

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

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VANNALKY SONSYNATH,<sup>1</sup> Personal  
Representative of the Estate of SOUVANNY  
PHONGPHILA, Deceased,

UNPUBLISHED  
April 15, 2003

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

No. 233768  
Court of Claims  
LC No. 97-016676-CM

Defendant-Appellant.

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Before: Talbot, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment awarding plaintiff \$12,700,100, following a bench trial. We reverse.

This action arises from a fatal automobile accident that occurred during the early morning hours of June 22, 1996, along I-94 at Wadhams Road in St. Clair County. The accident allegedly occurred when the decedent’s vehicle encountered a five to six inch current of water on the roadway, causing it to hydroplane off the road and turn upside down into a water-filled ditch. Plaintiff alleged below that she was not predicating liability on defendant’s failure to design an adequate drainage system. Rather, plaintiff sought to hold defendant liable under the highway exception to governmental immunity, MCL 691.1402(1), on the basis that the water over the roadway occurred because of a flash flood, which defendant should have both discovered and taken precautions to protect against possible harm to motorists; for example, by warning motorists of the hazard, closing the road, or detouring traffic around the area.

Following a bench trial, the court found no evidence that the decedent was operating his automobile negligently, and further found that he could not have avoided the unexpected accumulation of water on the roadway. Relying on *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), the court found that defendant had a duty to place adequate warning signs at the particular point of special danger in the roadway. It also found that defendant was negligent in failing to act on storm warnings and other indications of possible severe flooding, and did not

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<sup>1</sup> The record spells the personal representative’s first name as “Vannaly.”

employ its road operations in a timely fashion to discover the danger and protect the decedent from it. Additionally, the court determined that the “natural accumulation doctrine” was not applicable to this case because the amount of flooding was so unusual. The court found that the decedent would not have died had defendant acted appropriately to safeguard public travel.

The trial court subsequently reexamined its decision in light of *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), and determined that, because the defect in the instant case involved the roadbed itself, *Nawrocki* was not implicated. This appeal followed.

Defendant argues that the trial court erred in determining that plaintiff’s action was viable under the highway exception to governmental immunity. We agree.

At the time this action arose, MCL 691.1402,<sup>2</sup> the highway exception to governmental immunity provided in pertinent part:

Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

In *Pick, supra*, our Supreme Court held that the duty to maintain a highway in reasonable repair included the duty to erect warning signs or traffic control devices at a “point of hazard” or a “point of special danger.” A “point of hazard” or a “point of special danger” was deemed to be a condition that directly affected vehicular travel on the improved portion of the roadway so that travel was not reasonably safe. *Id.* at 621. In *Nawrocki*, however, the Supreme Court overruled *Pick*, and held that the highway exception did not contemplate conditions arising from points of hazard or special danger outside the actual roadbed designed for vehicular travel. The Court held that state and county road commissions have no duty under the highway exception to install, repair, maintain, or improve traffic control devices, including signs and lighting. *Nawrocki, supra* at 179-184.

Subsequently, in *Hanson v Mecosta Co Rd Comm’s*, 465 Mich 492; 638 NW2d 396 (2002), the Supreme Court limited the scope of the highway exception even further. In that case, the plaintiff argued that a section of highway was unsafe because of limited sight distance caused by the curvature of a hill. Several of the plaintiff’s claims were predicated on the road commission’s failure to adequately warn or inform the public of the danger through the placement of warning signs. *Id.* at 498. The Court reiterated its previous holding in *Nawrocki* that the placement of warning signs was not within the purview of the highway exception. *Id.* at

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<sup>2</sup> MCL 691.1402 was amended by 1999 PA 205, effective December 21, 1999. Because plaintiff’s accident occurred on June 22, 1996, we apply the version of the statute in effect before the amendment was made.

499. The Court also rejected the plaintiff's claims concerning the defendant road commission's failure to redesign the roadway to eliminate the dangerous condition, concluding that the plain language of the highway exception provides for a duty to repair and maintain, but not a duty to design or redesign a road to eliminate points of hazard or to fix other "design defects." *Id.* at 500, 503-504.

Applying *Nawrocki* and *Hanson*, we conclude that plaintiff's action clearly is not viable under the highway exception to governmental immunity. Plaintiff maintains that *Nawrocki* is not controlling because the defective condition involved the accumulation of water on the roadway itself, rather than an off-road condition. However, plaintiff's theory of liability is not based on an actual defect in the roadbed itself, but rather on an alleged design defect, coupled with the excessive rainfall and defendant's failure to warn about the hazardous condition. Failure to warn or place signage does not concern a failure to maintain "the actual physical structure of the roadbed surface" and, thus, does not fall within the highway exception. *Nawrocki, supra* at 183. Likewise, *Hanson* precludes any claim arising from the design of the surface or surrounding area that allowed the flooded condition to occur.

Plaintiff argues that *Nawrocki* does not address a "flood-on-the-roadway situation," such as that involved here, and maintains that the Court provided no indication that it intended to overrule prior cases that treated water, snow, or ice on the roadway as a dangerous condition within the maintenance duty of the highway exception. Although plaintiff relies on *Peters v State Hwy Dep't*, 400 Mich 50, 57; 252 NW2d 799 (1977),<sup>3</sup> in support of her argument that water on the roadway constitutes a dangerous condition within the maintenance duty of MCL 691.1402(1), the Supreme Court abrogated *Peters* in its decision in *Hanson*, specifically rejecting the idea in *Peters* that the duty to maintain a roadway in a reasonably safe condition includes the duty to correct defects arising from the original design or construction of the highway. *Hanson, supra* at 501, n 7. Therefore, upon considering plaintiff's action in light of *Nawrocki* and *Hanson*,<sup>4</sup> we conclude that the trial court erred in holding that defendant had a duty either to place signage to warn about the hazardous condition caused by the water on the roadway, or to correct any design defect that allowed the water to gather. Accordingly, we reverse the judgment for plaintiff.

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<sup>3</sup> *Peters* involved a fatal automobile accident similar to the accident that occurred here, wherein the question presented was whether the state knew or should have known that a highway drainage system was inadequately designed or constructed to handle a not unusual rainfall.

<sup>4</sup> Although *Hanson* was decided after the trial court decided the present case, we conclude that it applies retroactively. In *Adams v Dep't of Transportation*, 253 Mich App 431; 655 NW2d 625 (2002), a special panel of this Court resolved a conflict between *Adams v Dep't of Transportation*, 251 Mich App 801; 651 NW2d 88 (2002), vacated 251 Mich App 801 (2002), and *Sekulov v City of Warren*, 251 Mich App 333, 339; 650 NW2d 397 (2002), and held that *Nawrocki* should be given full retroactive effect. The Court concluded that, in overruling *Pick*, the Supreme Court in *Nawrocki* did not overrule clear and uncontradicted case law in order to establish a new legal principle, but rather properly interpreted the highway exception to governmental immunity. *Adams, supra*, 253 Mich App at 439-440. In *Adams*, the Court also vacated its earlier decision in *Sekulov*, which had held that *Hanson* applied prospectively only. *Adams, supra*, 253 Mich App at 433. Thus, we conclude that *Nawrocki* and *Hanson* are both applicable to this case.

In light of our decision to reverse, we need not consider defendant's remaining issues.

Reversed.

/s/ Michael J. Talbot  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell