

STATE OF MICHIGAN
COURT OF APPEALS

BETH E. WOLFE, Personal Representative of the
Estate of CHRISTINA ANN WOLFE, Deceased,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED
July 1, 2004

No. 245546
Court of Claims
LC No. 02-000013-MD

GILBERT MILES, Personal Representative of the
Estate of LINDSAY ANN MILES, Deceased,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

No. 245547
Court of Claims
LC No. 02-000010-MD

JERRY LAMBERT,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

No. 245548
Court of Claims
LC No. 02-000012-MD

JOSHUA CLARK McCREARY,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

No. 245549

Court of Claims

LC No. 02-000011-MD

Before: Murray, P.J., and Neff and Donofrio, JJ.

NEFF, J. (*dissenting*).

Because I agree with the trial court that this case is not appropriate for summary disposition treatment, I respectfully dissent. I would affirm the order denying defendant's motion for summary disposition and allow this case to go to jury determination.

I

The majority opinion concludes, essentially, that because the bridge pier and the crash attenuators are immovable objects, they cannot be parts of the improved portion of the highway designed for vehicular travel.¹ The videotape introduced as Exhibit C belies the conclusion that the bridge pier and crash attenuators are not within the improved portion of the highway designed for vehicular travel. The heavy traffic on M-24 uses the lane approaching the pier and attenuators fully and at high speeds. The video demonstrates that traffic crossing M-24 sometimes stops in the other traveled lanes to be able to enter the "median" to continue travel. I disagree with the majority's holding that the attenuators and pier were installations outside the improved portion of the highway designed for vehicular travel. The video clearly demonstrates that the pier and attenuators are installations *within* the improved portion of the highway designed for vehicular travel and well within the exception of MCL 691.1402(1).

The trial court held that these were "on-road installations within the improved portion of the highway" and concluded that the statutory duty of defendant is to maintain them in reasonable repair. It further concluded that whether defendant met this duty in this case "cannot be determined by summary judgment (sic)." Referring to the videotape the court said:

¹ Indeed, defendant argued that if defendant installed an immovable object in the center of a traffic lane, the result would be the same as argued here; immovable objects cannot be traveled upon and are therefore not part of the highway designed for travel. Presumably, traffic would have to adjust to the object and travel around it, regardless of whether its positioning in the traveled lane was reasonable.

[T]he attenuator effectively closes of (sic) the center lane before traffic could reach the pier. Consequently, with the attenuator removed, there is nothing to prevent a motorist attempting to merge with the southbound M-24 traffic from driving head-on into the exposed abutment. The videotape also depicts motorists exiting westbound I-69 travel upon and within the center lane as they endeavor to merge with southbound M-24.

The trial court then concluded that viewing the evidence in the light most favorable to the non-moving party, the center lane [the median] “serves as a travel lane, left turn land (sic) and taper lane primarily for vehicles merging into southbound traffic.” My view of the videotape leads me to the same conclusion. What defendant calls a median is clearly a travel lane and the pier and attenuators are within it. The highway exception to governmental immunity applies and the denial of summary disposition for defendant was the correct ruling. The videotape makes amply clear that whether the “median” as designed is a travel lane is not a question to be determined as a matter of law by the court. On the videotape evidence alone, I would affirm.

In addition to the videotape, the parties submitted affidavits of experts who reached differing conclusions with regard to the question of whether the so-called median is designed as a travel lane and whether the attenuators and pier are in the roadbed. There is no question that the “median” is an improved portion of the roadway; it is paved, unlike the common grassy medians separating travel lanes of expressways and it accommodates – even invites – heavy traffic use for travel purposes. Because the median is part of the improved portion of the roadway and the pier and attenuators are within the actual roadbed designed for vehicular travel, defendant had a duty to keep it repaired and maintained so that it was reasonably safe and convenient for travel. MCL 691.1402(1); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162; 615 NW2d 702 (2000). Whether defendant met this duty in light of the previous accidents, removal of the attenuators and failure to replace them before this accident² is a question for the jury to determine.

I would affirm and remand this case for trial.

/s/ Janet T. Neff

² The attenuators were removed after a March 31, 2001 crash and had not been replaced at the time of this accident on July 10, 2001