

STATE OF MICHIGAN  
COURT OF APPEALS

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UTAKA WALTON,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF  
TRANSPORTATION,

Defendant-Appellant.

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UNPUBLISHED  
November 7, 2006

No. 271271  
Court of Claims  
LC No. 05-000163-MD

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

This case arises out of injuries suffered by plaintiff when she was driving on I-96 and was hit by a piece of concrete that fell from an elevated crosswalk above I-96. On appeal, defendant argues that the crosswalk is not an improved portion of the highway. Therefore, the highway exception to governmental immunity does not apply, and governmental immunity bars plaintiff's claim. Accordingly, the crux of this appeal centers on whether the public highway exception to governmental immunity applies.

This Court reviews a trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Ind.*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). In making this determination, well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Dampier v Wayne Co.*, 233 Mich App 714, 720; 592 NW2d 809 (1999). Determination of the applicability of the highway exception is a question of law subject to de novo consideration on appeal. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000), rev'd on other grounds 475 Mich 72 (2006). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc.*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to

decide whether a genuine issue of material fact exists.” *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald*, *supra* at 332.

Although the government enjoys broad tort immunity pursuant to MCL 691.1407(1), there are six exceptions to governmental immunity, including the highway exception. MCL 691.1402(1). The highway exception to governmental immunity, MCL 691.1402(1), provides, in part:

[E]ach governmental agency having jurisdiction over any 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.

The purpose of the exception is to enhance the safety of travel on public highways. *Meek*, *supra* at 111. The highway exception to immunity is narrowly construed. *Grimes v Dep’t of Transportation*, 475 Mich 72, 78; 715 NW2d 275 (2006).

The issue pertinent to this appeal is whether the structure in question can be considered a “highway” pursuant to MCL 691.1402(1), and if so, whether it is a part of the “improved portion of the highway designed for vehicular travel.” In MCL 691.1401(e), “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. The term highway does not include alleys, trees, and utility poles.

As to defendant, the highway exception to governmental immunity extends liability only to the improved portion of the highway designed for vehicular travel. MCL 691.1402. The crosswalk in question is approximately nine feet wide and eight and one half feet high, and extends over I-96. An affidavit of an engineer employed with defendant states that “the Cherrylawn pedestrian crossover is a fenced-in, elevated walkway,” “the Cherrylawn pedestrian crossover is not wide enough, nor intended for vehicular traffic,” and “the Cherrylawn pedestrian crossover is solely for use by pedestrians.” Although plaintiff has made bare assertions to the contrary, she presented no documentary evidence to contest defendant’s claims concerning the nature of the overpass. Plaintiff contends that the overpass is a highway as defined by MCL 691.1402(1) because it is open for vehicular traffic in the form of motorcycles, which are considered vehicles. *Auto-Owners Ins Co v Hoadley*, 201 Mich App 555, 558-559; 506 NW2d 595 (1993). However, even if plaintiff could show that motorcycles have traveled across the overpass, she certainly has not proven that the overpass was intended for such use. The Court, in *Grimes*, *supra*, shed light on the phrase “designed for vehicular travel.” In holding that shoulders are not designed for

vehicular travel, the Court reasoned “that vehicular traffic might use an improved portion of the highway does not mean that that portion was ‘designed for vehicular travel.’” *Grimes, supra* at 90. The affidavit presented by defendant’s engineer explicitly states that the pedestrian crossover is solely for use by pedestrians and not intended for vehicular travel.

To the extent that plaintiff is arguing that I-96, upon which she was traveling, was unfit for public travel, this claim must fail. The state and county road commissions’ duty is only implicated by the failure to repair or maintain the actual physical structure of the roadbed surface. *Nawrocki v Macomb Co Rd Com’n*, 463 Mich 143, 183; 615 NW2d 702 (2002). The structure in question is not a part of the roadbed surface of I-96. To the extent that plaintiff is arguing that the overpass structure is a highway, her claim is defeated by the language of MCL 691.1402(1), which provides that the duty of the state and country road commissions “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.”

Defendant’s contention that the crosswalk is an installation outside of the improved portion of the highway is supported by case law. In *Fortunate v Michigan Dept of Transp*, 208 Mich App 467; 528 NW2d 743 (1994), the plaintiff was injured when someone threw a concrete block onto her vehicle from a pedestrian bridge. Although the plaintiff’s injuries arose from the intervening act of a tortfeasor and not a bridge in disrepair, this Court based its ruling in favor of the defendant on the conclusion that the bridge was outside the traveled portion of the roadbed and was designed for pedestrian traffic. *Fortunate, supra* at 468. In *Sebring v City of Berkley*, 247 Mich App 666; 637 NW2d 552 (2001), the plaintiff was injured when she tripped and fell over a defect in the pavement while walking in the crosswalk portion of a highway. This Court ruled that the crosswalk was located within the improved portion of the roadway, and thus, was subject to the highway exception. Importantly, this Court noted that it distinguished between a crosswalk as an installation separate from the roadbed (e.g., an elevated walkway) and a crosswalk that exists simply as an area within the roadbed, noting that the former fell outside of the improved portion of the highway designed for vehicular travel. *Sebring, supra* at 679-680.

In sum, plaintiff’s claims are barred by governmental immunity. The highway exception is a narrowly drawn exception to a broad grant of immunity, and there must be strict compliance with the conditions and restrictions of the statute. *Nawrocki, supra* at 158-159. Plaintiff failed to show that the overpass structure was a highway or that I-96 itself was unfit for public travel.

Reversed.

/s/ Karen M. Fort Hood  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio