STATE OF MICHIGAN

COURT OF APPEALS

DENISE JOHNSON-McINTOSH and
ALVIN McINTOSH, as Next Friends of
DAESHA JOHNSON, a Minor,

Plaintiffs-Appellees,

v

No. 244349

CITY OF DETROIT,

Defendant-Appellant,

Updated Copy
July 2, 2004

and

TOMMY NATHAN McGEE, JR., and
TOMMY NATHAN McGEE III,

Defendants.

ORDER ENTERED MAY 26, 2004

Johnson-McIntosh v City of Detroit, Docket No. 244349. The Court orders that a special panel shall be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Marchyok v Ann Arbor*, 260 Mich App 684; ___ NW2d ___ (2004).

The Court further orders that the opinion in this case released on April 29, 2004, is vacated. MCR 7.215(J)(5).

The appellant may file a supplemental brief within 21 days of the Clerk's certification of this order. The appellee may file a supplemental brief within 21 days of service of appellant's brief. Nine copies must be filed with the Clerk of the Court.

Docket No. 244349. Released April 29, 2004, at 9:00 a.m.; vacated May 26, 2004.

Before: Cooper, P.J., and Griffin and Borrello, JJ.

COOPER, P.J.

Defendant city of Detroit appeals as of right from the trial court's order denying its renewed motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8). Defendant asks that this Court's decision in *Weaver v Detroit*[1] be applied retroactively, and to therefore determine that defendant was governmentally immune from liability for its failure to maintain an inoperative traffic signal. We reverse, but only because we believe that we are required to do so by this Court's previous majority decision in *Marchyok v Ann Arbor*.[2]

I. Facts and Procedural History

On June 25, 2001, Tommy Nathan McGee III was driving southbound on Pennington Road in the city of Detroit with Daesha Johnson as his passenger. McGee drove through the intersection of West Seven Mile Road, and as a result of an inoperative traffic signal, collided with another vehicle and then ran into a tree. Johnson was injured and brought suit through her next friends against defendant city of Detroit, alleging a breach of duty under MCL 691.1402a to maintain and repair all installations, including traffic signals, on portions of county highways outside the improved portion designed for vehicular travel.[3]

Defendant responded to plaintiffs' claims with its initial motion for summary disposition. Defendant asserted that plaintiffs' claims were barred by governmental immunity under MCL 691.1402(1). Defendant, relying on *Nawrocki v Macomb Co Rd Comm*, contended that municipalities are immune from liability for injuries caused by defective traffic signals.[4] The trial court denied defendant's initial motion without prejudice, finding that, as *Nawrocki* involved claims against a *county*, it was inapplicable to the facts of this case.

This Court subsequently rendered its opinion in *Weaver*, explicitly extending the *Nawrocki* holding with regard to streetlight poles to municipalities. As a result, defendant filed a renewed motion for summary disposition based on governmental immunity, asserting that municipalities are now governmentally immune from tort liability arising from defective traffic signals. The trial court determined that if *Weaver* were applied, defendant would be governmentally immune from liability. However, the trial court declined to apply *Weaver*, as this Court did not expressly rule that the decision was to apply retroactively.

II. Legal Analysis

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[1] *Weaver v Detroit*, 252 Mich App 239; 651 NW2d 482 (2002), lv den 468 Mich 864 (2003).

[2] *Marchyok v Ann Arbor*, 260 Mich App 684; ___ NW2d ___ (2004); MCR 7.215(J)(1).

[3] Plaintiffs also alleged claims against McGee and his father, Tommy Nathan McGee, Jr., as the owner of the vehicle, but these claims are not relevant to this appeal.

[4] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 172-184; 615 NW2d 702 (2000). *Nawrocki* was consolidated on appeal with *Evens v Shiawassee Co Rd Comm'rs*. *Evens* involved a county's liability with regard to defective traffic control devices while *Nawrocki* involved a defective roadbed. The consolidated appeal will be referred to as *Nawrocki* throughout.

We review a trial court's determination regarding a motion for summary disposition de novo.[5] A motion under MCR 2.116(C)(7) "'tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.'"[6] A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.[7]

The majority in *Marchyok* found that a municipality is immune from liability under the highway exception for injuries caused by defective traffic control devices by erroneously extending *Nawrocki's* ruling regarding the limitations on a state or county road commission's liability to a municipality, in direct contravention of *Nawrocki*.[8] Absent an exception, a governmental agency is immune from tort liability for injuries caused while the agency was engaged in a governmental function.[9] A governmental function is "'an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.'"[10] The grant of governmental immunity is broad, and its exceptions are narrowly construed.[11]

In this case, plaintiffs alleged that defendant was liable under the highway exception to governmental immunity, which provides:

> *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 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,

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[5] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[6] *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

[7] *Beaudrie*, *supra* at 129-130.

[8] *Marchyok*, *supra* at 685-687, 688-689.

[9] MCL 691.1407(1); *Maskery*, *supra* at 613.

[10] *Carr v City of Lansing*, 259 Mich App 376, 379; 674 NW2d 168 (2003), quoting MCL 691.1401(f).

[11] *Nawrocki*, *supra* at 158.

> crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.[12]

A *municipality's* duty with regard to county highways is established in MCL 691.1402a.

> Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
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> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known 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.
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> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.[13]

"Highway" is defined, for purposes of the statute, as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway."[14] Specifically excluded from the definition are "alleys, trees, and utility poles."[15]

The panel in *Marchyok* rejected the plaintiff's reliance on *Cox v Dearborn Hts*,[16] by finding, based on *Carr v Lansing*, that *Nawrocki* implicitly overruled *Cox*.[17] In *Cox*, this Court analyzed the scope of a municipality's liability under the highway exception. This Court determined that the highway exception expressly limited only the liability of the state or county road commissions to injuries resulting from defective conditions on the improved portion of the highway designed for vehicular travel.[18] A municipality's liability was limited solely by the first

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[12] MCL 691.1402(1) (emphasis added). It is undisputed that the traffic signal was within defendant's jurisdiction.

[13] MCL 691.1402a(1).

[14] MCL 691.1401(e).

[15] *Id.*

[16] *Cox v Dearborn Hts*, 210 Mich App 389; 534 NW2d 135 (1995).

[17] *Marchyok*, *supra* at 686-689, quoting *Carr*, *supra* at 384-388.

[18] *Cox*, *supra* at 393.

sentence of the exception. Therefore, a municipality has a duty to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.[19]

Carr and *Marchyok* indicate that *Nawrocki* completely overrules *Cox*; however, we cannot agree. In *Nawrocki*, our Supreme Court overruled precedent imposing a duty on county road commissions "'to provide adequate warning signs or traffic control devices at known points of hazard . . . .'"[20] The phrase "improved portion of the highway designed for vehicular travel" in the highway exception is narrowly construed and only extends the duty of the state or county road commissions "to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel . . . ."[21] The state or county road commissions are, therefore, immune from liability for injuries arising from a defective traffic control device, because those devices are not part of "the improved portion of the highway designed for vehicular travel."[22]

In response to the dissent, the *Nawrocki* majority stated that its holding did not "shift" liability for traffic control devices from the state or county road commissions to municipalities.[23]

> Clearly, traffic signals and signs are not implicated in the broad definition of "highway" in MCL 691.1401(e); MSA 3.996(101)(e): "'Highway' means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles." MCL 691.1402; MSA 3.996(102) creates an exception to governmental immunity for the state or county road commissions' failure to maintain and repair the "improved portion of the highway designed for vehicular travel." Thus, there is a gap that exists between the "improved portion of the highway designed for vehicular travel," and the broader confines of "highway," defined in subsection 1(e). MCL 691.1402a; MSA 3.996(102a) seeks to fill this gap, at least with respect to *county* highways. However, because traffic control devices are clearly not implicated in the broad definition of "highway," there can be no "shifting" of liability from the state and county road commissions to local municipalities.[24]

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[19] *Id.* at 394, citing MCL 691.1402(1). We are not bound by this Court's decision in *Carr*. *Carr* conflicts with *Cox*, which was released eight years prior to *Carr*. In the case of a conflict, the first opinion released by our Court is binding on subsequent panels. MCR 7.215(J)(1).

[20] *Nawrocki*, *supra* at 173, quoting *Pick v Szymczak*, 451 Mich 607, 619; 548 NW2d 603 (1996).

[21] *Id.* at 180, 183.

[22] *Id.* at 184.

[23] *Id.* at 182 n 37.

[24] *Id.* (emphasis in original).

The duty to repair and maintain those portions of *county* highways outside the improved portion designed for vehicular travel fell on municipalities under MCL 691.1402a before the *Nawrocki* decision, and therefore, did not "shift" onto municipalities thereafter.[25] As *Nawrocki* expressly limited its own application to the duties of the state or counties, *Nawrocki* does not overrule *Cox*, implicitly or otherwise.

Subsequent to *Nawrocki*, a special panel of this Court[26] determined in *Weaver* that municipalities, like counties, are immune from tort liability for the negligent maintenance of streetlight poles.[27] The panel in *Marchyok* erroneously relied on dicta in *Weaver* that traffic control devices are not part of the statutory definition of highway. Although *Weaver* limited a municipality's liability under the highway exception, it also did not expressly overrule *Cox*. *Weaver* is factually dissimilar to *Cox* and the case before us, as the injury in *Weaver* arose when a streetlight pole fell and fatally struck the plaintiff's decedent. Streetlight poles and traffic control devices play significantly different roles in making a highway "reasonably safe and convenient for public travel."

The strained interpretation of MCL 691.1402(1) relied upon by *Carr* and *Marchyok* does not comport with the spirit of *Nawrocki*. In rendering its opinion, our Supreme Court noted its "return to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language . . . ."[28] In doing so, our Supreme Court recognized that the fourth sentence of MCL 691.1402(1) limiting liability to injuries caused by defects in the actual physical roadbed applied only to the state or county road commissions. The Supreme Court further recognized that, when read in conjunction with MCL 691.1402a, a municipality does face liability for injuries caused by defective conditions outside the improved portion of a *county* highway.[29] Therefore, the subsequent cases of our Court straining to limit all liability on all governmental agencies for defective conditions outside of the improved portion of the highway

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[25] We take exception, to the various opinions of our Court subsequently interpreting footnote 37 as a complete bar to any liability being imposed on any governmental agency—state, county or local—for defective traffic control devices. See *Marchyok*, *supra* at 686-689; *Carr*, *supra* at 382-383; *Ridley v Detroit (On Second Remand)*, 258 Mich App 511, 514-516; 673 NW2d 448 (2003).

[26] The special panel was convened in *Weaver*, *supra*, to resolve a conflict between *Weaver v Detroit*, 249 Mich App 801; 642 NW2d 342 (2002), vacated 249 Mich App 801 (2002), and *Ridley v Detroit (On Remand)*, 246 Mich App 687; 639 NW2d 258 (2001), vacated and remanded 468 Mich 862 (2003) (On Second Remand), 258 Mich App 511; 673 NW2d 448 (2003).

[27] *Weaver*, *supra*, 252 Mich App at 240.

[28] *Nawrocki*, *supra* at 150.

[29] *Nawrocki*, *supra* at 182 n 37.

is clearly unnecessary and leaves injured parties without recourse. It also leaves the public open to potential risk of further harm.

While the Supreme Court has ruled that it is now permissible to interpret a statute so that an absurd result is achieved,[30] apparently, that was not the case in *Nawrocki*, where the Supreme Court's intention was to reach a logical result by applying the plain language of MCL 691.1402(1) and MCL 691.1402a. By following *Marchyok's* misplaced interpretation of the plain language of MCL 691.1402(1) in contravention of the *Nawrocki* decision, we are continuing the perpetration of an unintended absurd result—that no governmental agency is ever responsible for installing and maintaining traffic control devices. As this Court noted in *Ridley v Detroit (On Second Remand)*:

> Our ruling today is made on the basis of binding precedent that we are required to follow. However, we respectfully voice our strong disagreement with recent precedent that has whittled away and vitiated the highway exception to governmental immunity, MCL 691.1402(1), to a degree which we believe is beyond that contemplated and intended by the Legislature. We find it imperative that the Legislature make itself heard, clearly and unequivocally, with respect to whether the highway exception should apply to traffic signals, signs, and lighting. . . .
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> We are required to conclude that the Legislature intended governmental agencies to be immune from liability where, for example: (a) a stop light malfunctions at an intersection, showing green lights to all traffic, and the local municipality fails for several hours, days, or years after notice to take corrective or safety measures before which time a motorist is injured in a collision caused by the malfunction, (b) a municipality negligently places a single one-way sign pointing in a direction opposite of the actual traffic flow, thereby causing a head-on collision for a motorist entering the one-way street, (c) a municipality fails to provide lighting at an intersection heavily used by motorists and pedestrians resulting in a car-pedestrian accident, or (d) a new road is constructed intersecting an established road without a stop sign or light being added before the road is opened, resulting in a collision.[31]

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[30] *People v McIntire*, 461 Mich 147, 155-159 & n 2; 599 NW2d 102 (1999), quoting and adopting the dissenting opinion, including footnotes, of Young, J., in the Court of Appeals opinion in that matter.

[31] *Ridley (On Second Remand), supra* at 516-518.

We reverse the trial court's order because we are bound to do so by the majority holding in *Marchyok*. Were it not for the *Marchyok* decision, we would affirm. Consequently, we recommend that this case be submitted to a special conflicts panel pursuant to MCR 7.215(J)(3).

Reversed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello