STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH PALETTA and SHELLY PALETTA, Plaintiffs-Appellees, v OAKLAND COUNTY ROAD COMMISSION, Defendant-Appellant, and SUPREME SWEEPING SERVICES, INC., Defendant.	UNPUBLISHED July 21, 2011 No. 298238 Oakland Circuit Court LC No. 2008-093717-NO

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant Oakland County Road Commission appeals as of right from a circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) in this action involving the highway exception to governmental immunity, MCL 691.1402. For the reasons set forth in this opinion, we affirm.

Plaintiff Joseph Paletta[1] lost control of his motorcycle while riding northbound on Union Lake Road near the intersection of Glasgow Drive in White Lake Township. Plaintiffs alleged that Joseph Paletta lost control of his motorcycle after it struck loose gravel in the travel portion of the asphalt roadway, and that defendant created this hazard by improperly scraping the gravel shoulders and failing to sweep the gravel debris from the roadway in accordance with industry standards.

Defendant moved for summary disposition arguing that plaintiffs could not establish that it had actual or constructive notice of the condition to satisfy MCL 691.1402. Defendant also

[1] As used in this opinion, the singular term "plaintiff" shall refer to Joseph Paletta only. The loss of consortium claim raised by plaintiff Shelly Paletta is derivative in nature.

argued that the presence of gravel on a roadway is not a "defect" and does not make a roadway unreasonably safe for public travel. The trial court disagreed with both arguments, stating:

> Defendants [sic] first argues it is entitled to summary disposition because there's no evidence it had actual or constructive notice of the alleged defect. However, plaintiff has submitted the deposition testimony of Shawn Fath (ph) who lived along the road where the accident occurred. Fath testified that he repeatedly observed defendants' trucks leaving gravel on the roadway when they graded the shoulder on a monthly basis.
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> He testified that he contacted defendant by telephone on at least five occasions regarding the gravel and that he once stopped one of the trucks performing the grady--grading to advise the driver that he had left gravel at the intersection of the roads, and to inform him that it was causing accidents. Fath testified that the gravel he observed was to the left of the fog line.
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> The evidence submitted by plaintiff is sufficient to create a genuine issue of material fact for trial with respect to whether defendant had notice of the defective condition.
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> Defendant next argues that even if there was sufficient notice it's entitled to summary disposition because the condition of the road did not pose an unreasonable threat to safe public travel and therefore no duty to repair existed.
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> Defendants submitted the affidavit of Aaron [sic] Higenbothom [sic], a mechanical engineer and motorcycle crash reconstruction expert who opined that the roadway at issue did not constitute a dangerous condition for motorcycle travel because the pavement was in good condition; the roadway conditions were clear and dry and the geometry of the curve was visible to an approaching cyclist.
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> In response, plaintiff submitted the affidavit of James Valenta, a civil engineer and roadway expert who's testified that based on his experience and the evidence he reviewed in the instant case; the amount of gravel described to have been present on the improved portion of the roadway at the site of the accident created an unreasonably dangerous condition for vehicular traffic.
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> Valenta also testified that the excessive amount of gravel in the roadway was either directly caused by defendant improperly grading the shoulder or defendant's failure to maintain the road.
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> The conflicting opinions presented by the experts creates a genuine issue of material fact for trial with respect to whether the alleged gravel on the road posed an unreasonable threat to safe travel. This is a close question for the Court and may be the subject of a directed verdict, therefore defendant's motion for summary disposition is denied.

This Court reviews de novo the applicability of governmental immunity and a trial court's decision denying summary disposition. *Plunkett v Dep't of Transp*, 286 Mich App 168,

180; 779 NW2d 263 (2009); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." Summary disposition may be granted pursuant to MCR 2.116(C)(7) if a claim is barred because of immunity granted by law. When reviewing a motion under MCR 2.116(C)(7), "[t]he plaintiff's well-pleaded factual allegations must be accepted as true and construed in the plaintiff's favor, unless the movant contradicts such evidence with documentation." *Plunkett*, 286 Mich App at 180.

Defendant argues that the trial court erred in concluding that a question of fact existed regarding whether defendant had notice of the alleged defect. Defendant relies on MCL 691.1403, which states:

> 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.

However, evidence was presented that defendant's own employees created the hazardous condition by scraping the gravel shoulders and depositing the gravel debris onto the roadway. Where a defendant's employees create a defect, their knowledge of the defect is imputed to the defendant. *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 149; 687 NW2d 380 (2004), aff'd 474 Mich 161 (2006). See also *LaMeau v City of Royal Oak*, 289 Mich App 153, 174; 796 NW2d 106 (2010), lv pending (noting that the evidence showed that the defendant "was not only aware of the defective condition, its employees actually *created* the defective condition"). Defendant correctly argues that notice of an "imperfection" is not adequate to establish the applicability of the highway exception. In *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006), our Supreme Court stated:

> [A]n *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 governmental agency is on notice of that fact.

In this case, the evidence indicates that defendant was informed of the existence of the hazard and its danger. Fath testified that he repeatedly called defendant and warned it about the serious danger the gravel posed in that location. Fath testified that the gravel had caused other accidents, including one that resulted in the loss of the driver's legs. Defendant's knowledge of prior accidents attributable to the same condition is adequate to put defendant on notice that the gravel routinely left at the intersection rendered the highway not reasonably safe and convenient for public travel. See *Sweetman v State Hwy Dep't*, 137 Mich App 14, 22-23; 357 NW2d 783 (1984). Accordingly, the trial court did not err in denying defendant's motion for summary disposition with respect to the issue of notice.

Defendant's contention that plaintiffs cannot establish that the gravel did not come from other sources is unpersuasive. Defendant is the only source of the gravel referenced in the testimony. Defendant relies on deposition testimony from an eyewitness, Shawn Fath when he testified at his deposition:

> *Q.* Exhibit 5 here Mr. Oliver showed you and asked you if you can see some gravel to the roadside or northbound lane side of that partial fog line. And you said how you can. Obviously we can all look at that and see that.
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> Is that how the gravel looked on the date that Mr. Paletta lost control of his vehicle or was there more or less than you see in Exhibit 5?
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> *A.* There was more.
>
> *Q.* Can you define in words for us how much more?
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> *A.* Probably a foot coming out to a point where when the cars turnout they drag it out even more from here. So I don't know if it was in the accident, but.
>
> *Q.* So what I'm trying to figure out is whether there's more in volume or just you're saying there's more because it's further into the travel lane or both or some combination?
>
> *A.* It's both. It goes more toward the triangle. This is more of a straight line and a lot of times it's more of a triangle.

Fath's testimony does not indicate that there was a potential source for the gravel other than defendant. Fath merely indicated that cars drove through the gravel deposited by defendant and extended the spread. Viewing the evidence in the light most favorable to plaintiffs, as the non-moving parties, defendant caused the deposit of gravel in the roadway when it graded the shoulder on the east side of Union Lake Road crossing Glasgow Drive.

Defendant also contends that claims based on objects on a roadway or sidewalk are not within the highway exception to governmental immunity because such objects do not constitute a "defect" in the actual roadway. Defendant relies on decisions involving precipitation, specifically *Haliw v City of Sterling Hts*, 464 Mich 297; 627 NW2d 581 (2001) (natural accumulation of ice or snow), and its progeny, *Estate of Buckner v City of Lansing*, 480 Mich 1243, 1244; 747 NW2d 231 (2008) (ice and snow, whether accumulated through natural causes or otherwise), and *Plunkett*, 286 Mich App at 168 (rainwater).

The natural accumulation doctrine that was the crux of *Haliw* has no bearing on defendant's liability for the alleged creation of a hazardous condition involving the placement of excessive amounts of gravel in the improved portion of the roadway. Whereas the law has long held that a governmental agency's failure to remove natural accumulations of ice and snow on a public highway does not establish negligence, *Haliw*, 464 Mich 305, the law has long recognized the potential liability of governmental agencies for obstructions on a sidewalk or roadway. See, e.g., *Wedderburn v Detroit*, 144 Mich 684; 108 NW 102 (1906) (flagstone in sidewalk); *Brown v City of St Johns*, 187 Mich 641; 154 NW 79 (1915) (steel on sidewalk leaning against building);

Joslyn v Detroit, 74 Mich 458; 42 NW 50 (1889) (pile of sand left by contractors in the street). Defendant did not cite any authority specifically stating, and we have found none, which holds that the duty to "maintain the highway in reasonable repair" does not extend to removal of objects or materials (other than precipitation) lying on the surface of the roadbed.

Although our Supreme Court has held that a defect or defective condition must be "within the paved or unpaved portion of the roadbed . . ." and "located in the improved portion of the highway," *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 171, 183-184; 615 NW2d 702 (2000), the loose gravel in this case was within the paved portion of the roadbed, and was located in the improved portion of the roadway. Defendant has not cited an authority which states that the defect must be to the actual roadbed as it was constructed, and we decline defendant's invitation to expand existing case law by extending the reasoning of the precipitation cases to other objects and materials lying on the surface of the roadbed.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro