STATE OF MICHIGAN
COURT OF APPEALS

PERCY LEWIS,

Plaintiff-Appellant,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
September 10, 2013

No. 307672
Court of Claims
LC No. 11-000069-MD

PERCY LEWIS,

Plaintiff-Appellee,

v

CITY OF FERNDALE,

Defendant-Appellant.

No. 311528
Oakland Circuit Court
LC No. 11-122989-NO

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Docket No. 307672 arises out of plaintiff Percy Lewis's action against the Michigan Department of Transportation (MDOT) seeking damages for an injury sustained as a result of MDOT's alleged negligence in maintenance of pavement. The trial court granted summary disposition in favor of MDOT based on governmental immunity, and Lewis appeals as of right.

Docket No. 311528 arises out of Lewis's action against the city of Ferndale seeking damages for the same injury and alleging the city was negligent in its maintenance of the pavement. The trial court granted partial summary disposition in favor of Lewis and denied Ferndale's motion for summary disposition based on governmental immunity, and Ferndale appeals as of right.

We affirm the trial court's rulings and hold, as a matter of law, that the site of the alleged defect was a portion of the sidewalk existing outside the improved portion of the highway designed for vehicular travel. Accordingly, Ferndale is potentially liable for failure to maintain the area in reasonable repair.

On May 13, 2010, Lewis fractured his left wrist when he allegedly stepped in a missing portion of concrete and fell. Lewis was in the process of crossing Woodward Avenue, a state highway, at Cambourne Street in Ferndale when the incident occurred. The sidewalk was cut and sloped to allow for handicapped access to the crosswalk. The alleged defect where Lewis fell was located at the base of the sloped curb where the curb and gutter installation bring the sidewalk flush with the roadway. Lewis sent a notice letter to both MDOT and Ferndale informing them of the nature and location of the incident and his intention to file a claim, as required by MCL 691.1404.

Lewis filed suit against MDOT, alleging negligence and asserting that MDOT had failed to maintain the area of the alleged defect in reasonable repair. MDOT answered, alleging that it was shielded by governmental immunity, and filed a motion for summary disposition under MCR 2.116(C)(7). MDOT contended that the defect was not located in the improved portion of the highway designed for vehicular travel, and that, therefore, the state was not responsible for maintenance. The trial court agreed with MDOT and granted MDOT's motion for summary disposition, ruling that "the Plaintiff fell on the curb portion of the sidewalk and not the improved portion of the highway designed for vehicular travel."

Lewis subsequently filed suit against the city of Ferndale, asserting that Ferndale had failed to maintain the sidewalk in reasonable repair. Ferndale answered, alleging that it was shielded by governmental immunity, and also filed a motion for summary disposition under MCR 2.116(C)(7). Ferndale contended that the defect was located in the "gutter pan," allegedly a portion of the highway for which municipalities are not liable. Lewis responded that the area was part of the "curb cutout" and was therefore an extension of the sidewalk. The trial court agreed with Lewis and denied Ferndale's motion for summary disposition, ruling that the area of the defect "was a sloped curb or 'curb cutout' designed to make pedestrian travel easier . . . . The Court finds that Defendant is responsible for maintaining the sloped curb or 'curb cutout' area." The trial court also found that Lewis's notice of intention to file a claim was adequate.

I. RETROACTIVITY

Whether a statute applies retroactively is a question of statutory interpretation that this Court reviews de novo. *Johnson v Pastoriza*, 491 Mich 417, 428-429; 818 NW2d 279 (2012).[1]

Ferndale contends that the amendments to MCL 691.1401, 1402, and 1402a contained in 2012 PA 50 should govern in this case. We disagree.

The intent of the Legislature governs a determination of whether a statute applies retroactively or prospectively. *Johnson*, 491 Mich at 429. "Statutes are presumed to apply prospectively, unless the Legislature clearly manifests the intent for retroactive application." *Id*. This is "'especially true when giving a statute retroactive application will . . . create a new

[1] As noted, this case also involves summary-disposition motions brought under MCR 2.116(C)(7); we review the rulings on such motions de novo. *Grimes v Mich Dep't of Transportation*, 475 Mich 72, 76; 715 NW2d 619 (2006)

liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed.'" *Id*. at 429-430, quoting *Hansen-Snyder Co v General Motors Corp*, 371 Mich 480, 484; 124 NW 286 (1963). "'[E]ven if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law.'" *Id*. at 430, quoting *Brewer v A D Transport*, 486 Mich 50, 56; 782 NW2d 475 (2010).

"'[T]he Legislature has shown . . . that it knows how to make clear its intention that a statute apply retroactively.'" *Johnson*, 491 Mich at 430, quoting *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 584; 624 NW2d 180 (2001). Nothing in the legislative history or text of 2012 PA 50 indicates an intention for retroactive application. "Use of the phrase 'immediate' effect does not at all suggest that a public act applies retroactively." *Johnson*, 491 Mich at 430. "'[P]roviding a specific, future effective date and omitting any reference to retroactivity support a conclusion that a statute should be applied prospectively only.'" *Id*. at 432, quoting *Brewer*, 486 Mich at 56. The amendments at issue in this case are silent on retroactivity and include a specific time—"immediate effect"—for the amendments to take effect. There is a presumption that the amended language applies only to injuries occurring on or after the effective date (March 13, 2012) of 2012 PA 50, rendering the amendments inapplicable to the present case.

Ferndale relies on the following exception to the presumption that statutes apply prospectively: "statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested." *Johnson*, 491 Mich at 432-433 (internal citations and quotation marks omitted). However, "the term 'remedial' in this context should only be employed to describe legislation that *does not affect substantive rights*." *Lynch*, 463 Mich at 585 (emphasis added). The Michigan Supreme Court has held that because an amended statute was enacted to invalidate a prior decision of the Court, it "effect[ed] a substantive change in the law" and would apply prospectively. *Hurd v Ford Motor Co*, 423 Mich 531, 534; 377 NW2d 300 (1985).

The amended versions of the statutes at issue in this case alter a municipality's potential liability. Previously, municipalities had a general duty, if certain conditions such as prior knowledge were met, to maintain all portions of a county "highway," except for the improved portion designed for vehicular travel. 2012 PA 50 limits a municipality's duty to only the *sidewalk* located next to municipal, state, or county highways. The change removes the ability to bring a cause of action, which existed before the amendments, for injuries occurring on trailways, crosswalks, or other installations. See former MCL 691.1402a. Because the amended versions of the statutes eliminate previously existing rights to bring causes of action and thus effect a substantive change in the law, the amended versions apply prospectively and do not apply to the present case.

We agree with *Moraccini v Sterling Heights*, 296 Mich App 387, 388, n 1; 822 NW2d 799 (2012), that because the effective date of 2012 PA 50 was subsequent to the accident in this case, the amendments do not apply.

II. DEFECTIVE NOTICE

Ferndale contends that Lewis's notice was defective because it stated that the incident occurred "on the crosswalk of Woodward Avenue," when the accident allegedly occurred, instead, on the "gutter pan." We disagree.

We review questions of statutory interpretation de novo. *Plunkett v Dep't of Transportation*, 286 Mich App 168, 174; 779 NW2d 263 (2009).

To bring a claim under the highway exception to governmental immunity, an injured person must within 120 days provide notice of the injury to the governmental agency having jurisdiction over the defective area. MCL 691.1404(1). "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." *Id*.

Lewis correctly named the intersection where his accident occurred, and he attached photographs of the defect in context with the surrounding area that were sufficient to identify the exact location of the defect. The fact that Lewis used the term "crosswalk" in his notice letter is not sufficient to render the notice defective, even if, for purposes of roadway engineering, the area is technically referred to as a "gutter pan."

Ferndale relies on *Jakupovic v Hamtramck*, 489 Mich 939, 939; 798 NW2d 12 (2011), where the plaintiff was injured while walking on a sidewalk in front of a home and gave written notice with the wrong address for the defect. The notice was held defective because it did not specify the "exact" location. *Id*. In the present case, Lewis could not have given a numbered address for the particular defect, but he did submit the proper intersection and enough photographic evidence to unmistakably alert the respective governmental agencies about the exact location of the defect.

III. MDOT DOES NOT HAVE JURISDICTION

This Court reviews de novo the applicability of governmental immunity and the statutory exceptions to governmental immunity. *Moraccini*, 296 Mich App at 391.

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., broadly shields governmental agencies, extending them immunity when engaged in the discharge of a governmental function. *Nawrocki v Macomb County Road Comm*, 463 Mich 143, 156; 463 NW2d 702 (2000). There is an exception to this broad grant of immunity—the highway exception—contained in MCL 691.1402(1):

> Except as otherwise provided in [MCL 691.1402a], 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 duty of the state and 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. . . .[2]

A "highway" is defined in MCL 691.1401(e) as:

> a public highway, road, or street that is open for public travel and includ[ing] bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.[3]

The highway exception is to be narrowly construed. *Nawrocki*, 463 Mich at 150. Under the highway exception, the duty of the state agency, MDOT, does not extend to every "improved portion of highway," but only to improved portions "designed for vehicular travel." *Grimes*, 475 Mich at 78.

The duty of the state agency for portions of the road "designed for vehicular travel" only extends to travel lanes of the highway, not to areas where it is merely possible that a vehicle may proceed. *Id*. at 90-91. In *Grimes*, a driver caused an accident when the driver attempted to return to a travel lane from a highway shoulder graded lower than the travel lane. *Id*. at 74-75. The Michigan Supreme Court held that the shoulder did not fall within the phrase "designed for vehicular travel," despite the fact that it might at some point be used by vehicles. *Id*. at 92.

This Court, in applying *Grimes*, concluded that the phrase "designed for vehicular travel" should be interpreted narrowly, but does not "exclude specialized, dual-purpose, or limited-access travel lanes." *Yono v Dep't of Transp*, 299 Mich App 102, 110; 829 NW2d 249 (2012). In *Yono*, this Court held that a lane along a highway that is reserved for parallel parking qualifies as "designed for vehicular travel" because it is designated for continuous vehicular travel. *Id.* at 113.

MDOT had jurisdiction and control over Woodward Avenue. However, the area where Lewis fell was not part of the "improved portion of the highway designed for vehicular travel" under MCL 691.1402(1). The alleged defect was not located in a travel lane, nor was the gutter and curb system designed for continuous vehicular travel. Ferndale contends that because the purpose of the gutter is to drain runoff water from the roadway, thereby facilitating vehicular travel, this means it is *designed* for vehicular travel. However, this contention is not supported by the *Grimes* and *Yono* holdings that limit "designed for vehicular travel" to the lanes on the roadway where vehicles continuously operate. Accordingly, the trial court properly granted

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[2] MCL 691.1402 was amended by 2012 PA 50, effective March 13, 2012. Unless otherwise indicated, all references to MCL 691.1402 are to the statute in effect at the time of the incident.

[3] MCL 691.1401 was amended by 2012 PA 50, effective March 13, 2012. Unless otherwise indicated, all references to MCL 691.1401 are to the statute as amended by 2001 PA 131, the version in effect at the time of the incident.

summary disposition to MDOT, because MDOT would only be liable if the defect was located in the improved portion of the highway designed for vehicular travel.

IV. FERNDALE DOES HAVE JURISDICTION

The highway exception to governmental immunity imposes a general duty on municipalities to maintain the sidewalks in their jurisdiction in reasonable repair. *Moraccini*, 296 Mich App at 393.

This Court has defined "sidewalk" as a "paved way that runs alongside and adjacent to a public roadway intended for the use of pedestrians." *Roby v Mount Clemens*, 274 Mich App 26, 30; 731 NW2d 494 (2007). "[S]uch proximity does not necessarily make it a sidewalk, and a court will take into account the character of the paved way and its intended use." *Id*. In *Moraccini*, 296 Mich App at 389, the plaintiff was injured when the wheels on his motorized scooter became jammed in concrete irregularities, causing him to fall from his scooter. The irregularities were located at the base of the ramped sidewalk where the concrete meets the roadway. *Id*. This Court held that the ramped area of the curb was part of the sidewalk for purposes of the definition of "highway" because the ramped curb was an extension of the sidewalk "that . . . constituted a path for pedestrians and was designed and intended to be used by pedestrians." *Id*. at 402-403.

The area where Lewis fell was substantially similar to the defect that caused the accident in *Moraccini*. In both *Moraccini* and the instant case, the areas in question were located at the base of the ramped sidewalk, thus serving as an extension of the sidewalk in order for pedestrians to access the crosswalk. By examining the character of the area where Lewis fell, *Moraccini* is dispositive, and Ferndale has jurisdiction over the defect.

Ferndale attempts to distinguish *Moraccini* by stating that the area where Lewis fell was not part of the "curb cutout," but was in fact a "gutter pan." Ferndale argues that the former is specifically designed to facilitate pedestrian travel, while the latter is specifically designed to control runoff to facilitate vehicular travel. This distinction does not change the result. By examining the total character of the area where Lewis fell, it is clear that the alleged defect was located in an area designed to facilitate pedestrian travel. It is located at the base of a sloped sidewalk. A pedestrian is required to cross over the area in order to reach the crosswalk. Even if the area is called a "gutter pan" for purposes of MDOT engineering, it is clear that the specific location of the alleged defect is part of the sidewalk, because it is a "paved way . . . intended for the use of pedestrians." *Roby*, 274 Mich App at 30. The alleged defect causing Lewis's fall was an extension of the sidewalk. The trial court correctly found Ferndale responsible for the area.

We affirm in both appeals. In Docket No. 311528, we remand for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio