

STATE OF MICHIGAN  
COURT OF APPEALS

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GARY HOVANEK,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

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UNPUBLISHED  
February 13, 2007

No. 273509  
Genesee Circuit Court  
LC No. 05-082251-NO

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying its motion for summary disposition that was based on governmental immunity, MCR 2.116(C)(7), and failure to create a genuine issue of material fact, MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises out of injuries suffered by plaintiff when he tripped and fell over a guardrail protruding over the sidewalk on which he was speed walking near the intersection of Beecher Road and Court Street in the city of Flint.

On appeal, defendant first argues that the guardrail is not an improved portion of the highway. Therefore, the highway exception to governmental immunity does not apply, and governmental immunity precludes plaintiff's claim. We disagree.

We review a trial court's ruling on a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). A genuine issue of material fact exists where the record leaves open an issue on which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the

parties.” *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998) (citation omitted). The reviewing court accepts all well-pleaded allegations as true and construes them in favor of the nonmoving party. *Dampier v Wayne Co*, 233 Mich App 714, 720; 592 NW2d 809 (1999). “The determination of the applicability of the highway exception to governmental immunity is a question of law subject to review de novo on appeal.” *Mitchell v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004).

According to the governmental immunity act, MCL 691.1401 *et seq.*, a governmental agency is immune from tort liability while engaging in a governmental function, unless a specified exception applies. The highway exception to governmental immunity, MCL 691.1402(1), provides in relevant part:

Except as otherwise provided in section 2a, 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.... 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.

The term “highway” is defined by MCL 691.1401(e), which states:

“Highway” means a public highway, road, or street that is open for public travel and includes bridges, *sidewalks*, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles. [Emphasis added.]

The statutory grant of immunity to governmental agencies is broad, and the highway exception must be narrowly construed. See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000).

Defendant maintains that it is not liable for the allegedly dangerous condition because the condition that caused plaintiff’s injury was due to a guardrail, which is not an improved portion of the highway. Defendant’s contention that the guardrail is an installation outside the improved portion of the highway has merit. See *Nawrocki, supra* at 183-184; *Weaver v Detroit*, 252 Mich App 239, 245; 651 NW2d 482 (2002). Nevertheless, given the facts of this case, defendant’s emphasis on the guardrail alone is misplaced. The area in which plaintiff actually tripped and fell meets the definition of a “sidewalk.” See *Stabley v Huron-Clinton Metro Park Auth*, 228 Mich App 363, 368-369; 579 NW2d 374 (1998) (holding that a “sidewalk” is a pedestrian way that runs alongside or adjacent to a public roadway); MCL 257.60. A municipality has the statutory obligation to actively perform necessary repairs to maintain its sidewalks in reasonable repair. *Jones v Enertel, Inc*, 467 Mich 266, 268; 650 NW2d 334 (2002); MCL 691.1402(1); MCL 691.1401(e). Defendant contends that the failure to repair the guardrail constitutes a

failure to properly repair or maintain the guardrail, not a failure to properly maintain the sidewalk. However, the defective guardrail in this case was located well inside the sidewalk and, arguably, created a hazardous condition. Thus, we conclude that a genuine issue of fact exists regarding whether defendant undertook the necessary repair work to maintain the sidewalk in a reasonably safe condition for public travel. *Jones, supra* at 268.

Alternatively, defendant argues that it is not liable for the defective guardrail because it had no notice that the defect existed. We disagree.

MCL 691.1403 provides:

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.

Thus, “in order for immunity to be waived, the agency must have had actual or constructive notice of ‘the defect’ before the accident occurred.” *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006).

Here, there was evidence that a police report dated November 29, 2003, described an automobile accident occurring at the same location as plaintiff’s accident that resulted in damage to the guardrail and a fence. Furthermore, a city official explained that the police department sends damage reports to the maintenance department for repairs, though no time frame is mandated. We note that the presumption of notice does not apply in this case because the police report was generated only 25 days before plaintiff’s accident. Nevertheless, we conclude that the evidence, when viewed in a light most favorable to plaintiff, is sufficient to create a genuine issue of material fact regarding whether defendant had notice of the defect at issue.

Affirmed.

/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald  
/s/ Pat M. Donofrio