

STATE OF MICHIGAN
COURT OF APPEALS

GAYLE ROSS, Individually and as Conservator of the
ESTATE OF ROBIN FALKENHAGEN, a Minor,

UNPUBLISHED
June 18, 1996

Plaintiffs-Appellants,

v

No. 176193
LC No. 92-001521

COUNTY OF MACOMB and MACOMB
COUNTY ROAD COMMISSION,

Defendants-Appellees.

Before: Murphy, P.J., and Reilly and C.W. Simon, Jr.,* JJ.

PER CURIAM.

Plaintiffs appeal as of right a trial court order granting summary disposition in favor of defendants. We affirm.

On July 27, 1990, at approximately 11:35 p.m., plaintiffs, Gayle Ross and her daughter Robin Falkenhagen, and Ross' husband, Gary Ross, were traveling eastbound on Armada Center Road in Macomb County in a Ford Bronco II. Gary Ross was driving the Bronco; plaintiffs were passengers. Armada Center Road is a two lane highway. Near the intersection of Armada Center Road and Coon Creek, a westbound vehicle passed another westbound vehicle in a no passing zone and forced plaintiffs' vehicle off the road. Ross was able to maneuver the Bronco back onto the road, but the Bronco then crossed over into the westbound lane, struck a third vehicle and ended up on its side in a ditch. As a result of the accident, plaintiffs suffered severe and permanent physical injuries.

Plaintiffs filed a negligence cause of action against defendants. In the complaint, plaintiffs alleged that defendants were negligent in failing to provide an adequate road shoulder to enable drivers to get off the road in emergencies, failing to warn of the lack of a shoulder and the presence of a ditch, failing to clear an area to enable drivers to see the lack of a shoulder and the presence of the ditch, failing to protect drivers from dangers associated with the road, and failing to maintain the road in a condition

* Circuit judge, sitting on the Court of Appeals by assignment.

reasonably fit and safe for public travel. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) [claim barred by immunity], MCR 2.116(C)(8) [failure to state a claim upon which relief can be granted], and MCR 2.116(C)(10) [no genuine issue as to any material fact]. The trial court granted defendants' motion for summary disposition on the basis that plaintiffs failed to establish that defendants were the proximate cause of plaintiffs' injuries.

On appeal, plaintiffs argue that the trial court improperly granted defendants' motion for summary disposition. Plaintiffs' appellate brief only addresses plaintiffs' claim that defendants were negligent in failing to provide a wide enough road shoulder to enable drivers to get off the road in emergency situations. Thus, to the extent that plaintiffs argue that the trial court erred in granting summary disposition as to plaintiffs' other claims, those issues have been abandoned because plaintiffs failed to argue those issues in their appellate brief. *Singerman v Municipal Service Bureau, Inc.*, 211 Mich App 678, 684; 536 NW2d 547 (1995). While we agree that summary disposition of plaintiffs' inadequate road shoulder claim was improper on the basis of a lack of proximate cause, we conclude that summary disposition of that claim was appropriate pursuant to MCR 2.116(C)(7) because defendants had no duty to construct a shoulder on Armada Center Road, and, if defendants did construct a shoulder, they had no duty to construct a shoulder of a particular width.

Liability for negligence requires that the injury inflicted was proximately caused by the defendant's negligence. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). Ordinarily, the determination of proximate cause is left to the trier of fact. *Id.* However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the trial court should rule as a matter of law. *Id.* The existence of proximate cause depends on foreseeability and is interrelated with the issue of duty. *Id.*, 53. Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. *Id.*, 54

After reviewing the record, we conclude that reasonable minds could differ regarding whether defendants' alleged negligence in failing to construct a wide enough shoulder was a proximate cause of plaintiffs' injuries. Reasonable minds could differ regarding whether plaintiffs' injuries would have occurred even if defendants had constructed a very wide shoulder on Armada Center Road. Accordingly, we conclude that the trial court erred in determining that there was no proximate cause as a matter of law.

However, summary disposition of this claim was proper pursuant to MCR 2.116(C)(7). The trial court properly granted defendants' motion for summary disposition regarding plaintiffs' claim that defendants failed to provide a wide enough shoulder on Armada Center Road because defendants owed no duty to plaintiffs to provide any shoulder at all on Armada Center Road. *Soule v Macomb Co Bd of Rd Comm'rs*, 196 Mich App 235; 492 NW2d 783 (1992). Under the highway exception to governmental immunity, MCL 691.1402(1); MSA 3.996(102)(1), the duty of the state and the county road commissions to repair and maintain highways extends "only to the improved portion of the highway designed for vehicular travel[.]" In *Soule*, this Court addressed whether the duty imposed under MCL

691.1402; MSA 3.996(102) required the Macomb County Board of Road Commissioners to construct a road shoulder on Armada Center Road, the same road at issue in this case. This Court held:

Plaintiff has not presented, and we have not found any authority mandating that a county road commission *construct* shoulders along its roadways. . . . We do not believe that the failure to construct shoulders along this particular stretch of Armada Center Road was a breach of defendant's statutory duty to maintain reasonably safe roadways under MCL 691.1402; MSA 3.996(102). The statute must be narrowly construed, and we cannot conclude that it imposes a duty upon governmental agencies such as defendant to construct shoulders along a roadway. [*Id.*, 237-238.]

Plaintiffs attempt to distinguish the instant case from *Soule* by arguing that while there was no shoulder in *Soule*, there is a shoulder in the instant case. Even if we accept plaintiffs' contention that the instant case is distinguishable from *Soule* because of the existence of a shoulder, we reject plaintiffs' suggestion that defendant was obligated to construct a shoulder of a particular width. *Soule* stated that governmental agencies have no duty to construct a shoulder along a roadway. We believe that it is implicit in the holding of *Soule* that claims based solely on a governmental agency's failure to construct a shoulder of a particular width are precluded. If defendants had no duty to construct a shoulder in the first place, it is illogical to conclude that once they undertake to construct a shoulder which they have no duty to construct, it must be a particular width. Accordingly, even accepting as true plaintiffs' contention that this case is distinguishable from *Soule* based on the existence of a shoulder, we conclude that any claim of negligence based solely on the width of a shoulder constructed by the government would be precluded by *Soule*.

In any event, we reject plaintiffs' contention that *Soule* is distinguishable because the instant case involves the same road as was involved in *Soule*. Moreover, plaintiffs do not contend and the record does not indicate that a shoulder was added to Armada Center Road after the accident in *Soule* and before the accident in the instant case. We concede that the record in the instant case is somewhat confusing regarding the existence of a shoulder on Armada Center Road. The record reveals that there are "no shoulder" signs on Armada Center Road. However, there is also an area immediately adjacent to the road that is comprised of grass and gravel and which was described in the deposition testimony by various individuals as a shoulder. Nonetheless, the grass and gravel area is not a formal shoulder, as evidenced by the "no shoulder" signs along the road. Accordingly, because MCL 691.1402; MSA 3.996(102) does not impose a duty upon governmental agencies to construct shoulders along a roadway, *Soule, supra*, summary disposition was appropriate pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ William B. Murphy
/s/ Maureen Pulte Reilly
/s/ Charles W. Simon, Jr

