# STATE OF MICHIGAN

# COURT OF APPEALS

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BARBARA HAAKSMA,

Plaintiff-Appellant,

v

CITY OF GRAND RAPIDS, and
FRYLING DEVELOPMENT CORPORATION,
a/k/a 50 MONROE PLACE PARTNERSHIP,

Defendants-Appellants,

and

CITY OF GRAND RAPIDS,

Cross-Plaintiff,

v

FRYLING DEVELOPMENT CORPORATION,
a/k/a 50 MONROE PLACE PARTNERSHIP,

Cross-Defendant.

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FOR PUBLICATION
July 24, 2001
9:15 a.m.

No. 222450
Kent Circuit Court
LC No. 98-007045-NO

Updated Copy
October 12, 2001

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

SAAD, P.J.

## I. Nature of the Case

In this personal injury case, plaintiff stepped on exposed electrical wires located on a public right of way owned and maintained by the city of Grand Rapids. The wires protruded from a pedestal that had held a lamppost that had been knocked down several weeks before the injury in issue. Approximately one month before the incident, defendant Fryling Development Corporation had an electrical worker cap and wrap the wires with electrical tape, place a plastic bag over the wires, and cover the entire repair with an orange cone.

After some discovery, the court held hearings regarding defendants' motions for summary disposition and dismissed plaintiff's claims against both the city and Fryling. The court

dismissed the claims against the city on governmental immunity grounds and reasoned that, under *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 364; 579 NW2d 374 (1998), because the accident did not occur on a sidewalk adjacent to a public roadway, the "highway exception" to governmental immunity did not apply. We affirm this ruling that is clearly supported by Michigan case law, and we also affirm the trial court's ruling that plaintiff cannot avoid the city's governmental immunity defense under a nuisance per se exception.

A closer and more difficult question is raised by the trial court's summary dismissal of plaintiff's claim against Fryling. Under Michigan law, though a landowner, as here, owes no duty to repair a defect in a public street, the landowner may be liable if, in seeking to correct the hazard, the landowner actually creates a new hazard or increases instead of decreases the original hazard.[1] Here, the trial court reasoned that Fryling did not create a new hazard or increase the original hazard when it removed the fallen lamppost, capped and taped the exposed wires, placed them in a plastic bag, and placed an orange cone over the pedestal. To the contrary, the court ruled that Fryling's conduct unquestionably decreased the immediate hazard, and, therefore, the court granted summary disposition for Fryling.

On appeal, plaintiff argues that the subsequent unknown event that uncovered and undid Fryling's "repair work," coupled with Fryling's removal of the fallen lamppost, created a jury question regarding the pivotal issue whether Fryling increased rather than decreased the original hazard. We reject this argument and affirm the trial court's granting of summary disposition because (1) at the time Fryling did its repair work, reasonable minds could not differ that Fryling decreased, not increased, the hazard and (2) Fryling had no continuing duty to inspect the sight, to make continuing repairs, or to repair the hazard again after a subsequent, intervening act reexposed the wires. Having virtually eliminated the immediate hazard, as a good citizen should, Fryling ought not to be prejudiced because some unknown event intervened to create a new hazard virtually identical to the original hazard. To hold otherwise would deter citizens, who have no legal duty to ameliorate those conditions, from acting responsibly, thereby creating much greater risks to the public.

## II. Facts and Proceedings

One morning in December 1996, Ronald Minnie, director of maintenance for Fryling's building at 50 Monroe Place in Grand Rapids, noticed that a fifteen-foot-tall lamppost near the building had fallen over. Minnie saw between six and eight exposed, bare wires protruding from the top of the cement pedestal on which the lamppost stood, beside which lay the fallen post. Minnie had the post moved to the basement of 50 Monroe Place and talked to employees from Westmaas Electric about reinstallation. Thereafter, Westmaas Electric capped the wires using wire nuts, taped them off with black electrical tape, covered the wires with a plastic bag, and covered the pedestal with an orange cone. After Westmaas employees took those steps, they performed no further work on the lamppost, pedestal, or wires.

On July 8, 1998, plaintiff filed a complaint alleging that, on January 21, 1997, (approximately one month after Westmaas employees capped and wrapped the wires), plaintiff

[1] *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 131-134; 463 NW2d 442 (1990).

stepped on exposed electrical wires on a sidewalk adjacent to 50 Monroe Place.[2] Plaintiff claimed that she suffered a severe electrical shock and that she suffered permanent injuries. Plaintiff further alleged that the sidewalk and light fixtures from which the wires protruded are within the ownership and control of the city, Fryling, or both. Accordingly, plaintiff contended that Fryling is liable for her injuries caused by the dangerous condition and that the city is liable under the public highway and nuisance per se exceptions to governmental immunity under the governmental tort liability act. MCL 691.1402.

On April 26, 1999, the city filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and argued that the public highway exception does not apply because the sidewalk on which plaintiff was injured is located between a city-owned parking lot and Fryling's building and, therefore, is not adjacent to a highway within the city's jurisdiction. Regarding plaintiff's nuisance per se claim, the city argued that, because the lamppost did not constitute a condition that was dangerous at all times and under all conditions, a nuisance per se did not exist. Following oral argument, the trial court granted the city's motion for summary disposition and dismissed plaintiff's claims against the city in an order entered June 10, 1999.

On July 29, 1999, Fryling filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and argued that, as a matter of law, an abutting landowner cannot be held liable for injuries that occur on a public right of way. Plaintiff also filed a motion for partial summary disposition under MCR 2.116(C)(10), arguing that no genuine issue of fact exists regarding Fryling's failure to comply with its duty to place the city on notice regarding its own attempt to repair the fallen lamppost, its failure to make permanent repairs, and its failure to notify the city about the needed repairs.

On August 12, 1999, the trial court granted Fryling's motion for summary disposition. As noted above, the trial court specifically ruled that Fryling is not liable for plaintiff's injuries because it did not create a new hazard or make the area more hazardous by wrapping the electrical wires and because the city, not Fryling, had a duty to repair the fallen lamppost. Accordingly, the trial court entered an order dismissing plaintiff's action against Fryling on September 7, 1999. Plaintiff appeals as of right the orders dismissing the city and Fryling, and we affirm.

## III. Analysis

### A. Governmental Immunity

Plaintiff contends that the trial court erred in granting summary disposition to the city because, under the public highway exception to governmental immunity, the city had a duty to make the sidewalk reasonably safe.

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[2] Evidently, the orange cone that covered the wrapped wires was somehow removed or missing when plaintiff stepped on them. Minnie testified that, when he saw the pedestal the day after the incident, it appeared that a snowplow or some other vehicle may have scraped it, tearing the plastic bag and exposing the wires.

This Court reviews de novo rulings regarding motions for summary disposition. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). Summary disposition is properly granted under MCR 2.116(C)(7) if a claim is barred because of immunity granted by law.[3]

MCL 691.1407(1) provides, in part, that "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." As our Supreme Court explained in *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000):

> Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency. Under the governmental tort liability act, MCL 691.1401 *et seq*.; MSA 3.996(101) *et seq.*, governmental agencies are immune from tort liability when engaged in a governmental function. Immunity from tort liability, as provided by MCL 691.1407; MSA 3.996(107), is expressed in the broadest possible language—it extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function. However, there are five statutory exceptions to governmental immunity. [Case citations omitted.]

"The highway exception waives the absolute immunity of governmental units with regard to defective highways under their jurisdiction." *Nawrocki, supra* at 158. At the time of plaintiff 's accident, the exception provided, in pertinent part:

> Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining 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 condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1).]

A "highway," for purposes of the highway exception is defined as "every public highway, road, and street which is open for public travel and shall include bridges, sidewalks, crosswalks, and culverts on any highway. The term highway does not include alleys, trees, and utility poles." MCL 691.1401(e).[4] Notwithstanding this general definition, however, our Supreme Court has specifically stated:

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[3] In determining whether the plaintiff 's claim is barred by governmental immunity, this Court must consider all documentary evidence, including any pleadings, depositions, admissions, or any documentary evidence submitted by the parties. *Suttles v Dep't of Transportation*, 457 Mich 635, 642; 578 NW2d 295 (1998). In order to survive a motion for summary disposition under this rule, a plaintiff must allege facts in the complaint justifying application of an exception to governmental immunity. *Id*.

[4] Following the enactment of 1999 PA 205, effective December 21, 1999, the current definition in MCL 691.1401(e) reads:

(continued…)

> We have held that the highway exception is a narrowly drawn exception to a broad grant of immunity. An action may not be maintained under the highway exception unless it is clearly within the scope and meaning of the statute. *Scheurman v Dep't of Transportation*, 434 Mich 619, 626-627, 630; 456 NW2d 66 (1990). Thus, in order for the plaintiff to proceed, the path on which he was injured must constitute a "sidewalk." [*Hatch v Grand Haven Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000).]

In *Stabley, supra* at 364, the plaintiff filed a suit based on the highway exception for injuries he suffered while rollerblading on a paved path through a park. In determining whether the trail constituted a "sidewalk" within the statute, our Court opined:

> According to *Webster's New World Dictionary*, a "sidewalk" is "a path for pedestrians, usually paved, along the side of a street." *The American Heritage Dictionary: Second College Edition* defines "sidewalk" as a "walk or raised path for pedestrians along the side of a road." *Random House Webster's College Dictionary* (1992) defines "sidewalk" as "a usu. paved walk at the side of a roadway." In Black's Law Dictionary (6th ed), "sidewalk" is defined as "[t]hat part of a public street or highway designed for the use of pedestrians."
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> Furthermore, the Supreme Court has looked to definitions set forth in the Michigan Vehicle Code to ascertain the meaning of terms shared by the Michigan Vehicle Code and the governmental immunity statute. See *Roy v Dep't of Transportation*, 428 Mich 330, 338-340; 408 NW2d 783 (1987). In the Michigan Vehicle Code, the term "sidewalk" is defined as "that portion of a street between the curb lines, or lateral lines of roadway, and the adjacent property lines intended for the use of pedestrians." MCL 257.60; MSA 9.1860. [*Stabley, supra* at 367-368.]

This Court then considered the phrase "sidewalks . . . on any highway" and stated:

> There are no published Michigan cases that expressly construe the phrase "sidewalks . . . on any highway." However, the highway exception has been applied where the injury was sustained on a sidewalk "adjacent" to or "along" a county road. See *Listanski v Canton Twp*, 452 Mich 678, 682; 551 NW2d 98 (1996). Moreover, in *Campbell v Detroit*, 51 Mich App 34, 35-36; 214 NW2d 337 (1973), this Court determined that a sidewalk alongside a street that had been closed for some time and was being removed for an urban renewal project was not a sidewalk "on any highway" because the street was not open for public travel, as required by the statutory definition of highway.

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(…continued)

> "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.

> In light of the foregoing, we conclude that linking the word "sidewalk" with an adjacent road is in accord with the common and approved usage of the word. See *USAA Ins Co v Houston General Ins Co*, 220 Mich App 386, 391; 559 NW2d 98 (1996). Plaintiff's fall did not occur on the portion of the trail that runs adjacent to the roadway, but rather on the portion that runs through the wooded interior of the park. *Because plaintiff's fall did not occur on a pedestrian way that ran alongside a public roadway, plaintiff's fall did not occur on a "sidewalk" within the meaning of MCL 691.1401(e); MSA 3.996(101)(e).* Consequently, defendants are entitled to immunity. [*Stabley, supra* at 368-369 (emphasis added).]

Here, there is no genuine issue of material fact regarding the location of the sidewalk; it runs between, not alongside, Monroe and Ottawa Streets and is adjacent to a parking lot and 50 Monroe Place. Accordingly, pursuant to *Stabley*, because the sidewalk does not run alongside or adjacent to a public roadway, the highway exception does not apply to avoid the city's governmental immunity defense.[5]

Plaintiff claims that *Stabley* is distinguishable because, here, the length of the sidewalk is short, the sidewalk is located in a downtown area with regular pedestrian traffic, and the sidewalk "is part of one interconnected sidewalk system." However, the length of the sidewalk and the amount of foot traffic it bears is not relevant to our interpretation of the phrase "sidewalks . . . on a highway" because the statute makes no such distinction. MCL 691.1401(e). Moreover, regardless of whether the sidewalk is part of an "interconnected sidewalk system," parts of which may run parallel to a roadway, *Stabley* makes clear that the critical inquiry is whether the injury occurred on a portion of the sidewalk that *runs adjacent to a public roadway*. *Stabley, supra* at 369. Accordingly, the trial court did not err in ruling that the highway exception does not apply to plaintiff's claim against the city.

Plaintiff also argues that the trial court erred in ruling that a "nuisance per se" exception to governmental immunity did not apply.

While it remains unclear whether a nuisance per se exception to governmental immunity exists in Michigan, there is no disputed issue of fact regarding whether the lamppost, pedestal, and wires constitute a nuisance per se. See, e.g., *Kent Co Aeronautics Bd v Dept of State Police*, 239 Mich App 563, 586, n 6; 609 NW2d 593 (2000); *Fox v Ogemaw Co*, 208 Mich App 697, 700; 528 NW2d 210 (1995).

A nuisance per se is "an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992). The operation of outdoor lighting serves an important public purpose, and plaintiff's claim concerns the care and maintenance of that lighting. Accordingly, plaintiff's claim must fail because the operation of an outdoor light, "without regard to the care with which it is . . . maintained," is not "an

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[5] Although the sidewalk *connects* Monroe and Ottawa streets, similar to the circumstances in *Stabley*, the incident here occurred on a portion of the sidewalk adjacent to the parking lot and 50 Monroe Place, not beside or near the streets.

intrinsically unreasonable or dangerous activity," and, therefore, cannot constitute a nuisance per se. *Id*. at 477. Plaintiff cannot prevail in her attempt to assert a negligence theory under the guise of a nuisance per se claim to avoid governmental immunity.

Accordingly, the trial court did not err in granting summary disposition to the city under MCR 2.116(C)(7), because plaintiff 's claims are banned by immunity granted by law.

B. Fryling Decreased the Hazard

Plaintiff claims that the trial court erred in granting summary disposition to Fryling because Fryling increased the risk of danger by covering the exposed wires and is, therefore, liable for plaintiff 's injuries.

Fryling brought this motion under MCR 2.116(C)(10). Summary disposition is proper under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. In deciding a motion under this rule, we review affidavits, pleadings, depositions, admissions, and other documentary evidence to determine if a record might be developed that would leave open an issue on which reasonable minds could differ. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

The trial court correctly stated and applied the law—Fryling had no duty to repair the hazard on a public sidewalk[6] and could be held liable for its voluntary "repair work" only if it increased rather than decreased the hazard in issue. *Ward, supra,* at 131-134. Here, reasonable minds could not differ—Fryling clearly reduced the hazard by its conduct. That some unknown intervening event created an entirely new hazard does not create liability, particularly where, as here, the resulting hazard is virtually identical to the original hazard.

To make Fryling responsible for unknown intervening events[7] that caused the wires to, once again, be exposed would create a duty where none existed originally. That Fryling substantially minimized the original hazard does not, without more, make it a guarantor that the hazard will remain decreased. Having voluntarily acted properly to decrease the hazard, Fryling should not be penalized for subsequent, intervening acts of an unknown third party who negated

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[6] In *Bivens v Grand Rapids*, 443 Mich 391, 395; 505 NW2d 239 (1993), our Supreme Court stated:

> At common law, a landowner is under no obligation to repair and maintain an abutting public sidewalk. *Detroit v Chaffee*, 70 Mich 80, 85; 37 NW 882 (1888); *Levendoski v Geisenhaver*, 375 Mich 225, 227; 134 NW2d 228 (1965). Such an obligation arises only when it is imposed pursuant to authority granted by the state. *Chafee*, 70 Mich 85; *Levendoski*, 375 Mich 227; see also 2 Restatement Torts, 2d, § 288(c), p 29.

[7] It is pure speculation whether the wires became exposed from a third party's negligent or intentional conduct. As we stated in n 2, *ante* at ___, however, Minnie testified that it appeared to him that a plow or other vehicle may have hit or scraped the pedestal.

the repair. Were we to hold otherwise, citizens may be deterred from acting voluntarily to minimize hazards for fear of exposing themselves to unforeseen liability, with the result that the public would be exposed to increased risks.

## IV. Response to the Dissent

If Fryling concealed the hazard that caused plaintiff's injuries, we would agree with the dissent that the jury should decide if Fryling's concealment of the hazard increased the hazard that caused plaintiff's injuries. However, reasonable minds cannot differ—neither did Fryling conceal the hazard nor did plaintiff's injuries happen because she was lulled into a false sense of security by Fryling's alleged concealment of the hazard.

In *Kinsey v Lake Odessa Machine Products*, 368 Mich 666; 118 NW2d 950 (1962), which the dissent erroneously regards as controlling, the defendant in fact concealed the hazard by covering a hole, which made the situation appear safe when it was not. There, the defendant's act of covering up the hole (concealment) caused the unsuspecting plaintiff to fall into a trap. Whereas here neither did Fryling conceal a danger and thereby set a trap for an unsuspecting traveler nor did plaintiff fall into a trap caused by Fryling's alleged concealment. To the contrary, Fryling decreased the hazard, substantially, and some other, unknown, third person recreated the hazard of exposed wires. Indeed, at the time of the accident, no one, including plaintiff, could have been lulled into a false sense of security—the wires were, at that time, exposed, not superficially hidden.

Finally, it is pure conjecture to allow a jury to speculate whether, had Fryling left the lamppost lying where it fell (which would have created a separate hazard), the city of Grand Rapids would have made repair efforts. Here, the city apparently failed to take any remedial action. However, regardless of the city's inaction, there is no basis for imposing liability on Fryling, whose conduct simply reduced the original hazard.

Affirmed.

O'Connell, J., concurred.

/s/ Henry William Saad
/s/ Peter D. O'Connell