

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SHARON BAYER,

Plaintiff-Appellee,

v

CITY OF KENTWOOD,

Defendant-Appellant,

and

CITY OF GRAND RAPIDS and VILLAGE  
GREEN RESIDENTIAL PROPERTIES L.L.C.  
d/b/a PHEASANT RIDGE APARTMENTS,

Defendants.

UNPUBLISHED

August 26, 2004

No. 249405

Kent Circuit Court

LC No. 02-004165-NI

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Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

In this governmental immunity case, defendant, City of Kentwood (“the City”), appeals as of right from the trial court’s denial of its motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiff was injured while riding her bicycle when she hit a pothole obscured by a puddle. The pothole was located in the middle of a private driveway that bisected the sidewalk upon which plaintiff was traveling. Plaintiff brought suit against the City<sup>1</sup> alleging that the pothole was located within the highway right of way. The City unsuccessfully moved for summary disposition asserting governmental immunity. We reverse.

**I. FACTS**

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<sup>1</sup> Plaintiff also brought suit against the City of Grand Rapids and Pheasant Ridge Apartments. They do not appeal the trial court’s denial of the City’s motion for summary disposition.

On the afternoon of September 21, 2001, plaintiff was riding her bicycle on the sidewalk along 32<sup>nd</sup> Avenue in the City. It was raining, and the streets and sidewalks were wet. As plaintiff bicycled down the sidewalk, she came to the driveway of the Pheasant Ridge Apartments. She continued riding in a straight line across the driveway apron. However, near the middle of the apron, she struck a pothole about eight inches in diameter. Plaintiff could not see the pothole or the water main cap within the pothole because they were covered with water. Plaintiff fell from her bicycle and suffered injury.

Plaintiff filed the instant suit on April 26, 2002 alleging that the City breached its duty to maintain the sidewalk in reasonable repair for safe and convenient public travel. Further, plaintiff claimed that the City knew or should have known of the existence of the pothole for at least 30 days before her accident.

The City denied any liability, arguing that plaintiff's injuries did not occur on the "sidewalk," but rather on the private driveway of Pheasant Ridge Apartments. The City argued that a driveway apron is not included in the definition of "highway" under MCL 691.1402 (as is "sidewalk") and, therefore, it was immune from liability. The City filed a motion for summary disposition pursuant to MCR 2.116(C)(7) based on its assertion that the claim was barred by Michigan's governmental tort liability act.

In answer to the motion for summary disposition, plaintiff argued that the pothole was on a line with the city sidewalk and was located within the highway right of way. She asserted that the pothole was a defect in the highway and the City was liable for its failure to maintain the sidewalk. Plaintiff further noted that the deposition testimony of Ronald Woods, the City's director of Public Works, revealed that Pheasant Ridge Apartments did not have the authority to repair the pothole without the City's permission. After hearing these arguments, the trial court denied the City's motion and concluded that the meeting of a sidewalk and a private driveway does not change the character of the sidewalk and that even at the point of intersection, the sidewalk remains a "highway" pursuant to MCL 691.1402.

## II. STANDARD OF REVIEW

Determination of the applicability of the highway exception is a question of law subject to de novo consideration on appeal. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000). We review a trial court's grant or denial of summary disposition under MCR 2.116(C)(7) de novo. *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003). In analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119, 597 NW2d 817 (1999). If a party supports a motion under MCR 2.116(C)(7) by submitting affidavits, depositions, admissions, or other documentary evidence, those materials must be considered. MCR 2.116(G)(5); *Maiden, supra*. A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery. *Cole v Ladbrooke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000). Additionally, this Court reviews de novo issues of statutory interpretation. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 297, 638 NW2d 396 (2002).

## III. ANALYSIS

Defendant argues that the trial court erred in failing to grant its motion for summary disposition because plaintiff's fall on the driveway apron does not give rise to a cognizable claim under MCL 691.1402(1), the highway exception to governmental immunity. At issue here is whether the term "highway" (defined by MCL 691.1401(e) to include "sidewalk") as used in MCL 691.1402, was properly interpreted by the trial court to include that portion of a private driveway that extends directly in line with the sidewalk. We find that the trial court erred.

"Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000). Pursuant to the governmental tort liability act, MCL 691.1401 *et seq.*, governmental immunity extends to all governmental agencies for all tort liability when they are engaged in the exercise or discharge of a governmental function. *Id.* at 156. Yet there are five exceptions to governmental immunity<sup>2</sup>, including the highway exception, MCL 691.1402. *Id.* The immunity conferred upon governmental agencies is broad, and the statutory exceptions to that immunity are to be narrowly construed. *Id.* at 158.

The highway exception to governmental immunity provides that except as provided in MCL 691.1402a,<sup>3</sup> a governmental agency having jurisdiction over a highway is liable in tort for breach of the duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). A plaintiff has the burden of pleading a claim in avoidance of governmental immunity. *Ridley v Detroit (On Second Remand)*, 258 Mich App 511, 512, 515; 673 NW2d 448 (2003). An action may not be maintained under the highway exception unless it is clearly within the scope and meaning of MCL 691.1402(1). *Weaver v Detroit*, 252 Mich App 239, 245; 651 NW2d 482 (2002). The highway exception creates a duty to maintain a "highway." MCL 691.1402(1). Liability for the failure to maintain a highway exists only if the defect complained of is "actually and specifically included in the" statutory definition of "highway." *Ridley, supra* at 515. A highway is defined as "a public highway, road, or street that is open for public travel and includes bridges, *sidewalks*, trailways, crosswalks, and culverts on the highway" but not alleys, trees, and utility poles. MCL 691.1401(e) (emphasis added).

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<sup>2</sup> The five statutory exceptions to governmental immunity are the "highway exception," MCL § 691.1402, the "motor vehicle exception," MCL § 691.1405, the "public building exception," MCL § 691.1406, the "proprietary function exception," MCL § 691.1413, and the "governmental hospital exception," MCL § 691.1407(4).

<sup>3</sup> Section 2a provides in part that a municipality does not have a duty to maintain a portion of a county highway outside of the improved portion of the highway designed for vehicular travel unless it knew or should have known of the defect and the defect is a proximate cause of the plaintiff's injury. MCL 691.1402a(1).

The City is a municipality and its duty with regard to a highway extends to the sidewalk. MCL 691.1401(e); *Ali v City of Detroit*, 218 Mich App 581, 588; 554 NW2d 384 (1996). Thus, defendant has a statutory obligation to keep a sidewalk in “reasonable repair so that it is reasonably safe and convenient for public travel.” MCL 691.1402(1); see also *Nawrocki, supra* at 160 (indicating that only one duty is imposed, which is to “maintain the highway in reasonable repair”). “This means that municipalities have an obligation, if necessary, to actively perform repair work to keep such sidewalks in reasonable repair.” *Jones v Enertel, Inc*, 467 Mich 266, 268; 650 NW2d 334 (2002).

The immunity conferred on governmental agencies is broad, and exceptions are to be narrowly construed. *Nawrocki, supra*, at 158. Consistent with that principle, no action may be maintained against a governmental agency unless it is clearly within the scope and meaning of MCL § 691.1402(1). Keeping this in mind, we must examine whether the area in question here is a “sidewalk.”

The term “sidewalk” is not defined by statute, but our Supreme Court in *Hatch v Grand Haven Twp*, 461 Mich 457, 462; 606 NW2d 633 (2000), looked to the dictionary definition of the term to conclude that a sidewalk is generally understood as a pathway for pedestrians, usually along a road. Indeed, a guiding factor in interpreting the highway exception is its purpose to enhance the safety of public travel upon state-owned highways. *Meek, supra* at 111. “While a paved way’s proximity to a highway is a necessary condition for determining that it is a sidewalk under the highway exception to governmental immunity, it is not a sufficient condition.” *Hatch, supra* at 464-465. The facts must be examined objectively to determine if a walkway is a sidewalk on a highway. *Id.* at 465 n 4. In *Hatch, supra*, our Supreme Court held that a bicycle path is not a “sidewalk” for purposes of the highway exception to governmental immunity. The Court specified: “Regardless of its proximity to a highway, a bicycle path is simply not a sidewalk.” *Id.* The fact that a path is close to the road at the point of the accident does not convert a bicycle path into a “sidewalk.” *Id.* Furthermore, the fact that pedestrians sometimes walk on a path does not make it a “sidewalk.” *Id.*

Although not binding precedent, we find this Court’s unpublished decision in *Kujawa v City of Sterling Heights* (rel’d 4/26/2002, docket #249940) to be instructive. In *Kujawa*, the plaintiff’s son was rollerblading down the driveway of the family home when he tripped over a defect in the cement on the driveway apron. *Id.* at 1. This Court held that the trial court did not err in finding that the driveway apron was not considered a sidewalk and in granting the City of Sterling Heights’ motion for summary disposition. The *Kujawa* Court held:

Assuming that defendant was responsible for maintenance of the driveway apron, given that it had an easement over the land, *Morrow v Boldt*, 203 Mich App 324, 329-330; 512 NW2d 83 (1994), and thus had jurisdiction over the bottom of the driveway, the term “jurisdiction” being synonymous with “control,” *Markillie v Livingston Co Bd of Co Rd Comm’rs*, 210 Mich App 16, 22; 532 NW2d 878 (1995), that does not in itself make defendant liable under the highway exception. That is because the exception applies not to any lands under the city’s jurisdiction, but only to highways under its jurisdiction. Because the immunity conferred on governmental agencies is broad and the statutory exceptions are to be narrowly construed, *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000), there may be situations in which a municipality has a duty that is not

legally compensable if breached. *Id.* at 157. Thus, for example, a municipality cannot be held liable for the failure to maintain a city-owned public parking lot because a parking lot does not come within the statutory definition of “highway.” *Bunch v City of Monroe*, 186 Mich App 347, 349; 463 NW2d 275 (1990).

The apron of plaintiff’s driveway provides access between plaintiff’s land and the street but is clearly not itself a road open for public travel. *Richardson v Warren Consol Sch Dist*, 197 Mich App 697, 704-705; 496 NW2d 380 (1992). Nor can it reasonably be considered a bridge, sidewalk, trailway, crosswalk, or culvert as those terms are commonly understood. *Churchman v Rickerson*, 240 Mich App 223, 228; 611 NW2d 333 (2000). Because the driveway apron was not a highway, the trial court erred in failing to grant the City’s motion for summary disposition. *Id.* at 1-2.

Here, keeping in mind that statutory exceptions to governmental immunity are to be narrowly construed, *Nawrocki, supra* at 158, we find the area in question is not a “sidewalk,” and, as a result, the trial court erred when it denied the City’s motion for summary disposition. As the *Kujawa* Court iterated, merely because a city has control over an area does not automatically make a city liable under the highway exception. When we closely and narrowly examine the definition of “sidewalk” we cannot find that the private driveway used for ingress and egress to the apartment complex fits within the definition.

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

/s/ William C. Whitbeck  
/s/ Donald S. Owens  
/s/ Bill Schuette