STATE OF MICHIGAN

COURT OF APPEALS

ADAM REICHERT,

Plaintiff-Appellant,

v

RUSHPA AFZAL,

Defendant,

and

UNIVERSITY OF MICHIGAN BOARD OF REGENTS,

Defendant-Appellee.

UNPUBLISHED
November 19, 2002

No. 233046
Wayne Circuit Court
LC No. 99-901072-NO

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order that granted defendant's[1] motion for relief from a prior order denying defendant's motion for summary disposition and that also granted defendant's motion for summary disposition. We affirm.

Plaintiff, a pedestrian who sustained injuries when he was struck by a vehicle while he was crossing a roadway maintained by defendant, a governmental agency, first argues that the trial court erred by holding that his defective design and construction claims against defendant were not within the highway exception to governmental immunity, MCL 691.1402. In essence, plaintiff argues that the trial court erred in granting defendant summary disposition on that basis.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether governmental immunity applies is a question of law that we also review de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

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[1] Defendant Rushpa Afzal is not a party to this appeal, and thus references to "defendant" in this opinion are to defendant University of Michigan Board of Regents.

Pursuant to MCL 691.1407(1), governmental agencies are granted tort immunity, subject to certain exceptions, when engaged in the exercise or discharge of a governmental function. Relevant to this appeal is the highway exception to governmental immunity, MCL 691.1402(1), which provided in pertinent part at the time of the accident from which this case arises:

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

In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 150, 174-184; 615 NW2d 702 (2000), our Supreme Court expressly overruled *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), and "return[ed] to a narrow construction of the highway exception" to governmental immunity.[2] The Supreme Court held that "the highway exception applies when a plaintiff's injury is proximately caused by a dangerous or defective condition of the improved portion of the highway designed for vehicular travel." *Nawrocki*, *supra* at 151. With regard to improper traffic control device claims, the *Nawrocki* Court held that the highway exception does not extend to traffic control devices and signage. *Nawrocki*, *supra*, at 151-152, 183-184. More recently, our Supreme Court similarly held in *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502, 503; 638 NW2d 396 (2002), that "the road commission's duty under the highway exception does not include a duty to design, or to correct defects arising from the original design or construction of highways," and further stated that "[t]he plain language of the highway exception to governmental immunity provides that the road commission has a duty to repair and maintain, not a duty to design or redesign."

Here, plaintiff's complaint alleges that the roadway "was not reasonably safe and fit for public travel by way of design, construction, or maintenance" because there were inadequate traffic control devices and warning signs and systems for motorists, inadequate means for controlling the speed of traffic, inadequate warnings and instructions to motorists and pedestrians and inadequate crosswalks for pedestrians. On appeal, plaintiff contends that the *Nawrocki* Court did not intend to eliminate all design and construction defect claims creating dangerous conditions in the roadway. Contrary to plaintiff's argument, we find that because plaintiff's claims allege defects in design, construction and signage, they do not meet the narrow constraints

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[2] The *Nawrocki* decision is applicable to cases brought both before and after the most recent statutory enactment. *Nawrocki, supra* at 157, n 15.

of the highway exception to governmental immunity. *Nawrocki, supra; Hanson, supra*. The trial court properly granted summary disposition in favor of defendant.[3]

Plaintiff also argues that the holdings in *Nawrocki, supra*, and *Hanson, supra*, should receive prospective application only. This issue is controlled by the recent decision by a conflict panel of this Court in *Adams v Dep't of State*, ___ Mich App ___; ___ NW2d ___ (2002), (Docket No. 230268, issued October 11, 2002), which held that *Nawrocki* is to be applied retroactively, and thus plaintiff's argument is without merit. For similar reasons, it is apparent that *Hanson* was not meant to be applied only prospectively.

Next, plaintiff claims that MCR 2.612(C)(1)(f) was not a proper vehicle to use in order to set aside the trial court's earlier order denying summary disposition. Pursuant to MCR 2.612(C)(1)(f), relief from judgment may be granted for any reason justifying relief from the operation of the judgment. *Id.*; *Driver v Hanley* (A*fter Remand*), 226 Mich App 558, 564; 575 NW2d 31 (1997). Even if MCR 2.612(C)(1)(f) were not a proper vehicle for attempting to set aside the trial court's earlier order denying summary disposition, plaintiff is entitled to no relief. Any error was harmless because summary disposition was proper and such result is not inconsistent with substantial justice. MCR 2.613(A). We note that defendant submitted its motion for summary disposition before *Nawrocki* was decided and the trial court entered the order denying the motion only three days after *Nawrocki* was released. We presume that had the trial court been cognizant of the *Nawrocki* decision at the time of its original ruling, it would have granted summary disposition at that point.

Finally, for the limited purpose of preserving an objection, plaintiff argues that *Nawrocki, supra*, was not correctly decided. Specifically, plaintiff contends that the Court ignored the Legislature's implied adoption of the *Pick* decision. Plaintiff's objection is noted, but under stare decisis, this Court is bound to follow the decisions of the Supreme Court. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra

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[3] Summary disposition is properly granted under MCR 2.116(C)(7) where a claim is barred by immunity granted by law. *Brown v Genesee Co Bd of Comm'rs*, 464 Mich 430, 433; 628 NW2d 471 (2001).