STATE OF MICHIGAN

IN THE SUPREME COURT

HELEN YONO,

Plaintiff/Appellee,

v.

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant/Appellant.

Supreme Court No._____

Court of Appeals Docket No.308968

Court of Claims No. 11-117-MD

L. PAGE GRAVES (P51649)
SMITH & JOHNSON, ATTORNEYS, P.C.
Attorneys for Appellee
P.O. Box 705
Traverse City, MI 49685
(231) 946-0700

BILL SCHUETTE (P32532)
JUSTIN GRAY (P73704)
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
Transportation Division
Attorneys for Appellant
425 W. Ottawa Street
Lansing, MI 48913
(517) 373-1470

14660B

APPELLEE'S ANSWER IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE

Dated: February 6, 2013.

L. Page Graves (P51649)
Attorney for Appellee

TABLE OF CONTENTS

Page

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

INDEX OF AUTHORITIES

Page

Cases

Statutes

Court Rules

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

STATEMENT OF JUDGEMENT/ORDER MDOT SEEKS LEAVE TO APPEAL FROM AND RELIEF SOUGHT

Except for the relief sought by Appellant, Appellee concurs with Appellant's statement of the judgment/order it seeks leave to appeal from. For relief, however, Appellee respectfully requests that this Honorable Court not reverse its decision in *Nawrocki v Macomb County Rd Comm,* 463 Mich 143 (2000). In so doing, Appellee requests that this Honorable Court affirm the judgment/order of the Court of Claims and the Court of Appeals, below.

COUNTER-STATEMENT OF QUESTION INVOLVED

I. WHETHER *NAWROCKI v MACOMB COUNTY RD COMM*, 463 Mich 143 (2000) WAS REVERSED BY *GRIMES V DEP'T OF TRANSPORTATION*, 475 Mich 72 (2006)?

Appellee answers:	"No."
Appellant answers:	"Yes."
The Court of Appeals Answered	"No."
The Court of Claims answered	"No."

STATEMENT REGARDING LACK OF GROUNDS FOR MDOT'S DESRIED APPEAL

This case is *Nawrocki's* identical twin-sister. Nothing more; nothing less. And *Grimes* did not reverse *Nawrocki*. Even this Court said so: "our decision is consistent with Nawrocki." *Grimes*, p 475 Mich at 91. If, however, *Grimes* reversed *Nawrocki*, which is what MDOT (and J. Talbot) believes and its argument dictates, then how is it that Mrs. Nawrocki could parallel park her car, exit her passenger door, step onto grass adjacent to the roadway, walk down the grass to the back end of her parallel parked car, step off the curb and onto the roadway -- again, behind her parallel parked car -- adjacent to the curb gutter, then trip and fall because of a defect in the roadbed surface, sustain an injury, file a lawsuit under the highway statute and ultimately have this Honorable Court rule that (1) pedestrians may file claims under the highway statute; and (2) that based upon Mrs. Nawrocki's facts pleaded, her claim was located in the roadway designed for vehicular travel, thus implicating the exception to governmental immunity? *Nawrocki*, 463 Mich at pp 161 and 171-172. Respectfully, MDOT can infinitely argue this case under *Grimes* while ignoring the raw factual reality of what occurred in *Nawrocki* all it wants; the brutal truth is that the case before this Court is and will always remain a *Nawrocki* twin-sister. If, however, *Grimes* in fact reversed *Nawrocki*, then this Honorable Court must now come forward and announce to the bench and bar that it decided *Nawrocki* in error or did not mean what it said or held. Otherwise, MDOT has failed to identify any sub-category of institutional review under MCR 7.302(B) that warrants accepting its application for leave to appeal.[1]

[1] Appellee trusts that this Court will reject as unfounded, the Appellant's platitude that this case "is a substantial roadblock to restoring Michigan's infrastructure, requiring MDOT and all local road agencies to expand maintenance activities, increase maintenance costs, and congest traffic with repair crews." Appellant's Brief, p 2. If this statement were taken to its logical conclusion, then this Court's ruling in *Nawrocki* is responsible for this mythical calamity.

COUNTER-STATEMENT OF FACTS

Facts Regarding Helen Yono's Incident

Appellee, Helen Yono states in her Verified Affidavit that she and her daughter visited the Village of Suttons Bay to do some shopping. (*Plaintiff's Brief In Opposition*, Exhibit 9, ¶ 2). Mrs. Yono and her daughter parked their car in the parallel parking lane for the east side of M-22. Id, ¶ 4. Mrs. Yono's intended destination was to visit a local art gallery across the street. Id, ¶ 3. She exited her vehicle and then crossed M-22, only to learn that the gallery had closed. Id, ¶ 5. Therefore, Mrs. Yono turned around proceeded back to her parallel parked car. Id, ¶ 6. Mrs. Yono was walking on the roadbed surface and intended to step off of the roadbed surface and onto the sidewalk. Id, ¶ 7. It was at this very juncture that Mrs. Yono's left foot stepped into a defect in the actual roadbed surface of M-22, which was a proximate cause for her to roll her left ankle, lose her balance, fall and sustain a serious fracture to her ankle. Id, ¶ 7 and sub-exhibit 9 (D). See, infra, Yono Location of Roadbed Surface Defect photo.

Facts Regarding Rachel Nawrocki's Incident

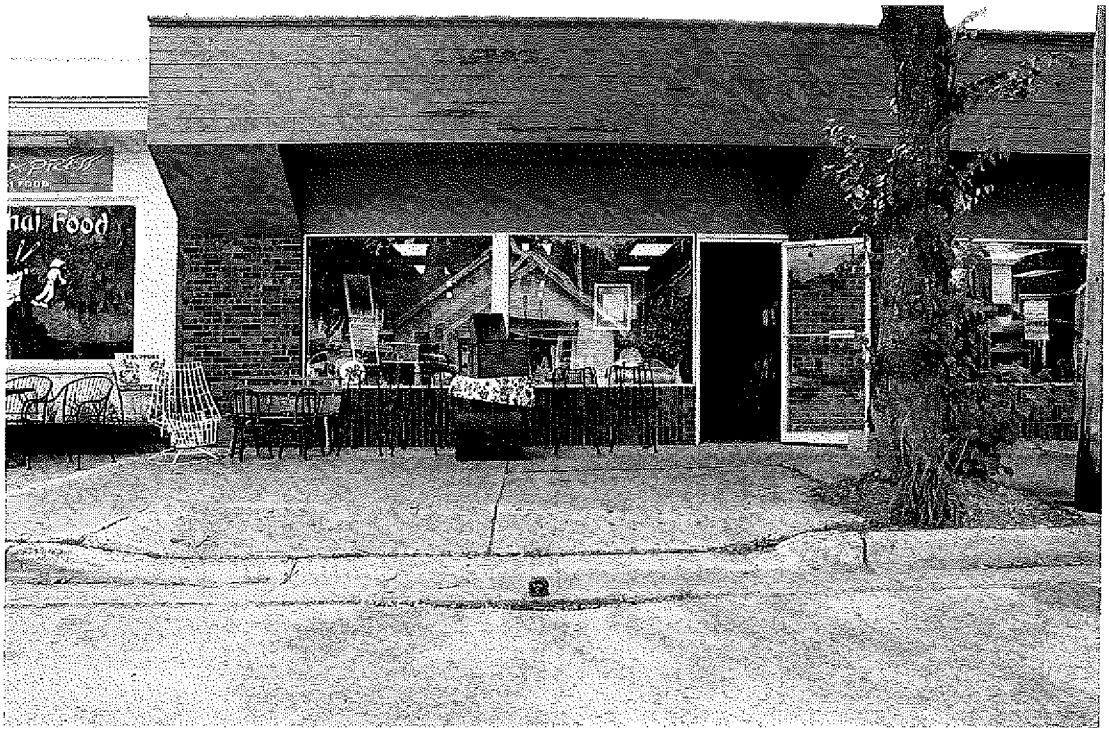
Mrs. Rachel Nawrocki states in her Verified Affidavit that she and Mr. Nawrocki parallel parked their car on Kelly Road, next to the concrete gutter and curb. (*Plaintiff's Brief In Opposition*, Exhibit 1, ¶ 5; see also, sub-exhibit B, Appendixes 8a-11a). Mrs. Nawrocki testified further that after she exited her truck and walked down toward the rear of her parked motor vehicle, she stood on the curb and looked for oncoming traffic. Id, ¶ 7 and Appendix 10a, lines 1-4. Mrs. Nawrocki testified that she then stepped off of the curb, about 6 to 12 inches from the curb, right onto the road surface and into the defect that caused her to fall. Id, ¶ 8, sub-exhibit B, Appendix 11a, lines 23-24; see also, ¶ 9 and sub-exhibit A and B,

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

Appendixes 38a-39a,which are photographs of the defect and location on Kelly Road in relationship to the first driveway north of Rockport Street. Mrs. Nawrocki testified that she fell toward her parallel parked truck. Id, ¶ 9; see also, sub-exhibit B, Appendix 11a, lines 12-13. See, infra, photo Nawrocki Location of Roadbed Surface Defect photo.

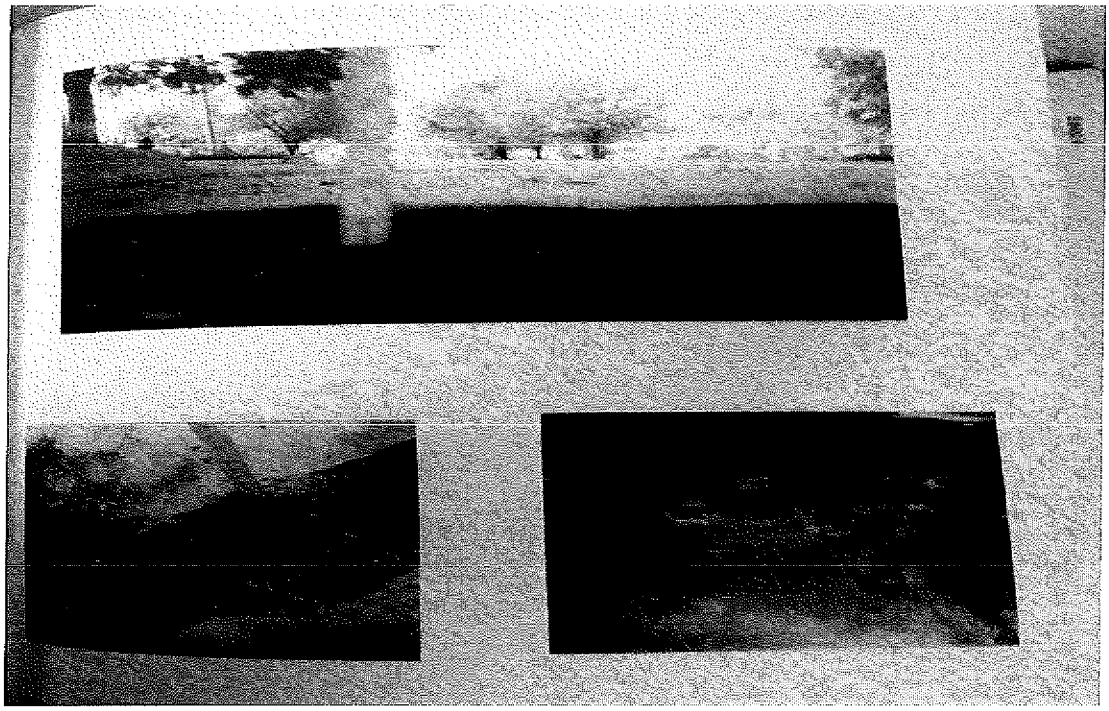
SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

Photos of Locations of Yono's and Nawrocki's Roadbed Surface Defects



Yono location

[*Plaintiff's Brief In Opposition*, Exhibit 9, Affidavit of Helen Yono, sub-exhibit E]



Nawrocki location

[*Plaintiff's Brief In Opposition*, Exhibit 1, Affidavit of Rachel Nawrocki, sub-exhibit A, which was attached as her Appendix 39a, to *Nawrocki's Brief On Appeal* to this Michigan Supreme Court]

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

CONCURING STATEMENT OF THE STANDARD OF REVIEW

Appellee concurs with Appellant's statement of the standard of review.

ARGUMENT

I. MDOT'S APPLICATION LACKS TRADITIONAL GROUNDS FOR INSTITUTIONAL REVIEW, AS CONTEMPLATED BY MCR 7.302(B).

The seminal case dispositive here is *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143 (2000)(Authored by Markman, J.). At page 152, this Court described the substantive facts, supra, as follows:

> "On May 28, 1993, plaintiff Rachel Nawrocki was a passenger in a truck driven by her husband. He parked the truck next to the curb on Kelly Road, in Macomb County, and Nawrocki exited from the passenger side onto the grass between the street curb and the sidewalk. She walked the length of the truck and stepped off of the curb onto the paved roadway. Nawrocki allegedly stepped on cracked and broken pavement on the surface of Kelly Road and sustained serious injuries to her right ankle, necessitating several operations."

In *Nawrocki*, this Court was presented the basic issue of whether pedestrians may bring a claim under § 1402? With the foregoing facts and issue before it, this Court focused on interpreting § 1402(1). This Court dissected the statute into its four separate sentences. This Court held that the first sentence, which states "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", means the government's sole duty is limited to "maintain[ing] the highway in reasonable repair." Id, p 160 (emphasis added). Next, this Court held that the "second sentence describes those persons who may generally recover damages when injured by a breach of the duty created by the *first* sentence." Id (emphasis in original). And moving to the fourth sentence, this Court held that sentence 4 narrowed sentence 1, by limiting the state's and the counties' duty to keep a highway in

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

reasonable repair solely to the improved portion of the highway designed for vehicular travel. Id, p 162. This Court explained that liability does not attach unless the "dangerous or defective condition" is "located in the actual roadbed." Id.

With this interpreted sentence structure, this Court answered the first of the two legal issues before it regarding Mrs. Nawrocki's claim, affirmatively, holding that pedestrians are a protected class that may claim under § 1402. In this regard, the court reasoned,

> "Moreover, because the state and county road commissions must 'repair and maintain' their respective highways and roads so that they are 'reasonably safe and convenient for public travel,' and because we believe 'public travel' encompasses *both* vehicular and pedestrian travel, the plain language of the highway exception cannot be construed to afford protection only when a dangerous or defective condition 'of the improved portion of the highway designed for vehicular travel' affects *vehicular* travel." Id, p 171 (emphasis in original).

Consistent with the fourth sentence of § 1402, this Court clarified that pedestrian claims qualify provided the *location* of the alleged defect is not within a sidewalk, crosswalk, or any other installation outside of the improved portion the road designed for vehicular travel. In so holding, this Court acknowledged the potential for inconsistent results that may occur between a pedestrian crossing a roadway at a crosswalk versus a pedestrian stepping out of his/her parallel parked car on the roadway. In this regard, this Court explained at footnote 27,

> "We are not unaware of the potential for today's holding to result in outcomes that appear illogical or incongruous. For example, a pedestrian injured by a dangerous or defective condition located within a crosswalk, which is arguably integrated into a roadbed, may not be able to plead in avoidance of governmental immunity, ***while a pedestrian who steps out of a vehicle, onto the paved or unpaved portion of the roadbed used by vehicular traffic, and is injured by a dangerous or defective condition within the roadbed itself, may proceed under the highway exception.*** However, such an anomalous result appears compelled by the language of the highway exception." Id, p 172 (emphasis supplied).

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

Finally, this Court held that state and county road authorities owe pedestrians a higher duty of care relative to repair and maintenance. This Court reasoned that just because a roadway may be in reasonable repair and safe for *vehicular* travel, such does not mean *ipso facto* that it satisfies the standard for *public* travel. In this regard, this Court stated at footnote 28,

> "We acknowledge that repairing and maintaining the improved portion of the highway in a condition reasonably safe and convenient for *public* travel represents a higher duty of care on the part of the government than repairing and maintaining it for *vehicular* travel." Id (emphasis in original).

With this legal framework established, this Court simply applied its interpretation of § 1402 to the uncontested facts in *Nawrocki, supra*. Again, Mrs. Nawrocki's car was parallel parked on the roadway next to the concrete gutter and curb. Id, p 152. Mrs. Nawrocki exited her vehicle and stepped off the roadway up onto the curb. Id. She then stepped back down onto the paved roadbed surface behind her parallel parked vehicle. Id. Mrs. Nawrocki's foot rolled in the defect located in the roadbed surface. Id. Based upon the foregoing set of undisputed facts, the court held that Mrs. Nawrocki claim implicated the highway exception to governmental immunity. Id, p 172. In this regard, the court stated,

> "Applying these principles to *Nawrocki,* we conclude that the circuit court erred in granting summary disposition to the MCRC. By alleging that she was injured by a dangerous or defective condition of *the improved portion of the highway designed for vehicular travel*, and not a sidewalk, crosswalk, or 'any other installation outside of the improved portion of the highway designed for vehicular travel,' Nawrocki pleaded in avoidance of governmental immunity." Id (emphasis supplied).

Boiled down to its core, *Nawrocki* holds that a person may parallel park his/her motor vehicle on a roadway's parallel parking lane next to a concrete gutter and curb, exit the vehicle and proceed to his/her intended destination on foot. Bluntly put, a pedestrian walking

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

on or within a parallel parking area on the highway is a location within "the improved portion of the highway designed for vehicular travel." *Nawrocki*, p 171-172. There is no other logical conclusion to reach from this Court's ruling in *Nawrocki*.

Here, there is no difference in the facts or of the location of the roadway surface defect between Mrs. Nawrocki's and Mrs. Yono's respective incidents. Both roadways allow for parallel parking. Both roadways had concrete gutters and curbs. Both roadways were paved from gutter edge to gutter edge. Both roadway surface defects were within the actual roadbed surface, adjacent to the concrete gutter and curb. Both injured persons were pedestrians traveling on the roadway. The only *insignificant* factual difference in the two cases is that in Mrs. Nawrocki's case, she was stepping *down* from the curb onto the defective roadway; whereas, in Mrs. Yono's case, she was stepping *up* and off of the defective roadway to the curb. Regardless, when Mrs. Nawrocki stepped onto the defective roadway, it was a proximate cause of her to roll her *right* ankle, lose her balance, fall and sustain bodily injury. For Mrs. Yono, she too stepped onto the defective roadway surface which similarly was a proximate cause for her to roll her *left* ankle, lose her balance, fall and sustain bodily injury. Mrs. Nawrocki fell toward her parallel parked vehicle. Mrs. Yono fell toward the adjacent sidewalk. Mrs. Nawrocki and Mrs. Yono are identical twin-sisters, factually and legally.

This Court's decision in *Nawrocki*, supra, controls. Respectfully, there is no factual or legal basis to conclude, otherwise. As such and despite MDOT's (and J. Talbot's) understanding to the contrary, *Grimes* does not reverse *Nawrocki*. In fact, this Court insisted in *Grimes* that "our decision is consistent with *Nawrocki*." 475 Mich at 91.

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN

CONCLUSION AND RELIEF SOUGHT

The defect that was a proximate cause for Appellee to stumble and fall originates from the actual roadbed surface designed for public travel. *Nawrocki, supra,* at pp 162 and 171-172; see, also, *Plaintiff's Brief In Opposition*, Exhibit 10, Affidavit of Ed Novak, ¶ 12(h)). This Court in *Nawrocki* has already said so and thus, the courts below correctly denied the Appellant's motion for summary disposition. Consequently, the Appellant has failed to identify any sub-category of institutional review under MCR 7.302(B) that warrants accepting its application for leave to appeal

WHEREFORE, Appellee respectfully requests that this Honorable Court deny the Appellant's application for leave.

Respectfully submitted,

SMITH & JOHNSON, ATTORNEYS, P.C.

Dated: February 6, 2013.

L. Page Graves (P51649)
Attorneys for Appellee

SMITH & JOHNSON, ATTORNEYS
PROFESSIONAL CORPORATION
TRAVERSE CITY, MICHIGAN