

STATE OF MICHIGAN  
COURT OF APPEALS

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GERARD GRAHAM,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 188629

Wayne Circuit Court

LC No. 94-420677

CITY OF LIVONIA, ORCHARD, HILTZ &  
MCCLIMENT, INC., and RIC-MAN  
CONSTRUCTION, INC.,

Defendants-Appellees.

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Before: Holbrook, Jr., P.J., and White and A.T. Davis, Jr.\*, JJ.

HOLBROOK, JR., P.J., dissenting.

I respectfully dissent.

The question whether a defendant is entitled to governmental immunity pursuant to MCL 691.1402; MSA 3.996(102) presents a question of law for the court to decide. *Moning v Alfonso*, 400 Mich 425, 436-437; 254 NW2d 759 (1977). Defendant City raised the affirmative defense of governmental immunity in its first responsive pleading, but failed to raise the specific issue of immunity as it applies to pedestrians walking in roadways designed for vehicular travel until the hearing on defendant's motion for summary disposition. Defendant's delay in raising the specific issue until oral argument in the trial court did not preclude the trial court from deciding the legal issue at that time, and does not preclude this Court from deciding the issue as a matter of law now. *Wechsler v Wayne County Road Com'n*, 215 Mich App 579, 585-586, n 3; 546 NW2d 690 (1996); *Alexander v Riccinto*, 192 Mich App 65, 70; 481 NW2d 6 (1991). "Issues of law are not resolved on the basis of evidentiary presentations." *Wechsler, supra*.

In this case, plaintiff tripped as he walked across a service drive intended for vehicular traffic only. "Pedestrians who trek upon Michigan highways must and do venture beyond the protective mandates of MCL 691.1402(1); MSA 3.996(102)(1)." *Mason v Wayne Co Bd of Comm'rs*, 447 Mich 130, 137; 523 NW2d 791 (1994). See also *Suttles v Dep't of Transportation*, 216 Mich App

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\* Circuit judge, sitting on the Court of Appeals by assignment.

166; 548 NW2d 671 (1996). Accordingly, given the facts pleaded by plaintiff in his complaint, I would hold that summary disposition was properly granted to defendant city pursuant to MCR 2.116(C)(7).

/s/ Donald E. Holbrook, Jr.