STATE OF MICHIGAN

COURT OF APPEALS

DENISE JOHNSON-MCINTOSH and ALVIN MCINTOSH, as Next Friends of DAESHA JOHNSON, a MINOR,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant-Appellant,

and

TOMMY NATHAN MCGEE, JR., and TOMMY NATHAN MCGEE III,

Defendants.

FOR PUBLICATION
May 5, 2005
9:25 a.m.

No. 244349
Wayne Circuit Court
LC No. 01-124542-NZ

Official Reported Version

Before: Owens, P.J., and Saad, Bandstra, Smolenski, Meter, Donofrio, and Fort Hood, JJ.

METER, J. (*dissenting*).

I respectfully dissent. If this case involved a defective traffic control device on a noncounty highway over which Detroit had jurisdiction, then statutory language, common sense, and case law support the conclusion that Detroit may be held liable for the injury in question. Conversely, if this case involved a defective traffic control device on a county highway over which Detroit had jurisdiction, then Detroit may be held liable if the two conditions set forth in MCL 691.1402a(1) were satisfied. I would remand this case for further proceedings.

I. Pertinent Statutes

In general, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The so-called "highway exception to governmental immunity" is found at MCL 691.1402, which states, in part:

(1) Except as otherwise provided in [MCL 691.1402a], each governmental agency[1] having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

MCL 691.1402a states, in part:

(1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:

(a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

(b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.

The term "highway" is defined by MCL 691.1401(e), which states:

"Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

II. Statement of the Issue

The issue in the present case is whether Detroit may be held liable for an injury allegedly caused by a defective traffic signal located at the intersection of West Seven Mile Road and Pennington Street in Detroit. The parties appear to disagree regarding whether the traffic signal

[1] Detroit is considered both a "municipal corporation" and a "governmental agency" by virtue of MCL 691.1401(a), (b), and (d).

at issue controlled the traffic on a county highway or a city road. Therefore, I will analyze this case under both factual situations.

III. Analysis

A. Noncounty Highway

Assuming that this case involves a noncounty highway, MCL 691.1402a becomes irrelevant, and the focus shifts to MCL 691.1402. Under that section, a municipality clearly is liable for failing to maintain a "highway in reasonable repair so that it is reasonably safe and convenient for public travel." Moreover, the duty of a municipality to keep a highway in reasonable repair is not statutorily limited, as it is with "state and . . . county road commissions," to "the improved portion of the highway designed for vehicular travel . . . . " MCL 691.1402(1). Therefore, the pertinent question becomes whether a traffic signal is included within the definition of "highway."

As noted, MCL 691.1401(e) states:

> "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

The majority concludes that a traffic signal does not fall within the definition of "highway." I disagree. Indeed, it is simply a matter of common sense that the duty to maintain a "highway" in proper condition entails the proper maintenance of a traffic signal that controls the flow of traffic on that highway. While the definition of "highway" in MCL 691.1401(e) does not specifically list the phrases "traffic signals" or "traffic control devices," it also does not include the term "asphalt" or the phrase "rumble strips," even though serious defects in those items would clearly subject a municipality to liability. Certain items are implicit within the term "highway" itself. It is simply incongruous that a municipality would have a duty to maintain road surfaces, bridges, sidewalks, trailways, crosswalks, and culverts, while *not* having a duty to maintain traffic signals, which are *crucial* to the ability of a pedestrian or a traveler in a vehicle to use a road or a crosswalk safely.

This commonsense conclusion—that the duty to maintain a highway encompasses the duty to maintain traffic control devices pertaining to that highway—is fully supported by this Court's decision in *Cox v Dearborn Hts*, 210 Mich App 389, 397; 534 NW2d 135 (1995), in which the Court stated, "[W]e today make explicit that municipalities may face liability where a pedestrian is injured as a result of allegedly inadequate traffic control devices." Contemplating the differing duties applied to municipalities as opposed to state and county road commissions under MCL 691.1402, the *Cox* Court stated, in part:

> While we are puzzled with regard to the Legislature's disparate treatment of municipalities vis-a-vis the state and county road commissions, our role is to enforce the law as written. Furthermore, our duty is to interpret the law, not make new laws. [*Cox, supra* at 397.]

The *Cox* Court also referred to Justice Boyle's concurring opinion in *Chaney v Dep't of Transportation*, 447 Mich 145; 523 NW2d 762 (1994). *Cox, supra* at 397. In *Chaney*, Justice Boyle stated that there are logical, statutory, and historical reasons for concluding that governmental agencies should be subject to liability for failing to maintain traffic signals and signs in reasonable repair. *Chaney, supra* at 175-176 (opinion of Boyle, J.).

It is true that in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 182 n 37; 615 NW2d 702 (2000),[2] the Supreme Court, responding to the dissenting opinion in that case, stated the following:

> The dissent accuses us of "shifting" the liability for traffic control devices, including traffic signs, from the state and county road commissions, to local municipalities. While the purpose of our holding today is merely to return to a principled application of the plain language of the highway exception, we are constrained to respond to the dissent's misapprehension of the governmental immunity statute.
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> Clearly, traffic signals and signs are not implicated in the broad definition of "highway" in MCL 691.1401(e); MSA 3.996(101)(e): "'Highway' means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles." MCL 691.1402; MSA 3.996(102) creates an exception to governmental immunity for the state or county road commissions' failure to maintain and repair the "improved portion of the highway designed for vehicular travel." Thus, there is a gap that exists between the "improved portion of the highway designed for vehicular travel," and the broader confines of "highway," defined in subsection 1(e). MCL 691.1402a; MSA 3.996(102a) seeks to fill this gap, at least with respect to *county* highways. [Emphasis in original.] However, *because traffic control devices are clearly not implicated in the broad definition of "highway," there can be no "shifting" of liability from the state and county road commissions to local municipalities.* [Emphasis added.]

The majority opinion in the instant case places great emphasis on this footnote. I, however, find that it constitutes nonbinding obiter dicta because it was simply not necessary to resolve the pertinent issue in *Nawrocki*. See *Dessart v Burak*, 252 Mich App 490, 496; 652 NW2d 669 (2002) (discussing obiter dicta).

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[2] In *Nawrocki, supra* at 179-180, 183-184, the Court held, among other things, that state and county road commissions cannot be held liable for the failure to repair and maintain traffic control devices because such devices are not part of "the improved portion of the highway designed for vehicular travel" as delineated in MCL 691.1402(1).

In *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003), the Court concluded that footnote 37 of *Nawrocki, supra* at 182, does in fact constitute binding precedent. The Court stated the following:

> Although, the trial court in the instant case dismissed footnote 37 in *Evens-Nawrocki* as dictum, this Court has noted that dictum is a "'judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).'" *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001), quoting Black's Law Dictionary (7th ed). Nevertheless, the *Higuera* Court recognized that, """[w]hen a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision."'" *Higuera, supra* at 437, quoting *Detroit v Michigan Pub Utilities Comm*, 288 Mich 267, 299-300; 286 NW 368 (1939), in turn quoting *Chase v American Cartage Co, Inc*, 176 Wis 235, 238; 186 NW 598 (1922). So, a "decision of the Supreme Court is authoritative with regard to any point decided if the Court's opinion demonstrates 'application of the judicial mind to the precise question adjudged, regardless of whether it was necessary to decide the question to decide the case.'" *Higuera, supra* at 437, quoting *People v Bonoite*, 112 Mich App 167, 171; 315 NW2d 884 (1982). Clearly, whether the Court's decision in *Evens* would "shift liability" for signage to municipalities was germane to the Court's holding regarding immunity of the state and county road commissions and displayed the "application of the judicial mind" to the question. Consequently, the *Evens* Court's comments in footnote 37 are more than mere dicta; they must be read as implicitly overruling *Cox.* [*Carr, supra* at 383-384.]

I do not agree with this analysis set forth by the *Carr* Court. Indeed, the *Nawrocki* Court's paragraph-long analysis in a footnote of its opinion should not be considered an "application of the judicial mind" such that the analysis is transformed from obiter dicta into binding precedent. This is especially true because the Supreme Court in footnote 37 of *Nawrocki* made no mention of *O'Hare v Detroit*, 362 Mich 19, 24-26; 106 NW2d 538 (1960), a case in which the Supreme Court concluded that a municipality's duty to maintain streets in reasonable repair encompasses the duty to maintain stop signs in reasonable repair. One would hope that a true "application of the judicial mind" to a question would include a discussion of decades-long precedent, such as *O'Hare,* that is evidently being overruled in the course of resolving the question at hand. That *O'Hare* is not discussed in footnote 37 of *Nawrocki* supports my conclusion that the footnote constitutes mere obiter dicta.

