STATE OF MICHIGAN
IN THE SUPREME COURT

HELEN YONO,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.
_____/

Supreme Court No. Pub Opn 12-20-12

Court of Appeals No. 308968

Court of Claims No. 11-000117-MD

C. Cavanagh

MDOT'S APPLICATION FOR LEAVE TO APPEAL

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Dated: January 29, 2013

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STATEMENT OF QUESTION PRESENTED

The Governmental Tort Liability Act provides that Appellant Michigan Department of Transportation (MDOT) is liable only for highway defects that are in "the improved portion of the highway designed for vehicular travel." MCL 691.1402(1). In *Grimes v Dep't of Transportation*, this Court held that "only the *travel lanes* of a highway are subject to the duty of repair and maintenance of MCL 691.1402(1)." 475 Mich 72, 91; 715 NW2d 275 (2006) (emphasis added). The single question presented is:

> Does a defect located in a marked parking lane, adjacent to a highway travel lane, subject MDOT to liability?

MDOT's answer:	No.
Yono's answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.

STATUTE INVOLVED

691.1402(1)

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 agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. 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. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer. [Emphasis added.]

STATEMENT OF JUDGMENT / ORDER APPEALED FROM AND RELIEF SOUGHT

On December 20, 2012, the Court of Appeals affirmed the Court of Claims' denial of MDOT's motion for summary disposition. (Exhibit A ["Slip op"].) The Court of Appeals issued its opinion for publication. MDOT respectfully requests this Court reverse the Court of Appeals and grant MDOT's motion for summary disposition.

INTRODUCTION

In *Grimes v Dep't of Transportation*, this Court clarified that under MCL 691.1402(1), "only the *travel lanes* of a highway are subject to the duty of repair and maintenance." 475 Mich 72, 91; 715 NW2d 275 (2006) (emphasis added). In derogation of *Grimes*, the Court of Appeals in this case issued a published opinion expanding MDOT's potential liability to parallel parking lanes and potentially every other highway feature other than a shoulder. The ruling 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.

There are numerous grounds warranting a grant of MDOT's application for leave to appeal:

- First, this case involves a substantial question about the interpretation of MCL 691.1402. MCR 7.302(B)(1).
- Second, the issue presented has significant public interest as the resolution will impact MDOT and every local road agency in Michigan, not to mention all of the Michigan citizens who support MDOT and other road agencies with hard-earned tax dollars. MCR 7.302(B)(2).
- Third, the scope of governmental liability for alleged road defects involves legal principles of major significance to the state's jurisprudence, as this Court has repeatedly recognized by granting leave to appeal in *Grimes; Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 158; 615 NW2d 702 (2000); and other highway defect cases.
- Finally, the Court of Appeals' published decision conflicts directly with this Court's decision in *Grimes*. MCR 7.302(B)(5).

STATEMENT OF FACTS

On July 31, 2011, Appellee Helen Yono was walking across M-22 in Suttons Bay, Leelanau County. (9/2/11 Notice of Intent [Notice], ¶ 2.) She stepped into a crack between the asphalt edge of the parallel parking lane and the concrete gutter. (Notice, ¶ 3.) As a result, she tripped and broke her ankle. (Compl, ¶ 13.)

Yono filed notice with the Court of Claims on September 8, 2011. The notice described the exact location of the defect to be "on the improved portion of M-22 . . . designed for vehicular travel," "at the edge of the roadway of the east side of M-22, abutting the concrete gutter and curb." (Notice, ¶¶ 1, 4.) Yono supported the description with several color photographs showing the streetscape, the highway, and several close-up photos of the alleged defect. MDOT Development Engineer Gary Niemi described the area in question:

- M-22 consists of two traffic lanes (northbound and southbound) and two parallel parking lanes. (MDOT Br in Support of Mot for Summary Disposition, Attachment 3, Aff of Gary Niemi, ¶ 5.)
- The two traffic lanes measure 22 feet wide—11 feet per lane—and comply with federal and state standards for this type of highway. (Niemi Aff, ¶¶ 6-9.)
- MDOT does not take the parallel parking lanes into account when measuring the traveled way and/or measuring individual lane widths. (Niemi Aff, ¶ 17.)
- The buffer zone between the northbound travel lane and the parallel parking lane is 8.3 feet wide. (Niemi Aff, ¶ 11.)
- The defect Yono alleges is located between the edge of the black asphalt surface of M-22 and the concrete gutter—neither of which is designed as a travel lane. (Niemi Aff, ¶¶ 11, 19.)

Niemi's observations can be observed easily in the following photograph of the highway:

[Brief in Opposition to MDOT's Motion for Summary Disposition, Attachment 10.]

[Google Satellite View.]

PROCEEDINGS BELOW

The circuit court denied MDOT's summary disposition motion.

On November 7, 2011, Yono sued MDOT in the Court of Claims alleging the highway exception to governmental immunity, MCL 691.1402(1). On November 28, 2011, MDOT moved for summary disposition claiming governmental immunity and arguing solely that the alleged defect was outside the improved portion of the highway designed for vehicular travel.

On February 1, 2012, the trial court heard oral arguments and denied MDOT's motion. The trial court's reasoning was a bit confusing:

> In order to get to the parking spot you have to travel on the road. (2/1/12 Hearing Transcript [HT], pp 29-30.)
>
> * * *
>
> The location of the alleged defect was not in a 'thru lane.' (HT, p 30, line 12.)
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> * * *
>
> And the Court senses that in order to get to the parking spot, you have to travel on the roadway. I mean, so you're driving down in this example, according to the affidavit, if we are driving on the northbound travel lane, and we are going to park, we are still traveling to get to the parking spot. (HT, p 30, lines 19-24.)
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> * * *
>
> So [the location is] a paved portion, it's not a shoulder. (HT, p 30, lines 24-25.)
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> * * *
>
> But for today's purposes, we'll deny the motion on the grounds I think it's a fact question as to whether or not the parallel parking area was designed for vehicular travel. Because in order for a vehicle to get to the parking spot, they have to drive there. And that would constitute travel in this Court's opinion. (HT, p 31, lines 9-15.)

MDOT's counsel sought clarification:

> MR. GRAY: The (C)(7) motion is a question of law. So by denying the motion, are you finding the defect, is it the improved portion of the travel lane – is it the improved portion of the highway designed for vehicular travel? (HT, p 32, lines 19-23.)

The trial court and Yono's counsel agreed that the denial of MDOT's motion was not because a question of fact existed as to the nature of the defect, but because, as a matter of law, the *location* of the defect was such that Yono could overcome MDOT's immunity:

> THE COURT: I would say that's in the portion of the road that's designed for vehicular travel because the vehicle would have to travel to get to the parking spot, parallel, back in, whatever. So I'm constituting that as vehicular travel. (HT, pp 33-34.)
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> * * *
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> THE COURT: I'm just saying, the alleged defect is a vehicular traveled portion. (HT, p 34, lines 13-15.)
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> * * *
>
> MR. GRAVES: He has placed it as a matter of law within the improved portion of roadway, designed within vehicular travel, is what I heard.
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> THE COURT: Yes. (HT, p 34, lines 21-25.)

On February 15, 2012, the trial court entered its order denying MDOT's motion because, as a matter of law, "the location of the defect that caused Plaintiff's fall is within the improved portion of the highway, M-22, designed for vehicular travel."

The Court of Appeals affirmed over Judge Talbot's dissent.

MDOT filed a Claim of Appeal on March 6, 2012, within 21 days of the entry of the trial court's order. MCR 7.204(A)(1)(a). On November 9, 2012, the Court of Appeals heard oral arguments. On December 20, 2012, the Court of Appeals issued a published opinion affirming the Court of Claims. Judge Talbot dissented.

The panel majority considered portions of *Nawrocki*; *Grimes*; and the Michigan Vehicle Code, MCL 257.1 *et seq.*, to conclude that marked parallel parking lanes are distinguishable from highway shoulders in that parallel parking lanes are integrated into the highway's main travel lanes and designed for regular vehicular travel. Slip op, p 3. The majority held that "the actual physical features of the improvement at issue—namely the area on M-22 that has been designated for parallel parking, show that the parking lanes were designed for vehicular travel." *Id.* at 7.

Judge Talbot disagreed. He cited *Grimes* as evidence of this Court's rejection of the broad definition of "travel," which could include "the shortest incremental movement by a vehicle on an improved surface." Slip op, p 1 (dissent). Such momentary travel uses of a marked parallel parking lane do not transform it into a travel lane. *Id.* at 2. By holding to the contrary, the panel majority was "attempting to judicially legislate and fashion a general rule regarding the Department's duty related to highways that permit parking, as opposed to applying the facts of this case to the rule that our Supreme Court established in *Grimes*." *Id.* at 4.

MDOT timely files this Application for Leave to Appeal.

ISSUE PRESERVATION

MDOT preserved the issue of immunity by raising it in the Court of Claims and Court of Appeals briefing.

STANDARD OF REVIEW

This Court reviews motions for summary disposition under MCR 2.116(C)(7) *de novo*. *Grimes*, 475 Mich at 76. Questions of statutory interpretation are also reviewed *de novo*. *Id.*

ARGUMENT

I. MDOT is immune from liability as a matter of law because the location of the defect at issue is outside the improved portion of the highway designed for vehicular travel.

Under the Government Tort Liability Act, MCL 691.1401 *et seq.*, governmental agencies are immune from tort liability when engaged in a governmental function. The immunity conferred upon governmental agencies is broad, and the statutory exceptions to immunity are to be narrowly construed. *Nawrocki*, 463 Mich at 158. An exception to this broad immunity is the highway exception, which provides that a governmental agency must maintain in reasonable repair those improved portions of a highway "designed for vehicular travel." MCL 691.1402(1). The waiver of immunity expressly excludes "sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel." *Id.* *Grimes* correctly construed MCL 691.1401(1) to limit MDOT's duty the "travel lanes of a highway." *Grimes*, 475 Mich at 91.

The parties, the trial court, and the Court of Appeals all relied on *Nawrocki* and *Grimes* to evaluate whether a plaintiff can plead the highway exception with an allegation of a defect that is within a parallel parking lane. The question presented is whether a marked parking lane adjacent to the travel lane is itself "designed for vehicular traffic."

A. *Grimes* held that MDOT is only liable for the travel lanes of a highway.

In *Grimes*, a motorist was forced from a travel lane onto the shoulder. As he returned to the highway, the grade differential between the gravel portion of the shoulder and the asphalt roadbed caused him to lose control and crash into the plaintiff's vehicle. The plaintiff sued under the highway exception claiming that MDOT failed to maintain the shoulder. The issue on appeal was whether the shoulder of a highway was part of the "improved portion of the highway designed for vehicular travel." MCL 691.1401(1); *Grimes*, 475 Mich at 73.

This Court held that MDOT's duty was limited to a highway's travel lane and that the shoulder was outside the travel lane. Under *Grimes'* narrow construction of the highway exception, its reasoning, and its holdings, this Court should now hold that a marked parking lane, parallel to the travel lane, is not designed for travel such that state immunity is waived.

First, *Grimes* expressly overruled *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990). *Gregg* held MDOT accountable for defects in a bicycle path that was located within the shoulder of a highway. *Grimes*, 475 Mich at 81. By

overruling *Gregg*, *Grimes* concluded that the location of a bicycle path in the shoulder—whether integrated into the roadbed or not—was irrelevant because a shoulder is not "designed for vehicular travel." *Id.* at 88. This was so even though a shoulder is "capable of supporting some form of vehicular traffic." *Id.*

Next, this Court considered the Legislature's use of the term "travel" within MCL 691.1402(1) and rejected the plaintiff's broad notion that "travel" can be construed to include "traversing even the smallest distance." Instead, this Court adopted a very narrow definition of the term "travel":

> [The Legislature] did not intend to extend the highway exception indiscriminately to every "improved portion of the highway." Otherwise, it would not have qualified the phrase. Rather, it limited the exception to the segment of the "improved portion of highway" that is "designed for vehicular travel."
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> * * *
>
> That vehicular traffic might *use* an improved portion of the highway does not mean that the portion was "designed for vehicular travel." [*Id.* at 89-90.]

With that background, the Court's predominant holding in *Grimes* seems self-evident:

> We hold that only the *travel lanes* of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1). [*Id.* at 91 (emphasis added).]

This Court's deliberate use of the phrase *travel lane* in *Grimes* makes answering the question presented here straightforward. A marked parking lane is not designed for vehicular travel, in the same way a highway shoulder does not qualify. Both *can* support vehicular travel, but neither was *designed* to do so.

B. *Grimes* makes it clear that MDOT's duty does not extend to a defect between a parallel parking lane and a gutter.

Thus, a marked parallel parking lane is just like the bike path in *Gregg* and the shoulder in *Grimes*—it is outside the travel lane. And just like a shoulder or a bike path, the momentary travel onto a marked parallel parking lane does not transform a parking lane into a travel lane. A travel lane, a bike path, a paved shoulder, and a parallel parking lane may be structurally indistinguishable—in fact, it is not uncommon for MDOT to construct a single roadbed and then mark it later to show its designated uses. But even construction from the same material does not demonstrate the entire roadbed was designed for the same purpose—for vehicular travel.

For example, when MDOT allows local governments to use state highways for parking, or bus stops, or pedestrian trails, or loading zones, etc., and re-marks the roadbed to identify these types of ancillary uses, MDOT does not agree to expand the exception to governmental immunity. Despite the panel majority's presumption, by allowing local governments to use highway shoulders for municipal purposes, MDOT does not change the highway's design to create "dual-purpose" thoroughfares. Slip op, p 4 ("[W]hile our Supreme Court refused to give the term 'travel' its broadest possible definition, it also did not narrow it to exclude specialized, dual-purpose, or limited access travel lanes"). Only the improved portion of the highway that *is not* designed for vehicular is available to local governments. To put it another way—MDOT will not allow parking on its highways if it interferes with the travel lanes. A parallel parking lane cannot be a travel lane.

C. The panel majority disregarded portions of *Grimes* and grafted a judicially-created expansion onto MDOT's statutory duty.

The Court of Appeals panel majority diminished *Grimes* as narrowly excluding highway shoulders from MDOT's duty. In so doing, the majority overlooked the predominant holding—that *anything* outside the travel lane, *i.e.*, anything not part of the improved portion of the highway designed for vehicular travel, is outside the highway exception. That ruling expanded MDOT's duty to include a new category of "specialized, dual-purpose, or limited access travel lanes" that is unfounded. Slip op, p 4.

But *Grimes* rightly does not distinguish "specialized, dual-purpose, or limited access travel lanes" or "momentary travel" to assess the location of a defect. Quite the opposite:

> That vehicular traffic might use an improved portion of the highway does not mean that that portion was 'designed' for vehicular travel. [*Grimes*, 475 Mich at 90.]

Despite that clear reasoning, the panel majority imposed the concept that *any* amount of travel will render any portion of a roadbed to be highway "designed for vehicular travel." But temporary driving through a marked parking lane, or actually maneuvering into the parking lane to park, does not mean that a parking lane was designed for vehicular travel.

Significantly, MDOT acknowledged its duty to maintain highway features that *are not* part of the traditional travel lane but *are* part of the improved portion of the highway designed for vehicular travel. Slip op, p 3 (dissent); see also, *e.g.*, *Snead v John Carlo, Inc*, 294 Mich App 343, 359; 813 NW2d 294 (2011) (holding

that an exit lane is "indisputably" part of the improved portion of the highway designed for vehicular travel). Turn lanes, median u-turn lanes, merge lanes, on and off ramps, *etc.*, are undoubtedly part of the improved portion of the highway and are designed to allow vehicular travel to continue with minimal interruption. *Cf.* Slip op, p 5. (Emergency turnarounds are different, as they are designed only to accommodate emergency vehicles and are marked to expressly prohibit non-emergency vehicles.) Highways are designed and plainly marked to include these types of uses to accommodate routine travel. Physical barriers distinguishing highway uses are not essential. *Cf.* Slip op, p 5, with *Id.* at 4 (dissent). Conversely, a parallel parking lane is marked to show that it is *not* a travel lane.

MDOT provided an affidavit that detailed the design features underlying M-22 in Suttons Bay. And Yono provided photographs that show the white pavement markings designating the parallel parking places. The proffered evidence shows that the travel lane of M-22 is separate from the parallel parking lane. The defect at issue is nowhere near the travel lane. Accordingly, the trial court should have granted summary disposition to MDOT.

D. *Nawrocki* is only marginally instructive here.

In 2000, this Court addressed the consolidated cases of *Nawrocki v Macomb Co Rd Comm*, and *Evans v Shiawassee Co Rd Comm'rs*, 463 Mich 143; 615 NW2d 702 (2000). The issue in *Nawrocki* was whether the highway exception applied to pedestrians injured by a county's failure to maintain the improved portion of the highway designed for vehicular travel. *Id.* at 148. The Court concluded that a

pedestrian-plaintiff is within the class of plaintiffs capable of pleading in avoidance of governmental immunity under the highway exception. *Id.* at 171. In *Evans*, the issue was whether the highway exception affixed a duty to install, maintain, repair, or improve traffic control devices, including traffic signs. *Id.* at 172-173. This Court held that the highway exception only requires repair and maintenance to the actual physical structure of the roadbed surface, as opposed to traffic control devices. *Id.* at 184.

Yono's argument depended on *Nawrocki's* use of the term "roadbed":

> We hold that the actual language of this statutory clause sets forth an exception that encompasses only the "traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel." [*Id.* at 180.]

Yono argued that because M-22 was constructed as a single roadbed, the pavement markings separating the travel lanes from the parallel parking lanes are irrelevant and that the roadbed *is* the improved portion actually designed for public vehicular travel.

The Court of Appeals panel majority viewed *Nawrocki* in the same way when it relied on language from *Evans* (which quoted *Scheurman v Dep't of Transportation*, 434 Mich 619, 631; 456 NW2d 66 (1990)), to improperly characterize this Court's holdings. Slip op, p 3 (*Scheurman* concluded that a street lighting and vegetation adjacent to the road are not part of the improved portion of the highway designed for vehicular travel). But *Evans* and *Scheurman* do not apply to the facts here because the issue here is not whether the defect is within the roadbed, but rather whether the location of the defect is within the portion of the roadbed

designed for vehicular travel. Nawrocki's use of the term "roadbed" is only to draw a distinction from other highway features, *e.g.*, signage. *See Nawrocki*, 463 Mich at 173-184.

Nawrocki is only marginally instructive to the instant case because the crux of that decision was about *who* could bring a claim under the highway exception, not *where* the alleged defect was located. In *Nawrocki*, the parties agreed that the location of the defect was within the improved portion of the county road that was designed for vehicular travel—the defect was in the *travel lane* of the residential street. The language of MCL 691.1402(1) was never tested.

Grimes, not *Nawrocki*, is the proper precedent to apply to factual scenarios like the instant matter—disputes over whether an alleged defect is within a travel lane. And this Court in *Grimes* explained that opinion's consistency with *Nawrocki*:

> Also, our decision is consistent with *Nawrocki*. We had no opportunity in *Nawrocki* to consider the validity of *Gregg* as it relates to the question presented in this case. However, our determination that the shoulder is not designed for vehicular travel reinforces *Nawrocki's* reading of the highway exception that it encompassed only the 'traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.' [*Grimes*, 475 Mich at 91-92.]

So while *Nawrocki* laid the foundation to interpret the highway exception, it did not thoroughly examine the legislative intent of the phrase "improved portion of the highway designed for vehicular travel." Yono, the trial court, and the Majority erred by relying on *Nawrocki* instead of *Grimes*.

The judicial expansion of governmental highway liability has serious fiscal and practical repercussions. It is no secret that Michigan is still recovering from one of the great financial downturns in its history. The Legislature is already

struggling to find more than $1 billion annually to shore up the State's roads. If the Court of Appeals' published opinion is left in place, it is difficult to imagine where MDOT will find the funds necessary to repair mere parking spaces, where potential for serious injury is at its lowest.

At the same time, every dollar diverted to repairing parking spaces means less funding for roads and bridges, the structures where vehicles travel at high speed and accidents are not only more frequent but far more destructive of persons and property. If the People want crack-free asphalt in parking spaces, the legislative process is available to address that desire. But in no event should the judicial branch put on a legislative drafting hat and re-write the operative terms of the highway immunity statute.

II. The Court of Appeals panel majority erred by using the Michigan Vehicle Code to override the Government Tort Liability Act's plain language.

The Court of Appeals panel majority opined that because the Michigan Vehicle Code allows vehicles to use the parallel parking lanes to travel around stopped or slowed cars (when the parallel parking lanes are unoccupied), then these lanes must have been designed to be used as a thoroughfare. Slip op, p 5, citing MCL 257.637(1)(b). But the Vehicle Code does not support the proposition that an unoccupied parallel parking lane is designed to be a travel lane.

To begin, this argument has a tail-wag-the-dog rationale—just because a lane is travelled on does not prove that it was designed for vehicular travel. (The same is true of the highway shoulder.) With this argument, the panel majority "conflates

two disparate concepts: design and contemplated use." *Grimes,* 475 Mich at 90; Slip op, p 2 (dissent).

More substantively, the panel majority's reliance on the Vehicle Code is inappropriate. At the very least, by overruling *Gregg, Grimes* discouraged courts from using the Vehicle Code to interpret the highway exception:

> The *Gregg* majority's analysis, as we will show, is not based on the text of the [Government Tort Liability Act] and is seriously flawed. Therefore, we overrule *Gregg* and its progeny to the extent that they can be read to suggest that a shoulder is "designed for vehicular travel."
>
> * * *
>
> "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." "Courts cannot attach provisions not found therein to an act of the legislature because they have been incorporated in other similar acts."
>
> * * *
>
> Once the *Gregg* majority inappropriately committed itself to using the language of the [Michigan Vehicle Code] rather than construing the actual words of the highway exception, the [Code] should have pressed the Court to reach the opposite conclusion.
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> * * *
>
> In sum, the *Gregg* majority's conclusion that a shoulder is designed for vehicular travel and the reasons supporting that conclusion are entirely unpersuasive and must be abandoned. [*Grimes,* 475 Mich at 84, 85 n 43, 87.]

In sum, the Legislature did not intend the Michigan Vehicle Code to become the tool for identifying the improved portions of the highway designed for vehicular travel.

CONCLUSION AND RELIEF REQUESTED

The highway exception to governmental immunity is intended to ensure safety on the potentially most dangerous portions of our State's infrastructure—the portions of the highway designed for vehicular travel. This Court has previously confirmed that the exception is not available for alleged defects on sidewalks and highway shoulders. The Court should now confirm that the exception is not available for alleged defects in parking lanes.

Accordingly, MDOT respectfully requests that this Court grant leave and reverse the Court of Appeals. Alternatively, MDOT asks that the Court reverse summarily and adopt the dissenting opinion of Judge Talbot.

Respectfully submitted,

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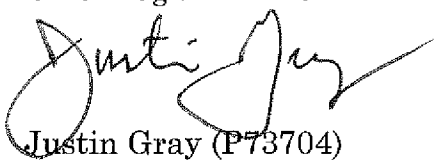

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Dated: January 29, 2013