

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHAEL WARMINSKI,

Plaintiff-Appellee,

v

CITY OF WARREN,

Defendant-Appellant.

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UNPUBLISHED

July 12, 2005

No. 260831

Macomb Circuit Court

LC No. 2004-001062-NO

Before: Cooper, P.J., and Fort Hood and R. S. Gribbs\*, JJ.

PER CURIAM.

Defendant appeals by right<sup>1</sup> a denial of its motion for summary disposition in this case involving the highway exception to governmental immunity, MCL 691.1401 *et seq.* We affirm. This opinion is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured when he hit a three-inch-deep hole in the asphalt while riding a bicycle on a paved road in Warren. The hole and accompanying area of “distressed asphalt” surrounded a manhole cover. Plaintiff filed suit alleging that defendant had failed to maintain the street in reasonable repair for the safety of public travel.<sup>2</sup> Defendant moved for summary

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<sup>1</sup> Pursuant to MCR 7.202(7)(v).

<sup>2</sup> The highway exception to governmental immunity is found in MCL 691.1402 which provides in pertinent part:

(1) [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. . . . The duty of the state and the county road commissions 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.

\* Former Court of Appeals Judge, sitting on the Court of Appeals by assignment.

disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court denied the motion, finding that plaintiff had created questions of fact as to whether defendant had notice of the defect and whether the road was reasonably safe.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

First, defendant argues that the trial court erred when it determined that plaintiff presented sufficient evidence to create a material question of fact regarding notice of the defect pursuant to MCL 691.1403. Under the statute, notice can be proved in one of three ways: (1) actual notice, (2) existence of the defect for over thirty days, which creates a presumption of notice, or (3) constructive notice, i.e., evidence showing that the city should have discovered and repaired the defect in the exercise of reasonable care. *Peterson v Dep't of Transportation*, 154 Mich App 790, 795; 399 NW2d 414 (1986); *Beamon v Highland Park*, 85 Mich App 242, 245; 271 NW2d 187 (1978). The trial court did not err in finding that plaintiff had created a question of material fact concerning whether the defendant had notice. Plaintiff presented the deposition testimony of an expert witness who indicated that, in his view, the distressed condition of the roadway occurred at the latest in March or early April of 2003, but probably occurred in 2002. He further stated that some of the damage would have been readily noticeable for at least a year, and possibly as early as 2001. Thus, plaintiff presented sufficient evidence to support a reasonable inference that the defect in the road existed for more than thirty days, which would establish a conclusive presumption of notice. There was also evidence from which the trier of fact could reasonably infer that defendant, in the exercise of reasonable diligence, should have discovered and repaired the defect. See *Peterson, supra* at 796-797. The trial court did not err when it found summary disposition inappropriate as to the question of notice.

Next, defendant argues that the trial court should have granted summary disposition in its favor because plaintiff did not present a question of fact that the highway was unsafe for "vehicular" traffic, rather than for bicycle use. Defendant is mistaken in its assertion that plaintiff was required to meet this higher standard of proof in order to avail himself of the highway exception. *Nawrocki v Macomb County Rd Comm'n*, 463 Mich 143, 167 n 25, 171-172; 615 NW2d 702 (2000); *Gregg v State Highway Dep't*, 435 Mich 307, 311 n 3; 458 NW2d 619 (1990). Defendant's reliance on *Roux v Department of Transportation*, 169 Mich App 582; 426 NW2d 714 (1988), to the contrary is incorrect.

Plaintiff's expert's conclusion that the condition was unsafe for bicycle, pedestrian, or motorcycle traffic as it existed at the time of the accident is easy to discern from his discussion of how the defendant should have repaired the defect. The import of this testimony is that, while the depression could have been repaired to render the roadway safe, at least temporarily, the condition was not reasonably safe when plaintiff encountered it. Given this statement, the extent of the defect as depicted in photographic exhibits, and the circumstances of the accident, we agree with the trial court and find that plaintiff has presented a question of fact concerning whether the condition of the roadway was reasonably safe for public travel.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Karen M. Fort Hood  
/s/ Roman S. Gribbs