

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA WALFORD,

Plaintiff-Appellee,

v

CITY OF KINGSFORD,

Defendant-Appellant.

UNPUBLISHED

March 16, 2004

No. 246088

Dickinson Circuit Court

LC No. 02-012610-NO

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sustained injuries when she tripped on a tree stump located in a grassy area between the sidewalk in front of her residence and the street. She filed suit alleging that defendant negligently failed to maintain the area in reasonable repair so that it was reasonably safe for public travel in that it failed to ensure that the area was free of stumps, and to warn of the unsafe condition.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that plaintiff's claim did not come within the highway exception to governmental immunity, MCL 691.1402(1), because while the definition of "highway" includes sidewalks, it does not include trees. Defendant asserted that its duty of maintenance and repair did not extend to the grassy area because the area was not a sidewalk and thus did not fall within the definition of highway. In response, plaintiff argued that her claim was not defeated by governmental immunity because she fell on a pathway that met the definition of a sidewalk, and because a tree stump is not specifically excluded from the definition of highway for purposes of application of the highway exception. The trial court denied defendant's motion, concluding that the grassy area in which plaintiff fell met the definition of a sidewalk because it ran adjacent to the street and was used by pedestrians to gain access to the street. The trial court also concluded that a tree stump is not a tree and is not otherwise specifically excluded from the definition of highway, and so the highway exception to governmental immunity applied.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The governmental immunity act, MCL 691.1401 *et seq.*, provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. The highway exception to governmental immunity, MCL 691.1402(1), requires a governmental agency to maintain highways under its jurisdiction in reasonable repair so that the highways are reasonably safe and convenient for public travel. The definition of “highway” includes sidewalks, but does not include trees. MCL 691.1401(e). The highway exception to governmental immunity is narrowly construed. *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000). Determination of the applicability of the highway exception is a question of law subject to de novo review. *Meek v Dep’t of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

We reverse the trial court’s decision and remand for entry of summary disposition in favor of defendant. The grassy area in which plaintiff fell ran alongside the street between the street and a paved sidewalk. The location of a path for pedestrians adjacent to a roadway is a critical factor in determining whether the path is a sidewalk, *Haaksma v Grand Rapids*, 247 Mich App 44, 55; 634 NW2d 390 (2001), but not every path that runs that runs adjacent to a roadway is a sidewalk. A bicycle path running adjacent to a roadway is not a sidewalk, even if pedestrians use it from time to time. *Hatch, supra*, 465. In this case the grassy area ran adjacent to the street; however, a paved pathway meant for pedestrian traffic ran parallel to the grassy area. The trial court erred in concluding that the entire area, including the grassy area in which plaintiff fell, constituted a sidewalk simply because it ran adjacent to the street and was crossed by pedestrians on occasion. The grassy area was not a sidewalk for purposes of application of the highway exception to governmental immunity. MCL 691.1401(e).

Something is not included in the definition of highway merely because it has not been specifically excluded. *Weaver v Detroit*, 252 Mich App 239, 246; 651 NW2d 482 (2002). A proper analysis looks to whether it is actually and specifically included in the definition. *Id.* A tree stump is not included in the definition of highway, but a tree is specifically excluded from the definition. The trial court erred in concluding that the highway exception applied because a tree stump is not specifically excluded from the definition of highway. Defendant was entitled to summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette