

STATE OF MICHIGAN
COURT OF APPEALS

MILOSLAV ROBERT HAJEK,

Plaintiff-Appellant,

v

EASTERN MICHIGAN UNIVERSITY BOARD
OF TRUSTEES,

Defendant-Appellee.

UNPUBLISHED

January 27, 2004

No. 245574

Court of Claims

LC No. 02-000001-MZ

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiff Miloslav Robert Hajek appeals as of right the court of claims' order granting defendant Eastern Michigan University Board of Trustees' motion for summary disposition, pursuant to MCR 2.116(C)(7). We affirm.

At issue is whether the condition of the sidewalk in this case could be considered a nuisance per se. And if so whether nuisance per se is a recognized exception to governmental immunity in Michigan. Because the facts in this case do not constitute a nuisance per se, we find that summary disposition was proper.

I. Factual Background and Procedural History

On January 6, 1999, plaintiff was leaving an evening class at Eastern Michigan University. While walking back to his car and talking with his professor, plaintiff slipped on the sidewalk and hit his head on the ground. It was not snowing at the time plaintiff fell but there was an inch of snow on the sidewalk. Upon further investigation, plaintiff also noticed a patch of ice under the snow. His professor subsequently discovered that a piece of cardboard had been between the snow and ice. Plaintiff immediately filled out an incident report at the department of public safety but refused medical treatment at the time. Sometime later in the evening, however, plaintiff drove himself to the emergency room.

Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(7), (8), and (10). Because a public university is a governmental agency, defendant asserted that plaintiff's claims were barred by governmental immunity. Defendant further argued that plaintiff did not state a claim upon which relief could be granted because he failed to cite one of the exceptions to governmental immunity.

Plaintiff responded to defendant's motion by arguing that the highway exception applied because the "sidewalk" in question was actually designed for vehicular travel. This claim was based on the fact that snowplows would drive on the sidewalk. Plaintiff further asserted that the negligent operation of a government vehicle by a government employee, which caused the ineffective removal of snow, was an exception to governmental immunity. He next claimed that a gross negligence action could be maintained against the individual trustees and that defendant could be held liable under respondeat superior. Ultimately, plaintiff argued that the existence of debris and the condition of the sidewalk amounted to nuisance per se.

After a hearing on defendant's motion, the court of claims concluded that plaintiff's complaint was barred because the incident took place on a sidewalk. It noted that the "[i]ncidental crossing of a sidewalk or a snowplowing tractor plowing a sidewalk is not normal vehicular traffic." The court of claims further asserted that having layers of snow, water, and ice on a sidewalk in Michigan was not a nuisance per se.

II. Legal Analysis

On appeal, plaintiff challenges the court of claims' holding that the instant facts do not amount to nuisance per se. A court's denial of a motion for summary disposition is reviewed de novo on appeal.¹ The applicability of governmental immunity is a question of law that we also review de novo on appeal.²

While the court of claims failed to articulate the specific subsection it relied upon in granting defendant's motion, it noted that plaintiff could not maintain an action because the injury occurred on a sidewalk and plaintiff failed to show nuisance per se. Accordingly, we find that summary disposition was granted pursuant to MCR 2.116(C)(7). A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties."³

Governmental agencies, including public universities, are generally granted statutory immunity from tort liability unless otherwise provided in the act.⁴ While there are several stated exceptions to governmental immunity, it remains unclear whether a nuisance per se exception exists in Michigan.⁵ Even assuming, arguendo, that it is a recognized exception, plaintiff has nevertheless failed to establish facts amounting to a nuisance per se.

¹ *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

² *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

³ *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

⁴ MCL 691.1401 *et seq.*; see also *Haaksma v Grand Rapids*, 247 Mich App 44, 52; 634 NW2d 390 (2001).

⁵ *Haaksma*, *supra* at 56.

A nuisance per se is defined as “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.”⁶ A nuisance per se is unreasonable by its very nature and is not predicated on a lack of care.⁷ Under this definition, our Supreme Court concluded that neither an improperly timed traffic light nor the maintenance of a holding pond could be considered “an intrinsically unreasonable or dangerous activity, without regard for care or circumstances . . . [because] 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.”⁸

Here, plaintiff asserts that “the slanted cement—slick ice—loose cardboard—snow layered combination, which created a hidden and treacherously slippery layer-cake type effect, constitutes a nuisance per se.” However, in *Haaksma* this Court held that electrical wires protruding from a lamppost on a public right of way did not constitute a nuisance per se.⁹ We have also concluded that the act of salting a road and the icy condition of the road itself cannot be considered a nuisance per se.¹⁰ Thus, the condition of the sidewalk, allegedly created by defendant’s failure to properly clear the snow and debris, cannot be considered a nuisance per se.¹¹ Accordingly, summary disposition pursuant to MCR 2.116(C)(7) was appropriate in this case.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper

⁶ *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992).

⁷ *Id.* at 477.

⁸ *Id.*

⁹ *Haaksma, supra* at 47, 56.

¹⁰ *Dykstra v Dep’t of Trans*, 208 Mich App 390, 392; 528 NW2d 754 (1995).

¹¹ See *Haaksma, supra* at 56; *Dykstra, supra* at 392.