# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| LISA KAY CHASE and CHARLES CHASE,<br><br>Plaintiffs-Appellants,<br><br>v<br><br>CITY OF ANN ARBOR,<br><br>Defendant-Appellee. | UNPUBLISHED<br>November 15, 2002<br><br>No. 233857<br>Washtenaw Circuit Court<br>LC No. 00-479-NI |

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting defendant's motion for summary disposition in this action seeking damages for personal injuries allegedly caused by defendant city's negligent conduct. We affirm.

## I. Basic Facts and Procedural History

The facts in this case are undisputed. On May 27, 1998 the City of Ann Arbor's Water Utilities Department dug a hole in the right hand lane of Washtenaw Avenue to prepare the site for a private contractor to make some repairs on a live water main.

After the city's workers dug the hole and completed all of the preparatory work, the workers placed two metal road plates over the hole and secured the plates to the road with metal railroad spikes and surrounded the plates with soft patch. To ensure that the plates were secure, the workers drove a dump truck over the area.

The crew that installed the road plates completed the job and left the worksite at approximately 4:00 to 4:15 p.m. From approximately 4:00 p.m. to 6:12 p.m., people drove over the road plates without incident. However, at 6:12 p.m., plaintiff[1] Lisa Chase was traveling down Washtenaw Avenue following a large truck with a trailer attached. In her deposition, she testified that she saw the truck ahead of her "bounce," which prompted her to slow down and take notice of her surroundings. Convinced that all was copasetic, she proceeded forward when she suddenly noticed a "dark shadow" in the road in the center of her path. When plaintiff

[1] Plaintiff Charles Chases' claim is a derivative claim for loss of consortium. Accordingly, the term "plaintiff" when employed in the singular refers only to Lisa Chase.

noticed that the shadow in front of her was a hole in the road, she "closed [her] eyes and slammed on the brakes." A portion of plaintiff's vehicle went over the hole without incident. However, plaintiff's left rear tire did not and the vehicle came to a halt with the back end of plaintiff's car sitting in the hole. The previously installed metal road plate was laying in the road directly in front of plaintiff's vehicle. As a result of this incident, plaintiff brought an action against the City of Ann Arbor alleging that defendant city breached its statutory duty to maintain the road in a reasonable state of repair thereby proximately causing plaintiff's injuries.

Defendant city brought a motion for summary disposition pursuant to MCR 2.116(C)(10)[2] arguing that governmental immunity barred plaintiff's recovery because plaintiff did not come forth with any documentary evidence demonstrating that defendant city knew or should have known of the alleged defect in the road before plaintiff's accident. After entertaining oral argument, the trial court issued its opinion and order granting defendant's motion finding that plaintiffs failed to produce documentary evidence establishing that defendant city knew or should have known of the alleged defect. Plaintiffs appealed and we affirm.

## II. Standard of Review

This court reviews de novo a grant or denial of summary disposition. *Jones v Enertel, Inc*, ____ Mich ____; 650 NW2d 334(2002). A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the underlying complaint. The inquiry relative to a (C)(10) motion is whether, looking at all of the evidence in a light most favorable to the nonmoving party, there are genuine factual issues presented upon which reasonable minds may differ. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. *Id*.

## III. Analysis

The immunity conferred upon a governmental agency is broad subject only to very specific and narrowly construed statutory exceptions. *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 159; 615 NW2d 702 (2000). At issue in the case at bar is the "highway exception" which requires a governmental agency having jurisdiction over a particular highway to "maintain [it] in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1).

MCL 691.1403, however, qualifies this general duty and provides that:

---

[2] We note at this juncture that the more appropriate basis upon which to bring a summary disposition motion in this particular case would be a motion under 2.116(C)(7) considering that defendant city erected the governmental immunity shield in response to plaintiffs' complaint. In any event, a motion brought pursuant to (C)(7) and (C)(10) are identical in that the court considering the motion must consider all documentary evidence and accepting the contents as true must determine whether plaintiff came forth with sufficient facts to create a viable exception to governmental immunity, i.e., a genuine factual issue upon which reasonable minds might differ. See *Regan v Washtenaw County Board of County Road Commissioners*, 249 Mich App 153, 157; 641 NW2d 285 (2002).

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency *knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place*. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place. (Emphasis added.)

Respecting the provisions contained in MCL 691.1403, incumbent upon plaintiff is to come forth with documentary evidence establishing that defendant city knew or should have known of the alleged defect created by the improperly installed metal road plate. In the case at bar, the record is utterly devoid of any evidence to establish that defendant city knew or should have known of the defect before plaintiff sustained her injuries.

By plaintiff's own account of the incident, the metal plate at issue was intact just moments before plaintiff attempted to travel over that area. While plaintiff acknowledges that the metal road plate at issue became dislodged almost immediately before the incident giving rise to this litigation, plaintiff nevertheless maintains that defendant city failed to exercise reasonable diligence in situating and inspecting the installation of the road plate and thus should have known that the plate, as installed, was not safe for vehicular traffic.

In support of their position, plaintiffs proffer Jonathan Crane's affidavit. Mr. Crane owns an engineering consulting service and in his affidavit opined that because the plate at issue was not placed square to the curb, "if there was excavation in the corner, they would want to `rock' with a heavy load." As the trial court properly noted, even accepting Mr. Crane's affidavit as entirely true, plaintiff still failed to demonstrate that the city knew or in the exercise of reasonable diligence should have known that the metal road plate was installed improperly thus causing a latent defect. Absolutely nothing in Mr. Crane's affidavit or otherwise demonstrates that defendant city had notice of the alleged defect resulting in plaintiff's injuries. Certainly, defendant city cannot be charged with notice, constructive or otherwise, of a defect that materialized just moments before plaintiff sustained injury.

Considering all of the evidence presented in a light most favorable to plaintiffs does not reveal any genuine factual issues upon which reasonable minds could differ. We thus affirm the trial court's decision granting defendant city judgment as a matter of law in all respects.

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly