

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL GRIMES and TAMARA GRIMES,

Plaintiffs-Appellees,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED

December 16, 2004

No. 249558

Court of Claims

LC No. 02-000067-MD

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals by right from an order denying its motion for summary disposition under MCR 2.116(C)(7), based on governmental immunity. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This case arises from a two-car accident on a portion of northbound I-75 where the shoulder is composed of asphalt and gravel. As Alan Thisse was driving north on I-75, he lost control of his vehicle and went onto the shoulder. When Thisse attempted to reenter the roadway, he encountered a seven- to eight-inch drop where the paved portion of the shoulder meets the gravel portion. The uneven drop allegedly caused Thisse to lose control of his vehicle and strike plaintiff Michael Grimes' car.

Plaintiffs filed a complaint, alleging, inter alia, that the highway exception to governmental immunity applied because the shoulder is part of the highway designed for vehicular traffic, and defendant failed to properly maintain and repair the gravel portion to make it level with the paved portion. Defendant moved for summary disposition on the basis of governmental immunity. The trial court denied defendant's motion.

This Court reviews a trial court's denial of summary disposition under MCR 2.116(C)(7) de novo. *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003). "This Court reviews the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the nonmoving party. A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery." *Cole v Ladbroke Racing Michigan, Inc.*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

A governmental agency having jurisdiction over a highway is liable in tort for breach of the duty to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” MCL 691.1402(1). “The state and county road commissions’ duty . . . 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[.]” *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 183; 615 NW2d 702 (2000). “[I]f 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.” *Id.* at 162.

Defendant argues that plaintiffs’ claim is not cognizable under MCL 691.1402(1), because a shoulder is not a part of the actual roadbed designed for vehicular travel; however, in *Gregg v State Highway Dep’t*, 435 Mich 307, 315-316; 458 NW2d 619 (1990), our Supreme Court held that the shoulder of a highway is part of the improved portion designed for vehicular travel. See also *Meek v Dep’t of Transportation*, 240 Mich App 105, 114; 610 NW2d 250 (2000), and *Soule v Macomb Co Bd of Rd Comm’rs*, 196 Mich App 235, 237; 492 NW2d 783 (1992). Although defendant asserts that our Supreme Court’s holding in *Nawrocki*, *supra* at 158 that the statutory exceptions to governmental immunity are to be narrowly construed effectively overruled *Gregg*, nothing in that case altered the Court’s earlier holding in *Gregg* regarding shoulders. This Court is bound by the Supreme Court’s decision in *Gregg*. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Consequently, the trial court properly denied defendant’s motion for summary disposition on the basis of governmental immunity.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens