STATE OF MICHIGAN

COURT OF APPEALS

ERIC ANDERSON and TERRI DALLAS, as Next Friend of TERTRICE DALLAS, Plaintiffs-Appellees, v CITY OF DETROIT, Defendant-Appellant, and COUNTY OF WAYNE, Defendant.	UNPUBLISHED September 20, 2007 No. 273727 Wayne Circuit Court LC No. 05-516242-NO

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant city of Detroit ("defendant") appeals as of right from the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7) (governmental immunity). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On February 19, 2005, plaintiff Eric Anderson was driving eastbound on Jefferson Avenue at the intersection of McDougall in the city of Detroit. Anderson ran over an unbolted or loose sewer grate and it shot up underneath his vehicle. As a result, he lost control of his vehicle and his car struck a nearby curb causing injury to himself and Tertrice Dallas, a minor child. An unidentified witness standing at a nearby bus stop told Anderson, "the manhole cover came up."

Plaintiffs filed this lawsuit against defendant on June 1, 2005, alleging: defendant was in control of the premises where plaintiffs were injured; a hazardous or dangerous condition existed on the street (to wit: the unbolted sewer grate); the defect created a hazard to travel; and this constituted a defective highway and is an exception to governmental immunity under MCL 691.1402(1). Defendant filed a motion for summary disposition under MCR 2.116(C)(7), contending that it had no prior notice of the unbolted grate. Defendant received a report about a missing grate only after plaintiffs' accident and replaced the cover immediately. Therefore, defendant argued that this lawsuit should be precluded by governmental immunity.

Plaintiffs submitted photographs of the grate, which they claimed demonstrated that the cover must have been loose for more than 30 days and that defendant knew or should have known in the exercise of due diligence that the defect existed under MCL 691.1402a(1)(a). Plaintiff further submitted a report from an independent accident reconstructionist, Thomas Bereza. Bereza concluded that four large anchor bolts were missing from the grate and opined that dislodging the bolts would have taken weeks if not months of heavy pounding by vehicles to come out.

The trial court denied defendant's motion stating, "[T]his case clearly falls within the highway exception." The trial court also held, "at least there's a prima facie case that the City should have known about [the defect]."

This Court reviews de novo the lower court's grant or denial of a motion for summary disposition. *Kreiner v Fischer,* 471 Mich 109, 129; 683 NW2d 611 (2004). When considering a motion brought under MCR 2.116(C)(7), it is proper for this Court to review all the material submitted in support of, and in opposition to, the plaintiff's claim. *Patterson v Kleiman,* 447 Mich 429, 433; 526 NW2d 879 (1994). Further, the governmental immunity act provides governmental agencies like defendant with "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function." *Linton v Arenac Co Rd Comm,* 273 Mich App 107, 111; 729 NW2d 883 (2006) (citation omitted); MCL 691.1402 *et seq.*

To survive summary disposition, "the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Smith v Kowalski,* 223 Mich App 610, 616; 567 NW2d 463 (1997). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. When evaluating motions for summary disposition based on governmental immunity under MCR 2.116(C)(7), the complaint and all documentary evidence are accepted as true "unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm,* 465 Mich 68, 74; 631 NW2d 678 (2001). The motion should not be granted unless "no factual development could provide a basis for recovery." *Smith v YMCA,* 216 Mich App 552, 554; 550 NW2d 262 (1996).

The trial court did not err in denying defendant's motion for summary disposition. Accepting as true plaintiffs' well-pleaded allegations, plaintiffs established that defendant, in the exercise of due diligence, should have known of the existence of a defect.

According to the governmental immunity act, MCL 691.1401 *et seq.*, a governmental agency is immune from tort liability while engaging in a governmental function, unless a specified exception applies. The highway exception provides in pertinent part:

> [E]ach 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).]

Further, MCL 691.1403 provides:

> 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. 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.

Thus, "in order for immunity to be waived, the agency must have had actual or constructive notice of 'the defect' before the accident occurred." *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006).

Defendant relies on *VanStrien v Grand Rapids*, 200 Mich App 56; 504 NW2d 13 (1993), to support its contention that the trial court erred in denying its motion for summary disposition. In *VanStrien*, the plaintiff brought suit against the city for injuries she sustained when she stepped on manhole cover while walking on public sidewalk. The cover gave way, causing her leg to go inside hole. *Id.* at 57. This Court upheld the trial court's grant of summary disposition under MCR 2.116(C)(10), stating:

> The record is devoid of evidence that defendant knew or should have known of the alleged defect in the abandoned manhole. Under the facts of this case, we believe that summary disposition was properly granted in favor of defendant. [*Id.* at 58-59 (citations omitted).]

VanStrien can be distinguished in two ways. First, in this case plaintiffs have presented evidence in the form of expert testimony from an accident reconstructionist that defendant should have known that the grate was loose. Accident reconstructionist Bereza's report indicates that the bolts would have taken weeks if not months to come out. This evidence could indicate that defendant should have known of the existence of the defect had it exercised reasonable diligence. Second, the defendant in *VanStrien* brought its summary disposition motion under MCR 2.116(C)(10), which tests the factual sufficiency of a claim. Here, defendant brought its summary disposition motion under MCR 2.116(C)(7) so plaintiffs' well-pleaded allegations must be accepted as true and must be construed in a light most favorable to plaintiffs. *Smith, supra,* 216 Mich App 554. Furthermore, defendant has submitted no documentary evidence directly contradicting plaintiffs' expert.

The trial court properly denied defendant's motion for summary disposition under MCR 2.116(C)(7) because plaintiffs established a prima facie exception to governmental immunity and their allegations could provide a basis for recovery.

Defendant next argues that the trial court erred in failing to sua sponte determine that the unbolted grate did not constitute a highway defect. Although defendant did not raise this issue below, this Court may nevertheless review it because it involves a question of law and the facts

necessary for its resolution have been presented. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

Plaintiff's expert did not specifically testify that the unbolted grate rendered the highway not reasonably safe and convenient for public travel. However, this conclusion can be easily extrapolated from his report. Further, under MCR 2.116(C)(7), the motion for summary disposition should not be granted unless "no factual development could provide a basis for recovery." *Smith, supra*, 216 Mich App 554. Whether the unbolted grate was not reasonably safe is a factual issue that is supported by plaintiffs' expert. His testimony could potentially provide a basis for recovery. Thus, summary disposition under MCR 2.116(C)(7) would not have been appropriate.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood