

STATE OF MICHIGAN
COURT OF APPEALS

LAWRENCE HUGHES and LILLIAN HUGHES,
as personal representatives of the Estate of
STEVEN MICHAEL LLOYD, and BERT
SMITH, Individually and as Next Friend of
MICHAEL C. SMITH,

UNPUBLISHED
February 9, 2006

Plaintiffs-Appellees,

and

BROCK ANTHONY LLOYD,

Intervening Plaintiff,

v

JACKSON COUNTY ROAD COMMISSION,

Defendant-Appellant.

No. 256652
Jackson Circuit Court
LC No. 02-001766 – NO

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

In this negligence and wrongful death action involving the highway exception to governmental immunity, MCL 691.1402(1), defendant appeals as of right the trial court's order denying defendant's motion for summary disposition brought under MCR 2.116(C)(7) and (10). We affirm.

I

Plaintiffs Lawrence and Lillian Hughes brought this action to recover damages for the death of their grandson, Steven Michael Lloyd, who died in an automobile accident on Hawkins Road in Jackson County on October 31, 2001.¹ Steven was killed when the driver of the car in which Steven and another teenage passenger, Michael C. Smith, were riding, lost control of the car, and the car went airborne and struck a tree.

¹ The Hughes case was subsequently consolidated with an action filed by plaintiff Smith.

Plaintiffs filed this action alleging that defendant failed to maintain Hawkins Road in reasonable repair so that it was “reasonably safe and convenient for public travel,” MCL 691.1402(1). Plaintiffs contended that “chatter bumps”² in the gravel road constituted a highway defect, which caused the driver to lose control of the car. The trial court initially granted defendant’s motion for summary disposition on the basis that even if there was a defect, there was no dispute of material fact concerning whether defendant had actual or constructive notice of the alleged defect pursuant to MCL 691.1403, and, therefore, defendant could not be held liable. On reconsideration, however, the trial court reversed its ruling and denied defendant’s motion for summary disposition, concluding that the evidence, viewed in a light most favorable to plaintiffs, was sufficient to create a triable issue of fact concerning notice.

II

Defendant argues that the trial court erred in denying defendant’s motion for summary disposition because there is no dispute that Hawkins Road was in reasonable repair. We disagree.

We review a trial court’s decision on a motion for summary disposition de novo. *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

“The trial court must review the record evidence, make all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists, giving the nonmoving party the benefit of reasonable doubt.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). On review, this Court likewise must make all reasonable inferences in the nonmoving party’s favor. *Id.* at 618.

A governmental entity has a duty to maintain a highway under its control “in reasonable repair so that it is reasonably safe and convenient for public travel.” MCL 691.1402(1). Plaintiffs contended that the driver of the car, Anthony Conklin, lost control because of chatter bumps on Hawkins Road which, at the time, was a gravel road. Based on the conflicting testimony of the parties’ experts, as well as other evidence, there is a genuine issue of material fact regarding whether chatter bumps were present on Hawkins Road on the day of the accident and whether the chatter bumps caused Hawkins Road to be unreasonably safe for travel.

² Chatterbumps are variously described in the record as a series of ruts, depressions, or holes close together in a gravel road, which creates a washboard effect in the road surface.

III

Defendant also argues that the trial court erred in denying its motion for summary disposition pursuant to MCL 691.1403 on the basis of lack of notice. Defendant contends that, the road commission did not know nor had any reason to know of the alleged highway defect, i.e., the chatter bumps. Although the record evidence in this case makes this issue a close call, because the summary disposition standard requires that we view the evidence and all reasonable inferences in plaintiff's favor, we conclude that the trial court properly denied the motion for summary disposition. *Bertrand, supra* at 617-618.

A governmental entity may not be held liable for injuries caused by a defective road unless the governmental entity had notice of the defect. MCL 691.1403. The statute provides:

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.]

Although the parties dispute the level of specificity required under the statute with respect to the defect at issue, i.e., notice of only the "general defective condition" of the road or notice of a "single, specific, particular defect," that contributed to the accident, we find such hypertechnical analysis unnecessary for our disposition. The alleged defect at issue is simply the presence of chatter bumps on the portion of Hawkins Road involved in the accident. The dispositive question is whether defendant "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."

Notice may be established by evidence of: (1) actual notice; (2) presumptive notice, if the defect existed for over thirty days and was readily apparent to an ordinarily observant person; or (3) constructive notice, if the governmental entity through reasonable diligence should have discovered and repaired the defect. *Peterson v Dep't of Transportation*, 154 Mich App 790, 795; 399 NW2d 414 (1986). On reconsideration, the trial court found that defendant had constructive notice of the alleged defect:

Although the testimony is disputed there is testimony that there was a defect in the road on the day of the accident. There is also evidence that a Road Commission employee regularly used the road. If the jury finds this road to be defective, the nature of the defect is such that it [is] unlikely it just became noticeable on that very day. Further, the Road Commission had knowledge that this road regularly needed re-grading. The Road Commission had regularly graded this road in the past because of the washboarding which Plaintiff asserts [sic, asserts] is a defect.

We concur in the court's reasoning given the evidence. Photographs of the accident scene taken the day after the accident, showing the roadway, were presented as evidence. According to defendant's expert witness, several of the photographs show small chatter bumps, although in the expert's opinion, the roadway contained no pot holes or other road defect that would have contributed to the driver's loss of control. According to plaintiff's expert witness, the pictures show "a washboard effect on the road," and "multiple protrusions of rocks that are imbedded into the road," which the expert opined "played a significant role in the accident." The driver of the car stated in various terms that he lost control of the car because of potholes or chatter bumps. Thus, whether the road was defective because of the presence of chatter bumps is clearly a disputed matter.

In addition, other testimony and evidence was presented concerning chatter bumps on Hawkins Road, complaints to defendant, and six previous accidents on Hawkins Road, some of which were specifically the result of the drivers losing control of their vehicles. Although the accident reports in and of themselves may not be sufficient to establish constructive notice of the alleged defect,³ all reasonable inferences from this evidence must be drawn in plaintiff's favor, including that Hawkins Road had a history of recurring chatter bumps and that defendant had notice of this history and its effect on travel on the road.

Three of defendant's employees testified that they had observed chatter bumps on Hawkins Road at various times. Defendant provided records of three citizen complaints concerning the rough condition of Hawkins Road, including a complaint from an East Jackson Schools bus driver, Meredith Pearson, who informed defendant that the road was full of potholes and was getting difficult to maneuver. The complaint record indicated that no action was taken in response to Pearson's complaint because the roads were not that bad and the road commission was delaying scraping the road as long as possible to avoid covering up the chloride. In noting this response in his report, plaintiff's expert stated the chloride was used as a dust suppressant and that it was inconceivable that defendant would "trade the safety of vehicle travel over having to relay Chloride after the road was repaired."

In her deposition testimony, Pearson stated that she complained to defendant two months before the accident at issue and at least five times previously because the road was "washboardy, very bumpy." Although she did not recall whether the road was scraped after her most recent complaint, in the past, the road would be scraped, which would make it smoother, and then it would become washboardy again in a couple weeks. Another bus driver also testified in his deposition that Hawkins road was quite "washboardy" on the day of the accident.

³ A party may be charged with constructive notice if the party had knowledge of prior accidents that occurred in the same place and arose from the same cause. *Sweetman v State Highway Dep't*, 137 Mich App 14, 23; 357 NW2d 783 (1984). Whether evidence of the accidents in this case meet this standard is questionable. Of the six accident reports, only one indicated that the accident had been caused by a defect, a pothole, in Hawkins Road.

According to the testimony of defendant's superintendent Charles Walz, there was no regular schedule for scraping Hawkins Road, although it was scraped an average of once per week. He inspected Hawkins Road at least every other day. This indicates that Hawkins Road was inspected at least the day before the accident, which would support a finding of notice if the presence of chatter bumps was found to constitute a defect at the time of the accident. Defendant presented evidence to the contrary, i.e., that the road was not defective at the time of the accident. However, because any evidence to the contrary is not conclusive, defendant was not entitled to summary disposition on the basis of notice.

Plaintiff presented sufficient evidence to survive a motion for summary disposition. We therefore affirm the trial court's order denying defendant's motion for summary disposition.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Alton T. Davis