

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

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ERIN LEECH,

Plaintiff-Appellee,

v

ANITA KRAMER,

Defendant,

and

KENT COUNTY BOARD OF ROAD  
COMMISSIONERS,

Defendant-Appellant.

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UNPUBLISHED

October 11, 2005

No. 253827

Kent Circuit Court

LC No. 03-006701-NI

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant Kent County Board of Road Commissioners (“the Board”) appeals from the order of the Kent Circuit Court denying its motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a passenger in a vehicle driven by defendant Anita Kramer when Kramer allegedly lost control of her vehicle on a county road that the Board allegedly failed to maintain in reasonable repair. Plaintiff claimed that the road had unrepaired ruts and grooves. Rain water collected in the ruts and grooves causing Kramer to hydroplane over the water in the ruts and grooves and crash. Plaintiff was injured and sued Kramer and the Board for negligence.

The Board moved for summary disposition arguing that plaintiff did not plead her claim in avoidance of governmental immunity under the highway exception, MCL 691.1402, because her claim was based on the presence of water on the surface of the road and not based on a defect in the physical structure in the surface of the road bed, as required by *Nawrocki v Macomb Co Rd Comm’n*, 463 Mich 143, 158; 615 NW2d 702 (2000). The Board also claimed, in reliance on *Haliw v Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001), that plaintiff could not show that any defect in the surface of road bed proximately caused her injuries because the accident resulted from the natural accumulation of water on road and not from any rut or groove. We disagree.

Plaintiff did not base her claim solely on the natural accumulation of rain water on the road surface. Rather, plaintiff alleged that the Board failed to maintain the road surface in reasonably safe condition by allowing ruts and grooves to remain unrepaired for a significant time. When the ruts and grooves filled with rain water, Kramer lost control of her vehicle when it hydroplaned over them. Thus, plaintiff implicated the highway exception to governmental immunity because she claimed that the physical structure of the surface of the road bed, i.e., the ruts and the grooves constituted a defect in the road surface itself. Plaintiff also alleged proximate cause because she claimed that the combination of the ruts and grooves, which were in themselves hazardous defects in the road bed, and the accumulation of rain water in them is what caused Kramer's accident and injuries.

We believe the facts in this case are different than those in *Haliw* because here plaintiff did allege that her accident was a result of the combination of the grain and a defect in the roadway. Moreover, in its opinion, the trial court specifically concluded that this case differed from *Haliw* because

The facts in this case are dramatic ruts in the roadway, ones that are noticeable by the plaintiff, noticeable by the defendant driver of the motor vehicle, and there is some rain, but I believe that the facts, taken in the light most favorable to the non-moving party, as it is my duty to consider those facts, indicate that that condition, standing alone, even without water, that condition standing alone, the ruts, could have caused a - - it made the roadway unsafe for travel, and I believe there's some evidence of that based on the answer to Interrogatory No. 10. Clearly the existence of rain on the roadway added to the problems, and it added to the hydroplaning which eventually led to the - - led to the accident. But clearly the ruts, the defect in the highway, were a proximate cause and were a defect in the condition which would make it unsafe - - which could have made it unsafe for public travel at all times.

The Board also argued that plaintiff's action should have been dismissed because she did not provide timely notice of her injury, as required by MCL 691.1404. The Board acknowledges that our Supreme Court, in *Hobbs v Dep't of State Highways*, 398 Mich 90; 247 NW2d 754 (1976) and *Brown v Manistee Co Rd Comm'n*, 452 Mich 354; 550 NW2d 215 (1996), requires the showing of actual prejudice before an action may be dismissed on the basis of an untimely notice. However, the Board maintains that there should be no actual prejudice requirement and that plaintiff's action should be dismissed because the plain language of the statute contains no actual prejudice requirement. Moreover, the Board contends that the Supreme Court in *Ross v Consumers Power Co*, 420 Mich 567, 618-19; 363 NW2d 641 (1984), undermined the rationale used in *Hobbs* for the actual prejudice requirement and that, therefore, *Ross* silently overruled *Hobbs*' judicial creation of the actual prejudice requirement. Finally, the Board also argues that the Court's recent trends of relying on the plain language of a statute and narrowly construing exceptions to governmental immunity favor overruling the actual prejudice requirement. We disagree.

We note that the plain language of MCL 691.1404 does not contain an actual prejudice requirement. However, we also note that controlling precedent from our Supreme Court requires a showing of actual prejudice before dismissing an action on the basis of an untimely notice. Therefore, we find that the trial court properly did not dismiss plaintiff's action on this basis.

Moreover, we are not persuaded by the Board's argument that *Ross* silently overruled *Hobbs*, especially because the Supreme Court had the opportunity in *Brown*, which was decided in 1996, to do so, but did not. Therefore, this Court and the trial court are constrained under *Hobbs* and *Brown* to require a showing of actual prejudice before dismissing an action on the basis of untimely notice.

We affirm.

/s/ Kathleen Jansen

/s/ Jane E. Markey