

STATE OF MICHIGAN
COURT OF APPEALS

MARY BANCROFT,

Plaintiff-Appellant,

v

CITY OF PONTIAC,

Defendant-Appellee.

UNPUBLISHED

October 20, 2011

No. 299397

Oakland Circuit Court

LC No. 2009-098086-NO

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). We reverse, on the ground that plaintiff presented evidence to create a material question of fact on the applicability of the highway exception to governmental immunity, MCL 691.1402(1).

Plaintiff alleges that she was injured in 2008 when she tripped and fell while walking across Earlmoor Street in Pontiac. According to plaintiff, she stepped into a leaf-covered hole in the street, which caused her to fall. She retained an expert to analyze the area of the road where she fell. The expert stated that asphalt in the area was missing or was broken into small pieces. The expert opined that a section of missing pavement on Earlmoor Street would not be reasonably safe for public travel.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Defendant asserted immunity from liability pursuant to MCL 691.1407(1), and further asserted that the highway exception to immunity, MCL 691.1402(1), did not apply to plaintiff's claim. The trial court agreed, finding that defendant was immune from liability on the ground that there was no genuine issue of fact regarding whether defendant kept the roadway in reasonable repair and in a condition reasonably safe and fit for travel.

We review de novo the trial court's grant of summary disposition. *Grimes v Michigan Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). Although the trial court did not specifically state that it was granting summary disposition under MCR 2.116(C)(7), the court expressly concluded that defendant was immune from liability for plaintiff's claim. Accordingly, we review the trial court's order as a grant of summary disposition under MCR 2.116(C)(7).

A trial court may grant summary disposition on the basis of statutory immunity after the court has reviewed all of the documentary evidence filed by the parties. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). To survive a motion for summary disposition based on immunity, a party must assert facts that show an exception to immunity applies. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). A trial court may not grant summary disposition if the documentary evidence presents a factual issue that could provide a basis for recovery. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010).

Unless an exception applies, government agencies are immune from tort liability for actions that arise out of governmental functions. MCL 691.1407; see also *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 151-152; 615 NW2d 702 (2000). The highway exception created by MCL 691.1402(1) provides in 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. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. [MCL 691.1402(1).]

Our Supreme Court explained that the statutory term “public travel” encompasses both vehicles and pedestrians. *Nawrocki*, 463 Mich at 171-172. If the highway exception to immunity applies, a plaintiff still must prove the traditional elements of negligence. *Haliw v Sterling Heights*, 464 Mich 297, 304; 627 NW2d 581 (2001). In other words, the plaintiff must show that defendant breached a duty and that the breach was the actual and proximate cause of the plaintiff’s injuries. *Id.*

Here, plaintiff provided evidence that defendant failed to properly maintain the road so that it was reasonably safe for public travel. Plaintiff’s expert indicated that the defect in the road was unsafe for pedestrians, bicyclists, and motor scooter riders. Defendant argues, and the trial court found, that the expert’s opinion was insufficient to create a factual issue. We disagree. The expert’s opinion was based on his review of the accident scene combined with his education and experience as an engineer. Moreover, the expert indicated that he relied upon photographs and Department of Transportation plans. For purposes of summary disposition, the expert’s testimony and his report were sufficient to present a material question of fact concerning whether the road was in reasonable repair and reasonably safe for public travel. Given the factual issue, the trial court erred in determining as a matter of law that defendant was immune from liability.

Defendant argued in the trial court that summary disposition was appropriate pursuant to two other statutory provisions: the “two inch rule” in MCL 691.1402a(2), and the knowledge of defect rule in MCL 691.1403. Defendant does not raise these arguments on appeal, and we do not consider them here. Similarly, we do not consider defendant’s argument regarding whether plaintiff was an “intended or permitted user” of the road. Defendant did not present this argument to the trial court, and we decline to address it for the first time on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O’Connell