STATE OF MICHIGAN

COURT OF APPEALS

GERARD GRAHAM,

Plaintiff-Appellant,

v

CITY OF LIVONIA,
ORCHARD, HILTZ & MCCLIMENT, INC.,
and RIC-MAN CONSTRUCTION, INC.,

Defendants-Appellees.

UNPUBLISHED
June 27, 1997

No. 188629
Wayne Circuit Court
LC No. 94-420677

Before: Holbrook, Jr., P.J., and White and A. T. Davis, Jr.*, JJ.

PER CURIAM.

Plaintiff appeals the circuit court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (C)(10). We reverse.

I

On August 25, 1993, at approximately 7:30 a.m., plaintiff was out for his daily three to four mile walk. Plaintiff was walking along Six Mile Road, in an area where Six Mile Road has service drives on the north and south sides. Grassy berms separate the service drives from Six Mile Road and there are sidewalks through the berms. Plaintiff walked west on the sidewalk of the south service drive of Six Mile Road until he reached Levan, where he turned north to cross Six Mile Road. He crossed the south service drive, crossed the grassy berm separating the south service drive from Six Mile, crossed Six Mile Road, and then crossed the northern berm separating Six Mile from the north service drive. After crossing the northern berm, plaintiff, now heading home, crossed the northern service drive at an approximately forty-five degree angle, in a northeasterly direction. While crossing the service drive, plaintiff's foot was suddenly stopped by a protrusion of tar from a two- to four-inch expansion joint, the tar protruding approximately one half inch above the concrete slabs on either side of it. Plaintiff fell forward onto his right hand and wrist, and sustained a severe fracture requiring surgery.

* Circuit judge, sitting on the Court of Appeals by assignment.

On July 8, 1994, plaintiff filed a complaint against the City of Livonia (City), alleging that it breached its duty under MCL 691.1402; MSA 3.996(102) to repair and maintain the service drive so that it was reasonably safe and convenient for public travel; negligence in failing to exercise due care and caution in the maintenance and repair of the service drive; and failing to inspect, warn and advise plaintiff of nuisances, defects, hazards, dangers and improper conditions in the service drive.

On May 5, 1995, defendant City filed a third-party complaint against Ric-Man, the contractor of the sewer construction project that included reconstruction of the highway area in question, and Orchard, Hiltz, the engineering firm that performed inspections of the area during and after the sewer reconstruction project, seeking indemnification or contribution.

On June 28, 1995, plaintiff filed a first amended complaint adding Orchard, Hiltz and Ric-Man as principal defendants and alleging negligent construction and inspection, and failure to warn.

Orchard, Hiltz moved for summary disposition, arguing that plaintiff failed to establish a causal connection between his fall and the allegedly protruding tar expansion joint and that if the joint was the cause of plaintiff's fall, it had no duty warn or protect plaintiff because the joint was an open and obvious danger. Orchard, Hiltz further argued that plaintiff was comparatively negligent for meandering outside the crosswalk, and that, as a named insured under Ric-Man's insurance policy, it should be held harmless and Ric-Man should assume its defense.

Defendant City moved for summary disposition, incorporating Orchard, Hiltz's arguments, and further argued that it was entitled to governmental immunity because, since it did not have actual or constructive notice of the alleged dangerous condition as required by MCL 691.1403; MSA 3.996(103), the public highway exception was inapplicable. The City attached to its motion an affidavit of the Director of the City's Public Service Department, which stated that the City had not received any complaints regarding the protrusion of the tar expansion joint at issue and that the City did not have actual notice of the alleged defect.

Ric-Man filed a joinder in part in the motions for summary disposition filed by the other defendants, arguing that plaintiff could not establish a causal connection between the tar expansion joint and his fall, and that no duty was owed to plaintiff because the expansion joint was open and obvious. Ric-Man further argued that it would be fundamentally unfair to hold it to a greater duty than that owed by defendant City, since Ric-Man was hired pursuant to the City's duty to repair and maintain roadways so as to keep them safe for vehicular traffic.

Plaintiff filed responses to defendants' motions, arguing that his deposition testimony established that he tripped and fell as a direct result of the protruding expansion joint, and that the average user with ordinary intelligence, upon casual inspection, would not expect that a tar expansion joint would be raised above the concrete level and would not inspect each expansion joint that he crossed to determine if it was raised. Plaintiff attached eight color photographs of the joint at issue, some of which were taken at an angle close to the road's surface and showed the tar protrusion, and others taken from a standing position, which did not show a protrusion. Plaintiff also attached an affidavit and report of his

expert, Robert Kelly, a traffic engineer with experience in highway construction, who inspected the site on November 24, 1993, and photographs of the site. The report stated in pertinent part:

> This asphaltic substance [tar] is used to seal the construction between slabs of Porland Cement concrete. This particular joint, although not very high, is undetectable by the normal prudent pedestrian. One would not observe its raised edge in normal walking.
>
> This joint was observed in 40 [degree] weather. This establishes that this tar seal did not ooze out of the joint as a result of expansion due to hot weather.
>
> The tar used on this joint is excessive, thereby creating a condition unsafe or unfit for travel. The excessive tar should have been struck off level with the pavement
>
> My knowledge of these street systems and fixtures is based on 40 years of Traffic Engineering, 14 years as Cleveland's Chief Traffic Engineer, directly in charge of the Division of Streets in the City of Cleveland for three years.
>
> Conclusion
>
> It is my opinion that this raised joint, which was defective, was the proximate cause of this fall and injury.

Plaintiff argued that comparative negligence was an issue for the trier of fact, and that indemnification was not an issue properly directed to plaintiff.

Plaintiff argued in response to the City's motion for summary disposition that the City had either actual or constructive notice of the protruding expansion joint because the joint had been in existence for two to three years, since the area had been reconstructed.

At the motion hearing, in the course of argument, counsel for the City asserted that "the duty here is for reasonably safe for vehicular travel, not pedestrian travel." Plaintiff's counsel argued at the motion hearing on the issue of notice to the City that plaintiff testified that the road had been reconstructed within the last two or three years, that plaintiff's expert testified that the protrusion was due to improper construction, and that given that the protrusion existed from the date of construction to the date of the injury, defendant should have known about it, and it had existed for more than thirty days. Plaintiff's counsel also argued that the City had not briefed any immunity issue other than that it lacked actual or constructive notice of the defect under MCL 691.1403; MSA 3.996(103), and so counsel would limit his argument to that issue.

The circuit court granted summary disposition to all defendants on the basis of the open and obvious danger rule, and granted summary disposition to the City on what it characterized as "all 3 of their theories [sic] that there is immunity, and that it is open and obvious, and that there was not any evidence of notice to the City, that this defect, or allege [sic] defect had existed for more than 30 days."

II

Plaintiff first argues that the circuit court incorrectly dismissed plaintiff's claims against all defendants under the open and obvious danger rule. We agree.

Whether a danger is open and obvious depends on whether it is reasonable to expect an average user with ordinary intelligence to discover the danger on casual inspection. *Eason v Coggins Memorial Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

Photographs plaintiff submitted below in support of his responses to defendants' motions for summary disposition raise a genuine issue of fact whether the tar protruding from the expansion joint would have been discovered by an average user of ordinary intelligence on casual inspection. The photographs of the expansion joint taken from a standing position reveal no obvious protrusion. In contrast, the photographs taken from a much lower vantage point, close to the road's surface, show a tar protrusion. Based on these photographs, a reasonable fact-finder could conclude that the protruding tar would not be apparent to a pedestrian of average intelligence on casual inspection. Accordingly, the circuit court erred in concluding that the alleged defect constituted an open and obvious danger as a matter of law and that defendants thus owed plaintiff no duty as a matter of law.

Regarding the City, we further observe that it was not entitled to summary disposition on the basis of the open and obvious danger rule for the additional reason that the City is not entitled to assert that rule as a defense to plaintiff's statutory claim under MCL 691.1402; MSA 3.996(102). *Haas v Ionia*, 214 Mich App 361, 364; 543 NW2d 21 (1995).

III

Plaintiff next argues that the circuit court improperly granted the City summary disposition under MCL 691.1403; MSA 3.996(103) where the City in the exercise of reasonable diligence should have known of the alleged defect because it was constructed improperly and had existed for approximately two to three years, from the date of construction to the date of plaintiff's accident. We agree that plaintiff established a genuine issue of material fact.

Plaintiff testified that the portion of highway at issue had been reconstructed two to three years before his accident.[1] Plaintiff's expert's report stated that he observed the expansion joint in forty-degree weather, that he concluded that the tar seal did not ooze out of the joint as a result of expansion due to hot weather, that the tar used on the joint was excessive, that the excessive tar should have been struck off level with the pavement, and that it created a condition unsafe for travel. Although the City submitted an affidavit below stating that it had no actual notice of the defect and had received no complaints regarding the portion of highway at issue, it did not address the issue of constructive notice. Plaintiff presented sufficient evidence to raise a genuine issue of fact whether the City, in the exercise of reasonable diligence, should have known of the alleged defect and had a reasonable time to repair the defect before the injury took place. MCL 691.1403; MSA 3.996(103).

IV

Plaintiff lastly argues that the circuit court incorrectly granted the City summary disposition on the basis of immunity on grounds separate from the notice issue when the City only briefed the notice issue below. We agree.

As to governmental immunity, the City's written motion for summary disposition argued only that it did not have actual or constructive notice of the alleged defect under MCL 691.1403; MSA 3.996(103), and that the highway exception thus did not apply.[2] At the hearing, however, defense counsel for the City additionally stated that "the duty here is for reasonably safe for vehicular travel, not pedestrian travel." In response, plaintiff's counsel stated:

> Going on to Defendant Lavonia's [sic] brief, the only issue that they bring up is the notice issue. There are mentions now at argument here about the proper care of a crosswalk or street area for vehicular travel. That has not been argued in brief here, and this is the first time I'm hearing about this now.
>
> So, the only issue I'm addressing here is the notice issue, and under that, the appropriate standard is . . . .

The court did not respond to counsel's statement, and did not indicate to counsel that it would consider the issue although not briefed and although raised for the first time at argument.

We reject the City's argument that the issue was raised by the general assertion of governmental immunity. While that assertion preserved the defense, it did not constitute adequate notice of the basis for the motion, especially when a different theory of governmental immunity was argued in its brief. On appeal, the City cites only *Roux v Dep't of Transportation*, 169 Mich App 582; 426 NW2d 914 (1988), as authority for its position. However, *Roux* was disapproved in *Gregg v State Hwy Dep't*, 435 Mich 307, 311 n3; 458 NW2d 619 (1990). In any event, we conclude that the court should not have addressed the argument raised for the first time at oral argument over plaintiff's objection. We vacate the grant of summary disposition on this basis and remand for further proceedings.[3] The City may raise this issue below through a properly filed motion and brief.

Reversed and remanded for further proceedings as to all defendants.[4] We do not retain jurisdiction.

/s/ Helene N. White
/s/ Alton T. Davis, Jr.

[1] Defendants did not dispute this, and provided no information regarding the date the area at issue was reconstructed, apart from argument at the hearing by counsel for Ric-Man that by the time plaintiff's expert inspected the site (in November 1993) the highway had been reconstructed for one or 1 ½ years.

[2] Counsel for Ric-Man argued in its brief joining in part in the motions for summary disposition of defendant City and Orchard, Hiltz, that defendant City "correctly observes that the traveled portions of roadways are to be safe for vehicular travel." However, we have reviewed the entire lower court record and have not found that defendant City made that argument below.

Defendant City, in its motion for summary disposition did adopt and incorporate the arguments made by Orchard, Hiltz in its motion for summary disposition. Orchard, Hiltz's brief in support of its motion argued, in a section addressed to plaintiff's comparative negligence, that

> For their own safety pedestrians should not be in the road outside the crosswalk, since roads are constructed for automotive travel and not pedestrian travel. As such, Plaintiff was comparatively negligent in walking outside of the designated crosswalk and, as such, any award to Plaintiff should be appropriately reduced.

[3] The dissent would decide the issue on the merits because the general defense of immunity was pleaded, and the issue is one of law. *Wechsler v Wayne County Road Comm'n,* 215 Mich App 579, 585-586, n 3; 546 NW2d 690 (1996). We reject this approach because we conclude the issue is not one of settled law and has not been properly presented for decision. The cases relied on by the dissent in deciding the issue on the merits, *Mason v Wayne Co Bd of Comm'rs,* 447 Mich 130, 137; 523 NW2d 791 (1994) and *Suttles v Dep't of Transportation*, 216 Mich App 166; 548 NW2d 671 (1996) are pertinent, but distinguishable. The language from *Mason* must be read in context. The issue there was the county's responsibility for crosswalks. By statute, the county's responsibility is limited to the improved portion of the highway designed for vehicular travel, and does not include crosswalks. Here, the municipality's liability is not so limited by statute. In *Suttles*, the Court determined that the area near the curb was an installation outside of the improved portion of the highway designed for vehicular travel, also in the context of applying the limitation applicable to counties and the state.

In identifying these distinctions, we express no opinion on the merits of the issue. We only conclude that because the issue was not properly presented below, and the only authority cited by defendant on appeal, *Roux, supra,* has been disapproved, plaintiff has not been accorded, but is entitled to, a full opportunity to address the legal issue.

[4] Ric-Man and Orchard, Hiltz' other grounds for summary disposition, not addressed by the trial court or by defendants on appeal, may be renewed on remand. We express no opinion on their merits.