# STATE OF MICHIGAN

# COURT OF APPEALS

GAIL LAROCHELLE,

Plaintiff-Appellee,

v

CITY OF WARREN,

Defendant-Appellant,

and

MACOMB COUNTY ROAD COMMISSION ADMINISTRATIVE AND TECHNICAL EMPLOYEES ASSOCIATION and BOARD OF COUNTY ROAD COMMISSIONERS OF MACOMB COUNTY,

Defendants.

UNPUBLISHED
September 23, 2010

No. 292169
Macomb Circuit Court
LC No. 2008-002079-NO

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

In this case involving the highway exception to governmental immunity, defendant[1] appeals as of right from an order denying its motion for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). We agree with the trial court's decision denying defendant's motion for summary disposition. However, because we also find as a matter of law that the area where plaintiff fell can only be characterized as a crosswalk, we conclude plaintiff is entitled to

[1] We will refer to city of Warren as defendant because the Macomb County Road Commission Administrative and Technical Employees Association and the Board of County Road Commissioners of Macomb County were previously dismissed from this case and are not a part of this appeal.

summary disposition on the issue whether plaintiff satisfied the highway exception to governmental immunity.[2] We affirm and remand for proceedings consistent with this opinion.

Defendant first argues that the trial court erred by not granting its motion for summary disposition because plaintiff's fall did not occur in an area covered by the highway exception to governmental immunity. Defendant contends that the evidence shows that plaintiff's fall occurred in a driveway approach, which is not included under the definition of highway. We disagree and conclude there is no genuine dispute that the area where plaintiff fell is more akin to a sidewalk or a crosswalk than a driveway.

Determination of the applicability of the highway exception is a question of law subject to de novo consideration on appeal. *Plunkett v Dep't of Trans*, 286 Mich App 168, 180; 779 NW2d 263 (2009). Under MCR 2.116(C)(7), an order granting a motion for summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id*. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id*. We must also consider the documentary evidence submitted for purposes of a motion brought under MCR 2.116(C)(7) relative to governmental immunity in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, while a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Where a motion is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, as is the case here, MCR 2.116(C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden*, 461 Mich at 120. A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Generally, a governmental agency is shielded from tort liability if it is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Grimes v Dep't of Trans*, 475 Mich 72, 76-77; 715 NW2d 275 (2006). Pursuant to the highway exception, however, a person who sustains bodily injury or property damage "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). A highway is defined as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and

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[2] The Court of Appeals may, in its discretion and on terms it deems just, "enter any judgment or order and grant further or different relief as a case may require." MCR 7.216(A)(7).

culverts on the highway," but not alleys, trees, or utility poles. MCL 691.1401(e). As our Supreme Court explained in *Robinson v City of Lansing*, 486 Mich 1, 7; 782 NW2d 171 (2010):

> [A] municipality has a duty to maintain highways in reasonable repair and "highway" is specifically defined to include "sidewalks." MCL 691.1402(1); MCL 691.1401(e). Thus, while MCL 691.1402(1) exempts state and county road commissions from liability for injuries resulting from defective sidewalks, municipalities are not exempt; municipalities do have a duty to maintain sidewalks in reasonable repair.

Further, as this Court explained in *Roby v City of Mount Clemens*, 274 Mich App 26, 30; 731 NW2d 494 (2006):

> Caselaw has defined the word "sidewalk" as a paved way that runs alongside and adjacent to a public roadway intended for the use of pedestrians. A paved way must be located adjacent to a highway to be considered a sidewalk, but such proximity does not necessarily make it a sidewalk, and a court will take into account the character of the paved way and its intended use. [Internal citations omitted.]

In *Roby*, which defendant relies on, this Court addressed whether an area paved with asphalt and cement between a fenced parking lot and the road was covered under the highway exception. *Roby*, 274 Mich App at 27. The panel in *Roby* held that "[t]he trial court properly granted summary disposition for the City after it determined that the accident did not occur on a public sidewalk" because " [t]he evidence presented established that the area in question was not intended for pedestrian travel and, therefore, was not a sidewalk for purposes of the highway exception." *Id*. at 30. The panel in *Roby* stated that the facts showed:

> The area was paved all the way to the road, but there were no permits in the file to build a sidewalk. . . . [A witness] testified that he thought it was a parking area for Johnson Controls because he had seen vehicles and trucks parked there. Roby also admitted that trucks park in this area on a daily basis. And Johnson Controls indicated that it used the area for parking, turning, and putting trucks on the property, which is why it was not a grass right-of-way. [*Id*. at 30-31.]

As a part of its analysis, the panel in *Roby* noted that "[t]his Court has held that the grass berm between a public road and a sidewalk 'is not included within the definition of the term 'highway' and is thus not included within the highway exception to governmental immunity.'" *Id*. at 31, quoting *Mitchell v Detroit*, 264 Mich App 37, 44-45; 689 NW2d 239 (2004). The panel in *Roby* went on to reason that:

> There is no reason that the City should be liable for the condition of an area that a private party chose to convert from grass to pavement with the intent to use it for parking, turning, and putting trucks on the property. The character of the area in question is more comparable to a private driveway than a public sidewalk, and, therefore, the highway exception to governmental immunity does not apply. The trial court did not err in granting summary disposition in favor of the City because it is entitled to governmental immunity from tort liability where Roby tripped on a

> paved area that was not a "sidewalk" for the purposes of the highway exception. [*Roby*, 274 Mich App at 31.]

Defendant relies on *Roby* in support of its argument that the character of the area where plaintiff fell is more comparable to a private driveway than a public sidewalk. However, *Roby* is wholly distinguishable. Although defendant's counsel continually characterized the area where plaintiff fell as a driveway or driveway approach during plaintiff's deposition, there no evidence to support that the area where plaintiff fell is used as a driveway approach. In particular, there is no evidence that vehicles used the area where plaintiff fell to park or turn around. Further, the paved area in question is attached to the other parts of the sidewalk and does not lead up to a parking lot or driveway. In addition, photographic evidence submitted by plaintiff shows that the area where plaintiff fell leads out into a pedestrian crosswalk based on the yellow street sign warning motorists of pedestrians, which is only a few feet away from where plaintiff fell. Also, the photographs show white lines leading up to the pavement where plaintiff fell, designating this area as a crosswalk for pedestrians. While we agree with the trial court that defendant was not entitled to summary disposition, we further conclude that there is no genuine dispute that the area where plaintiff fell can only be considered a sidewalk or a crosswalk.

Next, defendant argues that there is no dispute that the height differential of the defect was approximately one and one-half inches, which gives rise to the rebuttable presumption of reasonable repair under MCL 691.1402(a)(2). Defendant contends that because plaintiff has submitted no evidence to rebut the presumption, summary disposition is required. We disagree.

"A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair." MCL 691.1402a(2); *Robinson*, 486 Mich at 11. The inference applies only to installations adjacent to county highways. *Id*. at 13.

Plaintiff testified in her deposition that, based on her observation of the defect while she was on the ground after her fall, the height differential of the pavement was between three and four inches. However, defendant submitted photographs of the defect that purport to show that the height of the defect was about one and one-half inches. Defendant fails to assert when the photographs were taken and plaintiff argues that they were taken well after the incident occurred. Further, plaintiff testified in her deposition that by the time she returned to work in January 2007, the defect had been repaired. Based on the conflicting evidence, there is at least a question of fact regarding whether the height differential of the defect is two inches or more, and thus, plaintiff did not need to rebut the presumption of reasonable repair. Therefore, the trial court did not err in refusing to grant summary disposition on this basis.

Lastly, defendant argues that summary disposition should have been granted because it did not have actual or constructive notice of the defective condition under MCL 691.1403. Defendant contends that plaintiff failed to submit any evidence establishing that it had notice. We disagree.

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).

Plaintiff's deposition testimony asserted that she had observed that the defect in the pavement had existed for between three and four years prior to her fall, and had gotten worse during that time. Further, based on the photographic evidence of the defective condition, there is at least a question of fact regarding whether the crumbling concrete that resulted in the defective condition was readily apparent. Therefore, a question of fact exists in regard to whether knowledge of the defect can be conclusively presumed because plaintiff submitted evidence that the defect existed for 30 days or longer and that it was readily apparent to an ordinarily observant person. Thus, the trial court did not err by refusing to grant summary disposition on this basis.

Affirmed. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly