STATE OF MICHIGAN

COURT OF APPEALS

THOMASINE MARTIN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 305796 Wayne Circuit Court
CITY OF ECORSE, Defendant-Appellant.	LC No. 10-008009-NO

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by right the order denying defendant's motion for summary disposition premised on governmental immunity. We reverse and remand for entry of summary disposition in favor of defendant.

In February 2010, plaintiff was walking to her church when she purportedly tripped and fell in the street or crosswalk. Plaintiff filed this litigation, asserting that the condition existed for a period in excess of thirty days and defendant was on notice that the road or crosswalk was not in reasonable repair or reasonably safe. Defendant filed a motion for summary disposition, contending that it was entitled to governmental immunity as a matter of law or alternatively that plaintiff could not establish causation. Plaintiff opposed the motion by asserting that there were factual issues that precluded summary disposition. The trial court denied the motion, stating that plaintiff presented "a pretty weak situation as far as notice goes," and there was "a bare issue of fact." Defendant appeals the denial of its motion by right.

A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). A motion brought pursuant to MCR 2.116(C)(7) alleges that a claim is barred because of immunity by law. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 264; 792 NW2d 781 (2010). To determine whether summary disposition is appropriate on the basis of MCR 2.116(C)(7), a court must examine all documentary evidence submitted by the parties and accept as true the allegations in the complaint unless affidavits or other documentation contradicts them. *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 271; 792 NW2d 798 (2010).

Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials LLC v Galui Constr*,

Inc, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id*. "The nonmoving party may not rely on mere allegations or denials in the pleadings." *Id*. The documentation offered in support of and in opposition to the dispositive motion must be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). "The affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995). When the opposing party provides mere conclusions without supporting its position with underlying foundation, summary disposition in favor of the moving party is proper. See *Rose v National Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

A governmental agency is shielded from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); *Duffy v Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011). In 1964, the Legislature codified exceptions to governmental immunity which authorize a plaintiff to file a claim against a governmental agency. *Duffy*, 490 Mich at 204. The highway exception to governmental immunity provides in relevant 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).]

"[T]o defeat governmental immunity based on MCL 691.1402, a plaintiff must establish that the defendant knew or should have known about the defect and had notice that the defect made the road not reasonably safe and convenient for public travel." *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 170; 713 NW2d 717 (2006).

> 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. [MCL 691.1403.]

By enacting this legislation, the Legislature waived immunity from liability for bodily injury or property damage when the road, due to lack of repair or maintenance, has become "not reasonably safe for public travel." *Wilson*, 474 Mich at 167. However, the duty imposed is not one of perfection, but rather, only a duty to maintain the highway in "reasonable repair." *Id*. "[T]he Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason." *Id*.

Immunity is available when the maintenance is purportedly unreasonable, but the road is still reasonably safe for public travel. *Id*. at 168. Immunity is waived when the agency has actual or constructive notice of the defect before the accident occurred. *Id*.

> Thus, while 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 contains a defect rendering it not "reasonably safe and convenient for public travel." The governmental agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair.
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> If the agency knows, or should have known, of the existence of the defect or condition that makes the road defective, i.e., not reasonably safe for public travel, it has only a reasonable time to repair it. If it does not do so, it can be held liable for injury or damage caused by that defect. The Legislature has also indicated that knowledge and time enough to repair are conclusively presumed when the defect has been readily apparent to an ordinarily observant person for 30 days or longer before the injury. [*Wilson*, 474 Mich at 168-169 (emphasis in original; footnote omitted).]

The fact that a highway is rough, uneven, in bad repair, or unpleasant to ride "is not per se one that is not reasonably safe." *Wilson*, 474 Mich at 169. "It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case [a] plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it." *Id*.

In *Wilson*, the plaintiff alleged that she was biking on a road with innumerable potholes. At one point, she felt her handlebars drop down, and she was thrown over the handlebars onto the road. *Wilson*, 474 Mich at 163. The plaintiff alleged that the road had potholes in excess of six inches deep that had existed for more than thirty days at a time. She further asserted that the road had been in that condition for years and presented a danger to public safety because it was persistently potholed and rutted and only full resurfacing would render it safe. *Id*. at 164. In response, the defendant asserted that it had cold-patched the road only two weeks before the plaintiff's accident and had not received any complaints following the repair. *Id*. at 164-165. Our Supreme Court held that the plaintiff failed to meet her burden of proof:

> While all parties concede that there was notice of certain problems—that the road was bumpy and required frequent patching—these problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel. It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it. [*Id*. at 169.][1]

In the present case, plaintiff contends that she presented evidence that defendant was on notice of the condition in light of the photographs submitted of the bumpy condition of the road and that the condition must have existed for in excess of thirty days. However, plaintiff admitted that the photograph was not taken at or near the time of her accident and was only presented to demonstrate the "locus" of plaintiff's fall. Accordingly, the photographs fail to establish a genuine issue of material fact regarding notice. Additionally, plaintiff asserted that her testimony and the testimony of her pastor regarding the duration of the condition for years and his complaints to the mayor pro tem, a church member, create a genuine issue of material fact regarding notice. Again, plaintiff failed to meet the burden delineated in *Wilson*. First, the general complaints about the condition of the roads near the church are insufficient when they fail to take issue with the specific area of plaintiff's fall. Secondly, this testimony failed to establish that the rough or uneven or unpleasant condition of the road was not reasonably safe. *Wilson*, 474 Mich at 169. Accordingly, the trial court erred in holding that there was "weak" evidence of notice where plaintiff failed to comply with the standard established by the *Wilson* Court. *Id*.

Reversed and remanded for entry of defendant's motion for summary disposition. Defendant, the prevailing party, may tax costs, MCR 7.219. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

[1] The Court ordered a remand for both parties to present proofs on the issue of notice. *Wilson*, 474 Mich at 170.