

**IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals  
Borrello, PJ, and Jansen and Bandstra, JJ

ARTHUR WHITMORE and  
ELAINE WHITMORE,

Plaintiffs-Appellees,

v

CHARLEVOIX COUNTY ROAD  
COMMISSION, a governmental entity,

Defendant-Appellant.

Supreme Court Docket No. \_\_\_\_\_

68a 10-7-10

Court of Appeals Docket No. 289672

Charlevoix County Circuit Court  
Case No. 08-014922-NO

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**APPLICATION FOR LEAVE TO APPEAL**  
**ON BEHALF OF DEFENDANT**  
**CHARLEVOIX COUNTY ROAD COMMISSION**

**FILED**

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## INTRODUCTION

Plaintiffs allege that the Charlevoix County Road Commission (the "Road Commission") breached its duty under the highway exception to governmental immunity, MCL 691.1402, and consequently can be held liable in tort for the injuries sustained when their motorcycle allegedly struck a pothole in the surface of Advance Road.

The Road Commission moved for summary disposition based on governmental immunity, arguing that (1) the plaintiffs had not pleaded, or otherwise established, that the actual or constructive knowledge requirements of MCL 691.1403 were satisfied, (2) that the notice of injury sent by plaintiffs did not satisfy the requirements of MCL 691.1404, and that (3) the allegations in plaintiff's Complaint that the Road Commission breached its § 1402 duty by failing to warn the plaintiffs of the alleged pothole did not avoid governmental immunity.

The Circuit Court denied the Road Commission's motion. On appeal from that decision, the Court of Appeals issued a split decision, with Judge Bandstra concurring in part and dissenting in part, affirming the Circuit Court's decision.

The Court of Appeals' opinion misapplies §§ 1403 & 1404, and in refusing to dismiss the "failure to warn" allegations, irreparably conflicts with this Court's decision in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000). For the reasons discussed herein, the lower courts' decisions are in error, will create confusion in the law, and must be reversed.

### **I. ORDERS BEING APPEALED AND RELIEF SOUGHT**

Defendant Charlevoix County Road Commission (the "Road Commission") appeals two orders of the Charlevoix County Circuit Court (the "Circuit Court"). The first order was entered on December 4, 2008, and denied the Road Commission's Motion for Summary Disposition asserting governmental immunity. **(Exhibit 1)**. The second order was entered by the Circuit

Court on December 18, 2008, and denied the Road Commission's Motion for Reconsideration of the December 4, 2008 order. **(Exhibit 2).**

The December 4, 2008 and December 18, 2008 orders were appealed, as of right, to the Court of Appeals. A divided panel of that Court, after briefing and oral argument, issued an opinion and order on October 7, 2010. **(Exhibit 3).** The Road Commission now appeals the October 7, 2010 opinion and order, as well.

Defendant Road Commission respectfully requests that this Court grant preemptory relief reversing the lower courts' decisions to the extent they deny summary disposition to the Road Commission. Defendant alternatively requests that this Court grant leave to appeal and thereafter reverse the portions of the lower court decisions denying summary disposition to the Road Commission. Defendant respectfully requests any additional relief that this Court deems necessary, including, but not limited to, costs and fees incurred in prosecuting this appeal.

## **II. THE QUESTIONS PRESENTED FOR REVIEW**

The questions presented in this appeal are properly stated:

**A. WHETHER THE LOWER COURTS ERRED IN FINDING THAT THE REQUIREMENTS OF MCL 691.1403 WERE SATISFIED?**

Plaintiffs-appellees will say, "No."

Defendant-appellant says, "Yes."

The Circuit Court said, "No."

The Court of Appeals said, "No."

**B. WHETHER THE LOWER COURTS ERRED IN FINDING THAT THE REQUIREMENTS OF MCL 691.1404 WERE SATISFIED?**

Plaintiffs-appellees will say, "No."

Defendant-appellant says, "Yes."

The Circuit Court said, "No."

The Court of Appeals said, "No."

**C. WHETHER THE LOWER COURTS ERRED IN REFUSING TO DISMISS PLAINTIFFS' ALLEGATIONS CONCERNING THE ALLEGED FAILURE TO "WARN" MOTORISTS OF THE CONDITION OF THE HIGHWAY?**

Plaintiffs-appellees will say, "No."

Defendant-appellant says, "Yes."

The Circuit Court said, "No."

The Court of Appeals said, "No."

**III. GROUNDS FOR THIS APPEAL**

This appeal satisfies the criteria set forth in MCR 7.302(B). Specifically, the issues involve legal principles of major significance to the State's jurisprudence. MCR 7.302(B)(3). County road commissions are protected by governmental immunity as conferred by the Governmental Tort Liability Act, MCL 691.1401-1419. This Court has repeatedly determined that the immunity granted to government entities is broad, and the exceptions thereto must be narrowly construed. Each of the issues presented for review here, concerning knowledge, notice and the duty to warn, are integral to the protection afforded by immunity to governmental agencies. The lower courts' decisions here are erroneous, and rather than give immunity a broad application, instead undermine that protection. These issues are therefore of statewide significance to government entities, and to the citizens of the State of Michigan.

Second, the lower courts' decisions are clearly erroneous and will cause material injustice. MCR 7.302(B)(5). The lower courts' decisions with respect to actual or constructive knowledge of a defect pursuant to MCL 691.1403 mean that a road agency will be deemed to have the requisite knowledge simply by virtue of having had to repair the same highway in the past, or even more minimally, by scheduling the highway for replacement in the future.

Respectfully to the lower courts, if that is indeed the knowledge standard, then there would be no road agency without actual or constructive knowledge of the defect alleged to have caused any crash. Concerning the MCL 691.1404 issue, longstanding precedent from this Court has held that a notice must be sufficient on its face to convey the statutorily required information—parol evidence must be unnecessary, otherwise the notice is faulty. In this case, the lower courts not only allowed the consideration of parol evidence, but did so based on the erroneous factual assumption that the police UD-10 report had been enclosed with the plaintiffs’ notices. The record demonstrates that the police report was not enclosed. Lastly, the lower courts’ decisions refusing to dismiss the “failure to warn” allegations from the Complaint are a direct affront to this Court’s *Nawrocki* decision, and will as recognized by Judge Bandstra in partial dissent, at best create juror confusion and at worst permit the jury to predicate highway exception liability on the Road Commission’s alleged failure to post a traffic sign warning of the alleged pothole. If the lower courts’ decisions stand, material injustice will occur.

**STATEMENT OF APPELLATE JURISDICTION**

Defendant-appellant makes this Application for Leave to Appeal pursuant to MCR 7.301(A)(2), which provides jurisdiction for appeal by leave from a decision of the Court of Appeals.

The Court of Appeals Opinion and Order being appealed is dated October 7, 2010. This Application is filed within 42 days from that date, and is therefore timely pursuant to MCR 7.302(C)(2).

**STATEMENT OF PERTINENT FACTS  
AND PROCEDURAL HISTORY**

Plaintiffs Arthur and Elaine Whitmore allege in their Complaint that on May 28, 2006, they were traveling by motorcycle on Advance Road near its intersection with Cummings Road in Charlevoix County. **(Exhibit 4, Complaint at ¶ 15)**. Plaintiffs allege that they struck “a large, long-existing pothole within the traveled portion of the roadway already scheduled for repair and resurfacing by defendant Charlevoix County Road Commission.” **(Exhibit 4, at ¶ 15)**. As a result of striking the pothole, the Complaint alleges that the plaintiffs were violently dragged and thrown to the ground, where they sustained injuries. **(Exhibit 4, at ¶ 15)**.

The Complaint contains two counts brought pursuant to MCL 691.1402—one each on behalf of Arthur and Elaine. Each count asserts identical allegations of breach of duty, including for purposes of this appeal, “failing to warn motorists of the existence of a significant, large, and long-existing pothole of significant depth and width dimensions present in the northbound lane of travel of Advance Road near its intersection with Cummings Road, within the traveled and improved portion of the roadway open to public travel and vehicular traffic, which Defendant knew to exist via actual or constructive knowledge on its part.” **(Exhibit 4, ¶ 30(b) and ¶ 44(b))**. The Complaint also alleges that the Road Commission breached its duty by “failing to post appropriate warning signs to notify the public at large and Plaintiff . . . in particular that the traveled and improved portion of Advance Road at or near its intersection with Cummings Road was in a defective and highly dangerous condition.” **(Exhibit 4, ¶ 30(l) and ¶ 44(l))**.

The Road Commission moved for summary disposition, presenting essentially three broad arguments. First, the Road Commission argued that summary disposition must be granted based on governmental immunity as to plaintiffs’ “warning” claims or other allegations involving traffic control devices, because such claims are not encompassed within the plain

meaning of MCL 691.1402, the highway exception to governmental immunity. Second, the Road Commission argued that the statutory prerequisites created by MCL 691.1404 had not been satisfied, and therefore the Road Commission's immunity had not been waived. Third, the Road Commission argued that the statutory prerequisites of MCL 691.1403 had not been satisfied, and that therefore the Road Commission's immunity had not been waived.

Oral argument was held in the Circuit Court on November 21, 2008. At the conclusion of that hearing, the Court denied the Road Commission's motion. **(Exhibit 5, Trx of 11/21/08 hrg).**

The Road Commission filed a Claim of Appeal pursuant to MCR 7.203(A) and MCR 7.202(6)(v).

Shortly after the Claim of Appeal was filed, the Road Commission filed a second motion in the Circuit Court challenging additional theories advanced in the Complaint on the basis that they are not actionable under the highway exception to governmental immunity. The parties stipulated to lift the automatic stay for the limited purpose of permitting the Circuit Court to address the Road Commission's Motion for Partial Summary Disposition. After a hearing, the Circuit Court granted the partial summary disposition motion. **(Exhibit 6, Trx of 1/30/09 hrg.)**

Plaintiffs filed an Application for Leave to Appeal, which the Court of Appeals granted. The two pending cases were then consolidated for argument and decision in the Court of Appeals.

After oral argument, the Court of Appeals issued an unpublished written decision, in which Judges Borello and Jansen concurred in full, and in which Judge Bandstra concurred in part and dissented in part. First, the majority addressed the Road Commission's MCL 691.1403 argument. The majority recognized that *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713

NW2d 717 (2006), is the controlling precedent from this Court. The majority acknowledged that pursuant to *Wilson* and the highway exception to governmental immunity,

when a plaintiff alleges an injury resulting from a governmental agency's failure to remedy a defect in a highway, the "injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair." "It may be that a road can be so bumpy that it is not reasonably safe," . . . "but to prove her case [a] plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it."

*Whitmore v Charlevoix Cty Rd Comm*, unpublished opinion per curiam of the Court of Appeals, decided October 7, 2010 (Docket Nos. 289672, 291421), at 1 (quoting *Wilson*, 474 Mich at 169). Nevertheless, the majority opinion rejected the defendant's § 1403 argument predicated on its lack of actual or constructive knowledge of the defect alleged to have caused the accident. To support its rejection, the majority observed that the plaintiffs had "alleged the defendant had actual and constructive knowledge of the pothole, which they describe as 'a large, long-existing pothole of significant depth and width dimensions present in the northbound lane of Advance Road near its intersection with Cummings Road.'" *Whitmore, supra* at \*1. The Court also commented that the plaintiffs had alleged that defendant had "previously failed to repair" the alleged pothole. Based simply on those allegations, the majority concluded that the Complaint sufficiently fulfilled the knowledge of defect, and actual time to repair, requirements of MCL 691.1403.

Next, the majority decision addressed the Road Commission's MCL 691.1404(1) argument. The Court described plaintiffs' notice as consisting of a "cover page and two individual notices, one describing Arthur Whitmore's injuries and the other describing Elaine

Whitmore's injuries." *Id.* at \*2. The decision quoted from the individual notices, which are identical concerning the alleged pothole:

The subject accident occurred on or about May 28, 2006, on northbound Advance Road near its intersection with Cummings Road in the Township of Eveline, County of Charlevoix, State of Michigan.

\* \* \*

The accident occurred as a result of the defective maintenance of the traveled portion of the roadway, and specifically, the presence of a large pothole within the traveled portion of the roadway which was neither marked nor identified . . . .

*Id.* at \*2. The Court then suggested that the plaintiffs had mailed the police report of the accident with the notice of the claim.<sup>1</sup>

The Court also relied upon the recent Court of Appeals decision in *Plunkett v Michigan Dep't of Transp*, 286 Mich App 168; 779 NW2d 263 (2009). According to the majority, *Plunkett* stands for the notion that only substantial compliance with the notice statute is required.

The Court ended its analysis by stating in a cursory manner "[w]e cannot conclude that plaintiffs' notice was defective merely because it relied on descriptions in the accompanying police report." The obvious import to the Court's conclusion is that the notice on its face was insufficient to comply with § 1404, and that had the Court recognized that the police report did

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<sup>1</sup> The Court of Appeals panel's supposition was incorrect. As evidence that the police report had been mailed with the notice of claim, the Court majority simply commented that the plaintiffs' counsel had made that assertion at the summary disposition motion, and that defendant's counsel had not disputed it. With due respect to the majority, it should have been apparent from the record that the police report was not mailed with the notice of claim. The record shows that after the notice of claim was sent, a representative of the Road Commission contacted the plaintiffs' counsel and requested a copy of the police report. Had the police report been sent with the notice of intent, there obviously would have been no need for the Road Commission's representative to obtain a copy from the plaintiffs' counsel. Rather than rely on that record evidence, the majority here improperly chose to accept as true an unfounded, undocumented representation from plaintiff's counsel at the summary disposition hearing.

not accompany the notice, it would have granted summary disposition to the Road Commission based on § 1404.

The Court then turned to the Road Commission's argument concerning the plaintiffs' allegations of "failure to warn." The Court affirmed the denial of summary disposition as to that alleged breach of duty, finding that because plaintiffs contended that these allegations were not meant to be a separate cause of action, but simply as an item of "probative evidence that could be pursued at trial," plaintiffs would be allowed to plead failure to warn as a breach of the duty imposed under the highway exception to immunity. The majority decision expressly commented that it did not believe that permitting the plaintiffs to allege and pursue allegations of "failure to warn" in connection with their highway exception claim was inconsistent with this Court's decision in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000).

The majority of the Court then addressed the issues raised on appeal by the plaintiffs; namely, the trial court's grant of summary disposition to the plaintiffs on various miscellaneous theories, such as failure to inspect the roadbed, failure to close the road, and failure to properly supervise employees. The Court observed that those claims dealt with issues "much broader than 'the actual physical structure of the roadbed surface,'" and therefore were properly dismissed. *Whitmore, supra* at \*3.

Judge Bandstra wrote a separate partial concurrence and partial dissent, indicating that he disagreed with the majority's conclusion concerning the "failure to warn" claim. Specifically, Judge Bandstra wrote:

First, allegations of a failure to warn need not be in a complaint to warrant the introduction of evidence regarding a failure to warn if such evidence is relevant and otherwise permissible as to a separate claim. Second and more importantly, I do not see how evidence that defendant failed to post a warning regarding the pothole is at all relevant to whether defendant acted negligently in

failing to fix the pothole. At best, the majority's decision in this regard will lead to juror confusion. At worse, it will allow the jurors to base liability on allegations that defendant failed to properly warn regarding the pothole in direct derogation of *Nawrocki*.

*Whitmore, supra* at \*4 (Bandstra, J., concurring in part and dissenting in part).

### STANDARD OF REVIEW

The Court reviews de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may, but is not required to, file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).

## ARGUMENT

### I. THE LOWER COURTS ERRED IN FINDING THAT THE REQUIREMENTS OF MCL 691.1403 WERE SATISFIED

The Road Commission should have received summary disposition because the plaintiffs did not adequately plead, nor produce any material evidence in response to the Road Commission's summary disposition motion, to show that the Road Commission had actual or constructive knowledge of the specific pothole alleged to have caused this accident, and further that the pothole rendered the highway not reasonably safe for public travel. Absent pleadings setting forth concrete facts to demonstrate that a Road Commission had actual or constructive knowledge of (1) the specific defect, and (2) that the defect rendered the roadway not reasonably safe for travel, combined with a reasonable time to repair, there can be no liability pursuant to MCL 691.1402.

#### A. The Law of Governmental Immunity

Governmental immunity is derived from the traditional doctrine of sovereign immunity and reflects the public policy that a governmental agency should be subject only to very limited tort liability. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000). Under the Governmental Tort Liability Act, MCL 691.1401, *et seq* (the "GTLA"), "governmental agencies are immune from tort liability when engaged in a governmental function." *Id.* at 156; see also, MCL 691.1407(1). This immunity extends to all governmental agencies performing governmental functions and eliminates all tort liability except as specifically provided in the statute. *Nawrocki*, 463 Mich at 156.

There are only six statutory exceptions to governmental immunity. The very existence of these exceptions "evidences a clear legislative judgment that public and private tortfeasors are to be treated differently . . ." *Id.* As explained at length by this Court:

Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. ***Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity cannot often reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.*** Moreover, in our system of government, decision-making has been allocated among three branches of government – Legislative, Executive and Judicial – and in many cases decisions made by the Legislative and Executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions.

*Ross v Consumers Power*, 420 Mich 567, 618-619; 363 NW2d 641 (1984) (emphasis added). In other words, “[b]ecause immunity necessarily implies that a ‘wrong’ has occurred . . . some tort claims, against a governmental agency, will inevitably go unremedied.” *Nawrocki*, 463 Mich at 156. To summarize, [a]lthough governmental agencies may be under many duties, with regard to services they provide to the public, only those enumerated within the statutorily created exceptions are legally compensable if breached.” *Id.*

These exceptions must be construed narrowly; strict compliance with their terms and conditions is mandatory. *Nawrocki*, 463 Mich at 158-159. Unless a cause of action satisfies the narrow and strictly construed requirements of one of the exceptions, the governmental agency is immune and the case fails.

**B. The Highway Exception of § 1402 and the Knowledge and Reasonable Time to Repair Requirements of § 1403**

The exception at issue in this case is the “highway exception” of MCL 691.1402. That exception states, in pertinent part:

Sec. 2. (1) Except as otherwise provided in section 2a, 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. . . . The 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 and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

MCL 691.1402(1).

The highway exception is further tempered by the knowledge and reasonable time to repair requirements of MCL 691.1403:

Sec. 3. No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

*Id.*

This Court has recently elaborated on the strict limitations imposed by §§ .1402-.1403. In *Wilson v Alpena Co Rd Comm*, 474 Mich 161; 713 NW2d 717 (2006), this Court addressed “what notice of a defect in a road the governmental agency responsible for road maintenance and repair must have before it can be held liable for damage or injury incurred because of the defect.” *Id.* at 162. In the process, its discussion went beyond the mere “notice” issue by significantly

clarifying the precise combination of circumstances that must be shown by a plaintiff before a county road commission may be held liable for a highway defect.

Underlying this Court's decision was a bicycle accident which occurred on a paved road in Alpena County. According to the plaintiff, Diane Wilson, she had to "snake" her way through "innumerable potholes" in the road. *Id.* Her Complaint alleged that the road "had potholes in excess of six (6) inches deep that had existed more than 30 days at the time of her accident . . ." *Id.* at 164. Plaintiff also argued that the road had "for years been in a condition that was dangerous to public safety because it was persistently potholed and rutted and only full resurfacing could make it safe." *Id.*

The Road Commission moved for summary disposition asserting governmental immunity because, among other reasons, it lacked notice of a defective road so as to satisfy MCL 691.1403. The Road Commission pointed out that a road crew had "cold patched" the road two weeks before the plaintiff's accident and that it had received no complaints after the cold patching. *Id.* at 165. The plaintiff responded that the deteriorated condition of the road should be enough by itself to satisfy the notice requirement. *Id.*

In Section 3 of its Opinion, this Court summarized the state of highway exception jurisprudence. This Court wrote:

Hence, the Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason.

Viewing the GTLA as a whole, it can also be seen that the converse of this statement is true: that is, the Legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel.

*Id.* at 167-168. This Court further elaborated that pursuant to MCL 691.1403, immunity is not waived unless the governmental agency had actual or constructive notice of "the defect" before

the accident occurred. To determine what constitutes a “defect” under the Act, “our inquiry is again informed by the ‘reasonably safe and convenient for public travel’ language of MCL 691.1402(1).” *Id.* at 168. Stated differently, “an imperfection in the roadway will only rise to the level of a compensable ‘defect’ when that imperfection is one which renders a highway not ‘reasonably safe and convenient for public travel,’ and the government agency is on notice of that fact.” *Id.* at 168.

If the agency knows, or should have known, of the existence of the defect or condition that makes the road not reasonably safe for public travel, it has only a reasonable time to repair it. If it does not repair the defect within a reasonable time, it can be held liable for injury or damage caused by that defect. *Id.* at 169.

In *Wilson*, this Court noted that all parties conceded “that there was notice of certain problems – that the road was bumpy and required frequent patching,” but nevertheless concluded that “these problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel.” *Id.* at 169. This Court conceded that a road could possibly be “so bumpy” that it is not reasonably safe for public travel, “but to prove her case plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it.” This Court cited *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912), where this Court had long ago adopted the eminently reasonable, common sense notion that a road in bad repair, or with rough pavement, is not per se one that is not reasonably safe for travel. As observed by the *Jones* court, and repeated in *Wilson*, “nearly all highways have more or less rough and uneven places in them, over which it is unpleasant to ride; but because they have, it does not follow that they are unfit and unsafe for travel.” *Jones*, 171 Mich at 611.

**C. Application of *Wilson* To This Case Requires Summary Disposition For The Road Commission**

Application of *Wilson* should have resulted in summary disposition for the Road Commission. The holding in *Wilson* can be succinctly stated in four points:

- (1) A road commission is immune if the maintenance or repair that was done is reasonable, even if the highway is nevertheless not reasonably safe for public travel. *Wilson*, 474 Mich at 167-168.
- (2) A road commission is immune if the maintenance or repair that was done is not reasonable, but the road is nevertheless safe for public travel. *Wilson*, 474 Mich at 168.
- (3) A road commission is not immune only where the maintenance or repair that was done was not reasonable, and the road was not reasonably safe for public travel, and the defect stemmed from the failure to perform reasonable maintenance or repair, and the road commission knew or should have known of the defect, and a reasonable road commission would have recognized that the defect posed an unreasonable threat to safe public travel and would have addressed it. *Wilson*, 474 Mich at 168-169.
- (4) If all of the conditions of paragraph 3, supra, are satisfied, then the road commission has a "reasonable" amount of time to repair the defect. If it has not repaired the defect in a reasonable amount of time, only then may liability attach.

*Wilson*, 474 Mich at 169.

The key to understanding *Wilson* is to recognize that whether reasonable repair or maintenance was performed is a separate and independent question from whether the highway is reasonably safe for public travel. For immunity to be preserved, it is not necessary to answer both questions affirmatively; one or the other suffices. In other words, immunity exists where reasonable repair or maintenance is done, even if the highway is not reasonably safe for travel. Conversely, immunity exists where the highway is safe for travel, even if reasonable repair or maintenance has not been done. In a circumstance where the plaintiff has shown both the lack of reasonable maintenance or repair and that as a result, the highway is not reasonably safe for

travel, the plaintiff must still overcome the additional hurdle of showing that the road commission knew or should have known of the defect and that a reasonable road commission would have recognized that it posed an unreasonable threat to safe public travel and would have addressed it. Lastly, if all of the other criteria are shown, then the Road Commission still must be given a reasonable amount of time to repair the defect.

- 1. Plaintiffs have not adequately pleaded, nor produced any material evidence to suggest, that the Road Commission had actual or constructive knowledge of the alleged defect, that the alleged defect rendered the highway not reasonably safe for travel, and that the Road Commission had a reasonable amount of time to repair the defect**

Plaintiffs have not adequately pleaded, nor produced any material evidence to suggest, that the Road Commission had actual or constructive knowledge of the alleged defect, that the alleged defect rendered the highway not reasonably safe for travel, and that the Road Commission had a reasonable amount of time to repair the defect. The notice requirements of MCL 691.1403 cannot be satisfied through knowledge of a generally defective condition. By pleading and pointing to evidence showing only that the Road Commission may have known that potholes had developed on the road in the past, and that the road was scheduled for maintenance, does not show actual or constructive notice of the specific defect alleged to have caused this accident. In other words, plaintiffs overlook the plain language of the statute itself, which when construed narrowly (as this Court must pursuant to *Nawrocki*, 463 Mich at 155-156), refers to a single, specific defect.

To show actual or constructive notice, plaintiffs argued that the Road Commission acted in a public manner to “facilitate the commencement of a significant road repair project for Advance Road” and that this road repair was to “temporarily patch, remedy and/or repair the dangerous and defective conditions known by it to already exist.” (**Exhibit 4, at ¶ 10**). In other

words, because Advance Road was scheduled for maintenance, plaintiffs contend that the Road Commission must have known about the pothole they claim to have struck. Plaintiffs further alleged in their Complaint that

in the days and weeks preceding the May 28, 2006, motor vehicle accident involving Plaintiffs herein, Defendant . . . did again publicly acknowledge the deteriorated physical structure of and the need for significant maintenance to the roadbed surface designed for vehicular travel on Advance Road, including but not limited to that portion of Advance Road where the defect giving rise to this cause of action existed and was known to exist by the Defendant . . . .

**(Exhibit 4, at ¶ 9).** At the summary disposition hearing, plaintiffs' counsel articulated the reason why he believed the Complaint sufficiently alleged actual or constructive notice:

*THE COURT:* Alright, why don't you point out to us where in the complaint that alleges actual or constructive notice.

*MR. MICHAEL:* If the Court will indulge me a moment, Your Honor. I would indicate, perhaps, what I understand Counsel to mean, is that, the fact that I didn't say all of the magic words at one time in the same phrase.

*THE COURT:* Well—

*MR. MICHAEL:* But, clearly, we have alleged that the condition existed for more than 30 day's [sic]. That the Commission had actual and constructive notice. We indicate, sometimes it's scary to read one's own pleading's [sic], that the condition was dangerous and defective.

*THE COURT:* But, are there pled facts that would support those conclusions?

*MR. MICHAEL:* Absolutely, Your Honor. We indicate that the Road Commission had it's Duty [sic] to maintain the road under it's [sic] jurisdiction of reasonable repair so it was reasonably safe and convenient for public travel.

*THE COURT:* Well, that's a legal conclusion.

*MR. MICHAEL:* That's, actually, that's a recitation of the Statute that Counsel is indicating we are somehow short on. And,

we cite the statute [sic]. We are not saying that it's a factual basis. The statute is actually indicated right there in that paragraph.

Then we go on, in the sub-paragraph's—

*MR. MILLAR:* Which paragraph were we just talking about?

*MR. MICHAEL:* I'm sorry. I was referring to paragraph's [sic] 25 and 26, where the Statute is pled and the description of the Statute is indicated there.

We indicate in paragraph 30 that they failed to maintain the improved portion of the roadway, I'm sorry, 30(A), in a reasonably safe condition. In—

*THE COURT:* But, we're talking about actual or constructive notice of the Road Commission that the defect, the cause of the accident, existed. And there's a (Inaudible), if it is ignored for 30 day's [sic] that they have such notice.

*MR. MICHAEL:* Correct.

*THE COURT:* And, I think the objection is here, is that, what is there in your complaint that would establish that the Road Commission had actual notice or that the pothole, the cause of the accident, existed more than 30 day's [sic] to trigger the presumed notice.

*MR. MICHAEL:* Okay. If that's the case, in paragraph 10, we indicate that the Road Commission had publicly acknowledge [sic] that a significant road repair project, where the defect, giving rise to this cause of action existed, and was known to exist by the Defendant and it did fail to act, temporarily patch, remedy or repair the dangerous and defective conditions known by it to already exist within the traveled portion of the roadway. And, it specifically reference [sic] the northbound lane of Advance, at it's intersection of Cumming's [sic].

The [sic] paragraph 11, four lines in, speaks to the dangerous and defective condition that was left, that being the large, long existing pothole of depth and dimensions, which had [sic] previously failed to successfully repair on a number of occasions within the improved portion of the roadway.

Paragraph 12 speaks to it again, even though it was long aware of the continuing need to so do, I think that's really a

reference to the roadway as a whole. We then go on, I believe it is in paragraph—

*THE COURT:* Well, okay, let's stop here. This is a pothole case and it's clear the Road Commission understood that the road needed to be repaired. They had patched it twice since the day of the accident and then completely re-did it shortly thereafter. I mean, it's—I think there's sufficient notice and sufficient notice here that the Road Commission was on notice of the defect in the highway. So, I am going to deny the motion.

**(Exhibit 5 at 22-25).** So, in short, plaintiffs' counsel was unable to identify any fact pled in the Complaint to establish that the Road Commission knew about or should have known about the particular pothole that caused the accident, or that it had existed for 30 days or more. When pressed by the Court to identify specific facts, plaintiffs' counsel could come up with only that (1) the Road Commission publicly acknowledged that it was going to resurface the road in the future, and (2) it had repaired potholes on that road in the past. The Court then simply concluded that the case was a "pothole case," and that because the Road Commission had scheduled the roadway for repair, that it must have had sufficient knowledge of the defect to satisfy § 1403.

The cursory analysis employed by the Court of Appeals fares no better. Relying on cursory allegations that potholes had existed on the road in the past, and that the Road Commission's efforts to repair those potholes did not permanently prevent any future potholes, in no way shows that the Road Commission had actual or constructive knowledge of the pothole that plaintiffs allegedly struck with their motorcycle.

Plaintiffs' reliance—and the Circuit Court's apparent agreement—on the fact that Advance Road was scheduled for maintenance misses the point of *Wilson*. A simple acknowledgment by a road commission that a highway will undergo repair says nothing about whether the repair and maintenance that had been done to the highway up to that point was reasonable. *See Wilson*, 474 Mich at 167-168. Nor does it say anything about whether the

highway, in its present condition, is not reasonably safe for vehicular travel. *See Wilson*, 474 Mich at 168. Nor does it say anything about whether the Road Commission knew or should have known of the specific defect, or whether a reasonable road commission would have recognized that the defect posed an unreasonable threat to safe public travel and would have addressed it. *See Wilson*, 474 Mich at 168-169. In short, the pleadings and evidence relied upon by plaintiffs to satisfy the § 1403 criteria are completely immaterial to the § 1403 requirements. Nothing about the fact that the road had been repaired in the past, and that it was scheduled to undergo additional maintenance pleads a case, or creates an issue of fact, that the maintenance that had been done on the road was not reasonable, that the highway was not reasonably safe for travel, that the Road Commission knew or should have known both of those things, and had a reasonable time to repair the defect.

Plaintiffs' reliance on the general fact that the highway was going to be repaired to satisfy § 1403 also ignores the importance of the definite article "the" repeated four times within the pertinent statutory section. This Court has addressed this exact point. In *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), this Court was called upon to determine the meaning of the phrase "the proximate cause" as used in the MCL 691.1407(2) gross negligence exception to governmental immunity. There, the Court determined:

Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between "the" and "a." "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . . ." *Random House Webster's College Dictionary*, p. 1382. Further, we must follow these distinctions between "a" and "the" as the Legislature has directed that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . . ." MCL 8.3a; MSA 2.212(1). Moreover, there was no indication that the words 'the' and 'a' in common usage meant something different at the time this statute was enacted . . . .

*Robinson*, 462 Mich at 462. In short, this Court has concluded that in the immunity context, use of the word “the” has a specifying or particularizing effect.

In this case, the statute uses the term “the defect” four separate times. Just as in *Robinson*, the definite article “the” is combined with a singular noun (“defect”). The statute, therefore, by its plain and unambiguous language, contemplates a single, specific, particular defect, not a general tendency to deteriorate into a defective state.

The plaintiffs’ argument also ignores the language of MCL 691.1403 which requires that the governmental agency both know about the defect, “and ha[ve] a reasonable time to repair the defect” prior to the injury. By providing for a “reasonable time to repair,” the statute acknowledges that a governmental agency should not be forced to pay for an injury caused by a highway defect that it knew about, but did not have time to fix. This emphasis on the ability to repair demonstrates that the knowledge provisions of the statute are concerned with a specific defect that is alleged to have caused the harm—something concrete that could be remedied—rather than a generalization like the one relied upon by the plaintiffs here. In other words, the Plaintiffs’ generalization is that because there is evidence that the Road Commission repaired this road in the past, and that this road was scheduled to be repaired in the future, the Road Commission should have known about and repaired—in advance of this accident—the specific pothole that is alleged to have caused plaintiffs’ injuries. Such a reading of the statute flies in the face of its plain language, which focuses on a specific, particular defect that a road commission can both learn of and repair.

For these reasons, the Road Commission should have been granted summary disposition on plaintiffs’ claims in total.

**II. ALTERNATIVELY, THE CIRCUIT COURT ERRED IN FINDING THAT THE REQUIREMENTS OF MCL 691.1404 WERE SATISFIED**

Defendant Road Commission should have received summary disposition, in the alternative to the plaintiffs' § 1403 shortcomings, on the basis that the notice sent by plaintiffs did not comply with the substantive requirements of MCL 691.1404. Specifically, the notice did not state the "exact" location of the defect, nor did it identify the "exact" nature of the defect. The plaintiffs' failure to provide the Road Commission with the required information is fatal to their claim.

Pursuant to MCL 691.1404, an injured party shall:

within 120 days from the time the injury occurred . . . serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

The purpose of this statutory provision is:

To furnish the municipal authorities promptly with notice that a claim for damages is made, and advise them of the time, place, nature, and result of the alleged accident, and a sufficient statement of the main facts, together with names of witnesses, to direct them to the sources of information that they conveniently may make an investigation.

*Kustasz v City of Detroit*, 28 Mich App 312, 314; 184 NW2d 328 (1970) (quoting, *Swanson v City of Marquette*, 357 Mich 424, 431; 98 NW2d 574 (1959)).

The Notice of Injury supplied by the plaintiffs here provides only generalized information concerning the location of the incident. **(Exhibit 7)**. It does not, as required by the statute, describe the "exact" location of the defect. Case law from this Court has discussed the specificity required by a notice in the context of a highway defect claim. Even though these cases were decided under predecessor statutes to the one at issue in this case, the discussions are

relevant, and the policies behind the notice requirement have not changed. In *Barribeau v City of Detroit*, 147 Mich 119; 110 NW 512 (1907), this Court held:

The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular "venue" of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole notice and all of the facts stated therein may be used and may be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury. The nature of the defect stated may aid in locating the place, and the place may be stated with such particularity that a very general statement of the defect (cause of the injury) may be aided. *Sargent v City of Lynn*, 138 Mass 599. ***But to be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself. . . . [W]hen parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has not been given to the city.***

*Id.* at 125-126 (emphasis added; citations omitted).

Similarly, in *Ridgeway v City of Escanaba*, 154 Mich 68; 117 NW 550 (1908), this Court held:

Counsel urged that no description of the injury was necessary under the language of the statute, which he says mentions the extent of the injury, but not the nature, and he argues that this refers only to the amount of his claim. We do not so understand the statute, unless it is to be practically emasculated by construction. We must say that the Legislature intended to give to defendants in such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach. It is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments. It requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this statute that would not be applicable to any other statute of limitation. We have never held a notice ineffective when it could

reasonably said to be in substantial compliance with the law, but we think that cannot be said of this notice.

*Id.* at 72-73 (emphasis added).

In *Overton v Detroit*, 339 Mich 650; 64 NW2d 572 (1954), this Court concluded that the notice provided by the plaintiff was insufficient to satisfy the requirements of a predecessor statute to the one at issue here. In *Overton*, the plaintiff fractured her leg as she stepped from the street to the sidewalk near the corner of Bates and Larned Streets in the City of Detroit. She filed a claim with the city the following day, establishing the location “at the sidewalk front of 28 E. Larned, corner of Bates.” *Id.* at 651. Apparently, she did not describe the nature of the alleged defect. Almost two years later, however, she filed a declaration establishing the place of the injury in specificity: “immediately in front of the building located on the southwest corner of East Larned and Bates Street, in the City of Detroit, said building being commonly known as 28 East Larned Street, Detroit, Michigan.” *Id.* at 651-652. She described the defect as follows: “Said sidewalk was broken near the curb of Bates Street and the depression existed thereon, especially within the center of an uncovered metal pipe approximately three inches in diameter.” *Id.* at 651-652.

In examining the content of her initial notice to the city, this Court concluded that it failed to satisfy the statutory requirement:

The defect, if any, was comparatively easy to describe, and it is difficult to understand how appellee failed to make any reference to the location in the claim filed April 1, 1949, and that her signed statement of April 4, 1949, as later established by her testimony in March, 1953, that: “On Bates a little south of Larned, there is a pole and next to the pole there is a defect in the walk.” Parol evidence was required in this case “to determine both the place and the nature of the defect” and, applying the test set forth in *Barribeau v City of Detroit*, *supra*, there is but one conclusion, namely: A reasonable notice was not given to the city.’

*Id.* at 659.

Lastly, in *Smith v City of Warren*, 11 Mich App 449, 452; 161 NW2d 412 (1968), the Court of Appeals found that plaintiff's notice to defendants referring to an accident "at Thirteen Mile Road and Hoover, near the address of 11480 Thirteen Mile Road" was deficient.

In this case, the exact location of the defect cannot be determined through reference to the notice itself. Although the notice identifies northbound Advance Road near its intersection with Cummings Road, it does nothing to inform the Road Commission whether the alleged defect existed east or west of the intersection, two miles or two feet from the intersection, or before, after or within the intersection. It does not identify the intersecting leg where the defect was alleged to have existed. In short, parol evidence is necessary to determine where this defect is alleged to have existed. As such, the purported notice cannot pass the test of *Barribeau, Ridgeway, Overton* and *Smith*.

Aside from failing to provide the exact location of the defect, the Notice does not provide a sufficient description of the exact nature of the defect. There is no description as to the depth, width, length, general size or dimensions of the alleged pothole. Only plaintiffs would have known the exact location and description of the alleged defect, and from the Notice itself, absent parol evidence, the Road Commission would not have been able to locate this defect. Plaintiffs' Complaint, in fact, provides perhaps the most compelling reason why the description of the nature of the defect is insufficient. The Complaint alleges that the entirety of Advance Road was in need of maintenance and repair ("maintenance and repair over portions of the traveled portion of the roadway and roadbed of Advance Road," **Exhibit 4, at ¶ 7**; "deteriorated physical structure of and the need for significant maintenance to the roadbed surface designed for vehicular travel on Advance Road," **Exhibit 4 ¶ 9**; "significant road repair project for Advance Road," **Exhibit 4, at ¶ 10**; "presence of the dangerous and defective condition(s) present in the

improved portion of the roadway of Advance Road,” **Exhibit 4, at ¶ 14**; “defective, dangerous and poorly maintained roadbed surface constituting within the improved surface of the roadway,” **Exhibit 4, at ¶ 18**; “solicitation of assistance to perform the repairs upon this and other portions of Advance Road,” **Exhibit 4, at ¶ 20**; “the dangerous conditions present upon the roadway in question,” **Exhibit 4, at ¶¶ 29 and 43**; “failing to successfully repair some or all of the dangerous and defective conditions known to be present in the roadway,” **Exhibit 4, at ¶¶ 30(j) and 44(j)**). Plaintiffs themselves plead that Advance Road was defective and dangerous in more than one particular location. That allegation only proves that the Road Commission needed more specific notice of the exact nature and location of the defect alleged to have caused the crash.

While this case was pending on appeal, the Court of Appeals issued a published decision in *Plunkett v Dep’t of Transportation*, 286 Mich App 168; 779 NW2d 263 (2009). *Plunkett* was cited by the Court here in connection with the § 1404 argument. The Court of Appeals in this case specifically relied on *Plunkett’s* conclusion that a police report submitted with a statutory notice was properly considered in evaluating whether the notice itself was sufficient. *Whitmore, supra*, at \*3. This Court of Appeals panel stated that it “could not conclude that plaintiffs’ notice was defective merely because it relied on descriptions in the accompanying police report.” *Id.*

As an initial matter, the Road Commission disputes that it is appropriate, under the statute, to refer to outside sources to convey the information required by the statute. The longstanding case law discussed above establishes that parol evidence cannot be relied upon to meet the statutory requirements. In any event, even assuming *Plunkett* was correctly decided, the Court of Appeals conclusion here was flawed because the police report was not submitted with the notices sent to the Road Commission. The Court of Appeals based its conclusion that

the police report had accompanied the notice on plaintiffs' counsel's argument at the November 21, 2008 hearing:

*THE COURT:* It says near the intersection of Cummings Road. It doesn't say whether it's north of Cumming's [sic] or south of Cumming's [sic].

*MR. MICHAEL:* It does say near and the police report, which was in the possession of the Defendant at the time they discussed the Notice of Intent, within the 120 days, indicates that it's ten feet south of the actual intersection.

Now, the northbound lane of Advance Road is 11 feet wide, at least it was. The mouth of Cumming's Road, as I understand it, is approximately 15 feet wide. So, it's I mean, we've got a 15 foot line here and it's 10 feet south.

*THE COURT:* How does the police report figure into this? Was it accompanied with the Notice of Injury?

*MR. MICHAEL:* Yes, Your Honor. We mailed it with it. And, the Defendant also had possession of it. And, as I said earlier, discussed it in open meeting, minutes of which are attached to our reply . . . .

**(Exhibit 5 at pp 17-18).** The Court of Appeals here concluded that because defense counsel did not object to plaintiffs' counsel's statement at the hearing, that it must be true. The opinion cites no precedent supporting such reasoning. Nor would such a precedent make sense. There is no obligation for an attorney, at a summary disposition hearing, to contradict everything said by opposing counsel, lest it be deemed admitted. That is most certainly true when the Circuit Court record contradicts an attorney's statements, as it does in this case. The notices supplied by plaintiffs were dated September 19, 2006, and were sent to the Charlevoix County Clerk together, under one cover letter that itemized the contents of the envelope. **(Exhibit 7).** The police UD-10 report from the incident is not listed as an enclosure. **(Exhibit 7).** More importantly, the record contains a follow-up communication from the Road Commission's agent, dated October 2, 2006 (after the expiration of the 120 day period), acknowledging receipt of the

notices, and requesting that plaintiffs' counsel provide some additional information, including a copy of the UD-10 report. **(Exhibit 7)**. It could not be more clear that the UD-10 report was not included with the notices. For that matter, apart from plaintiffs' counsel's oral representations at the Circuit Court hearing and the Court of Appeal hearing, plaintiff has not made an argument, or provided any written record demonstrating, that the UD-10 report was enclosed with the original notices. For these reasons, the Court of Appeals based its conclusion on the § 1404 issue on its faulty assumption that the police report had been provided with the notices. Plaintiffs' counsel's statement notwithstanding, the admissible record proves otherwise.

In summary, the Notice of Injury does not satisfy the mandatory substantive statutory requirements of MCL 691.1404(1), and on this basis, the Road Commission should have received summary disposition.

### **III. THE LOWER COURTS ERRED IN REFUSING TO DISMISS PLAINTIFFS' ALLEGATIONS CONCERNING THE ALLEGED FAILURE TO "WARN" MOTORISTS OF THE CONDITION OF THE HIGHWAY**

Plaintiffs alleged, among other things, that the northbound portion of Advance Road was "without appropriate safety markings or precautions, construction zone signage and/or other markings which would have timely revealed to the traveling public, including but not limited to the Plaintiffs herein, the presence of a defective and dangerous condition which existed within the improved portion of the roadway." **(Exhibit 4, at ¶ 11)**.<sup>2</sup> In the paragraphs containing the so-called breaches of duty, plaintiffs repeatedly reference the alleged failure to warn, or to post signage. **(Exhibit 4, at ¶¶ 30(b), (f), (l), 44(b), (f), (l))**. The Defendant Road Commission is

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<sup>2</sup> There are two paragraphs labeled "11" in the Complaint. The quoted language comes from the second.

immune from these claims, as well as all other “warning” claims contained in plaintiffs’ Complaint.

As discussed above, plaintiffs rely solely on MCL 691.1402. MCL 691.1402 does not provide an exception to governmental immunity based on failure to post warnings, mark for known defective conditions, or alert drivers as to hazardous roadways, among other things. “It is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature’s intent.” *Nawrocki* 463 Mich at 159 (citing *Turner v Auto Club Ins Ass’n*, 448 Mich 22, 27 (1995)). The clear statutory language states that a person may recover damages only if a governmental agency fails to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” MCL 691.1402(1).

This Court was unambiguous when it specifically addressed that a cause of action does not lie against a road commission for failure to install, maintain, repair, or improve traffic control devices, including traffic signs. *Nawrocki*, 463 Mich at 172-173 (addressing companion case *Evens v Shiawassee Co Rd Comm’rs*). Plaintiff Evens argued that the road commission owed him a duty to install additional stop signs or traffic signals at the intersection of an accident. *Id.* at 154. This Court, in overruling *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996) (where this Court initially held that there was a duty to provide adequate warning signs at known points of hazard), held that:

The...road commissions’ duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage. [Citation omitted.] A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate

street lighting or vegetation obstruction, fails to plead in avoidance of governmental immunity because signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel. Traffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the improved portion of the highway designed for vehicular travel.

*Nawrocki* at 183-184. Further, this Court concluded that the road commission did not have a duty to install additional traffic signs. *Id.* at 184. In similar fashion and following the holding of *Nawrocki*, this court in *Iovino v State*, 244 Mich App 711; 625 NW2d 129 (2001), changed its position on remand and held that the alleged failure to install warning devices at a railroad crossing was not within the highway exception to governmental immunity.

In this case, plaintiffs have alleged that there was improper signage along Advance Road. There is no such cause of action, and it should have been dismissed outright by the Circuit Court. Although it appears from the transcript that plaintiffs' counsel conceded at the November 21, 2008 hearing that they were not bringing a "separate" duty to warn or signage claims, there was significant confusion in the dialogue between plaintiffs' counsel and the court, such that it looks as if plaintiffs' counsel was drawing a distinction between a common law duty to warn claim, and a duty to warn claim that plaintiffs' counsel intended to frame under § 1402:

*MR. MICHAEL:* Well, your honor, as indicated in our response, we don't allege a theory of liability as to a duty to warn. We do take some issue with the fact that we still should be allowed to use that argument in terms of demonstrating their failure to repair a condition of which they had knowledge.

\* \* \*

. . . [I]f they had actual knowledge or constructive knowledge of this defect, which we allege they did, the law doesn't say that they can simply ignore the responsibility to protect the motoring public from the condition they are aware that existed in the roadway. They can't turn their heads to it.

So, while we don't believe that it is a separate claim of liability, we haven't indicated that it it [sic] is. We have two Count's [sic], they are both straight Statutory Count's [sic].

I do believe that we should be permitted to argue on the basis of law as it currently exists, that their failure to warn of a condition of which they had actual or constructive notice, did, in fact, violate the Statute. But, is more importantly evidence of their knowledge and evidence of their failure to repair.

So, it's not a separate claim of liability, but I think that, I think their failure to repair it, is a violation of Statute.

*THE COURT:* But, you just said their failure to warn was a violation of the Statute.

*MR. MICHAEL:* Then, I misspoke and I apologize. I don't believe their failure to warn of the known condition violates the statute. I think, at a minimum, it's evidence of, it's evidence of the fact, if they were aware of this condition, it's evidence of the fact that they did not act to reasonably repair and maintain that road. It is not a separate theory of liability.

**(Exhibit 5, at pp 10-12).** So, at the end of the day, plaintiffs' counsel's position was that failing to warn of a highway defect does not violate § 1402, but that he should be allowed to present evidence to the jury of the supposed failure to warn, from which the jury could then conclude that § 1402 had been violated. Respectfully to plaintiffs' counsel, such reasoning is nonsensical. It is, in its purest form, an argument that failing to warn does not violate the statute, but that a violation of the statute can be found based on a failure to warn. Although the Circuit Court appeared fairly confident that no failure to warn could form the basis for liability, the Court's Order denied the Road Commission's motion in total.

The Court of Appeals decision simply compounds this error. As recognized in Judge Bandstra's dissent, to the extent the plaintiffs may wish to attempt to introduce evidence of the lack of warning in connection with their § 1402 claim, such an effort would be an evidentiary matter, and would not require that the failure to erect warning signage along the highway, or to

otherwise warn the plaintiffs of the alleged pothole, be pleaded as a breach of the duty imposed under § 1402. More importantly, as recognized by Judge Bandstra, the failure to warn of an alleged highway defect could never be relevant or material to the Road Commission's limited duty under § 1402 to repair and maintain the physical structure of the roadbed surface, as established in *Nawrocki*.

The Road Commission is entitled to summary disposition, and it respectfully asks this Court to enter such an Order, or command the Circuit Court to do so.

**RELIEF REQUESTED**

WHEREFORE, for the foregoing reasons and authorities, Defendant Charlevoix County Road Commission respectfully requests that this Court grant preemptory relief reversing the lower courts' decisions to the extent they deny summary disposition to the Road Commission. Defendant alternatively requests that this Court grant leave to appeal and thereafter reverse the portions of the lower court decisions denying summary disposition to the Road Commission. Defendant respectfully requests any additional relief that this Court deems necessary, including, but not limited to, costs and fees incurred in this appeal.

DATED: November 17, 2010



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