

IN THE SUPREME COURT OF MISSOURI

Case No. SC88176

DOUGLAS A. HENSLEY

Respondent,

v.

JACKSON COUNTY, MISSOURI

Appellant.

**BRIEF OF AMICUS CURIAE
MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION
CITY OF KANSAS, MISSOURI**

Galen Beaufort, #26498
City Attorney

Douglas McMillan, #48333
Assistant City Attorney
2800 City Hall
414 East 12th Street
Kansas City, Missouri 64106
doug_mcmillan@kcmo.org

Zachary T. Cartwright, Jr. #26506
Senior Litigation Counsel
Missouri Highways and Transportation
Commission
1511 Missouri Blvd, P.O. Box 718
Jefferson City, Missouri 65102
Phone (573) 526-4656
Fax (573) 751-3945

Rich Tiemeyer #23284
Chief Counsel

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INTEREST OF AMICUS CURIAE

The Missouri Highways and Transportation Commission (“MHTC”) is charged with the construction and maintenance of the state highway system in Missouri. The City of Kansas City, Missouri (“City”) is constitutional charter city located in parts of Jackson, Platte, Clay and Cass Counties and is charged with the construction and maintenance of city owned roadways within its corporate limits. The MHTC and City believe that the Court’s decision in this case would have a serious impact on the way courts will assess liability based on the condition, design and maintenance of their roadways. This brief is being filed in support of Appellant Jackson County, Missouri.

JURISDICTION STATEMENT

The Amicus Curiae adopt the jurisdiction statement of Appellant Jackson County, Missouri.

STATEMENT OF FACTS

The Amicus Curiae adopt the statement of facts Appellant Jackson County, Missouri

POINT RELIED ON

THE TRIAL COURT ERRED IN FAILING TO GRANT JACKSON COUNTY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO ESTABLISH ALL ELEMENTS OF A CAUSE OF ACTION UNDER SECTION 537.600, RSMO., IN THAT A FALLEN STOP SIGN DID NOT CREATE A DANGEROUS CONDITION IN THE COUNTY'S PROPERTY AND PLAINTIFF'S INJURIES DID NOT DIRECTLY RESULT FROM ANY DANGEROUS CONDITION, AND PLAINTIFF ALSO FAILED TO PROVE THAT JACKSON COUNTY BREACHED ANY DUTY OWED TO HIM.

Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988)

Donahue v. City of St. Louis, 758 S.W.2d 50 (Mo. banc 1988)

State ex rel. Missouri Highway and Transportation Commission v. Dierker,
961 S.W.2d 58 (Mo. banc 1998)

Hedayati v. Helton, 860 S.W.2d 795 (Mo. App. 1993)

ARGUMENT

On September 13, 1988, this Court handed down two significant decisions on sovereign immunity and the interpretation of Section 537.600, RSMo. (1986). In *Alexander v. State*, 756 S.W.2d 539 (Mo. banc 1988), this Court held that the term “dangerous condition” as used in that statute encompassed not only physical defects in property, but also a condition that was “dangerous because its existence, without intervention by third parties, posed a physical threat to plaintiff.” *Id.* at 542. Furthermore, in *Donahue v. City of St. Louis*, 758 S.W.2d 50 (Mo. banc 1988), this Court construed the language of the 1985 amendment to that statute to recognize a cause of action for the “negligent, defective or dangerous design of roads and highways.” *Id.* at 52. As noted in the opinion of the Western District in the present case, there has been confusion among the lower courts as to the application of those two decisions, particularly in cases involving allegations of a dangerous condition of a road or highway. The present case presents an opportunity for this Court to reexamine and clarify the existing law, and to articulate a reasonable standard that will guide future courts in cases of this nature.

The traditional elements of tort liability (i.e., duty, breach of duty and proximate cause) apply in a case brought under Section 537.600.1(2), RSMo., but sovereign immunity is only waived in instances where injuries directly result from a dangerous condition in property. Although the word does not appear in Section 537.600, the existence of a “duty” is either a condition precedent to liability under that statute, or is inherent in the analysis of whether a dangerous condition existed.

In fact, the existence of a duty has been held to be the “seminal issue” in a case involving allegations of a dangerous roadway condition. *Herzog v. City of St. Louis*, 792 S.W.2d 39, 40 (Mo. App. 1990).

It is well settled that a governmental entity is not an insurer of all injuries occurring on its streets or highways. *Dowell v. Hannibal*, 210 S.W. 2d 4 (Mo. banc 1948). The state and other entities have a duty to exercise ordinary care to maintain public roads in a reasonably safe condition for travel by those using them in the proper manner and with due care. *Lavinge v. City of Jefferson*, 262 S.W.2d 60, 63 (Mo. App. 1953); *Ashlock v. City of Herculaneum*, 670 S.W.2d 131 (Mo. App. 1984); *Williams v. City of Independence*, 931 S.W.2d 894 (Mo. App. 1996); and *Benoit v. Missouri Highway and Transportation Commission*, 33 S.W.3d 663 (Mo. App. 2000).

Other jurisdictions have also recognized that public entities have the responsibility to construct and maintain their streets or highways in a reasonably safe condition for travelers exercising due care for their own safety and the safety of others. *Shepard v. State of Nebraska Department of Roads*, 336 N.W. 2d 85 (1983); *Cormier v. Comeaux*, 748 So. 2d 1123 (La. 1999); *Polyard v. Terry and State of New Jersey*, 390 A. 2d 653 (1978); *Klein v. City of Seattle*, 705 P. 2d 806 (1985); *Bryant v. Jefferson City*, 701 S.W. 2d 626 (Tenn. App. 1985); *Smith v. Sharp*, 82 Idaho 420, 354 P.2d 172 (1960); *Pfiefer v. County of San Joaquin*, 60 Cal. Rptr. 493, 430 P. 2d 51 (Cal. banc 1967); *Boulos v. State of New York*, 440 N.Y. Supp. 2d 731 (App. Div. 1981); *Diegal v. City of West Fargo*, 546 N.W. 2d

367 (N.D. 1996); and *Commonwealth Department of Highways v. Shadrick*, 956 S.W. 2d 898 (Ky. 1997). In so holding, the courts in this and other states have acknowledged the obvious fact that it is not possible to provide a system of roads that is safe for all travelers, particularly when the rules of the road are violated. Such a concept is consistent with comparative fault, because a duty must be breached before any fault may be assessed to a party. *Shadrick, Id.* at 901.

In *Williams v. City of Independence*, the Western District properly noted that one element to be considered in determining whether a duty exists is the foreseeability of the injury. *Id.* at 896, citing *Rothwell v. West Central Electric Co-op*, 845 S.W. 2d 42, 43 (Mo. App. 1992). However, practically all manner of negligent highway use and intentional misuse is “foreseeable” in the sense that we know that it occurs. If the duty of a public entity to keep its roads reasonably safe for travel is extended to make it liable for failure to protect individuals from the “foreseeable” consequences of their own acts, or from all “foreseeable” negligence of others, then the entity becomes an insurer. See, e.g., *Linton v. Missouri Highways and Transportation Com.*, 908 S.W.2d 4 (Mo. App. 1998) – implicitly holding that MHTC has a duty to provide highways that are safe for drunk drivers.

The language in *Alexander* that, absent a physical defect, a condition must pose a physical threat “without intervention of third parties” is consistent with the duty to provide roads that are reasonably safe “when used in a proper manner and with due care.” For example, in *State ex rel. Missouri Highway and Transportation Commission v. Dierker*, 961 S.W.2d 58 (Mo. banc 1998), this

Court held that MHTC could not be liable for failing to protect against the conduct of a delinquent who dropped a chunk of concrete from a highway overpass. Even if foreseeable, that conduct was held to constitute an intervening cause. Clearly, the delinquent was also not using the overpass in a proper manner. Hence, the same result would be reached whether the case is analyzed from the standpoint of duty or third party intervention.

Similarly, in *State ex rel. City of Marston v. Mann*, 921 S.W.2d (Mo. App. 1996), the Southern District addressed the issue of whether drag racing was a dangerous condition within the meaning of Section 537.600.1(2) RSMo. In doing so, it identified three major lines of cases defining the term “dangerous condition.” The first line is set forth in *Kanagawa v. State ex rel. Freeman*, 685 S.W.2d 831 (Mo. banc 1985) and *Twente v. Ellis Fischel State Cancer Hospital*, 665 S.W.2d 2 (Mo. App. 1983), which defined dangerous condition in a narrow manner and referred to defects in the physical condition of a public entity’s property. The second line, as set forth in *Alexander*, relaxes the definition to include conditions that are dangerous because their existence, without intervention by third parties, pose a threat. That does not include property “which is not itself physically defective, but may be the site of injuries as a result of misuse or other intervening act.” *Marston*, 921 S.W.2d at 103, citing *Stevenson v. City of St. Louis School District*, 821 S.W.2d 609, 612 (Mo. App. 1991). The third line, set forth in *Donahue*, entails conditions that are dangerous because of negligent, defective or dangerous road design. The court in *Marston* found that plaintiff’s injuries did not

directly result from a dangerous condition in the city's property, but rather from the misuse of that property or intervening conduct of the two individuals drag racing. 921 S.W.2d at 104.

The confusion in the case law seemingly occurs most often in cases involving traffic control issues. By way of illustration, in *Ielouch v. Warsaw R-IX Schools*, 908 S.W.2d 769 (Mo. App. 1995), the Western District seriously questioned whether the placement of a school driveway at the crest of the hill could constitute a dangerous condition in property, and held that the driveway was not the "direct cause" of plaintiff's injuries. Yet, the same court held that MHTC could be potentially liable to plaintiff for failure to warn "adequately" of that driveway. *Ielouch v. Missouri Highway and Transportation Commission*, 972 S.W.2d 563 (Mo. App. 1998). The first opinion noted *Alexander* and the second cited *Donahue*.

Prior to discussing *Donahue*, some historical perspective is in order. Traffic control was traditionally viewed as a governmental function, for which all public entities enjoyed immunity. *Watson v. Kansas City*, 499 S.W.2d 515 (Mo. banc 1973). As Judge Seiler's dissent in *Watson* pointed out, there was a distinction recognized between the regulation of the movement of traffic and the warning of hazardous conditions. Although both involved the use of traffic control devices, liability could be imposed on a municipality for failure to warn of a condition that made a street not reasonably safe for travel. A careful reading of *Watson* reveals that the court split on whether the "T" intersection was

“particularly dangerous.” However, even the dissent noted that there was “no need” to hold “that cities have to erect warning signs at all intersections” *Id.* at 524.

The following year, this Court split again in another traffic control case, *German v. Kansas City*, 512 S.W.2d 135 (Mo. banc 1974). While continuing to recognize that keeping a street in a condition reasonably safe for travel is a different matter than regulation of traffic on such street, the court held that plaintiff made a submissible case on his claim that the city failed to adequately warn that a four lane roadway changed to two lanes, with two-way traffic. Although *Watson* and *German* both preceded the decision in *Jones v. State Highway Commission*, 557 S.W.2d 225 (Mo. banc 1977), they were part of the common law “restored” by the enactment of 537.600, RSMo. (1978).

In *Donahue v. City of St Louis*, 758 S.W.2d 50 (Mo. banc 1988), this Court held that public entities could be liable for the negligent design of roads and highways, and that traffic control devices were an element of design. The reasoning of the majority opinion was perplexing. The case also involved a fallen stop sign, and the claim was clearly for negligent maintenance of that stop sign rather than improper design. Neither the City of St Louis, nor the *amicus curiae*, argued that claims for negligent design did not fall within the limited waiver of sovereign immunity. However, the majority still chose to rule the case as though design had been the contested issue.

The majority opinion in *Donahue* observed that the 1978 enactment of Section 537.600, RSMo., “restored total immunity to all governmental entities relating to defects in roads and highways.” *Id.* at 52. That was clearly incorrect, as the statute only reinstated “such sovereign or governmental tort immunity as existed at common law”, and at common law a municipality could be held liable for failure to keep its streets in a reasonably safe condition for travel. *Watson v. Kansas City, supra.* Further, nothing in the language of the original statute suggested that highway defects were excluded from the “dangerous condition” exception.

The majority also found that one of the purposes of the 1985 amendment to Section 537.600 was to permit such suits for highway defects, including claims for negligent design. The opinion cited *Aylward v. Baer*, 745 S.W.2d 692 (Mo. App. 1987), and *State ex rel. Missouri Highway and Transportation Commission v. Ryan*, 741 S.W.2d 828 (Mo. App. 1987), as two cases where it could be “inferred” that the appellate courts would have reached the same interpretation of the statute, had they been permitted to do so. Neither of those cases discussed whether a cause of action existed for negligent design. To the contrary, both were decided on the fact the respective public entities had not purchased liability insurance, pursuant to *Bartley v. Special Road District*, 649 S.W.2d 864 (Mo. banc 1983). Consequently, the more logical view is that claims for highway defects and negligent design were cognizable under the 1978 version of the statute, if a dangerous condition was created and the public entity had liability insurance, and that the 1985 amendment

merely recognized a “state-of-the-art” defense for highways designed prior to September 12, 1977.

The dissent in *Donahue* reasoned that the plaintiff’s injuries did not directly result from the fallen stop sign, but rather his own failure to operate his vehicle in a careful and prudent manner. Further, plaintiff failed to yield the right of way as required by Section 304.351, RSMo. In other words, plaintiff was not using the street or the intersection in a proper manner and with due care. As such, the analysis in the dissenting opinion was more consistent with the traditional duty of public entities.

The same analysis is applicable in the present case. Although Douglas Hensley was a passenger, the intersection of R.D. Mize and Stillhouse Roads did not pose a physical threat to him, but for the intervening negligence of his driver, Justin Strait. Mr. Strait was traveling northbound and Andrew Westphal was westbound (TR 522-24, 651), so Westphal entered the intersection on the right. Like the plaintiff in *Donahue*, Mr. Strait failed to yield the right of way at the intersection as required by Section 304.351. There was also evidence that he was traveling at a speed between 60-70 mph in a 35 mph zone. (TR 660, 667). In any event, Mr. Strait was not using Stillhouse Road or the intersection in a proper manner and with due care.

In the present case the Western District found that *Donahue* was the controlling precedent, but observed that this Court only held in *Donahue* that a downed stop sign *might* be a dangerous condition. The Western District had

previously declined to follow *Donahue* in *Hedayati v. Helton*, 860 S.W.2d 795 (Mo. App. 1993), where the appellant had alleged that the intersection of a private road and a state highway was dangerous due to the absence of stop sign or other traffic control devices. This Court granted transfer in *Hedayati*, heard arguments and then retransferred the case to the lower court without opinion. Thus, if an open intersection is not necessarily a dangerous condition in property and only poses a threat when drivers fail to follow the rules of the road, then why does it become a dangerous condition because a stop sign is down?

It may be argued that the fallen stop sign was a physical defect in public property, or that Jackson County had a duty to maintain the stop signs it chose to erect. Either argument would be more logical than saying that the claim is grounded in the theory of negligent highway design. However, if public entities have a duty to maintain existing traffic control devices, then why should they not be entitled to a minimal expectation that drivers will perceive and heed existing signs, signals and markings? Moreover, public entities should not be potentially liable for failure to protect against the consequences of negligent or irresponsible driving by erecting additional or different traffic control devices. Examples of this include the *Linton v. Missouri Highway and Transportation Commission, Id.* - intoxicated driver violated open and obvious flashing red traffic signals at a high rate of speed; *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907 (Mo. App. 2004) – claim that intersection controlled by stop sign should have had traffic signal, where elderly lady violated the right of way of oncoming driver who was exceeding the

speed limit; *Moore v. Missouri Highways and Transportation Commission*, 169 S.W.3d 595 (Mo. App. 2005) - driver allegedly crossed centerline on two lane road because she was confused by oncoming headlights; and *Huifang v. City of Kansas City*, WD65086, Slip Op. January 23, 2007 – potential liability in all cases except those involving “intentionally wanton activities outside the normal range of reasonably anticipated driving activities of ordinary citizens”, where “impatient” driver who was not keeping a careful lookout struck a pedestrian in a crosswalk.

It is agreed that certain minimal deviations from the standard of care expected of drivers are reasonably foreseeable. For instance, in Louisiana the duty to maintain public highways in a reasonably safe condition extends to drivers who are “slightly exceeding the speed limit or momentarily inattentive.” *Cormier v. Comeaux*, 748 So.2d at 1127. Nevertheless, public entities cannot always protect against the consequences of even minimal deviations, as a momentarily inattentive driver may run a stop sign, cross a centerline on a two lane roadway, strike a pedestrian or collide with the rear end of another vehicle. Although foreseeability is an element of duty, the mere foreseeability of an injury does not establish a duty to protect against it. *Williams v. City of Independence*, 931 S.W.2d at 896. Likewise, the fact that a particular injury is foreseeable and the governmental entity has the ability to protect against it through an alternative design or additional warnings, should not mean that a jury may access fault to the entity for failure to do so.

Amicus Curiae do not contend that public entities should not be liable for comparative fault, if a dangerous condition contributes to cause an accident. However, the notion of liability for “a general failure to post adequate signing or traffic controls,” born in *Linton*, 980 S.W.2d at 9, and followed in *Kraus*, 147 S.W.3d at 915, should not be the law in this state. Frankly, how do you provide “adequate” traffic control for intoxicated, irresponsible or inattentive drivers? This extension of *Donahue* permits a jury to assess fault on speculation that the public entity could have done something that might have made a difference, which is akin to products liability theory.

It is respectfully submitted that this Court should reaffirm that the duty of public entities is to design, construct and maintain roads that are reasonably safe for travel when used in a proper manner and with due care. Further, a public entity should be entitled to the expectation that any person operating a vehicle on its roads (1) will be licensed to drive; (2) will possess the minimal amount skill necessary to operate the vehicle safely; (3) will perceive, comprehend and heed existing traffic control devices; and (4) will otherwise follow the rules of the road. See *Harris v. Niehaus*, 857 S.W.2d 222, 227 (Mo. banc 1993). If a road or highway is only dangerous because it is not used properly, or because one or more drivers fail to exercise due care or obey traffic laws, then liability should not be imposed on the governmental entity. As Judge Smart aptly observed in his concurring opinion in *Williams v. Missouri Highways and Transportation Commission*, 16 S.W.3d 605, 614 (Mo. App. 2000), “For a condition to be

dangerous within the meaning of Section 537.600, more is required than simply the notion that a collision is likely to happen there if someone does not follow the rules.” Certainly, liability for the negligent, defective or dangerous design of roads and highways should not be predicated on the pure speculation that an accident may have been prevented by an additional or different traffic control device.

CONCLUSION

For the foregoing reasons, Amicus Curiae Missouri Highway and Transportation Commission and the City of Kansas City, Missouri respectfully urge this Court to reverse the trial court’s judgment. This Court may correct these errors by entering the order the trial court should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

Respectfully submitted,

Zachary T. Cartwright, Jr. 26506
Senior Litigation Counsel
Missouri Highways and Transportation
Commission
1511 Missouri Blvd, P.O. Box 718
Jefferson City, Missouri 65102
Phone (573) 526-4656
Fax (573) 751-3945

Rich Tiemeyer 23284
Chief Counsel

And

Galen Beaufort, #26498
City Attorney

By: _____
Douglas McMillan, #48333
Assistant City Attorney
2800 City Hall
414 East 12th Street
Kansas City, Missouri 64106
doug_mcmillan@kcmo.org

ATTORNEYS FOR AMICUS CURIAE

AMICUS CERTIFICATE OF COMPLAINT

Zachary T. Cartwright, Jr., attorney for Amicus Curiae hereby certifies that he is in compliance with Rule 55.03, that this Brief is in compliance with the limitations contained in Rule 84.06(b), that the Brief contains 4,165 words, that the Brief was prepared using WordPerfect 13.0 in 13 point font, and in Times New Roman. Pursuant to Rule 84.06(g), the accompanying disk has been scanned for viruses and it is virus-free.

Zachary T. Cartwright, Jr.

CERTIFICATE OF SERVICE

A copy of Brief of Amicus Curiae and diskette were served via U.S. mail, postage prepaid,

This ____ day of February, 2007, to:

John C. Bragg

Spring Street Law Building

201 North Spring Street

Independence, Missouri 64050

ATTORNEY FOR RESPONDENT DOUGLAS HENSLEY

Randell G. Collins

Jackson County Counselor's Office

2nd Floor Jackson County Courthouse

415 East 12th Street

Kansas City, MO 64106

ATTORNEY FOR APPELLANT JACKSON COUNTY, MISSOURI

Zachary T. Cartwright, Jr.