

Case No. A04-97

STATE OF MINNESOTA  
IN SUPREME COURT

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MICHAEL SCHROEDER and  
KIMARIE SCHROEDER, for the Heirs  
and Next of Kin of Joshua Schroeder,  
Decedent,

Appellants,

vs.

ST. LOUIS COUNTY and  
STEPHEN PAUL ARIÓ,

Respondents.  
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**RESPONDENTS' BRIEF AND APPENDIX**  
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STATE OF MINNESOTA  
IN SUPREME COURT

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MICHAEL SCHROEDER and  
KIMARIE SCHROEDER, for the Heirs  
and Next of Kin of Joshua Schroeder,  
Decedent,

Petitioners,

Appellate Court Case No: A040097

**AFFIDAVIT OF SERVICE BY MAIL**

vs.

ST. LOUIS COUNTY and  
STEPHEN PAUL ARIO,

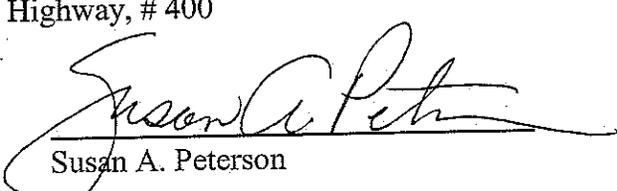
Respondents.

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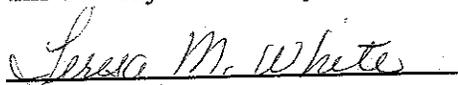
STATE OF MINNESOTA            )  
  ) ss.  
COUNTY OF ST. LOUIS        )

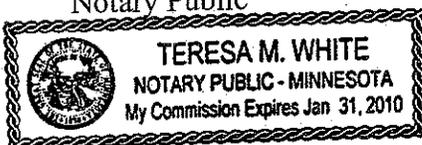
Susan A. Peterson, being first duly sworn, deposes and says that on February 18, 2005, at the City of Duluth, County of St. Louis, State of Minnesota, she sent for filing **Respondents' Brief and Appendix** to the Clerk of Appellate Courts, 305 Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155, and she served same upon counsel for Appellants by depositing two copies, postage prepaid, in the U.S. Mail addressed to:

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Susan A. Peterson

Subscribed and sworn to before me  
this 18<sup>th</sup> day of February 2005.

  
Notary Public



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## STATEMENT OF THE ISSUES

### **I. Whether St. Louis County is immune from suit by reason of statutory immunity, even if its affirmative acts created a dangerous condition?**

**Held:** The trial court and the Court of Appeals held that the County was entitled to statutory immunity. This Court specified the additional issue regarding affirmative acts causing a dangerous condition, which was not addressed below.

#### **Apposite Authority:**

1. Minn. Stat. § 466.03, subd. 6
2. *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988)
3. *Fisher v. County of Rock*, 596 N.W.2d 646 (Minn. 1999)
4. *Steinke v. City of Andover*, 525 N.W.2d 173 (Minn. 1994)

### **II. Whether Stephen Ario is immune from suit by reason of official immunity?**

**Held:** The trial court and the Court of Appeals held that Ario was entitled to official immunity.

#### **Apposite Authority:**

1. *In re Alexandria Accident of February 8, 1994*, 561 N.W.2d 543 (Minn. Ct. App. 1997)
2. *Watson v. Metropolitan Transit Commission*, 553 N.W.2d 406 (Minn. 1996)
3. *Rico v. State*, 472 N.W.2d 100 (Minn. 1991)

### **III. Whether St. Louis County is immune from suit by reason of vicarious official immunity?**

**Held:** The trial court and the Court of Appeals held that St. Louis County was entitled to vicarious official immunity for the acts of Stephen Ario.

**Apposite Authority:**

1. *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992)
2. *Anderson v. Anoka Hennepin Ind. School Dist. 11*, 678 N.W.2d 651 (Minn. 2004)
3. *In re Alexandria Accident of February 8, 1994*, 561 N.W.2d 543 (Minn. Ct. App. 1997)

**STATEMENT OF THE FACTS**

**St. Louis County Maintenance Operations**

The accident in question happened on County State Aid Highway (“CSAH”) 29 near Floodwood. Affidavit of Stephen Paul Ario (hereinafter “Ario Aff.”), ¶ 4. County state-aid highway construction, improvement, and maintenance are funded, but only in part, by state funds. Affidavit of David Skelton (hereinafter “Skelton Aff.”), ¶¶ 5-6. The county state-aid system was created in the Minnesota Constitution, codified by statute, and implemented by executive branch regulation. *See* Minn. Const. art. XIV, § 7; Minn. Stat. § 162.02, subd. 1; Minn. R. 8820.1400. Counties are responsible for “a reasonable standard of maintenance on state-aid routes within the county. . . consistent with available funds, the existing street or road condition, and the traffic being served.” Minnesota Rule 8820.2700, subp. 1. This required maintenance includes not only the road surface itself, but also adjacent shoulders, ditches, bridges and culverts. *Id.* The Commissioner of Transportation is required to retain ten percent of a county’s state-aid funding if a county is not fulfilling its maintenance responsibilities. *Id.* at subp. 2. St. Louis County has never been the subject of such a retainage.

As of March 2000, St. Louis County was responsible for 1378.88 miles of county state-aid highway, 1501.25 miles of county roads, and 31.09 miles of unorganized township roads. Skelton Aff., ¶4. This responsibility would be a significant challenge even if the state provided full funding and money were no option. Skelton Aff., ¶¶ 5-7. In 2000 St. Louis County received just 5.21 percent of the state-wide available funding. Skelton Aff., ¶ 5. The chronic lack of funding provided by the state, coupled with the substantial logistical burdens on the county in maintaining the roads, presents a difficult decision of how to spend these limited tax dollars. Skelton Aff., ¶¶ 5-9.

The St. Louis County Public Works Maintenance Division determines annual project lists on a priority basis, taking into consideration such factors as traffic counts, existing condition and use of roads, accident history, complaints, private and political pressure, funding availability, cost savings of construction versus maintenance, and the potential for continued maintenance expenses. *Id.* In the year 2000 the maintenance division spent \$50,634,919 on both county roads and county state-aid highways. *Id.* That amount breaks down to \$21,534,548 spent on road and bridge construction, \$13,962,970 spent on road maintenance, and the remainder spent on support activities. *Id.*

A primary responsibility for Public Works is maintaining the county's gravel road system. Skelton Aff., ¶ 11. St. Louis County has approximately 1,630 miles of gravel road, both county and county state-aid, to maintain. *Id.* In addition, the County maintains hundreds of miles of township gravel roads. *Id.* During the summer season, St. Louis County maintenance personnel grade approximately 81,333 lane miles<sup>1</sup> of gravel road. *Id.* Grading these roads constitutes approximately 20,300 hours of regular time and 440 hours of overtime

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<sup>1</sup>A lane mile is a single one mile pass by a grader.

each year. *Id.* Public Works attempts to grade the entire system on a two-week cycle, meaning that most gravel roads are graded every two weeks, with high-traffic areas graded weekly. *Id.* St. Louis County has 45 graders in operation daily to perform this work. *Id.*

In addition to grading, the Public Works Maintenance Division performs other functions that compete for significant labor, equipment, and financial resources. Skelton Aff., ¶ 12. These other functions include plowing, sanding, hauling gravel, dust control, road reclamation, supplying construction materials, ditching, beaver control, culvert maintenance and installation, shoulder work, and mowing or brushing. *Id.*<sup>2</sup>

St. Louis County employed 151 people in the year 2000 to accomplish all of these maintenance duties. *Id.* Money, time, and staff resources are all limited. If St. Louis County were to spend all its money on grading, then the roads would not get plowed. Or, if St. Louis County spent all its money on reclaiming and paving roads, the other roads could not be graded or maintained. The process of establishing priorities, especially in days of tight budgets, requires constant balancing and decision making.

### **St. Louis County's Grading Policy**

St. Louis County instituted its grading policy specifically in consideration and furtherance of the constant balancing of use of funds and staff time. Skelton Aff., ¶ 14. The policy grants its grader operators the discretion to grade over the centerline and against traffic as needed. Deposition of David Skelton (hereinafter "Skelton Dep."), p. 30, line 2 - p. 33, line 5; p. 34, line 25 - p. 35, line 7; Deposition of Richard Hansen (hereinafter "Hansen Dep."), p. 22, line 2-6, and p. 37, line 9-14; Deposition of John Rautanen (hereinafter

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<sup>2</sup>The Skelton Affidavit provides the approximate number of employee hours spent on each of these tasks in the year 2000. *See also* Appellants' Brief at 24-25.

“Rautanen Dep.”), p. 29, line 11-14; Deposition of John Strukel (hereinafter “Strukel Dep.”), p. 15, line 16-24; Deposition of Dennis Peterson (hereinafter “Peterson Dep.”), p. 16, line 24 - p.17, line 6; Deposition of Ron Garden (hereinafter “Garden Dep.”), p. 18, line 9 - p. 19, line 17; Deposition of Robert Martimo (hereinafter “Martimo Dep.”), p. 12, line 2 - p. 13, line 3. St. Louis County has allowed grader operators the discretion to grade against traffic for longer than any living memory. Skelton Dep., p. 23, line 10-25, p. 24, line 19 - p. 25, line 6, and p. 28, line 4 - 8; Hansen Dep., p. 33, line 19 - p. 35, line 4; Garden Dep., p. 18, line 19 - p. 19, line 17, Martimo Dep., p. 16, line 1-6 and p. 23, line 12-22.

Although the policy has never been reduced to a formal writing, it was summarized in a memorandum dated November 13, 1985, by the County Maintenance Engineer at the time, Joe Varda. Skelton Aff., Exhibit 5. The memo to all Public Works road and bridge maintenance employees, including grader operators, stated, “you may operate on any part of the roadway.” *Id.* The memo specifically enumerates “grading” as one of the activities addressed. The Department Head at that time reviewed the memorandum and authorized that it be sent. Hansen Dep., p. 14. Mr. Ario was grading against traffic at the time of this accident. Ario Aff., ¶¶ 17-20.

Some background is helpful to put this policy in context. To grade a gravel road, the grader operator first “cuts” material from one lane, then returns and “feathers” the cut material across the other lane.<sup>3</sup> Skelton Aff., ¶ 13. The operator grades the road in the shape of an upside-down smile, leaving a crown in the center of the roadway to allow for adequate drainage of rainwater and melting. *Id.* The operator must cut the material far enough to push

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<sup>3</sup> This is for a two-pass road. Some roads are wider and require more passes. The cut and feather principle is the same.

it across the crown so that when feathering the material across the other lane, the grader's moldboard does not cut the crown down. *Id.* Because of the need to cut material past the crown of the road, grader operators cannot avoid obstructing at least part of the opposing lane of traffic while grading. *Id.*

Depending on the circumstances, a grader operator might grade a stretch of roadway using two, three, four, or more passes using both cutting and feathering. When the operator finishes grading a road, the cutting and feathering leaves material on the outside (final pass) edge of the roadway. The next time the operator grades the road he or she needs to pick up that excess material and move it back across the roadway. If the operator did not do so and always approached the road from the same direction of travel, the road would become lopsided with the far shoulder building and the starting shoulder lowered. *Ario Aff.*, ¶ 19. This would result in run-off, unsafe roads, and diminish the life of the roads. *Id.*

Prohibiting grader operators from grading against traffic would have a significant budgetary impact, increasing costs and time spent. *Skelton Aff.*, ¶¶ 14-15. The grader operator would need to start at the other end of the roadway if he or she arrived and needed to cut material from the opposite side of the road. The operator would need to "deadhead" the grader (run with the blade up) to the other end of the roadway in order to begin. Likewise, if a grader operator is grading a road using a four-pass method, then, in order to always go with traffic, the grader operator would need to perform the first and second pass and then go to the other end of the road to start again. *Skelton Aff.*, ¶ 15.

The associated extra time or cost from this practice may not appear significant in any given instance; however, the impact on a county-wide basis would be devastating. *Id.* A grader travels less than 30 miles per hour at top speed when not blading. *Ario Aff.* ¶ 14.

Deadheading on a large scale would take as much as 20 to 30 percent longer to grade the more than 81,000 lane miles of road each summer. Skelton Aff., ¶ 15.

### **1998 Policy Review and Legal Consultation**

On July 13, 1998, Michael Dean of the St. Louis County Attorney's Office sent a letter of concern to the Public Works Department regarding the grading policy. Skelton Aff., Exhibit 6. In response, the Public Works Department reviewed the grading policy. Skelton Aff., ¶ 16. First, Engineer Hansen contacted other counties to survey their practices. *Id.* He also contacted the Minnesota County Engineers Association to inquire about existing policies and legislative options.

In the letter to the Minnesota County Engineers Association, Mr. Hansen wrote:

It has been the unwritten policy in St. Louis County to pull material from one edge of the road to the center and then with the second pass move the material from the center to the opposite edge of the road. This procedure is repeated in reverse the next time the road is bladed, thus there's always one pass every other time where our blade is blading against traffic. This happens because a large share of our gravel roads are long dead-end routes and the time to deadhead from one end to the other would be cost prohibitive on our 1700 miles of gravel.

*Id.* at Exhibit 7. Engineer Hansen and Deputy Public Works Director Skelton also reviewed state law exempting equipment engaged in work upon the highway from traffic rules. Skelton Aff., ¶ 16; Minn. Stat. § 169.03, subd. 6.

Director Skelton, who oversees the entire maintenance division, called a meeting with all six of his district road superintendents. Skelton Aff., ¶¶ 1-2, 17. Mr. Skelton supervises all maintenance employees, oversees the budget, and monitors all expenditures. *Id.* The six superintendents in turn manage operations for their respective districts. Skelton Aff., ¶ 17. That includes all aspects of the maintenance operation including employment issues, budget,

day-to-day project decisions, allocation of resources, and oversight of all maintenance activity within their district. The superintendents provide input into all policy discussions, decisions, and directives. *Id.*

At this meeting, Deputy Director Skelton and the superintendents discussed the existing policy allowing grading against traffic in light of Mr. Dean's memorandum. Skelton Aff., ¶¶ 17-22. Mr. Skelton and each of the superintendents present, with the exception of Mr. Peterson, recall this meeting and the discussion of the grading policy. Skelton Aff. ¶¶ 17-22; Skelton Dep., p. 51, line 1-18, p. 52, line 8 - p. 70, line 15; Garden Dep., p. 13, line 10, - p. 23, line 23; Martimo Dep., p. 18, line 25 - p. 23, line 22 (the meeting was "a lengthy discussion" lasting "at least two hours."); Rautanen Dep., p. 15, line 20 - p. 21, line 7; Deposition of Jack Schelde (hereinafter "Schelde Dep."), p. 16, line 8 - p.19, line 6; Strukel Dep., p. 19, line 15 - p. 29, line 23. Mr. Peterson did not recall the specific meeting discussing grading against traffic. Peterson Dep., p. 13, lines 9-21. However, Mr. Peterson testified that he had attended five separate meetings wherein the topic of grading against traffic was discussed among the superintendents. Peterson Dep., p. 15, line 4 - p.16, line 9.

Appellants also claim that this meeting did not consider the balancing of policy objectives. Appellants' Brief, p. 10. In fact, the superintendents discussed a variety of political, social, economic and legal factors when they met. They discussed the fact that township roads tend to be the most difficult to grade because they are often much narrower than county roads or county state-aid highways, resulting in the moldboard occupying a substantial portion of the roadway. Skelton Aff., ¶¶ 17-25. They compared snow plows, which cover approximately 16 to 18 feet of the roadway per pass, to graders that cover approximately 12 feet per pass. *Id.*

They discussed an option of using pilot vehicles to lead and follow graders. *Id.* They determined that if they required pilot vehicles while grading, the County would need to purchase 94 additional pickups (47 graders were in operation at the time) at a cost of approximately \$2,000,000, as well as radios for each pickup and grader at a cost of approximately \$200,000. *Id.* Those figures would not reflect the cost of labor for drivers to operate the pilot vehicles, fuel, or motor pool and self-insurance costs. *Id.* They estimated that signage for those vehicles alone would cost approximately \$100,000. *Id.* They determined that if St. Louis County attempted to use existing staff to operate pilot vehicles, then no other work in the department could be done as all employees would be involved in the grading operation. *Id.*

The superintendents discussed several other alternatives as well. *Id.* They discussed the possibility of deadheading. *Id.* They determined that in the Sixth District, which is the Virginia area, grading would take approximately 20 percent longer if they used deadheading. *Id.* The Third District, the Linden Grove, Cook, Crane Lake and Kabetogama area, would take 33 percent longer to grade if the county rescinded the existing policy and required deadheading. The increased percentages would be in actual days worked. *Id.*

A specific deadheading example they discussed was the Echo Trail, a single gravel roadway which takes two days to grade. Requiring deadheading on the Echo Trail would increase that time to 3.5 days. *Id.* They determined that those increases would occur throughout the operation and greatly increase the amount of time spent grading, greatly decrease the number of roads graded or the quality of the blading, or adversely impact other core operations. *Id.*

They also discussed the possibility of advance signing on gravel roads when grading. They determined that this would be unworkable, both financially and logistically, because of all the intersecting roads in a typical blading operation. They simply could not procure the staff or the signs to sign every road to be bladed and every intersecting road. *Id.* A signing example they discussed was the Frasier Bay Road. The Frasier Bay Road is 1.2 miles long. In that 1.2 miles there are six intermediate entrances, two private roads and a public access to the lake. To sign just that 1.2 miles of gravel road would require signs at every one of those nine access points plus a sign at each end of the roadway. *Id.* In addition, the Public Works Department knows from experience that signs are of limited value. *Id.* People simply become accustomed to signs in a short time and no longer notice them. *Id.*

They also discussed approaches which they could perhaps take with existing resources. *Id.* Among them were public service announcements, sign usage where practical, deadheading where practical, reviewing how others do this type of work, and approaching the legislature. *Id.* At the meeting, Deputy Director Skelton and the district superintendents determined that grading over the centerline or in the opposing lane was simply unavoidable given budget, staffing, equipment, the amount of work which must be done, and the nature of the work. *Id.*<sup>4</sup>

Deputy Director Skelton discussed the results of that meeting and the group's recommendation with Engineer Hansen. Skelton Aff., ¶ 23. They also discussed the results

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<sup>4</sup>Mr. Skelton and each of the superintendents, with the exception of Mr. Peterson who did not remember the specific meeting, discussed the meeting, the factors they discussed, and the issues involved at length in their depositions. Skelton Dep., p. 51, line 1-18, p. 52, line 8 - p. 70, line 15; Garden Dep., p. 13, line 10, - p. 23, line 23; Martimo Dep., p. 18, line 25 - p. 23, line 22; Rautanen Dep., p. 15, line 20 - p. 21, line 7; Schelde Dep., p. 16, line 8 - p.19, line 6; Strukel Dep., p. 19, line 15 - p. 29, line 23.

Engineer Hansen had obtained from his query to other counties and the Minnesota County Engineers Association. *Id.* They obtained and reviewed a video produced by the Federal Highway Administration in cooperation with the National Association of County Engineers entitled, “Blading Unpaved Roads.” *Id.* The video included a demonstration of the need to grade against traffic in order to adequately grade unpaved roads. *Id.* They also obtained a copy of a booklet entitled, “*Blading Aggregate Surfaces*” from the National Association of County Engineers training guide series produced in conjunction with the Federal Highway Administration. This manual advised to “periodically blade surface of the road against the flow of traffic to eliminate drifting of aggregate onto ends of bridges, culverts, intersections, and railroad crossings.” *Id.*

Lastly, Engineer Hansen and Deputy Director Skelton met with Mr. Dean from the County Attorney’s Office, showed him portions of the video, and went over their discussions, findings and policy concerns at length. Skelton Aff., ¶ 25. After their extensive review and following this consultation with the County Attorney’s Office, Engineer Hansen and Deputy Director Skelton elected to continue with the existing policy given all of the factors they had reviewed. *Id.* They concluded that to alter the existing policy would be unworkable given financial constraints. Skelton Aff., ¶ 24. Rescinding the existing policy would severely compromise the entire maintenance operation. Thus, Public Works would continue to allow operators to use discretion to grade against traffic and to assess various roadways and situations on a case-by-case basis as warranted.

### **November 9, 2000**

During the 2000 and 2001 construction seasons, St. Louis County conducted a reclamation project on the stretch of CSAH 29 where the accident occurred. Ario Aff., ¶ 5.

The reclamation consisted of grinding the bituminous surface off the roadway and adding gravel base in 2000, and then providing a new bituminous surface in 2001. Affidavit of James T. Foldesi (hereinafter "Foldesi Aff."), ¶ 2. The area in question was signed as a construction zone at the time of the accident. Ario Aff., ¶ 5; Affidavit of Marvin Matalamaki (hereinafter "Matalamaki Aff."), ¶ 3. During the 2000 reclamation project, a contractor was responsible for grading the roadway. *Id.* On November 2, 2000, when the contractor suspended work on the project for the winter, the grading of that stretch of roadway fell to the Public Works Maintenance Division. Foldesi Aff., ¶ 2; Ario Aff., ¶ 6.

Because of the reclamation project, the existing road surface was a mix of ground bituminous material and the gravel that had been added. The surface was rough and in need of grading. Ario Aff., ¶¶ 5, 6, 10. If the grading was not done prior to the roadway surface freezing, the roughness would remain and worsen throughout the winter. Ario Aff., ¶ 8. Therefore, fall grading is an important operation. *Id.*

On November 9, 2000, Defendant Stephen Ario was grading roads in the Floodwood district. Ario Aff., ¶ 3. His grader was equipped with a strobe light on top of the cab. *Id.* The grader was also equipped with headlights and work lights facing front and tail lights facing rear. *Id.* The grader was over 32-feet long without any attachments and stood just over 10-feet tall. *Id.* It weighed 31,300 pounds with standard equipment attached. *Id.* Before Mr. Ario headed out in the morning, his foreman gave him a list of roads to grade that day. Ario Aff., ¶ 4. CSAH 29, where the accident occurred, was on that list. *Id.* Mr. Ario's foreman instructed him to make sure that he completed grading all the roads on his list that day even if it meant working overtime. Ario Aff., ¶ 8.

Mr. Ario knew that the reclaimed roadway on CSAH 29 would be very hard and full of holes. Ario Aff., ¶6. The other roads on his list to grade that day were gravel roads, not reclaimed roads. *Id.* Mr. Ario knew that the milled blacktop surface of CSAH 29 would likely be frozen hard early in the morning. Ario Aff., ¶ 7. He elected to save that portion of road to be his last grading project of the day. *Id.* This was so the dark or black milled road surface would be exposed to any sunshine throughout the day and would warm as a result of the warmer daytime temperatures. *Id.* Milled blacktop packs down very hard under driving so the daytime heating process makes for better grading because the material becomes softer and is easier to cut in order to fill the holes. *Id.* By putting CSAH 29 last, by the time he graded the road the surface would be as thawed and as gradable as possible. *Id.* This would allow him to cut the road surface well in order to fill the holes and level the problem areas before winter. *Id.*

Mr. Ario left that morning to begin grading at approximately 8:00 a.m. Ario Aff., ¶ 9. As is his standard practice and County policy, Mr. Ario turned on the strobe light affixed to the top of the cab before leaving the garage area. *Id.* As he had planned, Mr. Ario graded all of the other roads on his list and then headed to CSAH 29 for his final project of the day. *Id.* He arrived at CSAH 29 sometime between 3:00 and 4:00 p.m. *Id.* The roadway had warmed up through the day, so it appeared he would be able to grade the road surface pretty well. *Id.*

There are two ways Mr. Ario and his co-workers grade roads. Ario Aff., ¶ 10. The first is to cut both sides of the roadway to the center and then use a squared moldboard blade to feather the windrow back across the roadway. *Id.* This method uses three passes on the road with the grader – two to cut material to the center of the roadway creating a large

windrow and the third to feather the material back out across the roadway. *Id.* In looking at the reclaimed roadway with milled blacktop on CSAH 29 that day, it was clear to Mr. Ario that that would not be an effective way to grade the road. *Id.* When the blacktop is milled as part of the reclamation project, it tends to leave fairly large chunks of blacktop, some approaching the size of a softball. *Id.* In addition, when cutting the milled blacktop with the grader, fairly large chunks tend to break loose. *Id.* The moldboard on the grader is only 14-foot wide. *Id.* This would mean that if Mr. Ario used this first method the big chunks of milled blacktop would first be cut to the center of the roadway and then would only be feathered back seven feet from the center of the roadway to each side, which would leave big chunks in the driving lane on the 28-foot, 6-inch-wide roadway. *Id.*

Mr. Ario elected to cut and feather the roadway instead. Ideally, this grades and smooths the cut section of the roadway and then smooths the feathered section of the roadway by filling holes with the material cut from the other side of the roadway. Ario Aff., ¶ 11; Skelton Aff., ¶ 13. It also deposits any large chunks of material off on the far shoulder of the road rather than leaving them in the driving lane. Ario Aff., ¶ 11. Sometimes a road can be effectively graded in just two passes using this method. *Id.* Looking at the road, Mr. Ario determined that given the milled blacktop surface and the condition of CSAH 29 that afternoon, this approach should result in a better quality road for the winter driving season. *Id.*

Mr. Ario's grader travels less than 30 miles per hour at top speed when not grading. Ario Aff., ¶ 14. The grader speed while blading is approximately 3 miles per hour. *Id.* While grading one must be aware of traffic, both approaching and following, road conditions, lighting, weather, the action and effectiveness of the blade, and the speed at which one

grades. *Id.* Speed is a variable factor depending upon the road conditions as well as temperature and atmospheric conditions. *Id.* If one grades too slowly, all the work does not get done. *Id.* However, if one grades too quickly, the grading is ineffective and can lead to a “washboard” surface, making travel difficult. *Id.* The optimum speed for grading always depends on the condition of the road, the road surface material, and also the flexing of the sidewalls of the radial tires on the grader which is affected by weather and temperature. *Id.* As Mr. Ario grades, he is required to constantly monitor traffic, speed, and the effectiveness of the grading. *Id.*

Mr. Ario began his first pass, cutting material, heading northbound in the northbound lane of travel. Ario Aff., ¶ 12. He was cutting this material from the eastern edge of the road and moving it over the center of the road, and creating a windrow in the southbound lane of travel. *Id.* Cutting at an angle meant that the width of the cut Mr. Ario was making was approximately 10 to 12 feet. *Id.* Mr. Ario then turned around to feather the windrow traveling southbound in the southbound lane of travel. Ario Aff., ¶ 13. In that pass he was picking up the windrow created by the northbound cut and feathering it across the southbound lane of travel with any extra material deposited on the west shoulder of the roadway. *Id.*

As Mr. Ario graded his second pass, he concluded that the road would require a third and fourth pass. Ario Aff., ¶ 16. Because of the nature of the milled blacktop and the large chunks present before and after cutting, the roadway was still fairly rough with holes and problem areas even after his second pass. *Id.* Mr. Ario believed that by giving the road a third and fourth pass, he could do a better job of grading the roadway by grading it finer and filling more holes so that it would be in better condition, especially with winter just around

the corner. *Id.* He was already in overtime status at that point and chose to stay longer to finish the job and get the road in as good shape as possible. *Id.*

For Mr. Ario's third pass he began by traveling against traffic northbound in the southbound lane of traffic. Ario Aff., ¶ 17. There are several reasons to do this. First, it is St. Louis County's policy to allow him to use his discretion to do so. *Id.* Second, it would not have been a good idea to run the third and fourth pass the same direction Mr. Ario had run his first and second pass. Ario Aff., ¶ 19. In the process of cutting and feathering in his first and second pass, Mr. Ario had cut and moved material from the east side of the roadway to the western shoulder of the roadway. *Id.* If he were to do that again, it would result in a pile of bituminous material on the western edge of the roadway and the road would be somewhat slanted with the west edge higher. *Id.* The road would be uneven and the windrow on the west edge could be dangerous or could pool water which could then break through and wash out portions of the road. *Id.*

Given the foregoing, Mr. Ario began his third pass traveling northbound in the southbound lane picking up the material he had just deposited on the west shoulder of the roadway, cutting the southbound lane at the same time, and moving all of the material into a windrow in the northbound lane of travel. Ario Aff., ¶ 20. On his fourth pass he would then feather that material through the northbound lane of travel and on to the eastern shoulder of the roadway. *Id.* This would keep the road level and result in a much better grading than just two passes. *Id.*

As Mr. Ario graded on CSAH 29 that day, he encountered traffic. Ario Aff., ¶ 21. While grading he always encounters traffic, whether behind or approaching. *Id.* Since he grades at approximately three miles per hour, dealing with traffic headed in either direction

is essential. *Id.* Typically, vehicles approach, slow down, and move around the grader whether they are passing or approaching. *Id.* As vehicles approach from either direction, Mr. Ario must be observant and careful, often needing to slow down or pull over as far as he can, so vehicles can get by. *Id.*

When grading against opposing traffic, operators do not move to the other side of the road every time a vehicle approaches. Ario Aff., ¶ 18. First, if that were the practice, operators would never get the grading done, as they would be constantly dropping the material and moving to the other side of the road, then picking up and moving back and starting again. *Id.* Operators would often get trapped on the other side of the road, unable to grade. *Id.* In addition, moving across the roadway at a slow rate of speed would increase the hazard to both traffic coming toward and from behind. *Id.* The size and speed of the grader dictate that in making the move it would block a significant portion, if not all, of the roadway. *Id.*

Sometime before the accident Mr. Ario turned on the headlights and work lights by flipping three switches in the grader cab. Ario Aff., ¶ 9; Ario Dep., p. 113, lines 3-10. That meant that he had six lights visible to the front and a strobe visible in all directions on top of the cab. *Id.*

As Mr. Ario was making his fourth and final pass, traveling southbound in the northbound lane, he saw the car being driven by the decedent round the corner heading northbound approximately one-half mile from him. Ario Aff., ¶ 22. As soon as Mr. Ario saw the vehicle, he checked in his mirrors to see if there was any traffic behind him. *Id.* He did this to make sure there was adequate room for the decedent's vehicle to pull into the

southbound lane and pass him. *Id.* There was no traffic whatsoever behind Mr. Ario so he knew that the oncoming vehicle had plenty of room to pass. *Id.*

Mr. Ario next looked down to monitor the moldboard and the grading at the road's surface. *Id.* He then looked up and saw that the vehicle was still coming at him in the northbound lane and had not slowed. *Id.* The vehicle was even straddling the windrow that Mr. Ario made on the third pass and which he was feathering in the northbound lane. *Id.* Mr. Ario checked his mirrors again and felt certain that the driver of the vehicle would see him. *Id.* Mr. Ario went just a short distance further and began to grow concerned because the vehicle was not slowing. Ario Aff., ¶ 23. He quickly began to consider his options. *Id.*

His first option was to yank the moldboard up, dumping the material he was pushing and move to the other side of the road. Ario Aff., ¶ 24. He rejected that as an option for several reasons. First, he was pushing a pile of material which was approximately one foot high in front of the moldboard. *Id.* As Mr. Ario feathered, he had the moldboard angled so that the material would be picked up by the front edge of the moldboard and travel along the moldboard in a backward angle toward the east side of the road. *Id.* If he simply yanked up the moldboard and tried to move to the other side of the road, he would leave that pile of material angled toward the ditch right in the middle of the oncoming vehicle's lane of traffic with the oncoming vehicle straddling the windrow. *Id.* The windrow alone could be dangerous if the vehicle struck it. *Id.*

In addition, the windrow was angled toward the ditch and at that point in the roadway the ditch was fairly steep. *Id.* The vehicle could have struck the dumped material and been diverted or gone airborne toward the steep ditch. *Id.* Finally, it would take some time to move the grader from the northbound lane to the southbound lane, even if Mr. Ario was able

to dump the load and quickly shift into high gear. *Id.* Because the grader is 32-feet long, what Mr. Ario feared would result is that either the moving grader would take up so much of the roadway that the vehicle would not have room to pass on either side or that they might both move into the southbound lane at the same time. *Id.* Mr. Ario decided not to dump the load and move to the southbound lane. *Id.*

The other option Mr. Ario considered was to try to first feather off the material he was pushing and then pull into the southbound lane. Ario Aff., ¶ 25. To do that he would have to slowly raise the moldboard so that instead of leaving a windrow he would be able to feather it slowly off into the shoulder area. *Id.* He believed that was also not a good option. *Id.* First, it required continuing to grade toward the vehicle and his sense was that he needed to give the driver as much time as possible to see the grader, slow down and move around. *Id.* He believed that moving toward the vehicle would take away time within which the driver could react. *Id.* Mr. Ario also feared, as with dumping the load, that in moving to the other side the grader would fill the roadway and give the vehicle no room to pass or that they would collide somewhere in the middle or on the other side of the road. *Id.*

As Mr. Ario watched the vehicle continue to come toward the grader, he determined that what he needed to do was give the driver the maximum amount of time to react. Ario Aff., ¶ 26. He threw in the clutch, hit the brakes, and quickly stopped the grader. *Id.* At that point the decedent's vehicle was approximately one-quarter mile away. *Id.* Mr. Ario watched as the vehicle continued to come toward the grader, straddling the windrow, and not slowing at all. *Id.* The driver did not veer from his lane of travel or slow at all. *Id.* Mr. Schroeder drove straight into the front of the grader and was killed. *Id.*

As stated, Mr. Ario had activated the strobe light on the top of the grader when he started work that day. Ario Aff. ¶ 9. The strobe was visible in all directions. *Id.* The strobe was on at the time of the accident. Ario Dep., p. 112, lines 21-23, p. 113, line 10. Appellants **argue** that the accident happened as late as 5:15 p.m. Appellants' Brief, pp. 3, 36. Civil twilight ended that day at 5:17 p.m. Hurd Aff., Exhibit B. Contrary to Appellants' argument, the accident happened well before 5:15 that day. Law enforcement received the call at 5:07 p.m. Hurd Aff., Exhibit C. Appellants' own witness, Aaron Vanderveer, places the accident at approximately 5:00 p.m. Affidavit of Aaron Vanderveer dated March 24, 2003. Moreover, it was still light when the accident occurred. Ario Dep., p. 110, lines 7-20; p. 111, lines 1-8.

## ARGUMENT

I. **The Court of Appeals Correctly Held that St. Louis County Is Immune from Suit Based on Statutory Immunity Because the County Balanced Social, Political, Economic and Legal Factors in Creating and also in Reviewing and Retaining the County's Policy of Allowing Operators to Grade Roadways Against the Flow of Traffic.**

A. **The County's Decision to Authorize Grading Against Traffic Was Protected Policy-Making Activity**

A county is immune from suit for "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6.<sup>5</sup>

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<sup>5</sup>Minn. Stat. §466.03, subd. 6 immunity has been referred to at times as "statutory discretionary function immunity, statutory discretionary immunity, discretionary function immunity, and discretionary immunity" by the Minnesota appellate courts but is now known simply as "statutory immunity." *Watson v. Metropolitan Transit Commission*, 553 N.W.2d 406, 410 n.1 (Minn. 1996).

Statutory immunity exists to prevent the courts from conducting an after-the-fact review which second-guesses 'certain policy-making activities that are legislative or executive in nature.' If a governmental decision involves the type of political, social and economic considerations that lie at the center of discretionary action, including consideration of safety issues, financial burdens, and possible legal consequences, it is not the role of the courts to second-guess such policy decisions.

*Watson*, 553 N.W.2d at 412 (citations omitted). "Government officials must be allowed to perform certain duties unfettered by the prospect of tort litigation. Judicial 'second-guessing' of administrative decisions grounded in policy would severely handicap efficient government operations." *Bjorkquist v. City of Robbinsdale*, 352 N.W.2d 817, 819 (Minn. Ct. App. 1984). "[J]udicial review of major executive policies for 'negligence' or 'wrongfulness' could 'disrupt the balanced separation of powers of the three branches of government.'" *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 718 (Minn. 1988) (quoting *Prosser and Keeton on Torts* § 131 at 1039 (5th ed. 1984)). "The crucial question ... is whether the conduct involves the balancing of public policy considerations in the formulation of policy." *Holmquist v. State*, 425 N.W.2d 230, 234 (Minn. 1988).

"The courts distinguish between 'operational decisions' and 'planning decisions.' Planning decisions involve questions of public policy and receive protection as discretionary decisions, while operational decisions relate to the day-to-day operation of government and do not receive protection." *In re Alexandria Accident of February 8, 1994*, 561 N.W.2d 543, 548 (Minn. Ct. App. 1997) (quoting *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn.1994)).

This Court and the Court of Appeals have mandated immunity from liability for government entities for their planning-level decisions on how to sign roads, how and when to maintain roads, and whether or not to expend money on construction or repair. *Holmquist*,

425 N.W.2d at 230; *Riedel v. Goodwin*, 572 N.W.2d 753 (Minn. Ct. App. 1998), *rev. denied*, (Minn. Apr. 30, 1998); *Hennes v. Patterson*, 443 N.W.2d 198 (Minn. Ct. App. 1989), *rev. denied*, (Minn. Sep. 15, 1989); *Chabot v. City of Sauk Rapids*, 422 N.W.2d 708 (Minn. 1988).

St. Louis County has had a policy of allowing its grader operators to grade against traffic for many years. The County, by virtue of the time frames involved, cannot point to an initial decision implementing this policy; however, that is not fatal to the immunity analysis. *But cf. Olmanson v. LeSueur County*, 673 N.W.2d 506, 515 (Minn. Ct. App. 2004), *rev. granted* (Minn. Mar. 30, 2004) (following a long-standing practice does not establish a deliberative process). The Supreme Court has stated, “where the challenged government conduct facially involves a balancing of policy objectives . . . it may be unnecessary for the [government] to produce evidence of how the decision precipitating the challenged conduct was made.” *Nusbaum*, 422 N.W.2d at 722 n.6. This is such a case. The policy by necessity involves a balancing of budgetary and social factors, specifically cost, safety, and operational requirements.

Appellants make much of the fact that this policy has never been reduced to writing. Appellants’ Brief, pp. 8-9, 18-19. Immunity is not “contingent on whether a policy has been reduced to writing.” *Bloss v. University of Minnesota Board of Regents*, 590 N.W.2d 661, 666-667 (Mn. Ct. App. 1999). Moreover, Defendants produced testimony from Public Works directors and superintendents, discussed above, regarding the long-standing policy in addition to documents memorializing or explaining the grading policy. First, Defendants produced a memorandum written by Mr. Joe Varda on November 13, 1985. Skelton Aff.,

Exhibit 5. The memorandum states that, “you may operate on any part of the roadway” and specifically addresses “grading.” *Id.*

Appellants allege that Mr. Varda, Deputy County Engineer at the time, had no authority to create policy. Appellants’ Brief, pp. 8, 20. Appellants fail to mention that the memorandum was reviewed and authorized by the Department Head and County Engineer at the time, Richard Hansen. Hansen Dep., p. 14. In addition, Engineer Hansen referred throughout his deposition to the Varda memo as a memorialization of the long-standing County policy. Hansen Dep., p. 16, lines 3-11; p. 26, lines 1-6; p. 28, lines 20-23; p. 35, lines 11-13; p. 36, line 2; p. 37, line 14. Second, in his letter dated July 22, 1998, County Engineer Hansen referred to the County’s “policy” of grading against traffic as needed. Both documents reflect a balancing of economic, social and political factors underlying the policy. Appellants’ claim that there is no evidence of a policy in place is unsupported by the record.

Engineer Hansen’s letter articulated the immunity-based reason for the policy, “because a large share of our gravel roads are long dead-end routes and the time to deadhead from one end to the other would be cost prohibitive on our 1700 miles of gravel.” Skelton Aff., Exhibit 7. Economic consideration is one of the key factors in determining whether statutory immunity applies. As of July 1998, the Public Works Director/County Engineer stated that the primary reason for the policy allowing grading against traffic is cost--with 1700 miles of gravel it would be cost prohibitive not to allow grading against traffic.

Over and above the testimony of all concerned and these two documents identifying the policy in place in 1985 and 1998, the Public Works Department also conducted a thorough review of the policy in 1998. That review considered political, social, economic and legal factors. This shows two important things. First, the fact that in reviewing the long-

standing policy the department immediately turned to consider political, social, economic and legal factors demonstrates that the reason the policy existed in the first place was because of those very factors. Second, the policy review and decision to continue with the policy is in itself a decision-making process protected by statutory immunity.

It is abundantly clear that the superintendents and Mr. Skelton discussed several issues related to balancing economic factors such as the cost of pilot vehicles, radios, labor for drivers, signage, the financial impact of deadheading (with specific discussion of the Echo Trail), the limited viability of advanced signing when grading (with specific discussion of the Frasier Bay Road) and a discussion of what could be done with existing resources. Again, Appellants' claim that discussion does not contain a balancing of economic factors is unsupported by the record.

Appellants argue a great deal in reliance upon the deposition testimony of Mr. Peterson both for the proposition that no superintendent meeting occurred and that St. Louis County had no policy concerning grading against traffic. Appellants' Brief pp. 18-19. First, the fact that Mr. Peterson does not recall a meeting does not create a fact issue as to whether the meeting occurred. It only creates an irrelevant fact issue as to Mr. Peterson's memory. Given the fact that every other witness testified to the meeting and, moreover, that Mr. Peterson remembers **five** separate meetings when the issue was discussed, it is clear that the policy meeting occurred.

Further, Appellants quote at page 19 of their Brief from Mr. Peterson's deposition. Appellants represent in their Brief that the following question occurred at page 16, lines 10-13.

“Hurd: And St. Louis County doesn’t have a policy concerning grading against traffic, do they?”

Peterson: . . . Not to my knowledge.”

This is a misquote. The deposition transcript actually reads:

Hurd: “. . . And St. Louis County **doesn’t currently have a** – have a policy concerning grading against traffic, do they?”

Peterson: “Not in my pol – not to my knowledge.”

(Emphasis added.) Mr. Peterson retired on January 31, 2003. Peterson Dep., p. 9, lines 5-6. His knowledge of “current” policies as of August 5, 2003, is irrelevant to the case at hand.

Moreover, Mr. Peterson goes on to testify that an operator was allowed discretion as to whether he would grade against traffic. Peterson Dep., p. 16, line 24 – p. 17, line 6. This is an exact statement of the policy, i.e., grader operators are allowed to grade against traffic. To argue that Mr. Peterson’s testimony in this regard creates an issue of fact as to whether St. Louis County had a policy at the time of the accident misses the mark.

Deputy Director Skelton took the feedback and discussion from the superintendents’ meeting wherein all agreed that it would be financially unworkable to abandon the existing policy and presented the discussion and conclusion to Engineer Hansen. Engineer Hansen and Deputy Director Skelton gathered materials from the Federal Highway Administration and the National Association of County Engineers. They reviewed a video showing from the Federal Highway Administration discussing grading against traffic.

Finally, Engineer Hansen and Deputy Director Skelton met and discussed the matter with Mr. Dean from the County Attorney’s Office for legal input. They presented the video,

their findings and the factors supporting the policy. They determined, after consulting with their legal counsel, to continue with the long-standing policy.

The 1998 policy review conducted by the St. Louis County Public Works Department shows that the reasons underlying the policy, which the Public Works Department elected to continue after its 1998 review, arose from the protected balancing of political, social, economic and legal factors. The record is replete with the factors the Public Works Department reviewed in 1998; namely, time involved, costs, budgetary considerations and implications, immunity, liability risk, other options and legal advice. These all are core concepts under the statutory immunity doctrine. Quite simply, St. Louis County could not afford, given the massive task before it, to suffer a 20, 30 or even a 50-percent increase in some instances in its maintenance costs. To do so would mean that other essential functions such as snow plowing, road and bridge building, repair and reconstruction would be disastrously impacted. The trial court and the Court of Appeals correctly applied the doctrine of statutory immunity to this policy-level decision.

**B. Affirmative Acts Creating a Dangerous Condition Do Not Nullify Statutory Immunity**

In its Order granting review, this Court specifically asked the parties to address “whether statutory immunity protects affirmative action by a governmental entity if it creates a dangerous condition.” Order of December 22, 2004. This precise question was left open by this Court in *Nusbaum*, 422 N.W.2d at 717. This question is essentially one of statutory interpretation of Minn. Stat. § 466.03, subd. 6.

Construction of a statute is a legal conclusion that this Court reviews *de novo*. *Education Minnesota-Chisholm*, 662 N.W.2d 139, 143 (Minn. 2003). The Court’s primary

goal is to effectuate the legislature's intent in drafting the statute. *Id.* In any matter of statutory interpretation, this Court must first look to the language of the statute itself and determine whether that language is clear and unambiguous. *Id.*

The plain language of the subdivision includes discretionary decisions even where that discretion is abused. This covers the full range of decisions, which might be viewed in hindsight as either wise or ill-advised. *See* Minn. Stat. § 466.03, subd. 6. Further, the immunity extends to *any* claim based upon *an act or omission* relating to a discretionary function. *Id.* (emphasis added); *see also* *Group Health Plan, Inc. v. Phillip Morris Incorporated*, 621 N.W.2d 2, 8 (Minn. 2001) (recognizing broad implication of the word "any" where no there were no other statutory restrictions). The plain meaning of this language covers both affirmative acts and passive omissions. *See* Minn. Stat. § 645.16; *see also* *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (noting that a statute is to be construed so that no word, phrase, or sentence is superfluous, void, or insignificant).

If this Court elects to look beyond the plain language of the specific subdivision at issue, the legislative intent behind that language is very clear. The broad language of the discretionary acts exception is in stark contrast to the specific limitations on other types of immunity contained within the same statute. *Compare* Minn. Stat. § 466.03, subd. 6, *with* Minn. Stat. § 466.03, subd. 4. "[V]arious provisions of the same statute must be interpreted in the light of each other, and the legislature must be presumed to have understood the effect of its words and intended the entire statute to be effective and certain." *Van Aspern v. Darling Olds, Inc.*, 254 Minn. 62, 73, 93 N.W.2d 690, 698 (1958). The "snow and ice"

immunity provision within the same statute applies “except when the condition is affirmatively caused by the negligent acts of the municipality.” Minn. Stat. § 466.03, subd. 4(a). Similarly, immunity for day care facility licensing decisions specifically excludes certain claims where “the municipality had actual knowledge of a failure to meet licensing standards that resulted in a dangerous condition that foreseeably threatened the plaintiff.” Minn. Stat. § 466.03, subd. 6d.

Several other subdivisions of the statute carve out comparable exceptions for “conduct that would entitle a trespasser to damages against a private person.” Minn. Stat. § 466.03, subsd. 6e, 16, 20 and 22. The immunity provision regarding beach and pool equipment not only excludes conduct that would entitle trespassing children to damages against a private person, but also incorporates a duty to warn trespassers under certain circumstances. Minn. Stat. § 466.03, subd. 6f. If the legislature desired to place similar limitations within the discretionary acts immunity subdivision, it could have easily added language to manifest that intent. *See Van Aspern*, 254 Minn. at 73, 93 N.W.2d at 698.

This intent is further embodied by subsequent legislative acts. In 1999, the legislature amended the snow and ice provision to include situations where one municipality owns or leases property in another municipality, and incorporated nearly identical language in a newly created paragraph. Minn. Stat. § 466.03, subd. 4(b); 1999 Minn. Laws c. 188, § 1. The day care licensing provision also was recently amended to cover claims involving swimming pools at those facilities, and limiting language was again employed. *Id.*; 2002 Minn. Laws c. 333, § 3.

The legislature has enacted substantive amendments to the immunity statute no less than eighteen times, eleven of those amendments occurring after this Court recognized this issue in its *Nusbaum* decision. If the legislature intended to exclude affirmative acts creating a dangerous condition from the protection of discretionary acts immunity, it had multiple opportunities to do so and expressly chose *not* to do so. *Cf. Metropolitan Sports Facilities Comm'n v. County of Hennepin*, 561 N.W.2d 513, (Minn. 1997). Nothing in the text of the statute creates an exception for the creation of a dangerous condition, and this Court cannot “read into the statute a provision the legislature purposely omits or inadvertently overlooks.” *Id.* (internal quotations and citations omitted); *see also State v. Fleck*, 281 Minn. 247, 252, 161 N.W.2d 309, 312 (1968); *In re Phillips' Trust*, 252 Minn. 301, 306, 90 N.W.2d 522, 527 (1958).

Likewise, this Court has had opportunities to address this issue, but has never placed such a limitation on statutory immunity. Several decisions of this Court and the Court of Appeals have determined whether statutory immunity applied to dangerous conditions, arguably created by affirmative conduct. In *Conlin v. City of St. Paul*, 605 N.W.2d 396 (Minn. 2000), the governmental entity created an unsafe street during maintenance operations and affirmatively chose to remove warning signs before the work was completed. *Id.* at 398-99. Ultimately, this Court determined that the City had not presented sufficient evidence to show that decision was policy-making in nature. *Id.* at 402-03. Presumably, if a *per se* rule precluded statutory immunity for affirmative acts, the Court would not have needed to reach the sufficiency of the evidence offered in support of the immunity claim.

Similarly, in *Fisher v. County of Rock*, 596 N.W.2d 646 (Minn. 1999), the County elected, on numerous occasions, to repair a dangerous bridge to its as-built condition rather than altering the bridge design for better safety. *Id.* at 648-49. This Court properly focused on the policy-making nature of the decision, rather than whether the implementation of that decision constituted an affirmative act creating a dangerous condition. *Id.* at 652-53. Again, that analysis would have been irrelevant if affirmative acts are outside the scope of the immunity statute.

Arguably, nearly any policy-level discretionary decision could be construed as some type of affirmative act. *See generally Angell v. Hennepin County Reg. Rail Auth.*, 578 N.W.2d 343 (Minn. 1998) (policy decision to restrict access to property); *Zank v. Larson*, 552 N.W.2d 719 (Minn. 1996) (decision to have a one-second interval where all semaphores at an intersection displayed red lights); *Steinke v. City of Andover*, 525 N.W.2d 173 (Minn. 1994) (decision to place signs only along certain roadways); *Minder v. Anoka County*, 677 N.W.2d 479 (Minn. Ct. App. 2004) (implementation of road repair schedule); *Olmanson v. LeSueur County*, 673 N.W.2d 506 (Minn. Ct. App. 2004), *rev. granted* (Minn. Mar. 30, 2004) (decision not to mark culverts with warning signs); *Christensen v. Mower County*, 587 N.W.2d 305 (Minn. Ct. App. 1998) (decision to remove road signs before road surface maintenance was completed); *Monnens v. Speeter*, 2004 WL 2984365 (Minn. Ct. App. Dec. 28, 2004) (unpublished decision) (policy of “minimal signage” on residential streets). Respondents’ Brief, pp. A-1 – A-7 With a minimal amount of creativity or ingenuity, a plaintiff could allege any dangerous condition resulted from some type of affirmative act

flowing from a policy-level decision. Such a limitation would eviscerate the doctrine of statutory immunity.

