STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL VELA,

Plaintiff-Appellee,

v

WAYNE COUNTY AIRPORT AUTHORITY,

Defendant/Third-Party Plaintiff-Appellant,

and

WAYNE COUNTY,

Defendant,

and

AMERICAN AIRLINES, INC.,

Third-Party Defendant.

UNPUBLISHED
July 25, 2013

No. 310174
Wayne Circuit Court
LC No. 08-113813-NO

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

In this negligence action, defendant Wayne County Airport Authority appeals by right the trial court's opinion and order denying its third motion for summary disposition. We conclude that the trial court did not err when it denied the motion. For that reason, we affirm.

I. BASIC FACTS

In a prior appeal, this Court affirmed the trial court's May 2010 orders denying the Airport Authority's first two motions for summary disposition on the grounds that it was immune from suit. In its prior motions, the Airport Authority argued that the road at issue was not a highway and that Vela failed to give it proper notice. See *Vela v Wayne County Airport Authority*, unpublished opinion per curiam of the Court of Appeals, issued on July 26, 2011 (Docket No. 298478). After this Court affirmed the trial court's orders and the case returned to the trial court, the Airport Authority again moved for summary disposition. The trial court

denied that motion in April 2012. The Airport Authority now appeals the order denying its third motion for summary disposition.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

On appeal, the Airport Authority argues that the trial court erred when it denied its third motion for summary disposition. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Likewise, this Court reviews de novo the proper application and interpretation of statutes. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). To the extent that common law tort principles apply, this Court reviews de novo the proper interpretation and application of the common law. *Id.*

B. REASONABLE REPAIR

Generally, governmental agencies are immune from tort liability arising from their exercise or discharge of a governmental function. MCL 691.1407(1). However, governmental agencies have a duty to maintain the highways under their jurisdiction in "reasonable repair" and remain liable in tort for the failure to keep "a highway under its jurisdiction in reasonable repair." MCL 691.1402(1). Although the Legislature required governmental agencies to keep their highways in reasonable repair, as our Supreme Court has explained, "an *imperfection* in the roadway will only rise to the level of a compensable 'defect' when that imperfection is one which renders the highway not 'reasonably safe and convenient for public travel,' and the governmental agency is on notice of that fact." *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161, 168; 713 NW2d 717 (2006). Thus, at trial, a plaintiff must be able to prove that a reasonable governmental agency, "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.

In addition, even if a highway is defective in some way, the governmental agency that has jurisdiction over the highway will not be liable for "injuries or damages caused by [the] defective highway[] unless" it "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." MCL 691.1403. It is, however, "conclusively presumed" that the agency had the requisite knowledge of the defect and a reasonable time to repair the defect if 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." *Id.*

In its third motion for summary disposition, the Airport Authority conceded that the road was uneven, had been "patched and re-patched", and contained "shallow potholes of less than two inches." It nevertheless argued that there was no evidence that it had "knowledge prior to [Vela's] accident that the uneven condition was a 'defect' that made the road unreasonably safe . . . ."

Although framed as a challenge to the evidence that it had knowledge of a defect, it is clear that the Airport Authority was not arguing that it had *no* knowledge of *any* defect in the road. Rather, it was arguing that the road's condition, as revealed by the photographic evidence

and testimony, was not really that bad. That is, because the road's condition was—in the Airport Authority's opinion—typical for a Michigan road, even with knowledge of those conditions, a reasonable governmental agency with jurisdiction over such a road would not conclude that it was unsafe for public travel. Indeed, at oral arguments on the motion, the Airport Authority's lawyer clarified that it was limiting its argument to whether the identified conditions were such that a reasonable governmental agency would conclude that the road was unsafe for public travel. He even conceded that, for purposes of the motion, the conditions identified by the evidence existed for more than 30 days, which would invoke the conclusive presumption provided under MCL 691.1403. Accordingly, because the Airport Authority conceded that it had notice and an opportunity to repair the conditions identified in the photos and deposition testimony, we shall limit our review to whether the trial court erred when it determined that the evidence submitted by the parties showed that there was a question of fact as to whether the road's condition was sufficiently deteriorated that a reasonable governmental agency would conclude that it was unsafe for travel. See *Barnard Mfg*, 285 Mich App at 380-381 (noting that this Court will limit its review to the evidence and arguments actually raised by the parties in the motion for summary disposition).

In support of its motion, the Airport Authority noted that Vela's own photos showed that the road was bumpy and uneven, but not so bad as to render it unsafe for travel. It also cited deposition testimony by persons who regularly used the road for the proposition that they were able to safely drive over it. Given the evidence, the Airport Authority's lawyer explained, the trial court had to conclude that the road was reasonably safe:

> Quite simply, your Honor, that's a typical road that we experience here in Michigan. I don't think it's anything more. I don't think . . . the photographs show it's an unsafe road. I don't think the Airport Authority thought it was an unsafe road before this accident, and I don't think anybody else did either because nobody came to the Airport Authority and said, you know, we drive this road and we think it's unsafe.

This testimony and evidence might permit (but does not require) a jury to infer that an ordinary user of the road at issue would not consider it to be unsafe for vehicular travel. But that inference was inadequate to establish that the Airport Authority was entitled to summary disposition on the grounds that the road was not unsafe.

In order to establish that the Airport Authority breached its duty with regard to the road at issue, Vela would have to show that a reasonable governmental agency with jurisdiction over the road (typically a road commission) would have understood that the road's condition posed an unreasonable threat to public travel and would have addressed it. *Wilson*, 474 Mich at 169. As a corollary to that burden, in order to prevail on the theory advanced in its motion for summary disposition, the Airport Authority had to present evidence that—given the road's undisputed condition—a reasonable governmental agency would not have understood that the road posed a threat to public travel and would not have taken any different steps to address its condition. See MCR 2.116(C)(10); MCR 2.116(G)(4); *Barnard Mfg*, 285 Mich App at 369-370. Yet the Airport Authority did not submit any evidence that would permit a reasonable fact-finder to determine how a reasonable governmental agency in the Airport Authority's position would have responded under the facts of this case—that is, it failed to present evidence that, if left

unrebutted, would permit an inference that the Airport Authority met the specific standard of care applicable to the facts of this case. See *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977) (explaining that whether the defendant's conduct in the particular case is below the general standard of care is a matter of fact for the fact-finder). By failing to establish how a reasonable governmental agency would have understood the road's condition and reacted to it, the Airport Authority failed to properly support its motion and the burden of production never shifted to Vela. *Barnard Mfg*, 285 Mich App at 369-370. Therefore, the trial court would have been justified in denying the Airport Authority's motion on that basis alone. *Id.* at 370.

Even if the Airport Authority had properly supported its motion for summary disposition, we would conclude that there was a question of fact as to whether the road's condition was such that a reasonable governmental agency would have concluded that it was unsafe for public travel and taken additional steps to repair the road. MCR 2.116(C)(10). In response to the Airport Authority's motion, Vela submitted an affidavit by Gilbert Baladi that, at the very least, established that the road's condition was such that a reasonable governmental agency would have concluded that it was unsafe and taken steps beyond those taken by the Airport Authority to rectify the condition. Baladi averred that he was a professor of civil engineering and that he visited the site of the accident and examined the relevant records. On the basis of his review of the evidence, he opined that the road at issue was not "safe or convenient for any type of vehicular and public travel." He further averred that the Airport Authority—"as well as any reasonable road commission"—would have realized that the road was unsafe and that the Airport Authority's actual maintenance practices (cold patching) were insufficient to address the safety problem. When viewed in the light most favorable to Vela, the affidavit and evidence tending to show that the road at issue was in poor condition established a question of fact as to whether a reasonable governmental agency with jurisdiction over the road at issue would have understood that the road posed an unreasonable threat to safe public travel (even for vehicular travel) and would have taken steps beyond those taken by the Airport Authority to repair the road. See *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Consequently, we cannot conclude that the trial court erred when it denied the Airport Authority's motion.

III. CONCLUSION

The trial court properly denied the Airport Authority's third motion for summary disposition. Given our conclusion, we decline to address the parties' arguments concerning whether the highway exception imposes a duty to keep the road safe for vehicular travel, as opposed to some other form of travel, and decline to address Vela's argument concerning the law of the case doctrine.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Vela may tax his costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly