

STATE OF MICHIGAN
COURT OF APPEALS

GERALD MAKI,

Plaintiff-Appellant,

and

BLUE CROSS & BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

CITY OF OWOSSO,

Defendant-Appellee.

UNPUBLISHED
December 4, 2003

No. 241256
Shiawassee Circuit Court
LC No. 01-006518-NO

Before: Murray, P.J. and Gage and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In mid-December 2000, heavy snow fell in mid-Michigan. On December 14, 2000 Shiawassee County was under a state of emergency, and county roads were closed. Road crews were working around the clock to clear roads of snow. On that morning, plaintiff set out to walk from his home to downtown Owosso. The sidewalks in his neighborhood had been cleared to the corners. However, when plaintiff came to an intersection he encountered a mound of snow on the curb created when snow plows passed by on the road. When plaintiff attempted to traverse the snow mound he slipped and fell to the ground, sustaining injuries.

Plaintiff filed suit, alleging that the snow mound had been created by defendant's snow moving equipment. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that the snow that accumulated at the corner as a result of plowing efforts did not create a more hazardous condition than already existed, and that it was entitled to summary disposition under the natural accumulation doctrine. Defendant also argued that plaintiff's claim was barred because the mound of snow was open and obvious.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). The trial court found that defendant's attempt to clear the roads did not increase the hazard at the corner. The trial court reasoned that snow removal could not be accomplished instantaneously, and given the amount of snow that had fallen defendant had no choice but to push the snow to the side of the road and onto the curb. In the alternative, the trial court found that plaintiff's claim was precluded because the condition was open and obvious.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The governmental immunity act, MCL 691.1401 *et seq.*, provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. The highway exception to governmental immunity, MCL 691.1402(1), requires a governmental agency to maintain highways under its jurisdiction in reasonable repair so that it is reasonably safe and convenient for public travel. The definition of "highway" includes sidewalks. MCL 691.1401(e).

Under the natural accumulation doctrine, a governmental agency has no obligation to remove a natural accumulation of snow or ice from a highway. The presence of snow or ice on a highway which causes difficulty for travelers does not constitute negligence on the part of a governmental agency. However, an unnatural accumulation of snow or ice on a highway can create liability if the unnatural accumulation increased the hazard beyond that presented by the natural accumulation. The increased hazard theory should not be applied in a manner that punishes a governmental agency that attempts to remove snow or ice while rewarding an agency that takes no action. *Haliw v Sterling Heights*, 464 Mich 297, 305-308; 627 NW2d 581 (2001); *Skogman v Chippewa Co Rd Comm*, 221 Mich App 351, 353-354; 561 NW2d 503 (1997).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree. The undisputed evidence showed that heavy snow fell in the days preceding the accident in which plaintiff was injured. The residents of plaintiff's neighborhood had cleared their sidewalks of snow as required by local ordinance.¹ Defendant was not required to take any action to clear the streets under its jurisdiction of snow. *Haliw, supra*. Defendant chose to clear the roads, and in doing so plowed snow to the sides of the roads and onto the curbs. The snow piled at the curbs constituted an unnatural accumulation. However, a governmental agency can be liable only if its efforts to remove snow from highways increase the hazards to travelers by creating a new danger or obstacle that exceeded the danger or obstacle originally caused by the natural accumulation. *Skogman, supra*; *Hampton v Master Products*,

¹ Plaintiff's reliance on *Bivens v Grand Rapids*, 443 Mich 391; 505 NW2d 239 (1993), for his assertion that defendant's ordinance requiring residents to clear sidewalks abutting their property of snow and ice is unconstitutional is without merit. The *Bivens* Court held that the defendant was without authority to enact an ordinance requiring residents to indemnify it for any liability to an injured person because such an ordinance was not authorized by the city charter. *Id.*, 397-402. The *Bivens* Court did not hold that a municipality was without authority to enact an ordinance requiring residents to clear sidewalks abutting their property.

Inc, 84 Mich App 767, 770; 270 NW2d 514 (1978). Defendant chose to remove snow from the roads. A governmental agency's act of removing snow from the roads routinely involves pushing the snow to the sides of the roads and onto the curbs. Pushing snow to the sides of the roads and onto curbs creates temporary mounds of snow on the curbs and often at corners. Such a result is typical, and cannot be characterized as exceptional or different from conditions that are to be expected in the winter in Michigan. *Skogman, supra*, 355. Plaintiff's assertion that the condition increased the hazard to travelers because defendant had no intention of removing the mounds of snow is unsubstantiated. The evidence showed that snow was still falling and that defendant had not finished plowing streets at the time plaintiff's accident occurred. Furthermore, evidence showed that defendant cleared residential sidewalks if homeowners failed to do so within a reasonable time. The trial court correctly concluded that defendant was entitled to the protection of the natural accumulation doctrine, *Haliw, supra*; *Skogman, supra*, 353-354, and properly granted defendant's motion for summary disposition.

We agree with plaintiff that a governmental agency's duty to maintain a highway or sidewalk under its jurisdiction in good repair is not abrogated by the open and obvious danger doctrine. *Haas v Ionia*, 214 Mich App 361, 363-364; 543 NW2d 21 (1995). To that extent, the trial court erred in relying on the open and obvious danger doctrine to grant summary disposition in favor of defendant. However, this error does not require reversal because the trial court correctly granted summary disposition in reliance upon the natural accumulation doctrine.

Affirmed.

/s/ Christopher M. Murray

/s/ Hilda R. Gage

/s/ Kirsten Frank Kelly