STATE OF MICHIGAN

COURT OF APPEALS

JACK TESCHENDORF, as Next Friend of JACOB TESCHENDORF, a Minor,	UNPUBLISHED December 8, 2005
Plaintiff-Appellee,	
v	No. 255774 Macomb Circuit Court
CITY OF ST. CLAIR SHORES,	LC No. 03-003010-NO
Defendant-Appellant.	

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by right[1] a denial of its motion for summary disposition in this case involving the highway exception to governmental immunity. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On May 27, 2002, Jacob Teschendorf was injured as he fell from his bicycle while riding on Greater Mack Avenue in St. Clair Shores. He alleged that he lost control of his bicycle when he struck an area of "wet" or "cold-patched" asphalt. He then struck a section of curb that had been cut out, and was thrown over the handlebars of the bicycle. According to defendant, the area was currently under construction in connection with the repair of a sewer catch basin. However, in its answers to interrogatories, defendant contrarily stated that the repair had occurred on May 20 and 21, 2002, and provided work documents for May 20, 2002. Defendant admitted the area was not marked or barricaded.

Plaintiff filed suit alleging that defendant had failed to maintain the street in reasonable repair for the safety of public travel. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing that the highway exception was not applicable because plaintiff's fall was allegedly caused by new construction, and that it had no duty to install warning signs about the portion of the road under repair. Defendant also alleged that the repair was clearly visible to plaintiff. The trial court denied the motion, finding that defendant's argument was inconsistent with the degree of care discussed in *Jones v Enertel, Inc*, 467 Mich

[1] See MCR 7.202(7)(a)(v).

266; 650 NW2d 334 (2002), and that defendant could not rely on the open and obvious doctrine to avoid liability. The trial court further found that plaintiff's comparative negligence, if any, would not be a complete bar to recovery.

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Determination of the applicability of the highway exception is a question of law that we also review de novo. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000). When reviewing a motion for summary disposition based on governmental immunity, we consider all documentary evidence submitted by the parties. *Dampier v Wayne Co*, 233 Mich App 714, 720; 592 NW2d 809 (1999). Well-pleaded allegations are accepted as true, and construed in favor of the nonmoving party. *Id*. A plaintiff must allege facts warranting application of an exception to governmental immunity to survive a motion for summary disposition under MCR 2.116(C)(7). *Id*. at 720-721.

The highway exception to governmental immunity is found in MCL 691.1402(1), which provides in pertinent part:

> [E]ach 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. A person who sustains 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. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

MCL 691.1401(e) provides the following definition of highway:

> "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

On appeal, defendant maintains that, because the area where plaintiff fell was under construction at the time, and because it had no duty to provide warning signs or barriers, plaintiff cannot maintain his claim. Defendant notes that our Supreme Court provided a limitation on the scope of the duty owed to travelers in *Nawrocki v Macomb County Rd Comm'n*, 463 Mich 143; 615 NW2d 702 (2000):

> The first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state, having jurisdiction over any highway: "[to] maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." This sentence establishes the duty to keep the highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" refers to the duty to maintain and repair. The plain

> language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." [*Nawrocki*, 463 Mich at 160 (citation omitted)].

Applying this limitation the *Nawrocki* Court overruled its previous decision in *Pick v Szymczak*, 451 Mich 607, 624; 548 NW2d 603 (1996), to the extent that it held that the highway exception imposed "a duty under the highway exception to install, maintain, repair, or improve traffic control devices, including traffic signs." *Nawrocki*, *supra* at 180. Instead, the Court found that the duty is limited only to the improved portion of the highway designed for vehicular travel. *Id*. at 176.

Defendant also relies heavily on this Court's decision in *Weakley v City of Dearborn Heights (On Remand)*, 246 Mich App 322; 632 NW2d 177 (2001). In that case, an individual tripped and fell on a removed portion of a sidewalk. Defendant had not blockaded the portion of the sidewalk or erected warning devices. Relying on *Pick*, *supra*, the *Weakley* Court initially found that plaintiff could continue his suit. However, on remand, the panel relied on *Nawrocki*, *supra*, to find that "defendant did not have a duty to make the sidewalk reasonably safe by placing a barrier or warning device around the portion of the sidewalk that was under repair." *Weakley*, *supra* at 328.

We find defendant's reliance on *Weakly*, *supra*, is misplaced. The holding in that case appears based in large part on the fact that the actual danger represented by the missing portion of the sidewalk was open and obvious. *Id*. at 323, 325 n 3, citing *Weakley v City of Dearborn Heights*, 240 Mich App 382, 385-388; 612 NW2d 428 (2000). However, after *Weakley*, *supra*, was decided, our Supreme Court held in *Jones*, *supra*, that the open and obvious doctrine is inapplicable to claims under the highway exception; because the plain language of the exception imposes an arguably greater duty than that owed by other landowners. *Jones*, *supra* at 268-269. Accordingly, *Weakley*, *supra*, may have correctly held that the highway exception does not require that signage be placed on a construction area. However, we find its holding that the plaintiff could not recover when the sidewalk was in obvious disrepair due to the construction itself arguably incorrect after *Jones*, *supra*. This aspect of *Weakley*, *supra*, was implicitly overruled by *Jones*, *supra*. We find defendant's attempt to rely on *Weakley*, *supra*, to be unpersuasive.[2]

When a municipality engages in road demolition and construction, at least for a lengthy period of time,[3] the municipality is arguably failing to maintain the road "in reasonable repair so that it is reasonably safe and convenient for public travel." However, defendant's claims

---

[2] Also implied in defendant's argument is a claim that any repair attempt, no matter how poorly carried out, is reasonable. Were we to agree with this argument, a municipality could claim, for example, that it provided a reasonable repair to a ten-foot deep pothole by simply spanning it with a length of lumber.

[3] See MCL 691.1403.

notwithstanding, such a finding does not create an unreasonable burden on municipalities. Both before and after *Nawrocki*, *supra*, this Court has held that the duty to maintain a public highway can be suspended while the highway is being improved or repaired by closing it to public traffic. Erecting barricades and marking a road as closed to through traffic sufficiently closes a road to suspend liability under the highway exception. *Pusakulich v City of Ironwood*, 247 Mich App 80, 85-86; 635 NW2d 323 (2002); *Grounds v Washtenaw County Rd Comm*, 204 Mich App 453, 456; 516 NW2d 87 (1994).

Under the circumstances, we find that defendant has not established that the trial court erred in refusing to grant summary disposition simply because the area had been, or was, under construction or because the alleged defect was open and obvious.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello