STATE OF MICHIGAN

COURT OF APPEALS

DANIELLE NORMAN,

Plaintiff-Appellant,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
May 20, 2021

No. 354459
Court of Claims
LC No. 20-000025-MD

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

Plaintiff, Danielle Norman, appeals by right the Court of Claims' grant of summary disposition to defendant, Michigan Department of Transportation, and dismissal of her lawsuit based upon governmental immunity. We affirm.

I. FACTUAL BACKGROUND

In Detroit, Michigan Avenue (U.S. Route 12), between the John C. Lodge Freeway and Brooklyn Street, has four motor vehicle traffic lanes and a center turn lane. Adjacent to the traffic lanes on each side of the avenue are eight-foot-wide marked parallel parking spots bordered by 3.5-foot-wide buffer zones marked by painted diagonal lines with periodically placed reflective delineator markers held in place by eight-inch-wide discs two inches in height affixed to the pavement. Six-foot-wide marked bike lanes adjacent to the buffer zones are bounded by the curbs on each side of the avenue. On July 11, 2019, while riding a bicycle in the vicinity of 1236-1254 Michigan Avenue, plaintiff struck a broken delineator, fell, and was injured. She sued defendant claiming tort liability existed under the highway exception to governmental immunity because her accident occurred on an improved portion of the highway and defendant failed to properly maintain it. In lieu of answering, defendant moved for summary disposition under MCR 2.116(C)(7) on the ground it was entitled to governmental immunity from tort liability. With its supporting brief defendant submitted an affidavit of its safety engineer with engineering drawings of Michigan Avenue's design and photos of the area where plaintiff alleged that she fell. Plaintiff did not timely respond to defendant's motion and the Court of Claims issued its opinion and order granting defendant's motion on the ground that the evidence established that the highway exception did not

apply entitling defendant to governmental immunity. Plaintiff moved for reconsideration and submitted with her brief in support her proposed opposition brief to defendant's motion and asserted that the trial court erred by ruling in favor of defendant. The trial court considered her submissions but found that her arguments for a different disposition of defendant's motion lacked merit. Plaintiff now appeals.

II. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). The availability of governmental immunity is a question of law reviewed de novo. *Pierce v City of Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). When reviewing a motion under MCR 2.116(C)(7), the trial court must accept as true all of the plaintiff's well-pleaded factual allegations and construe them in favor of the plaintiff, unless disputed by documentary evidence submitted by the moving party. *Dextrom*, 287 Mich App at 428; *Pierce*, 265 Mich App at 177. The court must consider any affidavits, depositions, admissions, or other documentary evidence submitted, and the court must determine whether there are any genuine issues of material fact. *Dextrom*, 287 Mich App at 429. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law for the trial court to decide. *Id*. If a question of fact exists, dismissal is inappropriate. *Id*. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We also review de novo a trial court's interpretation and application of statutes and court rules. *Safdar v Aziz*, 501 Mich 213, 217; 912 NW2d 511 (2018).

III. ANALYSIS

Plaintiff first argues that the trial court erred by following provisions of the Court of Claims local court rule, LCR 2.119, on the ground that it conflicts with MCR 2.116, the general procedural court rule governing dispositive motion practice, because LCR 2.119 prescribes different timing for filing response briefs in relation to such motions. She contends that MCR 2.116 requires setting a hearing for dispositive motions which triggers the time to file a response brief and because the trial court errantly followed LCR 2.119, which leaves setting a hearing to the discretion of the court, it violated her due-process rights by denying her notice and opportunity to respond to defendant's dispositive motion. We disagree.

A. ANALYSIS OF THE MICHIGAN COURT RULES AND THE LOCAL COURT RULES FOR THE COURT OF CLAIMS

A review of the court rules clarifies why plaintiff's argument in this matter lacks merit. MCR 1.103 provides that:

> The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. Rules stated to

be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over general rules.

MCR 1.105 directs that the "rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR 2.001 similarly states that the "rules in this chapter govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure." These rules plainly express our Supreme Court's intention to establish uniform rules of civil procedure in all courts except that courts of limited jurisdiction may follow different procedures.

MCR 2.116 provides for dispositive motions and states in relevant part as follows:

(B)(1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule.

(2) A motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim.

(C) The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

* * *

(7) Entry of judgment, dismissal of the action, or other relief is appropriate because of . . . immunity granted by law . . . .

* * *

(D)(2) The grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading.

* * *

(G)(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(*i*) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing, and

(*ii*) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.

* * *

(I)(1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.

Analysis of MCR 2.116 reveals that, under Subpart (G)(1)(a), except as provided in MCR 2.116, the provisions of MCR 2.119 also apply to dispositive motions, and unless a different period is set by the court, MCR 2.116 prescribes the timing for briefing. Significant to the issues before this Court in the case at bar, although Subpart (G)(1)(a) links dispositive motion brief filing to the date set for a hearing on such motions, the court rule, nevertheless, gives courts discretion to define the timing of submissions of briefs by the parties. Further, although MCR 2.116 indicates that hearings on dispositive motions may be held by trial courts, the rule nowhere makes holding a hearing mandatory. Consequently, one must look elsewhere in the court rules to determine whether hearings are mandatory.

MCR 2.119 generally governs motion practice in civil proceedings. MCR 2.119 provides in relevant part:

(C)(1) Unless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits must be served as follows:

(a) at least 9 days before the time set for the hearing, if served by first-class mail, or

(b) at least 7 days before the time set for the hearing, if served by delivery under MCR 2.107(C)(1) or (2) or MCR 1.109(G)(6)(a).

(2) Unless a different period is set by these rules or by the court for good cause, any response to a motion (including a brief or affidavits) required or permitted by these rules must be served as follows:

(a) at least 5 days before the hearing, if served by first-class mail, or

(b) at least 3 days before the hearing, if served by delivery under MCR 2.107(C)(1) or (2) or MCR 1.109(G)(6)(a).

(3) If the court sets a different time for serving a motion or response its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

> (4) Unless the court sets a different time, a motion must be filed at least 7 days before the hearing, and any response to a motion required or permitted by these rules must be filed at least 3 days before the hearing.
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> * * *
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> (E)(1) Contested motions should be noticed for hearing at the time designated by the court for the hearing of motions. A motion will be heard on the day for which it is noticed, unless the court otherwise directs. If a motion cannot be heard on the day it is noticed, the court may schedule a new hearing date or the moving party may renotice the hearing.
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> (2) When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.
>
> (3) A court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of and in opposition to a motion.

MCR 2.119(C), similar to MCR 2.116(G), prescribes deadlines for filing motions and responses to motions and links the deadlines to the date set for hearings on such motions. MCR 2.119(C) also indicates that trial courts have discretion to vary from the prescribed filing deadlines. Although Subpart (E)(1) states that "motions should be noticed for hearing at the time designated by the court for the hearing of motions[,]" (E)(3) grants trial courts discretion to "dispense with or limit oral arguments on motions[.]" Although MCR 2.119 indicates that hearings on motions may be held by trial courts, the rule nowhere makes hearings mandatory. These rules indicate that our Supreme Court anticipated that hearings on motions ordinarily will be held by trial courts, but it did not impose a mandatory requirement that they do so under all circumstances.

Respecting the Court of Claims, in *Okrie v Michigan*, 306 Mich App 445, 456; 857 NW2d 254 (2014) (quotation marks and citations omitted), this Court explained:

> The Court of Claims is a "legislative court" and not a "constitutional court" and derives its powers only from the act of the Legislature and is subject to the limitations therein imposed. The Legislature created a Court of Claims as a substitute for the board of State auditors and the State administrative board for the purpose of hearing and determining all claims and demands, liquidated and unliquidated, *ex contractu* and *ex delicto* against the State.

The Legislature enacted the Court of Claims Act, MCL 600.6401 *et seq*. (COCA), in 1961, effective January 1, 1963, and later authorized our Supreme Court to assign four judges from this Court to preside over the Court of Claims, MCL 600.6404. The Legislature defined the Court of Claims jurisdiction and power in MCL 600.6419 which provides in relevant part:

(1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals.

* * *

Except as otherwise provided in this section, the court has the following power and jurisdiction:

(a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

* * *

(7) As used in this section, "the state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties.

In *Progress Michigan v Attorney General*, 506 Mich 74; 954 NW2d 475 (2020), our Supreme Court considered whether a complaint had been timely filed in the Court of Claims. In deciding that issue, the Court looked "to the procedures that govern practice in the Court of Claims." *Id*. at 93. Our Supreme Court explained:

> Under MCL 600.6422, practice and procedure in the Court of Claims is governed by the statutes and court rules applicable to proceedings in the circuit court, unless otherwise specifically stated in the COCA:
>
> > (1) Practice and procedure in the court of claims shall be in accordance with the statutes and court rules prescribing the practice in the circuit courts of this state, except as otherwise provided in this section.
> >
> > (2) The supreme court may adopt special rules for the court of claims.
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> * * *
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> The Revised Judicature Act (RJA), MCL 600.101 *et seq*., governs practice and procedure in the Court of Claims because the COCA is contained within the RJA. [*Id*. at 93-94.]

MCL 600.6422 unambiguously provides that the Court of Claims must follow the statutes and the procedural court rules prescribed by our Supreme Court, but it also authorizes our Supreme Court to adopt special practice and procedural rules for the Court of Claims. *Progress Michigan* acknowledges that the Legislature authorized our Supreme Court in MCL 600.6422 to adopt special rules for procedure in the Court of Claims.

In MCR 8.112(A), our Supreme Court has prescribed the manner by which courts may adopt local rules. MCR 8.112(A) provides:

> (1) A trial court may adopt rules regulating practice in that court if the rules are not in conflict with these rules and regulate matters not covered by these rules.
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> (2) If a practice of a trial court is not specifically authorized by these rules, and
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> (a) reasonably depends on attorneys or litigants being informed of the practice for its effectiveness, or
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> (b) requires an attorney or litigant to do some act in relation to practice before that court, the practice, before enforcement, must be adopted by the court as a local court rule and approved by the Supreme Court.
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> (3) Unless a trial court finds that immediate action is required, it must give reasonable notice and an opportunity to comment on a proposed local court rule to the members of the bar in the affected judicial circuit, district, or county. The court shall send the rule and comments received to the Supreme Court clerk.
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> (4) If possible, the number of a local court rule supplementing an area covered by these rules must correspond with the numbering of these rules and bear the prefix LCR. For example, a local rule supplementing MCR 2.301 should be numbered LCR 2.301.

Relevant to the case at bar, the Court of Claims adopted LCR 2.119. Our Supreme Court approved LCR 2.119's adoption by MSC Admin Order No. 2014.16 issued May 21, 2014, effective that same day.[1] Since its adoption LCR 2.119 has been amended with approval of our Supreme Court and currently in relevant part provides:

> (A)(6) There is no oral argument on motions unless a request is made in the motion or response, and the request is granted by the assigned judge. A notice of hearing, if any, will be provided by the court.

[1] The administrative order is no longer available on our Supreme Court's website.

(7) The motion will be deemed submitted for decision 21 days after the date of filing as appears in the title of the motion unless otherwise specified by the court or noticed for hearing by the court.

* * *

(C)(1) Unless a different period is set by these rules or by the court for good cause, a written motion (other than one that may be heard ex parte) and any supporting brief or affidavits must be served within 5 days after the date of filing as appears in the title of the motion, and in accordance with MCR 2.107.

(2) Unless a different period is set by these rules or by the court for good cause, any response to a motion (including a brief or affidavits) required or permitted by these rules must be filed with the court and served within 14 days after the date of filing as appears in the title of the motion and in accordance with MCR 2.107.

(3) The failure to file a response to a motion will result in the treatment of the motion as uncontested.

* * *

(E)(1) Contested motions will be deemed submitted for decision 21 days after the date of filing as appears in the title of the motion unless otherwise specified by the court or noticed for hearing by the court.

(2) When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.

(3) In its discretion, the court may grant, dispense with, or limit oral arguments on motions; and may require the parties to file supplemental briefs in support of and in opposition to a motion.

LCR 2.119 plainly governs motion practice in the Court of Claims. It informs litigants that the date of filing of all contested motions triggers the 14-day response deadline and that such motions are deemed submitted for decision 21 days after filing unless the Court of Claims specifies otherwise. LCR 2.119 also informs litigants that the Court of Claims has sole discretion to determine whether to hold a hearing and permit oral arguments by the parties on such motions. LCR 2.119 lacks any ambiguity.

LCR 2.119 is readily accessible online at the Michigan Courts' website located at https://courts.michigan.gov/courts/michigansupremecourt/rules/pages/current-court-rules.aspx. Close analysis of MCR 2.116, MCR 2.119, and LCR 2.119, does not support plaintiff's argument. LCR 2.119 does not conflict with the general court rules that govern motions. MCR 2.116 and MCR 2.119 anticipate hearings on motions but do not mandate them. These rules grant trial courts in civil proceedings discretion to manage their dockets and dispense with hearings and oral argument. LCR 2.119, which exclusively applies to motion practice in the Court of Claims, a

legislatively created court of limited jurisdiction, leaves conducting hearings in the sole discretion of the presiding judge. LCR 2.119 does not link to hearing dates the filing of briefs in response to motions, dispositive or otherwise. Instead, it sets forth specific procedural guidelines for motion practice in the Court of Claims. We find no conflict existing between the general rules and this local rule.

Plaintiff asserts that *Schlender v Schlender*, 235 Mich App 230; 596 NW2d 643 (1999), stands for the proposition that a local court rule that conflicts or regulates matters covered by the Michigan Court Rules must be deemed invalid. *Schlender*, a child change of custody case, involved a circuit court's administrative policy that this Court found in essence functioned as a local rule which permitted the trial court to summarily decide the child custody dispute without holding an evidentiary hearing if it concluded that the movant could not sustain the burden of proof for changing custody of the parties' child. This Court found that the circuit court had not sought or obtained approval for the policy from our Supreme Court as required under MCR 8.112(A)(2). This Court held that, in child custody matters, a trial court cannot properly resolve a custody dispute without holding the necessary evidentiary hearing. This Court explained that the unapproved local court rule improperly denied the petitioner an evidentiary hearing in which the trial court had the statutory obligation to make findings on each factor defined in MCL 722.23. This Court also observed that MCR 3.210(C) recognized the right to a hearing in child custody cases, and postjudgment motions in domestic relations actions are specifically governed by MCR 2.119 pursuant to MCR 3.213. The unapproved local rule, therefore, lacked validity. *Id*. at 233-234.

Close analysis of *Schlender* reveals that it does not stand for the proposition that local rules are automatically invalid if they cover matters covered by the general court rules. *Schlender* simply stands for the proposition that a local court cannot eliminate an evidentiary hearing in a child custody dispute based upon a blanket administrative policy. Moreover, *Schlender* is inapposite to this case for a number of reasons. First, the case at bar does not concern a child custody dispute. Second, it does not involve an instance where a lower court applied a local court rule unapproved by our Supreme Court as required by MCR 8.112(A)(2). Third, this case does not involve a conflict between the general court rules and a local rule. Neither Michigan statutes nor court rules require that courts conduct hearings on dispositive motions, nor do they preclude a trial court from ruling on a properly filed dispositive motion where the opposing party fails to timely respond.

B. APPLICATION OF THE MICHIGAN COURT RULES AND THE LOCAL COURT RULES FOR THE COURT OF CLAIMS TO PLAINTIFF DO NOT VIOLATE HER DUE-PROCESS RIGHTS

That the underlying premise of plaintiff's argument, that LCR 2.119 conflicts with MCR 2.116 and MCR2.119, lacks merit, does not fully resolve this matter. We must also consider whether the trial court deprived her of due process. It did not.

Plaintiff claims that the trial court deprived her of due process by not scheduling a hearing that would have alerted her to respond to defendant's dispositive motion, which in essence, is a claim of denial of procedural due process. In *Bonner v Brighton*, 495 Mich 209, 223-224; 848 NW2d 380 (2014) (quotation marks and citations omitted), our Supreme Court explained:

> analysis of substantive and procedural due process involves two separate legal tests. While the touchstone of due process, generally, is protection of the individual against arbitrary action of government, the substantive component protects against the arbitrary exercise of governmental power, whereas the procedural component is fittingly aimed at ensuring constitutionally sufficient procedures for the protection of life, liberty, and property interests.

Respecting procedural due process, the Court clarified:

> Well established is the assurance that deprivation of a significant property interest cannot occur except by due process of law. While the meaning of the Due Process Clause and the extent to which due process must be afforded has been the subject of many disputes, there can be no question that, at a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard. To comport with these procedural safeguards, the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. [*Id*. at 235 (quotation marks and citations omitted).]
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> * * *
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> The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it. All that is necessary, then, is that the procedures at issue be tailored to the capacities and circumstances of those who are to be heard to ensure that they are given a meaningful opportunity to present their case, which must generally occur before they are permanently deprived of the significant interest at stake. [*Id*. at 238-239 (alteration, quotation marks and citations omitted).]

In *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005) (citations omitted), this Court stated:

> Moreover, due process is a flexible concept, the essence of which is to ensure fundamental fairness. Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker.

In this case, the proof of service in the trial court's record reflects that defendant through counsel filed its motion for summary disposition and supporting brief on April 21, 2020, and served plaintiff's counsel by e-mail at his e-mail address, and served him by ordinary mail on that same date in a postage-paid envelope addressed to plaintiff's counsel at his law firm's address. Plaintiff does not argue that defendant failed to properly serve her its motion. Plaintiff, therefore, cannot legitimately claim that she lacked notice of defendant's motion.

Respecting whether she had opportunity to be heard, LCR 2.119(A)(6) informed plaintiff that no oral argument would be heard unless requested by either party and the trial court granted

such request. The record reflects that defendant did not request oral argument in its motion. Therefore, plaintiff needed to request a hearing and oral argument if that is what she desired. LCR 2.119(E)(3), however, further informed the parties that the trial court had discretion regarding whether to grant the parties oral argument on the motion. Therefore, plaintiff had the opportunity to request a hearing with oral argument by the parties.

LCR 2.119(A)(7) informed the parties that defendant's motion would be deemed submitted for decision 21 days after the date of filing unless the trial court directed otherwise. LCR 2.119(C)(2) directed plaintiff to file a response to defendant's dispositive motion within 14 days after the date of defendant's filing of its motion. Therefore, because defendant filed its motion on April 21, 2020, plaintiff had until May 5, 2020, to file a response. Nothing in the record remotely suggests that the trial court deprived plaintiff of the opportunity to file a response to defendant's motion. LCR 2.119 provided plaintiff an unrestricted opportunity to file a response brief. Plaintiff did not file a response brief within the 14-day period in which required to do so.

The record reflects that, although LCR 2.119(A)(7) deemed defendant's motion submitted for decision as of May 12, 2020, the trial court did not issue its written opinion and order until June 29, 2020. In its opinion, the trial court noted that plaintiff failed to timely respond to defendant's motion, but it did not treat the motion as uncontested and merely grant the motion without consideration of the merits of defendant's motion in relation to plaintiff's claim in her complaint.

The record reflects that the trial court reviewed and considered plaintiff's allegations in her complaint in detail and then considered whether defendant established the availability of governmental immunity. The trial court reviewed the substantive evidence submitted by defendant and supported by defendant's safety engineer's affidavit testimony. The trial court's opinion indicates that the court thoroughly analyzed the applicable law and defendant's claim of no liability because of governmental immunity. Defendant presented ample evidence from which the trial court could appropriately conclude that the location of plaintiff's accident as specifically alleged by plaintiff did not constitute a portion of the highway designed for vehicular travel but a buffer zone off-limits to vehicular and bicycle traffic. The intended design of the buffer zone dictated the disposition of plaintiff's case because the highway exception did not apply. The record, therefore, reflects that, despite plaintiff's failure to respond to defendant's motion, the trial court did not jump to judgment but thoroughly considered whether any reasonable ground existed to permit plaintiff's case to continue.

Moreover, the record reflects that, after the trial court ruled and plaintiff moved for reconsideration, the court did not dismissively dispose of her motion but considered the grounds she asserted for a different disposition of defendant's motion. With her motion and supporting brief, plaintiff submitted her proposed opposition brief to defendant's motion which set forth her arguments for denying defendant's motion. The record indicates that the trial court reviewed all of her submissions but found that they lacked merit because she could not establish that the highway exception to governmental immunity applied in this case.

Based upon the record in this case, we conclude that the trial court did not deprive plaintiff an opportunity to be heard. LCR 2.119 afforded her opportunity to respond to defendant's motion and despite her failure to do so the trial court considered her claims and arguments for her case

and in opposition to defendant's claim of governmental immunity. Accordingly, the trial court did not deprive plaintiff of due process.

C. PLAINTIFF'S ARGUMENT THERE IS A FACTUAL QUESTION IS UNSUPPORTED BY THE RECORD

Plaintiff also argues that the trial court erred by granting defendant dismissal because vehicles can drive over the buffer zone which she claims necessitates a fact inquiry into the intent of its design and the practical effect of its design which allows vehicles to travel on it. We disagree.

In Michigan, unless a specified exception exists, governmental agencies have broad immunity from tort liability. MCL 691.1407(1) provides:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

One of the exceptions to governmental immunity is the highway exception under MCL 691.1402(1) which provides in relevant part:

> 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. . . . *[T]he duty of a governmental agency 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*. [Emphasis added.]

In *Grimes v Dept of Trans*, 475 Mich 72, 73; 715 NW2d 275 (2006), our Supreme Court considered whether the shoulder of a road constituted an improved portion of the highway designed for vehicular travel for purposes of the highway exception to governmental immunity. The Court concluded that the shoulders on highways do not fall within the highway exception because they are not designed for vehicular travel. *Id*. The Court explained:

> The scope of the highway exception is narrowly drawn. Under its plain language, every governmental agency with jurisdiction over a highway owes a duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." However, when the governmental agency is the state or a county road commission, as is the case here, the Legislature constricted the scope of the highway exception by limiting the portion of the highway covered by that exception. For these agencies, the highway exception does not extend to an installation "outside" the improved portion of the highway such as a sidewalk,

> trailway, or crosswalk, although these features are included in the general definition of a "highway." The duty of these agencies to repair and maintain does not extend to every "improved portion of highway." It attaches only "to the improved portion of the highway" that is also "designed for vehicular travel." As we discuss later in this opinion, such narrowing of the duty supplies important textual clues regarding the Legislature's intent concerning whether a shoulder falls within or without the protection afforded by the GTLA. [*Id*. at 78.]

Our Supreme Court further explained that in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162, 180; 615 NW2d 702 (2000), it reconciled prior decisions and clarified the scope of the highway exception so that it is understood that if the condition that caused the injury " 'is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable . . . .' " Our Supreme Court overruled *Gregg v State Hwy Dept*, 435 Mich 307; 458 NW2d 619 (1990), as based on erroneous reasoning because it had found a shoulder designed for vehicular travel because it could be used in an emergency. The Court explained that the plain language of the highway exception made clear that it did not apply simply because motorists could use the shoulder since the Legislature very specifically limited the exception's application to portions of the highway designed for vehicular travel, not areas just available for temporary use to accommodate disabled or stopped vehicles. *Grimes*, 475 Mich at 84-88. The Court clarified that the Legislature "did not intend to extend the highway exception indiscriminately to every 'improved portion of the highway[,]' " "[r]ather, it limited the exception to the segment of the 'improved portion of the highway' that is 'designed for vehicular travel.' " *Id*. at 89. Our Supreme Court held "that only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)." *Id*. at 91.

More recently in *Yono v Dept of Trans*, 499 Mich 636; 885 NW2d 445 (2016), our Supreme Court considered whether the highway exception applied in a case in which the plaintiff parked in a designated parallel parking space on the side of a highway under the defendant's jurisdiction, where upon return to her car, she stepped into a depression in the parking space, fell, and suffered injuries. The Court considered whether the parallel parking area constituted a portion of the highway that the defendant had a duty to maintain in reasonable repair. The Court explained that the Legislature specified that such duty extended only to the improved portion of the highway designed for vehicular travel. *Id*. at 641. The Court analyzed MCL 691.1402(1) and focused on the limitation of applicability of the highway exception to injuries sustained on "the improved portion of the highway designed for vehicular travel." *Id*. at 647-648. The Court explained that the case required it to determine "whether a parking lane is a 'travel lane'—and therefore 'designed for vehicular travel'—within the meaning of the statute." *Id*. at 648. As in *Grimes*, our Supreme Court directed that the inquiry required distinguishing between portions where ordinary vehicular travel occurred and areas where momentary vehicular travel could occur. Our Supreme Court directed that the primary focus must be on whether the area had been designed for vehicular travel. *Id*. at 649-650. The Court discerned that a parking spot essentially invited drivers to park and could support vehicular travel, but it did not find that use of the designated parking area to travel comported with its design. *Id*. at 650-651. The Court found that "paint markings and other traffic control devices can and do delineate how a highway is designed and redesigned over its useful life." *Id*. at 652.

The Court directed that, to analyze and determine whether a portion of a highway is designed for vehicular travel, courts "must consider how the Department [of Transportation] had designed the highway at the time of the alleged injury." *Id*. The Court found that the area of the alleged injury featured traffic control devices, i.e., the paint delineating the parking spaces, which indicated that the area had been designed for parallel parking use and not as a travel lane. *Id*. at 653. Our Supreme Court concluded:

> One basic principle must guide our decision today: the immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed. Our caselaw teaches that because MCL 691.1402(1) is a narrowly drawn exception to a broad grant of immunity, there must be strict compliance with the conditions and restrictions of the statute. We cannot conclude that the statute clearly applies to the act of parking, which is only incidental to travel and does not itself constitute travel. Accordingly, defendant is entitled to governmental immunity.
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> In this case, however, the lane was designated by the paint markings as a parking area, with no indication that it was also designed for vehicular travel. Accordingly, plaintiff cannot fit these facts into the narrow confines of the highway exception to GTLA. [*Id*. at 656-657 (quotation marks, alteration, and citations omitted).]

In the case at bar, defendant submitted to the trial court evidence that established both the engineering design of the location where plaintiff incurred her bicycle accident, as well as photos of the condition of the location at the time of plaintiff's bicycle accident. Defendant's safety engineer testified in her affidavit regarding the specific design of the buffer zones on the subject highway including the paint marking the area, the purpose of the buffer zones, the delineators' design and purpose, all of which served to designate the buffer areas as off-limits for vehicular and bicycle travel and to inform persons driving motor vehicles and bicycles not to use the buffer zones for travel. The engineering design drawings plainly describe the travel lanes, turn lane, parallel parking areas, bicycle lanes, and the buffer zones between the parallel parking areas and the bicycle lanes. The photos depicting the area where plaintiff had her bicycle accident unequivocally established that the buffer zone where plaintiff rode her bicycle into a delineator base had paint marking the area as off-limits to vehicular and bicycle travel and the placing of the delineators within the buffer zone emphasized the area as off-limits to vehicular and bicycle travel. The buffer zones plainly were not lanes of travel.

Under *Grimes* and *Yono*, defendant's evidence established beyond peradventure that the buffer zone did not constitute an improved portion of the highway designed for vehicular travel. Further, contrary to plaintiff's contention, the fact that one could violate the markings and delineators and traverse the buffer zones does not make the areas subject to the highway exception to governmental immunity. Application of the analytical principles directed by our Supreme Court in *Grimes* and *Yono* required the trial court to conclude as it did that the buffer zones are not improved portions of the highway designed for vehicular travel. The buffer zone where plaintiff's accident occurred, which only incidentally could be traveled upon, did not constitute a portion of the highway designed for vehicular or bicycle travel. The trial court, therefore, did not err by

ruling that the highway exception did not apply in this case and that governmental immunity protected defendant from tort liability.

D. THE GRANT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION BASED UPON GOVERNMENTAL IMMUNITY WAS NOT PREMATURE

Plaintiff argues that the trial court prematurely ruled because she did not conduct discovery and did not have an expert to rebut defendant's evidence. Plaintiff asserts that it is enough that she pleaded in her complaint that she traveled on a road maintained by defendant and where she fell constituted a part of the improved portion of the highway designed for vehicular travel. Plaintiff argues incorrectly that under MCR 2.116(C)(7) the trial court could only consider the pleadings.

Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Dextrom*, 287 Mich App at 428. When reviewing a motion under MCR 2.116(C)(7), the trial court must accept as true all of the plaintiff's well-pleaded factual allegations and construe them in favor of the plaintiff, *unless* disputed by documentary evidence submitted by the moving party. *Dextrom*, 287 Mich App at 428; *Pierce*, 265 Mich App at 177. The court must consider any affidavits, depositions, admissions, or other documentary evidence submitted, and the court must determine whether there are any genuine issues of material fact. *Dextrom*, 287 Mich App at 429. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law for the trial court to decide. *Id.*

In this case, the record reflects that defendant submitted with its motion and supporting brief evidence that absolutely gave her notice of the grounds on which defendant relied and the evidence supporting its position that governmental immunity protected it from her tort liability claim. Plaintiff had opportunity to present evidence to the trial court to establish factual issues precluding summary disposition but she failed and could not do so. Defendant's admissible evidence supported by affidavit testimony demonstrated that plaintiff's claim was barred by governmental immunity and that the highway exception did not apply. Reasonable minds could not differ regarding the legal effect of the evidence presented by defendant in this case. Accordingly, the trial court neither prematurely nor incorrectly granted defendant summary disposition and appropriately decided the governmental immunity issue as a matter of law. Therefore, the trial court properly dismissed plaintiff's lawsuit.

Affirmed.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford