

STATE OF MICHIGAN
COURT OF APPEALS

EDITH LOBSINGER,

Plaintiff-Appellee,

v

TISEO BROTHERS, INC.,

Defendant-Appellee,

and

CITY OF WAYNE,

Defendant-Appellant.

UNPUBLISHED

November 30, 2010

No. 291213

Wayne Circuit Court

LC No. 08-126625-NO

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Defendant City of Wayne¹ appeals as of right from an order denying its motion for summary disposition, which was premised on MCR 2.116(C)(7) (immunity granted by law). We reverse and remand for further proceedings.

Plaintiff lived on Carlisle Parkway (a boulevard) in the city of Wayne. At all relevant times, the eastbound lane of Carlisle was closed to through traffic, and the westbound lane remained open. While the southern eastbound lane of Carlisle Parkway was undergoing repairs and a sewer line was being installed, plaintiff approached a foreman and requested that a barricade at the end of the street be moved so that she could drive her automobile away from her home. At a public meeting, defendant had invited plaintiff and other residents living on the Parkway to make such requests while the repairs were being undertaken.² Plaintiff maintained

¹ References to “defendant” in the singular throughout this opinion are to defendant City of Wayne only.

² Plaintiff represents on appeal that the invitation was to the general public and that the barricades were being moved for the general public, and maintains that there was at least a

that there was a trench “in the dirt of that area” that “sloped from its edge to a depth of about 1½ feet deep.” Plaintiff attested that, after making the request, the foreman took firm hold of her arm and walked her southward towards her home. She claimed that he directed her movement, restricted where she could and could not walk, physically prevented her from turning to avoid falling into the trench, and physically forced her to fall into the trench face-first. Further, she claimed he indicated he would escort her to her driveway and then move the barricade.

Defendant moved for summary disposition, arguing that it was entitled to governmental immunity because Carlisle Parkway was closed to the public for travel and, therefore, the highway exception to the Governmental Tort Liability Act (“GTLA”), MCL 691.1402, did not apply. The trial court concluded that if the road were closed to public travel, defendant would have no duty to maintain it. However, the court concluded that the road was not completely closed for two reasons: westbound Carlisle Parkway was open for traffic and defendant had invited people to use the eastbound lane. Accordingly, the trial court denied defendant’s motion.³

The standard of review applicable to this issue was recently set forth in *Lameau v City of Royal Oak*, __ Mich App __, __; __ NW2d __ (2010):

This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Barnard Mfg, Inc v Gates Engineering Co, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

A trial court properly grants summary disposition under MCR 2.116(C)(7) where a claim is barred by immunity granted by law. A party may support or defend a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court reviews the evidence in the light most favorable to the nonmovant to determine whether a plaintiff’s claim is barred by immunity. *Zwiers v Grownney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). If the submissions demonstrate that there is a factual dispute as to whether immunity applies, summary disposition is not appropriate. *Id.*

Subject to certain exceptions, MCL 691.1407(1) provides immunity from tort liability to a governmental agency if it is engaged in the exercise or discharge of a governmental function. However, the highway exception, MCL 691.1402(1), provides in pertinent part:

question of fact regarding this issue. However, the documents submitted in response to defendant’s motion indicated that only affected residents of the neighborhood were entitled to take advantage of the invitation.

³ Subsequently, the trial court entered an order granting plaintiff leave to file a first amended complaint. Plaintiff’s first amended complaint was filed on April 1, 2009, and added a claim for gross negligence. That claim is not the subject of this appeal.

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 as “a public highway, road, or street that is *open for public travel . . .*” MCL 691.1401(e) (emphasis added).

In *Grounds v Washtenaw Co Rd Comm*, 204 Mich App 453, 454; 516 NW2d 87 (1994), one plaintiff was travelling east and another west on a road when they collided at an intersection. The road was closed to through traffic, as evidenced by eight-foot barricades on both sides of the intersection and a sign on the barricades stating as much. Noting that the highway exception “is a narrowly drawn exception to a broad grant of immunity” and does not apply “unless it is clearly within the scope and meaning of the statute[.]” *id.* at 455, a majority of the Court held:

a governmental agency may suspend its duty to keep the streets in good repair and fit for public travel while the street is being improved or repaired by closing to public traffic that portion of the street. *Southwell v Detroit*, 74 Mich 438; 42 NW 118 (1889), *Beattie v Detroit*, 137 Mich 319; 100 NW 574 (1904), and *Speck v Bruce Twp*, 166 Mich 550; 132 NW 114 (1911). Here, the road was marked by eight-foot barricades as being closed to through traffic while repairs and improvements were being made. We find this was sufficient to suspend the statutory exception to governmental immunity. [*Grounds*, 204 Mich App at 456.]

In *Pusakulich v City of Ironwood*, 247 Mich App 80, 81; 635 NW2d 323 (2002), the City left off a slab of sidewalk in front of the plaintiff’s property. The area filled with water. Plaintiff fell when, misjudging the area as a puddle, she tried to jump over the hole. The sidewalk was adjacent to a street that had been temporarily closed so that a water line that ran underneath the street could be repaired. Citing *Campbell v Detroit*, 51 Mich App 34, 36; 214 NW2d 337 (1973), the Court noted that the highway exception would not apply to an injury on a sidewalk adjacent to a street that was *permanently* closed. *Pusakulich*, 247 Mich App at 85. However, it also stated that “temporary closure removed a street itself from the highway exception.” *Id.* at 87. It concluded that “any sidewalk connected with the temporarily closed highway is also removed from the highway exception along with the highway.” *Id.*

Both *Grounds* and *Pusakulich* are binding on this Court, and require reversal of the trial court order.⁴ Carlisle Parkway was a boulevard separated by a berm. Given the existence of the berm, the east and westbound lanes were in essence separate highways. It is undisputed that the eastbound lanes where plaintiff was injured were closed to all travel except the residents on the

⁴ In *Pusakulich*, 247 Mich App at 89, the Court voted against convening a conflict panel to resolve any potential conflict between *Grounds* and *Stabley v Huron-Clinton Metro Park Authority*, 228 Mich App 363; 579 NW2d 374 (1998).

affected portion of the street. This temporary closure of the road to the public is exactly what was addressed in both *Grounds* and *Pusakulich*, and requires reversal.

Moreover, defendant's alleged invitation to residents to use the street did not make the street "open for public travel," as such a construction cannot be squared with *Grounds*. There, the street was open to local traffic but not to through traffic. By virtue of it being open to local traffic, residents were in effect invited to use the street. However, where, as here, the street was barricaded, closing it to through traffic, the local use was not sufficient to construe the street as being "open for public travel."

Plaintiff submits that summary disposition was nonetheless properly denied, asserting that she was entitled to relief based on the doctrines of promissory and equitable estoppel. In *Pohutski v City of Allen Park*, 465 Mich 675, 690; 641 NW2d 219 (2002), the Court held that a trespass-nuisance exception to a governmental agency's immunity to tort liability did not exist because it was not a statutorily-created exception set forth in the GTLA. The Court concluded that, with respect to governmental agencies, including cities, only statutorily recognized exceptions to immunity would apply. "Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions." *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 548 n 4; 619 NW2d 66 (2000). Similarly, equitable estoppel is a judicially created cause of action utilized in several different fashions. See, e.g., *McNeel v Farm Bureau Gen Ins Co*, __ Mich App __, __; __ NW2d __ (2010), and *Barnard v German American Seminary*, 49 Mich 444, 445-446; 13 NW 811 (1882). Since these are judicial remedies not expressly set forth as exceptions in the GTLA, we conclude that they are unavailable exceptions to defendant's immunity from tort liability.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

No costs, a public question being involved. MCR 7.219(A).

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray