# STATE OF MICHIGAN

# COURT OF APPEALS

THOMAS LAMEAU, Personal Representative of the ESTATE OF JOHN M. CRNKOVICH, deceased,

Plaintiff-Appellee,

v

CITY OF ROYAL OAK,

Defendant-Appellant,

and

DETROIT EDISON COMPANY,

Defendant-Appellee,

and

GAGLIO PR CEMENT CORPORATION[1], ELDEN DANIELSON, and BRIAN WARJU,

Defendants.

FOR PUBLICATION
July 13, 2010

No. 290059
Oakland Circuit Court
LC No. 07-083761-NO

---

THOMAS LAMEAU, Personal Representative of the ESTATE OF JOHN M. CRNKOVICH, deceased,

Plaintiff-Appellee,

v

No. 292006
Oakland Circuit Court

---

[1] Defendant, Gaglio Cement PR Corporation, filed an appeal in this matter (Docket No. 289947), which has been stayed pending the filing of a bankruptcy petition. *LaMeau v City of Royal Oak*, unpublished order of the Court of Appeals, entered April 29, 2010 (Docket Nos. 289947, 290059, 292006).

CITY OF ROYAL OAK and GAGLIO PR CEMENT CORPORATION,

LC No. 07-083761-NO

Defendants,

and

DETROIT EDISON COMPANY,

Defendant-Appellee,

and

ELDEN DANIELSON and BRIAN WARJU,

Defendants-Appellants.

---

Before: TALBOT, P.J., and FITZGERALD and M.J. KELLY, JJ.

TALBOT, P.J. (*dissenting*)

I respectfully dissent from the majority's opinion and would reverse the trial court's denial of defendants' motions for summary disposition based on their assertion of governmental immunity.

This lawsuit arises from an accident that occurred on May 24, 2006, at 11:00 p.m., on defendant City of Royal Oak's (hereinafter "City") sidewalk. At that time, plaintiff Thomas Lameau's decedent, John M. Crnkovich, died of blunt force head and neck trauma after striking a guy[2] wire strung at an angle from defendant Detroit Edison Company's (hereinafter "DTE") utility pole across and anchored on the opposite side of the sidewalk. It is undisputed that, at the time of the accident, the decedent was riding a motorized scooter, without benefit of lights or a helmet, and had a blood alcohol level of 0.13 g/dL in addition to the presence of cannabinoids in his system. Defendant Gaglio PR Cement Corporation (hereinafter "Gaglio") had a contract with the City for installation of the sidewalk where this accident occurred. Defendants Elden Danielson and Brian Warju are engineers employed by the City, involved in the design, placement and oversight of the construction project for the sidewalk.

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) serves to test the factual sufficiency of the claims. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In

---

[2] The parties and record alternatively reference this as a "guy wire" or "guide wire."

accordance with MCR 2.116(C)(10), the moving party is entitled to a grant of summary disposition upon a successful demonstration that no genuine issue of material fact exists. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Mere speculation and conjecture cannot give rise to a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). A motion for summary disposition brought in accordance with MCR 2.116(C)(8) tests the legal sufficiency of the allegations claimed in the pleadings. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). In contrast, when deciding a motion under MCR 2.116(C)(7), a court must consider the pleadings, admissions, affidavits, and other documentary evidence within the record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists, which would necessitate the conduct of a trial. See *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999).

The issues raised by defendants concern the applicability of governmental immunity. In general, governmental agencies are deemed to be immune from tort liability for actions taken in furtherance of their governmental functions. MCL 691.1407(1). "[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) (emphasis in the original). A governmental function has been defined to encompass "an activity . . . expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). The fact that the City's construction of a sidewalk comprises a governmental function is not in dispute.

The City is immune from liability while engaged in a governmental function, unless a statutory exception is found to be applicable. The only exception alleged to be at issue under the circumstances of this case is the highway exception, MCL 691.1402, which provides in relevant part:

> (1) Except as otherwise provided in section 2a, 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. 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.

Of particular relevance is the term "highway" as defined in MCL 691.1401(e), as follows: "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."

As discussed by our Supreme Court in *Estate of Buckner v City of Lansing*, 480 Mich 1243, 1244; 747 NW2d 231 (2008)[3]:

[3] "We treat the Supreme Court's order as binding precedent." *Gonzalez v St John Hosp and Med* (continued…)

> The term "highway" includes "sidewalks." MCL 691.1401(e). In order to show that a governmental agency failed to "maintain [a] highway in reasonable repair," a plaintiff must demonstrate that a "defect" exists in the highway. [Citations omitted.]

Because the parties do not dispute jurisdiction in this matter, the issue that must be resolved is whether the guy wire strung across the sidewalk comprises a "defect," as contemplated by the statute. Plaintiff contends that the guy wire was anchored into the sidewalk and thus is part of its construction and constitutes a defect. In contrast, the City argues that the guy wire is part of the utility pole owned and under the jurisdiction of Detroit Edison, which is specifically excluded from the definition of the term highway, pursuant to MCL 691.1401(e). As such, neither the pole, nor the wire that extends from it, is part of the sidewalk and, therefore, comprise an exception for purposes of immunity. In addition, the City cites to MCL 691.1402a, which provides in relevant part:

> (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.
>
> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.
>
> (2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.

Specifically, the City contends that any "defect" must be in the materials or construction actually comprising the sidewalk, which plaintiff cannot demonstrate and has not alleged. See MCL 691.1402a(2). Plaintiff responds that MCL 691.1402a(2) is not applicable because a "discontinuity defect" is not at issue. However, MCL 691.1402a(1) would impose liability.

The initial matter to be resolved is whether the term "defect" encompasses the current factual situation. Contrary to the majority's conclusion, I would find that the trial court erred in declining to award summary disposition to the City because a question of fact does not exist

---

(…continued)

*Ctr*, 275 Mich App 290, 304 n 3; 739 NW2d 392 (2007).

regarding whether the guy wire constitutes a "defect." As argued by the City, the fact that pursuant to MCL 691.1401(e), "The term highway does not include alleys, trees, and utility poles" leads to an implication in favor of the grant of summary disposition. "The goal of statutory interpretation is to discern and give effect to the intent of the Legislature from the statute's plain language." *Houdek v Centerville Twp*, 276 Mich App 568, 581; 741 NW2d 587 (2007). "[I]f the language of the statute is clear and unambiguous, no interpretation is necessary and the court must follow the clear wording of the statute." *American Alternative Ins Co v Farmers Ins Exch*, 470 Mich 28, 30; 679 NW2d 306 (2004). The relevant statutory language specifically excludes utility poles, and it is disingenuous to suggest that any appendage extending from that pole should be treated as a separate or distinguishable entity.

Further, in accordance with Black's Law Dictionary (8th ed), the word "defect" is defined as "[a]n imperfection or shortcoming, esp. in a part that is essential to the operation or safety of a product." In applying this definition, our Supreme Court has explicitly restricted sidewalk defects as imperfections occurring in the walkway itself. In *Estate of Buckner*, the Court stated:

> Because the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a "defect" in the sidewalk, plaintiffs have not shown that defendant violated its duty to "maintain" the sidewalk "in reasonable repair." [*Estate of Buckner*, 480 Mich 1244.]

Further buttressing the restrictive use of the term "defect" is the Court's emphasis on the meaning of the words "repair" and "maintain." Specifically:

> "Maintain" and "repair" are not technical legal terms. In common usage, "maintain" means "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." *Webster's Third New International Dictionary*, Unabridged Edition (1966), p. 1362. Similarly, "repair" means "to restore to a good or sound condition after decay or damage; mend." *Random House Webster's College Dictionary* (2000), p. 1119. [*Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 502; 638 NW2d 396 (2002).]

This is consistent with our Supreme Court's instruction in *Nawrocki* that statutory exceptions to governmental immunity "are to be *narrowly* construed." *Nawrocki*, 463 Mich at 158. Thus, the majority's effort to expand the term "defect" to encompass the guy wire is contrary to both its plain meaning and prior case law.

Interpretation by our Supreme Court of the language comprising MCL 691.1402 precludes an alternative level of analysis. Specifically, MCL 691.1402(1) provides, in relevant 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. [Emphasis added.]

Although the phrase "and in a condition reasonably safe and fit for travel" indicates the potential for the imposition of liability, our Supreme Court has determined that this phrase cannot be read or applied separately from the phrase "[t]o maintain the highway in reasonable repair." As discussed in *Nawrocki*:

> 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 of 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 160 (citation omitted).]

Because plaintiff has failed to demonstrate the existence of a "defect," as that term is defined and applied, the trial court erred in determining that a question of fact existed as both the statutory language and case law preclude such a determination.

The majority also implies that immunity is not available based on the City's decision to construct the sidewalk in the path of the guy wire, resulting in a defective design. However, this Court has recently addressed design defects and the applicability of the highway exception, noting in relevant part:

> With respect to design defects, the Supreme Court in *Hanson v Mecosta Co Rd Comm'rs*[, 465 Mich at 503] held that "the highway exception does not include a duty to design, or to correct defects arising from the original design or construction of highways." The Court explained, "Nowhere in the statutory language is there a duty to *install*, to *construct* or to correct what may be perceived as a dangerous or defective "*design*." [*Plunkett v Dep't of Transp*, 286 Mich App 168, 183-184; 779 NW2d 263 (2009) (footnotes omitted, emphasis in original).]

Specifically:

> "[T]he focus of the highway exception is on *maintaining* what has already been built in a state of reasonable repair so as to be reasonably safe and fit for public . . . travel." The plain language of the highway exception to governmental immunity provides that the road commission has a duty to repair and maintain, *not a duty to design or redesign*. [*Id.* at 184 (footnote omitted, emphasis in original).]

Hence, the majority's implication that construction of the sidewalk in the path of the guy wire comprised a design defect precluding the applicability of governmental immunity is inconsistent with previous rulings of this Court and our Supreme Court.[4] As discussed in *Hanson*:

> What the plaintiff sought in this case was to create a duty to design, or redesign, the roadway to make it safer by eliminating points of special danger or hazard. However, there is no such design duty included in the statute. Nowhere in the statutory language are phrases such as "known points of hazard" or "points of special danger." We emphasized in *Nawrocki* that the highway exception does not permit claims based on conditions arising from such points of hazard, and that the only permissible claims are those arising from a defect in the actual roadbed itself. [*Hanson*, 465 Mich at 503 (footnote omitted).]

As such the majority's attempt to broaden the meaning of the statutory language is misplaced, given the Court's indication that a hazard is not the equivalent of a defect.

With reference to the claims pertaining to Danielson and Warju, MCL 691.1407(2) delineates the circumstances permitting the invocation of governmental immunity by employees and provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

This appeal concerns the applicability of MCL 691.1407(2)(c), regarding plaintiff's assertions that the actions of Danielson and Warju constituted gross negligence and were the proximate cause of the injury, thereby establishing liability.

---

[4] I would further contend that any distinctions between the factual circumstances of this case and *Plunkett* regarding a sidewalk versus a roadbed do not necessitate a different ruling.

In determining the applicability of immunity, gross negligence is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); see also, *Costa v Community Emergency Med Serv, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). "Simply alleging that an actor could have done more is insufficient [to establish gross negligence] under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Rather, gross negligence implies the existence of "a willful disregard of precautions" to address "safety and a singular disregard of substantial risks." *Id.*

Again, I cannot concur with the majority's reasoning and conclusion on this issue. While a question of fact may exist regarding whether the conduct of these defendants rises to the level of gross negligence, liability is precluded, as it cannot be reasonably concluded that their conduct could be construed as "the proximate cause of the injury or damage." Consistent with the governmental tort liability act, government employees may be held liable for grossly negligent conduct only if the alleged conduct is "the" proximate cause of the injury sustained. MCL 691.1407(2). "The proximate cause" is defined as "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Consequently, it is insufficient if defendants' actions comprise simply "a" proximate cause. *Tarlea*, 263 Mich App at 92. Summary disposition may be granted pursuant to MCR 2.116(C)(7) only if reasonable jurors could not find that the government employees were "the" proximate cause of the injuries. *Robinson*, 462 Mich at 463 (citation omitted).

Applying *Robinson* to the factual circumstances in this case, the trial court erred in failing to grant summary disposition in favor of Danielson and Warju. It cannot reasonably be disputed that defendants' actions in designing and constructing the sidewalk to cross the guy wire and their failure to assure movement of the obstruction in a timely manner by Detroit Edison, arguably contributed to, and initiated, a chain of events that led to the decedent's injury. Consequently, the conduct attributable to these defendants could easily be construed to have comprised "a" proximate cause of plaintiff's injuries. However, defendants' actions were not "the" proximate cause of the decedent's injury as that phrase has been interpreted in *Robinson.* Despite defendants' initial actions, the decedent did not incur injury until he was traveling at night without lights or helmet, at a potentially unsafe speed, while drunk and struck the guy wire, which Detroit Edison had failed to relocate; despite the utility's acknowledgement that movement of the guy wire comprised a "rush job." Hence, decedent's own behavior, combined with that of Detroit Edison comprised a more "direct" and "immediate" cause of the injuries incurred than the actions attributed to Danielson and Warju. Consequently, any negligence on the part of Danielson and Warju was simply too remote to overcome the grant of immunity afford by MCL 691.1407.

/s/ Michael J. Talbot