

STATE OF MICHIGAN  
COURT OF APPEALS

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LISA MITCHELL, Individually and as Next  
Friend of LAVALE STEVENSON, a Minor,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

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FOR PUBLICATION  
October 5, 2004  
9:10 a.m.

No. 247074  
Wayne Circuit Court  
LC No. 01-117077-NO

Official Reported Version

Before: Jansen, P.J., and Meter and Cooper, JJ.

COOPER, J. (*dissenting*).

I must respectfully dissent from the majority opinion. I would find that the trial court properly held, based on longstanding precedent, that the "berm" was a natural extension of the sidewalk and, therefore, fell within the definition of "highway" provided in MCL 691.1401(e). I would, therefore, affirm the trial court's denial of defendant city of Detroit's motion for summary disposition.

In *Nawrocki v Macomb Co Rd Comm*,<sup>1</sup> the Michigan Supreme Court noted the "return to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language . . . ."<sup>2</sup> Even under a narrow construction of that statute and based on long-standing precedent, however, a berm falls within the highway exception.

The grassy area between the sidewalk and the street, referred to as a berm in this case, has long been considered a natural route of travel. In the early twentieth century, the Michigan Supreme Court found that:

In going upon the ornamental grass plat, between the sidewalk and the curb line, plaintiff was not a trespasser. That ground is as much a part of the

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<sup>1</sup> *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000).

<sup>2</sup> *Id.* at 150.

street as any other ground within its limits, and no citizen could be guilty of trespass in going upon it or over it.<sup>[3]</sup>

Twenty years later, the Court again recognized that pedestrians have a right to be on a city berm and specifically indicated that a municipality has a statutory duty to maintain and repair that area.<sup>4</sup> In *Jablonski v Bay City*, the Court found that it was in the municipality's discretion to divide a highway into portions "devoted to the various purposes of travel . . . ."<sup>5</sup>

But the city cannot lawfully, by the mere provision of suitable passageways for pedestrians, maintain dangerous and unreasonable obstructions or conditions in the street at places where people may reasonably be expected to go. It has the duty, in a well-traveled district, to keep the whole highway reasonably safe for travel. It cannot confine its citizens in a traffic groove. It must take into account the natural inclination of children to run about in play and the perverse insistence of adults to cut corners and cross streets and grass plats instead of following precisely the beaten or provided path. Such departure from the sidewalk is not negligence per se in the individual, nor does it relieve the city of the duty to keep its streets in proper condition for travel at the places where people may reasonably be expected probably to walk.<sup>[6]</sup>

More recently, this Court determined that a berm is a part of a highway for purposes of the highway exception. In *Messecar v Garden City*,<sup>7</sup> upon which plaintiff relies, an elderly man was fatally injured while attempting to step from the berm onto a sidewalk which was six to eight inches higher.<sup>8</sup> In affirming the judgment in the plaintiff's favor, this Court held that "[t]he defective highway exception extends to berms."<sup>9</sup> In *Ali v Detroit*,<sup>10</sup> upon which the trial court relied, this Court agreed with the defendant city that an injury caused by a bus shelter affixed to a sidewalk or berm did not fall within a narrow construction of the highway exception to

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<sup>3</sup> *Johnson v Bay City*, 164 Mich 251, 256; 129 NW 29 (1910). That case involved a municipality's negligent placement and maintenance of overhead electric lines on a city berm rather than a municipality's statutory duty to maintain the highway in a reasonably safe condition fit for public travel. *Id.*

<sup>4</sup> *Jablonski v Bay City*, 248 Mich 306, 309-310; 226 NW 865 (1929).

<sup>5</sup> *Id.* at 309.

<sup>6</sup> *Id.* at 309-310, citing *Finch v Village of Bangor*, 133 Mich 149; 94 NW 738 (1903); *Baker v Grand Rapids*, 111 Mich 447; 69 NW 740 (1897); *Lincoln v Detroit*, 101 Mich 245; 59 NW 617 (1894). See also *Rufner v Traverse City*, 296 Mich 204, 210-211; 295 NW 620 (1941).

<sup>7</sup> *Messecar v Garden City*, 172 Mich App 519; 432 NW2d 311 (1988).

<sup>8</sup> *Id.* at 521.

<sup>9</sup> *Id.* at 522, citing *Michonski v Detroit*, 162 Mich App 485, 494-495; 413 NW2d 438 (1987).

<sup>10</sup> *Ali v Detroit*, 218 Mich App 581; 554 NW2d 384 (1996).

governmental immunity.<sup>11</sup> However, this Court did find, relying on *Messecar*, that a berm "can be considered a natural extension of the sidewalk."<sup>12</sup> Accordingly, a berm is part of the highway, even under a narrow construction of the exception. The principles stated within *Messecar* and *Ali* are based on a long history of Michigan Supreme Court case law which should not be cast aside so easily.

Those cases finding that a berm is part of the highway have not been overruled. The previous cases indicate that a berm is part of the highway on which people *actually travel*. This distinguishes a berm from a street light or a traffic control device. Furthermore, it would be illogical to find that a city has a duty to repair and maintain a city-controlled sidewalk and a city-controlled street, but not a small strip of city-controlled land falling in between. This strip of land has long been considered a part of the street, a natural extension of the sidewalk, and a common place for pedestrians to stray. Defendant, therefore, cannot avoid its duty to maintain and repair the berm as part of the highway. Accordingly, I would affirm.

I also must disagree with the majority's description of the issue before the recently convened conflict panel in *Johnson-McIntosh v Detroit*.<sup>13</sup> The issue before the conflict panel is whether a municipality is excepted from immunity with respect to injuries resulting from defective traffic control signals placed outside the improved portion of a county highway within the municipality pursuant to MCL 691.1402(1) and MCL 691.1402a.

/s/ Jessica R. Cooper

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<sup>11</sup> *Id.* at 588.

<sup>12</sup> *Id.* at 589.

<sup>13</sup> *Johnson-McIntosh v Detroit*, 261 Mich App 801 (2004).