STATE OF MICHIGAN

COURT OF APPEALS

JOANNE ROWLAND, a/k/a JOAN ROWLAND

Plaintiff-Appellee,

v

WASHTENAW COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
December 13, 2005

No. 253210
Washtenaw Circuit Court
LC No. 03-000128 – NO

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's denial of its motion for summary disposition under MCR 2.116(C)(7) and (10). We affirm.

Defendant first claims we should disregard existing Supreme Court precedent and conclude that plaintiff's claim should have been dismissed for failure to timely file compliant notice under MCL 691.1404. We are unable to grant defendant the relief he seeks.

This Court reviews de novo a trial court's decision to deny a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

Under MCL 691.1404, "[a]s a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." Although MCL 691.1404 does not mention prejudice, our Supreme Court in *Hobbs v Michigan State Highway Dep't*, 398 Mich 90, 96; 247 NW2d 754 (1976), and later in *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), held that, "absent a showing of actual prejudice [to the governmental agency] . . . the notice provision . . . is not a bar to claims filed pursuant to [the highway exception]." Defendant claims that *Hobbs* and *Brown* were wrongly decided, and urges this Court to disregard their construction of MCL 691.1404. However, "[a] decision of the Supreme

Court is binding upon this Court until the Supreme Court overrules itself." *O'Dess v Grand Trunk Western Railroad Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996). Accordingly, we are duty bound to follow our Supreme Court's construction of MCL 691.1404,[1] and therefore reject defendant's argument that plaintiff's claim be dismissed absent a showing of actual prejudice.

Defendant next argues that the trial court erred in denying defendant summary disposition because plaintiff's failure to comply with MCL 691.1404 actually prejudiced defendant. We disagree.

Both *Hobbs* and *Brown* require the defendant who has not received timely notice under MCL 691.1404 show that they suffered actual prejudice, not merely hypothetical prejudice. During oral argument, defendant's counsel was hesitant to respond when the Court asked him whether defendant suffered "actual prejudice." "Prejudice refers to 'a matter which would prevent a party from having a fair trial, or matter which he could not properly contest.'" *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich.App 383, 388; 565 NW2d 924 (1997) (citations omitted). Defendant specifically claims that it did not have a reasonable opportunity to investigate the defect before it resurfaced the intersection. However, the notice was only twenty days late, and, in any event, defendant did not resurface the intersection until after it received the notice. Thus, untimely notice did not actually prejudice defendant. Defendant also objects to the notice's content, suggesting that it was so vague that it prevented defendant from conducting an investigation. But the notice identified the intersection, and if defendant was able to resurface that intersection, it could have also investigated it. While a more detailed notice may have narrowed the scope of defendant's investigation, defendant did not undertake any investigation despite knowing it would soon repave the intersection. Defendant had an opportunity to investigate the conditions of the road surface, and simply failed to do so. Therefore, because defendant, below and on appeal, failed to articulate any facts establishing actual prejudice, we cannot conclude the trial court erred in denying defendant summary disposition on this basis.

Defendant last argues that the trial court erred in not granting its motion for summary disposition because it was immune from liability. We disagree.

This Court reviews a trial court's decision to deny a motion for summary disposition de novo. *Smith, supra*. "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 v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

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[1] This Court has previously rejected invitations to disregard *Hobbs* and *Brown*. See *Leech v Kramer*, unpublished opinion per curiam of the Court of Appeals, decided October 11, 2005 (Docket No 253827); slip op at pp 2-3; *Mauer v Manistee County Road Commission*, unpublished opinion per curiam of the Court of Appeals, decided April 7, 2005 (Docket No. 250858), at slip op pp 3-4 n 3. Applications for leave to appeal to our Supreme Court were filed in both of these cases. As of the date of this opinion, both applications remain pending.

Defendant first asserts that it is immune because of the natural accumulation doctrine. The natural accumulation doctrine states that governmental entities are not liable for injuries that occur on a public highway which result from the natural accumulation of snow or ice. *Haliw v City of Sterling Heights*, 464 Mich 297, 311; 627 NW2d 581 (2001). To prove that plaintiff slipped on ice, defendant points to the reports of the emergency personnel who attended to plaintiff that state plaintiff slipped on ice, and testimony of an EMT who stated that there was ice along the road. Plaintiff counters that she never alleged she slipped on ice and that she testified that she fell because of a water-filled hole. In addition, the EMT testified that when she wrote her report she paraphrased what plaintiff had told her. Because the facts regarding the cause of plaintiff's fall are in dispute, we cannot determine at this time whether as a matter of law defendant is immune from liability because of the natural accumulation doctrine. Therefore, the trial court correctly denied summary disposition on this basis.

Defendant also argues that it is immune from liability because the alleged hole that caused plaintiff to fall was not in the improved portion of the highway. The highway exception to government immunity "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 691.1402(1). The highway exception applies to injuries sustained in a crosswalk if the crosswalk happens to be within the improved portion of the highway. *Sebring v Berkley*, 247 Mich App 666, 680; 637 NW2d 552 (2001).

Defendant argues that plaintiff fell on the unimproved portion of the roadway because the pictures taken by plaintiff's son show that the only place water accumulated was on the unimproved portion of the roadway. However, plaintiff testified during her deposition that the hole was in the crosswalk and part of the area she circled on defendant's photograph lies within the crosswalk. In addition, after looking at the photographs submitted by the parties, we conclude that reasonable minds could disagree on whether water had accumulated in the marked crosswalk. Because the facts regarding the location of the alleged hole are in dispute, we cannot determine at this time whether as a matter of law defendant is immune from liability on the ground that the alleged hole was not in the improved portion of the roadway. Therefore, the trial court correctly denied summary judgment on this basis.

Affirmed.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra