

STATE OF MICHIGAN
COURT OF APPEALS

IWONA WSZEDYBYL, Individually and as Next
Friend of MATEUSZ WSZEDYBYL, a Minor, and
KRZYSZTOF WSZEDYBYL,

Plaintiffs-Appellants,

v

MACOMB COUNTY ROAD COMMISSION,

Defendant-Appellee,

and

CITY OF WARREN, ST. MARON DIOCESE
ECCLESIASTICAL CORP., and STERLING
WARREN MONTESSORI, INC.,

Defendants.

UNPUBLISHED
September 28, 1999

No. 207967
Macomb Circuit Court
LC No. 94-006199 NI

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

I. Introduction

In this negligence action, plaintiff Iwona Wszedybyl,¹ who was injured in a car accident while driving on a roadway under the jurisdiction of defendant Macomb County Road Commission (the “Road Commission”), appeals an order granting the Road Commission’s motion for reconsideration and summary disposition. Wszedybyl contends that the trial court erred when it granted the Road Commission summary disposition because, according to Wszedybyl, there were genuine issues of material fact regarding whether there was a natural or unnatural accumulation of ice on the roadway in question. We disagree and affirm.

II. Basic Facts And Procedural History

In December of 1994, Wszedybyl filed a complaint alleging that in January of 1993, she was injured in a car accident when the car she was driving hit an unforeseen ice patch on Schoenherr Road. Wszedybyl was traveling in the southbound lane directly in front of the Sterling Heights Montessori School and St. Maron Church when she lost control of her car. Wszedybyl alleged that the Road Commission breached its duty to keep the road in reasonable repair by failing to provide proper drainage and failing to remove accumulated ice from the road.

In May 1996, the Road Commission filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). The Road Commission pointed out that even Wszedybyl's own expert, Jonathan Crane, opined during his deposition that the road was reasonably safe for public travel and that the ice patches were a naturally occurring phenomenon for the time of year. The Road Commission also argued that the parties had entered into a stipulation that prevented Wszedybyl from calling Crane to testify as an expert on road maintenance, road design, or the Road Commission's liability.² Without expert testimony, the Road Commission argued, Wszedybyl was unable to show that the accumulation was unnatural, which the Road Commission would have had an affirmative duty to remedy. In addition, the Road Commission maintained that there was no evidence that it had any notice of the condition. The Road Commission included the deposition testimony of Frank Randall, a night patrolman for the Commission. Randall testified that he never encountered a problem on Schoenherr Road and, had he observed ice, he would have salted.

In May 1996, Wszedybyl filed a response to the Road Commission's motion for summary disposition. Wszedybyl maintained that, even in the absence of an expert, she was able to create a genuine factual dispute regarding whether the accumulation was natural. For instance, there had been no precipitation for days prior to the accident. Yet Lynn Kornack, an area resident who drove by quite frequently, testified at her deposition that she noticed water pooling in the area for at least one week prior to the accident. Police officer Shawn Johnson described the ice as a sheet between one-eighth to one-half inch thick, seven to eight feet wide, and stretching approximately 100 to 150 feet — virtually the entire lane. Wszedybyl also included pictures showing the pooled water in the area. In a supplemental brief, Wszedybyl referred to Crane's deposition testimony and argued that the catch basins on Schoenherr Road were deficient and allowed the water to pool.

Following a hearing, the trial court issued an opinion and order denying the Road Commission's motion for summary disposition. The trial court explained that, after reviewing Crane's deposition testimony, it appeared that there were genuine issues of fact regarding a defect in the drainage system or road construction, which may have caused an unnatural accumulation of water. In addition, the court trial noted that there was conflicting testimony about whether the Road Commission had notice of the dangerous condition. In February 1997, however, the Road Commission filed a motion for reconsideration to remind the trial court that it could not consider Crane's testimony because of the parties' stipulation to exclude Crane's testimony. In March 1997, the trial court granted the Road Commission's motion for reconsideration and dismissed the case. The trial court found that Crane's testimony was irrelevant to the proceedings and, therefore, Wszedybyl failed to establish that the road was unfit for travel.

III. Preservation Of The Issue And Standard Of Review

Wszedybyl has properly preserved the issue for appeal because the issue was raised, argued and decided in the trial court. See *Environair v Steelcase*, 190 Mich App 289, 295; 475 NW2d 366 (1991). Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 210 (1998). It is not clear whether the lower court granted the Road Commission's motion under MCR 2.116(C)(7) or (C)(10). Pursuant to MCR 2.116(C)(7), summary disposition is proper if immunity granted by law bars a plaintiff's claim. Pursuant to MCR 2.116(C)(10), summary disposition may be granted when there are no genuine issues of material fact. For both MCR 2.116(C)(7) and (C)(10), the court must accept the plaintiff's allegations as true and construe them in a light most favorable to the plaintiff. *Quinto v Cross & Peters Co*, 451 Mich 358, 361; 547 NW2d 314 (1996); *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-377; 532 NW2d 541 (1995). The court should consider all affidavits, pleadings, depositions, admissions and documentary evidence submitted. MCR 2.116(G)(5).

IV. Governmental Immunity

A. Wszedybyl's Argument

Wszedybyl argues that summary disposition was inappropriate because there was a dispute regarding whether there was a natural or unnatural accumulation of ice on the road. According to Wszedybyl, the physical characteristics of the ice patch alone support her claim. Wszedybyl asserts that the only way the water would have been able to pool, and subsequently freeze when the temperature dropped, was if the lane on Schoenherr Road was depressed and the drainage system inadequate. Wszedybyl contends that the jury could have inferred that the Road Commission was responsible for this unnatural and dangerous condition that existed for at least one week prior to the accident without any remediation by the Road Commission. In the alternative, Wszedybyl argues that, even if the ice patch was a natural condition, it was a special point of hazard that the Road Commission had a duty to remedy.

B. The General Principle Of Governmental Immunity And The Statutory Exception

Governmental agencies are generally immune from tort liability for actions taken in furtherance of a governmental function. MCL 691.1407(1); MSA 3.996(107)(1); see generally *Ross v Consumers Power Co (On Remand)*, 420 Mich 567; 363 NW2d 641 (1984). A statutory exception exists for public highways, under which an injured party may hold the responsible governmental authority liable for failure to maintain the roadway "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1); MSA 3.996(102)(1).

C. "Natural Accumulations"

A governmental agency will not be held liable for failure to remove the natural accumulation of snow and ice on a public highway. *Skogman v Chippewa Rd Comm*, 221 Mich App 351, 353; 561 NW2d 503 (1997). "If, on the other hand, ice or snow on a roadway constitutes an *unnatural*

accumulation rather than a natural accumulation, the governmental agency may be liable.” *Id.* (emphasis added). Wszedybyl claims that Officer Johnson’s deposition testimony regarding the dimensions of the ice span and Kormack’s deposition testimony indicating that water had pooled on the road for one week prior to the accident sufficiently point to an unnatural accumulation, thereby defeating governmental immunity under this exception. Wszedybyl argues that the foregoing testimony, coupled with the photographs of the area, was sufficient to create a genuine issue of fact as to whether the road was unfit for travel.

Nevertheless, the Road Commission argues that, without expert testimony, Wszedybyl’s argument must fail. The Road Commission relies on *Cox v Dearborn Hgts*, 210 Mich App 389; 534 NW2d 135 (1995), to support its position. In *Cox*, this Court stressed the need for expert testimony in cases such as this:

Specifically, plaintiff had to present admissible evidence that the intersection was not reasonably safe as required by MCL 691.1402(1); MSA 3.996(102)(1). As mentioned above, plaintiff was unable to procure expert testimony to this effect, which testimony likely would have satisfied this requirement.

Plaintiff submits that the evidence she offered was sufficient to withstand defendant’s motion for summary disposition. First, she presents a petition signed by area residents stating that the intersection in question was unsafe. While we would not be inclined to find such a political document probative with regard to the issue of safety, we are not, in any event, persuaded that the common person could offer competent testimony regarding the issue where plaintiff’s own expert witness declined to offer his opinion because of allegedly inadequate traffic studies. If it can be said that plaintiff’s own expert was incompetent to testify with regard to the issue, it stands to reason that common citizens likewise are not competent to testify. [*Id.* at 397-398 (citations omitted).]

Just as was the case in *Cox*, Wszedybyl in this case fails to offer expert testimony that the road was not reasonably safe. Wszedybyl merely relies upon photographs and the testimony of two lay witnesses. The testimony does not even offer an opinion regarding the safety of the construction of the road or drains. Rather, it merely sets forth the size of the ice patch and the fact that it existed for at least one week. As in *Cox*, it is doubtful that a jury of laymen could decide the issue of whether the design and construction of the road and drainage system was adequate. Because Wszedybyl failed to bring forth evidence sufficient to withstand the Road Commission’s motion, summary disposition was appropriate. *Cox, supra* at 397-398.

D. Points Of Hazard

Wszedybyl also argues that, even if the ice patch was a natural condition, it was nevertheless a point of hazard. A “point of hazard” is a condition that uniquely affects vehicular travel on the improved portion of the road and is not a condition that generally affects the road and its surrounding environment. *Pick v Szymzak*, 451 Mich 607, 623; 548 NW2d 603 (1996). Wszedybyl raises this argument for the

first time on appeal and an issue first raised on appeal need not be addressed by an appellate court. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987). Furthermore, this argument is ultimately unconvincing because Wszedybyl fails to support her theory with expert testimony.

V. Conclusion

We hold that the trial court did not err when it granted the Road Commission summary disposition. We therefore affirm.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Joel P. Hoekstra

¹ Mateusz Wszedybyl and Krzysztof Wszedybyl allege loss of consortium due to Iwona Wszedybyl's injuries. Because their claims are derivative, "Wszedybyl" as it appears in this opinion refers to Iwona Wszedybyl only.

² The order specifically provided: "IT IS HEREBY ORDERED that plaintiffs. . . shall be precluded from offering expert testimony against the Road Commission . . . from Jonathan R. Crane regarding issues of road maintenance, road design and/or road liability at the time of trial in this matter." The order did not explain why the testimony would be excluded.