

STATE OF MICHIGAN
COURT OF APPEALS

BETTIE LEE JUSTICE and
ALLEN JUSTICE,

UNPUBLISHED
June 25, 1999

Plaintiffs-Appellants,

v

No. 207134
Wayne Circuit Court
LC No. 97-718592 NI

CITY OF RIVER ROUGE,

Defendant-Appellee.

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant summary disposition pursuant to MCR 2.116(C)(7). We affirm.

In November 1996, plaintiff Bettie Lee Justice parked her car along Leroy Street in River Rouge. As she walked around the vehicle's rear end, she slipped and fell on an accumulation of wet, slimy leaves near the Leroy Street curb and sustained injuries to her elbow and arm.

Plaintiffs' complaint alleged that pursuant to the governmental immunity highway exception, MCL 691.1402; MSA 3.996(102), defendant was liable for plaintiff's injuries because the wet, slimy leaves along the curb constituted a defect that rendered the highway unreasonably dangerous.¹ In lieu of answering the complaint, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10) on the basis that the leaves did not constitute a defect in the highway, nor did plaintiff allege that the pile of leaves existed as a result of a defect in the highway. Defendant suggested that the leaves represented a natural accumulation similar to ice or snow, for which defendant was not responsible. Plaintiffs responded that summary disposition would be inappropriate because discovery would reveal evidence that defendant breached a duty to "properly maintain the street and its means of drainage in such a way as to diminish the hazards of such accumulations of wet, slimy leaves." Plaintiffs further argued that a sign on Leroy Street stating the street was swept on Mondays indicated that defendant had assumed a duty to clean the street, which duty defendant had breached, and that the natural accumulation doctrine only applied to snow and ice. The circuit court granted defendant's motion pursuant to MCR 2.116(C)(7). The court reasoned that the leaves themselves did not represent a

defect in the highway, and accepted defendant's proposition that the leaves were akin to other natural accumulations of ice and snow.

Plaintiffs first argue that the circuit court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) because they asserted a design defect related to the Leroy Street drainage system. We review the circuit court's grant of summary disposition de novo. *Patrick v US Tangible Investment Corp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 204902, released on March 23, 1999), slip op at 2. When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130; 574 NW2d 706 (1997). This Court must also consider all documentary evidence submitted by the parties in determining whether the defendant is entitled to judgment as a matter of law. *Iovino v Michigan*, 228 Mich App 125, 131; 577 NW2d 193 (1998). To survive a motion for summary disposition under MCR 2.116(C)(7), the plaintiff must allege facts in the complaint justifying application of an exception to governmental immunity. *Suttles v Dep't of Transportation*, 457 Mich 635, 642; 578 NW2d 295 (1998). The motion should not be granted unless no factual development could provide a basis for recovery. *Patrick, supra*.

Plaintiffs' complaint invoked the governmental immunity highway exception. The highway exception to the broad statutory grant of governmental immunity, MCL 691.1407; MSA 3.996(107), provides as follows:

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 sustaining 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 condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1); MSA 3.996(102)(1).]

Plaintiffs failed to sufficiently aver that defendant did not maintain Leroy Street in reasonable repair. In their complaint, plaintiffs specifically identified as an alleged defect in the roadway the presence of wet, slimy leaves along the curb. These leaves, however, do not constitute a defect in the highway for which defendant is responsible. For purposes of the highway exception,

“[h]ighway” means every public highway, road, and street which is open for public travel and shall include bridges, sidewalks, crosswalks, and culverts on any highway. *The term highway does not include alleys, trees, and utility poles.* [MCL 691.1401(e); MSA 3.996(101)(e) (emphasis added).]

See also *Ehlers v Dep't of Transportation*, 175 Mich App 232, 233-234; 437 NW2d 642 (1988) (Noting that the defective highway exception must be strictly construed, this Court rejected the plaintiff's theory that the governmental defendant's duty to keep the road reasonably safe should extend to the maintenance of trees along the highway.). Because defendant's duty to maintain the highway in

reasonable repair did not include the duty to maintain roadside trees, the circuit court properly dismissed plaintiffs' allegation that defendant was liable for failing to sweep the curbside leaves.²

Plaintiffs also state on appeal that summary disposition was improper because they argued in the court below that defendant breached its duty to maintain the highway in reasonable repair by ignoring a defective drainage system that resulted in a hazardous accumulation of curbside leaves. This allegation, however, does not appear within plaintiffs' complaint. In their complaint, plaintiffs made several similar, general claims that defendant was negligent, see note 1, but no language within the complaint may be fairly read as setting forth any specific defect in the highway, drainage or otherwise. While plaintiffs, in response to defendant's motion for summary disposition, mentioned for the first time a drainage defect, plaintiffs made no effort to amend their complaint to incorporate this or any other specific alleged highway defect. Because plaintiffs' complaint failed to allege any specific defect that would avoid defendant's assertion of governmental immunity, the circuit court properly granted defendant summary disposition pursuant to MCR 2.116(C)(7). *Suttles, supra*. Furthermore, because no further factual development regarding the allegations within plaintiffs' complaint would entitle plaintiffs to relief, the circuit court did not err in granting defendant's motion prior to the conduct of discovery. *Bayn v Dep't of Natural Resources*, 202 Mich App 66, 70; 507 NW2d 746 (1993).³

Affirmed.

/s/ Hilda R. Gage
/s/ Michael R. Smolenski
/s/ Bruce K. Zahra

¹ Plaintiff's complaint made several similar allegations regarding defendant's liability pursuant to the highway exception.

¶ 10. Prior to the aforesaid time and place, the Defendant . . . had notice of and/or actual or constructive knowledge of said unsafe and /or defective roadway and curbside as a result of the prolonged accumulation of wet and slimy leaves.

¶ 11. The Defendant . . . in spite of actual and/or constructive notice and knowledge of the dangerous, unsafe, and defective roadway and curbside of Leroy Street did not properly construct, design, maintain, and repair said roadway and curbside, nor did Defendant warn persons lawfully on the premises of the dangerous condition of the subject roadway and curbside.

* * *

¶ 13. The acts and omissions of the Defendant . . . involve, inter alia, negligence, gross negligence an/or recklessness, in the construction, design, maintenance, and repair of a roadway and curbside open to the public and owned and

operated by Defendant . . . and said acts and/or omissions fall within the statutory exemption to the Governmental Immunity Acts

* * *

¶ 15. . . . Defendant . . . owed certain legal duties to all business invitees . . . which duties include, the duty to maintain its roadway and curbside in a safe condition, free from danger, to exercise reasonable care to diminish the hazards of wet and slimy leaves from accumulating on its roadway and curbside . . . and a duty to warn persons on the roadway and curbside of the defective condition of the roadway and curbside.

¶ 16. . . . Defendant . . . acted in a negligent, careless and reckless manner and in utter disregard for the rights of the Plaintiff . . . and in violation of its duty of care . . . and committed, inter alia, the following acts of negligence including, but not limited to:

a. negligently, carelessly, and/or recklessly designing, constructing and/or maintaining its roadway in an unreasonably dangerous condition by permitting wet and slimy leaves to accumulate on the roadway and curbside along Leroy Street . . . ;

b. negligently, carelessly and/or recklessly designing, constructing and/or maintaining its premises in an unreasonably dangerous condition by allowing the subject roadway and curbside to have wet and slimy leaves accumulate thereon;

* * *

e. negligently, carelessly and/or recklessly failing to keep the said roadway and curbside areas therein fit for the foreseeable uses;

* * *

h. negligently, carelessly and/or recklessly failing to maintain the roadway and curbside in order to eliminate the defect on said roadway and curbside, including removing and/or sweeping the wet and slimy leaves that accumulated prior to November 11, 1996;

* * *

j. other miscellaneous acts of negligence which are ascertained during the course of discovery.

² Although we do not sanction the circuit court's determination that defendant should avoid liability for the presence of leaves based on the natural accumulation doctrine, we may still affirm the court's grant of summary disposition with respect to plaintiffs' assertion that the leaves constituted a defect in the roadway. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998)

(When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.).

³ Plaintiffs also argue that the “trial court plainly erred in ruling that as a matter of law, plaintiff/appellant was not a ‘traveler’ on a public street because she was not driving a car at the time she was injured.” Even assuming *arguendo* that the circuit court relied on such a ruling in granting defendant’s motion, however, we will still affirm the circuit court’s ruling for the alternative reasons discussed above. *Messenger, supra*.