

# Chicago Daily Law Bulletin

Volume 151, No. 82

Tuesday, April 26, 2005

Thirty-six pages in two sections

## Trial Notebook

### Traffic safety is only one factor in municipal liability: justice



By Steven P. Garmisa  
Hoey & Farina

Splintering 2-1 on an important question of immunity for local authorities, the Illinois Appellate Court decided that Kendall County could not claim immunity from a \$5 million verdict in a case where the county carelessly marked a two-lane road as being safe for passing.

Monday's Trial Notebook focused on Justice Sue E. Myerscough's majority opinion on the surprisingly subtle philosophical distinctions presented by a case that involved, literally, line-drawing. This article turns to Justice Robert W. Cook's dissent in *Governmental Interinsurance Exchange v. Judge*, 2005 WL 639616 (4th Dist., March 16).

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

The key question was whether Kendall County's careless conduct was "failure to initially provide" a solid yellow line or "improper placement" of a broken yellow line.

The 2d District of the Illinois Appellate Court dismissed the county's appeal from the \$5 million judgment in favor of Sandra Wittenmyer, who was seriously injured in a head-on collision on Galena Road. Then, Kendall County's insurance carrier filed a malpractice claim in McLean County Circuit

Court against the defense attorneys who represented the county in the Wittenmyer case.

Summary judgment was entered in favor of the defense attorneys — based on a ruling that, as a matter of law, the 2d District would have rejected Kendall County's immunity defense.

As recounted by the majority opinion in the malpractice case, Kendall County painted a skip-dash yellow line in the middle of two-lane Galena Road, indicating that passing was OK. But passing should have been prohibited, based on the minimum line-of-sight requirements of the Manual of Uniform Traffic Control Devices, or MUTCD.

Aaron Gesell relied on these markings in passing another car and crashed head-on into Wittenmyer's oncoming vehicle at the top of a rise in the roadway.

Myerscough concluded that Kendall 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.'"

Here are some highlights of Cook's dissent (with various omissions not noted in the quoted text):

"I disagree that the county's actions were not covered by section 3-104 immunity.

"Standard roadways in Kendall County have broken yellow centerlines. A no-passing zone is created by the addition of a solid yellow line. There was never a solid yellow line at the scene of this accident.

"It is clear that the county's failure to designate this area as a no-passing zone, its failure to paint a solid yellow line, was 'the failure to initially provide' a regulatory traffic-control device, for which section

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3-104 affords immunity.

"The majority seeks to avoid section 3-104 by semantics, the argument being that the county did not initially fail to place a no-passing zone, it 'improperly placed' a passing zone (the standard broken yellow centerline).

"Under similar logic, the failure to place a reduced speed sign is actually the placement of a continued speed sign. That logic is contrary to the express language of section 3-104.

"The majority's decision is contrary to *West v. Kirkham*, 147 Ill.2d 1 (1992). 'The creative plaintiff, seeking to premise an action on the failure to provide a particular traffic device, could always circumvent section 3-104 by finding and pointing out some other traffic device that was provided.' *West*, 147 Ill.2d at 10.

"It is incorrect to say that a broken yellow line is a passing zone. Rather, the absence of a solid yellow line is a passing zone. Even a roadway without a centerline is a passing zone.

"All sorts of conduct is allowed on roadways with broken yellow lines: driving the maximum speed is allowed, nighttime driving is allowed and truck traffic is allowed, to give just a few examples. But we would not say that a broken yellow line is a maximum-speed-permitted line, or a nighttime-driving-permitted line, or a

truck-traffic-permitted line.

"It is true that a municipality is not allowed to put up half a sign. For example, a municipality is not allowed to provide a green light for east-west traffic at an intersection without providing a red light for north-south traffic. This case involves nothing like that, however.

"The absence of the solid yellow line does not interfere with the integrity of the broken yellow line. In like manner, the installation of a left-turn signal for northbound traffic does not require the installation of a left-turn signal for southbound traffic. See *West*, 147 Ill.2d at 10. A northbound left-turn signal can be operated without the installation of a southbound left-turn signal.

"The [Manual of Uniform Traffic Control Devices] guidelines do note that passing is permitted where there is a broken yellow centerline, but that reference seems to be one of emphasis, in a section designed to clarify passing and non-passing situations. Even if the drafters of the guidelines intended their language to control this case in the manner suggested by the majority, I am unaware of any authority that allows the MUTCD guidelines to overrule the statutory tort immunity of section 3-104.

"The majority asserts that once the roadway was repainted after the MUTCD guidelines were changed in

1984, 'the repainting must be done in a non-negligent manner.' The change in guidelines suggests that the length of no-passing zones is a matter of debate. In any event, this is not a case where the county installed the wrong no-passing zone. This is a case where the county did not put in a no-passing zone at all.

"The majority assumes that the county did not engage in any decision-making in determining not to install a no-passing zone at this location. I suggest the majority has it backward; the failure to religiously keep up with the most recent MUTCD guidelines is in itself a decision. Informal decisions are still decisions; decision-making does not require a committee hearing and vote.

"This court has previously attempted to read the words 'failure to initially provide regulatory traffic-control devices' out of section 3-104. *Snyder v. Curran Township*, 267 Ill.App.3d 174 (1994). The Supreme Court told us we were wrong. See *Snyder*, 167 Ill.2d at 477 ('strictly the province of the General Assembly').

"Immunity for failure to act is essential to the operation of government. Every roadway could be made safer. Two-lane roadways could be made four-lane. Four-lane roadways could be divided. Stop signs could be replaced with stoplights. If there is liability for failure to build the best possible roadway, the municipality's only choice may be not to build the roadway. That decision, of course, carries its own consequences.

"Is the community better served by a two-lane unlighted roadway or no roadway at all? Allowing the imposition of liability because something more could have been added creates a staggering burden for municipalities.

"One way for the county to avoid liability for the failure to establish no-passing zones is to put them everywhere. As *West* points out, that is exactly what section 3-104 was designed to prevent. '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.' *West*, 147 Ill.2d at 12. '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.' *West*, 147 Ill.2d at 11.

"Safety is only one of the factors that may be considered. It should not make any difference that a municipality could have laid out a road better; the question is whether there was something wrong in what it did.

"Once a municipality has provided a traffic-regulating device, it has a duty to maintain that device in a reasonably safe condition. The failure to initially provide a device, however, cannot be the basis for liability."

Rejecting Cook's analysis, however, the majority affirmed summary judgment for the defense attorneys in Kendall County's malpractice case.

E-mail: [garmisa@hoeyfarina.com](mailto:garmisa@hoeyfarina.com)