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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

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 and Appellants, v. State of North Dakota, Defendant and Appellee.	**Supreme Ct. No. 20190374** **Civil No. 02-2018-CV-00087** **ORAL ARGUMENT REQUESTED**

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

HONORABLE MARK T. BLUMER

BRIEF OF DEFENDANT/APPELLEE

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STATEMENT OF ISSUES

[¶1] Whether clearing snow and ice from Interstate 94 (I-94) is performing a public duty and immune from suit pursuant to N.D.C.C. § 32-12.2-02(3)(f).

[¶2] Whether the failure to remove a snowbank, which formed due to clearing snow and ice from I-94, is an omission that is immune from suit pursuant to N.D.C.C. § 32-12.2-02(3)(i).

STATEMENT OF CASE

[¶3] Brooke Schroeder's parents brought suit against the State of North Dakota after she died in a one-car accident near Valley City. The accident occurred when Ms. Schroeder's car drifted out of I-94's eastbound passing lane, hit a snowbank off the shoulder of the road, and traveled over a guardrail. The lawsuit alleged the State was negligent in failing to remove the snowbank because it eliminated the protection provided by the guardrail.

[¶4] After the Schroeders completed discovery, the State moved for summary judgment. In the summary judgment proceedings, the State presented evidence of its policy that prioritized clearing the driving lanes of a roadway over performing secondary cleanup operations, such as removing a snowbank from a roadway's shoulder. The State argued it was protected by discretionary immunity for this policy decision pursuant to N.D.C.C. § 32-12.2-02(3)(b).

[¶5] The State also presented undisputed evidence that the snowbank was created in the days before the accident by a combination of (1) weather events and (2) plowing activities that cleared snow and ice from I-94's driving lanes. The State argued it could not be held liable for clearing snow and ice from I-94's driving

lanes because that act was the performance of a public duty. See N.D.C.C. § 32-12.2-02(3)(f) (public duty immunity). The State further argued it could not be held liable for the subsequent failure to remove the snowbank because the snowbank was not "affirmatively caused by the negligent act of a state employee." N.D.C.C. § 32-12.2-02(3)(i) (snow and ice immunity).

[¶6] In opposing summary judgment, the Schroeders acknowledged they were not challenging the State's policy to clear snow and ice from a roadway before performing secondary cleanup operations. But the Schroeders argued that neither public duty immunity nor snow and ice immunity should protect the State from liability for the subsequent failure to remove the snowbank that formed next to the guardrail.

[¶7] On October 2, 2019, the district court granted the State's motion for summary judgment. The district court first noted that discretionary immunity was not at issue because the Schroeders were not challenging the State's policy to clear driving lanes before performing secondary cleanup operations. The district court then concluded the State was immune from suit under either public duty immunity, or snow and ice immunity:

> Either: (1) the accident was caused by plowing of the snow and chemicals off the road onto the shoulder where it formed into the hardened snowbank, in which case the State (and employees) are immune as clearing the roadways [is] a public duty; or (2) the accident was caused by a negligent omission by the State in failing to remove the condition caused by the performance of that duty, in which case the snow and ice immunity applies because the danger was not created by an "affirmative" act, but rather the failure to do an act to remove the danger. It is perhaps more appropriate to state that the allegedly negligent act which led to the accident was the failure to clear the guardrail. In either case, the State is immune.

Appellant's App. at 66.

[¶8] On December 2, 2019, the Schroeders filed a timely appeal.

STATEMENT OF FACTS

[¶9] As the district court noted, the relevant facts are not in dispute. On January 8, 2017, Brooke Schroeder was driving a car east on I-94 near Valley City when her car drifted left out of the passing lane and crossed the fog line, the rumble strips, and the shoulder. Id. at 62. The car then traveled four additional feet off the roadway before contacting a snowbank next to the guardrail of an overpass. Id. The car continued through the snowbank and traveled over the guardrail. Brooke Schroeder died in the accident. Id. These undisputed facts were set forth in the accident report prepared by the State Highway Patrol; the report indicated the physical evidence was consistent with a "collision involving an inattentive or fatigued driver." Dist. Ct. No. 02-2018-cv-87, Index # 28 at 6.

[¶10] The conditions that led to the formation of the snowbank started two weeks earlier. On December 25, 2016, an ice event of freezing rain mixed with snow began at about 6:00 a.m. and continued through December 26. Appellant's App. at 62-63. This weather event consisted of 2.5 inches of precipitation. Id. at 63. To keep I-94 clear of snow, ice, and redrifting snow, Department of Transportation (DOT) employees Keith Nelson, Matt Maresh, and Julius Schrenk applied multiple truckloads of salt, sand, and GeoMelt brine to I-94's driving lanes over the course of the next five days. Id. Numerous applications were required to keep the driving lanes clear of snow and ice because strong winds[1] coupled with existing and new

[1] Wind gusts over fifty-two miles per hour, and straight line winds of up to thirty-eight miles per hour, accompanied and followed the December 25th ice event.

snow caused additional drifting during that time. In addition, the new and drifting snow thawed and created slush when it contacted the melting mixture, and refreezing caused new ice to form. Dist. Ct. No. 02-2018-cv-87, Index # 32 (Nelson Dep. Tr.) at 40:18 – 42:6; 48:18 – 49:7; 49:18 – 50:3; 51:7 – 52:20; 56:12 – 57:1; 62:25 – 63:10; 68:25 – 69:19; 87:7-25; 89:9-25; 126:6-14; 127:5 – 128:10; 151:21 – 152:16; 153:10 – 154:3. See also Index # 36 at 2.

[¶11] The DOT's Snow and Ice Manual establishes the service levels for clearing snow and ice from roadways. Dist. Ct. No. 02-2018-cv-87, Index # 35. One of the policies set forth therein indicates that keeping the driving lanes clear – and maintaining that desired pavement condition – takes priority over cleanup operations. Id. at 15. The summary judgment record also included DOT's policy about plowing snow over a guardrail when there is a roadway underneath. DOT's Snow and Ice Control Manual states that "[s]now should not be plowed over the side of a bridge deck that has a roadway under the bridge," id. at 7, because snow falling onto the road below can cause accidents.

[¶12] During his deposition testimony, DOT crew supervisor Keith Nelson echoed the need to prioritize the act of clearing snow and ice from the driving lanes over secondary cleanup operations, for the safety of the traveling public. Nelson also explained how the initial ice event – coupled with subsequent weather conditions, the priority to keep driving lanes clear and maintain that condition, and DOT's

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These wind speeds are just one category of information contained on the Maintenance Decision Support System (MDSS) sheets used by the DOT and made a part of the record. Other categories of data on the MDSS sheets include temperature, precipitation, and road conditions.

plowing activities – led to the formation of the snowbank:

> What happens when we get that freezing rain/snow event and we're sanding and GeoMelting brining – slash brining the road is that we have a melting action and we have the slush, and when we have the snow keep coming on there and we keep plowing it into the guardrail, it gets mixed up with the slush and the chemicals that are in there, the salt and the GeoMelt, and – and in the act of trying to keep up, you keep pushing that snow into the guardrail, and then it cools off and get hard.
>
> And then, at the same time, it's hard to push that over when you're fighting just to keep the road open because you may not even have much time to swing over and take care of that because you're busy just keeping the main road open, which can mean that it can – it can build on you while you're busy just maintaining. It gets to be a by-product of making sure that the main roadway is clear.

Dist. Ct. No. 02-2018-cv-87, Index # 32 at 151:24 – 152:16.

> What I'm saying is that they weren't able to clear the rail after the snow event – the ice and snow event we had and the – and the – and the other snow events we had that were – we had trouble keeping up with, where you're just working – you can make one round and come back again and you can have a snowbank right on the road again, so you're moving the same – each round, you're moving the same snow off the roadway. And you don't have time to even get it all the way over to the – to the guardrail, so you're moving it off the roadway, off the roadway, off the roadway, and it comes back, and you keep making rounds when the winds blow. . . . So when you have it coming back every round that you make and it's blowing in, you don't – you're taking it off the road and you're not – you're not able to take it all the way over every time.
>
> . . .
>
> [W]hen you have enough snow accumulating on the roadway itself, that every round you make for an extended period of time, you only have the ability to get that off the roadway and it starts building up; and you're making your rounds, every round it's laying on the road, and then you may not be able to get it out all the way like you want to[.]

Id. at 68:25 – 69:19; Id. at 88:19 – 89:1.

[¶13] The snowbank that formed next to the guardrail overpass as a result of

these DOT plowing activities was not removed before Brooke Schroeder's accident. Dist. Ct. No. 02-2018-cv-87, Index # 38 at 3.

