STATE OF MICHIGAN

COURT OF APPEALS

DONNA KATHERINE SCHENK and WALTER SCHENK,

Plaintiffs-Appellants,

v

TUSCOLA ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
July 9, 1996

No. 181342
LC No. 94-13262

Before: Cavanagh, P.J., Hood and J.J. McDonald*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting summary disposition in favor of defendant. We affirm.

On July 1, 1992, plaintiff Walter Schenk was driving an automobile north on Bray Road in Tuscola County. His wife, Donna Schenk, was a passenger in the vehicle. As they approached Swaffer Road, where it intersects with Bray Road, a vehicle traveling eastbound on Swaffer Road ignored the stop sign and proceeded through the intersection. The cars collided and plaintiffs' vehicle was forced onto the shoulder of the roadway of northbound Bray where it came into contact with a sign post remnant which, in turn, caused the vehicle to flip off the roadway into a ditch.

On June 22, 1994, plaintiffs filed a complaint against the defendant, alleging that defendant breached its duty to adequately maintain the highway in a condition reasonably safe and convenient for public travel as required by MCL 691.1402; MSA 3.996 (102), by failing to maintain or remove the sign stub. Plaintiffs alleged that they suffered serious and permanent injuries as a direct and proximate result of defendant's breach.

On July 18, 1994, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Defendant argued that the duties of a county road commission extend only to the

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

improved, traveled portion of the roadway designed for vehicular travel pursuant to MCL 691.1402; MSA 3.996(102), and that the sign post stub was not located within that area. Defendant submitted affidavits and photographs supporting its position that the sign post stub was located 7½ feet from the eastern edge of the pavement of Bray Road and more than 2½ feet beyond the eastern most edge of the gravel shoulder, in the down slope of the ditch parallel to Bray Road. Consequently, defendant argued that plaintiffs' claim was barred by governmental immunity.

In resolving the issue, the trial court stated:

> After my review of the pleadings, and the law of the state at this juncture, I'm satisfied that the matter is ripe for summary disposition.
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> That is, the Appellate Courts have interpreted the statute providing immunity to the county road commission.
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> And the way I see it, is philosophically the courts are now narrowing the exposure of the county road commissions to claims filed against the road commission under the failure to maintain theory, failure to maintain the improved portion of the roadway, by narrowly interpreting the statute to provide for liability as to any negligence occurring in the maintaining of the roadway within "The traveled portion of the roadway." And that's what the case says. That's what the Court of Appeals cases say.
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> In this case, as far as I can tell from the facts, pleadings, and discovery, reasonable minds could not differ.
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> That I think it would be appropriate for me to say from the facts that I've been able to read and discover, that the major contributing cause to the injuries of the plaintiffs in this matter might have been the stub of a sign post located off the traveled portion of the roadway, which may be true.
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> However, in this instance, and under the law as it exists in the state at this point in time, there's no liability on the part of the road commission.

Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendant because defendant breached its duty to maintain the sign post stub, which was an integral part of the highway, and because whether the sign post was within the improved portion of the roadway was a question of fact to be determined by the jury. We review the trial court's grant of summary disposition de novo to determine if defendant was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Township*, 209 Mich App 484, 486; 532 NW2d 183 (1995). When reviewing a grant of summary disposition based on a finding that the claim is barred by governmental immunity, all documentary evidence submitted by the parties is to be considered. *Id.* All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Id.*

MCL 691.1402; MSA 3.996(102), in relevant part, provides:

> (1) Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability therefor, shall extend only to the improved portion of the highway designed for vehicular travel and shall not include sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

Agencies responsible for road maintenance are not liable for defects in traffic signs located outside the traveled or paved portion of the roadway unless they are at points of hazard or special danger affecting vehicular travel on roadways within their jurisdiction. *Pick v Szymczak*, ___ Mich ___; ___ NW2d ___ (Docket No. 98142, issued 6/5/96). A "point of hazard" (or "point of special danger") is any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe. *Id.*, p 15. Nothing arguably approaching such a condition existed in this case.

In this case, defendant submitted photographs of the scene of the accident which clearly depicted the location of the sign stub in relation to the paved portion of the roadway and the improved portion of the shoulder. Defendant submitted affidavits from Robert J. Wellington, an engineer, and James M. Kesek, a risk management traffic investigator. The affiants stated that the photographs submitted by defendant were taken by Kesek as part of his investigation of the scene after the accident and accurately depicted the area at Bray Road, north of Swaffer Road. Kesek averred that he had measured the distance from the sign stub to the roadway and found it to be 7½ feet from the eastern most edge of the pavement of Bray Road and approximately 2½ feet from the shoulder adjacent to Bray Road. Plaintiff, on the other hand, submitted only an affidavit from Dan Lee, an accident reconstructionist, in which he opined that the stub was a cause of plaintiffs' accident and injuries. This affidavit, however, did not contain any statements as to the location of the stub in relation to the roadway. Furthermore, there is no evidence that the sign remnant was at a point of hazard or special danger affecting vehicular travel on the improved portion of the roadway. Plaintiffs, therefore, failed to meet their burden of providing evidence to establish that a genuine issue of disputed fact existed so as to prelude summary disposition. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). Accordingly, we conclude that the trial court properly granted summary disposition in favor of defendant on this issue.

Plaintiffs also argue that the trial court erred in granting summary disposition in favor of defendant because the question of whether defendant had a duty to install a guardrail was a question of fact. Plaintiffs rely on *Hutchinson v Allegan Co (On Remand)*, 192 Mich App 472, 480; 481 NW2d 807 (1992), to support their contention that the issue of whether defendant should have installed a guardrail was a question of material fact for the jury. The *Hutchinson* Court acknowledged that MCL 691.1402; MSA 3.996(102) requires the appropriate governmental agency to keep the highways under

its jurisdiction in reasonable repair so that they are reasonably safe and convenient for public travel. The Court then stated:

> [T]he determination of the reasonableness of highway safety is necessarily a factual determination to be made by a jury. Because the issue whether the road was reasonably safe involves questions of fact concerning proximate cause and the reasonableness of installing a guardrail, the circuit court correctly concluded that summary disposition was inappropriate. [Citations omitted.]

Defendant counters that *Chaney v Michigan Dep't of Transportation*, 447 Mich 145; 523 NW2d 762 (1994), controls in this matter and supports its contention that there is no exception to governmental immunity with regard to the installation of a guardrail. Defendant asserts that the *Chaney* Court effectively demolished the guardrail cases brought pursuant to MCL 691.1402; MSA 3.996(102) when it stated:

> [W]e conclude that governmental immunity precludes liability for the bridge railing at issue in this instant case. First, it is clear that this bridge railing--lying outside both the curb and the shoulder of the highway--is not physically located within that improved portion of the highway designed for vehicular travel. . . .
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> Second, the bridge railing does not directly and integrally affect vehicular travel along the improved portion of this highway. Neither a guardrail nor a concrete abutment, located beyond the shoulder of a highway, has any affect upon the safe and convenient passage of vehicles while on the improved portion.
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> * * *
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> Accordingly, barriers such as guardrails and concrete abutments are not directly and integrally related to safe travel along the highway--the barrier is simply not necessary for safe vehicular travel on and along the improved portion. [*Chaney, supra*, pp 161-162.]

Following *Chaney*, a panel of this Court in *Zwolinski v Dep't of Transportation (After Remand)*, 210 Mich App 496, 498-499; 534 NW2d 163 (1995) ruled:

> Since the release of this Court's earlier opinion in *Zwolinski*, as well as the trial court's opinion on remand from this Court, our Supreme Court decided the appeal brought from this Court's opinion in *Chaney*. In *Chaney v Dep't of Transportation*, 447 Mich 145, 523 NW2d 762 (1994), a majority of the justices agreed that the defendant Department of Transportation could not be held liable for an alleged defect in a guardrail. *A majority of the Supreme Court is of the opinion that there can be no liability for an alleged failure to install a guardrail.* Although the Supreme Court in Chaney did not specifically reverse, modify, or mention this Court's opinion in

Hutchinson, we are constrained to conclude that *Chaney* has implicitly overruled this Court's opinion in Hutchinson. [*Id.*; Emphasis added.]

Pursuant to the holding in *Zwolinski*, the question of whether a governmental entity may be liable for failure to install a guardrail is one of law. Because this Court is constrained to apply *Zwolinski* under Administrative Order 1994-4, we find that there can be no liability against defendant for the alleged failure to install a guardrail. We therefore conclude that the trial court properly granted summary disposition in favor of defendant on this issue.

Plaintiffs finally argue that the trial court erred granting summary disposition in favor of defendant because discovery had not been completed. Summary judgment is appropriate, even though discovery is not yet complete, where further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Neumann v State Farm Mut Auto Ins Co*, 180 Mich App 479, 485; 447 NW2d 786 (1989).

We find that the trial court's grant of summary disposition in favor of defendant on November 18, 1994 was proper. Discovery was to be completed on March 25, 1995. However, regarding plaintiffs' claim relating to the sign post, plaintiffs failed to present any rebuttal evidence concerning the location of the stub. Moreover, it is inconceivable that discovery would have developed any basis upon which reasonable minds could have differed concerning the location. Likewise, regarding plaintiffs' claim that defendant had a duty to install a guardrail, this Court has held that there can be no liability for the failure to install a guardrail. *Zwolinski, supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Harold Hood
/s/ John J. McDonald