IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30857

ESTATE OF KYLEE L. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, and ESTATE OF JAYNA R. SANBORN, by and through its Personal Representative, Sarah C. Sanborn,

Plaintiffs and Appellants,

vs.

MARK PETERSON, TODD HERTEL, BRAD LETCHER, DAN MARTEL, MICHAEL HIEB, and TERENCE PECK,

Defendants and Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

THE HONORABLE KENT A. SHELTON

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES: Page

CONSTITUTIONAL PROVISIONS AND STATUTES:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Throughout *Appellants' Brief*, Plaintiffs/Appellants Estate of Kylee L. Sanborn and Estate of Jayna R. Sanborn, both acting by and through Personal Representative Sarah C. Sanborn, are collectively referred to as "Sanborns." The Defendants/Appellees, Mark Peterson, Todd Hertel, Brad Letcher, Dan Martel, Michael Hieb, and Terence Peck are collectively referred to as "Defendants." The settled record is denoted "SR," followed by the appropriate pagination. The transcript of the summary judgment hearing is referenced using "HT," followed by the corresponding page number(s). Documents in the Appendix will be referenced using "APP," followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

The Sanborns appeal from a judgment of the Third Judicial Circuit Court. *APP at 1*. The judgment was signed and filed on September 3, 2024. *Id.* Notice of entry of the judgment was filed and served on September 3, 2024. *SR at 678.* The Sanborns filed a *Notice of Appeal* on September 30, 2024. *Id. at 688.* Jurisdiction in this Court is therefore proper under SDCL 15-26A-6.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE SANBORNS' CLAIMS ARE BARRED BY THE PUBLIC DUTY DOCTRINE.

The circuit court concluded that the Sanborns' claims are barred by the public duty doctrine.

E.P. v. Riley, 1999 S.D. 163, 604 N.W.2d 7.

Maher v. City of Box Elder, 2019 S.D. 15, 925 N.W.2d 482.

Tipton v. Town of Tabor, 538 N.W.2d 783 (S.D. 1995) (*Tipton I*).

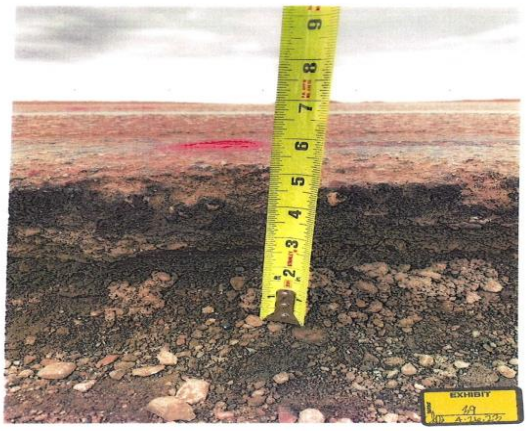
Tipton v. Town of Tabor, 1997 S.D. 96, 567 N.W.2d 351 (*Tipton II*).

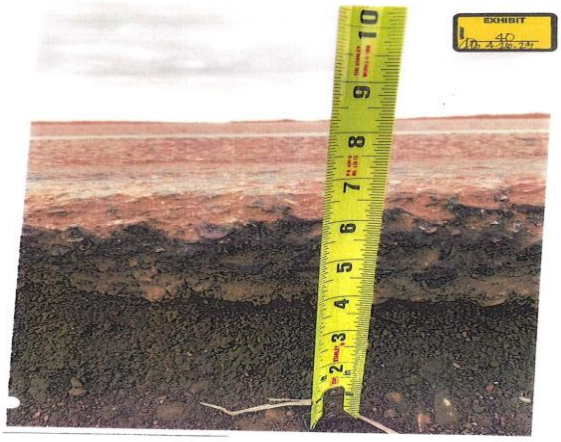
SDCL 31-5-1.

STATEMENT OF THE CASE AND FACTS

On November 24, 2019, sisters Kylee Sanborn and Jayna Sanborn were traveling north on U.S. Highway 281 ("Highway 281") in a 2007 Chevrolet Impala ("Sanborn Vehicle"). *SR at 306-07*. Kylee was driving and Jayna was in the front passenger seat. *Id. at 310-11*. At the same time, a fuel delivery truck driven by Forrest Thompson was proceeding south on Highway 281 followed by a 2014 Ram 1500 pickup driven by Sarah Kennedy. *Id. at 307-08, 634*.

Just north of where Highway 281 intersects with 191st Street, where there is a slight curve to the west, the Sanborn Vehicle moved toward the right-hand (eastern) portion of the northbound lane. *SR at 485, 488, 645*. Immediately after crossing the right-hand fog line, the Sanborn Vehicle abruptly dropped when the passenger-side wheels fell from the paved portion of the roadway down to the gravel shoulder—which was five to seven inches lower. *Id. 486-87, 645*. The severe pavement edge drop-off that the Sanborns encountered is depicted in the photographs below, taken by South Dakota State Trooper Andrew Miller ("Trooper Miller"), who investigated the accident:





SR at 513-14. The pavement edge drop-off existed for an extended distance. *Id. at 305, 487*. The significant length of the drop-off is apparent from a photograph taken the day

after the accident by Brad Letcher, the Area Engineer for the DOT's Huron Area Office. *Id. at 480-81, 506.* The photograph can be found in the Appendix. *APP at 46.*

When the passenger side tires of the Sanborn Vehicle went off of the severe drop-off onto the shoulder, the Sanborn Vehicle bottomed out and the undercarriage was scraping the roadway.[1] *SR at 485, 645-46.* Kylee attempted to steer the Sanborn Vehicle back onto the paved roadway. *Id. at 312, 646.* Because doing so required the passenger side tires to climb a five to seven inch nearly vertical wall, this required significant steering input. *Id. at 646.* Moments later, the passenger side tires ascended the drop-off and the Sanborn Vehicle veered across the northbound lane and into the southbound lane. *Id. at 312, 646.* After narrowly missing the southbound fuel truck driven by Mr. Thompson, the Sanborn Vehicle collided head-on with the Ram pickup driven by Ms. Kennedy. *Id.* Both Kylee and Jayna were killed in the collision. *Id. at 312.*

Forrest Thompson, the operator of the southbound fuel truck, witnessed the accident. *SR at 634-35.* According to him, "[t]he passenger tires of the [Sanborn Vehicle] went off onto the shoulder of the road in an area where there is a slight curve in the highway." *Id. at 634.* The driver [Kylee] then overcorrected and "the vehicle shot across the road like a slingshot." *Id. at 635.* In his words: "I could see her [Kylee's] face as she passed my vehicle. She looked scared to death and was holding on for dear

[1] While reciting the facts in its *Memorandum Decision*, the circuit court incorrectly suggested that the Sanborn Vehicle went off of the shoulder. *SR at 666 ("the vehicle went off the gravel shoulder on the highway).* The Sanborn Vehicle did not go off of the shoulder; rather, it traveled from the paved roadway and onto the gravel shoulder. *Id. at 317 (Trooper Miller stating in the accident report that Kylee had driven "off the road and onto the east shoulder" and then "[o]nce on the shoulder" she attempted to steer her vehicle back onto the roadway).*

life." *Id.*

The drop-off extended along Highway 281 for a considerable distance. Although Trooper Miller failed to measure the length of the drop off as part of his investigation, he acknowledged that the drop-off extended approximately one-third of the length of the tire and vehicle marks left by the Sanborn Vehicle, which he measured to be 358.93 feet. *SR at 305, 487.* According to Mr. Thompson, the driver of the southbound fuel truck, the pavement edge drop off extended for approximately 200-300 feet. *Id. at 635.*

The drop-off was not only long—it had been present for a long time. Jeff Boomsma, a local farmer who resides approximately one and a half miles from the scene of the accident, drives that section of Highway 281 "a couple of times per week." *SR at 637.* According to him, he "could clearly see the drop-off as [he] drove down the highway" and, just as important, he indicated that the drop-off had been present "for approximately one year before the accident." *Id. 637-38.* Mr. Thompson, the fuel truck driver that narrowly missed being struck by the Sanborn Vehicle, agreed that the drop-off had been there for a long time. *Id. at 635.* He reported that he traveled that section of Highway 281 on a frequent basis, "at least once every week and up to ten times per week," and had observed the drop-off from the pavement to the shoulder. *Id.* He described it as "approximately a six inch drop off from the pavement to the shoulder," and reported "[t]hat condition had existed for at least three months before the accident, if not longer."[2] *Id.* According to Mr. Thompson, the area of Highway 281 where the

[2] Mr. Thompson went on to indicate that the South Dakota Department of Transportation ("DOT") never repaired that drop off until several months later, in the spring of 2020. *Id. at 636.*

accident occurred "was more often out of repair than it was in repair in terms of a shoulder drop-off." *Id.* Notably, Mr. Thompson had observed other vehicles go onto the east-side shoulder of Highway 281 in this same location where there is a slight curve in the highway; the area where the Sanborns' accident occurred. *Id. at 635*. He had also observed tire tracks of vehicles that had previously gone off the paved roadway and onto the shoulder in that area. *Id.* In fact, Mr. Thompson himself had almost gone off onto the shoulder in that location. *Id.*[3]

Accident reconstructionist Brad Booth was hired by the Sanborns to investigate the accident. He described the sequence of events as follows:

- In the area of the accident, the Impala proceeded toward the right-hand portion of the northbound lane of Highway 281 and crossed the fog line.
- Immediately after crossing the fog line, the Impala abruptly dropped due to the passenger-side wheels (front and back) falling off the paved portion of the roadway due to a significant difference in elevation between the paved portion of the roadway and the unpaved shoulder.
- Once the Impala's passenger-side wheels dropped off of the paved portion of the roadway, portions of the underside of the Impala periodically came into contact with and began scraping the roadway surface, resulting in scratches and dents to the underside of the Impala. This contact/scraping is also evident from metal scarring on the roadway.
- The abrupt drop of the Impala, the Impala coming into contact with and scraping the roadway, and the vehicle traveling with its passenger-side wheels on the unpaved shoulder would have startled Kylee and affected her ability to control the vehicle.

[3] According to Trooper Miller, over the course of time, these vehicles going off of the pavement onto the shoulder had displaced the gravel and compacted the shoulder. *SR at 301*.

- As with any other driver, Kylee immediately tried to gain control of the Impala and return the vehicle to the paved portion of the roadway.

- When Kylee attempted to return the Impala to the paved portion of the roadway she had to forcefully attempt to steer the Impala up onto the roadway, requiring significant steering input, because the pavement edge drop off was several inches in height and, further, the pavement edge drop off was essentially vertical rather than having any slope.

- Due to the amount of steering input required to enable the Impala to ascend the pavement edge drop off, which is evident from the yaw marks left by the vehicle on the roadway, the vehicle then veered across the northbound lane and entered the southbound lane and collided head-on with a 2014 Ram 1500 pickup that was traveling south.

Id. 645-46.

Pavement edge drop-off is a phenomenon that is well known within the DOT. Mark Peterson, the Aberdeen Region Engineer in charge of the maintenance for this section of Highway 281 was asked about the significance of pavement edge drop-off as it concerns highway safety. *SR at 382.* Mr. Peterson described the significance as follows: "When you have an abrupt change, it may lead to losing vehicular control." *Id.* He further testified that he had known for most of his career that pavement edge drop-offs could lead to drivers losing vehicular control, and that this was well known in the transportation industry. *Id.*

The DOT has a policy regarding shoulder maintenance. *SR at 509-10.* It is Policy No. OM-2002-09 titled "Shoulder Maintenance" ("Policy"). *Id.* It has been in place since 1989—some three decades prior to the Sanborns' accident—and has never been superseded. *Id. at 509.* The stated purpose of the Policy is "[t]o provide the level of

service to which various types of highway shoulders are to be maintained." *Id.* The Policy provides, in pertinent part, as follows:

> **Policy Statement:**
>
> Asphalt concrete surfaced shoulders shall be maintained in general conformance to the original construction. Surfacing shall be repaired or patched, seals or flushes applied, cracks treated or sealed and vegetative growth controlled, as needed.
>
> Blotter shoulders shall be maintained through repair or patching of the surfacing, applying flushes or seals and controlling vegetative growth.
>
> Reclaimed asphalt shoulders shall be maintained by blading and adding material and/or flushing as necessary to essentially preserve the original template section and to control vegetative growth.
>
> Gravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders shall be maintained in design condition. Vegetative growth shall be controlled, as needed.
>
> Shoulders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed.
>
> Any questions or problems concerning shoulder maintenance are to be directed to the Area Engineer for resolution.

Id. (underlined emphasis added).

In this case, it is not disputed that the shoulder of Highway 281 in the location where the Sanborns' accident occurred was a gravel shoulder. *SR at 376.* Mark Peterson, the Aberdeen Region Engineer, admitted that the Policy's requirement that gravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve "the original template section" refers to the surface plans for the construction of the highway. *Id. at 385.* In other words, gravel shoulders are required to be maintained in the condition as they were originally designed. *Id.*

This section of Highway 281 was constructed and surfaced in 2004 and 2005. *SR at 409.* A review of the surfacing plans makes clear that the shoulder is flush with the driving portion of the roadway. *Id. at 534.* Thus, the design standards had the shoulder and the traveled portion of the highway flush. *Id. at 410.* The DOT admitted there was no exemption from this requirement. *Id.*

Highway 281 is part of the National Highway System, and the DOT typically uses federal funds for the construction of highways in the National Highway System. *SR at 412.* As such, Highway 281 is subject to a *Stewardship Agreement* between the DOT and the Federal Highway Administration ("FHWA"). *Id. at 411-12, 542.* According to the *Stewardship Agreement*, the DOT agreed to the control documents for the design of highways, including the *Policy on Geometric Design of Highways and Streets* (commonly referred to as the "*Green Book*"), the *Roadside Design Guide*, and other standards. *Id. at 412, 543.* In addition, the DOT specifically agreed "[t]o design all NHS [National Highway System] facilities in accordance with the AASHTO[4] Green Book, current edition and noted control documents regardless of funding source." *Id. at 543.* Importantly, federal law has adopted this AASHTO standard. *23 C.F.R. § 625.4.*

The *Roadside Design Guide* in effect at the time contained the following provision regarding pavement edge drop-offs:

> **9.3 PAVEMENT EDGE DROP-OFFS**
>
> Pavement edge drop-offs may occur during highway work such as pavement repairs, resurfacing, or shoulder work. When not properly addressed, drop-offs may lead to an errant vehicle losing control with a

[4] "AASHTO" is the acronym for the American Association of State Highway and Transportation Officials.

high potential for a serious accident.

Desirably, no vertical differential greater than 50 mm [2 in.] should occur between adjacent lanes. However, when a vertical differential does occur, mitigating measures should be taken. The extent of the measures depend upon:

- shape of vertical differential;
- longitudinal length of differential;
- location of differential (centerline, lane line and/or edge-of-traveled way);
- duration;
- traffic volume and speed;
- geometrics; and
- relative location of on-coming traffic.

Research has found that loss of vehicle control can develop at speeds greater than 50 km/h under certain circumstances, where inattentive or inexperienced drivers return to the traffic lane by oversteering to overcome the resistance from a continuous pavement edge and tire-scrubbing condition. Differentials can be mitigated satisfactorily with a 45-degree face or tapered at a rate of 150 mm horizontal per 25 mm of vertical. Pavement edge drop-offs greater than 75 mm [3 in.] immediately adjacent to traffic are not recommended to be left overnight. If they are higher than 75 mm and left overnight, mitigating measures should be considered.

SR at 413, 555.[5]

The *Policy on Geometric Design of Highways and Streets* (2001 version) (a/k/a the *Green Book*), in turn, provides as follows: "All types of shoulders should be constructed and maintained flush with the traveled way pavement if they are to fulfill their intended function. Regular maintenance is needed to provide a flush shoulder." *SR at 568.* It further noted that "[u]nstabilized shoulders generally undergo consolidation with time and the elevation of the shoulder at the traveled way edge tends to become

[5] The DOT agreed that the 1996 version is, with some minor wording differences, essentially the same as the 2011 version. *SR at 413.*

lower than the traveled way." *Id.* The *Green Book* then warns: "The drop-off can adversely affect driver control when driving onto the shoulder at any appreciable speed." *Id.*

From the preceding, it is clear that the DOT was contractually obligated to design and maintain Highway 281 in compliance with the federal standards set out in the *Green Book* and the *Roadside Design Guide*. The *Green Book* specified that shoulders are to be "constructed and maintained flush with the travelled way pavement." *SR at 568.* The reason that shoulders are to be flush with the pavement is for the safety of the driving public. According to the *Roadside Design Guide*, "[r]esearch has found that loss of vehicle control can develop at speeds greater than 50 km/h [approximately 31 m.p.h.] under certain circumstances where inattentive or inexperienced drivers return to the traffic lane by oversteering to overcome the resistance from a continuous pavement edge and tire- scrubbing condition." *Id. at 555.* That is precisely what happened here.

Importantly, Mr. Peterson the Aberdeen Region Engineer, testified that the pavement edge drop-off encountered by the Sanborns (as depicted in the photographs above) was a "dangerous condition." *SR at 388.* He agreed that it was a dangerous condition for the reasons laid out in the *Roadway Design Standard*, in that an inexperienced driver or somebody who may be inattentive can go off the pavement and overcorrect, resulting in an accident. *Id.* He further agreed that the drop-off on Highway 281 was a hazard regardless of whether it was caused by design or lack of maintenance. *Id. at 384.* Finally, Mr. Peterson testified that had he observed the drop-off that caused the Sanborns' accident: (i) it would have concerned him because it was a dangerous

condition; (ii) he would have requested that it be immediately repaired; and (iii) he would have requested that warning signs be immediately put up pending repair because the drop-off was a hazard to the driving public. *Id. at 390-91.* DOT maintenance workers similarly agreed that the pavement edge drop-off encountered by the Sanborns was a hazardous condition that should be repaired as soon as possible. *SR at 464, 477.*

The fact that the severe drop-off was allowed to exist, much less for up to a year, is troubling—even more so given that certain DOT employees are specifically tasked with traveling the highways to look for such dangerous conditions. Mike Hieb, the Highway Maintenance Supervisor in the DOT's Huron office was responsible for driving the roads in his region—including this section of Highway 281—to inspect them to see if something was out of repair or posed a hazard to the driving public. *SR at 372-73.* Mr. Hieb agreed that doing so was his responsibility. *Id. at 430.* According to him, it was his responsibility to drive the roads and check their condition, and that he drove all of the roads in his region once a week. *Id. at 430-31.* Although it was not in a written job description, he felt that it was an appropriate standard to drive the roads once a week to determine their condition as a product of his experience. *Id. at 431.* Terence Peck, the lead maintenance worker in the DOT's Huron office, also drove this particular road once or twice a week. *Id. at 460.* Of course, DOT maintenance workers were required to report something that did not look right. *Id.*

It is apparent from the testimony of Mr. Peterson, the Aberdeen Region Engineer, that DOT employees failed in their job. He testified that if the DOT employee responsible for inspecting Highway 281 was doing his job, he would expect the DOT

employee to have observed the severe drop-off depicted in the photographs above. *SR at 386-87.* Disappointingly, while various DOT employees contend that repairs were made to the shoulder after the Sanborns' accident, there is no record from the DOT reflecting the shoulder was ever repaired until May of 2020. *Id. at 495.*

The Sanborns commenced the instant action alleging wrongful death and survival claims. *SR at 174-75.* The Defendants moved for summary judgment on two alternative grounds: (1) that the Defendants' duties were discretionary in nature, and therefore the Defendants are immune from suit due to sovereign immunity; and (2) that the Sanborns' claims are barred by the public duty doctrine. *Id. at 252, 276, 285.*

The circuit court correctly denied the Defendants' motion for summary judgment on the basis of sovereign immunity, rejecting the Defendants' claim that their duties were discretionary in nature. *APP at 8-10.* The circuit court held that "there is a specific policy that was adopted by the DOT that creates a ministerial duty on the DOT to maintain the shoulder in accordance with the initial design plan and to maintain the shoulder generally." *APP at 10.* In the circuit court's words: [S]ummary judgment is denied because the DOT did not have the discretion to ignore the policies established by the DOT and was required to follow the policies the DOT set forth." *Id.* However, the circuit court granted summary judgment in favor of the Defendants based on the public duty doctrine. *APP at 12.* The circuit court observed that "the public duty doctrine extends to a government employee being sued on an issue involving law enforcement or public safety" and concluded that the DOT's maintenance of highways is "an act of public safety." *APP at 11-12.* This appeal followed.

STANDARD OF REVIEW

Summary judgment is only appropriate "'where, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Garrido v. Team Auto Sales, Inc., 2018 S.D. 41, ¶ 15, 913 N.W.2d 95, 100 (quoting McKie Ford Lincoln, Inc. v. Hanna, 2018 S.D. 14, ¶ 8, 907 N.W.2d 795, 798).* This Court will affirm the circuit court "'only when no genuine issues of material fact exist and the law was applied correctly.'" *Id.*

In this case, the circuit court granted summary judgment in favor of the Defendants based on the public duty doctrine. "Ascertaining whether a duty exists is 'entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law[.]'" *Maher v. City of Box Elder, 2019 S.D. 15, ¶ 9, 925 N.W.2d 482, 485 (quoting Tipton v. Town of Tabor (Tipton II), 1997 S.D. 96, ¶¶ 9, 12, 567 N.W.2d 351, 356-57).* "This Court reviews questions of law under the de novo standard with no deference afforded to the circuit court's decision." *Lewis & Clark Rural Water Sys., Inc. v. Seeba, 2006 S.D. 7, ¶ 12, 709 N.W.2d 824, 830 (citing Block v. Drake, 2004 SD 72, ¶ 8, 681 N.W.2d 460, 463).*

ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE SANBORNS' CLAIMS ARE BARRED BY THE PUBLIC DUTY DOCTRINE.

A. The history of the public duty doctrine in South Dakota.

The "public duty doctrine" (sometimes referred to as the "public duty rule") was

first applied by this Court in Hagen v. City of Sioux Falls, 464 N.W.2d 396 (S.D. 1990), a case in which the plaintiffs alleged that the city negligently enforced certain building codes by approving the defective construction of a garage and an addition to their home. *Id. at 397*. This Court analyzed cases reflecting the competing arguments as to whether a city's negligent failure to enforce building codes can give rise to an actionable duty. *Id. at 398*. Ultimately, this Court held that the city's building code "create[d] only a general duty to the public as a community, rather than an obligation to a specific class of individual members of the public." *Id. at 400*.

This Court next addressed the public duty doctrine in Tipton v. Town of Tabor, 538 N.W.2d 783 (S.D. 1995) (Tipton I), which arose after a child was mauled by two wolf dogs and the plaintiffs alleged that the city had failed to investigate and abate the nuisance presented by the wolf dogs. *Id. at 785*. In Tipton, this Court "reject[ed] the bright-line test developed in Hagen." *Id. at 787*. The Court began by observing that Hagen had "set[] forth a narrow interpretation of the public duty/special duty test" because "it permit[ted] recovery against a government entity for negligent failure to enforce its laws only when there is language in a statute or ordinance which shows an intent to protect a particular and circumscribed class of persons." *Id. at 786*. According to the Court, "[s]ole reliance on statutory language in determining whether a duty exists is needlessly restrictive and arbitrary." *Id. at 787*. "We require an analytical framework that more accurately measures a public entity's culpability for the harm suffered." *Id.* Against this backdrop, this Court elected to adopt a four-factor approach employed by the Minnesota Supreme Court to determine whether a governmental entity may be liable

because it assumed a special, rather than a public duty. The four factors are as follows:

> (1) The state's actual knowledge of the dangerous condition;
>
> (2) Reasonable reliance by persons on the state's representations and conduct;
>
> (3) An ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and
>
> (4) Failure by the state to use due care to avoid increasing the risk of harm.

Id. at 787. Given the adoption of this new test, the case was reversed and remanded for further consideration. *Id. at 788.*

The public duty doctrine soon returned to this Court in Tipton v. Town of Tabor, 1997 S.D. 96, 567 N.W.2d 351 (Tipton II), after the plaintiffs appealed a second time. This Court summarized the rationale for the doctrine as follows:

> Essentially, the rule declares government owes a duty of protection to the public, not to particular persons or classes. Sound reasons support this doctrine. Furnishing public safety always involves allocating limited resources. Law enforcement entails more than simply reacting to violations; it encompasses the art of keeping the peace. Deploying finite resources to achieve these goals is a legislative and executive policy function. To allow individuals to influence through private litigation how resources must be disposed would render government administration chaotic and enfeebled. Unrestricted liability might discourage communities from acting at all or encourage action merely to avoid suit, without regard to the common good. The rule promotes accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments. A "public duty" conception acknowledges that many "enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm."

Id. at ¶ 10 (citing Restatement (Second) of Torts § 288 cmt. b (1965)). This Court went on to hold that none of the four special duty factors were present and affirmed the circuit court's grant of summary judgment. *Id. at ¶ 41.*

The public duty doctrine was discussed again in Gleason v. Peters, 1997 S.D. 102, 568 N.W.2d 482, where this Court was asked to abrogate the doctrine. *Id. at ¶ 8.* That case arose after the plaintiffs' son was severely assaulted at an underage drinking party that two Lawrence County sheriff's deputies had failed to stop/break up. *Id. at ¶¶ 3-5.* This Court declined the request to abandon the public duty doctrine. *Id. at ¶ 8.* According to this Court, the public duty doctrine "promotes 'accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments.'" *Id. at ¶ 8 (quoting Tipton v. Town of Tabor, 1997 SD 96, ¶ 10, 567 N.W.2d 351, 356 (Tipton II)).* This Court summarized the principle as follows: "Generally, the law imposes 'no duty to prevent the misconduct of a third person." *Id. (quoting Tipton II, 1997 SD at ¶ 12, 567 N.W.2d at 357).*

The public duty doctrine was revisited by this Court in Walther v. KPKA Meadowlands Limited Partnership, 1998 S.D. 78, 581 N.W.2d 527, which arose after an apartment tenant was raped and stabbed by a former boyfriend. *Id. ¶ 7.* In addition to claims against other defendants, the plaintiff alleged that the city was negligent when it failed to arrest the boyfriend for domestic abuse due to an incident that had happened earlier that same day. *Id. ¶ 11.* The Court upheld the circuit court's grant of summary judgment in favor of the city:

> Generally, the law imposes no duty to prevent the misconduct of a third person. Thus, police officers are generally protected from liability through what is termed the public-duty rule. The rule provides that the police owe a duty to the public at large and not to an individual or smaller class of individuals.

Id. at ¶ 17.

This Court clarified the public duty doctrine in E.P. v. Riley, 1999 S.D. 163, 604 N.W.2d 7. Riley differed from prior cases involving the public duty doctrine because instead of law enforcement or building code officials, it involved the conduct of South Dakota Department of Social Services ("DSS") employees. *Id. at ¶ 1.* The allegation was that certain DSS employees had been negligent in the placement of a child with known dangerous propensities. *Id. at ¶¶ 1, 8.* In its discussion, this Court noted that "[t]hroughout Tipton II, analysis of the public duty doctrine explicitly and implicitly centered on law enforcement and other public safety scenarios." *Id. at ¶ 19.* Importantly, this Court quoted the following from Tipton II that, in its words, "[p]articularly reinforc[ed] the idea that the public duty doctrine is aimed at law enforcement and public safety . . . :"

> Essentially, the rule declares government owes a duty of protection to the public, not to particular persons or classes. Sound reasons support this doctrine. *Furnishing public safety always involves allocating limited resources. Law enforcement entails more than simply reacting to violations; it encompasses the art of keeping the peace.* Deploying finite resources to achieve these goals is a legislative and executive policy function. To allow individuals to influence through private litigation how resources must be disposed would render government administration chaotic and enfeebled. Unrestricted liability might discourage communities from acting at all or encourage action merely to avoid suit, without regard to the common good. *The rule promotes accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments.*

Id. (quoting Tipton II, 1997 SD at ¶ 10, 567 N.W.2d at 356) (emphasis in original).

After reviewing the key cases involving the public duty doctrine—Hagen (building code enforcement); Tipton I (law enforcement); Tipton II (law enforcement); Gleason (law enforcement); and Walther (law enforcement)—this Court limited the applicability of the public duty doctrine: "[W]e now specifically clarify that the public duty rule extends only to issues involving law enforcement or public safety." *Id. at ¶ 22.* Based upon this clarification, this Court held that the public duty doctrine was inapplicable because "DSS employees' action cannot be deemed 'law enforcement' in its traditionally understood sense." *Id. at ¶ 23.* According to this Court, "[t]he term law enforcement generally envisions police protection. Nor were DSS employees' actions within the ambit of public safety." *Id.*[6]

The most recent case in which the public duty doctrine was analyzed is Maher v. City of Box Elder, 2019 S.D. 15, 925 N.W.2d 482. In that case, it was alleged that the city's operation of its water system—in particular the installation of booster pumps—had resulted in numerous waterlines breaking in a mobile home park. *Id. at ¶¶ 3-4.* After reviewing the cases in which it had applied the public duty doctrine, this Court concluded that the doctrine did not apply. *Id. at ¶¶ 10-17.*

This Court's analysis began with noting that the public duty doctrine is limited

[6] The public duty doctrine was then applied in Pray v. City of Flandreau, 2011 S.D. 43, 801 N.W.2d 451 (dog attack – law enforcement), McDowell v. Sapienza, 2018 S.D. 1, 906 N.W.2d 399 (construction of large new home – building code enforcement), and Fodness v. City of Sioux Falls, 2020 S.D. 43, 947 N.W.2d 619 (apartment building collapsed – building code enforcement).

to issues involving law enforcement and public safety, "and the City ha[d] not identified how its proprietary act of providing water to Maher is law enforcement or in the nature of public safety." *Id. ¶ 17.* This Court noted that it "ha[s] never held that the public duty rule automatically applies when a plaintiff brings a negligence suit against a governmental entity." *Id. (citing Tipton II, 1997 S.D. at ¶ 10, n.3 (The public duty rule "is not to be confused with 'run of the mill' officer negligence.").* This Court then stated more directly: "In fact, we have previously recognized that a governmental entity may owe a plaintiff a specific duty arising out of general principals of tort law. *Id. (citing Elkjer v. City of Rapid City, 2005 S.D. 45, ¶ 16, 695 N.W.2d 235, 241; Pierce v. City of Belle Fourche, 2001 S.D. 41, ¶ 23, 624 N.W.2d 353, 357; Walther, 1998 S.D. 78, ¶ 57, 581 N.W.2d at 538).* This Court additionally noted that "[o]ther courts have likewise declined to apply the public duty rule when "a private person would be liable to the plaintiff for the acts that were committed by the government[.]" *Id. ¶ 18.* In conclusion:

> Because the City undertook the service of providing water through its waterworks to Maher's waterline, he had the right to expect that the City would operate and maintain its water system in a reasonable manner so as to not cause injury to his waterlines. The same would be true if a private company had provided the service of supplying water from its waterlines to Maher.

Id. at ¶ 19.[7]

[7] It is also worth noting that, to date, this Court has applied the public duty doctrine only to cities, counties, and their employees. *See Hagen, 464 N.W.2d 396 (S.D. 1990) (city); Tipton I, 538 N.W.2d 783 (S.D. 1995) (City, County, and their employees); McDowell, 2018 S.D. 1, 906 N.W.2d 399 (City); Walther, 1998 S.D. 78, 581 N.W.2d 527 (City and City police officers); Pray, 2011 S.D. 43, 801 N.W.2d 451 (City); and Fodness, 2020 S.D. 43, 947 N.W.2d 619 (City).*

B. The circuit court erred when it extended the public duty doctrine to apply to the maintenance of highways.

In its *Memorandum Decision*, the circuit court correctly noted that under this Court's precedent, "the public duty doctrine extends to a government employee being sued on an issue involving law enforcement or public safety." *APP at 11 (citing Riley, 1999 S.D. at ¶ 22, 604 N.W.2d at 13-14).* The circuit court did not conclude—and the Defendants have not contended—that the DOT employees' actions constituted "law enforcement." *Id. at 287 (Defendants argue that any duty "relates to public safety."); APP at 11-12.* As this Court noted in Riley, "[t]he term law enforcement generally envisions police protection." *Id. at ¶ 23.* As such, the applicability of the doctrine turns on whether the Defendants' actions were "within the ambit of public safety." *Id.* The circuit court held that the maintenance of highways is "an act of public safety for the society." *APP at 12.* This was an error as a matter of law. As will be seen, the Defendants' maintenance of Highway 281 was not the provision of "public safety."

Before addressing the merits of whether the highway maintenance constitutes public safety for purposes of the public duty doctrine, a separate error must be addressed. The circuit court improperly shifted the burden of proof from the Defendants (the movants) to the Sanborns (the non-movants). This is evident from language in the circuit court's *Memorandum Decision*. The circuit court stated that "the Plaintiffs have failed to identify how the DOT's proprietary act of maintenance on the highway is not in the nature of public safety." *APP at 11 (emphasis added).* Any doubt as to whether the circuit court placed the ultimate burden on the Sanborns was eliminated in the next paragraph: "[T]he Plaintiffs have still failed to show the material fact that the Defendants

were not engaged in an act of public safety for the society." *Id. at 11-12 (emphasis added).* This constituted error. As the movant, the Defendants had the burden of proving the applicability of the public duty doctrine, which is the nature of an affirmative defense, and that they were entitled to judgment as a matter of law. *Estate of Olsen v. Agtegra Coop., 2024 S.D. 39, ¶ 12, 9 N.W.3d 763, 768.*

1. This Court's rationale for the public duty doctrine does not support extending its application to the maintenance of highways.

In E.P. v. Riley, the case in which this Court limited the public duty doctrine to issues involving law enforcement or public safety, this Court relied upon the rationale for the doctrine as stated in Tipton II . *Riley, 1999 S.D. at ¶ 19, 604 N.W.2d at 13.* According to this Court, "[t]hroughout Tipton II, analysis of the public duty doctrine explicitly and implicitly centered on law enforcement and other public safety scenarios." *Id. at ¶ 19.* As previously noted, this Court quoted language from Tipton II and stated that it "[p]articularly reinforc[ed] the idea that the public duty doctrine is aimed at law enforcement and public safety . . . ." *Id. (quoting Tipton II, 1997 SD at ¶ 10, 567 N.W.2d at 356).*

The language from Tipton II provides insight as to what is envisioned by "public safety" and, for that matter, the overarching purpose of the public duty doctrine. The focus is on a governmental entity's ability to protect a citizen from harm caused by a third-party—as opposed to a government being accountable for its own negligence. The rationale refers to the government's "duty of protection" to the public and "[f]urnishing public safety." *Tipton II, 1997 S.D. at ¶ 10, 567 N.W.2d at 356.* Additionally, it emphasizes that "[t]he rule promotes accountability for offenders"—also labeled

"lawbreaker[s]" and "the true malefactors"—and keeping such accountability on the offenders "rather than police who through mistake fail to thwart offenses." *Id.* Although it was not quoted in Riley, this Court also stated as follows in Tipton II: "In carrying out our responsibility to ascertain duty, we must ponder the nature of government's relation to its citizens and ask to what extent it should and can tolerate accountability for the negligence and misdeeds of third persons." *Id. at ¶ 11 (emphasis added).* This language reinforces that the public duty doctrine is concerned about governmental liability to the public for harm caused by a third-party, not governmental liability for harm caused by its own conduct.[8]

This Court's language in Fodness v. City of Sioux Falls, 2020 S.D. 43, 947 N.W.2d 619, likewise reinforces that the public duty doctrine is aimed at preventing governmental entities from being held liable for third-parties' conduct: "'The duty to ensure compliance rests with the individuals responsible for construction. Permit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are local governments.'" *Id. at ¶ 14 (quoting McDowell, 2018 S.D. at ¶ 39).*

One writer perhaps best explained the suitability of applying the public duty doctrine to matters such as building code enforcement but not to the maintenance of highways:

---

[8] In a footnote in Tipton II, this Court added that while "[a] public official's duty is owed to the public and not to any specific individual in society," "[t]his is not to be confused with 'run of the mill' officer negligence." *Id. at ¶ 10, n. 3 (quoting Makris v. City of Grosse Pointe Park, 448 N.W.2d 352, 358 (1989) and Arnold v. Village of Chicago Ridge, 537 N.E.2d 823, 826 (Ill. App. Ct. 1989)).*

> The statutory duty to repair and maintain roads is substantively different from a city's statutory duty to inspect for housing code violations. Because the county or city owns all roads, it is solely responsible for road maintenance; if there is a defect, the governmental unit itself must repair it. In contrast, the owner of an apartment has the primary responsibility for correcting building code violations. The city's duty—to enforce the apartment owner's obligation to repair defects—is only secondary. Under this analysis, the rationale for holding a county liable for negligent road repair, a duty for which it is solely responsible, is much stronger than the rationale for holding a city liability for negligent building inspections.

Municipal Liability for Negligent Building Inspections—Demise of the Public Duty Doctrine, 65 Iowa L. Rev. 1416, 1439 (1980).

Extending the public duty doctrine to the DOT's maintenance of highways would be inconsistent with the stated purposes of the doctrine. Highways are not maintained by the DOT to *protect* South Dakota citizens from being harmed by third-party actors, the "lawbreakers" and "true malefactors." Nor does the maintenance of highways "promote the accountability of offenders." *Tipton II, 1997 S.D. at ¶ 10, 567 N.W.2d at 356.* Finally, declining to extend the public duty doctrine to maintenance of highways will not result in the DOT being held liable for failing to "thwart" the conduct of others. *Id.* Rather, the DOT would only be asked to answer for its own conduct. And this is true in this case. The Sanborns do not seek to hold the DOT liable for some other party's failure to repair the shoulder on Highway 281. Indeed, the duty to maintain the shoulder rested exclusively with the DOT.

2. The maintenance of highways is not "public safety."

This Court has not defined what constitutes "public safety" for purposes of the public duty doctrine. It is clear that highway maintenance is not. "Public safety" is defined as "[t]he welfare and protection of the general public, usually expressed as a

governmental responsibility." *Black's Law Dictionary (12th Ed. 2024).* "Welfare," in turn, is defined as "[w]ell-being in any respect; prosperity," and "public welfare" is defined as "[a] society's well-being in matters of health, safety, order, morality, economics, and politics." *Black's Law Dictionary (12th Ed. 2024).* Roads are not constructed and maintained for the public's "well-being." Likewise, they are not constructed and maintained for the public's "protection."

Moving beyond the formal definition of public safety, and borrowing this Court's phraseology in Riley, it also cannot be said that the maintenance of highways is public safety in its "traditionally understood sense." *Riley, 1999 S.D. at ¶ 23, 604 N.W.2d at 14*. Instead, the following government activities would be viewed as in the nature of public safety: law enforcement, fire departments, ambulance services, and disaster response services.

Finally, it is noteworthy that the state of South Dakota must view the DOT activities as not falling within the ambit of public safety. South Dakota has a Department of Public Safety—and the DOT is not part of it. Instead, the DOT is its own and entirely separate Department.

3. This Court has not previously applied the public duty doctrine to the DOT or highway maintenance.

Subsequent to this Court's adoption of the public duty doctrine in Hagen v. City of Sioux Falls, 464 N.W.2d 396 (S.D. 1990), this Court considered cases against governmental entities relating to the maintenance of highways and roads. In none of those cases was the public duty doctrine applied to shield the governmental entity from liability for its conduct.

In Bland v. Davison County, 507 N.W.2d 80 (S.D. 1993) (Bland I), the plaintiff lost control of her vehicle while crossing an icy section of a county road between two shelterbelts of trees. *Id. at 81*. The plaintiff alleged that the icy patch had existed for six weeks and that the County's inaction resulted in her being injured. *Id.* The circuit court granted summary judgment in favor of the County. *Id. at 80*. This Court reversed the circuit court, holding that "[s]tatutorily, County is expressly required to 'maintain properly and adequately the county highway system." *Id. at 81 (quoting SDCL 31-12-19)*. While this Court noted that the County could not be blamed for climatic conditions, it compared the County's obligation to that of any other person: "[U]nder common law, negligence occurs when one fails to exercise that care which an ordinarily prudent or reasonable person would exercise under the same or similar circumstances, commensurate with existing and surrounding hazards." *Id.* This Court added: "Counties should keep the highways in a reasonably safe condition." *Id. at 82*. Most important for purposes of the instant discussion, the claim was not barred due to the public duty doctrine.[9]

Another case, Fritz v. Howard Township, 1997 S.D. 122, 570 N.W.2d 240, arose when the plaintiff was injured after she struck an unmarked, unguarded, washed-out township road in the dark. *Id. at ¶ 1*. The plaintiff sued the Township, alleging that it had failed to maintain its roads. *Id. at ¶ 7*. The circuit court granted summary judgment

[9] The case returned to this Court after the case was tried to a jury and the County prevailed. Interestingly, in a separate opinion in which he concurred in part and dissented in part, Justice Konenkamp, noted that "Bland I never touched upon the public duty doctrine, which remains viable despite the absence of sovereign immunity." *Bland v. Davison County, 1997 S.D. 93, ¶ 63, 566 N.W.2d 452, 467, n. 14 (Bland II)*.

in favor of the Township. *Id.* This Court disagreed and reversed. *Id. at ¶ 25.* This Court noted that "[i]t is undisputed that Township has a duty to maintain township roads, and that "[i]f a road falls out of repair, certain other duties are implicated." *Id. at ¶¶ 11-13 (citing SDCL 31-13-1; SDCL 31-32-10; SDCL 31-28-6).* According to this Court, "[w]hether Township breached a duty under either of these statutes constitutes a question for the factfinder." *Id. at ¶ 17.* As before, the claim was not rejected based on the public duty doctrine.

In Estate of Shuck v. Perkins County, 1998 S.D. 32, 577 N.W.2d 584, the plaintiff, a rural mail carrier, was injured in single vehicle accident on a county gravel road. *Id. at ¶ 2.* One of the plaintiff's claims was that the County had failed to properly and adequately maintain the gravel road under SDCL 31-12-19. *Id. at ¶ 4.* Although this Court affirmed the grant of summary judgment, there was no discussion of the public duty doctrine. *Id. at ¶ 21.*

The next case involving highway maintenance was Wulf v. Senst, 2003 S.D. 105, 669 N.W.2d 135. In that case, a westbound motorist sued an eastbound motorist as a result of an accident, and then the eastbound motorist asserted a third-party claim against the DOT and private contractors alleging that they had failed to maintain the road during a winter storm, resulting in icy conditions. *Id. at ¶¶ 2, 14-15.* The circuit court granted summary judgment to the DOT employees on the basis of sovereign immunity, holding their duties were discretionary in nature. *Id. at ¶ 16.* On appeal, this Court reversed the decision, holding that their duties were ministerial in nature. *Id. at ¶ 53.* It did not, however, reject the claim under the public duty doctrine.

Holm v. City of Rapid City, 2008 S.D. 65, 753 N.W.2d 895, arose after a car in which the plaintiffs' son was a passenger skidded off of a street in Canyon Lake Park in Rapid City and ended up upside down in a nearby canal. *Id. at ¶ 2.* The plaintiffs sued the City alleging violation of various duties, including the construction and maintenance of streets. *Id. at ¶ 3.* After the jury returned a verdict in favor of the plaintiffs, the City appealed. *Id.* This Court upheld the verdict. *Id. at ¶ 25.* Ultimately, this Court held "that the City had a common-law duty to safely maintain its streets." *Id. at ¶ 24.* Once again, there was no application of the public duty doctrine.

The most recent case in involving a claim against the DOT relating to highway maintenance is McGee v. Spencer Quarries, Inc., 2023 S.D. 66, 1 N.W.3d 614. In McGee, the plaintiff rolled his pickup and was injured while driving on a portion of a highway that was being resurfaced. *Id. at ¶ 3.* In addition to the private contractor that was performing the resurfacing work, the plaintiff asserted claims against the DOT and several DOT employees alleging they failed to properly oversee the project and supervise the private contractor. *Id.* On appeal, much of the discussion focused on whether various acts were ministerial or discretionary in nature for purposes of sovereign immunity. *Id. at ¶¶ 29-52.* As to duty, this Court summarized the existence of the duty as follows:

> [T]he State has delegated to the DOT the responsibility for maintaining State highways, including the highway at issue here, Highway 45. *SDCL 31-4-165 (providing that the State trunk highway system includes Highway 45).* In addition, the Legislature has obligated the DOT to "advise and adopt standard plans and specifications for road, bridge, and culvert construction and maintenance suited to the needs of the different counties of the state and furnish the same to the several county superintendents of highways." *SDCL 31-2-20.* And in regard to warning signage, SDCL 31-28-6 imposes a duty on the DOT to "erect and maintain at points in conformity with standard uniform traffic control practices on .

> . . [a] point of danger on such highway, . . . a substantial and conspicuous warning sign."
>
> Because the DOT is legally responsible for the maintenance of Highway 45 and has adopted, at the Legislature's directive, Standard Specifications governing projects related to the maintenance and repair of State highways, consistent with this Court's analysis in *Wulf* regarding the source of the duties owed, [the plaintiff] has sufficiently alleged the existence of an actionable duty with respect to the resurfacing project at issue.

Id. at ¶¶ *27-28.* The public duty doctrine was not discussed.

From the preceding, it is clear that upholding the circuit court's grant of summary judgment on the basis of the public duty doctrine would be a departure from this Court's precedent of allowing governmental entities to be liable for breaches of ministerial duties.

4. Because the Defendants' duties in this case are based upon state and federal statutes and regulations, application of the public duty doctrine in this case would result in the abrogation of specific duties created by state and federal laws.

Pursuant to statute, the DOT "shall maintain, and keep in repair, all highways or portions of highways, including the bridges and culverts, on the state trunk highway system." *SDCL 31-5-1*. A separate statute provides that the DOT "shall supervise the construction and maintenance of the state trunk highway system, its bridges, and culverts." *SDCL 31-2-21*. The portion of Highway 281 that runs from Nebraska to North Dakota is part of the state trunk highway system. *SDCL 31-4-229*.

Highway 281, in turn, is part of the National Highway System, which triggers federal-based obligations. *SR at 412.* The United States Government mandates maintenance of highways in the National Highway System. "It shall be the duty of the State transportation department or other direct recipient to maintain, or cause to be

maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior acts." *23 U.S.C. § 116(b)*. Under federal law, "[t]he term 'maintenance' means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for safe and efficient utilization of the highway." *23 U.S.C. § 101(a)(13) (emphasis added).*

When this particular portion of Highway 281 was constructed and surfaced, the design drawings showed that the shoulder of the highway was to be flush with the traveled portion of the highway. *SR at 410.* The design standards required them to be flush. *Id.* To comply with the federal mandates for maintenance, the DOT issued a Policy Letter setting out the maintenance standard:

> Gravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders shall be maintained in design condition. Vegetative growth shall be controlled, as needed.

Id. at 510.

In this case, the Defendants, as agents and employees of the DOT, were charged with responsibilities and duties pursuant to various statutes (SDCL 31-2-21; SDCL 31-2-20.1; SDCL 31-2-20; SDCL 31-5-1; and SDCL 31-32-10) and by virtue of state and federal regulations for the maintenance and repair of Highway 281. Such duties, of course, are above and beyond any duties owed under SDCL 20-9-1 and SDCL 21-1-1 and/or the common law to use ordinary care. This is not a situation where the Sanborns are seeking to generate a duty simply by virtue of the Defendants' status as employees of a public entity. As a result, the application of the public duty doctrine in this case would result in the doctrine being used to abrogate specific duties created by state and federal

law, which is directly contrary to its intended purpose of acting as a shield for governmental entities where no duty otherwise exists. *Compare State v. Butte-Silver Bow County, 220 P.3d 1115, 1119 (Mont. 2009) (holding that 23 U.S.C. §116 requiring the state transportation department to maintain National Highway System highways, creates a statutory duty that the state cannot abrogate).* After all, Highway 281 is part of the National Highway System and governed by federal law.

5. Extending the public duty doctrine would effectively result in DOT employees being immune from liability for all conduct relating to the maintenance of highways.

This Court has stated that "'[t]hough some consider [the public duty] doctrine a form of immunity, [this Court] view[s] the rule principally within the framework of duty – if none exists, then no liability may affix." *Riley, 1999 S.D. at ¶ 15, 604 N.W.2d at 12*. The Sanborns agree that the public duty doctrine is different from sovereign immunity. The former acts to bar a claim based on the absence of a duty; a party cannot be liable if it owed no duty in the first instance. In contrast, the latter acts to bar liability regardless of whether there was a duty, breach of that duty, and causation of an injury.

Notwithstanding that the two principles differ legally in form, the Sanborns would submit that extension of the public duty doctrine to highway maintenance would effectively shield DOT employees from all liability whatsoever for conduct relating to the maintenance of highways. *Accord Gleason v. Peters: An Application of the Public Duty Rule as a Judicial Resurrection of Sovereign Immunity, 43 S.D. L. Rev. 706 (1998) ("The public duty rule has the effect of reinstating sovereign immunity despite the theoretical distinction between the two doctrines. While these are two separate doctrines, both*

produce the same result. Neither sovereign immunity nor the public duty rule apply unless the defendant has governmental status. Additionally, both operate to effectively shield the government from liability."). Application of the public duty doctrine in this case would upend a long established precedent of tort liability for negligent highway maintenance.

C. Alternatively, if this Court upholds the circuit court's extension of the public duty doctrine to maintenance of public highways, the Sanborns would submit that a special duty existed.

In Tipton I, this Court held that a governmental entity may nevertheless be held liable if it assumed a special duty. *Tipton, 538 N.W.2d at 787.* The determination of whether a special duty was owed involves the consideration of four factors:

(1) The state's actual knowledge of the dangerous condition;

(2) Reasonable reliance by persons on the state's representations and conduct;

(3) An ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and

(4) Failure by the state to use due care to avoid increasing the risk of harm.

Id. at 787. Notably, "proof of all four factors is not required to prove the existence of a special duty; rather, any combination of the factors may be sufficient." *Fodness, 2020 S.D. at ¶ 29, 947 N.W.2d at 629 (citing Tipton I, 538 N.W.2d at 787).*

Factors (2), (3), and (4) may be quickly dispensed with. With regard to factor (2), it cannot be disputed that the Sanborns relied upon the Defendants to maintain Highway 281 and ensure that a hazardous condition such as that presented by the severe drop-off

would not be permitted to exist. *Tipton, 538 N.W.2d at 787*. Turning to factor (3), the statute and federal regulations detailed above "set[] forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole." *Id.* And, with respect to factor (4), given that the Highway Maintenance Supervisor's duties specifically included inspecting this section of Highway 281, yet this hazardous condition existed for up to a year, it is beyond debate that the Defendants failed to use due care to avoid increasing the risk of harm. *Id.*

Returning to factor (1), the state's actual knowledge of the dangerous condition, two items bear discussion. At the outset, the special duty test's requirement of actual knowledge is at odds with other precedent of this Court pertaining to a governmental entity's duties with regard to highway safety—and demonstrates the unsuitability of the public duty doctrine to highway maintenance. In Fritz v. Howard Township, which was decided after this Court adopted the four-factor special duty test in Tipton I, this Court stated:

> Our statute [forerunner to SDCL 31–32–10] does not expressly require actual notice [of defect in highway], and by the great weight of authority it is held that unless actual notice is required by the statute constructive or implied notice is sufficient.

Id. at ¶ 21 (quoting Clementson v. Union County, 256 N.W. 794, 796 (S.D. 1934)). In that case this Court ultimately held: "It is a question of fact for the jury to determine whether Township, in the exercise of ordinary care, should have discovered that the sign was missing in time to replace it before this accident." *Id. at ¶ 22. See also Bland II, 507 N.W.2d at 81 ("We cannot infer from the statutes that County has permission to idly stand by while hazards knowingly exist on its roads.").*

Additionally, while it is acknowledged that the Defendants testified that they were unaware of the severe drop off, a wooden definition of "actual knowledge" and the disallowance of constructive knowledge would limit claims to the rare instance where the defendant admits his/her failure or perhaps documented it. In this case, Mr. Hieb testified that he frequently traveled this section of Highway 281 once a week; nevertheless, he claims to have never seen the severe and lengthy drop-off that Mr. Boomsma and Mr. Thompson—whose job duties did not include watching for such a hazard—observed for several months or up to a year. *Id. at 437 (Q But you, for some reason, never looked at that particular portion of the road, apparently? A Evidently not, no.").* In fact, the Defendants would have literally driven on or next to the drop-off while mowing ditches in the summer—yet it is claimed that they did not see the drop-off. *HT at 32-33.*

CONCLUSION

For all of the foregoing reasons, the Sanborns respectfully request that the judgment based on the public duty doctrine be reversed and that this matter be remanded to the circuit court for trial.

REQUEST FOR ORAL ARGUMENT

The Sanborns, by and through their counsel, respectfully request the opportunity to present oral argument before this Court.

Dated this 14th day of January, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellants' Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellants' Brief* was prepared using Times New Roman typeface in 12-point font and contains 9,889 words. I relied on the word count of our word processing system used to prepare *Appellants' Brief* and the original and all copies are in compliance with this rule.

/s/ John W. Burke .
John W. Burke

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2025, I filed the foregoing *Appellants' Brief* relative to the above-entitled matter via Odyssey File and Serve, and that such system separately effected service of the same on the following individuals:

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APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT

ESTATE OF KYLEE L. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, and ESTATE OF JAYNA R. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, Plaintiffs, vs. MARK PETERSON, TODD HERTEL, BRAD LETCHER, DAN MARTEL, MICHAEL HIEB, and TERENCE PECK, Defendants.	02CIV21-000059 **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF SOVEREIGN IMMUNITY AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF THE PUBLIC DUTY DOCTRINE AND JUDGMENT FOR THE DEFENDANTS**

This matter came before the Court on Defendants' Motion for Summary Judgment on August 1, 2024, at 1:00 p.m. in the courtroom of the Beadle County Courthouse in Huron, South Dakota, before the Honorable Kent A. Shelton, Circuit Court Judge. The Plaintiffs appeared personally, along with their attorneys of record, Michael J. Schaffer of Sioux Falls, South Dakota and John W. Burke, of Rapid City, South Dakota, and Defendants appeared by and through their attorney of record, Justin L. Bell of Pierre, South Dakota.

Upon consideration of the motions, briefs, pleadings, and arguments of counsel, for the reasons set forth in the Court's Memorandum Opinion dated August 15, 2024, which is incorporated herein by this reference, and for good cause appearing, it is:

ORDERED that Defendants' Motion for Summary Judgment based on the defense that Plaintiffs' claims are barred by sovereign immunity is hereby **DENIED**;

ORDERED that Defendants' Motion for Summary Judgment based on the defense that Plaintiffs' claims are barred by the public duty doctrine is hereby **GRANTED**; and

ORDERED that summary judgment having been granted in favor of Defendants, and such summary judgment fully adjudicating the case, Judgment is hereby entered for the Defendants.

BY THE COURT:

9/3/2024 9:55:39 AM

Kent A. Shelton
Third Circuit Court Judge

Attest:
Liebing, Lauren
Clerk/Deputy

STATE OF SOUTH DAKOTA

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Pierre, SD 57501

RE: *Sanborn's v. Peterson, Hertel, Letcher, Martel, Hieb, and Peck* 02CIV21-59; Defendant's Motion for Summar Judgment

Kylee and Sarah Sanborn, by and through its Personal Representative (hereinafter "Plaintiff") filed a complaint on March 23, 2021, and an amended complaint on November 6, 2022, alleging wrongful death and a survival action against Mark Peterson, Todd Hertel, Brad Letcher, Dan Martel, Michael Hied, and Terence Peck (hereinafter "Defendants") in their individual and official capacity. On April 30, 2021, Defendants brought a motion to dismiss seeking dismissal of the Plaintiff's claim for wrongful death and survival action. On June 3, 2021, the motion to dismiss was denied. Subsequently, on July 3, 2024, after more discovery was completed, the Defendant's moved for summary judgment. A hearing before this Court was held

on the aforementioned motion on August 1, 2024. For the following reasons, the Defendant's Motion for Summary Judgment is denied in part and granted in part.

STATEMENT OF FACTS

This case arose from a vehicle accident that occurred on November 24, 2019, on U.S. Highway 281 North of Wolsey, South Dakota. Plaintiffs were driving in a Chevrolet Impala when the vehicle went off the gravel shoulder on the highway. The gravel shoulder of the highway had an edge drop-off of approximately five to seven inches. The Plaintiffs made an effort to steer the vehicle back onto the pavement. The vehicle, however, overcorrected and crossed into a lane of oncoming traffic. As a result of going off the shoulder and the overcorrection neither plaintiff survived.

The highway that the accident occurred on is part of South Dakota's state trunk highway system. The trunk system creates a responsibility for the Defendant's to maintain and report the highway. Those duties extend to the shoulder elevation in relation to the travel lanes. It is stipulated that when a drop off is not remedied it creates a highway safety concern that can cause a vehicle to lose control resulting in severe injury. It is also stipulated that the Department of Transportation (hereinafter "DOT") policy referencing shoulder maintenance requires continuous maintenance of the gravel shoulders and how it is to continuously conform to the originally designed shoulder without any drop offs. See Policy No. OM-2002-09. South Dakota Department of Transportation Policy OM-2002-09 titled Shoulder Maintenance creates a readily ascertainable ministerial duty on the Defendants due to the plain language within the policy stating:

> "Gravel shoulders *shall* be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders *shall* be maintained in design condition..."

The Plaintiffs allege that the above policy creates a ministerial duty on the Defendants to maintain and repair the gravel shoulder drop off once the Defendant's become aware of such issue. The Defendant's allege that the above policy is supplemented by the Performance Standards which in turn creates a discretionary duty on the Defendants. As such, the parties disagree as to the duty owed under the policy and if the policy is discretionary or ministerial and thus allowing the Defendant's to invoke the sovereign immunity doctrine. Additionally, the parties are in disagreement regarding whether the duty owed under the policy for public safety in order to invoke the public duty doctrine.

The record before the court raises the disputes regarding sovereign immunity and the public duty doctrine. As to sovereign immunity, the crux of the dispute is regarding the ministerial duty and with that duty whether the Defendant's knew or should have known that there was a drop off on the shoulder that needed to be repaired to prevent injuries. As to the Public Duty Doctrine, the crux of that dispute is whether the Defendant's actions fall under public safety and as such are protected by the doctrine.

STANDARD OF REVIEW

SDCL § 15-6-56(c) states that summary judgment shall be granted when the moving party proves that "no genuine issue as to any material fact [exists] and that the moving party is entitled to judgment as a matter of law." *See also Anderson v. Production Credit Ass'n*, 482 N.W.2d 642, 644 (S.D. 1992). Summary judgment is authorized where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]" *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 844-45 (2006) (citing SDCL § 15-6-56(c)). "All reasonable

inferences derived from the facts are viewed in the light most favorable to the nonmoving party." *Id.* (citing *Northstream Invs., Inc. v. 1804 Country Store Co.*, 2005 S.D. 61, ¶ 11, 697 N.W.2d 762, 765.

In order to defeat summary judgment, the nonmoving party may not rest on mere allegations or his pleadings, but rather must set forth, by affidavit or other evidence, specific facts showing the existence of genuine issues of material fact for trial. *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 366 (S.D. 1996). While questions of fact are generally reserved for a jury and preclude the granting of summary judgment, "a court may determine a question of fact by summary judgment if it appears to involve no genuine issues of material fact and the claim fails as a matter of law." *Daktronics, Inc. v. McAfee*, 1999 S.D. 113, ¶ 16, 599 N.W.2d 358, 362. "Where . . . no genuine issue of fact exists [summary judgment] is looked upon with favor[.]" *Wilson v. Great N. Ry. Co.*, 157 N.W.2d 19, 21 (S.D. 1968).

APPLICABLE LAW

I. Sovereign Immunity

Plaintiff's suit alleges individual negligence against State employees, and "it is well-settled that suits against officers of the state 'in their official capacity, [are] in reality [suits against the State itself." *McGee v. Spencer Quarries, Inc.*, 2023 S.D. 66, ¶ 29, 1 N.W.3d 614, 623. Absent constitutional or statutory authority, litigation cannot be pursued against the State, its agencies, or its employees in their official capacity. *Truman v. Griese*, 2009 S.D. 8, ¶ 20, 762 N.W.2d 75, 80. If a litigant, however, is suing a state official in his or her individual capacity, sovereign immunity extends only to discretionary duties, not ministerial duties. *Truman*, 2009 S.D. 8, ¶ 19, 762 N.W.2d at 80. The South Dakota Supreme Court has stated that a duty that is not ministerial is discretionary. *Id.* A ministerial duty is defined as,

> "*absolute, certain, and imperative,* involving merely the execution of a specific duty arising *from fixed designated facts or the execution of a set task imposed by law prescribing and defining the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion,* being a simple, definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a *governing rule or standard with a compulsory result. It is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action.*

Id. at ¶ 21 (*Hansen v. South Dakota Dept. of Transp.*, 1998 SD 109, ¶ 23, 584 N.W.2d 881, 886) (emphasis in original). For a court to find a ministerial act, it must find a "'governing rule or standard' so clear and specific that it directs the government actor without calling upon the actor to ascertain how and when to implement that rule or standard." *Truman*, 2009 S.D. 8, ¶ 22, 762 N.W.2d at 81. Further, when an entity like the Department of Transportation makes the decision to adopt a policy, the employees are obligated to follow it. *Wulf v. Senst*, 2003 S.D. 105, ¶ 32, 669 N.W.2d 135, 146. "[O]nce it is determined that the act should be performed, subsequent duties may be considered ministerial." *Hansen.*, 1998 S.D. 109, ¶ 23, 584 N.W.2d at 886 (citing 57 Am. Jur.2d *Municipal, County, School & State Tort Liability* § 120, at 132–33 (1988)). Therefore, the policy after adoption is a ministerial duty.

Highway repair, generally, is a ministerial act. *Wulf* 2003 S.D, ¶ 23, 105, 669 N.W.2d at 114 (citing *Hansen*, 1998 S.D. 109, ¶ 23, 584 N.W.2d at 886). SDCL 31-32-10[1] prescribes the

[1] If any highway, culvert, or bridge is damaged by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of receiving notice of such danger, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair the damage or provide an alternative means of crossing within a reasonable time after receiving notice of the danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense. Our statute [forerunner to SDCL 31–32–10] does not expressly require actual notice [of defect in highway], and by the great weight of authority it is held that unless actual notice is required by the statute constructive or implied notice is sufficient.
Fritz v. Howard Twp., 1997 S.D. 122, ¶ 21, 570 N.W.2d 240, 244–45.

nature and extent of the duty imposed upon public entities to protect the public from injury occasioned by defective roads. *Gulbranson v. Flandreau Twp.*, 458 N.W.2d 361, 362 (S.D. 1990). However, if the highway repair and maintenance function "involve actual planning and design, policy decisions, or actions that are not subject to an established standard" the actions will be considered discretionary and therefore protected by sovereign immunity. McGee. Thus, the Plaintiff's claim must show a readily ascertainable standard at the time of the accident that creates a ministerial duty on the named defendants. *McGee*, 2023 S.D. 66, ¶ 36, 1 N.W.3d at 626.

ANALYSIS

I. Whether Policy OM-2002-09 sets forth a ministerial duty with respect to the duty to maintain.

Here, the Defendants, in their official capacity, are immune from suit. The claims against the Defendant's in their individual capacity, however, are not immune from suit because the duty the Defendants have regarding the policy are ministerial.

The claims against the Defendants are based upon allegations that the Defendants knew or should have known that the portion of Highway 281 where the accident happened was not properly cared for and the DOT took no action to correct that problem in compliance with SDCL 31-32-10 and DOT Policy OM-2002-09. Applying the rules above to the preceding arguments leads to the conclusion that South Dakota DOT Policy OM-2002-09 creates a ministerial duty requiring that the "Gravel shoulders *shall* be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders *shall* be maintained in design condition..." Additionally, the Plaintiffs have presented evidence that shows the initial design condition mandates that the shoulders need to be flush with the pavement and no exceptions are within the initial design.

The Defendants argue that the DOT policy is discretionary because it is modified by the Performance Standards of the DOT. These performance standards indicate "the maintenance supervisor or their designee shall retain the authority to modify or deviate from this performance standard within their discretion based on their experience and judgment due to specific weather conditions, roadway conditions, or other events which impact upon the performance standard." Performance Standard 5158 indicates that "gravel shoulders *should* be repaired when any of the following conditions exist such as, but not limited to, isolated area where gravel has been lost." In reading these statutes together in their plain meaning, the Defendants argue that no ministerial duty is created because the performance standards create a discretionary duty that precedes the DOT policy, thus inferring that the policy is therefore discretionary. Further, the Defendant's contend that if the court rules that the DOT has a ministerial duty to follow the policy it would create an impractical result to expect the DOT to keep every highway shoulder in ideal condition one hundred percent of the time.

Despite that argument, in similar contexts as the case at hand, the Supreme Court has recognized that specific policies within the DOT once adopted create a ministerial duty. In *Wulf*, the Supreme Court determined that "DOT Policy 2531 created a ministerial duty requiring the DOT to use sand/salt/chemical mixtures and continue operations from 5:00 am until 7:00 p.m. during winter storms, unless certain conditions existed. Similarly, in *McGee*, the Supreme Court held that Standard Specification 330.3(E) adopted by the DOT created a ministerial duty requiring that the "tack application ahead of the mat laydown shall not exceed the amount estimated for the current day's operation." Regardless of Performance Standard 5158, Policy OM-2002-09 specifically was adopted as a policy to be followed within the DOT, thus creating a ministerial duty.

Here, the policy at issue is in reference to highway repair, which generally is a ministerial duty. The DOT has a readily ascertainable standard that was not referencing the DOT's duties outside of the established standard such as planning, designing, or making decisions.
Upon this showing and following the statutory language of SDCL 31-32-10, there is a genuine issue of material fact regarding the notice of the DOT. *See Fritz v. Howard Twp.*, 1997 S.D. 122, ¶ 19, 570 N.W.2d 240, 244 (noting that it was improper for the trial court to conclude that Township complied with [sic] 31–32–10, as that is a jury question.")

Here too, there is a specific policy that was adopted by the DOT that creates a ministerial duty on the DOT to maintain the shoulder in accordance with the initial design plan and to maintain the shoulder generally. Consequentially, in accordance with the standards, the Defendants from the DOT have indicated that it is within their job description to drive on the roads on a regular basis to inspect the highway. In the case at hand, however, the Defendant's inspecting the highway did not notice the defect in the shoulder of the highway. In contrast to the Defendant's statements, the Plaintiffs have presented evidence that individuals outside of the DOT have noticed the drop-offs for months. Thus, there is a genuine issue of material fact regarding the ministerial duty imposed on the Defendants that was readily ascertainable at the time of the incident,

Therefore, summary judgment is denied because the DOT did not have the discretion to ignore the policies established by the DOT and was required to follow the policies the DOT set forth.

APPLICABLE LAW

I. Public Duty Doctrine

Under the "public duty doctrine," government entities are generally determined to owe governmental duties on matters of law enforcement and public safety to the public at large rather than to any specific individuals. *McDowell v. Sapienza,* 2018 S.D. 1, ¶ 36, 906 N.W.2d 399, 409 reh'g denied (Feb. 16, 2018); *E.P. v. Riley*, 1999 S.D. 163, ¶ 22, 604 N.W.2d 7, 14. The doctrine "acknowledges that many 'enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm.'" *E.P*, 1999 S.D. 163, ¶ 15, 604 N.W.2d at 12 (quoting *Tipton II,* 1997 S.D. 96, ¶ 13, 567 N.W.2d at 357). "Because such duties exist only for the protection of the public, they cannot be the basis for liability to a particular class of persons." *McDowell,* 2018 S.D. 1, ¶ 36, 906 N.W.2d at 409.

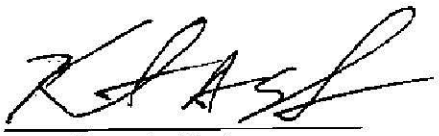
ANALYSIS

South Dakota Supreme Court precedent has stated that the public duty doctrine extends to a government employee being sued on an issue involving law enforcement or public safety. *E.P.* 1999 S.D. 163, ¶ 22, 604 N.W.2d at 13. Looking only to South Dakota Case law, the Plaintiffs have failed to identify how the DOT's proprietary act of maintenance on the highways is not in the nature of public safety.

The Plaintiffs contend that the Defendant's are not protected under the doctrine because "[t]he duty to ensure compliance rests with the individuals responsible for construction...[and] [p]ermit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are local governments." *Id.* Despite that argument and looking at the evidence in the light most favorable to the Plaintiffs, the Plaintiffs have still failed to show the

material fact that the Defendants were not engaged in an act of public safety for the society. It is within this court's judgment to apply South Dakota Supreme Court case law instead of out of state case law. In doing so, the court grants the motion for summary judgment as to the public duty doctrine.

BY THE COURT:



Hon. Kent A. Shelton
Circuit Judge, Third Judicial Circuit

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT

ESTATE OF KYLEE L. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, and ESTATE OF JAYNA R. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, Plaintiffs, vs. MARK PETERSON, TODD HERTEL, BRAD LETCHER, DAN MARTEL, MICHAEL HIEB, and TERENCE PECK, Defendants.	02CIV21-000059 **DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS SUPPORTING MOTION FOR SUMMARY JUDGMENT**

COME NOW the Defendants, by and through their counsel of record, hereby submit this Statement of Undisputed Material Facts Supporting Motion for Summary Judgment as follows.

FACTS

1. On November 24, 2019, at approximately 5:00 p.m., Trooper Joelle Schuknecht was dispatched to respond to a call reporting a two-vehicle head on collision in the area of the intersection of 191st Street and US Highway 281 in Beadle County. *See* Deposition of Andrew Miller ("Miller Depo") at Exh. 24, pg 1.
2. Kylee Sanborn was driving a 2007 Impala on US Highway 281 traveling North. Miller Depo at Exh. 24, pg. 12.
3. Jayna Sanborn was a passenger in the 2007 Impala. Miller Depo at Exh. 24, pg. 11.
4. Sarah Kennedy was driving a 2014 Dodge Ram 1500 Southbound. Miller Depo at Exh. 24, pg. 12.

5. Based upon witness statements and scene evidence, Trooper Schuknecht determined that the vehicle driven by Kylee Sanborn traveled off the roadway to the right and its passenger side tires entered the gravel shoulder, and that Kylee Sanborn over corrected which caused the vehicle to travel back onto the road and across the center line into the path of a southbound semi. Miller Depo at Exh. 24, pg. 7.
6. Trooper Schuknecht further determined that Sanborn again swerved by over correcting which caused the vehicle to re-enter the northbound lane at which point in an effort to regain control she again over corrected which caused the vehicle driven by Kylee Sanborn to cross the center line at which point it collided with the Dodge Ram driven by Sarah Kennedy head on. Kylee and Jayna Sanborn were both killed on impact. *Id.*
7. Trooper Andrew Miller, a crash reconstructionist for the South Dakota Highway Patrol, was contacted at approximately 5:30 p.m. on November 24, 2019, and arrived at 6:05 p.m. Miller Depo at 23:3-4.
8. That evening, he assisted at the crash scene by taking photographs and marking scene evidence. Miller Depo at Exh 24, pg 8.
9. Trooper Miller returned the following day at 10:00 a.m. and marked additional scene evidence that was not visible the night before due to darkness. *Id.*
10. When completing his investigation, Trooper Miller determined that there were areas of pavement edge drop-offs. Miller Depo. at 46 1-3.
11. At one point, there were isolated areas where the drop-off between the paved road and the gravel shoulder was roughly 5-6 inches, as measured by Trooper Miller. Miller Depo at 43:21-24.

12. At his deposition, although stated he didn't measure the exact distance, Trooper Miller testified that the area of the pavement edge drop off was isolated to a general area of approximately one-third of the 358.93 feet that he did measure, which he marked on his reconstruction drawings at his deposition. Miller Deposition at 73:18-22, Exh 46.

13. Trooper Miller stated he was *certain* that [the pavement edge drop-off] was contained to that area." Miller Depo. 73:24-74:1 (emphasis added).

14. The area of the accident was inside Trooper Miller's squad area and that he regularly drove this portion of Highway 281 (hundreds of times). Miller Depo at 68:15-69:2.

15. Trooper Miller testified that despite driving past this area hundreds of times, he had never noticed that there was a pavement edge drop off in this area. *Id.*

16. Trooper Miller was not certain when this condition began or as to the cause of the pavement edge drop-off, but reasoned: "When semis go around that correction, it's my opinion that -- it appeared to me here that the trailers of semis or other vehicles likely caused this to happen by dropping off the edge of the pavement there repeatedly over time." Miller Depo. at 53:11-15.

17. Trooper Miller also noted "This area has received above-average rainfall this year creating unusually wet conditions which may also have added to the compaction/erosion of the gravel in this area." Miller Depo. at. at 18-21.

18. Trooper Miller reasoned such was relevant because "Any time you introduce water and heavy vehicles, you get compaction, and the vehicles have a tendency to push the gravel surface away, just like on any gravel road." Miller Depo. at 54:1-4.

19. Although Trooper Miller testified that this area was in his squad area and that he regularly drove this portion of Highway 281 (hundreds of times), he testified he had never noticed that there was a pavement edge drop off in this area. Miller Depo at 68:15-69:2.

20. Based on his investigation, Trooper Miller concluded the following:

> Summary:
>
> On November 24, 2019 at approximately 1700 hours a two-vehicle head on crash occurred on US Highway 281 near mile post 135. Vehicle one was traveling southbound and was operated by Sarah Kennedy. Vehicle two was traveling northbound and was operated by Kylee Sanborn. For an unknown reason, vehicle two drove off the road onto the east shoulder. Once the front passenger wheels of vehicle two left the asphalt surface they dropped between 5 and 6 inches to the gravel surface. Scene evidence indicates Kylee Sanborn attempted to steer the vehicle back into the northbound lane. Scene evidence and a witness statement indicate that Kylee Sanborn lost control of her vehicle which traveled across the northbound lane, crossed the center line and struck vehicle one head on in the southbound lane. As a result of the crash, all three occupants in vehicle one received serious non-life-threatening injuries. Both occupants of vehicle two, Kylee Sanborn and her passenger Jayna Sanborn received fatal injuries.
>
> No criminal charges were filed.
>
> Opinion:
>
> South of the crash scene there is a slight west correction in US Highway 281. The driver of vehicle two Kylee Sanborn was 15 years old. She was operating on a restricted minor permit which was issued to her June 7, 2019. It is possible that Kylee Sanborn missed this correction in the road which caused her to drive to the right and off the road onto the, east shoulder. It is unknown what actually caused her to drive off the road to the right. Once on the shoulder Kylee Sanborn attempted to steer her vehicle back onto the roadway. Kylee Sanborn's failure to maintain her lane of travel and her steering input caused her to lose control of the vehicle which traveled into the southbound lane and ultimately caused the crash to occur. A simple application of vehicle two's brakes without any steering input after the vehicle was on the shoulder may have prevented this crash from occurring. Driver in-experience, failure to maintain lane and over correcting were all factors that played a role in this crash.

Miller Depo. at Exh. 24, pg. 12.

21. Asked why no criminal charges were filed as it related to the accident, Trooper Miller stated:

> if the driver of the Sanborn vehicle, Kylee Sanborn -- had she lived through this crash, we would have issued a citation to her in this particular case likely for two things: One being lane driving, or crossing the fog line, which is covered under state code 32-26-6. Additionally, we would have probably issued a citation for careless driving. But since both occupants in the vehicle at fault were deceased, there were no criminal charges possible.

Miller Depo. 61:22-62:5.

22. The South Dakota Department of Transportation is divided into four regions: Aberdeen, Mitchell, Pierre, and Rapid City. Deposition of Mark Peterson at 12:22-13:3.

23. In the Aberdeen region, there are the following subunits, known as "areas": Aberdeen area, Huron area, and Watertown area. *Id.*

24. Inside the areas, there are separate maintenance units, and inside the Huron Area are two Maintenance Units: Unit 191 and 192. Deposition of Bradley Letcher 10:13-11:2.

25. The Sanborn fatality accident took place within Unit 191, which is headquartered out of the Huron DOT office. Letcher Depo at 11:8-12.

26. The region engineer for the Aberdeen Region is Mark Peterson. Peterson Deposition at 19:6-11.

27. The region operations engineer is Todd Hertel. *Id.* at 19:16-20:12.

28. The region traffic engineering supervisor is Dan Martell. *Id.* at 49:6-14.

29. Bradley Letcher is the area engineer for the Huron area. Letcher Depo. at 7:13-14.

30. Though now retired, Michael Hieb was the highway maintenance supervisor for maintenance unit 191 from 2010 until he retired in 2021. Deposition of Michael Hieb 7:21-23; 57:11-14.

31. Terrance Peck is the lead maintenance worker in maintenance unit 191. Deposition of Terrance Peck at 8:12-13.

32. SDCL 31-4-14 sets forth the general responsibility of the department for maintaining the state trunk highway system, stating: "All marking, surveying, construction, repairing, and maintenance of the state trunk highway system is under the control and supervision of the department. The department shall administer the laws relative thereto." *Id.*

33. The policies, standards, and guidelines for maintenance of the state trunk highway system for the Department of Transportation are set forth in the Maintenance Manual in effect at any given time. In the maintenance manual in effect as relevant to this lawsuit, there is a policy letter that addresses shoulder maintenance, Policy Number OM-2002-09, and a performance standard for Shoulder Blading, Reshaping and Patching, specifically Performance Standard Function 2158. Peterson Depo at Exh. 23; Hieb Depo at Exh. 11

34. Policy Statement OM-2002-09 states, in pertinent part, as follows:

> Asphalt concrete surfaced shoulders shall be maintained in general conformance to the original construction. Surfacing shall be repaired or patched, seals or flushes applied, cracks treated or sealed and vegetative growth controlled, as needed.
>
> Blotter shoulders shall be maintained through repair or patching of the surfacing, applying flushes or seals and controlling vegetative growth.
>
> Reclaimed asphalt shoulders shall be maintained by blading and adding material and/or flushing as necessary to essentially preserve the original template section and to control vegetative growth.
>
> Gravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders shall be maintained in design condition. Vegetative growth shall be controlled, as needed.
>
> Shoulders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed.
>
> Any questions or problems concerning shoulder maintenance are to be directed to the Area Engineer for resolution.

Peterson Depo at Exh. 23.

35. As explained by Region Engineer Mark Peterson, as it relates to gravel shoulders, this policy statement is implemented by conforming with the Performance Standard Function 2158. Peterson Deposition at 92:2-22.

36. Performance Standard Function 2158 is a statement as to maintenance duties (whether discretionary or ministerial),, rather than the guidelines provided for in Policy Statement OM-2002-09.

37. Performance Standard Function 2158 is as follows:

PERFORMANCE STANDARD FUNCTION 2158

Issue Date: 06-28-82
Revision: 05-04-16

SHOULDER BLADING, RESHAPING AND PATCHING

DESCRIPTION:

Blade, reshape and patch gravel shoulders with similar material.

PURPOSE:

To provide a smooth shoulder free of ruts, distortions and maintain proper crown slope. This performance standard is a guideline to be considered by the maintenance supervisor or their designee. The maintenance supervisor or their designee shall retain the authority to modify or deviate from this performance standard within their discretion based on their experience and judgement due to specific weather conditions, roadway conditions, or other events which impact upon this performance standard.

QUALITY AND WORKMANSHIP:

Gravel shoulders should be repaired when any of the following conditions exist:

1. The shoulder surface next to the pavement is more than 1-1/2" low for more than 50% of any shoulder mile.
2. The shoulder slope is less than 1/4" per foot or more than 1" per foot.
3. Heaved or high shoulders.
4. Minor edge ruts.
5. Isolated soft spots.
6. Scattered potholes.
7. Isolated area where gravel has been lost.

EXHIBIT
Tabbies
11
11-14-19

8. If conditions 1 through 7 above are met, and work can't be scheduled because of seasonal conditions or other priorities, warning signs (i.e., low shoulder, shoulder dropoff) should be installed until repair can be completed.

SCHEDULING AND INSPECTION:

1. Gravel shoulder maintenance is not of an emergency nature and should be scheduled.

2. This work should be performed during moist weather conditions, if possible.

3. Routine inspections will identify needs related to gravel shoulder maintenance.

PROCEDURE:

1. Place applicable safety devices and signs and/or check safety/warning devices on equipment.

2. Pull material from inslopes and/or shoulder onto the roadway surface, scarifying, as needed.

3. Add similar material, as needed.

4. Blade material back onto the shoulder and make sufficient passes with the motor grader to place, smoothen and compact material to the proper grade and crown slope.

5. Loose material should be swept from the paved roadway, if the equipment is available.

38. In the case at hand, there is no evidence that anyone had any knowledge of the road condition prior to the Sanborn accident. *See* Hieb Depo at 41:3-8, Miller Depo at 68:15-69:2; Letcher Depo at 31:1-8.

39. Though there is some dispute about exactly when shoulder maintenance was completed after the accident, as several people testified to remembering putting some fill in shortly after the accident that may have dissipated before spring, it is not disputed that the shoulder maintenance was completed in the Spring (following the accident) when shoulder maintenance is typically scheduled because "[t]he ground is thawed out and there's some moisture there where you can pack it back in so it will stay put" in comparison to when the ground is frozen, because when the ground is frozen "[Fill] won't stay. It keeps moving." Hieb Depo at 68:1-17.

Dated this 3rd day of July, 2024.

MAY, ADAM, GERDES & THOMPSON LLP

By: /s/ Justin L Bell
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CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on this 3rd day of July, 2024, he electronically filed and served the foregoing through the Odyssey File & Serve system on the following, to wit:

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/s/ Justin L Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA)SS COUNTY OF BEADLE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
ESTATE OF KYLEE L. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, and ESTATE OF JAYNA R. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, Plaintiffs, vs. **MARK PETERSON, TODD HERTEL, BRAD LETCHER, DAN MARTEL, MICHAEL HIEB, and TERENCE PECK,** Defendants.	)	02CIV21-000059 **PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

COME NOW the Plaintiffs, by and through their attorneys of record, and, in accordance with SDCL 15-6-56(c), hereby respond to Defendants' Statement of Undisputed Material Facts as follows.

1. On November 24, 2019, at approximately 5:00 p.m., Trooper Joelle Schuknecht was dispatched to respond to a call reporting a two-vehicle head on collision in the area of the intersection of 191st Street and US Highway 281 in Beadle County.

RESPONSE:

Admit, subject to the following clarification. The Primary Narrative of Trooper Schuknecht provides that the 911 call was received at 4:58 p.m. and she was en route at 5:01 p.m. *Depo. Exhibit 24 at p. 1.*

2. Kylee Sanborn was driving a 2007 Impala on US Highway 281 traveling North.

RESPONSE:

Admit.

3. Jayna Sanborn was a passenger in the 2007 Impala.

RESPONSE:

Admit.

4. Sarah Kennedy was driving a 2014 Dodge Ram 1500 Southbound.

RESPONSE:

Admit.

5. Based upon witness statements and scene evidence, Trooper Schuknecht determined that the vehicle driven by Kylee Sanborn traveled off the roadway to the right and its passenger side tires entered the gravel shoulder, and that Kylee Sanborn over corrected which caused the vehicle to travel back onto the road and across the center line into the path of a southbound semi.

RESPONSE:

Admit that Trooper Schuknecht made such determinations.

6. Trooper Schuknecht further determined that Sanborn again swerved by over correcting which caused the vehicle to re-enter the northbound lane at which point in an effort to regain control she again over corrected which caused the vehicle driven by Kylee Sanborn to cross the center line at which point it collided with the Dodge Ram driven by Sarah Kennedy head on. Kylee and Jayna Sanborn were both killed on impact.

RESPONSE:

Admit that Trooper Schuknecht made such determinations.

7. Trooper Andrew Miller, a crash reconstructionist for the South Dakota Highway Patrol, was contacted at approximately 5:30 p.m. on November 24, 2019, and arrived at 6:05 p.m.

RESPONSE:

Admit.

8. That evening, he assisted at the crash scene by taking photographs and marking scene evidence.

RESPONSE:

Admit.

9. Trooper Miller returned the following day at 10:00 a.m. and marked additional scene evidence that was not visible the night before due to darkness.

RESPONSE:

Admit. However, the cite to the record provided by the Defendants (Miller Depo at Exh 24, pg 8) is incorrect. The correct cite is Miller Depo. at Exh 24, p. 9.

10. When completing his investigation, Trooper Miller determined that there were areas of pavement edge drop-offs.

RESPONSE:

Admit.

11. At one point, there were isolated areas where the drop-off between the paved road and the gravel shoulder was roughly 5-6 inches, as measured by Trooper Miller.

RESPONSE:

Deny. Trooper Miller did testify that there was a 5-6 inch drop-off; however, he did not refer to drop-off as being located "[a]t one point" or limited to "isolated areas." Instead,

Trooper Miller referred to the 5-6 inch drop-off as being "over the course" of an area and, in his opinion, was approximately one third of the total distance of the tire and vehicle skid marks, which was 358.93 feet. *Miller Depo. at 43:24, 73:13-74:15.*

12. At his deposition, although stated he didn't measure the exact distance, Trooper Miller testified that the area of the pavement edge drop off was isolated to a general area of approximately one-third of the 358.93 feet that he did measure, which he marked on his reconstruction drawings at his deposition.

RESPONSE:

Admit that Trooper Miller so testified.

13. Trooper Miller stated he was *certain* that [the pavement edge drop-off] was contained to that area." [sic]

RESPONSE:

Assuming that "that area" refers to the distance of the tire and vehicle skid marks, which was 358.03 feet, admit that that is what Trooper Miller testified.

14. The area of the accident was inside Trooper Miller's squad area and that he regularly drove this portion of Highway 281 (hundreds of times).

RESPONSE:

Admit.

15. Trooper Miller testified that despite driving past this area hundreds of times, he had never noticed that there was a pavement edge drop off in this area.

RESPONSE:

Admit. However, Trooper Miller additionally testified that he did not notice there was a drop-off on the evening of the accident. *Miller Depo. at 68:24-69:2.*

16. Trooper Miller was not certain when this condition began or as to the cause of the pavement edge drop-off, but reasoned: "When semis go around that correction, it's my opinion that -- it appeared to me here that the trailers of semis or other vehicles likely caused this to happen by dropping off the edge of the pavement there repeatedly over time."

RESPONSE:

Admit that Trooper Miller so testified.

17. Trooper Miller also noted "This area has received above-average rainfall this year created unusually wet conditions which may also have added to the compaction/erosion of the gravel in this area."

RESPONSE:

Admit.

18. Trooper Miller reasoned such was relevant because "Any time you introduce water and heavy vehicles, you get compaction, and the vehicles have a tendency to push the gravel surface away, just like on any gravel road."

RESPONSE:

Admit that Trooper Miller so testified.

19. Although Trooper Miller testified that this area was in his squad area and that he regularly drove this portion of Highway 281 (hundreds of times), he testified he had never noticed that there was a pavement edge drop off in this area. Miller Depo at 68:15-69:2.

RESPONSE:

This Statement appears to restate the Statements contained in Nos. 14 and 15. Admit. However, Trooper Miller additionally testified that he did not notice there was a drop-off on the evening of the accident. *Miller Depo. at 68:24-69:2.*

20. Based on his investigation, Trooper Miller concluded the following:

Summary:

On November 24, 2019 at approximately 1700 hours a two-vehicle head on crash occurred on US Highway 281 near mile post 135. Vehicle one was traveling southbound and was operated by Sarah Kennedy. Vehicle two was traveling northbound and was operated by Kylee Sanborn. For an unknown reason, vehicle two drove off the road onto the east shoulder. Once the front passenger wheels of vehicle two left the asphalt surface they dropped between 5 and 6 inches to the gravel surface. Scene evidence indicates Kylee Sanborn attempted to steer the vehicle back into the northbound lane. Scene evidence and a witness statement indicate that Kylee Sanborn lost control of her vehicle which traveled across the northbound lane, crossed the center line and struck vehicle one head on in the southbound lane. As a result of the crash, all three occupants in vehicle one received serious non-life-threatening injuries. Both occupants of vehicle two, Kylee Sanborn and her passenger Jayna Sanborn received fatal injuries.

No criminal charges were filed.

Opinion:

South of the crash scene there is a slight west correction in US Highway 281. The driver of vehicle two Kylee Sanborn was 15 years old. She was operating on a restricted minor permit which was issued to her June 7, 2019. It is possible that Kylee Sanborn missed this correction in the road which caused her to drive to the right and off the road onto the, [sic] east shoulder. It is unknown what actually caused her to drive off the road to the right. Once on the shoulder Kylee Sanborn attempted to steer her vehicle back onto the roadway. Kylee Sanborn's failure to maintain her lane of travel and her steering input caused her to lose control of the vehicle which traveled into the southbound lane and ultimately caused the crash to occur. A simple application of vehicle two's brakes without any steering input after the vehicle was on the shoulder may have prevented this crash from occurring. Driver in-experience, failure to maintain lane and over correcting were all factors that played a role in this crash.

RESPONSE:

The Plaintiffs object to this Statement on the grounds that it sets forth many statements of fact and therefore fails to comply with SDCL 15-6-56(c)(1), which requires that "[e]ach material fact . . . must be presented in a separate numbered statement and with appropriate citation to the record in the case. The Plaintiffs further object to this Statement on the grounds that it failed to comply with SDCL

15-6-56(e)(1), which requires that the movant "set forth such facts as would be admissible in evidence." Subject to these objections, the Plaintiffs admit that such text is found in the Supporting Narrative of Trooper Miller. *Depo. Exhibit 24 at p. 12.*

21. Asked why no criminal charges were filed as it related to the accident,

Trooper Miller stated:

> If the driver of the Sanborn vehicle, Kylee Sanborn -- had she lived through this crash, we would have issued a citation to her in this particular case likely for two things: One being lane driving, or crossing the fog line, which is covered under state code 32-26-6. Additionally, we would have probably issued a citation for careless driving. But since both occupants in the vehicle at fault were deceased, there were no criminal charges possible.

RESPONSE:

The Plaintiffs object to this Statement on the grounds that it sets forth multiple statements of fact and therefore fails to comply with SDCL 15-6-56(c)(1), which requires that "[e]ach material fact . . . must be presented in a separate numbered statement and with appropriate citation to the record in the case. Subject to this objection, the Plaintiffs admit Trooper Miller so testified. This testimony calls for speculation since Kylee Sanborn did not survive the accident and is not relevant on the issue of the negligence of the Defendants.

22. The South Dakota Department of Transportation is divided into four regions: Aberdeen, Mitchell, Pierre, and Rapid City.

RESPONSE:

Admit.

23. In the Aberdeen region, there are the following subunits, known as "areas": Aberdeen area, Huron area, and Watertown area.

RESPONSE:

Admit.

24. Inside the areas, there are separate maintenance units, and inside the Huron area are two Maintenance Units: Unit 191 and 192.

RESPONSE:

Admit.

25. The Sanborn fatality accident took place within Unit 191, which is headquartered out of the Huron DOT office.

RESPONSE:

Admit.

26. The region engineer for the Aberdeen Region is Mark Peterson.

RESPONSE:

Admit.

27. The region operations engineer is Todd Hertel.

RESPONSE:

Admit.

28. The region traffic engineering supervisor is Dan Martell.

RESPONSE:

Admit.

29. Bradley Letcher is the area engineer for the Huron area.

Admit.

RESPONSE:

30. Though now retired, Michael Hieb was the highway maintenance supervisor for maintenance unit 191 from 2010 until he retired in 2021.

RESPONSE:

Admit.

31. Terrance Peck is the lead maintenance worker in maintenance unit 191.

RESPONSE:

Admit.

32. SDCL 31-4-14 sets forth the general responsibility of the department for maintaining the state trunk highway system, stating: "All marking, surveying, construction, repairing, and maintenance of the state trunk highway system is under the control and supervision of the department. The department shall administer the laws relative thereto." *Id.*

RESPONSE:

The Plaintiffs object to this Statement on the grounds that it fails to comply with SDCL 15-6-56(c)(1), in that it sets forth a statement of law instead of a statement of material fact. The Plaintiffs further object to this Statement to the extent that the Defendants suggest that SDCL 31-4-14 comprises the entirety of the "general responsibility" of the South Dakota Department of Transportation. Subject to these objections, the Plaintiffs admit that the Defendants correctly quote SDCL 31-4-14.

33. The policies, standards, and guidelines for maintenance of the state trunk highway system for the Department of Transportation are set forth in the Maintenance Manual in effect at any given time. In the maintenance manual in effect as relevant to this lawsuit, there is a policy letter that addresses shoulder maintenance, Policy Number OM-2002-09, and a performance standard for Shoulder Blading, Reshaping and Patching, specifically Performance Standard Function 2158.

RESPONSE:

The Plaintiffs object to this Statement on the grounds that the first statement fails to provide any "citation to the record" as required by SDCL 15-6-56(c). The Plaintiffs further object to this Statement on the grounds that it sets forth multiple statements of fact and therefore fails to comply with SDCL 15-6-56(c)(1), which requires that "[e]ach material fact . . . must be presented in a separate numbered statement and with appropriate citation to the record in the case. Finally, the Plaintiffs object to this Statement to the extent that the Defendants suggest that the entirety of "[t]he policies, standards, and guidelines for maintenance of the state trunk highway system for the Department of Transportation are set forth in the Maintenance Manual in effect at any given time." Policies can be the product of experience. *See Wulf v. Senst, 2003 S.D. 105, ¶ 26, 669 N.W.2d 135, 145 ("If there is a readily ascertainable standard by which the action of the government servant may be measured, whether that standard is written or the product of experience, it is not within the discretionary function exception.") (emphasis in original).* In this case, Mark Peterson agreed that the drop-off condition was a "dangerous condition" that was to be repaired "immediately." *Peterson Depo. at 112:12-24.* Subject to these objections, the Plaintiffs admit that the South Dakota Department of Transportation's written policies include Policy Number OM-2002-09 (entitled Shoulder Maintenance) and Performance Standard Function 2158. (entitled Shoulder Blading, Reshaping and Patching). In addition, the Roadside Design Guide, Depo. Exhibit 52, and the Policy on Geometric Design of Highways and Streets (Green Book) contain maintenance standards. *Depo. Exhibit 51.*

34. Policy Statement OM-2002-09 states, in pertinent part, as follows:

Asphalt concrete surfaced shoulders shall be maintained in general conformance to the original construction. Surfacing shall be repaired or patched, seals or flushed applied, cracks treated or sealed and vegetative growth controlled, as needed.

Blotter shoulders shall be maintained through repair or patching of the surfacing, applying flushed or seals and controlling vegetative growth.

Reclaimed asphalt shoulders shall be maintained by blading and adding material and/or flushing as necessary to essentially preserve the original template section and to control vegetative growth.

Gravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders

shall be maintained in design condition. Vegetative growth shall be controlled, as needed.

Shoulders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed.

Any questions or problems concerning shoulder maintenance are to be directed to the Area Engineer for resolution.

RESPONSE:

Admit.

35. As explained by Region Engineer Mark Peterson, as it relates to gravel shoulders, this policy statement is implemented by conforming with the Performance Standard Function 2158.

RESPONSE:

Deny. The Policy Statement portion of Policy Number OM-2002-09 (entitled Shoulder Maintenance) does state that "[s]houlders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed;" however, Policy Number OM-2002-09 does not provide that the sole applicable standard is Performance Standard Function 2158. *Depo. Exhibit 23.* Indeed, the Policy Statement refers to "standards," plural. *Id.* Further, although Policy Number OM-2002-09 contains a section directing users to "Related Documents," there is no reference to Performance Standard Function 2158, and Policy Number OM-2002-09 has never been superseded. *Id.* The Policy Statement portion of Policy Number OM-2002-09 specifically provides that "[g]ravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section," and "[e]xisting gravel shoulders shall be maintained in design condition." *Id.* Finally, policies can be the product of experience. *See Wulf v. Senst, 2003 S.D. 105, ¶ 26, 669 N.W.2d 135, 145 ("If there is a readily ascertainable standard by which the action of the government servant may be measured, whether that standard is written or the product of experience, it is not within the discretionary function exception.") (emphasis in original).* In this case, Mark Peterson agreed that the drop-off condition was a "dangerous condition" that was to be repaired "immediately." *Peterson Depo. at 112:12-24.*

36. Performance Standard Function 2158 is a statement as to maintenance duties (whether discretionary or ministerial), rather than the guidelines provided for in Policy Statement OM-2002-09.

RESPONSE:

Deny. The Policy Statement portion of Policy Number OM-2002-09 (entitled Shoulder Maintenance) does state that "[s]houlders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed;" however, Policy Number OM-2002-09 does not provide that the sole applicable standard is Performance Standard Function 2158. *Depo. Exhibit 23.* Indeed, the Policy Statement refers to "standards," plural. *Id.* Further, although Policy Number OM-2002-09 contains a section directing users to "Related Documents," there is no reference to Performance Standard Function 2158 and it has never been superseded. *Id.* The Policy Statement portion of Policy Number OM-2002-09 specifically provides that "[g]ravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section," and "[e]xisting gravel shoulders shall be maintained in design condition." *Id.* Finally, policies can be the product of experience. *See Wulf v. Senst, 2003 S.D. 105, ¶ 26, 669 N.W.2d 135, 145 ("If there is a readily ascertainable standard by which the action of the government servant may be measured, whether that standard is written or the product of experience, it is not within the discretionary function exception.") (emphasis in original).* In this case, Mark Peterson agreed that the drop-off condition was a "dangerous condition" that was to be repaired "immediately." *Peterson Depo. at 112:12-24.* Further, Performance Standard Function 2158 simply informs how to schedule and the procedure for performing shoulder maintenance (how to), it informs the maintenance workers how to implement Policy Number OM-2002-09 (the Standard for Maintaining Shoulders).

RESPONSE:

37. Performance Standard Function 2158 is as follows:

PERFORMANCE STANDARD FUNCTION 2158

Issue Date: 06-28-82
Revision: 05-04-16

SHOULDER BLADING, RESHAPING AND PATCHING

DESCRIPTION:

Blade, reshape and patch gravel shoulders with similar material.

PURPOSE:

To provide a smooth shoulder free of ruts, distortions and maintain proper crown slope. This performance standard is a guideline to be considered by the maintenance supervisor or their designee. The maintenance supervisor or their designee shall retain the authority to modify or deviate from this performance standard within their discretion based on their experience and judgement due to specific weather conditions, roadway conditions, or other events which impact upon this performance standard.

QUALITY AND WORKMANSHIP:

Gravel shoulders should be repaired when any of the following conditions exist:

1. The shoulder surface next to the pavement is more than 1-1/2" low for more than 50% of any shoulder mile.
2. The shoulder slope is less than 1/4" per foot or more than 1" per foot.
3. Heaved or high shoulders.
4. Minor edge ruts.
5. Isolated soft spots.
6. Scattered potholes.
7. Isolated area where gravel has been lost.

8. If conditions 1 through 7 above are met, and work can't be scheduled because of seasonal conditions or other priorities, warning signs (i.e., low shoulder, shoulder dropoff) should be installed until repair can be completed.

SCHEDULING AND INSPECTION:

1. Gravel shoulder maintenance is not of an emergency nature and should be scheduled.

2. This work should be performed during moist weather conditions, if possible.

3. Routine inspections will identify needs related to gravel shoulder maintenance.

PROCEDURE:

1. Place applicable safety devices and signs and/or check safety/warning devices on equipment.

2. Pull material from inslopes and/or shoulder onto the roadway surface, scarifying, as needed.

3. Add similar material, as needed.

4. Blade material back onto the shoulder and make sufficient passes with the motor grader to place, smoothen and compact material to the proper grade and crown slope.

5. Loose material should be swept from the paved roadway, if the equipment is available.

RESPONSE:

Admit.

38. In the case at hand, there is no evidence that anyone had any knowledge of the road condition prior to the Sanborn accident.

RESPONSE:

Deny. Forrest Thompson, a fuel delivery truck driver, stated that he drove the section of U.S. Highway 281 where the accident occurred on a frequent basis, that he had observed the drop-off, and that the drop-off had existed for at least three months or longer. *Affidavit of Forrest Thompson at ¶¶ 6-7.* Additionally, Jeff Boomsma, a local farmer, observed the same condition and said that the drop-off as shown in Exhibit 18 existed for approximately a year. *Affidavit of Jeff Boomsma at ¶ 4.*

39. Though there is some dispute about exactly when shoulder maintenance was completed after the accident, as several people testified to remembering putting some fill in shortly after the accident that may have dissipated before spring, it is not disputed that the shoulder maintenance was completed in the Spring (following the accident) when shoulder maintenance is typically scheduled because "[t]he ground is thawed out and there's some moisture there where you can pack it back in so it will stay put" in comparison to when the ground is frozen, because when the ground is frozen "[Fill] won't stay. It keeps moving."

RESPONSE:

The Plaintiffs object to this Statement on the grounds that it sets forth multiple statements of fact and therefore fails to comply with SDCL 15-6-56(c)(1), which requires that "[e]ach material fact . . . must be presented in a separate numbered statement and with appropriate citation to the record in the case. The Plaintiffs object to that portion which provides that "several people testified to remembering putting some fill in shortly after the accident" on the grounds that no "citation to the record" is provided as required by SDCL 15-6-56(c). Subject to these objections, the Plaintiffs admit that Mr. Hieb testified to the quoted text. Repairs were not made until May 7th and May 11th of 2020, some six months after Kylee and Jayna were killed. *Depo. Exhibit 4, p. 5.*

PLAINTIFFS' STATEMENT OF MATERIAL FACTS

The Plaintiffs, by and through their attorneys of record, hereby identify the following facts which are material to *Defendants' Motion for Summary Judgment* and the Plaintiffs' resistance thereto.

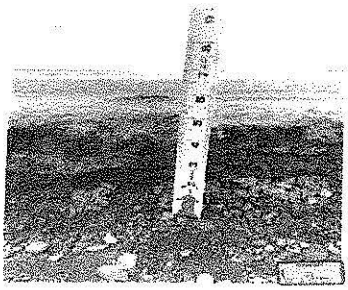
1. Kylee Sanborn and Jayna Sanborn were traveling north on U.S. Highway 281 in a 2007 Chevrolet Impala. *Depo. Exhibit 24 at p. 2.*

2. The southbound traffic consisted of a fuel truck driven by Forrest Thompson followed by a 2014 Dodge Ram pickup driven by Sarah Kennedy. *Exhibit 24 at pp. 2, 3, and 7.*

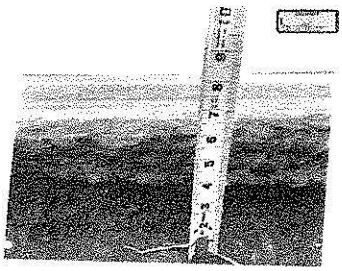
3. The accident occurred after the passenger side wheels of the Sanborn car went off onto the right-hand (east-side) shoulder of the road where there is a slight curve in the highway. *Miller Depo. at 38-40, 51.*

4. When Kylee attempted to steer the passenger side wheels back onto the pavement, the passenger side wheels encountered a severe drop off from the pavement to the shoulder of five to seven inches. *Miller Depo. at 60; Depo. Exhibits 39, 40, and 43.*

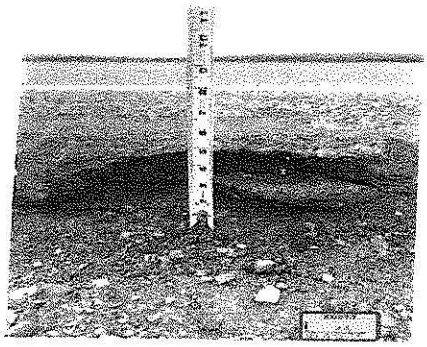
5. Trooper Andrew Miller investigated the accident scene the following day and took the following photographs of the pavement edge drop-off. *Miller Depo. at 42-43, 45, 47-48; Depo. Exhibits 39, 40, 43.*



Exh. 39 (same as Exh. 5)



Exh. 40 (same as Exh. 6)



Exh. 43 (same as Exh. 7)

6. During the time that the passenger side wheels were on the shoulder and attempting to come back onto the pavement, the undercarriage of the Sanborn vehicle had

bottomed out and was scraping the pavement. *Miller Depo. at 37-38; Affidavit of Brad O. Booth at ¶ 3 ("Affidavit of Booth").*

7. Trooper Miller did not measure the length of the drop off, but believed that it covered approximately one-third of the length of the tire and vehicle marks, which measured 358.93 feet. *Miller Depo. at 47, 73.*

8. Brad Booth, an accident reconstruction expert, has opined that "[o]nce the Impala's passenger-side wheels dropped off of the paved portion of the roadway, portions of the underside of the Impala periodically came into contact with and began scraping the roadway surface, resulting in scratches and dents to the underside of the Impala," and that such "contact/scraping is also evident from metal scarring on the roadway." *Affidavit of Booth at ¶ 3.*

9. Mr. Booth also opined that "[t]he abrupt drop of the Impala, the Impala coming into contact with and scraping the roadway, and the vehicle traveling with its passenger-side wheels on the unpaved shoulder would have startled Kylee and affected her ability to control the vehicle." *Id.*

10. Mr. Booth further opined that "[w]hen Kylee attempted to return the Impala to the paved portion of the roadway she had to forcefully attempt to steer the Impala up onto the roadway, requiring significant steering input, because the pavement edge drop off was several inches in height and, further, the pavement edge drop off was essentially vertical rather than having any slope." *Id.*

11. Mr. Booth finally opined that "[d]ue to the amount of steering input required to enable the Impala to ascend the pavement edge drop off, which is evident from the yaw marks left by the vehicle on the roadway, the vehicle then veered across the northbound lane and

entered the southbound lane and collided head-on with a 2014 Ram 1500 pickup that was traveling south." *Id.*

12. Forrest Thompson, the operator of the southbound fuel delivery truck, witnessed the accident and observed the Sanborn vehicle's passenger tires hit the loose gravel on the shoulder. *Affidavit of Forrest Thompsom at ¶ 3.*

13. According to Mr. Thompsom, "[t]he passenger tires of the car went off onto the shoulder of the road in an area where there is a slight curve in the highway," the driver of the car over corrected to steer onto the highway, and "the vehicle shot across the road like a slingshot." *Id. at ¶¶ 3-4.*

14. Mr. Thompson described the driver of the Sanborn vehicle (Kylee Sanborn) as "holding on for dear life." *Id. at ¶ 4.*

15. As a fuel delivery truck driver, Mr. Thompson had driven that section of U.S. Highway 281 on a frequent basis—once a week and up to ten times per week—and had observed the condition of the road and the drop-off from the pavement to the shoulder. *Id. at ¶ 7.*

16. According to Mr. Thompson, "[t]here was approximately a six inch drop off from the pavement to the shoulder in the area where the accident occurred" that measured "approximately 200 to 300 feet." *Id. at ¶ 6.*

17. Mr. Thompson stated that the drop-off condition "had existed for at least three months before the accident, if not longer," and "that area of the road where this accident occurred was more often out of repair than in repair in terms of a shoulder drop-off." *Id. at ¶¶ 6-7.*

18. Mr. Thompson reported that the South Dakota Department of Transportation ("DOT") never repaired the drop off until the spring of 2020. *Id. at ¶ 8.*

19. Mr. Thompson had observed other vehicles go onto the shoulder of the road in front of him in that area; had observed tire tracks of vehicles that had gone off the pavement onto the shoulder in that area; and himself had almost gone off onto the shoulder of the road in that area. *Id. at ¶ 5.*

20. According to Trooper Miller, over the course of time, vehicles going off of the pavement onto the shoulder in the area of the accident had displaced the gravel and compacted the shoulder. *Miller Depo. at 53-54.*

21. Pavement edge drop-offs are a phenomenon that is well known within the DOT, and Mr. Peterson of the DOT acknowledged that pavement edge drop-offs are significant because "[w]hen you have an abrupt change, it may lead to losing vehicular control." *Peterson Depo. at 76-77.*

22. The shoulder of U.S. Highway 281 in the location where this collision occurred was a gravel shoulder. *Peterson Depo. at 54.*

23. Mark Peterson of the DOT admitted that the policy requiring gravel shoulders to be maintained by blading it and adding material as necessary to preserve the original template section referred to the surface plans for the construction of the highway—meaning that gravel shoulders shall be maintained in the condition as the shoulders were originally designed. *Peterson Depo. at 91.*

24. The section of U.S. Highway 281 where the Sanborn accident happened was constructed and surfaced in 2004 and 2005. *Rabern Depo. at 9.*

25. According to the surfacing plans, the shoulder of the roadway is to be flush with the driving portion of the roadway. *Id. at 13; Exhibit 50, DOT 17422.*

26. There was no exemption from the requirement that the shoulder of the roadway be flush with the driving portion of the roadway. *Rabern Depo. at 13.*

27. According to the Stewardship Agreement between the DOT and the Federal Highway Administration (FHWA), the DOT agreed to the control documents for the design of highways, the Policy on Geometric Design of Highways and Streets (Green Book), the Roadside Design Guide, and other standards. *Rabern Depo. at 18-19; Exhibit 51 DOT 17268.*

28. U.S. Highway 281 is part of the National Highway System. *Rabern Depo. at 19.*

29. The DOT typically uses federal funds for the construction of highways in the National Highway System. *Rabern Depo. at 19.*

30. Under the Stewardship Agreement the SDDOT agreed: "To design all NHS (National Highway System) facilities in accordance with the AASHTO Green Book, current edition, and noted control documents regardless of funding source." *Rabern Depo. at 19; Exhibit 51, DOT 17268.*

31. The Roadside Design Guide in effect at the time of the accident provides, among other things, that "[w]hen not properly addressed, drop-offs may lead to an errant vehicle losing control with a high potential for a serious accident." *Depo. Exhibit 52.*

32. The Roadside Design Guide further provides that "[d]esirably, no vertical differential greater than 50 mm [2 in.] should occur between adjacent lanes." *Depo. Exhibit 52.*

33. The Roadside Design Guide also states, in pertinent part, that "[r]esearch has found that loss of vehicle control can develop at speeds greater than 50 km/h under certain circumstances, where inattentive or inexperienced drivers return to the traffic lane by

oversteering to overcome the resistance from a continuous pavement edge and tire-scrubbing condition." *Depo. Exhibit 52.*

34. Finally, the Roadside Design Guide provides, in pertinent part, that "[p]avement edge drop-offs greater than 75 mm [3 in.] immediately adjacent to traffic are not recommended to be left overnight," and "[i]f they are higher than 75 mm and left overnight, mitigating measures should be considered." *Depo. Exhibit 52.*

35. The applicable Policy on Geometric Designs of Highways and Streets (Green Book) provides, in pertinent part, as follows: "All types of shoulders should be constructed and maintained flush with the traveled way pavement if they are to fulfill their intended function." *Depo. Exhibit 53; Rabern Depo. at 28 (emphasis added).*

36. The applicable Policy on Geometric Designs of Highways and Streets (Green Book) further provides: "Regular maintenance is needed to provide a flush shoulder." *Depo. Exhibit 53; Rabern Depo. at 28.*

37. The applicable Policy on Geometric Designs of Highways and Streets (Green Book) also states: "Unstabilized shoulders generally undergo consolidation with time and the elevation of the shoulder at the traveled way edge tends to become lower than the traveled way." *Depo. Exhibit 53; Rabern Depo. at 28-29.*

38. Finally, the applicable Policy on Geometric Designs of Highways and Streets (Green Book) provides: "The drop-off can adversely affect driver control when driving onto the shoulder at any appreciable speed." *Depo. Exhibit 53; Rabern Depo. at 29.*

39. Mark Peterson of the DOT agreed that regardless of whether it was caused by design or lack of maintenance, the drop-off condition as depicted in Depo. Exhibits 39, 40, and

43 was a "dangerous condition" that was to be repaired "immediately." *Peterson Depo. at 86, 112.*

40. Mr. Peterson further testified that, given such a condition, he would have expected DOT personnel to have put up some kind of warning signs until the dangerous condition was repaired because it was a hazard to the driving public. *Peterson Depo. at 112-113.*

41. Other DOT Maintenance workers agreed that the pavement edge drop-off depicted in Exhibits 39, 40, and 43 was a hazardous condition that should be repaired as soon as possible. *Ulmer Depo. at 39; Peck Depo. at 24-30.*

42. The day after the accident, on November 25, 2019, Brad Letcher, the area engineer for the Huron area office of the DOT, visited the scene of the accident and took the photograph below which depicts the extended area where the pavement edge drop-off existed. *Letcher Depo. at 7-8, 56-59.*

43. There is no record from the DOT reflecting that that area of the road was ever repaired until the spring of 2020, when repairs to shoulder were performed by the DOT on May 7 and 11, 2020. *Depo. Exhibit 4, p. 5.*

44. Mike Hieb, the Highway Maintenance Supervisor in the Huron office was responsible for inspecting the section of road where the accident happened. *Peterson Depo. 40-41.*

45. Mr. Hieb's responsibility was to drive those roads to inspect them to see if something was out of repair or posed a hazard to the driving public. *Peterson Depo. at 41.*

46. Mr. Hieb testified that it was his responsibility to drive the roads and check their condition and that he drove all of the roads in his region, including this section of U.S. Highway 281, approximately once a week. *Hieb Depo. at 16, 18.*

47. Although it was not written down, Mr. Hieb testified that checking the roads in his region was part of his job description and that, as a product of his experience, the appropriate standard was to drive the roads once a week to determine their condition. *Hieb Depo. at 18-19.*

48. Terence Peck, the lead maintenance worker in the Huron office, also drove the road where the accident happened basically every week. *Peck Depo. at 14.*

49. Mr. Peck testified that the DOT maintenance workers reported something that required repair. *Id. at 12.*

50. After being shown the drop-off condition depicted in Depo. Exhibits 39, 40, and 43, Mark Peterson testified that if the DOT employee responsible for inspecting the road

was doing his/her job, he would have expected that DOT employee to have observed that condition. *Peterson Depo. at 96-97.*

SDCL 15-6-56(c)(2)

The Plaintiffs would submit that the Plaintiffs' submissions establish that the Defendants' duties were ministerial in nature, and, further, that genuine issues of fact exist as to whether the Defendants breached such duties and whether such breaches legally caused the deaths of Kylee and Jayna Sanborn.

Dated this 18th day of July, 2024.

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DEPOSITION
EXHIBIT

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30857; 30872

ESTATE OF KYLEE L. SANBORN,
by and through its Personal Representative,
Sarah C. Sanborn, and ESTATE OF
JAYNA R. SANBORN, by and through its
Personal Representative, Sarah C. Sanborn,

Plaintiffs and Appellants,

-vs-

MARK PETERSON, TODD HERTEL,
BRAD LETCHER, DAN MARTEL,
MICHAEL HIEB, AND TERENCE PECK,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BEADLE COUNTY, SOUTH DAKOTA

THE HONORABLE KENT A. SHELTON
CIRCUIT COURT JUDGE, PRESIDING

APPELLEES' BRIEF

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NOTICE OF APPEAL FILED SEPTEMBER 30, 2024
NOTICE OF REVIEW FILED OCTOBER 16, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED: Page No.

STATUTES CITED:

OTHER REFERENCES:

PRELIMINARY STATEMENT

For the convenience of the Court, Appellee will adopt the abbreviations used in the Appellate Brief. Accordingly, Plaintiffs/Appellants Estate of Kylee L. Sanborn and Estate of Jayna R. Sanborn, both acting by and through Personal Representative Sarah C. Sanborn, are collectively referred to as "Sanborns." The Defendants/Appellees, Mark Peterson, Todd Hertel, Brad Letcher, Dan Martel, Michael Hieb, and Terence Peck are collectively referred to as "Defendants" or "State Employee Defendants." The settled record is denoted "SR," followed by the appropriate pagination. The transcript of the summary judgment hearing is referenced using "HT," followed by the corresponding page number(s). Documents in the Appendix to Appellant's Brief will be referenced using "APP," followed by the appropriate page number(s). Appellees do not include their own Appendix, as the Appellants' Appendix includes the documents that would be included in the Appellees' Appendix.

JURISDICTIONAL STATEMENT

The Sanborns appeal from a judgment of the Third Judicial Circuit Court. *APP at 1*. The judgment was signed and filed on September 3, 2024. *Id.* Notice of entry of the judgment was filed and served on September 3, 2024. *SR at 678.* The Sanborns filed a *Notice of Appeal* on September 30, 2024. *Id. at 688.* State Employee Defendants filed a Notice of Review on October 16, 2024. Jurisdiction in this Court is therefore proper under SDCL 15-26A-6 and 15-26A-22.

STATEMENT OF LEGAL ISSUES

Issue 1. WHETHER SANBORNS' CLAIMS ARE BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY?

The circuit court concluded that the Sanborns' claims were not barred by sovereign immunity.

Authority:

McGee v. Spencer Quarries, Inc., 2023 S.D. 66, 1 N.W.3d 614

LP6 Claimants, LLC v. S.D. Dep't of Tourism, 2020 S.D. 38, 945 N.W.2d 911

Truman v. Griese, 2009 S.D. 8, 762 N.W.2d 75

Hansen v. S.D. DOT, 1998 S.D. 109, 584 N.W.2d 881

Issue 2. WHETHER SANBORNS' CLAIMS ARE BARRED BY THE PUBLIC DUTY DOCTRINE?

The circuit court concluded that the Sanborns' claims were barred by the public duty doctrine.

Authority:

Tipton v. Town of Tabor, 538 N.W.2d 783 (S.D. 1995) (*Tipton I*)

Tipton v. Town of Tabor, 1997 S.D. 96, 567 N.W.2d 351 (*Tipton II*)

Pray v. City of Flandreau, 2011 S.D. 43, 801 N.W.2d 451

McDowell v. Sapienza, 2018 S.D. 1, 906 N.W.2d 399

STATEMENT OF THE CASE

On November 24, 2019, at approximately 5:00 p.m., Trooper Joelle Schuknecht was dispatched to respond to a call reporting a two-vehicle head on collision in the area of the intersection of 191st Street and US Highway 281 in Beadle County. APP 13 at ¶ 1, SR 254, 306. Kylee Sanborn was driving a car on US Highway 281 traveling North. APP 13 at ¶ 2, SR 254, SR 317. Jayna Sanborn was a passenger. APP 13 at ¶ 3, SR 254, SR 316. Sarah Kennedy was driving a pickup truck Southbound. APP 13 at ¶ 4, SR 254, SR 317.

For an unknown reason, the Sanborn vehicle illegally drove off of the legal road onto the east shoulder. APP 15 at ¶ 19; SR 256, 303-304. Once the passenger wheels of the Sanborn vehicle left the asphalt surface they dropped between 5 and 6 inches to the gravel surface. *Id.* Plaintiffs allege Kylee Sanborn attempted to steer the vehicle back into the northbound lane. *Id*. Scene evidence and a witness statement indicate that Kylee Sanborn lost control of her vehicle which traveled across the northbound lane, crossed the center line and struck the vehicle driven by Kennedy head on in the southbound lane. Both occupants of the Sanborn vehicle sustained fatal injuries. *Id.*

Sanborns commenced this action alleging wrongful death and survival claims alleging that the South Dakota Department of Transportation and certain employees of the Department of Transportation were negligent in relation to the inspection, construction, maintenance, and repair of Highway 281 resulting in a Pavement Edge Drop Off which was the cause of the fatalities of Kylee and Jayna Sanborn. SR 11. The Defendants initially filed a Motion to Dismiss the action against both the South Dakota Department of Transportation and the State Employee Defendants on sovereign immunity

grounds. SR 36. The circuit court dismissed the Department of Transportation on sovereign immunity grounds, but allowed discovery to proceed as it related to the State Employee Defendants. SR 114. After Sanborns completed factual discovery, the State Employee Defendants moved for summary judgment on two grounds: (1) that the State Employee Defendants' duties at issue were discretionary in nature, and therefore they are immune from suit due to sovereign immunity; and (2) that the Sanborns' claims are barred by the public duty doctrine. SR 252-288.

The circuit court granted State Employee Defendants' Motion for Summary Judgment. In doing so, the circuit court denied the motion for summary judgment on the basis of sovereign immunity, reasoning that their duties were ministerial, rather than discretionary, in nature. SR 665, 676. However, the circuit court granted summary judgment in favor of State Employee Defendants based on the public duty doctrine. *Id.* Sanborns timely filed a Notice of Appeal and State Employee Defendants timely filed a Notice of Review on the issue of sovereign immunity. SR 688

STATEMENT OF THE FACTS

On November 24, 2019, at approximately 5:00 p.m., Trooper Joelle Schuknecht was dispatched to respond to a call reporting a two-vehicle head on collision in the area of the intersection of 191st Street and US Highway 281 in Beadle County. APP 13 at ¶ 1; SR 254, 306. Kylee Sanborn was driving a 2007 Impala on US Highway 281 traveling North. APP 13 at ¶ 2; SR 254, 306. Jayna Sanborn was a passenger. APP 13 at ¶ 3; SR 254, 306. Sarah Kennedy was driving a 2014 Dodge Ram 1500 Southbound. APP 13 at ¶ 4; SR 254, 306.

Based upon witness statements and scene evidence, Trooper Schuknecht determined that the vehicle driven by Kylee Sanborn traveled off the roadway to the right and its passenger side tires entered the gravel shoulder, and that Kylee Sanborn over corrected which caused the vehicle to travel back onto the road and across the center line into the path of a southbound semi. APP 14 at ¶ 5, SR 255, 321. Trooper Schuknecht further determined that Sanborn again swerved by over correcting which caused the vehicle to re-enter the northbound lane at which point in an effort to regain control she again over corrected which caused the vehicle driven by Kylee Sanborn to cross the center line at which point it collided with the Dodge Ram driven by Sarah Kennedy head on. Kylee and Jayna Sanborn were both killed on impact. APP 14 at ¶ 6; SR 255, 321.

Trooper Andrew Miller, a crash reconstructionist for the South Dakota Highway Patrol, was contacted at approximately 5:30 p.m. on November 24, 2019, and arrived at 6:05 p.m. APP 14 at ¶ 7; SR 255, 298. That evening, he assisted at the crash scene by taking photographs and marking scene evidence. APP 14 at ¶ 8; SR 255, 322. He returned the following day at 10:00 a.m. and marked additional scene evidence that was not visible the night before due to darkness. APP 14 at ¶ 9; SR 255, 322. When completing his investigation, Trooper Miller determined that there were areas of pavement edge drop-offs. APP 14 at ¶ 10; SR 255, 300. At one point, there were isolated areas where the drop-off between the paved road and the gravel shoulder was roughly 5-6 inches, as measured by Trooper Miller. APP 14 at ¶ 11; SR 255, 326-327.

At his deposition, although he didn't measure the exact distance, Trooper Miller testified that the area of the pavement edge drop off was isolated to a general area of approximately one-third of the 358.93 feet that he did measure, which he marked on his

reconstruction drawings at his deposition. APP 15 at ¶ 12; SR 256, 305, 328. Trooper Miller stated he was *certain* that [the pavement edge drop-off] was contained to that area." APP 15 at ¶ 13; SR 256, 305 (emphasis added). Although Trooper Miller testified that this area was in his squad area and that he regularly drove this portion of Highway 281 (hundreds of times), he testified he had never noticed that there was a pavement edge drop off in this area. APP 15 at ¶¶ 14-15; SR 256, 303.

Trooper Miller was not certain when this condition began or as to the cause of the pavement edge drop-off, but reasoned: "When semis go around that correction, it's my opinion that -- it appeared to me here that the trailers of semis or other vehicles likely caused this to happen by dropping off the edge of the pavement there repeatedly over time." APP 15 at ¶ 16; SR 256, 301. Trooper Miller also noted "This area has received above-average rainfall this year creating unusually wet conditions which may also have added to the compaction/erosion of the gravel in this area." APP 15 at ¶ 17; SR 256, 297. He reasoned such was relevant because "Any time you introduce water and heavy vehicles, you get compaction, and the vehicles have a tendency to push the gravel surface away, just like on any gravel road." APP 15 at ¶ 18; SR 256, 301.

Based on his investigation, Trooper Miller concluded the following:

> Summary:
>
> On November 24, 2019 at approximately 1700 hours a two-vehicle head on crash occurred on US Highway 281 near mile post 135. Vehicle one was traveling southbound and was operated by Sarah Kennedy. Vehicle two was traveling northbound and was operated by Kylee Sanborn. For an unknown reason, vehicle two drove off the road onto the east shoulder. Once the front passenger wheels of vehicle two left the asphalt surface they dropped between 5 and 6 inches to the gravel surface. Scene evidence indicates Kylee Sanborn attempted to steer the vehicle back into the northbound lane. Scene evidence and a witness statement indicate that Kylee Sanborn lost control of her vehicle which traveled across the northbound lane, crossed the center line and struck vehicle one head on in

> the southbound lane. As a result of the crash, all three occupants in vehicle one received serious non-life-threatening injuries. Both occupants of vehicle two, Kylee Sanborn and her passenger Jayna Sanborn received fatal injuries.
>
> No criminal charges were filed.
>
> Opinion:
>
> South of the crash scene there is a slight west correction in US Highway 281. The driver of vehicle two Kylee Sanborn was 15 years old. She was operating on a restricted minor permit which was issued to her June 7, 2019. It is possible that Kylee Sanborn missed this correction in the road which caused her to drive to the right and off the road onto the, east shoulder. It is unknown what actually caused her to drive off the road to the right. Once on the shoulder Kylee Sanborn attempted to steer her vehicle back onto the roadway. Kylee Sanborn's failure to maintain her lane of travel and her steering input caused her to lose control of the vehicle which traveled into the southbound lane and ultimately caused the crash to occur. A simple application of vehicle two's brakes without any steering input after the vehicle was on the shoulder may have prevented this crash from occurring. Driver in-experience, failure to maintain lane and over correcting were all factors that played a role in this crash.

APP 16 at ¶ 20; SR 257, 317. Asked why no criminal charges were filed, Trooper Miller stated:

> if the driver of the Sanborn vehicle, Kylee Sanborn -- had she lived through this crash, we would have issued a citation to her in this particular case likely for two things: One being lane driving, or crossing the fog line, which is covered under state code 32-26-6. Additionally, we would have probably issued a citation for careless driving. But since both occupants in the vehicle at fault were deceased, there were no criminal charges possible.

APP 16 at ¶ 21; SR 257, 302.

The South Dakota Department of Transportation is divided into four regions: Aberdeen, Mitchell, Pierre, and Rapid City. APP 17 at ¶ 22; SR 258, 330. In the Aberdeen region, there are the following subunits, known as "areas": Aberdeen area, Huron area, and Watertown area. APP 17 at ¶ 23; SR 258, 330. Inside the areas, there

are separate maintenance units, and inside the Huron Area are two Maintenance Units: Unit 191 and 192. APP 17 at ¶ 24; SR 258, 340. The Sanborn fatality accident took place within Unit 191, which is headquartered out of the Huron DOT office. APP 17 at ¶ 25; SR 258, 340.

The region engineer for the Aberdeen Region is Mark Peterson. APP 17 at ¶ 26; SR 258, SR 330. The region operations engineer is Todd Hertel. APP 17 at ¶ 27; SR 258, 330. The region traffic engineering supervisor is Dan Martell. APP 17 at ¶ 28; SR 258, SR 330. Bradley Letcher is the area engineer for the Huron area. APP 17 at ¶ 29; SR 258, 339. Though now retired, Michael Hieb was the highway maintenance supervisor for maintenance unit 191 from 2010 until he retired in 2021. APP 17 at ¶ 30; SR 258, 344, 346. Terrance Peck is the lead maintenance worker in maintenance unit 191. APP 17 at ¶ 31; SR 258, 354.

SDCL 31-4-14 sets forth the general responsibility of the department for maintaining the state trunk highway system, stating: "All marking, surveying, construction, repairing, and maintenance of the state trunk highway system is under the control and supervision of the department. The department shall administer the laws relative thereto." The policies, standards, and guidelines for maintenance of the state trunk highway system for the Department of Transportation are set forth in the Maintenance Manual in effect at any given time. APP 18 at ¶ 33; SR 259, 336, 348.

In the maintenance manual in effect as relevant to this lawsuit, there is a policy letter that addresses shoulder maintenance, Policy Number OM-2002-09, and a performance standard for Shoulder Blading, Reshaping and Patching, specifically Performance Standard Function 2158. APP 18 at ¶ 33; SR 259, 337, 348.

Policy Statement OM-2002-09 states, in pertinent part, as follows:

> Asphalt concrete surfaced shoulders shall be maintained in general conformance to the original construction. Surfacing shall be repaired or patched, seals or flushes applied, cracks treated or sealed and vegetative growth controlled, as needed.
>
> Blotter shoulders shall be maintained through repair or patching of the surfacing, applying flushes or seals and controlling vegetative growth.
>
> Reclaimed asphalt shoulders shall be maintained by blading and adding material and/or flushing as necessary to essentially preserve the original template section and to control vegetative growth.
>
> Gravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders shall be maintained in design condition. Vegetative growth shall be controlled, as needed.
>
> Shoulders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed.
>
> Any questions or problems concerning shoulder maintenance are to be directed to the Area Engineer for resolution.

APP 18 at ¶ 34; SR 259, 337. As explained by Region Engineer Mark Peterson, this policy statement incorporates and implements the performance of standard Performance Standard Function 2158. APP 18 at ¶ 35; SR 259, 334. Specifically, the language: "Shoulders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed" means that the guidelines are met by complying with Performance Standard Function 2158 as it relates to gravel shoulders. *Id.*

The applicable maintenance standard provides, in pertinent part:

PERFORMANCE STANDARD FUNCTION 2158

Issue Date: 06-28-82
Revision: 05-04-16

SHOULDER BLADING, RESHAPING AND PATCHING

DESCRIPTION:

Blade, reshape and patch gravel shoulders with similar material.

PURPOSE:

To provide a smooth shoulder free of ruts, distortions and maintain proper crown slope. This performance standard is a guideline to be considered by the maintenance supervisor or their designee. The maintenance supervisor or their designee shall retain the authority to modify or deviate from this performance standard within their discretion based on their experience and judgement due to specific weather conditions, roadway conditions, or other events which impact upon this performance standard.

QUALITY AND WORKMANSHIP:

Gravel shoulders should be repaired when any of the following conditions exist:

1. The shoulder surface next to the pavement is more than 1-1/2" low for more than 50% of any shoulder mile.
2. The shoulder slope is less than 1/4" per foot or more than 1" per foot.
3. Heaved or high shoulders.
4. Minor edge ruts.
5. Isolated soft spots.
6. Scattered potholes.
7. Isolated area where gravel has been lost.

8. If conditions 1 through 7 above are met, and work can't be scheduled because of seasonal conditions or other priorities, warning signs (i.e., low shoulder, shoulder dropoff) should be installed until repair can be completed.

SCHEDULING AND INSPECTION:

1. Gravel shoulder maintenance is not of an emergency nature and should be scheduled.

2. This work should be performed during moist weather conditions, if possible.

3. Routine inspections will identify needs related to gravel shoulder maintenance.

PROCEDURE:

1. Place applicable safety devices and signs and/or check safety/warning devices on equipment.

2. Pull material from inslopes and/or shoulder onto the roadway surface, scarifying, as needed.

3. Add similar material, as needed.

4. Blade material back onto the shoulder and make sufficient passes with the motor grader to place, smoothen and compact material to the proper grade and crown slope.

5. Loose material should be swept from the paved roadway, if the equipment is available.

APP 19-20 at ¶ 37; SR 260-261, 348-349.

In the case at hand, there is no evidence that State Employees had any knowledge of the road condition prior to the Sanborn accident. APP 20 at ¶ 38; SR 261, 303-34, 341, 345. In fact, although Trooper Miller testified that this area was in his squad area and that he regularly drove this portion of Highway 281 (hundreds of times), he testified he

had never noticed that there was a pavement edge drop off in this area. APP 15 at ¶ 19; SR 256, 303-34.

Although not relevant to this motion or on the merits pursuant to SDCL 19-19-407, there is some dispute about exactly when shoulder maintenance was completed after the accident, as several people testified to remembering putting some fill in shortly after the accident that may have dissipated before spring, it is not disputed that the shoulder maintenance was completed in the Spring (following the accident) when shoulder maintenance is typically scheduled because "[t]he ground is thawed out and there's some moisture there where you can pack it back in so it will stay put" in comparison to when the ground is frozen, because when the ground is frozen "[Fill] won't stay. It keeps moving." APP 21 at ¶ 39; SR 262, 347.

STANDARD OF REVIEW

The standard of review on a motion of summary judgment is well-established. "Summary judgment is examined de novo[.]" *Adrian v. Vonk*, 2011 S.D. 84, ¶ 8, 807 N.W.2d 119, 122 (further citations omitted). "If any legal basis emerges to support summary judgment, [this Court] must affirm." *Id.* at ¶ 8, (further citations omitted). Generally, summary judgment should never be viewed as 'a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Accounts Mgmt. v. Litchfield*, 1998 S.D. 24, ¶ 4, 576 N.W.2d 233, 234 (further citations omitted).

"Whether the defendants are protected by sovereign immunity is a question of law[.]" *Hansen v. S.D. DOT*, 1998 S.D. 109, ¶ 7, 584 N.W.2d 881, 883 (*citing Wilson v. Hogan*, 473 N.W.2d 492, 493 (SD 1991)). "Additionally, the predicate question, whether

the governmental duties . . . are ministerial or discretionary, is a question of law[.]" *Truman v. Griese*, 2009 S.D. 8, ¶ 10, 762 N.W.2d 75, 78 (*citing Bickner v. Raymond Twp.*, 2008 S.D. 27, ¶ 10, 747 N.W.2d 668, 671). Absent abrogation or waiver, sovereign immunity is "jurisdictional in nature[.]"*Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, ¶ 24, 931 N.W.2d 707, 713 *(quoting FDIC v. Meyer*, 510 U.S. 471, 475 (1994)).

"Summary judgment is appropriate for sovereign immunity claims." *Brown Eyes v. S.D. Dep't of Soc. Servs.*, 2001 S.D. 81, ¶ 6, 630 N.W.2d 501, 505 (*citing Casazza v. State of South Dakota*, 2000 SD 120, ¶ 8, 616 N.W.2d 872, 874). Likewise, application of the public duty doctrine is a question of law and appropriate for summary judgment. *See generally Tipton v. Town of Tabor*, 1997 S.D. 96, 567 N.W.2d 351 (*Tipton II*).

ARGUMENT

I. SOVEREIGN IMMUNITY AND THE PUBLIC DUTY DOCTRINE IN GENERAL

"Sovereign immunity is the right of public entities to be free from liability for tort claims unless waived by legislative enactment." *LP6 Claimants, LLC v. S.D. Dep't of Tourism*, 2020 S.D. 38, ¶ 13, 945 N.W.2d 911, 915 (*quoting Bickner v. Raymond Twp.*, 2008 S.D. 27, ¶ 10, 747 N.W.2d 668, 671). "The States' sovereign immunity derives from English law and was ratified in Article III, Section 2 of the United States Constitution." *Unruh v. Davison Cty.*, 2008 S.D. 9, ¶ 7, 744 N.W.2d 839, 842 (*citing Alden v. Maine*, 527 US 706, 713, 119 SCt 2240, 2246-47, 144 LEd2d 636(1999)). "Sovereign immunity is established on a state level by Article III, Section 27 of the South Dakota Constitution: 'The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.'" *Id.* at ¶ 8 (*citing Sioux Falls Constr. Co. v. City of Sioux Falls*, 297 NW2d 454, 457 (SD 1980)). "In the absence of constitutional

or statutory authority, an action cannot be maintained against the State." *Truman*, 2009 S.D. 8, ¶ 9 (further citations omitted). Any waiver of the State's sovereign immunity must be expressly identified by the Legislature. *LP6 Claimants*, 2020 S.D. 38, ¶ 13 (*citing High-Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736, 739 (S.D. 1980)). "Shortly after the adoption of Article III, section 27 of our State Constitution, [the South Dakota Supreme Court] first recognized that sovereign immunity applied to the construction and maintenance of highways." *Truman*, 2009 S.D. 8, ¶ 18 (*citing Bailey v. Lawrence County*, 5 SD 393, 59 NW 219 (1894)).

Tort claims directly against the State, as well as its agencies and its employees in their official capacity, are barred by sovereign immunity unless that immunity has been waived. The mode of analysis for individual capacity claims is more nuanced and immunity is dependent upon the function performed by the employee. As reasoned by the Supreme Court,

> It is well-settled that suits against officers of the state in their official capacity, are in reality suits against the State itself. It is further settled that the State is generally immune from suit under Article III Section 27 of the South Dakota Constitution. With respect to individual capacity suits, state employees who are sued in an individual capacity are entitled to immunity dependent upon the function performed by the employee. State employees are generally immune from suit when they perform discretionary functions, but not when they perform ministerial functions.

Truman, 2009 S.D. 8, ¶ 20 (*quoting Sisney v. Reisch*, 2008 SD 72, ¶ 12, 754 NW2d 813, 818-19).

Similar to, and often tied to, the doctrine of sovereign immunity is the public duty doctrine, which shields public officers from civil liability for negligence. *Briscoe v. Walsh*, 445 S.W.3d 660, 666 (citing *Benson v. Kansas City, Bd. of Police Com'rs*, 366 S.W.3d 120, 124 (Mo.App. W.D. 2012)).). The public duty doctrine is essentially a

fallback issue, still viable even when sovereign immunity is not. *Tipton II*, 1997 SD 96, ¶¶ 8-10 ("Despite this waiver [of sovereign immunity], however, South Dakota continues to observe the public duty rule[.]") (further citations omitted). The public duty rule is not an affirmative defense. *Throneberry v. Mo. State Highway Patrol*, 526 S.W.3d 198, 200 (MO 2017). Instead, it delineates the legal duty public employees owe to plaintiffs. *Id*. Simply put, the public duty doctrine is an issue of duty - if one does not exist then liability cannot affix. *E.P. v. Riley*, 604 N.W.2d 7, 12 (S.D. 1999) (further citations omitted).

A public officer owes a duty to the public, and not to a particular individual. *Briscoe*, 445 S.W.3d at 666. In South Dakota, the public duty doctrine has been limited only to issues dealing with law enforcement or public safety. *Maher v. City of Box Elder*, 2019 S.D. 15, ¶ 15, 925 N.W.2d 482, 486 (*quoting E.P. v. Riley*, 1999 S.D. 163, ¶ 22, 604 N.W.2d 7, 13-14). However, "public safety" may also extend to matters outside of police work and law enforcement, in matters which *generally* pertain to public safety, health, and well-being. *Id*. at ¶ 16 (*citing Pray v. City of Flandreau*, 2011 SD 43, ¶ 4, 801 N.W.2d 451, 453) (ruling the public duty doctrine shielded the City of Flandreau from liability when the plaintiff suffered injury by a dog and brought suit against the city for not enforcing its vicious animal ordinance) and *McDowell v. Sapienza*, 2018 SD 1, ¶ 6, 906 N.W.2d 399, 403 (the public duty doctrine applied when the City of Sioux Falls issued construction permits to a third party, proceeding in violation of building regulations, because building codes are meant to maintain public safety and the general welfare).

Given the fact that the public duty doctrine is generally viewed as complementary to a sovereign immunity analysis, State Employee Defendants present their argument in the traditional order of analyzing the sovereign immunity issue first, followed by the public duty doctrine issue.

II. SANBORNS' CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY.

A. The Official Capacity Claims are barred as claims against the State.

As has been addressed in several cases analyzing road design and maintenance, SDCL 21-32-16 waives sovereign immunity if the claim is covered by a policy of insurance, providing, in pertinent part,

> [t]o the extent . . . liability insurance is purchased . . . and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued.

Id. at 48. There is no policy of insurance which covers any of the defendants in this action. SR 49 at ¶ 4. Instead, it is not disputed that *employees* of the state are provided coverage for claims for damages pursuant to SDCL ch. 3-22 under the terms of the risk pool known as the Public Entity Pool for Liability.

"Under [SDCL 21-32-16], the state's sovereign immunity may be waived, but only by the purchase of liability insurance." See *Wilson v. Hogan*, 473 N.W.2d 492, 495 (S.D. 1991). The state's participation in a risk pool, such as the PEPL Fund, however, does not waive sovereign immunity as to its employees. *See Id.* at 497 ("Even though self-insurance through participation in a risk sharing pool accomplishes the same purpose as purchase of commercial insurance, it has been held that participation in such a risk sharing pool does not waive the state's sovereign immunity under SDCL 21-32-16."). Indeed, PEPL Fund coverage is not a waiver of sovereign immunity, but rather creates

coverage for claims against employees which are *not* barred by sovereign immunity. *See* SDCL 3-22-7 ("PEPL may pay a covered claim established by judgment or negotiated settlement as provided in the coverage document and which is not barred or avoidable through sovereign immunity or other substantive law."). Likewise, SDCL 3-22-17 waives sovereign immunity in claims against "the state" to the extent there is coverage under the PEPL coverage document, but it explicitly does not waive immunity as it relates to any claim against a state employee.

Moreover, even if the PEPL Fund was considered "insurance" for purposes of SDCL 21-32-16, SDCL 21-32-16 would not waive sovereign immunity as it relates to state employees in their official capacity. Simply stated, any waiver under SDCL 21-32-16 must be for a covered claim, and there is no PEPL Fund coverage for Department of Transportation employees in their official capacity, because the PEPL Fund coverage only extends to damages in which the employee would be legally obligated to pay. SR 50 at ¶ 6.

As it relates to claims against state employees in their individual capacity, those claims are covered by the PEPL fund unless excluded in the Memorandum of Liability Coverage. *Id.* Memorandum of Liability Coverage, Section I(E) provides the Exclusions, which states, in pertinent part, that: "This Memorandum does not extend coverage or apply to any liability: . . . 16. For damages that are a result of a discretionary act or task. This exclusion does not apply if the damages are the result of a ministerial act or task." *Id.* at ¶ 8.

In short, claims against the State of South Dakota, its agencies, and officers of the state in their official capacity (which in reality are suits against the State itself), are barred

because the State is immune from suit under Article III Section 27 of the South Dakota Constitution. State employees who are sued in an individual capacity are entitled to sovereign immunity dependent upon the function performed by the employee. In those claims, state employees are immune from suit when they perform discretionary functions, but not when they perform ministerial functions. *Sisney*, 2008 SD 72, ¶ 12 ("With respect to individual capacity suits, state employees who are sued in an individual capacity are entitled to immunity dependent upon the function performed by the employee. State employees are generally immune from suit when they perform discretionary functions, but not when they perform ministerial functions.") The existence of the PEPL Fund does not change the analysis which has been applied by the Supreme Court in similar claims, and in fact, the Participation Agreement is crafted to provide coverage where sovereign immunity does not apply, to claims against state employees in their individual capacity for damages resulting from the performance of (or failure to perform) a ministerial act. The PEPL Fund coverage documents were, in fact, created to preserve sovereign immunity to the fullest extent possible. SR 57 at Section I.A.

As reflected in the analysis above, the claims against the named employees in their official capacity cannot survive. The Supreme Court has repeatedly and recently found that there is no legislative, constitutional, or other waiver by the Department of Transportation or its employees (in their official capacity) regarding maintenance and design for highways in South Dakota. *See McGee v. Spencer Quarries, Inc.*, 2023 S.D. 66, ¶ 29, 1 N.W.3d 614, 623-24 (quoting *Dan Nelson Automotive v. Viken*, 2005 S.D. 109, ¶ 23, 706 N.W.2d 239, 247) ("McGee's suit alleges individual negligence against State employees, and 'it is well-settled that suits against officers of the state "in their

official capacity, [are] in reality [suits] against the State itself.'" As the Court in *High-Grade Oil Co., Inc. v. Sommer* explained, an action against an officer of the State is deemed to be against the State. 295 N.W.2d 736, 737 (S.D. 1980). Therefore, an action against the State and its employees (in their official capacity) is not maintainable unless sovereign immunity is waived, which has not happened in this case. *McGee*, 2023 SD 66, ¶ 29. *See also Sisney*, 2008 SD 72, ¶ 12 (Reaffirming *Dan Nelson Automotive* and further explaining the scope of sovereign immunity as it relates to state actors).

B. The Individual Capacity Claims are Barred Because Any Duties Alleged to Have Been Breached Were Discretionary, not Ministerial.

This Court's earliest opinions "defined a ministerial duty as a narrow one. It is where a governmental employee 'disregarded a plain provision of the law.'" *Truman*, 2009 S.D. 8, ¶ 19, 762 N.W.2d at 80 (*quoting State v. Ruth*, 9 SD 84, 68 NW 189 (1896)). Since that time, the Court's definition of ministerial act has only become more restrictive:

> A ministerial act is defined as absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed designated facts or the execution of a set task imposed by law prescribing and defining the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion, being a simple, definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a governing rule or standard with a compulsory result. It is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action.

Id. ¶ 21,762 N.W.2d at 80–81 (*quoting Hansen*, 1998 S.D. 109, ¶ 23, 584 N.W.2d at 886). In other words, a ministerial duty is marked by a specific if–then statement: if a specific triggering event occurs, then a specific response is required.

In the case at hand, it is absolutely clear that the Department of Transportation maintenance policies regarding maintenance of gravel shoulders are discretionary, and

not ministerial. First, the duties in Performance Standard Function 5158 are, by their explicit nature, discretionary, stating: The maintenance supervisor or their designee shall retain the authority to modify or deviate from this performance standard within their discretion based on their experience and judgment due to specific weather conditions, roadway conditions, or other events which impact upon the performance standard. The fact that the standard itself builds discretion into its performance makes clear that it is not "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed designated facts or the execution of a set task imposed by law prescribing and defining the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion[.]" *Truman*, 2009 S.D. 8, ¶ 19, 762 N.W.2d at 80. (*quoting Hansen*, 1998 S.D. 109, ¶ 23, 584 N.W.2d at 886).

Second, Performance Standard Function 5158 also does not use mandatory language, but instead uses non-mandatory language such as the word "should," which as set forth in *McGee*, is "a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed[.]" 2023 SD 66, ¶ 50 ("The MUTCD provision at issue uses terms such as "should" rather than "shall" and is therefore, by definition, not a mandatory directive."). This reasoning is echoed by Region Engineer Mark Peterson when he testified that "'Shall' is a definite directive whereas 'should' has more leeway . . . Best practice, scheduled in the future, not of immediate need." SR 335. Similarly, Scott Rabern, Program Manager for the Road Design Program for the South Dakota Department of Transportation, testified that "I would say references or language like this that say *should* allows for some discretion of whether it does or not, different than *shall* is more of a must." SR 356.

Third, the "Scheduling and Inspection" section builds in significant discretion for inspection and the timing of repairs. Indeed, it declares that gravel shoulder maintenance is not emergent and should be scheduled, and particularly, should be scheduled during moist weather conditions. Moreover, there is no specific timeline or method of identifying needs. In this case, there is no evidence that DOT (or anyone else) knew of the existence of the condition of the gravel shoulder and how long it was present, that it could have formed in the matter of days, and when they found out, it is undisputed that repair was completed in the Spring, when wet conditions were present, in line with the specific language of Performance Standard Function 5158.

Fourth, even if the word "should" were mandatory and discretion was not built into the "Purpose" and "Scheduling and Inspection" sections, there is either no evidence that any of the appliable conditions found in the "Quality and Workmanship" section are "absolute, certain, and imperative, involving merely the execution of a specific duty." As it relates to subsections 1 and 2, there is no evidence that either "the shoulder surface next to the pavement is more than 1-1/2" low for more than 50% of any shoulder mile" or that the gravel shoulder slope was less than a ¼" per foot or more than 1" per foot. The remainder of the items listed do not "prescribe[e] and defin[e] the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion."

The circuit court reasoned that Policy Letter OM-2002-09 provides a ministerial duty. However, that reasoning is in error. It is accurate that the policy statement states: "Gravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders shall be

maintained in design condition." However, that policy letter internally states that the language is to be implemented by following the Performance Standards, in this case, Performance Standard 5158, by stating "Shoulders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed."

Accordingly, Policy Letter OM-2002-09 does not create any duty greater than Performance Standard 5158. In short, use the word "shall" in the policy does not automatically make a policy ministerial, when the mandatory directive is to implement a discretionary standard. Otherwise, a directive that an employee "shall use their best judgment" would be considered ministerial, even though the duty plainly would be discretionary. Moreover, this is the only reasonable reading of Policy Letter OM-2002-09, in that it is not possible, practical, or reasonable to expect the DOT to keep every highway in ideal design condition one-hundred percent of the time.

Although not relied on by the circuit court, it is also possible that the Sanborns will argue that the "Roadsign Design Guide" or "A Policy on Geometric Design of Highways and Streets" creates a ministerial duty for DOT employees. However, there has been no showing that either is a statutory or rules-based duty for the DOT as it relates to maintenance. But, even if there were, as a primary matter, those books deal with design standards, not maintenance standards. There is no evidence that the road section at issue was designed or constructed with a pavement road drop off. Indeed, all evidence points to the opposite. The pavement edge drop off developed after construction and would be subject to maintenance standards, similar to pot holes. See SR 384 (Depo. of Mark Peterson stating "What's listed in [Exhibits] 5, 6, and 7, this is a roadway maintenance situation. And looking at Exhibit 21, this is a roadside design guide where

they're directing you not to design in a shoulder drop-off, is my understanding.”). Accordingly, those manuals don’t establish a maintenance duty for the South Dakota Department of Transportation. Moreover, even if they did relate to maintenance rather than design, the sections at issue are not mandatory, but rather, are discretionary and use the words indicating they are just guidance, such as “should,” “desirably” and “recommendations.” For example, as explained in the Policy on Geometric Design of Highways and Streets in the forward:

> The intent of this policy is to provide guidance to the designer by referencing a recommended range of values for critical dimensions. It is not intended to be a detailed design manual that can supersede the need for the application of sound principles by the knowledgeable design professional. Sufficient flexibility is permitted to encourage independent designs tailored to particular situations.

SR 416 (Rabern Depo. 35: 24-36:5). Such plainly do not meet the standard for a ministerial duty.

Under plain South Dakota case law, the claims by Plaintiff are barred by sovereign immunity. The circuit court relied on *Wulf v. Senst*, 2003 S.D. 105, 669 N.W.2d 135, but such does not support Sanborns’ argument in this case. As reasoned in *Truman*:

> *Wulf*, 2003 SD 105, 669 NW2d 135, so heavily relied upon by Truman and the dissent, is obviously distinguishable. *See infra* ¶¶ 62-65. It did not deal with SDCL 31-28-6 or the subject of the placement of highway signage. More importantly, Wulf dealt with a very specific DOT policy regarding sanding and plowing roadways during snowstorms. This policy dictated exactly when and how sanding was to occur. The *Wulf* court followed Hansen in concluding that the specific DOT Policy 2571, regarding the times and methods for sanding in a snowstorm, amounted to a virtual check-list with no discretion as to whether to do sanding, when to do it, or how to do it. Thus, the duties of the defendant DOT supervisors "may be defined and applied with relative ease," and were ministerial. *Wulf*, 2003 SD 105, P 32, 669 NW2d at 147 (*quoting Hansen*, 1998 SD 109, P 31, 584 NW2d at 888 (*quoting DuBree v. Commonwealth*, 481 Pa. 540, 393 A2d 293, 295 (Pa

1978)). In reaching this conclusion, we also held that "but for" DOT Policy 2571:

> Decisions made by Senst and Bultje as to how to allocate snow plow operators, resources and equipment, how many workers to call in for any given winter storm event, how many trucks to put on the road at any given time and where on the highways to place those vehicles are all discretionary and subject to sovereign immunity.

Wulf, 2003 SD 105, P 28, 669 NW2d at 145-146. Thus, what limited relevance *Wulf* brings to the question now before us actually supports Griese's argument.

2009 SD 8, ¶ 31.

In this case, similar to *Truman* and unlike *Wulf*, we are not dealing with a DOT policy that has specific, detailed requirements that are ministerial. Instead, like in *Truman*, the alleged duties at issue build in discretion for maintenance that must be done over miles of highways living within budgets and manpower constraints. "Given the thousands of miles of highways in this state that run over all kinds of terrain, such an undertaking is not a ministerial task for amateurs; it calls for a person with professional training to exercise professional discretion in the performance of his or her duties under SDCL [31-4-14]." *Truman*, 2009 S.D. 8, ¶ 42, 762 N.W.2d 75, 88

This standard was further confirmed and clarified in the recent case of *McGee v. Spencer Quarries, Inc*., 2023 S.D. 66, 1 N.W.3d 614. A 3-2 decision by this Court allowed a single claim regarding narrow, specific and mandatory Standard Specification in a construction contract regarding tack application to survive. However, the Court unanimously held that the term "should" found in the MUTCD is guidance and by definition, not a mandatory directive implicating a ministerial duty, consistent with DOT's long held interpretation, and rejected the majority of claims as being barred by

sovereign immunity. *See id.* at ¶ 50. Unlike *McGee*'s Standard Specifications claims, which were clear, mandatory contractual duties that gave to a claim, the duties at issue in this case under the Performance Standards are akin to the MUTCD duties alleged by the plaintiffs in *McGee*.

Indeed, this case is very similar to the cases of *Ex parte Estate of Reynolds*, 946 So. 2d 450 (Ala. 2006) and *Ex parte Tucker*, 303 So. 3d 467, 474 (Ala. 2019), which reasoned that similar allegations regarding a pavement edge drop off were barred by sovereign immunity under their adopted "state agent" test because of the discretion of similar officers. *Ex parte Tucker*, 303 So. 3d 467, 474-76 (Ala. 2019) (emphasis in original). Although not a controlling case in South Dakota, the reasoning equally applies to why this case presents a discretionary duty for the state employees in this case. Here, SD DOT Performance Standard Function 2158 set forth criteria by which decisions were made regarding gravel shoulder maintenance, the policy gives DOT employees a significant degree of discretion in inspecting the highways, formulating plans and policies, scheduling maintenance and exercising judgment in allocating resources for inspections. For the same reason the exact same claims were rejected in *Reynolds* and *Tucker*: "by exercising judgment in actually undertaking to accomplish the necessary maintenance and repairs, the district engineer and district maintenance supervisor were entitled to State-agent immunity." *Id.* (emphasis added).

Similar to the situations in *Hansen* and *Truman*: "No one can look at the facts surrounding this litigation without a sense of sorrow. Lives were lost and lives were damaged." *Truman*, 2009 S.D. 8, ¶ 11. Irrespective of the loss of life, the "task is a narrow one--to determine if the State of South Dakota's sovereign immunity applies." *Id.*

"In order to make this determination, first, we identify [Plaintiffs'] claim as it relates to this action. Next, we address the distinction between ministerial and discretionary duties in recognizing sovereign immunity. Then, we apply our sovereign immunity analysis[.]" *Id.* Plaintiffs cannot cite a specific ministerial duty that was breached, and accordingly has failed to allege entitlement to relief. Accordingly, as a matter of law, this case is barred by sovereign immunity and summary judgment is appropriate on that basis.

III. THE SANBORNS' CLAIMS ARE BARRED BY THE PUBLIC DUTY DOCTRINE.

A cause of action for negligence "against a public entity ... requires [proof of] the existence of a duty, a breach of that duty, and causation." *Fodness v. City of Sioux Falls*, 2020 S.D. 43, ¶ 11, 947 N.W.2d 619, 624 (*quoting Maher*, 2019 S.D. 15, ¶ 8). "Before liability may be imposed on the theory of negligence there must be a duty on the part of the defendant to protect a plaintiff from injury." *Id. (quoting Kuehl v. Horner (J.W.) Lumber Co.*, 2004 S.D. 48, ¶ 10, 678 N.W.2d 809, 812). This duty depends on "whether a relationship exists between the parties such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff." *Id.* (*quoting Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, ¶ 10, 873 N.W.2d 65, 69). "Under the public duty doctrine government entities are generally determined to owe governmental duties only to the public, not individuals." *Id*. (*quoting McDowell*, 2018 S.D. 1, ¶ 36, 906 N.W.2d at 409.) "Because such duties exist only for the protection of the public, they cannot be the basis for liability to a particular class of persons." *Id.*

The public duty doctrine is still viable even when sovereign immunity is not. *Tipton II*, 1997 S.D. 96, ¶ 9. The public duty rule is not an affirmative defense.

Throneberry v. Mo. State Highway Patrol, 526 S.W.3d 198, 200 (MO 2017). Instead, it delineates the legal duty public employees owe to plaintiffs. *Id.*

In South Dakota, the public duty doctrine has been limited to issues dealing with law enforcement or public safety. *Maher* 2019 SD 15, at 15 (quoting *E.P. v. Riley*, 1999 S.D. 163, ¶ 22, 604 N.W.2d 7, 13-14). However, "public safety" may also extend to matters outside of police work and law enforcement, in matters which *generally* pertain to public safety, health, and well-being. For example, in *Pray v. City of Flandreau*, 2011 S.D. 43, ¶ 4, 801 N.W.2d 451, 453, the plaintiff was injured by a dangerous dog of which the city was aware. She alleged the city had a duty to enforce its vicious animal ordinance because, in her view, the city undertook a special duty. This Court disagreed, concluding that plaintiff failed to establish the existence of a special duty because, among other things, she lacked evidence she relied on actions or representations of the city. In another example, *McDowell v. Sapienza*, 2018 S.D. 1, ¶ 31, 906 N.W.2d 399, 409, a city issued a building permit and allegedly permitted the construction of a home in violation of building regulations. This Court held that the city did not owe *McDowell* a special duty because building codes are "aimed" at public safety or general welfare. *Id.* ¶ 38; *see also Fodness v. City of Sioux Falls*, 2020 S.D. 43, ¶ 33, 947 N.W.2d 619, 630 (similar holding as *McDowell*).

In this case, although it is not disputed that DOT employes are not law enforcement officers, unlike the case in *E.P. v. Riley*, 1999 S.D. 163, 604 N.W.2d 7, where DSS employees were held not to be acting within the ambit of public safety as their duties were "with a limited responsibility (placement and supervision) to a limited class of intended beneficiaries (abused and neglected children)[,]" the discretionary duty

to maintain the gravel shoulder was plainly within the ambit of public safety owed to the general public akin to enforcement of a building code. Indeed, the entire theory of Sanborns' case is that the alleged duty at issue is a highway safety and/or public safety duty. Sanborns urge this court to adopt the following limitation to public safety analysis for the public duty doctrine: "Instead, the following government activities would be viewed as in the nature of public safety: law enforcement, fire departments, ambulance services, and disaster response services." Appellants' Brief at 25. However, this reading would eliminate, for example, building code enforcement, which this court has repeatedly found as "public safety" for purposes of the public duty doctrine.

Sanborns define "public safety" is defined as "[t]he welfare and protection of the general public, usually expressed as a governmental responsibility." *Black's Law Dictionary (12th Ed. 2024).* "Welfare," as "[w]ell-being in any respect; prosperity," and "public welfare" as "[a] society's well-being in matters of health, safety, order, morality, economics, and politics." *Black's Law Dictionary (12th Ed. 2024).* State Employee Defendants do not disagree with those definitions, but Sanborns position is self contradictory in that the duty being breached is the duty to "safely maintain its streets[,]" see Appellants' Br. at 28, and that the duty is based in state and federal law that requires maintenance for "necessary for safe and efficient utilization of the highway[,]" see Appellants' Br. at 30, and then at the same time argue that the alleged duty does not relate to the safety of the public.

Frankly, the entire theory of Sanborns' case is that a Pavement Edge Drop Off is a public safety hazard, which is the opinion presented by their expert Daniel W. Staton by Affidavit. SR 640-643. Their conclusory statements that "[r]oads are not constructed

and maintained for the public's 'well-being' or 'maintained for the public's 'protection'" is simply belied in the record, specifically as it relates to the maintenance duty that is alleged to have been violated in this case. The crux of Sanborns' case turns on the application of broad duties for the benefit of the public and, according to Sanborns, the only departure from that theory occurs in the application of defenses that would bar it.

Additionally, Sanborns argue in their brief that the Supreme Court has never applied the public duty in road maintenance cases. That is true, as was conceded by State Employee Defendants at the circuit court level. However, what is equally, if not more, important is that such a theory has also never been rejected by this Court. Instead, it simply has not been raised before or directly addressed by this Court. Indeed, addressing the issue of the public duty doctrine in cases where it was not raised before a circuit court or this Court would have been inappropriate on appeal. *Hall v. State ex rel. S. Dakota Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26 ("We have repeatedly stated that we will not address for the first time on appeal issues not raised below.").

Accordingly, the sovereign immunity cases which are raised by Sanborns that simply don't address the public duty doctrine have no precedential value as to this issue as it relates to the public duty doctrine. *See State v. MacDonald*, 260 N.W.2d 626, 627 (S.D. 1977) ("we confine ourselves only to the issues raised herein and our decision is not to be construed as precedent either way on the issues not raised."). In fact, at least one former Justice of this Court has alluded to the fact that the public duty doctrine's application in road maintenance cases is ripe for this Court's review in an appropriate case. Specifically, Justice Konenkamp in *Bland v. Davison Cnty. (Bland II)*, 1997 S.D. 92, ¶63, n.14, 566 N.W.2d 452, 467 (Konenkamp, J., concurring in part and dissenting in

part), noted that "*Bland I* never touched upon the public duty doctrine, which remains viable despite the absence of sovereign immunity."

Although never raised before, and therefore never addressed by, the South Dakota Supreme Court, several courts in other jurisdictions have extended the public duty doctrine to road maintenance cases, as was recognized by Justice Konenkamp in *Bland II*. *See Johnson v. Humboldt Cty.*, 913 N.W.2d 256 (Iowa 2018) (holding summary judgment in favor of the county based upon the public-duty doctrine was proper, because any duty to remove obstructions from a right-of-way corridor adjacent to a highway would be a duty owed to all users of the public road and it would thus be a public duty); *Georges v. State*, 249 A.3d 1261, 1266 (R.I. 2021) ("We are of the opinion that repairing potholes, no matter how numerous they may be, is part and parcel of the state's responsibility for roadway maintenance and falls squarely within the protections of the public duty doctrine."); *Goodwin v. City of Topeka*, 2021 Kan. Dist. LEXIS 940; *Phillips v. N.C. DOT*, 200 N.C. App. 550, 684 S.E.2d 725 (2009) (affirming denial of claim based on public duty doctrine because "[DOT]'s duty to the general public is to plan, design, locate, construct and maintain the public highways in the State of North Carolina, with reasonable care."). Although it is not disputed that the caselaw in different jurisdictions varies, there is certainly authority outside of South Dakota to support application of the public duty doctrine to this case, and such is consistent with the dictates of precedent in South Dakota.

Moreover, the facts established in this case do not establish a special duty of care, as has been recognized in South Dakota as an exception to the public duty doctrine. *Maher*, 2019 S.D. 15, ¶ 9, ("When the [public duty] rule is implicated, a breach of a

public duty will not give rise to liability to an individual unless there exists a special duty owed to that individual."); *Tipton II*, 1997 S.D. 96, ¶ 13, ("A widely accepted corollary to the public duty doctrine is the 'special duty' or 'special relationship' rule."). A special duty "'arises only when there are additional indicia that the municipality has undertaken the responsibility of not only protecting itself, but also undertaken the responsibility of protecting a particular class of persons[.]'" *Tipton v. Town of Tabor* (*Tipton I*), 538 N.W.2d 783, 786 (S.D. 1995) (*quoting Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806) (Minn. 1979)). If the public entity's own conduct indicates "a policy decision to deploy its resources to protect [an] individual," then the exception acknowledges, in essence, an assumed duty. *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358. Thus, "a government entity is liable for failure to enforce its laws . . . when it assumes a special, rather than a public, duty." *Pray*, 2011 S.D. 43, ¶ 3. The exception is based in general tort principles that when an actor chooses to assist another, the actor, "once having acted, must proceed without negligence." *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358.

This Court has adopted a four-part test to determine if a special duty exists:

1) Actual knowledge of the dangerous condition;

2) Reasonable reliance by persons on official representations and conduct;

3) An ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and

4) Failure to use due care to avoid increasing the risk of harm. Tipton II, 1997 S.D. 96, ¶ 6, 567 N.W.2d at 355 (*citing Tipton I*, 538 N.W.2d at 787). "Strong evidence concerning any combination of these factors may be sufficient to impose liability on a government entity." *Tipton I*, 538 N.W.2d at 787; see also *Tipton II*, 1997 S.D. 96, ¶ 29,

567 N.W.2d at 364 n.21 ("'Although the *Cracraft* court did not specify the weight to be given each of the four factors, a close reading of *Lorshbough* and *Cracraft* indicates that the single most important factor is that of actual knowledge on the part of the [governmental entity].'").

This Court has defined "actual knowledge" as "knowledge of 'a violation of law constituting a dangerous condition.'" *Tipton II*, 1997 S.D. 96, ¶ 17, 567 N.W.2d at 358 (*quoting Hage v. Stade*, 304 N.W.2d 283, 288 n.2 (Minn. 1981)). "Constructive knowledge is insufficient: a public entity must be uniquely aware of the particular danger or risk to which a plaintiff is exposed." *Id*. "Although actual knowledge may be shown by both direct and circumstantial evidence, it may not be established through speculation." *Id*. at ¶ 18, 567 N.W.2d at 359. "Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." *Id*. "In sum, actual knowledge imports 'knowing' rather than 'reason for knowing.'" *Id*.

The Sanborns discuss this factor at pages 33-34 of their brief. Missing from the discussion is any evidence to establish actual knowledge of a dangerous condition. In fact, the contrary is true: all evidence presented indicates that there was not actual knowledge of the condition at issue. *See* Hieb Depo at 41:3-8, Miller Depo at 68:15-69:2; Letcher Depo at 31:1-8. The Sanborns' speculation and arguments that that State Employee Defendants "should have known" are simply not sufficient under law pursuant to this factor. *See Tipton II*, 1997 S.D. 96, ¶ 17.

The second factor is reasonable reliance on official representations and conduct. For reasonable reliance to occur, the Sanborns must have depended on "specific actions

or representation which [caused them] to forgo other alternatives of protecting themselves." *Tipton II*, 1997 S.D. 96, ¶ 31, 567 N.W.2d at 364-65. Reasonable reliance requires more than just licensing, permitting or investigating; rather, "[r]eliance must be based on personal assurances." Id. ¶ 32, 567 N.W.2d at 365.

In *Tipton II*, this Court explained what qualifies as reliance based on personal assurances:

> Instructive of this axiom is *Champagne v. Spokane Humane Society*, 47 Wash.App. 887, 737 P.2d 1279 (1987), where a child was attacked by pit bulldogs. Over a five-month period, people complained about these dogs "running loose and threatening the neighborhood." *Id.*, 737 P.2d at 1283. In response, the Humane Society, regarded as a government agency under the public duty rule, "assured [complainants it] would patrol the area and apprehend any stray dogs." *Id.* at 1284. On the day before the attack, the Society assured the parent of the child later injured that the area would be patrolled. Consequently, a material issue of fact arose over whether the Society breached a private duty after creating reliance upon assurances of protection. *Id.*; *see Meaney v. Dodd*, 111 Wash.2d 174, 759 P.2d 455 (1988) (overruling earlier cases and holding a governmental duty cannot arise from implied assurances). Similar types of direct assurances have created reasonable reliance. *See, e.g., De Long, supra* (911 caller assured of help coming "right away").

Tipton II, 1997 S.D. 96, ¶ 32, 567 N.W.2d at 365.

In this case, there is no evidence that the Plaintiffs relied on State Employee Defendants as it relates to shoulder maintenance or that any "personal assurances" were made to the Sanborns by State Employee Defendants. Indeed, the Sanborn vehicle violated the law when it left the lawful lane of travel. It is highly unlikely, and no evidence was presented, that Sanborns intentionally drove on the gravel shoulder in reliance on DOT polices regarding shoulder maintenance. For that matter, there is no evidence in the record that the Sanborns even knew of the Department of

Transportation's policies regarding maintenance of gravel shoulders. Indeed, it is almost certain that they did not.

As it relates to the third factor, "[a]n ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole," the policies at issue are clearly for the public as a whole. Highway safety and shoulder maintenance duties are a classic "public safety" duty that is for the entire public, and not for specific individuals or classes of individuals. The Sanborns present no argument to support their conclusory statement that such is not the case, and frankly, the policies at issue are plainly "aimed only at public safety and general welfare." *E.P. v. Riley*, 1999 S.D. 163, ¶ 16, 604 N.W.2d 7, 12 (*citing Hagen v. City of Sioux Falls*, 464 N.W.2d 396, 399 (S.D. 1990).

As it relates to the fourth factor, failure by the state to use due care to avoid increasing the risk of harm, the State Defendant Employees "ha[ve] to be more than negligent." *Pray*, 2011 S.D. 43, ¶ 14, 801 N.W.2d at 455-56. Further, "[f]ailure to diminish harm is not enough." *Tipton II*, 1997 S.D. 96, ¶ 38, 567 N.W.2d at 366. Missing from Sanborns' argument are facts demonstrating any affirmative action by State Employee Defendants that "contributed to, increased, or changed the risk which would have otherwise existed." *Gleason v. Peters*, 1997 S.D. 102, ¶ 25, 568 N.W.2d 482, 487. The Sanborns' argument is nothing more than a claim that State Employee Defendants was negligent, which is barred by the public-duty doctrine.[1]

[1] Even if the Court were to find actual knowledge, satisfaction of more than one factor is necessary for a special duty. See *Tipton II*, 1997 S.D. 96, ¶ 28, 567 N.W.2d at 364 ("No matter the proof on actual knowledge, however, alone it is inadequate to establish a private duty. . . . Only when actual knowledge is coupled with one or more of the other factors, can we uphold both the spirit and substance of the private duty exception.");

In short, any duty owed regarding shoulder maintenance is to the public as a whole and relates to public safety. As in *Tipton*, this is particularly true when the underlying cause of the accident at hand was the illegal conduct of Kylee Sanborn driving outside the legal lane of travel. *Tipton II*, 1997 S.D. 96, ¶10, 567 N.W.2d 351 ("Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments."). Accordingly, the public duty doctrine bars this claim, and the circuit court should be affirmed on this issue.

CONCLUSION

Sanborns claims are barred by two well-settled legal doctrines – sovereign immunity and the public duty doctrine. Standing alone, either doctrine is sufficient to warrant affirmance of the circuit court. Accordingly, for the foregoing reasons, State Employee Defendants respectfully request that the circuit court's grant of summary judgment be affirmed.

REQUEST FOR ORAL ARGUMENT

Appellees, by and through their counsel, respectfully request the opportunity to present oral argument before this Court.

Pray, 2011 S.D. 43, ¶ 12, 801 N.W.2d at 455 (upholding *Tipton II's* findings that evidence of actual knowledge alone is insufficient to establish a special duty because "[t]o conclude otherwise would impose liability against a government entity for simple negligence, and would 'judicially intrude[] upon resource allocation decisions belonging to policy makers.'"); *Sorace v. United States*, No. CIV 13-3021-RAL, 2014 WL 2033149 (D.S.D. May 16, 2014), aff'd, 788 F.3d 758 (8th Cir. 2015) (granting defendant's motion to dismiss for failure to state a claim upon a finding that plaintiff could only establish the actual knowledge factor).

Dated this 1st day of April, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15 26A 66(b)(4), I hereby certify that Appellees' Brief complies with the type volume limitation provided for in SDCL 15-26A-66. Appellees' Brief was prepared using Times New Roman typeface in 12-point font and contains 9,895 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, Certificate of Service, and Certificates of Counsel. Counsel relied on the word count of Microsoft Word, word processing software, used to prepare this Brief.

Dated this 1st day of April, 2025.

/s/ Justin L. Bell
JUSTIN L. BELL

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2025, I filed the foregoing *Appellees' Brief* relative to the above-entitled matter via Odyssey File and Serve, and that such system separately effected service of the same on the following individuals:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal Nos. 30857 & 30872

ESTATE OF KYLEE L. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, and ESTATE OF JAYNA R. SANBORN, by and through its Personal Representative, Sarah C. Sanborn,

Plaintiffs and Appellants,

vs.

MARK PETERSON, TODD HERTEL, BRAD LETCHER, DAN MARTEL, MICHAEL HIEB, and TERENCE PECK,

Defendants and Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

THE HONORABLE KENT A. SHELTON

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES: Page

CONSTITUTIONAL PROVISIONS AND STATUTES:

PRELIMINARY STATEMENT

Herein, Plaintiffs/Appellants Estate of Kylee L. Sanborn and Estate of Jayna R. Sanborn, both acting by and through Personal Representative Sarah C. Sanborn, are collectively referred to as "Sanborns." The Defendants/Appellees, Mark Peterson, Todd Hertel, Brad Letcher, Dan Martel, Michael Hieb, and Terence Peck are collectively referred to as "Defendants." The settled record is denoted "SR," followed by the appropriate page number(s).

ARGUMENT

I. WHETHER THE CIRCUIT COURT WAS CORRECT WHEN IT CONCLUDED THAT THE SANBORNS' CLAIMS ARE NOT BARRED BY SOVEREIGN IMMUNITY.

Before the circuit court, the Defendants argued that their duties were not ministerial in nature, entitling them to summary judgment on the basis of sovereign immunity. The circuit court rejected this argument, holding: "there is a specific policy that was adopted by the DOT [Department of Transportation] that creates a ministerial duty on the DOT to maintain the shoulder in accordance with the initial design plan and to maintain the shoulder generally." *SR at 672.* The circuit court explained that "the DOT did not have the discretion to ignore the policies established by the DOT and was required to follow the policies the DOT set forth." *Id.* By notice of review, the Defendants challenge this ruling. As will be seen, the circuit court ruled correctly.

This Court's precedent makes clear that State employees are not immune from suit when they perform ministerial functions. *McGee v. Spencer Quarries, Inc., 2023 S.D. 66, ¶ 30, 1 N.W.3d 614, 624.* The reasoning is that "a ministerial act is the simple

carrying out of a policy already established . . . so that permitting state employees to be held liable for negligence in the performance of merely ministerial duties within the scope of their authority does not compromise the sovereignty of the state." *Id.*

This Court recently reaffirmed the distinction between discretionary and ministerial functions:

> [A] ministerial act is defined as absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed designated facts or the execution of a set task imposed by law prescribing and defining the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion, being a simple, definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a governing rule or standard with a compulsory result. It is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action.

Id. at ¶ 30. This determination "requires an individualized inquiry." *Id.* This Court has instructed that a "'proper analysis must avoid a mechanistic approach to the question and exemplifies the difficulties inherent in the ministerial/ discretionary dichotomy.'" *Id.* This is because the distinction "'is often one of degree, since any official act that is ministerial will still require the actor to use some discretion in its performance.'" *Id. (quoting Wulf v. Senst, 2003 S.D. 105, ¶ 23, 669 N.W.2d 135, 144).*

"[H]ighway repair is generally considered to be ministerial in nature." *Id. (quoting Wulf, 2003 S.D. at ¶ 23).* Highway repair and maintenance functions are only considered discretionary "when they involve actual planning and design, policy decisions, or actions that are not subject to an established standard." *Id.* In contrast, if the DOT is subject to a policy or standard, State employees are

required to follow that policy or standard and subsequent duties are ministerial in nature. *Wulf, 2003 S.D. at ¶ 32*.

The Defendants contend that "it is absolutely clear that the [DOT] maintenance policies regarding maintenance of gravel shoulders are discretionary, and not ministerial." *Appellees' Brief at 19.* The Defendants are incorrect.

A. The Defendants' have statutory duties.

In the Sanborns' opening brief, they explained that the Defendants have a statutory duty to maintain highway shoulders. SDCL 31-5-1 provides that the DOT "shall maintain, and keep in repair, all highways or portions of highways, including the bridges and culverts, on the state trunk highway system." *SDCL 31-5-1 (emphasis added).* SDCL 31-2-21, in turn, provides that "the DOT "shall supervise the construction and maintenance of the state trunk highway system, its bridges, and culverts." *SDCL 31-2-21 (emphasis added).*[1] The use of the term "shall" has significance. "[T]he term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." *SDCL 2-14-2.1*. The Defendants did not discuss these statutory duties.

B. The Defendants' have maintenance duties under federal law.

The Defendants also have a federal-based ministerial duty to maintain shoulders. U.S. Highway 281 is part of the National Highway System. *SR at 412. See 23 U.S.C. § 116(b) ("It shall be the duty of the State Transportation Department . . . to maintain . . .*

[1] The portion of Highway 281 that runs from Nebraska to North Dakota is part of the state trunk highway system. *SDCL 31-4-229*.

any project constructed under the provisions of this chapter . . . or prior acts."); 23 U.S.C. § 101(a)(13) ("maintenance means the preservation of the entire highway, including . . . shoulders[.]"). Highway 281 is subject to a *Stewardship Agreement* between the DOT and the Federal Highway Administration, wherein the DOT agreed to the control documents for the design of highways, including the *Policy on Geometric Design of Highways and Streets* (a/k/a the "*Green Book*"), the *Roadside Design Guide*, and other standards. *Id. at 411-12, 542-43.* The *Green Book* specifically addresses the construction and maintenance of shoulders: "All types of shoulders should be constructed and maintained flush with the traveled way pavement if they are to fulfill their intended function. Regular maintenance is needed to provide a flush shoulder." *SR at 568.* This AASHTO standard has been adopted by federal law. *23 C.F.R. § 625.4.* The Defendants did not address their obligation to maintain the shoulders of Highway 281 under federal law. Instead, they argue "there has been no showing that the *Roadside Design Guide* or the *Green Book* are a statutory or rules-based duty for the DOT as it relates to maintenance. *Appellees' Brief at 22.* This argument is simply false in light of the federal statutes, regulations, and standards cited above.

C. The Defendants breached their ministerial duty to inspect and report the pavement edge drop-off.

Standards which give rise to ministerial duties are not limited to those found in writings. "If there is a *readily ascertainable standard* by which the action of the government servant may be measured, whether that standard is written or the product of experience, it is not within the discretionary function exception." *Wulf, 2003 S.D. at ¶ 26 (emphasis in original).*

Mike Hieb, the Highway Maintenance Supervisor, was responsible for driving the roads in his region, including this section of Highway 281, to inspect them "to see if something was out of repair or posed a hazard to the driving public." *SR at 372-73.* Although it was not in a written job description, he testified that based on his experience, the appropriate standard was to drive the roads once a week to determine their condition, and that is what he did. *Id. at 431*. The lead maintenance worker in the DOT's Huron office also drove Highway 281 once or twice a week. *Id. at 460.*

In this case, the "readily ascertainable standard" was to drive the highways in the region to check their condition. *SR at 373.* This is consistent with Performance Standard 2158, which provides that "[r]outine inspections will identify needs related to gravel shoulder maintenance." *Id. at 349 (emphasis added).*

The photograph below was taken by Brad Letcher the day after the accident, and depicts the curve in the road where the Sanborn car left the travelled portion of the highway and dropped onto the shoulder. *SR at 506.* The approximately six inch drop-off ran for 200-300 feet. *Id. at 635*.

Jeff Boomsma, a local farmer, could clearly see the drop-off as he drove the highway. *Id. at 637*. Forrest Thompson, the truck driver who narrowly avoided the accident, also observed the drop-off for a considerable period of time before the accident. *Id. at 635*. The Defendants claim that no one knew of the condition of the shoulder, how long it was present, or that it could have formed in a matter of days. *Appellee's Brief at 21*. That is false. So is their claim that for an unknown reason the Sanborn vehicle illegally drove off of the road. *Id. at 3*.[2] Mr. Thompson testified that the Sanborn car went off onto the shoulder "in an area where there is a slight curve in the highway." *SR*

[2] The Defendants' claim of an illegal lane violation is based on Kylee Sanborn proceeding beyond the white fog line. Beyond that fog line are rumble strips. *SR at 506*. This type of driving event is not uncommon, and, in fact, Mark Peterson admitted doing it himself. *Id. at 388*.

at 634. He had seen other vehicles go onto the shoulder in that same area as well as evidence of tracks of vehicles having gone onto the shoulder. *Id. at 635*. Vehicles going onto the shoulder had displaced the gravel and compacted the shoulder. *Id. at 301*. It is obvious from this photograph that countless vehicles had done so.

Importantly, the duty to inspect the roads for repair needs and hazards does not require the exercise of discretion. According to Daniel Staton, who spent much of his career as a Traffic Engineer and Highway Access Engineer for the DOT, "[v]isually inspecting the condition of the roads as you travel them for purposes of assessing road needs is not a task that involves the exercise of judgment or discretion; rather, it is simply a matter of using care to look at the condition of the road and looking for deficiencies, hazards, etc." *SR at 640, 642.* He opined that the severe drop-off "should have been readily observable," and that if DOT personnel "were properly inspecting this area of U.S. Highway 281, they should have observed this degraded condition well before the drop-off got to approximately six inches." *Id. at 642.* Similarly, Mark Peterson, the Aberdeen Regional Engineer for the DOT, testified that he expected the person responsible for inspecting the highway to have observed the drop-off if they were doing their job. *Id. at 386-87.*

This is unlike Truman v. Griese, 2009 S.D. 8, 762 N.W.2d 75, where expertise and judgment were required for sign placement. The Defendants argue that their duties must include discretion based on thousands of miles of highway in the state. *Appellees' Brief at* 24. Here the only highway in Beadle County under the jurisdiction of the DOT's Huron office that had gravel shoulders was the twelve mile stretch of Highway 281

between Highway 14 and Highway 28 where this accident happened. *SR at 663-64.* Asphalt shoulders typically remain flush with the pavement. The Defendants have not disputed that inspecting the road for conditions out of repair such as pavement edge drop-off is a ministerial function, nor can they credibly argue that they did not breach that duty in light of the independent witnesses' testimony regarding the lengthy presence of the drop-off.

D. The Policy is ministerial in nature.

The stated purpose of the Shoulder Maintenance Policy is "[t]o provide the level of service to which various types of highway shoulders are to be maintained."[3] The Defendants acknowledge that the Policy specifically provides that "Gravel shoulders shall be maintained by blading and adding material as necessary to essentially preserve the original template section," (i.e., flush with the traveled portion) and that "[e]xisting gravel shoulders shall be maintained in design condition."[4] *Appellees' Brief at 21-22 (emphasis added); SR at 510.* The circuit court held that this Policy creates a ministerial duty. *SR at 670.*

Notwithstanding this mandatory language, the Defendants contend that the analysis should instead be dictated by the "Shoulder Blading, Reshaping and Patching" performance standard ("Performance Standard 2158"). *Appellees' Brief at 20.* The

[3] Notably, the Policy uses the phrase "are to be maintained," not "may be maintained." *SR at 509.*

[4] This language summarily defeats the Defendants claim that in this case "we are not dealing with a DOT policy that has specific, detailed requirements." *Appellees' Brief at 24.*

Defendants' route to Performance Standard 2158 is as follows. A provision in the Policy states that "[s]houlders are to be maintained in accordance with the above guidelines using the applicable standards for the work being performed." *SR at 510.* Although the Policy does not identify Performance Standard 2158 as a "Related Document[]," the Defendants submit that Performance Standard 2158 is the "applicable standard[]," and that because it uses the term "should"—and other language the Defendants view as non-mandatory—their duties are not ministerial in nature. *Appellees' Brief at 22.* They contend that Performance Standard 2158 trumps the mandatory language of the Policy and converts the maintenance of gravel shoulders from a ministerial function mandated by the Policy to a discretionary function that ignores the Policy altogether. This argument fails in several respects.

First, the Defendants failed to direct this Court to any authority providing that the nature of a Policy is transformed from ministerial to discretionary if there is a separate performance standard that uses the term "should." This Court's holdings indicate just the opposite. In McGee, this Court quoted Wulf v. Senst for the proposition that "[o]nce it is determined that the act should be performed, subsequent duties may be considered ministerial." *McGee, 2023 S.D. at ¶ 37.* Wulf, in turn, quoted that principle from this Court's decision in Hansen v. S.D. Dep't of Transportation, 1998 S.D. 109, 584 N.W.2d 881. *Wulf, 2003 S.D. at ¶ 26.* The Shoulder Maintenance Policy is *the* policy regarding shoulder maintenance. *SR at 509-10.* It has been in place since 1989 and has never been superseded. *Id. at 509.* The Policy requires that "[e]xisting gravel shoulders shall be maintained in design condition." This is mandatory and ministerial in nature. The

Defendants' emphasis on the term "should" in Performance Standard 2158 in an effort to make the Policy itself discretionary ignores this Court's teaching that any "act that is ministerial will still require the actor to use some discretion in its performance." *McGee, 2023 S.D. at ¶ 34.*

Second, the inapplicability of Performance Standard 2158 is apparent given the dangerous condition that existed. Performance Standard 2158 generally concerns maintenance that "is not of an emergency nature" that can be scheduled. *SR at 348-49.* That was not the situation here. Mark Peterson testified that the drop-off in this case was a "dangerous condition," and that had he observed the drop-off: (i) it would have concerned him because it was a dangerous condition; (ii) he would have requested that it be immediately repaired; and (iii) he would have requested that warning signs be immediately put up pending repair because the drop-off was a hazard to the driving public. *Id. at 388, 390-91*. DOT maintenance workers agreed that the severe drop-off was a hazardous condition that should be repaired as soon as possible.[5] *Id. at 464, 477*.

Third, the Defendants' reliance upon Performance Standard 2158 as the basis for a discretionary function is misplaced. While it provides that the maintenance supervisor retains the authority to modify or deviate from the standard "due to specific weather conditions, roadway conditions, or other events which impact upon this performance

[5] That there was no discretion to repair the severe drop-off is further evidenced by SDCL 31-32-10, which provides that if a highway is damaged to the extent that it "endangers the safety of public travel," the responsible governing body "shall within forty-eight hours of receiving notice of such danger," (1) erect guards to guard the public from accident or injury and (2) repair the damage or provide an alternative means of crossing within a reasonable time. *SDCL 31-32-10*.

standard," Mike Hieb testified that he did not make a decision to deviate from or modify Performance Standard 2158. *SR at 348, 441.* The Defendants claim that they were not even aware of the severe drop-off. Thus, they never used any discretion to hold off on repairing it "due to specific weather conditions, roadway conditions, or other events . . . ;" nor was the lack of repair due to a concern of "living within budgets and manpower constraints." *SR at 348; Appellees' Brief at 24.* This may be likened to McGee, in which this Court noted that while the Standard Specification 330.3(E) regarding tack application may be overridden, that "never occurred." *McGee, 2023 S.D. at ¶ 33, n. 7.*

Mr. Hieb testified that the only discretion he had under the Performance Standard was *when* to do the work. *SR at 441.* Mr. Peterson concluded that the photographs of the drop-off showed a dangerous condition requiring immediate repair. Thus, there was really no discretion for when the work should have been performed.

As support for their position, the Defendants reference two decisions of the Alabama Supreme Court, Ex parte Estate of Reynolds, 946 So.2d 450 (Ala. 2006) and Ex parte Tucker, 303 So.3d 467 (Ala. 2019). In those cases, claims arising from pavement edge drop-offs were barred by sovereign immunity under Alabama's "state agent" test, which affords immunity for a state employee "in the exercise of their judgment in executing their work responsibilities." *Estate of Reynolds, 946 So.2d at 453.* The Defendants maintain that these cases are helpful because: "[B]y exercising judgment and actually undertaking to accomplish the necessary maintenance and repairs, the district engineer and district maintenance supervisor were entitled to State-agent immunity." *Appellees' Brief at 25.* Setting aside the fact that Alabama's test for immunity is

markedly different than South Dakota's, the Defendants' reliance upon these cases is fundamentally flawed. In this case, it is undisputed that the non-repair of the drop-off was not due to an exercise of judgment; nor was there an "undertaking to accomplish the necessary maintenance and repair[] of the drop-off." This is because the Defendants claim to have been unaware of the existence of the severe drop-off—despite it being present for up to a year and Mr. Hieb driving that area of Highway 281 on a weekly basis.

Other states have upheld liability against Departments of Transportation for pavement edge drop-offs. For example, in Bozeman v. State, 787 So.2d 357 (La. Ct. App. 2001), a Louisiana court upheld the trial court finding the State liable for "the unreasonably dangerous condition of the shoulder." *Id. at 369.* In that case, the drop-off varied from 2 to over 3.5 inches and spanned 150 feet. *Id. at 360.* According to the Court, the State "has the basic responsibility for maintaining state highways" and "the duty to keep all state owned or state maintained shoulders in a reasonably safe condition." *Id. at 362*.

II. WHETHER THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE SANBORNS' CLAIMS ARE BARRED BY THE PUBLIC DUTY DOCTRINE.

A. The circuit court erred when it extended the doctrine to the maintenance of highways.

The Defendants concede that DOT employees are not law enforcement officers. *Appellees' Brief at 27.* Therefore, the doctrine only applies if it is determined that the maintenance of highways falls "within the ambit of public safety." *Id.* In this case, the circuit court broke new ground and extended the doctrine to the maintenance of highways. *SR at 673-74.* This Court has previously only applied the doctrine to law

enforcement and code enforcement type activities. The Sanborns advanced five considerations which demonstrate that the circuit court erred. The Defendants' responses to each, if any, are addressed below.[6]

(1) This Court's rationale for the doctrine does not support extending its application to the maintenance of highways.

In Tipton v. Town of Tabor, 1997 S.D. 96, 567 N.W.2d 351 (Tipton II), this Court's discussion of the reasons for the doctrine referred to the government's "duty of protection" to the public, the "[f]urnishing public safety, and the "misdeeds of third persons." *Id. at ¶¶ 10-11.* This Court noted that "[t]he rule promotes accountability for offenders, rather than police who through mistake fail to thwart offenses." *Id. at ¶ 10.* This reasoning was echoed by this Court in the more recent case of Fodness v. City of Sioux Falls, 2020 S.D. 43, 947 N.W.2d 619: "'The duty to ensure compliance rests with the individuals responsible for construction. Permit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are local governments.'" *Id. at ¶ 14 (quoting McDowell v. Sapienza, 2018 S.D. 1, ¶ 39, 906 N.W.2d 399, 410.*

The Sanborns argued that the focus of the public duty doctrine is a governmental entity's ability to protect a citizen from harm caused by a third-party; not a governmental entity being accountable for its own negligence. *Appellees' Brief at 22.* Declining to extend the doctrine to the maintenance of highways will not result in the DOT employees

[6] The Sanborns also contended that the circuit court erroneously shifted the burden of proof to the Sanborns, the non-movants. *Appellants' Brief at 21.* The Defendants did not address this clear error.

being held liable for the conduct of third-parties. It will simply allow DOT employees to be held accountable for their own conduct. The Defendants did not directly counter this argument.[7]

(2) The maintenance of highways is not "public safety" under the doctrine.

The Defendants argue that the Sanborns are relying upon duties that allow for the safe use of highways "and then at the same time argu[ing] that the alleged duty does not relate to the safety of the public." *Id.* That is inaccurate. The Sanborns' have not contended that the Defendants' duties do not "relate" to public safety; it could be said that many government duties "relate" to public safety in some form. The point is that highways are constructed and maintained to facilitate travel and commerce, not *for the public's well-being or protection.* Under the Defendants' approach, virtually all conduct by State employees might fall within the realm of "public safety," with the result being that State employees would have no duties whatsoever.

The Defendants also claim that the Sanborns are "urg[ing] this court" to limit the public safety doctrine to law enforcement, fire departments, ambulance services, and disaster response services. *Appellees' Brief at 28.* The Defendants misunderstand the Sanborns' argument. In an effort to shed light on the meaning of "public safety," the Sanborns appropriated a concept used by this Court in E.P. v. Riley, 1999 S.D. 163, 604

[7] This Court's most recent case analyzing the public duty doctrine is Maher v. City of Box Elder, 2019 S.D. 15, 925 N.W.2d 482. There this Court stated that it "ha[s] previously recognized that a governmental entity may owe a plaintiff a specific duty arising out of general principals of tort law," and that "[o]ther courts have likewise declined to apply the public duty rule when 'a private person would be liable to the plaintiff for the acts that were committed by the government[.]'" *Id.* ¶¶ *17-18.*

N.W.2d 7, where this Court observed that the public duty doctrine was inapplicable because "DSS employees' actions cannot be deemed 'law enforcement' in its traditionally understood sense," and that "[t]he term law enforcement generally envisions police protection." *Id. at ¶ 23.* In that same manner, the Sanborns noted that the maintenance of highways is not public safety in its "traditionally understood sense." *Appellants' Brief at 25.* The Sanborns did not seek to remove code enforcement from the ambit of public safety.

(3) This Court has not previously applied the doctrine to the DOT or highway maintenance.

The Sanborns noted that in this Court's various cases concerning the maintenance of highways and roads, the public duty doctrine had not been applied to shield the governmental entity from liability. *Appellants' Brief at 25.* The Defendants agree, but stress "that such a theory has also never been rejected by this Court." *Id. at 29.* The key is that extending the doctrine to highway maintenance would represent a departure from decades of precedent of holding governmental entities and employees liable for breaches of ministerial duties regarding highway maintenance.

(4) Application of the doctrine would result in the abrogation of specific duties created by state and federal laws.

The Sanborns explained that the Defendants were charged with responsibilities and duties pursuant to various statutes (SDCL 31-2-20; 31-2-20.1; 31-2-21; 31-5-1; and 31-32-10) and federal statutes and regulations for the maintenance of Highway 281. The Sanborns contended that application of the doctrine would result in the doctrine being used to abrogate duties created by state and federal law, which is contrary to its intended

purpose. The Defendants failed to respond to this argument.

(5) Extending the doctrine to highway maintenance would effectively result in DOT employees being immune from liability for all conduct relating to the maintenance of highways.

The Sanborns argued that extending the doctrine to highway maintenance would effectively shield DOT employees from all liability whatsoever for conduct relating to the maintenance of highways—and essentially permit them to not inspect highways or repair them at all. In the process, a long established precedent of tort liability for negligent highway maintenance would be toppled. The Defendants did not respond to this argument.

The Defendants conclude by directing this Court to four decisions from other jurisdictions that they contend extended the public duty doctrine to road maintenance. *Appellees' Brief at 30.* The first case identified by the Defendants is Johnson v. Humboldt County, 913 N.W.2d 256 (Iowa 2018). Reliance upon that case would be inappropriate. The Iowa Supreme Court later held that "the public-duty doctrine is inapplicable when the government defendants' affirmative negligence (misfeasance) created a dangerous condition on government-owned property that caused the injury. That is, 'the governmental entity is simply being held legally responsible for its own property and work.'" *Estate of Farrell v. Iowa, 974 N.W.2d 132, 138 (Iowa 2022).* The court noted that the "'doctrine is properly understood as a limit on suing a governmental entity for not protecting the public from harm caused by the activities of a third party.'" *Id. (quoting Fulps v. City of Urbandale, 956 N.W.2d 469, 475 (Iowa 2021)).*

The Defendants also cite Phillips v. North Dakota Department of Transp., 684

S.E.2d 725 (N.C. Ct. App. 2011). A closer review of Phillips, however, confirms that it likewise does not support the Defendants' position—because the public duty doctrine was not used to preclude liability for highway maintenance. Instead, the court of appeals noted that its Department of Transportation was subject to liability for its negligence under North Carolina's Tort Claims Act, under which "negligence is determined by the same rules as those applicable to private parties." *Id. at 730.* The public duty doctrine was not applied. Indeed, the court of appeals noted that the Industrial Commission had "not otherwise discuss[ed] the public duty doctrine in its findings or fact or conclusion." *Id. at 733. See also Ray v. North Carolina Dept. of Transp., 720 S.E.2d 720 (N.C. Ct. App. 2011) (public duty doctrine not applied where plaintiff's car went off the road due to an eroded section of pavement near the shoulder).*[8]

B. Alternatively, a special duty existed.

In response to the Sanborns' alternative argument that a special duty existed, the Defendants contend that none of the four factors can be met. While the parties disagree, the critical dispute concerns factor (1), whether the State had actual knowledge of the dangerous condition.

The Defendants submit that "actual knowledge of a dangerous condition" cannot be established. *Appellees' Brief at 32.* Proving *actual knowledge* can often be difficult as the defendant can simply deny it. However, as the Defendants acknowledge, actual knowledge may be shown by circumstantial evidence, and where the circumstances are

[8] The Defendants did not address the fact that, to date, this Court has applied the public duty doctrine only to cities, counties, and their employees. *Appellees' Brief at 20, n. 7.*

such that the defendant "must have known" and not "should have known," an inference of actual knowledge is permitted. *Id. (citing Tipton II, 1997 S.D. at ¶ 18).* Here, Mr. Hieb testified that he traveled this section of Highway 281 once a week but never saw the severe and lengthy drop-off that Mr. Boomsma and Mr. Thompson repeatedly observed for up to a year. *Id. at 430-31, 437*. Unbelievably, Mr. Hieb testified that he "evidently" never looked at that portion of Highway 281. *Id.* Without question, this is circumstantial evidence that permits an inference the Defendants "must have known" of the drop-off.

CONCLUSION

Based on the foregoing, the Sanborns respectfully request that this Court (1) affirm the ruling that their claims are not barred by sovereign immunity and (2) reverse the ruling that their claims are barred by the public duty doctrine.

Dated this 30th day of April, 2025.

Respectfully submitted,

Attorneys for the Plaintiffs

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellants' Reply Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellants' Reply Brief* was prepared using Times New Roman typeface in 12-point font and contains 4,768 words. I relied on the word count of our word processing system used to prepare *Appellants' Reply Brief* and the original and all copies are in compliance with this rule.

/s/ John W. Burke .
John W. Burke

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2025, I filed the foregoing *Appellants' Reply Brief* relative to the above-entitled matter via Odyssey File and Serve, and that such system separately effected service of the same on the following individuals:

Justin L. Bell / Douglas A. Abraham
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/s/ John W. Burke .
John W. Burke

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

ESTATE OF KYLEE L. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, and ESTATE OF JAYNA R. SANBORN, by and through its Personal Representative, Sarah C. Sanborn Plaintiffs/Appellants, v. MARK PETERSON, TODD HERTEL, BRAD LETCHER, DAN MARTEL, MICHAEL HIEB, and TERENCE PECK, Defendants/Appellees.	No. 30857 APPELLEE'S NOTICE OF REVIEW

TO: ESTATE OF KYLEE L. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, and ESTATE OF JAYNA R. SANBORN, by and through its Personal Representative, Sarah C. Sanborn, by and through their counsel of record, Michael J. Schaffer, Paul H. Linde, and John W. Burke

You will please take notice that the Appellant having filed its Notice of Appeal on September 30, 2024, that Appellees Mark Peterson, Todd Hertel, Brad Letcher, Dan Martel, Michael Hieb, and Terence Peck, seek review and files this Notice of Review pursuant to SDCL 15-26A-22 from the Third Judicial Circuit of the Circuit Court's Order Denying Defendants' Motion for Summary Judgment on the Basis of Sovereign Immunity and Granting Defendants' Motion for Summary Judgment on the Basis of the Public Duty Doctrine and Judgment for the Defendants rendered in this matter on the 3rd day of September, 2024.[1]

[1] Appellees specifically seek review of the portion of the order which denied Appellee's Motion for Summary Judgment on the basis of sovereign immunity. Appellees submit that a Notice of Review is likely not necessary as the Court has jurisdiction to consider the entirety of the Order pursuant to the Appellants' Notice of Appeal, *see generally Lagler v. Menard, Inc.*, 2018 S.D. 53, 915 N.W.2d 707, and because "[i]f there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper." *BAC Home Loans Servicing, LP v. Trancynger*, 2014 S.D. 22, ¶ 8, 847 N.W.2d 137, 140 (*quoting De Smet Farm Mut. Ins. Co. of S.D. v. Busskohl*, 2013 S.D. 52, ¶ 11, 834 N.W.2d 826, 831). However, the Notice of Review is filed in an abundance of caution.

Dated this 16th day of October, 2024.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
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CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 16th day of October, 2024, he electronically filed and served a true and correct copy of the foregoing in the above-captioned action via the Odyssey File & Serve system, which will serve the following counsel of record at their last known address:

Paul Linde (paull@schafferlawoffice.com)

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Michael Schaffer (mikes@schafferlawoffice.com)

/s/ Justin L. Bell
JUSTIN L. BELL

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

ESTATE OF KYLEE L. SANBORN, By and through its Personal Representative, Sarah C. Sanborn, and ESTATE OF JAYNA R. SANBORN, by and through its Personal Representative, Sarah C. Sanborn	)	No. 30857
-vs-	)	APPELLEE'S DOCKETING STATEMENT
MARK PETERSON, TODD HERTEL, BRAD LETCHER, DAN MARTEL, MICHAEL HIEB, and TERENCE PECK,	)	

SECTION A. ***TRIAL COURT***

1. The circuit court from which the appeal is taken: _____

2. The county in which the action is venued at the time of appeal: _____

3. The name of the trial judge who entered the decision appealed: _____

PARTIES AND ATTORNEYS

4. Identify each party presently of record and the name, address, and phone number of the attorney for each party. (May be continued on an attached appendix.)

SECTION B. ***TIMELINESS OF APPEAL***

(If Section B is completed by an appellee filing a notice of review pursuant to SDCL § 15-26A-22, the following questions are to be answered as they may apply to the decision the appellee is seeking to have reviewed.)

1. The date the judgment or order appealed from was signed and filed by the trial court: September 3, 2024

2. The date notice of entry of the judgment or order was served on each party: September 3, 2024

3. State whether either of the following motions were made:

a. Motion for judgment n.o.v., SDCL § 15-6-50(b)

_____ Yes __X__ No

b. Motion for new trial, SDCL § 15-6-59:

_____ Yes __X__ No

NATURE AND DISPOSITION OF CLAIMS

4. State the nature of each party's separate claims, counterclaims or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

Kylee and Jayna Sanborn were traveling north on U.S. Highway 281 north of Wolsey, South Dakota in a Chevrolet Impala. As they were traveling, the Impala crossed over the right-hand (east side) fog line and onto the shoulder. Plaintiff's allege that due to a drop-off at the pavement edge on the shoulder, the passenger side wheels of the Impala fell, and that the pavement-edge drop off initially prevented the Impala from returning to the roadway, and when it was able to return to the roadway it veered across the northbound lane and entered the southbound lane where it collided with a southbound Ram 1500 pickup, where both Kylee and Jayna perished in the collision.

The Plaintiffs subsequently commenced this action alleging wrongful death and survival claims. The Defendants moved for summary judgment based on two theories: 1) the duties alleged to

have been breached were discretionary in nature, not ministerial, and, as such, the Plaintiffs' claims were barred by sovereign immunity; and 2) that the Plaintiffs' claims were barred by the public duty doctrine.

The circuit court ruled that the duties in question were ministerial in nature and denied Defendants' motion for summary judgment based on sovereign immunity. In the alternative, the circuit court ruled that the Plaintiffs' claims were barred by the public duty doctrine.

5. Appeals of right may be taken only from final, appealable orders. See SDCL § 15-26A-3 and 4.

a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims?

__X__ Yes _____ No

b. If the trial court **did not** enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL § 15-6-54(b)?

_____ Yes _____ No

6. State each issue intended to be presented for review. (Parties will not be bound by these statements.)

1) Are the Plaintiffs' claims barred by sovereign immunity because any duties alleged to have been breached by Plaintiffs were discretionary?

Date: 10/16/24

Signature

Attach a copy of any memorandum opinion and findings of fact or conclusions of law supporting the judgment or order appealed from. See SDCL § 15-26A-4(2).

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

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Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
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August 14, 2024

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RE: *Sanborn's v. Peterson, Hertel, Letcher, Martel, Hieb, and Peck* 02CIV21-59; Defendant's Motion for Summar Judgment

Kylee and Sarah Sanborn, by and through its Personal Representative (hereinafter "Plaintiff") filed a complaint on March 23, 2021, and an amended complaint on November 6, 2022, alleging wrongful death and a survival action against Mark Peterson, Todd Hertel, Brad Letcher, Dan Martel, Michael Hied, and Terence Peck (hereinafter "Defendants") in their individual and official capacity. On April 30, 2021, Defendants brought a motion to dismiss seeking dismissal of the Plaintiff's claim for wrongful death and survival action. On June 3, 2021, the motion to dismiss was denied. Subsequently, on July 3, 2024, after more discovery was completed, the Defendant's moved for summary judgment. A hearing before this Court was held

on the aforementioned motion on August 1, 2024. For the following reasons, the Defendant's Motion for Summary Judgment is denied in part and granted in part.

STATEMENT OF FACTS

This case arose from a vehicle accident that occurred on November 24, 2019, on U.S. Highway 281 North of Wolsey, South Dakota. Plaintiffs were driving in a Chevrolet Impala when the vehicle went off the gravel shoulder on the highway. The gravel shoulder of the highway had an edge drop-off of approximately five to seven inches. The Plaintiffs made an effort to steer the vehicle back onto the pavement. The vehicle, however, overcorrected and crossed into a lane of oncoming traffic. As a result of going off the shoulder and the overcorrection neither plaintiff survived.

The highway that the accident occurred on is part of South Dakota's state trunk highway system. The trunk system creates a responsibility for the Defendant's to maintain and report the highway. Those duties extend to the shoulder elevation in relation to the travel lanes. It is stipulated that when a drop off is not remedied it creates a highway safety concern that can cause a vehicle to lose control resulting in severe injury. It is also stipulated that the Department of Transportation (hereinafter "DOT") policy referencing shoulder maintenance requires continuous maintenance of the gravel shoulders and how it is to continuously conform to the originally designed shoulder without any drop offs. See Policy No. OM-2002-09. South Dakota Department of Transportation Policy OM-2002-09 titled Shoulder Maintenance creates a readily ascertainable ministerial duty on the Defendants due to the plain language within the policy stating:

> "Gravel shoulders *shall* be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders *shall* be maintained in design condition..."

The Plaintiffs allege that the above policy creates a ministerial duty on the Defendants to maintain and repair the gravel shoulder drop off once the Defendant's become aware of such issue. The Defendant's allege that the above policy is supplemented by the Performance Standards which in turn creates a discretionary duty on the Defendants. As such, the parties disagree as to the duty owed under the policy and if the policy is discretionary or ministerial and thus allowing the Defendant's to invoke the sovereign immunity doctrine. Additionally, the parties are in disagreement regarding whether the duty owed under the policy for public safety in order to invoke the public duty doctrine.

The record before the court raises the disputes regarding sovereign immunity and the public duty doctrine. As to sovereign immunity, the crux of the dispute is regarding the ministerial duty and with that duty whether the Defendant's knew or should have known that there was a drop off on the shoulder that needed to be repaired to prevent injuries. As to the Public Duty Doctrine, the crux of that dispute is whether the Defendant's actions fall under public safety and as such are protected by the doctrine.

STANDARD OF REVIEW

SDCL § 15-6-56(c) states that summary judgment shall be granted when the moving party proves that "no genuine issue as to any material fact [exists] and that the moving party is entitled to judgment as a matter of law." *See also Anderson v. Production Credit Ass'n*, 482 N.W.2d 642, 644 (S.D. 1992). Summary judgment is authorized where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]" *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 844-45 (2006) (citing SDCL § 15-6-56(c)). "All reasonable

inferences derived from the facts are viewed in the light most favorable to the nonmoving party." *Id.* (citing *Northstream Invs., Inc. v. 1804 Country Store Co.*, 2005 S.D. 61, ¶ 11, 697 N.W.2d 762, 765.

In order to defeat summary judgment, the nonmoving party may not rest on mere allegations or his pleadings, but rather must set forth, by affidavit or other evidence, specific facts showing the existence of genuine issues of material fact for trial. *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 366 (S.D. 1996). While questions of fact are generally reserved for a jury and preclude the granting of summary judgment, "a court may determine a question of fact by summary judgment if it appears to involve no genuine issues of material fact and the claim fails as a matter of law." *Daktronics, Inc. v. McAfee*, 1999 S.D. 113, ¶ 16, 599 N.W.2d 358, 362. "Where . . . no genuine issue of fact exists [summary judgment] is looked upon with favor[.]" *Wilson v. Great N. Ry. Co.*, 157 N.W.2d 19, 21 (S.D. 1968).

APPLICABLE LAW

I. Sovereign Immunity

Plaintiff's suit alleges individual negligence against State employees, and "it is well-settled that suits against officers of the state 'in their official capacity, [are] in reality [suits against the State itself." *McGee v. Spencer Quarries, Inc.*, 2023 S.D. 66, ¶ 29, 1 N.W.3d 614, 623. Absent constitutional or statutory authority, litigation cannot be pursued against the State, its agencies, or its employees in their official capacity. *Truman v. Griese*, 2009 S.D. 8, ¶ 20, 762 N.W.2d 75, 80. If a litigant, however, is suing a state official in his or her individual capacity, sovereign immunity extends only to discretionary duties, not ministerial duties. *Truman*, 2009 S.D. 8, ¶ 19, 762 N.W.2d at 80. The South Dakota Supreme Court has stated that a duty that is not ministerial is discretionary. *Id.* A ministerial duty is defined as,

> "*absolute, certain, and imperative,* involving merely the execution of a specific duty arising *from fixed designated facts or the execution of a set task imposed by law prescribing and defining the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion,* being a simple, definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a *governing rule or standard with a compulsory result. It is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action.*

Id. at ¶ 21 (*Hansen v. South Dakota Dept. of Transp.*, 1998 SD 109, ¶ 23, 584 N.W.2d 881, 886) (emphasis in original). For a court to find a ministerial act, it must find a "'governing rule or standard' so clear and specific that it directs the government actor without calling upon the actor to ascertain how and when to implement that rule or standard." *Truman*, 2009 S.D. 8, ¶ 22, 762 N.W.2d at 81. Further, when an entity like the Department of Transportation makes the decision to adopt a policy, the employees are obligated to follow it. *Wulf v. Senst*, 2003 S.D. 105, ¶ 32, 669 N.W.2d 135, 146. "[O]nce it is determined that the act should be performed, subsequent duties may be considered ministerial." *Hansen.*, 1998 S.D. 109, ¶ 23, 584 N.W.2d at 886 (citing 57 Am. Jur.2d *Municipal, County, School & State Tort Liability* § 120, at 132–33 (1988)). Therefore, the policy after adoption is a ministerial duty.

Highway repair, generally, is a ministerial act. *Wulf* 2003 S.D, ¶ 23, 105, 669 N.W.2d at 114 (citing *Hansen*, 1998 S.D. 109, ¶ 23, 584 N.W.2d at 886). SDCL 31-32-10[1] prescribes the

[1] If any highway, culvert, or bridge is damaged by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of receiving notice of such danger, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair the damage or provide an alternative means of crossing within a reasonable time after receiving notice of the danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense. Our statute [forerunner to SDCL 31–32–10] does not expressly require actual notice [of defect in highway], and by the great weight of authority it is held that unless actual notice is required by the statute constructive or implied notice is sufficient.
Fritz v. Howard Twp., 1997 S.D. 122, ¶ 21, 570 N.W.2d 240, 244–45.

nature and extent of the duty imposed upon public entities to protect the public from injury occasioned by defective roads. *Gulbranson v. Flandreau Twp.*, 458 N.W.2d 361, 362 (S.D. 1990). However, if the highway repair and maintenance function "involve actual planning and design, policy decisions, or actions that are not subject to an established standard" the actions will be considered discretionary and therefore protected by sovereign immunity. McGee. Thus, the Plaintiff's claim must show a readily ascertainable standard at the time of the accident that creates a ministerial duty on the named defendants. *McGee*, 2023 S.D. 66, ¶ 36, 1 N.W.3d at 626.

ANALYSIS

I. Whether Policy OM-2002-09 sets forth a ministerial duty with respect to the duty to maintain.

Here, the Defendants, in their official capacity, are immune from suit. The claims against the Defendant's in their individual capacity, however, are not immune from suit because the duty the Defendants have regarding the policy are ministerial.

The claims against the Defendants are based upon allegations that the Defendants knew or should have known that the portion of Highway 281 where the accident happened was not properly cared for and the DOT took no action to correct that problem in compliance with SDCL 31-32-10 and DOT Policy OM-2002-09. Applying the rules above to the preceding arguments leads to the conclusion that South Dakota DOT Policy OM-2002-09 creates a ministerial duty requiring that the "Gravel shoulders *shall* be maintained by blading and adding material as necessary to essentially preserve the original template section. Existing gravel shoulders *shall* be maintained in design condition..." Additionally, the Plaintiffs have presented evidence that shows the initial design condition mandates that the shoulders need to be flush with the pavement and no exceptions are within the initial design.

The Defendants argue that the DOT policy is discretionary because it is modified by the Performance Standards of the DOT. These performance standards indicate "the maintenance supervisor or their designee shall retain the authority to modify or deviate from this performance standard within their discretion based on their experience and judgment due to specific weather conditions, roadway conditions, or other events which impact upon the performance standard." Performance Standard 5158 indicates that "gravel shoulders *should* be repaired when any of the following conditions exist such as, but not limited to, isolated area where gravel has been lost." In reading these statutes together in their plain meaning, the Defendants argue that no ministerial duty is created because the performance standards create a discretionary duty that precedes the DOT policy, thus inferring that the policy is therefore discretionary. Further, the Defendant's contend that if the court rules that the DOT has a ministerial duty to follow the policy it would create an impractical result to expect the DOT to keep every highway shoulder in ideal condition one hundred percent of the time.

Despite that argument, in similar contexts as the case at hand, the Supreme Court has recognized that specific policies within the DOT once adopted create a ministerial duty. In *Wulf*, the Supreme Court determined that "DOT Policy 2531 created a ministerial duty requiring the DOT to use sand/salt/chemical mixtures and continue operations from 5:00 am until 7:00 p.m. during winter storms, unless certain conditions existed. Similarly, in *McGee*, the Supreme Court held that Standard Specification 330.3(E) adopted by the DOT created a ministerial duty requiring that the "tack application ahead of the mat laydown shall not exceed the amount estimated for the current day's operation." Regardless of Performance Standard 5158, Policy OM-2002-09 specifically was adopted as a policy to be followed within the DOT, thus creating a ministerial duty.

Here, the policy at issue is in reference to highway repair, which generally is a ministerial duty. The DOT has a readily ascertainable standard that was not referencing the DOT's duties outside of the established standard such as planning, designing, or making decisions. Upon this showing and following the statutory language of SDCL 31-32-10, there is a genuine issue of material fact regarding the notice of the DOT. *See Fritz v. Howard Twp.*, 1997 S.D. 122, ¶ 19, 570 N.W.2d 240, 244 (noting that it was improper for the trial court to conclude that Township complied with [sic] 31–32–10, as that is a jury question.")

Here too, there is a specific policy that was adopted by the DOT that creates a ministerial duty on the DOT to maintain the shoulder in accordance with the initial design plan and to maintain the shoulder generally. Consequentially, in accordance with the standards, the Defendants from the DOT have indicated that it is within their job description to drive on the roads on a regular basis to inspect the highway. In the case at hand, however, the Defendant's inspecting the highway did not notice the defect in the shoulder of the highway. In contrast to the Defendant's statements, the Plaintiffs have presented evidence that individuals outside of the DOT have noticed the drop-offs for months. Thus, there is a genuine issue of material fact regarding the ministerial duty imposed on the Defendants that was readily ascertainable at the time of the incident,

Therefore, summary judgment is denied because the DOT did not have the discretion to ignore the policies established by the DOT and was required to follow the policies the DOT set forth.

APPLICABLE LAW

I. Public Duty Doctrine

Under the "public duty doctrine," government entities are generally determined to owe governmental duties on matters of law enforcement and public safety to the public at large rather than to any specific individuals. *McDowell v. Sapienza,* 2018 S.D. 1, ¶ 36, 906 N.W.2d 399, 409 reh'g denied (Feb. 16, 2018); *E.P. v. Riley*, 1999 S.D. 163, ¶ 22, 604 N.W.2d 7, 14. The doctrine "acknowledges that many 'enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm.'" *E.P*, 1999 S.D. 163, ¶ 15, 604 N.W.2d at 12 (quoting *Tipton II,* 1997 S.D. 96, ¶ 13, 567 N.W.2d at 357). "Because such duties exist only for the protection of the public, they cannot be the basis for liability to a particular class of persons." *McDowell,* 2018 S.D. 1, ¶ 36, 906 N.W.2d at 409.

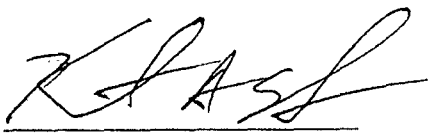
ANALYSIS

South Dakota Supreme Court precedent has stated that the public duty doctrine extends to a government employee being sued on an issue involving law enforcement or public safety. *E.P.* 1999 S.D. 163, ¶ 22, 604 N.W.2d at 13. Looking only to South Dakota Case law, the Plaintiffs have failed to identify how the DOT's proprietary act of maintenance on the highways is not in the nature of public safety.

The Plaintiffs contend that the Defendant's are not protected under the doctrine because "[t]he duty to ensure compliance rests with the individuals responsible for construction...[and] [p]ermit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are local governments." *Id.* Despite that argument and looking at the evidence in the light most favorable to the Plaintiffs, the Plaintiffs have still failed to show the

material fact that the Defendants were not engaged in an act of public safety for the society. It is within this court's judgment to apply South Dakota Supreme Court case law instead of out of state case law. In doing so, the court grants the motion for summary judgment as to the public duty doctrine.

BY THE COURT:



Hon. Kent A. Shelton
Circuit Judge, Third Judicial Circuit