S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

HELEN YONO,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

FOR PUBLICATION
December 20, 2012

No. 308968
Court of Claims
LC No. 11-000117-MD

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

TALBOT, J (*dissenting*).

I respectfully dissent. I believe that the portion of the road on which Helen Yono was allegedly injured was not in the improved portion of the highway designed for vehicular travel, and thus was not within the highway exception to governmental immunity. "[T]he highway exception [to governmental immunity] creates a duty to maintain only the 'traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.'"[1] In interpreting the highway exception, our Supreme Court rejected the broad definition of "travel" which could include "the shortest incremental movement by a vehicle on an improved surface."[2] The Court reasoned that because "[t]he Legislature modified the phrase 'the improved portion of the highway' with the phrase 'designed for vehicular travel[,]'" it was not intended that the highway exception extend "indiscriminately to every 'improved portion of the highway.'"[3] The Court explained that the distinction was created because the Legislature "believed there are improved portions of highway that are not designed for vehicular travel."[4] The Court cautioned that "[i]f 'travel' [was] broadly construed to include traversing even the smallest distance, then it must follow that every area surrounding the highway that has been improved for highway purposes is 'designed for vehicular travel' since such improved portions could support even momentary

---

[1] *Grimes v Dep't of Transportation*, 475 Mich 75, 79; 715 NW2d 275 (2006) (footnote, quotations and emphasis omitted).

[2] *Id*. at 89, citing *Random House Webster's College Dictionary* (1995).

[3] *Grimes*, 475 Mich at 89.

[4] *Id*.

vehicular 'travel.'"[5] The Court stressed that the concepts of contemplated use and design should not be conflated.[6] Thus, the mere fact that the public uses a portion of highway for vehicular travel does not mean that it is designed for such.[7] Accordingly, the Court held that "only the travel lanes of a highway are subject to the duty of repair and maintenance[,]" and excluded "the shoulder from the scope of the highway exception."[8]

The portion of the road on which Yono was allegedly injured clearly was not designed for vehicular travel. Rather, it was at the edge of the parallel parking lane[9] "abutting the concrete gutter and curb." The lane in which the alleged defect was located was designed for parallel parking as is evidenced by the demarcations on the pavement. While the road may be used to merge between the parking lane and the travel lane or to make a right turn, such use is merely "momentary" and under limited circumstances, when the lane is not occupied by parked vehicles. Similarly, travel in the lane while executing the maneuver of parallel parking requires movement in the lane for merely a short distance. Thus, the lane's limited use for travel does not transform the purpose of its design.[10]

I do not believe that the parallel parking lane at issue was designed to be used, when unoccupied, to travel around stopped or slow vehicles in the travel lane or as a thoroughfare because those contentions are not supported by the record. MCL 257.637, which is cited by the majority, discusses permissible circumstances in which to overtake and pass moving vehicles on the right and states in pertinent part that "[t]he driver of a vehicle shall not overtake and pass another vehicle upon the right by driving off the . . . main-traveled portion of the roadway."[11] Additionally, although drivers may use the parking lane to pass or as a thoroughfare, use does not establish that the lane was designed for such.[12]

In its opinion, the majority notes that it is not persuaded by the Department of Transportation's assertion that the parallel parking lane is not a travel lane because it is not part of the thoroughfare. The majority explained that if a travel lane were defined that way it would

---

[5] *Id*. at 90 (footnote omitted).

[6] *Id*.

[7] *Id*.

[8] *Id*. at 91.

[9] The majority's analysis appears to avoid calling the area where the defect was located a "parallel parking lane" and instead refers to it as "the portion [of the highway] where parallel parking is permitted" seemingly to strengthen its argument. I believe that review of the record demonstrates that the area is accurately described as a parallel parking lane.

[10] *Grimes*, 475 Mich at 90.

[11] MCL 257.637(2).

[12] *Grimes*, 475 Mich at 90.

result in the Department having no duty to maintain various lanes, "parts of lanes," and ramps.[13] The majority's characterization of the Department's argument reveals its failure to comprehend the issue presented on appeal. The Department asserted both in the trial court and before this Court that repair and maintenance of the parallel parking lane is not required because the lane is outside of the travel lane. The Department in no way claims that a travel lane is restricted to a lane that is part of the thoroughfare. In fact, the Department conceded during oral argument that an exit ramp, which is not part of the thoroughfare, has been determined to be a travel lane. That notwithstanding, I agree with the majority that a lane "designed for public vehicular travel" should not be limited to one that is part of the thoroughfare. It is important to note, however, that despite their limited use for travel, the lanes, "parts of lanes," and ramps noted by the majority do not contain markings delineating individual parking spaces, and thus are distinguishable from the designated parking lane at issue in this case.

Moreover, the majority's assertion that the Department is arguing that it does not have a duty to repair and maintain the "buffer zone," which the majority asserts would result in the Department failing to have a duty to repair and maintain "more than half the surface area of the highway at issue," is misplaced. The affidavit of Gary Niemi, a development engineer for the Department, describes the different areas of the roadway including the travel lane, the buffer zone, and the parallel parking lane. Niemi's affidavit states that "[t]he portion of the highway designed for through traffic measures 22 feet wide." Although Niemi concludes that "[t]he parallel parking lane is not designed for vehicular travel," his affidavit makes no such conclusion regarding the "buffer zone." Nor did the Department make such an assertion before the trial court or this Court. Thus, the record fails to support the majority's argument that the Department contends that it does not have a duty to repair and maintain the "buffer zone."

Assuming arguendo that the Department did contend that it does not have a duty to repair and maintain the "buffer zone," the Department's duty regarding the "buffer zone" is wholly irrelevant to the resolution of the issues on appeal as it is not where the defect is located. Instead of discounting the Department's alleged argument regarding the "buffer zone" based on relevancy alone, the majority uses the argument in combination with the Department's alleged assertion that a travel lane must be part of the thoroughfare to come to the illogical conclusion that "the Department's interpretation must mean that any time parking is permitted on a highway, the Department ceases to be responsible for the repair and maintenance for the area outside that used as a thoroughfare." The majority reaches a similar conclusion regarding a residential street allowing on-street parking. To make its finding, the majority ignores the argument actually being made by the Department. The Department contends that in the instant case, the roadway at issue is specifically designated by painted markings for parallel parking, and is not merely a highway or residential street that permits on-street parking without any designation. At oral argument, the Department specifically denied that it was asserting that when

[13] The majority provided the following lanes and ramps as examples of those that are not part of the thoroughfare: left-turn lanes, merge lanes, on and off ramps, right-turn lanes, median u-turn lanes, emergency turnarounds, and "the excess width provided on rural highways to permit drivers to proceed around vehicles that are waiting to turn left."

a residential two-lane street allows on-street parking, the Department fails to have a duty to repair and maintain the roadway.

While the majority appears to be persuaded by the fact that the parking lane at issue is not physically separated from the travel lane "by a median, driveway or other barrier," failure to physically separate the parking lane from the travel lane is not dispositive of whether the lane was designed for vehicular travel.[14] Moreover, there were painted markings on the road indicating that the lane was intended for parking and the parking lane was narrower than the travel lane. As such, the roadway at issue was distinguishable from the remainder of the highway, making it clear that the lane was not designed for vehicular travel.

The majority is attempting to judicially legislate and fashion a general rule regarding the Department's duty related to highways that permit parking, as opposed to applying the facts of this case to the rule that our Supreme Court established in *Grimes*. Therefore, I would reverse the trial court's order denying the Department's motion for summary disposition based on governmental immunity.

/s/ Michael J. Talbot

---

[14] See *Grimes*, 475 Mich at 74, 92.