STATE OF MICHIGAN

COURT OF APPEALS

ANN E. SABROSKY, Personal Representative of the Estate of HUGH SCOTT SABROSKY,

Plaintiff-Appellee/Cross-Appellant,

V

INGHAM COUNTY ROAD COMMISSION, COUNTY OF INGHAM, STATE OF MICHIGAN,

Defendant-Appellant,

and

LAWRENCE D. and DORIS A. CLARK,

Defendants/Cross-Appellees.

UNPUBLISHED
September 7, 2001

No. 221102
Ingham County Circuit Court
LC No. 96-083080-NO

Before: Markey, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant-appellant Ingham County Road Commission appeals by right the trial court's order of judgment entered against it in accordance with a jury's verdict and the order denying its motion for a new trial or judgment notwithstanding the verdict (JNOV). Plaintiff Ann Sabrosky cross-appeals the trial court's order granting a directed verdict in favor of defendants Lawrence and Doris Clark. We affirm in part, vacate in part, and remand.

I. DEFENDANT ROAD COMMISSION'S APPEAL

Defendant Road Commission claims that the judgment against it should be reversed because it is not liable for Sabrosky's death under the highway exception to governmental immunity. We agree. "Whether a duty arises under the highway exception is a question of law, subject to review de novo." *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

Generally, governmental agencies are immune from tort liability when engaged in a governmental function. MCL 691.1407(1); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143,

156; 615 NW2d 702 (2000). Governmental immunity is broad and extends to "all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki/Evens, supra* (emphasis in original). However, there are several statutory exceptions to governmental immunity, including the highway exception, MCL 691.1402(1), which imposes a duty on county road commissions to maintain highways under their jurisdiction in reasonable repair so that they are reasonably safe and convenient for public travel. *Nawrocki/Evens, supra* at 156-157.

Specifically, at the time of Sabrosky's death, the highway exception provided:[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. 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 the damages suffered by him or her from the governmental agency. The liability, procedure and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of Act No. 283 of the Public Acts of 1909, as amended, being section 224.21 of the Michigan Compiled Laws. The duty of the state and the county road commissions to repair and maintain highways, and the liability therefore, 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.

The highway exception, which is to be narrowly construed, waives the absolute immunity of governmental agencies with regard to defective highways under their jurisdiction. *Nawrocki/Evens, supra* at 158.

In *Nawrocki/Evens, supra*, our Supreme Court recently addressed the duty and resulting liability of county road commissions in negligence claims involving the highway exception to governmental immunity. The Court in *Evens v Shiawassee Co Rd Comm*, the companion case of *Nawrocki*, overruled its previous decision in *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), and held that the county road commissions' duty, the breach of which invokes the highway exception, "is limited exclusively to dangerous or defective conditions within the actual roadway, paved or unpaved, designed for vehicular travel." *Id*. at 174, 180, 184. The Court stated that "the county road commissions' duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the road bed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage." *Id*. at 183. In overruling *Pick*, the Court in *Evens* held that the highway exception to

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[1] Sabrosky's accident occurred on June 28, 1994. The statutory language applicable at that time is found in 1990 PA 278, § 1, effective December 11, 1990, rather than the current statutory language enacted by 1999 PA 205, effective December 21, 1999.

governmental immunity did not contemplate "conditions" arising from "point[s] of hazard," "areas of special danger," or "integral parts of the highway" as established in the *Pick* case. *Id*. at 176-177.

In the present case, in denying the Road Commission's motions for summary disposition and directed verdict and in allowing plaintiff to proceed with her negligence claim against the Road Commission, the trial court relied on *Pick, supra*, and *Miller v Oakland Co Rd Comm*, 43 Mich App 215; 204 NW2d 141 (1972). In *Miller, supra* at 216, this Court reversed the trial court's dismissal of the plaintiff's complaint against the Oakland County Road Commission. After the plaintiff was injured when a dead elm tree blew onto her truck while she was driving, she alleged that the road commission was liable under the highway exception to governmental immunity. *Id*. at 216-217.

However, as pointed out by the Road Commission in the instant case, after *Miller* was decided in 1972, the Legislature amended the statutory definition of "highway" in 1986 to provide that "[t]he term highway does not include . . . trees . . . ." 1986 PA 175, § 1, effective July 7, 1986. Although plaintiff argues that *Miller* remains precedent because this Court relied on it in deciding the 1997 case of *McKeen v Tisch (On Remand)*, 223 Mich App 721; 567 NW2d 487 (1997), our Supreme Court in *Evens* questioned this Court's decision in *McKeen* as well as several other cases relied upon by plaintiff in her appellate brief. *Evens, supra* at 178-179, n 34. Specifically, the *Evens* Court commented that various lawsuits brought under the highway exception to governmental immunity which involved traffic signs, median barriers, and tree limbs were never contemplated or intended by the Legislature. *Id.* Thus, some confusion existed as to the state of the law at the time that the instant trial court decided whether *Miller* remained good law on the basis of the *McKeen* decision. But contrary to the Legislature's clear language that a highway does not include trees, there can be no doubt after *Evens* that *Miller* can no longer be cited for the proposition that a road commission may be liable under the highway exception when a tree outside the actual roadbed falls and injures someone under circumstances similar to the present case. Moreover, as previously stated above, *Evens* overruled *Pick*, and under the clear holding of *Evens*,[2] the Road Commission is not liable for Sabrosky's death. Consequently, the trial court's order of judgment in accordance with the jury's verdict must be vacated.[3] Further, because governmental immunity applies in this case, we remand for entry of JNOV in favor of defendant Road Commission.

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[2] We note that the trial court did not have the benefit of the Supreme Court's decision in *Nawrocki/Evens*, which was issued after the trial court's orders in the present case.

[3]We indeed recognize and lament the accidental tragedy that occurred in this case, in which a young man with a family lost his life. However, in recommending that the jury's verdict of $1,880,000 in favor of plaintiff be vacated, it is clear under *Nawrocki/Evens, supra*, that the highway exception to governmental immunity is inapplicable in this case. As our Supreme Court stated in *Nawrocki/Evens, supra* at 157, "[b]ecause immunity necessarily implies that a 'wrong' has occurred, . . . some tort claims, against a governmental agency, will inevitably go unremedied."

In light our resolution of the above issue, we need not address the Road Commission's other issues.

II. PLAINTIFF'S CROSS-APPEAL

Plaintiff argues that the trial court erred in directing a verdict in favor of the Clarks because the Clarks had control over the tree, and they had a duty to maintain the premises.[4] We disagree that the trial court erred in directing a verdict in favor of the Clarks. Review of the grant or denial of a directed verdict is de novo. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NWd2 401 (1997).

In deciding this issue, the trial court stated:

> The case of [*Stevens v Drekich*, 178 Mich App 273; 443 NW2d 401 (1989)] holds that there is no premises liability upon a private landowner where the hazard to motorists is a tree growing within the public right-of-way unless the property owner has committed some affirmative act which created or increased that hazard. This 1989 decision clearly prevails over SJI Second 19.09, which is a premises liability instruction. It also carves out an exception to the landowner's duties as defined in the restatement section[5] and adopted in [*Langen v Rushton*, 138 Mich App 672; 360 NW2d 270 (1984)]; therefore, I believe the motion must be granted.

In asserting that that the trial court erred and that the Clarks are liable in this case, plaintiff relies on SJI2d 19.09, which states:

> A possessor of [land/premises/a place of business] has a duty to exercise ordinary care in maintaining [his/her] premises in a reasonably safe condition in order to prevent injury to persons traveling along an adjacent [street/or/sidewalk/or other/public way].

The comments following SJI2d 19.09 cite *Grimes v King*, 311 Mich 399; 18 NW2d 870 (1945).[6]

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[4] We note that before addressing plaintiff's issues in the cross-appeal, the Clarks claim that they have suffered prejudice because the issues raised in plaintiff's appellate brief are different from those raised in plaintiff's docketing statement. The Clarks claim that MCR 7.204(H)(1)(d) requires plaintiff as the appellant to "list in detail all issues being raised on appeal" in the docketing statement. Contrary to the Clarks' assertion, MCR 7.204(H)(1)(d) does not limit an appellant to the issues raised in the docketing statement. Further, the Docketing Statement form (CC 259) specifically states that an appellant's identification of issues in the docketing statement "will not limit appellant's presentation of issues in appellant's brief." The Clarks' assertion is without merit.

[5] The court is referring to 2 Restatement of Torts, Second, § 363, p 258.

[6] The case of *Parsons v E I Du Pont De Nemours Powder Co*, 198 Mich 409; 164 NW 413 (1917), is also cited in the comment section to SJI2d 19.09. However, after reviewing the *Parsons* case, we do not believe that it pertains to the instant case. Moreover, the parties have not relied on this case to support their assertions.

The *Grimes* case involved a coping stone, brick, and mortar that fell from defendant's building and killed a person walking by on a public sidewalk. In finding the defendant liable for the decedent's death, the Court relied on various cases involving unmaintained buildings that had resulted in injuries to people along the public streets. *Id*. at 412-413. In stating that persons in control and possession of the buildings had a duty to keep the premises safe so as to protect persons using the adjacent public sidewalks and streets, the Court cited cases that referred to such things as falling window glass, signboards on buildings, blinds, and awnings. *Id*. at 411-413.

We agree with the trial court that *Stevens, supra*, is more on point with the instant facts. In *Stevens, supra* at 275, Michael Stevens, a minor, was injured when the motorcycle on which he was riding collided with another vehicle near an intersection. The plaintiffs sued defendant landowners claiming that a tree growing on the defendant's property obstructed the view of a yield sign at the intersection where the accident occurred. *Id*. at 275-276. In affirming the trial court's grant of summary disposition in favor of the defendants, this Court first stated that "[u]nder the principles of premises liability, the right to recover for a condition or defect of land or for an activity conducted on the land requires that the defendant have legal possession and control of the premises." *Id.* The Court agreed with the defendant that liability could not be imposed because the tree was located in a public right-of-way abutting their home. *Id.* at 276. The Court held that the plaintiffs' cause of action was precluded against the defendants because a landowner's rights to a public right of way are not possessory in nature. *Id*. at 277. Further, in response to the plaintiffs' negligence claim involving the tree, the Court held that unless the landowner had committed some act that increased the existing hazard or created a new hazard, the landowner would not be liable.[7] *Id*.

Thus, applying *Stevens* to the instant case, the Clarks would not be liable because the tree was in the public right-of-way, and a landowner's residual rights to a right-of-way are not possessory in nature. *Id*. Although plaintiff asserts that the driveway construction permit issued by the county establishes that the Clarks had control over the tree, we disagree. The permit was issued to the Clarks for the construction of a driveway. Although the construction permit advised the Clarks to remove two trees, one being the tree that fell on Sabrosky, that language does not mean, nor can it be plausibly argued, that the county was relinquishing control over the tree which no one disputes was located in the right-of-way. In further denigration of plaintiff's argument, the permit specifically restricted the Clarks' activity within the county right-of-way to between the dates of July 2, 1987 and December 2, 1987. The county certainly did not relinquish its control over the right-of-way merely by issuing a permit for construction of a driveway. In addition, like the defendants in *Stevens*, the Clarks never planted, maintained, trimmed, or inspected the tree.

Further, contrary to plaintiff's assertion, there was no evidence that the Clarks had either actual or constructive notice of the tree's defective condition. As previously stated, the Clarks did not maintain, inspect, or trim the tree. The foliage on the tree looked healthy, and one of plaintiff's expert witnesses agreed that homeowners assume that a tree is healthy if the foliage looks healthy. The tree was rotted in its center, and some testimony indicated that it was missing

[7] This exception is examined later in this opinion.

bark, which could mean the tree was deteriorating. However, testimony was also presented that any missing bark may have been covered by vegetation.

Plaintiff claims that she presented sufficient evidence from which the jury could infer that the Clarks, in using heavy equipment to construct the driveway and in removing brush and trees from the ditch, damaged the tree roots and that damage precipitated the tree's decay and its ultimate failure on the day Sabrosky was killed. We disagree.

In *Stevens, supra* at 277, this Court held that a landowner would not be liable for conditions in the public right-of-way unless the landowner committed some act that increased the existing hazards or created new hazards. Here, the trial court directed a verdict after hearing the evidence regarding whether the Clarks had created or increased the hazard. The court stated that no evidence had been presented "from which the jury can do anything but speculate" regarding what or who, if anyone, created or increased the hazard.

A prima facie case of negligence may be shown by the use of legitimate inferences; however, these inferences must be based upon factual evidence and not upon conjecture. *Berryman v K-Mart*, 193 Mich App 88, 92; 483 NW2d 642 (1992). Further, inferences may not come from other inferences. *Berry v State Farm Mutual Auto Ins Co*, 219 Mich App 340, 345; 556 NW2d 207 (1996). We conclude, as did the trial court, that no evidence was presented from which a jury could do anything but speculate regarding the cause of damage to the tree, or who, if anyone, worsened the hazard. At trial, there was abundant evidence regarding the construction of the driveway and the deterioration of the tree. Experts testified that the tree that fell and killed Sabrosky had deteriorated to the point that eighty percent of its center was decayed. The deterioration began with root rot that was probably caused by some type of mechanical impact that injured the root. The driveway was installed in 1987; however, the testimony presented generally established that the tree was wounded at least ten years before Sabrosky's death in 1994, i.e., 1984 or earlier. Moreover, there was no reason for the workers who installed the driveway to be anywhere near the side of the tree where the root injury occurred, nor had the Clarks trimmed, planted, or maintained the tree. Hence, plaintiff's attempt to establish a prima facie case of negligence fails because the inferences she draws are not based upon established facts, but rather upon other inferences or speculation.

Plaintiff also asserts that the trial court improperly allowed the admission of David Hoedeman's testimony[8] and improperly limited/excluded the use of the driveway permit at trial. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). An abuse of discretion is found only if an unprejudiced person considering the facts on which the trial court acted would conclude that there was no justification or excuse for the ruling made. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

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[8] Contrary to the Clarks' assertion that plaintiff failed to preserve the issue regarding Hoedeman's testimony, plaintiff did raise this issue below.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Ellsworth, supra* at 188-189. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more or less probable than it would be without the evidence. MRE 401; *Dept of Transportation v Van Elslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Further, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Roulston v Tendercare (Michigan) Inc.*, 239 Mich App 270, 282-283; 608 NW2d 525 (2000).

In limiting the use of the construction permit, the trial court stated that the provision of the permit indicating that two trees be removed pertained to a duty to motorists who might be injured because the trees could affect their sight distance. Consequently, the court determined that the permit was too prejudicial because it required, without any explanation, the removal of trees.

Plaintiff's assertion that the trial court improperly refused to admit the permit into evidence even though the permit established that the Clarks had total dominion and control over the tree that killed Sabrosky is also without merit. We agree with the trial court that the permit was too prejudicial to admit into evidence. Again, although the permit advised the Clarks to remove two trees in order to install the driveway, it gave no explanation why the trees had to be removed. More importantly, contrary to plaintiff's argument, the permit did not establish that the Clarks had control over trees that were located in the county right-of-way.

Neither do we find any merit to plaintiff's argument that Hoedeman's deposition testimony constituted parol evidence on which the trial court should not have relied. "The parol evidence rule excludes evidence of prior contemporaneous agreements, whether oral or written, which contradict, vary or modify an unambiguous writing intended as a final and complete expression of the agreement." *Romska v Opper*, 234 Mich App 512, 516; 594 NW2d 853 (1999). The deposition testimony in question did not attempt to "contradict, vary or modify" the permit, but rather sought to explain why the county wanted the Clarks to remove the two trees in question. In addition, even if the testimony did constitute parol evidence, "the admission of parol evidence is viewed much more liberally" in the modern era. *Zurcher v Herveat*, 238 Mich App 267, 280; 605 NW2d 329 (1999). Moreover, regardless of the trial court's reliance on Hoedeman's deposition testimony that any duty the Clarks owed was to motorists who might be injured because the tree affected their sight distance, the fact still remains that the permit did not establish that the Clarks had the requisite legal control over the tree that fell on Sabrosky's truck. Because we cannot say that there was no justification for the ruling, the trial court did not abuse its discretion in refusing to admit the permit as an exhibit at trial.

Plaintiff also argues that sufficient evidence was submitted from which a jury could find that the Clarks' commercial development was in an "urban" area as required by 2 Restatement of Torts, Second, § 363, p 258, thereby substantiating plaintiff's claims that the Clarks could be liable for failing to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on their land. Plaintiff's assertion is without merit.

In directing a verdict in favor of the Clarks, the trial court noted that the case of *Stevens, supra,* created an exception to the duty of urban landowners set forth in section 363 of the Restatement of Torts, Second. Section 363 states:

> A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway. [2 Restatement of Torts, Second, § 363, p 258.]

First, section 363 provides that a "possessor" of land can be liable for trees that present an unreasonable risk of harm. As previously stated, the driveway construction permit did not establish that the Clarks had control and possession over the tree that fell on Sabrosky. As stated in *Stevens, supra* at 277, "whatever residual rights to a public right-of-way are retained by an adjacent landowner, they are not possessory in nature . . . ." Thus, the "possessor" requirement of section 363 is not satisfied in this case.[9]

We also note that *Langen, supra*, relied upon by plaintiff is distinguishable from the present case. In *Langen, supra* at 675, the defendant who was the owner of the shopping center "owned, controlled and maintained" the tree that was alleged to have created the unreasonable risk of harm. In the present case, the Clarks did not plant or maintain the tree that was located in the county right-of-way.

III. CONCLUSION

With respect to defendant Road Commission, we both vacate the trial court's judgment entered in accordance with the jury's verdict in favor of plaintiff and remand for entry of judgment notwithstanding the verdict in favor of defendant Road Commission. We affirm the trial court's order directing a verdict in favor of the Clarks. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Donald S. Owens

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[9] Further, even had we not concluded that section 363's "possessor" requirement was not satisfied, there still remains an issue regarding whether the "urban" requirement is satisfied. A review of the testimony indicates that the Clarks' property where the tree was located was not in an "urban" area as defined by comment e to section 363 of the Restatement. Comment e describes "urban" as an area "where traffic is relatively frequent, land is less heavily wooded, and acreage is small . . . ." In addition, with regard to the "urban" requirement in section 363, plaintiff also claims that the trial court should have allowed into evidence certain exhibits she sought to admit that related to the "urban" nature of the area around the Clarks' land. In refusing to admit the exhibits, the court indicated on the record that the exhibits were a surprise, i.e., they had not been listed previously as exhibits that would be presented at trial. The lower court record reveals that the exhibits were a surprise, and because there was a justification for the court's decision to exclude the evidence, we cannot say that the trial court abused its discretion. *Chmielewski, supra*; *Ellsworth, supra*.