

IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

Filed February 23, 1983

BRUCE T. BUTLER, Individually, and)
BRUCE T. BUTLER, as Next Friend and)
Natural Parent of SUSAN BUTLER, a)
Minor, STEVEN S. BUTLER, RANDALL)
BUTLER, and WILLIAM BUTLER,)

Plaintiffs-Appellants,)

vs.)

2-450
2-68041

STATE OF IOWA,)

Defendant-Appellee.)

Appeal from Johnson District Court - L. Vern Robinson, Judge.

Plaintiffs appeal from a judgment entered for defendant State in this negligence action brought under Iowa Code chapter 25A, the State Tort Claims Act. REVERSED AND REMANDED.

Lawrence L. Lynch and Mary K. Hoefer of Sladek & Lynch, Iowa City, Iowa,
for plaintiffs-appellants.

Thomas J. Miller, Attorney General of Iowa, and Craig Gregerson, Assistant
Attorney General, for defendant-appellee.

Heard en banc.

PER CURIAM

Plaintiffs appeal from a judgment entered for defendant State in this negligence action brought under Iowa Code ch. 25A, the State Tort Claims Act. Plaintiffs claim the trial court erred: 1) in finding the State not negligent in the design and placement of a guardrail along the highway; 2) in holding that the choice of a policy regarding guardrail design and placement was a "discretionary function" and thus, could not be subject to a lawsuit under an exception stated in ch. 25A, and 3) in failing to find that the State's negligence in this regard was the proximate cause of plaintiffs' accident. We reverse the trial court and remand for a new trial.

Plaintiffs, Michigan residents, filed this petition on May 6, 1977. In it, they alleged that they were driving west along Interstate 80 west of Iowa City in the early morning hours of April 11, 1974, in a 1973 Open Road motor home. While passing a truck, they were forced off the left side of the road by "wind and air factors" and collided with the end of a guardrail which was adjacent to the left paved shoulder of the highway's westbound lanes. Plaintiffs alleged that the State was negligent in various respects, including the design, installation, placement and maintenance of the guardrail. Specifically, plaintiffs claim that the guardrail end should have curved gradually into the ground rather than the bare, unprotected end being placed above ground with only a slight flare away from the side of the road. Plaintiffs also alleged the State's liability under theories of strict tort liability, warranty, nuisance and *res ipsa loquitur*, but these alternative grounds were dropped immediately before trial. They also presented claims of personal injury and property damage.

The State filed a special appearance on June 6, 1977, challenging the court's subject-matter jurisdiction. This challenge was based on Iowa Code § 25A.14 which provides in part as follows:

EXCEPTIONS. The provisions of this chapter shall not apply with respect to any claim against the state, to:

1. Any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.

The State claimed that the making of decisions regarding the design and placement of guardrails is a discretionary function; thus, plaintiffs are precluded from bringing an action against the State under chapter 25A. The special appearance was overruled. The State then filed an answer containing general denials and the affirmative defenses of the driver's contributory negligence and act of God. The trial court granted a series of continuances to avoid automatic dismissal under Iowa R. Civ. P. 215.1.

Trial was finally held in October, 1981, and, pursuant to Iowa Code § 25A.4, was held before the court without a jury. On December 28, 1981, the court issued its findings, conclusions and order. The court found that the relevant portion of Interstate 80 was constructed in 1966, with the guardrail design having been prepared and approved by the Federal Highway Administration in 1965 although the standards regarding guardrail design and placement had changed greatly between 1965 and 1981. At the time of its construction, the guardrail involved in plaintiffs' accident satisfied then-existing standards. Despite the changing standards in the intervening years, the State did not change the design of the guardrails already in place to conform to the new standards for two reasons: 1) the state of the art was changing so rapidly during that time that the State could not have kept up in trying to alter all existing guardrails to keep pace with the changing standards, and 2) the burdensome cost of changing the design of all guardrails in the state.

The court concluded that the State was not negligent in failing to change the guardrail design. First, there was no breach of duty at the time of construction since the design conformed to the standards existing at that time. According to the court, the only way to find negligence on the State's part would be to adhere to a highway engineering industry manual (the "Blue Book") which does not have

the force of law, is not a safety code and has been changed very often. The court also concluded that, even if the State had a duty to continually upgrade all guardrails to conform to changing standards, the State's decision to spend its transportation dollars on expanding the interstate system instead of upgrading guardrails was a discretionary policy matter and was therefore not subject to liability under Iowa Code § 25A.14(1). Since the court found no negligence on the part of the State, it did not reach the issue of proximate cause. From the judgment entered for defendant, plaintiffs brought this appeal.

Regarding our standard of review, we refer to Clites v. State, 322 N.W.2d 917, 921 (Iowa Ct. App. 1982):

Our review under the Iowa Tort Claims Act is not de novo but is on errors of law assigned. We review the findings of fact made by the trial court to determine whether the findings are supported by substantial evidence. (citation). We view the evidence in a light most favorable to the trial court's findings. (citations)

I. We first consider plaintiffs' claim that the trial court erred in concluding that the choice of a policy regarding guardrail design and placement was a "discretionary function" and therefore exempt from suit under chapter 25A. We agree with plaintiffs. In Stanley v. State, 197 N.W.2d 599 (Iowa 1972), plaintiff, a truck passenger, sued the State under chapter 25A for injuries received when the truck tipped over because of a ten to twelve-inch dropoff between the edge of the pavement and the shoulder. The dropoff was there because of road construction going on at the time. In responding to the State's "discretionary function" claim, the court held:

The decision to keep highway 175 open during construction was one within the proper discretionary function for which no liability would attach; but once that decision was made, negligence in carrying out that policy cannot be excused on the ground the negligent acts were performed in the exercise of discretion within the meaning of the statutory exemption.

Stanley, 197 N.W.2d at 603. A similar result prevailed in Lewis v. State, 256 N.W.2d 181 (Iowa 1977), where plaintiffs' petition alleged in part the State's negligence in the design and construction of Interstate 29. There, the court stated:

In the present case plaintiffs' claims do not focus on the decision to build Interstate 29, a discretionary function, but on the alleged negligence of the State in implementing that decision. Consequently, section 25A.14(1) is not preclusive of plaintiffs' right to relief.

Lewis, 256 N.W.2d at 195 (emphasis in original).

Likewise, in this case, plaintiffs are not challenging the State's decision to place guardrails along Interstate 80; instead, they are challenging the State's implementation of that decision. Specifically, plaintiffs are challenging the State's decision with regard to the design chosen and the placement of the guardrail involved here with respect to the location of the highway. Like the Stanley court, we do not believe that § 25A.14(1) was intended to shield the State from liability for negligent acts or omissions performed or allowed in the implementation of policies, the selection of which is admittedly a "discretionary function." The trial court erred in concluding that § 25A.14(1) shields the State from liability in this case.

II. Next, we consider plaintiffs' claim that the trial court erred in concluding that the State was not negligent in failing to update guardrail design and placement to conform to the current state of the art. On the issue of the State's negligence, the trial court held as follows:

Guardrail design was changing rapidly in 1964 to the present, and, other than the changing guardrail designs themselves, there is no evidence that the guardrail in question was a danger to motorists nor that the State owed a duty to motorists to change its location and/or design. The only possible basis for finding "negligence" in this case is to impose a duty on the State to conform its guardrails with a book used in the highway engineering industry entitled A Policy on Geometric Design of Rural Highways, (hereinafter referred to as the blue book). First of all, this document does not have the force of law; secondly, it is not

a safety code; and finally, it has changed its suggestions relating to guardrail design so often that not removing and replacing guardrails to conform to it is not a breach of due care to motorists along the interstate.

Again, we find merit in plaintiffs' contention and conclude that the trial court erred in finding that the State was not negligent; that finding is not supported by substantial evidence in the record.

First, we reject the court's conclusion that the only way to find negligence on the part of the State would be by reference to the blue book. This conclusion ignores the uncontradicted testimony of John O'Mara, a retired civil engineer and teacher. He testified that, in his professional opinion, the guardrail involved here was improperly designed in that the end should have gradually blended into the ground rather than coming to an abrupt end above ground, causing an unnecessary collision hazard. Regarding its placement, he testified that if the purpose of the guardrail was to prevent vehicles from striking the bridge pier (apparently that was the purpose), it should have been placed away from the side of the road and much closer to the pier itself. He further stated that there were federal funds available in the late 1960's and early 1970's to the State for the correction of interstate highway design problems. He also stated his conclusions that this guardrail was a definite hazard by 1974 (when the accident occurred), that the state of the art had long since passed the point where the guardrail design employed here was still acceptable and that given its design and placement, it would have been preferable to have no guardrail at the accident site rather than the one which was there.

The trial court's conclusion also ignores the testimony of George Sisson, the state road design engineer, who is also responsible for guardrail design. He testified that although the guardrail design here followed the state of the art at the time of its construction (1965), the standards and state of the art changed in 1966 and 1967 so that guardrail ends from then on were to be buried in the ground rather than be left above ground.

As we already indicated, the State presented no evidence to refute plaintiffs' claim that the guardrail placement and design under the current state of the art was improper. Rather, the State's evidence dealt with issues relating to the costs and infeasibility of changing guardrails to conform to the newer standard and its decision to use its time and funds to expand the interstate system instead. This evidence was introduced in an attempt to justify the State's decision not to update the guardrails, apparently grounding that decision for purposes of this action in the "discretionary function" exception of § 25A.14(1). We have already determined, however, that that exception is inapplicable in this case.

We also take issue with the trial court's somewhat cavalier dismissal of the importance of highway and guardrail design standards contained in the blue book referred to above. This 1965 publication (updated by the "yellow book" in 1967) which was prepared by the American Association of State Highway Officials, contains safety standards for highway and guardrail design and is known as the "Bible" of the highway design and construction industry. Although admittedly not having the force of law, the blue book does contain general safety standards to be employed in highway and guardrail design. Whether or not the blue book may be specifically called a "safety code" is not as critical as apparently believed by the trial court. Instead, we may consider the State's failure to follow those standards as evidence of negligence, although not conclusive thereof. See Evans v. Howard R. Green Company, 231 N.W.2d 907, 913 (Iowa 1975); Jorgensen v. Horton, 206 N.W.2d 100, 103 (Iowa 1973).

The blue book contained the following language on guardrail design standards:

The choice of providing guardrails or guideposts largely is a matter of hazard involved. Guardrails are designed to resist impact by deflecting the vehicle so that it continues to move on the reduced velocity along the guardrail. Any abrupt stop of the vehicle is dangerous and that which might snag a moving vehicle is not desirable. The sudden stop may be more hazardous than driving down a slope.

They should be located somewhere back from the usable shoulder line and about the same elevation. Generally, a graded shoulder section should be widened about two feet where guardrails are used. It is desirable to flare the rail outward for a short distance on the traffic approach end or sweep it outward or downward from [sic] the ground in order to lessen possible direct end impact and to provide a full view to the driver. It should be highly visible.

The 1967 yellow book contained similar language:

To increase safety when vehicles leave the pavement, a clear recovery area free of physical obstructions should be provided along the roadway thirty feet or more from the edge of the traveled way in the rural areas. . . Designers must keep in mind that the objective of guardrail installation is to lessen the hazard to highway users and not to protect any part of the roadway. Guardrails should only be used where the result of striking an object or leaving the roadway would be more severe than striking the rail. All guardrails on the approach to structures must be very securely attached. All approach ends of guardrails must be flared away from the road, anchored to the ground or otherwise blended into the approaching environment.

These general standards were in effect at all relevant times in this case although there have been a number of changes in recommendations involving the specific and technical engineering details. It is obvious that the guardrail involved here did not follow either the blue or yellow book—it was placed immediately adjacent to the paved shoulder, it was flared at the end only to a very slight degree, and the end was not at all "blended into the approaching environment."

The record also indicates that the State was aware that this guardrail type was no longer consistent with the current state of the art after 1966-67. George Sisson testified as to the State's reasons for not updating the guardrails after 1967, indicating the State's awareness that those already installed were outdated.

Even though the guardrails may have conformed to standards that were acceptable at the time the guardrails were constructed, the state of the art changed soon thereafter. We believe the State had a duty to update the guardrails to conform to this new, higher standard. In view of the State's failure in this regard and its knowledge that guardrails of this type were no longer consistent

with the state of the art after 1966-67, we conclude that the trial court erred in holding that the State was not negligent in this case. We reverse that holding.

III. The trial court did not decide the issue of whether the State's negligence in failing to conform the guardrails to the current state of the art was the proximate cause of plaintiffs' accident and their resulting injuries since there was no finding of negligence on the part of the State. Because of our holding in Division II above, the proximate cause issue must be determined. We therefore reverse the trial court's decision and remand for a new trial for the limited purpose of determining whether the State's negligence was the proximate cause of plaintiffs' accident and, if so, the damages to which plaintiffs are entitled.

REVERSED AND REMANDED.