STANDARD OF REVIEW

[¶14] The "Court's standard of review for summary judgment is well established[.]" Broten v. Carter, 2019 ND 268, ¶ 7, 935 N.W.2d 654. "A district court's decision on summary judgment is a question of law that [is] review[ed] de novo on the record." Id. (quoting Pettinger v. Carroll, 2018 ND 140, ¶ 7, 912 N.W.2d 305). While the evidence is viewed in the light most favorable to the opposing party, that party "must present competent admissible evidence . . . that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact." Pettinger, 2018 ND 140 at ¶ 7 (quoting A.R. Audit Servs., Inc. v. Tuttle, 2017 ND 68, ¶ 5, 891 N.W.2d 757). It is not enough for the opposing party to merely identify disputed facts if they are not material: summary judgment is appropriate when "resolving disputed facts will not change the result[.]" Long v. Jaszczak, 2004 ND 194, ¶ 7, 688 N.W.2d 173 (citation omitted).

LAW AND ARGUMENT

I. Clearing snow and ice from the state highway system is a public duty.

[¶15] The State has a uniquely public duty to maintain the state highway system, including the duty to remove snow and ice. See N.D.C.C. § 24-03-02 (imposing a duty to keep the state highway system in good and safe condition for general public use). The duty to maintain the state highways is "with full regard to the interest and well-being of the state as a whole." N.D.C.C. § 24-01-01; see also N.D. Admin.

Code § 37-01-01-01(1)(b) ("Under North Dakota Century Code title 24, the department of transportation is responsible for the planning, construction, maintenance, and protection of the state highway system."). The Interstate highway is part of the state highway system. N.D.C.C. § 24-01-01.1(24).

[¶16] By statute, the director of the DOT "is responsible for the . . . maintenance … of the state highway system[.]" N.D.C.C. § 24-01-03. In construing a similar statutory directive, another court said "[n]othing could be clearer than that the Department of Highways has a duty to keep the roads open for travel." Potter v. Miller, 287 S.E.2d 163, 165 (Va. 1981). Consequently, "[a]ny allegations of inadequate maintenance or improper action should be addressed to that recognized public duty." Truman v. Auxier, 647 S.E.2d 794, 797 n.4 (Va. 2007); see also King v. Stark Cty., 66 N.D. 467, 266 N.W. 654, 658 (1936) (describing the construction of a ditch along a public highway as the "performance of a public duty") (internal quotation marks and citation omitted).

[¶17] The duty to clear snow and ice from the state highway system is uniquely governmental in nature and is fully constrained by governmental determinations and actions, including policy decisions for the allocation, prioritization and methodologies of using limited resources. There is no dispute that clearing snow and ice from the state highway system, including I-94, is a public duty.[2]

[2] Although the Schroeders do not challenge the discretionary policy decisions on snow removal prioritization, or the policy not to push snow off a roadway onto an underpass, the discretionary nature of these choices and the statutory immunity provided when these choices are made remains an important consideration when analyzing the broader public duty doctrine and snow and ice immunity provision, because discretionary immunity is still applicable and was conceded by the Schroeders to apply to the policy determinations at issue in this case. See

II. Clearing snow and ice consistent with state policy cannot be an affirmative negligent act.

[¶18] Non-contract claims against the State are prescribed and limited by statute under Chapter 32-12.2 of the Century Code. No claim for money damages can be brought against the State except as authorized by Chapter 32-12.2. See N.D.C.C. § 32-12.1-02(1). As relevant here, "[n]either the state nor a state employee may be held liable under this chapter for . . . [a] claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty." N.D.C.C. § 32-12.2-02(3)(f).

[¶19] The North Dakota legislature adopted the public duty doctrine in 2005, in response to this Court's decision in Ficek v. Morken, 2004 ND 158, 658 N.W.2d 98, superseded by statute as stated in Tangedal v. Mertens, 2016 ND 170, ¶ 18, 883 N.W.2d 871. Under the public duty doctrine, neglecting a duty owed to the public at large, rather than to a particular individual or class of individuals, is simply not enforceable in tort. Ficek, 2004 ND 158, ¶ 11 (quoting 1 D. Dobbs, The Law of Torts § 271, at 723 (2000)). In general, a defendant may not be held liable for negligence unless the plaintiff first proves the defendant had a duty to protect a particular plaintiff from injury. Sternberger v. City of Williston, 556 N.W.2d 288, 290 (N.D. 1996). The public duty doctrine recognizes that the State as a defendant has no duty to individual plaintiffs, but to the public at large. Thus, any failure by the State to fulfill a public duty does not, by itself, give rise to a duty to any particular individual in a tort claim.

N.D.C.C. § 32-12.2-02(3) ("Neither the State nor a state employee may be liable under this chapter for *any of the following* claims.") (emphasis added).

[¶20] This doctrine is rooted in sound public policy concerns, which include the need to allow the State "to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them" and ensuring that exposure to liability does not result in "avoidance of liability rather than promotion of the general welfare [being] the prime concern" for state policymakers. Ficek, 2004 ND 158, ¶ 12 (internal citation omitted).

[¶21] Significantly, the doctrine immunizes the State and its employees when they perform a public duty, when they *fail to perform* a public duty, and for inadequately performing a public duty. See id. at ¶ 11 ("[I]f the duty which the official authority imposes . . . is a duty to the public, *a failure to perform it, or an inadequate or erroneous performance*, must be a public, not an individual injury") (quoting T. Cooley, A Treatise on the Law of Torts 379 (1879)) (emphasis added).

[¶22] Here, the DOT employees who cleared snow and ice from I-94's driving lanes in the days before Brooke Schroeder's accident were performing a duty owed to the public at large, rather than a duty owed to any particular individual. In addition, it is undisputed that the DOT employees were performing that public duty pursuant to a policy that prioritized clearing the driving lanes of snow and ice (and maintaining that condition) over performing secondary cleanup operations. In the district court, the Schroeders conceded they were not challenging the State's policy to keep driving lanes clear before performing cleanup operations.

[¶23] In addition to the broad blanket rule of immunity granted to the State and its employees under N.D.C.C. § 32-12.2-02(3)(f) for the nonperformance of a public

duty, the State and its employees cannot be held liable for a "claim resulting from snow or ice conditions . . . on a highway . . . except when the condition is affirmatively caused by the negligent act of a state employee." N.D.C.C. § 32-12.2-02(3)(i) (snow and ice immunity). Although the snow and ice immunity provision can be viewed as a particular application of the public duty doctrine, each remains an independent basis for barring a claim.[3]

[¶24] Thus, this case presents a purely legal question: whether the act of clearing snow and ice from the driving lanes of a roadway, consistent with discretionary state policy, is an affirmative negligent act when it contributes to form a snowbank off the roadway's shoulder. The answer must be no. An affirmative negligent act under snow and ice immunity must be something other than the mere act of clearing snow and ice from a roadway pursuant to discretionary policy. Otherwise, the narrow exception for affirmative negligent acts of a state employee would swallow the rule, and the State and its employees could be liable every time they perform the public duty of clearing snow and ice from a roadway pursuant to discretionary policy. Stated another way, a state employee would face a negligence claim for doing nothing more than following his employer's instructions on a matter of discretionary policy.

[¶25] Allowing the narrow exception for affirmative negligent acts of a given

[3] Unlike the statutory language governing public duty and discretionary immunity that refers to the actions of the State *and* its employees, the exception for affirmative acts of negligence contained in the snow and ice provision is limited to the affirmative negligent acts of a state employee, not the State itself. This statutory language is deliberate, keeping the snow and ice immunity provision consistent with both the discretionary immunity and public duty provisions.

employee to swallow the rule under the facts of this case would be particularly troublesome, given the fact that North Dakota's harsh weather conditions are outside the control of State employees, and frequently prevent them from performing secondary cleanup operations while attempting to perform their primary task of keeping the roadways themselves clear of snow and ice. The State could be exposed to liability whenever the act of clearing the roadway resulted in a snowbank off a roadway's shoulder.

[¶26] On appeal, the Schroeders contend that "[i]f 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." Appellants' Br. at ¶ 23. The Schroeders then pose the example of a state employee being immune for rear-ending a vehicle while approaching a stop light, and suggest that applying the public duty doctrine to the facts of this case would lead to absurd results. Id. at ¶ 24.

[¶27] The comparison is inapposite. The State does not have a policy of permitting state employees to violate traffic laws by rear-ending vehicles while approaching stop lights, and the safe operation of a motor vehicle is not a uniquely public duty like clearing snow from the thousands of miles of public highways. But the State does have a policy – adopted for the purpose of providing safety to the traveling public – of clearing the driving lanes of a roadway before performing secondary cleanup operations. The flaw in the Schroeders' traffic violation example, as applied here, lies in the fact that they have not presented ***any evidence whatsoever*** to establish that DOT employees committed a comparable

negligent act while clearing snow and ice from I-94's driving lanes. Instead, they want the mere performance of the public duty itself, that is, plowing activities undertaken pursuant to State policy, to be the very acts for which the State should be held liable. This approach would lead to absurd results, and expose the State to "open-ended and potentially crushing liability," Ficek, 2004 ND 158, ¶ 12 (citation omitted), merely for performing a public duty intended to protect the traveling public at large.

[¶28] The Schroeders also contend that public duty immunity should not be permitted to "swallow up" the claims permitted under snow and ice immunity. Appellants' Br. at ¶ 25. But that has never been the State's position. The State has always acknowledged that liability will lie under snow and ice immunity for a condition affirmatively caused by the negligent act of a state employee, but that it cannot be based upon a broad public duty or actions consistent with discretionary policy decisions. See *supra* at ¶ 23.

[¶29] When the provision for snow and ice immunity was enacted by the legislature in 1995, the two examples discussed of the type of affirmative negligent act that may give rise to state liability were: 1) a state employee "that may be following [another vehicle] too close;" and 2) "[a] branch or tire falling off someone's truck on the highway[.]" Hearing on S.B. 2080 Before the House Judiciary Comm., 54th N.D. Leg. Sess. (Mar. 8, 1995) (Statement of Paul Ceto [sic] Seado). Both examples involve a condition that is affirmatively caused, where the duty is not uniquely public but one the state employee shares with any other member of the traveling public, and where the conduct (i.e., driving too close or failing to secure

materials on a trailer) is not undertaken pursuant to discretionary State policy. Here, in contrast, the Schroeders are asking the Court to conclude that the mere performance of the public duty itself – removing snow and ice from driving lanes pursuant to policy – constitutes an affirmative negligent act.

[¶30] Again, the flaw in the Schroeders' argument is that they have not identified any affirmative negligent act committed by DOT employees while performing the public duty of clearing I-94's driving lanes of snow and ice. Rather, they seek to hold the State liable for the very act of performing a public duty, under circumstances where the public duty was performed pursuant to an unchallenged policy that prioritized clearing driving lanes over performing secondary cleanup operations.

[¶31] The Schroeders also seem to suggest that the district court defined the scope of public duty immunity beyond circumstances where the State has a unique governmental duty to its citizens. See Appellants' Br. at ¶ 26. But clearing the state highway system of snow and ice is exactly that type of circumstance. Private citizens do not have a comparable duty to clear public roads of snow and ice.

[¶32] The Schroeders further argue that public duty immunity is inapplicable because everyone, including the State, is liable for snow removal that creates an unreasonably dangerous or hazardous condition. See Appellants' Br. at ¶¶ 27-33. For this proposition, they rely in part upon Fast v. State, 2004 ND 111, 680 N.W.2d 265. A close reading of Fast indicates this Court did not actually address whether that general proposition applies to the State. See id. at ¶¶ 7-9 (noting the general rule that a landowner with knowledge that it has created a hazardous condition has

a duty to correct it, but concluding "we need not decide the issue in this case because the Fasts have not alleged the State should be liable based on the design of the sidewalk").

[¶33] More significantly, however, Fast was decided in 2004 and involved an accident that occurred in 2000, before the legislature adopted the public duty doctrine in 2005. Thus, even if the Court accepts the Schroeders' representation of Fast's holding, the case has no application to the question at issue here – whether the current claim against the State for a 2017 accident is barred by the public duty doctrine, and snow and ice immunity, under current statutory provisions.

[¶34] Similarly, the Court should reject the Schroeders' contention that public duty immunity is inapplicable because every person has a duty to use reasonable care. Citing the Restatement (Second) of Torts § 324A and federal and state cases applying the general tort principles set forth therein, the Schroeders contend that public duty immunity is "inapplicable because of the basic tort concept that anyone who undertakes an activity has an obligation to do it safely and properly." Appellants' Br. at ¶ 34. On the contrary, shielding the State from liability under general principles of tort is the precise purpose of the public duty doctrine. See Ficek, 2004 ND 158, ¶¶ 11-12. The doctrine is specifically intended to shield the State from liability for negligence for duties owed to the public at large. Id. Thus, the doctrine clearly prevents general principles of tort law from applying to the acts or omissions covered by it. See id. at ¶ 11 ("[I]f the duty which the official authority imposes . . . is a duty to the public, *a failure to perform it, or an inadequate or*

erroneous performance, must be a public, not an individual injury") (quoting T. Cooley, A Treatise on the Law of Torts 379 (1879)) (emphasis added).

[¶35] The Court should also reject the Schroeders' suggestion that the district court's application of public duty immunity to the circumstances of this case will essentially reestablish the sovereign immunity doctrine. See Appellants' Br. at ¶¶ 22-23. The State or a state employee is still liable "under circumstances in which a special relationship can be established between the state and the injured party" as demonstrated by the presence of four statutory elements. See N.D.C.C. § 32-12.2-02(3)(g). The Schroeders did not oppose summary judgment by attempting to show that a special relationship existed between their daughter and DOT employees, nor do the facts of this case satisfy the statutory elements for a special relationship. The fact remains, however, that the legislature recognized limits on the public duty doctrine, and the district court did not ignore those limits by granting summary judgment in this case.

III. The failure to remove a snowbank created by clearing snow and ice pursuant to state policy is not an affirmative negligent act.

[¶36] The Schroeders next contend both that the creation of the snowbank was an affirmative negligent act, Appellants' Br. at ¶¶ 39-40, and that the failure to remove the snowbank was an affirmative negligent act. Id. at ¶¶ 41-44.

[¶37] The contention that the creation of the snowbank was an affirmative negligent act should be rejected for all the same reasons discussed above in Section II. It is undisputed that the snowbank was created by a combination of (1) the weather and (2) plowing activities undertaken by DOT employees while clearing snow and ice from I-94's driving lanes. It is also undisputed that those

plowing activities were undertaken pursuant to a discretionary policy that prioritized clearing the driving lanes over performing secondary cleanup operations such as removing a snowbank from a roadway's shoulder. Thus, the Schroeders are contending that the very act of performing a public duty, pursuant to discretionary State policy, is itself the affirmative negligent act that gives rise to liability.

[¶38] As stated above, that cannot be the case because the exception would swallow the rule; the State would always be exposed to liability for the very act of performing a public duty under a policy that prioritizes one public duty (clearing the roadway of snow and ice) over another (performing secondary cleanup operations). Given North Dakota's frequently harsh weather conditions, the State's exposure to liability would expand to every situation where an accident is allegedly caused by a snowbank that forms off a roadway's shoulder.

[¶39] As to the second contention that the failure to remove the snowbank constitutes an affirmative negligent act, that claim is an oxymoron. A failure or omission is the antithesis of an affirmative negligent act. If the Court concludes that an omission can be recast as an affirmative act, the statutory provision limiting the State's liability to conditions "affirmatively caused by the negligent act of a state employee," N.D.C.C. § 32-12.2-02(3)(i), would be meaningless.

[¶40] In this regard, cases decided by the Minnesota courts applying that state's substantively identical snow and ice immunity provisions are instructive. See Minn. Stat. § 3.736, subd. 3(d) (providing that the state and its employees are not liable for "a loss caused by snow or ice conditions on a highway . . . except when the condition is affirmatively caused by the negligent acts of a state employee"). In

Norlander v. Norman's Bar, the Minnesota Court of Appeals addressed the legal question whether that narrow exception to snow and ice immunity exposed the state to liability where the act of plowing snow from a roadway itself resulted in a snowbank next to a guardrail. No. C6-98-1575, 1999 WL 118628 at *2 (Minn. Ct. App. March 9, 1999). There, like here, a plaintiff brought suit against the State because a vehicle hit the snowbank and jumped the guardrail. Id. at *1.

[¶41] The Court granted summary judgment in favor of the State, concluding "there are no genuine issues of material fact." Id. at *4. The Court held "snow and ice immunity 'protects government entities from liability for damages caused by the natural consequences of snow plowing when the plowing was done pursuant to established snow-removal policies.'" Id. at *3 (quoting In re Alexandria Accident of Feb. 8, 1994, 561 N.W.2d 543, 549 (Minn. Ct. App. 1997)).

[¶42] Similar to DOT's Snow and Ice Manual, Minnesota policy gave "highest priority to clearing the traveled portions of roadways." Id. at *2. Under Minnesota's policy, the "clearing of snow from barriers along areas such as bridges and ramps, is a secondary priority." Id. The Court stated that the performance of the "highest-priority snow removal by clearing snow from the traveled portions of roadways . . . delayed the clearing of snow from along the bridgerail involved here." Id. Under those facts, the court held "there is no evidence that the snowbank was caused by affirmative negligent acts of state employees in plowing the roadway." Id. at *3.

[¶43] The holding in Norlander was based upon another Minnesota case involving "virtually identical facts[.]" Id. at *1 (citing Hennes v. Patterson, 443 N.W.2d 198, 201-04 (Minn. Ct. App. 1989)). In Hennes, a car "rocketed up a pile of snow

packed against [a] guardrail . . . [j]ust past where Interstate 94 merges into the Lafayette Bridge" in St. Paul, Minnesota. 443 N.W.2d at 200. The car then toppled over the guardrail and plunged fifty feet below into a parking lot. Id. "Due to the heavy snowfall, the snow on the bridge was pushed to the top of the guardrail[.]" Id.

[¶44] One person in the car was killed, and several others injured. Id. They brought suit contending "the state was negligent in plowing the snow against the guardrail and/or allowing the snowbank to remain against the guardrail." Id. at 201. The court rejected that argument and held that the snow and ice immunity's exception for affirmative acts of negligence did not apply:

> In the present case, there was no evidence the snowbank along the guardrail was created by a negligent act of plowing the road. The act of plowing in this case was done pursuant to a policy of plowing the snow to the right and off the traveled portion of the road, but without pushing the snow over the bridge guardrail. This policy was developed at a supervisory level and balanced competing factors of safety to the cars traveling on the Lafayette Bridge, safety to cars and people below the Lafayette Bridge, and environmental concerns of dumping snow and other debris into the Mississippi River. Accordingly, the decision to plow the snow off the traveled portion of the road and against the guardrail is immune from liability under the discretionary function exception to liability because it was done pursuant to the state's policy, *and under the ice and snow removal exception to liability because there was no evidence that the snowbank was affirmatively caused by any negligent acts of a state employee*.

Id. at 203 (emphasis added). In other words, the very act of performing a public duty, undertaken pursuant to State policy, cannot itself be considered the affirmative negligent act that gives rise to liability under snow and ice immunity.

[¶45] The Schroeders attempt to distinguish the Minnesota cases on the grounds that "the snow removal policies by the State of Minnesota were far more detailed,

specific, and limiting." Appellants' Br. at ¶ 45. Even if true, that distinction is irrelevant; the Schroeders do not challenge North Dakota's policy. For all material purposes, the legal analysis remains the same. Both here and in the Minnesota cases, the states adopted a policy that gave priority to clearing the traveled portions of roadways over clearing snowbanks that might thereby form off the traveled portion of the roadway. Both here and in the Minnesota cases, plowing activities performed pursuant to that policy decision resulted in a snowbank next to a guardrail. Both here and in the Minnesota cases, plaintiffs brought suit because a vehicle hit the snowbank and jumped the guardrail. Thus, here, as in the Minnesota cases, the State should be protected by snow and ice immunity because the snowbank was not a condition affirmatively caused by the negligent act of a state employee.

[¶46] Citing Robinson v. Hollatz, 374 N.W.2d 300 (Minn. Ct. App. 1985), the Schroeders also contend the snow and ice immunity provisions found at N.D.C.C. § 32-12.2-02(3)(i) are limited to protecting public entities from claims resulting from the usual and natural accumulations of snow and ice. But the holding of Robinson was "severely undercut, if not impliedly overruled" by the Minnesota Supreme Court's decision in Holmquist v. State, 425 N.W.2d 230, 234 (Minn. 1988), as the Minnesota Court of Appeals has recognized on more than one occasion. Hennes, 443 N.W.2d at 202; see also In re Alexandria Accident, 561 N.W.2d at 548.

[¶47] Hennes rejected Robinson and recognized that snow and ice immunity, coupled with discretionary immunity, protected the state from liability despite the fact that a snowbank along a guardrail was created by the state, and was not a

natural accumulation of snow and ice. 443 N.W.2d at 202-03. Thus, not only have the Minnesota courts rejected Robinson's holding, but specifically for the reason the Schroeders now rely upon it – to attempt to hold the State liable for the creation of a snowbank along a guardrail that was not a natural accumulation of snow and ice.

[¶48] Moreover, by its plain terms, North Dakota's statutory provisions for snow and ice immunity are not limited to protecting the State from claims resulting from usual and natural accumulations of snow and ice. The provisions protect the State from all claims "resulting from snow or ice conditions . . . except when the condition is affirmatively caused by the negligent act of a state employee." N.D.C.C. § 32-12.2-02(3)(i). Thus, the statute shields the State from liability for snow and ice conditions created by the State itself.

[¶49] Here, it is undisputed that the snowbank along the guardrail resulted from a combination of natural snowfall, wind and drifting conditions, and the acts of state employees performing the public duty of clearing snow and ice from the driving lanes of the roadway itself. The Schroeders have simply failed to identify any specific affirmative act of negligence by a state employee that would trigger liability under Section 32-12.2-02(3)(i).

IV. The Schroeders have not identified any disputed facts that are material.

[¶50] Finally, the Schroeders attempt to suggest there are disputed facts that made summary judgment inappropriate. For example, they claim there is a disputed fact about whether the snowbank next to the guardrail was hardened by a combination of wind and chemicals, or whether DOT employees knew of the

snowbank's hardened condition or had inspected it prior to the accident. See Appellant's Br. at ¶¶ 7, 11-12. They also claim there is a fact dispute about when the snowbank began to form. Id. at ¶¶ 10, 12, 18. They further suggest there is a disputed fact about how complex an operation it would be to remove the snowbank. Id. at ¶¶ 13-14. They further contend there is a fact dispute about whether the snowbank could be removed without damaging the guardrail, the plow, or both. Id. at ¶¶ 10, 17. Finally, they seem to suggest that the absence of a snowbank along the right (or south) guardrail is relevant to the question whether the State should be liable for a failure to remove the snowbank along the left (or north) guardrail.

[¶51] Setting aside the fact that the summary judgment record supported all of the district court's factual observations on these issues, none of these alleged factual disputes are material because their resolution will not change the result. See Long v. Jaszczak, 2005 ND 194 at ¶ 7. The fact that Ms. Schroeder's car vaulted over the snowbank indicates the snowbank was hardened before the accident (as does the common sense notion that snow coming into contact with melting mixture creates slush, refreezes, and causes new ice to form). But whether the snowbank was hardened before the accident, or not, does not change the undisputed fact that the snowbank was created by a combination of (1) weather events and (2) plowing activities that cleared snow and ice from I-94's driving lanes pursuant to discretionary State policy. The dispositive legal question remains the same under the relevant undisputed facts, that is, whether the snowbank was a condition affirmatively caused by the negligent act of a state employee under

Section 32-12.2-02(3)(i).

[¶52] Similarly, none of the other alleged factual disputes identified by the Schroeders are relevant to that dispositive legal question. Deciding the dispositive legal question in this case does not turn upon when the snowbank began to form, how complex an operation it would have been to remove it, whether it could be removed without damage to the guardrail or a plow, or whether there was a snowbank on the other side of the roadway. All that is relevant is the fact that the snowbank along the left guardrail was still there at the time of the accident; the Schroeders' claim – no matter how they cast it – boils down to a claim that the State was negligent in failing to remove that snowbank. A failure is an omission, not an affirmative negligent act, and thus not actionable under snow and ice immunity.

CONCLUSION

[¶53] The act of clearing snow and ice from the driving lanes of I-94 pursuant to state policy falls within the public duty immunity provisions found at N.D.C.C. § 32-12.2-02(3)(f). The State's policy of prioritizing keeping driving lanes clear before performing secondary cleanup operations, and not pushing snow over a guardrail onto an underpass, are discretionary determinations under N.D.C.C. § 32-12.2-02(3)(b). In addition, the failure to remove a snowbank, which formed due to clearing snow and ice from I-94 pursuant to state policy, is an omission that is immune from suit pursuant to N.D.C.C. § 32-12.2-02(3)(i). The State respectfully requests that the district court's grant of summary judgment in favor of the State be affirmed in all respects.

Dated this 25th day of February, 2020.

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IN THE SUPREME COURT

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 and Appellants, v. State of North Dakota, Defendant and Appellee.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20190374** **Civil No. 02-2018-CV-00087**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Defendant/Appellee contains 27 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 25th day of February, 2020.

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[¶1] I hereby certify that on February 25, 2020, a **BRIEF OF DEFENDANT/APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Supreme Court through the E-Filing Portal and served on Jason R. Vendsel at jvendsel@mcgeelaw.com.

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