STATE OF MICHIGAN

COURT OF APPEALS

PATRICK MANN, SR., and GAYE MANN, Individually and as Next Friend of PATRICK MANN, JR., Minor,	FOR PUBLICATION November 15, 2002 9:05 a.m.
Plaintiffs-Appellees,	
v	No. 226443 St. Clair Circuit Court
ST. CLAIR COUNTY ROAD COMMISSION,	LC No. 98-001686-NI
Defendant-Appellant.	Updated Copy February 14, 2003

Before: Hood, P.J., and Murphy and Markey, JJ.

MARKEY, J. (*dissenting*).

I respectfully dissent. Although I think the majority sets forth a reasonable analysis, I have concluded after very careful study that the more accurate conclusion is that the statutory five percent cap on the reduction for comparative negligence for failure to use safety belts does not apply to this action under the highway liability act. Also, it seems logical that whichever conclusion is ultimately reached, the decision should apply uniformly to any situation where one claiming damages from a motor vehicle accident was not wearing a seat belt at the time of injury. It flies in the face of general common sense to apply a five percent cap on comparative negligence for failing to use a seat belt in one type of legal claim and to apply no cap in others. So, I urge either the Legislature or our Supreme Court to unify the law in this area. Regarding the case at hand, I agree with and incorporate the majority's recitation of the legislative history and the change in the common law in this area.

A. *KLINKE*: EXCEPTION TO THE STATUTE

My first area of disagreement involves the effect of *Klinke v Mitsubishi Motors Corp*, 458 Mich 582; 581 NW2d 272 (1998). As the majority noted, five justices agreed that the title of the vehicle code did not contemplate regulation of manufacturer liability; consequently, *Klinke* is binding authority for this proposition. I conclude in a similar manner that, because the vehicle code does not mention the liability of road commissions, the title of the vehicle code in which the safety belt law is found provides no notice that a road commission may face liability.

B. OTHER ARGUMENTS

Streets & Highways

Plaintiffs argue that the title of the vehicle code includes the factual situation at bar because the stated purpose of the vehicle code includes a specific reference to highway use: "to provide for the regulation and use of streets and highways." That clause indeed appears in the title of the act. Justice Weaver's opinion was based on a strict construction of the stated purpose in the title of the vehicle code, i.e., it stated that civil liability was provided for "owners and operators of vehicles," but omitted any mention of civil liability for manufacturers of vehicles. *Id.* at 589-590.

Highway *liability* is not found in the vehicle code. It is true that the title of a statute may not list every specific purpose for it. *Metro Funeral Sys Ass'n v Comm'r of Ins*, 331 Mich 185, 192; 49 NW2d 131 (1951). Nonetheless, the Legislature does not appear to have intended for the vehicle code to control highway commission liability. In fact, the vehicle code defines a highway in far broader terms than the governmental immunity statute. The vehicle code defines a highway or street as the "*entire width* between the boundary lines of *every way publicly maintained* when *any part* thereof is open to the use of the public for purposes of vehicular travel." MCL 257.20 (emphasis added). The highway liability exception to governmental immunity, however, defines the area of roadway to which liability attaches in narrower terms: "'Highway' means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles." MCL 691.1401(e). Clearly, if highway liability were controlled even in part by the vehicle code, definitional conflicts would immediately arise.

The Legislature obviously intended that the *liability* of governmental units be controlled by the governmental immunity statute, not the broader vehicle code. It is logical to surmise, then, that the vehicle code's provision regarding comparative negligence as a setoff to liability was not intended to extend to the governmental immunity act's highway exception any more than does the vehicle code's definition of a highway or street. Inclusion of "regulation and use of streets and highways" in the title of the vehicle code is a prelude to the detailed traffic laws contained in that statute (see MCL 257.601 *et seq.*) and is not intended as an expansive supplement to the governmental immunity statute. The use of the phrase "to provide for the regulation and use of streets and highways" in the title of the vehicle code is insufficient under the Title-Object Clause, Const 1963, art 4, § 24, to create or reduce a public road commission's liability.

Operation of a Motor Vehicle

Plaintiffs also argue that because this case arises out of the ownership, maintenance, or operation of a motor vehicle, i.e., plaintiffs' vehicle, it comes within the purview of the motor vehicle code. Defendant counters that this lawsuit arose from the condition of the highway, not from the ownership, maintenance, or operation of a motor vehicle, because the defendant operated a roadway, not a vehicle. Therefore, defendant argues, this case does not arise under the vehicle code. Defendant's position would be supported by the Court of Appeals decision in *Klinke v Mitsubishi Motors Corp*, 219 Mich App at 500, 509; 556 NW2d 528 (1996), where this

Court stated that a products liability action against an automobile manufacturer does not arise out of the ownership, maintenance, or operation of a motor vehicle. If the Legislature had intended to include design or construction of a motor vehicle as an included act, it could have done so. *Id*., citing *LaHue v Gen Motors Corp*, 716 F Supp 407 (WD Mo, 1989). Because the Supreme Court affirmed *Klinke* on different bases, the Court of Appeals decision in *Klinke* has been "modified" and is not binding authority under the conflict rule, MCR 7.215(I)(1).

The parties dispute whether the plaintiff's or the defendant's operation of a vehicle controls. It is arguable that this is an either/or situation because when the identical term is interpreted under the no-fault statute, a cause of action can arise if the *plaintiff* was operating a motor vehicle and hit a tree (such as happened here) or if the plaintiff was a pedestrian and was struck by the *defendant's* motor vehicle. Under either scenario, the no-fault law would consider the accident to have arisen out of the ownership, maintenance, or operation of a motor vehicle, and the benefits and limitations of that statute would apply. See MCL 500.3135(1) (a defendant's liability for his ownership, maintenance, or use of a motor vehicle); *Gajewski v Auto-Owners Ins Co*, 414 Mich 968 (1982), rev'g 112 Mich App 59; 314 NW2d 799 (1981) (the plaintiff was entitled to personal protection insurance benefits when his own car exploded). In any event, regardless of whether the plaintiff's or the defendant's operation of a vehicle controls, I would follow the binding authority of *Klinke* and conclude that the title of the vehicle code did not mention or contemplate the liability of road commissions.[1]

C. CONCLUSION

The statutory five percent cap on the reduction for comparative negligence for failure to use safety belts does not apply to this highway liability case because the title of the vehicle code provides for liability of owners and operators of vehicles, but does not provide for liability of a road commission. *Klinke* controls because a majority of justices agreed with Justice Weaver's reasoning.

I would reverse and remand.

/s/ Jane E. Markey

[1] I note that similar to the instant plaintiffs, the plaintiff's daughter in *Klinke*, 458 Mich 585, also was operating a motor vehicle at the time that she was killed.