STATE OF MICHIGAN

COURT OF APPEALS

DEBRA L. HAGERTY, as Personal Representative of the ESTATE OF DEBRA LOUISE HAGERTY-KRAEMER Plaintiff-Appellee, v BOARD OF MANISTEE COUNTY ROAD COMMISSIONERS, Defendant-Appellant.	UNPUBLISHED September 11, 2012 Nos. 304369; 304439 Manistee Circuit Court LC No. 10-014081-NI

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

The Board of Manistee County Road Commissioners ("the Board") appeals partially as of right and partially by leave granted a May 12, 2011, order denying in part the Board's motion for summary disposition in this governmental immunity case. We affirm in part and reverse in part.

At approximately 6:00 p.m. on May 28, 2010, Debra Hagerty-Kraemer ("decedent") passed a motorist going in the opposite direction while travelling on Litzen Road in Manistee County. The other vehicle allegedly caused the roadbed surface to disperse into a blinding cloud of dust. The decedent travelled approximately 378 feet into the dust cloud before her vehicle veered off the roadway and struck a tree, killing her. The medical examiner opined that death was instantaneous and that the decedent did not suffer any conscious pain or suffering. The decedent's injuries were allegedly caused when she was blinded by the dust cloud and lost all sense of direction before the ruts in the unpaved road made her lose control of her vehicle and the four-foot edge of soft sand caused her to veer into the tree.

The Board filed a motion for summary disposition[1] alleging that Debra L. Hagerty's claim was barred by governmental immunity. The trial court denied the Board's motion and found that the highway exception to governmental immunity applied and that damages for the decedent's conscious pain and suffering were available.

[1] MCR 2.116(C)(7).

The Board argues that the highway exception to governmental immunity does not apply, and therefore, the trial court erred in denying its motion for summary disposition. We disagree. The applicability of the highway exception to governmental immunity is reviewed de novo on appeal.[2] The proper interpretation of a statute is also reviewed de novo.[3] Likewise, a trial court's grant or denial of a motion for summary disposition is subject to de novo review.[4]

> MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. To survive a (C)(7) motion raised on these grounds, the plaintiff must allege facts warranting the application of an exception to governmental immunity. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence. The plaintiff's well-pleaded factual allegations must be accepted as true and construed in the plaintiff's favor, unless the movant contradicts such evidence with documentation.[5]

Immunity for non-sovereign units of government is provided for in the Governmental Tort Liability Act ("GTLA").[6] Generally, governmental agencies are immune from tort liability arising from the exercise or discharge of governmental functions.[7] There are six statutory exceptions to governmental immunity, including the highway exception.[8] Under the relevant statute, "highway" is defined as follows:

> [A] public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole.[9]

MCL 691.1402(1) provides, in pertinent part:

> 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. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental

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[2] *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009).

[3] *Id.*

[4] *Haaksma v Grand Rapids*, 247 Mich App 44, 51; 634 NW2d 390 (2001).

[5] *Plunkett*, 286 Mich App at 180.

[6] MCL 691.1401 *et seq.*

[7] MCL 691.1407(1).

[8] MCL 691.1402; *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 203 n 3; 731 NW2d 41 (2007).

[9] MCL 691.1401(c).

> agency . . . . Except as provided in section 2a, the duty of a governmental agency 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.

"[T]he immunity conferred upon governmental agencies is broad, and statutory exceptions [to governmental immunity] are to be narrowly construed."[10] Our Supreme Court has held that the plain language of the first sentence of MCL 691.1402(1) "states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway 'reasonably safe.'"[11] The fourth sentence of the statutory section, however, narrowly limits the duty to repair and maintain to only "the improved portion of the highway designed for vehicular travel."[12] Thus, in order for the highway exception to apply, the alleged dangerous or defective condition must be located in the actual roadbed designed for vehicular travel.[13]

The Board asserts several alternative grounds for finding that the highway exception does not apply in this case: (1) Litzen Road is—according to Hagerty's expert—an "unimproved road" so there can be no liability under the highway exception; (2) the dust cloud that allegedly caused the accident is not a defect in the physical structure of the roadbed; and (3) the four-foot edge of loose or soft sand that allegedly contributed to the accident was either part of the shoulder or an accumulation of a natural substance on the highway. If any of the Board's contentions are accurate, then the highway exception to governmental immunity should not apply, and summary disposition should have been granted.[14]

First, Hagerty's expert opined that Litzen Road is an unimproved road so that "any reference to pavement or roadbed structure defects is not valid." He later explained that an unimproved road "means its surface is the insitu [sic: in situ] soils to which no gravel has been applied to its surface." The Board argues that because the duty only extends to the "improved portion of the highway designed for vehicular travel" there is no duty when the road is "unimproved." The Board's argument, however, mischaracterizes the issue.

The highway exception applies to unpaved roads.[15] Our Supreme Court has defined road as "'a leveled or paved surface, made for traveling by motor vehicle.'"[16] Although Litzen Road

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[10] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000).

[11] *Id*. at 160.

[12] *Id.* at 161 (quotations omitted).

[13] *Id.* at 161-162.

[14] MCR 2.116(C)(7).

[15] *Grimes v Dep't of Transp*, 475 Mich 72, 79; 715 NW2d 275 (2006).

[16] *Duffy v Dep't of Natural Resources*, 490 Mich 198, 213; 805 NW2d 399 (2011), quoting *Random House Webster's College Dictionary* (1997).

is not paved, it is a level surface designed for vehicular travel. Thus, it is a highway within the meaning of MCL 691.1401(c).

The next step of the inquiry turns on what the Legislature meant when it limited liability to the "improved portion" of the highway. "[U]ndefined words are given meaning as understood in common language, taking into consideration the text and subject matter relative to which they are employed."[17] In the absence of a statutory definition, it is customary to look to dictionary definitions.[18] One meaning of "improve" is "to grade and drain (a road) and apply surfacing material other than pavement."[19] In this case, records obtained pursuant to the Freedom of Information Act ("FOIA") demonstrate that the Board regularly graded Litzen Road with a blade and applied clay and brine to its surface. Grading the road and applying clay and brine thus brings the road within this definition of "improved." Therefore, although Litzen Road may be classified based on some definitions as an unimproved road, it clearly has an improved portion of the road within the meaning of the statute. Consequently, the Board's argument does not negate the applicability of the highway exception.

Next, the Board argues that a dust cloud is not a defect in the roadbed structure, and that therefore, the highway exception does not apply. The highway exception does not contemplate conditions arising from "'point[s] of hazard,' 'areas of special danger,' or 'integral parts of the highway'" that are "outside the actual roadbed, paved or unpaved, designed for vehicular travel."[20] Instead, the defect must originate from the surface of the roadbed.[21] The Board contends that the dust cloud necessarily exists above the roadbed surface, and that therefore, it cannot be a defect in the surface of the road. Thus, the Board argues, the dust cloud is merely a point of hazard.[22] Furthermore, the Board claims that the dust cloud is, by analogy, the same as the missing traffic signals or the vegetation obstruction that were insufficient to invoke the highway exception in *Nawrocki*. The Board's argument is misplaced. Street lights, traffic signals, and overgrown vegetation do not originate from the roadbed. Instead, they necessarily exist in a completely separate state. The dust, in contrast, originates from the roadbed.

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[17] *Stabley v Huron-Clinton Metro Park Auth*, 228 Mich App 363, 367; 579 NW2d 374 (1998).

[18] *Id.*

[19] *Merriam-Webster's Collegiate Dictionary* (2002).

[20] *Nawrocki*, 463 Mich at 176-177.

[21] *Id.* at 176.

[22] In *Pick v Szymczak*, 451 Mich 607, 623; 548 NW2d 603 (1996), overruled by *Nawrocki*, the Court stated that in order to be a point of hazard, "the condition must be one that uniquely affects vehicular travel on the improved portion of the roadway, as opposed to a condition that generally affects the roadway and its surrounding environment." The condition did not have to be part of the actual roadbed.

