STATE OF MICHIGAN

COURT OF APPEALS

LENORE ROSS and DEWAYNE ROSS,

Plaintiffs-Appellants,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN, INC.,

Intervening Plaintiff,

v

CITY OF OWOSSO, OWOSSO PUBLIC SCHOOLS, and OWOSSO AREA AMPHITHEATER PERFORMING ARTS ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED
November 26, 1996

No. 184795
LC No. 92-001170

Before: Markman, P.J., and McDonald and M. J. Matuzak,* JJ.

PER CURIAM.

Plaintiffs appeal by right an order granting the Owosso Area Amphitheater Performing Arts Association's (OPAA's) motion for summary disposition. They also challenge orders granting motions for summary disposition to the City of Owosso and the Owosso Public Schools. We affirm.

On August 10, 1993, Lenore Ross, along with her husband and two minor sons, was riding her bicycle on the James S. Minor Riverwalk in Owosso. The Riverwalk is a paved pedestrian / bicycle path that runs between the cities of Corunna and Owosso. Ross was seriously injured when her bicycle struck a rise in the Riverwalk's pavement that was caused by the growth of a tree root.

On appeal, plaintiffs argue that the trial court erred in granting OPAA's motion for summary disposition pursuant to MCR 2.116(C)(10) regarding their premises liability theory. This Court reviews

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* Circuit judge, sitting on the Court of Appeals by assignment.

decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

> MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id*.]

In *Merritt v Nickelson*, 407 Mich 544, 551-553; 287 NW2d 178 (1980), the Court held:

> Invitors are liable for known dangerous conditions of property and for dangerous conditions which might be discovered with reasonable care, regardless of whether they have legal title or control over the premises… Premises liability is conditioned upon the presence of both possession and control over the land… Ownership alone is not dispositive. Possession and control are certainly incidents of title ownership, but these possessory rights can be "loaned" to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility. [Citations omitted.]

Liability attaches only where the rights to possess and control the premises are actually exercised. *Id*. at 554; *Little v Howard Johnson Co*, 183 Mich App 675, 679; 455 NW2d 390 (1990).

Here, the evidence established that the Schools owned the property upon which the Riverwalk was located and leased the land to Owosso during the summer. Under the terms of the lease, Owosso assumed responsibility for maintenance and repairs of the leased premises as well as liability for personal injuries. Owosso, in turn, entered into an operating agreement with OPAA, which gave OPAA sole authority to schedule cultural events on the property. The operating agreement did not purport to give possession and control over the property to OPAA. The operating agreement specifically stated: "The City shall be responsible for repairing and keeping in good condition the Amphitheater and grounds." Plaintiffs presented no evidence to show that OPAA was actually in possession of and exercising control over the premises at issue. Accordingly, the trial court properly granted OPAA's summary disposition motion with respect to the premises liability theory.

Next, plaintiffs argue that the trial court erred in granting OPAA's motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to their public nuisance theory. A public nuisance is "an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). The *Cloverleaf* Court held, at 191:

> A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the

> defendant employed another person to do work from which the defendant knew a nuisance would likely arise.

Here, plaintiffs acknowledged that the growth of a tree root caused the defect in the Riverwalk that resulted in Ross' injuries. Thus, OPAA did not "create" the nuisance. As concluded above, OPAA did not own or control the premises at issue. No evidence indicated that OPAA employed someone to do work from which a nuisance would likely arise. Therefore, plaintiffs failed to raise a genuine factual issue that the defect at issue constituted a public nuisance for which OPAA would be liable. Accordingly, the trial court appropriately granted summary disposition in favor of OPAA regarding this theory.

Plaintiffs next argue that the trial court erred in granting Owosso's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) on the basis of governmental immunity. MCR 2.116(C)(7) makes summary disposition appropriate when a claim is barred by "immunity granted by law."

> A motion under MCR 2.116(C)(7) *may* be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3). If such material is submitted to the court, it must be considered. MCR 2.116(G)(5). [*Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).]

Governmental agencies are generally immune from tort liability when engaged in the discharge of a governmental function.[1] MCL 691.1407(1); MSA 3.996(107)(1). However, there is a "highway exception" to governmental immunity, MCL 691.1402; MSA 3.996(102), which states in pertinent part:

> Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe for vehicular travel, may recover the damages suffered by him from such governmental agency.

The highway exception is "a narrowly drawn exception to the broad grant of governmental immunity," *Bachman v Wroten*, 196 Mich App 258, 261; 492 NW2d 792 (1992), and is, therefore, narrowly construed. *Soule v Macomb Road Commissioners*, 196 Mich App 235, 238; 492 NW2d 783 (1993). "No action may be maintained under the highway exception unless it is clearly within the scope and meaning of the statute." *Scheurman v Department of Transportation*, 434 Mich 619, 630; 456 NW2d 66 (1990) (Riley, C.J.).

The governmental immunity act defines "highway" as "every public highway, road, and street which is open for public travel and shall include . . . sidewalks, crosswalks, and culverts *on any highway*." MCL 691.1401(e); MSA 3.996(101)(e). (Emphasis added.) The Riverwalk at issue is not located adjacent to a highway. The parties agree that it does not run alongside a highway; it runs along a river. Because it is not a sidewalk "on any highway," it is not a "sidewalk" for purposes of the

highway exception. MCL 691.1401(e); MSA 3.996(101)(e); see also *Campbell v Detroit*, 51 Mich App 34, 35-36; 214 NW2d 337 (1973) (plaintiff injured on defective sidewalk running parallel to closed street denied recovery because sidewalk not located "on any highway," i.e., a street open for public travel). Accordingly, the accident at issue does not fit within the scope of the highway exception to governmental immunity. *Scheurman, supra*. Therefore, the trial court properly granted the City of Owosso's summary disposition motion on the basis of governmental immunity.

Next, plaintiffs argue that the trial court erred by granting the Schools' motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) on the basis of governmental immunity. A school system is a governmental entity entitled to governmental immunity pursuant to MCL 691.1407(1); MSA 3.996(107)(1). See *Richardson v Warren Consolidated School Dist*, 197 Mich App 697; 496 NW2d 380 (1992). As discussed above, the Riverwalk is not a sidewalk on a highway for purposes of the highway exception. Further, the highway exception imposes liability only on governmental entities having jurisdiction over highways. MCL 691.1402; MSA 3.996(102). Schools generally do not have jurisdiction over public highways. *Richardson, supra* at 702. Therefore, the trial court properly granted the Schools' motion for summary disposition on the basis of governmental immunity.

Finally, plaintiffs argue that the trial court erred in denying their motion to amend their complaint to add a theory of nuisance per se against Owosso. Where a claim is lacking in substantive merit so that it is legally insufficient on its face, a trial court may properly deny a motion to amend on the basis of futility. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 660; 213 NW2d 134 (1973); *Weymers v Khera*, 210 Mich App 231, 240; 533 NW2d 334 (1995).

Notwithstanding governmental immunity, a governmental entity may be liable for injury stemming from its maintenance of a nuisance per se. *Fox v Ogemaw Co*, 208 Mich App 697, 698; 528 NW2d 210 (1995). "A nuisance per se is 'an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained.'" *Fox, supra* at 700, citing *Li v Feldt*, 439 Mich 457, 476-477; 487 NW2d 127 (1995) (Cavanaugh, C.J.).

Here, the essence of plaintiffs' claim is that the Riverwalk became unreasonably dangerous because of a failure to exercise reasonable care in maintaining it. The Riverwalk serves a beneficial public purpose and is capable of existing in such a way as not to pose any nuisance at all. See *Fox, supra*; *Li, supra*. Thus, plaintiffs failed to allege facts to demonstrate that the Riverwalk constituted a nuisance per se. Accordingly, the trial court properly denied their motion to amend on the basis of futility.

While plaintiff's accident was tragic, not every such accident is attributable to the negligence of another party. For the reasons set forth, we affirm the trial court's order granting the defendants' motions for summary disposition.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak

[1] Plaintiffs argue that it is somehow contrary to public policy for governmental agencies to be immune from tort liability regarding premises they own or control. Whatever the merits of this contention, this is expressly what the governmental immunity act provides.