STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF JANIS MARCHYOK,
Deceased.

FOR PUBLICATION
February 24, 2004
9:05 a.m.

KATHARINE MARCHYOK and DELORES FOSTER, Individually and as Co-Personal Representatives of the ESTATE OF JANIS MARCHYOK, deceased, and DOUGLAS MARCHYOK, as Next Friend of PATRICK MARCHYOK, MICHAEL MARCHYOK, and RICHARD FOSTER, Minors,

Petitioner-Appellants,

v

No. 242409
Washtenaw Circuit Court
LC No. 01-000279-CZ

CITY OF ANN ARBOR,

Respondent-Appellee.

Updated Copy
May 7, 2004

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. The primary issue in this case concerns the definition of "highway" as it applies to municipalities, and the scope of a municipality's responsibility for a "highway" within its jurisdiction.

Unquestionably, the statutory definition of "highway" includes "crosswalks." MCL 691.1401(e). Therefore, according to the plain language of MCL 691.1402, a person may recover damages for personal injury or property damage caused by a city's failure "to keep a [crosswalk[1]] under its jurisdiction in reasonable repair and in a condition reasonably safe and fit

[1] The fact that a crosswalk falls under the definition of "highway" found in MCL 691.1401(e) justifies the substitution of the word "crosswalk" for the word "highway" in the quotation.

for travel . . . ." In contrast to county road commissions and the state,[2] the Legislature did not limit a plaintiff's recovery from municipalities to damages arising only from defects in the "improved portion of the highway designed for vehicular travel." *Id*. It could have applied this "roadbed" restriction[3] to cities as well, but it did not. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). I would follow established and binding precedent and reiterate that traffic control devices are part of the "highway" and incorporated into the highway exception to municipal immunity. *Cox v Dearborn Hts*, 210 Mich App 389, 397; 534 NW2d 135 (1995). By holding otherwise, the majority grafts a severe and unintended limitation onto the legislative design and seriously erodes the municipal accountability that the Legislature intended to create.

The majority's analysis posits that *Cox* lacks value as binding precedent today, but such a declaration requires close scrutiny of the majority's analysis and cited authority. The majority incorrectly states that our Supreme Court in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 180; 615 NW2d 702 (2000), based its decision regarding the liability of county road commissions and the state on the understanding that traffic control devices were not part of the definition of "highway" under MCL 691.1401(e). On the contrary, *Nawrocki* expressly limited its analysis to the clear legislative intent that the state and the county road commissions were only liable for defects to the roadbed according to the fourth sentence of MCL 691.1402(1). *Nawrocki, supra* at 179-180, 183-184. Therefore, the majority misplaces its reliance on any substantive portion of *Nawrocki*.

Furthermore, before the footnote that contains the dicta that the majority cites as dispositive, *Nawrocki* recognizes that the Legislature's definition of "highway" could otherwise arguably include traffic control devices if it were not for the fourth sentence of MCL 691.1402(1). *Nawrocki, supra* at 182 n 36. The statute's fourth sentence plainly does not apply to this case, so contrary to the ruling in *Carr v Lansing*, 259 Mich App 376, 384; 674 NW2d 168 (2003), *Nawrocki* refrained from deciding whether the term "highway" could encompass traffic control devices as the term pertains to municipalities. The expressly limited application of *Nawrocki* to the duty of the state and counties should dispose of any notion that *Nawrocki* overruled *Cox*, implicitly or otherwise.[4]

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[2] County road commissions and the state are not liable for crosswalks by the express language of MCL 691.1402. However, this distinction only underscores the difference between this case, which deals with the city of Ann Arbor, and the cases cited by the majority that deal with county road commissions and the state.

[3] In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 183; 615 NW2d 702 (2000), the Supreme Court explained the restriction by suggesting that the Legislature severed a highway into two parts—"the portion of the roadbed designed for vehicular travel," and the balance of the highway. *Nawrocki* proposes that the duty of the state and county road commissions extends only to the improved portion. Municipalities, however, are responsible for the entire highway, including sidewalks, culverts, crosswalks, etc. MCL 691.1402(1); MCL 691.1401(e).

[4] I am unfamiliar with the judicial practice of overruling binding precedent by implication, so I
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Carr obviously conflicts with *Cox*. We released *Cox* in 1995 and released *Carr* in 2003. According to MCR 7.215(J)(1), the first opinion released by this Court is binding on subsequent panels. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999). Moreover, *O'Hare v Detroit*, 362 Mich 19; 106 NW2d 538 (1960), which is consistent with *Cox*, is a Supreme Court decision. Inexplicably, the majority opinion adopts the reasoning of *Carr* and improperly fails to acknowledge the significance of *O'Hare*. See *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 441; 513 NW2d 148 (1994).

Delving deeper into the cases that support the majority's position fails to unearth any overriding justification for holding contrary to our established precedent. For example, the majority relies, as did *Carr*, on the decision in *Weaver v Detroit*, 252 Mich App 239, 243; 651 NW2d 482 (2002), but that decision dealt with a streetlamp and barely mentioned *Cox*. Moreover, none of the majority's supporting cases considered *O'Hare, supra* at 23, which expressly recognizes municipal liability for installed but improperly maintained signage. In *O'Hare, supra* at 23-24, our Supreme Court stated, "It seems obvious to us that once a municipality has decided to exercise the discretion vested in it to declare one street a through street and erect a stop sign facing the subordinate street, the stop sign becomes an important part of the physical appurtenances of the street."

Because our Supreme Court has never overruled either *Cox* or *O'Hare*, the majority can only assume that these precedential cases no longer remain in force. Similarly, *Carr* improperly fails to follow *Cox* and *O'Hare* where it should, and also completely avoids the substance of the municipal issue by declaring its stop sign part of a *state* intersection. *Carr, supra* at 381-383. Therefore, contrary to the majority's suppositions, *Carr* does not bind our decision today, and the majority misplaces its reliance on it.

In contrast to the questionable assumptions about legislative intent adopted by the majority and its cited cases, the Legislature, in MCL 691.1402a, plainly indicates its intent to include defective traffic control devices and other defective "installations" as part of the highway exception to municipal immunity. The statute begins by limiting a municipality's liability for defects on county roads. It then adds, however, that the caveat for county roads "does not prevent or limit a municipal corporation's *liability* if . . . 30 days before the occurrence . . . the municipal corporation knew . . . 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." MCL 691.1402a (emphasis added). Given this language, it is irrational to assume that the Legislature did not intend to hold municipalities liable for defective installations, such as traffic control devices.[5] Such a dismissive reading of this statute improperly renders the "installation"

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leave it to the majority to explain the practical effects of such a doctrine on our obligations under MCR 7.215(J)(1).

[5] When the three statutes are read together, the Legislature's design becomes apparent. It makes sense for individual municipalities to bear the cost of known defective installations under their control rather than holding the entire state or the county liable for those defects. The statutory design recognizes that individual citizens may not possess the political strength to change a defect in a different county or a different township on the other side of their county, but can force their *local* governments to correct any defects. By holding municipalities liable for defective

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language mere surplusage and its meaning nugatory. It is also irrational to assume that the Legislature intended to hold a municipality liable for installations on county roads but not on roads completely under its jurisdiction.[6] The legislative edict is clear—Municipalities, repair your highways or face the consequences.[7] *Cox* and *O'Hare* correctly hold municipalities liable for defective installations, including traffic control devices, and we are bound to follow those cases today.

Because Ann Arbor's alleged failure to keep the crossing signal repaired was ostensibly a failure to "keep" the crosswalk in "a condition reasonably safe *and* fit for travel," I would remand to the trial court for its preliminary determination of this issue. MCL 691.1402 (emphasis added).

/s/ Peter D. O'Connell

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installations, the Legislature protects individual citizens from the catastrophic results of dangerous sidewalks, dilapidated footbridges, malfunctioning stoplights, and other highway defects by putting responsibility for such defects on the political organizations that have the strongest incentive to correct them—municipalities. More important than the Legislature's justifications, however, is its intent. Only by closing one's eyes to the language in MCL 691.1402a can one hold that it manifests the Legislature's ignorance or whimsy rather than a simple intent to hold municipalities liable for reasonable maintenance of their installations. By liberating municipalities from their designated responsibility, the majority undermines the legislative plan and leaves injured citizens to pay for the ramifications that flow from defective maintenance of their cities' infrastructures. Therefore, when the majority undermines the system designed by the Legislature, it not only oversteps its function of enforcing the law as written but also unnecessarily fails to serve the interests of this state's citizenry.

[6] I note that any strict limitation of the definitional language in MCL 691.1401 to those objects specifically included in the definition of "highway" would render nugatory all the exclusions that follow the list of included items. The definition would not need to exclude anything if the Legislature intended to include only the listed items. The more logical approach recognizes that the Legislature merely intended to outline the scope of the term "highway" by providing concrete examples of included and excluded items. While not as clear-cut as we may like, the Legislature employed this method as a means of leaving close questions to the judiciary: a responsibility we should accept rather than avoid.

[7] The Legislature intentionally allows municipalities to face suit as a means of ensuring that our older cities will diligently repair their roads, including the roads' appurtenances. The threat of potential lawsuits keeps our cities' roads, sidewalks, and crosswalks safe and in constant repair.