

STATE OF MICHIGAN
COURT OF APPEALS

DAVID HENDERSON and MARY
LIBERADZKI,

Plaintiffs-Appellants,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
December 27, 2002

No. 235415
Court of Claims
LC No. 2000-017681

DAVID HENDERSON and MARY
LIBERADZKI,

Plaintiffs-Appellants,

v

DAVID PHILIPS MASON,

Defendant-Appellee,

and

DEPARTMENT OF TRANSPORTATION,

Defendant.

No. 235445
Wayne Circuit Court
LC No. 00-020903-NI

Before: Hood, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order dismissing their claim under the highway exception to governmental immunity, MCL 691.1402(1), against defendant Michigan Department of Transportation (“defendant”). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs first argue that the Michigan Supreme Court opinion in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), should not be applied retroactively to this case

to bar plaintiffs' theories of liability predicated on defendant's alleged negligence related to the operation of a traffic light and the presence of a utility pole in the median of a street. However, after the filing of plaintiffs' brief, a special panel of this Court held that "*Nawrocki* must be given full retroactive effect." *Adams v Dep't of Transportation*, ___ Mich App ___; ___ NW2d ___ (Docket No. 230268, issued October 11, 2002), slip op, p 5. Thus, we must apply *Nawrocki* to this case. See MCR 7.215(I)(6) (special panel decision "is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court"). As plaintiffs forthrightly acknowledge, *Nawrocki* precludes the imposition of liability on defendant under the highway exception based on the traffic light and utility pole because these objects are not part of the actual roadway designed for vehicular travel. *Nawrocki, supra* at 184.

Plaintiffs similarly argue that the holding in *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502; 638 NW2d 396 (2002), that the highway exception to governmental immunity does not include a duty to design or correct defects arising from an original design should not be applied retroactively to bar their theory that the intersection pertinent to this case was negligently designed. However, the Michigan Supreme Court in *Hanson* stated that it emphasized in *Nawrocki* that "the only permissible claims [under the highway exception] are those arising from a defect in the actual roadbed itself." *Hanson, supra* at 503. Further, the Court expressed agreement with the Court of Appeals decision in *Hanson* that *Nawrocki* made clear that defective design claims are not within the scope of the highway exception. *Hanson, supra* at 500-502. Thus, *Hanson* must be viewed as simply an application of *Nawrocki* and, accordingly, *Hanson* falls within the scope of the holding in *Adams* that *Nawrocki* must be given full retroactive effect. Thus, plaintiffs cannot prevail on their highway exception claim under a design defect theory. In sum, the trial court correctly dismissed plaintiff's highway exception claim against defendant because *Nawrocki* and *Hanson* must be given full retroactive effect.

Affirmed.

/s/ Harold Hood

/s/ Michael R. Smolenski

/s/ Kirsten Frank Kelly