STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN PALMER,

Plaintiff-Appellant,

and

BLUE CROSS/BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

V

CHARTER TOWNSHIP OF ORION and ROCK BLANCHARD, a/k/a ROCHE BLANCHARD,

Defendants-Appellees,

and

TRAILWAYS COMMISSION, LINDA GORECKI, WILLIAM STARK and RICHARD SCHULTZ,

Defendants.

UNPUBLISHED
September 14, 2001

No. 220992
Oakland Circuit Court
LC No. 98-008867-NO

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm.

The Paint Creek Trailway (Trailway) is a trail surfaced with crushed limestone that lies partially within the boundaries of defendant Charter Township of Orion (Township). The Trailway is 10.5 miles long and is used for public recreational purposes, such as bicycle riding, horseback riding, running, and walking. The parties presented conflicting evidence in regard to whether the Trailway runs adjacent to or intersects highways in some areas.

On June 29, 1997, plaintiff was riding her bicycle on the Trailway within the boundaries of the Township at an area near a bridge passing over Goldengate Road. Plaintiff was riding with Max LaValley, who was in front of her, and two other people who were riding behind her. As the group was riding, both LaValley and plaintiff hit a depression in the Trailway that had been caused by erosion. Plaintiff slid into the depression and her bicycle fell on top of her. As a result of the incident, plaintiff alleges injuries to her knee, head, neck, shoulder, and back.

Plaintiff filed a complaint against the Township, Blanchard, who was the Parks and Recreation Director for the Township, the Trailways Commission, and three officers of the Trailways Commission, alleging violations of the highway defect statute, MCL 691.1402, gross negligence, and claims involving nuisance for failing to safely maintain the Trailway. Plaintiff's claims against the Trailways Commission and its officers were voluntarily dismissed. Thereafter, the trial court granted summary disposition for the Township and Blanchard under MCR 2.116(C)(7) and (10).

I

On appeal, plaintiff first argues that the trial court erred in granting summary disposition to the Township on the basis of governmental immunity. We disagree. We review a trial court's decision on a motion for summary disposition de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). Likewise, statutory interpretation is an issue of law that we review de novo. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(7), this Court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Id.* To survive a motion for summary disposition, brought under MCR 2.116(C)(7), the nonmoving party must allege facts warranting the application of an exception to governmental immunity. *Maiden, supra.* A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden, supra* at 120. The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Maiden, supra*. The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue as to any material fact. *Id.*

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted. *Elia v Hazen*, 242 Mich App 374, 381; 619 NW2d 1 (2000). We may not speculate as to the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). When reasonable minds may differ as to the meaning of a statute, the courts must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994).

Michigan's governmental immunity statute provides, in pertinent part:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. [MCL 691.1407(1).]

The highway exception to governmental immunity waives the absolute immunity of governmental units in regard to defective highways under their jurisdiction. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). At the time of the incident, the highway exception provided, in pertinent part:

> 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 a condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commissions 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, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. [MCL 691.1402(1).][1]

A "highway" is defined as a "public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e).

In the present case, the parties dispute whether the Trailway could be considered a "sidewalk" under MCL 691.1401(e). In *Hatch v Grand Haven Twp*, 461 Mich 457, 465; 606 NW2d 633 (2000), our Supreme Court held that a bicycle path is not a "sidewalk" for purposes of the highway exception to governmental immunity. The Court specified: "Regardless of its proximity to a highway, a bicycle path is simply not a sidewalk." *Id.* The fact that a path is close to the road at the point of the accident does not convert a bicycle path into a "sidewalk." *Id.* Furthermore, the fact that pedestrians sometimes walk on a path does not make it a "sidewalk." *Id.*

Consistent with *Hatch*, we conclude that the Trailway is not a "sidewalk" for purposes of governmental immunity. The Trailway is a trail surfaced with crushed limestone that is used for public recreational purposes, such as bicycle riding, horseback riding, running, and walking. Portions of the Trailway wander in and out of the woods. The fact that part of the Trailway runs close to a highway does not make it a "sidewalk." *Hatch, supra*. Thus, the trial court properly determined that plaintiff's claim does not fall within the highway exception to governmental

[1] The incident at issue in this case occurred on June 29, 1997. Accordingly, the statutory language applicable is that found in 1990 PA 278, § 1, effective December 11, 1990, rather than the current statutory language, which was enacted by 1999 PA 205, effective December 21, 1999.

immunity and that the Township is immune as a matter of law from plaintiff's claims. Accordingly, the trial court properly granted the Township's motion for summary disposition under MCR 2.116(C)(7).

Plaintiff's additional argument that the Township is not entitled to governmental immunity because plaintiff alleged a failure to warn claim, as opposed to a claim involving the government's duty to maintain and repair highways under the highway exception to governmental immunity, does not alter that conclusion. Plaintiff may not circumvent the governmental immunity statute simply by maintaining a duty to warn claim against the governmental entity. Thus, plaintiff's argument in this regard lacks merit.

II

Plaintiff next argues that the trial court erred in granting summary disposition in regard to defendant Blanchard because the public-duty doctrine does not apply to Blanchard and Blanchard's gross negligence caused plaintiff's injuries. The trial court granted summary disposition for Blanchard on the basis that he did not owe a duty to plaintiff under the public-duty doctrine. Our Supreme Court recently held that the public-duty doctrine does not apply to governmental employees other than police officers. *Beaudrie v Henderson*, __ Mich __; __ NW2d __ (Docket No. 114261; issued 7/27/01), slip op pp 16-20. However, we ordinarily will not reverse a lower court's ruling if it reached the right result for the wrong reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). We conclude that there is no genuine issue of material fact as to whether Blanchard acted in a grossly negligent manner and, thus, the trial court's grant of summary disposition for Blanchard was appropriate.

The governmental immunity act provides that a government employee is immune from tort liability if all the following conditions are met:

> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [MCL 691.1407(2).]

Where reasonable jurors could not differ in regard to whether a government employee's conduct amounted to gross negligence, summary disposition should be granted. *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999). Evidence of ordinary negligence does not create a material question of fact concerning gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999).

The documentary evidence in the present case indicates that Blanchard had visited the Trailway before the accident and discussed the erosion areas just north of Goldengate bridge.

Blanchard testified at deposition that he recognized the depressions caused by the erosion could become a safety issue. On March 31, 1997, Blanchard received a letter from Trailway Commission Officer Linda Gorecki, stating, in pertinent part:

> Without a doubt, the most serious maintenance problem on the Orion Township portion of the trail are the three eroding areas north of this bridge. One of these areas has eroded approximately 3 feet into the trail surface. These areas need to be addressed immediately to make the area safe, and there should be a permanent solution in effect before the end of this year.

Blanchard testified that in April 1997, the erosion areas near Goldengate bridge became priority issues because he knew that the erosion could become worse and cause a safety problem. Blanchard's testimony indicates that he actively looked for a contractor to repair the trail surface near Goldengate bridge. On April 17, 1997, Blanchard wrote a letter to the Orion Parks and Recreation Supervisor, requesting the approval of spending to make critical repairs to the Trailway. The letter further stated, in part:

> The eroding areas north of the bridge over Goldengate Road are the most serious problems. These areas pose a safety liability problem and should be addressed immediately. . . . Because these areas are caused by a combination of erosion caused by water and by people accessing the trail from Goldengate, I would suggest we look into a retaining wall and building a stairway to allow access to the trail. [emphasis in original.]

Blanchard received two bids to repair the eroded areas of the Trailway; however, the depression that allegedly led to plaintiff's fall was not repaired until after the accident. We conclude that these circumstances indicate Blanchard was actively taking steps to repair the depressions. Given Blanchard's actions in furtherance of repair of the eroded areas, reasonable jurors could not conclude that Blanchard's conduct was so reckless as to demonstrate a substantial lack of concern for whether injury results. MCL 691.1407(2)(c). Therefore, Blanchard's conduct was not grossly negligent as a matter of law and he is entitled to summary disposition.

III

Next, plaintiff argues that the trial court erred in granting summary disposition because there is a genuine issue of material fact in regard to whether an exception to governmental immunity based on nuisance per se applied to defendants. We disagree. There is no authority establishing that nuisance per se is an exception to governmental immunity. Our Legislature has not indicated such an exception. Also, in the plurality opinion *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992), our Supreme Court declined to decide whether nuisance per se is an exception to governmental immunity. Even assuming the existence of a nuisance per se exception, we conclude that plaintiff failed to present facts to establish a genuine issue of material fact in regard to the existence of a nuisance.

The existence of a nuisance per se is a matter of law for the court to decide. *Kuhn v Associated Truck Lines, Inc*, 173 Mich App 295, 301; 433 NW2d 424 (1988). A nuisance per se is "an activity or condition which constitutes a nuisance at all times and under all circumstances,

without regard to the care with which it is conducted or maintained." *Palmer v Western Michigan University*, 224 Mich App 139, 144; 568 NW2d 359 (1997), quoting *Li, supra* at 476-477 (Cavanagh, C.J.). A nuisance per se is not predicated on the want of care, but is unreasonable by its very nature. *Li, supra* at 477. In *Li*, Justice Cavanagh opined that conditions in that case (operation of a traffic light and maintenance of a holding pond) were not nuisances per se because they did not constitute "an intrinsically unreasonable or dangerous activity, without regard for care or circumstances. To the contrary, both activities serve obvious and beneficial public purposes and are clearly capable of being conducted in such a way as not to pose any nuisance at all." *Id.* at 477 (Cavanagh, J.). Where the plaintiff claims that the underlying activities became unreasonable and dangerous because the defendant allegedly exercised improper or inadequate care, the plaintiff has not presented a colorable claim of nuisance per se. *Id.*

The Trailway in the instant case is not an intrinsically unreasonable or dangerous activity and is not a nuisance at all times under all circumstances. In fact, the Trailway serves a beneficial public purpose by providing the public with an opportunity to bicycle, walk, and run through the woods. The Trailway is capable of existing in a state in which it does not pose a nuisance to the public at all. Plaintiff's claims in the instant case revolve around the maintenance of the Trailway and her allegation that the Trailway was not repaired or properly taken care of. A nuisance per se must be a nuisance at all times, without regard to the care with which it is conducted or maintained. *Palmer, supra* at 144. Because plaintiff's claims allege that defendants were at fault because of the failure to maintain the Trailway and plaintiff did not present any evidence that the Trailway was unreasonably dangerous at all times, we conclude that even if there is a nuisance per se exception to governmental immunity, summary disposition was proper under MCR 2.116(C)(10).

IV

Plaintiff further argues that the trial court abused its discretion in granting defendants' motion to amend their answer to plead the fault of a non-party and that the trial court should grant plaintiff's motion to amend her complaint, or in the alternative, summary disposition. In light of our disposition above, we need not address these arguments.

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra