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Their Way or The Highway: Michigan Supreme Court Holds That Private Parties Are Under No Duty To Maintain Public Highways

By Drew Broaddus

The first question that must be answered in any negligence suit is: Did the defendant owe a duty to the plaintiff?[1] Duty is frequently the subject of dispositive motions and appeals because (1) it is a question of law to be decided by the court (not the jury),[2] and (2) if the plaintiff cannot prove duty – or the defendant can negate it – the lawsuit cannot go on.[3]

The Michigan Supreme Court, in a 4-3 decision, recently made an important statement about duty in *McCue v O-N Minerals Co,* 2011 Mich LEXIS 2145 (Case No. 142287). Although the factual background for the holding was not explained in the Court's memorandum order, *McCue* states quite clearly that private parties are under no duty to repair a public highway, even when the private party's actions allegedly caused or exacerbated damage to the roadway.

The facts of *McCue* are not contained in the Court's order, but are set forth in Justice Cavanagh's dissent as follows: Plaintiff and his wife were participating in a bicycle tour when she fell from her bike, suffering a serious debilitating injuries, while riding over a portion of state highway M-134 in the Upper Peninsula. Plaintiff alleged that the portion of the highway where his wife fell was extensively damaged. Defendant O-N Minerals Co. owned the land on both sides of M-134 where the fall occurred. Defendant conducted mining operations on that property, on both sides of the highway. The state held an easement that allowed M-134 to pass over defendant's property. At the point where plaintiff's wife fell, the highway consisted of a concrete pad with large steel rails embedded into the concrete. As permitted by an agreement with the state, defendant routinely crossed M-134 on the concrete pad with heavy trucks and equipment. Plaintiff alleged that defendant's repeated intense use of the highway caused damage to the highway, resulting in his wife's fall.

SECREST WARDLE NOTES:

After the pivotal *Loweke v Ann Arbor Ceiling & Partition Co,* 489 Mich 157 (2011) decision failed to generate a dissent,[4] the Court has again fallen along partisan lines on the issue of tort duty; the historically conservative Justices (Young, Markman, Mary Beth Kelly, and Zahra) voted to reverse in *McCue,* as the historically liberal Justices (Cavanagh, Marilyn Kelly, and Hathaway) dissented.

Because the memorandum order does not contain a statement of facts, *McCue's* precedential value will be debated. Supreme Court orders *can* be, but are not necessarily, binding precedent; the order must be a final disposition of an application and contain a concise statement of the applicable facts and the reason for the decision. *People v Crall,* 444 Mich 463, 464, n 8 (1993).

Although not expressed in the memorandum order, *McCue* may reflect concerns about private parties undertaking their own repairs of public highways. It is likely preferable, from a public policy standpoint, to have all state highway repairs undertaken by MDOT so that there can be oversight regarding materials and labor used. For these and other reasons, courts may be reluctant to impose a maintenance duty upon private parties in this context.

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[1] See *Romain v Frankenmuth Mut Ins Co,* 483 Mich 18, 22 (2009) ("[U]nder Michigan law, a legal duty is a threshold requirement before there can be any consideration of whether a person was negligent….").

[2] *Miller v Ford Motor Co (In re Certified Question),* 479 Mich 498, 504 (2007).

[3] See *Romain, supra* at 22.

Defendant moved for summary disposition, arguing that it owed no duty to the plaintiff. The trial court granted the motion, but the Court of Appeals reversed and found a "question of fact as to whether O-N Minerals had created or increased the hazard at issue." Court of Appeals No. 294661, decided November 4, 2010, p 12. The Supreme Court reversed in an one-paragraph memorandum order, holding: "The plaintiff's claim of negligence failed because the plaintiff did not demonstrate that the defendant, rather than the State of Michigan Department of Transportation [MDOT], owed the plaintiff and his spouse a duty to maintain or repair the State highway in question. See MCL 691.1402(1). Similarly, the plaintiff failed to state a claim for public nuisance because he did not demonstrate that the defendant acted in a way that unreasonably interfered with a common right enjoyed by the public or that the plaintiff's spouse's injury was different from the type of harm that a member of the general public could have suffered." The trial court's order granting summary disposition was therefore reinstated.

Justice Cavanagh dissented. In his view:

> [e]ven if the majority [was] correct that defendant had no duty to maintain or repair the state highway in question, I think that defendant arguably had a duty to inform … MDOT … of the damage apparently caused by defendant's unusual use of the highway. I believe that this arguable duty arises out of the fact that defendant's use of the portion of the highway where plaintiff's wife was injured is highly intense and fundamentally different from the public's use, and that use potentially either increased the hazard on the public highway that existed at the time of the injury or created a new hazard on the public highway. … Because defendant's intense use seemingly caused or hastened the damage to the highway and defendant was in the best position to know when repairs were needed, I think that imposing a duty on defendant to inform MDOT of the damage is a fair balancing of the competing policy considerations that necessarily go into determining whether a duty exists.

For similar reasons, Justice Cavanagh felt that plaintiff also could have proceeded under a public nuisance theory, which plaintiff had pled, but the trial court and the Supreme Court rejected. Justice Marilyn Kelly also dissented; she wrote separately to clarify that in her view, O-N Minerals Co. had a duty to *maintain* the highway, not just inform MDOT. Justice Hathaway also dissented for the reasons stated by Justices Cavanagh and Kelly.

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[4] See *Boundaries,* June 8, 2011, "Back to Basics? Supreme Court Guts Fultz Defense in Opinion that Crosses Partisan Lines," by Drew Broaddus.

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