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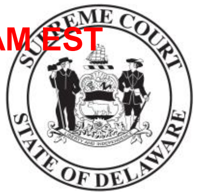

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SABRA A. HORVAT, Plaintiff Below, Appellant, v. 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.	:	No. 483, 2017 Court Below: Superior Court of the State of Delaware, Sussex County C.A. No. S16C-03-003 RFS

APPELLANT'S AMENDED OPENING BRIEF

SCHMITTINGER & RODRIGUEZ, P.A.
WILLIAM D. FLETCHER, JR.
Bar I.D. No. 362
BONNIE GLADU
Bar I.D. No. 6281
414 S. State Street
P.O. Box 497
Dover, DE 19903-0497
(302) 674-0140
Attorneys for Plaintiff Below, Appellant

Dated: January 16, 2018

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NATURE OF PROCEEDINGS

Plaintiff, Sabre Horvat filed, suit against Defendants, The State of Delaware Office of Management & Budget (OMB), an agency of the State of Delaware, The State of Delaware Department of Transportation, 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 on March 3, 2016. The Complaint alleged that while Defendants acted within the scope of their agency relationship with the Defendant, The State of Delaware and as the State's authorized agent(s), Defendants owned, maintained and utilized a parking lot located on Water Street in Dover, Delaware, that was posted to be used exclusively by persons with business at the Kent County Courthouse. Pursuant to summons, Plaintiff was commanded to appear at the Kent County Courthouse for jury duty on March 4, 2014. Defendants' negligent clearing of this restricted use parking lot with State-owned motor vehicles directly and proximately caused Plaintiff to slip, fall and break her left tibia and left fibula.

Defendants filed a Motion for Summary Judgment on June 30, 2017, raising three immunity defenses. The Defendants additionally asserted that Del DOT was not involved in this incident and should be dismissed.

Plaintiff responded in opposition to Defendants' Motion on August 3, 2017, asserting the State waived or was not entitled to assert, any claimed immunity

defense under the facts of this case. Plaintiff agreed that Del Dot was not involved in the incident and could be dismissed from the case. Defendants filed a reply in support of their Motion for Summary Judgment on August 29, 2017.

The Honorable Richard F. Stokes granted Defendants' Motion for Summary Judgement on October 30, 2017 on the grounds that the State is shielded from liability by sovereign immunity, by the State Tort Claims Act and by the public duty doctrine. A timely appeal was filed with this Court on November 21, 2017 seeking reversal of the lower Court decision. This is Plaintiff's Opening Brief in support of her appeal.

SUMMARY OF ARGUMENT

1. The State of Delaware waives sovereign immunity when there is applicable insurance coverage, either by a commercial policy or when the State is self-insured. Here the State has applicable self-insurance coverage thereby waiving its sovereign immunity defense to Plaintiff's personal injury claim, 18 Del. C. § 6511. In responding to a State issued summons to appear for jury duty on March 4, 2014, Plaintiff Sabre Horvat fell and severely fractured her leg in Defendants' parking lot. Her fall was caused by the existence of a dangerous and unsafe condition involving the presence of snow and ice which the State failed to clear from the parking lot surface and failed to carefully treat the lot with an application of salt. The State's only method for this work was by motor vehicle plowing and motor vehicle salt spreading of the parking lot surface. The motor vehicles responsible for the work are all self-insured by the State. This insurance coverage applies to any incident caused by the use of the insured vehicles. Thus, Defendants have waived any sovereign immunity defense to Plaintiff's claim, see *Zak v. GPM Invs., LLC*, 2013 Del. Super. LEXIS 166 (Del. Super. Apr. 30, 2013).

2. The State is responsible for the negligent acts of its agents when the conduct causing injury to a person involved a ministerial act and not a discretionary act, 10 Del. C. § 4001(1). Maintenance of premises or equipment has been found to be ministerial in nature and not a discretionary function, *Triple C Railcar Serv. v. City of Wilmington*, 630 A.2d 629 (Del. 1993). Thus, acts or omissions regarding the performance of maintenance duties which cause injury are not protected by the State Tort Claims Act. Thus, this statute does not bar Plaintiff's claim against Defendants.

3. Defendants have neither a factual or legal basis to bar Plaintiff's claim against them under the "Public Duty" doctrine. Reasonable and careful maintenance of premises to prevent the premises condition from causing harm to invites is a duty placed upon all landowners. If the parking lot in question were owned or controlled by a non-governmental entity, there is no dispute that a breach of the duty of care owed an invitee resulting in injury is an actionable tort. This duty of care should not be suspended merely because the premises are owned by the State. This duty of care does not implicate the type of responsibility generally placed only upon a governmental entity for the benefit of the general public. Further, in this matter, the premises

were not open to the general public and the general public was not invited to use the premises. Thus, there is no duty of care owed to the general public which eliminates a duty of care to any particular person. Lastly, given the special relationship created by the State in commanding Plaintiff to appear at the Kent County Courthouse on March 4, 2014, this relationship operates as an exception to the Public Duty doctrine and Plaintiff's claim against Defendants is not barred by this doctrine.

STATEMENT OF FACTS

Sabre Horvat was summoned for jury duty by the State's Superior Court (A-35 – A-38). The two-week term began on February 24, 2014. (A-35). During this term, Dover, Delaware experienced a snow storm with periods of freezing rain and snow fall on March 2 and 3, 2014. The storm ended on March 3, 2014 around 5:35 p.m. with the last snow falling around 2:47 p.m. and accumulating approximately 7 inches. The last precipitation in the form of light freezing rain occurred around 5:35 p.m. (A-28 – A-34). Thereafter the weather remained free of precipitation until Sabra Horvat slipped and fell on the morning of March 4, 2014, around 8:30 a.m.

On March 2, 2014, Sabra Horvat called the Superior Court as required and was instructed not to report on March 3, 2014 for jury duty. (A-15, A-16). She called the Superior Court again on the evening of March 3, 2014, shortly after 5:00 p.m., and was directed by recording that all groups were to report on March 4, 2014 for jury duty. (A-16). The Court instructions provided to Plaintiff with her Summons, invited her to park in one of three places; the Kent County Courthouse Parking lot, the Del One parking lot or on the street. (A-36)..Plaintiff arrived early and parked in the Kent County Courthouse parking lot, which is especially designated for courthouse patrons only.

When Horvat entered the Kent County Courthouse parking lot, she saw that the lot had been plowed of snow. While in the lot, she did not see any salt or sand on the parking lot surface. (A-18). Horvat was wearing treaded boots and jeans and she was she was carrying her purse. (A-16 – A-18). After Horvat exited her car, she headed toward the sidewalk when she slipped and fell on snow and ice in the parking lot near its entrance. (A-19, A-26).

Two good Samaritans, William Lewis Sr. and Jacob Lewis stopped to assist, called an ambulance and Horvat's husband, Jeffery Horvat. (A-20, A-21). Both men remember snow and ice on the ground in the parking lot, however neither recalls whether or not there was salt or sand. (A-40 – A-42, A-44).

Horvat's fall resulted in a spiral fracture of the left tibia and left fibula requiring two surgeries and the placement of a rod in her leg. (A-22). Horvat suffers from pain, decreased mobility, and emotional symptoms due to the change in physical ability and resulting lack of independence. (A-23 – A-24). Horvat has been unable to resume her prior employment in New Castle County (A-24) and her past medical expenses are approximately $85,000.00. (A-45).

Defendants' snow removal operating procedures require that personnel "shall perform all necessary tasks to ensure that assigned areas are clear of snow and ice in a timely manner. Plow trucks, snow blowers and shovel crews shall report to areas assigned to them by dispatch." (A-54). Only motor vehicles were

used for the clearing and salting of the Kent County Courthouse parking lot (A-70).

Snow and ice removal from State grounds, including the Kent County Courthouse parking lot is the responsibility of the Office of Management and Budget (OMB), Division of Facilities employees. (A-53 – A-57). Snow removal is completed with Fleet services trucks owned by the State of Delaware (A-71) and equipped with snow plow blades. (A-57, A-58, A-71). Salt spreading is completed with different Ford F250 and F350 trucks equipped with salt spreaders and are sent to spread salt after parking lots are cleared of snow. (A-59, A-68, A-69).

Justin King and Robert Kapp jointly supervised snow removal operations on March 3-4, 2014. (A-60, A-61). Robert Kapp was a snow plower that day who was responsible for plowing Kent County Courthouse. (A-58). Kapp had done snow removal on many prior occasions and it was a routine function. (A-80).

Justin King, employed by the State of Delaware, Office of Management and Budget, Division of Facilities, as a Conservation Technician 4 (A-11) has supervised ground maintenance for the past 5 years, including the removal of "snow from parking lots, sidewalks, apply salt and another ice melt as needed through the winter season." (A-55, A-56). OMB employees use State owned fleet vehicles with 7-1/2 or 8-1/2 foot snow plows attached for snow clearing. Some of these vehicles are also equipped with salt spreaders in the back. King stated it

takes an hour and half to plow the Kent County Courthouse parking lot and about 15-20 minutes to salt with spreader and hopper. (A-61). He used Fleet services vehicles for salting and sanding. (A-64). Mr. King testified that he has no reason to doubt that the parking lot would have been plowed and salted by 08:00 on March 4, 2014 (A-77, A-78). "I believe that it would have been done."

Snow Removal Operating Procedures provides: "Personal shall perform all necessary tasks to ensure that the assigned areas are clear of snow and ice in a timely manner." (A-50). King testified all parking areas should be clear of snow and ice if there were no vehicles parked there. (A-65, A-67). For plowing "[T]he cutting edge of blade rides on parking lot surface" (A-64) "object is to get a clean result in the end." (A-64). Once the parking lot is plowed, rock salt, ice melt, or sand would be applied by one of three State fleet trucks. (A-68). The Salter slides into the bed of the truck. King testified that once plowed, Mr. Kapp would have "reported back" to inform that the lot was ready for salt to be applied. (A-69, A-70). Defendants' agent, Debra Lawhead (A-83) testified that all of the vehicles utilized to plow the Kent County Courthouse parking lot between March 1-4, 2014 were State owned fleet services vehicles and the plow and mounted salt equipment was registered to Delaware Fleet Services, part of the State of Delaware's ownership and operation of motor vehicles. (A-83). All vehicles are self-insured based on an old PMA Group business automobile policy 000036-000057 providing

for one million dollars in coverage (A-83). It is the exact same vehicle policy applied in *Zak v. GPM Invs.*, LLC, 2013 Del. Super. LEXIS 166 (Del. Super. Apr. 30, 2013), another snow plowing occurrence. (A-86).

Since the State's self-insurance coverage is based on an old PMA Group Business Automobile policy, the policy covers damages for bodily injury and property damage "caused by an accident and resulting from the ownership, maintenance or use of a covered auto." (A-88).

ARGUMENT I

I. THE LOWER SUPERIOR COURT ERRED IN FINDING THAT THE ACT OR OMMISION OF CLEARING SNOW AND ICE BY MOTOR VEHICLE DID NOT CONSTITUTE THE "USE" OF A STATE-OWNED MOTOR VEHICLE SNOW PLOW AND SALT SPREADER, AND THEREFORE WAS NOT COVERED BY THE STATE'S SELF-INSURANCE POLICY.

(1) QUESTION PRESENTED

Does the clearing of snow and ice and salting of a parking lot surface by a State of Delaware's Fleet Motor Services vehicle constitute a "use" of the motor vehicle such that it is covered by the State's self-insurance? (A-110)

(2) SCOPE OF REVIEW

"Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law. All facts are viewed in a light most favorable to the non-moving party. Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances. *Friel v. Hartford Fire Ins.*, 2014 Del. Super. LEXIS 234 at *3-4 (Del. Super. Ct. May 6, 2014). This Court reviews decisions granting summary judgment de novo. *Sanchez v. Am. Indep. Ins. Co.*, 2005 Del. LEXIS 393 (Del. Oct. 17, 2005). This Court also reviews de novo, the

interpretation of language in insurance contracts. *Twin City Fire Ins. Co. v. Del. Racing Assn.*, 840 A.2d 624, 626 (Del. 2003).

(3) MERITS OF ARGUMENT

Under the facts of Plaintiff's claim, her injuries were caused by the "ownership, maintenance or use" of a State-owned motor vehicle, covered by the State's self-insurance coverage, thereby waiving sovereign immunity. There also remains a dispute of fact as to the whether or not the Kent County Courthouse parking lot was reasonably and carefully plowed and salted or sanded. Summary Judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances. *Zak v. GPM Invs., LLC.*, 2013 Del. Super. LEXIS 166 (Del. Super. Apr. 30, 2013), (quoting, *Mumford & Miller Concrete, Inc.* v. New Castle County, 2007 Del. Super. Lexis 22 2007 WL 404771, at *4 (Del. Super. Jan 31, 2007)).

In *Zak*, The Superior Court analyzed and interpreted the commercial policy the State's adopted as its self-insurance coverage to determine if a particular accident is covered, thereby waiving sovereign immunity. *Zak v. GPM Inv., LLC.*, 2013 Del. Super. LEXIS 166 at *9 (Del. Super. Apr. 30, 2013). The issue in the present case is similar; did the "use" of the State's motor vehicles create the dangerous condition causing Plaintiff's fall and injuries?

Delaware law, 18 Del. C. § 6511, waives sovereign immunity where the State has funded liability insurance to cover an injury through the State insurance program whether the coverage is by a commercial policy or self-insurance. It is undisputed that the State of Delaware adopted a self-insurance liability coverage program for its fleet motor vehicles which plow snow and spread salt which were the only things utilized to address the parking lot surface. The State's insurance administrator admits that the vehicle insurance policy coverage is the same insurance policy that covered the snow plows involved in *Zak*. (A-86). The applicable policy coverage provides:

> "Part IV – Liability Insurance: 1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from ownership, maintenance or use of a covered auto." (A-88).

The Court in *Zak* denied summary judgment on the grounds of sovereign immunity, finding the State-owned snow plow was "used" to create a hazardous condition which was a cause of a motor vehicle collision involving others and its coverage applied to the resulting claim. Zak, 3013 Del. Super. LEXIS 166. At *? (granting Summary Judgement on other grounds). The Court found instructive, a review of cases interpreting the motor vehicle exception as applied to county and municipal government immunity because of similar language to the State's insurance policy. *Id.* at *12. 10 Del. C. § 4012 (1) provides that:

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances: (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary. 10 Del. C. § 4012 (1).

In *Zak*, the Court found the State's insurance policy covered the injuries even when there was only the possibility that the snow mounds impaired the motorist's line of sight and thus contributing to the cause of the accident. *Id.* at 14. The Court found that "the accident may have been at least partially caused by the "use" of the Del DOT snow plow." *Id.* at* 9, 13-14. Additionally, the Court found that the injuries were the result of the "use" of the snow plow, despite the fact that the snow plow was not directly involved in the accident and did not remain in the vicinity. *Id.* at *7.

The *Zak* Court held that when the snow plow "allegedly produce[d] or was the instrument of the harm," the injuries resulted from the "use" of the vehicle. *Id.* at 14 (quoting *Sadler v. New Castle County*, 565 A2d. 917, 922 (Del. 1989). The *Zak* Court did *not* say that piling snow or other affirmative acts are the only way the "use" of a vehicle can cause harm. In fact, the language of Section 4012 and the State Tort Claims Act both contemplate liability for "acts or omissions." 10 Del. C. § 4001; 10 Del. C. § 4012 (1).

In *Morris*, this Court denied dismissal on the grounds of sovereign immunity and found that the motor vehicle was the "instrument of harm" when a suicidal person jumped out of the Constable's moving vehicle while being transported to a psychiatric facility. *Sussex County v. Morris*, 610 A.2d 1354, 1359-1360, Del. 1992). This Court reasoned that the motor vehicle exception to immunity applied because the injury resulted directly from the use of an improperly equipped vehicle. *Id.* at 1360. Because the vehicle was the Constable's personal vehicle, it was not equipped with backseat door locks that were inaccessible to backseat passengers. *Id.* The patient opened the back door and jumped from the moving car. *Id.* This Court held that "it could not be more obvious that that [Plaintiff's] injuries were a direct result of the improperly equipped automobile [the Constable] used." *Id.* at 1360.

In contrast, in *Hedrick* the vehicle was not the "instrument of harm," and, therefore, the vehicle exception did not apply because the plaintiff did not allege that the police officers' vehicles were used negligently, were defective or that they were maintained negligently. *Hedrick v. Webb*, 2004 Del. Super. LEXIS 379, at *37 (Del. Super. Nov. 22, 2004). The Plaintiff was injured when another motor vehicle failed to notice police hand signals or she failed to remain stopped and entered the intersection despite flashing police car lights. *Id.* at 2-3. In this case, the

Court reasoned that the police vehicles were not the "instrument of harm" because there was a lack of causation between the police vehicle and the injuries. Id. at *37.

Similar to the *Zak* allegations, Horvat alleges that the motor vehicle "produced or was the instrument of harm." *Zak*, 2013 Del. Super LEXIS 166, at *14 (quoting *Sadler*, 565 A.2d at 922). She asserts that Defendants' negligent "use" of the snow plow and salter vehicles created the hazardous condition of unremoved snow and untreated ice that led to her injuries. While, the lower Court identified the "crux of the issue" as whether or not the use of the snow plow to clear the parking lot constituted "use" of vehicle, under the terms of the State's applicable self-insured vehicle policy, (A-87 – A-108), it failed to follow the *Zak* decision which answered the very same question in the affirmative and found coverage under the State self-insurance policy. Zak, 2013 Del. Super. LEXIS 166 at *13.

Horvat alleges that the snow plow was the "instrument of harm" because its negligent use in failing to clear the lot of snow and ice caused the hazardous condition that caused Plaintiff's fall and injuries. Similar to the truck in *Zak*, the State vehicles which plowed the snow and salted the parking lot were not directly involved in the accident and were no longer in the vicinity when the accident occurred. Id. at *7. *Zak* is directly on point and supports Plaintiff's position that negligently plowing snow and spreading salt and sand, or the failure to do so

carefully and reasonably constituted a "use" of a vehicle resulting in harm to Plaintiff. Id. at *13.

Though Defendants argued that the affirmative role of piling snow mounds was distinguishable from the failure to reasonably and carefully remove snow and ice, the Court in *Zak* did not hold that affirmative acts were the *only* way to cause harm by "use" of the vehicle. Furthermore, neither the plain language of 4012(1), the applicable insurance policy covering Delaware Fleet snow plows, nor the State Tort Claims Act distinguishes affirmative acts from omissions. 10 Del. C. 4001; 10 Del. C. 4012(1); A-80-101. To exclude omissions to act which result in harm is an erroneous application of the law and without any justifiable basis.

Defendants relied on *Morris* to support their position that the snow plow was not the cause of the Plaintiff's accident. In Morris, the vehicle was not itself involved in the accident. Sussex Cty. 610 A.2d at 1156. In fact, there was an intervening act by the Plaintiff in the case, yet the Court still found that the government did not enjoy immunity even though the vehicle itself did not run over, crash into or cause another vehicle to strike someone, yet the Court still found the injuries resulted from the "use" of the vehicle. *Id.* at 1359-60. Neither the Morris Court, the plain language of the insurance policy nor Section 4012 require that the "accident" be a vehicle collision. Similar to the Plaintiff in Morris, Horvat was injured when she hit the snow and ice-covered lot surface. *Id.* at 1356.

The snow plow and salter vehicles' use were at least a partial cause of Plaintiff's fall and injuries. Were it not for either the failure of the snow plow to reasonably and carefully clear the snow and ice from the parking lot surface, or the failure of the salt spreader truck to reasonably and carefully dispense salt or sand throughout the parking lot surface, Mrs. Horvat would not have encountered the dangerous untreated conditions.

This Court has adopted the "Klug" test as "the standard by which the courts of this State should determine whether an injury has arisen out of the operation, use or maintenance of a motor vehicle." *Nationwide Gen Ins. Co. v. Royal*, 700 A.2d 130,132 (Del. 1997); *see also*, *State Farm Mut. Auto. Ins. Co. v. Buckingham*, Del. 919 A.2d 1111, 1113 (Del. 2007). The test provides a useful alternative to analyze the narrow issue of what constitutes an injury arising from the "ownership, maintenance or use" of a motor vehicle. The "Klug" three-part test provides:

> (1) whether the vehicle was an "active accessory" in causing the injury--i.e., "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury;" (2) whether there was an act of independent significance that broke the causal link between use of the vehicle and the injuries inflicted; and (3) whether the vehicle was used for transportation purposes. Zak, 2013 LEXIS 166 at *9n.13 (citing Nationwide Gen. Ins. Co. 700 A.2d 130, at 132.)

Although the Court in *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, (Del. 2013), modified the original test, excluding the third prong to make it consistent with the Delaware PIP statute, the modification is unnecessary in the

present liability coverage case and can be included in the analysis since the *Kelty* decision was limited to the PIP Statute and did not address its application to other statutes. *Kelty* at 930-32, n.36.

In applying the modified "Klug" test to the facts in *Kelty*, this Court reversed defendant's Summary Judgment, by finding that Plaintiff's injuries arose out the "use" of the vehicle. *Id.* at 932. The injured Plaintiff in Kelty climbed a tree and used a chainsaw to help trim branches from the tree. The branches were tied with a rope to the trailer hitch of a truck. *Id.* at 929. The driver accelerated the truck which caused the rope to snap free from the trailer hitch, causing the branches to recoil and knock the Plaintiff from the tree to the ground. *Id.*

In *Kelty* this Court found the "Klug" test to be a "useful framework" to the extent that the test was consistent with the language of the PIP statute that provided coverage "to each person occupying such motor vehicle and to any other person *injured in an accident involving such motor vehicle*, other than an occupant of another motor vehicle." *Kelty*, 73 A.3d at 930. The Court found that the first prong was met and that the truck was an "active accessory" in causing the injury, because the truck exerted the force that caused the rope to break and the branch to recoil, resulting in the Plaintiff's fall and injuries. *Id.* at *933. The Court did not find that there was an independent act breaking the causal link. *Id.* The Court reasoned that

the truck's acceleration caused all of the subsequent acts leading to the injury. *Id.* Thus, there was no "independent decision unrelated to the vehicle." Kelty at 933

Likewise, in *State Farm Mut. Auto. Ins. Co. v. Buckingham*, Del. 919 A.2d, 1111 (Del. Feb. 21, 2007) this Court held that the vehicle was an "active accessory" in Plaintiff's injury when the Plaintiff driver used his car to kick up rocks that hit an assailant's truck, thereby provoking an attack. *Buckingham* at 1111, 1114. The Court found that the vehicle was not just the mere situs of the attack, because the driver operated his vehicle in a manner that precipitated the circumstances that provoked the assailant to attack him. *Id.* at 1114. However, the Court found the second prong was not satisfied because there was an intervening decision on the part of the assailant to get out of his car and commit the attack. *Id.* at 1115. An independent criminal act by a third party breaks the causal link flowing from the vehicle's use to the injury. *Id.* at 1114-15. Lastly, the Court also found the facts satisfied the third transportation prong because the assailant's vehicle transported him to the site where he attacked the Plaintiff thereby providing a causal connection between the use of the vehicle and the injury. *Id.* at 1114.

In contrast, this Court's holding in *Sanchez*, did not find that the injuries arose out of the "use" of the vehicle, because the vehicle not an "active accessory" but only the "mere situs" of the injuries when an assailant drove by and shot into

the vehicle. *Sanchez v. Am. Indep. Ins. Co.*, 2005 Del. LEXIS 393, at *7 (Del. Oct. 17, 2005). The Court reasoned that nothing about the Plaintiff's location in the vehicle contributed to being shot. *Id.* The only connection between the injury and the vehicle was that the Plaintiff just happened to be sitting in his vehicle when a pedestrian accidently shot him. *Id.*

The snow plow was an "active accessory" under the "Klug" test. The snow plow was not merely the situs. The use of the snow plow was related to the injury. Were it not for the failure of the motor vehicle to plow the snow and ice from the parking lot surface and salt the cleared surface, the Plaintiff would not have been harmed. Furthermore, failure to reasonably and carefully spread salt by way of vehicular travel also directly led to the hazardous condition. In fact, Plaintiff claims that the vehicular snow plowing and salt treating of the parking lot surface was a proximate cause of Plaintiff's fall and injuries. There was no act of independent significance. The transportation prong was also satisfied. The snow plow and the salt spreader were attached to the insured motor vehicle similar to the hitch attached to the truck in *Kelty*. The snow plow and salt spreader were transported over to the parking lot and the only way the plow and spreader could clear and treat the lot surface was by being attached to the State-owned vehicles which transported them over the parking lot surface.

Although directed to clear the snow and ice, it remains in dispute that the Kent County Courthouse parking lot was reasonably and carefully cleared of snow and ice as directed by State policy. (A-50). Besides, Plaintiff and both good Samaritans coming to her aid, testified that the parking lot surface had snow and ice where they found Ms. Horvat on the ground. (A-41 – A-42, A-45, A-19). These conditions are evidence of an unreasonable and careless plowing and salting of the lot surface which was a dangerous and unsafe condition which caused Plaintiff to fall and suffer injury on March 4, 2013. Plaintiff testified that she did not see any salt. (A-19). Thus, Plaintiff's harm resulted from the negligently plowed and salted lot by Defendants' use of their insured motor vehicles.

ARGUMENT II

II THE ACT OF CLEARING SNOW AND ICE FROM A PARKING LOT AND THE SALTING OF SAID LOT ARE MINISTERIAL MAINENTANCE ACTS AND NOT DISCRETIONARY ONES. THUS, PLAINTIFF'S CLAIM AGAINST DEFENDANTS IS NOT BARRED BY THE STATE TORT CLAIMS ACT.

(1) QUESTION PRESENTED

Does the plowing and salting of the Kent County Courthouse parking lot constitute a ministerial act for which Defendants are liable for their negligent conduct which caused harm to another? (A-111).

(2) SCOPE OF REVIEW

Where the issue on appeal is one of law, including the review of a trial Judge's interpretation of a statute, the scope of review is *de novo*. *Matter of Burns*, 519 A.2d 638, 643 (Del. Dec. 19, 1986); *Sussex Cy. Dep't of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 421 (Del. 2013).

(3) MERITS OF ARGUMENT

The act of clearing snow and ice from the parking lot and the salting of it is a ministerial duty, for which a governmental entity is liable for harm caused by its negligent acts and omissions. Where the State has waived its sovereign immunity defense, the State Torts Claims Act, further limits its liability. *Tilghman v. Del. State Univ.*, 2012, Del. Super. LEXIS 405, at *9-10 (Del. Super., Aug. 15,

2012). The State Tort Claims Act shields the State, its agencies, and employees from liability for the employees conduct in the following pertinent respect:

> **(1)** The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any *other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;* [emphasis added]

While a bright line distinction between "ministerial" and "discretionary" acts has escaped the courts, the issue is normally a question of law, determined on a case by case basis. *Hale v. Elizabeth W. Murphey Sch., Inc.*, 2014 Del. Super. LEXIS 246, at *12-13 (Del. Super. Ct. May 20, 2014). "An act is ministerial when the actor "performs in a prescribed manner without regard to his [or her] own judgment concerning the act to be done." *Id.* at *13. An act is discretionary, by contrast, when it "require[s] some determination or implementation which allows a choice of methods, or, differently stated, those where there is no hard and fast rule as to a course of conduct" *Id.* (citation omitted).

The following cases illustrate the difficulty Delaware Courts have had distinguishing ministerial acts from discretionary acts. In, *Jackson v. Minner*, Del. Super LEXIS 42, (Del. Super. Mar 1, 2013), the Court found that prison guards were immune from suit under the STCA when they failed to assist a prisoner

shackled in leg irons to get in a van causing him to fall and be injured. *Jackson,* 2013 LEXIS 42, at *2, 21. Though finding immunity for other reasons, the Court ruled the prison guards' duties were of a discretionary nature based upon broad statutory duties of "exclusive jurisdiction over the care, charge, custody, control, management, administration and supervision" of the inmates. *Id.**18-21. In contrast to the *Jackson* holding, *Clark v. Kelly*, cited in the Restatement (Second) or Torts § 895D cmt. h (1979), found the jailer's statutory duties to "keep the jail clean and well ventilated, and food in sanitary condition at all times, and free from bugs and vermin and to furnish every prisoner with a bed and bedding cleanly and sufficient, and to have his apartment warmed when it is proper" to be ministerial duties. *Id.* at 19-20. (Restat 2d of Torts § 895D cmt. h (1979)(quoting *Clark v. Kelly*, citation omitted). In Clark, the Court found the language of the statute provided for "all positive duties, the reasonable compliance with which there can be no escape." *Id.* at 20 (quoting Restat 2d of Torts § 895D cmt. h (1979)(quoting *Clark v. Kelly*, citation omitted). Similarly, the *Jackson* Court noted that duties are ministerial where public employees are "specifically charged by statute, regulations, or other established procedures to perform particular actions." *Id.* at *19-20 (citing *Sussex Cty.* 610 A.2d 1354 (Del. 1992). Here, Defendants were charged with performing an established procedure regarding the removal of snow and ice from parking lot surfaces and salting of it.

In *Morris*, this Court found the Constable's negligent choice of a vehicle used to transport the Plaintiff to the psychiatric center to be a ministerial act, thereby removing its statutory immunity. *Sussex Cty. v. Morris*, 610 A.2d 1354, 1358-59 (Del. 1992). The Constable chose a vehicle that did not have proper door locks which allowed that Plaintiff to jump from the vehicle, sustaining serious injuries. *Id.* Noting that practically every act involves some element of voluntariness or choice, this Court limited the meaning of a discretionary function to those acts involving only significant elements of choice. *Id.* at 1358-59. The *Morris* Court adopted the definition of ministerial from the Restatement (Second) of Torts where an "act of the official 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 … . *Id.* (quoting Restat 2d of Torts § 895D cmt. h (1979))(giving examples of ministerial acts including driving a vehicle).

In *Triple C*, this Court found the City was required to operate and maintain the tidegate facilities as a condition of a construction grant. *Triple C. Railcar Serv. v. City of Wilm.*, 630 A2d, 629 (Del. 1993). The maintenance of gates included the removal of accumulated debris from the trash racks which permitted the gates to serve the intended purpose of preventing flooding. *Id.* at 630. This Court found that keeping the tidegate trash racks free from the accumulation of debris to prevent the risk of flooding was so "*clearly a routine maintenance* obligation that

the failure of the City to remove debris, on its face, is an act of ministerial negligence." *Id.* at 631 (emphasis added).

In *Simon,* the Court held a police officer's negligent signaling of traffic which caused an accident was a ministerial duty. *Simon v. Heald,* 359 A.2d 666 (Del. Super. 1976) The Court found that traffic duty was a routine function and not an exercise of an executive level decision such that the officer was entitled to protection from liability if found to have performed those duties negligently. *Id.* at 667-68. This holding was recently followed in *Hales v. English,* where the Superior Court again held that an officers' duty to safely control traffic was a ministerial function. 2014 Del. Super. LEXIS 3468, (Del. Super. Ct. Aug 6, 2014).

In *Higgins v. Walls*, the task of issuing a hunting license was held to be ministerial. 901 A.2d 122, 143 (Del. Super. Ct. 2005)(dictum). The Court noted that because there was a prescribed procedure to follow requiring no decision making, the contractor's failure to act was not an exercise of discretion. *Id.* at 144.

Defendants cite a Minnesota case, wherein the majority opinion (2-1) held that clearing snow from a public street with a snow plow was a discretionary function. *Simmons v. Olson,* 2001 WL1530845 (Minn. Ct. App. Dec. 4, 2001). The dissenting opinion found it to be ministerial. Defendants have ignored Delaware law in making this argument. Several Delaware cases hold that acts fulfilling a routine or maintenance function are ministerial. When focusing on the specific

task, plowing snow and salt treating ice these are more like routine functions, not ones involving broad choices for executing the duty. Clearing the snow and ice did not require "the determination of policy, the interpretation of or the enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement..." 10 Del. Code § 4001. Certainly, in the present setting, clearing snow and ice is nothing more than routine maintenance similar to the removal of accumulated debris in the trash racks in *Triple C* or the driving of a vehicle. Defendants' employees described it as a routine practice. (A-)..The Division of Facilities employees are mandated under the Snow Removal Operating procedures, to clear and salt lots similar to the City's requirement to maintain the tidegate facility. Triple C 630 A2d, at 630.

