

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH L. IGNASH,
Plaintiff-Appellee,

UNPUBLISHED
November 20, 2012

v

No. 309173
Alcona Circuit Court
LC No. 11-001789-NI

CITY OF HARRISVILLE,
Defendant/Third Party Plaintiff-
Appellant,

and

ALCONA COUNTY ROAD COMMISSION,
Defendant,

and

MACARTHUR CONSTRUCTION, INC.
Third Party Defendant-Appellee.

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Defendant, City of Harrisville, appeals by right an order denying its motion for summary disposition premised on a claim of governmental immunity in this trip and fall case. We affirm.

According to plaintiff's negligence complaint, she tripped and fell on a city street that was undergoing resurfacing. In particular, she alleged that she tripped because of a height differential between unimproved pavement and blacktopped pavement. Plaintiff claimed that her lawsuit was not barred by governmental immunity because the highway exception applied.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the street was “in reasonable repair,” as required by the statute, because no defect existed; thus, summary dismissal was required. In support of its argument, defendant referenced one photograph plaintiff provided with her pre-suit notice and argued that it showed “an unremarkable transition between two surfaces of almost identical elevation.” Plaintiff responded to defendant’s motion, arguing that the photograph defendant was relying on was taken from above the seam and could not demonstrate the height differential. And the defective condition was apparent on the other two photographs she provided with her pre-suit notice. After reviewing the photographs of the area where plaintiff fell, the trial court held that questions of fact precluded summary disposition in defendant’s favor. This appeal followed.

Defendant argues that its motion for summary disposition should have been granted because no defect existed in the area where plaintiff allegedly fell as evidenced by plaintiff’s own photograph of the area. After de novo review of the trial court’s decision, we disagree. See *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

MCL 691.1402(1) sets forth the highway exception to governmental immunity, generally providing that the responsible governmental agency must “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” Defendant argues on appeal, as it did in the trial court, that plaintiff’s own photograph “displays nothing more than an unremarkable transition between newly laid asphalt and older roadway almost identical in elevation level.” Accordingly, the highway was “in reasonable repair so that it [was] reasonably safe and convenient for public travel” and defendant’s motion should have been granted. We do not agree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must identify the matters that have no disputed factual issues, and must support that claim with documentary evidence. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006), quoting MCR 2.116(G)(4). In reviewing such a motion, we consider the pleadings and documentary evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists. *Corley*, 470 Mich at 278. “A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.” *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010).

Here, plaintiff alleged in her complaint that she tripped and fell because of a height differential between unimproved pavement and blacktopped pavement. In support of its motion for summary disposition, defendant relied exclusively on one photograph which was taken at a right angle to the disputed area and showed the two sections of the street, i.e., black asphalt and white pavement. However, because the photograph was taken from directly over the top of the “seam,” the photograph did not and could not demonstrate whether a height differential at the location existed. Nevertheless, defendant insisted that the photograph conclusively established that there was “no defect.” The trial court properly rejected defendant’s argument, essentially holding that the photograph could not establish either the existence or nonexistence of the claimed height differential. We agree with that conclusion. See *Coblentz*, 475 Mich at 569; see

also MCR 2.116(G)(3)(b). Because a factual dispute exists, the trial court properly denied defendant's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro