STATE OF MICHIGAN

COURT OF APPEALS

DJUSTE LJULJDJURAJ,

Plaintiff-Appellant,

v

CITY OF STERLING HEIGHTS,

Defendant-Appellee.

UNPUBLISHED
December 4, 2007

No. 275317
Macomb Circuit Court
LC No. 2005-002822-NO

Before: Owens, PJ, and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition in this governmental immunity case. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a resident on Caroway Street within defendant's city limits, stepped into the street to retrieve her mail from the street-side mailbox in front of her residence. Plaintiff tripped on "broken and raised cement in the street" and fell to the ground, sustaining injuries.

Plaintiff filed suit, alleging that defendant had jurisdiction over Caroway Street and failed to maintain the street "in reasonable repair so that it was reasonably safe and convenient for public travel, including vehicular, pedestrian, bicycle, and/or motorcycle [travel] . . . ." Plaintiff alleged that defendant was not entitled to governmental immunity.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Defendant did not dispute that when plaintiff tripped and fell, she was standing in the improved portion of the roadbed. However, defendant contended that in order to avoid governmental immunity, plaintiff was required to demonstrate that the improved portion of the road was unsafe for vehicular travel. Defendant relied on authority such as *Grimes v Dep't of Transportation*, 475 Mich 72; 715 NW2d 275 (2006) (a shoulder is not an improved portion of a roadway), and *Roux v Dep't of Transportation*, 169 Mich App 582; 426 NW2d 714 (1988) (an alleged defect must be unreasonably dangerous to a vehicle, not a bicycle), overruled in part on other grounds by *Grimes*, *supra* at 81. Defendant asserted that no evidence showed that the roadway on which plaintiff fell was unreasonably dangerous to vehicles. In response, plaintiff argued that pursuant to authority such as *Gregg v State Hwy Dep't*, 435 Mich 307; 458 Mich 619 (1980) (a shoulder encompassing a bicycle path fell within the highway exception), overruled in part by *Grimes*, *supra*, and *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000) (highway

exception applies to pedestrians injured by defect in improved portion of roadway), the fact that she was a pedestrian when the accident occurred was irrelevant. The trial court granted defendant's motion for summary disposition, finding that *Grimes, supra*, stood for the proposition that "the duty of a governmental entity to maintain a highway attaches only to the approved [sic, improved] portion of the highway that is designed for vehicular travel."

We review a trial court's decision on a motion for summary disposition de novo. When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), we must accept as true the plaintiff's well-pled allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

MCL 691.1402(1), the highway exception to governmental immunity, provides:

> [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 liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in . . . MCL 224.21. 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. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer.

The definition of "highway" includes, in addition to roads open for public travel, "bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e). The highway exception to governmental immunity is narrowly construed. *Grimes, supra* at 78. The applicability of governmental immunity is a question of law that we review de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

The factual scenario in *Nawrocki, supra*, is similar to this case. In *Nawrocki*, the plaintiff, Rachel Nawrocki, stepped off the curb and onto a county roadway, stepped on cracked and broken pavement on the surface of the roadway, and injured her ankle. *Nawrocki, supra* at 152. Yet unlike Caroway Street, which was in the jurisdiction of a municipality, the road on which Nawrocki was injured was within the jurisdiction of a county road commission. *Id.* at 152 n 5. "[T]he first and second sentences of the highway exception clause apply to all governmental agencies having jurisdiction over any highway." *Id.* at 159. However, the third and fourth sentences of MCL 691.1402(1) "address more specifically the duty and resulting liability of the state and county road commissions," and apply to the defendant county road commission in *Nawrocki* but not to this defendant. *Id.* The provision in MCL 691.1402(1) stating that liability

for the breach of duty to repair and maintain highways "extends only to the improved portion of the highway designed for vehicular travel" only concerns state and county road commissions and does not impose a standard of liability on defendant in this case; instead, defendant's liability is defined in the first two sentences of MCL 691.1402(1).

In *Nawrocki*, *supra* at 160, our Supreme Court stated:

> The first sentence of [MCL 691.1402(1)], 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."

In *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 167; 713 NW2d 717 (2006), our Supreme Court then noted that "the Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason." The first sentence of MCL 691.1402(1), therefore, identifies a basic duty imposed on all governmental agencies to maintain a highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" describes the result that must be achieved for the repair to be reasonable. Therefore, although the Legislature has not waived immunity regarding claims that a road is unsafe because of a condition independent of a government entity's failure to properly repair the road, the Legislature has waived immunity regarding claims arising from a government entity's failure to maintain a highway in reasonable repair so that it is reasonably safe and convenient for public travel.

Plaintiff's allegations establish a prima facie case that defendant failed to maintain the road in reasonable repair so that it was reasonably safe and convenient for public travel. The parties do not dispute that plaintiff was injured when she tripped on broken and raised cement in the roadway or that defendant was aware of this defect at the time of the accident. Further, plaintiff need not establish that the portion of the roadway was unsafe for vehicular travel, as defendant claims; instead, she must establish that defendant failed to maintain the highway in reasonable repair so that it was reasonably safe and convenient for *public* travel. "'[P]ublic travel' encompasses *both* vehicular and pedestrian travel . . . ." *Nawrocki*, *supra* at 172. Plaintiff alleged that a crack in the roadway made it unsafe for public travel, and that she was injured when she tripped on this crack as she walked on the roadway. Accordingly, plaintiff has established a prima facie case that defendant breached its duty to maintain the roadway in reasonable repair, and the trial court erred when it granted defendant's motion for summary disposition and dismissed the case.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis