

STATE OF MICHIGAN
COURT OF APPEALS

DONALD O'HARA, Personal Representative of
the Estate of THOMAS MICHAEL O'HARA,

UNPUBLISHED
May 22, 2007

Plaintiff-Appellee,

v

No. 275029
Court of Claims
LC No. 05-000226-MD

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from the order of the Court of Claims denying its motion for summary disposition predicated on governmental immunity. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

I

Plaintiff's decedent was killed when the car he was driving collided with a train at a crossing on South Huron River Drive, near its intersection with North Dixie Highway, in the Village of South Rockwood. According to plaintiff, decedent turned left from North Dixie Highway onto South Huron River Drive. Upon making that turn, he faced a steep incline, over rough road surface, leading to the railroad tracks. The warning flashers at the crossing were not clearly visible to a driver situated as was decedent.

Plaintiff filed suit, asserting that defendant was responsible for the condition of the roadway and grade crossing, and the signals marking the crossing. Defendant moved for summary disposition, initially arguing that it was not the governmental unit with jurisdiction over the roads and crossing at issue, but ultimately relying on the alternative argument that no exception to governmental immunity applied in any event. The trial court denied the motion, explaining as follows:

[I]n my opinion, this is not a design defect. This is a road defect. I mean as a result of maintenance and actions taken over and the effect of travel over the road. I mean we didn't—it's not, quote, designed to be the way it is. And at least from the testimony of the Plaintiff's experts, this road as currently postured, based on the amount of travel, based on the repeated maintenance or ill-maintenance if you

will over a period of years, is in a defective condition. So there's no basis at this point. I think there's a genuine issue of material fact.

II

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion for summary disposition based on governmental immunity is decided by examining all documentary evidence submitted by the parties, accepting all well-pleaded allegations as true, and construing all evidence and pleadings in the light most favorable to the nonmoving party. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004); *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 477; 586 NW2d 760 (1998).

III

Governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). However, the immunity statute includes an exception for public highways, according to which "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." MCL 691.1402(1). The statute further provides that "[t]he 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 . . . any . . . installation outside of the improved portion of the highway designed for vehicular travel." *Id.* The Department of Transportation has "no duty, under the highway exception to governmental immunity, to correct . . . design defects." *McIntosh v Dep't of Transportation (On Remand)*, 244 Mich App 705, 710; 625 NW2d 123 (2001).

In this case, plaintiff presented experts who opined that the subject railroad crossing violated industry standards, including defendant's own, by way of the abrupt change in grade as the roadway approaches the train tracks, and that the state of disrepair of the roadbed approaching the crossing would have interfered with a driver's ability to detect a train ahead. The trial court did not explicitly rule on the latter facet of plaintiff's theory, but concluded that the evidence raised a question of fact whether the steep incline in the roadway was a design defect or resulted from road maintenance operations over the years that raised the grade of the roadway. The trial court's denial of summary disposition on this basis was not error.

The highway exception to governmental immunity imposes a duty to repair and maintain a highway, but imposes no duty to design or redesign the highway to make it safer. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 501-502; 638 NW2d 396 (2002). Defendant argues that plaintiff's claim is precluded under *Hanson*, because *Hanson* involved an identical issue of an allegedly defectively designed slope causing limited sight distance. In *Hanson*, the Court specifically rejected a highway exception claim based on the slope of the road, which allegedly prevented drivers from seeing each other at the crest of a hill to avoid a collision. *Id.* at 493-494. Defendant contends that here, as in *Hanson*, the slope of the road is a design defect, which is not actionable under the highway exception.

However, unlike in *Hanson*, in this case, plaintiff alleged that there had been a change over time in the roadway and crossing because of maintenance. Plaintiff presented evidence that maintenance operations on the road approaching the railroad crossing had sharpened the grade over time. Plaintiff's claim is not premised on the highway design, but rather the effects of maintenance and repair that modified the road, resulting in a defective condition.

The supervisor of South Rockwood's Department of Public Works, Arthur Wenzel, testified in his deposition that over the course of 30 years, whenever the pertinent train company upgraded the crossing it tended to raise the grade "a couple of inches." Likewise, plaintiff presented the affidavit of Dr. Stephen Richards, a civil engineer, who stated that the combined effects of track maintenance and the roadway surface paving over time caused the approach grade at the crossing to become more severe. Plaintiff also presented affidavits from Charles VanDeusen, a professional engineer, in which he stated that maintenance operation resulted in a steeper approach grade to the railroad tracks. VanDeusen also stated that the grade crossing does not meet defendant's own standards for grade crossings.

Further, plaintiff presented expert testimony and other evidence that the road's state of disrepair, having numerous holes and cracks in the roadbed surface, contributed to the accident because it distracted the driver from noticing an approaching train as the driver neared the crossing. Richards opined that the safety of the crossing "was significantly decreased and/or compromised by the insufficient conditions of the roadway approaches to the crossing," and that "this was a major and/or significant contributing factor in the occurrence of the subject accident," because "a rough and poorly maintained surface would tend to divert and adversely compete for the attention of motorists navigating South Huron River drive at the grade crossing." The trial court properly concluded that the evidence was sufficient to raise a question of fact under the highway exception to governmental immunity.

To the extent that defendant argues that it was entitled to summary disposition because plaintiff's assertions were limited to defendant's role in redesign of the grade crossing, and did not implicate defendant with respect to the disrepair of the road, we find the record to the contrary. Plaintiff alleged that defendant was liable on several grounds other than the failure to correct the steep incline of the road, including the failure to maintain the roadway. Moreover, plaintiff presented testimony and evidence implicating defendant's liability generally for the inspection and evaluation of grade crossings, and for remedial action concerning issues of motorist safety at grade crossings, including the approach grades to the crossing. Accordingly, we disagree that plaintiff failed to create a genuine issue of fact that could justify recovery against defendant.

IV

Defendant also argues that it is entitled to immunity with respect to plaintiff's claim of inadequate railroad warning devices. MCL 257.668(2) states that "erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, shall not be a basis for an action of negligence against the state transportation department" Defendant argues that plaintiff presented no evidence that an order to upgrade the railroad crossing was outstanding at the time of the accident, and thus, plaintiff's claim is barred under the immunity provisions of MCL 257.668(2).

The trial court did not address the issue whether defendant was immune from liability based on allegations of a defective railroad crossing, and we decline to do so on appeal. *Polkton Charter Twp v Pellegrum*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Given the factual and legal intricacies of the parties' arguments, this issue is properly addressed by the trial court in the first instance.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff