STATE OF MICHIGAN

COURT OF APPEALS

AMANDA LAFNER and AARON HEAGLE, Plaintiffs-Appellees, v CITY OF FLINT, Defendant-Appellant.	UNPUBLISHED February 3, 2009 No. 282669 Genesee Circuit Court LC No. 05-082535-NI 05-082800-NI

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant claims an appeal from the trial court's denial of its motion for summary disposition in this governmental immunity case. We affirm in part, reverse in part, and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs[1] Amanda Lafner and Aaron Heagle sustained injuries when the vehicle in which they were riding struck a pothole on Torrey Road in the City of Flint and left the road. When the driver attempted to steer back onto the road, the vehicle hit the road edge drop-off causing the driver to cross the centerline, where the vehicle was struck by an oncoming vehicle.

Plaintiffs filed separate lawsuits[2] alleging that potholes in the portion of the roadway designed for vehicular travel, as well as the road edge drop-off, rendered the road not reasonably safe and convenient for public travel as required by MCL 691.1402, and that as a consequence of the failure to maintain the road in a condition that was reasonably safe and convenient for public travel, defendant was not entitled to governmental immunity.

[1] Only appellee Lafner has filed a brief on appeal. That brief refers to the "appellees"; logically, we can conclude that the arguments put forth by Lafner accurately reflect the position taken by appellee Heagle. In this opinion "plaintiffs" refers to both Lafner and Heagle.

[2] The trial court consolidated the actions for purposes of hearing and decision.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing, inter alia: that the driver of the vehicle in which plaintiffs were riding was not certain that he hit a pothole; that defendant had no duty to maintain the shoulder of the road because the shoulder is not included in the statutory definition of highway and is not designed for vehicular travel; that defendant had no notice of a defect that might have caused the accident; and that no evidence showed that any pothole that might have caused the accident was deeper than two inches.

In response, Lafner argued that she had pled a valid claim in avoidance of governmental immunity. Lafner noted that Richard Dunavan, the driver of the vehicle, opined that the condition of the road caused him to lose control of his vehicle. Lafner also noted that Thomas Bereza, an accident reconstructionist, examined the accident scene and identified a pothole that he believed caused Dunavan to lose control of the vehicle. The pothole was in excess of four inches deep and 12 inches in diameter; Bereza opined that the pothole had been in existence in excess of 45 days. Bereza concluded that the road was not maintained in reasonable repair and in a condition reasonably safe and convenient for public travel.

Lafner also argued that defendant's argument that the claim regarding the road edge drop-off did not avoid governmental immunity failed for three reasons. First, the holding in *Grimes v Dep't of Transportation*, 475 Mich 72, 91; 715 NW2d 276 (2006), that, "only the travel lanes of a highway are subject to the duty of repair and maintenance" in the highway exception applied only to the state and to county road commissions. Second, under MCL 691.1402a, a municipality such as defendant had a duty of repair and maintenance with respect to an "other installation" adjacent to a roadway. Third, the road edge drop-off was actually part of the traveled portion of the roadway to which defendant's duty applied.

The trial court denied defendant's motion for summary disposition. The trial court found that a question of fact existed as to whether a specific pothole in the traveled portion of the road caused Dunavan to lose control of the vehicle, and whether the pothole had been in existence for more than 30 days when the accident occurred. In addition, the trial court concluded that pursuant to MCL 691.1402a(1), the shoulder of the road could be considered an "installation" and thus come within a municipality's duty to maintain.

We review a trial court's decision on a motion for summary disposition de novo. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002).

Generally, a governmental agency is immune from tort liability for actions taken in furtherance of a governmental function. MCL 691.1407. There are several narrowly drawn exceptions to governmental immunity, including the highway exception. MCL 691.1402(1) provides in pertinent part:

> Except as otherwise provided in section 2a, 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.

MCL 691.1401(e) provides:

> "Highway" means 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.

MCL 691.1402a sets out the scope of liability for municipal corporations, and provides in pertinent 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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> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.
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> (2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.

MCL 691.1403, a notice provision, states:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

The highway exception is narrowly construed. *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000). Determination of the applicability of the highway exception is a question of law subject to de novo review. *Stevenson v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004).

The trial court denied defendant's motion for summary disposition on the ground that a question of fact existed as to whether a specific pothole in the traveled portion of the roadway caused Dunavan to lose control of his vehicle, whether the existence of the pothole made the

road not reasonably safe and convenient for public travel, and whether the condition had existed for more than 30 days. Defendant has not challenged that ruling on appeal;[3] therefore, we affirm that portion of the trial court's decision.

The trial court also denied defendant's motion for summary disposition on the ground that the shoulder of a highway is a type of "other installation" cited in MCL 691.1402a(1) that a municipality is responsible to repair and maintain.[4] We conclude that the trial court erred in so holding. Our Supreme Court has held that the shoulder of a highway is not designed for vehicular travel, even if the shoulder is sometimes used for such a purpose, and thus is not included within the scope of the highway exception. The *Grimes* Court held that "only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)." *Grimes, supra* at 91 (footnote omitted). The trial court declined to apply *Grimes* to the circumstances of this case because *Grimes* concerned a highway under the jurisdiction of the state rather than a municipality. MCL 691.1402a indicates that, absent notice and proximate cause, a municipality "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." MCL 691.1402a(1). The doctrine of ejusdem generis provides that if a statute contains general words following an enumeration of particular subjects, the general words are presumed to including only things of the same class, kind, character, or nature as the particular subjects enumerated. *Sands Appliance Serv, Inc v Wilson*, 463 Mich 231, 242; 615 NW2d 241 (2000). In MCL 691.1402a(1), the general words "other installation" follow the particular subjects "sidewalk, trailway, [and] crosswalk[.]" These particular subjects refer to installations designed for pedestrian traffic and on which general, non-emergency pedestrian traffic is expected to take place. Thus, under the doctrine of ejusdem generis, the general words "other installations" would also be of that type. The shoulder of a highway might accommodate emergency pedestrian traffic, just as it accommodates vehicular traffic under some circumstances, but pedestrians are not expected to be walking on the shoulder of a highway as a general rule. The trial court's conclusion that the type of "other installation" referred to in MCL 691.1402a(1) includes the shoulder of a roadway does not find support in the language of the statute, and plaintiffs point to no decisions that support the ruling. We reverse that portion of the trial court's decision, and remand this case to the trial court for further proceedings in accordance with this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not

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[3] Defendant's decision to not challenge this portion of the trial court's ruling concerning the pothole is consistent with the position defendant took below.

[4] The trial court did not specifically discuss whether it concluded that a question of fact existed as to whether defendant knew or should have known of the existence of a defect in the shoulder of the highway at least 30 days before the accident occurred, MCL 691.1402a(1)(a).

retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra