STATE OF MICHIGAN

COURT OF APPEALS

KAREN MARIE UTLEY,

Plaintiff-Appellant,

v

BOARD OF COUNTY ROAD COMMISSIONERS OF WASHTENAW COUNTY,

Defendant-Appellee.

UNPUBLISHED
April 24, 2012

No. 303572
Washtenaw Circuit Court
LC No. 10-000237-NI

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We reverse and remand.

Plaintiff and five of her friends were riding motorcycles on Zeeb Road in Lodi Township when plaintiff hit a pothole and was thrown to the ground and suffered serious injuries. The pothole was located at the crest of a hill where the road transitions from pavement to gravel. One of the riders testified that the hole was approximately six-inches deep and approximately two to three-feet wide. The other riders and the responding officer described the hole as "large" and "significant." Plaintiff filed suit against defendant, alleging that defendant was liable under the highway exception to governmental immunity, MCL 691.1402(1). The trial court granted defendant's motion for summary disposition.

We review a trial court's decision whether to grant summary disposition de novo. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; ___ NW2d ___ (2011). The determination whether a plaintiff's claim is barred by governmental immunity involves a question of law that we also review de novo. *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010). A moving party may support a motion under MCR 2.116(C)(7) with "affidavits, depositions, admissions, or other documentary evidence" if the substance of the supporting materials would be admissible at trial. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The documentary evidence submitted in support of the motion must be considered in a light most favorable to the non-moving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). Where the record presents a relevant factual

dispute, summary disposition is not appropriate. *Snead v John Carlo, Inc*, 294 Mich App 343; ___ NW2d ___ (2011).

Pursuant to the Government Tort Liability Act (GTLA), MCL 691.1401 *et seq*., a governmental agency is immune from tort liability whenever the agency is engaged in a governmental function. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000). However, the highway exception to governmental immunity provides in relevant part:

> [E]ach governmental agency having jurisdiction over any highway *shall maintain* the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his or her property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency . . . [MCL 691.1402(1).]

MCL 691.1403 grafts a notice requirement onto the highway exception as follows:

> 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 . . . .

In order to successfully show that a governmental agency violated its duty under MCL 691.1402(1) a plaintiff must demonstrate "that the governmental agency was on notice that the highway contained a defect rendering it not 'reasonably safe and convenient for public travel.'" *Wilson v Alpena Cty Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006).

> The governmental agency does not have a separate duty to eliminate all conditions that make the road not reasonably safe; rather, 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. [*Id.*]

Therefore, a plaintiff must present evidence that "a reasonable road commission, aware of [the] particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it." *Id*. A plaintiff must also show that the agency had actual or constructive knowledge and a reasonable amount of time to repair the defect. *Id*.

We find that, viewed in a light most favorable to plaintiff, the evidence was sufficient to create a relevant question of fact concerning whether the pothole amounted to a defect that a reasonable road commission would have understood "posed an unreasonable threat to safe public travel and would have addressed it." *Id*. It was uncontested that at the time of the crash, the pothole was very large. Bishop estimated that it was six inches deep and two to three feet wide, and other eyewitnesses agreed that the pothole was large. Plaintiff's expert, Edwin Novak, testified that the pothole was a "high level severity" pothole that had not been attended to by

defendant. And, as noted, plaintiff lost control of her bike when her front tire hit the pothole and two of the other bikers who hit the pothole had trouble controlling their bikes.

Defendant sought summary disposition arguing that there was no question of material fact on the issue of reasonable repair asserting that its employees had repaired the pothole three days before the crash and that an intervening heavy rainfall had caused the pothole to reappear. While defendant presented evidence to support its position, there was also contrary evidence from which a reasonable jury could conclude that defendant had not reasonably repaired the pothole. Although a department worksheet purported to show that a road worker conducted some spot scraping on this gravel road three days' prior to the accident it did not demonstrate that this pothole had been repaired, let alone reasonably repaired. The worker testified that he did not recall whether he scraped or otherwise repaired the pothole.

The mere presence of so large a pothole less than three full days after the road was spot-scraped supports a reasonable inference that the pothole was not repaired. In addition, plaintiff's expert Novak, a registered civil engineer who for 30 years had been employed by the Michigan Department of Transportation, testified that he reviewed the road commission's records, photographs of the site, depositions and visited the site himself. As noted, he described the pothole as a "high level severity pothole that's not been attended to" and stated that the roadway had "not been reasonably maintained. It's not safe."

Novak specifically rejected defendant's theory that the pothole had been reasonably repaired three days before the subject accident but had redeveloped because of the intervening rainfall. He testified that the rainfall would have *increased* the depth of the pothole by only a small amount and that the pothole would not have significantly changed in shape or depth as a result of the rainfall. Novak concluded, therefore that the post-accident and observations and photos were inconsistent with a repair having been conducted three days earlier. Referring to the post-accident photos, he testified that if the pothole had in fact been graded three days earlier "it wouldn't look like this." He further testified:

> Q: So your opinion would be that if they were out there spot scraping on June 18, 2009, as their records show, that they didn't – they didn't attend to this particular pothole?
>
> A: I don't think they did, no.
>
> Q: And would you repeat again the reason you don't think they did?
>
> A: Because the material on the west side of [exhibit 22] shows an accumulation of coarse aggregate which I don't think would exist if it had been brought and blended into the gravel that would be used to fill the hole . . . .

The testimony of plaintiff's expert clearly establishes a relevant question of fact whether the pothole had been repaired, let alone reasonably repaired, three days earlier as claimed by the

defendant, whose own employee testified that he could not recall if he had conducted any repair of the pothole.[1]

The evidence was also sufficient to create a relevant question of fact concerning whether defendant knew or should have known of the pothole. *Id*. A road commission foreman signed an affidavit attesting that, during the week before the accident, he inspected the area of Zeeb Road where the pothole was located. The foreman ordered repairs for that general area of the roadway, and, as noted above, records show that a road worker did conduct some repairs on the road three days before the accident. Accordingly, we conclude that there were genuine issues of material fact concerning whether defendant knew, or with the exercise of reasonable diligence should have known, of the pothole.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane M. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro

[1] The worker's testimony that he believes that if he had seen the pothole he would have reasonably repaired it is relevant and does weigh in favor of defendant's position. It is not, however, dispositive evidence and is contradicted by the evidence offered by plaintiff.