STATE OF MICHIGAN

COURT OF APPEALS

MELANIE SOKOLOWSKI, Guardian of SKYLAR SOKOLOWSKI, Plaintiff-Appellant, v COUNTY OF MACOMB, Defendant-Appellee.	UNPUBLISHED December 17, 2013 No. 311661 Macomb Circuit Court LC No. 2011-000632-NI

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

PER CURIAM.

Plaintiff Melanie Sokolowski, guardian of Skylar Sokolowski, appeals as of right the trial court's order granting summary disposition in favor of defendant Macomb County. Plaintiff also challenges the trial court's order granting defendant's motion to withdraw or amend an admission. We affirm.

This appeal concerns an alleged defect in the intersection of Hayes Road and 24 Mile Road in Macomb County. On August 30, 2005, Skylar was the passenger on a school bus. Skylar's wheelchair was "fixed to the deck of the bus by four restraint straps," and she was also restrained in her wheelchair with a "three-point lap shoulder belt." The school bus traveled south on Hayes Road. When it reached the 24 Mile Road intersection, it traveled over a "crown" in the intersection, which caused the bus to violently buck. The bucking caused Skylar to be thrown from her seat, causing serious injuries. That intersection underwent a reconstruction in the 1990s. The construction plans called for an "approach slope" of 1.78 percent, which met American Association of State Highway and Transportation Officials standards of being less than two percent. However, it was later discovered that the intersection was built with approach slopes that were well in excess of those designs and standards.

On October 6, 2011, plaintiff filed her third-amended complaint, naming Macomb County as the only defendant. In the two-count complaint, plaintiff alleged that the "sharply ramped intersection crown constituted a hazardous defect to the improved surface of the road that was not reasonably safe for travel." She asserted that defendant breached its duties pursuant to MCL 691.1402 and MCL 224.21 by failing to "maintain" and "keep" the intersection in a reasonably safe condition.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), arguing, among other things, that plaintiff's claims were barred by governmental immunity because the highway exception did not apply to construction defects. After a hearing on the motion, the trial court took the matter under advisement and later granted summary disposition in favor of defendant on governmental immunity grounds. Plaintiff moved for reconsideration, arguing for the first time that defendant admitted, in its response to plaintiff's request for admission, that the crown in the intersection was unreasonably dangerous.[1] Defendant opposed the motion for reconsideration and moved to withdraw or amend the admission, arguing that the failure to respond was inadvertent. The trial court denied plaintiff's motion for reconsideration and granted defendant's motion to withdraw or amend the admission in the same written order.

Plaintiff first argues that the trial court erred by granting defendant's motion for summary disposition because there was an actionable highway defect in this case pursuant to MCL 691.1407(1). This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The trial court granted summary disposition pursuant to both MCR 2.116(C)(7) and (C)(8). However, whether governmental immunity bars a claim is decided under MCR 2.116(C)(7). *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 382; ___ NW2d ___ (2013). Therefore, we will analyze the issue under that subrule.

A motion for summary disposition under MCR 2.116(C)(7) is properly granted when the undisputed facts establish that the moving party is entitled to immunity as a matter of law. *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). A motion under MCR 2.116(C)(7) may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Id.*

"Except as otherwise provided, the governmental tort liability act . . . broadly shields and grants to government agencies immunity from tort liability when an agency is engaged in the exercise or discharge of a governmental function." *Moraccini*, 296 Mich at 391, citing MCL 691.1407(1). The highway exception to governmental immunity, MCL 691.1402(1), provides in pertinent part, the following:

> 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

[1] In responding to plaintiff's request for admissions, defendant failed to respond to request 29, which asked defendant to admit "that the crown of the Hayes-24 Mile Rd. intersection . . . was not reasonably safe (as required . . . under MCL 224.21 and MCL 691.1402) for a school bus occupied by special-needs children to be driven across at the posted 45 mph speed limit." Matters are deemed admitted if a party "served with a request for admissions neither answers nor objects to the request." *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991); see also MCR 2.312(B)(1). Even though plaintiff first relied on this particular admission in her motion for reconsideration, plaintiff had previously submitted to the trial court the entirety of defendant's response to plaintiff's request for admissions.

> 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 . . . MCL 224.21.

In *Hanson v Bd of Co Rd Comm'rs*, 465 Mich 492, 501; 638 NW2d 396 (2002), our Supreme Court held that the plain language of MCL 691.1402(1) "imposes on the state and county road commissions a narrow duty to '*repair and maintain* . . . the improved portion of the highway designed for vehicular travel . . . .'" The "road commission's duty under the highway exception does not include a duty to design, or to correct defects arising from the original design or construction of highways." *Id.* at 502. Further, this Court has held that allegations concerning the "cross-slope/crown and/or super-elevation of the roadbed" are premised on design defect claims, not claims of lack of "repair" or "maintenance" that would otherwise fall within the highway exception. *Plunkett v Dep't of Transp*, 286 Mich App 168, 186; 779 NW2d 263 (2009) (quotation marks omitted).

In the instant case, plaintiff's complaint alleged that the intersection's "sharply ramped . . . crown" was the proximate cause of Skylar's injuries. Further, at the hearing on the motion for summary disposition plaintiff acknowledged that her claims were based on "the original construction of the roadway." Accordingly, we find that plaintiff's claim is premised on a construction defect, which does not fall within MCL 691.1402(1)'s exception to governmental immunity. *Hanson*, 465 Mich at 502; *Plunkett*, 286 Mich App at 186. Therefore, summary disposition pursuant to MCR 2.116(C)(7) was properly granted on plaintiff's claim that defendant breached its duty under MCL 691.1407(1). *Moraccini*, 296 Mich App at 391.

Plaintiff nevertheless also argues that the trial court erred by granting summary disposition because MCL 224.21, which is referenced in MCL 691.1407(1), creates a separate statutory duty specific to county road commissions to repair construction defects. Plaintiff argues that MCL 224.10 created a duty for defendant to strictly comply with the design plans when constructing the intersection, and that MCL 224.21 creates a "remedy" for the breach of this duty. Statutes are interpreted according to their plain meaning. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). We find that the language of MCL 224.21(2) is identical to that of MCL 691.1402(1), with the exception that MCL 224.21(2) uses the word "keep" instead of "maintain." "Keep" is not defined by the statute. The general rule is, unless defined in the statute, every word should be construed according to its plain and ordinary meaning. MCL 8.3(a); *Koontz*, 466 Mich at 312. The *Random House Webster's College Dictionary* (1999) defines "keep" as "to maintain." Accordingly, the word "keep" is synonymous to the word "maintain." Furthermore, our Supreme Court has previously held that "a county road commission's duty is coextensive with that owed by other governmental agencies, including the state . . . ." *Nawrocki v Macomb Co Rd Comm'rs*, 463 Mich 143, 170; 615 NW2d 702 (2000). Therefore, plaintiff is incorrect that MCL 224.21 creates a duty that is distinguishable from that contained in the highway exception. It is well settled that the highway exception does not create "a duty to install, to construct," or "to correct defects arising from the original design or construction of highways." *Hanson*, 465 Mich at 501-502. Accordingly, plaintiff's claim that defendant was liable for its failure to repair the defect in the intersection

that resulted because of the alleged failure to strictly comply with design plans when constructing the roadway does not fall within any exception to governmental immunity. *Id.* We hold that summary disposition pursuant to MCR 2.116(C)(7) was properly granted on this claim.

Plaintiff also argues that the trial court abused its discretion by granting defendant's motion to withdraw or amend the admission. We review a trial court's decision on a party's motion to withdraw an admission for an abuse of discretion. *Bailey v Schaaf*, 293 Mich App 611, 620; 810 NW2d 641 (2011). "A matter admitted under [MCR 2.312] is conclusively established unless the court on motion permits withdrawal or amendment of an admission." MCR 2.312(D)(1). However, "[t]he court may allow a party to amend or withdraw an admission for good cause." *Bailey v Schaaf*, 293 Mich App 611, 621; 810 NW2d 641 (2011), citing MCR 2.312(D)(1).

Here, defendant sought to withdraw the admission that "that the crown of the Hayes-24 Mile Rd. intersection on was not reasonably safe . . . for a school bus occupied by special-needs children to be driven across at the posted 45 mph speed limit." The duty to "repair" and "maintain," as contemplated under the highway exception, does not include a duty to fix construction defects, *Hanson*, 465 Mich at 502, such as an elevated crown in the road, *Plunkett*, 286 Mich App at 186. Therefore, even when considering request 29 as being admitted, the undisputed facts established that defendant still was entitled to immunity as a matter of law on plaintiff's claims. Thus, whether the admission was properly withdrawn has no effect on the case, and we need not consider the issue further. See *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004) ("Generally, this Court need not reach moot issues or declare legal principles that have no practical effect on the case . . . ."). Likewise, we need not consider plaintiff's argument that the trial court erred by failing to consider the admission when it initially granted defendant's motion for summary disposition.

Plaintiff next argues that she was denied due process because the trial court granted defendant's motion to withdraw or amend the admission before the hearing on the motion and before plaintiff was able to timely file her response. We review issues concerning due process infringements de novo. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). Generally, due process "in civil cases requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). While the trial court granted defendant's motion before the time had lapsed for plaintiff to file the response and before the hearing was held, this Court will not reverse on the basis of a violation of procedural due process if the outcome of the case would remain the same even if the violation had not occurred. *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 640-641; 506 NW2d 920 (1993). Here, plaintiff alleges on appeal that permitting defendant to withdraw the admission affected the outcome of her motion for reconsideration of the trial court's order granting summary disposition. However, as discussed *supra*, the admission had no effect on whether defendant was entitled to immunity as a matter of law on plaintiff's claims. Therefore, even if the trial court had denied defendant's motion, plaintiff would not have been entitled to reversal of the order granting summary disposition on her claims. Because the outcome would not have been different if plaintiff had been given an opportunity to be heard, she is not entitled to reversal based on the fact that the motion was decided before she was able to respond. *Id.*

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto