

STATE OF MICHIGAN
COURT OF APPEALS

LUCIA J. HANSON, Personal Representative of the
Estate of NELS THOMAS HANSON, Deceased,

UNPUBLISHED
October 3, 2000

Plaintiff-Appellant,

v

No. 217869
Mecosta Circuit Court
LC No. 96-011467-NI

DALLAS JOSEPH SULLIVAN,

Defendant,

ON REHEARING

and

BOARD OF COUNTY ROAD COMMISSIONERS
OF MECOSTA COUNTY,

Defendant-Appellee.

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

JANSEN, P.J. (*concurring in part and dissenting in part*).

I agree with the majority that the nuisance per se claim was properly dismissed by the trial court, for the reasons set forth in our prior opinion. I also agree that plaintiff's claims of failure to provide adequate warning and failure to reduce the speed limit are no longer claims involving a dangerous or defective condition in the improved portion of the roadway designed for vehicular travel and cannot form the basis of a defective highway claim in light of *Nawrocki v Macomb Co Rd Comm*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 107903, 109921, decided July 28, 2000).

I would again reverse the trial court's ruling, but believe that only paragraphs b and c under the defective highway claim in the complaint can now survive for trial in light of *Evens v Shiawasee Co Rd Comm*, the companion case to *Nawrocki*. These allegations with regard to the defective highway claim are:

- b. Failing to grade and profile 160th Avenue on the hill north of 22 Mile Road to conform to the applicable standards for sight distance;

c. Maintaining the grade and profile of 160th Avenue on the hill north of 22 Mile Road so that southbound motorists did not have a safe sight distance as they climbed the hill;

Our Supreme Court has recently held:

The state and county road commissions' duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage. . . . A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate street lighting or vegetation obstruction, fails to plead in avoidance of governmental immunity because signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel. Traffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the improved portion of the highway designed for vehicular travel. [*Evens, supra*, slip op, pp 44-45.]

I believe that paragraphs b and c under the defective highway claim in plaintiff's complaint are sufficiently pleaded in avoidance of governmental immunity. Here, the allegation is that defendant failed to grade and profile the road so as to eliminate the danger posed by the sight distance. I believe that this allegation does relate to a condition of the roadbed itself, that being the grade of the road, and do not read *Evens* as narrowly as the majority does. I do not read anything in *Evens* that states that the governmental entity involved has no duty to correct design defects. I cannot believe that the Legislature "intended" that a governmental entity responsible for designing and building a road would be immune from liability where the design itself is dangerous, but the road itself contained no "potholes" or other defects in the surface itself.

Further, I would find that plaintiff has presented sufficient evidence to create a material factual dispute regarding whether defendant's failure to grade and profile the hillcrest on 160th Avenue proximately caused the decedent's injuries, contrary to the trial court's ruling. The evidence indicates that the decedent and Sullivan were driving in opposite directions on 160th Avenue, which was then an unpaved, gravel road, during the afternoon. The road was dry and was twenty-six feet wide. Both drivers were traveling at about forty to forty-five miles an hour and the Mecosta County Sheriff's report indicated that the speed limit is unposted at fifty-five miles an hour. This report further noted no notable deficiencies in the road surface itself that would have contributed to the accident. However, this report specifically notes that the grade for both northbound and southbound vehicles was enough so that the neither driver would have been able to see the other until just before reaching the hillcrest.

This report additionally found that the northbound vehicle driven by Sullivan had the driver's side tires in the center of the road, and the southbound vehicle driven by the decedent was left of the center of the road. Another private investigator, however, determined that both drivers were over the center line: the decedent by six inches and Sullivan by twelve inches. It is well established that there may be more than one proximate cause of an injury and when a number of factors contribute to produce an injury, one can still be a proximate cause if it is a substantial factor in bringing about the injury. *Hagerman v Gencorp Automotive*, 457 Mich 720, 737; 579 NW2d 347 (1998). Here, there is a

question of fact regarding which, if either, automobile crossed the center line as being a proximate cause or the sole proximate cause of the collision. This issue should not have been decided by the trial court as a matter of law.

Additionally, William Taylor, Ph.D., a professor of civil engineering, testified at his deposition, than an ordinary driver would not be able to determine what the sight distance was, or a safe speed for going over the hill, or precisely where the center line was in order to make appropriate decisions and avoid collision with other vehicles without resort to extraordinary efforts. Edward Burch, a consulting engineer, also testified at deposition that recognized standards require a stopping distance of 462 feet for the hillcrest when designing a road, which is approximately four times longer than what 160th Avenue had. Plaintiff's expert, John Glennon, Ph.D., a civil engineer, testified at his deposition that the grade approach for the northbound driver was 4.6 percent and for the southbound driver was 3.4 percent at the hillcrest. Glennon characterized these as moderate grades, but also testified that the length of the vertical curve was one hundred feet, which was a "very short vertical curve." Glennon noted that this creates a sight distance problem, and that the vertical curve at fifty-five miles an hour should have been between one and two thousand feet. Glennon also stated that the hillcrest was designed as having a 24.7 mile an hour speed. Based on his survey of the hillcrest, Glennon believed it was not reasonably safe for public travel because of the limited sight distance available to motorists nearing the hillcrest and the inability of an ordinary driver to appreciate the hazard posed by the limited sight distance.

I believe that this evidence is sufficient to raise of material factual dispute regarding whether defendant breached its duty to repair or maintain the roadway designed for vehicular travel. Specifically, I believe that plaintiff has presented sufficient evidence that the roadway was dangerous because of the limited sight distance at the hillcrest and that the failure to maintain or repair this dangerous condition led to the head-on collision between Sullivan and the decedent. Accordingly, I would reverse the decision to grant summary disposition regarding the defective highway claim and allow the allegations contained in paragraphs b and c to go before a jury.

/s/ Kathleen Jansen