STATE OF MICHIGAN

COURT OF APPEALS

ARTHUR WHITMORE and ELAINE WHITMORE, Plaintiffs-Appellees, v CHARLEVOIX COUNTY ROAD COMMISSION, Defendant-Appellant.	UNPUBLISHED October 7, 2010 No. 289672 Charlevoix Circuit Court LC No. 08-014922-NO
ARTHUR WHITMORE and ELAINE WHITMORE, Plaintiffs-Appellants, v CHARLEVOIX COUNTY ROAD COMMISSION, Defendant-Appellee.	 No. 291421 Charlevoix Circuit Court LC No. 08-014922-NO

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

In these consolidated appeals concerning the highway exception to governmental immunity, defendant appeals by right the trial court's denial of its motion for summary disposition, and plaintiffs appeal by leave granted the trial court's subsequent grant of partial summary disposition for defendant. We affirm both orders of the trial court.

Plaintiffs allege that they were injured in May 2006 when their motorcycle hit a large pothole on Charlevoix County's Advance Road, near the intersection of Cummings Road. Defendant sought summary disposition under MCR 2.116(C)(7), asserting governmental immunity. The trial court denied the motion. Defendant subsequently sought partial summary disposition, and this time the trial court granted the motion. We review de novo the trial court's

decisions regarding these motions. *Burise v Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009).

The government tort liability act (GTLA), MCL 691.1401 *et seq*., provides that governmental agencies are liable for injuries arising from road defects only if the agency knew or should have known of the defect:

> No governmental agency[1] 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. [MCL 691.1403.]

In *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006), our Supreme Court made clear that when a plaintiff alleges an injury resulting from a governmental agency's failure to remedy a defect in a highway, the "injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair." "It may be that a road can be so bumpy that it is not reasonably safe," the *Wilson* Court explained, "but to prove her case [a] plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it." *Id*. at 169.

Defendant argues that plaintiffs failed to satisfy MCL 691.1403 because they failed to allege that defendant had notice of the single, specific pothole that caused the accident. When reviewing a motion for summary disposition brought on the ground that the plaintiff has failed to fulfill these requirements, we accept the plaintiff's factual allegations as true and construe them in the plaintiff's favor, unless the defendant has provided evidence to contradict them. *Plunkett v Dep't of Transportation*, 286 Mich App 168, 180; 779 NW2d 263 (2009). Having examined the complaint and the evidence submitted at the time of defendant's first motion for summary disposition, we conclude that plaintiffs properly alleged that defendant had actual and constructive knowledge of the pothole. Plaintiffs alleged that defendant had actual and constructive notice of the pothole, which they described as "a large, long-existing pothole of significant depth and width dimensions present in the northbound lane of Advance Road near its intersection with Cummings Road." Plaintiffs alleged that defendant had "previously failed to successfully repair" it. These allegations were sufficient to fulfill the notice of defect requirements in MCL 691.1403.

The GTLA also includes the following provision, requiring notice to the governmental agency in charge of maintaining the highway:

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[1] The term "governmental agency" includes county road commissions. MCL 691.1401(b) and (d).

> As 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 subsection (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(1).]

Legislative acts requiring serving notice of defective highway conditions serve "(1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured." *Plunkett*, 286 Mich App at 176-177.

Plaintiffs' notice consists of a cover page and two individual notices, one describing Arthur Whitmore's injuries and the other describing Elaine Whitmore's injuries. Defendant does not challenge the timeliness of the notice. However, defendant argues that the notice insufficiently described the location and the nature of the pothole. The individual notices, which are identical with regard to the description of the pothole, read in pertinent part:

> The subject accident occurred on or about May 28, 2006, on northbound Advance Road near its intersection with Cummings Road in the Township of Eveline, County of Charlevoix, State of Michigan.
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> * * *
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> The accident occurred as a result of the defective maintenance of the traveled portion of the roadway, and, specifically, the presence of a large pothole within the traveled portion of the roadway which was neither marked nor identified . . . .

At the hearing on defendant's first summary disposition motion, plaintiffs' counsel asserted that plaintiffs had mailed the police report of the accident with the notice of claim. Defendant's counsel did not dispute this assertion. Minutes of commission meetings following the accident indicate that defendant received the police report, which defendant intended to forward to a self-insurance pool. In the police report, the accident is described as occurring 10 feet from the intersection of Advance Road and Cummings Road, and a hand drawn diagram of the crash site, which includes a depiction of the location of the pothole, is included. This location is reflected in a letter sent from the claims administrator for the insurance pool to plaintiffs' counsel.

Citing *Barribeau v Detroit*, 147 Mich 119; 110 NW 512 (1907), defendant argues that the police report is parol evidence that cannot be considered in determining whether the notice itself was sufficient. The plaintiff in *Barribeau* was injured when she fell while traversing a sidewalk. *Id*. at 120. The location of the alleged defect was identified in the notice as being "at corner of Howard and Twenty-First streets." *Id.* Our Supreme Court noted, "When parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has not

been given . . . ." *Id.* at 126. However, in *Barribeau*, no supporting evidence was timely filed with the notice to help identify the location of the defect.[2] Rather, the plaintiff in that case had merely argued that "a description of the most general charter, when applied to the ground, may locate the place with utmost exactness." *Id.* at 124.

In contrast to *Barribeau* is *Plunkett*, wherein this Court considered a police report as a supplemental description of an accident for purposes of evaluating the adequacy of the statutory notice. *Plunkett*, 286 Mich App at 175-179. As this Court concluded, the notice, combined with the police report, sufficiently identified the location and nature of the pothole. *Id*. at 179. Indeed, as this Court stated, "when notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention." *Id*. at 176. We cannot conclude that plaintiffs' notice was defective merely because it relied on descriptions in the accompanying police report. See *id*. at 179.

Next, we examine two additional matters at issue in these consolidated appeals. First, defendant challenges the trial court's denial of its motion to dismiss plaintiffs' allegations concerning "failure to warn." And second, plaintiffs challenge the trial court's dismissal of their claims concerning failure to inspect the highway and the previous repair work, failure to supervise employees assigned to repair the road, and failure to close the road.

We affirm both rulings on the basis of *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000). In *Nawrocki*, our Supreme Court held that governmental immunity bars any claim arising from road conditions unless the plaintiff asserts "the failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage." *Id*. at 183. Any other claim involving road conditions, such as claims based on road signage or lighting, are barred by governmental immunity. *Id*. Here, plaintiffs set forth certain claims (such as those concerning failure to inspect, closing the road, and the supervision of employees) that dealt with issues much broader than "the actual physical structure of the roadbed surface," itself. Accordingly, these claims were properly dismissed. *Id*. With respect to plaintiffs' allegations regarding the "failure to warn," plaintiffs contend that these allegations were not intended to be a separate cause of action, but simply as an item of probative evidence that could be pursued at trial. Given plaintiffs' concession that they were not seeking additional damages on the basis of a separate, self-styled "failure to warn" claim, but only seeking to introduce evidence concerning the failure to warn that would be probative and relevant to their actual underlying cause of action, we perceive no error in the trial court's denial of defendant's motion to dismiss these allegations. We cannot say that the trial court's ruling with regard to plaintiffs' "failure to warn" allegations was inconsistent with *Nawrocki*.

Plaintiffs also argue that the trial court erred by refusing to consider their request to amend their complaint, and by denying their motion for reconsideration. We disagree. There is

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[2] When the lawsuit was begun over eight months after the accident, the plaintiff provided a more exact description of the location of the defect. *Barribeau*, 147 Mich at 120-121.

no right to amend the pleadings when the summary disposition motion is based on subrule (C)(7). See MCR 2.116(I)(5). Moreover, it strikes us that the automatic stay provisions of MCR 2.614(D) and 7.209(E)(4) precluded amending the complaint as well. Further, the trial court properly determined that its order contained no palpable error. Plaintiffs' motion for reconsideration was therefore properly denied. See MCR 2.119(F)(3).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen