

STATE OF MICHIGAN
COURT OF APPEALS

RYAN R. HELVIE,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, DEPARTMENT OF
NATURAL RESOURCES,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 250417

Court of Claims

LC No. 01-018144-CM

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

HOEKSTRA, J., (dissenting).

I respectfully dissent.

To establish entitlement to compensation for his injuries plaintiff must establish that defendant was at least 50% at fault for the crash. MCL 500.3135(2)(b). Because the evidence failed to establish fault on the part of defendant's employee, Jeff P. Hiddema, I would vacate the judgment of the trial court and remand for entry of a judgment of no cause for action.

A determination of comparative negligence generally constitutes a question for the fact finder. *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991). Factual determinations made by a trial court sitting without a jury are reviewed for clear error. *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002). Such findings are clearly erroneous when, upon review of the entire record, "the appellate court is left with a definite and firm conviction that a mistake was made." *Westlake Transp, Inc v Public Service Com'n*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

A duty, the breach of which may give rise to a cause of action for negligence, can arise from a statute, a contract, or "by application of the basic rule of common law." *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). In the instant case, the collision between plaintiff and Hiddema took place in an open area used by off-road vehicles (ORVs) that permitted travel in any direction. Because this area does not constitute a highway, the traffic laws set forth in the motor vehicle code do not apply. MCL 257.601. MCL 324.81133(a) imposes an obligation on persons driving ORVs to not operate "[a]t a rate of speed greater than is reasonable and proper, or in a careless manner having due regard for conditions then existing." But under MCL 324.81101(m), vehicles used for "fire,

emergency, or law enforcement purposes” are excluded from the definition of ORV and it is undisputed that Hiddema was responding to an emergency in his capacity as a park ranger. Consequently, no statutory duty governs Hiddema’s operation of a motor vehicle where the accident occurred. Because no statutory duties are at issue, the general common law duty of care applies. This “imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others.” *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992), quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). To the extent that the trial court imposed a duty greater than this on Hiddema, it erred as a matter of law.

On the facts of this case, I conclude that the trial court committed clear error in finding that Hiddema breached the duty owed by him to plaintiff. Hiddema proceeded through the area across the customary flow of traffic, but at the very moderate rate of speed of approximately 20 miles per hour. He understood that cross traffic could be approaching and remained on the lookout for other vehicles. No evidence supports the conclusion that he merely relied on his lights and sirens without attempting to observe and avoid cross traffic. Because Hiddema operated his vehicle at a reasonable speed and with proper regard for the traffic conditions, he did not fail to use due care or act in an unreasonably dangerous manner. Clearly, Hiddema did not breach the standard of care for operation of a motor vehicle in this area. To conclude otherwise would unjustifiably impose a duty requiring him to observe and avoid all other traffic. Hiddema had no more of an obligation to do this than plaintiff had an obligation to observe and avoid him. Each failed to observe the other. But failing to observe a vehicle or avoid all collisions is not a duty imposed upon drivers in this area open to largely unregulated use by ORVs.

/s/ Joel P. Hoekstra