While every act has some degree of choice, here the choice of where to push the snow or which path to take had no significant impact on the validity of performing "all necessary tasks to ensure that assigned areas are clear of snow and ice in a timely manner." Like the ministerial acts of choosing the vehicle and its equipment in *Morris*, any choice or decision made by the plow drivers regarding equipment or whether to plow in one direction or another was inconsequential to ensuring that the parking lot was cleared of snow and ice in a timely manner per Defendants' policy. If a police officer signaling traffic, like in *Simon* or *Hale*, does not rise to the level of the kind of decision making constituting a discretionary act,

then certainly clearing snow and ice from a parking lot surface does not rise to the level of a discretionary act either. The act of plowing snow and ice, similar to traffic control duties and routine maintenance activities is a ministerial duty or function. Thus, 10 Del. C. § 4001(1) permits Plaintiff to pursue her claim against Defendants.

ARGUMENT III

III. THE PUBLIC DUTY DOCTRINE DOES NOT PROTECT "DEFENDANTS FROM LIABILITY FOR THEIR NEGLIGENT CONDUCT BECAUSE THEIR DUTY OF CARE IS NOT TO THE GENERAL PUBLIC, BUT RATHER TO THEIR INVITEES AND PLAINTIFF HAD A "SPECIAL RELATIONSHIP" WITH THE STATE WHICH IS AN EXCEPTION TO THE DOCTRINE'S APPLICATION

(1) QUESTION PRESENTED

Does the State owe a duty of care to a Plaintiff beyond that owed to the general public because she was an invitee on Defendants' premises or because of a special relationship between the parties created when the State summoned Ms. Horvat to appear at the Kent County Courthouse on a specific day and at a specific time for jury duty under penalty of law? (A-113).

(2) SCOPE OF REVIEW

Where the issue on appeal is one of law, including the review of a trial Judge's interpretation of a statute, the scope of review is *de novo*. *Matter of Burns*, 519 A.2d 638, 643 (Del. Dec. 19, 1986); *Sussex Cy. Dep't of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 421 (Del. 2013).

(3) MERITS OF ARGUMENT

The Kent County Courthouse parking lot is not open to the general public. There was a sign at its entrance permitting parking only to those who have business at the Courthouse. (A-26). Thus, the State's duty of care is limited to a

select group of persons it has invited to use its premises which is not applicable to the general public. Those seeking to use the lot who do not have Courthouse business are uninvited trespassers. As such, the Public Duty Doctrine is not applicable to this case. Moreover, a landowner's duty of care owed its invitees is the same for governmental owners and private owners. The duty of care does not arise out of a government's responsibility to the general public. This is another reason the Public Duty doctrine is not applicable to Horvat's claim.

The State of Delaware owed a duty of reasonable care to Plaintiff, beyond any duty it owed to the general public because the State initiated and created a special relationship with the Plaintiff as a member of the jury pool summoned to appear for jury duty on March 4, 2014. The public duty immunity defense is inapplicable when the State assumes an affirmative duty to act on behalf of the Plaintiff by creating a special relationship with her when the State summoned her to provide jury services. As a result, the State had a duty to act with reasonable care to provide a reasonably safe premise that it invited Plaintiff to use to meet her statutory obligation.

In order to recover under the theory of negligence, the Plaintiff must show that the State owes her a duty of care, and that the breach of that duty proximately caused Plaintiff's injuries. *Zak*, 2013 LEXIS 166 at *14-15. "The public duty doctrine provides that when a public entity or employee owes a duty to the public

in general rather than a specific individual, no individual member of the public may pursue a claim against the government entity or employee unless the claims are based upon non-discretionary acts or failure to act." *J.L. v. Barnes,* 33 A.3d 902, 916 (Del. Super. Ct. 2011). However, "[t]he public duty doctrine is inapplicable, when there is a "special relationship" between the governmental agency or its agents and the injured individual." *Zak*, 2013 LEXIS 166 at *15. A "special relationship" is established between the government agency or its agents and the injured Plaintiff when there is:

> an assumption by the governmental agency or its agents, through promises or actions, or an affirmative duty to act on behalf of the party who was injured; (2) knowledge on 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. *Id.*

In *Patton v. Simone*, 1993 Del. Super. LEXIS 126 (Del. Super. Ct. Mar. 22, 1993), the Superior Court recognized the special relationship exception to the duty to the public as a whole and found that "[t]o give rise to a special relationship, the agency's response to the private party must in some demonstrable way exceed the response generally made to other members of the public." *Patton*, 1993 LEXIS 126

at p.43 (quoting *Wanzer v. District of Columbia*, D.C. App., 580 A.2d 127, 132 (1990)).

In *Tilghman v. Delaware State College,* supra, the Superior Court found the public duty doctrine inapplicable when police provided security to a specific group of college students attending a homecoming celebration on the Delaware State University campus. *Tilghman*, 2012 LEXIS 405 at *13. The Court acknowledged that although the students were not "an individual," this specific group of students did not constitute the public at large either. Id. at *13-14 n.31. Thus, there was a special relationship created between the police and the students participating in the festivities, when the police agreed to "perform a specific duty, at a specific time, in a specific area in exchange for payment from the University. Id. at *13.

In *Zak* the Court found that there was no special relationship between the decedent motorist and the State because no one on behalf of the State, including the snow plow driver had actual knowledge or direct contact with her. *Zak*, 2013 LEXIS 166 at *20. The Court found the motorist was only part of the general public using the plowed roadways, thus she did not have a special relationship and the State was immune from suit. *Id.*

Citing to *Zak*, the State argues that no special relationship exists between the State and the Plaintiff; that she was only a member of the public at large when she was injured, and the State owed her no duty beyond that owed to the general

public. Ms. Horvat's special relationship with the State is far different from the decedent motorist in *Zak* who was driving on a public road for reasons unrelated to State business and who had no direct contact with any agent of the State. *Id.* at *17-19. Horvat was not merely a member of the general public, but rather a member of a specific and limited group of prospective jurors summoned by the State to appear for jury duty in the Superior Court on March 4, 2014. Similar to the group of students in *Tilghman*, she belonged to a group who appeared at a specific time and at a specific place in response to a directive from the State, see *Tilghman v. Del. State Univ.*, supra at *13. However, unlike the students at the homecoming event in *Tilghman*, Ms. Horvat was not present by choice, but by a State directive. If one summoned by the State for jury duty seeks to be excused, the State requires documentation to justify the excuse which may include a physician's certificate or employer confirmation. 10 Del. C. § 4509. The State does not place such requirements upon the general public. *Patton v. Simone*, supra.

Here, the State did have specific knowledge of the Plaintiff and its directive that she appear at the courthouse on March 4, 2014 with the State inviting her to use its Kent County Courthouse parking lot where she was injured. Plaintiff had direct contact with the State when she received a legal summons. (A-36 - A-39). Further, Plaintiff had a continuing obligation to contact the Court to receive instructions on when she must appear. Thus, by telephone communication on the

evening of March 3, 2014, Ms. Horvat was instructed to appear the next morning by 9:00 a.m. for jury duty. (A-17).

When the Plaintiff was summoned for jury duty a reciprocal special relationship was created beyond that of the general public. The State affirmatively asserted its sovereign power over the Plaintiff which created specific statutory reciprocal rights and responsibilities, 10 *Del. C.* §4501-4517. Should Plaintiff not comply with the State's summons, she was subject to criminal contempt, a fine not more that $100 or imprisonment not more than more 3 days. 10 *Del. C.* §4516. Furthermore, the State assumed affirmative duty to compensate the juror pool for appearing and reimburse jurors for food and lodging expenses when they are sequestered. 10 *Del. C.* §4514. The State also provides protection through criminal, civil and equitable remedies for individuals providing jury services when threatened by deprivation of employment or wages. 10 *Del. C.* §4515. Lastly, the State specifically invited Plaintiff to use its parking lot and knew it had a duty of care to not cause dangerous conditions to exist when Plaintiff would be expected to use it. Plaintiff also relied upon Defendant's instructions and had the right to expect this lot to be safe and reasonably maintained.

The State had knowledge that the failure to clear the snow and ice could lead to harm. Just the day before Plaintiff's incident, the State including the Superior Court closed for business as a result of the weather conditions. (A-13). In addition,

the snowplow driver through the OMB facility management had a duty as directed in the policy for Snow Removal Operating Procedures to: "... perform all necessary tasks to ensure that the assigned areas are clear of snow and ice in a timely manner." (A-50). The Supervisor prided himself on timely completion of the task. On the morning of March 4, 2014, the State had opened this lot and invited Ms. Horvat to use it. (A-76).

When Plaintiff called on the evening of March 3, she relied on the fact that the State was open for business the next day and she was directed to appear. The Plaintiff also relied on the fact, that there would be a safe place for her to park as set forth in the Summons instructions. The Kent County Courthouse parking lot was an assigned area to be cleared of snow and ice and open for use by Ms. Horvat. (A-81). The factual setting meets the Special Relationship exception to the Public Duty doctrine.

Defendants' expressed concern that finding for Plaintiff could expose the State to liability for every slip-and-fall on State property is overstated and unfounded. Initially, sovereign immunity bars such claims unless the dangerous and unsafe condition is created by use of an "insured" motor vehicle or some other insured conduct. Secondly, State premises open to the public is not an exception to the public duty doctrine as there is no special relationship. Thus, Ms. Horvat's incident is distinguishable from most slip-and-fall occurrences. The Plaintiff is not

seeking to have the State to pay for every slip-and-fall on State property, but when the Plaintiff is on State property at the express direction and invitation of the State and it was the State that created the dangerous condition by use of "insured" motor vehicles, then the Plaintiff, as a private citizen should not have to bear the burden alone of the harm she sustained.

CONCLUSION

For the aforementioned reasons, the Superior Court's order granting The Defendants' Summary Judgment Motion should be reversed, and the case remanded for a jury to determine whether Defendants are liable for Plaintiff's fall and injuries.

Respectfully submitted,

SCHMITTINGER & RODRIGUEZ, P.A.

BY: */s/ William D. Fletcher, Jr.*
WILLIAM D. FLETCHER, JR.
Bar I.D. No. 362
BY: */s/ Bonnie Gladu*
BONNIE GLADU
Bar I.D. No. 6281
414 S. State Street
P.O. Box 497
Dover, DE 19903-0497
(302) 674-0140
Attorneys for Plaintiff, Below,
Appellant Sabra A. Horvat

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