STATE OF MICHIGAN

COURT OF APPEALS

VERA SEKULOV, Personal Representative of the Estate of RADE SEKULOVSKI, Deceased, Plaintiff-Appellant, v CITY OF WARREN and COUNTY OF MACOMB, Defendants-Appellees.	FOR PUBLICATION May 14, 2002 9:00 a.m. No. 228159 Macomb Circuit Court LC No. 98-000497-NP Updated Copy August 16, 2002

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

NEFF, P.J.

Plaintiff Vera Sekulov appeals as of right from the trial court's orders granting summary disposition in favor of defendants city of Warren and Macomb County. We reverse in part, affirm in part, and remand for further proceedings.

I

In February 1997, plaintiff's decedent, Rade Sekulovski, was struck and killed by an oncoming vehicle as he crossed Mound Road in Warren on his way to work at a Chrysler plant. Sekulovski was crossing at a designated crosswalk, which led from an employee parking lot on the west side of Mound Road, across seven lanes of highway, to the plant on the east side of Mound Road. The driver of the vehicle was also a Chrysler employee and had just driven out of the parking lot onto the highway. The crosswalk traversed the traveled portion of the highway, i.e., the roadbed. Plaintiff filed a negligence action against the driver of the vehicle and defendants city of Warren and Macomb County. Plaintiff settled her claim against the driver. The trial court subsequently granted summary disposition in favor of defendants.

II

Plaintiff argues that the trial court erred in granting summary disposition in favor of Macomb County. We agree. This case involves review of a decision on a motion for summary disposition and also presents a question of statutory construction, both of which are subject to review de novo. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 497; 638 NW2d 396 (2002). The trial court granted summary disposition to Macomb County under MCR 2.116(C)(7) (claim barred by immunity granted by law). In reviewing a motion under this subrule, the trial court

must consider any supporting evidence submitted by the parties, including affidavits, depositions, and admissions, to determine whether the claim is barred by immunity granted by law. *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 289-290; 618 NW2d 98 (2000).

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). Immunity from tort liability, as codified by the governmental 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." *Nawrocki*, *supra* at 156. The five specific statutory exceptions to governmental immunity are to be narrowly construed. *Id*. at 156, 158; *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000).

In avoidance of governmental immunity, plaintiff relies on the statutory highway exception, MCL 691.1402(1), which, at the time this action arose, 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.

In *Nawrocki*, *supra* at 176, and its companion case, *Evens v Shiawassee Co Rd Comm'rs*, the Supreme Court, relying on *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), noted that the duty of the state and county road commissions "is significantly limited, extending *only* to the improved portion of the highway *designed for vehicular travel*." (emphasis in original). The Court stated:

> The state and county road commissions' duty, under 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, which in turn proximately causes injury or damage. A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate street lighting or vegetation obstruction, 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 highway designed for vehicular travel.

> Evens argues that the SCRC failed to install additional traffic signs or signals that might conceivably have made the intersection safer. Because the highway exception imposes no such duty on the state or county road commissions, we reverse the decision of the Court of Appeals and reinstate the trial court's grant of summary disposition to the SCRC. [*Nawrocki, supra* at 183-184 (citation omitted).]

Plaintiff contends that the decision in *Nawrocki* should be applied prospectively only. We agree. The general rule is that judicial decisions are to be given complete retroactive effect. *Lincoln v General Motors Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000). Prospective application has generally been limited to decisions that overrule clear and uncontradicted case law. *Id*. By its own express terms, *Nawrocki* overruled clear and uncontradicted case law, specifically *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), so the general rule is inapplicable, and *Nawrocki* has only prospective application. *Lincoln, supra*; *Nawrocki, supra* at 180.

In this case, plaintiff alleged that Macomb County breached its duty to design roadways, crosswalks, and pedestrian traffic lights in a reasonably safe manner. Specifically, plaintiff alleged that Macomb County (1) failed to maintain appropriate signage, (2) failed to maintain adequate traffic control devices, (3) failed to make improvements to the roadway and crosswalk despite notice of previous, similar accidents, and (4) failed to provide adequate lighting to illuminate the area.

Nawrocki overruled existing law on which plaintiff relied in commencing, litigating, and settling her claims in this action. *Id*. at 176-177, 180. In overruling this precedent, *Nawrocki* thus eliminated under the highway exception any claim premised on areas of special danger and the installation, maintenance, repair, or improvement of traffic control devices, including signage. *Id*. at 176-177, 180, 183. In this context, giving *Nawrocki* full retroactive effect is unjust and unwarranted. *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).

More recently, in *Hanson, supra*, the plaintiff's claims that a county road was poorly designed were determined to be insufficient to avoid governmental immunity. The Court explained: "Nowhere in the statutory language is there a duty to *install*, to *construct* or to correct what may be perceived as a dangerous or defective '*design*.'" *Id*. at 501 (emphasis in original). Accordingly, we must also determine whether *Hanson* is to be applied prospectively only. As Justice Kelly points out in her dissent in *Hanson*, a significant body of law before *Hanson* held governmental entities liable for defective highway design. *Id.* at 505. Accordingly, following the analysis applied above, we conclude that *Hanson*, like *Nawrocki*, overruled clear and uncontradicted case law and should have prospective application only.

III

The question then becomes whether plaintiff has sufficiently pleaded a cause of action in avoidance of governmental immunity, and we hold that she has. In granting summary disposition in favor of Macomb County, the trial court ruled that the simple fact that the accident occurred in a crosswalk precluded plaintiff's cause of action. However, this notion of automatic preclusion has been rejected by this Court, even considering the strictures of *Nawrocki*. *Sebring*

v City of Berkley, 247 Mich App 666, 680; 637 NW2d 552 (2001). In reaching the conclusion that a pedestrian's claim that alleges a dangerous defect in the improved portion of the highway that also happens to fall within the crosswalk is not barred by governmental immunity, Judge Holbrook's well-reasoned opinion provides the historical context of governmental immunity as it relates to crosswalks, and carefully explains why automatic preclusion on this ground is unwarranted. *Id.* at 676-680.

Given that plaintiff's action is not automatically barred by governmental immunity simply because the accident occurred in the crosswalk, we conclude that the allegations of her complaint, along with the affidavits filed in opposition to defendant's motion for summary disposition, satisfy the pre-*Nawrocki* and pre-*Hanson* requirements for a valid cause of action. Plaintiff alleged design defects for which, as pointed out in Justice Kelly's *Hanson* dissent, there has long been governmental liability, and the affidavit of her expert witness establishes a claim that a point of special danger existed pursuant to *Pick*, *supra* at 621. Summary disposition in favor of defendant Macomb County was improperly granted.

IV

We conclude that the trial court properly granted summary disposition to defendant city of Warren under MCR 2.116(C)(10). In reviewing a motion under MCR 2.116(C)(10), a trial court considers the affidavits, pleadings, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition if the affidavits and other documentary evidence show that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

The governmental immunity act limits liability under the highway exception to the governmental agency having jurisdiction over the highway at the time of the injury. *Sebring, supra* at 684; *Markillie v Livingston Co Bd of Co Rd Comm'rs*, 210 Mich App 16, 19; 532 NW 2d 878 (1995). Only one governmental agency at a time can have jurisdiction over a highway; there is no concurrent jurisdiction. *Sebring, supra* at 684; *Markillie, supra* at 20.

We disagree with plaintiff that the submitted evidence established a genuine issue of material fact regarding jurisdiction. On the contrary, the evidence established that Macomb County had jurisdiction over the location of the accident on Mound Road. It is undisputed that Macomb County was responsible for maintenance of the traffic signals, crosswalk signals, and pedestrian lights at the accident site and that Macomb County controlled and regulated the timing of pedestrian lights and traffic lights at the crosswalk at issue. More significantly, it was undisputed that Mound Road between Eight Mile and Nine Mile roads was a county road. MCL 224.21(2) provides that the county must keep in reasonable repair all county roads, bridges, and culverts used for public travel within its jurisdiction. The county can transfer jurisdiction to a city only by written agreement and with the consent and resolution of both parties. MCL 247.852. Because no evidence was submitted indicating that such a transfer occurred, jurisdiction rested with Macomb County. Even if Warren may have had some involvement or input with certain aspects of the roadway, because jurisdiction rested with Macomb, and because

Warren cannot have concurrent jurisdiction, the trial court did not err in dismissing the case against the city of Warren.[1]

Affirmed with respect to the city of Warren, reversed with respect to Macomb County, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

Fitzgerald, J., concurred.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald

[1] We also reject plaintiff 's claim that summary disposition was premature because discovery was not complete. Plaintiff has not demonstrated that there was a reasonable chance that further discovery would uncover factual support for her position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1994).