

STATE OF MICHIGAN
COURT OF APPEALS

JOHN POWELL,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED

June 16, 2005

No. 261541

Court of Claims

LC No. 04-000077-MD

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

MEMORANDUM.

Plaintiff commenced this action against defendant alleging that he was injured while riding a motor scooter on state highway M-152. Plaintiff alleged that, due to a rapidly approaching vehicle, he left the standard driving lane and entered the shoulder, which was “comprised of unusually soft material, not fit for shoulder application.” The area was allegedly under construction. The scooter slowed abruptly, and plaintiff was injured. Defendant moved for summary disposition under MCR 2.116(C)(7), based on governmental immunity. The trial court concluded that plaintiff’s claim was within the highway exception to governmental immunity, MCL 691.1402, and denied defendant’s motion. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of immunity granted by law. The trial court’s decision regarding the applicability of the highway exception to governmental immunity is a question of law that we review de novo on appeal. *Mitchell v City of 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) (emphasis added). Defendant argues that a shoulder is not part of the “improved portion of the highway designed for vehicular travel,” so plaintiff’s claim falls outside the highway exception to governmental immunity. *Id.* However, Supreme Court precedent¹

¹ We note that this Court has previously rejected defendant’s argument in *Grimes v Dep’t of* (continued...)

indicates that in cases such as this one, a highway's shoulder is considered part of the improved portion of the highway designed for vehicular travel. *Gregg v Dep't of State Hwys*, 435 Mich 307, 311-317; 458 NW2d 619 (1990). Defendant argues that *Gregg* is inconsistent with the narrow interpretation given the statute in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 183; 615 NW2d 702 (2000). While we agree that *Gregg* appears to conflict with the "roadbed" restriction in *Nawrocki*, "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Affirmed.

/s/ Peter D. O'Connell

/s/ Bill Schuette

/s/ Stephen L. Borrello

(...continued)

Transportation, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2004 (Docket No. 249558). An application for leave to appeal is pending before the Supreme Court in *Grimes*.