonably dangerous hazard - a snow ramp against a guardrail and then refusing to remedy the situation - is negligent is a decision for the jury; not one for the District Court.

B. Public Duty Immunity is Inapplicable Because Every Person has a Duty to Use Reasonable Care in Its Activities.

[¶34] Public duty immunity is, also, inapplicable because of the basic tort concept that anyone who undertakes an activity has an obligation to do it safely and properly. Specifically, an actor who may or may not have a duty to act, must, if he acts at all, exercise reasonable care to make sure that his acts are safe for others. Restatement (Second) of Torts § 324A provides that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> > (a) his failure to exercise reasonable care increases the risk of such harm, or
> > (b) he has undertaken to perform a duty owed by the other to the third person, or
> > (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The Restatement (Second) torts is, routinely, adapted by this Court. Collette v. Clausen, 2003 ND 129, ¶22, 667 N.W.2d 617, 624; See also Nelson v. Gillette, 1997 ND 2005, ¶20, 571 N.W.2d 332, 337. Moreover, persuasive precedent dictates that this basic tort concept applies to cases against government entities. Weber v. Towner Cty., 565 F.2d 1001, 1009–10 (8th Cir. 1977) (holding a county liable for permitting a road to remain impassable after an initial attempt to fix it without proper signage). Similarly, creation of a hazard, even if not negligently created, creates a duty of care to others encountering the hazard. Domagala

v. Rolland, 787 N.W.2d 662, 673 (Minn. Ct. App. 2010), quoting Zylka v. Leikvoll, 144 N.W.2d 358, 367 (Minn. 1966).

[¶35] In its opinion, the District Court held the State and their employees are immune from any liability because it was caused by performance of a public duty. Using that logic, the State is immune from suit for any action it takes as long as the precipitating event is under the broad, undefined, guise of a public duty. The legislature specifically stated that it did not intend to advocate for a return to sovereign immunity in implementing the public duty exception; however, the District Court's ruling effectively promulgates the State and its employees free from suit.

III. Whether the District Court Erred in Finding that Snow and Ice Immunity is Inapplicable to This Action.

[¶36] Snow and Ice immunity in the Century Code is set out in N.D.C.C. § 32-12.2-02(3)(i), and it provides:

> 3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:
> …
> i. A claim resulting from snow or ice conditions, water, or debris on a highway or on a public sidewalk that does not abut a state-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a state employee.

This statute, indisputably, creates an exception to immunity if the condition is caused by an affirmative negligent act of a State employee. Here, the reasonable inferences that should have been applied by the District Court are that the bank/ramp was created by the State, it should have been removed initially, that it was not hard, and that it was easily removable. Of course, that would have created material questions of fact and would have rendered the immunity inapplicable, at least at this stage.

[¶37] The District Court's rationale for applying snow and ice immunity was two-fold. First, the court indicated that since the creation of the snow bank/ramp is immune under the public duty immunity, then the snowbank's creation cannot be an affirmative negligent act to trigger the liability recognized under the snow and ice immunity. Second, it assumed that the failure to remove the snow bank was a separate omission and not an affirmative act that would have removed the immunity. App. p. 66. Both arguments are contrary to the law and the purpose of the statute.

[¶38] Snow and ice immunity was designed to protect public entities from claims resulting from the usual and natural accumulation of snow and ice. Robinson v. Hollatz, 374 N.W.2d 300, (Minn. Ct. App. 1985). Here, we are not dealing with a usual or natural accumulation. It is undisputed that the State had a significant part in the creation of the snow ramp, it did not clear the rail, and it did not remove the bank in the days between the creation of the ramp and the date of the accident. Those facts are abundantly clear on the record and there is a genuine issue of material fact whether the State was negligent in both creating the snow ramp and then failing to remove it. As before, though, negligence is a question that must be left for the jury.

A. Creation of the Snow Ramp was an Affirmative, Negligent, Act.

[¶39] In its decision, the District Court determined that the creating of the bank/ramp was not a negligent act. It cited no support for its position other than the invalid assumption that an immune act cannot be negligent. That is not a correct analysis. The issue of negligence is generally inappropriate for summary judgment because it is a question of fact for the jury to decide. Saltsman v. Sharp, 2011 ND 172, ¶ 5, 803 N.W.2d 553. In reality, immunity is an issue of protection from liability, even if the state is negligent. F.D. v. Ind.

Dep't of Child Servs., 1 N.E.3d 131, 136 (Ind. 2013). It is not an assumption that there is no negligence on the part of the State. Id. The issue of negligence is irrelevant to an immunity analysis. Durdahl v. City of Hastings, No. A04-1804, 2005 Minn. App. LEXIS 532, at *16 (Ct. App. May 17, 2005); Am Family Mut. Ins. Co. v. Outagamie Cty., 2012 WI App 60, ¶24, 816 N.W.2d 340, 348.

[¶40] Here, the State argued, and the District Court agreed, that the State cannot be liable for the accident because of snow and ice immunity provided in the Century Code. N.D.C.C. § 32-12.2-02(3)(f). In reality, though, the undisputed facts show that the exception applies as the State had a meaningful and significant part in creation of the ramp. The undisputed facts (or at least the reasonable inferences) show the State was aware that the bank was dangerous to the traveling public and that the State could have kept the left rail clear, just as it did the right. That is particularly true since it is undisputed that the State had two left wing plows and two operators for those plows. In other words, the State had twice the opportunity to keep the left rail clear; yet, it failed to do so. That failure is, unquestionably, an affirmative act. Whether that failure amounts to negligence is a separate question that cannot be decided in this motion.

B. Failure to Remove the Snow Ramp was an Affirmative, Negligent, Act.

[¶41] The District Court opinion indicates that the failure to clear the guardrail was not an affirmative act and that the failure, if it occurred, merely amounted as omission. App. p. 66. That determination is not factually accurate and, more importantly, ignores the basic precepts behind the immunity statute.

[¶42] First, the undisputed evidence is that the right guard rail was completely clear. It was also acknowledged that the left guard rail could have also been cleared as the road was

being plowed in the first place. That, at a minimum, is the reasonable inference from the evidence. That failure to remove the bank/ramp in real time is an affirmative act. Surely, someone made the decision, for whatever reason, not to put the left wing up against the left rail, as had been done on the right side. Similarly, the decision not to remove the admittedly dangerous bank/ramp, despite simplicity of removal, was an affirmative act. Right or wrong, the decision was made to put the State's resources in other areas of the district. App. p. 46, 47.

[¶43] The common-sense purpose of the snow and ice immunity is to prevent claims against public entities when natural conditions contributed to an accident. Robinson v. Hollatz, 374 N.W.2d 300, 303 (Minn. Ct. App. 1985). Again, that is not the case here because it is undisputed that the State's actions created the bank. More importantly, basic tort law dictates that the creation and removal of a hazard are linked obligations. In fact, even if it was not negligent in creating the hazard, the State still has a duty to protect others from the hazard it created. Domagala v. Rolland, 787 N.W.2d 662, 673 (Minn. Ct. App 2010). "A municipality should have a duty to remove dangerous obstructions or conditions which it affirmatively created." Robinson, at 303. It is a stretch to suggest that the legislature intended to allow the State to create, and then ignore, unreasonably dangerous conditions that it created. In fact, that concept is directly against this Court's precedent. Fast v. State, 2004 ND 111, ¶12, 680 N.W.2d 265; 270; Skjervem v. Minot State Univ., 2003 ND 52, ¶¶14-17, 658 N.W.2d 750, 753-754.

[¶44] It is undisputed that the State's actions created the ramp. It is undisputed that the State's actions failed to remove the ramp. It is also undisputed that the ramp created by the State could be removed by, at least, two different methods that were fairly simple.

Snow and ice immunity does not protect the State from liability when it created the snow bank and, similarly, when it failed to remove the bank. The State's negligence in doing so is a question of fact for the jury to decide.

IV. Whether the District Court Erred in Finding that the Minnesota Cases are Persuasive Authority.

[¶45] The District Court notes, and the State relied heavily on, the Minnesota cases of Hennes v. Patterson, 443 N.W.2d 198, 200 (Minn. Ct. App. 1989) and Norlander v. Norman's Bar, No. C6-98-1575, 1999 Minn. App. LEXIS 229, at *3 (Ct. App. Mar. 9, 1999). Admittedly, the accident facts in Hennes and Norlander are similar to this situation. However, the accident facts are the only thing similar. In each case, the snow removal policies by the State of Minnesota were far more detailed, specific, and limiting. Those policies are the very ones that triggered the immunity analysis by the courts and, therefore, the Minnesota cases provide no guidance.

[¶46] In Hennes, the snow event that lead to the snow ramp concluded just four (4) days prior to the accident. Id. at 200. Here, we are dealing with a minimum of 14 days and perhaps much longer. Next, the procedure to clear the bank went from left to right with no snow to be stored against the median, completely different from this case. Id. Moreover, in its decision, the Hennes Court conducted a day by day analysis and made note of that detailed snow removal policies that greatly limited, or even eliminated the opportunity to remove the bank. Id. One such policy was that the snow bank removal could occur only after 7 p.m. Id. at 201. In addition, the four days between the snow event and the accident included two weekend days and there were specific district policy preventing crews from working weekends, thereby allowing only two days for removal. Id. The third policy that prevented removal was a policy that prevents outside work in severe cold, as was the case

facing the workers, limiting the removal opportunities even further. Id. There are no such policies or procedures in this case.

[¶47] Likewise, in Norlander, the facts and policies that created and left the snow bank in place are distinct from the facts of Ms. Schroeder's accident and the policies of North Dakota. First, in Norlander, the snow event occurred five (5) days before the fatal accident. Id. at **1, 5. Next, there was a specific state policy prohibited working in very cold conditions and that policy greatly limited the State's ability to move the bank. Id. at *5. Next, the State's specific rules on overtime for employees prevented removal of the bank during off hours. Id. at *6. Finally, the removal was a complex procedure that required coordination that, presumably, could not be completed in the short time span. Id. Based upon the admissions and/or the reasonable inferences that should have been made, those facts and policies are not at issue in this case.

[¶48] The defendants in Hennes and Norlander only had a couple days to remove the banks at issue. Those were controlling facts that triggered and guided the immunity analysis. Here, there were at least two full weeks (and perhaps more) between the significant snow event and Brooke's death. More importantly, the limiting policies in Minnesota that served as the basis for the decisions does not exist in our state.

[¶49] The only meaningful policy at play here is the obligation to clear the driving lanes first. The State claims the snow bank was created by the state policy of prioritizing the driving lanes. That may well be true; however, there is no rational explanation why the State could plow one side of the road so that the guard rail is clear and safe (right) while the other side (left) in an extremely hazardous condition. That is particularly questionable given the undisputed fact that the State had twice the equipment, and twice the man power,

to clear the left rail. In fact, Mr. Nelson even admitted that if you can clear the right rail you can clear the left rail. Similarly, the State offers no policies that explain its failure to remove the snow bank in the many days between the banks creation and the accident.

[¶50] In both Norlander and Hennes, specific policies pervaded the immunity analysis. Here, there are no similar policies at play. Here, the State failed to throw the snow over the left rail during the initial pass and it made no effort to remove the bank/ramp. No explanation is offered besides the suggestion (unsupported by the admissions) that the snow bank could not be removed. It is for the jury to accept or reject the State's explanations and the Minnesota cases provide no guidance.

CONCLUSION

[¶51] There are material issues of fact that precludes awarding the State summary judgment. None of the immunities cited by the State apply to the circumstances of this case. The issue before the Court is only whether the State is immune from liability, not whether the State's decisions were reasonable. The question of negligence is one that must be left for the jury

[¶52] Based upon the above and foregoing argument and authority, Plaintiffs/Appellees respectfully request that the District Court's Judgment be, in all things, REVERSED.

Respectfully submitted this 27th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

[¶53] The undersigned hereby certifies that the foregoing Brief of Plaintiffs/Appellants complies with the page limit requirements imposed by Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The Brief of Plaintiffs/Appellants contains Twenty-Seven (27) pages.

DATED this 27th day of January, 2020.

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CERTIFICATE OF SERVICE

[¶54] I hereby certify that on January 27, 2020, I served the foregoing Brief of Plaintiffs/Appellants on the following attorneys by electronic transmission:

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STATE OF NORTH DAKOTA

Duane Schroeder and Lynae Schroeder, parents of Brooke Schroeder, and Lynae Schroeder as Personal Representative of the Estate of Brooke Schroeder, Plaintiffs-Appellants, vs. State of North Dakota, Defendant-Appellee,	**Supreme Court No. 20190374** **Barnes County No. 02-2018-CV-00087**

CERTIFICATE OF SERIVCE

[¶1] I hereby certify that on January 31, 2020, the following document(s):

1. **Plaintiffs/Appellants' Appendix to Supreme Court Brief;**
2. **Plaintiffs/Appellants' Supreme Court Brief**

was/were filed electronically with the Clerk of the Supreme Court through ECF, and served by email upon the following parties:

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[¶2] Dated this 31st day of January, 2020.

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