Moreover, and importantly, I am not bound by *Carr* (despite my disagreement with it) under MCR 7.215(J)(1)[3] because *Cox*, which conflicts with *Carr*, was released before *Carr*. As noted in *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999), "in cases of conflicting opinions issued on or after November 1, 1990, the Court is to follow the first opinion that addresses the matter at issue." See also *Marchyok v Ann Arbor*, 260 Mich App 684, 694; 679 NW2d 703 (2004) (O'Connell, J., dissenting). Moreover, *O'Hare*, as a Supreme Court case, obviously takes precedence over *Carr*.

Further, my conclusion that municipalities may be held liable for defective traffic control devices on noncounty highways is not undermined by either *Weaver v Detroit*, 252 Mich App 239; 651 NW2d 482 (2002), or *Stevenson v Detroit*, 264 Mich App 37; 689 NW2d 239 (2004), the latter of which I authored. These cases involved municipalities, and the decisions relied heavily on the definition of "highway" in MCL 691.1401(e). See *Weaver, supra* at 240, 245-246 (streetlight pole, which fell on the plaintiff's decedent, not considered part of highway), and *Stevenson, supra* at 43 (berm not considered part of highway). I do not find these cases dispositive because a streetlight pole and a berm are fundamentally different from traffic control devices. As noted in *Stevenson, supra* at 45 n 2, "a defective 'berm' as defined in the instant case is fundamentally different from a defective traffic control device, which can directly affect a person's use of the street itself." This observation from *Stevenson* applies equally, in my opinion, to the question of a streetlight pole versus a traffic control device. A reasonable and commonsense construction of the term "highway" includes traffic control devices.[4]

In sum, I believe that statutory language, common sense, and case law support the conclusion that a municipality may be held liable for improperly maintaining traffic control devices on a noncounty highway under its jurisdiction. The duty of a municipality to keep a highway in reasonable repair simply is not limited, as it is with "state and . . . county road commissions," to "the improved portion of the highway designed for vehicular travel . . . . "

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[3] MCR 7.215(J)(1) states that

> [a] panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

[4] In *Ridley v Detroit (On Second Remand)*, 258 Mich App 511, 514-516; 673 NW2d 448 (2003), this Court concluded, albeit reluctantly, that a municipality could not be held liable for inadequate illumination of a highway because illumination was not included within the definition of "highway" in MCL 691.1401(e). Although the issue is not before me, illumination arguably falls within the definition of "highway" in the same commonsense manner that traffic control devices do. At any rate, I am not bound by the *Ridley* holding because it dealt with illumination and not traffic control devices and because the *Cox* decision preceded it. See *Novak, supra* at 690. Moreover, the *Ridley* Court's discussion regarding traffic control devices, see *Ridley, supra* at 515-518, constitutes nonbinding obiter dicta.

MCL 691.1402(1). Moreover, a reasonable construction of the term "highway" includes traffic control devices, and both *Cox* and *O'Hare* support my conclusion today.

B. County Highway

With regard to a county highway, my analysis is straightforward, given my conclusion in part A that traffic control devices are implicitly part of a "highway." MCL 691.1402a indicates that municipalities may be held liable, when certain conditions are met, for improperly maintaining portions of a county highway that are "outside of the improved portion of the highway designed for vehicular travel . . . ." Case law has made clear that traffic control devices are not part of the "improved portion of the highway designed for vehicular travel . . . ." *Nawrocki, supra* at 179-180, 183-184. MCL 691.1402a therefore indicates that a municipality may be held liable for the improper maintenance of a traffic control device on a county highway if the municipality had notice of the defect that caused the injury in question.[5]

IV. Conclusion

If this case involved a traffic control device on a noncounty highway over which Detroit had jurisdiction, then Detroit clearly was subject to liability. If this case involved a traffic control device on a county highway over which Detroit had jurisdiction, then Detroit was subject to liability if the two conditions set forth in MCL 691.1402a(1) were satisfied.

I would remand this case for further proceedings.

/s/ Patrick M. Meter

[5] A municipality's liability under MCL 691.1402a(1) is limited by certain environmental protection laws that apparently are not at issue here. See MCL 691.1402a(3).