STATE OF MICHIGAN

COURT OF APPEALS

BETH E. WOLFE, Personal Representative of the Estate of CHRISTINA ANN WOLFE, Deceased,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED
July 1, 2004

No. 245546
Court of Claims
LC No. 02-000013-MD

GILBERT MILES, Personal Representative of the Estate of LINDSAY ANN MILES, Deceased,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

No. 245547
Court of Claims
LC No. 02-000010-MD

JERRY LAMBERT,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

No. 245548
Court of Claims
LC No. 02-000012-MD

JOSHUA CLARK MCCREARY,

Plaintiff-Appellee,

No. 245549

v

Court of Claims
LC No. 02-000011-MD

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals as of right the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(7). See MCR 7.202(7)(a)(v); MCR 7.203(A). We reverse.

I. Material Facts and Proceedings

On the evening of July 10, 2001, Lindsey Ann Miles was driving southbound on M-24 in Lapeer County with her passengers, Christina Ann Wolfe, Jerry Lambert, and Joshua Clark McCreary. As Miles drove the car under the I-69 overpass, the car struck the bridge pier supporting the overpass located between the northbound and southbound lanes. As a result, Miles and Wolfe were killed, and Lambert and McCreary were injured.

Approximately 1,250 feet north of the bridge pier, the center lane consists of a twelve-foot-wide "median," with two four-foot-wide valley gutters on either side of a four-foot-wide "median" that is slightly raised. The raised portion of the median has corrugated rumble strips beginning two-hundred feet before the bridge pier, which are designed to "audibly alert motorists using the median lane as they approach the north pier." Additionally, there is a seventy-five-foot gap in the median approximately 530 feet north of the bridge pier that allows traffic exiting from I-69 to cross the center lane and enter southbound M-24. Between this gap and the bridge pier, a solid yellow line separates the left edge of the southbound lane from the median.

Prior to the incident in this case, the bridge pier was guarded by a crash attenuator system or "crash cushion," which was designed to prevent oncoming traffic from colliding with the bridge pier. However, the crash attenuator system was damaged following two separate accidents. After the second accident (which occurred on March 31, 2001), the crash attenuator system was removed and six construction barrels with yellow warning lights were put in its place. As of July 10, 2001, the crash attenuator system had not been replaced.

Plaintiffs each filed a three-count complaint alleging negligence, gross negligence, and nuisance against defendant for failing to replace the crash attenuator system and allowing the bridge pier to remain unguarded. Defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that the crash attenuator system was an "off-road facility" on a portion of the highway that was not designed for vehicular travel, and that plaintiffs' claims did not, therefore, fall within the highway exception to governmental immunity.

Following a hearing on defendant's motion, the trial court ruled that

> the center lane serves as a travel lane, left turn land [sic] and taper lane primarily for vehicles merging into southbound traffic. The center lane extends north into the City of Lapeer and is part of the improved roadway. It is the opinion of this Court that if the center lane was not to be used as a traveling lane, then, MDOT should have taken appropriate measures to insure its non-use as a travel lane.

The court further noted that defendant was statutorily obligated to maintain on-road installations within the improved portion of the highway in reasonable repair, and concluded that it could not determine (in the context of a motion for summary disposition) whether defendant breached this duty. The trial court subsequently denied defendant's motion for summary disposition.

II. Standard of Review

This Court reviews a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Regarding motions brought pursuant to MCR 2.116(C)(7),[1] this Court has explained:

> In analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). If a party supports a motion under MCR 2.116(C)(7) by submitting affidavits, depositions, admissions, or other documentary evidence, those materials must be considered. MCR 2.116(G)(5); *Maiden*, *supra*. The substance or content of the supporting materials must be admissible into evidence. *Id*. [*Pusakulich v Ironwood*, 247 Mich App 80, 82-83; 635 NW2d 323 (2001).]

Additionally, this Court reviews de novo issues of statutory interpretation. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 297; 638 NW2d 396 (2002).

III. Analysis

Defendant argues that the trial court erred in denying its motion for summary disposition because the highway exception to governmental immunity does not apply in this case. Specifically, defendant contends that the highway exception to governmental immunity limits liability to defects in the improved portion of the highway designed for vehicular travel and that the site of the accident was not designed for vehicular travel. We agree.

This case involves an issue of statutory interpretation. The primary goal of interpreting statutes is to discern and give effect to the intent of the Legislature as expressed by the language contained in the statute. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705

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[1] We need not consider whether the trial court improperly denied defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) because summary disposition was proper pursuant to MCR 2.116(C)(7) based on governmental immunity.

(2003). "If the language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.'" *Id*. (citation omitted).

"Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000). Pursuant to the governmental tort liability act, MCL 691.1401 *et seq*., governmental immunity extends to all governmental agencies for all tort liability when they are engaged in the exercise or discharge of a governmental function. *Id*. at 156.[2] Yet, there are five exceptions to governmental immunity, including the highway exception, MCL 691.1402, which is at issue in this case. *Id*. The immunity conferred upon governmental agencies is broad, and the statutory exceptions to that immunity are to be narrowly construed. *Id*. at 158.

The highway exception to governmental immunity provides, in relevant part:

> 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 damages 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 the improved portion of the highway designed for vehicular travel*. . . . [MCL 691.1402(1) (emphasis added).]

In *Nawrocki, supra*, the Michigan 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." *Id*. at 151. The Court further clarified in the companion case, *Evens v Shiawassee Co Rd Comm'rs*, that the duty under the highway exception

> does not extend to the installation, maintenance, repair, or improvement of traffic control devices, including traffic signs, but rather is limited exclusively to dangerous or defective conditions *within the improved portion of the highway designed for vehicular travel; that is, the actual roadbed, paved or unpaved, designed for vehicular travel*. [*Id*. at 151-152 (emphasis added).]

In *Nawrocki*, the Court explained that "[t]he fourth sentence of the statutory clause, specifically applicable to the state and county road commissions, proceeds to narrowly limit the

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[2] There is no issue raised regarding whether defendant was engaged in a governmental function.

general duty to repair and maintain . . . 'only to the improved portion of the highway designed for vehicular travel.'" *Id.* at 161. The Court stated, "We believe the plain language of this sentence definitively limits the state and county road commissions' duty with respect to the *location* of the alleged dangerous condition; if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach." *Id.* at 161-162 (emphasis in original). The Court again expressed:

> While we agree with *Pick*[*v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), overruled by *Nawrocki*, *supra*] that the first sentence of the statutory clause establishes a general duty to repair and maintain highways so that they are reasonably safe and convenient for public travel, this duty, with regard to the state and county road commissions, is significantly limited, extending "*only* to the improved portion of the highway *designed for vehicular travel*." [*Nawrocki*, *supra* at 176 (emphasis in original).]

The *Nawrocki* Court concluded:

> Because we are persuaded that the state and county road commissions' duty, imposed by the highway exception clause, is only to repair and maintain "the improved portion of the highway designed for vehicular travel," . . . we hold that the actual language of this statutory clause sets forth an exception that *encompasses only the "traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel*." [*Id.* (citation omitted; emphasis added); see also *McIntosh v Dep't of Transportation (On Remand)*, 244 Mich App 705, 709-710; 625 NW2d 123 (2001).]

Pursuant to the language of the statute and the principles established in *Nawrocki*, we find that the trial court erred in denying defendant's motion for summary disposition. Regardless of whether the crash attenuator system was missing, the actual location of the accident, the bridge pier, was not a defective condition within the improved portion of the highway *designed for vehicular travel*. Clearly, neither a bridge pier nor a crash attenuator system is designed for vehicular travel, as they are not part of the "traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel." See *Nawrocki*, *supra*. The bridge pier itself is certainly not designed for public vehicular travel as it can only prevent vehicular travel, and the crash attenuator system, if in place, would also, by design, prevent vehicular travel. As plaintiffs state in their brief on appeal, the original highway specifications and construction plans "required the permanent installation of crash cushions on the north and south sides of the abutment *to prevent direct impacts* from oncoming traffic." Plaintiffs also state in their brief on appeal that the crash attenuators "were permanently installed into the roadbed surface *to close off* the center median lane." (Emphasis added.) In other words, because a cement pier is located at this particular point, this area of the improved portion of the highway was not intended for vehicular travel. Instead, it was designed to support the bridge overpass. Because the accident occurred at the bridge pier (and not the traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel), it did not come within the highway exception and thus defendant was immune from liability.

Further, MCL 691.1402(1) mandates that installations outside the improved portion of the highway designed for vehicular travel are not to be included in the exception to governmental

immunity. "The duty of the state and the county road commissions to repair and maintain highways...does not include...any other installation outside the improved portion of the highway designed for vehicular travel." MCL 691.1402(1). Since the supporting piers and crash attenuator are installations outside that portion of the highway designed for vehicular travel, plaintiffs' claims do not come within the highway exception.

Plaintiffs argue that governmental immunity does not apply in this case because the location of the defect was in the median or center lane designed and marked as a lane of travel, and because the center lane is and was used for vehicular travel on a daily basis. We address that issue keeping in mind that the exceptions to governmental immunity are to be narrowly construed while the governmental immunity itself is very broad in nature.

As previously stated, the location of the accident was not the median preceding the bridge pier, but rather the bridge pier itself; hence, the fact that vehicles drive on the median is of no consequence to this case. *Nawrocki, supra* at 171. However, even if we were to conclude that the median preceding the bridge pier constituted the "location" of the accident, the median[3] was

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[3] We have previously held that grassy medians separating north and southbound lanes or westbound and eastbound lanes are not within the highway exception. See *McIntosh v Dep't of Transportation (On Remand)*, 244 Mich App 705, 709-710; 625 NW2d 123 (2001); *Fogarty v Dep't of Transportation*, 200 Mich App 572, 573; 504 NW2d 710 (1993); see also *Collucelli v Wayne Co*, 196 Mich App 387, 389; 493 NW2d 439 (1993). Although the median in this case is paved, the critical issue is if the bridge pier area was designed for vehicular travel.

[3] MCL 257.644 provides:

> (1) When a highway has been divided into 2 roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section constructed to impede vehicular traffic, a vehicle shall be driven only upon the right-hand roadway and a vehicle shall not park or be driven over, across, or within the dividing space, barrier, or section, except through an opening in the physical barrier, dividing section, or space or at a crossover or intersection established by public authority. Crossovers on limited access highways shall not be used except by vehicles described in section 603, road service vehicles while going to or returning from servicing a disabled vehicle, and as otherwise permitted by authorized signs. . . .
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> (2) A person who violates this section is responsible for a civil infraction.

[3] Plaintiffs also rely on *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990), and argue that the Supreme Court rejected the argument that defects are not actionable unless they are located between the "solid yellow lines demarcating the principal traffic lanes." However, in *Gregg*, the Court was faced with the issue of whether the inner portion of a shoulder (demarcated by a solid white line) adjacent to the highway was part of the improved portion of the highway designed for vehicular travel. *Id*. at 317. The instant case is easily distinguishable because we are not dealing with a paved shoulder, which the Court indicated was "part of the improved portion of the highway designed for vehicular travel," but rather, a median. Here, we are faced
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not part of the roadbed designed for vehicular travel. The term "designed" means "made or done by design; intended; planned." *Random House College Dictionary* (1988). Pursuant to MCL 257.644,[4] when a highway is divided into two roadways by an intervening space, as in this case, vehicles "shall be driven only upon the right-hand roadway." Additionally, this statute provides that "a vehicle shall not . . . be driven over, across or within the dividing space, barrier, or section . . ."

Here, the evidence demonstrates that between the seventy-five-foot gap in the median and the bridge pier, a solid yellow line separates the left edge of the southbound lane from the median. Further, the twelve-foot-wide "median" consists of two four-foot-wide valley gutters on either side of a four-foot-wide median that is slight raised with corrugated rumble strips beginning two-hundred feet before the bridge pier. According to Mark Bott of MDOT, solid lines are restrictive in character, and solid yellow lines delineate the separation of traffic flows in opposing directions and/or mark the left edge of the pavement of divided highways and one-way roads. Additionally, William Taylor, a civil engineer, stated that yellow lines mark the left edge of the pavement, and this in combination with the corrugated rumble strips indicates that the median is not designed or intended for vehicular travel. Further, James Valenta, a licensed professional engineer, indicated that a solid yellow line demonstrates that vehicular travel is prohibited beyond that line, and that the paved median (consisting of the valley gutter and rumble strips) was installed to warn vehicles that they are traveling on an area not so intended. Thus, the design of the M-24 median (i.e., the combination of the solid yellow lines, the placement of the rumble strips, and the bridge pier) in conjunction with the statutory provision (prohibiting vehicles from driving across, over, or through the intervening space) demonstrate

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with the much different question of whether a median, set off by solid yellow lines and corrugated rumble strips was designed for vehicular travel, which it clearly is not. It is of further significance that in *Gregg*, the Court focused on whether the shoulder was part of the improved portion of the "highway," *id*. at 315-316, whereas the *Nawrocki* Court made it clear that a governmental agency's duty "is limited exclusively to dangerous or defective conditions within the *actual roadway*, paved or unpaved, designed for vehicular travel," *Nawrocki*, *supra* at 184.

[4] MCL 257.644 provides:

> (1) When a highway has been divided into 2 roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section constructed to impede vehicular traffic, a vehicle shall be drive only upon the right-hand roadway and a vehicle shall not park or be driven over, across, or within the dividing space, barrier, or section, except through an opening in the physical barrier, dividing section, or space or at a crossover or intersection established by public authority. Crossovers on limited access highways shall not be used except by vehicles described in section 603, road service vehicles while going to or returning from servicing a disabled vehicle, and as otherwise permitted by authorized signs. . . .
>
> (2) A person who violates this section is responsible for a civil infraction.

that the "median" was not designed for vehicular travel, but was designed to prevent drivers from traveling on that area.[5]

Contrary to the dissent, we believe that in determining whether the pier and attenuator were designed for vehicular travel, we must focus on the design of the highway (i.e. the markings on, and construction of, the road bed) and state law (MCL 257.644). We do not believe the actions of errant drivers establish whether a portion of a highway was designed for vehicular travel.

In further support of their position, believe plaintiffs rely on *Hanson*, *supra*,[6] and argue that defendant has a duty to maintain "what has already been built in a state of reasonable repair so as to be reasonably safe and fit for public vehicular travel." The *Hanson* Court, in addressing a governmental agency's duty regarding the design of the highway system under the highway exception to governmental immunity, held that the highway exception provides for a duty to repair and maintain and not a duty to design or redesign. *Id*. at 503. The Court again emphasized that the plain language of the statute provides a limited exemption from governmental immunity and "imposes on the state and county road commissions a narrow duty to '*repair and maintain* . . . the improved portion of the highway designed for vehicular travel. . . .'" *Hanson*, *supra* at 501 (emphasis in original). Plaintiffs contend that the *Hanson* Court clearly delineated the evidentiary burden imposed upon a plaintiff pleading a claim under the highway exception to governmental immunity. See *id*., *supra* at 503-504 n 8. However, that same footnote once again stresses the *Nawrocki* definition of the duty imposed on governmental agencies by the highway exception:

> In *Nawrocki*, we stated that the duty imposed upon state and county road commissions to "repair and maintain . . . the improved portion of the highway

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[5] The fact that drivers utilize this median when merging onto M-24 does not establish that this area was designed for vehicular traffic. The proper focus is on what MDOT designed the roadway for, not how errant drivers utilize the roadway.

[6] Plaintiffs also rely on *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990), and argue that the Supreme Court rejected the argument that defects are not actionable unless they are located between the "solid yellow lines demarcating the principal traffic lanes." However, in *Gregg*, the Court was faced with the issue of whether the inner portion of a shoulder (demarcated by a solid white line) adjacent to the highway was part of the improved portion of the highway designed for vehicular travel. *Id*. at 317. The instant case is easily distinguishable because we are not dealing with a paved shoulder, which the Court indicated was "part of the improved portion of the highway designed for vehicular travel," but rather, a median. Here, we are faced with the much different question of whether a median, set off by solid yellow lines and corrugated rumble strips, was designed for vehicular travel, which it clearly is not. It is of further significance that in *Gregg*, the Court focused on whether the shoulder was part of the improved portion of the "highway," *id*. at 315-316, whereas the *Nawrocki* Court made it clear that a governmental agency's duty "is limited exclusively to dangerous or defective conditions within the *actual roadway*, paved or unpaved, designed for vehicular travel," *Nawrocki*, *supra* at 184.

> designed for vehicular travel" is implicated only when the alleged "*defect*," or "dangerous or defective *condition*," is located within the actual roadbed itself. . . . [*Hanson, supra* at 503 n 8.]

The *Hanson* Court clarified that the usage of the terms "defect" and "dangerous or defective condition" do not expand the statutory duty, but merely describe the general conditions that trigger the duty to "repair and maintain." *Id*. However, as the Court made it clear, the duty under the highway exception is limited to those defects or dangerous conditions that are located "within the actual roadbed itself." *Hanson, supra* at 503 n 8. Therefore, as the bridge pier was not part of the actual roadbed designed for vehicular travel, plaintiffs' claims are barred by governmental immunity.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio