

STATE OF MICHIGAN
COURT OF APPEALS

BHUPINDER MINHAS,

Plaintiff-Appellant,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED

July 15, 2008

No. 278477

Oakland Circuit Court

LC No. 2006-075282-NI

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

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting, on reconsideration, defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (10).¹ The court rejected plaintiff's contention that the action was within the highway exception to governmental immunity, MCL 691.1402(1). We affirm.

At approximately 8:00 a.m., on February 14, 2006, plaintiff and her daughter drove toward her school. Plaintiff turned on to Gunn Road, which is unpaved and gravel-covered. According to plaintiff, the road conditions were "[v]ery bad" because of potholes and because the road was icy from overnight frost. The posted speed limit was 25 miles an hour. When she turned on to Gunn, she checked her speedometer and saw that she was traveling 20 miles an hour. In spite of the road conditions, she was driving "fine." She drove on Gunn for approximately three minutes, more than a half mile, before the accident occurred. She had not reached the hill yet.

She and her daughter saw a "big pothole" toward the middle of the road. Plaintiff tried to avoid hitting it, but it was too close when she saw it. Her front left tire went into the hole. When she hit the pothole, she tried to move the steering wheel, and it "got stuck." The vehicle was still moving, but she could not control it. She applied steady pressure to the brake, but "it just

¹ Although the parties have attached exhibits to their briefs that were not presented to the trial court, this Court will not consider these on appeal. MCR 7.210(A). *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

slipped.” After hitting the pothole, the vehicle slipped and swerved to the right. It left the road, went up an embankment and struck a tree.

Plaintiff had traveled Gunn Road at least once a week to take her daughter to school for over three years. Although she had traveled that road about a week before, she had never seen the pothole before that day. She agreed that road conditions on a gravel road may change overnight.

Deputy Newlin observed a track approximately 75 to 100 feet long on the road from plaintiff’s vehicle and could see where the anti-lock brakes started “catching” on the surface. The surface was “slightly glazed over.” According to Newlin, the area of the accident sat in a valley area between hills to the east and west. The track was “pretty straight all the way to the point that she left the roadway.” The braking began on the downward slope as she was entering a valley between two hills, before the area with the potholes. Newlin, who had investigated hundreds of traffic accidents over a period of 28 years with the sheriff’s department, opined that when she crested the hill, her speed exceeded 25 miles an hour. Seeing the potholes ahead, she hit the brakes in a “panic brake.” The road was icy, and she slid off.

Plaintiff’s expert, Duane Dunlap, reviewed photographs that depicted road conditions comparable to those present on Gunn Road at the time of the accident. He indicated that the documentation he had reviewed showed that defendant graded Gunn Road approximately three weeks before the accident. However, he opined that based on the photographs, the level of surface maintenance and repair work on Gunn Road was “wholly inadequate” for the level of traffic, and as such, it was not reasonably safe, fit or convenient for public travel.

Plaintiff’s complaint alleged that defendant failed to maintain Gunn Road in reasonable repair so that it was reasonably safe and convenient for public travel and failed to repair defects in Gunn Road when defendant knew or should have known of the existence of the defect.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). It argued that it lacked actual or constructive notice of the pothole that allegedly caused plaintiff to lose control of her vehicle. It further contended that plaintiff could not establish that the condition of the road proximately caused plaintiff’s accident.

The trial court initially denied defendant’s motion, but thereafter granted defendant’s motion for reconsideration and concluded that plaintiff had not established that defendant did not “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.”

On appeal, plaintiff argues that potholes may constitute a defective condition and that her expert’s opinion created an issue of fact regarding whether defendant did not repair and maintain Gunn Road so that it was reasonably safe and convenient for public travel. She further claims that she proved that defendant knew or should have known of the condition of Gunn Road.

We review de novo a trial court’s ruling on a motion for summary disposition. *Stevenson v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004). The determination of the applicability of the highway exception to governmental immunity is a question of law that we review de novo. *Id.*

Pursuant to MCL 691.1402(1), “with regard to the governmental agency having jurisdiction over a highway, the Legislature has waived immunity from liability for bodily injury or property damage if the road has become, through lack of repair or maintenance, not reasonably safe for public travel.” *Wilson v Alpena Rd Comm*, 474 Mich 161, 167; 713 NW2d 717 (2006). In accordance with MCL 691.1403, for immunity to be waived, the agency must have actual or constructive notice, before the accident occurred, that the highway contained a defect rendering it not reasonably safe and convenient for public travel. *Id.* at 168. Notice that a road was bumpy and required frequent maintenance measures does not necessarily establish that it was not reasonably safe for public travel. *Id.* at 169. “[A] road in bad repair, or with rough pavement, is not per se one that is not reasonably safe.” *Id.* “It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it.” *Id.*

The “particular condition” that plaintiff claimed caused her accident was a large pothole toward the middle of Gunn Road, which she unsuccessfully attempted to avoid. Her acknowledgement that she did not see this pothole when she traveled that area a week earlier is incompatible with her argument that defendant had notice of the claimed defect. To the extent that she is relying on the potholed condition of the area in general, she has not shown that a reasonable road commission would have recognized that her specific pothole posed an unreasonable threat to safe public travel and would have addressed it. *Wilson, supra* at 169.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio