STATE OF MICHIGAN

COURT OF APPEALS

MARCELLA WEAVER, Personal Representative of the Estate of DENNIS WEAVER, Deceased,

Plaintiff-Appellee,

v

No. 218514

CITY OF DETROIT, a municipal corporation,

Defendant-Appellant.

Updated Copy
March 15, 2002

ORDER ENTERED FEBRUARY 8, 2002

Weaver v City of Detroit, Docket No. 218514. The Court orders that a special panel shall be convened pursuant to MCR 7.215(I) to resolve the conflict between this case and *Ridley v City of Detroit (On Remand),* 246 Mich App 687; ___ NW2d ___ (2001).

The Court finds under MCR 7.215(I)(5) that the conflict in question is the only issue addressed in this case and orders that the opinion released January 11, 2002, is vacated in its entirety.

The appellant may file a supplemental brief within 21 days of the Clerk's certification of this order. Appellee may file a supplemental brief within 21 days of service of appellant's brief. Nine copies must be filed with the Clerk of the Court.

McDonald J., did not participate.

Docket No. 218514. Released January 11, 2002, at 9:10 a.m.; vacated February 8, 2002.

Before: Markey, P.J., and McDonald and Kelly, JJ.

MARKEY, P.J.

Defendant city of Detroit appeals by right the trial court's order entered upon a jury verdict that found defendant liable for the wrongful death of Dennis Weaver and that awarded plaintiff Marcella Weaver, the decedent's personal representative, $2 million in damages plus interest. We affirm, but only because we believe that we are required to do so by this Court's

previous majority decision in *Ridley v Detroit (On Remand)*, 246 Mich App 687; ___ NW2d ___ (2001). MCR 7.215(I)(1).

This case arises from an accident that occurred when a bus struck a light pole, and the light pole fell on Dennis Weaver and killed him. Plaintiff 's theory of the case was that because of defendant's failure to inspect and repair the light pole, the pole corroded so seriously that when the bus merely bumped or rubbed it, it fractured and broke. Testimony presented at trial established that the rusty light pole, erected in 1970 and last inspected in 1979, was placed eighteen inches from the highway's curb, which was in accordance with industry standards, and was owned and maintained by defendant city.

Defendant city asserts that it is immune from tort liability in this case because the highway exception to governmental immunity is inapplicable in this case. We agree. The question whether a light pole adjoining a public highway comes under the highway exception to governmental immunity is one of statutory interpretation that requires review de novo. See *Haworth, Inc v Wickes Mfg Co*, 210 Mich 222, 227; 532 NW2d 903 (1995).

Governmental agencies are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). A "governmental function" is an activity that is "expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."[1] MCL 691.1401(f). Further, "governmental agency" is defined to include municipal corporations such as defendant city. *Weakley v Dearborn Heights (On Remand)*, 246 Mich App 322, 325; 632 NW2d 177 (2001); *Cox v Dearborn Heights*, 210 Mich App 389, 392; 534 NW2d 135 (1995).

Governmental immunity under MCL 691.1407 is expressed in the "broadest possible language"[2] and "extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki*, *supra* at 156 (emphasis in original). Still, several statutory exceptions to governmental immunity exist, including the highway exception, MCL 691.1402. *Pusakulich v Ironwood*, 247 Mich App 80, 83; 635 NW2d 323 (2001). Under the highway exception, each governmental agency having jurisdiction over a highway is "required to 'maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel,' and a person who sustains bodily injury or damage to property from the failure of a governmental agency to meet this requirement may recover for the damages suffered."[3] *Id.*; see, also, MCL 691.1402(1). At the time of the instant

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[1] The definition of "governmental function" contained in MCL 691.1401(f) was amended after the occurrence of the decedent's accident by 1999 PA 205, effective December 21, 1999. The amended statutory language does not affect our analysis in this case.

[2] "Because immunity necessarily implies that a 'wrong' has occurred, . . . some tort claims, against a governmental agency, will inevitably go unremedied." *Nawrocki*, *supra* at 157.

[3] We note that Dennis Weaver's accident in this case occurred in March 1995. Accordingly, the statutory language applicable in this case is found in 1990 PA 278, § 1, effective December 11, 1990, rather than the current statutory language that became effective on December 21, 1999, as

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accident, "highway" was defined as "every public highway, road, and street which is open for public travel and shall include bridges, sidewalks, crosswalks, and culverts on any highway."[4] MCL 691.1401(e). Further, "highway" is expressly defined to exclude alleys, trees, and utility poles. MCL 691.1401(e). "An action may not be maintained under the highway exception unless it is clearly within the scope and meaning of the statute." *Hatch v Grand Haven Twp*, 461 Mich 457, 464; 606 NW2d 633 (1990); *Weakley, supra* at 326.

There is no dispute in this case that defendant's erecting and maintaining a light pole constituted a governmental function. Defendant, however, asserts that the light pole at issue was a utility pole; consequently, defendant is not liable under the highway exception to governmental immunity. But in the recent case of *Ridley (On Remand), supra* at 691-692, a majority of this Court explicitly concluded that a light pole is *not* a utility pole, so it is not excluded by definition from the highway exception of governmental immunity and an action may be maintained. This Court's decision in *Ridley (On Remand)* followed the Supreme Court's remand[5] of this Court's first decision in *Ridley v Detroit*, 231 Mich App 381; 590 NW2d 69 (1998) (hereinafter "*Ridley I*"), for reconsideration in light of *Evens v Shiawassee Co Rd Comm'rs*, 463 Mich 143; 615 NW2d 702 (2000), the companion case of *Nawrocki, supra*.

In *Ridley I, supra* at 383, a group of men attacked and beat the plaintiff 's decedent. After the beating, an automobile struck the decedent when he tried to stand. *Id*. After the first automobile knocked him down, a second vehicle struck and killed him. *Id*. On the night and on the street where the decedent was killed, the streetlights were not functioning and had not been for some time. *Id*. at 383-384. The trial court found that the defendant, city of Detroit, was liable because it had been negligent in failing to provide street lighting and awarded plaintiff damages. *Id*. at 384. This Court affirmed the trial court's entry of judgment in favor of the plaintiff and rejected the defendant city's argument that the plaintiff 's claim was barred by governmental immunity. *Id*. at 383, 384.

In *Ridley I, supra* at 385, this Court first stated that the statutory language contained in MCL 691.1402(1) that restricts potential liability to "the improved portion of the highway designed for vehicular travel" is a limitation applicable to "state and county road commissions," not municipalities such as the city of Detroit. The Court further concluded that "street lighting is not included with the definition of 'utility poles' for purposes of the highway exception."[6] *Id*. at 387. The Court explained that it reached this conclusion because the legislative purpose behind

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enacted by 1999 PA 205. We believe that our analysis in this case is equally applicable to cases brought after the 1999 amendment.

[4] The definition of "highway" has since been amended by 1999 PA 205, effective December 21, 1999. However, the amended language does not affect our analysis in this case, and we believe that our analysis is equally applicable to cases brought after the 1999 amendment.

[5] *Ridley v Detroit*, 463 Mich 932 (2000).

[6] Sawyer, P.J., dissented, stating that "this case is specifically excluded from the public highway exception to governmental immunity because the light pole is a utility pole." *Ridley I, supra* at 390.

the highway exception "is to enhance the safety of travel on public highways," and because "[s]treetlights, unlike utility poles, are intended to improve highway safety by providing adequate illumination." *Id*.

Our Supreme Court held the application to appeal *Ridley I* in abeyance pending its decision in *Evens, supra*. In *Evens, supra* at 148, 150, our Supreme Court considered the scope of the highway exception to governmental immunity and determined that it was "return[ing] to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language . . . ." The Court opined that prior decisions of the Supreme Court had "improperly broadened the scope of the highway exception . . . ." *Id*. at 151. In deciding *Evens*, the Supreme Court stated:

> There is one basic principle that must guide our decision today: the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed. [*Id*. at 158 (emphasis in original).]

Although the Supreme Court did not directly rule on a municipality's potential liability for defective streetlights, the Court held that traffic control devices (i.e., traffic signals and signs) "are clearly not implicated in the broad definition of 'highway'" contained in MCL 691.1401(e), and emphasized that this conclusion applied equally to municipalities and to state and county road commissions. *Id*. at 182-183, n 37.

In *Ridley (On Remand), supra* at 689, this Court affirmed its previous holding in *Ridley I* after concluding that the Supreme Court's modification of the highway exception to governmental immunity in *Evens* did not apply to the facts of *Ridley*. The Court stated that the issue regarding whether a streetlight is included within the definition of a utility pole under MCL 691.1401(e) and would thereby be excluded from the definition of a highway was not at issue in *Evens* and was not addressed by the Supreme Court.[7] *Ridley (On Remand), supra* at 691-692.

After reviewing the *Evens* and *Ridley* decisions, we conclude that regardless of whether streetlights are considered to be utility poles, streetlights clearly are not implicated in the broad definition of "highway," which, as previously stated, includes public highways, roads, streets that are open for public travel, bridges, sidewalks, trailways, crosswalks, and culverts on the highway, but does not include "alleys, trees, and utility poles." MCL 691.1401(e). It appears to us that streetlights are akin to the traffic control devices that typically adjoin public highways and are so placed for the purpose of enhancing the safety of travelers on the roadway. Because the *Evens* Supreme Court specifically declared that traffic control devices were excluded from the definition of "highway," we believe it logical to equate street lights with traffic control devices as being excluded from the statutory definition of "highway." Thus, under *Evens*, we believe it irrelevant to debate whether streetlights are "utility poles."

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[7] Sawyer, P.J., continued to dissent from this portion of the majority's opinion in *Ridley (On Remand)* and urged the Supreme Court to take the case up on the merits. *Id*. at 693-694.

Further, even assuming that the Court in *Ridley (On Remand)* properly concluded that a streetlight is not a utility pole, we believe that the analysis should have continued. The wording in MCL 691.1401(e) that alleys, trees, and utility poles are not included in the definition of "highway" is not meant to be construed as an exclusive list. In *Evens* the Court held that traffic control devices are not implicated in the definition of "highway." In other words, the fact that an item is not expressly excluded in the definition of "highway" does not mean that it is automatically included within the definition. It still must be determined whether streetlights are clearly implicated within the entire definition of "highway" because an action cannot be maintained under the highway exception statute unless it is clearly within the scope and meaning of the statute. *Hatch, supra* at 464; *Weakley, supra* at 326. Construing the highway exception narrowly as we are required to do under *Evens* and recognizing the rule that an action cannot be maintained under the highway exception unless it clearly falls within the scope and meaning of the statute, we conclude that the highway exception does not apply under the facts of this case. That is, we simply cannot conclude that a streetlight is clearly implicated *within* the entire definition of "highway." Defendant was entitled to governmental immunity. We are, however, bound by *Ridley (On Remand).*

We affirm the trial court's order because we are bound to do so by the majority holding in *Ridley (On Remand).* Because we disagree with the analysis set forth in the *Ridley (On Remand)* decision and were it not for that decision, we would have decided this case differently. Consequently, we recommend that this case be submitted to a special conflicts panel pursuant to MCR 7.215(I)(3).[8]

We affirm.

/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

McDonald, J. did not participate.

[8] Although an application for leave to the Supreme Court was submitted in September 2001 in *Ridley (On Remand),* leave had not been granted at the time this opinion was written.