STATE OF MICHIGAN

COURT OF APPEALS

GLORIA KRASINSKI and EDWIN KRASINSKI,

Plaintiffs-Appellants,

v

ERNEST M. SWANTON, SUSANNE SWANTON, and CITY OF SAGINAW,

Defendants-Appellants.

UNPUBLISHED
September 28, 1999

No. 207564
Saginaw Circuit Court
LC No. 97-018755 NO

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiffs appeal by right from orders granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8). We affirm.

Gloria Krasinski (plaintiff) was injured when she tripped on an uneven sidewalk abutting defendants Ernest and Susanne Swanton's property and located in the city of Saginaw. Plaintiffs contended that the city and the landowners were liable for her injuries under a city ordinance and because the sidewalk was a nuisance per se.

Initially, plaintiffs argue that the trial court erred in ruling that they failed to state a claim against the city under city ordinances or on a nuisance theory. While the trial court granted summary disposition to Saginaw of plaintiffs' negligence claims under MCR 2.116(C)(8), failure to state a claim, we believe it more appropriately reviewed under MCR 2.116(C)(7) because plaintiffs' claims against the city were barred by governmental immunity.[1]

When reviewing a grant of summary disposition on the ground that the claim is barred by governmental immunity, this Court considers all documentary evidence submitted by the parties. *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998), *Codd v Wayne County*, 210 Mich App 133, 134-135; 537 NW2d 453 (1995). To survive a motion under MCR 2.116(C)(7), plaintiffs must allege facts warranting the application of an exception to governmental immunity. *Id.*

Michigan's governmental tort liability act, MCL 691.1401 *et seq*.; MSA 3.996(101) *et seq*., confers broad immunity on governmental units, including cities, when engaged in the exercise or discharge a governmental function. *Glancy*, *supra* at 584, citing *Wade v Dep't of Corrections*, 439 Mich 158, 166; 483 NW2d 26 (1992). The act defines a governmental function as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); MSA 3.996(101)(f). The city's responsibility for the sidewalk upon which plaintiff tripped is expressly or impliedly authorized by its city ordinance and is therefore within the definition of a governmental function.

The governmental tort liability act provides a limited exception to governmental immunity for defective highways, however. For the purposes of municipal liability, the statute includes sidewalks in its definition of "highway." MCL 691.1401(e); MSA 3.996(101)(e). This defective highway exception contains a two-year period of limitation for actions. MCL 691.1411(2); MSA 3.996(111)(2). In the complaint, plaintiffs allege that the injury occurred on May 23, 1994. The complaint was filed on April 29, 1997, more that two years after the injury. Therefore, this action is barred by the period of limitation and summary disposition was proper under MCR 2.116(C)(7).

Plaintiffs attempt to avoid the two-year period of limitation by arguing that their claim was not brought pursuant to the highway exception, but instead was brought under the city ordinance. Plaintiffs acknowledge in their appellate brief, however, that their action against the city is one for negligence. The governmental immunity statute bars negligence actions not excepted from coverage. See *Wade, supra; Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365-366; 579 NW2d 374 (1998). Plaintiffs' negligence cause of action is therefore barred by governmental immunity unless one of the exceptions to immunity apply. While the defective highway's exception would normally allow plaintiffs' claim, it is, as previously discussed, time-barred.

Further, the trial court did not err in ruling that plaintiffs failed to state a claim under the common law nuisance per se exception to governmental immunity. *Royston v City of Charlotte*, 278 Mich 255, 260-261; 270 NW 288 (1936); *Askwith v Sault Ste Marie*, 191 Mich App 1, 3-4; 477 NW2d 448 (1991). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feister v Bosack*, 198 Mich App 19, 21-22; 497 NW2d 522 (1993). This Court reviews a trial court's decision under MCR 2.116(C)(8) de novo to determine if the claim is so clearly unenforceable as a matter of law that no factual development could establish the plaintiff's claim and justify recovery. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

Nuisances per se, as opposed to nuisances in fact, are activities or conditions that constitute a nuisance at all times and under all circumstances, regardless of the care with which it is conducted or maintained. *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992) (Cavanagh, C.J.). In *Li*, and its companion case, *Garcia v Jackson*, our Supreme Court ruled that neither the operation of the traffic light nor the maintenance of a holding pond constituted a nuisance per se because neither was intrinsically unreasonable or dangerous activity, without regard for care or circumstances. Instead, the Court stated that "both activities serve obvious and beneficial public purposes and are clearly capable of being conducted in such a way as not to pose any nuisance at all."

Li, supra at 477. Under the reasoning of *Li, supra*, the sidewalk on which plaintiff tripped, although having an uneven surface, cannot constitute a nuisance per se because a sidewalk does not constitute an intrinsically unreasonable or dangerous activity. A sidewalk has a beneficial public purpose of providing citizens with a place to walk apart from the more dangerous roadside. Summary disposition pursuant to MCR 2.116(C)(8) was therefore proper regarding this claim.

Next, plaintiffs argue that the trial court erred in granting summary disposition of their claims against the landowners pursuant to MCR 2.116(C)(8). We disagree.

The abutting landowners owed plaintiffs no duty to maintain the public sidewalk crossing their land, nor did plaintiffs allege that the landowners exercised possession or control over the sidewalk that might create a duty to rectify a dangerous condition. Ordinances that place a duty on a landowner create only public duties and do not serve as a basis for private causes of action. *Levendoski v Geisenhaver*, 375 Mich 225, 227; 134 NW2d 228 (1965); *Figueroa v Garden City*, 169 Mich App 619, 621; 426 NW2d 727 (1988), citing *Taylor v Saxton*, 133 Mich App 302, 306; 349 NW2d 165 (1984). The ordinance in the instant case purported to create a duty owed by landowners to the city, not to the public at large, and therefore plaintiffs have failed to state a claim under the ordinance.

Finally, plaintiffs argue that apart from the ordinance, the Swantons had a common law duty to ensure that the sidewalk was not uneven or otherwise defective. Property owners have no duty to maintain public sidewalks abutting their property, however. See *Devine v Al's Lounge, Inc*, 181 Mich App 117, 119; 448 NW2d 725 (1989); *Morton v Goldberg*, 166 Mich App 366, 368-369; 420 NW2d 207 (1988).

We affirm.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] An order granting summary disposition under the wrong subrule may be reviewed under the correct subrule. *Smith v Kowalski*, 223 Mich App 610, 612 n 2; 567 NW2d 463 (1998); *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997).