STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF JANIS MARCHYOK, Deceased.

KATHARINE MARCHYOK and DELORES FOSTER, Co-Personal Representatives of the ESTATE OF JANIS MARCHYOK, and DOUGLAS MARCHYOK, Next Friend of PATRICK MARCHYOK, MICHAEL MARCHYOK and RICHARD FOSTER, Minors,

Plaintiffs-Appellants,

v

CITY OF ANN ARBOR,

Defendant-Appellee.

FOR PUBLICATION
February 24, 2004
9:05 a.m.

No. 242409
Washtenaw Circuit Court
LC No. 01-000279-CZ

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

JANSEN, J.

In this wrongful death action, plaintiffs Katharine Marchyok, Delores Foster, Douglas Marchyok, Patrick Marchyok, Michael Marchyok, and Richard Foster appeal as right from an order granting defendant city of Ann Arbor's motion for summary disposition. We affirm.

The present case arises from an accident that occurred at the intersection of Catherine Street and Glen Street in Ann Arbor, Michigan. The decedent was walking west on the sidewalk on the north side of Catherine Street. While the pedestrian signal was turned to "walk," the decedent attempted to cross Glen Street. At this same moment, the traffic light for westbound vehicles on Catherine Street turned green. The decedent was struck and killed by a bus turning right on to Glen Street.

Plaintiffs brought suit. Defendant moved for summary disposition relying on the doctrine of governmental immunity. The trial court granted defendant's motion for summary disposition on the basis of governmental immunity.

Plaintiffs first argue that under MCL 257.610(a), municipalities must provide such traffic control devices as they deem necessary to regulate traffic and that defendant had notice of the dangerous conditions at the intersection in question yet failed to correct the problem. Plaintiffs

contend that this constituted breach of an affirmative duty and creates a cause of action against defendant. We disagree.

We review de novo decisions to grant or deny summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). And the same standard applies to the interpretation and application of statutes. *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29, 32; 658 NW2d 139 (2003).

The Michigan Supreme Court has distinguished statutes that impose a duty to install traffic control devices from those that create causes of action for failing to maintain the highways. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 181; 615 NW2d 702 (2000). An individual can seek to hold a municipality liable under the highway exception to governmental immunity pursuant to MCL 691.1402. *Id.* But the duty "implicating the installation, maintenance, repair, improvement of traffic signs is expressly created" by a separate provision. *Id.*

The statute imposing the duty to install traffic control devices, MCL 257.610(a), provides, in relevant part, the following:

> Local authorities . . . shall place and maintain such traffic control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or local traffic ordinances or to regulate, warn or guide traffic.

Our Supreme Court emphasized the point that municipalities are required to do what they deem necessary to control traffic. *Nawrocki, supra* at 182. The statute grants municipalities discretion. *Id.* The statute does not contemplate the "imposition of a duty the breach of which subjects the agencies to tort liability." *Id.*

Because there is no tort liability for a breach of the duties imposed by MCL 257.610(a), plaintiffs fail to state a claim on which relief can be granted. Therefore, upon a de novo review, we find that summary disposition under MCR 2.116(C)(8) was proper.

Plaintiffs next contend that defendant can be held liable under the highway exception to governmental immunity for the negligent failure to install or maintain traffic control devices. Plaintiffs argue that our Supreme Court's decision in *Nawrocki, supra,* only excludes the state and county road commissioners from such liability. We disagree.

Summary disposition under MCR 2.116(C)(7) "is proper when a claim is barred by immunity granted by law." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In order to get past such a motion, the plaintiff must "allege facts justifying the application of an exception to government immunity." *Id.*

MCL 691.1407(1) grants immunity from tort liability to agencies in "exercising or discharging governmental functions." *Weaver v Detroit*, 252 Mich App 239, 243; 651 NW2d 482 (2002). The act confers broad immunity and its exceptions must be narrowly construed. *Nawrocki, supra* at 158.

Our Supreme Court has specifically applied this narrow construction to the highway exception provided in MCL 691.1402. *Id.* In *Nawrocki, supra*, the Court held that the state and county road commissions are only liable for negligence in repairing and maintaining the "'roadbed actually designed for public vehicular travel,'" not traffic control devices. *Id.* at 180 quoting *Scheurman v Dep't of Transportation*, 434 Mich 619, 631; 456 NW2d 66 (1990). And the Court further noted that "traffic signals and signs are not implicated in the broad definition of highway in MCL 691.1401(e)." *Id.* at 182 n 37. In a case, involving a municipality, where a pedestrian was killed by a falling light pole, this Court held "that, as with traffic signals and signs," the plain language of the statute does not support the conclusion that streetlight poles are part of the definition of the term "highway" in MCL 691.1401(e). *Weaver, supra* at 245, citing *Nawrocki, supra* at 180, 182 n 37.

Plaintiffs cite *Cox v Dearborn Heights*, 210 Mich App 389; 534 NW2d 135 (1995), in support of their argument that traffic control devices are a part of the highway for purposes of a municipality's liability for failure to repair and maintain traffic control devices. Our Supreme Court in *Nawrocki, supra* at 182 n 37, noted the following:

> The dissent accuses us of "shifting" the liability for traffic control devices, including traffic signs, from the state and county road commissions, to local municipalities. While the purpose of our holding today is merely to return to a principled application of the plain language of the highway exception, we are constrained to respond to the dissent's misapprehension of the governmental immunity statute.
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> Clearly, traffic signals and signs are not implicated in the broad definition of "highway" in MCL 691.1401(e); MSA 3.996(101)(e): "'Highway' means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles." . . . However, because traffic control devices are clearly not implicated in the broad definition of "highway," there can be no "shifting" of liability from the state and county road commissions to local municipalities.

