STATE OF MICHIGAN

COURT OF APPEALS

SCOTT SMITH,

Plaintiff–Appellee,

v

COUNTY OF WAYNE,

Defendant–Appellant.

UNPUBLISHED
May 9, 1997

No. 179324
LC No. 92-221322-NI

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

In this negligence action, defendant appeals as of right from a jury verdict of $135,200 for plaintiff. We affirm.

Plaintiff was injured as the result of a collision between his motorcycle and an automobile at the intersection of Outer Drive and Gallagher in Detroit. Outer Drive at Gallagher is a six-lane highway divided by a 38-foot wide grass median. There is no stop, yield, or one-way sign for either direction of Outer Drive traffic at the Gallagher intersection. Gallagher is a one-way south-bound street at Outer Drive. There is a stop sign for Gallagher traffic as it approaches west-bound Outer Drive. However, there is no stop or yield sign for Gallagher traffic in the median before east-bound Outer Drive.

On the evening in question, plaintiff was driving a motorcycle east-bound on Outer Drive. He was injured when a car pulled out from the median separating the east- and west-bound lanes of Outer Drive at Gallagher, and struck his motorcycle. The driver of the car, Robert Bluitt, testified that he had been traveling west-bound on Outer Drive, and turned left into the median. As Bluitt attempted to proceed across east-bound Outer Dive, he was struck by plaintiff's motorcycle.

Plaintiff initially filed his complaint against the other driver, Allstate Insurance Company, and "John Doe Insurance Company." Plaintiff's motion to add Wayne County and the City of Detroit was

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

later granted. By stipulation of the parties, Allstate was dismissed from the case. On December 13, 1993, the trial court entered an order dismissing Detroit. Trial commenced on August 22, 1994. At trial, Wayne stipulated that Outer Drive is under its jurisdiction. Only one governmental agency can have jurisdiction over a highway at anytime. *Markillie v Livingston Rd Comm'rs,* 210 Mich App 16, 20 (1995).

In his amended complaint, plaintiff alleged that defendant was negligent in failing to install traffic signage at the intersection. Following trial, defendant moved for judgment notwithstanding the verdict, arguing that it was immune from liability under MCL 691.1402; MSA 3.996(102), because it had no duty to maintain areas outside the improved portion of the road. The trial court denied defendant's motion.

In reviewing the trial court's denial of a motion for judgment notwithstanding the verdict, we examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the nonmoving party. *Zander v Ogihara Corp,* 213 Mich App 438, 441; 540 NW2d 702 (1995). If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Id.* If, on the other hand, the evidence is insufficient to establish a prima facie case, then the motion should be granted, since reasonable persons would agree that there is an essential failure of proof. *Id.*

Generally, governmental agencies are immune from tort liability where the agency is engaged in the exercise of discharge of a governmental function. MCL 691.1407(1); MSA(107)(1); *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 134; 545 NW2d 642 (1996). However, MCL 691.1402(1); MSA 3.996(102)(1), permits actions for injuries suffered on highways over which a governmental agency has jurisdiction. The highway exception provides, in pertinent part:

> 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. Any person sustaining bodily injury or damage to his or her property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover damages suffered by him or her from the governmental agency. . . . The duty of the state and 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.

Because this exception is narrowly drawn, no action may be maintained unless it is clearly within the scope and meaning of the statute. *Grounds v Washtenaw Rd Comm,* 204 Mich App 453, 455; 516 NW2d 87 (1994).

Defendant argues that it did not have a duty to install traffic signs. We disagree. The duty to maintain the highway in reasonable repair includes the duty to erect adequate warning signs or traffic

control devices at a "point of hazard," or a "point of special danger." *Pick v Szymczak*, 451 Mich 607, 621; ___ NW2d ___ (1996). 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.* To be a point of hazard for purposes of the highway exception, the condition must be one that uniquely affects vehicular travel on the improved portion of the roadway, as opposed to a condition that generally affects the roadway and its surrounding environment. *Id.*

Here, there were no stop or yield signs for east-bound traffic on Outer Drive at Gallagher. Similarly, there were no stop or yield signs for south-bound traffic on Gallagher at east-bound Outer Drive. Although there was a stop sign before west-bound Outer Drive, the presence of the median effectively created two separate intersections for traffic on Gallagher. In any case, drivers like Bluitt who turned onto Gallagher from west-bound Outer Drive never encountered a stop or yield sign. Thus, the intersection of Gallagher and east-bound Outer Drive was one without stop or yield signs in either direction. Road commissions cannot simply disregard danger and avoid liability by ignoring the need to install appropriate signs or signals. See *Tuttle v Dep't of State Hwys*, 397 Mich 44; 243 NW2d 244 (1976); *Bonneville v City of Alpena*, 158 Mich 279; 122 NW 618 (1909); *Mullins v Wayne Co*, 16 Mich App 365; 168 NW2d 246 (1969). Because a reasonable juror could find that the intersection of Gallagher and east-bound Outer Drive presented a point of hazard for vehicular travel, the trial court properly denied defendant's motion for JNOV. *Pick*, *supra*, p 621; *Zander*, *supra*, p 441.

Defendant argues that the trial court should have granting its motion for JNOV because any alleged failure to install adequate signs was not a proximate cause of the accident. We disagree.

Both Bluitt and his passenger testified that Bluitt stopped at the median before proceeding across east-bound Outer Drive. Bluitt testified that he never saw plaintiff's motorcycle. Accordingly, defendant argues that the accident would have occurred even if there had been traffic signs at the intersection. However, the testimony of Bluitt and Moore was contradicted by plaintiff, who indicated that Bluitt's car did not stop before it emerged from the median. Where the facts bearing on proximate cause are in dispute and reasonable minds could differ regarding the cause of plaintiff's injury, the determination of proximate cause is a factual issue to be decided by the jury. *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992). The trial court properly denied defendant's motion for JNOV. *Zander*, *supra*, p 441.

Defendant argues that it was not the proximate cause of the accident because plaintiff's own negligence, as well as that of Bluitt, constituted superseding intervening causes. We disagree. In order to constitute a superseding cause which relieves a negligent defendant from liability, the intervening act must not have been reasonably foreseeable. *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 437; 487 NW2d 106 (1992) (Brickley, J). Where the defendant's negligence enhances the likelihood that the intervening cause will occur, or results in a failure to protect the plaintiff against the very risk that occurs, the intervening cause can be said to have been reasonably foreseeable. *Id.*

Examining the testimony in a light most favorable to plaintiff, Bluitt failed to stop before attempting to cross east-bound Outer Drive. In that case, defendant's failure to install a stop sign

enhanced the likelihood that a car would fail to stop there. *Id.* Our conclusion that any intervening negligence was foreseeable is enhanced by the testimony of plaintiff's expert who stated that a number of accidents had occurred in the Outer Drive area involving median crossings. We note that the opinion in *Fitzpatrick v Ionia Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 1995 (Docket Nos. 166956; 170165) has no precedential value. MCR 7.215(C)(1). In any case, that case preceded *Pick*, *supra*, and is distinguishable since the intersection in that case had a traffic sign. The trial court properly denied defendant's motion for JNOV.

Finally, defendant argues that the trial court abused its discretion by refusing to instruct the jury regarding the highway exception to governmental immunity. We disagree. When a party requests an instruction that is not covered by the standard jury instructions, the trial court may, in its discretion, give additional, concise, understandable, conversational, and nonargumentative instructions, provided they are applicable and accurately state the law. *Chmielewski v Xermac, Inc*, 216 Mich App 707, 713-714; ___ NW2d ___ (1996). A trial court's decision regarding supplemental instructions will not be reversed unless failure to vacate the jury's verdict would be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985).

Here, both the instruction that was given and the standard of care embodied within MCL 691.1402(1); MSA 3.996(102)(1) focus on the reasonableness of defendant's actions or omissions. We do not believe that failure to vacate the jury's verdict would be inconsistent with substantial justice. *Johnson, supra*, p 326. In addition, it was undisputed that defendant knew that there were no traffic signs on the Outer Drive median at Gallagher. Accordingly, defendant's notice of the condition of the roadway at that intersection was not in dispute. It is error to instruct the jury on a matter not supported by the evidence. *Koester v Novi*, 213 Mich App 653, 664; 540 NW2d 765 (1995). In any case, the failure to instruct the jury as to the notice requirements of the highway exception did not create substantial injustice. *Johnson, supra*, p 326.

Affirmed.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin