

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

JUNE SESSION

Case No: 2022-0101

ANDREW SZEWCZYK & A.

V.

CONTINENTAL PAVING, INC. & A

BRIEF FOR THE PETITIONER

**Mark D. Morrissette, Esq., Bar #10033
McDOWELL & MORRISSETTE, P.A.
282 River Road
P.O. Box 3360
Manchester, NH 03105
(603) 623-9300**

	Page
CONCLUSION.....	46
CERTIFICATE OF SERVICE.....	48
REQUEST FOR ORAL ARGUMENT.....	49
RULE 16 (3) (I) CERTIFICATION.....	50
CERTIFICATE OF WORD LIMIT.....	50

TEXT OF RELEVANT AUTHORITIES & STATUTES

Page

New Hampshire Constitution, Part 1, Art. 20

In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed \$1,500 and no title to real estate is involved, the parties have a right to a trial by jury. This method of procedure shall be held sacred unless, in cases arising on the high seas and in cases relating to mariners' wages, the legislature shall think it necessary to alter it.

31

New Hampshire R.S.A. 228:5-a:

The performance of contracts for all state transportation projects shall be inspected to assure compliance with the plans and specifications. The department shall require inspection service by one of the following methods: (a) by the registered architect or professional engineer or his representative, (b) by qualified personnel of a professional construction company, or (c) by personnel of the department of transportation.....

15, 44, 45

New Hampshire R.S.A. 230:78

I. Whenever any class I or class II highway or highway bridge in the state shall be insufficient, any person may give notice of such insufficiency to the department of transportation. The notice shall set forth in general terms the location of such highway or highway bridge, and the nature of such insufficiency.

II. For purposes of this subdivision, a highway or bridge thereon shall be considered "insufficient" only if:

(a) It is not passable in any safe manner by those personal or vehicles permitted on such highway or bridge thereon; or

(b) There exists a safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway or highway bridge at posted speeds in obedience to all posted regulations, and in a manner which is reasonable and prudent as determined by the condition and state of repair of the highway or highway bridge, including any warning signs, and prevailing visibility and weather conditions..... 44

New Hampshire R.S.A. 230:80:

I. The department of transportation shall not be held liable for damages in an action to recovery for personal injury or property damage arising out of its construction, maintenance, or repair of public highways and highway bridges unless such injury of 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.

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..... 12, 25, 42, 43, 44, 45, 46

New Hampshire R.S.A. 231:92: Liability of Municipalities, Standard of Care:

I. A municipality 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 sidewalks constructed thereupon unless such injury or damage was caused by an insufficiency, as defined by R.S.A. 231:90, and:

(a) The municipality received a written notice of such insufficiency as set forth in R.S.A. 231:90, but failed to act as provided by R.S.A. 231:91; or

(b) The selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to R.S.A. 231:90, and were 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 a municipal officer or 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.....

45

New Hampshire R.S.A. 491:8-a, III:

III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages..... 26

New Hampshire R.S.A. 507:7-e: Apportionment of Damages:

I. In all actions, the court shall:

(c) RSA 507:7-e, I(b) notwithstanding, in all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of joint and several liability..... 35

TABLE OF CASES & OTHER AUTHORITIES

	Page
<u>Boynton v. Figueroa</u> , 154 N.H. 592 (2006).....	38
<u>City of Dover v. Imperial Casualty & Indemnity Company</u> , 133 N.H. 109 (1990).....	45, 46
<u>Corso v. Merrill</u> , 119, N.H. 647 (1979).....	28
<u>Emery v. Tilo Roofing Company</u> , 89 N.H. 165 (1937).....	31
<u>Estate of Gordon-Couture v. Brown</u> , 152 N.H. 265 (2005).....	46
<u>Estate of Joshua T. & A. v. State of New Hampshire</u> , 150 N.H. (2003).....	32
<u>Goodwin v. James</u> , 134 N.H. 579 (1991).....	32, 35
<u>Grady v. Jones Lang Lasalle Construction Company, Inc.</u> , 171 171 N.H. 203 (2018).....	29
<u>Hungerford v. Jones</u> , 143 N.H. 208 (1998).....	29
<u>Iannelli v. Burger King</u> , 145 N.H. 190 (2000).....	26
<u>Kenneth Boisvert and Elizabeth Boisvert v. Romuald Sluyters</u> , <u>M.D., New Hampshire Orthopaedic Surgery, P.A., et al</u> , 2006 WL 4386456 (N.H. Super., Hillsborough County, Mangones, J. October 4, 2006).....	35
<u>Harrington v. Brooks Drugs, Inc.</u> 148 N.H. 101 (2002).....	43
<u>Kierstead v. Betley Chevrolet-Buick, Inc.</u> , 118 N.H. 493 (1978).....	31
<u>Langevin v. Twin State Gas & Electric</u> , 81 N.H. 446 (1925)...	28
<u>Manchenton v. Auto Leasing Corp.</u> , 135 N.H. 298 (1992).....	28
<u>Palsgraf v. Rhode Island Railroad</u> , 248 N.Y. 339, 162 N.E. N.E. 99 (1928).....	28
<u>Plaisted v. LaBrie</u> , 165 N.H. 194 (2013).....	43

	Page
<u>Remsburg v. Docusearch</u> , 149 N.H. 148 (2003).....	29
<u>Rowe v. Public Service Co. of NH</u> , 115 N.H. 397 (1975).....	33, 34, 35
<u>Russell v. Whitcomb, Inc.</u> , 100 N.H. 171 (1956).....	29
<u>Smith v. Company</u> , 97 N.H. 522 (1952).....	33
<u>Sorenson v. City of Manchester</u> , 136 N.H. 692 (1993).....	43
<u>Stachulski v. Apple New England, LLC</u> , 171 N.H. 158 (2018)..	37, 41, 46
<u>State v. Newman</u> , 148 N.H. 287 (2002).....	42
<u>White Oak Farm, Inc. v. NHDOT</u> , 2008 WL 5683396, p. 1 (N.H. Super., Hillsborough County, McHugh, J., September 19, 2008).....	46
<u>Williams v. O’Brien</u> , 140 N.H. 595 (1995).....	43
<u>Ybarra v. Spangard</u> , 154 P.2d 687 (Cal. 1944).....	35

OTHER AUTHORITIES

New Hampshire Civil Jury Instructions, § 4.6.....	31
New Hampshire Department of Transportation’s Highway Design Manual, Ch. 6, p. 6-7 (2007).....	17, 29
W. Prosser, Handbook of the Law of Torts, 212 (4 th Ed. 1971))...	31
New Hampshire Department of Transportation Standard Specification for Road and Bridge Construction, 105.01, 105.10 (2016).....	17, 43
New Hampshire Rules of Evidence, 702 (b-d).....	37, 38
New Hampshire Department of Transportation Regulation TRA 502.12	44

QUESTIONS PRESENTED

I. WHETHER SUMMARY JUDGMENT WAS WRONGLY GRANTED TO THE DEFENDANT CONTRACTORS, BASED ON FINDINGS OF THE HIGHWAY FLOODING THAT OCCURRED SOON AFTER THE RECONSTRUCTION TO THE HIGHWAY DRAINAGE SYSTEM, BUT THE SYSTEM WAS NOT TESTED OR INSPECTED, AND WHERE THE COURT DETERMINED THE LIKELY CAUSE OF THE FLOODING, THOUGH THE TESTIMONY WAS CONFLICTING?

(This issue was preserved in the Plaintiffs' Objection to Continental's Motion for Summary Judgment. Apx. V at 219-236; Plaintiffs' Objection to Bellemore's Motion for Summary Judgment, Apx. III at 249-267; and, in the Plaintiffs' Motion to Reconsider the Grant of Summary Judgment. Apx. VI at 153-162.)

II. WHETHER THE SUPERIOR COURT WRONGLY STRUCK THE PLAINTIFFS' ENGINEERING EXPERTS WITHOUT FOLLOWING THE REVIEW STANDARDS EXPLAINED IN STACHULSKI v. APPLE NEW ENGLAND, 171 N.H. 158, 164 (2018), SUCH THAT THE COURT CHALLENGED THE FINDINGS AND OPINIONS OF THE ENGINEERS AS OPPOSED TO ASSESSING THE RELIABLE METHODOLOGY USED BY THE EXPERTS, AND THE COURT MADE FACTUAL DETERMINATIONS BASED ON TESTIMONY THAT WAS CONTROVERTED?

(This issue was preserved in the Plaintiffs' Objections to Continental Paving's and Bellemore Catch Basin Maintenance's Motions to Strike the opinions of the Plaintiffs' consulting engineer, Thomas Broderick, Apx. V at 351, 352-369, and 447; and, with the Plaintiffs' Motion to Reconsider the Court's Order on the Motion to Strike, Apx. VI at 31, 33-45.)

III. WHETHER THE SUPERIOR COURT WRONGLY GRANTED THE STATE'S MOTION TO DISMISS WHERE THE COURT DETERMINED THAT THE STATE DID NOT HAVE NOTICE OF AN INSUFFICIENCY UNDER R.S.A. 230:80 EVEN THOUGH THE CLAIMS AGAINST THE STATE WERE BASED ON THE ACTUAL ACTIONS AND OMISSIONS OF THE STATE'S ACTORS WHERE THE STATE AND ITS CONTRACTORS RENOVATED A HIGHWAY DRAINAGE SYSTEM; FAILED TO TEST OR INSPECT THE FUNCTIONALITY OF THE DRAINAGE SYSTEM; AND, FLOODING RESULTED WHICH THEN CAUSED A VERY SERIOUS CAR CRASH?

(The issue was preserved through the Plaintiffs' Objection to the NH Department of Transportation's Motion to Dismiss at Apx. 1 at 36-39; and at the Plaintiffs' Motion to Reconsider the Court's Order on the NH Department of Transportation's Motion to Dismiss, Apx. 1 at 121-130.)

STATEMENT OF THE CASE

The Plaintiffs, Andrew Szewczyk and Marian Szewczyk, brought negligence claims against the Department of Transportation (NHDOT), Continental Paving, Inc. (Continental) and Bellemore Catch Basin Maintenance (Bellemore) where the Plaintiffs allege that the Defendants, collectively, negligently undertook a repaving and drainage system rehabilitation project associated with the F.E. Everett Turnpike (turnpike) in Nashua, New Hampshire. The work on the drainage system took place over several months during 2016. The construction ended on October 4, 2016, and a rainstorm occurred on October 21, 2016 which caused flooding. Due to the flooding, the Plaintiff suffered great injuries.

After the negligence Complaint was filed, the NHDOT filed a Motion to Dismiss. The State filed its motion before any discovery was completed. The Plaintiffs were able to gain significant documentation and information through Right-To-Know requests to the NHDOT and to the Department of Safety (NHDOS). From the documents produced by the State and through depositions, it was learned that there were no prior or subsequent reports of flooding or accidents due to flooding in the area where the Szewczyk accident occurred. With regard to the construction, the Defendants failed to test the drainage system after significant work was completed on the catch basins.

The Superior Court granted the NHDOT's Motion to Dismiss relying on immunity within R.S.A. 230:80 and the Court denied the Plaintiffs' Motion to Reconsider the Dismissal. Apx. I at 148.

The construction defendants filed Motions for Summary Judgment. The appropriate objections were filed. The construction defendants also filed Motions to Strike the Expert Opinions of Thomas F. Broderick, P.E., a highway engineer. The appropriate objections were filed. The Superior Court granted the construction defendants' Motions to Strike the engineering opinions of Thomas F. Broderick, P.E., and the Court granted the Defendants' Motions for Summary Judgment. Apx. VI at 20; 131. As part of the Order on the Motions for Summary Judgment, the Superior Court, *sua sponte*, struck the engineering opinions of a second highway engineer, a hydrologist, Richard G. Murphy, P.E. *Id.* at 141-146. Engineers Broderick and Murphy worked together to assess the cause of the flooding on October 21, 2016. Apx. III at 323-343.

The Plaintiffs filed the appropriate Motions to Reconsider and the Superior Court sustained the Dismissal Order, Orders on experts, and the Summary Judgment Order. Apx. I at 148; Apx. VI at 252. The Superior Court did reconsider one issue relating to the effect of insurance coverage on the State's claim of immunity. Apx. I at 150.

STATEMENT OF FACTS

On October 21, 2016, at approximately 9:00 p.m., the Plaintiff, Andrew Szewczyk, was operating a motor vehicle southbound on the F.E. Everett Turnpike (turnpike) in the City of Nashua, New Hampshire, near southbound mile marker 3.2, when Mr. Szewczyk encountered significant flooding in the left-hand travel lane of the highway. Apx. V at 190; 192-193. Andrew Szewczyk was traveling with his father, Marian Szewczyk. *Id.* As Andrew Szewczyk encountered the flooded highway, his motor vehicle hydroplaned and it left the highway. *Id.* Soon after, a second motor vehicle, following the same path, drove into the flooded highway, hydroplaned, and then forced the Szewczyk vehicle into the Plaintiffs causing great injury to the Plaintiffs. *Id.* at 192-193.

The police found that the turnpike was flooded due to a clogged catch basin. Apx. V at 193; 197.

As of October 21, 2016, Continental Paving (Continental) was repaving the turnpike pursuant to a contract with the New Hampshire Department of Transportation (NHDOT). Apx. III at 76. Concurrently, Continental, the NHDOT, and Bellemore Catch Basin Maintenance (Bellemore) were involved with the central turnpike drainage rehabilitation project which included alterations, modifications and adjustments to the catch basins of the highway; the catch basins were located in the middle of the highway with multiple lanes in each direction at the location of the crash. Apx. III at 76-78; 92; 136-140 (contract); Apx. V at 190-197 (Police Reports).

While the NHDOT had a contract with Continental to undertake the repaving work and the drainage system rehabilitation, the NHDOT was the owner, the architect for the project, and the field engineer for the project. Apx. I at 25, ¶31-33; Apx. III at 116 (Continental's Interrogatory Answers); Apx. II at 126, 143 (Primary Contract); Apx. II at 158 (Subcontract). The NHDOT was mandated by statute, that being R.S.A. 228:5-a, to inspect all transportation projects to assure compliance with the plans and specifications. The NHDOT's engineer had the authority to suspend any construction work due to unsafe conditions and the NHDOT was to decide the quality and acceptability of the work. NHDOT Standard Specifications for Road and Bridge Construction, No. 105.01; 105.10.

The NHDOT had an active role with the daily work responsibilities on the project, including supervisory responsibilities. Apx. III at 116. Two NHDOT employees, David Simonella and Dennis Kelly, were involved with the work. *Id.*

In the NHDOT's Highway Design Manual, Chapter 6, applicable to drainage infrastructure, any ponding on a roadway must "... be confined to a width and depth that will not affect traffic flow." Apx. III at 388, 390.

Bellemore did the cleaning work of the catch basins after the rehabilitation had been completed. Joshua Moss testified that Bellemore only cleaned the catch basins that they were told to clean by Continental; not all catch basins were cleaned; and the State was supposed to do the inspection work. Apx. VI at 239 (Moss Deposition, p.p. 51-52); *See*, Apx. III at 117 (Continental Interrogatory Answer #5).

The resurfacing work involved cold planing (grinding) the pavement which created loose aggregate and required the use of street sweepers to

clean up the milled surface and surrounding area. Apx. III at 118 (Interrogatory Answer #7). Street sweepers were necessary on multiple dates. Apx III at 117. The catch basins still required cleaning after the work was done. Apx. III at 201-202.

As part of the drainage rehabilitation work, the catch basins, including the frames and grates of the drainage system, were removed after the cold planing. Any existing polyethylene liners were also removed. Apx. III at 117, 119, 120, 121, 122. If a polyethylene liner was in place, the liner was removed along with the mortar and brick that served as the foundation for the frame and grate. *Id.* A liner was reinserted in each catch basin during the rehabilitation work. Apx. III at 122. A liner was reused if it was in good condition or a new liner was installed. Apx. III at 121. After a liner was installed, and after the frames and grates were adjusted to grade, the new paving was completed. Apx. III at 117. The catch basin grates were then opened again and the debris from the construction activity was removed by a vacuum truck, pressurized hoses and hand tools. *Id.* Apx. III at 202 (Tsoukalas Deposition).

An employee of the NHDOT, Mark Bolduc, testified that the paving operations create debris which can clog the catch basins. Apx. V at 94, lines 21-23. Another NHDOT employee, Christopher Tsoukalas, explained that the catch basins had to be cleaned due to debris left by the repaving work. Apx. III at 201, lines 5-17). In fact, Mr. Tsoukalas described that “what happens is when the contractors do work on the highway, sometimes they drop their hot-top into the storm drains which screws everything up.” *Id.*, at 202, lines 7-10.

In spite of the effect of the milling and paving operations, not every catch basin was cleaned; rather, the cleaning was sporadic. Apx. III at 183, lines 19-23, p. 184, lines 1-18. Mr. Moss confirmed that the need to clean the catch basins was due to the fact that debris fell into the catch basins. *Id.* at 182, lines 3-7. Mr. Moss explained that debris removed from the catch basins included “pieces of rock, bricks if they fell in, concrete – not concrete, but asphalt . . . It wasn’t any large amounts of leaves or any of that stuff. . . .” *Id.*, lines 11-18.

Joshua Moss explained that to clean the catch basins, a large metal vacuum pipe was used to bang and break up the asphalt that fell into the catch basin. Apx. III at 185, lines 21-23; 1-2. There were times when a worker had to go down into a catch basin to break up debris and the person would have to pass through the 20-inch opening (through the polyethylene liner) to get down into the catch basin requiring the use of a rope and pulley. *Id.* at 186, lines 1-10; 3-23.

Joshua Moss testified that the bottom of the liners can break off when someone has to go down into the catch basin. Apx. V at 295, lines 19-23; at 296, lines 1-14.

Christopher Tsoukalas, a NHDOT employee who assisted Bellemore with the cleaning of the catch basins in 2016, testified that the metal vacuum pipe would necessarily contact the “plastic” (polyethylene) liners. Apx. III at 216, lines 21-23; 1. After installation of the liners, new or reused, the liners were subject to hammering or chiseling if asphalt had fallen down through the metal grate onto the liners. Apx. III at 216, lines 14-19; 3-9.

The catch basin grates and frames, along with the liners, were removed and reinstalled by a company owned by Luis Martinez. Apx. III at 220-228. During the removal process, Mr. Martinez explained that the liners get damaged and then they can become separated where the downspout of the liner separates from the top of the liner. Apx. III at 221-223. The Superior Court acknowledged that liners can break as a result of the construction and reconstruction efforts. Apx. VI at 139 (Court Order, p. 9). Photographs were submitted showing several liners to be broken and separated on another project involving Continental. Apx. VI at 90-104. Mr. Tsoukalas testified that if the bottom of the liner broke free, it would need to be retrieved to avoid a clog. Apx. III at 212 (lines 5-19.) Mr. Moss described that at his new job with the Town of Bedford, Continental supplied liners that would break where the cylinder would separate and the cylinder could float as it was plastic. Apx. VI at 238, (p. 39, lines 9-18.)

The Plaintiffs hired two highway engineers, Thomas Broderick and Richard Murphy, who had long careers with the Department of Transportation in Massachusetts. Engineers Broderick and Murphy concluded, after methodically excluding other potential causes of the blockage within the catch basin, that a broken polyethylene liner was the only object large enough to block the outlet pipe within the catch basin. Apx. V at 198, 210-218 (Reports of Broderick and Murphy). They ruled out other causes for the flooding. *Id.*

Thomas Broderick and Richard Murphy, a hydrology expert, determined that the turnpike's drainage system was designed and working properly with no history of flooding in the area of the Szewczyk crash. *Id.* The engineers found that the only reasonable explanation was that there

was a blockage within the basin which was reasonably attributed to a defective new polyethylene liner or through a damaged liner (e.g., chiseling, cleaning or removal). *Id.* at 213-214, 218.

On the evening of October 21, 2016, as a result of the flooded highway, the NHDOT sent two employees, Joseph Maguire and Mark Bolduc, to assist with the emergency personnel. Apx. VI at 165, lines 21-23; 166, lines 16-23. Mr. Bolduc and Mr. Maguire were called in for flooding and an accident around Exit 4, that there was a disabled fire truck in the left lane, and that the employees assisted police with traffic control and opened various catch basins. *Id.* at 166, 169. Importantly, the NHDOT documentation did not explain the source of the clogging of the catch basin or why there was flooding. Apx. V at 118, 119. NHDOT documents show that Maguire and Bolduc worked for a total of three hours. *Id.* After traffic control, Mr. Maguire and Mr. Bolduc spent the rest of the three hours opening catch basins and outfalls and inlets of the catch basins. Apx. VI at 172 lines 13-17. Mr. Maguire explained that cleaning the outfalls and inlets involved cleaning the pipes where the drainage pipes terminate. *Id.* The cleaning of the outfalls and inlets has a focus that does not relate to the surface of a catch basin.

After October 21, 2016, on an annual basis, Bellemore cleaned the catch basins on the turnpike beginning in April 2017 through August 22, 2019. Apx. VI at 201-234. The annual cleanings involved catch basin cleaning and pipe jetting to the outlet and inlet pipes. *Id.*

No documentation has been produced to explain what was cleaned or removed from the catch basins on October 21, 2016 or, during the subsequent annual cleanings.

Before the accident in issue, Bellemore last cleaned the catch basins near the scene of the accident on October 4, 2016. Apx. II at 79.

Following the Defendants' work on the catch basins, and after the milling and grinding, no one conducted any inspection or assessment of the functionality (drainage) of the catch basins. Bellemore has affirmed that it did not test, assess, inspect or clean any outlet pipe or inlet pipe within each catch basin and that they only cleaned the basins. Apx. III at 78; 109-110 (Bellemore's Interrogatory Answers 15, 17, 23). The NHDOT confirmed that there were no hydraulic studies done after the rehabilitation work. Apx. III at 79; 113-114. Continental stated that it did not do any testing or assessments to check the functionality of the catch basins. Apx. III at 79; 122 (Continental's Answers to Interrogatories, #22, 23). Continental did not test or assess the outlet or inlet flows to or from each catch basin. *Id.* at 122.

Looking for reports of prior flooding, the Plaintiffs' engineer reviewed documents from the NHDOS and the NHDOT about incidents involving the area where the Mr. Szewczyk's accident occurred, including State Police Dispatch Logs and Reports, NHDOT work reports and shed logs. Apx. V at 276-277 (Broderick Report). Mr. Broderick confirmed that there were no reports which evidenced flooding. There were no such reports before or subsequent to the accident. *Id.* Several NHDOT witnesses and employees of the Defendants testified that there was no historical evidence of flooding in the area where the Szewczyk accident happened, and no such occurrences after the accident. Apx. V at 31-32; 117 (Maguire Deposition, lines 7-11); *Id.* at 155 (Tsoukalas Deposition, lines 5-10); *Id.* at

168 (Martinez Deposition, lines 18-23); *Id.* at 169, lines 1-5); *Id.* at 68 (Fagan Deposition, lines 19-23); *Id.* at 69, lines 1-5).

The Plaintiffs' engineers assessed the functionality of the drainage system by reviewing the original design plans and as-built plans for the highway. Apx. V at 209 (Broderick Report). The engineers concluded that an outlet pipe within a catch basin (near the Szewczyk accident scene) was clogged. *Id.* at 214; 218 (Murphy Report). The blockage occurred within the catch basin and the most likely cause was a broken or displaced liner. *Id.* at 214. Mr. Broderick explained that the flooding was caused by a blockage to the outflow pipe within the catch basin and the only item large enough to block or partially block the outlet pipe (15-inch diameter) had to be within the structure. *Id.* Mr. Broderick further explained that the only object within the structure of a sufficient size would be the cone of the liners which would have come dislodged due to a manufacturing defect, or a disturbance to the cone from external forces such as the cleaning and adjustment work described by the Defendants' employees. *Id.* Mr. Broderick concluded that the plastic liner had more buoyancy than water, so it would float up to the level of the pipe and would partially block the pipe causing a water backup onto the roadway. *Id.*

The Superior Court gave credence to the notion that the flooding on the turnpike was the result of surface debris it determined to be common. Apx. VI at 136-138. The Court relied on portions of the Trooper's testimony and testimony from the DOT employees. *Id.*

Joseph Maguire was the second of two NHDOT employees to respond to the general area of the accident. Mr. Maguire spent the first 45 minutes a significant distance away from the flooding. Mr. Maguire only

approached the area of the accident after he did traffic control. *Id.* When he approached the area of the flooding, he found that the roadway was still flooded with six inches of water in the breakdown lane and in the adjacent lane. Apx. VI at 169, lines 3-13. Mr. Maguire did not see the water level at the time of the accident. *Id.* at 169, lines 16-23. Curiously, the Court relied upon Mr. Maguire's testimony to conclude that the flooding abated in about five minutes and that there was a whirlpool going on with the water dropping rapidly. Apx. VI at 138. In reality, Mr. Maguire was not in the area of the flooding at the time of the accident and not until the accident scene had cleared out. *Id.* at 175-177, p. 175, lines 20-23, p. 176, lines 1-23, p. 177, lines 1-14.

The Superior Court relied on the testimony of Trooper Fagan to support the notion that surface debris was removed by the NHDOT employees. However, Trooper Fagan testified that he did not see any debris on the catch basin on the evening of the accident. Apx. VI at 183; (Fagan Deposition); Apx. V at 342; Apx. VI at 182, lines 12-15; p. 181, lines 22-23. Also, in the 12 months prior to the October 21, 2016, Trooper Fagan was not aware of any crash due to water in the same area. Apx. VI at 184, lines 9-17. The Superior Court suggested that Trooper Fagan testified that flooding was common at the scene of the accident; this was not so. The Trooper spoke, historically, that some ponding could occur near catch basins.

To evaluate the cause of the flooding, the Superior Court relied on the testimony of Mark Bolduc, another NHDOT employee. Mr. Bolduc testified that he had no memory of his response to the October 21, 2016 crash in the area of Exit 4. Apx. III at 144, lines 3-6, 18-19; *Id.* at 145,

lines 5-8, 20-22; *Id.* at 146, lines 13-17. Mr. Bolduc was unequivocal that he had no memory as to what he did on October 21, 2016. Apx. VI at 196, lines 16-17. The Superior Court misapplied Mr. Bolduc's historical testimony about his usual practices and procedures; but, he did not have any memory as to what he did on the evening of the crash. Mr. Bolduc did share that naturally occurring debris, like foliage, would not impede catch basins in the area of the Szewczyk crash. Apx. VI at 193, lines 3-8. Mr. Bolduc also explained that it was part of his usual work responsibilities to inspect the catch basins on a weekly basis and to inspect the catch basins on the day that a storm is forecasted to remove any debris. Apx. VI at 199 (Bolduc Deposition, lines 11-23; *Id.* at 200, lines 1-22.) Mr. Bolduc testified, as did his co-workers, that if a storm was forecasted, the catch basins were inspected during the workday to remove any debris and this is what would have occurred on October 21, 2016. Apx. V at 100, lines 1-13.

The Superior Court's suggestion that flooding was common in the area of the Szewczyk accident was contrary to the evidence. Joshua Moss testified that flooding did not occur near Exit 4 in Nashua, New Hampshire. Apx. VI at 36, lines 16-23; at 37, lines 1-5. NHDOT employee Christopher Tsoukalas never saw flooding where the Szewczyk accident occurred. Apx. VI at 241, lines 5-12. Joseph Maguire, the NHDOT employee who responded to the scene of the accident, testified that he had no memory of any other accident that may have been contributed to by flooding at the same location. Apx. VI at 178-179, p. 178, lines 15-23; p. 179, lines 9-13. Luis Martinez, the gentleman who was involved with the reconstruction of the catch basins, testified that he never saw highway flooding near Exit 4

on the turnpike before or after the October 21, 2016 crash. Apx. VI at 244-245, p. 244, lines 18-21; p. 245, lines 1-7.

SUMMARY OF ARGUMENT

The Superior Court's Order on the NHDOT's motion to dismiss erroneously relied on R.S.A. 230:80. This statute applies to circumstances where the NHDOT does not have knowledge or notice of a hazard. The Plaintiffs' Complaint detailed that the NHDOT created the highway hazard which caused highway flooding through its work on the construction project. The NHDOT failed to test, to assess, and to inspect the drainage system which led to the flooded highway; the NHDOT was obligated to inspect the construction work pursuant to R.S.A. 228:5-a and NHDOT regulations and specifications.

The Superior Court wrongly granted the construction defendants' Motions for Summary Judgment. As part of the summary judgment analysis, the Superior Court wrongly took issue with and evaluated contested facts.

The evidence well supported that the NHDOT had employees at the accident scene soon after the accident and they undertook remedial efforts, but they did not document what was done or how it was done; however, the testimony from the NHDOT witnesses supported the Plaintiffs' claims that the flooding occurred from causes other than surface debris. The Superior Court wrongly suggested that the roadway flooding was caused by roadway debris. The notion that roadway debris caused the flooding was strongly contested.

The Superior Court wrongly barred the opinion testimony from Thomas F. Broderick, P.E. and Richard G. Murphy, P.E. The Superior

Court failed to limit its scrutiny to the engineers' methods; rather, the Superior Court determined facts to dismiss the analyses of the two engineers. The Superior Court's evaluation of the Motions to Strike was erroneous.

ARGUMENT

I. THE SUPERIOR COURT WRONGLY GRANTED SUMMARY JUDGMENT TO THE DEFENDANT CONTRACTORS, CONTINENTAL AND BELLEMORE, WHERE THE CONSTRUCTION WORK CAUSED A CATCH BASIN TO BECOME CLOGGED WHICH CAUSED SIGNIFICANT HIGHWAY FLOODING.

Summary judgment is appropriate when there are no genuine issues of material fact and only where the moving party is entitled to judgment as a matter of law. R.S.A. 491:8-a, III. In this case, each of the construction Defendants, Continental and Bellemore, filed motions for summary judgment which were granted by the Superior Court. The Superior Court concluded the Plaintiffs were unable to prove by a preponderance that one or both of the Defendants caused or substantially contributed to the condition that caused the flooding. Apx. VI at 148-149.

When considering motions for summary judgment, the Superior Court “. . . cannot weigh the contents of the parties' affidavits and resolve factual issues [citation omitted]. It must determine whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial. If so, summary judgment must be denied.” Iannelli v. Burger King, 145 N.H. 190, 193 (2000). “The reviewing court must consider the evidence in the light most favorable to the party opposing the motion giving

that party the benefit of all favorable inferences that may be reasonably drawn from the evidence.” *Id.* “While summary judgment can at times be a useful avenue to pursue in order to eliminate baseless claims . . . , trial courts must be wary of its application. . . .” *Id.* at 192. Summary judgment was not appropriate in this case; the cause of the flooding, in light of the Defendants’ construction activities, was, at best, a contested material dispute.

The construction work by Continental, the NHDOT and Bellemore included the repaving of the highway and reconstruction of the catch basins that were located within the turnpike. The work involved the milling of the preexisting pavement, the removal of the catch basins’ grates and frames, the removal of polyethylene (plastic) liners, the reconstruction of the same components, and the repaving. Continental worked with the NHDOT to complete the work.

Through a review of information and documentation produced by the NHDOT and the Department of Safety (NHDOS), there was no record of flooding either before or after the October 21, 2016 accident at the same location where the Szewczyk accident occurred. The Right-To-Know responses from the NHDOT and the NHDOS confirmed that there was not any previous or subsequent flooding at the location of the Szewczyk accident.

Several witnesses associated with the NHDOT, the investigating State Trooper, and an employee of Bellemore, testified that they had no memory or information about prior flooding. In the Superior Court’s Order, the Court seemingly adopted the position that flooding at the accident scene was commonplace; such a finding is contrary to the

evidence. *See*, Apx. VI at 136, 147. The Superior Court made findings that the flooding was attributable to roadway debris. *Id.* at 136-139; 147. Important to the Superior Court's assessment of the facts was the Court's reliance on portions of the testimony of Trooper Fagan and NHDOT employees, Joseph Maguire and Mark Bolduc. *Id.* The Court's assessment of the referenced testimony was incomplete and selective. Each of the referenced witnesses testified that there was no history of flooding in the area of the Szewczyk accident. *See*, Statement of Facts (SOF) at 11. Moreover, none of the witnesses testified that there was *debris* on the catch basin where the flooding occurred. SOF at 10, 12-14.

The NHDOT, along with its contractors, Continental and Bellemore, owed a duty of care to Andrew Szewczyk and Marian Szewczyk where the Defendants were involved with the reconstruction and rehabilitation of the drainage system of the turnpike. Where a defendant's conduct creates "some general probability of danger, the duty to anticipate it and give it attention arises according to the circumstances." Langevin v. Twin State Gas & Electric, 81 N.H. 446, 447 (1925). "The risk reasonably to be perceived defines the duty to be obeyed." Corso v. Merrill, 119, N.H. 647, 651 (1979) (*quoting*, Palsgraf v. Rhode Island Railroad, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928)). Persons owe a duty of care "only to those who are foreseeably endangered by their conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." Manchenton v. Auto Leasing Corp., 135 N.H. 298, 304 (1992). The "duty of care" and "foreseeability of risk" are inextricably bound together. *Id.*

A contractor is held to a general standard of reasonable care for the protection of third parties who may be foreseeably endangered by the contractor's negligence. *See, Russell v. Whitcomb, Inc.*, 100 N.H. 171, 173 (1956). A contractor who is hired by a municipality to complete construction work or improvements on a public way owes a duty of reasonable care to third parties who may be foreseeably endangered by the contractor's negligence. *Id.* Additionally, "all persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm." *Grady v. Jones Lang Lasalle Construction Company, Inc.*, 171 N.H. 203, 207 (2018) (*quoting, Remsburg v. Docusearch*, 149 N.H. 148, 153 (2003)). "The existence of a duty does not arise solely from the relationship between the parties, but also from the need for protection against reasonably foreseeable harm." *Id.* (*quoting, Hungerford v. Jones*, 143 N.H. 208, 211 (1998)). "Parties owe a duty to those third parties foreseeably endangered by their conduct with respect to those risks whose likelihood and magnitude make the conduct unreasonably dangerous." *Id.* (*quoting, Remsburg, supra*, at 153.)

In the case at hand, the defendant contractors, along with the NHDOT, were well aware of the users of the highway and they were well aware of the need for a functional drainage system, as confirmed by the nature of the rehabilitation of the drainage system on the turnpike. The NHDOT, in its Highway Design Manual, recognizes that ponding on a roadway must "be confined to a width and depth that will not affect traffic flow." NHDOT's Highway Design Manual, Ch. 6, p. 6-7 (2007). The contractors and the NHDOT were obligated to reasonably ensure that the turnpike did not flood as a byproduct of the resurfacing and rehabilitation

work done on the turnpike's drainage system. The evidence strongly supports that the area of the Szewczyk accident did not have a history of ponding or flooding; but, that flooding did occur on October 21, 2016, just after the conclusion of the work completed by Continental and Bellemore.

Additionally, testimony from the contractors' employees, along with employees of the NHDOT, demonstrated that the repaving activities, which generated debris, could clog the catch basins. NHDOT employee, Mark Bolduc, testified that the milling associated with repaving can create debris which can clog the catch basin. SOF at 7. Christopher Tsoukalas, another NHDOT employee, also testified that the catch basins had to be cleaned because of the debris left by Continental and that the hot top can fall into storm drains which "screws everything up." SOF at 7. Not one of the Defendants made any effort to test the catch basins in the area of the Szewczyk accident, or to assess or inspect the outlet or inlet pipes that carry the fluids contained within the catch basins. SOF at 10-11. In fact, Bellemore and Continental expressly indicated that they did no such testing and that it was not part of their contract with the NHDOT. *Id.* The NHDOT, in response to Right-To-Know requests, authored correspondence which confirmed that no hydraulic testing of the catch basins was completed as part of the construction work in issue. SOF at 11.

The Plaintiffs introduced evidence to support that the construction activities caused or contributed to cause a clog or blockage within the catch basin near Exit 4 on the turnpike. Also, opinions from two consulting engineer witnesses and significant sworn-to evidence from depositions and interrogatories, along with official reports and documents produced by the NHDOT and the NHDOS, well supported a reasonable finding that the

outlet pipe within the catch basin - in close proximity to the area of the Szewczyk accident – was blocked.

The Plaintiffs’ claims should have been reasonably presented to a jury. *See*, N.H. Const., Pt.1, Art. 20. In proving a negligence claim, a “...plaintiff [is] not bound to exclude all other possible causes. [] Negligence, like any other fact, may be proved by circumstantial evidence. This is evidence of one fact, or of a set of facts, from which the existence of a fact to be determined may reasonably be inferred. (*citing*, W. Prosser, Handbook of the Law of Torts, 212 (4th Ed. 1971)) . . . [P]hysical causation is not always provable by an eyewitness or a high-powered razzle-dazzle expert from M.I.T. The law in this State is that ‘as in the case of other questions of fact, a finding upon the issue of causation may be made as an inference from evidentiary facts.’” Kierstead v. Betley Chevrolet-Buick, Inc., 118, N.H. 493, 498 (1978) (*quoting*, Emery v. Tilo Roofing Company, 89 N.H. 165, 167 (1937)). *See also*, New Hampshire Civil Jury Instructions, § 4.6 (2022) (“circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. . .”).

The evidence demonstrated that the construction work created a flooding situation that did not exist prior to the Defendants’ construction work. The Defendants did not conduct inspections or assessments of the functionality of the drainage system after the work on the drainage system.

Several witnesses testified that the catch basin liners had a history of breaking and separating. Photographs from another Continental project showed numerous liners damaged, unraveled and wholly broken as part of the disassembling process of catch basins. Apx. VI at 90-104. NHDOT

employee Christopher Tsoukalas testified that during cleaning, the metal vacuum pipe contacts the downspout of the “plastic” liner. Apx. V at 29 (Tsoukalas Deposition, p. 151, lines 15-23, p. 152, line 1). Joseph Maguire testified that the liners hindered the use of the vacuum pipe because the top of the catch basin was not necessarily centered over the base of the catch basin. Apx. V at 29, lines 16-22. The contractor, Luis Martinez, who inserted the liners, testified that the liners can separate where the cone breaks away from the top. SOF at 8-9.

The Plaintiffs’ experts ruled out all known causes for the flooding of the catch basin in the area of Mr. Szewczyk’s motor vehicle crash with the sole remaining (probable) cause to be attributed to a separation of the liner. Apx. V at 210-218.

The Plaintiffs introduced reliable evidence that the construction work, including the milling, disassembly of the catch basins, assembling of the catch basins, and the repaving work, caused debris to go within the catch basins, along with the cleaning work, which caused the blockage of the outlet pipe. These facts, supported by deposition testimony and official documents associated with the construction work, reasonably supported the Plaintiffs’ claims. Even if there was a reasonable basis to dispute the facts alleged, the matter must be reserved to the triers of fact. *See, Goodwin v. James*, 134 N.H. 579, 585 (1991). Any factual contest regarding the evidence put forth by the Plaintiffs must be reserved to the trier of fact. *Estate of Joshua T. & A. v. State of New Hampshire*, 150 N.H. 405, 408 (2003).

The Superior Court suggested that the Plaintiffs’ argument was akin to the doctrine of *res ipsa loquitur*. Apx. VI at 151. The Court found that

the Plaintiffs did not meet any of the three prongs required to warrant a *res ipsa loquitur* jury instruction. *Id.*

The Superior Court's conclusion that *res ipsa loquitur* could not be satisfied was incorrect. *Res ipsa loquitur* is a doctrine relating to the introduction of circumstantial evidence to prove a civil claim. With *res ipsa loquitur*, a jury is allowed to find a particular occurrence, incident or cause which would warrant an inference of negligence. Rowe v. Public Service Company of NH, 115 N.H. 397, 399 (1975). For the doctrine of *res ipsa loquitur* to apply, it is necessary for the Plaintiffs to show: (1) the accident be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) other responsible causes are sufficiently eliminated by the evidence. *Id.* (citing, Smith v. Company, 97 N.H. 522, 524 (1952)).

The first element of the *res ipsa loquitur* doctrine requires that the accident be of a kind which ordinarily does not occur in the absence of someone's negligence. In this case, Right-To-Know responses from the NHDOT and to the NHDOS confirmed that there was no prior or subsequent report of an accident or flooding in the area where the Szewczyk accident occurred. The Plaintiffs' engineer, Thomas Broderick, reviewed all of the referenced historical incident reports associated with the turnpike, and Mr. Broderick confirmed that there were no prior or subsequent reports of accidents or flooding in the area of the Szewczyk accident. Apx. V at 207-208; 213-214. Additionally, Mr. Broderick reviewed the interrogatories and depositions of the Defendants' employees and agents and the witnesses confirmed that there was not any known

flooding at the location of the Szewczyk accident, neither before nor after the crash. *Id.* The evidence in this case well supports that the flooding did not occur but for the negligence of another; especially after the recent work on the drainage system, the damage to the liners, the debris put into the catch basins, and the failure to test the drainage system after completion of the work.

The second factor of *res ipsa loquitur* require that the accident be caused by an agency or instrumentality within the exclusive control of the defendant. Rowe, 115 N.H. at 399. The Superior Court concluded that the area of the flooding was not within the exclusive control of either Defendant. Apx. VI at 151-152. Contrary to the Court's finding, the NHDOT and the Defendant contractors, collectively, maintained control over the highway. Continental entered into a contract to complete the repaving work. Continental subcontracted with Bellemore to undertake the cleaning activities after the catch basins were rehabilitated. Luis Martinez also contracted with Continental where Mr. Martinez and his company were responsible for the disassembly and then reassembly of the catch basins, including the placement of the polyethylene liners. SOF at 8-9. The NHDOT was the owner of the highway and catch basins and it was the architect and field engineer for the project. The construction project was controlled by representatives of Continental and the NHDOT, including David Simonella and Dennis Kelly. Apx. V at 255.

The Defendants collectively had exclusive control of the highway and the catch basins during the construction project. The application of the doctrine of *res ipsa loquitur* is not precluded where there are multiple defendants who share responsibility for the cause of the accident. *See*,

Kenneth Boisvert and Elizabeth Boisvert v. Romuald Sluyters, M.D., New Hampshire Orthopaedic Surgery, P.A., et al, 2006 WL 4386456 (N.H. Super., Hillsborough County, Mangones, J., October 4, 2006), p. 2 (*citing*, Ybarra v. Spangard, 154 P.2d 687, 690 (Cal. 1944)). Apx. I at 40.

Analogously, New Hampshire law recognizes that where multiple parties have knowingly pursued or take part in a common plan or design resulting in harm, the parties are jointly and severally liable for any harm resulting therefrom. R.S.A. 507:7-e, I (c). Where there was a contract to complete construction work on the highway, with the NHDOT taking an active role in the construction, along with its contractors, the Defendants had exclusive control of the catch basins. Any factual assessment of “control” should be reserved to the jury. Goodwin, *supra*, at 22.

The third factor of the doctrine of *res ipsa loquitur* requires that the Plaintiffs demonstrate that: other responsible causes are sufficiently eliminated by the evidence. Rowe, 115 N.H. at 399. With regard to this third factor, the Plaintiffs’ consulting engineers, Mr. Broderick and Mr. Murphy, considered whether the highway was designed appropriately, whether the construction was consistent with the design plans, whether the rainfall on October 21, 2016 exceeded the capacity of the drainage system, whether there were other incidents of flooding before or after October 21, 2016, and whether surface debris would have likely caused or contributed to cause the flooding on the day of the Szewczyk accident. The engineers concluded that there was no other probable cause for the flooding but for a blockage within the catch basin that was likely from a broken, damaged or defective polyethylene liner. Apx. V at 281; 287 (Broderick and Murphy reports).

Mr. Broderick expressly incorporated the report of Richard Murphy, P.E., a hydraulic engineer, as a supplement to his own report where Mr. Murphy considered the 1994 drainage design analysis, the 1996 as-built construction plans, the hourly precipitation data during October 2016 and the plans and specifications of the inlet grates that covered the catch basins. *Id.* at 285-287. Both Mr. Broderick and Mr. Murphy concluded that the grates themselves would have prevented any debris or material, of a sufficient size, from getting within the catch basin itself and that the ultimate blockage occurred within the catch basin as opposed to outside of the catch basin or from surface debris. *Id.* at 283; 287.

Additionally, given the testimony of the NHDOT employees, there was no supporting evidence that the flooding on October 21, 2016 was caused by surface debris; no one documented surface debris and no one testified of any debris which blocked the catch basin. Importantly, if surface debris caused the significant flooding that was seen on October 21, 2016, such flooding would have been known to the NHDOT workers, the contractors and the State Police. The evidence was clear that there was no flooding before or after October 21, 2016.

Based on a totality of the evidence submitted to the Superior Court through multiple pleadings, other causes were reasonably and sufficiently eliminated by the evidence. The doctrine of *res ipsa loquitur* supports the inference of negligence that the Defendants, collectively, were responsible for the catch basin clogging. Aside from *res ipsa loquitur*, the evidence strongly supports the Plaintiffs' claims.

II. THE SUPERIOR COURT WRONGLY GRANTED THE DEFENDANTS' MOTIONS TO STRIKE THE ENGINEERING OPINIONS AS THE COURT SCRUTINIZED THE FINDINGS MADE BY THE ENGINEERS.

The Superior Court granted the Defendants' motions to strike the expert opinion of Thomas Broderick, P.E., Apx. VI at 20; Apx. VI at 73. Separately, the Superior Court struck the opinions of Richard Murphy, P.E. as part of the Court's analysis on the Defendants' motions for summary judgment. Apx. VI at 131; 140-145. The Superior Court scrutinized and questioned the scientific basis for the opinions put forth by the Plaintiffs' consulting engineers by challenging the factual findings made by the engineers. The Court was critical that Mr. Broderick nor Mr. Murphy undertook testing to assess the force needed to displace or relocate a portion of the polyethylene liner. Apx. VI at 23-30. The Superior Court's assessment of the opinions of Mr. Broderick and Mr. Murphy were contrary to the gatekeeping functions of the Superior Court with regard to the consideration of expert opinions. Stachulski v. Apple New England, LLC, 171 N.H. 158, 164 (2018).

New Hampshire Rule of Evidence 702 authorizes a qualified expert, by way of knowledge, skill, experience, training or education, to provide testimony in the form of an opinion if: the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. An expert's testimony must be based on sufficient facts or data; the testimony must be the product of reliable principles and methods; and the expert has to reasonably apply the

principles and methods to the facts of the case. N.H.R.Ev. 702 (b-d).

Expert testimony is required where the subject at issue is distinctly related to some science, profession or occupation as to be beyond the ken of the average lay person. Boynton v. Figueroa, 154 N.H. 592, 601 (2006).

In the case at bar, engineers Thomas Broderick and Richard Murphy assessed the functionality of the drainage system associated with the turnpike at the time of the Szewczyk crash on October 21, 2016. Thomas Broderick has highway design and highway drainage system experience. Similarly, Richard Murphy was an engineer who worked for the Department of Transportation in Massachusetts and he had a particular specialty in hydrology. Working together, they scrutinized all available evidence, including the design and as-built plans associated with the turnpike and drainage system, and any and all reports of flooding or incidents involving the same area where the Szewczyk accident occurred near Exit 4 on the turnpike. SOF at 10, 13-15, 28-29, 31.

Thomas Broderick and Richard Murphy considered any and all possible reasons or causes for the flooding that occurred on October 21, 2016 near Exit 4 where the Szewczyk crash occurred. They determined that the highway was designed properly and constructed properly prior to October 21, 2016. Knowing the components of a highway catch basin, and the details required for the proper function of catch basins, Mr. Broderick and Mr. Murphy concluded that external material (roadway debris) could not enter the catch basin grates to serve as an impediment or to clog the inlet or outlet pipes situated beneath the surface grate. Engineers Broderick and Murphy concluded that the outlet (outbound) drainage pipe within the catch basin became clogged which served to impede the flow of rain water

which, in turn, caused the significant flooding of the highway on October 21, 2016. The conclusions and analysis reached by Mr. Broderick and Mr. Murphy were based on their respective expertise in the design, functionality, construction and operation of highway catch basins.

Mr. Broderick offered a lengthy report which details his experience, education and relevant work history to support the conclusions he reached as to the cause of the flooding of the turnpike on October 21, 2016. Mr. Broderick's report was presented to the Superior Court. Apx. V at 198, 210-218. Mr. Broderick incorporated into his report an opinion paper by Richard Murphy. Mr. Murphy focused on the overall design capacity of the highway drainage system in the vicinity of the accident site to determine if the drainage system could accommodate the maximum hourly precipitation rate of the storm that occurred on the night of October 21, 2016. *Id.* at 216-218. Mr. Broderick and Mr. Murphy determined that the design of the highway drainage system could well handle the precipitation that occurred on October 21, 2016.

The Court felt that Mr. Broderick's scene inspection (to rule out foliage) was inadequate. However, the Court failed to recognize that the NHDOT employees did not believe and did not see that foliage played a role in blocking the catch basins. Apx. VI at 193 (Bolduc Deposition, lines 3-8); Apx. III at 171 (Maguire Deposition, lines 16-23).

To strike the Plaintiffs' expert opinions, the Superior Court relied on portions of the deposition testimony of Trooper Fagan, Mark Bolduc and Joseph Maguire to suggest that roadway debris was the source of the flooding. In reality, none of the witnesses testified that they removed or saw debris on the catch basins in the area of where the Szewczyk crash

occurred. The Court's suggestion regarding same is unsupported. Mr. Maguire, Mr. Bolduc and even Trooper Fagan testified about historical findings of "ponding" in and around catch basins, but not the flooding of the highway. Not one of the witnesses testified that they retrieved roadway debris from the catch basin on October 21, 2016.

"Surface debris" becomes important because the Superior Court undermined the conclusions reached of engineers Broderick and Murphy by suggesting that debris caused the flooding. The evidence that surface debris caused the flooding is weak at best. NHDOT employees, Mr. Bolduc, Mr. Maguire and Mr. Tsoukalas uniformly testified that they were aware of no similar prior flooding as that which occurred on October 21, 2016. Trooper Fagan similarly testified that he had no memory of responding to a crash where flooding was the cause at the same location as Mr. Szewczyk's crash. Another contractor, Luis Martinez, testified that he had no prior knowledge of flooding in that area prior to October 21, 2016. An employee of Bellemore, Joshua Moss, testified similarly such that he had no knowledge of flooding like that which occurred on October 21, 2016.

The lack of evidence of historical flooding in the area of the Szewczyk accident is important: if surface debris could readily cause flooding on the highways, then it would have been a regular or common occurrence. The witnesses who worked in that area or who worked on the project in issue testified that there was no similar experience with flooding, at the same area, nor any similar experience after October 21, 2016. The Superior Court's suggestion that roadway debris was a potential source of the flooding was wrong.

The task of the Superior Court was to determine if an expert's opinions were based upon a reliable methodology. Stachulski, *supra*, at 165. To assess an expert's reliable methodology, the Stachulski Court recognized that an expert could provide his or her opinion where the expert considered other possible causes ". . . and then eliminating each of the [] potential causes until reaching one that cannot be ruled out or determining which of those cannot be excluded is the most likely." *Id.* The Stachulski Court recognized that expert testimony is appropriate where the expert considers different causes or different etiologies for an incident and the Court recognized that such an approach to reach an opinion is a reliable methodology. *Id.* Thomas Broderick, coupled with his consultation with Richard Murphy, followed the same approach as did the expert used in Stachulski. Mr. Broderick assessed the functionality of the catch basins, before and after the construction work completed by the Defendants. The engineers determined that the construction activities introduced an object into the catch basins which ultimately blocked or partially blocked the outlet pipe. Given the engineers' specialized knowledge, work experiences and methodologies, the opinions of the experts should be presented to a jury.

To the extent there are factual differences or factual interpretations that are contested, which may serve as the basis or foundation for an expert's opinion, the factual differences are to be weighed by the jury and such differences should not be part of the Superior Court's evaluation about the reliability and admissibility of an expert's opinion. State v. Newman, 148 N.H. 287, 292, (2002).

Thomas Broderick and Richard Murphy had sufficient evidence to suggest that the liners were subject to damage or defect, as the evidence supported just that type of occurrence. SOF at 8-10. Through their specialized knowledge, the engineers determined that the source of the blockage was within the catch basin itself, and based on probabilities, the source was the downspout of the liner. Their analyses were based on their knowledge of the catch basins, the piping, the plans, and the fact that there had been reports and evidence that the liners had a history of separating so that the cone would break away. That aside, to the extent there are factual differences or factual interpretations which do not support the engineers' opinions, those issues are to be weighed by the jury. State v. Newman, 148 N.H. 287, 292 (2002). The Order on the motions to strike must be vacated.

III. THE SUPERIOR COURT WRONGLY GRANTED THE STATE'S MOTION TO DISMISS WHERE THE NHDOT WAS NOT ENTITLED TO THE IMMUNITY PROVIDED WITHIN R.S.A. 230:80 AS THE NHDOT HAD ACTUAL KNOWLEDGE OF THE RISKS ASSOCIATED WITH THE FLOODING.

The Superior Court wrongly granted the NHDOT's Motion to Dismiss. The Superior Court found that the NHDOT was protected by the immunity set out within R.S.A. 230:80. This finding was erroneous. The Motion to Dismiss must be vacated.

In deciding a motion to dismiss, the Superior Court was to have considered "whether the allegations and the Plaintiffs['] pleadings are reasonably susceptible of a construction that would permit recovery." Plaisted v. LaBrie, 165 N.H. 194, 195 (2013). The Superior Court tests the facts as alleged in the Complaint against the applicable law to determine

whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995). The Court must assume the truth of the facts as alleged in the Plaintiffs' pleadings and the Court must construe all reasonable inferences in the light most favorable to the Plaintiffs. Harrington v. Brooks Drugs, Inc. 148 N.H. 101-104 (2002). If the facts, as alleged, would constitute a basis for legal relief, the motion to dismiss should be denied. Sorenson v. City of Manchester, 136 N.H. 692, 693 (1993).

The Superior Court determined there were two alternative reasons to grant the motion to dismiss. Apx. 1 at 114-117. The Court first found that the Plaintiffs failed to plead sufficient facts to evidence the NHDOT had notice of an insufficiency or to plead an intentional act of an employee creating an insufficiency. *Id.* Separately, the Superior Court found that the Plaintiffs failed to allege gross negligence or a reckless disregard of the hazard, if the hazard was the result of an intentional act of an employee. *Id.* at 116-117.

The immunity contained within R.S.A. 230:80 does not apply to the NHDOT based on the facts and circumstances at issue. The NHDOT was the owner of the highway, it was the architect of the construction project underway, and, as the field engineer, it oversaw the construction work. NHDOT Standard Specification 105.10; 105.01 (2016). The Plaintiffs' claims are based on the fact that the NHDOT, along with its contractors, Continental and Bellemore, negligently completed the construction and rehabilitation work on the drainage system associated with the turnpike which led to the flooded highway on October 21, 2016. The construction work caused a blockage within the catch basin and the NHDOT failed to

conduct the necessary inspection required by R.S.A. 228:5-a and TRA 502.12 (c). Because the NHDOT and its contractors created a hazard, knowing that they did not test the drainage system or test the inlet or outlet pipes within each catch basin, the Defendants had actual notice of the hazard that naturally arises from resurfacing work and the rehabilitation work to the drainage system. The Defendant had notice and knowledge that the construction necessarily required street sweeping, cleaning of the drains, and follow-up inspections. However, at the time of completion, the inspections and testing were not done to ensure the functionality of the catch basins. The Defendants created a plain and foreseeable hazard; no independent “notice” of same is called for.

R.S.A. 230:80 provides protection if the NHDOT does not have knowledge of a risk or, if the NHDOT fails to reasonably address the risk. R.S.A. 230:80 speaks to having notice of an insufficiency. An “insufficiency” is a “. . . safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway or highway bridge at posted speeds in obedience to all posted regulations, and in a manner that is reasonable and prudent as determined by the condition and state of repair of the highway bridge, including any warning signs, prevailing visibility and weather conditions.” R.S.A. 230:78. On October 21, 2016, Andrew Szewczyk and a second motorist who traveled on the same highway shortly after Mr. Szewczyk, were unaware of the safety hazard created by the flooded highway. A fire truck responding to the scene was disabled by the flooding. The hazard was unknowable and unappreciable to Mr. Szewczyk. That aside, the NHDOT had actual knowledge that it was involved, along with its contractors, in rehabilitating

the drainage system; the work created debris and subjected the components of the catch basins to trauma. In spite of these activities, no effort was made to test the drainage.

The NHDOT was required by R.S.A. 228:5-a to ensure that the highway was restored and improved to a reasonably safe condition, including the functionality of the drainage system and the catch basins in the area of Exit 4 in the southbound travel lanes of the turnpike. The Defendants' failure to test the catch basins was well detailed in the Plaintiffs' Complaint. *See*, Apx. I at 24-27. On the project at issue, the inspections to check for functionality of the drainage system did not occur which created a foreseeable hazard, from the perspective of the NHDOT.

The protections under R.S.A. 230:80 which protect the NHDOT are similar, if not identical, to immunity that protects municipalities under R.S.A. 231:92. The statutes allow a claim if a governmental agency has notice of an insufficiency. *See*, R.S.A. 230:80 and R.S.A. 231:92. In the City of Dover v. Imperial Casualty & Indemnity Company, 133 N.H. 109 (1990), the Supreme Court, in the City of Dover, explained that the immunity "statute [] is tailored to protect the interests of communities when they have no notice of a problem or when they have inadequate opportunity to respond to a known problem But, when a community has actual notice of a hazard condition on its highways or sidewalks and has had adequate opportunity to correct the condition, protect travelers from injury or warn public users of the hazard, those injured as a result should not be denied an opportunity to recover." City of Dover, 133 N.H. at 120. (Emphasis supplied.) In determining that unlimited immunity was unconstitutional, the City of Dover Court noted that it was improper for a

town or a city, in the course of highway maintenance or construction, to create the hazardous conditions and to avoid making reparation to those injured by its actions. *Id.* at 119.

The principles discussed in the City of Dover, *supra*, case apply to the Plaintiffs' claims. The flooding on the turnpike on October 21, 2016 fit the definition of an "insufficiency," but where the risk was created by the NHDOT, separate notice is not required. *See, White Oak Farm, Inc. v. NHDOT*, 2008 WL 5683396, p. 1 (N.H. Super. Hillsborough County, McHugh, J, September 19, 2008) (R.S.A. 230:80 was not designed to require a separate notice when the NHDOT created the hazard.) Apx. 1 at 49; *See also, Estate of Gordon-Couture v. Brown*, 152 N.H. 265, 267 (2005) (immunity statutes must be strictly construed).

The Order on the Motion to Dismiss must be vacated where R.S.A. 230:80 does not require "notice" because the NHDOT created the risk of harm alleged in the Complaint.

CONCLUSION

For all of the foregoing arguments, the Supreme Court should remand this case to allow the Plaintiffs a jury trial on each claim against the NHDOT, Continental Paving and Bellemore Catch Basin Maintenance; vacating the orders on summary judgment and the motion to dismiss. Additionally, the opinions of the Plaintiffs' consulting engineers should be recognized as consistent with the principles ratified in Stachulski, *supra*.

Respectfully submitted,

Andrew Szewczyk and
Marian Szewczyk
By Their Attorneys,

MCDOWELL &
MORRISETTE, P.A.

Dated: June 6, 2022

By: /s/Mark D. Morrissette
Mark D. Morrissette, Esq.
(#10033)
Joseph F. McDowell, III
(#1675)
282 River Road
P.O. Box 3360
Manchester, NH 03105
(603) 623-9300
[mmorrissette@mcdowell-
morrissette.com](mailto:mmorrissette@mcdowell-morrissette.com)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing will be served electronically through the Court's electronic filing system to the following:

Gary M. Burt, Esq.
Primmer, Piper, Eggleston & Cramer, P.C.
P.O. Box 3600
Manchester, NH 03105-3600

Fred J. Desmarais, Esq.
Debra Mayotte, Esq.
831 Union Street
Manchester, NH 03104

Emily C. Goering, Esq.
Christina Wilson, Esq.
Department of Justice,
33 Capitol Street
Concord, NH 03301

By: /s/Mark D. Morrissette

REQUEST FOR ORAL ARGUMENT OF 15 MINUTES
BEFORE THE FULL COURT

In the context of motions for summary judgment, the Superior Court considered issues which served as the predicate for the Plaintiffs' claims and the Court made determinations based on weighing the facts. This procedure is beyond what the New Hampshire Supreme Court announced with regard to the purpose for and the limitation of summary judgment. The Superior Court similarly scrutinized the factual underpinnings for the expert opinions of two engineers and the Court did not limit its review of the experts' opinions to the reliability of the methods employed by the experts.

Lastly, the Superior Court broadly construed R.S.A. 230:80, an immunity statute to require "notice" to the NHDOT even though the NHDOT was actively involved with the creation of the risk of harm which led to the Plaintiffs' injuries.

Cumulatively, the Superior Court has assessed and resolved the Plaintiffs' claims which were well supported by lay witnesses' testimony and expert opinions. This approach strips the sacred right to a jury trial provided for in the New Hampshire Constitution, Part 1, Article 20. Oral argument is important to emphasize the contested issues of fact, and present the adverse impact to the Plaintiffs and similarly situated civil litigants.

/s/ Mark D. Morrissette

RULE 16 (3) (I) CERTIFICATION

I certify that the decisions from which this appeal has been taken are in writing and are attached in Appendices I through II to this Brief.

/s/ Mark D. Morrissette

CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this Brief do not exceed the maximum of 9,500 words.

/s/ Mark D. Morrissette