STATE OF MICHIGAN

COURT OF APPEALS

RACHEL NAWROCKI and LAWRENCE NAWROCKI,

Plaintiff-Appellants,

v

MACOMB COUNTY ROAD COMMISSION,

Defendant-Appellees.

UNPUBLISHED

No. 181350
LC No. 93-5021

Before: White, P.J. and Smolenski and R.R. Lamb,* JJ.

WHITE, J. (concurring).

I

The facts viewed in a light most favorable to plaintiff are that on May 28, 1993, plaintiff Rachel Nawrocki exited a truck, stepped onto the curb of Kelly Road in the City of Roseville, then stepped down onto the street, and tripped and fell because the street was cracked and broken. Plaintiffs' complaint alleged that defendant negligently failed to maintain Kelly Road "in reasonable repair so that it was reasonably safe and convenient for public travel and this is an exception to governmental immunity, pursuant to MCLA 691.1402." Plaintiff alleged that defendant knew, or in the exercise of reasonable diligence should have known, that the street was defective and in disrepair, and defendant had a reasonable time to repair the street before the injury took place, but failed to do so. Plaintiff alleged that as a direct and proximate result of defendant's negligence, she sustained severe and permanent injury to her right ankle and neurological injury.[1]

Defendant, the county agency charged with the repair and maintenance of Macomb County streets, admitted having jurisdiction over the area of Kelly Road where plaintiff was injured. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), arguing that it was undisputed both that plaintiff was a pedestrian and that the roadway was reasonably safe for vehicular travel; thus defendant owed and breached no duty to plaintiff and was entitled to governmental immunity. Defendant argued that *Roux v Dept of Transportation*, 169 Mich App 582; 426 NW2d

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* Circuit judge, sitting on the Court of Appeals by assignment.

714 (1988), is directly on point and requires only that governmental entities keep roadways safe for motor vehicles, i.e., for vehicular, and not pedestrian, travel. Defendant argued that since plaintiff's expert, Peter Cupal, testified at his deposition that Kelly Road was reasonably safe for vehicles on the date of the accident, there is no question of fact for the jury and plaintiff failed to state a claim upon which relief could be granted. Defendant attached a copy of one page of Cupal's deposition testimony, citing the following testimony:

> Q Would you agree that on the date of the accident the roadway was safe for vehicles?
>
> A For vehicles?
>
> Q Yes?[2]

Plaintiffs' response to defendant's motion argued that in *Gregg v State Highway Dept*, 435 Mich 307; 458 NW2d 619 (1990), the Supreme Court specifically disapproved of the language in *Roux, supra*, relied on by defendant. Plaintiffs cited the following language in *Gregg*:

> The defendant argues that nonmotorists are not protected parties under § 2 of the governmental immunity act and that such protection is afforded only to "vehicular travel." The defendant notes that the Motor Vehicle Code defines vehicles as motor vehicles. Hence a bicyclist must be excluded from protection under § 2.
>
> We think a straightforward reading of the statute clearly and adequately refutes the defendant's assertions. The statute extends the immunity exception to "[a]ny *person* sustaining bodily injury or damage to his property . . . ." (Emphasis supplied.) The plaintiff certainly qualifies as one to whom the duty to maintain safe highways extends and the waiver of immunity applies.
>
> However, the "vehicular travel" language of § 2 seized upon by the defendant clearly does not limit the class of travelers who may recover damages for injuries due to defects on the improved portion. The words "designed for vehicular travel" describe and define the "improved portion of the highway" to which the duty of the governmental agency "to keep any highway under its jurisdiction . . . safe and fit for travel" applies. MCL 691.1402; MSA 3.996(102). [*Gregg*, 435 Mich at 310-311.]

Footnote three, appended to the last sentence of the above quote, states:

> **Similarly, and contrary to dicta in** *Roux v Dept of Transportation*, 169 Mich App 582; 426 NW2d 714 (1988), the language and purpose of the highway immunity statute implies that the standard of care imposed on highway authorities applies to persons and not the vehicles in which they travel. It allows recovery to "[a]ny person sustaining bodily injury or damage to his property" and requires maintenance of highways "reasonably safe and convenient for public travel." Therefore, although the

> exception to immunity limits the duty of the state to "the improved portion of the highway designed for vehicular travel," the standard of care allows a cause of action for persons—both motorists and nonmotorists—entitled to travel on the improved portion. [435 Mich at 311 n 3.][Emphasis added.]

Plaintiffs further argued that an issue of material fact remained whether defendant failed to keep Kelly Road in reasonable repair so it was reasonably safe and convenient for public travel of nonmotorist pedestrians, based on the depositions of plaintiffs and Cupal and four photographs. Plaintiffs attached the photographs to their brief. Plaintiffs supplied various portions of Cupal's deposition testimony, including Cupal's answer to the last question, quoted above, which was:

> A For motor vehicles, probably was, yes, but that's not the sole use of a public roadway.

The following additional testimony of Cupal's was also supplied:

> Q And have you formulated any opinions in this case?
>
> A Yes.
>
> Q What are they?
>
> A It's easy to see that from the condition of the pavement, you've got to [sic] problems. You had a void in the coal patch of approximately an inch and a half deep by about 12 or maybe 18 inches in length by 12 inches or so in width near the curb line of Kelly Road at this location.
>
> There was a lot of debris according to both witnesses. There was a lot of—the seeds coming off the maple trees. Both sides of the street are covered with maple trees. So you would later in May, end of May and June, you would have the seeds coming off the trees. But anyhow this void was still there and Mrs. Nawrocki stepped into that void and tripped and fell.
>
> Now, first of all that void, that depression in the roadway and that joint should have been repaired and made flush with the rest of—with the continuous pavement on either side of it.
>
> But the bigger problem is that this construction joint has been failing. You can see it's not a short-term failure. It's been failing over the years. This pavement is probably 40, 50 years old from the looks of the neighborhood and the condition of the pavement, I would say it's that age. That's usually beyond the life of concrete pavement. When a pavement gets that old, joints will fail and what used to be a vertical joint, where one slab met the other slab with very little of any space between, now has become an opening of approximately 12 inches in width. So that vertical face of that joint where

the slabs butted upon each other now has become a 12 inch wide void and it's being filled with coal patch. Now that's well and good. The coal patch is only a temporary pothole filler.

That slab, that whole pavement, expands and contracts with the seasons and in the cold months the concrete will contract and that coal patch material will sink, it will drop like it did perhaps in this case where it dropped the inch and a half from where it was when it was originally placed. It also can be beaten on with trucks and other heavy vehicles coming over that will eventually beat it up. If it freezes, it will also pop and cause more potholes.

So coal patch is not a good material to use in a joint to try to alleviate a joint problem. And this is what's happened at this area because of the movement of the concrete slabs, the freeze/thaw cycles, coal patch will pop and will have to be constantly replaced. Every year or twice a year or three times a year you may have to have crews go out there and replace that material in order to keep it level.

And we have to keep pavements level because people will trip in it if it isn't level, bicycles will trip and fall if it isn't level. A motor vehicle can go through an inch and a half hole, but you're going to have a lot of people complaining about it because it can cause tire problems, tire failures also. But you're going to have to keep roadway surfaces relatively level and you can't tolerate an inch and a half depression.

Plaintiffs' response brief quoted plaintiff as having given the following testimony at her deposition:

I was on the passenger side. I got out of the truck and came down around—you know, down the curb line, and went to get off of the—step off of the curb here, approximately here, and there was a –when I stepped down, I put my foot down and I realized that the street was not what it should have been. It was like one part of it was up higher than the other, but it was too late. I had already stepped down and I had lost my balance and fell. And my foot went like—you know, it's setting up higher. And whenever I put my weight down, when I stepped down, my foot kind of like went in and twisted and I went down on it.

* * *

When I was coming down, I was on this side of the crack. I was on the south side of the crack, because when I stepped down, my foot was not just on paved—you know, flat pavement. There was something there because the pavement did not meet, but when I stepped down, it was too late. I had came [sic]—you know, when I stepped down on the street, you know how you put one foot down in front of the other, you don't realize and my foot went.

The four color photographs attached to plaintiffs' brief depict the vertical construction joint and the 1 ½ inch depression on Kelly Road. It appears from the photographs that the vertical construction joint problems Cupal described in his deposition extended across at least half of Kelly Road, and that the depression in which plaintiff allegedly tripped and fell extends out some distance from the curb.

The circuit court initially denied defendant's motion for summary disposition, relying on *Gregg, supra*, and noting that the *Gregg* court specifically disapproved of the language defendant relied on from *Roux, supra,* language the *Gregg* Court had noted was dicta. The court responded to defendant's argument that *Gregg* did not overrule *Roux* by noting that the *Gregg* Court had not overruled the *Roux* language because it was dicta. Additionally, the circuit court determined:

> Factually, there is no dispute whether Rachel Nawrocki's accident occurred on the improved portion of Kelly Road. The issues are: (1) whether plaintiff was reasonably entitled to travel on the improved portion of Kelly Road; and (2) whether defendant failed to keep Kelly Road in reasonable repair if plaintiff was entitled to travel on the improved portion of the road.

The court noted that MCL 257.655; MSA 9.2355 requires pedestrians to walk on a sidewalk if one exists along a highway, but permits pedestrians to travel on the left side of highway facing traffic when no sidewalk has been provided "when practicable." The court concluded that there clearly were circumstances permitting a pedestrian to walk on a highway or road which raised a question about the road's reasonable state of repair, and denied defendant's motion.

Defendant filed a motion for reconsideration, arguing that the Supreme Court's decision in *Mason v Wayne Cty Bd of Comm'rs,* 447 Mich 130; 523 NW2d 791 (1994), entitled it to summary disposition. *Mason* involved a ten-year-old student who ran out into an intersection near an elementary school in Detroit and struck the side of a car that had just run a red light. *Id.* at 132-33. The plaintiff sued Wayne County, among others, alleging that it breached its duty under the highway exception to maintain the streets and intersection in reasonable repair by failing to install stop signs, a pedestrian overhead walkway, a flashing red stop light, school advance signs, school crossing signs, school speed limit signs, and school pavement markings. *Id.* at 133. Following a trial and a jury award in the plaintiffs' favor, this Court affirmed the trial court's denial of the defendant's motion for summary disposition, concluding that the duty to maintain public highways encompasses the duty to post adequate signs. *Id*. at 133-34. The Supreme Court reversed, holding that the defendant had no duty to post school warning signs on the street where the injury occurred because the highway exception specifically excludes "installations whose only rational purposes narrowly service the unique needs of pedestrians." *Id.* at 136.

The circuit court granted defendant's motion on reconsideration, on governmental immunity grounds. In its opinion and order, the court agreed with defendant's argument that, under *Mason,* the highway exception does not apply to pedestrians who travel on the improved portion of the highway. The circuit court, like defendant, relied on two portions of *Mason.* The first is footnote four, which states:

> It is true that "[a]ny person" may recover, but only for injuries that result from vehicular accidents. If a defect in the improved portion of the highway causes a traffic accident, any person injured as a result of that accident may recover, including injured passengers or pedestrians, if any, and the owner of the vehicle. [447 Mich at 135 n 4.]

The second statement the circuit court relied on is:

> Pedestrians who trek upon Michigan highways must and do venture beyond the protective mandates of MCL 691.1402(1); MSA 3.996(102)(1). [447 Mich at 137.]

The court concluded that "[s]ince there now is no doubt plaintiffs' complaint is barred by governmental immunity, defendant's motion for summary disposition must be granted . . ." This appeal ensued.

II

Plaintiffs' sole issue on appeal is whether defendant is entitled to governmental immunity when a pedestrian sustains bodily injury in the improved portion of the highway designed for vehicular travel, rather than in a crosswalk. Plaintiffs argue that the circuit court's grant of summary disposition was based on a misreading of Michigan law, under which no distinction is made between pedestrians and non-pedestrians injured on the improved portion of public streets. Plaintiffs argue that the proper focus of the governmental immunity inquiry is the location of the accident, and that a plaintiff may bring a negligence action against a governmental agency if the accident takes place within the improved portion of the highway designed for vehicular travel.

The public highway exception to governmental immunity, MCL 691.1402(1); MSA 3.996(102)(1) provides in pertinent part:

> Sec. 2. (1) Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for **public** travel. **Any person** sustaining bodily injury or damage to his or her property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in 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 therefor, shall extend only to the **improved portion of the highway designed for vehicular travel** and shall not include sidewalks, crosswalks, or any other installation **outside of the improved portion of the highway designed for vehicular travel**. . . .[Emphases added.]

Plaintiffs argue that the circuit court improperly ruled that *Mason*, which involved a crosswalk, changed the standard set forth in *Gregg* and *Roy v Department of Transportation*, 428 Mich 330; 408 NW2d 783 (1987). Plaintiffs further argue that the circuit court improperly based its decision on dicta in *Mason*,[3] *supra*, referring to the two sections of *Mason* quoted *supra*.

Defendant argues that under *Roux, supra,* and *Mason, supra,* highway commissions are charged with the duty to maintain public streets in a condition reasonably safe for vehicular travel, not pedestrian travel. Defendant concedes that any person, motorist or non-motorist, may recover damages for a highway defect, but only if the duty to maintain the highway in a condition reasonably safe and convenient for *vehicular* travel is breached. Defendant further argues, as it did below, that it is undisputed that the street plaintiff was injured on, which was a public street intended for vehicular travel, was reasonably safe for vehicular travel when plaintiff was injured.

I agree with plaintiffs that defendant erroneously relies on dicta in *Roux*, which the *Gregg* Court expressly disapproved. I also agree with plaintiffs that both *Gregg* and *Roy* recognized that both motorists and nonmotorists may recover for a highway defect, and both decisions looked to the location of the accident, rather than whether the injured person was a motorist or nonmotorist. *Gregg*, 435 Mich at 317; *Roy*, 428 Mich at 337-339. In *Roy*, the plaintiff was riding his bicycle on a bicycle path adjacent to I-275 when his bicycle hit an asphalt bump obscured by weeds that had been cut and piled over the bump. The bicycle path was held to fall under the exclusion for "an installation outside the improved portion of a highway designed for vehicular traffic," and thus outside the public highway exception to immunity. 428 Mich at 332, 340. In *Gregg*, the plaintiff was riding his bicycle on a shoulder of M-35 and was injured after his bicycle struck a pothole. 435 Mich at 317. The Court held that the plaintiff could maintain a negligence action, concluding that the shoulder of a public highway is part of the improved portion of the highway designed for vehicular travel. *Id.* I further agree with plaintiffs that *Mason* is distinguishable because it involved a crosswalk, and the defendant's duty to provide signage for the safety of pedestrians. Thus, were I not constrained under Administrative Order 1996-4 to follow *Suttles v Department of Transportation*, 216 Mich App 166; 548 NW2d 671 (1996), I would conclude that the case should be reversed and remanded on the basis that *Mason* did not overrule *Gregg*, and is distinguishable from *Gregg* and the instant case because it involved a crosswalk, an "installation[ ] whose only rational purpose[ ] narrowly service[s] the unique needs of pedestrians." *Mason* at 136.

III

Although I am constrained to follow *Suttles, supra*, I believe it was wrongly decided, for the reasons stated in Judge Murphy's dissent. I agree with Judge Murphy that the *Suttles* majority ignored the literal language of the highway exception and extended the holding of *Mason* too far. 216 Mich App at 174. Judge Murphy properly distinguishes *Mason* as having involved the crosswalk exclusion to the highway exception, and properly identifies the location of the plaintiff's injury, i.e., "on the street directly next to the curb," as falling "within the improved portion of the highway designed for vehicular travel," and, further properly and common-sensically notes that "[a]utomobiles travel on the area of a highway next to a curb." *Id.* at 176.

I further agree with the dissent in *Suttles* that interpreting the highway exception as not applying to pedestrians injured within the improved portion of a public highway is inconsistent with the literal language of the highway exception as well as with prior precedent, including the Supreme Court's

decision in *Gregg, supra*, which explicitly allowed causes of action for both motorists and nonmotorists entitled to travel on the improved portion of a highway designed for vehicular travel. *Id*. at 177, quoting *Gregg*, 435 Mich At 311 n 3. The *Mason* Court did not overrule *Gregg*, and the *Suttles* majority makes no mention of *Gregg*. The *Suttles* majority opinion is counter to the established tenet that nonmotorists may recover damages for injuries due to defects in the improved portion of a public highway, and for the first time alters the physical parameters of the common-sense phrase "improved portion of the highway designed for vehicular travel," MCL 691.1402(1); MSA 3.996(102)(1), to exclude an ill-defined area described as "the part of a highway adjacent to a parked car onto which an occupant of the car, especially the driver, might step when getting out of the car." 216 Mich App at 169.

/s/ Helene N. White

[1] Plaintiff's husband, Lawrence Nawrocki, claimed loss of consortium.

[2] In its brief before the trial court, and on appeal, defendant failed to attach the next page of Cupal's deposition, which contains Cupal's answer to this question. Plaintiffs quoted excerpts from Cupal's deposition in their response to defendant's motion for summary disposition, including Cupal's answer to this question. See page 4, *infra*.

[3] In his separate opinion, Chief Justice Cavanagh said:

> CAVANAGH, C.J. (concurring in part and dissenting in part). I agree with the conclusion that the trial court should have granted the defendant's motion for summary disposition on the ground of governmental immunity because `[t]he highway exception specifically excepts the state and counties from liability for defects in crosswalks, the defect alleged by the plaintiff . . . .' *Ante*, p 135 (opinion of Boyle, J.). I write separately to distance myself from the dicta contained in my sister's opinion: ''The highway exception abrogates governmental immunity at 'points of special danger to motorists . . . . '" *Id.* (citations omitted). The instant case can be decided on the basis of the highway exception's specific exclusion of crosswalks. [447 Mich at 139.]