Plaintiffs, in this case, indicated that footnote 37 from *Nawrocki, supra*, was dicta and that *Cox, supra,* supported their argument. But this Court in *Carr v Lansing*, 259 Mich App 376; __ NW2d ___ (2003), recently determined that the footnote was more than dicta and implicitly overruled *Cox, supra*,[1] as follows:

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[1] In response to the dissent, we note that it is interesting that the dissent cites MCR 7.215(J)(1), as this is the same rule that requires us to follow the precedent established by *Carr, supra*. We further note that there has been a judicial practice of, and there is authority to support, a panel of this Court finding that a binding opinion of another panel of this Court has been implicitly overruled by a subsequent Supreme Court decision. See *Barnes v Int'l Business Machines Corp*, 212 Mich App 223, 225-226; 537 NW2d 265 (1995); *Zwolinski v Dep't of Transportation*, 210 Mich App 496, 499; 517 NW2d 852 (1995); *People v Alexander*, 207 Mich App 227, 230 n1;

(continued...)

The [*Nawrocki*] Court's comments in footnote 37 [of *Nawrocki, supra,*] are more than mere dicta; they must be read as implicitly overruling *Cox*. The "governmental immunity statute as a whole" does not permit tort liability for inadequate signage or obstructed sight lines. *Nawrocki, supra* at 182. See also [*Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502-503; 638 NW2d 396 (2002).]

Indeed, in cases decided after *Nawrocki*, this Court has extended the holding . . . to municipalities. In *Weakley v Dearborn Heights*, 240 Mich App 382, 387-388; 612 NW2d 428 (2000), this Court held that under the highway exception a municipality had a "duty to provide barriers or warning signs" with regard to points of special hazard. Our Supreme Court . . . remanded *Weakley, supra*, for reconsideration in light of *Nawrocki*. *Weakley, supra*, 463 Mich 980; 624 NW2d 188 (2001). On reconsideration, *Weakley v Dearborn Heights (On Remand)*, 246 Mich App 322, 326; 632 NW2d 177 (2001), this Court cited *Cox, supra*, but held that the city "did not have a duty to make the sidewalk reasonably safe by placing a barrier or warning device around the portion of the sidewalk that was under repair."

But this Court in *Ridley, supra*, 246 Mich App at 691, held that *[Nawrocki, supra]* did not apply to municipalities; consequently, a city could be liable under the highway exception for inadequate illumination because a "streetlight is not a utility pole and is not excluded by definition from the highway exception to governmental immunity." A special panel of this Court . . . . disagreed with the *Ridley* panel's analysis. *Weaver, supra,* 252 Mich App at 245. The special panel found the distinction the *Ridley (On Remand)* panel relied on between the state and county road commissions on the one hand, and municipalities on the other hand, to be "insignificant . . . [in light of] the central theme of the Supreme Court's decision in *Nawrocki* . . . that 'the immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed[,] *Nawrocki, supra* at 158, [and that] 'no action may be maintained under the highway exception unless it is clearly within the scope and meaning of [MCL 691.1402(1)].'" *Weaver, supra* at 245, quoting *Weakley, supra* at 326 (emphasis in the original). This Court held the city was immune from claims that it negligently maintained a streetlight pole because "a streetlight pole is not part of the 'highway'" as defined in MCL 691.1401(e). *Weaver, supra* at 245. Although the *Weaver* special panel did not specifically reach the question of whether the *Ridley (On Remand)* panel correctly held that a municipality could be liable for inadequate street lighting, *Weaver, supra* at 246, our Supreme Court thereafter vacated *Ridley* (*On Remand*) and remanded it again for reconsideration again in light of *Weaver, supra,* 252 Mich App 239. *Ridley v City of Detroit (Ridley v Collins[])]*, 468 Mich 862; 659 NW2d 228 (2003).

(...continued)

523 NW2d 653 (1994); see also *Gilmore v Parole Bd*, 247 Mich App 205, 214; 645 NW2d 345 (2001).

On reconsideration in light of *Weaver*, the *Ridley(On Second Remand)* panel concluded that "because illumination is not part of the actual highway, the highway exception to governmental immunity does not apply and defendant city was entitled to judgment as a matter of law." [*Ridley v City of Detroit (On Second Remand)*, 258 Mich App 511, 513; 673 NW2d 448 (2003).] . . .

After reviewing *Weaver, supra,* the *Ridley (On Second Remand)* panel reluctantly concluded that illumination "is not included within the statutory definition of 'highway' [and] does not represent a defect in the highway itself because it is not part of the highway." [*Ridley (On Second Remand) , supra* at 515.] The panel reasoned that if inadequate signage is not within the highway exception, neither is inadequate illumination. . . .

[T]raffic control or warning signs, or sightlines, are not part of the "highway" as MCL 691.1401(e) defines that term. And in light of the emerging case law, it is clear that *Cox, supra*, has been overruled to the extent that it holds that the highway exception includes a "duty to maintain . . . highways . . . [that] encompasses the duty to install adequate traffic signs." *Id.* at 394-395.

Because traffic control devices are not part of the highway under MCL 691.1401(e), we find that the highway exception to governmental immunity does not apply to the instant case. See *Carr, supra*; see also *Nawrocki, supra* at 182 n 37; *Weaver, supra* at 245. Therefore, upon a de novo review, the trial court did not err in granting defendant's motion for summary disposition under MCR 2.116(C)(7).

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder