STATE OF MICHIGAN

COURT OF APPEALS

CHRIS PENZAK, Plaintiff-Appellant,	UNPUBLISHED April 26, 2016
v	No. 326064 Oakland Circuit Court
CITY OF ROYAL OAK, Defendant-Appellee.	LC No. 2014-138890-NO

Before: BECKERING, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff, Chris Penzak, appeals as of right from the trial court's order granting summary disposition to defendant, City of Royal Oak, pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On February 17, 2012, plaintiff was crossing Parent Street in Royal Oak to reach her car in a parking lot after leaving an appointment. She tripped and fell when her toe hit a one-half inch rise in the middle of the road and suffered a fractured pelvis and two fractured ribs, along with knee injuries. Plaintiff had been attending appointments in the same building twice weekly for the previous two or three years, but she had never had a problem crossing the road before, nor had she previously noticed this defect in the road.

Defendant moved for summary disposition based on governmental immunity. After a hearing, the trial court granted defendant's motion, holding that plaintiff failed to raise a genuine issue of fact that the highway exception applied in this case. On appeal, plaintiff argues that the trial court erred when it granted summary disposition to defendant.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). The applicability of the highway exception to governmental immunity is a question of law and is therefore subject to de novo review on appeal. *Plunkett v Dep't of Trans*, 286 Mich App 168, 180; 779 NW2d 263 (2009).

When affidavits, depositions, admissions, or other admissible documentary evidence is submitted by either party in support of, or opposition to, a motion under MCR 2.116(C)(7), the court must consider the evidence in order to determine whether there is a genuine issue of material fact precluding summary disposition. *Dybata v Wayne Co*, 287 Mich App 635, 637; 791 NW2d 499 (2010), citing MCR 2.116(G)(5). When facts are not in dispute, or when the facts do not leave open an issue on which reasonable minds could differ, then there is no genuine issue of material fact and the applicability of governmental immunity is a question of law. *Id*. at 637-638. In reviewing the facts, the appellate court "makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*., 445 Mich 153, 162; 516 NW2d 475, 479 (1994).

III. ANALYSIS

Under the Michigan governmental immunity act, MCL 691.1401 *et seq.*, governmental agencies have the benefit of extensive immunity from tort liability while they are "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). See also *Plunkett*, 286 Mich App at 181. Defendant enjoys the governmental immunity established by the statute because municipal corporations qualify as governmental agencies. *Weaver v Detroit*, 252 Mich App 239, 243; 651 NW2d 482 (2002). The act includes several narrow exceptions to this immunity. At the time of plaintiff's fall,[1] the highway exception provided, in relevant part:

> 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. [MCL 691.1402(1), as amended by 2012 PA 50.]

The definition of "highway" includes, among other things, "a public highway, road, or street that is open for public travel." MCL 691.1401(c).[2] The parties do not dispute that the street on which plaintiff sustained her injuries was a public road that was subject to defendant's jurisdiction.

The Michigan Supreme Court has stated that "the 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

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[1] The statute was amended and made effective on March 13, 2012, about one month after plaintiff's fall. The quoted language, however, is identical with that in the current version.

[2] Following the enactment of 2012 PA 50, this definition now appears in MCL 691.1401(c). At the time of plaintiff's fall, it appeared in MCL 691.1401(e); however, the substance of the definition is, for purposes of our decision, unchanged.

within the scope and meaning of the statute." *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000).

Under the highway exception, defendant has a basic duty to "maintain [a] highway [under its jurisdiction] in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). See also *Nawrocki,* 463 Mich at 160 (stating same). This statutory language only comprises one duty, i.e., to "maintain [a] highway in reasonable repair." "In order to show that a governmental agency," including a municipality, "failed to 'maintain [a] highway in reasonable repair,' a plaintiff must demonstrate that a 'defect' exists in the highway." *Buckner Estate v Lansing*, 480 Mich 1243, 1244; 747 NW2d 231 (2008), citing *Nawrocki*, 463 Mich at 158, and *Haliw v Sterling Heights*, 464 Mich 297, 309 n 9; 627 NW2d 581 (2001). Further, "an *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 v Alpena County Road Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006).

In this instance, plaintiff tripped while walking across Parent Street. The Supreme Court has concluded that the highway exception includes a duty to "protect pedestrians from dangerous or defective conditions in the improved portion of the highway designed for vehicular travel, even when the injury does not arise as a result of a vehicular accident." *Nawrocki,* 463 Mich at 162. See also *Sebring v City of Berkley*, 247 Mich App 666, 680–681; 637 NW2d 552 (2001) ("[T]he plain language of the highway exception cannot be construed to afford protection only when a dangerous or defective condition of the improved portion of the highway designed for vehicular travel' affects vehicular travel. If the alleged dangerous condition is located in the actual roadbed designed for vehicular travel, then the highway exception applies and liability can attach.") (internal quotation marks and citations omitted).

Although the trial court focused on whether plaintiff had established constructive notice of the defect by defendant, we find that summary disposition was appropriate as a matter of law because the alleged defect at issue did not rise to a level that rendered the highway not reasonably safe and convenient for public travel. In support of her position regarding the severity of the defect, plaintiff points to photographs of the defect and her deposition testimony, in which she contended that the area where she tripped was "really, really broken up." The photographs, however, show a very minor defect; there is a small crack traversing the roadway, within which is poured a rubber filling material. The rise of the asphalt on one side of the crack barely reaches one-half of an inch, and in most of the photographs there is no discernable rise.[3] At her deposition, plaintiff admitted that she did not see the defect, which she described as a ridge, at the time she tripped because the sun was shining down on the road and it appeared to be smooth. Although plaintiff's trip and fall was unfortunate, her injuries alone do not render the road sufficiently defective. While a cracked, uneven roadway is clearly defective, a one-half inch vertical discontinuity and a small gap does not make it unsafe for public travel, and it was

[3] The depth of the crack, from the roadbed surface to the filler material, appears to be about one inch, and the width of the crack appears to be less than one inch.

not unreasonable that defendant had not repaired it. See *Wilson*, 474 Mich at 169. As such, the trial court properly granted summary disposition to defendant pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly