

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DONA REGAN and BRIAN REGAN,

Plaintiffs-Appellees,

v

WASHTENAW COUNTY ROAD  
COMMISSION,

Defendant-Appellant,

and

DAVID CAVANAUGH,

Defendant.

FOR PUBLICATION

June 10, 2003

9:05 a.m.

No. 219761

Washtenaw Circuit Court

LC No. 97-4017-NI

ON REMAND

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LEONARD ZELANKO,

Plaintiff-Appellee,

v

WASHTENAW COUNTY BOARD OF ROAD  
COMMISSIONERS,

Defendant-Appellant,

and

RICHARD LEE SHEHAN,

Defendant.

No. 220532

Washtenaw Circuit Court

LC No. 98-9848-CZ

Updated Copy

July 18, 2003

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Before: Murphy, P.J., and Griffin and Wilder, JJ.

WILDER, J. (*dissenting*).

Respectfully, I dissent. On reconsideration in light of *Stanton v Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002), and *Chandler v Muskegon County*, 467 Mich 315; 652 NW2d 224 (2002), I would reverse the trial court's decision in each case.

## I. Facts and Proceedings

### A. Docket No. 219761

Plaintiff Dona Regan,<sup>1</sup> while driving her conversion van<sup>2</sup> on US-12 between Saline and Clinton, collided with defendant's<sup>3</sup> broom tractor<sup>4</sup> as it was driven by David Cavanaugh, defendant's employee. The broom tractor was the third vehicle in a five-vehicle convoy performing shoulder maintenance on US-12. On the day of the collision, the weather was hot and windy. Regan slowed as she approached the broom tractor rounding a curve, but as she attempted to pass the broom tractor, a blinding cloud of dust formed. Unable to see, Regan swerved to the right and applied her brakes, but nevertheless collided with the broom tractor. In her complaint, Regan alleged that Cavanaugh negligently operated the vehicle by failing to pay proper attention to his surroundings, failing to keep an appropriate lookout, failing to keep the tractor under control, and failing to operate the vehicle with concern for the safety of Regan and others. Regan also alleged that defendant was liable as the owner of the vehicle and had breached its duty to her by permitting "Cavanaugh to operate the motor vehicle owned by [defendant] to regravel on a blustery, windy day; and . . . failed to provide a water truck to hose down the dust and debris stirred up by the tractor, thus enabling both Plaintiff Dona Regan and [another driver] to be blinded and unable to safely proceed."

Defendant and Cavanaugh moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). Although the trial court found that no reasonable juror could conclude that Cavanaugh was grossly negligent and granted his motion, the trial court denied defendant's motion. The trial court stated that because the allegations in Regan's complaint could lead to a conclusion that Cavanaugh was negligently operating the broom tractor and questions of fact existed concerning whether the alleged actions were within the scope of MCL 691.1405, the motor-vehicle exception to governmental immunity, summary disposition was inappropriate. The trial court subsequently denied defendant's motion for reconsideration. This Court granted defendant's application for leave to appeal.

### B. Docket No. 220532

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<sup>1</sup> Plaintiff Brian Regan's claim is for loss of consortium.

<sup>2</sup> Our prior opinion, *Regan v Washtenaw Co Bd of Co Rd Comm'rs*, 249 Mich App 153; 641 NW2d 285 (2002), stated that Regan was driving a school bus at the time of the collision. *Id.* at 155, 164. Our review of the record shows that although she had driven a school bus earlier in the day, she was driving her van at the time of the collision.

<sup>3</sup> Throughout this opinion, "defendant" refers to the Washtenaw County Road Commission.

<sup>4</sup> The record reflects that the broom tractor is a farm tractor with a front-mounted cylindrical broom.

Plaintiff Leonard Zelanko suffered injuries after a piece of rubber tire tread that was propelled by defendant's roadside tractor mower<sup>5</sup> shattered the windshield of the tractor-trailer rig he was driving on I-94 in Washtenaw County. Zelanko claimed that Richard Shehan, defendant's employee, ran over the tire tread with the mower while cutting the grass and that the mower threw the tire tread toward Zelanko's truck. In his complaint, Zelanko alleged that Shehan negligently failed to operate the tractor mower with due care, failed to maintain control, failed to avoid the piece of tire tread when he knew or should have known that hitting the tire tread would result in injury to Zelanko, and failed to keep a sharp lookout. Zelanko claimed that defendant was liable for negligent entrustment of the tractor and attached mower to Shehan.

Shehan and defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). The trial court granted Shehan's motion, finding that Zelanko failed to allege or demonstrate that Shehan acted in a grossly negligent manner. The trial court denied defendant's motion apparently finding that a genuine issue of material fact existed concerning defendant's negligence, although the precise basis of the trial court's ruling is unclear from the record. This Court granted defendant's application for leave to appeal and consolidated this case with Docket No. 219761.

### C. This Court's Prior Opinion

On appeal, defendant argued that plaintiffs did not assert claims that resulted from the negligent operation of motor vehicles but asserted claims that focused on the performance of governmental functions, i.e., sweeping and mowing. On that basis, defendant argued that plaintiffs' claims did not fall within the ambit of the motor-vehicle exception to governmental immunity, MCL 691.1405. *Regan v Washtenaw Co Bd of Co Rd Comm'rs*, 249 Mich App 153, 158-162; 641 NW2d 285 (2002). In a divided opinion, this Court held that in each case, the trial court properly denied defendant's motion for summary disposition. *Id.* at 163. The majority found that plaintiffs had sufficiently alleged that the negligent operation of a motor vehicle caused their injuries and that the basis of their claims was not that the "end result of defendant's actions" caused their injuries. *Id.* at 159.

Additionally, the majority concluded that because Regan had alleged injuries that resulted from impact with defendant's vehicle, and Zelanko had alleged injuries that resulted from impact with an object propelled by defendant's vehicle, plaintiffs' claims were distinguishable from the plaintiffs' claims in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), and the motor-vehicle exception was clearly applicable. *Regan, supra* at 160-161, citing *Robinson, supra* at 445. Defendant sought leave to appeal this Court's decision, and the Supreme Court's remand followed.

## II. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Poppen v Tovey*, 256 Mich App 351; \_\_\_ NW2d \_\_\_ (2003). In deciding whether governmental immunity entitles a defendant to summary disposition pursuant to MCR 2.116(C)(7), the court

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<sup>5</sup> The record shows that the tractor mower is a farm tractor with a side-mounted mower.

must review the affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Id.*; *Sewell v Southfield Pub Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). We accept as true the allegations in the plaintiff's complaint to the extent that affidavits or other documents submitted by the movant do not specifically contradict them. *Sewell, supra* at 674; *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when no genuine issues of material fact exist, except concerning the amount of damages, and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). The court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.*

### III. Analysis

"[G]overnmental immunity is a characteristic of government." *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002). Accordingly, to assert a viable claim against a governmental agency, a plaintiff must plead facts that establish an exception to governmental immunity. *Id.* The immunity enjoyed by governmental agencies is broad, and the statutory exceptions to immunity are narrowly construed. *Stanton, supra* at 617. The exception to governmental immunity on which plaintiffs rely is the motor-vehicle exception, MCL 691.1405, which provides that

[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is the owner, as defined in [the Michigan Vehicle Code], as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

Although our prior opinion focused on whether plaintiffs had alleged injuries *resulting from* the operation of a motor vehicle, the Supreme Court, through its order of remand, has drawn our attention to two other requirements of the statute. For a plaintiff to pursue a claim under § 5, the vehicle in question must be a *motor vehicle*, and the plaintiff's claims must result from the negligent *operation* of the motor vehicle.

The majority first concludes that the broom tractor and tractor mower are "motor vehicles" for purposes of § 5.<sup>6</sup> I respectfully disagree. Whether a vehicle is a "motor vehicle" for purposes of MCL 691.1405 presents a question of statutory interpretation, *Stanton, supra* at 615, and is, therefore, a question of law for the court. *Haliw v Sterling Hts*, 464 Mich 297, 302;

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<sup>6</sup> As the majority points out, defendant did not preserve this issue, and we address it because the Supreme Court has ordered us to do so. Because the unpreserved question before us involves statutory interpretation, I cannot join the majority in its suggestion that invoking an issue *sua sponte* is *entirely* or always inappropriate, because, as the Supreme Court stated in *Mack, supra* at 209, "[t]he jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions."

627 NW2d 581 (2001). In *Stanton*, the Court determined that a motor vehicle, for purposes of MCL 691.1405, is "an automobile, truck, bus, or similar motor-driven conveyance." *Stanton*, *supra* at 618, quoting *Random House Webster's College Dictionary* (2001). The *Stanton* Court concluded that a forklift, "a piece of industrial construction *equipment*," did not meet that definition. *Id.* (Emphasis in original.)

In the instant cases, each vehicle consisted of a farm tractor with a piece of functioning equipment attached to it. Because the vehicles cannot be classified as automobiles, buses, or trucks, under *Stanton*, the vehicles must qualify as "similar motor-driven conveyance[s]" in order to be classified as "motor vehicles" for purposes of § 5. Unlike the majority, I would conclude that the vehicles are not similar to automobiles, buses, or trucks and, therefore, are not "motor vehicles" within the meaning of § 5.

Automobiles and buses are designed principally for carrying passengers, including the driver. See *Random House Webster's College Dictionary* (2001) (defining an automobile as a "passenger vehicle designed for operation on ordinary roads . . ."); and MCL 257.4b (defining a bus as "a motor vehicle designed for carrying 16 or more passengers. . ."). A truck is designed primarily for transporting property. See MCL 257.75. A common purpose, therefore, of automobiles, buses, and trucks as motor-driven conveyances is that their principal function is to transport and carry either passengers or property.

In contrast, although the operators of the broom tractor and the tractor mower in question were transported or carried by these vehicles, it is undisputed that the principal function of these vehicles is road maintenance. Thus, although the broom tractor and the tractor mower are motor-driven conveyances, they are not similar in their principal function to automobiles, buses, and trucks. On this basis, and consistent with the requirement that we narrowly construe the undefined term "motor vehicle," I would conclude that the motor-vehicle exception to governmental immunity does not apply here because the broom tractor and the tractor mower are not "similar motor-driven conveyances," and, therefore, are not motor vehicles within the meaning of § 5. *Stanton*, *supra* at 618.

I would also conclude that even if a "motor vehicle" was involved in each incident, plaintiffs' injuries, nevertheless, did not result from the negligent "operation" of a motor vehicle. In *Chandler*, the Supreme Court concluded that "'operation of a motor vehicle' means that the motor vehicle is being operated *as* a motor vehicle." *Chandler*, *supra* at 320 (emphasis in original). "Operation," the Court said, has a narrower meaning than the term "use," which "may include a range of activity unrelated to actual driving." *Id.* at 320 n 7, quoting *Pacific Employers Ins Co v Mich Mut Ins Co*, 452 Mich 218, 226; 549 NW2d 872 (1996). "Operation of a motor vehicle," however, "encompasses activities that are directly associated with the driving of a motor vehicle." *Id.* at 321.

In the instant cases, I would find that plaintiffs' injuries did not result from operation of the tractors as motor vehicles. Rather than allegedly resulting from activities directly associated with the driving of a motor vehicle as a motor vehicle, plaintiffs' injuries were allegedly caused by the negligent use of maintenance equipment. Even assuming that the tractors are motor vehicles, the use of the broom and the mower was not incident to driving the tractors as motor vehicles. See *Chandler*, *supra* at 322. In this regard, the broom tractor and the tractor mower are different in operation from, for example, a snowplow that, in design, is a truck with salt in the

truck bed and a blade or blades attached to the front to push the snow. Although the snowplow engages in a maintenance function as it moves on the roadway, its operation on the roadway is directly related to its operation as a truck, or in other words, as a motor vehicle.

On the other hand, plaintiff Regan alleged that defendant was negligent by permitting its employee to use the broom on "a blustery, windy day" without providing "a water truck to hose down the dust and debris stirred up by the tractor . . . ." Plaintiff Zelanko alleged that defendant negligently entrusted the operation of the tractor mower to its employee because the employee "was incompetent or unqualified to operate the tractor and attached lawnmower." Defendant's employee was allegedly incompetent and unqualified to operate the tractor mower because he "failed to avoid driving [the lawnmower] over [a] piece of rubber and/or other debris" in the grass that he was mowing.

These challenged functions are not directly related to the operation of the vehicles as motor vehicles. Rather, the challenged functions relate to the operation of the maintenance attachments to the vehicles. In other words, if the maintenance functions had been performed differently, by using a water truck to keep dust down in the case of the broom tractor, or by clearing debris from the mowing area before mowing in the case of the tractor mower, the claimed negligence might have been avoided. Neither the alleged negligent operation of the vehicles nor these potential corrective measures have anything at all to do with the operation of the vehicles at issue as motor vehicles.<sup>7</sup> I conclude, therefore, that in neither case did the plaintiff's injury arise out of the operation of a motor vehicle as a motor vehicle, and that governmental immunity is not avoided under the motor-vehicle exception found in § 5.

For the above reasons, and in light of the Supreme Court's holdings in *Stanton, supra*, and *Chandler, supra*, I would hold that plaintiffs' claims do not satisfy the requirements of the motor-vehicle exception to governmental immunity, and that the trial court erred when it denied defendant's motions for summary disposition.

/s/ Kurtis T. Wilder

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<sup>7</sup> This conclusion is analogous to the determination by our Supreme Court that in order to obtain personal-injury-protection benefits pursuant to MCL 500.3105, the use of a motor vehicle "as a motor vehicle" requires that the injury be closely related to the transportational function of the motor vehicle. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 220, 225-226; 580 NW2d 424 (1998).