

STATE OF MICHIGAN
COURT OF APPEALS

ALOMA WATLEY,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

August 25, 2005

No. 260510

Wayne Circuit Court

LC No. 04-403450-NO

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

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10).¹ We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's sole issue on appeal is that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10) because issues of material fact existed regarding whether a defective condition existed in the sidewalk and regarding whether the broken water pipe constituted a nuisance per se.

The decision to grant or deny summary disposition is reviewed de novo on appeal. MCR 2.116(C)(7); *Iovino v State*, 228 Mich App 125, 131; 577 NW2d 193 (1998). In deciding a motion for summary disposition based on governmental immunity, this Court must consider any supporting evidence submitted by the parties, including affidavits, depositions, and admissions, to determine whether the claim is barred by immunity granted by law. This Court must review the pleadings and documentary evidence to determine whether the nonmoving party established an exception to governmental immunity. MCR 2.116(C)(7); *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 289-290; 618 NW2d 98 (2000). This Court must accept all well-

¹ Defendant also filed a motion for summary disposition pursuant to MCR 2.116(C)(8). However, because both parties submitted documentary evidence that is not relevant to a motion brought under MCR 2.116(C)(8), but is relevant to a motion brought under MCR 2.116(C)(7) and MCR 2.116(C)(10), and the trial court considered documentary evidence in ruling on defendant's motion, we will analyze the motion under MCR 2.116(C)(7) and MCR 2.116(C)(10).

pleaded allegations as true and consider them in the light most favorable to the nonmoving party and determine whether the defendant is entitled to judgment as a matter of law. MCR 2.116(C)(7); *Iovino, supra*. In reviewing a motion for summary disposition under MCR 2.116(C)(10), summary disposition may be granted if a review of the evidence demonstrates that there is no genuine issue of material fact and the nonmoving party is entitled to a judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Generally, government agencies have broad immunity from tort liability when they are engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Iovino, supra*. There are five statutory exceptions to governmental immunity. Among these exceptions is the highway exception. MCL 691.1402; *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). Under the highway exception, 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); *Nawrocki, supra*, at 157. The highway exception imposes a duty of reasonable repair and maintenance, but does not impose a secondary duty to keep a highway reasonably safe. *Weakley v Dearborn Heights*, 246 Mich App 322, 328; 632 NW2d 177 (2001). The term highway includes sidewalks. MCL 691.1401(e); *Haaksma v City of Grand Rapids*, 247 Mich App 44, 53; 634 NW2d 390 (2001).

Plaintiff alleged no deficiency in the sidewalk requiring repair, and testified that the water on the ground emitting from the broken pipe in the water stop box caused her to fall. She further testified that she slipped in a mixture of water and mud caused by water leaking from the broken pipe in the water stop box. The mud and water was located on the sidewalk at the time of the incident. The record indicates that there is no evidence that plaintiff’s injuries were proximately caused by a defect in the sidewalk that was in need of repair. Instead, plaintiff’s testimony established that her injuries were caused by slipping in the water and mud mixture caused by the broken pipe in the water stop box. Therefore, plaintiff has failed to establish that defendant breached its duty to maintain the sidewalk in reasonable repair.

Plaintiff contends that an expert’s affidavit established that the sidewalk was defective. However, plaintiff testified that, although the sidewalk “wasn’t in good condition,” it did not provide a hazard for anyone to trip and fall. Plaintiff further testified that the sidewalk had a “little crack” in it and that it was a “little uneven,” but was not such that anyone would normally trip and fall over it. Plaintiff’s phone calls to the city were regarding the faulty water stop box and not a defect in the sidewalk. There is no genuine issue of material fact regarding whether defendant breached its duty to maintain the sidewalk at issue in reasonable repair. Therefore, the trial court did not err in granting defendant’s summary disposition motion.

Plaintiff further contends that the broken pipe in the water stop box constituted a nuisance per se. Whether there exists a nuisance per se exception to governmental immunity is an unresolved question. *Haaksma, supra* at 56. However, even assuming for the sake of argument that nuisance per se is a recognized exception, plaintiff has failed to present facts amounting to a nuisance per se. A nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained. *Id.* A nuisance per se must be unreasonable by its nature rather than predicated on a lack of care. *McDowell v Detroit*, 264 Mich App 337, 347; 690 NW2d 513 (2004).

We cannot conclude that a broken pipe in a water stop box is dangerous at all times and under all circumstances, without regard to the care with which it is conducted or maintained. Plaintiff was injured when a broken water stop box leaked water onto the sidewalk in front of her residence causing an accumulation of mud and water. The transport and distribution of water serves a “innumerable valuable public purpose and can be conducted in a manner so as not to pose any nuisance whatsoever.” *McDowell, supra* at 348. Plaintiff contends that the “unabated cycle of flowing water from the stop box constituted a nuisance per se at all times during the period of time that it was free flowing.” However, the test for nuisance per se is not whether the condition is a nuisance per se over a specified period of time; rather, the test is whether the condition is a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained. *Haaksma, supra*. A water stop box is not a nuisance at all times and under all circumstances. Therefore, the trial court properly granted defendant’s motion for summary disposition with respect to plaintiff’s nuisance per se claim.

Affirmed.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray