MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MICHAEL LEE

APPELLANT,

v.

MISSOURI DEPARTMENT OF TRANSPORTATION

RESPONDENT.

DOCKET NUMBER WD83644

DATE: February 23, 2021

Appeal From:

Boone County Circuit Court
The Honorable John D. Beger, Judge

Appellate Judges:

Division Three: Karen King Mitchell, Presiding Judge, Gary D. Witt, Judge and Anthony Rex Gabbert, Judge

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Attorneys:

Mark C. Prugh, Waynesville, MO, for appellant.

Scott T. Sergent, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MICHAEL LEE, APPELLANT,
v.
MISSOURI DEPARTMENT OF TRANSPORTATION, RESPONDENT.

WD83644 Boone County

Before Division Three Judges: Karen King Mitchell, Presiding Judge, Gary D. Witt, Judge, and Anthony Rex Gabbert, Judge

Appellant, Michael Lee ("Michael") appeals from the judgment of the Circuit Court of Boone County dismissing his petition on the pleadings, which raised a claim of wrongful death stemming from the death of his daughter, Jessica Lee ("Jessica").

On August 6, 2013, Jessica was driving with her four-year-old son on Southside Drive in Waynesville, Missouri, at approximately 4:50 a.m. heading to her workplace in a storm. A portion of Southside Drive is in the flood plain and was flooded. Jessica was immediately following another vehicle, when the driver stopped briefly before successfully crossing the flooded section of Southside Drive. Immediately after that vehicle successfully crossed the flooded roadway, Jessica "paused momentarily to examine the flooded portion of the road before unsuccessfully, this time, attempting to drive through the flooded area." Within seconds, Jessica's car began to be swept off the roadway, and Jessica "attempted to stop the car's movement by placing it in park; unbuckled her seatbelt; opened the right rear door of the vehicle; and unsuccessfully attempted to ger herself and her son to safety prior to both being sucked against their will under the interstate highway along with her car." The car was swept completely off of Southside Drive through the culvert under Interstate 44 into Mitchell Creek, killing Jessica and her son.

Michael alleged in the petition that the Missouri Highway and Transportation Commission ("Commission") knew this portion of Southside Drive was a flood hazard and the Commission did not ensure the unclogged capacity of the culverts in the area were sufficient to keep water from coming over the road at a sufficient speed and depth to sweep Jessica's car off the roadway. Michael further alleged the Commission did not provide adequate barriers or guardrails to keep Jessica's vehicle from being swept off of the roadway and failed to provide adequate warning that the road was susceptible to flooding.

The Commission filed a motion for judgment on the pleadings asserting that the flooded roadway was an open and obvious condition and that Jessica had a duty to exercise reasonable care for her own safety. The circuit court granted the motion and dismissed the petition holding that the cause of action fell under *Harris v. Niehaus*, 857 S.W.2d 222 (Mo. banc 1993) because

Michael's "own pleadings and the reasonable inference therefrom indicates [Jessica] saw the danger, examined the danger and decided to proceed anyway."

REVERSED AND REMANDED.

Division Three holds:

(1) The circuit court erred in holding that the Petition failed to state a claim as a matter of law because an open and obvious danger is one where both the condition and the risk are apparent and the Petition alleged that Jessica did not appreciate the risk of entering the flooded portion of Southside Drive because she had seen a vehicle successfully cross the flooded section and a jury could infer that a reasonable driver in Jessica's position may have attempted the same crossing even if that driver was aware of the water on the roadway. Furthermore, Jessica may not have realized the severity of flooding given that she attempted to cross before sunrise in a rainstorm and the pleadings do not indicate the depth of the water on the roadway or whether it was rising or falling at the time she attempted to cross. An obvious danger requires that both the dangerous condition and the risk are apparent to and would be recognized by a reasonable person exercising ordinary perception, intelligence, and judgment.

(2) The circuit court erred in entering judgment dismissing the Petition for failure to state a claim as a matter of law because the circuit court misapplied section 343A of the Second Restatement of Torts, which was adopted by the Missouri Supreme Court, in that the Petition adequately alleged the Commission was aware that a portion of Southside Drive was in the floodplain and Southside Drive was the only means of egress for numerous residents and reasonable minds could differ as to whether the Commission should have anticipated drivers in Jessica's position would continue through the hazard given that there were no alternative routes.

Opinion by: Gary D. Witt, Judge February 23, 2021

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