

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

LUCILE HOFFMANN and FRANK HOFFMANN,

Plaintiffs,

vs

File No. 91-5483-NO
HON. PHILIP E. RODGERS, JR.

VILLAGE OF MANCELONA, a Municipal
Corporation,

Defendant.

Thomas R. Rensberry (P19365)
William J. Donoghue, Jr. (P39792)
Attorneys for Plaintiffs

Michael J. Roberts (P19505)
Attorney for Defendant

DECISION AND ORDER

Defendant submits a Motion for Summary Judgment pursuant to MCR 2.116 (C)(7) and (8) based upon the statutory provision for governmental immunity in personal injury actions, seeking dismissal with prejudice. MCLA 691.1401 et seq.

Plaintiffs responded requesting that the Motion be denied in that Plaintiffs' claim is valid within the defective highways exception of the Governmental Immunity Act or, alternatively, that an evidentiary hearing on the issues of notice and prejudice be conducted.

This action originates from injuries sustained by Plaintiff while walking on a sidewalk within the village limits of Mancelona on or about July 18, 1989.

The Court has reviewed the briefs, motions, affidavits and other documentary evidence submitted by the parties. Pursuant to the applicable standards of review and for the reasons set forth ahead, Defendant's motion is denied.

The standard of review for a (C)(7) motion is set forth in Moss v Pacquing, 183 Mich App 574, 579 (1990).

"In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. Wakefield v Hills, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. Levinson v Sklar, 181 Mich App 693, 697; 449 NW2d 682 (1989); Hazelton v Lustig, 164 Mich App 164, 167; 416 NW2d 373 (1987)."

Accepting Plaintiffs' factual allegations as true and constraining those allegations in a light most favorable to Plaintiffs, there remains a material factual issue which precludes the Court from granting Defendant's motion. Defendant Village is not exempt from the defective highway exceptions of the Governmental Immunity Act. MCLA 691.1402; MSA 3.996 (102) Therefore, Plaintiffs' action is not barred by statute.

"Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover for damages suffered by him from such governmental agency . . ." MCLA 691.1402.

Under section 1401 (e), a sidewalk is defined as a "highway" for statutory purposes. As a matter of law, then, Defendant Village had a duty to maintain the sidewalk in reasonable repair for the benefit of pedestrians travelling over its surface. Messecarr v Garden City, 172 Mich App 519; 432NW2d 311 (1988), Beamon v Highland Park, 85 Mich App 242; 271 NW 2d 187 (1978), Gregg v State Highway Department, Michigan Supreme Court, July, 16, 1990, Docket No. 84395.

"The defective highway exception to governmental immunity exists where a governmental agency's failure to maintain a highway under its jurisdiction in reasonable repair causes bodily injury or property damage. MCL 691.1402; MSA 3.996(102). This exception applies to municipal corporations such as defendant MCL 691.1401 (a) and (d);

MSA 3.996 (101) (a) and (d). The term highway includes sidewalks MCL 691.1401 (e); MSA 3.996(101) (e)." Messecarr, id. at pages 521-522.

Plaintiff has complied with the requirements of the statute for filing claims against a governmental agency and has sufficiently plead facts in avoidance of governmental immunity. Grames v King, 123 Mich App 573; 332 NW2d 615 (1983), Cobb v Fox 113 Mich App 249; 317 NW2d 583 (1982), Davis v Homestead Farms, 138 Mich App 152; 359 NW2d 1 (1984), Jones v City of Ypsilanti, 26 Mich App 574; 182 NW2d 795 (1970).

The standard of review for a (C) (8) motion is set forth in Mitchell v General Motors Acceptance Corp. 176 Mich App 23 (1989).

"A motion for summary disposition brought under MCR 2.116 (C) (8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co. 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]"

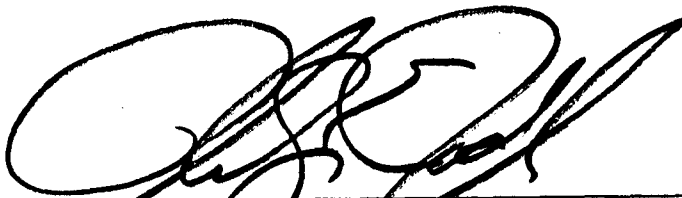
Again, taking Plaintiffs' factual allegations as true together with any inferences the Court can reasonably draw from them, in an examination of the legal basis of the complaint reveals that Plaintiffs' claims are not clearly unenforceable. The issue of Defendant's alleged negligent maintenance and repair of the sidewalk remains and relief may be forthcoming based upon the defective highway exception to governmental immunity.

It is the opinion of this Court, that Plaintiffs have plead specific facts to support the claim asserted in a manner sufficient to comply with the defective highway exception of the Governmental Immunity Act. Plaintiffs did properly notify Defendant of the claim asserted, injuries sustained and location of the defective

sidewalk. MCLA 691.1404. Defendant is not exempt from a duty to maintain, in a reasonably safe manner, the streets and sidewalks within its jurisdiction, MCLA 691.1402. whether or not the defect alleged in this case was unreasonable is a factual question to be resolved by a jury.

Defendant's Motion for Summary Disposition is denied.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

12/20/91