STATE OF MICHIGAN

COURT OF APPEALS

DENISE JOHNSON-MCINTOSH and ALVIN MCINTOSH, as Next Friends of DAESHA JOHNSON, a MINOR,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant-Appellant,

and

TOMMY NATHAN MCGEE, JR., and TOMMY NATHAN MCGEE III,

Defendants.

FOR PUBLICATION
May 5, 2005
9:25 a.m.

No. 244349
Wayne Circuit Court
LC No. 01-124542-NZ

Official Reported Version

Before: Owens, P.J., and Saad, Bandstra, Smolenski, Meter, Donofrio, and Fort Hood, JJ.

DONOFRIO, J.

Pursuant to MCR 7.215(J), this Court convened a special panel to resolve the conflict between the prior opinion in this case[1] and *Marchyok v Ann Arbor*, 260 Mich App 684; 679 NW2d 703 (2004). These cases involve the interpretation of MCL 691.1402(1), the highway exception to governmental immunity, and MCL 691.1402a, which concerns a municipality's duty with regard to county highways. In *Marchyok, supra* at 691, the Court found that a municipality is immune from liability under the highway exception for injuries caused by defective traffic control devices. The original *Johnson-McIntosh* panel followed the *Marchyok* panel's holding and reversed the trial court, but only because it was required to do so pursuant to MCR 7.215(J). Because no basis currently exists in Michigan law for the proposition that a governmental entity, including a municipality, is subject to liability for the failure to repair and maintain traffic control

[1] The opinion in this case was vacated pursuant to MCR 7.215(J)(5) in the order convening this special panel. *Johnson-McIntosh v Detroit*, 261 Mich App 801 (2004).

devices, we adopt the holding in *Marchyok* and reverse the trial court, as the initial *Johnson-McIntosh* panel concluded.

I. Substantive Facts and Procedure

We adopt the facts and procedural history of the case as set out in *Johnson-McIntosh, supra* at 801-802:

> 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]
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> 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.
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> This Court subsequently rendered its opinion in *Weaver*,[2] 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,[3] 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.

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[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.

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[2] *Weaver v Detroit*, 252 Mich App 239; 651 NW2d 482 (2002).

[3] Defendant's motion for summary disposition was brought pursuant to both MCR 2.116(C)(7) and MCR 2.116(C)(8).

[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.

[Emphasis in original.]

II. Standard of Review

"We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) to determine if the moving party was entitled to judgment as a matter of law." *McDowell v Detroit*, 264 Mich App 337, 346; 690 NW2d 513 (2004). "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."'" *Id.*, at 345, quoting *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998); see also MCR 2.116(G)(5).

"This Court reviews de novo a trial court's decision to grant summary disposition under MCR 2.116(C)(8)." *McDowell, supra* at 354, citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "MCR 2.116(C)(8) tests the legal sufficiency of the pleadings standing alone." *McDowell, supra* at 354, citing *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). '"The motion must be granted if no factual development could justify the plaintiff's claim for relief."' *McDowell, supra* at 354-355, quoting *Spiek, supra* at 337; see also *Maiden, supra* at 119.

III. Analysis

Absent an exception, a governmental agency is immune from tort liability if the agency was engaged in a governmental function. MCL 691.1407(1); *Maskery, supra* at 613. The highway exception to governmental immunity, MCL 691.1402(1), 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, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

Section 2a, MCL 691.1402a, provides limited immunity for a municipality with regard to the portions of county highways not designed for vehicular travel that fall within its borders. Specifically, MCL 691.1402a(1) provides:

> 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.

The definition of "highway" for purposes of this statute is found in MCL 691.1401(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.

In *Chaney v Dep't of Transportation*, 447 Mich 145, 158; 523 NW2d 762 (1994) (opinion of Brickley, J.), our Supreme Court stated that "the improved portion of a highway designed for vehicular travel" included installations physically located within the roadbed and those installations physically located outside the roadbed "that directly and integrally affect safe vehicular travel on this improved portion." The Supreme Court noted that its decision was consistent with "clear" precedent. *Id.*, citing *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990), and *Roy v Dep't of Transportation*, 428 Mich 330; 408 NW2d 783 (1987).

Two years later, the Supreme Court returned to the "still-unsettled issue of the highway exception . . . ." *Pick v Szymczak*, 451 Mich 607, 610; 548 NW2d 603 (1996). In determining that county road commissions have a duty to erect traffic signs to ensure that the portion of the road designed for vehicular travel remains reasonably safe, the Supreme Court noted that it was properly interpreting the statute in light of "our undeniably fractured case law precedents . . . ." *Id.* at 621-622, 624.

In *Nawrocki*, our Supreme Court held that traffic control devices are not included in the definition of "highway" provided in MCL 691.1401(e), and therefore do not fall within the highway exception provided in MCL 691.1402(1). The Supreme Court stated that it had a duty to narrowly construe exceptions to the broad grant of governmental immunity provided in the statute. *Nawrocki, supra* at 175. While discussing the highway exception, our Supreme Court counseled that the statutory definition of "highway" does not include conditions that may arise from hazards or special dangers that integrally affect the highway, but are outside the portion

actually designed for vehicular travel. *Id.* at 176-177. And it further stated that the statute does not impose a duty to install, maintain, repair, or improve traffic control devices. *Id*, at 180, 184. As a result, the *Nawrocki* Court expressly overruled *Pick* and held that the plain language of the highway exception includes only the "'traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.'" *Nawrocki*, *supra* at 180, quoting *Scheurman v Dep't of Transportation*, 434 Mich 619, 631; 456 NW2d 66 (1990). Furthermore, in a footnote addressing the dissent, the *Nawrocki* Court stated:

> The dissent contends that "[t]he plain meaning of the words 'improved portion of the highway designed for vehicular travel' connotes a broader concept than just the surface of the road, itself." [463 Mich at 188 (Kelly, J. dissenting).] We are convinced, however, that quite the opposite is true; while the term "highway" may be broad and potentially ambiguous, the phrase "improved portion" clearly narrows the term "highway" to its physical structure, and the phrase "designed for vehicular travel" further narrows "highway" to the physical roadbed itself. *Thus, the dissent is simply wrong, in our judgment, when it states that the language of the highway exception "leaves uncertain whether the space above the highway containing traffic lights is included*." [463 Mich at 189.] [*Nawrocki*, *supra* at 175 n 30 (emphasis added).]

Hence, construed narrowly, the phrase "improved portion" limits the meaning of "highway" to the physical structure of the highway, and the phrase "designed for vehicular travel" further limits the meaning to the physical roadbed alone. *Id.*

In *Nawrocki*, our Supreme Court was "convinced that *Pick* . . . contradicts the plain language of the highway exception." *Id.* at 183. Although *Nawrocki* involved a county road commission, the Supreme Court stated, in apparent dicta, that municipalities would also be immune from tort liability for defective traffic signals because traffic signals did not fit into the definition of "highway" as used in the statute and, therefore, would not be part of the highway exception. *Id.*, 182 n 37.

This Court also extended the *Nawrocki* decision to municipalities. In *Weaver*, this Court convened a special panel to resolve a conflict between the vacated opinion in that case[4] and *Ridley v Detroit (On Remand)*, 246 Mich App 687; 639 NW2d 258 (2001). The conflict revolved around whether a municipality was liable under the highway exception for negligent maintenance of a streetlight pole. *Weaver*, *supra* at 240. The special panel relied on *Nawrocki* in finding that streetlight poles, like "traffic signals and signs," are not part of the definition of "highway" provided in MCL 691.1401(e) and, therefore, do not fall within the highway exception to governmental immunity. *Weaver*, *supra* at 245.

In *Adams v Dep't of Transportation*, 253 Mich App 431; 655 NW2d 625 (2002), this Court also convened a special panel to resolve the conflict between this Court's vacated opinion

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[4] 249 Mich App 801 (2002).

in that case[5] and *Sekulov v City of Warren*, 251 Mich App 333; 650 NW2d 397 (2002), regarding the issue of the prospective or retrospective effect of *Nawrocki*. The special panel concluded that *Sekulov* was wrongly decided and that, although *Nawrocki* expressly overruled *Pick*, it did not state a new principle of law, so its holding therefore applied retroactively. *Adams, supra* at 440. Significantly, in *Adams*, a power outage caused a traffic signal at an intersection to become disabled. The *Adams* panel approved the trial court's grant of immunity from liability for injuries resulting from the motor vehicle accident caused by the inoperative traffic signal light.

After studying the history of cases addressing the "still-unsettled issue of the highway exception,"[6] and applying the statutory law to the instant issue, we have no other option but to conclude that a municipality is not responsible for failure to maintain a traffic control device, including a traffic signal light, under the prevailing judicial precedent and statutory law. Specifically of interest to us in reaching this conclusion, other than the obvious guidance of *Nawrocki* and its progeny, was our Supreme Court's fragmented set of opinions in *Chaney*, written some ten years ago. While the facts of *Chaney* indicate that the case involved a guardrail, our Supreme Court discussed the state of the law on the issue of governmental immunity, resulting in five concurring opinions and one dissent.

In *Chaney*, a case relied upon by plaintiffs in the instant action, Justice Boyle clearly enunciated in a concurring opinion the argument for holding governmental units liable for failing to repair and maintain traffic signal lights and signs. See *Chaney, supra* at 171-177. Justice Boyle's concurring opinion culminated in the following conclusion: "[B]ecause the Legislature restricted liability without mentioning signs and traffic lights, it is reasonable to infer that it intended that governmental units should be liable for failing to repair and maintain signs and signals." *Id*. at 176. Essentially, Justice Boyle made the argument that plaintiffs would have us adopt in the instant case—that while the highway exception is limited, it should also include those objects in the roadway that affect safe and efficient travel, such as signal lights.

An opinion concurring in part and dissenting in part, written by Justice Riley and concurred with by Justice Griffin, would limit liability to roadbed defects alone. *Chaney, supra* at 163-171. The view of Justices Riley and Griffin was, in effect, the holding of the *Nawrocki* Court.

Justice Brickley's view on the issue was as follows:

> . . . I read the statute as creating liability for an accident that occurs on the improved portion of the highway caused by a condition that affects that improved portion, regardless of the ultimate location of that cause. Hence, this and my prior decisions allow for recovery when, and only when, the occurrence is on the improved portion and is caused by a condition directly affecting vehicular travel

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[5] 251 Mich App 801 (2002).

[6] *Pick, supra* at 610.

> on the improved portion, even though that condition may have been occasioned by an act or an omission outside the improved portion of the highway.
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> As expressed herein, it is my view that this latter interpretation best captures the essence of a statute that provides liability for mishaps occurring on the improved portion of the highway, but which does so without any direct reference to the location of their causality. [*Chaney, supra* at 163 n 7.]

Finally, Chief Justice Cavanagh, while concurring with the majority that immunity applies under the guardrail fact pattern, stated the following regarding his view of the highway exception in general:

> Admittedly, Justice Riley's plain interpretation of the highway exception results in harsh consequences. Her interpretation, however, is defensible because it is in accord with the plain language of the statute and *Ross*'[7] command of broad governmental immunity with narrowly drawn exceptions. Furthermore, Justice Riley's interpretation provides an exact standard, defining not only an injured party's rights but the government's potential liability. None of the other separate opinions satisfies each of these components.
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> Although I find Justices Brickley's and Boyle's interpretations preferable from a policy standpoint, I cannot in good conscience join either opinion. Justice Brickley's interpretation does not provide a standard with which to guide both the bench and bar. The test is vulnerable to endless interpretation, encouraging recurrent appellate litigation. Justice Boyle's interpretation, while more limited in scope, is not supported by the statutory language or post-*Ross* case law. [*Chaney, supra* at 177-178.]

While strong policy considerations make Justice Boyle's approach an attractive one, the developing law in the last decade, both pre- and post-*Nawrocki*, simply does not allow that result today in the instant case. We recognize that Justice Boyle's argument, although to some more palatable, was made and not adopted. Since then, various courts in Michigan have faced the situation again and again, and have left us with a plethora of precedent dealing with the highway exception, seemingly each in its own way expanding the exception while purporting to narrowly construe it at the Legislature's direction. Conscience aside, we are left with little doubt regarding the resolution of this matter and must adopt the *Marchyok* reasoning. If liability is to attach to the municipality, it is a matter for the Legislature and not the judiciary.

In sum, after a comprehensive review of applicable legal precedent, we are required to respect the holding in *Marchyok* that footnote 37 of *Nawrocki*, *supra* at 182, was "'more than mere dicta . . . . '" *Marchyok*, *supra* at 689, quoting *Carr v City of Lansing*, 259 Mich App 376, 384; 674 NW2d 168 (2003). And, as such, we apply *Nawrocki* and *Weaver* and conclude that

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[7] *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984).

defendant has governmental immunity from liability for Johnson's injury caused by the inoperative traffic signal at Pennington and West Seven Mile Road. A governmental agency is immune from tort liability when engaged in a governmental function. MCL 691.1407(1). However, a governmental agency has a duty to maintain the highways under its jurisdiction in reasonable repair to keep the highways reasonably safe and convenient for public travel, and is not immune from tort liability for failing to do so. MCL 691.1402(1). In applying the precedent and statutory law in a logical manner, we conclude that defendant did not fail in its duty to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel because a traffic signal is not part of the highway. The highway exception does not impose a duty on municipalities to install, maintain, repair, or improve traffic signals. See *Nawrocki*, *supra* at 180; *Weaver*, *supra* at 245.

IV. Conclusion

Because plaintiffs' claim does not fall within an exception to governmental immunity, defendant is entitled to summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8).

Reversed and remanded for entry of an order of dismissal. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Karen M. Fort Hood