

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS LAMEAU, Personal Representative of
the ESTATE OF JOHN M. CRNKOVICH,
deceased,

Plaintiff-Appellee,

v

CITY OF ROYAL OAK,

Defendant-Appellant,

and

DETROIT EDISON COMPANY,

Defendant-Appellee,

and

GAGLIO PR CEMENT CORPORATION, ELDEN
DANIELSON, and BRIAN WARJU,

Defendants.

THOMAS LAMEAU, Personal Representative of
the ESTATE OF JOHN M. CRNKOVICH,
deceased,

Plaintiff-Appellee,

v

CITY OF ROYAL OAK and GAGLIO PR
CEMENT CORPORATION,

Defendants,

and

FOR PUBLICATION
July 13, 2010
9:00 a.m.

No. 290059
Oakland Circuit Court
LC No. 2007-083761-NO

No. 292006
Oakland Circuit Court
LC No. 2007-083761-NO

DETROIT EDISON,

Defendant-Appellee,

and

ELDEN DANIELSON and BRIAN WARJU,

Defendants-Appellants.

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

M. J. KELLY, J.

In this suit to recover damages for wrongful death allegedly caused by a defective sidewalk, defendants City of Royal Oak, Elden Danielson, and Brian Warju appeal as of right the trial court's denial of their motions for summary disposition premised on governmental immunity. Because the trial court correctly determined that Royal Oak, Danielson and Warju were not entitled to governmental immunity, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE SIDEWALK AND ACCIDENT AT ISSUE

Bryan Warju¹ testified at his deposition that he was an engineering assistant under the supervision of Royal Oak's City Engineer, Elden Danielson. Warju stated that he served as the field manger for Royal Oak's sidewalk improvement project in the summer of 2005. Warju said he walked the area on the south side of Normandy Street where a new sidewalk was to be constructed and noticed a telephone pole's guy wire anchored into the soil that crossed the path of the proposed sidewalk.

Skylan McBeth, who is a service planner with Detroit Edison, testified that a guy wire is a steel cable that runs from a telephone pole to an anchor in the ground. The wire pulls the pole in the opposite direction as the weight on the pole. McBeth said that a "down guy" is a guy wire that runs in a direct line from the pole to the ground. However, a "sidewalk guy" is a wire that runs along a three-inch steel bar that juts out from the telephone pole and then proceeds straight down from the end of the bar to the anchor in the ground.

In May 2005, Warju informed various parties, including defendant Gaglio PR Cement Corp (Gaglio Cement) and defendant Detroit Edison Company (Detroit Edison), about a pre-construction conference to discuss the details of the 2005 summer sidewalk construction project.

¹ At his deposition, Warju clarified that he spells his first name Bryan.

The letter indicated that the conference would include a discussion concerning any conflicts with utilities. Danielson averred that Detroit Edison did not send a representative to this meeting and Warju stated in his affidavit that he would have discussed the existence of the guy wire with the representative from Detroit Edison had a representative gone to the meeting. Danielson also averred that he spoke with various persons from Detroit Edison and orally requested them to move the guy wire to a safe location. However, no one from Detroit Edison came to move the wire.

Rosalino Gaglio (Rosalino) testified that he was a foreman with Gaglio Cement and that he visited the site on Normandy where the sidewalk was to be constructed. He stated that he saw the wire at issue and told Warju that the wire needed to be moved. Rosalino said that Warju told him that he would contact Detroit Edison and have it moved.

Salvatore Gaglio (Salvatore) testified that he was a foreman with Gaglio Cement and that he worked on the project to pour a new sidewalk on Normandy in 2005. He stated that Royal Oak had set out the path of the new sidewalk using stakes and paint. As they approached the guy wire, he notified Royal Oak's inspector about the need to move the wire. He said that Warju told them to just block it off, but he responded that they should either block it off further back or stop the project until the guy wire could be moved. Rosalino stated that he wanted to leave 10 flags—which are 5 foot by 5 foot slabs of concrete—open on either side of the guy wire. Thus, there would have been 50 feet of unpaved land on either side of the guy wire. However, Warju disagreed with this approach: “he made us form it to the guy wire. He told me not to form it like that. He told me go right up to the guy wire and just leave one flag out.” Rosalino said that he did as Warju asked, but warned that it was not a good idea because “people could get hurt over here, with this wire being here.” Salvatore also said he warned Warju many times about the hazard of cementing up to the wire. At his deposition, Warju explained that he ordered Gaglio to pave up to the guy wire because he was on a schedule: “Well, we are on a schedule to do the sidewalk. We are coming down that street. We are not going to stop and wait for nine months in this case for Detroit Edison to relocate their wire along with other objects which are in the way.”

Salvatore said they prepared the area around the guy wire for cementing, but left it unpaved. Later Warju instructed them to fill the gap left at the point where the guy wire was anchored to the ground with asphalt. Salvatore said he protested that the “wire still hasn't been moved,” but Warju said, “just put it there, and then next year when you guys come back, you guys can fill it in with the concrete.” Salvatore said he warned Warju that if they put asphalt in there, people are going to just “kick over our barricades and walk through.” He said that Warju told him not to “worry about it, we'll just keep an eye on it.” Danielson testified that the city does not have a policy that construction should be halted because of a conflict with a utility; rather, the proper procedure is to barricade the area.

According to an inspection report, Gaglio Cement paved the area between the cement portions of the sidewalk with asphalt on July 22, 2005. Photos of the anchor for the guy wire show that the anchor was actually in the asphalt and the wire crossed the path of the sidewalk at an angle to the telephone pole.



Rosalino said that Warju made them surround the area with barricades. He placed the barricades in such a way that the sidewalk “wasn’t useable in between that area.” Unfortunately, people kept taking the barricades and throwing them. For that reason, he reemphasized that Warju had to move the wire because the barricades “are missing every day.” He said that Royal Oak even sent others to barricade the location. Rosalino said that the problem persisted even after they completed working for the summer and returned in the spring of 2006: “And I told Bryan [Warju], it’s like that wire’s still there, it’s been eight months now. I was like why is that wire still there. I was like you gotta move that wire, ‘cause they’re taking the barricades and we just put more barricades there.”

Douglas Burg testified at his deposition that he was a lineman with Detroit Edison and that he was dispatched to Normandy Street on April 24, 2006, regarding a bicyclist who had struck a guy wire. When he arrived there were no emergency personnel and no injured person, but he noticed that the plastic guard for the guy wire was on the ground some feet from the guy wire. He reattached the guy guard after tightening some lines. After this he called his dispatch and instructed them to have a service planner schedule a project to move the guy wire as soon as possible. He wrote a note that stated: “At the lead south of Normandy, 10 poles east of Crooks a guy ran into the down guy on his bike. We looked at it and it does need a sidewalk guy to stop decapitating pedestrians. Needs service planning.” Burg said he was so concerned about the wire that, if he had had the right crew with him, he would have asked for permission to move the wire immediately.

McBeth testified that he received a memo about a potential problem with a guy wire on Normandy. He acknowledged that the memo stated that the area needed a sidewalk guy in order to stop decapitating pedestrians. McBeth said he got the memo on May 4, 2006, and went to the site on the same day. He said that he was concerned about the guy wire and let his supervisor know that the guy wire needed to be moved as soon as possible. Indeed, McBeth said he turned the job package in the same day and told his supervisor that he short dated it, meaning that it should be done in two weeks rather than the normal six weeks, which he thought was warranted by the seriousness of the situation.

David Colling testified at his deposition that his daughter Lara fell and injured herself while riding her bike by the area of the guy wire at issue. He stated that Lara had her accident in May 2006 before the accident at issue here and that the accident happened at around four or five in the afternoon.

At approximately 11:00 pm on May 24, 2006, John Crnkovich rode a small scooter equipped with a gas motor down the sidewalk on the south side of Normandy. A cyclist stated that he rode past Crnkovich, who he thought was moving at a high rate of speed given the high pitch sound of the engine, on the sidewalk going in the opposite direction. The cyclist said that, when he got to the driveway of the adjacent school, he heard a crash. He turned around and went back where he saw that Crnkovich had hit the guy wire. He said that Crnkovich was bleeding from his neck and unresponsive. The cyclist stated that a motorist stopped and called for help. Crnkovich died from his injuries.

The pathologist who autopsied Crnkovich indicated that Crnkovich, who was 35 years old and 253 pounds at the time, died from blunt force trauma to his neck and head. The pathologist specifically noted that Crnkovich had "Separation of C3 from C4 with transection of the spinal cord." The pathologist also noted that Crnkovich was under the influence of alcohol and marijuana. According to a toxicology report, Crnkovich had 0.13 g/dL of Ethyl alcohol in his femoral blood and 4 ng/mL of THC and 13 ng/mL of Carboxy THC in his heart blood.

B. PROCEDURAL HISTORY

In June 2007, Thomas LaMeau, who was acting as the personal representative of Crnkovich's estate, sued Royal Oak and Detroit Edison for damages arising out of Crnkovich's death. LaMeau amended the complaint to state new claims and eventually to state claims against Gaglio Cement, Danielson, and Warju. For his first count of his third amended complaint, LaMeau alleged that Detroit Edison negligently placed, maintained, and failed to move its utility pole and guy wire and that this negligence caused Crnkovich's death. In the second count, LaMeau alleged that Royal Oak had a duty to maintain its sidewalks in reasonable repair and that it breached that duty by imbedding the guy wire anchor in the sidewalk, which breach caused Crnkovich's death. LaMeau alleged in the third count that Gaglio Cement breached its duty to perform its contract with Royal Oak in a proper and workmanlike manner by building an unsafe sidewalk that ultimately caused Crnkovich's death. LaMeau also alleged various nuisance claims in counts four through nine. In counts ten and eleven respectively, LaMeau alleged that Danielson and Warju were grossly negligent in planning and constructing the sidewalk at issue and that their gross negligence caused Crnkovich's death.

Royal Oak moved for summary disposition of LaMeau's claims in October 2008. Royal Oak argued that it was entitled to summary disposition because LaMeau failed to plead claims in avoidance of its governmental immunity. Specifically, Royal Oak argued that the guy wire and anchor were part of the telephone pole and, therefore, were expressly excluded from the definition of a highway for purposes of the highway exception to governmental immunity.

Gaglio Cement also moved for summary disposition in October 2008. Gaglio Cement argued that LaMeau failed to allege that it breached a duty owed to Crnkovich beyond the duty arising under its contract with Royal Oak. It also argued that LaMeau's claims were barred because Crnkovich was more than 50% at fault and under the influence of alcohol and marijuana.

In December 2008, Danielson and Warju moved for summary disposition, in part, on the grounds that LaMeau's claims against them were barred by governmental immunity. Specifically, they argued that their actions with regard to the construction of the sidewalk did not rise to the level of gross negligence and were not "the" proximate cause of Crnkovich's injuries.

On January 5, 2009, the trial court signed an opinion and order in which it addressed the motions by Royal Oak and Gaglio Cement. The trial court granted the motions with regard to the nuisance claims, but denied the motions for the individual negligence claims against Royal Oak and Gaglio Cement.

On January 7, 2009, Royal Oak again moved for summary disposition along with Danielson and Warju. In this motion, Royal Oak and its employees argued that LaMeau failed to establish that the sidewalk itself caused Crnkovich's injuries. Rather, they argued, Crnkovich's own reckless behavior was the cause of his own injuries. They also argued that there were superseding intervening causes that precluded LaMeau's claims against them: "1) [Crnkovich's] careless and illegal behavior; 2) [Detroit Edison's] failure to respond to [Royal Oak's] request to relocate the wire . . .; 3) The unknown person(s) removing the barricades, barrels, and yellow safety tape and/or sleeve; and, 4) Gaglio's alleged failure to determine if the barrels were in place on May 24, 2006." Finally, Royal Oak, Danielson, and Warju argued that Crnkovich's wrongful conduct and intoxication barred him from recovery as a matter of law.

Royal Oak appealed as of right the trial court's denial of its motion for summary disposition founded on governmental immunity on January 26, 2009. This Court assigned that appeal docket no. 290059.² Royal Oak's appeal automatically stayed the proceedings below. See MCR 2.614(D). On February 10, 2009, Royal Oak filed a motion asking this Court to permit the trial court to conduct a hearing on the pending motions for rehearing and summary disposition. This Court entered an order for remand on March 13, 2009.³

² This Court granted leave to Gaglio Cement to appeal the trial court's decision to deny its motion for summary disposition. However, that appeal was later stayed pending bankruptcy. See *LaMeau v City of Royal Oak*, unpublished order of the Court of Appeals, entered April 29, 2010 (Docket No. 289947).

³ *LaMeau v City of Royal Oak*, unpublished order of the Court of Appeals, entered March 13, (continued...)

On April 29, 2009, the trial court entered an opinion and order denying Danielson and Warju's motion for summary disposition premised on governmental immunity. In a separate opinion and order entered on the same day, the trial court denied the motion for reconsideration filed by Royal Oak, Danielson, and Warju.

Danielson and Warju appealed the trial court's decision to deny their motion for summary disposition on May 11, 2009. This Court assigned that appeal docket no. 292006.

II. GOVERNMENTAL IMMUNITY

A. STANDARDS OF REVIEW

On appeal, Royal Oak, Danielson, and Warju primarily argue that the trial court erred when it determined that LaMeau's claims against them were not barred by governmental immunity and, for that reason, denied their motions for summary disposition under MCR 2.116(C)(7), (8), and (10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg, Inc v Gates Engineering Co, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

A trial court properly grants summary disposition under MCR 2.116(C)(7) where a claim is barred by immunity granted by law. A party may support or defend a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court reviews the evidence in the light most favorable to the nonmovant to determine whether a plaintiff's claim is barred by immunity. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). If the submissions demonstrate that there is a factual dispute as to whether immunity applies, summary disposition is not appropriate. *Id.*

A motion for summary disposition brought under MCR 2.116(C)(8) tests the "legal sufficiency of the complaint on the allegations of the pleadings alone." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When reviewing a motion under MCR 2.116(C)(8), this Court accepts all well-pleaded allegations as true and construes them in a light most favorable to the nonmovant. *Maiden*, 461 Mich at 119. Summary disposition under MCR 2.116(C)(8) is appropriate only where the claims alleged are so clearly unenforceable that no factual development could justify recovery. *Id.*

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 120. A party may be entitled to summary disposition under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact" This Court reviews a motion brought under this subsection by considering the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most

(...continued)

2009 (Docket No. 290059).

favorable to the party opposing the motion to determine whether there are genuine issues of material fact. *Maiden*, 461 Mich at 120.

B. THE HIGHWAY EXCEPTION

Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, a governmental agency is “immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” MCL 691.1407(1). It is undisputed that Royal Oak is a governmental agency, see MCL 691.1401(b) and (d), and that its construction of the sidewalk at issue constituted the exercise of a governmental function. Thus, unless one of the statutory exceptions to immunity applies to this case, Royal Oak is immune from tort liability arising from its construction of the sidewalk.

One exception to the immunity provided by MCL 691.1407(1) is the highway exception to governmental immunity. Under MCL 691.1402(1), every “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.” Further, 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 condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.” *Id.* The Legislature defined highway to include “a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway.” MCL 691.1401(e). Hence, Royal Oak may be liable for breaching its duty under MCL 691.1402(1) to keep the sidewalk in reasonable repair.

Although Royal Oak concedes that it has a duty to maintain the sidewalk at issue in reasonable repair, it argues that the sidewalk itself was not defective. Rather, the problem was with the placement of the anchor for the guy wire and the guy wire that supported a nearby telephone pole. Because the guy wire and its anchor are by definition not part of the highway, Royal Oak argues that it cannot be held liable for the dangerous placement of the anchor and guy wire. Royal Oak relies on MCL 691.1401(e) to support its contention that the improper placement of the anchor and guy wire at issue cannot give rise to liability because those structures are never part of a highway.

1. DEFINITION OF HIGHWAY

MCL 691.1401(e) defines the term highway to broadly include public highways, roads, and streets that are “open for public travel.” It also clarifies that certain structures that are “on the highway” are included within the definition: “bridges, sidewalks, trailways, crosswalks, and culverts.” *Id.* It also defines highway to not include one type of thoroughfare—“alleys”—and to not include “trees, and utility poles,” even though trees and utility poles will often be located within the right-of-way of a highway. *Id.*

In this case, Crnkovich died when he struck a guy wire that was strung across Royal Oak’s sidewalk and connected to an anchor imbedded in the sidewalk at one end and in a utility pole at the other end. Thus, the question becomes whether the exclusion of utility poles from the definition of highway insulates Royal Oak from liability for paving the sidewalk through the anchor and under the guy wire with insufficient clearance for persons using the sidewalk.

The definition of the term “highway” has no operative effect outside of the substantive provisions of the GTLA—that is, the definition must be interpreted in light of the provisions of the statute that impose liability. MCL 691.1402(1) imposes a duty on municipalities to maintain its highways “in reasonable repair.” Therefore, the definition of highway is integral to understanding what the municipality must maintain in reasonable repair; it must maintain its public highways, roads, and streets in reasonable repair and it must maintain the bridges, sidewalks, trailways, crosswalks, and culverts that are associated with those highways in reasonable repair. In contrast, a municipality does not have a duty to maintain alleys in reasonable repair and does not have a duty to maintain trees and utility poles that may be within the highway right-of-way in reasonable repair. However, the fact that a municipality does not have a duty to maintain utility poles in reasonable repair does not relieve a municipality of its duty to maintain its sidewalks in reasonable repair even when a utility pole causes the sidewalk’s state of disrepair. Thus, assuming—without actually deciding—that the anchor and guy wire constitute “utility poles” within the meaning of MCL 691.1401(e), Royal Oak nevertheless had a duty to make reasonable repairs to its sidewalk that were occasioned by the anchor and guy wire.⁴

Under these facts,⁵ the anchor and guy wire were part of the sidewalk. This case does not involve conditions that are external to the sidewalk such as snow, ice, or an oil spill. See *Estate of Buckner v Lansing*, 480 Mich 1243, 1244; 747 NW2d 231 (2008) (explaining that “the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a ‘defect’ in the sidewalk . . .”). This case involves a physical structure in the sidewalk itself. Further, the structure is not a fixture that was attached to the sidewalk after the sidewalk’s construction. See *Ali v City of Detroit*, 218 Mich App 581, 589; 554 NW2d 384 (1996) (holding that the definition of highway does not include fixtures, such as a bus passenger shelter, that are “linked with the sidewalk solely by its placement.”). Rather, the anchor and guy wire were in place *prior* to the construction of the sidewalk. And Royal Oak decided to construct the sidewalk in such a way as to incorporate the guy wire and its anchor into the sidewalk. Once Royal Oak decided to pave through the guy wire and anchor, the fact that the anchor and guy wire were also attached to a utility pole become irrelevant because the anchor and guy wire were, at that point, part of the sidewalk.⁶

For these reasons, we reject Royal Oak’s argument that MCL 691.1402(1) must be narrowly construed to exclude the defect at issue. Although this Court must construe the

⁴ For example, if a utility pole fell and seriously damaged a sidewalk, the fact that the defect in the sidewalk was caused by a utility pole would not relieve the municipality of any liability arising from its failure to remedy the defect.

⁵ At oral argument, the parties acknowledged that this case involved unique facts and was an issue of first impression.

⁶ By way of example, if Royal Oak’s contractors had left a work boot in a freshly poured concrete slab with one half submerged and the other half protruding above the level of the concrete, the boot would be part of the sidewalk such that Royal Oak would be liable for harms caused by the failure to remedy the defect.

exceptions to governmental immunity narrowly, *Nawrocki v Macomb Co Rd Comm’n*, 463 Mich 143, 158; 615 NW2d 702 (2000), this Court is not at liberty to ignore the plain language of the statute under the guise of interpreting it narrowly, see *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005); and MCL 691.1402(1) plainly and unequivocally imposes liability on municipalities for defects in sidewalks—even if the defect in the sidewalk is occasioned by the presence of a structure that the municipality would normally not have a duty to maintain in reasonable repair.

2. JURISDICTION

Royal Oak also argues that it did not have jurisdiction over the anchor and guy wire at issue. However, Royal Oak admitted that it has jurisdiction over the sidewalk and, once it chose to incorporate the anchor and guy wire into its sidewalk, it necessarily acquired jurisdiction over the anchor and guy wire to the extent that they were part of the sidewalk. See MCL 691.1401(1)(e); MCL 691.1402(1). Moreover, the fact that Royal Oak did not have the equipment or expertise to relocate the anchor and guy wire did not relieve it of its duty to rectify the defective condition; had Royal Oak wanted to avoid responsibility for the anchor and guy wire, it could simply have elected not to incorporate those structures into its sidewalk. Indeed, if Royal Oak had followed the advice of its own contractor and left several flags on either side of the anchor and guy wire unpaved—or even left the flag at issue unpaved—Royal Oak would have had no duty with regard to the anchor and guy wire. See MCL 691.1401(1)(e).

3. OPEN TO PUBLIC

Contrary to Royal Oak’s contention, the evidence does not demonstrate that the sidewalk at issue was closed to the public. See *Pusakulich v Ironwood*, 247 Mich App 80, 85-86; 635 NW2d 323 (2001) (noting that a governmental agency can suspend its duty to keep its highways in good repair by closing it to public traffic). Royal Oak presented evidence that it had Gaglio Cement barricade the flag at issue to prevent the general public from using the sidewalk at the point where it crossed under the guy wire. However, the evidence also shows that the remainder of the new sidewalk was open to the public and that Royal Oak ordered Gaglio Cement to pave the missing sidewalk flag with asphalt. Likewise, the evidence shows that the barricades were routinely moved or stolen from the location and there is evidence from which reasonable persons could conclude that there were no barriers in place on the date at issue. Under the totality of the circumstances, whether Royal Oak had closed the sidewalk to the public is a question of fact.

4. THE TWO-INCH RULE

Royal Oak also argues that LaMeau’s claims are barred under MCL 691.1402a. However, our Supreme Court recently explained that the limitations stated under MCL 691.1402a(2) apply only to sidewalks that are adjacent to a county highway. *Robinson v Lansing*, 486 Mich 1, 21-22; ___ NW2d ___ (2010). In this case, there is no evidence that the sidewalk at issue is adjacent to a county highway. Therefore, MCL 691.1402a(2) does not apply to the street at issue. Further, even if MCL 691.1402a(2) could be said to apply under the facts of this case, the rebuttable inference provided under that statute applies only to “a discontinuity defect” in a sidewalk. Because this case does not involve a discontinuity defect, that presumption does not apply.

5. NOTICE

Finally, Royal Oak argues that LaMeau's claims are barred under MCL 691.1403 because it did not have the required 30-day notice of the defect. Specifically, Royal Oak contends that LaMeau had to show that Royal Oak had notice that the barricades were missing before the accident at issue. Royal Oak's argument that it had to have notice that the barricades were missing is unpersuasive. MCL 691.1403 requires notice of the defect in the highway—not the absence of barricades warding travelers from the defect. The undisputed evidence in this case shows that Royal Oak was not only aware of the defective condition, its employees actually *created* the defective condition. See *Wilson v Alpena Co Rd Comm'n*, 263 Mich App 141, 149; 687 NW2d 380 (2004) (noting that governmental agency's employee's knowledge of a defect will be imputed to the agency). Further, knowledge of the defect is "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. The evidence in this case shows that the extreme danger posed by the defective condition of the sidewalk—that is, the anchor and guy wire—was "readily apparent" for the requisite 30 days. And, in any event, there is evidence that even after Royal Oak created the defective condition, its contractor repeatedly warned it about the continuing hazard from the anchor and guy wire. Finally, there is clear evidence that Royal Oak had notice that a cyclist fell after encountering the guy wire over the sidewalk. Accordingly, there is no dispute that Royal Oak had adequate notice of the defect for purposes of MCL 691.1403.

6. CONCLUSION

Royal Oak had a duty under the highway exception to rectify the defect that it created in the sidewalk after it decided to pave the sidewalk through the anchor and, thereby, incorporate the anchor and guy wire into the sidewalk. MCL 691.1402(1). Therefore, the trial court did not err when it denied Royal Oak's summary disposition on the ground that Royal Oak was immune to suit. Given the conclusion that Royal Oak could be liable under MCL 691.1402(1) for the actual defect at issue—the anchor and guy wire incorporated into the sidewalk, we decline to consider whether Royal Oak could be liable under a failure to warn or negligent design theory.

C. IMMUNITY FOR GOVERNMENTAL EMPLOYEES

On appeal, Danielson and Warju argue that the trial court also erred when it refused to dismiss LaMeau's claims against them on the ground that they were entitled to governmental immunity. Under MCL 691.1407(2), certain classes of persons working for governmental agencies are immune from tort liability if all the following are true:

- (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise of a governmental function.
- (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

The first two criteria are not at issue. Rather, Danielson and Warju only argue that their actions did not amount to gross negligence and, even if they did, their actions did not amount to “the” proximate cause of Crnkovich’s injuries.

1. GROSS NEGLIGENCE

In order to survive a motion for summary disposition premised on the immunity afforded to governmental employees, the plaintiff must present evidence sufficient for a reasonable finder of fact to conclude that the employee was grossly negligent. If there is no question of fact as to whether the allegedly negligent conduct rises to the level of gross negligence, the court may decide the question as a matter of law. Evidence of ordinary negligence will not be sufficient to survive summary disposition. *Maiden*, 461 Mich 122-123 (“[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence.”); see also *Costa v Community Medical Services*, 475 Mich 403, 411; 716 NW2d 236 (2006) (noting that the gross negligence exception applies to situations “in which the contested conduct was substantially more than negligent.”). Rather, there must be evidence that the employee engaged in “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a); see also *Maiden*, 461 Mich at 123.

On appeal, Danielson and Warju frame the issue in terms of their conduct after the construction of the sidewalk at issue. That is, they argue that the evidence concerning the steps they took to barricade the sidewalk and to get Detroit Edison to move the anchor and guy wire do not rise to the level of gross negligence; instead, they contend: “If such a minor level of negligence is sufficient to avoid immunity, immunity for individuals based upon gross negligence would be undermined, if not abrogated.” However, the proper focus is not solely on the evidence concerning the steps they took *after* creating the defect in the sidewalk. Rather, the totality of their conduct—including their actions leading to the creation of the defect in the sidewalk as well as the steps they took to remediate the defect—must be evaluated when determining whether their actions could be found to amount to gross negligence. Indeed, if the defect had not been created in the first instance, then there would have been no need to remediate it.

Although the sidewalk project called for the placement of the sidewalk through the area occupied by the anchor and guy wire, the decision to place the sidewalk along this path was not inherently negligent—let alone grossly negligent—given that the anchor and guy wire could be relocated.⁷ Indeed, there is evidence that another utility was able to timely move its own anchor and guy wire. However, once Gaglio Cement began to prepare the area and pour concrete flags, both Rosalino and Salvatore Gaglio noticed that the anchor and guy wire had not been relocated

⁷ By pointing out this fact, we do not mean to imply that the negligent design of a highway or sidewalk might be actionable—it is now settled that design defects are not actionable. See *Hanson v Mecosta Co Rd Comm’rs*, 465 Mich 492, 502-504; 638 NW2d 396 (2002). As already noted, this case involves a physical defect in the surface of the sidewalk occasioned by the incorporation of the guy anchor and wire into the sidewalk during construction; it does not involve a defect in the design or layout of the sidewalk.

and informed Warju of the need to move it. Nevertheless, Warju ordered them to proceed with the project and told them to just block the area off. Rosalino disagreed with this course and urged Warju to leave a substantial distance—fifty feet in either direction—unpaved for safety. Despite Rosalino's protestation that people would get hurt, Warju told them to pave right up to the anchor and guy wire and leave just one flag unpaved.

Sometime later, Warju asked Salvatore to fill the missing flag with asphalt. Salvatore again warned Warju against paving the area before the guy wire was relocated, but Warju said, "just put it there, and then next year when you guys come back, you guys can fill it in with the concrete." Salvatore said he also warned Warju that if they put asphalt in there, people were going to just "kick over our barricades and walk through." He said that Warju told him not to "worry about it, we'll just keep an eye on it."

When asked whether Warju could have halted the project to await the relocation of the anchor, Danielson admitted that he could have done so, but explained that there was no policy requiring that. Instead, he said the proper procedure is to complete the project and barricade the area. Similarly, when asked to explain why he did not leave the area unpaved, Warju explained: "Well, we are on a schedule to do the sidewalk. We are coming down that street. We are not going to stop and wait for nine months in this case for Detroit Edison to relocate their wire along with other objects which are in the way."

The testimony concerning the events leading up to the creation of the hazard strongly suggests that Danielson and Warju were indifferent to the magnitude of the danger being created. The anchor and guy wire posed a clear danger even to pedestrians traversing the paved portion of the sidewalk. Yet, the danger increased dramatically for persons moving at any speed greater than a walk—the location of the fence on one side and of wires and poles on the other made it difficult for any person moving at a speed to avoid the hazard, and the height of the guy wire rendered anyone who failed to avoid it in danger of sustaining a head or neck injury. Given this evidence, Danielson and Warju should have realized the seriousness of the hazard they were creating by ordering the sidewalk to be paved prior to moving the anchor and guy wire and, on the basis of this evidence, a reasonable jury could conclude that the decision to incorporate the anchor and guy wire into the sidewalk demonstrated "a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Maiden*, 461 Mich at 122-123 (stating that, in order to survive a motion for summary disposition premised on governmental immunity for governmental employees, a plaintiff must adduce proof of conduct so reckless that it demonstrates a substantial lack of concern for whether an injury result). Even if Danielson and Warju did not fully appreciate the danger, the evidence also shows that they were repeatedly warned about the danger posed by paving up to the anchor and guy wire, yet ordered Gaglio Cement to proceed anyway.

Further, although there was evidence that Danielson and Warju contacted Detroit Edison about moving the anchor and guy wire, the evidence also suggests that Danielson and Warju's efforts in this regard were deficient. Neither Danielson nor Warju ever formally requested Detroit Edison to relocate the anchor and guy wire. Warju did send a letter to Detroit Edison advising it of a meeting concerning the project and in the letter he noted that any conflicts with utilities would be discussed at the meeting, but he addressed the letter to a person who was not located at the office to which the letter was addressed and who was not responsible for resolving utility conflicts. Likewise, although Danielson testified that he contacted various Detroit Edison

personnel about moving the anchor and guy wire, he admitted that the requests were verbal and evidence shows that some of these communications occurred during discussions about other projects. In addition, there was evidence from which one could conclude that Detroit Edison did not receive any requests—verbal or otherwise—to move the anchor and guy wire. Thus, there was evidence from which a reasonable finder-of-fact could conclude that the efforts to have the anchor and guy wire relocated were not just deficient, but grossly deficient.

The evidence also shows that Danielson and Warju’s efforts to safeguard the public from the hazard they created were inadequate. Although there is evidence that the sidewalk was barricaded at the point of the hazard, there is also evidence that the barricades were repeatedly moved or stolen. Rosalino testified that he warned Warju over and over again about the problem with the barricades and told him that the wire had to be moved; he even expressed exasperation over the fact that the wire had not been moved after eight months. Moreover, the photos from the accident at issue show no sign of any barricade within the general vicinity of the anchor and guy wire. There was also evidence that the general public was using the sidewalk before the accident at issue. The evidence shows that two cyclists were injured while encountering the hazard and that Royal Oak clearly had notice of one of those accidents because its fire department responded and generated a report about the guy wire at issue.

When the totality of the evidence and testimony concerning the events at issue are viewed in light most favorable to LaMeau, there is a clear question of fact as to whether Danielson and Warju were grossly negligent. The evidence shows that Danielson and Warju created the hazard at issue by paving a path right up to and including the anchor and guy wire notwithstanding the evident serious danger. The evidence also shows that their efforts to have the anchor and guy wire moved were deficient and untimely, and that they ignored the fact that the barricades were inadequate and that the general public was using the sidewalk. Taken together, this conduct could be found to be “so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). Accordingly, the trial court did not err when it concluded that there was evidence from which a finder of fact could conclude that Danielson and Warju were grossly negligent.

2. “THE” PROXIMATE CAUSE

Danielson and Warju also argue that, even assuming that there is a question of fact as to whether their conduct rose to the level of gross negligence, they are nevertheless entitled to immunity because there is no question of fact as to whether their conduct was “the” proximate cause of Crnkovich’s injuries. The Legislature has provided that a governmental employee will be immune from tort liability unless his or her conduct amounted “to gross negligence” and that gross negligence was “*the* proximate cause of the injury or damage.” MCL 691.1407(2)(c) (emphasis added). Our Supreme Court has held that the Legislature’s reference to “the proximate cause”—as opposed to “a proximate cause”—means that the employee’s gross negligence must be more than just a proximate cause of the injury in order to meet the requirements of the exception to the governmental employee’s immunity. See *Robinson v Detroit*, 462 Mich 439, 461-463; 613 NW2d 307 (2000). Instead, a governmental employee will be immune from tort liability unless his or her conduct amounted to gross negligence that was “the one most immediate, efficient, and direct cause of the injury or damage . . .” *Id.* at 462.

On appeal, Danielson and Warju argue that Detroit Edison negligently failed to move the anchor and guy wire after Warju and Danielson requested its removal and after receiving notice of the accident with the cyclist. They also argue that Crnkovich himself was largely at fault for his own accident. Specifically, they note that Crnkovich illegally rode the motor scooter on the sidewalk, that he did so at night and without appropriate safety equipment, at a high rate of speed and while under the influence of the alcohol and marijuana. They also fault Gaglio Cement for not taking better steps to ensure that the area was properly barricaded, and fault unknown persons for removing the barricades. On the basis of this evidence, Danielson and Warju contend that—even if their conduct were deemed grossly negligent—their conduct was clearly not the one most immediate, efficient, and direct cause of Crnkovich’s injuries.

In the present case, there is evidence from which a reasonable jury could conclude that Crnkovich’s conduct was the one most immediate, efficient, and direct cause of his injuries. He elected to ride the motor scooter at night, without protective gear, and after having ingested alcohol and marijuana at some prior point. However, there was also evidence from which a reasonable jury could conclude that Danielson and Warju’s conduct in creating the hazard at issue and then failing to rectify or mitigate the hazard constituted the one most immediate, efficient, and direct cause of Crnkovich’s injuries. Danielson and Warju were responsible for the decision to pave the sidewalk directly up to and including the anchor and guy wire. And a reasonable jury could conclude that, had Warju halted the project or followed Rosalino’s advice to leave 50 feet of land unpaved on either side of the anchor and guy wire, Crnkovich could not have operated his small motor scooter on the unpaved land or, if he had traversed the unpaved land, that he could not have had a catastrophic collision with the anchor and guy wire. In addition, a reasonable jury could conclude that it was Danielson and Warju’s failure to formally request the relocation of the anchor and guy wire that caused Detroit Edison to be unable to move the anchor and guy wire in time to prevent the accident. Indeed, the evidence supports an inference that Detroit Edison was not aware of the changed circumstances involving the anchor and guy wire—namely, that Danielson and Warju had paved through the anchor and under the guy wire and, thereby, created a far more hazardous condition than previously existed; a condition that only then urgently required Detroit Edison’s intervention. As for Gaglio Cement’s alleged failure to properly barricade the site, the evidence shows that Gaglio Cement contracted with Royal Oak under the supervision of Danielson and Warju. There is also evidence that Salvatore warned Warju that barricading the site would not prevent injuries and that the barricades would likely be removed. Rosalino also informed Warju about the problem with the barrels and urged him to ensure that the guy wire got relocated. From this, a reasonable jury could conclude that the failure to have barricades in place was attributable to Danielson and Warju’s conduct or was not a significant cause of Crnkovich’s injuries.

In light of the evidence before the trial court, a question of fact clearly existed regarding the one most immediate, efficient, and direct cause of Crnkovich’s injuries.

3. CONCLUSION

Considering the evidence presented to the trial court, a reasonable jury could conclude that Danielson and Warju’s acts in ordering the paving of the area up to and including the anchor and guy wire, as well as their failure to have the anchor and guy wire relocated and properly barricaded, amounted to gross negligence. Likewise, a reasonable jury could conclude that the one most immediate, efficient, and direct cause of the injuries at issue was Danielson and

Warju's grossly negligent conduct. MCL 691.1407(2)(c); MCL 691.1407(7)(a); *Robinson*, 462 Mich at 462. Accordingly, the trial court did not err when it denied Danielson and Warju's motion for summary disposition premised on governmental immunity.

III. GENERAL CONCLUSION

The trial court correctly determined that Royal Oak, Danielson and Warju were not entitled to governmental immunity under the facts of this case. For that reason, it did not err when it denied their motions for summary disposition on that basis.

Affirmed in both dockets.

/s/ Michael J. Kelly

/s/ E. Thomas Fitzgerald