

STATE OF MICHIGAN
COURT OF APPEALS

SHERIF KODSY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED

June 14, 2011

No. 297833

Court of Claims

LC No. 10-000012-MD

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm.

On July 1, 2008, plaintiff was injured in a car accident at the northwest intersection of Woodward Avenue and Eight Mile Road, and filed a complaint against defendant seeking damages for his injuries. In response to plaintiff's complaint, defendant sought dismissal on the basis of statutory governmental immunity. MCL 691.1401 *et seq*; MCR 2.116(C)(7). The trial court granted the motion, holding that plaintiff failed to provide defendant with timely notice of his claim and that the allegations did not fall within an exception to governmental immunity. On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant pursuant to MCR 2.116(C)(7), because he is disabled and defendant failed to show prejudice resulting from plaintiff's untimely serving of notice on defendant pursuant to MCL 691.1404.

The trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). When determining whether summary disposition is appropriate under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id.* "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law

whether the claim is statutorily barred.” *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).¹

Generally, governmental agencies are statutorily immune from tort liability pursuant to the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, unless a specific exception under the GTLA allows a plaintiff to pursue a claim against a governmental agency. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). Here, plaintiff asserted that liability should be imposed upon defendant pursuant to the highway exception, MCL 691.1402. However, to avoid governmental immunity under the highway exception, a plaintiff must timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the nature of the defect, and the names of known witnesses. *Id.* at 203-204. MCL 691.1404(1) provides:

[a]s a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in [MCL 691.1404(3),] shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

MCL 691.1404(3) provides:

[i]f the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by [MCL 691.1404(1)] not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. The provisions of this subsection shall apply to all charter provisions, statutes and ordinances which require written notices to counties or municipal corporations.

Here, plaintiff’s complaint alleged liability pursuant to the highway exception. In response to defendant’s argument that plaintiff untimely served notice, plaintiff asserted that he was unable to give timely notice because he was currently disabled and lived outside of Michigan. Although plaintiff submitted a document showing he was disabled from working, this document failed to establish that plaintiff was physically or mentally incapable of serving notice. Because plaintiff failed to show that he was physically or mentally incapable of serving notice, the trial court correctly applied the 120 day rule from MCL 691.1404(1). Since plaintiff was injured on July 1, 2008, he had until October 29, 2008, to serve notice on defendant. Plaintiff

¹ We are not considering the unmarked documents and photographs plaintiff attached to his brief on appeal and reply brief that were not properly presented to the trial court. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

did not serve notice until January 11, 2010. The trial court properly concluded that plaintiff's claim was barred.²

Plaintiff also argues that the trial court erred in concluding that he failed to plead a defect in the actual roadbed designed for vehicular travel. We hold that, even if plaintiff had served timely notice on defendant, his claim would have been properly dismissed on immunity grounds.

As previously noted, governmental agencies are statutorily immune from tort liability pursuant to the GTLA, MCL 691.1401 *et seq.*, unless a specific exception under the GTLA allows a plaintiff to pursue a claim against a governmental agency. *Rowland*, 477 Mich at 202-203. The highway exception states that a governmental agency:

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. [MCL 691.1402(1).]

Thus, liability under the highway exception extends only to the traveled portion, paved or unpaved, of a roadbed actually designed for vehicular travel. *Grimes*, 475 Mich at 78-79. Only the travel lanes of a highway are actually designed for vehicular travel. *Id.* at 91. Additionally, the highway exception does not extend to claims based upon defective design, *Hanson v Mecosta Co Rd Comm*, 465 Mich 492, 502; 638 NW2d 396 (2002), or the installation, maintenance, repair or improvement of traffic control devices, *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 151; 615 NW2d 702 (2000). Because plaintiff's claim is based upon an obscured view due to a poorly designed bridge and malfunctioning traffic lights, he has failed to allege a defect in the actual roadbed of a highway designed for vehicular travel. Thus, the highway exception does not apply and plaintiff's claim is barred by governmental immunity. The trial court properly granted defendant's motion for summary disposition.³

² Plaintiff's suggestion that defendant is required to show that prejudice resulted from plaintiff's untimely serving of notice is misplaced. Rather, the Michigan Supreme Court has expressly overruled any case law suggesting that a defendant must show prejudice. See *Rowland*, 477 Mich at 218-219, 223.

³ Plaintiff's assertion that defendant was grossly negligent for failing to maintain the intersection fails because gross negligence is not an exception to an agency's governmental immunity. *Rowland*, 477 Mich at 203 n 3.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens