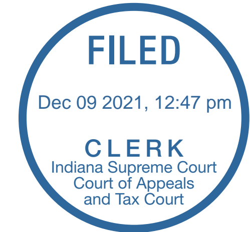


IN THE

# Indiana Supreme Court

Supreme Court Case No. 21S-CT-235

Tracy Ladra,

*Appellant (Plaintiff below)*

–v–

State of Indiana and State of Indiana Department of Transportation,

*Appellees (Defendants below).*

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Argued: June 23, 2021 | Decided: December 9, 2021

Appeal from the Porter Superior Court,
No. 64D05-1803-CT-2716
The Honorable Jeffrey W. Clymer, Special Judge.

On Petition to Transfer from the Indiana Court of Appeals,
No. 20A-CT-1418

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**Opinion by Justice Goff**

Chief Justice Rush and Justice David concur.
Justice Massa dissents with separate opinion in which Justice Slaughter joins.

**Goff, Justice.**

Under the Indiana Tort Claims Act, a government entity is "not liable" for a loss or injury resulting from the "temporary condition of a public thoroughfare . . . that results from weather." In deciding whether immunity applies in these circumstances, is the government's negligence in the design or maintenance of a public thoroughfare relevant to our inquiry? We conclude that it is and hold that, when the government knows of an existing defect in a public thoroughfare, and when it has ample opportunity to respond, immunity does not apply simply because the defect manifests during recurring inclement weather. In so holding, we expressly modify our rule in *Catt v. Board of Commissioners*.

Because the evidence designated by the plaintiff here shows that the Indiana Department of Transportation (INDOT) had long known of the defect causing the highway to flood, and because INDOT had more than ample opportunity to remedy that defect but failed in its duty, we hold that summary judgment was inappropriate. So, we reverse the trial court and remand for further proceedings consistent with this opinion.

# Facts and Procedural History

On a rainy evening in January of 2017, Tracy Ladra was driving home from church, heading eastbound along Interstate 94. As she approached mile marker 20.3, her car struck a flooded area extending from the far-left shoulder of the highway to the middle lane. Her car hydroplaned, struck the concrete median, and spun across traffic before rolling into a ditch.

When the first responding officer arrived on the scene, he witnessed flooding "all across the interstate," with water extending "up above [his] ankle." Appellant's App. Vol. 2, p. 57. This section of the interstate, he later testified, "flood[s] consistently." *Id.* at 58. When there's a heavy downpour, he stated, "debris collects," clogging the drains and flooding the area. *Id.* at 60. In fact, the area floods so consistently, the officer added, that he's had to call highway maintenance crews to "clear th[e] drains" at least ten to fifteen times during his six years on the force. *Id.* at 63. The

officer, however, had received no reports of flooding in the area in the hours leading up to the accident. *Id.* at 64.

A second responding officer agreed that the "area was prone to flooding," the result of faulty drainage on the interstate. *Id.* at 125, 128. He noted the same problem in his accident report for Ladra, which attributed the hazard "to a clogged drainage system." *Id.* at 129. When this section of the interstate floods, the officer testified, police dispatch contacts INDOT "to come out and clear those drains." *Id.* at 128. After police contacted INDOT on the night of Ladra's accident, which happened to follow a similar accident at the same spot just moments before, a maintenance crew spent nearly three hours unclogging the drains and clearing the highway of flooding.

Ladra sued the State of Indiana and INDOT (collectively INDOT) for negligence, alleging that INDOT's "failure to post warnings of flooded roadway" and "failure to maintain proper drainage" resulted in "severe and permanent injury." *Id*. at 10–13. INDOT moved for summary judgment. Relying on Indiana Code subsection 34-13-3-3(3) (or Subsection (3)), INDOT claimed immunity from injury due to a "temporary condition of a public thoroughfare . . . that results from weather." Appellant's App. Vol. 2, pp. 19–20. The trial court ruled for INDOT.

The Court of Appeals affirmed in a divided opinion. *Ladra v. State*, 162 N.E.3d 1161, 1172 (Ind. Ct. App. 2021). The majority held that immunity applies because, while Ladra presented evidence that INDOT knew the area was prone to flooding, no evidence in the record suggested that INDOT knew of the specific flooding that led to Ladra's accident. *Id*. at 1169. Citing this Court's decision in *Catt v. Board of Commissioners*, the majority emphasized that past incidents of flooding in this area have "no bearing on whether that condition is permanent." *Id.* (quoting 779 N.E.2d 1, 5 (Ind. 2002)). But while acknowledging *Catt* as binding precedent, the majority criticized that decision for creating "a circular analysis that makes any factual variance irrelevant" in granting immunity to the state. *Id*. at 1169 n.7. Under *Catt*, the majority explained, a condition inevitably "results" from the weather even when that condition results, not from the weather itself but, rather, from "the failure to repair or maintain" the public thoroughfare. *Id.* at 1170 n.7. And by prohibiting courts from

considering the state's knowledge of similar conditions in the past when determining whether a condition "is truly from the weather" or from "the failure to take some action prior to the weather event," the *Catt* decision, the majority opined, not only permits government negligence, "it encourages it." *Id.*

While sharing the majority's concern that courts have interpreted *Catt* to cover **every** accident that occurs during bad weather, regardless of the state's negligence, the dissent found genuine issues of material fact on "whether the condition was 'temporary' or whether 'the hazardous condition of [the] roadway [was] due to poor inspection, design or maintenance.'" *Id*. at 1172, 1173 (Tavitas, J., dissenting) (quoting *Catt*, 779 N.E.2d at 4).

Ladra petitioned this Court for transfer, which we granted, vacating the Court of Appeals opinion. *See* Ind. Appellate Rule 58(A).

## Standards of Review

This Court reviews a grant of summary judgment de novo. *G&G Oil Co. of Indiana, Inc. v. Continental Western Insurance Co.*, 165 N.E.3d 82, 86 (Ind. 2021). "We resolve all questions and view all evidence in the light most favorable to the non-moving party." *Id.* (cleaned up). Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). A de novo standard of review likewise applies to questions of statutory interpretation. *Ballard v. Lewis*, 8 N.E.3d 190, 193 (Ind. 2014).

## Discussion and Decision

Indiana has long held that the government "has a common law duty to exercise reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel." *Catt*, 779 N.E.2d at 3–4 (collecting cases). But, under Subsection (3) of the Indiana Tort Claims Act (ICTA or Act), a government entity, or a government employee acting within the scope of employment, enjoys immunity from liability for an injury or loss

resulting from the "temporary condition of a public thoroughfare" or roadway "that results from weather." Ind. Code § 34-13-3-3(3) (2016).

The dispute here centers on the proper standard for determining whether Subsection (3) applies. Ladra, along with the Indiana Trial Lawyers Association (ITLA) as amicus curiae, argues that the *Catt* rule is simply "unworkable." Pet. to Trans. at 7. *See also* Amicus Br. at 5 (asking this Court to create a "workable standard"). Echoing the panel's criticism below, ITLA insists that *Catt* "eliminates any meaningful incentive for the government to exercise reasonable care when designing and maintaining public roads." Amicus Br. at 6. INDOT, on the other hand, argues that *Catt* correctly interpreted Subsection (3)—an interpretation in which the legislature has ostensibly acquiesced.

Resolution of this dispute compels us to reconsider our precedent, to determine whether it was properly decided or whether it's in need of clarification or modification. *See* App. R. 57(H)(5). To that end, we begin our discussion by examining the common-law origins of sovereign immunity, the doctrine's substantial abrogation by Indiana courts, and the legislative codification of the common-law rule recognizing government liability for tortious conduct. *See* Pt. I, *infra.* With this context in mind, we then turn our analysis to *Catt*, ultimately concluding that the rule in that case sanctions negligent government conduct at Hoosiers' expense. *See* Pt. II.A, *infra.* We go on to explain why legislative acquiescence and stare decisis present no bar to our modification of the rule in *Catt*. *See* Pt. II.B, *infra.* We then address INDOT's policy arguments, dispelling unfounded fears that our modified rule threatens the public treasury or opens the floodgate of negligence claims against the state. *See* Pt. II.C, *infra.* Finally, we analyze the merits of Ladra's claim under our modified rule, concluding that she designated sufficient evidence of INDOT's negligence to withstand summary judgment. *See* Pt. III, *infra.*

## I. At common law and by statute, government *liability* for tortious conduct is the rule while immunity is the exception.

Premised on the "substantive principle that 'the king could do no wrong,'" the English common-law doctrine of sovereign immunity exempted the Crown from "being sued in his own court."[1] *State v. Rendleman*, 603 N.E.2d 1333, 1335 (Ind. 1992) (citation omitted). The adoption of this doctrine in post-Revolutionary America stood on the assumption that the fledgling states lacked the financial security to litigate claims of negligence for their official activities. *Campbell v. State*, 259 Ind. 55, 58, 284 N.E.2d 733, 734 (1972). In recent decades, however, courts and commentators have questioned this explanation, characterizing the doctrine's reception in the United States as "obscure" and as "one of the mysteries of legal evolution." *Peavler v. Bd. of Comm'rs of Monroe Cty.*, 528 N.E.2d 40, 41 (Ind. 1988); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 4 (2002) (quotation marks omitted). Whatever the basis for its origins, Indiana received the doctrine "as part of its common law" when it entered the Union in 1816. *Rendleman*, 603 N.E.2d at 1335.

Under the state's first constitution, the only means by which to hold the government accountable for its conduct involved petitioning the legislature to adopt an act specifically authorizing an individual to sue. *Id.* The 1851 Constitution prohibited this type of special legislation, *see* Ind. Const. art. 4 § 22, but authorized general statutes permitting a party to bring "suit against the State," *id.* art. 4 § 24.

[1] Legal scholars have documented "several forms of action against the Crown as a matter of course," debunking the idea that English law completely barred recovery against the sovereign. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 3 (2002) (citing studies).

Still, the first major effort to limit the doctrine of sovereign immunity came not from the legislature but, rather, from the judicial branch.[2] As early as 1848, this Court acknowledged the "settled" rule "that municipal corporations are responsible to the same extent and in the same manner as natural persons, for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for the benefit of the cities or towns under their government." *Ross v. City of Madison*, 1 Ind. 281, 284 (1848). Subsequent decisions recognized a municipality's common-law duty to maintain public "streets, sidewalks and crossings, in a reasonably safe condition." *Glantz v. City of South Bend*, 106 Ind. 305, 309, 6 N.E. 632, 634 (1886). By neglecting this duty, the city risked liability "to persons suffering injury or loss." *City of Goshen v. Myers*, 119 Ind. 196, 200, 21 N.E. 657, 658–59 (1889). This duty "did not render the government strictly liable for all defective conditions." *Gary Cmty. Sch. Corp. v. Roach-Walker*, 917 N.E.2d 1224, 1226 (Ind. 2009). Rather, our courts recognized a government entity's "legal obligation" to "exercise ordinary care and skill in making and keeping its streets in a reasonably safe condition for travel by persons who exercise ordinary care." *Michigan City v. Boeckling*, 122 Ind. 39, 40–41, 23 N.E. 518, 518 (1890).[3] In short, principles of ordinary negligence generally governed the state's liability for maintenance of public roadways and thoroughfares. *Roach-Walker*, 917 N.E.2d at 1226.

Despite these limited, judicially created exceptions, the prevailing common-law rule held government entities immune from liability in tort. By the mid-twentieth century, however, a growing body of critical scholarship began questioning "the anomalies and paradoxes in the present state of the law" and the "lack of theoretical justification for the prevailing doctrine of [government] irresponsibility." Edwin M. Borchard,

[2] The General Assembly took no action under article 4, section 24 of the state constitution until 1889, when it permitted individuals to sue the state for contract claims. *Rendleman*, 603 N.E.2d at 1335.

[3] "Specifically, at common law a governmental entity was not liable for injuries caused by 'accumulation of snow or ice through natural causes' in public streets and sidewalks that result in a 'general slippery condition.'" *Roach-Walker*, 917 N.E.2d at 1226 (quoting *City of Linton v. Jones*, 75 Ind. App. 320, 322, 130 N.E. 541, 542 (1921)).

*Government Liability in Tort*, 34 Yale L.J. 1, 3 (1924). *See also* Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 Harv. L. Rev. 1060, 1060–61 (1946) (rejecting, with few exceptions, the traditional reasons supporting the doctrine of sovereign immunity); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 2 (1963) (same). Influenced by this academic commentary, state courts "began to excise major parts of the doctrine" while urging legislatures to balance "state accountability with fiscal responsibility." Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 Ind. L.J. 543, 552 (2003).

Indiana was no exception to this paradigm shift. In two decisions from the late 1960s, our Court of Appeals abolished the doctrine—first at the municipal level and then at the county level. *Brinkman v. City of Indianapolis*, 141 Ind. App. 662, 666, 231 N.E.2d 169, 172 (1967) (municipalities), *trans. denied*; *Klepinger v. Bd. of Comm'rs of Miami County*, 143 Ind. App. 155, 177–78, 143 Ind. App. 178, 201, 239 N.E.2d 160, 173 (1968) (counties), *trans. denied*. This trend culminated with the 1972 decision in *Campbell v. State*, in which this Court abolished the doctrine statewide. 259 Ind. at 63, 284 N.E.2d at 737. This decision overturned the common-law rule that government entities were immune from liability for their torts unless the courts recognized an exception. The new rule, under *Campbell*, held that, with certain exceptions, government entities were **liable** for "a breach of duty owed to a private individual."[4] *Id.* And that rule, we've since emphasized, "is properly applied by presuming that a governmental unit is bound by the same duty of care as a non-governmental unit." *Benton v. City of Oakland City*, 721 N.E.2d 224, 230 (Ind. 1999).

In response to *Campbell*, which exposed most activities of state government to liability under traditional tort theories, the General

[4] The exceptions recognized in *Campbell* included cases where (1) a government unit fails "to provide adequate police protection to prevent crime"; (2) a government official appoints "an individual whose incompetent performance" results in a negligence suit against the "state official for making such an appointment"; and (3) judicial decision making is challenged. 259 Ind. at 62–63, 284 N.E.2d at 737.

Assembly adopted the ITCA in 1974. *Roach-Walker*, 917 N.E.2d at 1227. This measure codified the common-law rule of government liability while granting immunity only in specific circumstances. *Id.* That portion of the ITCA applicable here immunizes a government entity, or one of its employees acting in an official capacity, from liability for a loss resulting from the "temporary condition of a public thoroughfare . . . that results from weather." I.C. § 34-13-3-3(3).

## II. The rule in *Catt* barring courts from considering the government's prior negligence calls for reconsideration.

In deciding whether Subsection (3) applies to a particular claim, the "relevant inquiry," under this Court's decision in *Catt*, "is whether the loss suffered by the plaintiff was actually the result of weather or some other factor." *Catt*, 779 N.E.2d at 4. This question of causation, however, is separate from the "determination of whether a condition is temporary or permanent." *Id.* at 5. And the focus of the temporary-versus-permanent determination "is whether the governmental body has had the time and opportunity to remove the obstruction but failed to do so." *Id.* Critical to the issues presented here, the *Catt* decision characterized the government's prior negligence in the design or maintenance of a public thoroughfare, and its knowledge of "the frequency with which" a weather-related hazard may have occurred "in the past," as irrelevant, with "no bearing on whether [a] condition is permanent." *Id.* In other words, under *Catt*, the question of whether a condition is "temporary" encompasses only the **particular** condition that causes the loss or injury.

INDOT insists that *Catt* correctly interpreted Subsection (3). "Because the focus of the temporal element is about notice and the opportunity to respond," INDOT contends, "*Catt* properly held that past incidents or negligent design or maintenance are irrelevant to determining whether the condition is permanent or temporary." Resp. to Trans. at 14. Allowing courts to consider government negligence, INDOT submits, "collapses the liability and immunity inquiries into one" and "effectively nullif[ies]" Subsection (3). *Id.*

Ladra, on the other hand, characterizes the *Catt* rule as "unworkable." Pet. to Trans. at 7. By characterizing as irrelevant the state's prior negligence in designing or maintaining a public thoroughfare, the rule in *Catt*, Ladra contends, confers immunity regardless of whether the state knows that adverse weather triggers the condition and regardless of the state's past failure to prevent that condition from recurring. To illustrate this point, Ladra emphasizes that "INDOT could have filled I-94's drains with concrete the day before [her] accident and that fact would be of no consequence because the water on the roadway came from the rain." Appellant's Br. at 14.

We agree with Ladra that, by prohibiting courts from considering the government's prior negligence in the design or maintenance of a public thoroughfare, the *Catt* rule effectively grants blanket immunity to the state in every circumstance involving inclement weather, leaving injured plaintiffs with virtually no remedy under Subsection (3). We also agree with INDOT on the practical importance of government notice and opportunity to respond. Mindful of these competing interests, we hold that, when the government knows of an existing defect in a public thoroughfare that manifests during recurring weather conditions, and when it has ample opportunity to respond, immunity does **not** apply simply because the defect manifests during inclement weather.

## A. By requiring injured parties to prove the impossible, the *Catt* rule sanctions negligent government conduct.

The *Catt* Court noted that "a governmental entity is not entitled to immunity every time an accident occurs during bad weather." 779 N.E.2d at 4. "[I]f the hazardous condition of a roadway is due to poor inspection, design or maintenance," the Court added, "then the governmental entity may be held liable for injuries caused thereby." *Id.* But *Catt* made clear that government liability may attach only when the plaintiff shows that negligence **alone** caused the injury. *Id.* at 5. *See, e.g.*, *Roach-Walker*, 917 N.E.2d at 1225, 1228 (holding, in a claim asserting negligent maintenance of a walkway, that immunity did not apply where the state failed to prove its case due to an "inconclusive" record of weather conditions). So long as the state offers sufficient evidence of inclement weather, immunity

**inevitably** applies, rendering the government's prior negligence entirely irrelevant. As the Court in *Catt* put it, "[i]mmunity assumes negligence but denies liability." 779 N.E.2d at 5.

This standard essentially requires an injured party to prove the impossible. In *Dzierba v. City of Michigan City*, for example, a young child, standing near a lighthouse on a city-owned pier, drowned when a large wave swept him into Lake Michigan. 798 N.E.2d 463, 465 (Ind. Ct. App. 2003). The plaintiffs sued under the ITCA, alleging negligence by the city in failing to warn of potentially dangerous conditions and in failing to provide safety measures to prevent the drowning. *Id.* The Court of Appeals held that, even if the city owed a duty to the public, immunity applied under Subsection (3). *Id.* at 467, 470. The proper inquiry under *Catt*, the court explained, was whether the city knew "of *that particular* hazard and [had] the opportunity, based on that awareness, to neutralize the hazard." *Id.* at 470. In other words, *Catt* required the plaintiffs to show that the city knew that the "large, dangerous waves were in fact washing over the East Pier around the time [the child] was swept off of the pier" and "that, armed with such knowledge, the [c]ity had time to remedy the situation." *Id.* It "would not have been enough to show that high waves may or indeed even did result whenever inclement weather was present in the area," the court emphasized, as that evidence is irrelevant to the question of immunity. *Id.*

*Dzierba* epitomizes the illogic of ignoring evidence of prior weather hazards. By forcing injured parties to show that the government knew of a particular weather condition before it occurred and that the government failed to remedy that condition when it had the time and opportunity to do so, the rule inevitably results in immunity for the state. Such a rule is simply incompatible with the government's duty to reasonably ensure the safety of our public thoroughfares. And our courts have recognized as much.

In *Dahms v. Henry*, the plaintiff sued several government entities for injuries he sustained from an accident in which an on-duty firefighter—aware of the poor road conditions but unable to stop his car on the snow-covered ice—struck the plaintiff from behind. 629 N.E.2d 249, 250 (Ind. Ct. App. 1994). The defendants sought immunity under Subsection (3). *Id.* at

251. In response, the plaintiff argued that the "primary cause of the loss was the negligent act of the [firefighter]," not the "temporary condition of the road." *Id.* Otherwise, he insisted, "the mere fact that roads are snow-covered, icy and slick would allow governmental entities and employees *carte blanche* to act without the reasonable care required under the circumstances." *Id.*

The trial court found the defendants immune. *Id.* at 250. But the Court of Appeals reversed, finding a material-fact issue related to whether the accident resulted from inclement weather or whether it resulted from the firefighter's negligence. *Id.* at 252. In reaching this conclusion, the panel relied in part on *Quakenbush v. Lackey*, in which this Court stated that "[g]ranting immunity to law enforcement officers who fail to exercise reasonable care while driving would sanction negligent and reckless conduct" and would "result in hardship to the individual injured by the enforcement." *Id.* (quoting 622 N.E.2d 1284, 1290 (Ind. 1993), *overruling on other grounds recognized by King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 482 (Ind. 2003)). The *Quakenbush* Court's analysis, the panel opined, was "equally applicable" in *Dahms*, "where defendants urge[d] a finding of immunity no matter what [the firefighter's] conduct." *Id.* "It is incongruous to allow governmental employees charged with a duty to protect the safety of the public" and "to ignore their duty to use reasonable care when driving," the panel concluded, "solely because ice and snow had accumulated on the road." *Id.*

We agree with the reasoning in *Dahms* and *Quakenbush*. Granting immunity for injuries resulting from the government's negligent conduct, simply because that conduct manifests during inclement weather, permits the state and its employees "*carte blanche* to act without the reasonable care required under the circumstances," ultimately imposing substantial hardship on those injured by the government's negligence. And this same reasoning applies when the government negligently fails to remedy a known defect that only manifests during a temporary, but recurring, weather condition.

### B. Legislative acquiescence and stare decisis present no bar to our reconsideration of *Catt*.

INDOT contends that, by declining to amend Subsection (3) following the decision in *Catt*, the legislature acquiesced in its interpretation. By modifying that interpretation, INDOT insists, we impermissibly "rewrite" Subsection (3). Resp. to Trans. at 16.

We disagree.

To begin with, this Court has long taken a "restrained view" of legislative acquiescence. *Fraley v. Minger*, 829 N.E.2d 476, 493 (Ind. 2005). Silence by our legislature often stands as "a poor beacon to follow in determining the meaning of a statute." *St. Mary's Medical Ctr., Inc. v. State Bd. of Tax Comm'rs*, 571 N.E.2d 1247, 1250 (Ind. 1991). Indeed, the fact "that the legislature has expressed its opinion through silence is better seen as the legislature's failure to express an opinion at all." *Estabrook v. Mazak Corp.*, 140 N.E.3d 830, 835 (Ind. 2020).

Of course, we recognize that "the doctrines of *stare decisis* and legislative acquiescence are especially compelling in matters of statutory interpretation." *Myers v. Crouse-Hinds Div. of Cooper Industries, Inc.*, 53 N.E.3d 1160, 1163 (Ind. 2016). Indeed, for reasons of "continuity and predictability" in our jurisprudence, "we should be reluctant to disturb long-standing precedent." *Layman v. State*, 42 N.E.3d 972, 977 (Ind. 2015) (citations and quotation marks omitted). But while stare decisis often compels a court to follow its prior decisions, the doctrine is not a straitjacket and we may overrule or modify precedent if there are "urgent reasons" or if there is a "clear manifestation of error." *Id.* (citations and quotation marks omitted).

Here, we find several reasons to support our decision.

### 1. Interpreting Subsection (3) to encompass losses resulting from the government's prior negligence *along with* a temporary weather condition expands immunity beyond its statutory scope.

Ladra recognizes that the government isn't responsible for weather conditions beyond its control. But to ignore the "government's negligence that contributed to the loss," she insists, "violates the textual requirement that the loss solely result from the circumstances encompassed" in Subsection (3). Pet. to Trans. at 12. In other words, it's the "condition addressed in the immunity provision," rather than the government's conduct, that's "the sole cause of the loss." *Id.*

We agree. Subsection (3) confers immunity for losses resulting from a "temporary condition of a public thoroughfare . . . that results from weather," **not** from government negligence "**along with** a temporary condition of a public thoroughfare . . . that results from weather."

We find support for this conclusion in *Hinshaw v. Board of Commissioners of Jay County*. The plaintiffs in that case, having sustained injuries from a car accident at an unmarked rural intersection, sued the county for damages, alleging negligence in maintaining proper signage. 611 N.E.2d 637, 638 (Ind. 1993). The county claimed immunity under, what is now, subsection (10) of the ITCA, which applies to a loss resulting from an "act or omission of someone other than the governmental entity." *Id.* This subsection, the plaintiffs argued, applied "only when the conduct of a non-government employee is the sole proximate cause" of the loss. *Id.*

The county, on the other hand, argued that the subsection granted immunity whenever the government's "negligence combines with the negligence of a third party." *Id.* In other words, the county interpreted the applicable subsection "to preclude governmental liability if *any* third party intervenes, whether foreseeable or not." *Id.* at 639. In rejecting this argument, we concluded that the various subsections of the ITCA, taken together, "are *not* referring to activities apart from the governmental activity upon which a claim of governmental liability is based." *Id.* at 640. "The introductory phrase 'if a loss results from,'" we emphasized, "does *not* mean 'if a loss also results from.'" *Id.*

The same principle applies here. A loss resulting from a temporary weather condition does not mean a loss **also** resulting from a temporary weather condition. Indeed, to illustrate this very point, the *Hinshaw* Court cited the hypothetical example of "a government employee who falls asleep while driving a maintenance truck and collides with a parked car." *Id.* In that situation, we opined, immunity would not apply "merely because [the employee] alleges that an additional factor in the loss was 'the temporary condition of a public thoroughfare which results from weather.'" *Id.* (quoting Subsection (3)).

Normally, "clear statutory language makes it unnecessary to resort to other statutory construction rules." *Jackson v. State*, 50 N.E.3d 767, 775 (Ind. 2016). But despite the interpretive inconsistencies between *Hinshaw* and *Catt*, our courts have consistently applied *Catt*'s reading of Subsection (3) since our decision in that case. And, so, we turn to another means of statutory construction: the presumption against change in the common law.

### 2. The common-law basis of Subsection (3) recognizes government liability for negligence that manifests through inclement weather.

In the first case to address a government entity's liability for injuries caused by a "temporary condition resulting from weather," the Court of Appeals described the ITCA as "little more than a codification of the common law." *Walton v. Ramp*, 407 N.E.2d 1189, 1191 (Ind. Ct. App. 1980). And based on this observation, the court concluded that the ITCA did "not abrogate the common law duty" of a government entity "to exercise reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel." *Id.*

Since *Walton*, our courts have consistently relied on "common law precedents" when interpreting Subsection (3). *Roach-Walker*, 917 N.E.2d at 1227 (citing cases). Indeed, the *Catt* Court itself interpreted this provision by surveying several common-law cases decided "in the context of a city's duty to remove snow and ice." 779 N.E.2d at 4. Reflecting the "common law principles" announced in these cases, the Court concluded, Subsection

(3) "provides immunity for temporary conditions caused by weather" but not "for immunity when the condition is permanent or not caused by the weather." *Id.*

In synthesizing its rule, however, the *Catt* Court's survey omitted several important pre-ITCA decisions. And these decisions recognized that liability **may** in fact attach when the government's negligence manifests during inclement weather.

In *McQueen v. City of Elkhart*, for example, the plaintiff sued the city for injuries she sustained when she slipped and fell on a sidewalk covered by a blanket of snow, obscuring a sublayer of ice with "depressions or unevenness of surface." 14 Ind. App. 671, 674, 43 N.E. 460, 460 (1896). In finding no cause of action for the plaintiff, the court acknowledged the city's duty "to exercise diligence and care to keep its streets and sidewalks in reasonably good condition and repair." *Id.* at 675, 43 N.E. at 461. But that duty, the court concluded, "does not guaranty absolute safety" for pedestrians. *Id.* So long as the public walkway "was properly graded and constructed," the court explained, "the mere fact of snow falling thereon and melting and then freezing and making it slippery would not create a liability on [the city's] part for an injury to one slipping and falling" on it. *Id.* at 679, 43 N.E. at 462. However, the court also recognized that, had the city "been negligent either in devising and adopting a grade for its streets and sidewalks, or in the manner of constructing the sidewalk," it may have been liable for the plaintiff's injuries. *Id.* In other words, if a government entity improperly constructs or maintains a thoroughfare, the manifestation of that negligence through a defect caused by recurring inclement weather may result in liability.

In another case, *City of Muncie v. Hey*, the plaintiff sued the city for injuries after falling on an ice- and snow-covered sidewalk. 164 Ind. 570, 572, 74 N.E. 250, 251 (1905). For "more than four months prior" to the accident, the city had "negligently permitted" the discharge of roof water from a nearby building onto the uneven sidewalk below, creating a sheet of ice "six feet wide" and "five inches thick." *Id.* at 573, 74 N.E. at 251. The city "had both actual and constructive notice" of this "dangerous obstruction" at least five days prior to the accident. *Id.* In affirming judgment for the plaintiff, this Court, in a unanimous opinion, found the

city liable for failing in its duty to "prevent or abate" the "accumulation of water and ice in the manner shown." *Id.* at 574, 74 N.E. at 251. In so holding, the Court distinguished this case from *McQueen* and similar cases in which the plaintiff "sought to hold cities liable for a failure to remove from their pavements snow, sleet and ice accumulated in a **natural way**." *Id.* (emphasis added). That is, inclement weather **alone** creates no government liability for a person's injuries, as the court in *McQueen* concluded. But when the government fails to remedy a **known** condition, and when that condition manifests through inclement weather, liability attaches. The city has a "continuing duty" to "exercise reasonable care and diligence" in keeping its streets and sidewalks "in safe condition," the *Hey* Court emphasized, "and for any negligent omission or failure in its performance an action will lie for the resultant damages."[5] *Id.* at 573, 74 N.E. at 251.

In a similar case, *City of Linton v. Maddox*, the plaintiff sought damages for injuries she sustained after slipping and falling on an ice-covered sidewalk. 75 Ind. App. 449, 451, 130 N.E. 810, 811 (1921). The surface of the sidewalk had "broken loose and become displaced, leaving depressions in which the water collected." *Id.* at 450–51, 130 N.E. at 811. This state of disrepair "had so remained for a considerable length of time, with the knowledge of the city authorities." *Id.* On the day of the accident, water had collected and froze in the depressions—a danger obscured by a blanket of snow. As in *Hey*, the court affirmed judgment for the plaintiff, *id.* at 450, 130 N.E. at 811, imposing liability for a condition caused by weather in combination with the city's prior negligence in maintaining the sidewalk.

These cases reflect, not jurisprudential anomalies but, rather, a general consensus among late-nineteenth and early-twentieth-century courts and

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[5] Ironically, the Court in *Catt* cited *Hey*, albeit for the proposition that "a city could be held liable under the common law for failure to remove snow and ice if it could be shown that the snow and ice represented an obstruction to travel and the city had an opportunity to remove the snow and ice, but failed to do so." 779 N.E.2d at 4. But *Hey* conflicts with the rule in *Catt* in that *Hey* considered the government's negligence, as manifested through inclement weather, in determining liability for the dangerous condition.

commentators on the scope of government liability in tort. According to one leading treatise, "the bare fact that a highway" of proper construction "had become slippery" from a "coating of ice" would "not constitute a defect for which municipal corporations are responsible." W. Williams, The Liability of Municipal Corporations for Tort § 99, at 161 (1901). But if such coating of ice "formed upon the highway because of the improper construction, or the defective condition, of the highway itself," the treatise added, "**or because of the negligence of the municipal authorities to properly care for the drains [and] gutters**" along the highway, "there may be a defect for which the [government]" may be liable "in damages to a person who suffers an injury through a fall upon such ice." *Id.* at 162–63 (emphasis added) (citing cases).

This authority clearly suggests that *Catt*'s interpretation of Subsection (3) embodied a much broader immunity exception than recognized at common law, **expanding** the specific circumstance articulated by our legislature to include the government's conduct itself. After all, this "Court presumes that the legislature does not intend to make any change in the common law beyond what a statute declares either in express terms or by unmistakable implication." *Quakenbush*, 622 N.E.2d at 1290.

Our modified rule, by contrast, which permits courts to consider the government's prior negligence when determining immunity under Subsection (3), properly reflects the principles articulated at common law. And when construing the scope of a "common-law statute," the doctrine of stare decisis carries less significance than it otherwise would. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

We acknowledge, as INDOT points out, that we effectively merge the liability and immunity inquiries into one by allowing negligence to factor into our analysis. *See* Resp. to Trans. at 14. But we reject the idea that such analysis "nullif[ies]" Subsection (3). *See id.* As Indiana courts have consistently recognized, Subsection (3) codified the common law. *Roach-Walker*, 917 N.E.2d at 1227 (citing cases). And at common law, at the time of the ITCA's adoption, government liability for tortious conduct was the rule while immunity was the exception. *See* Pt. I, *supra*. Indeed, the language of the ITCA itself reflects this understanding, finding

government entities "not liable"—rather than "immune"—for specific losses. *See* I.C. § 34-13-3-3.

### C. Properly applied, our modified standard conforms with the public policies underlying the ITCA.

Under *Catt*, INDOT contends, Subsection (3) "immunity both limits the potentially dire fiscal consequences of liability and allows public officials to make decisions without fear of potential litigation." Resp. to Trans. at 14. Modifying this standard to create a government-negligence exception, INDOT asserts, "would have serious financial and policy-making ramifications." *Id.* And such a change, INDOT insists, would open the floodgate of negligence claims against the state in "every case involving bad weather." *Id.* at 15. What's more, INDOT submits, it would "encourage public officials to become excessively cautious—thereby imposing greater costs on taxpayers—so as to avoid liability." *Id.*

We acknowledge the underlying purposes of immunity: to protect the public treasury from excessive lawsuits and to ensure that public employees can exercise discretion in carrying out their official duties without fear of litigation. *Harrison v. Veolia Water Indianapolis, LLC*, 929 N.E.2d 247, 253 (Ind. Ct. App. 2010); *Burton v. Benner*, 140 N.E.3d 848, 852 (Ind. 2020) (citations omitted). But immunity does **not** apply when a condition or defect in a public thoroughfare is "not caused by weather." *Catt*, 779 N.E.2d at 4. What's more, in the sovereign-immunity cases of the 1960s and 1970s, our courts rejected similarly dire predictions that "excessive litigation would result in unbearable costs to the public in the event" that government entities "were treated as ordinary persons for purposes of tort liability," *Brinkman*, 141 Ind. App. at 666, 231 N.E.2d at 172, and that the abrogation of common-law immunity would "impose a disastrous financial burden" on Indiana, *Campbell*, 259 Ind. at 61, 284 N.E.2d at 736.

In the years following *Campbell*, the legislature has enacted a comprehensive statutory framework of procedural and substantive measures designed to, among other things, (1) cap damages and limit a claimant's potential recovery; (2) restrict actions against employees of a

government entity; (3) bar claims against a government entity absent proper notice from the claimant; (4) prohibit lawsuits against a government entity before that entity denies the claim; (5) facilitate insurance coverage for the investigation, settlement, and defense of claims or suits brought against a government entity; and (6) enable the payment of attorneys' fees, in certain circumstances, to a prevailing government entity. *See* I.C. § 34-13-3-4 (damage caps); I.C. § 34-13-3-5 (actions against employees); I.C. §§ 34-13-3-6, -10 (notice); I.C. § 34-13-3-13 (claim-denial prerequisite); I.C. § 34-13-3-20 (liability insurance); I.C. § 34-13-3-21 (attorneys' fees). The ITCA further protects a government entity from liability in the "performance of a discretionary function" and for the design of a highway if a claimed injury arises at least twenty years after the highway "was designed or substantially redesigned." I.C. §§ 34-13-3-3(7), (18). Still, INDOT worries that "[m]ore can always be done to make roadways marginally safer," suggesting that a negligence analysis under Subsection (3) would expose the state to potentially unlimited liability. Resp. to Trans. at 15. But not every omission to improve roadway safety is actionable in tort. The standard for negligence is the "reasonable care that an ordinary person would exercise in like or similar circumstances." *Murray v. Indianapolis Public Schools*, 128 N.E.3d 450, 453 (Ind. 2019) (citations and quotation marks omitted). And while some claims may proceed to trial, those lacking a sufficient evidentiary basis would not survive summary judgment. *See Lowery v. SCI Funeral Servs., Inc.*, 163 N.E.3d 857, 861 (Ind. Ct. App. 2021) ("The mere allegation of a fall is insufficient to establish negligence, and negligence cannot be inferred from the mere fact of a fall.") (citations and quotation marks omitted).

We now turn to the merits of Ladra's claim.

## III. Because the designated evidence shows that INDOT had long known of the clogged drain, summary judgment was inappropriate.

Under our modified rule, when the government knows of an existing defect in a public thoroughfare, and when it has ample opportunity to

respond, immunity does **not** apply simply because the defect manifests during inclement weather.

Here, Ladra designated evidence that INDOT had received numerous reports that the drains in that area consistently clogged. According to testimony from one of the responding officers, the area floods so consistently that he's had to call highway maintenance crews to "clear th[e] drains" at least ten to fifteen times during his six years on the force. Appellant's App. Vol. 2, p. 63. And the second responding officer testified that, when this section of the interstate floods, police dispatch contacts INDOT "to come out and clear those drains." *Id.* at 128. But INDOT never fixed the underlying problem, ultimately leaving Hoosier drivers like Ladra at significant risk of injury or even death. To be sure, a maintenance foreman for the Gary Subdistrict of INDOT filed an affidavit stating that INDOT didn't know that the area was flooded the night of the accident. But no one testified or averred that INDOT was unaware that this part of I-94 was prone to flooding. A finder of fact might credit INDOT's testimony and find that INDOT didn't have proper notice of the issue. But testimony from the responding officers is sufficient to survive summary judgment.[6]

Because the evidence, taken in the light most favorable to Ladra as the nonmoving party, demonstrates the condition **resulted** from INDOT's failure to rectify a known problem—a problem that manifested only during inclement weather—and because the evidence shows that INDOT had ample opportunity to address that problem, we find that INDOT did not meet its burden of showing that it was entitled to immunity under Subsection (3).[7]

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[6] We emphasize that our decision doesn't establish INDOT's liability. Instead, we merely find that INDOT hasn't established that it is immune. Whether INDOT was negligent remains a question for the trier of fact.

[7] Because we find that Ladra presented sufficient evidence that that the flooding was not the result of the weather, we need not consider her claim that the condition of I-94 was temporary or the claim that the alleged negligence related to the drain, which is not a public thoroughfare.

## Conclusion

By emphasizing that government immunity for tortious conduct is the **exception** to the rule of liability, our decision today reaffirms long-standing principles of democratic **accountability**—principles embodied in our common law and codified in the ITCA.

For the reasons above, we hold the trial court erred in granting summary judgment in favor of INDOT on the issue of immunity. We, therefore, remand the case to the trial court for further proceedings consistent with this opinion.

Rush, C.J., and David, J., concur.
Massa, J., dissents with separate opinion in which Slaughter, J., joins.

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**Massa, J., dissenting.**

I respectfully dissent. The Court today resuscitates a clearly sympathetic plaintiff's lawsuit because the Indiana Department of Transportation (INDOT) may have been negligent. It seems only fair that question now be put to a jury. But a plain reading of the Indiana Tort Claims Act (ITCA) leads to an opposite conclusion—the question of negligence should not reach a jury, because INDOT is immune per the judgment of the General Assembly.

Not too long ago, we noted the history of sovereign immunity in Indiana, from its English origins to its codification via the ITCA. *Esserman v. Ind. Dep't of Env't Mgmt.*, 84 N.E.3d 1185, 1188–90 (Ind. 2017). The ITCA allows lawsuits against the State, but only under certain circumstances and only for certain harms. The State is immune under the ITCA for harms resulting from a public thoroughfare's weather-induced temporary condition. Ind. Code § 34-13-3-3(3) (2016). Here, the condition that harmed Tracy Ladra was flooding. That flooding temporarily occurred due to rain; the highway was not constantly under water. It is immaterial that the State, through INDOT, may have negligently failed to maintain the drains, because that alone would not have harmed Ladra. The harm only arose because of the rain, i.e., the weather. Accordingly, Ladra's suit is barred by ITCA immunity.

The Court cites a number of ancient precedents concerning immunity for municipal corporations—not the State—in support of its **policy** argument that the State should have to answer for any negligence, or else Ladra will have "virtually no remedy." *Ante*, at 10. But immunity assumes negligence because it "bars recovery even where ordinary tort principles would impose liability." *Gary Cmty. Sch. Corp. v. Roach-Walker*, 917 N.E.2d 1224, 1225 (Ind. 2009). The Court goes on to question the need for immunity under the circumstances, including the legislative rationale of protecting taxpayers from tort judgments. But that misses the point. The legislature is aware that immunity may work a harsh—even "unfair"—outcome, yet still authorized it in certain circumstances. Any policy arguments are more properly considered by the General Assembly, which

"has wide latitude in determining public policy." *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind. 1992). Indeed, this Court cannot substitute "its beliefs for [those] of the legislature in determining the wisdom or efficacy of a particular statute." *Mahowald v. State*, 719 N.E.2d 421, 424 (Ind. Ct. App. 1999). I believe we have done so today and thus respectfully dissent.

Slaughter, J., joins.