STATE OF MICHIGAN

COURT OF APPEALS

RONALD HAMPTON, Plaintiff-Appellee,	UNPUBLISHED December 18, 2012
v	No. 306322 Oakland Circuit Court
CITY OF SOUTHFIELD, Defendant-Appellant.	LC No. 2010-112943-NO

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying its motion for summary disposition in this case involving governmental immunity. We affirm.

On June 15, 2009, plaintiff, who was 63 years old at the time, was returning by bicycle from a grocery store and turning into his apartment complex on Shiawassee Road in Southfield when he struck a pothole. He alleged in his complaint that he was thrown from his bicycle and sustained severe injuries, including punctured lungs and vocal-chord damage. He alleged that defendant breached its duty to maintain its roadways "in a safe manner and correct and remove any dangerous and defective conditions then and there existing . . . ."

Defendant moved for summary disposition under MCR 2.116(C)(7) (governmental immunity), emphasizing that plaintiff had testified in his deposition that he had ridden his bicycle over the same area "millions of times." Plaintiff answered, when asked why he hit the pothole that particular time, "I don't know. I . . . guess maybe I wasn't looking. So many holes on that street. It's like double lanes, and there's big holes on both sides in both lanes." Plaintiff also stated that he had "no idea" how long that particular hole had been in place, because "there's [sic] so many holes exactly like that on that street." Defendant claimed that plaintiff's evidence failed to establish that the road was unsafe and unfit for public travel and failed to establish that defendant had actual or constructive notice of the hole. Defendant also contended that because plaintiff was riding a bicycle at the time of the incident, he was not within the class of persons intended to be protected by the highway exception to governmental immunity.

Plaintiff filed a response brief, arguing that, under *Roy v Dep't of Trans*, 428 Mich 330, 341; 408 NW2d 783 (1987), the pertinent inquiry regarding protected persons under the highway exception is not the "class of travelers, but the road on which they travel." Accordingly, plaintiff argued, bicyclists are protected. Plaintiff further stated:

> Here, a reasonable road commission would find that a 2.5" deep pot hole would not be reasonably safe and convenient for public travel because vehicles could potentially be damaged, as well as vehicles swerving to miss the pothole, resulting in vehicles heading into oncoming traffic. Further, it is known that bicyclists tend to travel on roads, as in this case, and if their bike tire was to hit such a large pothole, the result would be injury to the bicyclist. Therefore, at the very least, there are genuine issues of fact in regards to whether the pothole in this case was safe and convenient for public travel.

With regard to the issue of defendant's required notice, plaintiff relied primarily on his expert witness, Theodore D. Dziurman, who opined that "the depression was generally 'clean,' indicating that it had existed for some time, i.e. no concrete pavement debris." He stated that plaintiff's accident

> was caused by a common concrete pavement distress called "D-Cracking." The hole in the pavement was visible for more than 30 days. Since this is common concrete pavement distress, the City of Southfield should have been more 'pro-active' in maintenance activities for the pavement on Shiawassee.

In his response brief, plaintiff also emphasized the sheer size of the pothole as depicted in photographs.

Defendant then filed a reply brief that expanded somewhat on its prior arguments, and it also filed a supplemental brief in which it alleged that an affidavit of a maintenance worker, Bob Piech, that had been filed in plaintiff's support was unreliable and thus inadmissible.[1]

The trial court, in making its ruling, emphasized plaintiff's photographic evidence that the pothole was more than 2.5 inches deep and 20 inches wide. The court found a genuine issue of material fact concerning danger and concerning notice because of the size of the pothole, because of the maintenance worker's sworn statement that the road "has been covered in potholes and in disrepair for a number of years," and because of the findings of Dziurman. The court also accepted plaintiff's argument concerning *Roy* and found that bicyclists were encompassed by the statute's protections. The court denied defendant's motion.

We review de novo questions of governmental immunity and grants or denials of summary disposition. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). "Under MCR 2.116(C)(7), any supporting evidence, including affidavits, depositions, and admissions, may be considered." *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 290; 618 NW2d 98 (2000).

[1] The worker had stated in his affidavit that the pothole had been in existence for years, but at his deposition he indicated that he did not have information about the *specific* pothole in question. It appears that the trial court did not specifically rule on defendant's objection to the affidavit, but the court did rely on certain limited parts of the affidavit, as explained *infra*.

This appeal concerns the highway exception to governmental immunity, MCL 691.1402, which states, in 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. . . . Except as provided in section 2a [dealing with sidewalks], the 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. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer.

MCL 691.1403 deals with the notice requirement for bringing a claim under the highway exception; it states:

> 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.

In *Wilson v Alpena County Rd Comm'n*, 474 Mich 161, 168; 713 NW2d 717 (2006), the Court stated:

> [T]he Legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel. We note that, pursuant to MCL 691.1403, in order for immunity to be waived, the agency must have had actual or constructive notice of "the defect" before the accident occurred. In determining what constitutes a "defect" under the act, our inquiry is again informed by the "reasonably safe and convenient for public travel" language of MCL 691.1402(1). In other words, 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 government agency is on notice of that fact.
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> 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 contained 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. [Emphasis in original.]

We find that plaintiff presented sufficient evidence to establish genuine issues of material fact. First, with regard to defendant's "class of persons" argument, we find persuasive the plain language of the statute, the reasoning of *Roy*, *supra*, and the holding of *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 162-263; 615 NW2d 702 (2000). MCL 691.1402 states that "the 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." The statute does not indicate that only motor-vehicle-related accidents were intended to be encompassed by the statute; instead, the statute emphasizes the *portion of the roadway* that the duty to repair encompasses. In *Roy*, 428 Mich at 331, the Court dealt with whether bicycle paths were encompassed by section 2. In the course of its analysis, the Court made the following observations:

> Section 2 does not reveal a legislative purpose to protect bicyclists in general, as suggested by the Court of Appeals. Indeed, the statute does not offer general protection of pedestrians or motorists without regard to location. The statute announces a duty to repair and maintain the highway so that the improved portion designed for vehicular travel is reasonably safe and convenient for public travel. *The criterion used by the Legislature was not based on the class of travelers, but the road on which they travel*. [Emphasis added.]

Here, plaintiff was traveling on the "improved portion of the highway designed for vehicular travel," see MCL 691.1402, and thus his claim is encompassed by the statute, so long as the other statutory criteria are fulfilled. This conclusion is in accordance with *Nawrocki*, 463 Mich at 162-163, 168, in which the Court agreed with the reasoning of *Roy* and concluded that section 2 applies to pedestrians, even when a vehicular accident is not involved.[2]

With regard to the issue of notice, Dziurman testified at his deposition that "what happened on" the street was called "D-cracking on joints."[3] He stated that "[i]t's a common

[2] We reject defendant's argument that section 2 does not apply to plaintiff because he was riding his bicycle in a portion of the street not appropriate for bicyclists (i.e., away from the edge of the road). Defendant cites no binding authority for this proposition.

[3] Dziurman testified that he assumed the photographs he reviewed were taken soon after the accident. Plaintiff testified that the photographs were taken approximately in late August and accurately depicted the scene at the relevant time.

phenomena [sic] on concrete pavements . . . and the City of Southfield should have been aware of that and kept a closer eye on the road there . . . ." He stated:

> D-cracking is going to occur, so they know they put concrete pavement there, they -- it takes maybe a year to two to show up, and they -- you know. I don't know how often they inspect the road, but if they inspected it on a regular basis, they should have seen signs of the distresses occurring in the pavement and that D-cracking is occurring, and they should have patched them.

Dziurman stated that "this is a classic form of a D-crack." He opined that, because of the freeze-thaw cycle, the hole likely appeared in March or April, more than 30 days before the accident. He also stated in a summary letter[4] that because there was no concrete pavement debris surrounding the hole, "it had existed for some time." He stated that the defect was "common concrete pavement distress" and "had to be in existence for over 30 days," and that defendant "should have been more 'pro-active' in maintenance activities for the pavement . . . ." Dziurman testified at his deposition that in reaching his conclusions he relied on articles pertaining to distresses in concrete pavement and on his "close to 50 years now of engineering experience that I've been involved with concrete pavements and familiar with D-cracking [sic]."

Given Dziurman's testimony, we find that the trial court did not err in concluding that there was a question of fact concerning whether defendant had constructive notice of the defect. Defendant contends that Dziurman's testimony was mere speculation, but this is not an accurate characterization. Dziurman, in reaching his conclusions, relied on the photographs and the surrounding debris level, on the freeze-thaw cycle, on the documented characteristics of D-cracking, and on his own considerable experience. He referred to the pothole as a "classic" case of D-cracking. In addition, Dziurman's testimony was bolstered by Piech's statement that the road "has been covered with potholes and in disrepair for a number of years . . . ."[5] We find no basis upon which to reverse the trial court's well-reasoned opinion.[6]

With regard to whether the road was "in reasonable repair and in a condition reasonably safe and fit for travel," see MCL 691.1402, the photographs themselves demonstrate a genuine

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[4] While defendant takes issue with the conclusion in this summary letter, it does not argue that the letter is inadmissible on evidentiary grounds.

[5] While Piech's statement *in itself* would likely be insufficient to establish the requisite notice, it lends support to the additional evidence of constructive notice.

[6] Defendant emphasizes plaintiff's testimony that he had ridden his bike along the same route many times and yet could not say how long the pothole had been in existence. Defendant, citing pages 74 and 85 of plaintiff's deposition, claims that plaintiff did not meet his burden of establishing notice because he himself was "not aware of the hole." However, plaintiff did not testify that he was not aware of the hole; he simply claimed that he was not sure how long it had been in existence and further claimed that he did not encounter the hole while driving because "most of the time [when driving] I went in through the front of the complex . . . ." (He had testified earlier that when riding his bicycle he would use the back gate.)

issue of material fact. A hole of that size clearly presents a danger to bicyclists, and it is a matter of common sense that it would also pose a potential danger to vehicle drivers attempting to avoid the hole. Again, there is no basis for reversal.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher