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2012 IL App (3d) 110576-U

Order filed November 28, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

JENNIFER GREGORY, Individually, as	)	
Executor of the Estate of STEPHEN MICHAEL	)	
GREGORY, and as next friend of her minor	)	Appeal from the Circuit Court
children, MICHAEL DOUGLAS GREGORY	)	of the 10th Judicial Circuit,
and RICHARD IVAN GREGORY,	)	Peoria County, Illinois
	)	
Plaintiff-Appellant,	)	
	)	Appeal No. 3-11-0576
v.	)	Circuit No. 04-L-233
	)	
THE CITY OF PEORIA,	)	Honorable
	)	David J. Dubicki,
Defendant-Appellee.	)	Judge Presiding

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JUSTICE WRIGHT delivered the judgment of the court.  
Justices Holdridge and O'Brien concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The trial court properly granted summary judgment in favor of defendant, the City of Peoria, finding plaintiff's claims in her third amended complaint were barred by the statute of repose.
- ¶ 2 Plaintiff Jennifer Gregory filed a third amended complaint against Jeffrey W. Wolf

(Wolf), the City of Peoria (the City), and various other defendants following the 2004 death of plaintiff's husband, a passenger in a vehicle driven by Wolf that crashed through a wooden guard rail that was constructed by the City more than 10 years before the incident. The trial court allowed the City's motion for summary judgment regarding this third amended complaint based on the construction statute of repose, but denied summary judgment on the other grounds raised in the City's motion for summary judgment. Plaintiff filed a timely notice of appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). We affirm.

¶ 3

### **BACKGROUND**

¶ 4 On July 30, 2004, plaintiff filed a nine-count complaint, individually, as the executor of the estate of her deceased husband, Stephen Michael Gregory (decedent), and as next friend of her minor children, Michael Gregory and Richard Gregory, against Wolf based on decedent's injuries resulting from a crash that occurred off of Orange Prairie Road in Peoria, Illinois, on June 26, 2004. Subsequently, on October 26, 2010, plaintiff filed a multi-count third amended complaint alleging certain acts or omissions by multiple defendants, including the City, that proximately caused and contributed to decedent's death.<sup>1</sup>

¶ 5 On February 15, 2011, the City filed a "Motion for Summary Judgment" concerning count II of the third amended complaint. First, the City contended plaintiff's allegations in this count arose out of the original 1977-1979 design and construction of a wooden guard rail along this section of Orange Prairie Road and were barred by the 10-year construction statute of repose

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<sup>1</sup>The court consolidated this action with another complaint, also filed by plaintiff, in Peoria County case No. 04-L-392, involving dram shop actions against BW3 of Peoria, LLC, and Twoputt, Inc. All other defendants in both consolidated actions settled with plaintiff leaving the City of Peoria as the only remaining defendant involved in this appeal.

(735 ILCS 5/12-214 (West 2004)). Second, the City claimed the allegations regarding the City's "voluntary undertaking," to replace a few wood rails and install unattached, separate metal guard rails in an area above an inlet that was not involved in the crash, did not create a duty for the City to redesign or upgrade the entire wooden guard rail or extend the length of the wooden guard rail further to the north. Third, the City argued that the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2004)) provided immunity for City employees named as defendants. Next, the City argued that plaintiff's third amended complaint did not establish the City's alleged acts or omissions proximately caused the crash and resulting death. Finally, the City claimed it did not have an ongoing duty of care to the decedent to make changes to Orange Prairie Road after completing construction in 1979.

¶ 6 The undisputed facts set out in the pleadings and exhibits indicate that in the late evening hours of June 26, 2004, Wolf was driving a 1991 Chevrolet Cavalier convertible, with its top down, that was involved in a single-vehicle crash. At the time of the accident, Wolf was driving his convertible on Orange Prairie Road in Peoria, Illinois, at the minimum rate of 97 miles per hour, in a posted 30 mile per hour zone. In addition, it was undisputed that Wolf's blood alcohol content was .252 percent that evening when he failed to negotiate a left curve in the roadway, causing the vehicle to hit the concrete curb, leave the roadway, strike a wooden guard rail, roll down an embankment and ravine, hit a tree, and flip over on its roof. As a result, decedent, a passenger in Wolf's vehicle, sustained injuries and died at the scene. The record shows the State charged Wolf with felony DUI and reckless homicide.

¶ 7 The third amended complaint alleged the City negligently approved the original design and construction of the guard rail "[a]fter 1978", and thereafter maintained the roadway in a

dangerous and defective condition due to “the design and placement” of the wooden guard rail.

The third amended complaint alleged the City’s negligence was the direct and proximate cause of decedent’s injuries and death.<sup>2</sup>

¶ 8 Specifically, plaintiff alleged the City negligently approved the design and construction of the guard rail in 1977-1979 (design approval in 1977 and completed construction in 1979). Further, plaintiff claimed the City had a duty to redesign the entire wooden guard rail when it modified and/or repaired the wooden guard rail in “1995 or 2002.” The complaint also alleged the City later negligently and knowingly maintained the roadway in a dangerous or hazardous condition because the wooden guard rail did not comply with the updated Illinois Department of Transportation (IDOT) standards effective in 1995 and 2002.

¶ 9 The City filed a motion for summary judgment regarding the third amended complaint. The City argued that the allegations in count II (against the City) concerned the original design, construction, and placement of the wooden guard rail in 1977-1979, and were barred by the construction statute of repose. The City attached portions of the deposition of plaintiff’s own expert engineer, Adam Senalik, in support of the motion for summary judgment. Senalik testified the wooden guard rail should have been originally placed closer to the road immediately adjacent to the concrete barrier curb, rather than four feet back from the curb and roadway, and should have been extended 21 to 65 feet further to the north at the time of the crash in 2004.

However, in his deposition, Senalik said the “maintenance” or condition of the wooden guard rail

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<sup>2</sup> The parties initially disputed whether the wooden rail was, in fact, a guard rail. The City’s engineer stated the City built a 7½ inch high concrete barrier curb at the edge of Orange Prairie Road at this location, and the wooden guard rail was for aesthetic purposes. The City argued the wooden rail was not intended to be an actual “guard rail,” because the concrete barrier curb was intended to prevent vehicles from going down the embankment if they left the roadway.

did not contribute to the vehicle crash or injuries sustained in 2004.

¶ 10 During the hearing on the City’s motion for summary judgment on the third amended complaint, plaintiff’s counsel stated the cause of action did not focus on the fact that the wooden guard rail was negligently designed and constructed in 1977-1979. Rather, plaintiff’s counsel emphasized that the City’s negligence arose from the fact that the City, as the landowner, “knowingly” neglected “to fix the guard rail during the twenty-plus years after it was designed to make it comply with IDOT and other standards in place from the time it was first constructed in 1977.” (Emphasis in original.) Therefore, plaintiff claimed the City violated its ongoing duty to “maintain” the wooden guard rail in compliance with new IDOT standards for guard rails so the *roadway* did not continue to exist in a dangerous condition. Additionally, plaintiff contended the City had a duty to redesign and construct the wooden guard rail when it voluntarily undertook the responsibility of replacing five pieces of the wood in 1995 and adding sections of separate, unattached metal guard rails, not involved in the crash at issue, parallel to the southern-most part of the wooden rail and closer to the road around 2002.<sup>3</sup>

¶ 11 On July 20, 2011, Judge Dubicki entered a six-page, written order providing a carefully detailed explanation of his findings and the applicable case law. In this order, Judge Dubicki noted that the threshold issue raised in the motion for summary judgment was “whether the City’s involvement in the Orange Prairie Road Project (Project) allows the City to invoke the

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<sup>3</sup> During oral arguments before this court, counsel for plaintiff stated that some of the wooden guard rail pieces were *replaced* with metal. However, after careful review of the record, this assertion appears to be mistaken. The record shows the evidence presented to the trial court indicates five wooden rails in the wooden guard rail were replaced with more wooden rails in 1995. Additionally, three *separate* metal guard rails were installed around 2002, placed in front of and parallel to the southern portion of the wooden guard rail, much closer to the roadway. These metal guard rails were not involved in the location of the crash.

statute of repose.” The trial court determined, in its written order, that the third amended complaint alleged the City “approved the design and construction of the Orange Prairie Road” and that the City “allowed construction of a wood guard rail... where the automobile left the roadway.”<sup>4</sup>

¶ 12 Judge Dubicki found the attached depositions undisputedly showed that Eugene Hewitt, the City’s engineer at the time, monitored the project and construction of the wooden guard rail, but the work was hired out due to the size of the project. Additionally, Judge Dubicki found that plaintiff conceded the City’s involvement in earlier pleadings alleging the City “installed or caused the installation of the wooden guardrail” and “was responsible for the design and placement of such barriers.” Consequently, the trial court found the City was sufficiently involved in the “design, planning, supervision, observation or management” of the construction project and, as such, fell under the protections available in the construction statute of repose.<sup>5</sup>

¶ 13 Next, Judge Dubicki’s order found the City did not have an ongoing duty to improve or modify the guard rail each time IDOT created new standards for guard rails along public roadways. According to Judge Dubicki’s order, “all of the allegations [of the third amended complaint] relating to the alleged deficiencies in the [wooden] guard rail were deficiencies which

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<sup>4</sup> Specifically, plaintiff’s third amended complaint alleges that the City “approved the design and construction of Orange Prairie Road;” the City “allowed the construction of a wood rail where the automobile left the roadway;” and the “design and placement of the wood guard rail rendered the roadway physically defective and unsafe.”

<sup>5</sup> Judge Vespa previously entered an order, on October 18, 2010, allowing summary judgment on plaintiff’s second amended complaint in favor of the City based on the construction statute of repose, after finding the wooden guard rail at the crash site was a guardrail and that the City supervised the design and construction of the Orange Prairie Road Project in 1977-1979. In lieu of proceeding on a filed motion to reconsider, plaintiff filed a third amended complaint.

existed upon completion of the Project, in 1979, nearly 25 years prior to the accident.” The court found “there is no genuine issue of material fact that the allegedly defective portion of the guard rail (the northern-most portion) remained inert and unmodified from the completion of the Project until the time of the accident.”

¶ 14 Further, Judge Dubicki noted the third amended complaint did not allege that the guard rail had deteriorated due to lack of maintenance to proximately cause the injuries. Moreover, the court found that *plaintiff’s* expert concluded that lack of maintenance did not contribute to the proximate cause of decedent’s death.

¶ 15 In his order, Judge Dubicki stated that plaintiff’s allegations in the third amended complaint attempted to use the “‘duty to maintain’ to expand a landowner’s obligation to require it to redesign and reconstruct an improvement that remained inert and unchanged for 25 years.” The court found the City’s voluntary undertaking, in 1995 and/or 2002, to replace wood rails in a portion of the wooden guard rail, approximately 300 feet to the south of the crash site, did not give rise to a duty for the City “to redesign, reconstruct, and extend the northernmost section of the guard rail.” Accordingly, Judge Dubicki granted the City’s motion for summary judgment based upon the construction statute of repose, but denied the City’s motion for summary judgment on the other grounds asserted in its motion.

¶ 16 In this written order, the court found, pursuant to Rule 304(a), there was no just reason to delay enforcement or appeal of its order. Plaintiff filed a timely notice of appeal requesting this court to review the court’s decision granting the City’s motion for summary judgment based on the construction statute of repose. We affirm.

¶ 17

#### ANALYSIS

¶ 18 Plaintiff appeals the trial court’s decision allowing summary judgment for the City on the third amended complaint based on an application of the construction statute of repose to the undisputed facts established by the pleadings and attachments. Plaintiff does not contend the pleadings involve contested facts, but challenges the court’s application of the construction statute of repose to those facts set forth in the pleadings and exhibits related to the third amended complaint.

¶ 19 We review a trial court’s granting of summary judgment *de novo*. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004); *MBA Enterprises, Inc. v. Northern Illinois Gas Co.*, 307 Ill. App. 3d 285, 287 (1999). The relevant portion of the construction statute of repose provides:

“No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.” 735 ILCS 5/13-214(b) (West 2004).

¶ 20 It is well established that section 13-214(b) applies to municipalities engaged in construction activities. *O’Brien v. City of Chicago*, 285 Ill. App. 3d 864, 869 (1996). Municipal defendants may invoke section 13-214(b) as a defense if they participated, in some way, in the construction of the property at issue. *Id.* Here, the trial court found, based on the deposition of the City’s engineer, Eugene Hewitt, and admissions by plaintiff in earlier pleadings, that the City participated in overseeing and supervising the project between 1977 and 1979, by hiring out the work and approving the design and monitoring the construction of the project. After our careful

review of the record, we conclude the trial court properly found the City could invoke the defense of the construction statute of repose with regard to the third amended complaint.

¶ 21 First, the trial court's ruling was consistent with Judge Vespa's previous order, entered on October 18, 2010, allowing summary judgment on plaintiff's second amended complaint in favor of the City based on the construction statute of repose, after finding the undisputed facts established the structure at the site of the crash was a wooden guard rail designed and constructed by the City in 1977-1979. Although plaintiff filed a motion for reconsideration of Judge Vespa's ruling on the second amended complaint, rather than requesting a hearing on that motion to reconsider, plaintiff simply filed a third amended complaint on October 18, 2010. The third amended complaint purportedly asserted another separate theory of recovery based on the landowner's (City's) ongoing negligent failure to maintain the wooden guard rail according to IDOT standards making the roadway unsafe and hazardous. It is well-established that a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 153 (1983).

¶ 22 The third amended complaint included allegations that the City's ongoing negligent *maintenance* of the wooden guard rail, occurring long after construction was completed, gave rise to a continuing cause of action which did not fall under the protections of the construction statute of repose. Specifically, in count II, plaintiff claimed the City, as a landowner, voluntarily undertook to modify and/or repair the wooden guard rail in 1995 and/or 2002 without redesigning the wooden guard rail to comply with updated IDOT standards applicable on the date these improvements occurred. Plaintiff alleged the City violated an ongoing duty to maintain the

*roadway* in a non-dangerous condition, when it made the 1995 and 2002 improvements, thereby negligently maintaining the original wooden guard rail in an unsafe condition, not conforming to IDOT standards, which proximately caused the vehicle to break through the wooden guard rail resulting in decedent's injuries. Plaintiff argues the voluntary undertaking claims set out in the third amended complaint did not relate back to the date of original construction, but rather focused on the dates of the repairs and modifications to the original wooden guard rail and created a new duty on the City to redesign and reconstruct the wooden guard rail according to the current IDOT standards. Thus, plaintiff argued these allegations were not barred by the 10-year construction statute of repose.

¶ 23 The trial court rejected this contention. The trial court concluded plaintiff's third amended complaint again focused on the condition of an inert object, the wooden guard rail, designed and constructed by the City in 1977-1979 that remained unchanged throughout the 25-year period preceding the date of the crash. The court found count II of the third amended complaint did not establish a claim for negligent failure to maintain the wooden guard rail in a safe condition, but once again focused on the design and construction of the original structure which was now barred by the construction statute of repose. We agree.

¶ 24 On appeal, plaintiff relies on the decision in *MBA*, to challenge the trial court's ruling, which held that the duty to maintain the piping equipment could give rise to a cause of action more than 10 years after the original construction of a gas piping system by the Northern Illinois Gas Company (NI Gas). *MBA*, 307 Ill. App. 3d 285. In *MBA*, a defect in the original design and construction of a gas pipe nipple, which was a part of the equipment used daily to deliver gas to the general public by NI Gas, had existed for more than 10 years before an explosion in the pipe

system resulted in injuries. *Id.* at 286-87. Unlike the case at bar, the *MBA* plaintiff alleged NI Gas negligently *inspected, operated* and maintained the defective pipe system that was used on a daily basis in order to sell and supply gas to the Ramada Inn, where the explosion occurred. *Id.*

¶ 25 The *MBA* court held, “Such claims of negligence are based on the theory that the gas company owed MBA an ongoing duty of care to operate and maintain the gas system in a safe manner.” *Id.* at 288 (citing *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446 (1965)) (holding that gas is a dangerous commodity and those who furnish gas must exercise a degree of care commensurate to the danger of supplying gas and use precaution to prevent injury). The *MBA* court stressed that NI Gas, as a *supplier*, owed plaintiff an ongoing duty of care to operate, inspect, and maintain the piping equipment, used as components of an ongoing utility service, in a safe manner based on defendant’s daily *operation* of this system when providing a utility service directly to the injured party. *Id.* at 288. Due to defendant’s daily use of the defective system to deliver the gas, the court held plaintiff’s claims regarding negligence in the daily, ongoing operation of the system “survive[d] apart from the plaintiffs’ claims related to the initial construction of the system.” *Id.* at 288.

¶ 26 Plaintiff also relies on *Ryan v. Commonwealth Edison Co.*, 381 Ill. App. 3d 877 (2008), which dealt with Commonwealth Edison’s ongoing duty of care to inspect and maintain their equipment and system in a safe condition while the company continued to use the system to sell and supply electricity on a daily basis as a service to the plaintiff. *Ryan*, 381 Ill. App. 3d at 888. The *Ryan* court held that this duty to inspect and maintain the operational equipment arose out of Commonwealth Edison’s role as the power supplier and not from its status as the original installer of the system itself. *Id.*

¶ 27 The City asserts the cases cited by plaintiff are not controlling because the trial court correctly recognized the third amended complaint focused on the original negligent design and installation of the inert wooden guard rail, constructed along Orange Prairie Road, and did not involve the negligent maintenance of the unchanged wooden guard rail, itself. The wooden guard rail along a roadway is not a part of equipment in a system used in the daily delivery of a utility service to the public. The City directs us to consider the decisions of *O'Brien*, 285 Ill. App. 3d 864, *Gavin v. City of Chicago*, 238 Ill. App. 3d 518 (1992), and *Wright v. Board of Education of City of Chicago*, 335 Ill. App. 3d 948 (2002). The *O'Brien* case involved a car accident that occurred at the site of a permanent roadway median, designed and constructed more than 10 years before the accident. *O'Brien*, 285 Ill. App. 3d 864. The *O'Brien* court held “[t]he crux of O'Brien's complaint is the dangerousness of the existing median, requiring that a new median be installed, and is a claim for defective design in a different form.” *Id.* at 870. Accordingly, the *O'Brien* court held that, in spite of the language in the complaint that the City of Chicago maintained the roadway in a dangerous condition that did not conform to the newer applicable requirements, the claim was barred by the construction statute of repose. *Id.*

¶ 28 Similarly, the *Gavin* case involved a traffic light pole that was originally designed and constructed in a location that created a hazard to motorists. *Gavin*, 238 Ill. App. 3d at 519-21. The *Gavin* court found the construction statute of repose applied because, although plaintiff alleged the City as a landowner was negligent in properly maintaining the pole by allowing it to remain in a hazardous condition, plaintiff's allegations actually concerned the City's original improper design of the traffic light fixture, not its failure to properly maintain the fixture. *Id.* at 522-23.

¶ 29 In *Wright*, the plaintiff fell and was injured on a step outside the door of a school building in 1998. *Wright*, 335 Ill. App. 3d 948. Like the case at bar, *Wright* maintained that the step was not in conformance with updates and changes required by the City of Chicago’s municipal code. *Id.* at 957-58. However, the step was not in disrepair and remained unchanged since its construction in 1965 until the time of the injury. *Id.* The *Wright* court distinguished its facts from those in *MBA*, concluding the construction statute of repose barred *Wright*’s claim that the school board should have “maintained” the step by redesigning it and reconstructing it to become compliant with changes in the ordinances effective after the date of construction. *Id.* The *Wright* court held that the school board did not have a duty to improve or redesign a completed construction project based on changes in the standards or ordinances, and determined that a duty to *maintain* or *repair* an improvement did not mean redesigning an inert object that was not in disrepair and remained unchanged throughout the years. *Id.*

¶ 30 In the case at bar, the trial court's decision recognized the “inert” and unchanged nature of the wooden guard rail. As the trial court noted, the wooden guard rail remained inert, in its original design and condition, for over 25 years. It was undisputed by plaintiff’s expert that the wooden guard rail, in this case, was not in disrepair, and the City’s maintenance of the wooden guard rail did not contribute to the accident or injuries in 2004.

¶ 31 Here, plaintiff attempted to reword count II of the third amended complaint to allege a new theory of recovery based on an ongoing duty of care to maintain the *roadway* in a non-dangerous condition. However, the cause of action set out in count II of the third amended complaint is founded on allegations directly related to the City’s failure to redesign or change the original design and construction of the wooden guard rail that was both inert and remained

unchanged in its design and original nature since it was built more than 10 years before the crash. Therefore, we agree that the *MBA* and *Ryan* cases are distinguishable.

¶ 32 As the *Ryan* court stressed, the duty of care to safely inspect and maintain equipment, in that case, derived from defendant's role as the power supplier using operational equipment to deliver a product, and not from its status as the original installer of the system. *Ryan*, 381 Ill. App. 3d at 888. Accordingly, we conclude, as did the trial court, that the facts pled in count II of the third amended complaint against the City are barred by the construction statute of repose.

¶ 33 In the case at bar, plaintiff also contends that the theory of voluntary undertaking to maintain the wooden guard rail required the City to redesign or correct the faulty design of the original wooden guard rail in 1995 and/or 2002. Contrary to plaintiff's contention, the City's voluntary undertaking to repair the guard rail or add another, separate and free-standing metal guard rail does not require a different result. As noted above, a duty to maintain and repair an inert object, in its original condition, did not create a duty to redesign that object according to newer standards or ordinances. *Wright*, 335 Ill. App. 3d at 957-58.

¶ 34 It is well-established that, under the voluntary undertaking doctrine, the duty is limited to the actual work performed and whether there was negligence in the performance of that new undertaking, as distinguished from a "failure to perform," and such undertaking does not create a duty to perform additional acts beyond the actual work that was performed. *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 418-19 (1991); see also *O'Brien*, 285 Ill. App. 3d at 874 (the performance of minor repairs such as filling potholes and resurfacing roads cannot be considered a voluntary undertaking by the City to reconstruct the road completely). Here, plaintiff has not claimed the negligent construction of the separate metal guard rails, many years after the wooden

guard rail was erected, actually contributed to the plaintiff's injuries since the metal guard rails were not involved in this crash. Nor did plaintiff allege that faulty work proximately caused decedent's injuries when the City replaced wooden rails in the original wooden guard rail.

Therefore, the voluntary undertaking doctrine did not create a new duty or avoid the application of the 10-year construction statute of repose in the case at bar.

¶ 35 Accordingly, after our *de novo* review of the instant case, we conclude that the crux of the allegations against the City, set out in count II of plaintiff's third amended complaint, once again focused on the original alleged defective design and construction of the wooden guard rail rather than alleging a breach of the ongoing duty of care to maintain operational equipment, or the roadway itself, in a safe condition. Consequently, the third amended complaint is barred by the construction statute of repose.

¶ 36 Having affirmed the trial court's ruling on the construction statute of repose, it is unnecessary to address the propriety of the trial court's ruling denying summary judgment in favor of the City on other grounds.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we hold that facts in this case support the granting summary judgment for the City based on the construction statute of repose.

¶ 39 Affirmed.