STATE OF MICHIGAN

COURT OF APPEALS

THOMAS PAGEL, Plaintiff-Appellant,	UNPUBLISHED November 18, 2003
v	No. 241217 Oakland Circuit Court
OXFORD TOWNSHIP, Defendant-Appellee.	LC No. 01-035259-NP

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiff Thomas Pagel appeals as of right an order granting summary disposition to defendant Oxford Township. We affirm.

I. Basic Facts And Procedural History

Pagel is a resident of Oxford, Michigan. On June 16, 2001, Pagel and his wife brought their boat to Stony Lake Park in the township. To enter the launch area, Pagel had to first register his boat with the township's staff and drive through the parking lot to reach the cement ramp to launch his boat. Pagel drove his vehicle and trailer onto the boat launch area and successfully placed his boat in the water. He jumped into the boat and was holding onto the dock while his wife attempted to park their vehicle and trailer. Because Pagel's wife was having difficulty parking, Pagel climbed from his boat to the dock area and proceeded down the dock to a wooden sidewalk or walkway that connected to the parking lot area. Pagel was not wearing shoes and stepped over an area that appeared wet, then immediately slipped and fell, dislocating and fracturing his arm.

Park staff assisted Pagel and his wife to the hospital, trailered the boat and assisted in the return of the vehicle and boat to Pagel's home. Pagel later indicated an unidentified person was on the dock that witnessed the event and told Pagel's wife that he had almost fallen in the same location minutes before Pagel's fall. Pagel testified one of the park personnel, Steve Lajoie, told him on the way to the hospital that there were problems with algae buildup on the dock. Allegedly, Lajoie also told Pagel the dock was too low in the water due to waves from the boats on the lake at times submerging a portion of the dock. Pagel also stated that Lajoie indicated an intent to immediately raise the dock on his return to the park.

Lajoie testified, "[t]he only big problem is when boats pull out, it causes wakes and it goes backwards, so you get a little splash . . .. In the morning lots of time [sic] it's dry because [the] lake level goes down, because nobody pounds on the water . . .." At the end of the day of

Pagel's injury, as the park was closing, Lajoie did raise the dock a few inches. According to Lajoie, the height the dock could be raised was limited as it was necessary to maintain wheelchair accessibility. Lajoie testified he had not completed or received any other reports of injury or complaints concerning the walkway area where Pagel fell the entire summer he supervised the park. Lajoie did complete an accident report as a result of Pagel's fall and described the incident as occurring at "Stony Lake Park – Dock (wooden ramp)." In his report, Lajoie indicated:

> Mr. Pagel was getting ready to load his boat on his trailer after a morning of use on the lake. He was barefooted and stepped onto the wooden part of the dock that was submerged into the water. He slipped and tried to break his fall severely dislocating his shoulder.
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> * * *
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> I immediately took the tractor and lifted the dock and placed material under it to lift the wooden part from the water. The dock was secured and made so that it would not be submerged.

According to Pagel's wife, Michelle Pagel, following Pagel's fall:

> Another park visitor immediately exclaimed to me that he had slipped on the wooden walkway just before we arrived. . .. Mr. Lajoie told me and my husband that the walkway was too low, was getting wet and that he was going to raise it up as soon as he returned to the Park. . .. On the way to our house, Mr. Lajoie told me that they were having trouble with the lake. Because of what he believed was material from a nearby golf course getting into the lake when it rained, the walkway would get slimy. He also told me that one of his employees had slipped on the walkway that morning.

Ron Davis, Lajoie's supervisor and the Director of Parks and Recreation for the township indicated that a foam substance had been observed in the lake but, despite routine chemical testing by environmental agencies, the source of the substance has not been determined or confirmed. Davis denied having had any conversations with Lajoie, prior to Pagel's accident, indicating concerns with the safety of the dock or walkway area or reports of any other injuries in that location.

In his complaint, Pagel stated that "MCLA 691.1402a establishes this cause of action." Pagel's complaint alleged negligence and did not include any specific reference to the township being on notice of the alleged dangerous condition of the sidewalk thirty days prior to Pagel's accident. Pagel's pleadings did not contain any allegation that the township's operation of the boat dock area was a proprietary function.

The township filed responsive pleadings denying Pagel's allegations and asserting affirmative defenses, then filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10) and asserting the defense of governmental immunity under MCL 691.1407. The township further asserted the allegation of the existence of "slimy material on a walkway which is not adjacent to a public highway will not support an action . . . because it does not create an unsafe highway." Pagel filed an answer to the township's motion for summary

disposition and a first motion to file a first amended complaint that sought to add a claim of gross negligence and to add Lajoie as a defendant on the basis that his actions "amounted to gross negligence, that is, whether his actions or inactions demonstrated a substantial lack of concern for whether an injury would result" pursuant to MCL 691.1407(2)(c). The proposed amended complaint contained no allegations pertaining to the operation of the park's boat dock as a proprietary function.

At the hearing on the motion for summary disposition and to amend the complaint, the trial court summarized the arguments of the parties and addressed very specifically the wording and application of the various statutes cited by the parties. As a result, the trial court ruled, in relevant part:

> Looking only at the pleadings in this case and accepting all of the allegations as true, the Court finds pursuant to MCR 2.116(C)(8), that Plaintiff has failed to state a valid claim, because although he asserts liability pursuant to MCL 691.1402(A), MCL 691.14201—1402(A) provides for liability only if at least 30 days before the occurrence of the relevant injury the Defendant knew or in the exercise of reasonable diligence should have known of the existence of the defect. The Plaintiff in this case has not pled the existence of notice of a defect by the Defendant more than 30 days before this incident. Although the filing of an amended complaint could cure the defect, the Court finds in this case the area where the Plaintiff fell is not a highway, as defined by MCL 691.1401. . .. Thus, because the area where the Plaintiff fell is not a highway, pursuant to MCR 2.116(C)(7), the Court finds Plaintiff's claim is barred by governmental immunity.
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> Finally, with respect to Plaintiff's motion to file an amended complaint, the Court finds the filing of an amended complaint alleging gross negligence in this case would be futile. Gross negligence requires a reckless act and substantial lack of concern for whether injury results. . .. The Court has considered the evidence Plaintiff relies on in support of it's [sic] proposed gross negligence claim, but finds that even after considering that evidence in a light most favorable to the Plaintiff, that reasonable minds could not differ. That there was no conduct by the Defendant, which would arise to gross negligence.

On appeal, Pagel contends the trial court erred in granting summary disposition to the township because the testimony and facts presented meet the requirements of MCL 691.1402a(1)(a) and (b). In addition, Pagel asserts that the trial court erred in denying him an opportunity to amend his complaint to include a claim of gross negligence.

II. Summary Disposition And MCL 6591.1402a(1)(a) And (b)

A. Standard Of Review

We review a trial court's decision on a motion for summary disposition de novo.[1]

B. Standards For Summary Disposition

Although the trial court granted summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), it is clear from a review of the pleadings, the hearing transcript, and the lower court file that the trial court and parties relied upon materials provided in supplement to the pleadings. Hence, our review will be in accordance with the standards applicable to a motion under MCR 2.116(C)(10).[2] A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim.[3] In deciding a motion for summary disposition under this section of the court rule, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the non-moving party.[4] A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact.[5] Review is limited to the evidence that had been presented to the trial court at the time the motion was decided.[6]

C. Statutory Provisions

Pagel brought his claim pursuant 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:
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> (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.

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[1] *Dressel v Ameribank*, 468 Mich 557, 516; 664 NW2d 151 (2003).

[2] *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[3] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[4] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

[5] *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

[6] *Pena v Ingham County Road Comm*, 255 Mich App 299, 313; 660 NW2d 351 (2003).

(b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.

Pagel also implies that MCL 691.1402(1) mandates a general duty on municipalities to maintain "highways," including sidewalks adjacent to the highways, within its jurisdiction in reasonable repair:

> Except as otherwise provided . . . 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.

The statutory language of MCL 691.1402(1) has been interpreted to place "a duty on municipalities to maintain their sidewalks on public highways in reasonable repair. This means that municipalities have an obligation, if necessary, to actively perform repair work to keep such sidewalks in reasonable repair."[7]

D. The Notice Requirement

We note that nowhere in Pagel's original complaint or proposed amended complaint did he plead or provide evidence as required by MCL 691.1402a(1)(a) that the township had thirty days' notice of any defect. The testimony, as Pagel presented it, indicates, at most, that individuals slipped in the same area as did Pagel on the same day, not thirty days before. Pagel implies that the township's knowledge that the dock became wet at various periods throughout the day and the existence of "soap bubbles" in the surrounding water is sufficient to demonstrate its knowledge of a defective condition. However, the facts that Pagel alleged are, in our view, far too attenuated to conclude that the township had knowledge of a defect, particularly given the absence of any reports of injury or accident in that area prior to Pagel's fall.

In addition, Pagel apparently assumes that a slippery or slimy substance at the location of his fall was the cause of his injury. However, he testified that he did not know the cause of his fall. Conjecture that a slippery substance was on the area where Pagel fell without demonstration of a causal link between his fall and any negligence on the part of the township in maintaining the area is speculative at best and insufficient to withstand a motion for summary disposition.[8]

E. The Definition Of Highway

MCL 691.1401(1)(e) defines "highway" as:

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[7] *Jones v Enertel, Inc*, 467 Mich 266, 268; 650 NW2d 334 (2002).

[8] *Siewert v Sears Roebuck & Co*, 177 Mich App 221, 223; 441 NW2d 9 (1989).

> [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.

The definition is further refined, with regard to the highway exception to governmental immunity, by MCL 691.1402(1), which provides:

> [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. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

Pagel relies on this statutory language to claim that his injuries fall within the highway exception to governmental immunity. However, "the highway exception is a narrowly drawn exception to a broad grant of immunity. An action may not be maintained under the highway exception unless it is clearly within the scope and meaning of the statute."[9] For Pagel to maintain this action, "the path on which [he] was injured must constitute a 'sidewalk.'"[10]

But we conclude that the location of Pagel's fall cannot be construed as a sidewalk, crosswalk or other installation outside the improved portion of a highway as contemplated by MCL 691.1401, MCL 691.1402, and MCL 691.1402a. Whether the location of Pagel's fall is defined as a sidewalk, trailway, crosswalk, or any other installation outside of the improved portion of the highway is irrelevant given the fact that it is not adjacent or appurtenant to a highway as defined by the applicable statues. It is clear that the location of Pagel's fall is a walkway or other installation *outside* the improved portion of the highway connecting a dock to a parking lot. A parking lot is not a highway and was not contemplated by the legislature as falling within the "improved portion of the highway designed for vehicular travel."[11] If the highway exception to governmental immunity does not apply to public parking lots, it certainly does not extend to an area connecting a dock to a parking lot. We conclude that the area at issue here is not sufficiently proximate to a highway to constitute an exception to the statute.

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[9] *Hatch v Grand Haven Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000).

[10] *Id.*

[11] *Bunch v Monroe*, 186 Mich App 347, 349; 463 NW2d 275 (1990). In *Bunch*, the plaintiff slipped and fell in a municipal parking lot and sought abrogation of governmental immunity to pursue her claim of negligence against the defendant. The Court ruled, "under such circumstances, we decline plaintiff's invitation to extend the highway exception to public parking lots which are owned or operated by governmental agencies." *Id.* at 349.

III. Amendment To The Complaint

A. Standard Of Review

Pagel also appeals the denial of his motion to amend his complaint to include a claim of gross negligence and add an employee of the township as a party to the lawsuit. Although Pagel appeals this issue as a determination by the court for summary disposition, in actuality the trial court dealt with this issue based upon his motion to file an amended complaint. We therefore review for an abuse of discretion.[12]

B. Standards For Granting Leave To Amend

MCR 2.118(A)(2) permits a party to amend a complaint by leave of court or stipulation by the opposing party and "[l]eave shall be freely given when justice so requires." Leave to amend should be denied only for specified reasons such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously permitted, undue prejudice to the adverse party, or futility.[13]

C. Gross Negligence

Pagel asserts that the prior knowledge of the township, via its employee, that the dock area where he was injured was inappropriately low so as to permit water to submerge the area at various times of the day, coupled with the existence of an unknown substance creating "soap bubbles" in the water and the failure to correct this condition, amounts to gross negligence. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[14] By alleging gross negligence, Pagel apparently seeks to avoid the defense of governmental immunity by bringing the township's employee into the litigation.

D. Statutory Provisions

Pursuant to MCL 691.1407:

> (2) 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

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[12] *Detroit/Wayne County Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 46-47; 601 NW2d 879 (1999).

[13] *Tierney v University of Michigan Regents*, 257 Mich App 681, 687-688; 669 NW2d 575 (2003).

[14] MCL 691.1407(2)(c); *Stanton v Battle Creek*, 466 Mich 611, 620; 647 NW2d 508 (2002).

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.
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> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (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. As used in this subdivision, 'gross negligence; means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

E. Applying The Standards

(1) Previous Claims

Here, the testimony indicates that the township had received no claims of injury in the area of Pagel's fall prior to that fall. The closest Pagel comes to asserting notice of a dangerous condition are his reports, and those of his wife, that other individuals had fallen in the same area immediately prior to his fall or earlier that day.

(2) Corrective Action

As a result of Pagel's injury, the township took corrective action in raising the dock. This alone does not permit an inference of township's prior negligence or liability. MRE 407 states:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

We conclude that, contrary to Pagel's assertion, the township's actions can be interpreted to demonstrate its quick response to a dangerous condition once the township had been apprised of the situation. At most, the township's knowledge that the area periodically became wet and its failure to take corrective action are negligence, but not the gross negligence as defined by MCL 691.1407(2)(c). Further, the township's immediate raising of the dock following Pagel's fall demonstrates a legitimate and commendable concern for safety. Reasonable minds could certainly determine that the township's knowledge of occasional submersion of the dock area and the existence of "soap bubbles" in the dock's vicinity was not sufficient to conclude any failure to raise the dock prior to Pagel's accident amounted to gross negligence. Hence, we conclude that the trial court did not abuse its discretion in refusing to permit Pagel to amend his complaint on the ground of futility.

IV. Proprietary Function

Pagel also seeks to raise, for the first time on appeal, a claim that the township's operation of the boat launch and dock is a proprietary or non-governmental function. The issue

is not properly preserved as it was not raised by Pagel or considered by the trial court.[15] An appellate court is obligated only to review issues that are properly raised and preserved, and the appellate court need not address issues first raised on appeal.[16] We therefore decline to address this issue.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

[15] *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

[16] *Blackwell v Citizens Ins Co of Am*, 457 Mich 662, 674; 579 NW2d 889 (1998).