

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Parking Lot Post and Chain Placement Not a Proximate Cause of Motorcycle Accident

By Jack Weston

In *Hammond v Salvation Army*, an unpublished decision of the Michigan Court of Appeals, Secrest Wardle won the case for the Defendant at the trial and appellate court levels.

Plaintiff filed suit alleging that he suffered injuries as a result of an unwitnessed motorcycle accident which occurred at the entrance of Defendant's thrift store parking lot. The store was closed. Defendant blocked the parking lot entrance by extending a chain between two posts. However, the posts and chain were not located on Defendant's property, rather they were placed five feet into the public right-of-way. Plaintiff was riding his motorcycle west on M-59, which includes two traffic lanes in each direction plus a center turn lane. Plaintiff decided to use Defendant's parking lot to turn around and go east. Because Defendant's lot was located on the south side of M-59, Plaintiff had to wait in the center lane for oncoming traffic to clear. Plaintiff then turned left across the oncoming lanes and up the twenty-five foot deep entrance to the parking lot. Plaintiff alleged his motorcycle struck the chain hanging across the entrance, which apparently then slid up the front of the motorcycle and over the windshield. Plaintiff was struck in the mouth and suffered severe dental and jaw damage. Plaintiff testified that he never saw the chain before he hit it and that he only saw it after the impact when he looked back.

Plaintiff alleged that Defendant had been negligent in locating the posts and chain within the public right-of-way and in failing to properly maintain the chain so that it would be visible to others. At trial, the jury returned a unanimous verdict of no cause of action finding Defendant free of negligence. Plaintiff moved for a judgment notwithstanding the verdict or a new trial, arguing: (1) that the verdict was against the great weight of the evidence; (2) that the trial court erred in denying Plaintiff's motion for a partial directed verdict on the issues of negligence and proximate cause; and (3) that the trial court erred in refusing to give a special jury instruction requested by Plaintiff that Defendant's placement of the posts and chain within the public right-of-way constituted negligence *per se* (i.e., negligent on its face). The trial judge denied the motion, specifically noting that she had "talked to the jury" after the trial and "[t]hey did not believe the Plaintiff's testimony." Plaintiff appealed.

SECRET WARDLE NOTES:

Although *Hammond* is an unpublished decision and not binding on lower courts, it is significant since the opinion was rendered by a panel of judges considered by many to be very liberal in favor of Plaintiffs. This decision demonstrates that even a liberal panel will require a plaintiff to provide sufficient proof of all of the required elements of a negligence claim, or suffer dismissal.

Nevertheless, it is not recommended that private property owners do anything to impede or interfere with public right-of-ways. As seen in this case, such interference can be considered negligence *per se*.

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The Appellate Court held that there was scant (if any) evidence tending to show that Defendant's negligence in locating the posts and chain within the public right-of-way was a proximate cause of the accident. The Court noted Defendant's liability expert's testimony that, even if the posts and chain had been located entirely on Defendant's property, Plaintiff would still have been unable to stop in time. Thus, the expert concluded that the location of the posts and chain was not a proximate cause of the accident. Plaintiff did not attempt to rebut this testimony by, for example, showing that he would have seen the chain sooner if it had been located on Defendant's property rather than on the right-of-way. Therefore, the Court could not conclude that the ultimate verdict of no cause of action was against the great weight of the evidence.

However, the Court of Appeals agreed with Plaintiff that Defendant's installation of the posts and chain within the public right-of-way, rather than on its own property, constituted negligence. Therefore, the trial court erred in denying Plaintiff's motion for a partial directed verdict on that limited issue. Plaintiff additionally argued on appeal that, because of the negligent installation, he was entitled to a directed verdict on the issue of proximate cause. However, the Court of Appeals noted that Plaintiff had conceded at trial that there was a question of fact for the jury on the issue of proximate cause and held that the issue had been waived and was not reviewable on appeal. Further, the Court noted that Plaintiff failed to rebut Defendant's expert's opinion that the location of the posts and chain was not a proximate cause of the accident. Accordingly, the Court concluded that Plaintiff was not entitled to reversal or a new trial on this argument either because, even if the trial court had directed a partial verdict for Plaintiff on the issue of negligence, the ultimate verdict of no cause of action would have been the same due to lack of proximate cause.

Finally, the Court agreed with Plaintiff that the trial court erred in denying Plaintiff's request for a special jury instruction that would have allowed the jury to infer, from the fact that the posts and chain were located within the public right-of-way, that Defendant was negligent. However, the Court held that the error was harmless because Plaintiff failed to rebut Defendant's expert's testimony that the location of the posts and chain was not a proximate cause of the accident, and the issue was therefore moot.

CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

Champaign, IL

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183
Tel: 217-378-8002 Fax: 217-378-8003

www.secrestwardle.com

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CONTRIBUTORS

Premises Liability Practice Group Chair

Mark F. Masters

Editor

Carina Nelson

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