STATE OF MICHIGAN

COURT OF APPEALS

VIVIAN ELLERBEE, Plaintiff-Appellee,	UNPUBLISHED June 13, 2013
v	No. 308952 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellant.	LC No. 10-002134-NO

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right the order denying its motion for summary disposition premised on governmental immunity. We reverse and remand for entry of an order granting defendant's motion.

On February 20, 2008, plaintiff allegedly fell in the street or curb area in front of 2990 West Grand Boulevard. On March 20, 2008, plaintiff mailed a notice to defendant that identified the date of the incident, the location of the incident, the nature of her injury, and photographs of the location of the injury. On April 29, 2008, defendant's director of the department of public works notified defendant's legal investigator that the area was investigated on April 22, 2008. The area was consistent with contractors working in the area. Nonetheless, a crew was sent to "make the area safe for vehicle and pedestrian traffic." The letter further noted that defendant had not received complaints regarding the repairs at that location. After plaintiff was deposed, defendant filed a motion for summary disposition, asserting that plaintiff failed to delineate the exact location of her injury in her notice contrary to MCL 691.1404, failed to provide evidence that defendant was on notice of any defect contrary to MCL 691.1403, and failed to establish causation between plaintiff's fall and any alleged defect. The trial court concluded that there were factual issues underlying the application of the statutes. Defendant appeals by right. MCR 7.202(6)(a)(v); MCR 7.203(A)(1).

A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material

fact exists for trial. *Id*. Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995).

A governmental agency is shielded from tort liability "if the governmental 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). In 1964, the Legislature codified exceptions to governmental immunity which authorize a plaintiff to file a claim against a governmental agency. *Duffy*, 490 Mich at 204. The highway exception to governmental immunity provides in relevant part:

> [E]ach 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. . . . [MCL 691.1402(1).]

"[T]o defeat governmental immunity based on MCL 691.1402, a plaintiff must establish that the defendant knew or should have known about the defect and had notice that the defect made the road not reasonably safe and convenient for public travel." *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 170; 713 NW2d 717 (2006).

> 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.]

By enacting this legislation, the Legislature waived immunity from liability for bodily injury or property damage when the road, due to lack of repair or maintenance, has become "not reasonably safe for public travel." *Wilson*, 474 Mich at 167. However, the duty imposed is not one of perfection, but rather, only a duty to maintain the highway in "reasonable repair." *Id*. "[T]he Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason." *Id*.

Immunity is available when the maintenance is purportedly unreasonable, but the road is still reasonably safe for public travel. *Id*. at 168.

> Thus, while MCL 691.1402(1) only imposes on the governmental agency the duty to "maintain the highway in reasonable repair," in order to successfully

> allege a violation of that duty, a plaintiff must allege that the governmental agency was on notice that the highway contains a defect rendering it not "reasonably safe and convenient for public travel." The governmental agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair.
>
> If the agency knows, or should have known, of the existence of the defect or condition that makes the road defective, i.e., not reasonably safe for public travel, it has only a reasonable time to repair it. If it does not do so, it can be held liable for injury or damage caused by that defect. The Legislature has also indicated that knowledge and time enough to repair are conclusively presumed when the defect has been readily apparent to an ordinarily observant person for 30 days or longer before the injury. [*Wilson*, 474 Mich at 168-169 (emphasis in original; footnote omitted).]

The fact that a highway is rough, uneven, in bad repair, or unpleasant to ride "is not per se one that is not reasonably safe." *Wilson*, 474 Mich at 169. "It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case [a] plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it." *Id.*

In *Wilson*, the plaintiff alleged that she was biking on a road with innumerable potholes. At one point, she felt her handlebars drop down, and she was thrown over the handlebars onto the road. *Wilson*, 474 Mich at 163. The plaintiff alleged that the road had potholes in excess of six inches deep that had existed for more than thirty days at a time. She further asserted that the road had been in that condition for years and presented a danger to public safety because it was persistently potholed and rutted and only full resurfacing would render it safe. *Id*. at 164. In response, the defendant asserted that it had cold-patched the road only two weeks before the plaintiff's accident and had not received any complaints following the repair. *Id*. at 164-165. Our Supreme Court held that the plaintiff failed to meet her burden of proof:

> While all parties concede that there was notice of certain problems—that the road was bumpy and required frequent patching—these problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel. It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case plaintiff must present evidence that a reasonable road commission, aware of

> this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it. [*Id*. at 169. [1]]

In the present case, plaintiff contends that she presented evidence that defendant was on notice of the condition in light of the fact that contractors were working in the area and her submission of photographs of the bumpy condition of the road such that the condition must have existed in excess of thirty days. However, defendant presented an affidavit from an employee who searched the records and found no evidence of a complaint for the area in question. Plaintiff's submission of photographs does not contradict this affidavit addressing the lack of any notice. The mere fact that construction occurred is not evidence of a defective condition, and the photographs merely evidence the condition at that time. Accordingly, plaintiff failed to meet the burden delineated in *Wilson*, specifically, that a reasonable road commission would be aware of this particular condition and understood it posed an unreasonable threat to safe public travel and would have addressed it. *Wilson*, 474 Mich at 169. The fact that a road is bumpy and requires patching does not lead to the conclusion that the road was not reasonably safe for public travel. *Id*. In light of our conclusion, we do not address the challenge to the sufficiency of the notice.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction. Defendant, the prevailing party, may tax costs. MCR 7.219.

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

[1] The Court ordered a remand for both parties to present proofs on the issue of notice, *Wilson*, 474 Mich at 169-170, because the parties did not submit evidence in accordance with MCR 2.116(C)(10).