

Trial Notebook

Justices debate county's immunity for roadway markings



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Is a county immune from liability for a head-on collision that allegedly was caused by the county's negligence in marking a strip of two-lane road as being safe for passing?

The surprisingly subtle philosophical distinctions presented by this serious traffic-safety controversy generated an intense debate between Justices Sue E. Myerscough and Robert W. Cook.

Myerscough's majority opinion decided that section 3-104 of the Local Governmental and Governmental Employees Tort Immunity Act did not protect the county for its carelessness. *Governmental Interinsurance Exchange v. Judge*, 2005 WL 639616 (4th Dist., March 16).

Kendall County painted a skip-dash yellow line in the middle of a two-lane road, indicating that passing was OK. But passing should have been prohibited, based on the minimum line-of-sight guidelines from the Manual of Uniform Traffic Control Devices.

Section 3-104 of the Tort Immunity Act insulates local public entities from liability for injury caused by "the failure to initially provide regulatory traffic control devices," including "roadway markings."

The crucial controversy that divided Myerscough and Cook was whether the county's negligence was an immunized "failure to initially

provide" a traffic control device, or the "improper placement of markings."

Was the county immune for the "initial failure" to paint the road with a solid yellow line, or was the skip-dash line an "improper placement" of a traffic control device?

The majority concluded that the dashed yellow line painted by Kendall County was a "traffic control device" under section 3-104 and that the county could be held liable for improper placement of these markings.

Dissenting, Cook asserted that the "failure to paint a solid yellow line, was 'the failure to initially provide' a regulatory traffic-control device, for which section 3-104 affords immunity."

As recounted by the majority opinion, Aaron Gesell relied on skip-dash markings on Galena Road when passing another vehicle and crashed head-on into Sandra Wittenmyer's oncoming car at the top of a rise.

Wittenmyer obtained a \$5 million verdict against Kendall County. On appeal, the county argued it was immune from liability based on section 3-104.

The momentous debate about the reach of section 3-104 came up in a malpractice case against the defense attorneys who represented Kendall County. The county's appeal from the \$5 million judgment was dismissed by the 2d District Appellate Court. Then the county and its insurer — Governmental Insurance Exchange, as subrogee — filed a malpractice case in McLean County, alleging that Kendall County's defense attorneys failed to properly perfect an appeal.

The key question in the malpractice case — resolved by a McLean County judge as a matter of law — was whether the 2d District would have ruled that Kendall

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County was immune from liability under section 3-104.

Granting defense counsel's motion for summary judgment, the trial judge in the malpractice case concluded that Kendall County would have lost its appeal to the 2d District on the immunity issue. The insurance company then appealed this ruling to the 4th District.

When Kendall County obtained ownership of two-lane Galena Road in 1978, Myerscough explained, it "developed an improvement plan," and "striped the center of the road with a skip-dash yellow line that permitted passing."

The Manual of Uniform Traffic Control Devices, or MUTCD, provides guidelines for when the "sight distances" for oncoming traffic are adequate for passing. As a result of a change of the MUTCD guidelines in 1984, the area where Gesell crashed into Wittenmyer should have been marked as a no-passing zone. Yet, in 1993, Kendall County repainted "the center of the road with the same skip-dashing yellow line that it had placed in 1978."

Here are some highlights of Myerscough's analysis of the important immunity issue (with various omissions not noted in the quoted text):

"Plaintiffs [Kendall County and its insurer] acknowledge that the statutory language 'insulates a public body in the initial placement of markings' but not 'improper placement of markings.' Plaintiffs, however, argue that by failing to paint a no-passing line, the county committed a failure of initial placement.

"Defendants [the county's attorneys in Wittenmyer's tort case] argue that, by painting Galena Road with a skip-dash yellow line that permitted passing, the county committed improper placement of markings. We agree with defendants.

"Section 11-304 of the Illinois Vehicle Code provided that when placing local traffic-control devices, local authorities 'shall' follow the state manual adopted by the Illinois Department of Transportation.

"The Illinois Manual on Uniform Control Devices consists of the MUTCD and the Illinois Supplement to the MUTCD.

"The MUTCD states that a normal broken yellow line indicates a two-direction passing zone, and passing is permitted for traffic traveling in either direction. A one-direction no-passing zone indication, on the other hand, includes a normal broken yellow line and a normal solid yellow line, and passing is only permitted for the traffic

traveling adjacent to the broken line.

"The above description is consistent with the Illinois Rules of the Road. Chapter eight of the Illinois Rules of the Road, which covers traffic signals and pavement markings, states as follows: 'Broken yellow lines separate single lanes of traffic moving in opposite directions. Passing is allowed.'

"Further, 'when there is a solid and a broken yellow line separating two lanes of traffic moving in opposite directions, you may pass only when the broken yellow line is nearest to your lane.'

"The above regulations clearly establish that, contrary to the dissent's statement that 'it is incorrect to say that a broken yellow line is a passing zone,' a broken yellow line does indicate a passing zone. Such an indication exists regardless of whether a driver can pass on a roadway without a centerline. Therefore, a broken yellow line, by itself, is a traffic-control device.

"On the other hand, a solid yellow line, by itself, is not a traffic device, as both the IMUTCD and the Illinois Rules of the Road have established that a one-way no-passing-allowed signal must include both a broken yellow line and a solid yellow line, and a two-way no-passing-allowed signal has two solid yellow lines.

"As Gesell testified at trial, he passed another vehicle in the westbound lane based on the passing-permitted signal then existing on Galena Road and collided head-on with Sandra Wittenmyer's vehicle. As a result of the collision, Sandra Wittenmyer suffered severe and permanent injuries, and a jury later found the county 80 percent at fault.

"These facts demonstrate that, despite the dissent's assertion that 'the absence of the solid yellow line does not interfere with the integrity of the broken yellow line,' such an absence gave the erroneous traffic indication on Galena Road and caused the accident.

"Further, the markings on the road indicated that passing was allowed, and therefore the county's underlying liability did not result from its failure to indicate whether passing was allowed. On the contrary, the county's liability stemmed from its placement of an erroneous traffic signal indicating passing was allowed.

"Such an error was an 'improper placement' and not an 'initial failure to place.'

"Plaintiffs also argue the Supreme Court of Illinois' decisions in *West v. Kirkham*, 147 Ill.2d 1 (1992), support its position that the county was protected by the Tort Immunity Act. In *West*, the plaintiff suffered an injury when, in the

process of making a left turn, her vehicle collided with another vehicle.

"The plaintiff sued the City of Urbana, claiming the city had a statutory duty to provide a left-turn arrow for her direction of traffic. Specifically, the plaintiff argued that because the city had installed a left-turn arrow for traffic traveling in the opposite direction at the intersection where the accident occurred, the city's error was an 'improper placement.'

"The Supreme Court of Illinois disagreed, finding the plaintiff's claim fits squarely within the immunity granted by section 3-104 of the Tort Immunity Act and the city is not liable for its failure to 'provide a particular traffic device.'

According to the Supreme Court in *West*, 147 Ill.2d at 11-12:

"Section 1-101.1 of the act states the expressed purpose of the act. According to that section, the act is intended to 'protect local public entities and public employees from liability arising from the operation of government.'

"The 'operation of government' necessarily encompasses the policy decisions made by a municipality; that is, those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests.

"The decision whether to install a traffic signal requires the municipal traffic planner to balance a host of competing interests, among them, safety, convenience and cost. This is not the sort of decision that should be second-guessed by the courts.

"Were such second-guessing permitted, the traffic planner would be more concerned with avoiding possible litigation than with using his best judgment to properly balance the competing interests. Thus, instead of seeking the best balance of safety, convenience and cost, the traffic planner would concern himself only with whether it could later be argued that the regulation provided could have possibly been safer.

"Excessive regulation, with no corresponding gain in safety, convenience or cost efficiency, would be the natural result. The legislature recognized this by enacting section 3-104 and expressly immunizing the failure to provide a traffic-control device or sign."

"However," Myerscough continued, "plaintiffs' reliance on *West* is misplaced.

"First, unlike the defendant's alleged failure to install a left-turn signal in *West*, the county here placed the wrong traffic signal on the road, one that had the opposite traffic-directing function.

"Since section 3-104 of the Tort Immunity Act only protects a municipality's 'failure to initially provide' a particular traffic device, the county's mistake here is not protected

by this immunity.

"Second, unlike the *West* case where the 'creative' plaintiff 'circumvented section 3-104 of the Tort Immunity Act by finding some other traffic device that was provided,' the county's mistake in the instant case involved the erroneous painting of one traffic signal, i.e., the centerline of the road.

"Third, the MUTCD guideline states: 'markings that are no longer applicable for roadway conditions or restrictions and that might cause confusion for the road user shall be removed or obliterated to be unidentifiable as a marking as soon as practical.'

"As the record indicates, the county's failure to correct the passing-permitted indication was not a result of its traffic planner's balancing 'a host of competing interests, among them, safety, convenience and cost,' and the county's liability did not stem from its 'operation of government.' Instead, the county's failure to correct was simply a negligent oversight, and such a failure is not 'in itself, a decision.'

"Because of the above distinctions, to hold the county liable in the instant case does not reflect the type of second-guessing that *West* prohibits.

"The above conclusion is further supported by the Supreme Court of Illinois' holding in *Snyder v. Curran Township*, 167 Ill.2d 466 (1995). In *Snyder*, the Supreme Court stated that it is the long-standing common-law principle that 'although a governmental agency has discretion in determining whether to perform a public work or make an improvement, once the decision to perform the work is made, it must be done with reasonable care and in a non-negligent manner.'

"In the instant case," Myerscough reasoned, "once the decision to repaint the highway following an engineering study was made, the repainting must be done in a non-negligent manner. We agree with the dissent that 'every roadway could be made safer.' However, contrary to the dissent's interpretation, the county's liability did not result from its 'failure to build the best possible roadway,' but rather from its failure to paint the road non-negligently.

"Such a failure rendered the initial-failure-to-place immunity inapplicable.

"To conclude, the county improperly placed an erroneous passing-permitted signal on Galena Road. Because the clear language of section 3-104 of the Tort Immunity Act only protects the county from its initial failure of placement, the county is not immune from its improper-placement liability.

"The trial court, therefore, correctly granted summary judgment to defendants on the proximate cause issue."

Tuesday's Trial Notebook turns to Cook's dissent.