

STATE OF MICHIGAN  
COURT OF APPEALS

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JOSEPH P. URBIS and CATHY MUNOZ,  
Personal Representatives of the Estate of  
JESSICA LEE URBIS,

UNPUBLISHED  
April 18, 2006

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF  
TRANSPORTATION,

No. 266354  
Court of Claims  
LC No. 04-000186-MD

Defendant-Appellant.

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Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court’s order denying its motion for summary disposition, which was based on governmental immunity. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs’ decedent was traveling in the eastbound lane of a two-lane highway when a westbound vehicle, driven by Natalie Perrault, was pulled by slush to the right shoulder of the road. There was a 2- to 4-inch drop between the pavement and the gravel shoulder, and Perrault lost control of her vehicle after it was pulled down into the dip and onto the shoulder. Perrault crossed the centerline, striking the decedent’s vehicle head-on.

Plaintiffs brought an action against defendant, alleging that the drop-off between the pavement and the shoulder constituted a highway defect for which defendant was responsible under the “highway exception” to governmental immunity, MCL 691.1402(1). Defendant sought summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), arguing that a drop-off occurring on the edge of the paved portion of a highway did not fit within the “improved portion of the highway designed for vehicular travel” as contemplated by the highway exception. Defendant contended that *Gregg v State Highway Dep’t*, 435 Mich 307; 458 NW2d 619 (1990), in which the Supreme Court had held that the highway exception extends to the highway shoulder, was contrary to the Court’s subsequent holding in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), that the highway exception was to be very narrowly construed and did not apply to anything other than the “actual roadbed” designed for vehicular

travel. The trial court denied defendant's motion, holding that it was bound by *Gregg*, which remained good law, notwithstanding *Nawrocki*.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005). “MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.” *Maskery v Bd of Regents of Univ of Michigan*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998); see also MCR 2.116(G)(5). A motion for summary disposition under MCR 2.116(C)(8), on the other hand, tests the legal sufficiency of the pleadings standing alone, *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), and “[t]he motion must be granted if no factual development could justify the plaintiff’s claim for relief,” *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Additionally, this Court reviews 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).

Absent an applicable statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function. MCL 691.1407(1); *Maskery*, *supra* at 613. The “highway exception,” MCL 691.1402(1), imposes on governmental agencies having jurisdiction over highways a duty to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” The duty of the state and county road commissions under the highway exception, however, “extends only to the improved portion of the highway designed for vehicular travel.” MCL 691.1402(1).

In *Gregg* the Supreme Court, noting that it would “[fly] in the face of common experience” to conclude that a highway shoulder was not “designed for vehicular travel,” *id.* at 315, held that the highway exception applies to the shoulder. In *Nawrocki* the Supreme Court held that the state and county road commissions’ duty under the highway exception is limited exclusively to repairing and maintaining “the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel.” *Nawrocki*, *supra* at 172-184. However, the Court additionally reaffirmed its holding in *Gregg* that the exception applied to a bicyclist who was injured when his bicycle struck a pothole in a designated bicycle path on the inner portion of the paved shoulder of a state highway. *Gregg*, *supra* at 168. Although the *Nawrocki* Court’s focus in approving *Gregg* was on the right of the *pedestrian* to bring a claim under the highway exception, it did not criticize or otherwise comment on the *Gregg* Court’s application of the exception to the shoulder of the highway.

We believe that defendant’s argument has some merit to it, but because the Supreme Court has not overruled *Gregg*, we are bound to follow it and must affirm the trial court’s denial of summary disposition. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993) (“[I]t is the Supreme Court’s obligation to overrule or modify case law if it becomes obsolete, and until [the] Court takes such action, the Court of Appeals and all lower courts are bound by that authority”). The Supreme Court’s future decision in *Grimes v Dep’t of*

*Transportation*, lv gtd 474 Mich 877 (2006), may ultimately control the final disposition of this case.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Christopher M. Murray