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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

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

Jason Vendsel (ID No. 04912)
McGee, Hankla & Backes, P.C.
2400 Burdick Expressway East, Suite 100
P.O. Box 998
Minot, ND 58702-0998
Attorneys for Plaintiffs/Appellants Duane Schroeder and Lynae Schroeder, parents of Brooke Schroeder, and Lynae Schroeder as Personal Representative of the Estate of Brooke Schroeder

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ARGUMENT

[¶1] Plaintiffs (herein referred to as "Schroeders") submit that the trial court erred in awarding Summary Judgment to the Defendant when it concluded: 1) there were no material facts in dispute; 2) public duty immunity applies to this case; and, 3) snow and ice immunity applies to this case.

I. The District Court Erred in Finding There Were No of Material Facts in Dispute.

[¶2] In its decision, the District Court stated that "the facts in this matter are not effectively in dispute." See Appellant's Appendix, at 62, ¶ 2. In their initial brief, the Schroeders explained, in great detail, how that statement was inaccurate and how the inaccuracy lead to an erroneous ruling. See Brief of Appellants, ¶¶ 7-18. In its reply, the Defendant suggests that the Court's statement is supported by the record but, in fact, provided no evidence or argument that actually controverts the Schroeders' position. See Brief of Defendant-Appellee, ¶ 51. That failure is, effectively, an admission that the facts are, actually, in dispute and the factual basis for the District Court's analysis is clearly erroneous.

[¶3] Simply stated, the District Court was obligated, under clear summary judgment standards, to give the benefit of all disputed facts and all reasonable inferences to the Schroeders. It failed on both accounts and, instead, accepted the State's inaccurate statement of facts, despite the reality that they were based upon flawed affidavits. Ultimately, the facts and inferences that should have been found by the District Court are: 1) the snow bank was not hard; 2) the snowbank was created by State activity; 3) the Defendant did not inspect the snowbank prior to the accident; 4) the snowbank was a dangerous situation for the travelling public 5) the snowbank had existed for at least two

weeks, and probably much longer; 6) the left guardrail could have been cleared as easily as the right rail; and, 7) the method to remove the ramp/bank was relatively simple and readily available. See Brief of Appellants, ¶¶ 7, 10-14, 17, 18.

[¶4] The Schroeders submit that the abovementioned facts are material to the outcome of this case. The reality is that every one of the facts played, or should have played, a part in the Court's analysis of immunity. In reality, a quick read of the opinion shows that the Court's assumption of the Defendant's inaccurate facts served as the cornerstone of the decision on whether immunity applies. That is, by definition, a material fact.

[¶5] The District Court failed to give all favorable inferences to the non-moving party. Accordingly, the matter should be remanded. Everett Drilling Ventures v. Knutson Flying Service, 338 N.W.2d 662, 664 (N.D. 1983).

II. Public Duty Immunity is Inapplicable to this Action.

[¶6] In its brief, The Defendant continues its argument that public duty immunity applies to this case because moving snow off the roadway is a particular obligation of the State. See Brief of Defendant-Appellee, ¶ 17. In doing so, the Defendant ignores the fact that nearly all activity by the State is a special obligation and its position is, essentially, a return Sovereign Immunity. However, as the Schroeder's have previously briefed, that argument is not supported by the legislative history nor is it consistent with the statute or this Court's past rulings. See Brief of Appellants, ¶¶ 29-31.

[¶7] In addition to the clear legislative history, this Court has already rejected the notion that the State is always immune for snow and ice when it ruled that any person, private or public, can be liable for snow removal that creates an unreasonably dangerous and hazardous condition. Fast v. State, 2004 ND 111, ¶ 12, 680 N.W.2d 265, 270. Similarly,

this Court has suggested, via an extensive citation and block quotations, 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. Taking the facts and inferences in favor of the Schroeders, as is required, the State knowingly created a hazardous condition, was aware of the dangerous condition, and failed to remedy the situation for many weeks despite the fact that operations to move the bank/ramp were simple and available. See Appellant's Appendix, at 13, 12, 19, 39.

[¶8] The Defendant suggests in its brief that the adoption of the public duty immunity, effectively, overturns Fast. See Brief of Defendant-Appellee, ¶ 33. That argument, once again, ignores the legislative intent behind public duty immunity and North Dakota caselaw. In reality, if the legislature intended to repeal the Fast case and/or the Skjervem case, and return to sovereign immunity it was free to do so. In reality, it said the exact opposite; the immunity was not intended as a return to sovereign immunity. At a minimum, a jury should be allowed to decide these questions, not the District Court.

III. Snow and Ice Immunity is Inapplicable to this Action.

[¶9] Admittedly, the State cannot be held liable for a claim 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). The Defendant contends, in its brief, that a state employee is not acting affirmatively when it creates a bank/ramp on the side of a guardrail and, also, immune when it ignores the risky condition and puts its resources and energy to other projects within the district. See Brief of Defendant-Appellee, ¶¶ 24, 37. That argument does not, logically, pass muster. The Defendant had a significant part in creation of the ramp, it admitted that it knew the bank was a dangerous/hazardous condition to the

traveling public, and the State could have easily removed the bank in a number of ways that were minimally invasive. See Appellant's Appendix at 13, 12, 39. Creation of the bank/ramp is an affirmative negligent act in which the State may be held liable. The decision to not remove a dangerous condition and/or put resources elsewhere is an affirmative act. At a minimum, it is a jury question whether these failures amount to an affirmative act that might trigger immunity.

[¶10] Persuasive case law dictates that 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). In its brief, the Defendant argues that the holding of Robinson is undercut by the Minnesota Supreme Court's decisions in Holmquist v. State and Hennes v. Patterson. See Defendant-Appellee Brief, ¶ 46. Of note, though, neither of the cases listed by the Defendant were decided on public duty immunity or on snow and ice immunity. Both cases were decided on discretionary immunity. Therefore, in addition to the clear policy distinctions that guided the analysis, these cases provide no guidance.

[¶11] In Holmquist, the issue was whether the State's action/inaction was immune under the discretionary function immunity. Holmquist v. State, 425 N.W.2d 230, 235 (Minn. 1988). Neither snow and ice immunity nor public duty immunity are ever mentioned. Moreover, as previously argued, the immunity analysis made by the Court was based on Minnesota policies that differ, almost entirely, from this case. Id. at 234. Ultimately, Holmquist provides no guidance on the issues before this Court.

[¶12] In Hennes v. Patterson, the Minnesota Court of Appeals, again, balanced competing factors in applying discretionary immunity to the State's creation of a snowbank and the

failure to remove that bank. Hennes v. Patterson, 443 N.W.2d 204 (Minn. Ct. Appl. 1989). The Defendant argues the snow and ice immunity was the gravamen of the decision but that is, simply, inaccurate. The Court said almost nothing about snow and ice immunity, with the exception of the introductory statement of the issues and the conclusion to one of the issues; the creation of a snowbank. Id. at 203. However, snow and ice exception had no impact on the analysis of whether the State was liable for failure to remove the snowbank. Id. The analysis was, for both issues, entirely devoted to discretionary immunity. Again, this case provides no guidance.

[¶13] Discretionary immunity is not at issue here and, as such, the Minnesota case law cited by the Defendant is of no value. Even if they were instructive, there is more recent and more persuasive case law from Minnesota that, actually, is supportive of the Schroeders. In Gorecki v. County of Hennepin, the Court of Appeals in Minnesota upheld a verdict against Hennepin Country after a truck vaulted from a bridge and hit a snowbank against a guardrail. Gorecki v. County of Hennepin, Dep't of Public Works, 443 N.W.2d 238 (Minn. Ct. App. 1989). The Gorecki decision did not, specifically, overturn Holmquist or Hennes but conducted a very similar analysis. Id. at 241. In doing so, the court found the discretionary immunity protected the State for planning level decisions, but not the operational level decisions at play, thereby negating the immunity arguments. Id. at 240. In this case, like in Gorecki, the Defendant created the bank, knew of the dangerous conditions, and decided not to remove the snowbank. Id. at 238; See also Appellant's Appendix, 13, 12, 28.

CONCLUSION

[¶14] Based upon the arguments set out in the initial brief, as well as the arguments set out in this reply brief, the Plaintiffs/Appellants (Schroeders) respectfully request that the Court overturn the District Court decision granting summary judgment and return this case for further proceedings.

Respectfully submitted this 12th day of March, 2020.

McGEE, HANKLA & BACKES, P.C.

BY: */s/ Jason R. Vendsel*

Jason R. Vendsel ID #04912)
Rheider W. McCormick (ID #08870)
2400 E. Burdick Expy., Ste. 100
P.O. Box 998
Minot, ND 58702-0998
(701) 852-2544
jvendsel@mcgeelaw.com
rmccormick@mcgeelaw.com
Attorneys for Plaintiffs/Appellants Duane Schroeder and Lynae Schroeder, parents of Brooke Schroeder, and Lynae Schroeder as Personal Representative of the Estate of Brooke Schroeder

CERTIFICATE OF SERVICE

[¶15] I hereby certify that on March 9, 2020, I served the foregoing Reply Brief of Plaintiffs/Appellants on the following attorneys by electronic transmission:

James E. Nicolai
Deputy Solicitor General
Email – jnicolai@nd.gov

DATED this 9th day of March, 2020.

McGEE, HANKLA & BACKES, P.C.

BY: */s/ Jason R. Vendsel*
Jason R. Vendsel (ID #04912)
Rheider W. McCormick (ID #08870)
2400 E. Burdick Expy., Ste. 100
P.O. Box 998
Minot, ND 58702-0998
(701) 852-2544
jvendsel@mcgeelaw.com
rmccormick@mcgeelaw.com
Attorneys for Plaintiffs/Appellants Duane Schroeder and Lynae Schroeder, parents of Brooke Schroeder, and Lynae Schroeder as Personal Representative of the Estate of Brooke Schroeder

CERTIFICATE OF COMPLIANCE

[¶15] The undersigned hereby certifies that the foregoing Reply 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 Reply Brief of Plaintiffs/Appellants contains Nine (9) pages.

DATED this 12th day of March, 2020.

McGEE, HANKLA & BACKES, P.C.

BY: */s/ Jason R. Vendsel*

Jason R. Vendsel (ID #04912)
Rheider W. McCormick (ID #08870)
2400 E. Burdick Expy., Ste. 100
P.O. Box 998
Minot, ND 58702-0998
(701) 852-2544
jvendsel@mcgeelaw.com
rmccormick@mcgeelaw.com
Attorneys for Plaintiffs/Appellants Duane Schroeder and Lynae Schroeder, parents of Brooke Schroeder, and Lynae Schroeder as Personal Representative of the Estate of Brooke Schroeder

CERTIFICATE OF SERVICE

[¶16] I hereby certify that on March 12, 2020, I served the foregoing Reply Brief of Plaintiffs/Appellants on the following attorneys by electronic transmission:

James E. Nicolai
Deputy Solicitor General
Email – jnicolai@nd.gov

DATED this 12th day of March, 2020.

MCGEE, HANKLA & BACKES, P.C.

BY: */s/ Jason R. Vendsel*
Jason R. Vendsel (ID #04912)
Rheider W. McCormick (ID #08870)
2400 E. Burdick Expy., Ste. 100
P.O. Box 998
Minot, ND 58702-0998
(701) 852-2544
jvendsel@mcgeelaw.com
rmccormick@mcgeelaw.com
Attorneys for Plaintiffs/Appellants Duane Schroeder and Lynae Schroeder, parents of Brooke Schroeder, and Lynae Schroeder as Personal Representative of the Estate of Brooke Schroeder