STATE OF MICHIGAN

COURT OF APPEALS

RAPHAEL EVANOFF,

Plaintiff-Appellant,

v

CITY OF PONTIAC and CHRISTOPHER M. REDDING, d/b/a EMPIRE/OAKLAND INVESTMENTS,

Defendants-Appellees.

UNPUBLISHED
May 24, 2002

No. 229162
Oakland Circuit Court
LC No. 00-030121-GC

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant city on the basis on governmental immunity. Plaintiff claims that the highway exception to governmental immunity, MCL 691.1402, is applicable. We disagree. This Court reviews de novo the trial court's decision on a motion for summary disposition. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995).

At the time of plaintiff's slip and fall, the highway exception set forth in MCL 691.1402 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. Any 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. [MCL 691.1402(1).[1]]

[1] Plaintiff's accident occurred in December 1997. The statutory language applicable in this case is that found in 1996 PA 150, § 1, effective March 25, 1996, rather than the current statutory (continued…)

In addition, MCL 691.1401(e)[2] provides a definition of "highway," which expressly excludes alleys from its scope. The highway definition in effect at the time plaintiff fell provided:

> '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.

The highway exception to immunity is to be narrowly construed, and no action can be maintained under the highway exception unless it clearly falls within the meaning of the statute. *Scheurman v Dep't of Transpotation*, 434 Mich 619, 630 (Riley, C.J.), 637 (Boyle, J.); 456 NW2d 66 (1990); *Richardson v Warren Consolidated School Dist*, 197 Mich App 697, 702; 496 NW2d 380 (1992); see, also, *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 150, 158; 615 NW2d 702 (2000).

We agree with the trial court's conclusion that the area in question where plaintiff fell was an alley; therefore, defendant city was governmentally immune. The evidence submitted in this matter, including descriptions and pictures of the area, is more consistent with "the generally understood notions of an alley" rather than those of a public street, road, or highway. MCL 691.1401(e); *Richardson, supra* at 704; *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 126; 463 NW2d 442 (1990). Even though the area may have some streetlike qualities and, perhaps, sometimes used for public travel, we cannot say that the area was a "street which is open for public travel." MCL 691.1401(e); *Richardson, supra* at 704-705. As stated by the trial court, plaintiff may be able to show that the area in question was not strictly an alley, but was also used as a parking lot; however, because the highway exception specifically states that the definition of highway does not include alleys, plaintiff's action cannot be maintained because it does not "clearly" come within the scope and meaning of the statute. *Scheurman, supra*; *Richardson, supra* at 702, 704. Further, to the extent that plaintiff argues that defendant city is responsible for the parking area in question, the trial court, relying on *Bunch v City of Monroe*, 186 Mich App 347; 463 NW2d 275 (1990), correctly concluded that a municipality is not liable for a public parking lot under the highway exception.

Plaintiff also argues that the trial court erred in granting summary disposition in favor of defendant Redding. We disagree. On this issue, the court found that plaintiff fell in the alley and not in the parking area or on the property that defendant owned. The court then opined that the danger was open and obvious and that plaintiff could have used an alternative route.

Viewing the evidence in a light most favorable to plaintiff as the nonmoving party, we conclude that the trial court did not err in granting summary disposition to defendant Redding. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). As the trial court

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(…continued)

language, which was enacted by 1999 PA 205, effective December 21, 1999.

[2] The statutory language applicable in this case is that found in 1986 PA 175, § 1, effective July 7, 1986, rather than the current statutory language, which was enacted by 1999 PA 205, effective December 21, 1999.

in this case properly determined, plaintiff fell in the alley that defendant city owned, not on the property that defendant Redding owned. Defendant Redding is not responsible for a condition not on his property. *Stevens v Drekich*, 178 Mich App 273, 276; 443 NW2d 401 (1989). Moreover, even if the fall did occur in the area over which defendant Redding had a responsibility to maintain under the snow removal provision of the lease between Redding and plaintiff's employer, there was no evidence to establish that two or more inches of snow had fallen which Redding had a contractual duty to remove. Thus, this assertion is without merit. *Joyce v Rubin*, 249 Mich App 231, 244-246; 642 NW2d 360 (2002).

We further note that if the fall had occurred on defendant Redding's property, plaintiff's action still would be barred because of the open and obvious danger doctrine. Plaintiff had successfully crossed the alley several hours before the fall occurred and was aware of the ice on which he fell. Thus, the danger was known to plaintiff, and defendant Redding had no duty to warn plaintiff of the open and obvious danger unless "special aspects" of the condition made it unreasonably dangerous. *Lugo v Ameritech Corp, Inc.*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). Special aspects that serve to remove a condition from the open and obvious doctrine are those conditions that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." *Id*. at 519. The illustrations of special aspect conditions discussed in *Lugo* were (1) "an unguarded thirty foot deep pit in the middle of a parking lot" resulting in a fall of an extended distance and (2) standing water at the only exit of a commercial building resulting in the condition being unavoidable because no alternative route is available. *Id.* at 518, 520.

Plaintiff's reliance on *Corey v Davenport College of Business*, unpublished per curiam opinion of the Court of Appeals, issued July 6, 1999 (Docket No. 206185), is misplaced. Our Supreme Court recently remanded *Corey* to this Court for reconsideration in light of *Lugo, supra*. *Corey v Davenport College of Business*, 465 Mich 885 (2001). Upon reconsideration, this Court vacated the opinion upon which plaintiff relies and ultimately affirmed the trial court's grant of summary disposition in favor of the defendant. *Corey v Davenport College of Business (On Remand)*, ___ Mich App ___; ____ NW2d ___ (Docket No. 206185, issued April ___, 2002).

In the present case, we conclude that the ice at issue here was not only an open and obvious condition, but there also was no "special aspect" that created a "uniquely high likelihood of harm or severity of harm" if the risk were not avoided. Plaintiff was aware of the ice and knew that there was an alternate route that he could use to avoid the ice. Although the icy pavement had "some potential for severe harm," *Lugo, supra* at 518, n 2, we conclude that the circumstances in this case are not the type of special aspects that *Lugo* contemplated. *Lugo, supra*; *Corey (On Remand), supra*.

We affirm.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra