

STATE OF MICHIGAN
COURT OF APPEALS

TRACY SNEAD,

Plaintiff-Appellee,

v

JOHN CARLO, INC. and STATE FARM
INSURANCE COMPANY,

Defendants,

and

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant.

FOR PUBLICATION
October 18, 2011
9:10 a.m.

No. 298575
Macomb Circuit Court and Court
of Claims
LC No. 2009-000161-NO and
2009-000025-MD

Advance Sheets Version

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

TALBOT, J. (*concurring*).

Although I concur with the majority's ultimate ruling, I write separately because I believe it unnecessary to suggest the existence of a new rule of law or test to reach this correct outcome.

Tracy Snead was driving her vehicle on eastbound I-94 near Hall Road, which was under construction. Snead drove onto an exit ramp where she encountered a large hole where the concrete had been removed in part of the exit lane. Snead's automobile was one of four vehicles that were involved in accidents at this location within a very short time. Her allegations against the Michigan Department of Transportation (MDOT) are that her injuries are the direct result of the defective, unsafe, and confusing manner in which the construction area was barricaded. MDOT contends that Snead's claims are barred by governmental immunity and it is entitled to summary disposition because the highway exception does not require signage to be placed in a construction area and the exception is inapplicable because the roadway was closed to traffic.

The highway exception to governmental immunity is statutory and provides:

[E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his

or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.¹

The Legislature has defined a highway as “a public highway, road, or street that is open for public travel”² Because neither party disputes that MDOT is a governmental agency³ that was engaged in a governmental function⁴ at the time of the events comprising this matter, the focus of the analysis is on MDOT’s duty to maintain the highway “in reasonable repair and in a condition reasonably safe and fit for travel”⁵

In asserting its entitlement to summary disposition, MDOT contends that Snead cannot demonstrate that it had a duty to provide warning signs or barriers since the duty owed to travelers is recognized by law to be very limited in scope.⁶ Specifically MDOT notes:

The first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state, having jurisdiction over any highway: “[to] maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” This sentence establishes the duty to keep the highway in reasonable repair. The phrase “so that it is reasonably safe and convenient for public travel” refers to the duty to maintain and repair. The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway “reasonably safe.”⁷

To the extent that Snead implies that MDOT had a duty to place warnings signs or barricades for safety purposes on the highway, her allegations cannot be sustained. Yet, while there is no affirmative duty to place barricades to designate a hazardous condition, the use and placement of barricades can serve as evidence of whether MDOT’s duty to keep the highway in reasonable

¹ MCL 691.1402(1).

² MCL 691.1401(e).

³ MCL 691.1401(d).

⁴ MCL 691.1401(f).

⁵ MCL 691.1402(1).

⁶ See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000).

⁷ *Id.* at 160 (citation omitted).

repair was suspended through the closure of the relevant portion of the highway. This Court has recognized decisions by our Supreme Court “that a governmental agency may suspend its duty to keep the streets in good repair and fit for public travel while the street is being improved or repaired by closing to public traffic that portion of the street.”⁸ As such, the trial court correctly identified that “[t]he primary issue is whether MDOT had closed the subject area of the highway.” Contrary to the majority’s opinion, this determination simply comprises a question of fact and does not necessitate the construction or imposition of a reasonable-person test.

As discussed by the trial court, in this case

“there is no evidence of a sign that clearly and specifically marked the area as closed to traffic. Neither were there any flashing arrows or detour signs. Significantly, the area was confusing to several other drivers, including an MDOT employee, all of whom also drove into the hole. Even law enforcement personnel expression [sic] confusion as to whether the area was closed. Contrary to MDOT’s assertion, this dispute does not merely involve the proper spacing of the orange cones, but also involves the lack of other warning devices. Under the totality of [the] circumstances, it was not clear that the area was in fact closed to traffic.

Because of the existence of this question of fact regarding whether the roadway was closed or open to traffic, the trial court correctly ruled that MDOT was not entitled to summary disposition based on governmental immunity. The error committed by the trial court was the granting of partial summary disposition in favor of Snead on the issue of governmental immunity because the overriding question of whether the roadway was open or closed comprised a factual determination for the trier of fact.

/s/ Michael J. Talbot

⁸ *Grounds v Washtenaw Co Rd Comm*, 204 Mich App 453, 456; 516 NW2d 87 (1994), citing *Southwell v Detroit*, 74 Mich 438; 42 NW 118 (1889), *Beattie v Detroit*, 137 Mich 319; 100 NW 574 (1904), and *Speck v Bruce Twp*, 166 Mich 550; 132 NW 114 (1911). See also *Pusakulich v Ironwood*, 247 Mich App 80, 85-86; 635 NW2d 323 (2001).