

STATE OF MICHIGAN  
COURT OF APPEALS

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STEVEN PRICE,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

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UNPUBLISHED  
December 5, 2006

No. 257577  
Court of Claims  
LC No. 01-018063-MT

ON REMAND

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right<sup>1</sup> an order denying its motion for summary disposition on the ground of governmental immunity. We reverse and remand for entry of an order granting summary disposition in favor of defendant.

Plaintiff sustained injuries while riding his bicycle on a bridge on M-68. Plaintiff alleged that he was struck by an automobile when he had to swerve into its path to avoid a 1 3/8 to 3 inch deep drain hole on the bridge in an area between the fog line and the curb.

We review de novo a trial court's decision on a motion for summary disposition. *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 144; 687 NW2d 380 (2004) aff'd 474 Mich 161 (2006). MCR 2.116(C)(7) tests whether a claim is barred because of governmental immunity, and requires consideration of all documentary evidence filed or submitted by the parties. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In determining whether a party is entitled to judgment as a matter of law under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor. *Wilson, supra* at 145. Additionally, we review de novo as a question of law the trial court's decision regarding the applicability of the highway exception to governmental immunity. *Stevenson v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004).

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<sup>1</sup> This case comes to us on remand from our Supreme Court. *Price v Dep't of Transportation*, unpublished order of the Supreme Court, entered October 4, 2006 (Docket No. 130699). In lieu of granting leave to appeal, our Supreme Court vacated the January 31, 2006 opinion of this Court and remanded for reconsideration in light of its decision in *Grimes v Dep't of Transportation*, 475 Mich 72; 715 NW2d 275 (2006).

Under the highway exception to governmental immunity, “[t]he 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. . . .” MCL 691.1402(1). Stated another way, the duty “is limited exclusively to dangerous or defective conditions within the actual roadway, paved or unpaved, designed for vehicular travel.” *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 184; 615 NW2d 702 (2000).

Defendant argues that the trial court erred in denying its motion for summary disposition because it was entitled to governmental immunity. Specifically, defendant argues that the area where the drain hole was located was the shoulder of the road, and that the shoulder fell outside the scope of the highway exception because it was not an improved portion of the highway designed for vehicular travel. MCL 691.1402(1). This case is resolved by our Supreme Court’s recent decision in *Grimes v Dep’t of Transportation*, 475 Mich 72, 73-74, 88-92; 715 NW2d 275 (2006), which specifically held that the shoulder is not within the highway exception to governmental immunity because it is not designed for vehicular travel.<sup>2</sup> Accordingly, the trial court erred in denying defendant’s motion for summary disposition.<sup>3</sup>

We reverse and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Helene N. White

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<sup>2</sup> Defendant argues that *Gregg v State Hwy Dep’t*, 435 Mich 307, 315-316; 458 NW2d 619 (1990), which held that the shoulder was included in the improved portion of the highway designed for vehicular travel, was wrongly decided. Our Supreme Court agreed and specifically overruled *Gregg*. *Grimes*, *supra* at 73-74, 83-87, 92.

<sup>3</sup> In light of this determination, we need not address defendant’s alternate argument that the trial court should have granted its motion for summary disposition on the basis that plaintiff’s claim essentially alleged a design defect, and there is “no duty, under the highway exception to governmental immunity, to correct [] design defects.” *McIntosh v Dep’t of Transportation (On Remand)*, 244 Mich App 705, 710; 625 NW2d 123 (2001).