STATE OF MICHIGAN

COURT OF APPEALS

ANN MILZARSKI, Plaintiff-Appellant,	UNPUBLISHED March 15, 2016
v	No. 324950 Kent Circuit Court
CITY OF GRAND RAPIDS, Defendant-Appellee.	LC No. 13-009986-NO

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Plaintiff Ann Milzarski appeals as of right the trial court's order granting defendant City of Grand Rapids' motion for summary disposition under MCR 2.116(C)(7). We affirm.

I. FACTUAL BACKGROUND

In September 2012, plaintiff was working as a volunteer at Art Prize, an art festival in downtown Grand Rapids, Michigan. While she was assisting a group of festival attendees, plaintiff tripped and fell on a manhole cover that was slightly elevated above the pavement in a crosswalk on Weston Street at Sheldon Boulevard. Between 30 and 50 people were simultaneously using the crosswalk at the time of plaintiff's fall. Photographs taken of the manhole cover and surrounding pavement showed that the discontinuity between the cover and the pavement was less than the diameter of a quarter, or approximately 3/4-inch. Plaintiff suffered a broken arm and lacerations.

In January 2013, plaintiff provided notice of her injury to defendant. Defendant responded to the notice in May 2013, denying plaintiff's claim because (1) it did not have actual or constructive notice of a defect in that location before the accident occurred, and (2) the manhole cover and surrounding pavement did not constitute a defect under Michigan law. In October 2013, plaintiff initiated the instant case, filing a complaint alleging a claim under the highway exception to governmental immunity. In its answer, defendant restated the same arguments that it raised in its response to plaintiff's notice of the injury.

Defendant moved for summary disposition under MCR 2.116(C)(7), asserting that governmental immunity barred plaintiff's claim because her allegations did not fall under the highway exception. It contended that it had maintained the crosswalk in reasonable repair so that it was reasonably safe for public travel. Likewise, defendant proffered documentary evidence in

support of its contention that the manhole cover and crosswalk were in reasonable repair, including evidence regarding its notice of conditions in that area and its maintenance of the intersection.

In her response, plaintiff argued that (1) she had presented sufficient evidence to establish a presumption that defendant had constructive notice of the raised manhole cover; (2) the presumption of reasonable repair under MCL 691.1402a was not applicable in this case; and (3) she had demonstrated that the crosswalk was not reasonably safe and convenient for public travel. In support of her claims, plaintiff relied on two affidavits prepared by nearby residents who had tripped over, or observed other people trip over, the raised manhole cover within the past four years. Plaintiff also proffered an affidavit prepared by a forensic engineer, David A. Weaver, which stated, *inter alia*, that (1) the elevated manhole cover, which was higher than 1/4-inch, was properly classified as a "defect" and "trip hazard"; (2) the manhole was defective and dangerous to pedestrians based on defendant's own sidewalk standards; and (3) "[t]he City of Grand Rapids, as well as any reasonable road commission[,] would have realized that the road was unsafe with routine maintenance and inspection."

Following oral argument, the trial court granted defendant's motion for summary disposition. It held that plaintiff's claim did not fall within the scope of the highway exception to governmental immunity because plaintiff was a pedestrian, and only vehicular travel is covered by the highway exception. It also concluded that even if plaintiff had demonstrated that a defect existed in the crosswalk, she had failed to establish that the highway was unsafe for "public travel" at all times, which, according to the court, denoted "vehicular travel." Finally, it found that even if defendant had a duty to maintain the roadway for pedestrians, no one could reasonably conclude that the crosswalk was unsafe for public travel at all times in light of the fact that 30 to 50 other people safely used the crosswalk at the same time as plaintiff.

II. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's grant or denial of summary disposition as well as "[t]he applicability of governmental immunity and the statutory exceptions to immunity." *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). A trial court may grant summary disposition under MCR 2.116(C)(7) when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . immunity granted by law." MCR 2.116(C)(7); *Moraccini*, 296 Mich App at 391.

A movant can demonstrate that it is entitled to governmental immunity by either (1) showing that it has immunity based on the allegations in the pleadings, or (2) by demonstrating that it has immunity using supporting affidavits, deposition testimony, admissions, or other documentary evidence. *Yono v Dep't of Transp (On Remand)*, 306 Mich App 671, 679; 858 NW2d 128 (2014), lv gtd 497 Mich 1040 (2015). Here, defendant utilized the latter approach. "In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013).

When a motion is brought under MCR 2.116(C)(7) with supporting documentary evidence, the "challenge is similar to one under MCR 2.116(C)(10)," and "the movant may establish that, given the undisputed facts of the case, he or she is entitled to immunity as a matter of law, notwithstanding the plaintiff's allegations." *Yono (On Remand)*, 306 Mich App at 679. "[T]he relevant rules applicable to a motion under MCR 2.116(C)(10) apply equally to a factual challenge under MCR 2.116(C)(7)." *Id.* at 677 n 1. If a moving party properly supports its motion with documentary evidence that, "if left unrebutted, would show that there is no genuine issue of material fact that the movant has immunity, [then] the burden shifts to the nonmoving party to present evidence that establishes a question of fact as to whether the movant is entitled to immunity as a matter of law." *Id.* at 679-680. "[A]ny documentation that is provided to the court . . . must be admissible evidence," *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009), and we consider the documentary evidence in a light most favorable to the nonmoving party, *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

"If the trial court determines that there is a question of fact as to whether the movant has immunity, the court must deny the motion." *Yono (On Remand)*, 306 Mich App at 680. "A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). However, "[i]f no [material] facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Willett v Charter Twp of Waterford*, 271 Mich App 38, 45; 718 NW2d 386 (2006) (quotation marks and citation omitted; second alteration in original).

III. THE HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY

Under the Michigan governmental tort liability act ("GTLA"), MCL 691.1401 *et seq.*, governmental agencies enjoy "broad immunity from tort liability . . . whenever they are engaged in the exercise or discharge of a governmental function[.]" *Plunkett*, 286 Mich App at 181; see also MCL 691.1407(1) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."). Defendant is entitled to immunity under the GTLA because cities qualify as governmental agencies. See MCL 691.1401(a), (d), (e); *Weaver v Detroit*, 252 Mich App 239, 243; 651 NW2d 482 (2002). The act includes several exceptions to this immunity, and those exceptions are the only means by which an individual may bring a tort claim against a governmental agency. *Lash v Traverse City*, 479 Mich 180, 195; 735 NW2d 628 (2007). At issue in this case is the highway exception, which states, 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. . . . Except as provided in section 2a, the duty of a governmental agency 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. [MCL 691.1402(1).]

"[T]he immunity conferred upon governmental agencies is *broad,* and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). Accordingly, "[a]n 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 Charter Twp,* 461 Mich 457, 464; 606 NW2d 633 (2000).

IV. ANALYSIS

First, as both parties agree on appeal, the trial court erred in concluding that pedestrians are excluded from bringing a claim under the highway exception to governmental immunity. Pedestrians "are not automatically and entirely excluded, as a class, from the protections of the [highway exception]." *Nawrocki*, 463 Mich at 170. Rather, the statutory language of the highway exception imposes a duty on governmental agencies "to protect pedestrians from dangerous or defective conditions in the improved portion of the highway designed for vehicular travel, even when injury does not arise as a result of a vehicular accident." *Id*. at 162 (interpreting a prior version of the statute that includes nearly identical language, except now that language applies to all governmental agencies, not just state and county road commissions). Thus, a pedestrian may recover damages for a personal injury when the injury is proximately caused by a failure of a governmental agency to repair and maintain the " 'improved portion of the highway designed for vehicular travel.' " *Id.* at 162-163, quoting MCL 691.1402(1). Likewise, pedestrians who are inside crosswalks within the "improved portion of the highway designed for vehicular travel" are not barred from raising a claim under the highway exception, as the phrase "outside of the improved portion of the highway designed for vehicular travel" modifies "crosswalks" under the statute. See *Sebring v City of Berkley*, 247 Mich App 666, 680-682; 637 NW2d 552 (2001).[1]

Because pedestrians may bring a claim under the highway exception, the trial court erred in granting summary disposition in favor of defendant largely based on its erroneous conclusion that plaintiff was excluded as a pedestrian. Nevertheless, we will not reverse on this ground because "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Michigan Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). Contrary to plaintiff's claim on appeal, we conclude that the trial court properly granted

[1] The language of MCL 691.1402(1) was amended by 2012 PA 50, effective March 13, 2012. This amendment changed the language of the fourth sentence slightly. In comparing the minor differences between the former and current statutory language, we conclude none of the amendments of the statutory language undermined the analysis of the cases cited in this opinion as applied to the crosswalk in this case, and we likewise conclude that the principles cited in this opinion remain applicable and instructive. Cf. *Sebring*, 247 Mich App at 669 n 2 (stating, with regard to a previous amendment, "[w]e believe that the reasoning in *Nawrocki* is instructive, even though the language of the highway exception at issue in that case is different from the exception applicable here.").

summary disposition in favor of defendant because the documentary evidence submitted by the parties demonstrated that defendant was entitled to governmental immunity as a matter of law.

The parties do not dispute that the crosswalk in which plaintiff sustained her injuries was a crosswalk inside "the improved portion of [a] highway designed for vehicular travel." MCL 691.1402(1). Thus, under the first sentence of MCL 691.1402(1), defendant had a duty to maintain the highway, including the crosswalk, "in reasonable repair so that it [was] reasonably safe and convenient for public travel." MCL 691.1402(1). "The phrase 'so that it is reasonably safe and convenient for public travel' simply refers to the duty to maintain and repair, and states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway 'reasonably safe.' " *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 167; 713 NW2d 717 (2006) (citation omitted). "[T]he Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason." *Plunkett*, 286 Mich App at 182 (quotation marks and citation omitted). Likewise, "[v]iewing the [governmental immunity act] as a whole, it can also be seen that the converse of this statement is true: that is, the Legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel." *Id*. (quotation marks and citation omitted; second alteration in original).

"[A]n *imperfection* in the roadway will only rise to the level of a compensable 'defect' when that imperfection is one which renders the highway not 'reasonably safe and convenient for public travel,' and the government agency is on notice of that fact." *Wilson*, 474 Mich at 168. Accordingly, "an 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." *Plunkett*, 286 Mich App at 183 (quotation marks and citation omitted).

"[A] road in bad repair, or with rough pavement, is not per se one that is not reasonably safe." *Wilson*, 474 Mich at 169, citing *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912). " 'Nearly all highways have more or less rough and uneven places in them, over which it is unpleasant to ride; but because they have, it does not follow that they are unfit and unsafe for travel.' " *Id*. at 169-170, quoting *Jones*, 171 Mich at 611. However, "[i]t may be that a road can be so bumpy that it is not reasonably safe, *but to prove her case 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 (emphasis added).

Here, plaintiff failed to establish a genuine issue of material fact as to whether the crosswalk contained a defect that rendered it not reasonably safe and convenient for public travel in order to survive summary disposition under MCR 2.116(C)(7). See *id*. at 168. As mentioned *supra*, attached to plaintiff's response is an affidavit prepared by David Weaver, a licensed forensic engineer, which states, *inter alia*, that (1) a height discrepancy of more than 1/4 of an inch constitutes a trip hazard; (2) the raised manhole cover on which plaintiff tripped "represented a defect, a trip hazard that could result in an injurious trip and fall"; (3) the manhole

was defective and dangerous to pedestrians based on defendant's own sidewalk standards; and (4) "[t]he City of Grand Rapids, as well as any reasonable road commission[,] would have realized that the road was unsafe with routine maintenance and inspection."[2] Although this affidavit provides minimal evidence that a governmental agency would have concluded that the area on which plaintiff fell posed a hazard and was, therefore, "unsafe," the affidavit is devoid of any basis for concluding that a reasonable governmental agency would have understood that the raised manhole cover posed an *unreasonable* threat to public safety (*i.e.*, was *not reasonably safe*) *and addressed it*. See *id*. at 169. Additionally, plaintiff may not rely on defendant's own internal policies and procedures to establish that the sidewalk was not reasonably safe, as "without some express legislative authorization, [a] city cannot create a cause of action against itself in contravention of the broad scope of governmental immunity established by the GTLA." *Mack v City of Detroit*, 467 Mich 186, 196; 649 NW2d 47 (2002); see also *Lynd v Charter Twp of Chocolay*, 153 Mich App 188, 202; 395 NW2d 281 (1986) (stating that violating an internal policy "does not, in and of itself, establish that the MDOT failed to maintain the highway in *reasonably* safe repair and in a condition *reasonably* safe for public travel" under MCL 691.1402).

Likewise, the rest of the evidence proffered by plaintiff is similarly insufficient and provides no basis for, at a minimum, inferring that the defect was of such a nature that a reasonable governmental agency would have understood that the manhole cover was in a state of unreasonable repair and addressed it. See *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006) ("We review the evidence and all legitimate inferences in the light most favorable to the nonmoving party."); *Yono (On Remand)*, 306 Mich App at 678 n 1 ("[T]he relevant rules applicable to a motion under MCR 2.116(C)(10) apply equally to a factual challenge under MCR 2.116(C)(7)."). Affidavits prepared by residents living near the crosswalk at issue only demonstrated that other individuals had tripped on the manhole cover in the past and that *the affiants* believed that defendant should have fixed the manhole cover previously. Additionally, photographs presented to the trial court indicate that the height differential was less than the diameter of a quarter, *i.e.*, less than 3/4 of an inch,[3] and, as the trial court noted, it was undisputed that 30 to 50 other individuals used the crosswalk at the same time as plaintiff

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[2] We note that we may not consider Weaver's statement regarding defendant's subsequent act of fixing the manhole cover in considering defendant's motion for summary disposition under MCR 2.116(C)(7). See MRE 407 ("When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."); *Plunkett*, 286 Mich App at 180 (stating that any documentation provided to the court for purposes of a summary disposition motion under MCR 2.116(C)(7) must be admissible evidence).

[3] We note, by analogy, that MCL 691.1402a(3) establishes a presumption that a municipal corporation maintained a sidewalk in reasonable repair, which may be rebutted only with evidence (1) that the sidewalk contained a vertical discontinuity of two inches or more, or (2) that the sidewalk included a dangerous condition other than a vertical discontinuity. Here, the vertical discontinuity at issue was only 3/4 of an inch.

without incident.[4] Given this evidence, plaintiff failed to demonstrate a genuine issue of material fact as to whether a reasonable governmental agency would have concluded that the raised manhole cover posed an *unreasonable* threat to public safety and remedied it. See *Wilson*, 474 Mich at 169. Likewise, as a result, plaintiff has failed to demonstrate a genuine issue of material fact as to whether the raised manhole was an actionable defect that made the crosswalk not reasonably safe and convenient for public travel. See MCL 691.1402(1); *Wilson*, 474 Mich at 168-170.

Therefore, especially given that the highway exception must be narrowly construed, *Nawrocki*, 463 Mich at 158, the trial court properly granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(7) on the basis of governmental immunity.

V. CONCLUSION

Although the trial court erred in concluding that plaintiff was automatically excluded from raising a claim under the highway exception to governmental immunity as a pedestrian, it properly granted summary disposition in favor of defendant under MCR 2.116(C)(7).

Affirmed.

/s/ Patrick M. Meter
/s/ Mark T. Boonstra
/s/ Michael J. Riordan

[4] We reject plaintiff's argument that the trial court failed to view the evidence, specifically the fact that 30 to 50 people safely used the crosswalk at the same time as her fall, in the light most favorable to her. Plaintiff's argument that this evidence could be viewed favorably to her is based only on speculation, and we conclude that the fact that 30 to 50 people safely used the crosswalk cannot be viewed in a light favorable to plaintiff.