THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0101

Andrew Szewczyk & A.

v.

Continental Paving, Inc. & A.

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DISTRICT

BRIEF FOR THE NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Emily C. Goering, Bar No. 268497
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3675
Emily.C.Goering@doj.nh.gov

(Oral argument requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

QUESTION PRESENTED

Plaintiffs raise three questions on appeal. The only Question Presented that pertains to the New Hampshire Department of Transportation is question number III. Accordingly, this brief only addresses that question. The remaining Questions Presented relate to other defendants in the underlying matter and arise from events that occurred after the State was dismissed from the case.

I. Whether the superior court correctly dismissed the single claim against the State because the Plaintiffs failed to describe with particularity the circumstances required to establish a *prima facie* case pursuant to RSA 230:80.

STATEMENT OF THE CASE

On July 23, 2019, Andrew and Marian Szewczyk (collectively "Plaintiffs") filed suit in the Hillsborough County Superior Court, Northern District, against Continental Paving, Inc. ("Continental"), Bellemore Catch Basin Maintenance ("Bellemore"), and New Hampshire Department of Transportation ("NHDOT" or "State"). App. I, 13-29.[1] The Complaint included one count against NHDOT, claiming bodily injury to Plaintiffs as a result of the maintenance, repair, and conditions of the highway upon which Plaintiffs were injured in an automobile accident. App. I, 23-28. Specifically, the Complaint alleged that NHDOT performed negligent construction work, repairs, and adjustments to catch basins that resulted in a deficient drainage system and caused highway flooding. App. I, 27-28.

On October 1, 2019, NHDOT moved to dismiss the single count against the State. App. I, 30-35. NHDOT argued that dismissal was proper because Plaintiffs failed to meet the pleadings requirements of RSA 230:80, II. Specifically, NHDOT argued that Plaintiffs failed to describe with particularity the means by which NHDOT received notice of flooding, as required by RSA 230:80, I(a), and, in the alternative, Plaintiffs failed to describe with particularity that a NHDOT employee created the flooding by an intentional act while acting with gross negligence or in reckless disregard of the hazard, as required by RSA 230:80, I(c). Plaintiffs objected

[1] "AB" refers to Appellants' Brief. "App." refers to the Appendix submitted with Appellants' Brief.

(App. I, 36-61), NHDOT replied (App. I, 62-69), and Plaintiffs surreplied (App. I, 70-88).[2]

On January 29, 2020, the superior court (*Nicolosi*, J.) issued an order granting NHDOT's motion to dismiss. App. I, 111-18. The court found that "plaintiffs have not adequately pled sufficient facts relative to requisite notice of the insufficiency or to an intentional act of an employee creating the insufficiency. App. I, 113-14. The court determined that the Complaint made "no specific allegation that a notice of insufficiency . . . was provided to the NHDOT by anyone, or that the commissioner had notice or actual knowledge of the insufficiency prior to the accident." App. I, 114. The court rejected Plaintiffs' contention that NHDOT had notice of a highway insufficiency merely by having general maintenance and oversight of the area of highway. App. I, 115-16. The court further determined that Plaintiffs "have not pled gross negligence or reckless disregard" and made only allegations that "sound in ordinary negligence." App. I, 117. Lastly, the court determined that Plaintiffs had "not identified any NHDOT employee who caused or contributed to causing the clogging or flooding, much less intentionally causing any insufficiency." App. I, 117. In the absence of any of the circumstances of RSA 230:80, I(a)-(c), and a failure to meet the pleading requirement of RSA 230:80, II, the court determined

[2] Plaintiffs additionally filed a Supplemental Objection to NHDOT's Motion to Dismiss pertaining to the applicability of RSA 507-B:7-a. In their Notice of Appeal, Plaintiffs include a question to be raised on appeal that pertains to the applicability of RSA 507-B:7-a, and the pleadings supporting that question are included in Appellants' Appendix. This question was not raised nor developed in Appellants' Brief; therefore, NHDOT does not address those pleadings or arguments in this brief. *See State v. Blackmer*, 149 N.H. 47, 49 (2003) (confining appellate review to only those issues that the appellant has fully briefed).

that Plaintiffs failed to establish a *prima facie* case and dismissed the claim against NHDOT. App. I, 111-18.

On February 10, 2020, Plaintiffs filed a motion to reconsider. App. I, 119-36. Plaintiffs argued that notice of the insufficiency was plain and clear because NHDOT was an active part of the construction work that caused drain clogging. App. I, 121. On reconsideration, Plaintiffs elaborated that subcontractor invoices were submitted to NHDOT for sweeping trucks which indicated catch basins needed to be cleaned, the consequence of a clogged catch basin is that water will not flow, if water does not flow then a highway can be flooded, and that it will have an impact on the motoring public; therefore, NHDOT was on notice of an insufficiency. App. I, 123. NHDOT objected on the basis that Plaintiffs' understanding of notice was contrary to the plain language of RSA 230:80. App. I, 138-46.

On April 9, 2020, the court issued an order denying the motion for reconsideration. App. I, 148-52. The court declined to "assume that NHDOT had notice of the clogging merely because of its general oversight of the work being done by Continental Paving and Bellemore in the area of the accident." App. I, 149. The court elaborated that Plaintiffs had a heightened pleading standard and "[t]hey have not met this standard through the inferential leaps they urge the Court to make from the circumstances stemming from NHDOT's supervision and oversight . . . ." App. I, 149. Lastly, the court rejected Plaintiffs' argument that NHDOT must have known or could have deduced that catch basins were clogged, because "a deduction or awareness of the risk does not satisfy Plaintiffs' obligation to plead sufficient facts with particularity that NHDOT had

actual notice or knowledge of the insufficiency or that its employee intentionally created the insufficiency." App. I, 150.

The other defendants, Continental and Bellemore, remained in the case until they were granted summary judgment on January 9, 2022. App. VI, 132-53.

STATEMENT OF FACTS

Plaintiffs appeal the dismissal of the single claim asserted against NHDOT; therefore, for purposes of this appeal, NHDOT assumes the truth of the facts alleged in the Complaint. The Plaintiffs alleged the following in their Complaint relative to the claim against NHDOT.

In October of 2016, NHDOT had a construction contract with Continental and Bellemore to perform repaving and ancillary maintenance along the F.E. Everett Turnpike. AB 14; App. I, 15-16. NHDOT owned the project, Continental was contracted to perform repaving, and Bellemore was subcontracted to clean catch basins after rehabilitation work was completed. AB 14-15; App. I, 15. Bellemore cleaned only those catch basins that they were instructed to clean by Continental, and not all catch basins were cleaned. AB 15; App. I, 17.

On or about October 21, 2016, Plaintiff Andrew Szewczyk encountered flooding while traveling on the F.E. Everett Turnpike. App. I, 14-15. As he encountered the flooding, his vehicle hydroplaned and traveled to the area of the median and off of the traveled lanes. App. I, 15. The occupants of his vehicle exited the vehicle, and soon thereafter another motorist encountered the flooding, lost control of their vehicle, and struck the Szewczyk vehicle, pushing it into the former occupants of the Szewczyk vehicle. App. I, 15. The collision caused serious and permanent injuries to Plaintiffs. App. I, 15. Notably absent from the Complaint is any allegation that this portion of highway had any history of flooding or that NHDOT was notified or aware of flooding prior to the accident.

On appeal, Plaintiffs elaborate on the condition of the highway in this area. Even if this Court were to consider facts not alleged in the Complaint in reviewing Plaintiffs' appeal of the dismissal order, State records and deposition testimony reveal that there were no reports of flooding or accidents where the Plaintiffs' accident occurred, either prior to their accident or subsequent to their accident. AB 12. Plaintiffs' engineering and hydrology experts additionally determined that there was no history of flooding where the Plaintiffs' accident occurred. AB 18. Various employees from NHDOT, Bellemore Catch Basins, New Hampshire State Police, and another construction contractor, provided further testimony that there was no history or knowledge of highway flooding or accidents caused by flooding in this area prior to Plaintiffs' accident. AB 23, 40.

SUMMARY OF THE ARGUMENT

NHDOT is immune from the claims in this matter because Plaintiffs were unable to allege any of the prerequisites to liability required under RSA 230:80. Despite the clear immunity laid out by RSA 230:80, Plaintiffs challenge the superior court's determination that NHDOT was protected by this immunity. AB 42. Plaintiffs argue that NHDOT created the flooding hazard by not testing the drainage system, which gave NHDOT actual knowledge of the hazard, as alleged, that naturally arises from resurfacing work, such that separate notice was not required under RSA 230:80. AB 44-46. This argument fails because, even if an NHDOT employee had understanding of the potential for highway flooding, the Complaint failed to allege that the Commissioner had actual knowledge, that NHDOT acted with gross negligence or exercised bad faith in responding to the flooding, or that the insufficiency was created by the intentional act of an NHDOT employee acting with gross negligence or reckless disregard. Furthermore, Plaintiffs' argument fails because it imputes actual knowledge of a specific flooding event on NHDOT by virtue of NHDOT's general maintenance and construction responsibilities, and such an argument has already been rejected by this Court.

STANDARD OF REVIEW

In reviewing a trial court's ruling on a motion to dismiss, the Court must consider whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery. *Pesaturo v. Kinne*, 161 N.H. 550, 552 (2011). The Court assumes the plaintiff's allegations to be true and construes all inferences in the light most favorable to the plaintiff. *See Id*. However, the Court need not assume the truth of statements in the complaint that are merely conclusions of law. *See Tessier v. Rockefeller*, 162 N.H. 324 (2011). The Court then engages in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, the Court must hold that it was improper to grant the motion to dismiss. *Id*.

ARGUMENT

I. THE COMPLAINT FAILED TO ESTABLISH A *PRIMA FACIE* CASE UNDER RSA 230:80.

RSA 230:78-82, commonly referred to as the "insufficiency statutes," confer comprehensive and specific immunity to NHDOT for damages arising out of the construction, maintenance, or repair of public highways. Because Plaintiffs allege damages arising from the repaving construction and drainage system maintenance upon a highway, this is the exclusive statutory scheme through which Plaintiffs must establish a claim to confer liability upon NHDOT. This Court has recognized that "the legislature has the authority to specify the terms and conditions of suit . . . or take any other action which in its wisdom it may deem proper." *Bowden v. Commissioner, New Hampshire Dept. of Transp.*, 144 N.H. 491, 494 (1999). In exercising the authority to specify the conditions of suit against the State, the Legislature has crafted a statutory scheme "to provide the greatest possible protection from liability on highways and bridges" because it is "unreasonable to expect that all highways and highway bridges will be routinely patrolled . . . or that all such highways and highway bridges should be constructed and maintained to a uniform standard." Statement of Purpose, HB 1226-FN, App. 69. When enacting these statutes, the Legislature understood that the condition of a highway is the product of "capital investments, made at different times, in response to differing and evolving needs of the public" and such varied conditions should not make NHDOT a "guarantor of the safety of the traveling public, nor guarantor of any particular condition or standard or ordinary negligence." *Id*. To provide

the greatest possible protection from liability, the Legislature has designated only three specific circumstances in which NHDOT can be held liable for a roadway condition. In pertinent part, RSA 230:80, I, provides as follows:

> I. The department of transportation shall not be held liable for damages in an action to recover for personal injury or property damage arising out of its construction, maintenance, or repair of public highways and highway bridges unless such injury or damage was caused by an insufficiency, as defined by RSA 230:78, and:
>
> (a) The department of transportation received a notice of such insufficiency as set forth in RSA 230:78, but failed to act as provided by RSA 230:79; or
>
> (b) The commissioner of the department of transportation who is responsible for maintenance and repair of highways or highway bridges, had actual notice or knowledge of such insufficiency, by means other than notice pursuant to RSA 230:78 and was grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge; or
>
> (c) The condition constituting the insufficiency was created by an intentional act of an employee acting in the scope of his official duty while in the course of his employment, acting with gross negligence, or with reckless disregard of the hazard.
> […]

As plainly written, NHDOT is only liable for damages arising from its construction, maintenance, or repair of highways in three circumstances: (1) when NHDOT has received notice of an insufficiency but failed to act pursuant to RSA 230:79; (2) when the Commissioner of NHDOT had

actual notice or knowledge of the insufficiency and was grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge; or (3) when the insufficiency was created by an intentional act of an employee acting in the scope of their employment, acting with gross negligence, or with reckless disregard of the hazard. In all three circumstances, there is a triggering act on behalf of NHDOT (receiving notice; the Commissioner having actual notice; or an intentional act by an employee), which then sets the standard of care (acting in accordance with RSA 230:79; gross negligence or exercising bad faith in responding or failure to respond; or gross negligence or reckless disregard of the hazard). In the absence of one of these triggering events, and in the absence of a breach of the standard of care, NHDOT cannot be held liable, and is therefore immune from suit.

The circumstances in which NHDOT may be held liable for a highway condition are so narrow and particular that the Legislature has required one of the three triggering events to be pled with particularity as a prerequisite to maintaining an action against NHDOT. RSA 230:80, II provides as follows:

> II. Any action to recover damages for bodily injury, personal injury or property damage arising out of construction, repair or maintenance of its public highways or highway bridges shall be dismissed unless the complaint describes with particularity the means by which the department of transportation received actual notice of the alleged insufficiency, or the intentional act which created the alleged insufficiency.

Plaintiffs do not clearly articulate which provision of RSA 230:80, I, they contend confers liability upon NHDOT. However, Plaintiffs state that

"[d]efendants created a plain and foreseeable hazard; no independent 'notice' of same is called for." AB 44. Plaintiffs further argue that separate notice was not required because NHDOT created the hazard, and therefore had actual knowledge of the hazard. AB 44. Such statements suggest that Plaintiffs are not applying RSA 230:80, I(a), which requires "separate notice" from an individual reporting an insufficiency. RSA 230:78; 230:80, I(a). In arguing that notice was not required, Plaintiffs have seemingly aligned their argument in RSA 230:80, I(b) or I(c).

Plaintiffs have failed to plead with particularity that the Commissioner had actual knowledge of highway flooding at this location. But assuming Plaintiffs are applying RSA 230:80, I(b), and assuming even further that the creation of "a plain and foreseeable hazard" by one or more NHDOT employees suffices to show "actual knowledge" on the part of the Commissioner, Plaintiffs were required to plead facts to demonstrate that NHDOT exhibited gross negligence or bad faith in failing to respond to the actual knowledge. Applying the facts of this case, Plaintiffs would have needed to allege that an NHDOT employee knew that the highway actually flooded in this area and was grossly negligent or exercised bad faith in responding to the flooding. No such allegation was contained in the Complaint.

Alternatively, Plaintiffs have failed to plead with particularity the NDHOT employee or the intentional act that resulted in flooding. Assuming that Plaintiffs are applying RSA 230:80, I(c), in which an employee of NHDOT created the insufficiency through an intentional act, Plaintiffs were required to plead facts to demonstrate that the NHDOT employee acted with gross negligence or reckless disregard of the hazard.

Again applying the facts of this case, Plaintiffs would have needed to allege that an NHDOT employee was grossly negligent or exhibited reckless disregard in intentionally creating a situation that allowed the drainage structure to flood. No such allegation was contained in the Complaint. To the contrary, the Complaint alleges actual construction work that was performed by Continental and Bellemore employees, but does not allege work performed by NHDOT employees. App. I, 13-28.

Even assuming *arguendo* that Plaintiffs have managed to allege one of the triggering events – actual knowledge on behalf of NHDOT – they failed to allege facts sufficient to suggest that the standard of care was breached. In the Complaint, Plaintiffs allege that the catch basins were deficient because of NHDOT's *negligent* construction work, *negligent* inspection, *negligent* oversight, and *negligent* hiring. App. 27-28. On appeal, Plaintiffs again argue that NHDOT "*negligently* completed the construction and rehabilitation work on the drainage system associated with the turnpike which led to the flooded highway…." (emphasis added) AB 43. In no instance have Plaintiffs alleged facts or made arguments to support anything more than an ordinary negligence theory. Plaintiffs are incorrectly reading the three separate tracks through the statute by blending an ordinary negligence standard with the actual knowledge of RSA 230:80, I(b), and the intentional act of creating an insufficiency of RSA 230:80, I(c). Such a blending defies the plain language of the statute that provides three separate, and distinct, tracks to confer liability, each with its own standard of care. Moreover, Plaintiffs have continually argued that this case sounds in ordinary negligence, the precise standard from which the Legislature sought to exempt NHDOT.

II. PLAINTIFFS SEEK TO IMPERMISSIBLY CONFER LIABILITY UPON NHDOT BASED ON NHDOT'S GENERAL RESPONSIBILITY FOR HIGHWAY MAINTENANCE.

Plaintiffs argue that NHDOT had actual knowledge of the insufficiency because it was the owner of the highway, architect of the construction project, and the field engineer that oversaw construction work. AB 43. Plaintiffs further argue that NHDOT had actual knowledge that the hazard – flooding – naturally arises from resurfacing work and rehabilitation to a drainage system. AB 44. In sum, Plaintiffs are arguing that, by mere virtue of NHDOT contracting with third parties for construction activities, it has actual knowledge of hazards that may arise from the construction, and that NHDOT having general understanding that clogged catch basins can cause flooding is tantamount to NHDOT having knowledge of actual flooding in a particular location. Plaintiffs' argument first fails because it extrapolates that any NHDOT employee, or NHDOT contractor, having actual notice satisfies RSA 230:80, I(b). However, RSA 230:80, I(b) requires that the Commissioner have actual notice, and there is nothing to suggest that any employee, or even more so any hired contractor, with generalized knowledge would satisfy this actual notice prong. Plaintiffs' argument next fails because this Court has already rejected the notion that NHDOT is on notice of highway insufficiencies based on the State's broad responsibility for highway maintenance.

In the case of *Bowden*, this Court considered and rejected the "naked legal conclusion that the State must have had notice based on the state's responsibility for highway maintenance." *Bowden v. Commissioner, New Hampshire Dept. of Transp*., 144 N.H. 491, 499 (1999). The *Bowden*

plaintiff was injured when his motorcycle encountered the surface of a storm drain that was four inches below grade which caused him to lose control of the motorcycle. *Id*. at 492. The *Bowden* plaintiff alleged that the "commissioner and his subordinates had a duty to exercise care in designing, constructing, inspecting, and maintaining the public ways to ensure that they are in a passable condition" and that "the commissioner knew or should have known the location and nature, in specific terms, of the insufficient condition and defect existing in the highway." *Id*. The lower court (*Lynn*, J.) dismissed the writ on the basis that "an assumption that the [department of transportation] possessed actual notice through routine maintenance and repair of the roadway" does not comport with RSA 230:80, II. *Id*. at 493. In the amended writ, the *Bowden* plaintiff alleged that the State conducts regular and routine visual inspections of all portions of the turnpikes, and that as a result of these routine inspections, the State had notice and knowledge of the insufficient condition and defect in the highway. *Id*. The lower court (*Barry*, J.) again dismissed the writ for failing to specify the manner in which the State received actual notice of the defect in the storm drain and the conduct of the State which constituted gross negligence or bad faith. *Id*. This Court affirmed the dismissal on the basis that plaintiff's theory wrongly assumes that because the reported defect must have existed for some period of time, the state would, in the course of its construction, inspection, maintenance, and repair functions on public highways, have obtained either actual or constructive notice of the defect. *Id*. at 499.

Here, the Plaintiffs attempt to argue a theory that is nearly identical to the faulty theory in *Bowden*. In the Complaint, Plaintiffs argue that

NHDOT "had the affirmative duty to maintain the highway in a reasonably safe condition, and to repair any defect or known hazards." App. 25. Much like the general duty of care and ordinary negligence standard that was rejected in *Bowden*, Plaintiffs' argument that NHDOT owed a general duty of care must be rejected here. On appeal, Plaintiffs further argue that, because NHDOT was involved with its contractors on the rehabilitation project, and inspections for drainage functionality did not occur, there was a foreseeable hazard of insufficiency that NHDOT knew about. App. 44-45. Plaintiffs confuse general supervision over construction activities performed by contractors with an intentional act of an NHDOT employee, and then further conflate a generic understanding of how drainage structures could flood with knowledge of actual flooding in a particular location. Just as the *Bowden* plaintiffs were unable to prevail on a theory that general maintenance supervision met the actual notice and gross negligence requirements of RSA 230:80, Plaintiffs cannot prevail on a theory that general construction oversight meets the notice and/or knowledge requirements of RSA 230:80.

III. THE APPLICABILITY OF RSA 228:5-A WAS NOT RAISED WITH THE LOWER COURT, AND IS THEREFORE NOT PRESERVED FOR APPEAL, NOR DOES IT CONFER LIABILITY UPON NHDOT.

On appeal, for the first time, Plaintiffs argue that RSA 228:5-a required NHDOT to inspect the catch basins. AB 44-45. Plaintiffs appear to argue that RSA 228:5-a created duty to inspect that was not performed. "This court has consistently held that [it] will not consider issues raised on appeal that were not presented in the lower court." *LaMontagne Builders v.*

Bowman Brook Purchase Group, 150 N.H. 270, 274 (2003). "This requirement is designed to discourage parties unhappy with the trial result [from] comb[ing] the record, endeavoring to find some alleged error never addressed by the trial judge that could be used to set aside the verdict." *Id*. Because the applicability of RSA 228:5-a was not previously raised, it is improper to consider it at this juncture.

Beyond the preservation issue, RSA 228:5-a is inapplicable to an inquiry into NHDOT's liability arising out of the construction, maintenance, or repair of a highway. RSA 228:5-a is part of the chapter titled "Administration of Transportation Laws," which pertains to the administrative aspects of contracting, funding, and working with NHDOT. RSA 228:5-a provides several ways in which performance on State transportation projects can be reviewed. It does not, however, provide any mechanism for a third party – who is neither the State, the contractor, nor the subcontractor - to seek damages or maintain a cause of action against NHDOT for a perceived failure to inspect a State transportation project. Rather, liability arising out of construction, maintenance, or repair of highways – i.e., the subject of the State transportation contract implicated in this lawsuit – is governed exclusively by RSA 230:78-82.

CONCLUSION

For the foregoing reasons, this Court should affirm the superior court's order dismissing the single claim against NHDOT.

NHDOT requests oral argument to be presented by Assistant Attorney General Emily Goering.

Respectfully submitted,

STATE OF NEW HAMPSHIRE
DIVISION OF MOTOR VEHICLES

By its attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

X, X, 2022

/s/ *Emily C. Goering*
Emily C. Goering, Bar No. 268497
Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3675

CERTIFICATE OF COMPLIANCE

I, Emily C. Goering, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately XXXX words, excluding the table of contents and table of authorities, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

X, X, 2022

/s/ *Emily C. Goering*
Emily C. Goering

CERTIFICATE OF SERVICE

I, Emily C. Goering, hereby certify that I am filing this brief electronically and that a copy is being served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system.

X, X, 2022

/s/ *Emily C. Goering*
Emily C. Goering