In addition, the Court of Appeals has retreated from a similar line of cases, contemporaneous with *Nusbaum*, involving a duty to warn of known hazards. See *Nguyen v. Nguyen*, 565 N.W.2d 721, 723 (Minn. Ct. App. 1997) (limiting the holdings of *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. Ct. App. 1984); *Gutbrod v. County of Hennepin*, 529 N.W.2d 720 (Minn. Ct. App. 1995); *Seaton v. Scott County*, 404 N.W.2d 396 (Minn. Ct. App. 1987); and *Gonzales v. Hollins*, 386 N.W.2d 842 (Minn. Ct. App. 1986)). Even where there is an affirmative duty to correct a known hazard, the governmental agency still enjoys statutory immunity if its corrective action involves policy-level decisions. *Nusbaum* (citing *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988)). Holding an exception for affirmative acts creating a dangerous condition would be a radical departure from the current state of the law.

**C. Even If Affirmative Acts Creating a Dangerous Condition Can Nullify Statutory Immunity, St. Louis County Did Not Create a Dangerous Condition**

Even if this Court determines that such an “affirmative act” limitation to statutory immunity exists, it would not apply to this case. St. Louis County has an obligation to properly maintain county state aid highways. Minn. Stat. § 162.02, subd. 1. It is undisputed that graders will often infringe upon the oncoming traffic lane, even if the grader is blading with the traffic, because the grader is wider than half of the roadway in many instances. *Skelton Aff.*, ¶¶ 17-25. It is also undisputed that graders typically travel at speeds of less

than five miles per hour while blading. Thus, even if a grader is traveling with the traffic flow, that traffic will be moving at a significantly higher rate of speed. In other words, graders are large, slow-moving vehicles operating on rural highways, regardless of whether they are blading with traffic or against it. To the extent blading against traffic is dangerous, it is only marginally more hazardous than blading with traffic.<sup>6</sup> Road construction work zones require drivers to exercise additional care, and St. Louis County did not create a dangerous condition by engaging in its statutory obligation to maintain the roads.

The facts in the record demonstrate that Mr. Ario's strobe light was engaged the entire day of November 9, 2000. Ario Aff., ¶ 9; Minn. Stat. § 169.59, subd. 4. At the time of the accident, the roadway where Mr. Ario was grading was signed as a construction zone. Ario Aff., ¶ 5; Matalamaki Aff., ¶3. The accident occurred before the end of civil twilight. Hurd Aff., Exhibits B and C. Under these conditions, Mr. Ario was performing work on the highway within the meaning of Minn. Stat. § 169.03, subd. 6. Accordingly, the County did not create a dangerous condition.

The trial court and the Court of Appeals correctly held that St. Louis County is entitled to statutory immunity on Appellants' claims, and this Court should affirm that decision in all respects.

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<sup>6</sup>Arguably, the situation of blading with traffic is even more dangerous, as the grader operator would be less aware of traffic approaching at high speed from the rear.

**II. The Court of Appeals Correctly Held That Stephen Ario Is Entitled to Official Immunity Because He Exercised Judgment and Discretion in His Grading and Concerning the Decisions He Made in Responding to the Oncoming Vehicle.**

**A. Mr. Ario was Engaged in Discretionary Activity at the Time of this Accident.**

Under Minnesota law, public employees who perform discretionary functions are immune from liability. *Janklow v. Mn. Bd. of Examiners*, 552 N.W.2d 711 (Minn. 1996). This immunity stems from the common law of sovereign immunity and is distinct from statutory immunity, above, which is a function of legislative enactment and protects the government as an entity. *Id.* at 715; *Anderson v. Anoka Hennepin Ind. School Dist. 11*, 678 N.W.2d 651, 655 n.4 (Minn. 2004).

This Court has discussed the distinction between statutory immunity and official immunity:

The tort immunity of a governmental unit provided by the discretionary function exception of the state and municipal tort claims acts should be distinguished from common law immunity of a government employee. Although both are phrased in terms of whether the exercise of discretion was involved, they are based on entirely different rationales. Immunity of an employee honestly exercising discretion under common law was based in the notion that imposition of liability for an erroneous decision would inhibit decision making. Thus, discretion in the context of an employee's immunity was much broader than the type of discretion referred to in the discretionary function exception applicable in actions against governmental units. As the following analysis indicates, the discretion referred to in the latter context involves a balancing of policy objections.

*Nusbaum*, 422 N.W.2d at 718. Unlike statutory immunity, official immunity protects the kind of discretion which is exercised on an operational rather than a policymaking level. *Watson*, 553 N.W.2d at 414. “[S]tatutory [] immunity and common law official immunity may operate in concert.” *Alexandria*, 561 N.W.2d at 549.

Official immunity “is intended to protect public officials ‘from fear of personal liability that might deter independent action.’” *Id.* (quoting *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn.1988)). “Government officials are accorded near complete immunity for their actions in the course of their official duties, so long as they do not exceed the discretion granted them by law.” *Janklow*, 552 N.W.2d at 716 (citation omitted). Whether an act is discretionary is a legal question which the court determines. *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 (Minn. 1999).

Ministerial decisions, as opposed to discretionary actions, are not immune. *Anderson*, 678 N.W.2d at 655. These types of decisions are those which are absolute, certain and imperative, and involve merely the execution of a specific duty arising from fixed and designated facts. *Id.* (citations omitted); *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991).

The Court of Appeals held that snow plow operators are entitled to official immunity because their actions while plowing “involve[] discretion and balancing of several factors.” *Alexandria*, 561 N.W.2d at 549. While plowing, drivers must “assess the conditions and rely on [their] judgment to determine the appropriate speed.” *Id.* In addition, drivers must “assess the existing conditions and rely on [their] judgment to determine the best time and manner for plowing.” *Id.* “These decisions involved sufficient discretion to fall within the protection of official immunity.” *Id.*

Appellants claim that Mr. Ario’s grading duties were ministerial, “he was to grade the roads.” Appellants’ Brief, p. 34. The argument misses the mark. First, if it were that simple, the result would have been different in *Alexandria*. The plow driver in *Alexandria* was clearly sent out to plow the roads so, according to Appellants’ argument, immunity would not apply. If that was the extent of immunity analysis, then the doctrine would not exist.

The *Alexandria* Court properly went deeper and analyzed what exactly the plow driver was doing while he plowed.

Mr. Ario was involved in the same discretionary activity as the snowplow operator in *Alexandria* on the day in question. He was required, while operating the grader, to be aware of traffic both approaching and following, road conditions, weather, lighting, the action and effectiveness of the blade, and speed. Mr. Ario's discretionary actions while operating the grader are, discretionary and therefore immune.

Furthermore, Mr. Ario made discretionary decisions at the time in question over and above those granted immunity in *Alexandria*. First, Mr. Ario made the discretionary decision to make four passes with the grader on the roadway as opposed to two passes. He evaluated the road condition in light of the fact that it may well have been the final opportunity to grade the road that year. He considered whether the results from two passes were adequate. He observed that the roadway was still rough and in need of work so he elected to complete two more passes on the roadway. As stated, he performed that discretionary activity consistent with the County policy which gave him the discretion to grade against traffic. *See also Anderson*, 678 N.W.2d at 660 (employee does not forfeit official immunity for ministerial acts, if those acts are required by a policy decision).

Second, Mr. Ario was also faced with a vehicle coming toward him straddling the windrow which, as it came on, did not slow or move around him at all. Ario Aff., ¶¶ 22-26. Mr. Ario made discretionary decisions as he saw Mr. Schroeder's vehicle approaching. He considered yanking the moldboard, dumping the material, and attempting to move to the other side of the road. He considered feathering the material he was pushing and trying to move to the other side of the road. In Mr. Ario's estimation at the time, that would have

increased Mr. Schroeder's risk. Mr. Ario determined that in order to give Mr. Schroeder the maximum amount of time to react, he should stop the vehicle immediately.

The situation confronting Mr. Ario is analogous to that in *Watson*, 553 N.W.2d at 406. In *Watson*, a bus driver was faced with an altercation between passengers. This Court, in examining the *Watson* driver's official immunity claim, stated:

[h]ere [the driver's] decisions in a situation where passengers were being assaulted were clearly not 'absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.' The situation unfolded in a manner which was far from 'fixed and designated,' and called for the exercise of judgment and discretion on the part of [the driver] for the protection of all the passengers on the bus.

*Id.* at 415. This Court did not look at the situation and conclude that the driver's duties were simply to drive his bus route and, therefore, ministerial. The Court looked at the actual event, determined that the situation was not "fixed and designated" and ruled accordingly, granting the driver official immunity.

The same is true in this case. Not only was Mr. Ario using his judgment to decide how to grade and how many passes to take, he was also faced with the decedent's vehicle coming toward him and needed to quickly determine how to respond. Appellants imply that Mr. Ario should have done things differently by moving into the other lane every time a vehicle approaches, moving into the other lane to avoid the collision, or sounding the horn on the grader. Appellants' Brief, p. 5. Mr. Ario was confronted with the terrible situation, weighed his options quickly, and made his best decision given what he knew. Hindsight criticism does not show the situation was fixed and designated; in fact, it shows that Mr. Ario's decision making was discretionary.

An unpublished decision by the Court of Appeals is instructive, *Schaffer v. Ramsey County*, 2002 WL 1423114 (Minn. Ct. App. 2002), Respondents' Brief, pp. A-8 – A-11. *Schaffer* arose from an accident that occurred at an intersection when a Ramsey County Public Works employee was sanding the road. The operator elected to proceed through a red semaphore rather than stopping based on safety concerns. *Id.* at A-8. The court first found that because the operator was “actually engaged in work upon the highway” he was exempt from the traffic laws. *Id.* at A-10; *see* Minn. Stat. § 169.03, subd. 6. The court noted, “Ramsey County’s policies do not require that snowplow drivers obey every traffic regulation at all times. The policies instruct the drivers to exercise their discretion in the performance of their duties when safety requires.” Respondents’ Brief, p. A-11. The court then held the operator immune based on official immunity and Ramsey County, consequently, protected by vicarious official immunity. *Id.* at A-11. The court found that the sanding operator was engaged in discretionary as opposed to ministerial activity in balancing safety concerns while sanding. *Id.* at A-10.

The case at hand is analogous. St. Louis County policy allows Mr. Ario to grade against traffic. Mr. Ario made split-second decisions. Weighing different options, trying to proceed in the safest fashion, are exactly the types of decisions, over and above the decisions as to speed, traffic, operation, etc., that are protected by official immunity.

Finally, Appellants argue, “Whether to turn on one’s lights when it is dark is a ministerial decision that is not protected by official immunity.” Appellants’ Brief, p. 37. First, the factual record is clear that it was not dark at the time of the accident. The accident occurred at approximately 5:00 p.m. Civil twilight was not until 5:17 p.m. that day by

Appellants' own evidence. Hurd Aff., Exhibit B. It was still light at the time of the accident. Ario Dep., p. 110, line 7 - p. 111, line 8.

Second, the strobe light was on at the time of the accident. Ario Dep., p. 112, line 21 - p. 113, line 10. The strobe light is the safety light. Ario Dep., p. 57, lines 17-24. Thus, Mr. Ario was working in a signed construction zone with an operating strobe light. The strobe light required "the exercise of unusual care" by other motorists in this signed construction zone. Minn. Stat. § 169.59, subd. 4.

Third, Appellant has not explained why the use of headlights and work lights over and above the use of the strobe light, is ministerial. The trial court held that this decision required the exercise of discretion. Trial Court's Memorandum p. 2. The Court of Appeals did not even reach this decision, holding that Appellants' assertion that the lights were off at the time of the accident is merely speculative. Appellants' Brief at A-219.

Finally, Appellants' claim as to the use of headlights in addition to the strobe is really just an argument that allegations of negligence defeat immunity. If that were the state of the law, then official immunity would never apply because there is always a claim of negligence. As discussed below, the only showing that defeats immunity is malice or willfulness. Appellants have not alleged, nor can they, that the issue concerning headlights constitutes malice or willfulness. Mr. Ario had his strobe light on. The claim that he did not have his headlights on, a claim he vehemently denies, does not rise to "violation of a known right" to constitute malice or willfulness.

**B. Appellants Have Not Shown Malice or Willfulness to Defeat Official Immunity.**

Where a discretionary decision is subject to challenge, it must be alleged and proven that the government actor acted willfully and maliciously in order to defeat the immunity.

*Kelly*, 598 N.W.2d at 663. Willful or malicious conduct has been defined as conduct which demonstrates the “intentional doing of a wrongful act without legal justification or excuse or, otherwise stated, the willful violation of a known right.” *Rico*, 472 N.W.2d at 100, 107. “Malice in the context of official immunity means intentionally committing an act that the official has reason to believe is legally prohibited.” *Kelly*, 598 N.W.2d at 663.

Grading against traffic is not in violation of the law and does not constitute malice. The Court of Appeals, in an unpublished decision, *Menk v. County of Cottonwood*, 1999 WL 326133 (Minn. Ct. App. 1999) *rev. den.*, July 28, 1999, Respondents’ Brief, pp. A-12 – A-14, has addressed this very issue. The Court first concluded that plowing decisions are immune. The Appellants therein then argued that the plow operator’s decision “to operate the snowblower in the direction of oncoming traffic was an intentionally wrongful act without legal justification” thus defeating official immunity. The court noted, as did Mr. Varda in his memo nearly 19 years ago, that persons operating equipment while engaged in work on the highway are exempt pursuant to Minn. Stat. § 169.03, subd. 6, from the requirement to travel only in the right-hand lane of travel. Respondents’ Brief, pp. A-13 – A-14. The court then stated, “[the operator’s] supervisor testified that the snowblower operators had the discretion to drive the snowblowers either with or against traffic, according to their individual assessment of which direction was safer under the circumstances. [The operator’s] actions were not prohibited and, thus, the immunity is not forfeited because of willfulness and malice.” *Id.* at A-14.

The same is true here. Mr. Ario’s decision to grade in the opposing lane, pursuant to County policy, was not prohibited by law and was within his discretion, thus, it was not

malicious or willful. Official immunity is not defeated. *See also Anderson*, 678 N.W.2d at 660.

### **III. St. Louis County Is Entitled to Vicarious Official Immunity.**

Because Mr. Ario is entitled to official immunity, the County is entitled to immunity by virtue of vicarious official immunity. *Anderson*, 678 N.W.2d at 663-64; *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992); *Nesbit v. Hennepin Cty*, 548 N.W.2d 314, 319 (Minn. Ct. App. 1996); *Leonzal v. Grogan*, 516 N.W.2d 210, 214 (Minn. Ct. App. 1994). “If official immunity protects a government employee from suit, the government entity will not be liable for its employee’s torts.” *Alexandria*, 561 N.W.2d at 549.

This Court has repeatedly held that failing to extend vicarious official immunity to the employer defeats the purpose of official immunity. *Anderson*, 678 N.W.2d at 665 (“to rule otherwise would create a disincentive to use collective wisdom”); *Pletan*, 494 N.W.2d at 42; *see also Watson*, 553 N.W.2d at 415; *Olson v. Ramsey County*, 509 N.W.2d 368, 372 (Minn. 1993) (“[T]o grant immunity to the [employee] while denying it to the county would still leave the focus of a stifling attention on the [employee’s] performance, to the serious detriment of that performance.”)

Mr. Ario was operating in a discretionary capacity at the time of the accident. Furthermore, he was operating within the policy which has been in place in St. Louis County for decades. To hold Mr. Ario immune and not extend vicarious official immunity to St. Louis County would subject Mr. Ario’s discretionary activity to review and, moreover, subject the County’s policy to further scrutiny which would be in direct contravention of the rationale behind the statutory immunity protection. Public policy supports a grant of vicarious official immunity in this case.

## CONCLUSION

The Court of Appeals was correct on all issues. St. Louis County formulated and even recently reviewed a long-standing unwritten policy based on a balancing of political, social, economic and legal factors allowing grader operators the discretion to grade against traffic. Mr. Ario was operating within that discretionary policy at the time of this accident. Moreover, Mr. Ario made discretionary decisions concerning how to grade and how to safely try to respond to the vehicle bearing down upon him. Statutory, official and vicarious official immunity all apply. This Court should affirm the decision of the Court of Appeals in all respects.

Dated this 6<sup>th</sup> day of February 2005.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).