

STATE OF MICHIGAN
COURT OF APPEALS

JANE F. MCINTOSH, JOHN MCINTOSH and
BETTY A. GUZIK, as Personal Representative of
the Estate of ALBERT J. GUZIK,

Plaintiffs-Appellants,

STATE OF MICHIGAN, DEPARTMENT OF
TRANSPORTATION (MDOT),

Defendant-Appellee.

FOR PUBLICATION
February 20, 2001
9:10 a.m.

ON REMAND

No. 203017
Court of Claims
LC No. 95-015954-CM

Before: Kelly, P.J., and Hood and Markey, JJ.

KELLY, J.

This matter is before us on remand from our Supreme Court for reconsideration of our determination that plaintiffs' claims against defendant fell within the highway exception to governmental immunity. We are to reconsider our previous decision in light of *Evens v Shiawassee County Road Commissioners*, 463 Mich 143; 615 NW2d 702 (2000).¹ In *Evens*, our Supreme Court overruled *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996). In our previous opinion, we relied on the *Pick* decision in determining that plaintiffs' claims fell within the highway exception to governmental immunity. After further review, and in light of the Court's holding in *Evens*, we now affirm the trial court's grant of summary disposition.

The facts of this case were set out in our previous opinion, *McIntosh v Dep't of Transportation*, 234 Mich App 379, 380; 594 NW2d 103 (1999):

On November 23, 1993, Jane McIntosh was driving her 1988 Buick and
Albert J. Guzik was driving his 1991 Ford pickup truck on westbound I-96 near
Old Plank Road in Lyon Township. William Jones was driving his 1985 Camaro

¹ *Evens* is the companion case to *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000).

on eastbound I-96 in the center lane near Old Plank Road. Jones, who was driving at an excessive rate of speed, abruptly veered to the right onto the right shoulder, swerved left across the eastbound lanes of traffic, lost control of his car, and entered the center grassy median. When he entered the median, his car became airborne, crossed the median, entered the westbound lanes of I-96, and struck Guzik's pickup truck, which exploded on impact. After striking the pickup truck, Jones' car rolled and struck several vehicles, including McIntosh's car. Guzik was killed on impact and McIntosh was severely injured.

Subsequently, plaintiffs brought claims against defendant "based on the allegation that the highway was defective in that either the grassy median separating the westbound and eastbound traffic lanes of I-96 should have been wider or a median barrier should have been installed." *McIntosh, supra* at 381. Defendant moved for partial summary disposition, claiming that plaintiffs' claims did not fall within the highway exception to governmental immunity. The trial court granted defendant's motion.² Because of our Supreme Court's recent decision in *Evens*, we are compelled to affirm the trial court's grant of summary disposition in favor of defendant, however reluctantly.

In *Evens*, the plaintiff sustained serious injuries in an automobile accident at the intersection of Newburg Road and Byron Road in Shiawassee County. The plaintiff was driving northbound on Byron Road at the time of his accident. Byron Road was regulated by stop signs, posted on both the left and right sides of the roadway. Traffic on Newburg Road was not required to stop at this particular intersection. After stopping at the stop sign, the plaintiff entered the intersection with Newburg Road, where he collided with a westbound car traveling on Newburg Road, which had the right of way. Thereafter, the plaintiff sued the defendant, Shiawassee County Road Commissioners, "arguing that they negligently failed to maintain the intersection in reasonable repair and in a condition safe and convenient for public travel. Specifically, Evens argued that the SCRC owed him a duty to install additional stop signs or traffic signals at the intersection." *Evens, supra* at 153-155. Subsequently, the SCRC moved for summary disposition, arguing that "county road commissions could not be held liable for a failure to install traffic signs on the theory that signs are outside the improved portion of the highway designed for vehicular travel and are not covered by the highway exception." *Evens, supra* at 154. The circuit court granted the SCRC's motion. The Supreme Court in *Evens* affirmed the circuit court.

The *Evens* Court held that the state and county road commissions' duty, under the highway exception, MCL 691.1402(1); MSA 3.996(102)(1), is only to repair and maintain the improved portion of the highway designed for vehicular travel and that the duty is limited exclusively to dangerous or defective conditions within the actual roadway designed for vehicular travel. *Evens, supra* at 183-184. Specifically, the Court held:

² After the trial court granted defendant partial summary disposition, the parties stipulated to the entry of an order dismissing plaintiffs' remaining claims.

The state and county 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. 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. [*Evens, supra* at 183-184. Citations omitted.]

The median between the eastbound and westbound lanes of I-96 is, obviously, outside of the actual physical structure of the roadbed surface designed for vehicular travel. It is not a road surface condition. The width of the median and the lack of a median barrier are basically design features. The *Evens* decision makes it clear that defendant had no duty, under the highway exception to governmental immunity, to correct these design defects. *Evens, supra* at 183-184. Defendants' duty only extended to a dangerous or defective condition of the *roadway designed for vehicular travel*. *Id.* There is no dispute that the median area between the eastbound and westbound lanes of I-96 is outside the actual physical structure of the roadbed surface designed for vehicular travel.

In sum, plaintiffs' claim of improper and/or dangerous median design is not a claim involving a dangerous or defective condition in the improved portion of the roadway designed for vehicular travel. Therefore, they have failed to plead in avoidance of governmental immunity. Hence, summary disposition was properly granted in favor of defendant.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey