Court of Appeals, State of Michigan

ORDER

Anthony A Adeleye, MD v Department of Transportation

Docket No. 280585

LC No. 06-000094-MD

Christopher M. Murray
Presiding Judge

Jane E. Markey

Kurtis T. Wilder
Judges

The Court orders that the July 16, 2009 opinion is hereby AMENDED. The opinion contained the following clerical error: The word "not" was inadvertently omitted from the first sentence of footnote 2, page 4.

In all other respects, the July 16, 2009 opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 29 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY A. ADELEYE, M.D., Plaintiff-Appellee,	UNPUBLISHED July 16, 2009
v	No. 280585 Court of Claims
DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.	LC No. 06-000094-MD

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals the trial court's denial of its motion for summary disposition, brought under MCR 2.116(C)(7) (governmental immunity) and MCR 2.116(C)(8) (failure to state a claim on which relief may be granted). For the reasons set forth below, we affirm the trial court's order.

I. Facts and Proceedings

Plaintiff was driving in the left northbound lane of the Lodge Freeway (M-10) when a piece of concrete crashed through his windshield and struck him, causing injuries. The incident occurred at or near the M-39 overpass that crossed M-10. Plaintiff filed suit alleging that defendant breached its duty to repair and maintain the road "in reasonable repair and in a condition safe and fit for travel" by allowing the M-39 roadbed "to deteriorate to such a degree as to form cracks, separations, potholes and other openings, allowing water to filter through to the bottom of the roadbed, causing concrete to dismantle from the bridge . . . ."

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8). Defendant argued that plaintiff's claims did not fall within the highway exception to governmental immunity because plaintiff did not allege that a defective condition of the roadbed surface of M-39 made the travel lanes of that road not reasonably safe and convenient for public travel. In addition, defendant argued that plaintiff's claim that it breached its duty to repair and maintain the M-39 overpass superstructure fell outside the highway exception because the support structure was not the traveled portion of the roadbed. In response, plaintiff asserted that the M-39 overpass was in disrepair, and submitted an affidavit from a professional engineer who stated that the deteriorated condition had existed for more than 30 days prior to the accident.

The trial court denied defendant's motion, finding that plaintiff stated an actionable claim based on the assertion that defendant's breach of its duty to repair and maintain M-39 resulted in the deterioration of the M-39 roadbed and caused danger to those persons driving on M-10. In addition, the trial court concluded that plaintiff stated a cause of action because the improved portion of the highway included the structure that supported the actual roadbed.

II. Analysis

We review a trial court's decision on a motion for summary disposition de novo. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996). MCR 2.116(C)(7) provides for summary disposition based on governmental immunity. As our Court has previously stated:

> Under MCR 2.116(C)(7), the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party." A trial court may also consider the parties' pleadings, affidavits, depositions, admissions, and other documentary evidence filed to determine whether the defendant is entitled to immunity. [*Roby v City of Mount Clemens*, 274 Mich App 26, 28-29; 731 NW2d 494 (2006) (footnotes and citations omitted).]

MCR 2.116(C)(8) on the other hand provides for summary where the nonmoving party "has failed to state a claim on which relief can be granted." Claims made under this subsection

> must be "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." In reviewing the outcome of a motion under MCR 2.116(C)(8), we consider the pleadings alone. We accept the factual allegations in the complaint as true and construe them in a light most favorable to the nonmoving party. [*Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008), quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).]

Generally, a governmental agency is immune from tort liability for actions taken in furtherance of a governmental function. MCL 691.1407. Under this legislative scheme, immunity is intended to be broad in scope, while the several exceptions to governmental immunity are to be narrowly construed. *Roby*, *supra* at 29. The exception at issue here is commonly referred to as the highway exception, MCL 691.1402(1), and provides in pertinent part that:

> 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. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21.

> *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*. [Emphasis added.]

According to the emphasized language, MCL 691.1402(1) imposes liability on the state only for injuries resulting from the failure to repair and maintain "the improved portion of the highway designed for vehicular travel" but not for "any other installations outside of the improved portion of the highway designed for vehicular travel." *Id*. Thus, in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 183; 615 NW2d 702 (2000), the Court held that the Legislature limited state liability to only "the actual physical structure of the roadbed surface" designed for vehicular travel. See, also, *Fortunate v Dep't of Transportation*, 208 Mich App 467, 468; 528 NW2d 743 (1994) ("The highway exception to governmental immunity . . . extends only to the traveled portion of the roadbed actually designed for vehicular travel."); *Iovino v Dep't of Transportation*, 244 Mich App 711, 715; 625 NW2d 129 (2001).

As noted above, plaintiff was driving on M-10, but the concrete piece that crashed through his windshield fell from some portion of the M-39 (Southfield) overpass. However, plaintiff does not merely allege that his injury was caused by the defective overpass structure. Rather, plaintiff clearly asserts that the crash was caused by defendant's failure "to maintain and repair *the Southfield roadbed*, causing it to deteriorate to such a degree as to form cracks, separations, potholes and other openings, allowing water to filter through to the bottom of the roadbed, causing concrete to dismantle from the bridge, foreseeably contacting drivers operating their vehicles on M-10 beneath the overpass." (Emphasis added.) Accepting these factual allegations as true and construing them in the light most favorable to plaintiff, we cannot say that plaintiff failed to state a claim upon which relief may be granted. *Kuznar*, *supra* at 176. Indeed, were the factual development of the record to show that the improved portion of the Southfield roadbed designed for vehicular travel deteriorated to such a degree that water filtered through and caused the concrete piece at issue to injure plaintiff, plaintiff's claim would be sustainable under the highway exception.

We note that in denying defendant's motion, the trial court reasoned that the overpass structure constitutes part of the improved portion of the highway based on Webster's dictionary definition that "a structure is the arrangement or interrelationship of all the parts of the whole." Such a conclusion, however, is inconsistent with the plain language of MCL 691.1402(1), which extends defendant's *duty of repair and maintenance* "only to the improved portion of the highway[1] designed for vehicular travel and does not include . . . any other installation outside of the improved portion of the highway designed for vehicular travel." (Footnote added.) Applying this language, our Supreme Court has held that "only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402." *Grimes v Dep't of Transportation*, 475 Mich 72, 91; 715 NW2d 275 (2006) (footnote omitted). The overpass

[1] A bridge – and thus an overpass structure – is a "highway" as defined by MCL 691.1401(e).

structure that supported M-39 is not itself the surface of the roadbed designed for vehicular travel. *Nawrocki, supra* at 180. Rather, it is the support structure for the improved portion of the highway designed for vehicular travel, much like the paved shoulder is a supportive structure to the traveled portion of a highway. See *Grimes*, *supra* at 91. As the *Grimes* Court noted when discussing the limiting language of MCL 691.1402:

> The Legislature modified the phrase "the improved portion of the highway" with the phrase "designed for vehicular travel." It did not intend to extend the highway exception indiscriminately to every "improved portion of the highway." Otherwise, it would not have qualified the phrase. Rather, it limited the exception to the segment of the "improved portion of highway" that is "designed for vehicular travel." Because the Legislature created this distinction, it believed there are improved portions of highway that are not designed for vehicular travel. Hence, this Court ought to respect this distinction as we parse the statutory language. [*Id*. at 89-90.]

Thus, were the factual development of the record unable to show that conditions on the traveled portion of the M-39 roadbed were causative of plaintiff's injury, and instead were only to show that the support structure itself was causative, plaintiff's claim would fail. In any event, in light of the current disposition of this case, we will not reverse the trial court's order where it reached the right result for the wrong reason.[2] *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

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[2] We are mindful of this Court's holding in *Moser v Detroit*, ___ Mich App ___; ___ NW2d ___ (2009), that MDOT was immune from suit where a chunk of concrete fell from a bridge overpass onto the plaintiff's car because the "fascia of the bridge is a part of the improved portion of the highway designed for vehicular travel." Although the case at hand is not ripe for application of *Moser*, we express our disagreement with *Moser's* failure to recognize the limiting nature of MCL 691.1402 as interpreted in *Nawrocki*, *Grime*, *Roby*, and *Iovino*. Indeed, as the dissenting opinion in *Moser* expressed:

> [I]n *Grimes* [*supra* at 91], the Michigan Supreme 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)." The Supreme Court had previously held in *Nawrocki* [*supra* at 162], that "if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable . . . ." *Id.* at 180 (citation omitted). The term "roadbed" is defined as "the material of which a road is composed." Random House Webster's College Dictionary, 2001, p 1140. The Supreme Court's reference to "travel lanes" and "roadbed" make clear that only the portion of the road upon which a vehicle is driven is subject to the "narrowly drawn highway exception." *Nawrocki*, *supra* at 180. Vehicles are not driven on the fascia of a bridge. As such, plaintiff has failed to show a defect in the improved portion of the highway which would subject the state to liability in this case. [*Moser*, *supra*, (Wilder, P.J., dissenting).]

(continued…)

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder

(…continued)

In any event, as just noted, application of *Moser* to this case is premature.