"Roadbed" is not defined in MCL 691.1402(1). Thus, we must look to how it commonly understood.[23] "Roadbed" is defined as "the material of which a road is composed."[24] Hagerty's expert opined that the dust cloud occurred because the surface of the road is composed of "insitu [sic: in situ] soil [which] is a gravely [sic: gravelly] sand that contains a significant quantity of dust size particles and nothing to bind the particles together." The dust cloud was allegedly kicked up when the tires and wind eroded the surface of the road. Thus, while it was on the surface of the road, the gravelly sand was part of the roadbed. The only question that remains is whether the movement from the roadbed surface to the area just above the roadbed surface transformed the materials from part of the roadbed surface into a substance existing outside the physical structure of the roadbed. In *Moser v Detroit*,[25] the plaintiff was injured when a chunk of concrete fell from the fascia of an overpass and landed on his windshield. This Court concluded that "[p]ieces of the bridge structure (which were part of the improved portion of the roadway, designed for vehicular travel) falling onto the highway below, created an unsafe condition on the traveled portion of the roadbed actually designed for vehicular travel."[26] Therefore, if part of the roadbed structure travels and leaves the roadbed, it does not transform into something other than the roadbed surface. Accordingly, the dust cloud, which originated from the roadbed surface, was arguably a defect in the physical surface of the roadbed, and the Board's argument does not negate the applicability of the highway exception.

The Board also alleges that the four-foot edge of soft sand and gravel is a natural substance that accumulated on the road's surface. Additionally, the Board argues that the dust cloud is a temporary occurrence that is the equivalent of mud, water, algae, or other natural substances that could accumulate above or on the roadbed surface. The Board, in essence, argues that the natural accumulation doctrine applies in this case. The natural accumulation doctrine provides that "'a governmental agency's failure to remove the natural accumulations of ice and snow on a public highway does not signal negligence of that public authority.'"[27] The natural accumulation doctrine, however, only applies if there is a persistent defect in the highway that renders it unsafe for public travel at all times that, in combination with the accumulation of a natural substance, caused the accident.[28] In *Haliw v City of Sterling Heights*, the plaintiff was injured after slipping on ice that accumulated in a depression in the sidewalk.[29] The plaintiff was not able to recover because the evidence established that the "sole proximate cause of the

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[23] *Stabley*, 228 Mich App at 367.

[24] *Random House Webster's College Dictionary* (2001).

[25] *Moser v Detroit*, 284 Mich App 536, 537; 772 NW2d 823 (2009).

[26] *Id.* at 542.

[27] *Haliw v Sterling Hts*, 464 Mich 297, 305; 627 NW2d 581 (2001), overruled on other grounds 471 Mich 700 (2005), quoting *Stord v Dep't of Transp*, 186 Mich App 693, 694; 465 NW2d 54 (1991).

[28] *Haliw*, 464 Mich at 310.

[29] *Id.* at 299.

plaintiff's slip and fall was the ice" and that the plaintiff had not lost her balance or tripped "in any way because of the claimed depression in the sidewalk."[30]

Here, the defect in the roadbed surface was the in situ soil that easily disbursed into a dust cloud. To the extent that the Board argues the dust cloud is the natural accumulation that is suspended temporarily above the roadbed surface, the Board's argument is without merit. Because the dust is part of the roadbed surface, there is no additional accumulation of a natural substance on top of the road. Instead, part of the roadbed surface was kicked into the air by traffic. The dust was still part of the roadbed surface when it was temporarily suspended above the road, and it was still part of the roadbed surface when it settled back to the ground. Further, to the extent that the Board argues that the four foot edge of soft sand is a natural accumulation, the same problems exist. The soft sand allegedly occurs because traffic erodes the roadbed surface. Thus, it is part of the roadbed surface, not the accumulation of a foreign natural substance like ice or snow.[31]

Finally, the Board correctly notes that the highway exception does not apply to the shoulder of a roadway because the shoulder "is not designed for vehicular travel."[32] Hagerty contends that Litzen Road does not have a shoulder. Because a shoulder defect is not the basis of Hagerty's claim, it is not necessary to address this issue further.

The highway exception to governmental immunity applies if the Board failed to fulfill its duty to repair and maintain the improved portion of the highway that is designed for vehicular travel. Based on the record, the Board had a duty to maintain and repair the road—a duty the Board carried out by grading Litzen Road and applying clay and brine. On the day of the accident, the roadbed surface disbursed into a blinding cloud of dust that made the road unsafe for public travel. Therefore, the trial court's determination that the highway exception to governmental immunity applied in this case was not in error.

The Board next argues that Hagerty's claim for damages arising from the decedent's pre-impact fright is barred by the GTLA and the wrongful death act ("WDA").[33] We agree.

The WDA applies in personal injury cases resulting in death.[34] The WDA is "essentially a 'filter' through which the underlying claim may proceed."[35] Therefore, the WDA "does not

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[30] *Id.* at 310.

[31] This Court notes that our Supreme Court's order in *Paletta v Oakland Co Rd Comm*, 491 Mich 897; 810 NW2d 383 (2012), which is cited in the Board's supplemental authority, lacks the requisite factual statement to be binding precedent on the instant case. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483-484; 633 NW2d 440 (2001). Additionally, this case is distinguishable from *Paletta*, as there was no accumulation of any substance on the roadbed.

[32] *Grimes,* 475 Mich at 73 (quotations omitted).

[33] MCL 600.2922.

[34] *Id.*

waive a governmental agency's immunity beyond the limits set forth in the underlying statutory exception."[36] MCL 600.2922(1) makes "liability contingent on whether the party injured would have been entitled to maintain an action and recover damages if death had not ensued."[37] In *Wesche*, the plaintiff sought to recover damages for loss of consortium. The Court held that immunity was not waived for loss of consortium claims because the motor-vehicle exception only waived immunity for damages from a "bodily injury."[38] Because loss of consortium was not a bodily injury, immunity was not waived.[39] In other words, if the decedent had lived, there would have been no claim for loss of consortium.[40] Therefore, for Hagerty to recover damages under the WDA, the claimed pre-impact fright damages would have to be permissible under MCL 691.1402.

MCL 691.1402(1) provides in pertinent part that:

> A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

The Board argues and we agree that the definition of "bodily injury" should be the same definition the court applied in *Wesche*.[41] The *Wesche* Court held that "bodily injury" within the context of the GTLA means "a physical or corporeal injury to the body."[42] In *Goldman v Detroit United Railroad*, the Court stated that "the law does not recognize fright alone, unaccompanied by any physical injury, as a basis for damages."[43] Pre-impact fright does not fall within the

[35] *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 88; 746 NW2d 847 (2008).

[36] *Id.* at 87.

[37] *Id.* at 88.

[38] *Id*.

[39] *Id.*

[40] *Id.*

[41] Hagerty argues that *Wesche* dealt with the motor-vehicle exception, not the highway exception, and, as a result, that it should not apply in this case. Specifically, Hagerty points out the difference in language used in MCL 691.1405 ("the motor-vehicle exception") and MCL 691.1402 ("the highway exception"). Section 1405 states the government is liable for "bodily injury and property damage." Section 1402 states that "[a] person who sustains bodily injury or damage to his property . . . may recover the damages suffered by him or her from the governmental agency." Hagerty contends that by using the plural form of 'damages' the legislature intended it to be construed broadly. This argument is without merit. The Legislature explicitly limited the recovery of damages to those caused by bodily injury or property damage. MCL 691.1402. And, it is well settled that exceptions to governmental immunity are to be narrowly construed. *Nawrocki*, 463 Mich at 158.

[42] *Wesche*, 480 Mich at 85.

[43] *Goldman v Detroit United R*, 200 Mich 543, 545; 166 NW 1007 (1918).

definition of physical or corporeal injury to the body, and therefore, it is not a recognized form of damages to which governmental immunity is subject to waiver pursuant to MCL 691.1402(1).

Affirmed in part and reversed in part.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot