

STATE OF MICHIGAN
COURT OF APPEALS

WALLACE LEE HORACE,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
February 26, 2002

No. 227452
Wayne Circuit Court
LC No. 98-836928-NO

DIANE GUTIERRIEZ and MANUEL
GUTIERRIEZ,

Plaintiffs-Appellants,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

CITY OF DETROIT,

Defendant-Appellee.

No. 227453
Wayne Circuit Court
LC No. 98-836929-NO

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

MEMORANDUM.

In these consolidated cases, plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

On August 15, 1997, plaintiffs Wallace Horace and Diane Gutierrez suffered injuries when a tree limb fell on top of the vehicle in which they were seated, while parked in the public

street. They claimed that the city was liable for its failure to maintain the tree under the highway exception to governmental immunity. The trial court ruled that defendant was immune from suit.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion premised on immunity granted by law is properly considered under MCR 2.116(C)(7). "This Court reviews all the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the nonmoving party. A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

Each governmental agency having jurisdiction over a highway is liable in tort for breach of the duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). The term highway is defined as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway" but not "alleys, *trees*, and utility poles." MCL 691.1401(e) (emphasis added).

Because a tree is excluded by definition from the statutory definition of "highway," MCL 691.1402(1) created no liability on the part of the city for its failure to maintain the tree involved in the present case. *Ehlers v Dep't of Transportation*, 175 Mich App 232, 234-235; 437 NW2d 642 (1988). *McKeen v Tisch (On Remand)*, 223 Mich App 721; 567 NW2d 487 (1997), does not compel a contrary result because it was decided under *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), which has since been overruled. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 180; 615 NW2d 702 (2000). Therefore, the trial court did not err in ruling that defendant was immune from liability.

Affirmed.

/s/ Michael R. Smolenski
/s/ Martin M. Doctoroff
/s/ Donald S. Owens