

No. A09-919

---

STATE OF MINNESOTA

IN COURT OF APPEALS

---

Charles Rodenwald, and Gayle Rodenwald,

Appellants,

vs.

State of Minnesota, Department of Natural Resources,

Respondent.

---

RESPONDENT'S BRIEF AND APPENDIX

---

JAMES B. PETERSON  
1200 Alworth Building  
306 West Superior Street  
Duluth, MN 55802  
Atty. Reg. No. 184012

ATTORNEY FOR APPELLANTS

LORI SWANSON  
Attorney General  
State of Minnesota

ANNA E. JENKS  
Assistant Attorney General  
Atty. Reg. No. 0342737

445 Minnesota Street, Suite 1100  
St. Paul, Minnesota 55101-2128  
(651) 282-5735 (Voice)  
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENT

---

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).

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
LEGAL ISSUES .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS.....	2
A.    Rodenwald’s Slip and Fall .....	2
B.    The DNR’s Snow and Ice Maintenance Practices .....	4
C.    The Weather Conditions .....	5
SCOPE OF REVIEW.....	5
ARGUMENT .....	6
I.    THE DISTRICT COURT’S DECISION THAT THE MERE SLIPPERINESS RULE APPLIES WITH EQUAL FORCE TO THE STATE AS MUNICIPALITIES SHOULD BE UPHELD. ....	6
II.   THE DISTRICT COURT CORRECTLY HELD THAT THE MERE SLIPPERINESS RULE APPLIES TO THE UNDISPUTED FACTS IN EVIDENCE.....	9
III.  THE DISTRICT COURT CORRECTLY DECIDED NOT TO ADDRESS WHETHER THE STATE IS IMMUNE UNDER MINN. STAT. § 3.736 BECAUSE THE STATE IS NOT SEEKING IMMUNITY UNDER THIS STATUTE.....	15
IV.   THE DISTRICT COURT CORRECTLY HELD THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT. ....	16
CONCLUSION.....	19
<b>APPENDIX</b>	

## TABLE OF AUTHORITIES

	Page
<b>STATE CASES</b>	
<i>Anderson v. Anoka Hennepin Independent School District 11</i> , 678 N.W.2d 651 (Minn. 2004).....	5
<i>Bufkin v. City of Duluth</i> , 291 N.W.2d 225 (Minn. 1980).....	13, 14
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn. 1997).....	16
<i>Doyle v. City of Roseville</i> , 524 N.W.2d 461 (Minn. 1994).....	passim
<i>Erickson v. County of Polk</i> , No. CX-95-608, 1995 WL 507529 (Minn. Ct. App. August 29, 1995).....	16
<i>Glassman v. Miller</i> , 356 N.W.2d 655 (Minn. 1984).....	1, 7
<i>Gleason v. Metropolitan Council Transit Operations</i> , 582 N.W.2d 216 (Minn. 1998).....	6
<i>Henkes v. City of Minneapolis</i> , 44 N.W. 1026 (Minn. 1890).....	10
<i>Kelleher v. City of West St. Paul</i> , 258 N.W. 834 (Minn. 1935).....	18
<i>Kuehl v. Metropolitan Airports Commission</i> , No. A06-1658, 2007 WL 2034434 (Minn. Ct. App. July 17, 2007).....	9, 14
<i>Lienhard v. State</i> , 431 N.W.2d 861 (Minn. 1988).....	7
<i>Lorenzen v. County of Pipestone</i> , No. C2-94-2584, 1995 WL 389239 (Minn. Ct. App. July 3, 1995) .....	16
<i>Nicollet Restoration, Inc. v. City of St. Paul</i> , 533 N.W.2d 845 (Minn. 1995).....	18

<i>Nieting v. Blondell</i> , 235 N.W.2d 597 (Minn. 1975).....	6
<i>Olson v. City of St. James</i> , 380 N.W.2d 555 (Minn. Ct. App. 1986).....	11
<i>Otis v. Anoka-Hennepin School District No. 11</i> , 611 N.W.2d 390 (Minn. Ct. App. 2000).....	11
<i>Smith v. Village of Hibbing</i> , 136 N.W.2d 609 (Minn. 1965).....	passim
<i>Snyder v. City of Minneapolis</i> , 441 N.W.2d 781 (Minn. 1989).....	7
<i>Spanel v. Mounds View School District No. 621</i> , 118 N.W.2d 795 (Minn. 1962).....	6
<i>State Farm Fire &amp; Casualty v. Aquila Inc.</i> , 718 N.W.2d 879 (Minn. 2006).....	6
<i>Teske v. Steele County</i> , 170 N.W.2d 234 (Minn. 1969).....	10, 15

**STATE STATUES**

Minn. Stat. § 3.736.....	passim
Minn. Stat. § 466.03.....	7, 8, 13
Minn. Stat. § 473.602.....	9
Minn. Stat. § 473.608.....	9

**STATE REGULATIONS**

Minn. R. Civ P. 56.03.....	2, 6
Minn. R. Civ P. 56.05.....	16

## LEGAL ISSUES

1. For more than 100 years the mere slipperiness rule has been applied to municipalities and governmental entities, such as the Metropolitan Airport Commission. Given that the mere slipperiness rule has consistently been applied to protect governmental entities from liability, does it apply to the State?

*The District Court held that the mere slipperiness rule applies to the State.*

*Apposite Authorities:*        *Glassman v. Miller*, 356 N.W.2d 655 (Minn. 1984).

2. Under Minnesota's mere slipperiness rule, governmental entities are not liable for glare ice that is caused by the natural flow of water from melted ice and snow. Charles Rodenwald slipped and fell on undisturbed smooth slick ice that looked like glass. Does the mere slipperiness rule apply to this naturally formed ice?

*The District Court held that the mere slipperiness rule bars all of Appellants' claims.*

*Apposite Authorities:*        *Doyle v. City of Roseville*, 524 N.W.2d 461 (Minn. 1994);  
   *Smith v. Village of Hibbing*, 136 N.W.2d 609 (Minn. 1965).

## STATEMENT OF THE CASE

Appellants Charles Rodenwald (“Rodenwald”) and Gayle Rodenwald commenced this action on January 9, 2008 by serving a complaint on the State of Minnesota, Department of Natural Resources. Compl., Appellants’ Appendix (“A”) A 1-3. This case was filed in St. Louis County District Court on July 25, 2008. The complaint claims that Charles Rodenwald slipped and fell on ice at a driveway at the Minnesota Department of Natural Resources’ (“DNR”) garage in Orr, Minnesota due to the negligence of the DNR.

On February 27, 2009, Respondent, State of Minnesota, Department of Natural Resources (“the State”) moved for summary judgment under Minn. R. Civ. P. 56.03. Resp’t’s Mem., A 44-51. Hearing was held before the Honorable James B. Florey, a Judge of the St. Louis County District Court, on March 31, 2009. Order at 1, A 76.

By order filed and entered on April 29, 2009, the District Court granted the State’s motion and dismissed Appellants’ claims with prejudice. Order at 4, A 79. The District Court concluded that the mere slipperiness rule barred Appellants’ claims. *Id.* This appeal followed.

## STATEMENT OF FACTS

### **A. Rodenwald’s Slip and Fall**

On March 15, 2007, Rodenwald worked for Auto Glass Specialists installing windshields in vehicles. Rodenwald Dep. at 12, A 12. Rodenwald worked for Auto Glass Specialists approximately one to four times a month on an as needed basis. Rodenwald Dep. at 6, A 11.

At approximately 8:10 a.m., Rodenwald's coworker, Bret Bergman ("Bergman"), picked him up at his home to start the workday. Rodenwald Dep. at 13, A 14. Rodenwald was wearing jeans, a jacket, a cap and a pair of slip on work boots. Rodenwald Dep. at 17, A 15. After Bergman picked up Rodenwald, they installed a couple of windshields on vehicles located in the area. Rodenwald Dep. at 14, A 14. Then they headed to the DNR facility. *Id.* Prior to arriving at the DNR facility, Bergman called the DNR to ask where the vehicles were located that needed repair. *Id.* Rodenwald and Bergman arrived at the DNR facility around 11:30 a.m. *Id.*

Upon arrival at the DNR facility, Rodenwald and Bergman drove to the South garage where Bergman backed the repair truck into the driveway. Rodenwald Dep. at 15, A 14. They proceeded to repair the windshield on a DNR truck. Rodenwald Dep. at 16, A 14. This took approximately a half hour. *Id.* While Rodenwald was repairing the windshield, he walked back and forth between the repair truck and the DNR truck which was parked inside the garage. *Id.* During this time, Rodenwald did not notice any ice on the ground. Rodenwald Dep. at 15, A 14. After they repaired the windshield on the DNR truck, Bergman made a phone call to determine where the second DNR truck that needed repair was located. Rodenwald Dep. at 14, A 14. Then, Rodenwald and Bergman drove a short distance to the North garage where the other DNR truck was located. Rodenwald Dep. at 14, 18, A 14, 15.

When they arrived at the North garage, Bergman backed the repair truck into the driveway of the garage. Rodenwald Dep. at 18, A 15. Rodenwald exited the passenger side of the repair truck, took one or two steps, and slipped and fell on ice. Rodenwald

Dep. at 18, 19, A 15. Thereafter, Bergman left Rodenwald to find help for him, and returned a couple of minutes later with three or four people who attempted to assist Rodenwald. Rodenwald Dep. at 22, A 16. Approximately ten to fifteen minutes after the accident, an ambulance arrived and transported Rodenwald to the hospital. Rodenwald Dep. at 23, A 16.

At no time prior to his fall did Rodenwald notice any ice at the DNR facility. Rodenwald Dep. at 15, A 14. Only after he fell did he observe that the ice that he fell on was clear and slippery and smooth on top. Rodenwald Dep. at 21, A 16. In fact, Rodenwald described the ice as smooth slick ice that looked like glass. *Id.* Rodenwald did not see any snow, salt or sand covering the ice. *Id.*

#### **B. The DNR's Snow and Ice Maintenance Practices**

The DNR facility has a gravel driveway. Stegmeir Dep. at 9, A 39. During the winter, the DNR uses a snow plow to clear the driveway. Stegmeir Dep. at 11-12, A 39. Because the driveway is gravel, packed snow remains on top of the driveway even after plowing. Stegmeir Dep. at 9, A 39. Consequently, during the winter when a freeze thaw cycle develops, the snow on top of the gravel melts and refreezes as ice. *Id.* When the DNR driveway becomes icy, the DNR calls St. Louis County to apply the mixture it uses on the roads to the DNR's driveway. Stegmeir Dep. at 12, A 39. The DNR also uses salt and sand that is available at the facility when ice is noticed on the premises. Stegmeir Dep. at 13, A 40. It is not uncommon during a freeze thaw cycle for ice to develop on the gravel roads in the facility because the snow is melting and refreezing. Stegmeir Dep. at 17-18, A 41.

### **C. The Weather Conditions**

On March 15, 2007, the temperature never reached above freezing. In fact, it was the first day during which the temperature did not reach above freezing after a period of warmer weather. According to certified meteorological records from the National Climatic Data Center, the high temperature on March 15, 2007 at the Orr Regional Airport was 19 degrees Fahrenheit and the low was 5 degrees Fahrenheit. Meteorological Records for March 15, 2007, Respondent's Appendix ("RA") RA 4. The Hourly Observation Table recorded the temperature at the airport (which is taken every hour) at 18 degrees between 10:55 a.m. and 12:55 p.m. *Id.*

The temperature during the days proceeding March 15, 2007 was remarkably warmer. Meteorological Records for March 13-15, 2007, RA 2-4. On March 13, 2007, the temperature reached a high of 52 degrees Fahrenheit. Meteorological Records for March 13, 2007, RA 2. On March 14, 2007, the temperature reached a high of 37 degrees Fahrenheit. Meteorological Records for March 14, 2007, RA 3. The temperature was recorded as dropping below freezing at 3:55 p.m. on March 14, 2007, and was below freezing for the duration of the evening and night. *Id.*

### **SCOPE OF REVIEW**

When reviewing an order denying summary judgment, an appellate court "must determine whether there are genuine issues of material facts and whether the lower court erred in applying the law." *Anderson v. Anoka Hennepin Ind. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). Summary judgment is appropriate "where there are no genuine issues of material fact, and either party is entitled to judgment as a matter of

law.” *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006); Minn. R. Civ. P. 56.03. Immunity is a legal question that the court reviews de novo. *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 219 (Minn. 1998).

## ARGUMENT

The District Court appropriately dismissed this action holding that the mere slipperiness rule bars Appellants’ claims. Not only did the District Court find that the mere slipperiness rule applies equally to the State as to municipalities, it decided that there were no genuine issues of material fact that precluded the court from applying the mere slipperiness rule. This decision should be affirmed.

### **I. THE DISTRICT COURT’S DECISION THAT THE MERE SLIPPERINESS RULE APPLIES WITH EQUAL FORCE TO THE STATE AS MUNICIPALITIES SHOULD BE UPHELD.**

The District Court held that the mere slipperiness rule applies to the State. Order at 8, A 83. In so deciding, the District Court determined that the same policy rationale behind the rule’s adoption applies to the State as to municipalities. *Id.* This decision should be affirmed. The Minnesota court and legislature have consistently applied similar immunities to both the State and municipalities. There is no legitimate policy rationale that would justify not affording the State the same immunity under the mere slipperiness rule as other governmental entities.

The Minnesota Supreme Court, in abolishing sovereign immunity, applied the same rationale to the State as to municipalities. *Compare, Spanel v. Mounds View Sch. Dist. No. 621*, 118 N.W.2d 795 (Minn. 1962); *Nieting v. Blondell*, 235 N.W.2d 597 (Minn. 1975). Since abolishing sovereign immunity, the court has had numerous

opportunities to interpret and apply exclusions to liability or immunities. It has treated municipalities and the State equitably, applying the same policy rationale to both. For example, the court applied the same policy rationale when upholding both the State and municipality tort liability caps. The court found in both instances that the caps were “rationally related to the legitimate government objective of insuring fiscal stability to meet and carry out the manifold responsibilities of government.” *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989) (quoting *Lienhard v. State*, 431 N.W.2d 861, 868 (Minn. 1988) (applying the same policy rationale used to uphold the State tort liability cap when deciding to uphold the municipality tort liability cap.) The court also applied the same policy rationale when it struck down the notice provision of the Municipal Tort Claims Act as unconstitutional because it was more restrictive than its State counterpart. *Glassman v. Miller*, 356 N.W.2d 655, 656 (Minn. 1984) (stating “[w]e can discern no rational basis for distinguishing between municipal and state tortfeasors”).

Similarly, in response to the abolishment of sovereign immunity, the legislature drafted many identical provisions in the State and Municipal Tort Claims Acts to protect the State and municipal governments from liability, including those pertaining to snow and ice immunity. See Minn. Stat. §§ 3.736, Subd. 3(d); 466.03, Subd. 4(a) (2008).

<b>Limitations On Liability Of The State and Municipalities</b>		
<b>Immunity</b>	<b>State Tort Claims Act Provision</b>	<b>Municipality Tort Claims Act Provision</b>
Discretionary Immunity	Minn. Stat. § 3.736, Subd. 3(b)	Minn. Stat. § 466.03, Subd. 6
Execution of Statute Immunity	Minn. Stat. § 3.736, Subd. 3(a)	Minn. Stat. § 466.03, Subd. 5
Snow and Ice Immunity	Minn. Stat. § 3.736, Subd. 3(d)	Minn. Stat. § 466.03, Subd. 4(a)
Parks and Recreation Areas Immunity	Minn. Stat. § 3.736, Subd. 3(i)	Minn. Stat. § 466.03, Subd. 6(e)
Unimproved Real Property Immunity	Minn. Stat. § 3.736, Subd. 3(g)	Minn. Stat. § 466.03, Subd. 6(b)
Welfare Benefits Exceptions Immunity	Minn. Stat. § 3.736, Subd. 3(j)	Minn. Stat. § 466.03, Subd. 9
Hospital or Correctional Facility Immunity	Minn. Stat. § 3.736, Subd. 3(l)	Minn. Stat. § 466.03, Subd. 11

In fact, the legislature drafted the Municipal Tort Claims Act to include a provision that provides immunity to a municipality in instances where the State would have immunity under the State Tort Claims Act. Minn. Stat. § 466.03, Subd. 15 (2008).

Appellants' argument that the mere slipperiness rule only applies to municipalities is wrong. Appellants assert that the policy rationale behind the mere slipperiness rule does not apply to the State. In so arguing, Appellants explain that the mere slipperiness rule was created to "protect cities from liability for slippery conditions ...[because] [e]conomically it was simply impossible to require a municipality to maintain non-slippery conditions during Minnesota winters on all of the miles and miles of sidewalks and streets owned by them." Appellants' Mem. at 7. Appellants' erroneous factual

assumption is that municipalities need more protection than the State from slippery conditions.<sup>1</sup> There is no basis in case law or statute for such a distinction.

In addition, simply because the cases decided by the Minnesota Court of Appeals predominantly apply the rule to municipalities does not mean that the rule does not apply to the State. The court has applied this rule to other governmental entities that are not municipalities. For example, in *Kuehl v. Metropolitan Airports Commission*, the court applied the mere slipperiness rule to the Metropolitan Airports Commission. No. A06-1658, 2007 WL 2034434, at \*1 (Minn. Ct. App. July 17, 2007), RA 19 (citing Minn. Stat. §§ 473.602, .608 (2006)) (applying the rule to the Metropolitan Airport Commission, “a governmental entity established to provide and coordinate aviation services in the Twin Cities metropolitan area”). Consequently, the mere slipperiness rule applies to the State just as it does to other governmental entities.

## **II. THE DISTRICT COURT CORRECTLY HELD THAT THE MERE SLIPPERINESS RULE APPLIES TO THE UNDISPUTED FACTS IN EVIDENCE.**

The District Court dismissed this action holding that the mere slipperiness rule bars Appellants’ claims. In so deciding, the District Court stated that it was “hard pressed to say that [the mere slipperiness rule] is not applicable in this case.” Order at 7, A 82.

---

<sup>1</sup> This assumption ignores the many campuses of MnSCU (Minnesota State Colleges and Universities), the numerous facilities operated by the Department of Corrections, the regional treatment centers and community based group homes operated by the Department of Human Services, the miles of sidewalks maintained by the Department of Transportation, and the many state parks administered by the Department of Natural Resources, just to name a few examples of sidewalks maintained by the State.

Here, we have an individual who exited a vehicle on DNR property and did not observe an icy condition. The ice Plaintiff slipped on was clear, glossy, smooth and slick. There is no testimony that there was any irregular dangerous condition, or that the condition existed for an extended period of time, rather it was slippery.

Order at 7-8, A 82-83. This decision should be affirmed.

An unbroken line of authorities in Minnesota for over 100 years have upheld the common law rule that the “mere slipperiness of a sidewalk by either ice or snow is not a defect for which [governmental entities] are liable.” *Doyle v. City of Roseville*, 524 N.W.2d 461, 463 (Minn. 1994) (citing *Henkes v. City of Minneapolis*, 44 N.W. 1026, 1027 (Minn. 1890)). A governmental body’s “obligation to keep their streets in a safe condition does not extend to the removal of ice which constitutes no other defect than slipperiness.” *Id.* Simply put, a governmental entity “has never been held liable for injuries sustained in a fall on newly formed glare ice.” *Id.* This “mere slipperiness” rule applies to any snow and ice condition that is natural. *Teske v. Steele County*, 170 N.W.2d 234, 235 (Minn. 1969) (“The law is well settled that a municipality is not liable for injuries occasioned by the ‘mere slipperiness’ of sidewalks if that condition was created by natural means”). The Minnesota Supreme Court has continued to recognize the mere slipperiness rule subsequent to the abolition of sovereign immunity and the adoption of the Municipal Tort Liability Act. *Doyle*, 524 N.W.2d at 463.

Under the mere slipperiness rule, a governmental entity will be held liable only “if it negligently permits an accumulation of ice and snow to remain on a sidewalk for such a period of time that slippery and dangerous ridges, hummocks, depressions, and other

irregularities develop there.” *Id.* The mere slipperiness rule applies to the “natural accumulation [on streets and sidewalks] of ice or snow, however dangerous to pedestrians the situation thus created may be.” *Otis v. Anoka-Hennepin Sch. Dist. No. 11*, 611 N.W.2d 390, 392 (Minn. Ct. App. 2000). If dangerous artificial ridges and depressions are the basis of a claim, the dangerous condition must have existed for a sufficient time to place the governmental entity on actual or constructive notice of a defect. *Smith v. Village of Hibbing*, 136 N.W.2d 609, 610 (Minn. 1965); *see also Olson v. City of St. James*, 380 N.W.2d 555, 559-60 (Minn. Ct. App. 1986). “And since a [governmental entity] is not required to guard against mere slipperiness caused by a natural flow of water from melted ice and snow, it follows that the actual or constructive notice must be of hazards due to slippery ice made more dangerous by reason of a rough or uneven surface.” *Smith*, 136 N.W.2d at 610 (internal citation omitted).

As in these previous cases, the mere slipperiness rule applies in this instance for several reasons. First, Rodenwald’s deposition testimony is clear and unequivocal that the ice was a natural condition. Rodenwald described the ice as smooth slick ice that looked like glass. Rodenwald did not see any snow, sand or salt on top of the ice. Further, at no time prior to the incident did Rodenwald notice DNR personnel doing anything to cause snow and/or ice to accumulate. Had the DNR caused the ice to form or disturbed the ice and/or snow that was already there (which the State denies occurred), the ice would not have looked like smooth slick ice to Rodenwald, but instead, would have had an irregular artificial texture.

Second, there is no evidence that the State had notice of a dangerous artificial ridge or depression in the ice prior to Rodenwald's fall, nor has any such evidence been adduced, because no such condition existed. *See e.g., Doyle*, 524 N.W.2d at 463; *Smith*, 136 N.W.2d at 610. The only evidence that exists about the ice is that it was smooth. It was newly formed glare ice. Although Appellants assert that the State had actual or constructive notice of the icy condition, this assertion is irrelevant because Rodenwald slipped and fell on slippery glare ice. There must be dangerous ridges or other irregularities for the mere slipperiness doctrine not to apply and for the State to be liable. *Doyle*, 524 N.W.2d at 463. Moreover, there is no evidence that the State had any notice of the ice. Stegmeir, the DNR forest area supervisor, testified that he did not know when the ice had formed. Stegmeir Dep. at 15, A 40. He testified that during this time of year due to the freeze thaw cycle and the snow melting and refreezing, the condition of the facility changes on a daily basis. *Id.*

Lastly, the certified meteorological records prove that a freeze thaw temperature cycle was occurring on the day that Rodenwald slipped and fell. The State was not required to guard against the natural flow of water and ice that occurred from such a cycle. *Smith*, 136 N.W.2d at 610. The temperature during the days preceding the accident reached above freezing. On March 14, 2007, the day before the accident, the temperature reached 36 degrees Fahrenheit and dropped below freezing in the late afternoon. On March 15, 2007, the temperature never reached above freezing. The ice was created by a freeze thaw cycle and was natural.

Appellants argue that because Rodenwald was a hired invitee, this case falls within an exception to the mere slipperiness rule.<sup>2</sup> Appellants' Mem. at 9. In making this argument, Appellants fail to cite any case law supporting this exception because none exists. The only case law provided is general premises liability law. This case, however, does not involve a private landowner because the property where Rodenwald fell is State owned property operated for the general public, for which the law provides immunity. Further, the mere slipperiness rule has been applied when the plaintiff was an invitee. See *Doyle*, 291 N.W.2d at 462 (applying the mere slipperiness rule when the plaintiff was an invitee to a high school hockey game). Inserting general premises liability law into this issue only serves to confuse the issue and distort the law.

Appellants' argument that the mere slipperiness rule does not apply to the driveway where Rodenwald fell is contrary to the court's interpretation of *Bufkin v. City of Duluth*, 291 N.W.2d 225 (Minn. 1980).<sup>3</sup> In *Bufkin*, the court limited the mere slipperiness rule by finding that the rule did not apply to a slip and fall that occurred at the main entrance to a for profit arena auditorium that was operated by the City of

---

<sup>2</sup> Appellants' argument that the State "directed [Rodenwald] to park his vehicle on an ice patch that it knew was dangerous" and tried to "lur[e] people into a trap" is absurd. Appellants' Mem. at 9. There are no facts in evidence that the State had actual or constructive notice of this ice. Stegmeir, the DNR forest area supervisor, stated in his deposition that he did not know when the ice had formed, but that the snow had been melting and refreezing during the recent freeze thaw cycle. Stegmeir Dep. at 15-17, A 40-41.

<sup>3</sup> Appellants argue that the mere slipperiness rule should not be applied where, as here, the plaintiff's fall occurs on a highway or sidewalk abutting a publicly owned building or publicly owned parking lot, citing Minn. Stat. § 466.03, Subd. 4. This argument is flawed in two respects. First, there is no indication in the legislature's enactment of numerous exceptions to liability (Minn. Stat. §§ 3.736, Subd. 3; 466.03) that it intended to limit common law immunities such as the mere slipperiness rule. Second, the Minnesota Supreme Court, in *Doyle*, applied the mere slipperiness rule to a parking lot that abutted a public building. 524 N.W.2d at 463.

Duluth. *Id.* In so deciding, the court stated that “the scope of the rule is defined by the reason for its existence and that in the circumstances of this case it is not applicable.” *Id.* at 226. The court limited the scope of *Bufkin*, however, in *Doyle v. City of Roseville*, 524 N.W.2d 461. In *Doyle*, the court applied the mere slipperiness rule to a slip and fall that occurred at an ice hockey arena where the admission fee was only used to defray the cost of the operation. The court found that “there was no basis for departing from the ‘mere slipperiness’ rule.” *Doyle*, 524 N.W.2d at 464.

In *Kuehl*, the Minnesota Court of Appeals applied both *Bufkin* and *Doyle* to decide that the mere slipperiness rule was applicable to a slip and fall in an employee parking lot. 2007 WL 2034434, at \*1. The court applied the rule despite the parking lot serving a business function because the parking lot was not a heavily trafficked area, did not operate for profit, and was predominantly used by employees:

The case before us has elements of both the *Doyle* and *Bufkin* situations. The parking lot is ancillary to the operation of an office building at an airport and is furnished for employees who work in that building. In this sense, it is related to a business activity, like the Duluth arena in *Bufkin*. But there is no showing that MAC operates the parking ramp or the adjacent building to make a profit. Furthermore, the slip and fall here occurred in a portion of a parking ramp used by vehicles, not in front of a dedicated, heavily used pedestrian walkway, let alone a building entrance. Moreover, the plain language of the mere-slipperiness rule supports according MAC immunity.

*Id.* at \*4.

As in *Kuehl*, in this case, Rodenwald’s accident occurred at a DNR facility, which is a State property that does not operate for profit. The driveway at the facility was not a

heavily trafficked area and was used predominantly by employees that worked at the property. Consequently, the mere slipperiness rule applies in this instance.

**III. THE DISTRICT COURT CORRECTLY DECIDED NOT TO ADDRESS WHETHER THE STATE IS IMMUNE UNDER MINN. STAT. § 3.736 BECAUSE THE STATE IS NOT SEEKING IMMUNITY UNDER THIS STATUTE.**

The District Court decided not to address whether the State is immune under Minn. Stat. § 3.736 because the State is not seeking immunity under this statute.<sup>4</sup> Minn. Stat. § 3.736 (2008). Despite the District Court not addressing this issue and the State never claiming immunity under this statute, Appellants argue that the State is not immune under Minn. Stat. § 3.736. The State does not dispute Appellants' argument that it is not immune from liability under Minn. Stat. § 3.736. Minn. Stat. § 3.736 is not at issue in this case and Appellants' claim that it is demonstrates Appellants' failure to understand the difference between the State's common law and statutory snow and ice immunities.

Appellants' suggestion that the snow and ice immunity provisions of the State and Municipal Tort Claims Acts are a codification of the law in this area and preempt the common law mere slipperiness rule is wrong. Appellants' Mem. at 13. In fact, the Minnesota Supreme Court has explicitly rejected this contention stating that "the court has continued to recognize and honor the 'mere slipperiness' rule subsequent to the adoption of the Municipal Tort Liability Act." *Doyle*, 524 N.W.2d at 463 (citing *Teske*, 170 N.W.2d 234); *Smith*, 136 N.W.2d 609 (applying the mere slipperiness rule to a fall on a sidewalk in front of a municipal ice arena and deciding the matter solely on the basis

---

<sup>4</sup> The District Court stated: "[The State] has indicated specifically that it is not seeking immunity pursuant to Minnesota Statute § 3.763 [sic], therefore the Court will not address this issue." Order at 9, A 84.

of the mere slipperiness rule despite the trial court's finding the city was free of liability under both the mere slipperiness rule and the Municipal Tort Claims Act). As a result, while the statutory snow and ice immunity found in Minn. Stat. § 3.736, Subd. 3(d) does not apply to a public sidewalk that abuts a public building, the court has applied the mere slipperiness rule to bar liability for falls on sidewalks and ramps abutting courthouses and public buildings. *Lorenzen v. County of Pipestone*, No. C2-94-2584, 1995 WL 389239 (Minn. Ct. App. July 3, 1995), RA 24 (slip and fall on icy sidewalk in front of Pipestone County Courthouse); *Erickson v. County of Polk*, No. CX-95-608, 1995 WL 507529 (Minn. Ct. App. August 29, 1995), RA 27 (slip and fall on ice in front of Polk County building.). Thus, even if the State's immunity under the State Tort Claims Act is not at issue, the State is still entitled to immunity under the mere slipperiness rule.

**IV. THE DISTRICT COURT CORRECTLY HELD THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT.**

The District Court correctly found that there were no genuine issues of material fact in this case. Order at 3, A 78. Appellants have failed to raise any factual disputes that are essential elements of this case.

Summary judgment is appropriate "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *see also* Minn. R. Civ. P. 56.05. No genuine issue of material fact exists in this instance because all of the facts that Appellants raise concern

elements that are nonessential to whether the mere slipperiness rule applies. Appellants do not dispute that the ice that Rodenwald slipped and fell on was smooth slick ice that looked like glass and had no snow, sand, or salt covering it. Rodenwald Dep. at 21, A 16; *see also* Appellants' Mem. at 3. Rather, Appellants assert that a genuine issue of material fact exists as to the length of time the ice existed before Rodenwald fell, and whether the State had notice of the ice.<sup>5</sup> Appellants' argument lacks merit.

First, the amount of time that elapsed between the formation of the ice and Rodenwald's fall is irrelevant. It is irrelevant because the ice that Rodenwald slipped on was smooth slick ice. *See Doyle*, 524 N.W.2d at 463; *Smith*, 136 N.W.2d at 610. In *Smith v. Village of Hibbing*, the court explained that a governmental entity is only liable if: 1) there was rough ice and, 2) the governmental entity "had either actual or constructive notice of the perilous condition a sufficient time before the accident to allow a reasonable opportunity to remedy it." 136 N.W.2d at 610 (citations omitted). In this instance, there is no factual dispute that ice was not rough, and because a freeze thaw cycle was occurring, there was not sufficient time to allow the State to remedy the situation.

Second, Appellants' claim that the State had actual or constructive notice such that it was obligated to clear the driveway is misleading. Such notice would have to be of a dangerous artificial ridge or depression in the snow. *See, Doyle*, 524 N.W.2d at 463;

---

<sup>5</sup> Appellants also state that there is a genuine issue of material fact as to whether it was snowing at the time of the accident, stating that the State claimed it was snowing by submitting weather records. Appellants' Mem. at 4, 15. The State has never claimed it was snowing at the time of the accident. But, even if it were snowing at the time of the accident, this does not affect the fact that the ice was a natural condition. The mere slipperiness rule still applies.

*Smith*, 136 N.W.2d at 610. If artificial ridges and depressions in the snow and ice are claimed to be the cause of a fall and the basis of liability, the “defects must be so rough or ridgy that the condition constitutes a menace to reasonably safe travel.” *Kelleher v. City of W. St. Paul*, 258 N.W. 834, 835 (Minn. 1935). Here there is no allegation of any such condition. Indeed, Rodenwald’s deposition testimony is that the ice was smooth slick ice that looked like glass and had no snow, salt, or sand covering it. Because the condition of the ice was natural, the State was not on notice of a dangerous condition for which its employees had a duty to respond. Accordingly, liability is precluded by the mere slipperiness rule.

Moreover, Appellants’ claim that the State had notice of the smooth slick ice is speculative. “Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial” and, consequently, not enough to defeat summary judgment. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). Appellants have failed to produce any sufficient evidence demonstrating the length of time the ice had been in existence. Indeed, Stegmeir, the DNR forest area supervisor, testified that he did not know when the ice had formed. Stegmeir Dep. at 15, A 40. He only suspected it had formed during the freeze thaw cycle that was occurring during the time period of the accident. *Id.* Appellants have not produced any sufficient evidence that the State had notice of the ice beyond speculation.

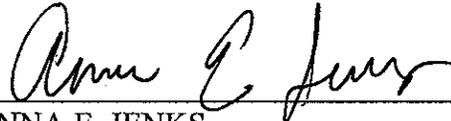
**CONCLUSION**

For all of the reasons discussed above, Respondent State of Minnesota, Department of Natural Resources, respectfully requests that the Court affirm the decision of the District Court in all regards.

Dated: 9/8/2009

Respectfully submitted,

LORI SWANSON  
Attorney General  
State of Minnesota



ANNA E. JENKS  
Assistant Attorney General  
Atty. Reg. No. 0342737

445 Minnesota Street, Suite 1100  
St. Paul, Minnesota 55101-2128  
(651) 282-5735 (Voice)  
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENT