STATE OF MICHIGAN
IN THE SUPREME COURT

HELEN YONO,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.
_____/

Supreme Court No. 146603

Court of Appeals No. 308968

Court of Claims No. 11-000117-MD

MDOT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

146603

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STATEMENT OF QUESTION PRESENTED

Is the parallel parking area where Plaintiff-Appellee Yono fell in the improved portion of the highway *designed for vehicular travel* within the meaning of MCL 691.1402(1)?

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

STATUTE INVOLVED

MCL 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.]

INTRODUCTION

> The majority is attempting to judicially legislate and fashion a general rule regarding the Department's duty related to the highways that permit parking, as opposed to applying the rule that our Supreme Court established in *Grimes*. [*Yono v Dep't of Transportation*, 299 Mich App 102, 120; 829 NW2d 249 (2013) (Talbot, J, dissenting).]

This case presents a straightforward issue of statutory interpretation: is a parallel parking lane "designed for vehicular travel"? If not, then sovereign immunity bars a suit brought by a pedestrian who seeks to sue the State for injuries sustained after falling down in a parallel parking spot.

The answer is supplied by this Court's recent decision in *Grimes v Dep't of Transportation*: 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). A parallel parking lane is not a travel lane, nor is it "designed" for vehicular travel. Indeed, the record shows that the parking lane at issue here was neither designed nor marked for vehicular travel.

To be sure, it is possible for cars to travel down a parking lane. But it is also possible for cars to travel down a highway shoulder or through the grassy median. That fact does not subject the State to liability for defects in the shoulder or the median. If the People of Michigan want to expand liability in the manner propounded by Plaintiff Yono in this case, the proper forum to do so is the Legislature, not the courts.

Accordingly, MDOT respectfully requests that this Court reverse the Court of Appeals and direct that judgment be entered in favor of the State.

STATEMENT OF FACTS

MDOT relies upon the Statement of Facts set forth in its Application for Leave to Appeal.

PROCEEDINGS BELOW

MDOT relies upon the description of the Proceedings Below set forth in its Application for Leave to Appeal.

ARGUMENT

I. The parallel parking area where Yono fell is not in the improved portion of the highway *designed for vehicular travel* within the meaning of MCL 691.1402(1).

A. 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.*

B. A parallel parking lane is designed for parking, not for travel, and must be treated as such for purposes of the highway exception to sovereign immunity.

The highway exception to governmental immunity limits MDOT's liability to only the improved portion of the highway *designed for vehicular travel*—i.e., the travel lane. *Grimes*, 475 Mich at 91. The parallel parking lane at issue here is certainly within the improved portion of M-22. But it, being a parallel parking lane, is designed for parking, not for travel.

The panel majority below began correctly with this Court's analysis in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), and *Grimes*, noting that the term *travel* must be narrowly construed because "it was clear that the Legislature 'did not intend to extend the highway exception indiscriminately to every improved portion of the highway.'" *Yono*, 299 Mich App at 109, *quoting Grimes*, 475 Mich at 89. Significantly, the panel majority quoted *Grimes*' explanation that "the Legislature believed that there were improved portions of the highway that 'are not designed for vehicular travel,'" *id.*, *quoting Grimes*, 475 Mich at 89, and it acknowledged that the momentary travel onto a highway shoulder during an emergency is not the type of vehicular travel contemplated by the highway exception. *Id.*

But at that point, the panel majority veered off course, characterizing a parallel parking lane as a type of pseudo-travel lane—a specialized, dual-purpose, or limited-access travel lane. *Yono*, 299 Mich App at 110. The majority confused the parking lane's *use* with its *design*. In addition to the highway itself, lanes designed for left turns, right turns, U-turns, merging, etc., are all designed for vehicular travel. In contrast, a parking lane is designed for parking, i.e., non-travel. The panel majority's analysis does not hold up under scrutiny.

For example, a vehicle making an emergency stop on a shoulder operates identically to a vehicle pulling into a parallel parking lane, or to a vehicle entering a turn lane, or to a bus arriving to drop off passengers, etc. The conduct of a vehicle is not relevant. It is the *design* that controls whether the improvement falls within

the highway exception—e.g., parking, stopping, and standing versus turning, passing, and travel. *Grimes*, 475 Mich at 90. Areas that are designed for parking are fundamentally different than those designed for travel, as illustrated by the parallel parking lane at issue here:

- The parking lane is marked as such, both by signage and the painting on the pavement itself. (MDOT's Brief in Support of its Motion for Summary Disposition, Attachment 1, Attachment 3, ¶¶ 13-14.)
- The parking is separated from the actual travel lane by a "buffer zone." (MDOT's Brief, ¶¶ 10-11.)
- The parking lane does not satisfy state and federal guidelines for vehicular traffic. (MDOT's Brief, cf. ¶¶ 8-9 with ¶¶ 17-18.)
- And the area where Yono actually fell is between the gutter and the parking lane. (MDOT's Brief, ¶ 19.)

The panel majority stretched to reach a contrary conclusion, stating that the parking area is indistinguishable from the remainder of the highway "absent the painted markings." *Yono*, 299 Mich App at 111. But the same could be said about a highway shoulder. In both cases, pavement markings and design components are an essential part of determining whether an improved portion of the highway was indeed "designed" for vehicular travel. And a parallel parking lane is marked and designed like a shoulder, not like a travel lane.

Moreover, the majority's approach leads to strange results: the defect in the M-22 parallel parking lane, which, on its surface, is indistinguishable from M-22, would be within the highway exception, but a defect in the parallel parking lane along Woodward Avenue in downtown Detroit (which is constructed with brick or

concrete as opposed to the black asphalt roadbed), would be outside the exception. There is no rationale for such differing results.

Nawrocki and *Grimes* instruct that to plead the highway exception, one must consider both roadbed construction and demarcation. First, a defect must be located in the actual roadbed (as opposed to defects such as signage, raised in *Nawrocki's* companion case, *Evans v Shiawassee Co Rd Comm'rs*, 463 Mich 143, 172-184; 615 NW2d 702 (2000)). Next, the defect must be in the travel lane of the roadbed. The travel lanes are identified by the highway's demarcation. This Court should reverse and hold that a highway's structural components must be coupled with its demarcations to determine "the improved portion of the highway designed for vehicular travel."

II. The panel majority's misplaced reliance on the Michigan Vehicle Code (MVC), MCL 257.1 *et seq.*, has already been relied on by another Court of Appeals panel and improperly broadens the highway exception.

In addition to misconstruing the language of the highway exception, *Yono* erred by using the MVC to interpret the highway exception. That error has already perpetuated a divergence from *Grimes* by another Court of Appeals decision.

Since MDOT filed its Application, *Yono's* misuse of the MVC to create pseudo-travel lanes has been adopted by another appellate panel:

> This Court, in applying *Grimes*, concluded that the phrase "designed for vehicular travel" should be interpreted narrowly, but does not 'exclude specialized, dual-purpose, or limited-access travel lanes.'" [*Lewis v MDOT*, unpublished opinion per curiam of the Court of Appeals, decided September 10, 2013 (Docket Nos. 307672, 311528), p 5, *quoting Yono*, 299 Mich App at 110 – Attachment 1.]

This conclusion does not align with *Grimes*. *Grimes* explained that MDOT's liability under the highway exception was limited to the travel lane, inclusive of any ancillary features designed for vehicular travel. The divergence created in *Yono* and adopted by *Lewis* illustrates why this Court in *Grimes* explicitly rebuked using the MVC to interpret the highway exception:

> We also decline to consult the definitions contained in the MVC to inform our construction regarding the scope of the highway exception. . . . The absence of any other reference to the MVC in the GTLA, coupled with the explicit incorporation of "owner" in the motor vehicle exception indicates that the Legislature intended to limit the applicability of the MVC in the GTLA. [*Grimes*, 475 Mich at 85.]

While *Lewis* was favorable to MDOT, it reached the right conclusion for the wrong reasons. The plain language of the highway exception does not include specialized, dual-purpose, or limited-access travel lanes—only travel lanes. The MVC should not be used to broaden the highway exception.

CONCLUSION AND RELIEF REQUESTED

A parallel parking lane, like a highway's shoulder, is not designed, marked, or intended for regular vehicular travel. Accordingly, an alleged defect in such a lane cannot be used as a basis for a pedestrian to invoke the highway exception to sovereign immunity.

For all these reasons, and those stated at greater length in MDOT's application for leave, this Court should reverse the Court of Appeals and direct that judgment be entered in favor of the State.

Respectfully submitted,

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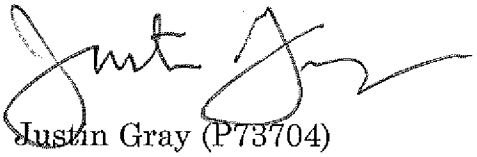

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