# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| RAYMOND HERNANDEZ,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 14, 2013 |
| v | No. 307683<br>Macomb Circuit Court |
| TOWNSHIP OF CLINTON,<br><br>Defendant-Appellant. | LC No. 11-003134-NO |

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Plaintiff Raymond Hernandez sued defendant Clinton Township when he was injured due to a defect along the "Macomb County Hike & Bike Trail" (MCHBT). The Township claimed that it was immune from suit. Hernandez retorted that the MCHBT is a sidewalk on Metropolitan Parkway and therefore, falls within the highway exception to governmental immunity. The circuit court agreed, denied the Township's summary disposition motion, and allowed the matter to proceed to discovery. The court also allowed Hernandez to amend his complaint to alternatively claim that the MCHBT is a trailway on the highway. Because Hernandez pleaded his claim in avoidance of governmental immunity and the evidence presented thus far reveals that further factual development may support that the MCHBT falls within either the sidewalk or trailway exception to governmental immunity, we affirm.

## I. BACKGROUND

Hernandez was injured when his bicycle tire contacted a sink hole on the asphalt-paved MCHBT along the south side of Metropolitan Parkway in Clinton Township. The MCHBT was created through a "cost sharing agreement" between Clinton Township, the City of Sterling Heights and Macomb County. The MCHBT was originally designed as a "bike path" but, by the time of its actual development, was dubbed a "hike/bike path" by the founding parties. The cost sharing agreement indicated that the MCHBT would run "along a portion of [Metropolitan Parkway] . . . from Utica Road to west of Freedom Hill Park." Accepting Hernandez's allegations as true, at the point of his accident, the MCHBT is ten-feet wide and sits 30 feet from the roadway with only grass in between. Hernandez timely filed suit, alleging that the Township was "legally responsible for the upkeep and maintenance of the public sidewalks in it's [sic] jurisdiction and in particular, the sidewalk/bike path on the south side of Metropolitan

Parkway[.]" As such, Hernandez averred that his claims fell within the highway exception to governmental immunity, MCL 691.1402.

The Township immediately moved for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity). The Township asserted that the MCHBT is not a "sidewalk" for purposes of the highway exception to governmental immunity; rather, it is a "bike path" that is not included in the statutory immunity exception. The Township further argued that Metropolitan Parkway is a limited access highway on which no sidewalk can legally be constructed. Hernandez challenged both positions and also sought to amend his complaint to alternatively allege that the MCHBT is a trailway on the highway.

The circuit court took judicial notice of the general character of Metropolitan Parkway and the MCHBT based on his first-hand knowledge of the area. The court determined that the MCHBT is a sidewalk on the highway for purposes of the highway exception because it runs alongside and adjacent to Metropolitan Parkway, is not in a wooded area and is intended for dual use by pedestrians and bicycles. The court declined to determine whether Metropolitan Parkway is a limited access highway, finding that fact to be irrelevant. The court also permitted Hernandez to amend his complaint as discovery had not yet begun and thus "there [was] no undue prejudice."

## II. STANDARD OF REVIEW

"MCR 2.116(C)(7) provides that summary disposition is proper when a claim is barred because of immunity granted by law." *Stabley v Huron-Clinton Metro Park*, 228 Mich App 357, 365; 579 NW2d 99 (1998). We review de novo the circuit court's decision on such a motion. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). In reviewing the motion, we "must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery." *Stabley*, 228 Mich App at 365. The plaintiff, however, bears the burden of pleading his or her claim "in avoidance of governmental immunity." *Odom*, 482 Mich at 478-479.

We also review de novo underlying matters of statutory interpretation, such as the circuit court's interpretation of the highway exception to governmental immunity. *Duffy v Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011). "The primary goal of statutory interpretation is to discern the intent of the Legislature" based on the statute's plain language. *Odom*, 482 Mich at 467. We may resort to the tools of statutory construction only where the language is ambiguous. *Id.* "[T]he highway exception is a narrowly drawn exception to a broad grant of immunity. An action may not be maintained under the highway exception unless it is clearly within the scope and meaning of the statute." *Hatch v Grand Haven Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000), citing *Scheurman v Dep't of Transp*, 434 Mich 619, 626-627, 630; 456 NW2d 66 (1990).

We review a circuit court's ruling on a motion to amend a complaint for an abuse of discretion. *Tierney v Univ of Mich Bd of Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d (2006).

MCR 2.118(A)(2) provides that "amendment is generally a matter of right rather than grace" and should be "freely grant[ed] . . . if justice so requires." *Tierney*, 257 Mich App at 687. A court does not abuse its discretion in denying a motion to amend, however, if the amendment would be futile. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973).

III. HERNANDEZ PLEADED IN AVOIDANCE OF GOVERNMENTAL IMMUNITY

Hernandez pleaded his claim in avoidance of governmental immunity and overcame the Township's motion for summary disposition by establishing that further factual development will likely support his claim for recovery. Pursuant to MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." There are several exceptions to that immunity, including the highway exception of MCL 691.1402, which provides in relevant part:

> (1) 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.

At the time of Hernandez's injury, the term "highway" was defined by MCL 691.1401(e) as "a public highway, road, or street that is open for public travel *and includes* bridges, *sidewalks*, *trailways*, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles." (Emphasis added.)[1] And municipalities are legally responsible for the sidewalks within their borders, even if those sidewalks travel alongside state or county roads. See *Listanski v Canton Twp*, 452 Mich 678; 551 NW2d 98 (1996); *Moraccini v Sterling Hgts*, 296 Mich App 387, 393; 822 NW2d 799 (2012), citing MCL 691.1402(1).

At issue in the motion for summary disposition was whether the MCHBT is a "sidewalk" as contemplated in the highway exception. Our Supreme Court emphatically directed in *Hatch*, 461 Mich at 465 n 4, "that the question whether a path is a 'sidewalk[] . . . on any highway' for purposes of the statutory highway exception to governmental immunity is determined by an objective analysis of the facts not by the labels attached by a municipality." (Alterations in original.) . At the time of Hernandez's injury, "sidewalk" was not defined in the statutes.[2] This Court and the Supreme Court have considered the definition of the term in the past:

---

[1] Effective March 13, 2012, the definition of "highway" was moved to MCL 691.1401(c) and was restated without any substantive change. 2012 PA 50.

[2] 2012 PA 50 also added the following definition for "sidewalk" at MCL 691.1401(f): "a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel."

> The *Stabley*[, 228 Mich App at 367,] Court looked to dictionary definitions of "sidewalk":
>
> > "According to *Webster's New World Dictionary*, a 'sidewalk' is 'a path for pedestrians, usually paved, along the side of a street.' *The American Heritage Dictionary: Second College Edition* defines 'sidewalk' as a 'walk or raised path for pedestrians along the side of a road.' *Random House Webster's College Dictionary* (1992) defines 'sidewalk' as 'a usu. paved walk at the side of a roadway.' In Black's Law Dictionary (6th ed), 'sidewalk' is defined as 'that part of a public street or highway designed for the use of pedestrians.'" . . .
> >
> > The *Stabley* Court also noted the definition of "sidewalk" in the Motor Vehicle Code as "that portion of a street between the curb lines, or the lateral lines of roadway [sic], and the adjacent property lines intended for the use of pedestrians." MCL 257.60 . . . . The Court noted that we have looked to definitions in the Motor Vehicle Code to interpret terms also found in the governmental immunity statute. See *Roy v Dep't of Transp[]*, 428 Mich 330; 408 NW2d 783 (1987).
>
> * * *
>
> Applying *Stabley*, the panel in the instant case viewed the phrase "sidewalks . . . on any highway" as denoting "a paved way dedicated to the use of pedestrians that runs alongside and adjacent to a public roadway and within the right of way of the roadway." [*Hatch*, 461 Mich at 462-463.]

*Stabley*, 228 Mich App at 369, further held that "linking the word 'sidewalk' with an adjacent road is in accord with the common and approved usage of the word." Ultimately, a "sidewalk on the highway" for purposes of the highway exception must be (1) a path designed for pedestrian use, (2) usually paved, (3) running alongside and adjacent to a public road, (4) within the right-of-way of that road.

Accepting Hernandez's well-pleaded allegations as true and construing the evidence in his favor, Hernandez has at least established that factual development could provide a basis for recovery; i.e., that the MCHBT is a sidewalk on the highway. The cost-sharing agreement indicates that the MCHBT was intended for dual use by bicyclists and pedestrians, despite the affidavits of Township officials claiming that the MCHBT is only a bicycle path. Plaintiff presented evidence that the Township had publicly and repeatedly marketed that the MCHBT is intended to be used as a multi-use pathway, and that the MCHBT is in fact regularly and consistently used by the general public in this way. The Township may not now "avoid potential liability by a sham labeling of" the MCHBT as simply a bicycle path. *Hatch*, 461 Mich at 465 n 4. The MCHBT is paved and runs alongside and adjacent to Metropolitan Parkway—a public roadway. While neither party presented any evidence regarding whether the MCHBT is actually in the right-of-way of Metropolitan Parkway, a quick review of a local map reveals that it likely is.

In *Stabley*, 228 Mich App at 364, the plaintiff was injured when he fell on a crack along "a paved path in the Stoney Creek Metropolitan Park." The path was "designated as a 'Hike-Bike Trail'" and "meander[ed] through the park, in some places running parallel to the road." *Id.* After considering the various definitions of "sidewalk" laid out above, the *Stabley* Court noted that the plaintiff's injury "did not occur on the portion of the trail that runs adjacent to the roadway, but rather on the portion that runs through the wooded interior of the park." *Id.* at 369. Therefore, although *Stabley* found the path to be a "sidewalk," it concluded that it was not "on the highway" and the highway exception was inapplicable. *Id.* at 369-370.

In *Hatch*, 461 Mich at 458, the plaintiff was injured "when the front tire of [his] bicycle struck a hole in a paved bicycle path." The path travelled alongside Lake Shore Drive in Grand Haven Township and sat approximately 30 feet from the roadway. *Id.* at 459. It was separated from the roadway by a swath of "trees and brush." *Id.* at 465. The defendant township moved for dismissal of the plaintiff's claims, asserting that the path was not a "sidewalk" and was "outside the improved portion of the highway designed for vehicular travel." *Id.* at 459. The *Hatch* Court of Appeals panel reversed the following reasoning of the circuit court:

> However, [the highway exception] does not by definition include bicycle paths. Plaintiff argues that there is no difference between a bicycle path and a sidewalk. This Court disagrees. A sidewalk is generally recognized as a paved pathway for pedestrian traffic along side [sic] a highway or street. A bike path is a paved path designed and intended for bicycle travel. The fact that bicyclists and rollerbladers may use a sidewalk or pedestrians and rollerbladers may use a bike path does not change the characteristic or purpose of either one any more than the use of a street by pedestrians, bicyclists or rollerbladers make the street a sidewalk or bike path. [*Id.* at 460.]

In reinstating the circuit court's dismissal of the plaintiff's claims, the *Hatch* Court first analyzed and accepted *Stabley*'s definition of a "sidewalk on the highway" and determined that the challenged pathway was indeed "on the highway." *Id.* at 463. However, the *Hatch* Court determined that the pathway was not a "sidewalk." The pathway in *Hatch* "was dedicated to the use of bicyclists and not pedestrians." *Id.* The Court continued, "[T]he hike-bike trail in *Stabley* was the functional equivalent of this path." *Id.* The photographic evidence of the *Hatch* trail showed footsteps in the snow indicating pedestrian traffic and there was no signage restricting access to bicyclists. *Id.* at 463-464.

The *Hatch* Court determined that it had to look beyond the labels placed by the government on these paths to determine their true character. *Id.* at 464. In making this factual analysis, the Court determined, "while a paved way's proximity to a highway is a necessary condition for determining that it is a sidewalk under the highway exception to governmental immunity, it is not a sufficient condition." *Id.* at 464-465. The Court noted that *Stabley* ultimately reached the correct result by considering the path's proximity to the highway, but held that "the panel in this case erred by concluding that the lack of such distance was dispositive. Regardless of its proximity to a highway, a bicycle path is simply not a sidewalk." *Id.* at 465. Rather, "the fact that at the particular location where this injury took place was one where the bicycle path was relatively close to the road does not convert the bicycle path into a sidewalk. Nor does the fact that pedestrians sometimes walk on the path change its character." *Id.* The

majority in *Hatch* noted that "unlike a typical sidewalk, the present bicycle path is not continuously aligned with a particular street." *Id.* at 465 n 4.

This case is close call because it shares characteristics with both *Stabley* and *Hatch*. However, the governmental entities creating the MCHBT specifically dedicated it for dual use, not just for bicyclists like in *Hatch*. Compare *Hatch*, 461 Mich at 463 (the path "was dedicated to the use of bicyclists"). Also unlike in *Hatch*, there is signage along the MCHBT indicating its intended use for both pedestrians and bicyclists. While the MCHBT does not run in a straight line parallel to Metropolitan Parkway at all times, it also does not veer off and "meander" through parks, except at the ends of the six-mile path. While there is vegetation between the MCHBT and the road in some locations, this is not the rule for the entirety. Ultimately, the MCHBT's designated and intended purpose and its proximity to the road, suggest it is a sidewalk rather than a bicycle path near a road.

Further, there is no record support for the Township's claim that Metropolitan Parkway is a limited access highway along which only bicycle paths may be legally constructed and on which no sidewalk could ever exist. See *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990), overruled in part on other grounds by *Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006). See also *Roy*, 428 Mich 330. A "limited access highway" is one "to which owners or occupants of abutting lands and other persons have no legal right of access to or from the same except at such points only, and in such manner as may be determined by the public authority having jurisdiction over" the highway. MCL 257.26. They are "highways specially designed for through traffic, and over, from or to which owners or occupants of abutting land have no easement or right of light, air or access by reason of such abuttal." MCL 252.51.

The Township claims that "it is undisputed that the area in question is a 'limited access highway;'" however, Hernandez *does* dispute this averment. He notes that there are traffic lights at major intersections and the sidewalks from those major cross streets end in ramps leading to crosswalks across Metropolitan Parkway. Between Harper and Gratiot, a side street—Nunneley—intersects the Parkway. Reviewing a map of the area claimed to be a limited access highway reveals there are other intersecting side streets and several entrances to subdivisions, a church, a county park, and a CVS drug store. There are even a handful of places where a pathway veers off the MCHBT and intersects with Metropolitan Parkway with a crosswalk across the roadway where no cross streets are present. These access points for pedestrians would be illegal under MCL 257.679a ("nor shall a pedestrian, bicycle . . . or other nonmotorized traffic be permitted on a limited access highway").

While the Township claims that Metropolitan Parkway was designated as a limited access highway "decades ago," it has presented no documentation in support. MCL 252.52 provides that a roadway may be established as a limited access highway by the state, county, or township acting together or alone. The Township does not tell us what governmental entity allegedly designated Metropolitan Parkway as a limited access highway. In fact, MCL 252.55 provides that "after the establishment of any limited access highway, no road which is not part of said limited access highway system shall run into or intersect the same at grade." Yet, the Township does not claim that the major cross streets intersecting Metropolitan Parkway are limited access highways. And those streets intersect Metropolitan Parkway "at grade."

## IV. AMENDMENT OF THE COMPLAINT

At issue in the motion to amend the complaint was whether the MCHBT could be a "trailway" for purposes of the highway exception to governmental immunity. When determining whether a path is a "trailway," just as when deciding whether it is a "sidewalk," a court should be required to undertake "an objective analysis of the facts" and not be bound "by the labels attached by a municipality." *Hatch*, 461 Mich at 465 n 4. The immunity statutes do not define "trailway," but the Supreme Court has looked to the Michigan Trailways Act (MTA), MCL 324.72101 *et seq.*, to define that term. The purpose of the MTA is "to provide for a statewide system of trailways on lands 'owned by the state or a governmental agency.'" *Duffy*, 490 Mich at 211, quoting MCL 324.72102. MCL 324.72101(k) defines a "trailway" as "a trail or other land corridor that features a broad trail capable of accommodating a variety of public recreation uses." See *Duffy*, 490 Mich at 211.

The Township has not shown that amendment of Hernandez's complaint would be futile. The MCHBT is a broad trail capable of accommodating a variety of public recreation uses—its 10-foot-wide asphalt-paved surface attracts rollerbladers, bicyclists and hikers; it is even wheelchair accessible. The MCHBT is also a land corridor along a major urban road.

As noted by the circuit court, discovery has not yet occurred. During discovery, the correct classification of the MCHBT will likely become clearer. In the meantime, Hernandez has presented sufficient information to permit amendment of his complaint.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher