STATE OF MICHIGAN

COURT OF APPEALS

KIPATRICK MRKVA, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
v	No. 312132 Court of Claims
DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.	LC No. 10-000106-MD

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant Michigan Department of Transportation (MDOT) appeals as of right the trial court's order denying its motion for summary disposition. We affirm.

On May 4, 2010, plaintiff sustained injuries when he fell from his bicycle after entering an intersection from a sidewalk. Plaintiff alleged that his bike slid on a coat of tack, which is an emulsion product that works as a glue to hold layers of asphalt together in the process of paving roads, causing the bike to veer out of control and throwing plaintiff to the ground. The tack had just been sprayed from a truck onto the roadbed as part of a road construction project overseen by MDOT. Ajax Paving Industries, Inc. (Ajax), performed the paving work under contract with MDOT.

Plaintiff filed suit against MDOT in the Court of Claims, alleging a defective roadway and failure to maintain the roadway in reasonable repair. Plaintiff separately sued Ajax in the Wayne Circuit Court. The Court of Claims entered an order joining the suit against MDOT with the Wayne Circuit Court suit against Ajax, and the State Court Administrative Office assigned the circuit court judge to serve as a judge of the Court of Claims. Thereafter, the trial court denied MDOT's motion for summary disposition, in which MDOT had argued that the highway exception to governmental immunity, MCL 691.1402, did not apply because the alleged defective condition was not a defect in the roadbed itself and because the area in which plaintiff fell was closed for travel. MDOT had also maintained that, assuming the highway exception was implicated, plaintiff failed to provide any evidence that the roadway was not kept in reasonable repair.

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity and the statutory exceptions to immunity are likewise reviewed de novo on appeal.

Snead v John Carlo, Inc, 294 Mich App 343, 354; 813 NW2d 294 (2011). MCR 2.116(C)(7) provides for summary disposition when a claim is "barred because of . . . immunity granted by law . . . ." The movant may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The complaint's contents must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id.* When, however, a relevant factual dispute does exist, summary disposition is not appropriate. *Id.*

In *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391-392; 822 NW2d 799 (2012), this Court set forth some basic governing principles regarding governmental immunity:

> Except as otherwise provided, the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., broadly shields and grants to governmental agencies immunity from tort liability when an 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); *Grimes v Dep't of Transp*, 475 Mich 72, 76-77; 715 NW2d 275 (2006). "The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency." *Duffy*, 490 Mich at 204. A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory exceptions. *Grimes*, 475 Mich at 77; *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. *Id.* at 614. "A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Odom*, 482 Mich at 478-479.

With respect to the highway exception to governmental immunity at issue here, at the time of the bicycle mishap, MCL 691.1402(1) provided in pertinent part as follows:

> Except as otherwise provided in [MCL 691.1402a], 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. . . . 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.[1]

The highway exception to governmental immunity encompasses injuries to pedestrians and bicyclists, not simply motorists. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 171-172; 615 NW2d 702 (2000); *Hatch v Grand Haven Twp*, 461 Mich 457; 606 NW2d 633 (2000).

MDOT first argues that, as a matter of law, the presence of tack on the roadway did not constitute an alleged defect in the roadbed itself; therefore, the highway exception to governmental immunity was not implicated. "The state['s] . . . duty, under the highway exception, is only implicated upon [its] failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage." *Nawrocki*, 463 Mich at 183. In *Hagerty v Bd of Manistee Co Rd Comm'rs*, 493 Mich 933, 934; 825 NW2d 581 (2013), our Supreme Court observed:

> The plaintiff's decedent was fatally injured when the vehicle she was driving left an unpaved road in Manistee County and hit a tree. The plaintiff alleged that this accident occurred when an oncoming motorist caused a cloud of dust to rise from the roadway, causing the decedent to lose her orientation, drive into soft sand on the edge of the road, and veer off the roadway. This theory of causation failed to point to a condition of the highway in need of repair. A dust cloud rising from an unpaved road is not a defect in the physical structure of the roadbed, as required for liability to arise under the Governmental Tort Liability Act highway exception. Moreover, a plaintiff cannot recover in a claim where the sole proximate cause of the injury is a natural substance that has accumulated over a highway. An accumulation of gravel, whether natural or otherwise, does not implicate the defendant's duty to maintain the highway in "reasonable repair." [Citations omitted.]

In a dissenting opinion in *LaMeau v Royal Oak*, 289 Mich App 153, 187-189; 805 NW2d 841 (2010), which was adopted by the Supreme Court in reversing the majority's holding and in lieu of granting leave to appeal, 490 Mich 949 (2011), the dissent opined that a guy wire anchored into and strung across a sidewalk did not constitute a defect under the highway exception to governmental immunity. The dissent, in reaching this conclusion, defined the term "defect" as an imperfection or shortcoming in the highway itself, defined the term "repair" as meaning to restore to a good or sound condition, and defined the term "maintain" as keeping in a state of repair or efficiency. *LaMeau*, 289 Mich App at 188-189.

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[1] This is the version of the statute as amended by 1999 PA 205 and as it existed in May 2010 when the accident occurred. The Legislature amended MCL 691.1402 pursuant to 2012 PA 50, but the amendment did not take effect until March 13, 2012.

According to deposition testimony, "tack" is an emulsion product that works as a glue to hold layers of asphalt together in the process of paving a road. MDOT describes tack in its appellate brief as follows:

> Tack is a necessary step in a repaving project. Its purpose is to allow the new asphalt to bind and adhere to the existing surface. Tack is sprayed before each new layer (called a lift) of asphalt [is] laid down.

Therefore, unlike the dust cloud or gravel mentioned in *Hagerty* or the guy wire addressed in *LaMeau*, the coat of tack was necessarily part of "the actual physical structure of the roadbed surface." *Nawrocki*, 463 Mich at 183. Accordingly, we reject MDOT's argument that the presence of tack on the roadway did not constitute an alleged defect in the roadbed itself.

MDOT next argues that, as a matter of law, the condition complained of by plaintiff, i.e., the tack on the roadway, could not logically arise from a failure to maintain the roadway in reasonable repair and thus could not constitute a defect. Moreover, MDOT maintains that even if legally the presence of tack could be viewed as a possible defective condition resulting from a failure to maintain the roadway in reasonable repair, there was no evidence establishing that the roadway was not kept in reasonable repair, nor that the presence of tack gave rise to a defective condition. MDOT additionally contends that the accident did not occur in an area open to public travel and, therefore, there was no duty to maintain the area of the fall in reasonable repair. We grouped these arguments together, given that there is some overlap in the required analyses as reflected in *Snead*, 294 Mich App 343.

In *Snead*, *id.* at 346, this Court summarized the nature of the case and its holding:

> This case arose out of a motor vehicle accident in which plaintiff drove her car into a large construction hole located in the roadbed of a highway exit lane, allegedly as a result of confusing and inadequate traffic-control devices. We conclude that the relevant condition or hazard for purposes of determining the applicability of the highway exception was the construction hole itself, which proximately caused the accident and any resulting damages. Furthermore, we find, as a matter of law, that the exit lane's roadbed where the construction hole was located constituted an improved portion of the highway and that the exit lane had been designed for vehicular traffic. We also conclude that a genuine issue of material fact exists regarding whether the exit lane was closed or effectively remained open for public travel at the time of the accident, as gleaned by a reasonable motorist traveling along the pertinent section of highway.

In the context of a situation where a defect allegedly existed in a roadway that was subject to a construction project, the analysis in *Snead* makes clear that in determining whether there was indeed a defect implicating the highway exception, the condition at issue must be viewed from the perspective of the roadway being open for public travel, assuming, at a minimum, that a question of fact existed regarding whether the roadway was open or closed. *Id.* at 362-363. The *Snead* panel explained:

> With its focus placed chiefly on the traffic-control devices, MDOT's position in this appeal essentially ignores the fact that a construction hole existed in the roadbed of the exit lane. Again, the issue concerning the traffic-control devices cannot be considered in isolation; rather, it affects the questions whether the exit lane was open for public travel and whether MDOT was negligent, both of which questions relate to the construction hole. . . . MDOT argues that "[e]ven assuming the road was not properly barricaded, this has nothing whatsoever to do with governmental immunity." This argument fails to take into consideration the presence of the construction hole. If there were absolutely no barricades blocking access to the exit lane and a complete absence of signage indicating a closure, one would simply have a case where a motorist struck a major defect in the exit lane and the case would easily fit within the parameters of the highway exception. [*Id.*]

For purposes of invoking the highway exception to governmental immunity and imposing a duty and liability, a roadway, *left open for public travel*, is not in reasonable repair, nor is it being reasonably maintained, if there is an enormous hole in the roadway. We appreciate that MDOT is essentially questioning how a roadway can be defective and not in reasonable repair when MDOT and its contractors are actively engaged in legitimate efforts to repair and maintain the roadway, desiring to make it reasonably safe and fit for travel. But the problem is that, if the roadway remains open for public travel during the construction, the motorist, bicyclist, or pedestrian using the roadway can potentially encounter a condition that, while likely not hazardous or defective once the construction is completed, is in fact hazardous or defective in the midst of the construction. We acknowledge that the hole in *Snead*, which was "the width of one lane and probably six to seven feet deep[,]" *id.* at 350, is more clearly a defect in the roadbed, reflecting a failure to keep the road in reasonable repair, than would be the tack on the roadbed in the case at bar. However, we find that there is at least a question of fact regarding whether the tack, in its initial slippery, un-dried, and exposed state, constituted a defective condition of the roadway, such that the roadway was not in reasonable repair when plaintiff fell from his bicycle.

First, the circumstances of the accident itself give rise to a reasonable inference that the tack caused plaintiff to lose control of his bike, thereby suggesting a defective road condition relative to bike travel. Further, one of Ajax's employees testified in his deposition that, while tack was not slippery to walk on if gym shoes were being worn, he would avoid any attempt to ride a bike or motorcycle on recently-placed tack. Additionally, plaintiff's expert testified that tack would not affect a motor vehicle, unless the driver tried to quickly accelerate; however, he further opined that tack is unreasonably slippery for two-wheelers, like bicycles. MDOT's expert testified that the roadway, at the time and place at issue, was reasonably safe if a bicyclist exercised some care,[2] but then he also indicated later that the tack did not "present an *extreme* danger to pedestrians or traffic." (Emphasis added.) This testimony suggests that some degree of danger existed. In sum, an issue of material fact existed concerning the presence of a

[2] We note that plaintiff testified that he was going "[v]ery slow" when the accident occurred.

defective condition and whether the roadway was kept in reasonable repair as to bike traffic. To the extent that some of MDOT's arguments pertain to fault on the part of plaintiff and comparative negligence, those arguments do not directly relate to governmental immunity, there exist genuine issues of material fact as to the allocation of fault, and the matter is for the trier of fact to resolve.

Finally, we must still address the question of whether the area of the roadway traversed by plaintiff was open for public travel. In *Snead*, 294 Mich App at 359-362, this Court observed:

> [W]e must also contemplate the impact of construction activities on MDOT's duty, and this issue necessarily entails consideration of whether the exit lane could properly be deemed a "highway" at the time of the accident under the statutory definition of "highway" in MCL 691.1401(e), which required the exit lane to be "open for public travel . . . ."[3] This is the part of the analysis where the traffic-control devices, i.e., orange barrels, signs, markers, and barricades, become relevant.
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> Traffic-control devices generally indicate whether or not a road is "open for public travel." Matters concerning the traffic-control devices here cannot be viewed or examined in a vacuum and must necessarily be considered in conjunction with, and not independent of, the construction hole in the exit lane. If the exit lane was effectively open for public travel and not closed as reflected by traffic-control devices, MDOT's duty to keep the exit lane reasonably safe for public travel would be implicated. MDOT argues that it is beyond rational dispute that the exit lane was in fact closed for public travel given the construction activities and the placement of orange barrels. We shall later discuss the issue concerning whether the exit lane was open or closed for public travel as indicated by the barrels and other traffic-control devices. Setting aside for the moment consideration of the barrels with regard to the determination whether the exit lane was open for public travel, we do not find that the construction activities, in and of themselves, support a conclusion that the exit lane was closed. Assuming a motorist could observe from a distance that construction was ongoing on part of a highway that he or she wished to use, the motorist could still reasonably proceed to drive through the construction zone if there were no signs or traffic-control devices indicating a closure, given that roadways through construction zones often remain open, although there might be some limitations, e.g., only one lane available. A road is not necessarily closed for public travel simply because construction work is being performed in the area. We acknowledge that there are situations in which a construction project so blatantly blocks any potential use of a roadway that a reasonable motorist would certainly understand and appreciate that the roadway was fully closed, even in the absence of any signage or traffic-

[3] This language is now found in MCL 691.1401(c). See 2012 PA 50.

> control devices. For purposes of analyzing the applicability of the highway exception to governmental immunity, we conclude that the appropriate test for determining whether a road is open for public travel is whether a reasonable motorist, under all the circumstances, would believe that the road was open for travel. It would be nonsensical to conclude that a road was closed for public travel in circumstances in which a motorist had no notice that construction activities precluded the safe use of the road, making evasive action difficult or impossible. [*Snead*, 294 Mich App at 359-362.]

A governmental agency's duty to keep a highway in good repair and fit for travel is suspended while the highway is being improved or repaired by closing the highway to public travel. *Id.* at 367.

Here, there was evidence sufficient to create a factual dispute regarding whether the area of the intersection in question was open for public travel. We agree with MDOT that there was undisputed evidence that plaintiff, on the basis of his observations on approaching the intersection, was aware of construction that resulted in the closure of the two northern lanes of Michigan Avenue to vehicular traffic. These northerly lanes were the first lanes encountered by plaintiff as he pedaled alongside north-south Military Street and entered the intersection at Michigan Avenue, at which point he fell; the two southern lanes of Michigan Avenue remained open and allowed for the flow of east-west traffic. There was also evidence that some temporary blockading had occurred on Military Street when the tack was being sprayed onto the roadbed and that barrels had otherwise been placed in the general area where plaintiff was biking when the accident occurred.[4] However, what is not clear is whether the exact area in which plaintiff attempted to traverse Michigan Avenue was part of any closure, nor is it clear whether plaintiff was riding his bike inside or outside any assumed barreled-off area. Margaret Mrkva, plaintiff's wife, was riding her bike behind her husband at the time of the accident, and she testified in her deposition:

> I can tell you that there was no barricade of any kind to alert us that we shouldn't be crossing there, so there was – so there was no barrels or no tape or anything to say that the sidewalk was closed or that this was not an intersection to cross the street at.

Contrary to MDOT's argument, the fact that Mrs. Mrkva could not recall whether there otherwise were barrels in the middle of Michigan Avenue does not negate her assertion that there were no barrels blocking the specific area where plaintiff attempted to cross Michigan Avenue. MDOT maintains that plaintiff's own expert testified that plaintiff was riding his bike within a barreled-off area. However, a close review of the testimony shows conflicting statements and an absence of clarity on the matter. Regardless, plaintiff could nonetheless rely on his wife's testimony, and she was actually present at the scene when the accident occurred. The testimony of Ajax's personnel was not helpful on the issue, as it was vague and reflected a lack of

[4] Military Street generally remained open to all traffic.

knowledge primarily due to a failure to personally observe the actual fall. One Ajax employee testified as follows:

> *Q.* Was there a blockade of some sort that prevented [plaintiff] from getting into the intersection?
>
> *A.* There may have been.
>
> *Q.* Do you have an explanation for how he got into the intersection, if there was a blockade that may have been up?
>
> . . .
>
> *A.* You can ride through it if you choose to disobey the setup, the construction setup.
>
> *Q.* Is that what you believe happened here?
>
> *A.* I don't know what happened. When I turned around, he was picking himself up off the ground.
>
> . . .
>
> *A.* I didn't see him fall.
>
> *Q.* And you didn't see him go around any barriers?
>
> *A.* I didn't see him go around any barriers.
>
> *Q.* You didn't see him go through any tape?
>
> *A.* I didn't see him go through any tape.
>
> *Q.* Did you see any cones on the ground that he knocked over?
>
> *A.* Not that I noticed, no.

Although couched in terms of generalities, another Ajax employee actually testified as follows:

> *Q.* [D]o you do anything to keep people off of the tack when it's still slippery?
>
> *A.* No.

Aerial photographs from Google Earth were submitted to the trial court, but those photos, which appear to show construction barrels, are dated six days after the accident. And the position of the barrels, which form a north-south line in a sweeping arc with the southerly end to the east of the northerly peak, do not clearly depict that the intersection was closed off with

respect to someone crossing from Military Street's northeast sidewalk to that street's southeast sidewalk. Plaintiff's testimony was not sufficiently developed as to whether he observed any barrels or barricades blocking his path or whether he attempted to cross Michigan Avenue inside or outside any barreled-off area that may have existed. With respect to the roadway area that he attempted to cross, plaintiff did testify, "I would say for bicycles and pedestrians, it was fine." MDOT makes too much of plaintiff's testimony which acknowledged that the northern lanes of Michigan Avenue were closed to vehicular traffic. This testimony simply does not establish that a person on a bike traveling south along *open* Military Street would reasonably be aware that the intersection was closed to pedestrian and bicycle traffic that was heading through the intersection in order to continue on down Military Street, assuming there was even an actual attempt at such a closure.

In sum, a question of fact exists regarding whether the area where the bike spill took place was open for public travel.

Affirmed. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello