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Case Number 483,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SABRA A. HORVAT,	:
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Plaintiff Below,	: Case No.: 483, 2017
	:
Appellant,	: Court Below:
	: Superior Court of the State of Delaware
v.	: C. A. No.: S16C-03-003-RFS
	:
THE STATE OF DELAWARE OFFICE OF MANAGEMENT & BUDGET, an agency of the State of Delaware, THE STATE OF DELAWARE SUPERIOR COURT, an entity of the State of Delaware, and THE STATE OF DELAWARE,	:
	:
Defendants Below, Appellees.	:

APPELLANT'S AMENDED REPLY BRIEF

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ARGUMENT I

THE SUPERIOR COURT ERRED IN HOLDING THAT PLAINTIFFS INJURIES DID NOT RESULT FROM THE USE OF A STATE OWNED AND INSURED MOTOR VEHICLE.

The Superior Court erred in holding the State's Insurance policy coverage did not cover Plaintiff's accident resulting from " ... use of the State-owned motor vehicle." The lower Court and Defendants erroneously try to distinguish the ruling in *Zak v. GPM Investments.*[1] Both involve insured motor vehicles negligently being used to plow and remove or treat snow covered surfaces from State owned properties. The negligence in each occurrence resulted from the use of an insured State vehicle creating a dangerous condition. In each case, the harm was caused by an accident. Coverage by the State's insurance policy is consistent with the language of the insurance contract, public policy and applicable case law.

Defendants assert that the coverage language should be changed by inserting the word "automobile."[2] "Accident" as defined by Defendants' policy does not include the word "automobile."[3] By inserting it, Defendants seek to narrow its meaning.[4] A party cannot legally redraft policy coverage after a loss occurs.[5] The

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[1]2013 Del. Super. LEXIS 166 (Del. Super., Apr. 30, 2013).
[2]Appellees' Answering Brief at 10.
[3]A-88.
[4] Answering Brief at 10.
[5]*Estate of Osborne v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010).

policy's plain language should be applied.[6] Only if the language is deemed ambiguous and capable of at least two reasonable interpretations, will a Court resolve the ambiguity and will construe the language against the drafters, and in favor of coverage.[7] This Court has consistently found that accidents do result from the use of a motor vehicle for coverage purposes though no direct collision between the vehicle and injured person occurred.[8] Although there was an automobile collision in *Zak* involving a third party, the Court determined it resulted from the use of the State snow plow which was not even present when the collision occurred.[9]

The State's policy requires payment for injuries "caused by an accident and resulting from the ownership, maintenance or use of a covered auto."[10] The phrase "caused by an accident" must be interpreted from the viewpoint of the injured.[11]

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[6]*Id.*
[7]*Id.*
[8]*Sussex Cty. Del. v. Morris*, 610 A.2d 1354 (Del. 1992) (finding negligent use of a motor vehicle where there was no automobile collision.); *Gray v. Allstate Ins. Co.*, 668 A.2d 778, 782-83 (Del. Super. 1995) (an accident "involving a motor vehicle" occurred when a bicyclist fell swerving to avoid collision with a vehicle); *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 928 (Del. 2013) (Plaintiff was injured by a fall when a rope connected to the vehicle hitch snapped).
[9]*Zak* at *7-8.
[10]A-88.
[11]*Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1171-72 (Del. 1990).

The *Zak* Court looked to the contract to strictly construe it.[12] It is significant that the State insurance policy puts no words of limitation on the unambiguous word "use." The State was free to put limitations on its coverage but chose not to, either before or after the *Zak* occurrence.

Defendants assert the vehicle must be the "instrument of harm" that "directly" caused injury.[13] The snow plow was the "instrument of harm" that "directly" caused Plaintiff's harm because the negligent plowing and treating of the parking lot surface caused the snow and ice conditions that caused Plaintiff's fall. Although how the snow and ice remained on the lot remains in dispute, were it not for the negligently inadequate clearing and treating of the snow and ice conditions by the State vehicles, Plaintiff would not have fallen.[14] This dispute of fact is a material one for which summary judgment is inappropriate.[15]

Defendants argue there is a "critical" distinction between an affirmative act and the failure to act which distinguishes the holding in *Zak*.[16] If, in fact, the cause of the dangerous condition of the parking lot surface was the State's inadequate salting or sanding of the lot, rather that the unreasonably inadequate removal of the snow and ice, then there is no liability for its omissions. Defendant provides no

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[12]*Zak* at *12.
[13]Answering Brief at 10-11.
[14]A-19; A-41-A-42; A-45
[15]*Friel v. Hartford Fire Ins.*, 2014 LEXIS 234, at *3-4 (Del. Super., May 6, 2014).
[16]Answering Brief at 9-11.

support for this alleged distinction.[17] Certainly a landowner's duty of care to its invitees is breached by negligent acts and negligent failures to act.[18] Additionally, there can be more than one cause of harm.[19] For instance, in *Morris*, the vehicle was the instrument of harm and Plaintiff's injuries by *failing* to equip the vehicle properly.[20] In *Hedrick* it was the "*failure* to adequately provide safety."[21]

Defendants' reliance upon *McCaffrey v City of Wilmington* is misplaced.[22] *McCaffrey* denied liability under 10 *Del.C.* § 4012's automobile and equipment exception by finding the use of the police officer's identification, badge, gun and magazine did not cause "property damage, bodily injury or death" to a victim of an attempted sexual assault by a drunken police officer.[23] Thus, the equipment in McCaffrey was not the instrument of harm, unlike the State vehicles involved here.[24]

The State vehicles were in active use when the dangerous snow and ice condition causing Plaintiff's fall was created by the negligence of the vehicles' operators. Similar to *Zak*, the snow plow was "connected with the accident or the

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[17]Answering Brief at 9-11.
[18]*Restatment. (Second) of Torts*, § 343, cmt. b, d, e (1965).
[19]*Hedrick v. Webb*, 2004 LEXIS 379, at *11 (Del. Super., 2004).
[20]*Morris*, 610 A.2d at 1359-60.
[21]*Hedrick* at *11-13.
[22]Answering Brief at 11.
[23]*McCaffrey v. City of Wilmingto*n, 133 A.3d 536, 550-51 (Del. 2016).
[24]*Id.*

creation of a condition that caused the accident."[25] The dangerous condition causing the accident was created by the State vehicles operators' negligent acts or failures to act.

Merchants Co. v. Hartford Accident and Indemnity Co. determined the conditions causing the accident arose out of the operation, maintenance and use of a motor vehicle.[26] Defendants' truck driver drove into a ditch and then negligently left the poles used to extricate it in the roadway and drove away. The poles were hit by another driver causing injuries and damage twelve hours later.[27] The Merchant Court reasoned:

> "... where a dangerous situation causing injury is one which arose out of or had its source in, the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation,--which is to say, that the event which breaks the chain, and which, therefore, would exclude liability under the automobile policy, must be an event which bears no direct or substantial relation to the use or operation; and until an event of the latter nature transpires the liability under the policy exists."[28]

The Court found no intervening act to break the continuity of the direct and subtstantial connection to the use or operation of the truck.[29] The use of the poles

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[25] *Wiebel v. Am. Farmers Mut. Ins. Co., v. Hartford Accident & Indem. Co.,* 140 A.2d 712, 714 (Del. 1958).
[26] 187 Miss. 301, 306 (Miss. 1939).
[27] *Id.*
[28] *Id.* at 308.
[29] *Id.*

to remove the truck from the ditch arose out of the operation of the truck and the negligent failure to remove the poles occurred the moment the truck drove away.[30]

In order for the accident to arise out of the use of the vehicle there must be a causal connection between the accident and the vehicle.[31] The state vehicle operators' unreasonably inadequate plowing and salting were casually connected to the accident. The sole purpose of the state vehicles was to remove and treat the lot's snow and ice condition. The vehicles were equipped with plows and salt/sand spreaders in order to "clear the snow and ice." The insurance policy covers" [mobile] equipment while being carried or towed by a covered auto."[32] No other acts broke the direct and substantial connection between the use of the plow and salt trucks and the dangerous condition of the parking lot. There was no more precipitation, nor any other instruments used to clear the lot.[33]

The State asserts there would be a "perverse incentive for the State to not plow" and face "daunting budgeting and planning decisions." Defendants exaggerate the scope of Plaintiff's claim from the very narrow circumstance of compensating a victim where the State summoned one to appear for jury duty, invited one to use the State's parking lot, then caused harm by its negligent use of

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[30]*Id.* at 308-09.
[31]*Nationwide Gen. Ins. Co. v. Royal,* 700 A.2d 130, 133 (Del., 1992).
[32]A-88.
[33]A-72; AR1-4.

insured State vehicles.[34] The State's concerns that finding for Plaintiff will "greatly broaden the State's liability" are further narrowed by the necessity of overcoming the additional defenses of the State Tort Claims act and the Public Duty Doctrine.[35]

The General Assembly has determined the State is in a better position to bear the financial burden for its own wrong doing where there is insurance coverage.[36] Finding Plaintiff's claim viable is also consistent with the public policy of the Delaware Financial Responsibility Laws[37] requiring all vehicles maintain Indemnity insurance for legal liability regarding bodily injury, death or property damage arising out of ownership, maintenance or use of the vehicle and promoting protection for those harmed by motor vehicles.[38] Furthermore, construing the State's insurance policy as it is written is consistent with the intent of the General Assembly "to enact a viable program which would, in its own words, protect the public from wrongful actions of State officials and employees."[39]

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[34]Answering Brief at 12, n.55
[35]Answering Brief at 12.
[36]18 *Del. C.* § 6503; *Pajewski v. Perry*, 363 A.2d 429, 432-35 (Del. 1976).
[37]21 *Del. C.* § 2118, 2902 and 6503.
[38]*Nationwide Gen. Ins. Co. v. Seeman*, 702 A.2d 915, 918-920 (Del. 1997) and *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 560 (Del. 1988).
[39]*Pajewski,* 363 A.2d at 435.

The Klug test is applicable for the limited purpose of determining whether a loss resulted from the use of a motor vehicle. Reliance on this test does not add an argument to Plaintiff's opposition to summary judgement. Rather, Klug's three-part test is a standard by which State courts determine whether an injury "has arisen out of the operation, use or maintenance of a motor vehicle" for insurance coverage purposes.[40]

In order to provide consistency in the interpretation of whether an injury arose from by the use of a vehicle,[41] the Klug test should be considered in all determinations of whether the injuries resulted from the use of a vehicle, whether defined under statute or contract. This is especially appropriate where the language is indistinguishable in meaning for the State's adopted vehicle insurance policy, Delaware's statutes requiring motor vehicle insurance coverage, the uninsured/underinsured motorist's statute, the Municipal Tort Claims Act; and insurance policy in the *Royal* cases.[42]

Defendants assert Plaintiff fails to meet the first and third prongs of the Klug test.[43] The first prong is "whether the vehicle was an "active accessory" in causing the injury and the third prong is whether the vehicle was used for transportation

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[40]*Royal*, 700 A.2d at 132.
[41]Royal v. Nationwide Gen. Ins. Co., 1996 LEXIS 441 at *21 (Del. Super. 1996).
[42]21 Del. C. § 2902 (b)(2); 18 Del. C. § 3902(a); 21 Del. C. § 2118(a)(1); 10 Del. C. § 4012(1); *Royal*, 700 A.2d at 131; A-88-A-90.
[43]Answering Brief at 15.

purposes.[44] An "active accessory" in causing injury is "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury."[45] "For an injury to arise out of use of an automobile there must be a causal relationship between the use of the vehicle for transportation purposes and the injury."[46]

Defendants' reliance upon *Royal* is unfounded.[47] In contrast, here the use of the State vehicles was not merely the situs, but actually caused the dangerous condition. The State vehicle operators' unreasonably inadequate plowing and salting were casually connected to the accident. The sole purpose of the harmful State vehicles was to remove and treat the lot's snow and ice condition. The vehicles were equipped with plows and salt/sand spreader in order to "clear the snow and ice."[48] The insurance policy covers "[m]obile equipment while being carried or towed by a covered auto."[49] No other acts occurred to break the direct and substantial connection between the use of the plow and salt trucks and the

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[44]*Royal,* 700 A.2d at 131-32.
[45]*Sierra v. Allstate Prop. & Cas. Ins. Co.*, 2013 LEXIS 218, at *4 (Super. Ct., June 12, 2013).
[46]*Id.* at *5-6.
[47]Answering Brief at 15-16.
[48]A-50.
[49]A-88.

dangerous condition of the parking lot. There was no more precipitation, nor any other instruments used to clear the lot.[50]

In *State Farm Mutual Insurance Co. v. Buckingham*, the first prong was met when "the initial circumstances precipitating the incident arose" when the vehicle was operated in a manner that kicked up stones provoking another driver to commit harm.[51] Similarly, the snow plow and salt spreading vehicles were an "active accessory" and not merely the situs when operated in a manner that created the dangerous condition resulting in Plaintiff's injury.[52] Here the State vehicles were an "essential element" in creating the lot's dangerous condition.[53] It was foreseeable that if a vehicle used to clear and treat a snow and ice condition, did so negligently, then a pedestrian fall could have resulted.[54]

Asserting the State vehicles were used as an "instrument of good," which negates their "active accessory" status is a non sequitur.[55] The intent of the plow and salt vehicle operators to do good is irrelevant in this negligence case. Mens Rea is not an element of negligence for civil liability purpose. Nor does it address

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[50]A-72; AR1-4.
[51]919 A.2d 1111, 1114 (Del. 2007).
[52]*Id.*
[53]*Royal*, 700 A.2d at 132-33.
[54]Answering Brief at 16.
[55]Answering Brief at 14.

the causal relationship between the vehicles' use and the creation of the dangerous condition. Further, the State provides no case law to support this assertion.

In *Kelty*, the truck likewise, started as "an instrument of good." The rope tied to the vehicle was intended to make the endeavor safer.[56] Nevertheless, the vehicle was found to be an "active accessory" in causing the injury.[57] In *Zak*, the plow truck was attempting to do good, yet the harm was, at least, in part caused by the use of the snow plow, despite the drivers' "good intentions".[58] The State also argues the "parking lot was the instrument of harm or the active accessory."[59] This fails to acknowledge the causal connection between the dangerous condition of the parking lot and the negligent plowing and salting of it.

Klug's third prong is met. The trucks were used for transportation purposes. It was necessary for the State vehicles to be driven throughout the lot to remove snow and transport it to specific locations to clear the lot. It was necessary to drive a vehicle though the lot to transport and spread salt to treat the surface conditions. Rob Kapp testified that he pushed the snow with his vehicle clearing the entrances, clearing from east to west, placing snow on islands, the end, and the back of the lot.[60]

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[56]*Kelty*, 73 A.3d at 928.
[57]*Id.* at 928.
[58]Answering Brief at 16.
[59]*Id.*
[60]A-80.

The sole purpose of the State vehicles in the parking lot on March 3rd and 4th was to clear snow and ice and spread salt by driving these vehicles throughout the lot. These State vehicles were the only instruments assigned to complete the task of making the lot reasonably safe for invitees.[61] A plow and salter were attached to and transported throughout the lot by these State vehicles.[62] These vehicles did attempt to make the lot reasonably safe. The precipitation stopped the day before and State workers testified that they believed that they had completed the job before Plaintiff arrived for jury duty on the morning of March 4th, 2014.[63] As Plaintiff made her way out of the lot, Plaintiff fell.[64] Plaintiff's injuries were caused by her accidental fall that resulted directly from the State vehicles failing to adequately and reasonably remove snow and ice and salt the cleared surface as confirmed by Plaintiff and two witnesses.[65] Defendants do not assert any other instrument of harm or any act breaking the causal link between the State vehicles' actions and Plaintiff's fall.

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[61]A-72.
[62]A-68-A-69; A-60.
[63]AR1-4; B5-B6.
[64]A-20.
[65]A-19; A-42, A-45

ARGUMENT II

THE SUPERIOR COURT ERRED BY FAILING TO FIND ROUTINE MAINTENANCE OF THE PARKING LOT ONLY AMOUNTED TO MINISTERIAL ACTS NOT PROTECTED BY THE STATE TORT CLAIMS ACT.

The specific task of removing the snow and ice per the State's Snow Removal Procedure, is a ministerial act. It does not warrant protection from liability when exercised negligently. While every action enjoys some level of discretion, arguing snow removal operations "involve significant discretion" is unpersuasive and overstated.[66] A discretionary act "goes to the essence of governing."[67] The level of decision making required to remove snow and ice from a parking lot does not rise to the level of discretionary decision making contemplated by the State Tort Claims Act.[68]

State courts have found it difficult to define the distinction between what is discretionary or what is ministerial.[69] The distinction is one of degree and must be considered on a case-by-case basis.[70] An act tends to be discretionary where there

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[66]Answering Brief at 19.
[67]*Scarborough v. Alexis I. duPont High Sch.*, 1986 LEXIS 1343, at *6 (Del. Super., 1986).
[68]10 *Del. C.* § 4001(1); *Simon v. Heald*, 359 A.2d 666, 668 (Del. Super. 1976) (a police officer "performing routine duties, would not be susceptible to potential dangers of over-caution" and is liable for his negligence).
[69]*Hale v. Elizabeth W. Murphey Sch., Inc.*, 2014 LEXIS 246, at *12-13 (Del. Super., May 20, 2014); *Scarborough,* LEXIS 1343, at *6.
[70]*Hale,* LEXIS 246, at *13-15.

are "no hard and fast rules" for the course of conduct. An act is ministerial where it "involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act."[71] "Ministerial acts or omissions, ... are more routine, and typically involve conduct directed by mandatory rules or policies."[72]

The distinction between these types of acts or omissions is illustrated by two Delaware cases involving police officer duties and the procedures that govern the activities: one discretionary, *Amalfitano v. Cocolin*[73], and one ministerial *Simon v. Heald.*[74] *Amalfitano* involved an officers' high speed chase which was found to be discretionary, because the Pursuit Policy expressly provided that pursuits were subject to the officer's discretion.[75] In contrast, *Simon* involved an officer's routine activities governed under standard operating procedures which were ministerial.[76] The duties of the State employees removing the snow from the parking lot are more like the police office performing a routine activity according to a standard operating procedure.

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[71]*Amalfitano v. Cocolin*, 2017 LEXIS 350, at *13 (Del. Super., July 18, 2017).
[72]*J.L. v. Barnes,* 33 A.3d 902, 914 (Del. Super. 2011).
[73]LEXIS 350, at *13-14.
[74]359 A.2d at 667-69.
[75]*Amalfitano,* LEXIS 350, at *13-14.
[76]*Simon,* 359 A.2d at 667.

The conduct in question is governed by the State's Snow Removal Operating Procedure and Safety Training Manual.[77] The manual provides mandatory rules and policies leaving little room for personal judgment or decision making. Drivers are mandated to ensure the areas assigned to them are cleared of snow and ice and where to and where not to pile the snow.[78] They are prescribed what to wear, what to bring, where to report, and must be available 24/7 during the snow season.[79] Drivers are assigned their vehicle and work locations, and when they have completed their work, it is inspected by a supervisor.[80] They are advised to identify enumerated obstacles and what to do and not to do in case of an accident.[81] The direction the driver plows or placement of the snow had "little bearing of importance upon the validity of the act."[82] Neither does the amount of the accumulated snow, change the requirement the driver clear the snow and ice.[83] The State does not argue the snow removal drivers had any other choice of methods to clear the parking lot, or there was any other relevant and discretionary conduct provided for in the manual that led to the parking lot's dangerous condition.

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[77]B07-B10; A-50.
[78]A-50; B-9.
[79]A-50; B-08-10.
[80]B05-B06.
[81]B-09; B-10.
[82]*Amalfitano,* LEXIS 350, at *13.
[83]Answering Brief at 20.

While there is some degree of discretion in most acts, the plow operator did not have discretion as to whether or not to plow. The decision was not his.[84] He did not have the discretion to clear or not clear the lot entrance. In fact, he was instructed to make sure that entrances were clear.[85] Nor was there discretion to decide what equipment to use, or even what clothing to wear.[86] The snow plow vehicle operator, described plowing as more of routine work."[87]

The State raises the "continuing storm doctrine" and argues, like other landowners, the doctrine should apply.[88] While this doctrine generally applies to all landowners, it is inapplicable to the facts of this case. It is undisputed the storm ended during the day prior to Plaintiff's fall. The State did not raise this defense in its pleadings and did not brief it. Thus, it is waived. Furthermore, the reasonableness of commencing snow removal is established by the Defendants' own actions.

Stanfield v. Peregoy[89] is distinguishable. In *Stanfield* the plow/salt truck was clearing public streets during an active storm when the truck collided with a bus.[90] The Court found that the driver exercised his judgment and discretion because there were special risks, requiring him to balance safety concerns, similar to a police car

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[84]B-08.
[85]B-09.
[86]B-10
[87]A-80.
[88]Answering Brief at 19.
[89]245 Va. 339 (Va. 1993).
[90]*Id.* at 341-42.

in pursuit, or a firetruck on the way to a fire.[91] The present matter does not involve an active storm or public roadway. Defendants were clearing a closed, vacant parking lot, making inapplicable the consideration of road conditions and safety concerns.[92]

In *Simmons v. Olson*, the plow truck proceeded through an intersection in disregard of a red light when it hit another vehicle.[93] The Court found that the driver was exercising his professional judgment when he went through the red light; permissible under a Minnesota law exempting motor vehicles doing work on highways.[94] Combined with the hazardous nature of plowing the streets, because of the driver's need to assess speed and other road conditions to balance safety factors, the Court found that the driver's act was discretionary.[95]

In contrast, when these safety factors are absent, a Minnesota Court found snow plowing ministerial, *Shariss v. City of Bloomington.*[96] Similar to the *Shariss* holding, there is no evidence of any safety concerns, hazardous conditions, or other drivers in the lot when plowed and salted.[97] Many states have held plowing and

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[91]*Id.* at 343.
[92]Answering Brief at 19 n.84.
[93]2001 LEXIS 1298 at *2 (Minn. App. Dec. 4, 2001).
[94]*Id* at *4.
[95]*Id* at *1, *4, *6.
[96]852 N.W.2d 278 (Minn. App. 2014).
[97]*See also*, *Fladwood v. City of St. Paul*, 2016 LEXIS 463, at *7-10 (Minn. App., May 9, 2016) (finding conduct ministerial where circumstances were "absolute,

salting snow and ice, even on public highways, is a ministerial duty.[98] Lastly, regardless of the jurisprudence of other states, the law of Delaware holds that maintenance activities are ministerial.[99]

The snow removal activities in the courthouse parking lot were ministerial and performed according to "hard and fast" mandatory policies. The activities were routine and free of public highway hazards, thus requiring little personal judgment or decision making. Thus, the State Tort Act does not bar Plaintiff's claim against the Defendants.

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certain, and imperative" involving little split-second decision making, but rather execution of a specific duty).

[98]*State v. Abbott*, 498 P.2d 712 (AK, 1972) (proper winter maintenance of the highway was ministerial); *Morway v. Trombly* 173 Vt. 266 (Vt. 2001) (finding that the operation of a snowplow was a ministerial duty); *Fields v. Baker*, 2017 LEXIS 93 (KY App., 2017) (snow and ice removal was a ministerial duty, granting summary judgment for other reasons).

[99]*Triple C Railcar Serv. v. City of Wilmington*, 630 A.2d 629 (Del. 1993); *Bartley v. Norfolk Southern Corp.*, 2009 LEXIS 293 at *13-15 (Del. Super., 2009).

ARGUMENT III

THE PUBLIC DUTY DOCTRINE DOES NOT BAR PLAINTIFF'S CLAIM

"The public duty doctrine provides when a public entity or employee owes a duty to the public at large rather than a specific individual, no member of the public may pursue a claim against that entity or employee unless the claims are based upon non[-]discretionary acts or failures to act."[100] Since the act of removing snow and ice from the Courthouse parking lot is ministerial, the public duty doctrine does not bar Plaintiff's claim.

"The scope of the duty of care often turns on the relationship between the party claiming harm and the party charged with negligence."[101] Defendants assert Plaintiff was a member of the general public when she was injured. However, Ms. Horvat was a business invitee on March 4th, 2014.[102] The public duty doctrine applies to the general public, not specific individuals. The State had a duty to maintain a safe premise for Plaintiff, a business invitee,[103] who was invited to use

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[100] *Tilghman v. Del. State Univ.*, 2012 Del. Super. LEXIS 405, at *6 (Del. Super., 2012).

[101] *Castellani v. Del. State Police*, 751 A.2d 934, 938 (Del. Super., 1999); *see also*, *J.L. v. Barnes*, 33 A.3d 902, 916 (Del. Super., 2011).

[102] *Di Ossi v. Maroney*, 548 A.2d 1361, 1366 (Del., 1988) "As a business visitor or invitee … plaintiff …[is] entitled to expect that the premises would be free of any dangerous condition known or discoverable by the possessor of the land."; *see also*, *Furek v. Univ. of Del.*, 594 A.2d 506, 510 (Del. 1991)

[103] *Di Ossi*, 548 A.2d at 1366.

the parking lot as a summoned prospective juror. This lot was not open to the general public.

The *Tilghman* Court found students attending school homecoming activities were not members of the general public, thus this doctrine did not apply, and there was no need to find another reason to avail it.[104] The Court found it unnecessary to apply the special relationship exception "[s]ince the duty owed was not to the public at large, the public duty doctrine cannot apply."[105] The Court reasoned that the hired Delaware State policemen performed a "specific duty, at a specific time, in a specific area" for a specific group of people similar to this present matter.[106] The parking lot was not open to the general public, but rather limited to a specific group of people using the lot for Court business.[107] Anyone else using the lot would be considered trespassers.

Ms. Horvat was not at the parking lot doing her own business. Rather, she was summoned to do State business and was not there as a member of the general public, but rather a member of the limited specific group. She reported as instructed at a "specific time, in a specific area" performing specific duties for the

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[104]2012 Del. Super., LEXIS 405, at *10 ("Although, as the Court has made clear, it is not particularly fond of the timing or the adamantine effect that the public duty doctrine has had on Delaware case law, the Court must, nonetheless, apply it to the case at bar based on the principle of stare decisis.")
[105]*Id.* at *7-14, n.31.
[106]*Id.* at *13.
[107]A-119.

State. The State's vehicle drivers owed a duty of care to make the lot reasonably safe for Defendants' invitees.[108] Here the State's contact with Ms. Horvat was not brief like escorting a traveler through hazardous construction site,[109] it was ongoing; by summons, solicitation of personal information, phone instructions, and face to face contact with Court staff.[110] Once Ms. Horvat was summoned and required to appear, she ceased to be just a member of the general public.

Assuming, arguendo, Plaintiff was a member of the general public, the public duty doctrine still does not apply because, the State formed a special relationship with the Plaintiff. "The duty of care runs to specific individuals when certain facts are established."[111] They are:

> (1) an assumption by the [governmental agency or its agents], through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the [governmental agency or its] agents that inaction could lead to harm; (3) some form of direct contact between the [governmental agency or its] agents and the injured party; and (4) that party's justifiable reliance on the . . . affirmative undertaking (of the governmental agency or its agents).[112]

The State assumed an affirmative duty to act on Plaintiff's behalf. This duty flowed from the reciprocal obligation resulting from the State's summon of

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[108] *Jenks v. Sullivan*, 813 P.2d 800, 803 (Colo. App., 1991) (noting a courthouse is different from other public facilities because jurors' appearance is not optional) (rev'd on other grounds).
[109] *Hales v. English*, 2014 LEXIS 3468 (Del. Super., 2014).
[110] A114.
[111] *Id.* at 938.
[112] *Id.*

Plaintiff for jury duty and the applicable statute.[113] A juror "may be excused from jury service by the Court only upon a showing of undue hardship, extreme inconvenience or public necessity"[114] and the "failure to comply with a summons to appear for jury service or to complete jury service is guilty of criminal contempt and upon conviction may be fined not more than $100 or imprisoned not more than 3 days, or both."[115] The State's duty of care owed Plaintiff ran "individually" to Plaintiff. By inviting Plaintiff to use its lot, the State assumed the affirmative duty to make the lot's condition reasonably safe for Plaintiff's use.[116] Here, as a result of Defendants' negligence Plaintiff was injured.

As a landowner, the State was or should have been aware that its failure to clear the snow and ice from its parking lot could lead to harm. This knowledge was evidenced by its purchase of salt, fuel and trucks, plow blades, salt spreaders and the commitment of personnel to remove snow and ice as directed by State practices and procedures.[117] During and upon completion, facilities management supervisors performed inspections.[118] When complete, facilities management

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[113] 10 *Del. C.* Ch. 45.
[114] 10 *Del. C.* § 4511.
[115] *Id.* at § 4516.
[116] *Restatement (Second) of Torts* § 343 (1965); *see e.g.*, *DiOssi*, 548 A.2d.
[117] B-14-B-118.
[118] B-06.

supervisors make a "bridge call" to advise their supervisors that the State parking lots were prepared to open for business.[119]

The State instructed Ms. Horvat to appear on the morning of March 4th, 2014, knowing it invited her to use its lot. The State did not give Plaintiff the option not appear.[120] Thus, it is reasonable to infer the State knew or should have known an unreasonably inadequate removal of snow and ice from its lot could cause harm to Plaintiff.

To avoid finding a special relationship with Plaintiff, the State claims direct contact to the facilities management office and the plow drivers must have occurred.[121] While some form of direct contact between the governmental agency or its *agents* and the injured party is required, it is not as limited as asserted by Defendants.[122]

Here the applicable special relationship was initiated by the State and flows from the applicable juror statutes.[123] Plaintiff had more than "some" contact with the State. The State's Court had direct knowledge of and contact with Ms. Horvat. The contact required her to appear for jury duty.[124] The State's Court knew or

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[119]B-06a.
[120]A36-A38.
[121]Opinion at 10.
[122]*Castellani,* 751 A.2d at 934.
[123]10 *Del. C.* Ch. 45.
[124]10 *Del. C.* § 4511 (b).

reasonably expected that Ms. Horvat would appear on March 4th as instructed by the Court's telephone message of March 3rd. The contact was not "tangential." The only reason Ms. Horvat was in the parking lot arose from the State's direct instructions to her. There is no reasonable basis to conclude otherwise.

Plaintiff called the State's Court the night before she fell. She was instructed to report the next morning.[125] She arrived early so she could park in the Water Street parking lot because it was closer.[126] Her only purpose was to comply with Defendants' instructions to appear for jury duty. She relied on the fact that the Court advised it would be open for business and relied upon the State to make its premises safe for her use like all landowners are expected to do under the law.[127]

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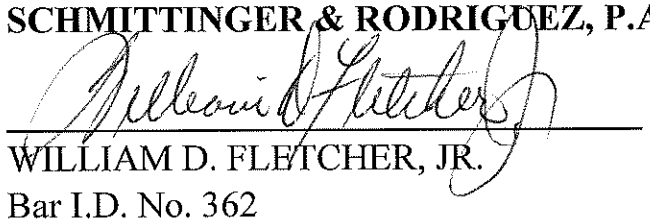
[125]A14-15.
[126]A-15.
[127]*Restatement (Second) of Torts*, § 343 (1965).

CONCLUSION

For the reasons set forth above, Appellant's appeal seeking reversal of the lower Court's decision should be granted.

SCHMITTINGER & RODRIGUEZ, P.A.



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