STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER LYNN IVAN, by her Conservator, SHIRLEY A. IVAN,

Plaintiff-Appellant,

v

LENAWEE COUNTY ROAD COMMISSION,

Defendant-Appellee,

and

ROBERT P. MCGILL,

Defendant.

UNPUBLISHED
October 23, 1998

No. 202668
Lenawee Circuit Court
LC No. 95-006385 NI

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant[1] summary disposition pursuant to MCR 2.116(C)(10)[2]. We affirm.

Plaintiff was injured when the car in which she was a passenger flipped over and landed in a ditch. Robert McGill, plaintiff's boyfriend, was driving through a curve when he lost control of the car.[3] Plaintiff's complaint alleged that defendant was negligent in the construction and maintenance of the road, listing five reasons: (1) the radius of the curve was too tight, (2) there was substandard pavement width on the curve, (3) there was an inadequate shoulder between the end of the pavement and beginning of the ditch, (4) the signs before the curve were inadequate to warn drivers of the danger of the curve, and (5) substandard maintenance resulted in an excessive accumulation of sand and gravel on the traveled portion of the road, causing McGill's vehicle to slip. The trial court granted defendant's motion for summary disposition, finding that the curve, as signed, was reasonably safe for vehicular travel and that driver error was the sole cause of plaintiff's injuries.

"Appellate review of a motion for summary disposition is de novo." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition relying upon MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* A court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it to ascertain whether a genuine issue of material fact exists for resolution at trial. *Id.* The party opposing the motion has the burden of showing that a genuine issue of material fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994), citing MCR 2.116(G)(4). All inferences will be drawn in favor of the party opposing the motion. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

Governmental agencies are generally immune from tort liability for actions taken in furtherance of a governmental function. MCL 691.1407(1); MSA 3.996(107)(1). See also *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618-619; 363 NW2d 641 (1984). A statutory exception exists for public highways, under which an injured party may hold the responsible governmental authority liable for failure to maintain the roadway "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1); MSA 3.996(102)(1). However, liability extends "only to the improved portion of the highway designed for vehicular travel and does not include . . . any . . . installation outside of the improved portion of the highway designed for vehicular travel." *Id.*

"Vehicular travel" as referred to in the statute "necessarily implicates factors not physically within the improved portion of the roadway itself, factors that can be points of hazard to reasonably safe vehicular travel on the interconnected network of public roadways." *Pick v Szymczak*, 451 Mich 607, 622-623; 548 NW2d 603 (1996). Thus, liability under the highway exception may reach deficiencies in warning signs and traffic control devices "at known points of hazard." *Id.* at 619. A "point of hazard" is "any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe." *Id.* at 623. The condition "need not be physically part of the roadbed itself." *Id.*

Plaintiff argues that several road-related deficiencies caused her injuries. Plaintiff states that the curve constitutes a ninety-degree turn, and argues that this degree of sharpness constitutes substandard design. However, plaintiff cites no authority for the proposition that this alone renders a roadway unreasonably dangerous. Plaintiff further argues that the pavement on the curve was of substandard width, and that there was an inadequate "clear zone" from where the pavement ended to where the ditch began. Plaintiff's expert, James Hrycay, testified that the width of the hard top and the clear zone fell short of the dimensions suggested by the American Association of State Highway and Transportation Officials (AASHTO). He opined that McGill's vehicle may not have fallen into the ditch if the pavement had been wider and if there had been more room for error. However, AASHTO standards are not mandatory minimum standards, but are instead advisory guidelines for governmental agencies. *Hutchinson v Allegan Co Bd of Rd Comm'rs (On Remand)*, 192 Mich App 472, 478; 481 NW2d 807 (1992). Plaintiff concedes that the applicable legal standard is whether the roadway was reasonably safe and convenient for travel. Regarding the clear zone separating the roadway from the ditch, plaintiff alleges that it should have been larger, not that it was otherwise defective or dangerous. However, providers of roads are not obligated to include shoulders at all. *Soule v*

Macomb Co Bd of Rd Comm'rs, 196 Mich App 235, 237-238; 492 NW2d 783 (1992). Because defendant could have chosen to provide no shoulder at all, that it instead provided a narrow one does not constitute any failure to maintain a safe roadway. What plaintiff has identified is not an inherently defective stretch of roadway, but rather a point of hazard whose dangerousness must be adjudged in light of warnings provided.

Just ahead of the curve as plaintiff and McGill approached it, while traveling on a section of roadway whose nominal speed limit was 55 miles per hour, signs indicated that the road was going to change from east-west to north-south, and that recommended a speed limit of ten miles per hour. Hrycay testified that the accident may have been avoided if defendant had simply configured the curve as an intersection with a stop sign, although he did not recommend that defendant flatten the curve's radius, in light of the low volume of traffic in the area plus budget constraints. However, whether some other design might have made the roadway safer is not at issue; the question is whether the warnings provided adequately alerted drivers to the danger involved.

Plaintiff correctly states that the signs warning about the curve come within the highway exception to governmental immunity, because the signs, although mounted on an installation lying outside of the improved portion of the roadway, necessarily affect vehicular travel at a point of hazard—the curve. See *Pick, supra*, at 622-623. However, plaintiff has failed to show that the curve, as signed, was not reasonably safe for vehicular travel.

Plaintiff's expert testified that the signs were in accordance with the Manual of Uniform Traffic Control Devices, and that the placement of the signs allowed drivers sufficient time to reduce speed so as to take the curve without incident. Further, McGill's deposition testimony confirms that McGill did, in fact, know that the curve existed and that a greatly reduced speed was recommended. Plaintiff contends that McGill's actual knowledge of the posted speed recommendation was nevertheless insufficient to warn him of the danger because his "driver expectations" were violated. Hrycay testified that it was reasonable and commonplace to expect drivers to reduce speeds by ten to twenty miles per hour in such situations, but that the eighty percent reduction called for in this instance constituted a "dramatic change . . . that's going to violate a driver's expectation" of a smooth transition in driving conditions. Essentially, plaintiff's argument is that defendant should have anticipated that drivers would underestimate the need to comply with the warnings and accordingly take the curve at faster speeds.

Plaintiff's expert and attorney both stated that had McGill complied with the sign, there would have been no accident. We are not persuaded by plaintiff's argument that the curve violated "driver's expectations," considering that the driver himself, McGill, testified that he knew the curve was there and that significantly reduced speed was in order to negotiate it. A driver's reasonable expectations can hardly be violated where the driver is so well apprised of the situation. Had McGill obeyed the plain warning provided, the accident would not have occurred. In this instance, the signage was adequate to render that point of hazard reasonably safe for vehicular travel.[4]

Finally, plaintiff argues that the curve was not properly maintained because there was loose gravel on the hard top. However, plaintiff has failed to show that defendant had notice of any such condition. A governmental agency can be held liable for such a condition only where it

had knowledge of the condition and a reasonable opportunity to effect a timely remedy. MCL 691.1403; MSA 3.996(103). See also *McKeen v Tisch (On Remand)*, 223 Mich App 721, 725-726; 567 NW2d 487 (1997). The notice requirement is strictly adhered to in the face of a claim that the highway authority should have provided warning devices at points of hazard. *Pick, supra*, at 624. Plaintiff has offered no evidence that defendant had actual or constructive knowledge of loose gravel on the roadway.

In sum, the trial court properly granted defendant's motion for summary disposition. Because all indications in the record suggest that the curve in question, as signed, under applicable standards, was reasonably safe for vehicular travel, and because the evidence uncontrovertibly shows that McGill drove through the curve at far greater than the recommended speed, the court properly concluded that driver error was the sole cause of plaintiff's injuries.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[1] Because Robert McGill is not participating in this appeal, our use of the designation "defendant" will refer exclusively to the Lenawee County Road Commission.

[2] Defendant brought the motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Although the trial court did not specify according to which provision it was granting the motion, the court went beyond the pleadings in rendering its decision. Therefore, we will treat it as a (C)(10) motion.

[3] McGill pleaded guilty to reckless driving.

[4] Had the warning signs suggested a reduced speed that nonetheless kept the driver at the threshold of danger, where even the smallest excess would likely result in accident, that situation could be considered a violation of a driver's reasonable expectations. However, in this instance, even the most conservative of widely varying estimates indicates that McGill took the curve at a speed exceeding the recommended speed by at least half again.