

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1343

CA 10-00974

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GORSKI, JJ.

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GARY A. WAHL AND BEVERLY WAHL,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

COUNTY OF WAYNE, DEFENDANT-APPELLANT.

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BOYLAN, BROWN, CODE, VIGDOR & WILSON, LLP, ROCHESTER (SCOTT M. MOONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FOLEY AND FOLEY, PALMYRA (JAMES F. FOLEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered March 4, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part defendant's motion and dismissing the negligence cause of action insofar as it is based on the alleged violation of Highway Law § 139 and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Gary A. Wahl, a volunteer fireman, when he was struck by a vehicle while directing traffic at an accident scene. Defendant appeals from an order that, inter alia, denied its motion for summary judgment dismissing the complaint. Contrary to defendant's contention, Supreme Court properly determined that the complaint did not raise new legal theories outside the scope of the notice of claim (*cf. Moore v County of Rockland*, 192 AD2d 1021, 1023). We agree with defendant, however, that the court erred in denying that part of its motion seeking summary judgment dismissing the negligence cause of action insofar as it is based on the alleged violation of Highway Law § 139. Defendant owns neither of the roads that intersect in the area where plaintiff was directing traffic, and thus it cannot be said that defendant had "charge of the repair or maintenance" of those roads (Highway Law § 139 [1]). We therefore modify the order accordingly.

Entered: November 12, 2010

Patricia L. Morgan  
Clerk of the Court