STATE OF MICHIGAN

COURT OF APPEALS

EDWARD HARDGE, JR., and GWENDOLYN HARDGE, Plaintiffs-Appellees, v WAYNE COUNTY, Defendant-Appellant.	UNPUBLISHED August 1, 2006 No. 266780 Wayne Circuit Court LC No. 04-414587-NI

EDWARD HARDGE, JR., and GWENDOLYN HARDGE, Plaintiffs-Appellees, v WAYNE COUNTY, Defendant-Appellant.	 No. 266808 Wayne Circuit Court LC No. 04-414587-NI

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

In Docket No. 266780, defendant appeals as of right an order denying its motion for summary disposition based on governmental immunity. In Docket No. 266808, this Court granted defendant leave to appeal relative to additional issues stemming from the same order of the trial court. We affirm.

In Docket No. 266780, defendant claims that it is entitled to immunity from suit because plaintiff, Edward Hardge, Jr.,[1] collided into the back of a road maintenance truck (the "truck")

[1] For ease of reference, we refer to Edward Hardge, Jr., as "plaintiff" given that his accident forms the basis of the suit.

operated by defendant's employee, William Trent. Defendant argues that, therefore, plaintiff's damages did not "result from" Trent's negligence for purposes of the motor vehicle exception to governmental entities' general immunity from tort actions, MCL 691.1405. We disagree.

We review de novo a trial court's decision on a motion for summary disposition based on governmental immunity pursuant to MCR 2.116(C)(7). *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). Under MCR 2.116(C)(7), this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). This Court must consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

A governmental agency is generally immune from tort liability when it is engaged in the exercise of a governmental function, subject to various exceptions. MCL 691.1407. The exception in MCL 691.1405 provides, in pertinent part:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner. . . .

Our Supreme Court examined the meaning of the "resulting from" language in MCL 691.1405 in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). There, the Court was faced with the question whether governmental entities could be liable for injuries to innocent passengers who were riding in cars being pursued by police. *Id.* at 447-449. In each instance, the police vehicles did not make contact with the cars; rather, during the chases, one car collided into a house and the other car hit an uninvolved vehicle. *Id.* at 448-449. In light of the fact that the immunity granted by MCL 691.1407 is broad and the exceptions are to be narrowly construed, the Court rejected an analysis based on a broader notion of "but for" or proximate cause. *Id.* at 456-457, 457 n 14. Rather, it invoked the need for more direct causation, opining that the plaintiffs "cannot satisfy the 'resulting from' language of the statute where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object." *Id.* at 457.

Here, defendant argues that the trial court improperly concluded that the "resulting from" language may be satisfied if there is mere physical contact with the government vehicle. To the contrary, we opine that the trial court properly concluded that Trent's alleged negligence not only caused contact, but also physically forced plaintiff's car off the road. Plaintiff provided evidence that Trent was driving at 25-35 miles an hour in the high-speed lane of a divided highway, at night, under a dark bridge, without lights or warnings. Accordingly, plaintiff argues that his car approached Trent without enough warning to avoid contact. Plaintiff collided with Trent and was forced out of his lane. Therefore, so long as Trent's acts may be considered the

negligent operation of a motor vehicle, as will be discussed *infra*, his negligence physically forced plaintiff's car off the road. We agree with the trial court that it would be nonsensical to require a government vehicle to actively run into a plaintiff's car; this result would rule out cases, for instance, in which a government vehicle abruptly turns in front of oncoming traffic without warning.

This result also comports with this Court's conclusions in *Regan v Washtenaw Co Bd of Co Rd Comm'rs*, 249 Mich App 153; 641 NW2d 285 (2002) ("*Regan I*"), and *Regan v Washtenaw Co Bd of Co Rd Comm'rs (On Remand)*, 257 Mich App 39; 667 NW2d 57 (2003) ("*Regan II*"). In *Regan II*, this Court reiterated with approval its conclusion in *Regan I* that a plaintiff had sufficiently fulfilled the "resulting from" language of MCL 691.1405 by alleging "'a direct and physical link between the operation of'" a street sweeping tractor and the plaintiff's injuries. *Regan II, supra* at 43, quoting *Regan I, supra* at 162. The sweeper was performing shoulder maintenance and, while doing so, was straddling the fog line and extending several feet into the plaintiff's lane. *Regan I, supra* at 155. The plaintiff was therefore required to move to the left to pass the tractor and, when she did, a "blinding dust cloud formed" and the two vehicles collided. *Id.* at 155-156. Distinguishing *Robinson*, this Court opined that the plaintiff fulfilled the "resulting from" language because the sweeper caused her to collide with it and caused her to try to maneuver around it before the collision; she had "alleged a direct and physical link between the operation of the county vehicle . . . and [her] injuries." *Id.* at 161-162.

We also distinguish *Curtis v City of Flint*, 253 Mich App 555; 655 NW2d 791 (2002), on which defendant relies. There, a third-party driver noticed an emergency vehicle approaching from a highway exit ramp and so the driver "abruptly moved his vehicle to the curb lane and stopped" in order to allow the emergency vehicle onto the road against a red traffic signal. *Id.* at 557. The plaintiff, who was driving in the curb lane a short distance behind the driver, rear-ended the driver's car. *Id.* This Court concluded that the defendant city was immune from liability, stating that the trial court

> correctly read *Robinson* to require that the emergency vehicle at issue . . . be physically involved in the collision that caused [the] plaintiff's injuries, either by hitting plaintiff's vehicle or by physically forcing that vehicle off the road or into another vehicle or object. [*Id.* at 562.]

Accordingly, not only was there a lack of physical contact in *Curtis*, but this Court specifically opined that the third-party driver who abruptly entered the plaintiff's lane had exercised "one of many options available to him" to avoid the emergency vehicle. *Id.* The third-party "was not physically required by the alleged negligent operation of the emergency vehicle" to obstruct the plaintiff's path. *Id.* To the contrary, here, plaintiff has presented evidence to show that the truck forced the collision because its speed and visibility made it impossible for plaintiff to avoid the truck.

In Docket No. 266808, defendant's primary focus is on arguing that the Michigan Manual of Uniform Traffic Control Devices ("MMUTCD") has no application to this case with respect to establishing negligence under the motor vehicle exception to governmental immunity. According to defendant, this is so because the MMUTCD does not apply to winter maintenance activities such as blading to clear highway drains, which is the activity in question here, and because the MMUTCD speaks of, relevant to our case, the possible required use of trailing

warning trucks, flashing arrow panels or boards, or other safety mechanisms directly or not directly mounted on the maintenance vehicle, which has nothing to do with establishing that plaintiff's injuries resulted from the negligent operation of Trent's truck, thereby precluding application of the motor vehicle exception under MCL 691.1405. Before launching into a discussion of the applicability of the MMUTCD, we shall first address defendant's secondary argument in Docket No. 266808 that plaintiff's speculation concerning the accident, relative to the lights on the truck allegedly being out, cannot serve to create a fact question on the issue of negligence. Under the heading of this argument, defendant also blends in provisions of the Motor Vehicle Code that it contends were violated by plaintiff, thus precluding recovery.

Defendant cites MCL 257.627(1), which charges drivers with a duty to

> drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing. A person shall not drive a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead.

Regardless, plaintiff presented an expert accident reconstructionist's testimony that the physical scene of the accident suggested that plaintiff was driving prudently and that he attempted to swerve to avoid the truck. Plaintiff also attested that he usually drove 55 or 60 miles an hour on that stretch of highway, and defendant does not appear to contest plaintiff's presumption that the speed limit was 55 miles an hour. Finally, plaintiff arguably provided ample evidence that speeds slower than the speed limit were not generally warranted on the highway that night; Trent attested that the roads were dry and that it was not snowing, raining, or misting. A second man, Trent's supervisor, also testified that temperatures were above freezing and that there were no snow piles or ice patches.

Defendant also notes MCL 257.402(a), which deems that the driver of a car which rear-ends another car is "prima facie guilty of negligence." However, plaintiff presented evidence that Trent had not properly activated the truck's lights. This is the evidence defendant deems speculative. The trial court previously ruled that plaintiff's statement at the scene to a police officer that "there were no lights" on the truck would be admissible as an excited utterance. Contrary to defendant's argument in Docket No. 266808, this statement is not inadmissible speculation merely because plaintiff lost his memory of the event after becoming unconscious on the night of the accident. Rather, this statement constituted a direct observation. It is up to the jury to gauge the credibility of the statement and of the responding officer's testimony about the statement. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Accordingly, based on this statement, plaintiff invoked subsection (b) of MCL 257.402, which reads:

> This section may not be invoked by the owner of any vehicle, the rear of which was struck under the circumstances above mentioned, if the accident occurred between 1 hour after sunset and 1 hour before sunrise, and the vehicle so struck did not, at the time, have a lighted lamp or lantern reasonably visible to the drivers of vehicles approaching from the rear.

We conclude that factual issues abound with regard to any negligence arising from Trent's alleged failure to activate lights on the truck and with regard to fault under various

provisions of the Motor Vehicle Code.[2] We now turn to the issue regarding whether plaintiff can utilize the MMUTCD as evidence of negligence.

The MMUTCD was promulgated by a state advisory committee in conjunction with the Michigan Department of Transportation ("MDOT") and the Department of State Police, pursuant to MCL 257.608. The violation of administrative rules and regulations issued under statutory authority may be submitted to a jury as evidence of negligence. *Beals v Walker*, 416 Mich 469, 481; 331 NW2d 700 (1982); *Douglas v Edgewater Park Co*, 369 Mich 320, 328; 119 NW2d 567 (1963); *Zalut v Andersen and Assoc, Inc*, 186 Mich App 229, 235; 463 NW2d 236 (1990). Moreover, the MMUTCD is generally applicable to state actors in negligence suits because it has been applied as a factor in determining whether a governmental entity breached a duty under the highway exception to the governmental immunity statute, MCL 691.1402. *Meek v Dep't of Transportation*, 240 Mich App 105, 117-118; 610 NW2d 250 (2000) ("Compliance with traffic manual standards is a factor that may be considered in determining the reasonableness of the state's actions with regard to an accident.");[3] *Boccarossa v Dep't of Transportation*, 190 Mich App 313, 316; 475 NW2d 390 (1991); *Tuttle v Dep't of State Highways*, 60 Mich App 642, 647; 231 NW2d 482 (1975), rev'd on other grounds 397 Mich 44; 243 NW2d 244 (1976).

The relevant subsection of the January 2001 revision of the MMUTCD appears in chapter 6G on temporary traffic control, under the "Short-Duration and Mobile Operations" section, and provides as follows:

> D-2 Mobile – Intermittently or Continuously
>
> Continuously moving mobile operations include work activities where workers and equipment move along the road without stopping, usually at slow speeds for such activities as street sweeping, mowing and pavement marking. The advance warning area moves with the work area. Warning signs, flags and channelizing devices may not be required. Flashing vehicle lights shall be used.
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> For intermittently moving and continuously moving mobile operations a minimum of a well-marked and well-signed vehicle with flashing rotating or strobe lights is required. A protection vehicle equipped as a sign truck, preferably supplied with a flashing arrow panel, should follow the work vehicle when traffic

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[2] Defendant additionally argues that inadequate lighting relates to a failure to warn and is not related to the driving of a motor vehicle; therefore, it does not support application of the motor vehicle exception. Defendant's argument is reiterated in the context of its argument with respect to the MMUTCD, and we shall substantively address the argument in our discussion of the MMUTCD.

[3] The portion of the holding in *Meek, supra* at 116-118, that relates to the defendant's omission of signage at a point of special danger no longer appears to be good law under *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000). However, *Nawrocki* in no way suggests that the MMUTCD may not generally continue to be used as a factor in determining the reasonableness of a governmental entity's actions.

> volumes, traffic speeds or visibility dictate increased protection. Where feasible, warning signs should be placed along the roadway and moved periodically as the work progresses. In addition, vehicles may be equipped with flags, truck-mounted attenuators and appropriate signs.
>
> * * *
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> [I]f mobile operations are in effect on a high-speed travel lane of a multi-lane divided highway, flashing arrow panels[4] shall be used.

There was evidence that Trent was driving at 25 to 35 miles an hour in the high-speed lane of a multilane divided highway in an effort to remove debris from a flooded catch basin. Trent testified in his deposition as follows:

> *Q*. And this was a catch basin that had been flooding?
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> *A*. It was flooding on the freeway and the State Police had called and they had it blocked off until I came. . . . As I was going by, they wanted me to uncover – see if I could uncover some stuff that might have been on the catch basin. There was some on the . . . eastbound side and westbound side. The state troopers were on both sides. Then, as I came, the state trooper left and I was blading the shoulder, trying to – blading the catch basin.[5]

Accordingly, if the regulations apply to Trent's activities, at a minimum it appears that flashing vehicle lights and flashing arrow panels were required under the MMUTCD. Defendant and the Michigan County Road Commission Self-Insurance Pool ("MCRCSIP"), which organization was allowed to submit an amicus curiae brief, appear most concerned that a flashing arrow panel could be required or that a jury could conclude that a trailing vehicle was warranted, perhaps because "traffic speeds or visibility dictate[d] increased protection." They claim that allowing for either requirement, here, would result in poor public policy because it would unpredictably expand these signage requirements to a broad range of activities including snow plowing and, therefore, would "significantly hinder a road commission's ability to undertake day-to-day winter maintenance activities."

We first note that the circumstances of this case are distinguishable from ordinary snowplowing activities. Moreover, these ongoing public policy concerns are largely unwarranted in light of the current version of the MMUTCD. The MMUTCD was revised in 2005 and now includes an option that reads: "For some continuously moving operations, such as street sweeping and snow removal, a single work vehicle with appropriate warning devices on

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[4] Section 6F.56 of the current MMUTCD defines an arrow panel as "a sign with a matrix of elements capable of either flashing or sequential displays." An arrow panel is a free-standing sign that is placed on the ground near the work site. MMUTCD, 2005 revision, p 6F-26.

[5] Trent explained that the process involved lowering the blade on his vehicle and then making a pass in an attempt to remove whatever was clogging the catch basin.

the vehicle may be used to provide warning to approaching road users." MMUTCD, 2005 revision, § 6G-02, p 6G-3. However, the revision does not answer the questions posed in this case regarding whether the January 2001 version applied and, generally, whether a violation of the MMUTCD may be evidence of negligence in cases brought under the immunity exception in MCL 691.1405.

This issue concerns the "negligent operation . . . of a motor vehicle" language of the immunity exception in MCL 691.1405. Our Supreme Court initially established in *Robinson, supra* at 457-458, that a plaintiff's injury must result from the negligent operation of the government vehicle, itself, not from, for instance, a police officer's decision to pursue a fleeing car. The meaning of this portion of the statute was further refined in *Chandler v Muskegon Co,* 467 Mich 315; 652 NW2d 224 (2002). There, the Court determined that an injury caused by the passenger door of a bus that was parked in a bus barn for cleaning purposes was not caused by the negligent *operation* of the bus as defined by the statute. *Id.* at 316, 322. Rather, the Court concluded that "the language 'operation of a motor vehicle' means that the motor vehicle is being operated *as* a motor vehicle." *Id.* at 320 (emphasis in original). Accordingly, "the 'operation of a motor vehicle' encompasses activities that are directly associated with the driving of a motor vehicle." *Id.* at 321. In other words, the motor vehicle exception applies where a governmental employee drives a vehicle in a negligent manner, thereby causing injury.

In applying this mandate here in the context of the MMUTCD issue, Trent was clearly driving the truck at the time of the accident. We conclude that one cannot separate the safe operation or driving of a vehicle at night from the use of attached lighting. Driving without lights or flashing warning lights under certain circumstances can indeed equate to driving in a negligent manner. Moreover, a driver's act of turning on attached lights through the use of an interior switch is directly associated with the driving of the vehicle. Such a conclusion is also supported by MCL 257.402(b), which relieves a nighttime driver such as plaintiff from the normal presumption of negligence if the vehicle he strikes from behind did not "have a lighted lamp or lantern reasonably visible to the drivers of vehicles approaching from the rear." Therefore, the MMUTCD provisions related to the use of flashing warning lights or signs directly affixed to the vehicle doing the maintenance work can be introduced to the jury as evidence of negligence. The motor vehicle exception to governmental immunity, MCL 691.1405, does not bar use of the MMUTCD in this respect. Similarly, with regard to the use of lighting in general and defendant's previously discussed argument made outside the context of the MMUTCD, failure to use appropriate lighting under certain conditions, as well as the failure to use turn signals and other related devices, can constitute negligent operation or driving of a motor vehicle.

Plaintiff presents a sound argument that this concept should be extended to other safety devices. In essence, he argues that operating a slow moving vehicle, in a maintenance operation, at night, under a bridge, and in the fast lane of a highway can constitute evidence of negligence if one fails to employ warnings that are similar to taillights in function, but which happen to be physically separate from the vehicle being operated. Failing to employ adequate safety mechanisms that, while physically separate from the vehicle, are directly associated with the act of driving the particular vehicle and which can affect the manner in which the vehicle is safely operated, is relevant in the context of determining whether the vehicle was being driven negligently, and consideration of such safeguards does not remove the case from the motor

vehicle exception. Ultimately, the focus remains on the vehicle's operation, with the evidence concerning separate safety mechanisms simply bearing on the question of whether the operation was negligent. Viewing this issue in a slightly different manner, it must be accepted that driving a vehicle slower than the minimum posted highway speed can constitute negligent operation of the vehicle; however, this negligence could be negated if, for example, separate flashing arrow panels were utilized, warning approaching vehicles of slow moving maintenance vehicles ahead. In other words, the use of arrow panels could impact the determination of whether the slow-moving vehicle was indeed being driven in a negligent manner. A reasonable juror could conclude that it is negligent to drive at low speeds on the highway if no safeguards are in place, regardless of whether the safeguards are directly attached to the vehicle involved in the accident or are separate. In this case, had separate flashing arrow panels been used, and had plaintiff nonetheless collided with Trent's truck, defendant most certainly would have sought to introduce the MMUTCD and the evidence that it used arrow panels to support a position that the truck was not being operated negligently in the face of a claim that the truck's operation caused a hazard by moving too slowly on the expressway. There is a direct and necessary correlation or association between the use of safety mechanisms and the operation of the vehicle. Where a governmental maintenance vehicle collides with another vehicle, potential liability does not rest directly on the failure to use arrow panels or other separate safety features in itself, rather liability and the injuries themselves directly arise out of the collision and operation of the governmental vehicle, which operation may or may not be deemed negligent on the basis of surrounding circumstances, including the use of separate safety precautions such as arrow panels. Therefore, evidence regarding possible violations of the MMUTCD with respect to safety mechanisms that would not have been directly attached to Trent's truck can be considered by the jury as evidence bearing on the alleged negligent operation of the truck. The motor vehicle exception to governmental immunity, MCL 691.1405, does not bar use of the MMUTCD in this respect.

Finally, defendant's remaining argument – that none of the MMUTCD provisions were admissible because it was generally inapplicable to Trent's work activity – was correctly rejected by the trial court. Whether a statute or regulation is applicable to the facts of a case is a question of law for the court. See, e.g., *Krueger v Lumbermen's Mut Cas Co*, 112 Mich App 511, 514-515; 316 NW2d 474 (1982). As in cases involving statutory interpretation, a court must ascertain and give effect to the intent of the drafter of an administrative rule. *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003). If the text is unambiguous on its face, the drafter is presumed to have intended the meaning plainly expressed. *Id.*

The MMUTCD defines the "continuously moving mobile operations" as "work activities where workers and equipment move along the road without stopping, usually at slow speeds for such activities as street sweeping, mowing and pavement marking." MMUTCD, January 2001 revision, § D-2, p 6G-11. Trent's 25 to 35 miles an hour debris removal activity meets this definition. The regulation's use of the language "such activities as" indicates that the examples of street sweeping, mowing and pavement marking are not meant to be an exhaustive list.

Nonetheless, defendant claims that certain MDOT performance guidelines governing winter maintenance activities preempt the application of the MMUTCD to Trent's activity. We note, first, that it is unclear whether Trent's activity should be categorized as a winter maintenance activity according to the MDOT guidelines. The guidelines address work such as

spot salting, "blading" accumulated snow, and plowing. They describe winter maintenance as the "[c]learing of snow, ice, or slush from roadway surfaces or shoulder; applying salt on troublesome spot locations . . . – blading may be included," and otherwise applying sand or salt to road surfaces. Trent's work took place in February, and his truck had a blade for scraping snow and a spreader for dumping salt or gravel. However, he attested that, on the night of the accident, police had asked him to "uncover some stuff that might have been on the catch basin." Thus, although Trent was using the underblade to remove debris from the catch basin, there is no evidence that he was clearing snow or slush. Defendant also claims that the guidelines further define winter maintenance as "[e]nsur[ing] that drainage systems are operating properly." However, we were unable to locate this text anywhere in the materials defendant provided on appeal or to the trial court.

Regardless, nothing in the MDOT guidelines suggests that they preempt the MMUTCD. To the contrary, a glance at the guidelines reveals that they merely describe "recommended work methods," by explaining salting and plowing techniques and describing necessary equipment to perform such work. In fact, the guidelines explicitly note under the recommended methods for blading or plowing that one should "[r]eview environmental, training, and safety precautions." The sections of the guidelines offered by defendant do not include any safety precautions that are peculiar to winter maintenance. Accordingly, facially, the guidelines do not appear intended to replace other safety precautions such as the MMUTCD and, in fact, they support the trial court's conclusion that both documents should be simultaneously applied to winter maintenance activities.

Defendant further claims, however, that the affidavits of Gary Mayes and Jill Morena, two MDOT engineers, establish the MDOT's intent that the MMUTCD does not apply to snow plowing or work such as Trent's "blading" activity. We note, first, that the proffered affidavits do not appear to properly establish that Trent was engaged in a winter maintenance activity. Each affiant attests: "The MMUTCD is not applicable to the winter maintenance and blading activity that, upon information and belief, the Wayne County vehicle was involved in at the time of the accident . . . ." Thus, Trent's activity is not even described by the affiants, but is merely conclusively called "a winter maintenance and blading activity." Such unsupported opinions bear little weight. For an expert's opinion to be determinative in the summary disposition context, the opinion must be admissible. MCR 2.116(G)(6); *Amorello v Monsanto Corp,* 186 Mich App 324, 331; 463 NW2d 487 (1990). To be admissible, the opinion must be (1) "based on sufficient facts or data" and (2) "the product of reliable principles and methods" which have been (3) reliably applied to the facts of the case. MRE 702; *In re Noecker,* 472 Mich 1, 11; 691 NW2d 440 (2005). Here, there is no evidence of what facts or considerations led the affiants to opine that Trent's debris removal activity was properly defined as winter maintenance or otherwise defined as a "blading" activity which is governed by the guidelines.

Regardless, defendant also offers no authority for why the opinions of Morena and Mayes regarding the applicability of the MMUTCD to winter maintenance activities, generally, may be used as evidence of the MDOT's expressed intent. When the text of a rule is ambiguous, courts generally defer "to the construction of the statute or administrative rule given by the agency charged with administering it." *Romulus, supra* at 65. However, courts will not defer when the language is unambiguous or when they are convinced that the agency's interpretation is "clearly wrong." *Id.* at 65-66. Here, both affiants are engineers employed with the MDOT. Morena

attested that she had worked for the MDOT for over 20 years and that she is "familiar with" the MMUTCD and "specifically" with the section concerning temporary work zone traffic control. Mayes had worked for the MDOT for over 15 years. However, defendant presents little argument for why they should be deemed to have the authority to speak for the MDOT in these matters. For instance, the case defendant cites, *Thomas Twp v John Sexton Corp of Michigan*, 173 Mich App 507, 514; 434 NW2d 644 (1988), involves this Court's deference to a decision of a Natural Resources Commission hearing officer interpreting a rule promulgated by that agency. Thus, deference was given in a context that differs greatly from the instant one; this Court examined whether a circuit court had applied the appropriate standards of review for an agency's formal determinations at an administrative hearing. *Id.* Accordingly, regardless that the engineers' opinions here may bear on common practice within the agency, their opinions do not constitute the controlling intent of a manual drafted by a state advisory committee in conjunction with the MDOT and the Department of State Police pursuant to MCL 257.608.

Finally, Mayes also attested that Trent's activity was governed by MCL 257.698(5), which addresses the use or possession of certain lights and provides, in pertinent part:

> (5) The use or possession of flashing, oscillating, or rotating lights of any color is prohibited except as otherwise provided by law, or under the following circumstances:
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> * * *
>
> (d) Flashing, rotating, or oscillating amber lights, placed in a position as to be visible throughout an arc of 360 degrees, shall be used by a state, county, or municipal vehicle engaged in the removal of ice, snow, or other material from the highway and in other operations designed to control ice and snow.

Although the word "shall" suggests that such lights were required when Trent was removing "other material from the highway," there is no reason to conclude that this provision excludes applicability of the MMUTCD.

In conclusion, the MMUTCD's language unambiguously applies to Trent's activity, regardless of whether his activity may also be classified as winter maintenance. Accordingly, even assuming that Mayes and Morena had authority to speak for the MDOT, their interpretations are irrelevant.

Affirmed.

/s/ William B. Murphy
/s/ Karen M. Fort Hood