

STATE OF MICHIGAN  
COURT OF APPEALS

---

ARTHUR WHITMORE and ELAINE  
WHITMORE,

UNPUBLISHED  
October 7, 2010

Plaintiffs-Appellees,

v

CHARLEVOIX COUNTY ROAD  
COMMISSION,

No. 289672  
Charlevoix Circuit Court  
LC No. 08-014922-NO

Defendant-Appellant.

---

ARTHUR WHITMORE and ELAINE  
WHITMORE,

Plaintiffs-Appellants,

v

CHARLEVOIX COUNTY ROAD  
COMMISSION,

No. 291421  
Charlevoix Circuit Court  
LC No. 08-014922-NO

Defendant-Appellee.

---

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

BANDSTRA, J. (*concurring in part and dissenting in part*).

I concur with the decision of the majority except with regard to the trial court's failure to dismiss plaintiffs' allegations concerning "failure to warn." The majority correctly concludes that these allegations cannot properly present a separate cause of action under *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000). Nonetheless, the majority reasons that the failure to warn allegations need not have been dismissed as plaintiffs only made those allegations so that they could "seek[] to introduce evidence concerning the failure to warn that would be probative and relevant to their actual underlying cause of action," i.e., that defendants had failed to fix the pothole. I disagree. First, allegations of a failure to warn need not be in a complaint to warrant the introduction of evidence regarding a failure to warn if such evidence is relevant and otherwise permissible as to a separate claim. Second and more

importantly, I do not see how evidence that defendant failed to post a warning regarding the pothole is at all relevant to whether defendant acted negligently in failing to fix the pothole. At best, the majority's decision in this regard will lead to juror confusion. At worst, it will allow the jurors to base liability on allegations that defendant failed to properly warn regarding the pothole, in direct derogation of *Nawrocki*.

/s/ Richard A. Bandstra