STATE OF MICHIGAN

COURT OF APPEALS

BRENDA BRODEUR, Plaintiff-Appellant,	UNPUBLISHED October 18, 2016
v	No. 328565 Oakland Circuit Court
OAKLAND COUNTY ROAD COMMISSION, Defendant-Appellee.	LC No. 2014-142864-NO

Before: MURRAY, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

Plaintiff, Brenda Brodeur, appeals as of right an order granting defendant, Oakland County Road Commission's, motion for summary disposition. We affirm.

I. FACTS

On June 17, 2014, around 10:00 p.m., plaintiff fell when she was walking with her mom on Ponderosa Street in Commerce Township. As plaintiff was walking, she fell in a pothole in the street. Plaintiff subsequently sent to defendant a notice of intent to sue and then filed a lawsuit on September 11, 2014, alleging that defendant owed a duty to plaintiff to maintain Ponderosa Street in a manner reasonably fit, safe, and convenient for public travel.

Thereafter, defendant filed a motion for summary disposition asserting that plaintiff's statutory notice was deficient, see MCL 691.1404(1), and that there was no genuine issue of any material fact that the stretch of road was reasonably safe for vehicular traffic.

Plaintiff responded by arguing that (1) the notice of intent to sue was adequate, and (2) a question of fact existed regarding whether the road was in reasonable repair when it contained a 6 foot by 6 foot pothole that was 5 to 6 inches deep. In reply, defendant also argued that plaintiff was precluded from recovery under MCL 691.1403, as defendant did not know, nor should it have known, of the defect and did not have a reasonable time to repair the defect before the injury took place.

At oral argument the parties argued consistent with their briefs. After arguments, the trial court granted summary disposition, holding that no genuine issue of material fact existed regarding whether the road was safe for vehicular traffic, nor as to whether plaintiff's notice was

sufficient. The trial court declined to address defendant's argument that defendant did not have actual or constructive notice of the alleged defect.

Plaintiff filed a motion for reconsideration, asserting that the trial court committed palpable error in ruling that the road was safe for vehicular travel when the correct standard is that it must be safe for public travel. At a subsequent hearing on plaintiff's motion, the trial court agreed that the standard was in fact "public travel," which would include bicyclists, pedestrians, and vehicles. Notwithstanding correcting its previous error, the trial court still concluded that the road was in reasonable repair because the pothole was a gradual decline, not a steep drop off. Additionally, the trial court determined that no genuine issue of material fact existed regarding whether defendant had actual or constructive knowledge of the alleged defect.

II. ANALYSIS

Plaintiff contends that the trial court erred when it granted summary disposition to defendant. This Court reviews a trial court's determination regarding a motion for summary disposition de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are 'barred because of immunity granted by law . . . .' " *Odom*, 482 Mich at 466, quoting *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). "The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with 'affidavits, depositions, admissions, or other documentary evidence,' the substance of which would be admissible at trial" and " '[t]he contents of the complaint are accepted as true unless contradicted' by the evidence provided." *Id*., quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

Under the governmental tort liability act, 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). "An exception to this immunity is found in MCL 691.1402, the highway exception, which allows individuals to 'recover the damages suffered by him or her' resulting from a municipality's failure to keep highways—including sidewalks, MCL 691.1401(c)—'in reasonable repair and in a condition reasonably safe and fit for travel.' " *Bernardoni v City of Saginaw*, 499 Mich 470, 473; __ NW2d __ (2016) quoting MCL 691.1402(1).

Specifically, MCL 691.1402(1) provides in relevant part:

> Each 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.

This provision establishes the duty to maintain the highway in reasonable repair; it does not establish a duty to keep the highway reasonably safe. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006). An imperfection in the road will only rise to the level of a compensable defect when the imperfection is one which renders the highway not "reasonably safe and convenient for public travel." *Id*. Public travel extends to pedestrian travel. See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162-170; 615 NW2d 702 (2000).

"[W]hile MCL 691.1402(1) only imposes on the governmental agency the duty to 'maintain the highway in reasonable repair,' in order to successfully allege a violation of that duty, a plaintiff must allege that the governmental agency was on notice that the highway contained a defect rendering it not 'reasonably safe and convenient for public travel.' " *Wilson*, 474 Mich at 168.

With regard to an agency's notice of the defect, MCL 691.1403 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.

"Thus, to invoke the highway exception . . . a plaintiff must show that the defect existed at least 30 days before the accident." *Bernardoni*, 499 Mich at 474.

Here, no genuine issue of material fact existed regarding whether the road was reasonably safe for travel. "[A] road in bad repair, or with rough pavement, is not per se one that is not reasonably safe." *Wilson*, 474 Mich at 169, citing *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912). " 'Nearly all highways have more or less rough and uneven places in them, over which it is unpleasant to ride; but because they have, it does not follow that they are unfit and unsafe for travel.' " *Wilson*, 474 Mich at 169-170, quoting *Jones*, 171 Mich at 611.

The pictures of the gravel dirt road only demonstrate that a portion of the road was uneven. While plaintiff relies on the fact that the pothole was 5 to 6 inches in depth, the pictures of the road demonstrate that the surface of the road gradually sloped down 5 to 6 inches. Stated differently, the road did not contain a 5 to 6 inch drop off or sharp decline, but instead, the road contained a gradual depression over a distance of approximately 6 feet. At most, the photographs demonstrate that the road may have been uneven, but because of the gradual

decline, it was still reasonably safe and convenient for public travel as the road was merely uneven. *Wilson*, 474 Mich at 169-170.

Additionally, no genuine issue of material fact existed regarding whether defendant knew or should have known of the alleged defect. The pictures submitted by plaintiff were taken on June 19, 2014, two days after plaintiff's accident. While these pictures are helpful in determining the condition of the road around the time plaintiff fell, the pictures do not establish the condition of the road 30 days before the accident. See *Bernardoni*, 499 Mich at 475. As mentioned in *Bernardoni*, plaintiff could have established that the condition existed 30 days before the accident by providing an affidavit of a neighbor who viewed the sidewalk 30 days before the accident or expert testimony that the sidewalk discontinuity was of a type that usually forms or enlarges over a long period of time. *Id*. Plaintiff did not provide either of these sources of proof or any other type of proof that the defect existed 30 days before her accident. Moreover, two of defendant's employees testified that they graded the road on May 21, 2014, and again on June 20, 2014, which was within 30 days of plaintiff's fall, and noticed no such defect in the road. As such, no genuine issue of fact exists regarding whether defendant knew or should have known of the alleged defect.

Affirmed. Defendant may tax costs. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder