

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT KEGLER and ANITA KEGLER,

Plaintiffs-Appellees,

v

CITY OF LIVONIA,

Defendant-Appellant.

UNPUBLISHED

June 29, 2004

No. 245693

Wayne Circuit Court

LC No. 01-134781-NO

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order denying its motion for summary disposition based on the highway exception to governmental immunity. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Robert Kegler tripped and fell after stepping into a depression surrounding a sunken manhole cover in the grassy berm between the street and sidewalk at the intersection of Newburgh Road and Myrna Street. The trial court ruled that the berm was within the highway exception and denied defendant's motion for summary disposition.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). "This Court reviews the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the nonmoving party. A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

Except as provided in section 2a,¹ a governmental agency having jurisdiction over a highway is liable in tort for breach of the duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). Section 2a provides in part that a municipality does not have a duty to maintain a portion of a county

¹ MCL 691.1402a.

highway outside of the improved portion of the highway designed for vehicular travel unless it knew or should have known of the defect and the defect is a proximate cause of the plaintiff's injury. MCL 691.1402a(1).

A plaintiff has the burden of pleading a claim in avoidance of governmental immunity. *Ridley v Detroit (On Second Remand)*, 258 Mich App 511, 512, 515; 673 NW2d 448 (2003). An action may not be maintained under the highway exception unless it is clearly within the scope and meaning of MCL 691.1402(1). *Weaver v Detroit*, 252 Mich App 239, 245; 651 NW2d 482 (2002). The highway exception creates a duty to maintain a "highway." MCL 691.1402(1). Liability for the failure to maintain a highway exists only if the defect complained of is "actually and specifically included in the" statutory definition of "highway." *Ridley, supra* at 515. 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" but not alleys, trees, and utility poles. MCL 691.1401(e). Because berms are not part of the "highway" as that term is defined by statute, municipalities do not have a duty to maintain them under the highway exception.

Further, MCL 691.1402a(1) applies only to county highways and "creates no liability for municipalities that would not otherwise exist" under MCL 691.1402(1). *Carr v Lansing*, 259 Mich App 376, 380-381; 674 NW2d 168 (2003). Plaintiff asserts that defendant has jurisdiction over the roadway in question, not the county. Accordingly, plaintiff's claim does not fall within the exception of § 2a. *Carr, supra* at 381. We conclude that the trial court erred in denying defendant's motion for summary disposition.

Reversed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray