STATE OF MICHIGAN

COURT OF APPEALS

RAND O'LEARY, Personal Representative of the Estate of THOMAS TRUETT, Plaintiff-Appellant,	UNPUBLISHED May 6, 2014
v	No. 313638 Wayne Circuit Court LC No. 11-009164-NO
WAYNE COUNTY DEPARTMENT OF PUBLIC SERVICES, Defendant-Appellee.	

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals by right the order granting summary disposition in favor of defendant in this negligence action. On appeal, plaintiff argues that the trial court erred in holding that defendant was entitled to governmental immunity. We affirm.

I. FACTUAL BACKGROUND

In 2010, a storm struck the area of Willis Road in Sumpter Township during the Labor Day weekend. This storm knocked down a tree alongside the road. Two of the tree's branches protruded into the roadway. The lower branch lay on the road, extending approximately one foot past the white line demarcating the area of the road intended for travel, while another branch was elevated over the road surface. A neighbor reported the fallen tree to defendant on September 8, 2010, but the tree was not removed.

On September 15, 2010, Thomas Truett was riding his motorcycle, with 10 other riders, along Willis Road. The riders rode two abreast. The first rider to encounter the tree was able to swerve around the protruding branches, avoiding serious injury. The following rider struck a branch, causing him to veer into the ditch alongside the road. Truett, the third rider to encounter the tree, struck one of the branches that encroached into the road. Truett was thrown from his motorcycle, suffered serious injuries, and died. Plaintiff alleged that defendant was liable for Truett's death because it did not maintain the road in a reasonable manner, and this lack of maintenance caused Truett's accident. Defendant moved for summary disposition under MCR 2.116(C)(7), arguing it was entitled to governmental immunity. The circuit court granted summary disposition in favor of defendant, and from that order, plaintiff appeals.

II. GOVERNMENTAL IMMUNITY[1]

Plaintiff argues that the circuit court erred in granting summary disposition in favor of defendant, because of an erroneous analysis of the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* We agree with the result reached by the trial court, albeit for a different reason.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A defendant is entitled to summary disposition under MCR 2.116(C)(7) when a claim is barred because of immunity granted by law. *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). To avoid summary disposition under MCR 2.116(C)(7), a plaintiff suing a governmental agency must plead facts in avoidance of immunity. *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The applicability of governmental immunity, as well as statutory exceptions to immunity, is reviewed de novo on appeal. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Issues of statutory construction are likewise reviewed de novo on appeal. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

Under the GTLA, MCL 691.1401 *et seq.*, government agencies are immune from "*all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000) (emphasis in original). Although the GTLA provides certain exceptions[2] to this grant of immunity, those exceptions must be narrowly construed. *Id.* at 158 ("[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." (emphasis in original)).

The circuit court concluded that, because Truett was injured by a fallen tree, and trees are specifically excluded from the definition of a "highway" under the GTLA, MCL 691.1401(c), the highway exception did not save plaintiff's claim. This conclusion was erroneous. It is true that trees are specifically excluded from the definition of "highways" under the GTLA, MCL 691.1401(c), and a governmental agency's duty of reasonable repair and maintenance under

---

[1] Defendant contends that plaintiff filed a motion to amend the complaint to plead in avoidance of immunity, but the request was denied, and therefore, plaintiff failed to properly invoke the jurisdiction of Michigan courts. Although the trial court denied the motion to amend, it addressed the merits of the claim, holding that an exception to governmental immunity did not apply. In light of the trial court's ruling on the merits, we reject defendant's challenge.

[2] These exceptions are found in MCL 691.1402 (highways); MCL 691.1402a (sidewalks); MCL 691.1405 (government-owned vehicles); MCL 691.1406 (public buildings); MCL 691.1407(4) (medical treatment); MCL 691.1413 (proprietary government functions); and MCL 691.1417 (sewage disposal system event).

MCL 691.1402(1) extends only to "highways," as that term is defined in MCL 691.1401(c). However, what is at issue here is not maintenance of the tree; rather, it is maintenance of the highway itself, i.e., clearing an obstruction so as not to impede traffic flow along the highway. That the obstruction also happened to be a tree is irrelevant to the question of whether defendant may be held liable for failing to properly maintain the highway.

What is relevant, and ultimately dispositive, is the proper scope of the highway exception to the general grant of governmental immunity. "The highway exception waives the absolute immunity of governmental units with regard to defective highways under their jurisdiction." *Nawrocki*, 463 Mich at 158. MCL 691.1402(1) provides in relevant part:

> Each 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 liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. Except as provided in section 2a, the duty of a governmental agency 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.

"The fourth sentence of [MCL 691.1402(1)] . . . narrowly limit[s] the general duty to repair and maintain, created by the *first* sentence, 'only to the improved portion of the highway designed for vehicular travel.'" *Nawrocki*, 463 Mich at 161 (emphasis in original).[3]

Our Supreme Court overruled its prior decision in *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), *in Nawrocki*, by concluding:

> In *Pick*, this Court stated that "a bright-line rule . . . that limits governmental responsibility for public roadways to factors that are physically part of the roadbed itself" would require "an improperly stringent reading of the highway exception." [*Pick*, 451 Mich at] 621. This statement evidences a departure from the interpretative principle of *Ross*[*v Consumers Power Co (On Rehearing)*, 420

[3] We recognize that the *Nawrocki* decision held that the fourth sentence of the statute, by the statute's terms at the time of the Court's decision, only applied to state and county road commissions. *Nawrocki*, 463 Mich at 161-162. However, the Legislature has since amended MCL 691.1402(1) by enacting 2012 PA 50. The limitation of duty found in the fourth sentence of MCL 691.1402(1) now applies to "governmental agenc[ies,]" such as defendant here. MCL 691.1402(1).

> Mich 567; 363 NW2d 641 (1984)]. In ostensibly stating a more "workable principle" for applying the highway exception, *Pick* resulted in a complete abrogation of this Court's duty to narrowly construe exceptions to the broad grant of immunity. Because *Pick* entails such a broad reading of the highway exception, and thus disregards the basic principle of *Ross*, we believe that it must be overruled if we are to have any hope of restoring a stable rule of law in this difficult area of the law. [*Nawrocki*, 463 Mich at 174-175.]

The *Nawrocki* Court held "that the highway exception applies when a plaintiff's injury is proximately caused by a dangerous or defective condition of the improved portion of the highway designed for vehicular travel." *Id*. at 151. However, "the state or county road commissions' duty, under the highway exception, does not extend to the installation, maintenance, repair, or improvement of traffic control devices, including traffic signals, but rather is limited exclusively to dangerous or defective conditions within the improved portion of the highway designed for vehicular travel; that is the actual roadbed, paved or unpaved, designed for vehicular travel." *Id*. at 151-152. In the present case, plaintiff does not take issue with the condition of the roadway itself, but rather, the failure to remove the tree from the roadway.

Lest there be any confusion regarding what the Court meant when it overruled *Pick*, our Supreme Court recently affirmed that, to invoke the highway exception, a hazard must be part of the physical structure of the roadbed itself. In *Hagerty v Board of Manistee Co Comm'rs*, 493 Mich 933; 825 NW2d 581 (2013),[4] a motorist was killed while driving on an unpaved highway when she became disoriented by a cloud of dust caused by an oncoming motorist. *Hagerty*, 493 Mich at 934. Our Supreme Court held that the defendant was entitled to governmental immunity because "[a] dust cloud rising from an unpaved road is not a defect *in the physical structure of the roadbed, as required for liability to arise under the [GTLA] highway exception*, MCL 691.1402(1)." *Id*. (citing *Nawrocki*, 463 Mich at 176-177) (emphasis supplied).

Application to the case at hand is straightforward. The defective condition that plaintiff alleges caused Truett's injury was a tree, a portion of which was lying across the highway. Plaintiff has *not* alleged any "defect in the physical structure of the roadbed, as required for liability to arise under the [GTLA] highway exception, MCL 691.1402(1)." *Hagerty*, 493 Mich at 934. Because plaintiff has not pleaded facts or established facts through discovery that would allow him to escape the broad grant of immunity provided to defendant by the GTLA, the circuit court correctly ruled that defendant was entitled to immunity in regard to plaintiff's claim, albeit for an incorrect reason. This Court will not disturb the circuit court's ruling because it reached

---

[4] Our Supreme Court decided *Hagerty* through an order, not an opinion. However, "[a]n order of th[e Supreme] Court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). Because our Supreme Court's order in *Hagerty* meets those requirements, we are bound by its holding. See *Hagerty*, 493 Mich 933; *DeFrain*, 491 Mich at 369.

the correct result, even if it did so for the wrong reason. *Adams v West Ottawa Pub Sch*, 277 Mich App 461, 466; 746 NW2d 113 (2008).[5]

Affirmed. Defendant may tax costs. MCR 7.219.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering

---

[5] We acknowledge that plaintiff cited unpublished decisions by this Court in support of his position. However, we are bound by stare decisis to follow the decisions of our Supreme Court. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Plaintiff did not challenge the denial of the motion to amend the complaint in the statement of questions presented, and therefore, this issue was waived. *English v Blue Cross Blue Shield*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Nonetheless, the trial court properly denied the motion because amendment was futile. *Boylan v Fifty Eight LLC*, 289 Mich App 709, 727-728; 808 NW2d 277 (2010).