STATE OF MICHIGAN

COURT OF APPEALS

GREGORY D. CALLAHAN, Personal Representative of the Estate of YVONNE MARIE CALLAHAN, Deceased,

Plaintiff-Appellee,

v

GLADWIN COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
October 21, 2004

No. 248847
Gladwin Circuit Court
LC No. 00-014277-NO

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by right from a partial denial of summary disposition. The case arose out of a fatal head-on collision between plaintiff's decedent and another motorist on a gravel road under defendant's jurisdiction. The trial court held that plaintiff had stated several claims in avoidance of governmental immunity and denied summary disposition for those claims. We affirm in part and reverse in part.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and viewed in a light most favorable to the non-moving party to determine if the claims are so clearly unenforceable that no factual development could justify recovery. *Id.* at 119-120. Under MCR 2.116(C)(7), the contents of the complaint are accepted as true, unless contradicted by other documentation, and all documentary evidence is reviewed to determine whether the claim is barred by immunity. *Id*. at 118-119. Questions of law and issues of statutory interpretation are reviewed de novo. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 482; 673 NW2d 739 (2003). "The primary rule of statutory construction is to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, it is generally applied as written." *Id*.

Defendant first argues that plaintiff may not allege that "defendant had a duty to 'maintain the roadway in reasonable repair so that it is reasonably safe for public travel'" or that defendant breached a duty by failing "to maintain in reasonably safe condition." Although defendant apparently concedes a duty to repair and maintain the roadway in a reasonable manner, it argues that plaintiff's allegation would effectively subject defendant to strict liability

if the road should happen to become unsafe for any reason. The highway exception to governmental immunity, MCL 691.1402(1), provides, in relevant part:

> Except as otherwise provided in section 2a, 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 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 liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. 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.

The duty of a county regarding road maintenance is set forth in MCL 224.21(2):

> A county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel. The provisions of law respecting the liability of townships, cities, villages, and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control apply to counties adopting the county road system.

Governmental immunity is broad, and its exceptions must be narrowly construed. *Nawrocki v Macomb County Road Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). Nevertheless, MCL 691.1402(1) imposes a duty on county road commissions to "'repair and maintain' their respective highways and roads so that they are 'reasonably safe and convenient for public travel.'" *Id*. at 171-172. This duty extends to both vehicular and pedestrian travel. *Id.*

But, our Supreme Court also stated that there is no "second duty to keep the highway 'reasonably safe.'" *Id*. at 160. Thus, a defendant cannot be held liable *solely* because a road is not "reasonably safe," unless that condition results from a failure to maintain the road; allegations that a dangerous or defective condition that proximately causes injury or damage and is located on the improved portion of a highway suffice to plead a cause of action in avoidance of governmental immunity. *Id*. at 171. But, a plaintiff must then prove the traditional negligence elements of breach, causation, and damages. *Haliw v Sterling Heights*, 464 Mich 297, 304; 627 NW2d 581 (2001).

Plaintiff's allegations are nearly verbatim quotations of defendant's duty under MCL 691.1402(1). But even presuming the road here was not reasonably safe, defendant may not be found liable on that basis alone. Defendant has no *independent* duty to keep the road "reasonably safe." Defendant has a duty to keep the road "reasonably safe" as part of its duty to maintain and repair the road in a reasonable manner.

Defendant next argues that it is not obligated to provide shoulders for a road and is not obligated to repair them if they are not part of the compacted, traveled portion of the road. Plaintiff concedes no duty to design or construct shoulders. Although the parties debate the definition of what constitutes a "shoulder," that is not the relevant inquiry. Our Supreme Court found paved shoulders along a high-speed state highway to be part of the highway's improved portion and therefore subject to the maintenance duty under the highway exception to governmental immunity. *Gregg v State Highway Dep't*, 435 Mich 307, 313, 315-316; 458 NW2d 619 (1990). The Court also found "that a three-foot-wide dirt and gravel shoulder adorned with an occasional tree is not 'designed for vehicular travel.'" *Id*. at 313. MCL 691.1402(1) "sets forth an exception that encompasses only 'the traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.'" *Nawrocki*, *supra* at 180, quoting *Scheurman v Dep't of Transportation*, 434 Mich. 619, 631; 456 NW2d 66 (1990). Even temporary travel on the shoulder of a highway was sufficient if that temporary accommodation were intentional. *Gregg*, *supra* at 315. Therefore, the relevant inquiry is not how to label an area adjacent to a road, but whether that area is intended to accommodate at least temporary vehicular travel. Neither party cites any facts on this issue. Because "a party may not leave it to this Court to search for a factual basis to sustain or reject its position," *Great Lakes Division of National Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998), this remains a question of fact.

Defendant next argues that plaintiff's allegation that it used improper materials to repair and maintain is not actionable. A government agency's duty to maintain and repair a road "does not include a duty to design, or to correct defects arising from the original design or construction of roadways." *Hanson v Bd of Co Road Comm'rs of Co of Mecosta*, 465 Mich 492, 502; 638 NW2d 396 (2002). The parties agreed below that the road was gravel, and the hill was sand. There was no allegation that any other materials were used. Because governmental agencies are not required to "improve or enhance existing highways," *id*., defendant cannot logically be liable for using the same materials to repair and maintain as those used in a road's original construction.

Although in *Hanson* the roadbed was well-maintained, *id*. at 500, there is no indication that the decision was limited to its facts. The Court explicitly disagreed with dicta in other cases "that the duty to maintain a road in a reasonably safe condition includes the duty to correct defects arising from the original design or construction of highways." *Id*. at 501 n 7. It held that "highway authorities are under no statutory obligation to reconstruct a highway whenever some technological safety advancement has been developed," *id*. at 503, and concluded that "the road commission has a duty to repair and maintain, not a duty to design or redesign." *Id*. The dissent characterized the majority opinion as finding that "the government has no duty other than to keep a highway in its original condition." *Id*. at 506 (Kelly, J., dissenting). Therefore, if the original road was constructed of gravel and sand, defendant could not be liable for electing to use gravel and sand to maintain and repair it. Defendant remains liable for failing to maintain the road in a reasonably safe condition. Here, plaintiff has not alleged that defendant used materials different from those used in the road's original design, so defendant cannot be held liable because it continued using those materials to repair and maintain. The trial court should have granted summary disposition on this issue.

Defendant finally argues that plaintiff failed to show notice and time to repair under MCL 691.1403, which qualifies government agencies' duties to maintain highways. *Jones v Enertel, Inc*, 467 Mich 266, 269; 650 NW2d 334 (2002). MCL 691.1403 provides:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

Defendant argues that it did not have actual notice of the condition of the road. Presuming that to be true, our Supreme Court has interpreted MCL 691.1403 as contemplating that a government agency may, in appropriate circumstances, be held liable for a condition that is open and obvious. *Jones*, *supra* at 270. Deposition testimony was presented to establish that the condition of the road was open and obvious for at least thirty days before the accident. It is therefore unnecessary to address whether defendant's employee's statements demonstrate actual notice of a defect or merely notice of the possibility of a defect. The trial court appropriately denied summary disposition.

We reverse the trial court's refusal to grant summary disposition to defendant on plaintiff's allegation that defendant used improper materials to repair and maintain the road. We affirm the trial court's decision in all other respects. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey