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Case Number 483,2017

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	)	Case No.: 483,2017 Court Below: Superior Court of the State of Delaware C.A. No. S16C-03-003 RFS

APPELLEES' ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: March 2, 2018

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

On March 3, 2016, Plaintiff, Sabra Horvat, filed suit against Defendants, the State of Delaware, Office of Management & Budget (OMB), the State of Delaware Superior Court, and the State of Delaware (hereinafter "Defendants") as a result of a slip and fall incident that occurred on March 4, 2014. Plaintiff alleges that the State is responsible for Plaintiff's slip and fall as a result of the parking lot conditions following a snow event on March 3, 2014.

On June 30, 2017, the State filed a Motion for Summary Judgment asserting sovereign immunity, immunity under the State Tort Claims Act ("STCA"), and the public duty doctrine.

On August 3, 2017, Plaintiff filed an opposition to the State's motion.

On August 29, 2017, the State filed a reply in support of their Motion for Summary Judgment.

On October 30, 2017, the Superior Court granted summary judgment in favor of the State based upon sovereign immunity, the STCA, and the public duty doctrine.

On November 21, 2017, Plaintiff filed an appeal.

On January 9, 2018, Plaintiff filed an Opening Brief. This is the State's Answering Brief on appeal.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court correctly held that sovereign immunity barred Plaintiff's slip and fall claim since it was not a loss caused by a State owned motor vehicle.

II. Denied. The Superior Court correctly held that the State's actions were discretionary and thus protected under the State Tort Claims Act.

III. Denied. The Superior Court correctly held that the public duty doctrine barred Plaintiff's claim.

STATEMENT OF FACTS

On March 4, 2014 at 8:30 a.m., Plaintiff parked in the Kent County Courthouse parking lot off Water Street in Dover ("Lot") to report for jury duty.[1] Plaintiff fell in the Lot, injuring her leg.[2] The summons informed jurors that the Lot was one of three parking lots available for parking, including street parking.[3]

On March 3, 2014, there had been a period of freezing rain followed by several hours of light and then heavy snowfall, accumulating 7 inches of snow.[4] The snow stopped at approximately 2:39 p.m. on March 3, 2014.[5]

Doug Minner, Justin King, and Rob Kapp routinely inspect snow plowing and salting operations while the snow event is occurring.[6] Robert Kapp was a maintenance supervisor with OMB on the date of the incident.[7] Mr. Kapp was responsible for plowing the Lot.[8] Rob Kapp testified that he plows the Lot by clearing the entrances of snow, pushing the snow back into the Lot and away from Water Street, clearing the snow from east to west, placing the snow on the islands, and at the end of the Lot, he pushes the snow to the back of the Lot.[9] The plow

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[1] A15.
[2] A20.
[3] A36-37.
[4] A29-35.
[5] *Id.*
[6] B5.
[7] B2.
[8] *Id.*
[9] A80.

plan is always changing depending on the cars that are in the Lot, the layout of the Lot at that time, and the available space to store the snow.[10] The plow plan primarily depends on the amount of snow that has accumulated.[11]

The plow plan comprises a number of documents and provides, among other things, that snow removal operators maintain a safe snow pushing speed and for the operators to consider road conditions in assigned areas.[12] Operators must be familiar with various equipment and must inspect various items, such as plow hitch pins and presto pins during operation.[13] Operators have the responsibility to identify various obstructions, such as manhole covers, sewer caps, fuel oil caps, catch basins, handicap curbs, among other things.[14] At times, snow must be stored.[15] The procedures mandate additional clothing and winter driving techniques.[16] There is no evidence in this case of a routine practice or routine of snow removal operations, specifically plowing a lot.

Justin King was the Grounds Maintenance Supervisor in March 2014.[17] Mr. King created documents assigning OMB staff to cover specific properties in March

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[10] A63.
[11] *Id.*
[12] B7 and; A50
[13] B8
[14] B9
[15] *Id.*
[16] *Id.*
[17] A58.

2014.[18] He was one of three people who was responsible for salting the Lot in March 2014.[19] Mr. King has no reason to doubt that the Lot was plowed and salted no later than 8:00 a.m. on March 4, 2014.[20] He indicated that since he has been supervisor of grounds, his group has not yet missed a deadline.[21] Defendants do not have a document that confirms conclusively that the Lot was salted as well as plowed; however, unchallenged testimony establishes that OMB personnel responsible for plowing and salting would have plowed *and* salted State lots before the State opened for business following a snowstorm.[22] Further, overtime records show that, consistent with the State's normal practice, OMB personnel in charge of plowing and salting the Lot worked overtime continuously from the end of the storm, on March 3, 2014, through the morning on March 4, 2014.[23]

Plaintiff admitted that when she parked in the Lot on March 4, the lot had been plowed, though she disputed that it had been salted.[24] Plaintiff testified that when she drove past the Lot before pulling in that the blacktop was covered with

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[18] A62.
[19] A53; A61
[20] A77.
[21] *Id.*
[22] B3-4 (no document confirming), B6a (Governor makes call on state opening following call with OMB Director); B13 (worked through the night); A81 (when done with a lot, they "call it in.").
[23] B14-118. King explained that their normal shift is 7 a.m. to 3 p.m., so overtime records indicating they worked 12 a.m. to 7 a.m. on March 4, 2014, means they also worked from 3 p.m. to 12 a.m. on March 3, 2014 as well. B12-13.
[24] A19.

ice.[25] She testified that the lot had been plowed and that she saw piles of snow throughout the parking lot.[26] Plaintiff indicated that there was no salt or sand on the Lot surface.[27]

The State does not have a premises-liability policy covering the loss.[28] Plaintiff does not dispute this, but argues that the State's auto-policy[29] insures the loss. The pertinent provision of the insurance policy at issue here states: "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 the ownership, maintenance or use of a covered auto***."[30]

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[25] A19.
[26] *Id.*
[27] A19.
[28] A82-83; B119-120.
[29] A87-108; A83.
[30] B119-120 (emphasis added); s*ee also*, A88. A87-108

I. THE SUPERIOR COURT CORRECTLY HELD THAT SOVEREIGN IMMUNITY BARRED PLAINTIFF'S SLIP AND FALL CLAIM SINCE IT WAS NOT CAUSED BY A MOTOR VEHICLE ACCIDENT.

(1) QUESTION PRESENTED

Does sovereign immunity bar Plaintiff's slip and fall claim since it was not a loss caused by a State owned motor vehicle?

(2) SCOPE OF REVIEW

The Court reviews a trial court's grant of summary judgment *de novo* "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[31] The Court may affirm summary judgment on grounds other than those on which the trial court relied.[32] The Court also reviews contract interpretation *de novo*.[33]

(3) MERITS OF THE ARGUMENT

The Superior Court correctly held that Plaintiff's claim was barred by sovereign immunity. It is undisputed that the State does not have a general premises liability insurance policy that would cover losses such as Plaintiff's slip

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[31] *Riverbend Cmty. LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012) (internal quotations omitted).
[32] *Id.*
[33] *Id.*

and fall.[34] Rather, Plaintiff argued below and continues to argue on appeal that the State waived sovereign immunity through its automobile insurance policy (the "Auto Policy").[35]

As the Superior Court observed, the pertinent provision of the Policy states: "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 the ownership, maintenance or use of a covered auto.***"[36] Plaintiff's argument that sovereign immunity does not bar Plaintiff's claim was based entirely upon *Zak v. GPM Investments, LLC.*[37]

A. *Zak v. GPM Investments, LLC* supports affirmance.

In *Zak*, a driver was struck and killed by another car when exiting a convenience store parking lot.[38] A Delaware Department of Transportation plow piled up three tall snow mounds that obstructed the view of an exiting driver. Construing the Auto Policy, the court held that the motor vehicle accident was at

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[34] *See Caraballo v. Delaware Dep't of Corr.*, 2001 WL 312453, at *1 (Del. Super. Mar. 22, 2001) (self-insurance coverage waives sovereign immunity under 18 *Del. C.* § 6511)). The deposition testimony and sworn affidavit of the Insurance Coverage Office Director, Debra Lawhead, established that the State does not have premises liability insurance for claims like Plaintiff's. Lawhead Dep at p. 3, 5 (A82-83); *see also* Affidavit of Debra Lawhead (B119-120).

[35] *See* A87-108.

[36] *See* A88. In her Opening Brief ("Opening Br.") on appeal, Plaintiff omits the phrase "caused by an accident" in quoting the policy. *See* Opening Br., at 12.

[37] *Id.*, 2013 WL 1859344 (Del. Super. Apr. 30, 2013). However, as argued below, Plaintiff raises an additional, new argument on appeal.

[38] *Id.*

least caused in part by the "use" of the plow (a covered vehicle) and thus the Auto Policy waived the State's immunity.[39]

In this case, the Superior Court correctly distinguished *Zak*, noting that there was no similar showing of a "use" of a snowplow causing Plaintiff to fall. The court correctly drew a distinction between the affirmative role the plow played in *Zak* and the role the plow in this case arguably played: a failure to remove a patch of ice from the parking lot.[40] The court reasoned that the fall was not caused by the "usage of the snowplow itself."[41]

In determining that the Auto Policy applied to waive sovereign immunity, the *Zak* court looked to the Municipal Tort Claims Act ("MTCA") and its exception to immunity found in 10 *Del. C.* § 4012(1). That section provides that a municipal government "shall be exposed to liability" in its "ownership, maintenance or use" of motor vehicles.[42] Beyond being inapplicable to a claim against the State,[43] this MTCA exception is different from the Auto Policy in a critical respect. The Auto Policy provides coverage for a loss "***caused by an accident and resulting from*** the ownership, maintenance or use of a covered

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[39] *Zak*, 2013 WL 1859344 at *2-4.
[40] *See* Opening Br., Ex. A at 8.
[41] *Id.*
[42] *Zak*, 2013 WL 1859344 at *3-4.
[43] *Zak* itself recognized this. *Id.* at *4 (noting the MTCA applies to torts of county and municipal governmental entities, not the State).

auto."[44] The MTCA exception does not reference an "accident" and contains much broader language exposing the municipality to liability for losses "in its ownership, operation or maintenance" of motor vehicles. The reference to "caused by an accident" in the Auto Policy must be read together with the reference to "ownership, operation or maintenance."[45] Doing so provides appropriate context, confirming that the Auto Policy covers automobile accidents, not slip-and-falls. *Zak* did not address this issue.

The cases applying the MTCA exception discussed in *Zak* confirm that the Auto Policy does not cover Plaintiff's fall. In *Morris*, the Court held that the MTCA auto exception applied to a claim by a mentally ill patient who was injured when he jumped out of a moving car operated by a Sussex County employee.[46] The Court stated that it was "obvious" that the injuries were a "direct result of what was used, a car undisputedly ill-equipped for the transportation of mentally ill passengers."[47] Conversely, in *Hedrick*, the Superior Court held that the motor vehicle exception in the MTCA did *not* apply to a motor vehicle accident allegedly

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[44] *See* A88 (emphasis added). Plaintiff omits "caused by an accident" when quoting the Auto Policy in her Statement of Facts. *See* Opening Br., at 10. Plaintiff similarly refers to the Auto Policy as a "commercial policy." Opening Br., at 12.

[45] Courts apply normal principles of contract interpretation in interpreting an insurance policy, including the principle that contracts must be read as a whole in order to give effect to each provision. *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001); *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 114 (Del. Ch. 2009).

[46] *Sussex Cty., Del. v. Morris*, 610 A.2d 1354, 1359-60 (Del. 1992)

[47] *Id.* at 1349.

caused by police officers waving a motorist through an intersection.[48] Relying upon *Morris*, the court reasoned that the officers' vehicles were not the "instrument of the harm" alleged.[49] Thus, *Hedrick* and *Morris* require that the automobile be the "instrument of harm" that "directly" causes injury to fit within the MTCA motor vehicle exception.[50]

Plaintiff argues that the Court should make no distinction, as the Superior Court did, between affirmative acts (*Zak*) and failures to act (here).[51] But this distinction is critical. First, the distinction flows naturally from *Morris* and *Hedrick*'s emphasis on a "direct cause" and the vehicle being the "instrument of harm." Second, stretching the Auto Policy even further than elongated by *Zak* would result in a broad waiver of sovereign immunity without the requisite clear mandate from the General Assembly.

"A waiver of sovereign immunity must be a clear and specific act of the General Assembly."[52] "Any waiver is to be strictly applied and extends only to the

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[48] *Hedrick v. Webb*, 2004 WL 2735517, at *12 (Del. Super. Nov. 22, 2004)).
[49] *Id.*
[50] *See also McCaffrey v. City of Wilmington*, 133 A.3d 536, 550-51 (Del. 2016) (rejecting application of the motor vehicle exception, stating that it "applies to the use of automobiles, but only when the automobile itself causes harm.").
[51] *See* Opening Br., at 17.
[52] *Turnbull v. Fink*, 668 A.2d 1370, 1376-77 (Del. 1995). *See also Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004); *see also Smith v. Bunkley*, 171 A.3d 1118, 1122-23 (Del. Super. 2016), *aff'd*, 171 A.3d 1117 (Del. 2017).

terms of the statute."[53] When a party seeks to hold the State liable under a statute, any reasonable doubt as to the proper construction of the statute "should be resolved in favor of the State."[54] Here, although the General Assembly has waived sovereign immunity for losses covered by insurance, an unsupported interpretation of the Auto Policy violates the above constitutional principle and presumption of non-waiver. The cases discussing the MTCA do not, obviously, address these concerns. An improper interpretation of the Auto Policy to cover premises liability would greatly broaden the State's liability with no input from the General Assembly. *Zak* must be confined to its specific facts and not expanded so greatly as Plaintiff advocates.

Finally, the "failure to" distinction, drawn by the court below, makes sense when taken to its logical conclusion. Imagine the scenario where an icy, snowy lot is not plowed or salted (by a plow/salter). The Auto Policy clearly would not cover such a loss.[55] So too, it should not cover a loss where the plow is used in an attempt to improve the condition of a lot.

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[53] *Tomei v. Sharp*, 902 A.2d 757, 762 (Del. Super. 2006).
[54] *Doe v. Cates*, 499 A.2d 1175, 1180 (Del. 1985) (internal quotations omitted).
[55] A finding of coverage here promotes a perverse incentive for the State not to plow. The General Assembly or Executive Branch should be involved in the daunting budgeting and planning decisions necessarily involved in providing self-insurance for the State's roads and/or parking lots.

The Policy does not cover this classic premises liability loss. Because there is no insurance, the Superior Court correctly held sovereign immunity bars Plaintiff's claim.[56]

B. Plaintiff waived her alternative argument under *Klug*, but in any event fails to prove that reversal is required under the *Klug* test.

i. Plaintiff has waived the argument.

Plaintiff devotes five pages of her Opening Brief (18-22) to an argument that the "*Klug*" test[57] 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."[58] This argument was not raised by Plaintiff below.[59] Instead, in rebutting Defendants' sovereign immunity defense, Plaintiff relied entirely upon the holding of *Zak*,[60] which expressly rejected application of the *Klug* test to the facts that case. Plaintiff did not cite to *Klug* and the Delaware precedent applying it in her

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[56] *Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004); *Pajewski v. Perry*, 363 A.2d 429, 433 (Del. 1976).

[57] *See Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987). The test derived from *Klug* was adopted by Delaware in *Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997).

[58] *See* Opening Br., at 18 (noting the *Klug* 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).

[59] *See* A109-14 (Plaintiff's opposition to Defendants' motion for summary judgment).

[60] *See* A110-11.

opposition to summary judgment. Plaintiff has therefore waived the argument appearing on pages 18-22 of the Opening Brief.[61]

ii. The *Klug* test is inapplicable because it supports a policy that is not at issue here.

Even if the argument has not been waived, it is questionable whether the *Klug* test is even applicable. In *Zak*, the defendants urged the court to use the *Klug* test to determine whether the Auto Policy covered the loss.[62] The court rejected this request, noting "Delaware courts have utilized that test only when determining whether a person was covered by underinsured motorist insurance."[63] The court observed that this Court adopted *Klug* in *Royal* because "'[t]he *Klug* approach provides a flexible framework that takes into [] account the circumstances of the injury and promotes the legislative purpose of Delaware's underinsured motorist statute-the "protection of innocent persons from the negligence of unknown or impecunious tortfeasors."'"[64] Imbedded in that test is Delaware's 'settled principle that contracts are liberally construed in favor of finding uninsured/underinsured coverage.'"[65] The legislative purpose of protecting innocent persons from the negligence of unknown or impecunious tortfeasors has no application here and

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[61] *See Russell v. State*, 5 A.3d 622, 627 (Del. 2010) ("Under Supreme Court Rule 8 and general appellate practice, this Court may not consider questions on appeal unless they were first fairly presented to the trial court for consideration").
[62] *Zak*, 2013 WL 1859344 at *3.
[63] *Id.*
[64] *Id.*
[65] *Id.*

such a purpose (for PIP cases) also runs counter to the principle that sovereign immunity is grounded in the Constitution and can only be waived by the General Assembly. Thus, the *Klug* test has no application and need not be considered. But if it is considered, the test supports affirmance.

iii. Application of the three-factor *Klug* test supports the Superior Court's conclusion that the Auto Policy does not cover this loss.

Klug applied a three-part test in determining whether a loss arises from the "ownership, maintenance or use" of a motor vehicle: (1) whether the vehicle was an "active accessory" in causing injury; (2) whether there was an act of "independent significance" breaking the causal link between the use of the vehicle and the injury; and (3) whether the vehicle was used for transportation purposes.[66] Plaintiff's loss is not covered by the Auto Policy under the *Klug* test because the first and third elements are not met.

For the first factor to favor coverage, the vehicle has to be an "active accessory" or an "affirmative instrument" of the harm that arises. For instance, in *Royal*, the Court held that a vehicle used in a drive by shooting of a mobile home was "not an essential or even significant element in the events that led to the shooting.[67] The shooter did not use the vehicle to catch up to the victim (a factor other courts determine weighs in finding coverage under *Klug*). Rather, the Court

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[66] *See* Opening Br., at 18; *see Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997).

[67] *Royal*, 700 A.2d at 132-33.

reasoned, the shooter could have injured the plaintiff by shooting at the home from the street. The Court thus concluded that the vehicle was not "an essential component of the assault."[68] Conversely, in *Buckingham*, the Court concluded that the vehicle was the instrument of harm where the vehicle was used to provoke the assailant by kicking kicked up rocks that hit the assailant's truck. The Court concluded that the vehicle, unlike in *Royal*, was an "instrument of harm." [69] Finally, the Court more recently confirmed in *Kelty* that the vehicle, there a truck used to remove tree branches that struck plaintiff, was an "active accessory" in causing injury.[70]

Here, the plow was not an "instrument of harm" or "an *active* accessory" in Plaintiff's fall. Quite the opposite: it was an instrument of good; the plow and salter were used in an attempt to make the conditions of the Lot safer. In this sense, the plow did not *actively* contribute to the fall or the condition of the Lot. That the plow may have been used insufficiently does not transform it into something that *actively* caused injury. Similar to analysis employed in the above MTCA cases, the plow did not play an affirmative role in the slip and fall. The *parking lot* was the instrument of harm or the active accessory. The first factor of the *Klug* test is not met.

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[68] *Id.*

[69] *State Farm Mut. Auto. Ins. Co. v. Buckingham*, 919 A.2d 1111, 1114 (Del. 2007).

[70] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 933 (Del. 2013).

Plaintiff likewise fails the third factor. The plow was undisputedly not used for transportation.[71] Realizing she does not meet this element, Plaintiff compares her fall to facts in *Kelty* where the truck in that case was likewise not used for transportation. However, the Court in *Kelty* did not analyze the facts under the third prong of *Klug* because, as Plaintiff acknowledges, *Kelty* expressly held that the third *Klug* factor was inapplicable in PIP cases.[72] Thus, Plaintiff's comparison of the facts in *Kelty* to the facts here in the context of the third prong[73] is meaningless, as *Kelty* expressly did not address that element.

This loss is not covered by the Auto Policy under the *Klug* test. The Superior Court correctly held that sovereign immunity bars Plaintiff's claim.

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[71] *Compare Buckingham*, 919 A.2d at 1114 (concluding that vehicle was the instrument of harm where the vehicle was used to provoke the assailant by kicking kicked up rocks that hit the assailant's truck).

[72] *Kelty*, 73 A.3d at 932 (holding *Klug's* third prong cannot be reconciled with the PIP statute); *see also* Opening Br., at 18-19 (stating that *Kelty* "modified" the *Klug* test by excluding the third prong, but arguing that the "modification" is "unnecessary" in this liability case and "can be included in the analysis."). *Kelty* did not "modify" the *Klug* test; rather the Court simply did not use the third prong because *Kelty* was a PIP case.

[73] *See* Opening Br., at 21.

II. THE SUPERIOR COURT CORRECTLY HELD DEFENDANTS' ACTIONS WERE DISCRETIONARY AND THUS PROTECTED UNDER THE STATE TORT CLAIMS ACT

(1) QUESTION PRESENTED

Did the Superior Court correctly conclude that the State Tort Claims Act, 10 *Del. C.* § 4001 ("STCA"), bars Plaintiff's claim because Defendants' actions were discretionary?

(2) SCOPE OF REVIEW

The Court reviews a trial court's grant of summary judgment *de novo* "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[74]

(3) MERITS OF THE ARGUMENT

The Superior Court correctly held that the STCA bars Plaintiff's claim.[75] On appeal and below, Plaintiff argues that the STCA does not bar her claim because Defendants' activities are discretionary.[76] She did not and does not now argue that any state employee acted wantonly or with gross negligence.

"In order to prevent overcaution and a lack of zealousness on the part of public employees charged with the exercise of their individual judgment, State

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[74] *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012) (internal quotations omitted).
[75] *See* Opening Br., Ex. A at 12-15.
[76] *See* Opening Br., at 23-30; *see also* A111-13.

employees must be free from personal liability in the use of their discretion even if discretion is exercised negligently."[77] Immunity protects not only the "policy decision to undertake a function but also the manner in which that undertaking is discharged."[78] The STCA protects government employees when "they make good faith decisions in their official capacities for the benefit of the public."[79] Under the continuing storm doctrine, landowners are endowed with a fair level of discretion by waiting a "reasonable" period of time before commencing with snow and ice removal.[80]

In addition to the discretion provided under the continuing storm doctrine, the undisputed evidence below showed that the States' actions (or alleged inactions) involve significant discretion. OMB personnel are required to perform ongoing inspections of the snow removal operations.[81] In clearing the Lot, Mr. Kapp first clears the entrances by pushing snow into the Lot and away from the street, he then clears the snow from east to west and places snow on islands toward

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[77] *Simon v. Heald*, 359 A.2d 666, 668 (Del. Super. 1976).
[78] *Sadler v. New Castle Cty.*, 565 A.2d 917, 922 (Del. 1989).
[79] *Higgins v. Walls*, 901 A.2d 122, 143 (Del. Super. 2005).
[80] *See Cash v. East Coast Property Man'g, Inc.*, 7 A.3d 484, at *3 (Del. 2010) (continuing storm doctrine); *cf. Great Plains Services, Inc. v. K-VA-T Food Stores, Inc.*, 2008 WL 11342667, at *3 (E.D. Ky. Mar. 31, 2008) (noting, in interpreting a contract, that the term "'reasonable implies a level of discretion ... in following such recommendations.").
[81] *See* B5-6.

the end of the Lot.[82] OMB utilizes a plow plan that is always changing depending on the vehicles in the lot, the layout of the lot and the available space to store the snow.[83] The plow plan, only one page of which appears in Plaintiff's Appendix (A50), varies depending on the amount of snow that has accumulated and provides snow removal procedures.[84] There is no evidence in this case of a routine practice or routine of snow removal operations, specifically plowing a lot. Plaintiff argues in her Opening Brief, without citation, that the State employees described their conduct as a "routine practice."[85] Plaintiff's argument is not supported by the record.

Plaintiff's reliance on *Triple C* is misplaced. The Court there was "not concerned with the discretionary/ministerial distinction."[86] The Court stated only that "it would appear" that the duty to keep tidegates clear of debris "appeared" to

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[82] *See* A80.

[83] *See* A63-64

[84] *Id.* The plow plan comprises a number of documents (*see* B7) and provides among other things, that snow removal operators maintain a safe snow pushing speed and for the operators to consider road conditions in assigned areas. (A50). Operators must be familiar with various equipment and must inspect various items, such as plow hitch pins and presto pins during operation. (B8). Operators have the responsibility to identify various obstructions, such as manhole covers, sewer caps, fuel oil caps, catch basins, handicap curbs, among other things. (B9). At times, snow must be stored. *Id.* The procedures mandate additional clothing and winter driving techniques. (B10).

[85] *See* Opening Br., at 28.

[86] *Triple C Railcar Serv., Inc. v. City of Wilmington*, 630 A.2d 629, 631 (Del. 1993).

be ministerial.[87] The Court did not analyze the issue, and the Court's observation is arguably *dicta*.[88] Conversely, in *Simmons v. Olson*, the court held that plowing and salting lots involve sufficient discretion for immunity purposes.[89] The Supreme Court of Virginia has also held that plowing and salting involves discretion for purposes of immunity.[90]

As *Simmons* and *Stanfield*, Defendants' actions require them to assess conditions and rely on judgment to determine appropriate speed and the best time and manner for plowing.[91] Similarly, Delaware courts have held that similar activity, such as pruning trees or controlling weeds, also involves a sufficient level of discretion.[92] And as Plaintiff points out, the act of assisting an inmate from a van involves sufficient discretion and therefore protection under the STCA.[93]

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[87] *Id.*

[88] *Hale v. Elizabeth W. Murphey Sch., Inc.*, 2014 WL 2119652, at *5-6 (Del. Super. May 20, 2014) also does not help Plaintiff, as that decision denied a Rule 12(b)(6) motion and the Court was clearly concerned with the procedural posture of the case, and concluding that it was "acutely aware that dismissal may be the appropriate course in many instances similar [to] this."

[89] *See, e.g.*, *Simmons v. Olson*, 2001 WL 1530845, at *1 (Minn. Ct. App. Dec. 4, 2001).

[90] *Stanfield v. Peregoy*, 429 S.E.2d 11, 13-14 (Va. 1993).

[91] *Id.* at *2.

[92] *Sack By Sack v. New Castle Cty.*, 1991 WL 53397, at *3 (Del. Super. Mar. 22, 1991).

[93] *Jackson v. Minner*, 2013 WL 871784, at * 7 (Del. Super. Mar. 1, 2013). Plaintiff tries to distinguish this case by citing *Clark v. Kelly* but she fails to provide a cite. Opening Br., at 25. In any event, the case seemingly predates 1979 (the date of the cited Restatement excerpt) and does not appear to be a Delaware case. *Higgins* also does not help Plaintiff. There, a hunting license was issued contrary to a "set

Ministerial duties are governed by hard and fast rules.[94] The record here supports the Superior Court's conclusion that Defendants' activities were not governed by any hard and fast rules and were discretionary. Summary judgment should be affirmed.

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procedure" to ensure a required safety course was taken by the applicant. *Higgins*, 901 A.2d at 144. Evidence that a patch of ice may have remained after the lot was plowed and salted is not the same as evidence that an employee failed to follow a set procedure.

[94] *Hughes ex rel. Hughes v. Christiana School Dist.*, 2008 WL 73710 (Del. Super. Jan. 7, 2008) (describing that ministerial duties are those governed by hard-and-fast rules).

III. THE SUPERIOR COURT CORRECTLY HELD THAT THE PUBLIC DUTY DOCTRINE BARRED PLAINTIFF'S CLAIM

(1) QUESTION PRESENTED

Whether the public duty doctrine barred Plaintiff's claim?

(2) SCOPE OF REVIEW

The Court reviews a trial court's grant of summary judgment *de novo* "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[95]

(3) MERITS OF THE ARGUMENT

The Kent County Courthouse, along with adjacent State owned parking lots, provides the public with access to the courts and to jury trials. Any argument that the Kent County Courthouse is not a government building for public use is without merit.

"[W]here government action is involved, the duty that is claimed to be owed to the injured party by a governmental agency or its agents runs to the public at large and not to the specific individual."[96] The public duty doctrine, however, is inapplicable when there is a "special relationship" between the governmental

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[95] *Riverbend Cmty. LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012) (internal quotations omitted).

[96] *Jackson v. Minner*, 2013 WL 871784, at *4 (Del. Super. Mar. 1, 2013)

agency or its agents and the injured individual. Such a special relationship exists when there is:

> (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. (*emphasis added*).[97]

The Superior Court held in *Zak* that when DelDOT plows public streets, the duty owed by DelDOT is to the public, not to particular motorists who are injured because of alleged negligence in clearing snow or ice.[98] The court further held that the "special relationship exception" to the public duty doctrine did not apply, holding that any statutory requirement on the State to plow roads was "for the benefit of the public as a whole and not to the decedent individually."[99] The court reasoned that the driver plowed Route 13 the day prior, not at the time of the accident, and "therefore, it [was] clear that the driver of the snow plow did not have actual knowledge of the decedent in this case, and there was no direct contact between the snow plow operator and the decedent."[100] Finally, the court noted

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[97] *Id.*
[98] *Zak*, 2013 WL 1859344 at *5.
[99] *Id.*, at *6.
[100] *Id.*

that the decedent could not have relied upon the undertaking of the defendants; DelDOT plowed the snow from the road for the benefit of the public.[101]

In *Hales v. English*, the Superior Court held that the public duty doctrine barred a claim against a state trooper who waived a vehicle across a median into oncoming traffic, hitting the plaintiff.[102] The court held that the plaintiff did not meet her burden of proving the application of the special relationship exception:

> The State did not agree ... to undertake traffic control just for the [plaintiffs]. It instead agreed to do this for every member of the public traveling through the area of construction. This is a perfect example of a duty to the public at large rather than to a specific individual. It would be a different situation if the State had agreed to escort the [plaintiffs] down the road and through the construction area. But that is not the case. Since the State owed no duty to the [plaintiffs], it cannot be responsible for their damages.[103]

As in *Zak* and *Hales*, the duty to plow State lots is another perfect example of a duty to the public at large, including jurors, and not to a duty to Plaintiff individually. With regard to the first and third factors, there was no assumption by any State defendant, through promises or actions, of an affirmative duty to act on behalf of Plaintiff regarding snow removal at the Lot. There was no contact between the State and Plaintiff promising that the State would plow and salt the

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[101] *Id.*
[102] *Id.*, 2014 WL 12059005 (Aug. 6, 2014), *aff'd*, 115 A.3d 1215 (Table) (Del. 2015).
[103] *Id.* at *3.

Lot. Though the form summons from the Superior Court contained notice to all jurors of possible parking options, including street parking, it was not a personal communication to Plaintiff, it did not direct jurors to use the Lot, and it did not provide express assurances in any way. The Superior Court, in summoning jurors was simply carrying out its public duty of providing the public with access to the courts and jury trials.

With regard to the second factor, there is no evidence in the record that supports that knowledge on the part of the State that failing to plow and salt the Lot for Plaintiff could lead to harm. Plaintiff argues that because the State was closed for business on March 3, 2014, the knowledge factor is met. That argument is without merit because the State was closed to the public at large and not closed to potential jurors and/or Plaintiff. Nor is there evidence that Plaintiff justifiably relied on any representation from the State to plow and salt the Lot. As such, the public duty doctrine applies to the duty to plow. That duty is owed to the public such that there is no special relationship.[104]

Delaware courts have found a special relationship where there is direct interaction with an injured party. For example, in *Jackson v. Minner*,[105] the Superior Court held that the public duty doctrine barred claims against DOC supervisors who had no interaction with plaintiff, but held that correction officers

[104] *Zak*, 2013 WL 1859344 at *6 (duty to plow is owed to the public).
[105] *Jackson v. Minner*, 2013 WL 871784, at *4 (Del. Super. Mar. 1, 2013).

who physically assisted inmate into a prison van causing him injuries met the special relationship test.

In addition, *Patton v. Simone* held that "to 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."[106] The Superior Court did not find a special relationship between the City of Wilmington and a plaintiff who fell down an elevator shaft because none of the four factors of the special relationship test were met.[107] Specifically, there was no direct contact between Plaintiff and the City agreeing that the City would act on behalf of Plaintiff regarding the condition of the elevator.[108] Similar to *Patton*, in this case there was no representation by any defendant to Plaintiff regarding snow removal at the Lot.

In *Castellani v. Delaware State Police*, the administrator of the estate of a vehicle passenger who sustained fatal injuries, the driver of the vehicle and surviving passenger, sued the Delaware State Police and various Police officials for failing to carry out their assigned duties to maintain traffic control during a traffic light malfunction.[109] The Superior Court held that neither statutes nor the

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[106] *Patton v. Simone*, 1993 WL 144367, *14 (Del. Super. Mar. 22, 1993) *citing Wanzer v. District of Columbia,* 580 A.2d 127, 132 (D.C. 1990).
[107] *Id.*
[108] *Id.*
[109] *Castellani v. Delaware State Police* , 751 A.2d 934, 935 (Del. Super. 1999).

Delaware State Police Divisional Manual created a duty on the part of the Delaware State Police.[110] In finding no special relationship between the Plaintiff and the Delaware State Police, the Superior Court found none of the four special relationship factors to exist.[111] The Superior Court noted that to find a duty without a special relationship "would generate a drastic expansion of liability" better left to the discretion of the General Assembly.[112]

Plaintiff argues that there is a special relationship between those summoned for jury service and the State because of the State's statutory authority to require that jurors appear, because Delaware statutes create rights and responsibilities of jurors, because the State compensates jurors, and because statutes provide assistance to jurors who are deprived wages. What Plaintiff fails to recognize is that the public at large is subject to jury service. As such, the statutory provisions referenced by Plaintiff do not further Plaintiff's argument that a special relationship existed between Plaintiff and the defendants with regard to plowing and salting the Lot in this case.

In *Tilghman v. Delaware State University*, the Superior Court held that the public duty doctrine was inapplicable where DSP and a trooper agreed to perform special duty police work, at a specific time, in a specific area in exchange for

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[110] *Id.*, 751 A.2d at 940.
[111] *Id.*
[112] *Id.*, 751 A.2d at 941.

payment from DSU.[113] In doing so, the court found that the duty owed was not to the public at large, but rather to a specific group: the Delaware State University campus community attending the Homecoming festivities on the evening in question.[114] The analysis set forth above from *Tilghman* does not follow the four-factor public duty doctrine analysis set forth by long standing Delaware law. Specifically, the Superior Court did not require direct contact between the governmental agency, DSP, and the Plaintiff. As such, defendants submit that the *Tilghman* analysis should be rejected. In the alternative, defendants submit that Plaintiff fails to meet the *Tilghman* analysis because OMB was not performing a contract for special duties, at a specific time, in a specific area, or in exchange for payment from the Superior Court. There is no dispute that OMB personnel was responsible for completing snow removal operations of plowing and salting for all state properties, including the Lot, which is a part of their regular duties as OMB essential personnel. However, there is no evidence to support that the snow removal operations were performed in response to a special contract, at a specific time, in a specific area, or to benefit a specific event or group of people.

Plaintiff has failed to provide evidence sufficient to support a special relationship with Defendants regarding snow removal at the Lot. As such, the Superior Court properly held that the public duty doctrine barred Plaintiff's claim.

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[113] *Id.* 2012 WL 3860825, *4 (Del. Super. Aug. 15, 2012).
[114] *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court granting Defendants summary judgment should be affirmed.

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The undersigned certifies that on March 2, 2018, he caused the attached *Appellees' Answering Brief* to be filed via LexisNexis and delivered via U.S. Mail to the following person(s):

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