STATE OF MICHIGAN

COURT OF APPEALS

REVA MATSCO,

Plaintiff-Appellant,

v

ELMWOOD PROPERTIES and THE CITY OF BIRMINGHAM,

Defendants-Appellees.

UNPUBLISHED
February 12, 1999

No. 204950
Oakland Circuit Court
LC No. 96-511269 NI

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant Elmwood Properties (Elmwood). Plaintiff also contests the trial court's earlier order granting summary disposition in favor of defendant City of Birmingham. We affirm.

I.

The facts of this case are essentially undisputed. Plaintiff was injured in a one-vehicle automobile accident. Making a left turn from Maple Road in the City of Birmingham onto the driveway leading to 920 E. Maple Road, plaintiff's vehicle came to an abrupt stop when it struck a metal cap covering a water valve that was protruding above the concrete surface of the driveway approach below the sidewalk. The water valve and driveway approach were on property owned in fee by Elmwood within an easement of public way owned by the City of Birmingham. When the accident occurred, plaintiff was attempting to visit a tenant who was leasing part of the property owned by Elmwood.

Plaintiff filed suit against Elmwood and the City of Birmingham alleging that both defendants were negligent for failing to maintain the property in a safe manner and failing to warn the public of a hazardous condition existing on the property. The trial court granted the City of Birmingham's motion for summary disposition pursuant to MCR 2.116(C)(7) on grounds of governmental immunity. Later, the trial court granted Elmwood's motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that Elmwood owed no duty to plaintiff under the circumstances.

II.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of Elmwood. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider pleadings, affidavits, admissions, depositions, and any other documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Premises liability is conditioned on the presence of both possession and control over the property containing the alleged hazardous condition.[1] See *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998); *Orel v Uni-Rak Sales Co*, 454 Mich 564, 568-569; 563 NW2d 241 (1997). The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights. However, the owner of the easement, rather than the owner of the fee, is responsible for maintaining the easement in a safe condition so as to prevent injuries to third parties. E.g. *Morrow v Boldt*, 203 Mich App 324, 329-330; 512 NW2d 83 (1994). The residual rights held by the landowner in a public right-of-way are not possessory in nature. *Id.* at 330, citing *Stevens v Drekich*, 178 Mich App 273, 277; 443 NW2d 401 (1989). Therefore, Elmwood owed plaintiff no duty under a premises liability theory.

Under certain circumstances, a landowner may be held liable for injuries resulting from a hazardous condition existing on abutting property. For such liability to exist, the landowner must have undertaken some affirmative act of control over, or physical intrusion into, the abutting property so as to create or increase the hazard posed by the abutting property. See *Stevens*, *supra* at 277; see also *Morrow*, *supra* at 330; *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 132-133; 463 NW2d 442 (1990); *Devine v Al's Lounge, Inc*, 181 Mich App 117, 120; 448 NW2d 725 (1989); *Rodriguez v Detroit Sportsmen's Congress*, 159 Mich App 265, 271-272; 406 NW2d 207 (1987). In this case, plaintiff produced no documentary evidence to suggest that Elmwood took any affirmative acts of control over, or physical intrusion into, the driveway approach that could have created or increased the hazard posed by the protruding water valve cap. Plaintiff's argument regarding the increased traffic flow over the driveway approach is unpersuasive because she presented no documentary evidence to suggest that Elmwood's ownership of the fee caused an increase in the amount of vehicles traveling over the driveway approach, or that vehicular traffic increased the hazard posed by the water valve cap. In any event, Elmwood's ownership of the fee would not, in itself, constitute an affirmative act of control over or physical intrusion into the driveway approach. Accordingly, Elmwood owed plaintiff no duty as a result of its status as possessor of the land abutting the city's easement of public way.

For these reasons, we hold that the trial court did not err in granting Elmwood's motion for summary disposition.

III.

Next, plaintiff argues that the trial court erred in granting summary disposition in favor of the City of Birmingham. We disagree. In deciding a motion for summary disposition based on governmental immunity pursuant to MCR 2.116(C)(7), a court must consider all documentary evidence submitted by the parties. All well-pleaded allegations are accepted as true and construed most favorably to the nonmoving party in determining whether the defendant is entitled to judgment as a matter of law. To defeat the motion for summary disposition, the plaintiff must allege facts giving rise to an exception to governmental immunity. *Terry v City of Detroit*, 226 Mich App 418, 428; 573 NW2d 348 (1997).

Plaintiff contends that the City of Birmingham may be held liable pursuant to the highway exception to governmental immunity, see MCL 691.1402(1); MSA 3.996(102)(1). The highway exception is narrowly drawn. *Richardson v Warren Consolidated School Dist*, 197 Mich App 697, 702; 496 NW2d 380 (1992). The liability of state and county road commissions extends only to the "improved portion of the highway designed for vehicular travel." *Cox v City of Dearborn Heights*, 210 Mich App 389, 393; 534 NW2d 135 (1995). Municipalities are additionally responsible for sidewalks and crosswalks used for pedestrian travel. See *Mason v Wayne Co Board of Comm'rs*, 447 Mich 130, 136 n 6; 523 NW2d 791 (1994), modified 451 Mich 1236; 549 NW2d 575 (1996); *Richardson*, *supra* at 704. However, under no circumstances do "alleys" come within the definition of "highway" for purposes of the highway exception. See MCL 691.1401(e); MSA 3.996(101)(e).

Here, the driveway approach at issue was more consistent with the "generally understood notion" of an alley than with the "generally understood notions" of public thoroughfares designed for vehicular or pedestrian travel. Cf. *Richardson*, *supra* at 704-705 (explaining that a school driveway, despite its "streetlike" qualities, was not a "highway" under the highway exception); *Bunch v City of Monroe*, 186 Mich App 347, 348-349; 463 NW2d 275 (1990) (holding that "an area designated as a passageway for vehicles" within a public parking lot was not a "highway" for purposes of the highway exception); *Ward*, *supra* at 126 (explaining that a passageway between two businesses "not used as a common means of passage by persons leaving from and going to places not in close proximity to the two businesses" was not a "highway" for purposes of the highway exception). Accordingly, we hold that the water valve cap within the driveway approach was not on a "highway" for purposes of the highway exception. While it is true that the alleged hazardous condition need not be physically located on the "highway" itself for a plaintiff's claim to fall within the highway exception, the hazardous condition must be one that "uniquely affects" travel on the "highway." See *Pick v Szymczak*, 451 Mich 607, 623; 548 NW2d 603 (1996). In this case, the alleged injury did not result from a hazardous condition alleged to have affected travel on the "highway."

For these reasons, we hold that the trial court did not err in granting summary disposition in favor of the City of Birmingham.

Affirmed.

/s/ Gary R. McDonald
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[1] In her brief on appeal, plaintiff makes much of *Bonham v Wyandotte Community Theater*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 1997 (Docket No. 189713), citing it for the proposition that an invitor may be held liable for dangerous conditions existing on property outside of its possession and control. In peremptorily reversing this Court's decision in *Bonham*, the Michigan Supreme Court noted that the defendant "did not have possession and control of the parking lot where the plaintiff fell." See *Bonham v Wyandotte Community Theater*, 457 Mich 854; 581 NW2d 727 (1998).