STATE OF MICHIGAN

COURT OF APPEALS

JESSICA STEVENSON, Personal Representative of the ESTATE OF JACQUELINE D. STEVENSON,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant,

and

TRACY HARWELL and SAFEWAY TRANSPORTATION, INC.,

Defendants.

UNPUBLISHED
November 15, 2005

No. 255620
Wayne Circuit Court
LC No. 02-209244-NI

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant City of Detroit appeals as of right an order that effectively resulted in the denial, in part, of its motion for summary disposition predicated on governmental immunity. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Decedent was killed when the car in which she was a passenger collided with a school bus at an intersection. Plaintiff, as personal representative of decedent's estate, filed suit, asserting that defendant city breached its duty to maintain the highway in reasonable repair and that the city maintained a nuisance. Plaintiff asserted that the collision took place because the driver of the car in which decedent was riding failed to see a yield sign, which was obscured by tree limbs and foliage growing from land owned by the city. Plaintiff also alleged that defendant city allowed excessive growth of branches and foliage to obscure the bus driver's view of the intersection.

The trial court initially dismissed all claims against the city on the ground that the claims failed to avoid governmental immunity, but it later reversed itself in part, declaring both that this case raised a genuine question whether the untrimmed trees constituted a nuisance per se and that a nuisance per se constituted an exception to governmental immunity.

We review a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). This includes a motion brought pursuant to MCR 2.116(C)(7). *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003). MCR 2.116(C)(7) provides, in part, for summary disposition where a claim is barred by immunity granted by law. In analyzing a (C)(7) motion predicated on immunity, this Court gives consideration to the affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Poppen, supra* at 353-354. For purposes of this subrule, the documentary evidence must be construed in a light most favorable to the nonmoving party. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen, supra* at 354, citing *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

Governmental agencies are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). However, the immunity statutes include an exception for public highways, according to which "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." MCL 691.1402(1). A municipal corporation is a governmental agency. *Weaver v Detroit*, 252 Mich App 239, 243; 651 NW2d 482 (2002). "[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000)(emphases in original).

The only issue presented here is whether plaintiff may proceed under a nuisance per se theory against the city. In *Pohutski v City of Allen Park*, 465 Mich 675, 678-679; 641 NW2d 219 (2002), our Supreme Court held that there does not exist a trespass-nuisance exception to governmental immunity with respect to municipalities, thereby overruling *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), and its progeny.[1] However, the *Pohutski* Court decided that its ruling would only apply "to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield* will apply." *Pohutski, supra* at 699. Here, plaintiff's action was filed on March 19, 2002. In the initial complaint, plaintiff alleged claims of intentional nuisance and nuisance per se. In subsequent amended complaints, filed after April 2, 2002, plaintiff alleged claims entitled nuisance in fact, public nuisance, trespass-nuisance, and nuisance per se. The trial court ultimately dismissed all of the nuisance claims, except the one premised on nuisance per se, which was alleged in the

[1] *Pohutski* indicated that *any* nuisance claim against a municipality could not avoid governmental immunity. *Pohutski, supra* at 688. The opinion focused on the language in the second sentence of MCL 691.1407(1), which provides that, "[e]xcept as otherwise provided in this act, this act does not modify or restrict the immunity of the *state* from tort liability as it existed before July 1, 1965, which immunity is affirmed." (Emphasis added.) The state not being a party, the plaintiffs could not rely on this language to avoid immunity against the defendant cities. *Pohutski, supra* at 688-690.

initial complaint and is therefore not controlled by *Pohutski*. Plaintiff has not appealed the dismissal of the other nuisance claims.

In *Hadfield, supra* at 145, the Supreme Court recognized the existence of "a limited trespass-nuisance exception to governmental immunity." With respect to other nuisance versions or claims, Justice Brickley, speaking on behalf of himself and two other Justices, stated, "Having found some historical evidence of a nuisance per se exception and of a limited public nuisance exception, we leave for another day the question whether such exceptions are sufficiently supported by precedent so as to exist independent of trespass-nuisance and, if so, the issue of their proper scope." *Id.*[2] In *McDowell v Detroit*, 264 Mich App 337; 690 NW2d 513 (2004), oral argument scheduled on whether leave should be granted or peremptory action taken 474 Mich 866; 703 NW2d 472 (2005), this Court addressed a case predicated on various nuisance theories, including nuisance per se, which action was also filed prior to April 2, 2002. With regard to nuisance per se, this Court stated, "Despite the fact that there are some stated exceptions to governmental immunity, it remains unclear in Michigan whether a nuisance per se exception exists." *Id.* at 346-347. The Court declined to decide whether such a claim represented an exception to governmental immunity because the plaintiff had failed to establish facts amounting to a nuisance per se. *Id.* at 347. We resolve the case at bar in similar fashion.

The *McDowell* panel stated that a nuisance per se must be unreasonable by its very nature and must not be based on a lack of care. *Id.* The Court further noted:

> Pursuant to this definition, our Supreme Court has stated 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." [*Id.* (citations omitted; omission and alteration in original).]

Here, the care and maintenance of the offending trees and foliage are capable of being conducted in such way as not to pose a nuisance. Plaintiff's claim is essentially one predicated on a lack of proper care; therefore, the theory of nuisance per se is inapplicable. However, plaintiff places reliance on MCL 125.587 and various regulations and ordinances regarding the trimming of trees and shrubbery located at intersections. MCL 125.587 provides that a "building erected, altered, razed, or converted, or a use carried on in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se." Assuming that this statutory definition of nuisance per se is applicable in the context of a civil action for damages in relation to an attempt to avoid governmental immunity under a nuisance per se exception, we find that the claimed nuisance is too inextricably entwined with road signage as to allow plaintiff relief.

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[2] Three other Justices appear to have concluded that a nuisance per se is indeed an exception to governmental immunity. *Hadfield, supra* at 204-216 (separate opinions by Justices Boyle, Levin, and Archer). Justice Griffin took no part in the decision. *Id.* at 216.

For purposes of the immunity statute, "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," with the elaboration that the term "does not include alleys, trees, and utility poles." MCL 691.1401(e). Traffic control devices, including signals and signs, are not included within the definition of "highway," and thus when these devices are defective, there is no actionable claim against a governmental entity. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 326-327; 701 NW2d 179 (2005); see also *Weaver*, *supra* at 245, citing *Nawrocki*, *supra* at 180, 182 and n 37. Because the city would not be liable for failure to install a yield sign at all, or for installing one in a way that causes it not to function properly, neither is the city liable for installing such a sign then allowing plant growth to obscure it. A plaintiff may not broaden the narrow highway exception to governmental immunity simply by characterizing an obscured traffic control device, in this case a yield sign, that way. See *McDowell*, *supra* at 360-361 (a municipality providing public housing retains governmental immunity against claims arising from injuries caused by a fire attributed to a violation of applicable housing codes).

Reversed and remanded for entry of judgment in favor of defendant city. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter