STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Talbot, P.J., Beckering and M. J. Kelly, JJ)

HELEN YONO,

Plaintiff / Appellee,

vs.

Supreme Court Docket No. 146603
Court of Appeals Docket No. 308968
Court of Claims Case No. 11-000117-MD

DEPARTMENT OF TRANSPORTATION,

Defendant / Appellant.

SUPPLEMENTAL BRIEF BY THE COUNTY OF MACOMB, DEPARTMENT OF ROADS, THE ROAD COMMISSION FOR OAKLAND COUNTY, AND WAYNE COUNTY IN SUPPORT OF DEFENDANT / APPELLANT DEPARTMENT OF TRANSPORTATION'S APPLICATION FOR LEAVE TO APPEAL

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QUESTION PRESENTED FOR SUPPLEMENTAL BRIEFING

In its September 20, 2013 order granting oral argument on the Department of Transportation's Application for Leave to Appeal, the Court requested supplemental briefing from the parties concerning the following question:

> Whether the *parallel parking area* where the plaintiff fell is in *the improved portion of the highway designed for vehicular travel* within the meaning of MCL 691.1402(1)?[1]

Amicus curiae respectfully submit for the reasons expressed in its original brief in support of the state's Application for Leave to Appeal, in the state's supplemental brief, and in this brief, the answer to the supplemental question is "No."

[1] *Yono v. Dep't of Transportation*, ___ Mich. ___; 836 N.W.2d 686 (2013) (emphasis added).

STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus curiae Macomb County, through its Department of Roads, is responsible for the maintenance and upkeep of approximately 1,888 miles of highway. *Amicus curiae* Wayne County maintains more than 1,000 miles of county primary and secondary highway. *Amicus curiae* the Road Commission for Oakland County is responsible for nearly 2,700 miles of highway. Annually, these entities receive numerous notices under § 4[2] of the Governmental Tort Liability Act (GTLA)[3] in which claims are asserted under § 2, the so-called "highway exception" to governmental immunity.[4]

This case presents the issue concerning the government's duty to maintain in *reasonable* repair only the "improved portions of the highway designed for vehicular travel", and therefore it is relevant to all governmental entities represented herein.[5] More particularly, this case involves the "scope" of the definition of "highway" under the highway exception to governmental immunity.

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[2] MCL 691.1404.

[3] MCL 691.1401 *et seq.*

[4] MCL 691.1402.

[5] MCL 691.1402. See also *Duffy v. Dep't of Natural Resources*, 490 Mich. 198, 207 (2011). It should be noted that MCL 224.21 addresses a county road commission's duty to keep in reasonable repair and maintain highways under its jurisdiction in a manner reasonably safe and convenient for public travel. However, the duty expressed in this statute has been held subject to and subsumed by the "highway exception" in MCL 691.1402, such that the principles of immunity inherent in the performance by all governmental entities of governmental functions applies equally to county road commissions as to other governmental entities exercising jurisdiction over highways. See *Potes v. Dep't of State Highways*, 128 Mich. App. 765, 769-770 (1983); *Moerman v. Kalamazoo County Road Comm'n*, 129 Mich. App. 584, 591-592 (1983), superseded by statute on other grounds as stated in *Ehlers v. Dep't of Transportation*, 175 Mich. App. 232 (1988) (citing *Mullins v. Wayne County*, 16 Mich. App. 365, 373, n. 3 (1969), lv. denied 382 Mich. 791 (1969) and stating MCL 691.1402 (the "highway exception" to governmental immunity) "imposes an important limitation on the liability of the...county road commission[s]" as described in MCL 224.21).

In the case *sub judice*, the Court of Appeals' published opinion involves an issue of significant importance to *amicus curiae*.[6] Given Plaintiff's factual allegations and the legal disposition of her claim, nearly every "portion" of a highway will be subject to the scope of the exception. Many surface areas of highways and streets (whether integrated into or contiguous with the actual, *improved portion* of the highway that *is* designed for vehicular travel) are untraveled and / or are not designed for vehicular travel within the definition and meaning of the "highway exception" as provided in MCL 691.1401(e) and MCL 691.1402, and this Court's jurisprudence, respectively. Moreover, many publicly owned spaces, including parking lots, that are either conjoined with or adjacent to "highways", contain the same characteristics as the area where Plaintiff is alleged to have fallen in the instant case. Expanding the "area" of what is, by definition and this Court's interpretation, a "highway" within the meaning of the highway exception exposes the government to potential liability in situations that do not encompass the government's narrow waiver of suit immunity.

As noted in the Department's Application for Leave to Appeal, imposing potential liability on governmental entities will burden these entities to an extent not intended by the GTLA.[7] There is considerable and legitimate concern among *amicus curiae* that the Court of Appeals' ruling will be detrimental to the public *fisc*. In the three counties participating as *amicus curiae* in this brief, there are over 5,500 miles of roadways which constitute "highways" within the meaning of the statutory exception. Virtually every highway that falls within the definition in the statutory exception contains significant surface areas of untraveled, but adjacent

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[6] *Yono v. Dep't of Transportation*, 299 Mich. App. 102 (2012).

[7] Department's Application for Leave to Appeal, pp. 15-16; see also *Ross v. Consumers Power Co (On Rehearing)*, 420 Mich. 567, 618 (1984).

and contiguous, i.e., "integrated" surface areas with substantial pedestrian and vehicular occupancy.[8] It is well-established that such areas are frequently used for parking and access to public and private dwellings. The majority opinion in the Court of Appeals inappropriately construed the "highway exception" broadly to include these non-traveled areas of every highway.

[8] MCL 691.1401(e).

SUPPLEMENTAL BRIEF

In its September 20, 2013 order inviting supplemental briefing this Court framed the question it wanted addressed, as follows:

> Whether the *parallel parking area* where the plaintiff fell is in *the improved portion of the highway designed for vehicular travel* within the meaning of MCL 691.1402(1)?[9]

The issue is presented this way because this Court has previously held that "the improved portion of the highway designed for vehicular travel" as expressed in MCL 691.1402(1) is *limited* to only a specific "portion" of a "highway" as defined in MCL 691.1401(e).[10] Indeed, the definition provided in the latter provision encompasses a more expansive area than the *limited portion* that is covered by the former. It states: "'Highway' means a public highway, road, or street that is *open for public travel*...." (emphasis added). Thus, the term *includes* areas that are open for public travel. However, the *duty* of reasonable repair and maintenance "and the liability for that duty" that applies in this case to *amicus curiae*, and to appellant MDOT, is *limited*, further, to only those "*improved portions*" of the "highway" that are specifically "designed for vehicular travel."[11] Thus, while a "highway" may be any thoroughfare "open for public travel", indeed, even more expansive areas such as parking lots or contiguous areas, the duty of the state and county pertinent to the case *sub judice* is *limited* to only those *improved*

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[9] *Yono v. Dep't of Transportation*, ___ Mich. ___; 836 N.W.2d 686 (2013) (emphasis added).

[10] *Nawrocki v. Macomb County Road Commission*, 463 Mich. 143 (2000); *Grimes v. Michigan Dep't of Transp.*, 475 Mich. 72 (2006).

[11] See MCL 691.1402(1).

portions designed for *vehicular*, as opposed to *public* travel.[12] This is consistent with the Court's jurisprudence on the subject to date.[13]

Importantly, MCL 691.1402(1) contains additional limitations on the duty and liability that can be imposed because it further excludes, pertinently in this case, "*any other installation outside of* the improved portion of the highway designed for vehicular travel."[14] As noted in the brief previously filed by *amicus curiae* in support of the state's Application for Leave to Appeal, this phrase would apply to the parallel parking areas and similar installations.[15]

Any response to the Court's question presented in the instant case must, of necessity, begin with the overarching principles of interpretation that apply to statutory provisions that waive the government's suit immunity. That is, such provisions must be read to *broadly* preserve the state's suit immunity, and the exceptions are to be narrowly construed and applied to that end. Thus, while it is the position of *amicus curiae* that the plain language of the relevant provisions construed together provide sufficient authority to *exclude* the particular "parallel parking area" at issue in the instant case, when immunity is broadly drawn and the exception itself is narrowly applied there is even more reason for such exclusion. Indeed, the judiciary is ill equipped to make *policy* choices (or choices of interpretations that reflect such choices) that

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[12] *Id.*

[13] As explained by this Court in *Nawrocki*, *supra* at 157, governmental agencies are under many duties, including a duty to maintain surface areas outside of the improved portion of a highway actually designed for vehicular travel. However, "[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.*, citing *Ross*, *supra* at 618-619. See also *Duffy v. Michigan Dep't of Natural Resources*, 490 Mich. 198 (2011) and *Grimes v. Michigan Dep't of Transportation*, 475 Mich. 72 (2006).

[14] MCL 691.1402(1) (emphasis added).

[15] See *Amicus Curiae Brief in Support of MDOT's Application for Leave to Appeal*, pp. 30-33.

cause a particular claim to fall within the Legislature's narrow exceptions to the government's jealously guarded immunity because it is itself a branch of government subservient to the collective will of the People's choice of when immunity can be waived and, therefore, when jurisdiction may be conferred in a given case so that the judiciary may decide the merits of a legitimate claim.[16] The default must always be that a particular claim *does not* satisfy the requirements to access the courts and lift the presumptive veil of immunity that is cast widely upon the government's activity.[17]

In sum, the conclusion of this Court with respect to the instant application for leave to appeal, as recognized in its articulation of the question presented in this case, must be mindful of the restraints placed upon it by the parameters of governmental immunity defined by the Legislature, which is the expression of the People's will to waive immunity in only a small subset of cases against the government.[18] Those restraints, as identified and outlined in the state's Application for Leave to Appeal and in the *amicus curiae* briefs in support thereof, reveal the following summary of the conclusions as applied to the case *sub judice*, which conclusions are borne out by the statutory provisions, as well as this Court's well-developed and consistent jurisprudence on the subject.

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[16] *Atkins v. SMART*, 492 Mich. 707, 714-715 and n. 11 (2012), quoting *Moulter v. Grand Rapids*, 155 Mich. 165, 168-169 (1908) ("it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred any limitations it chose"). As a matter of constitutional limitations imposed on the branches of government, the judiciary cannot similarly restrict or expand such limitations.

[17] *Mack v. City of Detroit*, 467 Mich. 186, 198-202, 202 (2002) ("immunity is a 'characteristic of government'" inherent in its function as the basic framework of day-to-day support provided for the public good).

[18] *Atkins*, *supra*.

First, contiguous, and other connected areas of pavement and surface areas adjacent to the improved portion of the highway designed for vehicular travel *are not* included within the definition of "highway" as used in the GTLA, and as interpreted under its narrowly construed scope. By explicit designation, the Legislature chose to *include* some other areas as being considered a "highway", e.g., a bridge, sidewalk, trailway, crosswalk, etc., but then, with respect to the state and *amicus curiae* herein, limited the duty to a narrower portion of any highway, and explicitly *excluded* other areas from the scope of that duty, e.g., sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.[19]

This is even more of a reason to conclude that all other such areas *are not* within the exception. Such areas when compared to the actual travel lanes designed for vehicular travel *may be* extensive; indeed, it could be argued these areas comprise an even larger portion of the government's property. Yet, the Legislature has narrowed the exception by definition, and the judiciary must maintain that limitation by narrowly construing and applying the definition to a given case. In the instant case, the parallel parking area is *without* the improved *portion* of the highway designed for vehicular travel. On this basis, the Plaintiff's case was not stated.

Second, there are "defects" and "actionable defects". The former can and do exist, even through the government's "negligence", yet these defects do not invoke the government's duty, and therefore do not come within statutory exception to the government's retained suit immunity. Any road crew would have prior notice of the types of defect alleged in Plaintiff's complaint. They are a familiar and frequent occurrence in many locations outside the traveled portions of highways over which governmental entities have jurisdiction within the meaning of MCL

[19] MCL 691.1402(1).

691.1402. While a cause for caution to the reasonable person, and even dangerous under the proper circumstances, these defects are not "actionable defects" thereby triggering the government's duty under the second sentence of MCL 691.1402(1).

"Actionable defects" are only those that fit within the strictest / narrowest interpretation of the statutory exception. The Court's jurisprudence reveals the government has a duty only of maintaining "highways" in *reasonable* repair and keeping them *reasonably safe* for travel.[20] As stated by Justice Coleman, speaking to the concept of holding the government only to the duty to keep highways reasonably safe for public travel, stated: "We will not require of [the government] more than what is reasonable under the circumstances; nor will we make [it] an insurer of the travelers of the roadway."[21] This means, of course, some "defects" that *are in fact* on "highways" as defined are not actionable.

This Court's jurisprudence also establishes that to be an "actionable" defect, it must be a persistent defect.[22] Dust, debris, gravel, and other transient objects on the surface of a roadbed but not physically integrated and/or permanently embedded upon that *improved portion* thereof designed for vehicular travel are *never* actionable defects.[23] Finally, actionable defects are

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[20] See *Evens v. Shiawassee County Road Commission, sub nom Nawrocki v. Macomb County Road Comm'n*, 463 Mich. 143, 160 (2000) (citing *Pick v. Szymzak*, 451 Mich. 607, 635-637 (1996) (Riley, J., dissenting) – *Evens* was a case that was consolidated with and addressed in *Nawrocki*).

[21] *Salvati v. State Hwys. Dep't.*, 415 Mich. 708, 716 (1982).

[22] *Wilson v. Alpena County Rd. Comm'n* 474 Mich. 161, 167-169 (2006). The Court in *Wilson* addressed the issue of "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 162-163.

[23] See, e.g., *Hagerty ex rel. Hagerty-Kraemer v. Bd. of Manistee County Road Commissioners*, 493 Mich. 933 (2013); *Paletta v. Oakland Co. Rd. Comm'n*, 491 Mich. 897 (2012); *Estate of Buckner v. City of Lansing*, 480 Mich. 1243 (2008).

limited by interpretive principles to the *narrowest* of the *portion* of the "highway" designed for vehicular travel.[24]

Third, and following from the results of the statute and its interpretation, the geographical and/or physical location, rather than the allegations in a particular suit, dictates the ability of a claimant to access Michigan courts – if unverified *allegations* of a defect anywhere were allowed to pierce the veil of immunity then the purpose of immunity to prevent not only judgments and liability, but the costs of defending suits will be lost.[25] Thus, allegations of defects that are not unequivocally *both* located within and integrated into the improved portion of the highway designed for vehicular travel are not allegations of "actionable defects" within the meaning of the exception in MCL 691.1402.

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[24] *Grimes, supra.*

[25] *Costa v. Community Emergency Medical Services, Inc.*, 475 Mich. 403, 409-410 (2006).

CONCLUSION

In the GTLA, the Legislature provided its own internalized definition of "highway".[26] "Highway" as used in MCL 691.140(1)(e) and MCL 691.1402(1) is further defined by this Court's significant jurisprudence as the improved portion of a roadway, paved or unpaved, actually designed for vehicular travel.[27] Given the narrow interpretation mandated for statutes waiving the government's suit immunity and the broad grant of immunity, and the fact that the definition of "highway" provided by the Legislature suffers from "no apparent ambiguity",[28] resort to speculation about what should or should not be included as "part" of a highway is prohibited.

Indeed, engaging in such an exercise is nothing more than substituting one Court of Appeals' panel's policy choices for that of the Legislature – it is an expression of what the particular panel thinks should and should not be included as part of a highway.[29] Such policy choices (or speculating about what should or should not be included as waiving the government's inherent immunity) are best left to the Legislature.[30] This is especially true when addressing provisions that lift the broad veil of immunity and subject the government to suit in its own courts.[31]

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[26] MCL 691.1401(e); *Grimes v. Mich. Dep't of Transp.*, 475 Mich. 72, 87 (2006).

[27] See *Nawrocki*, *supra* at 179.

[28] *Grimes*, 475 Mich at 87.

[29] *People v. McIntire*, 461 Mich. 147, 152.

[30] *Rowland v. Washtenaw County Rd. Comm'n*, 477 Mich. 197, 214, n. 10 (2007).

[31] *Mack*, *supra*.

In properly limiting the scope of the highway exception to only the traveled portion of the highway designed for vehicular travel, this Court has recognized the Legislature's right to limit the government's waiver of immunity in all but a small subset of cases. Indeed, in *Nawrocki*, the Court reiterated the thrust of the Legislature's intent in strictly confining causes of action brought under the highway exception. A cause of action exists only for "actionable" defects, as opposed to other defects, the latter being defects with respect to which though the government may have a "duty", it is not one breach of which gives rise to a cause of action under the "highway exception".[32]

The Court of Appeals majority in the instant case engaged in an usurpation of the Legislature's will because rather than strictly confine the scope of the highway exception, its opinion broadened the exception. This Court has consistently admonished lower courts from engaging in such interpretations because it represents *ultra vires* change in the law of immunity as expressed by the Legislature in the GTLA.[33] Courts must jealously guard the Legislature's waiver of suit immunity because the presumption is the People *have not* waived immunity from suit and exposed the government to potential liability where such an expression is not plainly evident in the statutory exception – the only exceptions that can avail a claimant of access to courts of law in cases against the government. Thus, even if an interpretation of an exception to immunity *might* encompass a particular case or circumstance, the default outcome *must be* that it does not so apply absent clear legislative expression. Interpretations of the highway exception must always abide by this principle.

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[32] See *Nawrocki*, 463 Mich. at 157, citing *Ross*, *supra* at 618-619.

[33] *Mead v. Public Service Comm'n*, 303 Mich. 168, 174 (1942) ("[A] change in the established law of immunity...cannot be brought about by judicial fiat. It can only be done by the legislature."), *accord Nawrocki*, *supra* at 150-151.

RELIEF REQUESTED

Amicus curiae urge the Court to peremptorily reverse the Court of Appeals' decision. In the alternative, the Court should grant the Department's Application for Leave to Appeal to fully address this case.

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