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IN THE  
COURT OF APPEALS OF INDIANA

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Tracy Ladra,  
*Appellant-Plaintiff,*

v.

State of Indiana and State of  
Indiana Department of  
Transportation,  
*Appellees-Defendants,*

January 27, 2021

Court of Appeals Case No.  
20A-CT-1418

Appeal from the Porter Superior  
Court

The Honorable Jeffrey W. Clymer,  
Special Judge

Trial Court Cause No.  
64D05-1803-CT-2716

**Robb, Judge.**

## Case Summary and Issues

- [1] On March 19, 2018, Tracy Ladra filed a complaint against the State of Indiana and the State of Indiana Department of Transportation (collectively “INDOT”), seeking damages for injuries she sustained in an automobile accident.
- [2] INDOT filed a motion for summary judgment and supporting memorandum asserting immunity under Indiana Code section 34-13-3-3(3). Following a hearing, the trial court granted INDOT’s motion for summary judgment. Ladra now appeals raising multiple issues which we restate as: (1) whether immunity under Indiana Code section 34-13-3-3(3) was applicable under the facts of this case; and (2) whether Ladra presented a genuine issue of material fact regarding INDOT’s immunity under Indiana Code section 34-13-3-3(3). Concluding that Indiana Code section 34-13-3-3(3) is applicable to this case and that Ladra failed to designate evidence to establish a genuine issue of material fact, we affirm.

## Facts and Procedural History

- [3] On January 11, 2017, Ladra was driving her car home, eastbound on Interstate 94 in Portage. It was raining at the time. As Ladra neared mile marker 20.3 she came upon a flooded section of the interstate. Both the inner shoulder and one travel lane were covered with water. Ladra drove through the water causing her vehicle to hydroplane. Ladra lost control of her vehicle and struck the concrete

barrier wall head on and continued to spin out of control across traffic, eventually coming to rest in a ditch.

[4] Indiana State Police Officer Rogelio Escutia was the first on the scene and stated that when he arrived, the “water [was] up above my ankle.” Appellant’s Appendix, Volume II at 57. Officer John Holmen was the assisting officer. Officer Holmen testified that in his opinion the crash “occurred due to flooding on the roadway which was caused by a clogged drainage system in the areas of the crash.” *Id.* at 134. It took approximately three hours for the water to subside after Officer Escutia contacted the highway maintenance crew to unclog the drain.<sup>1</sup> *See id.* at 61. Officer Escutia stated that the area consistently floods “when there are times of heavy downpour . . . because the way [the interstate is] set up . . . [a]ll debris collects in [the] area[] . . . and it floods.” *Id.* at 111. However, Officer Escutia and Officer Holmen both testified that on the day of Ladra’s crash they had no indication that the area was flooded prior to Ladra’s accident. *See id.* at 64, 70. Similarly, Jim Scheffer, district operations manager for INDOT maintenance department, stated that prior to Ladra’s crash INDOT did not have knowledge that the area between mile marker 19 and 20.3 was an area prone to flooding. *See id.* at 53.

[5] On March 19, 2018, Ladra filed a complaint against INDOT alleging that she suffered injury due to INDOT’s “failure to post warnings of flooded roadway,

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<sup>1</sup> It is unclear whether only one drain was clogged or multiple. *See* Appellants App., Vol. II at 62.

failure to maintain proper drainage, [and] maintenance of existing drains[.]” *Id.* at 10. INDOT answered the complaint and asserted, among other affirmative defenses, that it was entitled to immunity pursuant to Indiana Code section 34-13-3-3(3). On December 19, 2019, INDOT filed a motion for summary judgment claiming that it was immune under the weather-immunity provision of the Indiana Tort Claim Act (“ITCA”). Ladra filed a motion in opposition to INDOT’s motion. On July 1, 2020, the trial court held a hearing on INDOT’s motion. The next day, the trial court granted summary judgment to INDOT. Ladra now appeals. Additional facts will be provided as necessary.

## Discussion and Decision

### I. Standard of Review

[6] Summary judgment is appropriate only 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 judgment as a matter of law. Ind. Trial Rule 56(C). We review a summary judgment order de novo. *Bules v. Marshall Cnty.*, 920 N.E.2d 247, 250 (Ind. 2010). We resolve any doubt as to any fact, or inference to be drawn therefrom, in favor of the party opposing summary judgment. *Yerkes v. Heartland Career Ctr.*, 661 N.E.2d 558, 560 (Ind. Ct. App. 1995), *trans. denied*. We must determine whether there is a genuine issue of material fact and whether the law has been correctly applied by the trial court. *Cloverleaf Apartments, Inc. v. Town of Eaton*, 641 N.E.2d 665, 667 (Ind. Ct. App. 1994).

[7] Our review of a summary judgment motion is limited to those materials designated to the trial court. *Sheehan Constr. Co., v. Continental Cas. Co.*, 938 N.E.2d 685, 688 (Ind. 2010). We may affirm the grant of summary judgment on any grounds supported by the designated materials. *Catt v. Bd. of Comm'rs of Knox Cnty.*, 779 N.E.2d 1, 3 (Ind. 2002).

## II. Immunity

[8] A traditional formulation of tort liability requires the plaintiff to establish a duty, breach of that duty, proximate cause, and damages. *Gary Cmty. Sch. Corp. v. Roach-Walker*, 917 N.E.2d 1224, 1225 (Ind. 2009). In Indiana, it is well settled that a governmental entity has a common law duty to exercise reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel. *See Catt*, 779 N.E.2d at 3. However, ITCA provides the following immunity to liability for breach of this duty:

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:

\* \* \*

(3) The temporary condition of a public thoroughfare . . . that results from weather.

Ind. Code § 34-13-3-3(3).

[9] Immunity, whether under Indiana common law or ITCA, assumes negligence but denies liability. *Putnam Cnty. Sheriff v. Price*, 954 N.E.2d 451, 453 (Ind.

2011). Whether immunity applies is a matter of law for the courts to decide. *Bules*, 920 N.E.2d at 250. The party seeking immunity bears the burden of establishing the immunity. *Id.* If the evidence permits conflicting reasonable inferences as to material facts, the governmental unit has failed to establish its immunity. *Id.*

[10] Ladra argues that Indiana Code section 34-13-3-3(3) is inapplicable because (1) the relevant “condition” at issue is a clogged drain and (2) the flooded roadway is not the sole cause of the alleged injury. We disagree.

[11] First, Ladra contends that the relevant condition is not the flooded highway but the clogged drain. Ladra argues for the first time on appeal that Indiana Code section 34-13-3-3(3) is inapplicable because “[t]he clogged drain at issue is not a public thoroughfare[.]”<sup>2</sup> Appellant’s Brief at 8 (quotations omitted). “It is the general rule that an argument or issue raised for the first time on appeal is waived[.]” *First Chicago Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020); *see also Plank v. Cmty. Hosp. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013)

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<sup>2</sup> Ladra states in her motion in opposition to summary judgment that “the evidence is sufficient to permit a jury to find that the flooding of the at-issue public thoroughfare, which undisputedly caused this collision, was caused by a faulty and improperly maintained drainage system[.]” Appellant’s App., Vol. II at 84. We also note Ladra contradicts this argument in her reply brief when she states, “It’s undisputed that a flooded Interstate 94 is the relevant hazardous condition.” Appellant’s Reply Brief at 12.

("[A]ppellate review presupposes that a litigant's arguments have been raised and considered in the trial court.")<sup>3</sup> Therefore, we find this argument waived.

[12] Next, Ladra argues that Indiana Code section 34-13-3-3(3) is inapplicable because the flooded roadway was not the sole cause of her injury. Ladra contends that the primary cause of her loss is the clogged drain and "[u]nder the Supreme Court's decision in *Hinshaw*, to the extent that the clogged drains secondarily caused flooding on the roadway contributing to the accident, [Indiana Code section] 34-13-3-3(3)'s immunity provision doesn't apply." Appellant's Br. at 15. We disagree.

[13] In *Hinshaw*, our supreme court held that "immunity is not conferred when the circumstances designated in the subsections do not encompass or directly relate to the specific governmental conduct for which liability is sought to be imposed." *Hinshaw v. Bd. of Comm'rs of Jay Cnty.*, 611 N.E.2d 637, 640 (Ind. 1993). Ladra states that the "alleged conduct is [INDOT's] failure to maintain proper drainage and their maintenance of existing drains" and calls the accumulation of water on the interstate an "additional factor[.]" Appellant's Br. at 18 (internal quotation marks omitted).

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<sup>3</sup> Waiver notwithstanding, we believe that Ladra's attempt to differentiate between the flooded interstate and the clogged drain is untenable. Claiming that the clogged drain alone is the condition ignores that Ladra undisputedly crashed due to hydroplaning on the flooded interstate. A flooded highway would clearly fall within the scope of Indiana Code section 34-13-3-3(3) if the flood was indeed shown to be temporary and caused by weather.

[14] However, Ladra mischaracterizes the flooding in this case and we find that *Hinshaw* is distinguishable for the following reasons. After a collision at the intersection of country roads, the *Hinshaw* plaintiffs claimed Jay County was negligent in the signage and maintenance of the intersection. Jay County argued that it was immune under Indiana Code section 34-4-16.5-3(9)<sup>4</sup> which applied “if a loss results from . . . the act or omission of someone other than the governmental entity employee.” *Hinshaw*, 611 N.E.2d at 638. Whereas the plaintiffs alleged this provision applied only when the conduct of the non-governmental employee was the sole proximate cause, Jay County argued that the provision granted it immunity whenever its negligence combined with the negligence of others. The proximate causes of the accident included the negligence of the driver of the automobile that collided with the plaintiffs’ vehicle and that of the owners of vehicles parked at the intersection. Our supreme court found that the conduct of another driver at the intersection had no bearing on the alleged negligent signage and maintenance by Jay County, therefore immunity was inapplicable. *See id.* at 641.

[15] Here, Ladra was driving on Interstate 94 when she encountered a flooded portion of the interstate and lost control of her car. Unlike *Hinshaw*, where the negligent conduct of third-party motorists had no bearing on the alleged negligent signage and maintenance, here, it is undisputed that the flooded

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<sup>4</sup> This statute is an older version of the ITCA that has since been recodified and amended. *See* Ind. Code § 34-13-3-3(10).



interstate was a direct result of the drain being clogged, a drain for which INDOT had responsibility. Thus, the flooded interstate is “directly relate[d] to the specific government conduct for which liability is sought to be imposed.” *Id.* at 640. Therefore, Indiana Code section 34-13-3-3(3) is applicable.<sup>5</sup>

### III. Issue of Material Fact

[16] Ladra argues that even if the immunity provision could apply, there is a genuine issue of material fact precluding summary judgment. Immunity under Indiana Code section 34-13-3-3(3) requires that the loss result from a condition that is both “temporary” and “caused by weather” *Roach-Walker*, 917 N.E.2d at 1227. We will address each separately.

#### A. Temporary Condition

[17] Ladra argues that “the drains being clogged with debris was a permanent condition that allowed the flooding to occur with the rain.” Appellant’s Br. at 20. In *Catt*, our supreme court stressed that deciding whether a condition is temporary or permanent is a threshold determination that is to be made independent of the allegations of negligence asserted against the defendant. *See* 779 N.E.2d at 6. That is, in determining whether the condition in question is “temporary,” courts should not consider such factors as poor inspection,

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<sup>5</sup> Ladra attempts to analogize this case to a hypothetical set forth in *Hinshaw* positing that “a government employee who falls asleep while driving a maintenance truck and collides with a parked car [does not] appear to be immunized from liability for such negligence merely because he alleges that an additional factor in the loss was ‘the temporary condition of a public thoroughfare which results from weather.’” *Hinshaw*, 611 N.E.2d at 640. This hypothetical is clearly distinguishable from the facts of the case at hand.

design, or maintenance of the thoroughfare. *See id.* at 4-5. Rather, the court explained, the focus is on whether the “governmental body has had the time and opportunity to remove the obstruction but failed to do so.” *Id.* at 5.

[18] To support her contention that the condition was not temporary, Ladra relies on designated deposition testimony by Officer Escutia that the flooding occurs “whenever a downpour is heavy.” Appellant’s App., Vol. II at 21. Similarly, Ladra designated Officer Holmen’s deposition testimony that in his opinion the crash “occurred due to flooding on the roadway which was caused by a clogged drainage system in the areas of the crash.” *Id.* 21-22. Officer Holmen further testified that he had seen flooding at this specific location before. *See id.* at 128. Ladra argues that the officers’ testimony raises genuine issues of material fact regarding whether the clogged drain was a chronic condition and not a temporary instance. We disagree.

[19] In *Catt*, a driver sustained injuries stemming from a culvert that was washed out by a torrential rain. The driver presented evidence that the culvert in question had washed out on many occasions. However, our supreme court stated that “the frequency with which the culvert may have washed out in the past has no bearing on whether that condition is permanent.” *Catt*, 779 N.E.2d at 5. “Permanency” in this context is a function of the governmental defendant’s awareness of *that particular* hazard and the opportunity, based on that awareness, to neutralize the hazard. *Dzierba v. City of Mich. City*, 798 N.E.2d 463, 470 (Ind. Ct. App. 2003); *see also Roach-Walker*, 917 N.E.2d at 1227 (“Lack

of notice of the condition and the demands of responding to other emergencies bear on the opportunity to remedy it.”).

[20] When the government is “in the process of responding to a weather condition,” immunity under Indiana Code section 34-13-3-3(3) “extends to all claims caused by that condition during the period of reasonable response, whether the alleged injury occurred early or late in that period.” *Id.* at 1228. Further, in *Bules*, our supreme court held that governmental immunity applies “at least until the weather condition has stabilized, and immunizes the governmental unit from liability for alleged flaws in its remedial steps.” 920 N.E.2d at 249. “As a governmental entity responds to the temporary weather conditions, the statute confers immunity at least until the condition is stabilized and the responses are completed.” *Id.* at 251.

[21] Here, Ladra was driving her car home when she hydroplaned on a flooded section of Interstate 94. Officer Escutia testified that it had been raining the whole day and throughout the evening and when he arrived at the scene, the water on the shoulder of the road was above his ankles. Both Officer Escutia and Officer Holmen testified that they had no notice of the flooded area prior to Ladra’s crash. *See* Appellant’s App., Vol. II at 64, 70. After they responded to the crash and contacted the state highway maintenance crew to unclog the drain, it took approximately three hours for the water to subside. Officer Escutia further testified that this is required every time there is a heavy rain in this and two other spots, stating he has personally had it done between ten and

fifteen times. Further, INDOT employees were already responding to the storm in other areas. *See id.* at 78.

[22] Ladra presents no evidence that INDOT had notice of the flooding of Interstate 94 the day at issue prior to her crash.<sup>6</sup> *See Catt*, 779 N.E.2d at 6 (stating that the County had “no notice that the culvert washed out until after Catt’s accident”). Ladra only argues that the clogging of the drain is a chronic condition that INDOT had notice of due to their imputed knowledge of prior flooding. The appellant in *Catt* presented an argument similar to Ladra’s, wherein they focused on the repeated instances of the culvert being washed away during rainstorms and insisted that “the condition of the roadway, culvert, and drainage system near the roadway. . . [is] a long term, permanent, condition, which caused the culvert to wash away[.]” *Id.* at 5. However, *Catt* establishes that “frequency . . . has no bearing on whether [a] condition is permanent.” *Id.*

[23] Ladra attempts to differentiate her case from *Catt*: “This is unlike the facts in *Catt*, where the temporary event of the rainstorm caused the washout of the culvert. Here, the drains being clogged with debris was the permanent condition

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<sup>6</sup> The dissent believes that evidence has been designated establishing a genuine issue of material fact regarding whether the condition was temporary. However, Ladra presents no argument that the weather condition had stabilized or that her crash occurred outside INDOT’s “period of reasonable response[.]” *Roach-Walker*, 917 N.E.2d at 1228. Further, Ladra presents no evidence that the State had notice of this *particular* flood prior to her crash. Accordingly, contrary to the dissent, there is no designation to alter the *Catt* definition of temporary. The dissent relies on Officer Escutia’s testimony that the drain in this area of the interstate has needed to be cleared ten to fifteen times in four years; however, *Catt* establishes that neither “frequency” nor “poor inspection, design, or maintenance” are to be considered in the determination of whether a condition is temporary. 779 N.E.2d at 4-5. Thus, evidence of the State’s past conduct, specifically clearing the drain, is not evidence that the condition was not temporary, it is evidence of potential negligence which immunity assumes and disregards.

that allowed the flooding to occur with the rain.” Appellant’s Br. at 20. However, under *Catt* this is an argument regarding whether the flooding was in fact caused by weather rather than if the condition was temporary. *See Catt*, 779 N.E.2d at 4 (courts should not consider such factors as “poor inspection, design, or maintenance . . . in determining whether the condition of a roadway is permanent”). We conclude that Ladra’s argument falls within the scope of *Catt* and Ladra failed to designate evidence presenting a genuine issue of material fact as to whether the condition of the roadway was temporary.<sup>7</sup>

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<sup>7</sup> In the nearly twenty years since *Catt* was decided, it has become clear that *Catt* has created a circular analysis that makes any factual variance irrelevant and the statute’s grant of immunity for a “temporary condition of a [public] thoroughfare that results from weather” now covers all scenarios. *Catt*, 779 N.E.2d at 4 (internal quotation omitted). Knowledge of and failure to maintain or repair a defect in a public thoroughfare that only manifests during a weather event has been interpreted such that the actual defect is not relevant to whether something is temporary or permanent and goes only to negligence. Rain, of whatever duration or frequency (perhaps even the 100-year flood since it too will eventually subside), has been deemed a temporary condition until it has sufficiently ended so that the situation can be assessed. And what has happened in the meantime is deemed a condition that “results” from the weather when, in fact, the condition was not the result of the weather but a manifestation of the failure to repair or maintain. But that failure is only relevant to negligence and *Catt* instructs us that immunity assumes negligence but denies liability. *Id.* at 5.

Although the facts of this case are analogous to *Catt* and fall directly within the scope of our supreme court’s ruling, we are concerned with this outcome. *Catt* removes any ability for the court to consider INDOT’s knowledge regarding the frequency at which conditions caused by weather arise in determining whether a condition is temporary or whether the result is truly from the weather or the failure to take some action prior to the weather event. We believe this not only allows for the State to be negligent, it encourages it. The decision in *Catt* gives the State no incentive to attempt to implement remedial or preventative measures regarding such conditions. In the instant case, we have a situation in which debris is known to clog the drains; the State is aware of that issue, and further, has knowledge that this problem has caused flooding on the interstate in the past when it rains. Yet, like the culvert that repeatedly washed away with no attempt to repair, the *Catt* analysis requires us to find that insufficient time had lapsed in this rain for action and accordingly, the State is immune. *See id.* We are not convinced that the State should be relieved of responsibility to at least attempt to mitigate the effect of future weather conditions in areas or thoroughfares where they are known to arise frequently. However, Ladra designates no evidence to take us outside of the four corners of *Catt* and we are bound by it.

## B. Causation

- [24] The law is settled that governmental entities are immune for losses resulting from roads rendered temporarily hazardous by inclement weather. *Bd. of Comm'rs of Steuben Cnty. v. Angulo*, 655 N.E.2d 512, 513 (Ind. Ct. App. 1995). However, this immunity does not automatically arise every time an accident occurs during bad weather. *Id.* Rather, in determining whether a governmental entity is immune under Indiana Code section 34-13-3-3(3), the relevant inquiry is whether the loss suffered by the plaintiffs was actually a result of the weather or some other factor. *Id.*
- [25] Ladra argues that she has “designated evidence sufficient enough to raise a reasonable inference that an additional cause, and in fact the primary cause, of the condition of the public thoroughfare which resulted in her injuries was the clogged drains and not the weather.” Appellant’s Br. at 25. To support her argument, Ladra relies on *Angulo*. In *Angulo*, the plaintiff was injured in a one-car collision when he failed to navigate a curve and drove his car off the roadway during a dense fog. The designated portions of the plaintiff’s deposition indicated that the subject roadway contained ruts which at times caused the car to “bounce off as you come up the curve.” *Angulo*, 655 N.E.2d at 514. This court found that the designated material was sufficient to withstand the County’s contention that the fog, a temporary weather condition, was the sole proximate cause of the collision and the plaintiff’s resulting injuries because he had “designated materials concerning the physical condition” of the road. *See id.*

[26] Ladra attempts to analogize this case to *Angulo*; however, we find it distinguishable. In *Angulo*, the fog and the physical condition of the road were both possible factors in the plaintiff's crash and were distinct from one another. Here, it is undisputed that the flooding caused Ladra to crash and that the flooding was a direct result of the drain clogging. Therefore, what is at issue is whether the drain clogged due to weather. Again, we find this case analogous to *Catt*.

[27] In *Catt*, two theories were presented as to whether the accident was due to weather: (1) negligent inspection, design, or maintenance of the roadway resulted in his injuries, or (2) negligent inspection, design, or maintenance of the roadway caused the culvert to be washed away by rain which resulted in his injuries. *Catt*, 779 N.E.2d at 5. Ladra claims that the "primary cause of the flooding of the roadway[,] " which resulted in her injuries, is the clogged drain. *Id.* This is very similar to the second theory presented in *Catt*. Ladra is essentially arguing that it is not weather that causes the drain to clog and the interstate to flood but the negligent inspection, design, or maintenance of the drain which causes it to clog resulting in flooding.

[28] "[C]onditions caused 'due to weather' distinguish themselves from those in which the road condition was the result of, say, poor inspection, design, or maintenance." *Hochstetler v. Elkhart Cnty. Highway Dep't.*, 868 N.E.2d 425, 426-27 (Ind. 2007) (citation omitted). Poor inspection, design, or maintenance may demonstrate negligence. *Catt*, 779 N.E.2d at 4. However, the State's negligence is not relevant as immunity assumes negligence but denies liability. *Id.* at 5. But

if a party can show “that his or her injury is due to negligence – as opposed to the temporary condition of a thoroughfare ‘that results from weather’ – then the governmental entity may be held liable for the party’s loss.” *Id.* at 4. Therefore, to prevail, Ladra was required to designate evidence that the drain clogging was not due to weather.

[29] However, Ladra only designated evidence that the drain clogs when it rains and failed to designate evidence that the condition was not a result of weather. Ladra’s designated evidence included the original complaint, portions of her own deposition, the crash report, portions of the depositions of Officer Escutia and Officer Holmen, and an affidavit of Officer Holmen. *See* Appellant’s App., Vol. II at 81-82.

[30] Officer Escutia testified that the interstate area at issue floods consistently, however, he clarified that it only floods “when there are times of heavy downpour[.]” *Id.* at 111. Officer Escutia explained that “[w]hile it’s raining . . . debris collects . . . and it floods.” *Id.* Ladra presented no evidence to show that the drain was clogged prior to when it rained on the date at issue. Further, when asked how often the area floods, Officer Escutia stated that “[i]t happens whenever a downpour is heavy.” *Id.* at 112.<sup>8</sup> Officer Holmen testified:

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<sup>8</sup> Officer Escutia further testified that the flooding subsided only after the drain was unclogged by state highway maintenance crews. Officer Escutia stated that he has had highway maintenance clear the drain between ten and fifteen times in the four years that he’s been an officer and each time it had rained heavily. *See* Appellant’s App., Vol. II at 63. This portion of Officer Escutia’s testimony was designated by INDOT,



Flooding typically happens when there's a problem with . . . drainage on the interstate. There's drains, metal drains, sometimes they get clogged up with road debris an sand and dust and – or whatever else from the roadway, garbage. And when those get clogged up, the water pools soluble [sic] drain and it accumulates.

*Id.* at 128. However, Ladra presented no evidence that this clogging happens independently of rain. It is undisputed that the drain clogging led to the flooding of the interstate and Officer Holmen's testimony provides no additional information regarding whether the clogging was unrelated to weather.

[31] The fact that the drain clogs when it rains may be indicative of “[p]oor inspection, design, or maintenance” constituting negligence. *Catt*, 779 N.E.2d at 4. However, this is irrelevant because Ladra failed to designate any evidence that this clogging happens independently of rain. Thus, Ladra fails to present a genuine issue of material fact regarding whether the condition was caused by weather.

## Conclusion

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but Ladra did not attempt to use this evidence to support her position. However, we believe that this is further evidence that the drain clogs as a result of rain.

[32] Concluding that Indiana Code section 34-13-3-3(3) is applicable to this case and that Ladra failed to designate evidence to establish a genuine issue of material fact, we affirm the trial court's grant of summary judgment to INDOT.

[33] Affirmed.

Bailey, J., concurs.

Tavitas, J., dissents with separate opinion.

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Tracy Ladra,  
*Appellant-Plaintiff,*

Court of Appeals Case No.  
20A-CT-1418

v.

State of Indiana and State of  
Indiana Department of  
Transportation,  
*Appellees-Defendants.*

**Tavitas, Judge, dissents.**

[34] I respectfully dissent from the majority’s opinion affirming the trial court’s grant of summary judgment to INDOT. I conclude that genuine issues of material fact preclude the grant of summary judgment here.

[35] Indiana Code Section 34-13-3-3(3) provides that “[a] governmental entity . . . is not liable if a loss results from . . . [t]he temporary condition of a public thoroughfare . . . that results from weather.” In *Catt*, our Supreme Court held that, in determining whether the condition is permanent or temporary, the focus “is whether the governmental body has had the time and opportunity to remove the obstruction but failed to do so.” *Catt v. Bd. of Comm’rs of Knox Cty.*, 779

N.E.2d 1, 5 (Ind. 2002). The Court, however, also noted that “if the hazardous condition of a roadway is due to poor inspection, design or maintenance, then the governmental entity may be held liable for injuries caused thereby. Indeed a governmental entity is not entitled to immunity every time an accident occurs during bad weather.” *Id.* at 4.

[36] In *Catt*, our Supreme Court affirmed summary judgment for a county highway department after a woman was injured in an accident due to a washed-out culvert. The Court held:

In this case, the County has shown that the washed-out culvert was the result of a rainstorm and that it had no notice that the culvert washed out until after Catt’s accident. Although there is no evidence in this record that the culvert has since been repaired, the record does show that the Knox County Highway Department was busy on the morning after the storm repairing other washed out culverts of which it was aware, and had repaired this particular culvert when it had been washed out on previous occasions. We conclude that the County carried its burden of demonstrating that the condition of the roadway was temporary and resulted from weather. It is therefore immune under the Act, and the trial court properly granted summary judgment in the County’s favor.

*Id.* at 6.

[37] The majority expresses concern that the *Catt* holding has been applied to provide immunity even where a failure to maintain or repair underlies the temporary condition resulting from weather. *See* Slip op. p. 13 n.7 (“We are not convinced that the State should be relieved of responsibility to at least

attempt to mitigate the effect of future weather conditions in areas or thoroughfares where they are known to arise frequently.”). I agree with this concern. Although the Court in *Catt* specifically noted that “a governmental entity is not entitled to immunity every time an accident occurs during bad weather,” this seems to be how *Catt* has been interpreted. *Catt*, 779 N.E.2d at 4.

[38] Here, INDOT designated evidence that Officer Escutia had highway maintenance clear the drain between ten and fifteen times in the four years that he has been an officer and each time it had rained heavily. *See* Appellant’s App. Vol. II p. 63. The designated evidence demonstrated that the drain routinely clogged, resulting in flooding on the interstate when it rained, and that INDOT had repeatedly unclogged the drain. INDOT representative Jim Scheffer, however, testified in a deposition that he did not have knowledge that the area was “particularly prone to flooding.” *Id.* at 53. Given the designated evidence, I conclude that genuine issues of material fact exist as to whether the condition was “temporary” or whether “the hazardous condition of [the] roadway [was] due to poor inspection, design or maintenance.” *Catt*, 779 N.E.2d at 4. Accordingly, I would reverse the trial court’s grant of summary judgment to INDOT.