STATE OF MICHIGAN

COURT OF APPEALS

ROGER L. JOHNSON and BETTY JOHNSON, Plaintiffs-Appellants,	UNPUBLISHED November 27, 2001
V	No. 222512 Court of Claims
DEPARTMENT OF TRANSPORTATION, Defendant-Appellee.	LC No. 99-017314-CM

Before: O'Connell, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the September 10, 1999, order of the Court of Claims granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). We affirm.

On June 20, 1997, plaintiff was driving northbound on Telegraph Road in the City of Detroit when another vehicle drove into his path, forcing him to take evasive action. After veering to the right, plaintiff's automobile struck a pole located approximately one foot to the east and outside of the roadbed designed for vehicular traffic. Plaintiff filed the instant action on June 18, 1999, claiming defendant breached its duty to keep the highway reasonably safe and fit for public travel. Defendant moved for summary disposition on July 19, 1999, arguing plaintiff failed to plead in avoidance of governmental immunity. The trial court granted defendant's motion in an order entered September 10, 1999.

This Court reviews de novo a trial court's grant of summary disposition. *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 289; 618 NW2d 98 (2000). Where summary disposition is sought pursuant to MCR 2.116(C)(7), "any supporting evidence, including affidavits, depositions, and admissions, may be considered" to determine whether the claim is barred by immunity granted by law. *Id*. at 290.

Governmental immunity is the public policy limiting imposition of tort liability on a governmental agency. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000). Governmental immunity from tort liability, as codified by the governmental tort

[1] Plaintiff Betty Johnson's claim against defendant is for loss of consortium only. Therefore, "plaintiff" in this opinion will refer only to plaintiff Roger L. Johnson.

immunity act, MCL 691.1401 *et seq*., "is expressed in the broadest possible language – it extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Id*. at 156 (emphasis in original). The five specific statutory exceptions to governmental immunity are to be narrowly construed. *Id*. at 158; *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000).

In an attempt to plead in avoidance of governmental immunity, plaintiff relies on the statutory highway exception. At the time of the accident giving rise to this appeal,[2] the highway exception to governmental immunity provided:

> Each governmental agency 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 sustaining 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 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, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel*. . . . [MCL 691.1402(1) (emphasis supplied).]

On appeal, plaintiff argues that the light pole constituted a "point of hazard" affecting safe travel on the highway and triggering the highway exception to governmental immunity. To support this argument, plaintiff points to our Supreme Court's decision in *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), a case that broadly interpreted the highway exception and imposed liability for conditions uniquely affecting vehicular traffic on the improved portion of the highway, but were not necessarily part of the physical roadbed itself. *Id.* at 623. Plaintiff also argues that a "No Parking" sign attached to the light pole transformed the pole into a traffic sign or traffic control device. Therefore, plaintiffs argue, defendant had a duty under the highway exception to keep the pole in reasonable repair.

Since the parties filed briefs in the present case, our Supreme Court decided *Nawrocki* and its companion case, *Evens v Shiawassee Co Rd Comm'rs*.[3] In *Nawrocki, supra* at 162, our

---

[2] Plaintiff's accident occurred on June 20, 1997. Accordingly, the statutory language applicable in this case is that found in 1996 PA 150 § 1, effective March 25, 1996.

[3] In *Evens* the Supreme Court expressly overruled its prior holding in *Pick. Evens, supra* at 174-175. Plaintiff also relies on several decisions of this Court in support of his assertion that summary disposition was improperly granted. Specifically, plaintiff relies on this Court's decision in *Iovino v Michigan*, 223 Mich App 125; 577 NW2d 193 (1998), vacated 463 Mich 925 (2000), a decision that was vacated and remanded to this Court for reconsideration in light of *Evens, supra*. On remand, this Court concluded that the plaintiff failed to plead in avoidance of

(continued…)

Supreme Court concluded that the plain language of the statutory highway exception to governmental immunity "definitively limits the state and county road commissions' duty with respect to the *location* of the alleged dangerous or defective condition; if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach" (emphasis in original). In *Evens*, the Court went on to conclude that state and county road commissions' duty, pursuant to the highway exception, "is only implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel . . . ." *Evens, supra* at 183.

> A plaintiff making a claim of inadequate signage . . . fails to plead in avoidance of governmental immunity because signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel. Traffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the improved portion of the roadway designed for vehicular traffic. [*Id.* at 183-184.]

In the instant case, the light pole that plaintiff struck with his automobile was located approximately one foot outside of the actual roadbed designed for vehicular traffic. Because the pole was outside of the actual roadbed designed for vehicular traffic, the highway exception is not applicable. *Nawrocki, supra* at 161-162. Further, to the extent plaintiff challenges defendant's maintenance of traffic signage, he has failed to plead in avoid of governmental immunity. *Evens, supra* at 183-184. Because plaintiff's claim that defendant did not properly maintain the pole is not a claim involving a dangerous or defective condition in the improved portion of the roadway, *McIntosh (On Remand), supra* at 710, the trial court properly determined that governmental immunity barred plaintiff's suit.

In the lower court, defendant argued that the highway exception to governmental immunity did not apply to allow plaintiff's claim because the pole struck by plaintiff's automobile was a utility pole. MCL 691.1401(e); see also *Ridley v Detroit*, 246 Mich App 687, 691; ___ NW2d ___ (2001). The Court of Claims accepted this argument. Plaintiff challenges this determination on appeal. Whether the pole struck by plaintiff was a utility pole speaks to the issue regarding the applicability of the highway exception. We have concluded that plaintiff failed to plead in avoidance of governmental immunity because the condition alleged to have

---

(…continued)

governmental immunity where the plaintiff did not allege that there was a dangerous or defective condition within the improved portion of the roadway designed for vehicular travel. *Iovino v Michigan (On Remand)*, 244 Mich App 711, 715; 625 NW2d 129 (2001). Likewise, this Court's decision in *McIntosh v Dep't of Transportation*, 234 Mich App 379; 594 NW2d 103 (1999), vacated 463 Mich 899 (2000), was remanded for reconsideration in light of *Evens, supra*. On remand, this Court held that summary disposition was properly granted where the plaintiff did not allege defects in the portion of the roadway designed for vehicular traffic. *McIntosh v Dep't of Transportation (On Remand)*, 244 Mich App 705, 710; 625 NW2d 123 (2001). Further, plaintiff's reliance on *McKeen v Tisch (On Remand)*, 223 Mich App 721; 567 NW2d 487 (1997) is of dubious value following our Supreme Court's decision in *Evens, supra*.

caused his injuries were not part of the improved portion of the highway designed for vehicular travel. Thus, any issue relating to the characterization of the pole is superfluous.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael R. Smolenski