

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN PRICE,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED

January 31, 2006

No. 257577

Court of Claims

LC No. 01-018063-MT

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition on the ground of governmental immunity. We affirm.

Plaintiff sustained injuries while riding his bicycle on a bridge on M-68. Plaintiff alleged that he was struck by an automobile when he had to swerve into its path to avoid a 1 3/8 to 3 inch deep drain hole on the bridge in an area between the fog line and the curb.

We review de novo a trial court's decision on a motion for summary disposition. *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 144; 687 NW2d 380 (2004). MCR 2.116(C)(7) tests whether a claim is barred because of governmental immunity, and requires consideration of all documentary evidence filed or submitted by the parties. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In determining whether a party is entitled to judgment as a matter of law under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor. *Wilson, supra* at 145. Additionally, we review 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).

Under the highway exception to governmental immunity, "[t]he duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel. . . ." MCL 691.1402(1). Stated another way, the duty "is limited exclusively to dangerous or defective conditions within the actual roadway, paved or unpaved, designed for vehicular travel." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 184; 615 NW2d 702 (2000).

Defendant first argues that the area where the drain hole was located was the shoulder of the road and that the shoulder is not "designed for vehicular travel." MCL 691.1402(1).

However, even assuming that the area where the drain hole was located was considered the shoulder area of the road, our Supreme Court in *Gregg v State Hwy Dep't*, 435 Mich 307, 315-316; 458 NW2d 619 (1990), held that the shoulder was included in the improved portion of the highway designed for vehicular travel. See also *Meek v Dep't of Transportation*, 240 Mich App 105, 114; 610 NW2d 250 (2000) and *Soule v Macomb Co Bd of Rd Comm'rs*, 196 Mich App 235, 237; 492 NW2d 783 (1992). Defendant argues that *Gregg* was wrongly decided and is no longer valid in light of *Nawrocki*. However, *Nawrocki* did not overrule *Gregg* and we are bound by *Gregg*. 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.”).¹

Defendant next argues that although plaintiff’s complaint used the words “repair and maintain,” plaintiff was actually alleging a claim based on a design defect. We disagree. The plain language of the statute makes it clear that there is “no duty, under the highway exception to governmental immunity, to correct [] design defects.” *McIntosh v Dep't of Transportation (On Remand)*, 244 Mich App 705, 710; 625 NW2d 123 (2001). “Nowhere in the statutory language is there a duty to install, to construct or to correct what may be perceived as a dangerous or defective ‘design.’” *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 501; 638 NW2d 396 (2002).

However, we conclude that plaintiff did not allege a design defect in his complaint. Plaintiff alleged that defendant failed to repair and maintain the bridge surface when it repaved the surface. The drain grates were originally designed to be flush with the roadway but, as a result of defendant repaving the bridge, the grates were not flush with the surface and allegedly caused plaintiff to swerve into danger. It was the act of improperly resurfacing the bridge that allegedly led to plaintiff’s injuries. Because plaintiff alleged that defendant’s failure to properly repair and maintain the bridge caused the dangerous or defective condition in the roadway, *Nawrocki, supra* at 184, the highway exception to governmental immunity applies to plaintiff’s claim.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White

¹ We note that this Court has previously rejected defendant’s argument in *Grimes v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2004 (Docket No. 249558) and *Powell v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2005 (Docket No. 261541), that application for leave to appeal has been granted by our Supreme Court in *Grimes* (order of the Supreme Court, issued October 6, 2005 (Docket No. 127901)), and that application for leave to appeal is pending before our Supreme Court in *Powell* (Docket No. 129043).