STATE OF MICHIGAN

COURT OF APPEALS

FLORA DONEGHY,

Plaintiff-Appellant,

v

CITY OF FERNDALE,

Defendant-Appellee,

and

F & M DISTRIBUTORS,

Defendant.

UNPUBLISHED
July 18, 1997

No. 197083
Oakland Circuit Court
LC No. 96-511240-NO

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) based upon governmental immunity. We affirm.

After exiting an F & M store in Ferndale, plaintiff crossed an access drive located between the rear of the store and a municipal parking lot. As plaintiff stepped onto the curb separating the access drive from the parking lot, she allegedly fell and sustained injury after her right shoe became caught in the pavement.

Plaintiff filed the present suit, claiming that both the City of Ferndale (hereinafter defendant) and F & M were negligent in failing to maintain the pavement in a reasonably safe condition. Defendant filed a motion for summary disposition claiming that the access drive which abutted the crosswalk was an "alley," and therefore, plaintiff's fall did not occur on a public highway. Thus, defendant claimed that governmental immunity barred plaintiff's claim. The trial court agreed and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Plaintiff alleges that the trial court erred in granting defendant's motion for summary disposition because the access way upon which she fell was a "highway" as opposed to an "alley," and thus, the highway exception precluded defendant from successfully asserting the governmental immunity defense. We disagree. When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept plaintiff's well-pleaded allegations as true, *Florence v Dep't of Social Services*, 215 Mich App 211, 213-214; 544 NW2d 723 (1995); *Diversified Financial Systems, Inc v Schanhals*, 203 Mich App 589, 591; 513 NW2d 210 (1994), and examine any pleadings, affidavits, admissions, and documentary evidence submitted by the parties in a light most favorable to the nonmovant. MCR 2.116(E)(5). *Skotac v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617; 513 NW2d 428 (1994). If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits and other proofs show that there is no genuine issue of material fact, the trial court must enter judgment without delay. MCR 2.116(I)(1); *Skotac, supra* at 617; *Nationwide Mutual Ins Co v Quality Builders, Inc.*, 192 Mich App 643, 647-648; 482 NW2d 474 (1992). This Court reviews a summary disposition determination de novo as a question of law. *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).

Generally, governmental agencies are immune from tort liability for actions taken in furtherance of a governmental function. MCL 691.1407; MSA 3.996(107); *Cox v Dearborn Heights*, 210 Mich App 389, 392; 534 NW2d 135 (1995). Municipal corporations are governmental agencies. MCL 691.1401(a) and (d); MSA 3.996(101)(a) and (d); *Cox*, *supra* at 392. Plaintiff seeks to circumvent defendant's governmental immunity through application of the defective highway exception, which provides:

> 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 sustaining 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 condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency. . . . [MCL 691.1402(1); MSA 3.996(102)(1).]

The highway exception to governmental immunity is to be strictly construed. *Ward v Frank's Nursery*, 186 Mich App 120, 125; 463 NW2d 442 (1990). Plaintiff asserts that the access road is a "highway," and therefore, within the defective highway exception to defendant's governmental immunity.

A public highway is defined as follows:

> "Highway" means every public highway, road, and street which is open for public travel and shall include bridges, sidewalks, crosswalks, and culverts on any

> highway. The term highway does not include alleys, trees, and utility poles. [MCL 691.1401(e); MSA 3.996(101)(e).]

This public highway exception does not apply to municipal parking lots. *Bunch v City of Monroe*, 186 Mich App 347, 349; 463 NW2d 275 (1990). However, a crosswalk is within the defective highway exception if it is located on a public highway. MCL 691.1401(e); MSA 3.996(101)(e).

The distinction between a "highway" and an "alley" as it pertains to the highway exception was addressed by this Court in *Stamatakis v Kroger*, 121 Mich App 281; 328 NW2d 554 (1982). This Court in *Stamatakis* held that the distinction between an alley and a highway is determined by use and custom, stating:

> We do not hold that a plaintiff's claim that an alley has become a highway usually presents a question for the trier of fact. . . . If plaintiff can prove that the physical characteristics and pattern of use of the place are those of a highway, not those of an alley, she may be entitled to claim avoidance of the defense of governmental immunity. [*Id*. at 285.]

This Court's decision in *Ward, supra*, further clarified the distinction initially expressed in *Stamatakis*. *Ward* involved a plaintiff who was injured on an access drive similar to the one in the present case. The accident in *Ward* was described as occurring

> in an area of public access characterized, alternatively, as an alley or a walkway. This way, owned by defendant City of East Detroit, served as a means of access for vehicles and pedestrians to adjacent business premises and parking lots operated by defendants Frank's Nursery & Crafts, Inc., and Pete & Franks Fruit Ranch. [*Id*. at 123.]

In *Ward*, this Court held that the access way constituted an alley, as opposed to a highway, because, "[t]here is no indication that the alley was used as a common means of passage by persons leaving from and going to places not in close proximity to the two businesses." *Id*. at 126. However, this Court continued, stating:

> Although we do not believe that lack of usage as a general thoroughfare is conclusive of this issue, we find it significant, particularly since nothing is asserted that suggests that the alley was otherwise used in any manner inconsistent with the generally understood notions of an alley. In the absence of any evidence of this nature, the described usage of the passageway does not alter its characterization as an alley statutorily excepted from the definition of a highway in MCL 691.1401(e); MSA. 3.996(101)(e). [*Id*.]

In the present case, plaintiff presented eleven factors to support her contention that the custom and use of the access way at issue is that of a highway and not an alley. However, plaintiff failed to provide any authority in support of these claims. See *Goolsby v Detroit*, 419 Mich 651, 655, n1; 358 NW2d 856 91984); *Isagholian v Transamerica, Inc, Corp,* 208 Mich App 9, 14; 527 NW2d 13 (1994). Additionally, plaintiff has failed to provide any record support for the assertion that the access way at issue was being used for anything other than providing access for the parking lot and stores immediately adjacent thereto. See *Skotac, supra* at 617. Consequently, we find that plaintiff failed to demonstrate that the custom and use of the access way is anything other than that of an alley. *Ward, supra* at 126. Therefore, because the highway exception is inapplicable, plaintiff's claim is barred by governmental immunity. MCL 691.1407; MSA 3.996(107). Accordingly, the trial court did not err as a matter of law in granting defendant's motion for summary disposition.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin