STATE OF MICHIGAN

COURT OF APPEALS

ROBERT FLICKINGER and PEGGY FLICKINGER, Plaintiffs-Appellants, v VAN BUREN COUNTY ROAD COMMISSION, Defendant, and VAN BUREN COUNTY, Defendant-Appellee.	UNPUBLISHED February 2, 2010 No. 289701 Van Buren Circuit Court LC No. 08-057477-NO

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting Van Buren County's motion for summary disposition based on governmental immunity, MCR 2.116(C)(7).[1] We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Procedural History

This case arises out of a claim for personal injuries resulting when plaintiffs' snowmobile struck a fallen tree lying across the Kal-Haven Trail on February 11, 2008. Plaintiffs filed suit on June 20, 2008, alleging that defendants were "negligent and/or grossly negligent" by failing to "exercise due care and caution for the protection of others lawfully on the Kal-Haven Trail," "inspect the trail for downed trees across the trail that would create an unreasonable risk of harm to those using its trails," "discover said downed tree and removing [sic] it," "warn of the

[1] Defendant Van Buren County Road Commission also was granted summary disposition, but that order has not been appealed.

presence of said tree," and "properly respond to reports of the downed tree and/or failing to establish a mechanism for answering and responding to such complaints." The complaint further alleged that the "described hazard constituted an unreasonable risk of harm" and that plaintiffs "paid valuable consideration for the use of said trail" (i.e., the trail permit plaintiffs purchased).

The County's answer asserted generally that plaintiffs failed to plead in avoidance of governmental immunity as set forth in the Government Tort Liability Act (GTLA), MCL 691.1401 *et seq*. The Road Commission moved first for summary disposition, asserting that it had no authority or jurisdiction over the Kal-Haven Trail, that plaintiffs' complaint merely alleged defendants negligently "operated" the trail (unsuccessfully pleading in avoidance of governmental immunity), and that MCL 691.1402(1) expressly excluded trailways from the liability imposed on county road commissions under the highway exception to governmental immunity. Plaintiffs responded to the motion by asserting they were "not premising liability on the basis of" the highway exception but instead on the recreational use act.

The trial court concluded hat the recreational use act did not create an additional exception to governmental immunity but instead was enacted to limit the liability of landowners. The court further concluded that the unopposed affidavit submitted by the Road Commission showed it was not an owner or possessor of the property, and so it was also not liable for that reason.

The County then filed its motion for summary disposition, arguing that the recreational use act did not create an exception to governmental immunity because under the GTLA, a governmental agency is immune from tort liability when engaged in a governmental function "except as otherwise provided in this Act." MCL 691.1407(1). The statute relied on by plaintiffs was not "provided" for in the GTLA, and in *Ballard v Ypsilanti Twp*, 457 Mich 564, 576; 577 NW2d 890 (1998), our Supreme Court held that the recreational use act does not apply to publicly owned property. Thus, the County argued, plaintiffs' claim failed.

Plaintiffs countered by asserting that both the recreational use act and the highway exception to governmental immunity applied to the County. The highway exception included trailways, MCL 691.1401(e), and although the Road Commission was excepted from liability for trailways, the County was not.

The trial court held that the highway exception did not apply, stating:

> Well, I think its [sic] positively clear that the highway exception doesn't apply here. When the argument is made that the road commission has the benefit of the statute, not the County, is it because the County Road Commission has the liability and the degree of liability and the limitation on that liability the [sic] set forth by statute because the Road Commission has a duty under the statute as express waiver of liability.

The court also found there was no liability under the recreational use act. The court expressly said it was not treating the County and the Road Commission as identical, and when pressed by plaintiffs' counsel why plaintiffs could not proceed under the highway exception, the court replied, "Because of [g]overnmental immunity."

II. Analysis

When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), we must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. We review a summary disposition determination de novo as a question of law. *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365; 579 NW2d 374 (1998).

The governmental immunity act sets forth six exceptions to immunity. *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). The "highway exception" holds that a governmental agency can be liable for damages caused by an unsafe highway. MCL 691.1402. Exceptions to immunity are to be narrowly construed. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). A plaintiff asserting a claim against a governmental entity must plead the claim in avoidance of immunity by averring facts indicating that the pertinent conduct was not the exercise of a governmental function or was subject to an exception to immunity. *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006).

In this case, there is no question that the County is a governmental agency, that it was engaged in a governmental function, and that it had jurisdiction. The only issue here is whether the Kal-Haven Trail qualifies as a "highway" under the statutory definition. Plaintiffs simply argue that it is, because the word was inserted into the statute by 1999 PA 205. In contrast, the County provides case law in support of its theory that the modifier "on the highway" applies to all the structures listed in the statute.

The relevant portion of the highway exception, MCL 691.1402(1), provides:

> 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.

"Highway" is defined within MCL 691.1401(e), and states:

> "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. [Emphasis added.]

In interpreting this narrow exception to the otherwise broad grant of governmental immunity, *Scheurman v Dep't of Transportation*, 434 Mich 619, 630 (opinion by Riley, C.J.); 456 NW2d 66 (1990), both our Court and the Supreme Court have held that a sidewalk, trailway, crosswalk, etc., must be "on the highway" to come within the definition of "highway," and thus fall within the highway exception. See *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464-465; 606 NW2d 633 (2000); *Stabley v Huron Clinton Metropolitan Park Authority*, 228 Mich

App 363, 367; 579 NW2d 374 (1998). Both these Courts concluded that to determine whether a trailway, sidewalk, etc. is "on the highway," the primary focus is on the proximity of the path to the actual highway. *Hatch*, 461 Mich at 464; *Stabley*, 228 Mich App at 369. See, also, *Haaksma v Grand* Rapids, 247 Mich App 44, 55; 634 NW2d 390 (2001). In this case, the trailway where the injury occurred was approximately 800 feet from the closest road, and therefore clearly was not a "trailway . . . . on the highway," and thus not a "highway" for purposes of the exception contained within MCL 691.1402(1).

We also do hold that the trial court correctly determined that the recreational use statute, MCL 324.73301(2), does not offer plaintiffs any relief as that provision does not impact the trailway owner's liability. Instead, by its plain terms, the statute only addresses the liability of landowners whose property is adjacent to trails. See *Ballard v Ypsilanti Twp*, 457 Mich 564, 577-578; 577 NW2d 890 (1998).

Affirmed. Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray