

**IN THE SUPREME COURT**

On Appeal from the Michigan Court of Appeals  
(Shapiro, PJ, and M.J. Kelly and O'Brien, JJ)

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TIM EDWARD BRUGGER, II, Supreme Ct. Docket No.158304  
Plaintiff/Appellee, Court of Appeals No.: 337394  
vs. Midland County Circuit Court  
Case No.: 15-2403-NO B

BOARD OF COUNTY ROAD COMMISSIONERS  
FOR THE COUNTY OF MIDLAND, AKA  
MIDLAND COUNTY ROAD COMMISSION, a  
Governmental agency,

Defendant/Appellant.

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**PLAINTIFF-APPELLEE BRUGGER'S APPENDIX**  
**TO PLAINTIFF-APPELLEE'S BRIEF ON APPEAL (Corrected)**

**\*ORAL ARGUMENT REQUESTED\***

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\*\*\***ORAL ARGUMENT REQUESTED**\*\*\*

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Dated: 9/8/2020

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# APPENDIX 1

Arthur WHITMORE and Elaine Whitmore, 2011 WL 5893821...

2011 WL 5893821 (Mich.) (Appellate Brief)  
Supreme Court of Michigan.

Arthur WHITMORE and Elaine Whitmore, Plaintiffs/Appellees,  
v.  
CHARLEVOIX COUNTY ROAD COMMISSION, Defendant/Appellant.

No. 142106.  
July 22, 2011.

Appeal from the Court of Appeals (Borrello, P.J., and Jansen and Bandstra, JJ.)  
Court of Appeals Docket 291421  
Charlevoix Circuit Court 08-014922-NO  
Hon. Richard M. Pajtas

Plaintiffs' Supplemental Brief

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### \*1 INTRODUCTION

This Court asked the parties to address whether the governmental agency, Charlevoix County Road Commission, knew or should have known of the defect on Advance Road that rendered the roadway not “reasonably safe and convenient for public travel.” (05/04/11 SCt Order). The allegations and evidence in this case overwhelmingly demonstrate that the northbound lane of Advance Road just before its intersection with Cummings Road was riddled with large and dangerous potholes and that the condition had existed for more than 30 days before the Plaintiffs' accident.

Moreover, the roadway was in such unreasonable repair that the Road Commission regularly had to patch the road before the accident, and had also scheduled it for a complete reconstruction. Not only was the Road Commission frequently near the site of the accident to patch the road, but a concerned citizen had called the Road Commission more than 30 days before the accident to complain of 32 sizeable potholes on that part of Advance Road. Another disinterested witness confirmed that she had driven many times on that roadway and had observed the numerous and dangerous potholes, including the very same pothole that caused Plaintiffs' accident, and that the pothole and roadway had been left in a state of unreasonable repair and unsafe for travel for more than 30 days before Plaintiffs' accident. The Road Commission finally took care of this terrible and unsafe roadway after the accident, by again, temporarily patching the pothole and surround area on two separate occasions within 8 days of Plaintiffs' accident, and then completely reconstructing the entire roadway within 43 days of the accident.

In spite of the allegations and evidence demonstrating that the Road Commission \*2 “knew, or in the exercise of reasonable diligence should have known, of the existence of the defect,” Defendant did not present any evidence or documentation to the Trial Court to contradict Plaintiffs' evidence that the road was not in reasonable repair and was not reasonably safe and convenient for public travel. Instead, Defendant simply argued that the numerous potholes on Advance Road made it merely bumpy and that was not sufficient to make the roadway not reasonably safe for travel.

Plaintiffs satisfied the notice requirements of MCL 691.1403 and the Trial Court correctly denied Defendant's motion for summary disposition as Plaintiffs created a genuine issue of material fact to present to the jury.

### \*3 STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

This litigation arises out of a motorcycle accident which occurred on May 28, 2006 in the northbound lane of Advance Road just before its intersection with Cummings Road in Eveline Township, Charlevoix County, Michigan.

#### *The roadway in the years and months leading up the accident*

In 2005 the Charlevoix County Road Commission began its planning for a large scale reconstruction of Advance Road. (10/18/05 Minutes at FOIA Records, p. 54; 12/30/05 Minutes at FOIA Records, p. 56; FOIA Records attached to Appellee's Supplemental Brief at Tab 1). The reconstruction of Advance Road was a major undertaking, and involved 6 miles of “grading, bituminous wedging, overlay, intersection paving and aggregate shoulders.” (FOIA Records, pp. 25-27, Tab 1). The reconstruction project

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included the portion of Advance Road that intersects Cummings Road, and which is the subject of this litigation. (Map of Advance Road Project, FOIA Records, p. 27, Tab 1).

Before this major reconstruction project commenced, the Road Commission engaged in isolated patching of Advance Road. (FOIA Records, pp. 3-9, Tab 1). In fact, the Road Commission patched the portion of Advance Road near its intersection with Cummings Road at least seven times between December 2005 and April 2006. (FOIA Records, pp. 3-9, Tab 1). The poor condition of Advance Road is further reflected in the Road Commission's telephone log on April 21, 2006, which denotes that a citizen called to complain that she had "counted 32 potholes (good sized ones only)" and informed the \*4 Road Commission that Advance Road was in "terrible shape." (04/21/06 Telephone Log, FOIA Records, p. 2, Tab 1). The Road Commission did some additional patchwork a few days later. (FOIA Records, pp. 2, 9, Tab 1).

Around the same time, another citizen observed the numerous and dangerous potholes on northbound Advance Road just before its intersection with Cummings Road. (Affidavit of Karen Kopkau, ¶¶ 5-7, attached to Appellee's Supplemental Brief at Tab 2). Although the road had been in poor condition for a while, by early 2006 the road had deteriorated such that Ms. Kopkau had to be especially careful to drive on the road to "avoid as many of the potholes as possible because [she] was afraid that they would cause damage to [her] car or possibly even cause [her] to lose control." (Kopkau Affidavit, ¶¶, Tab 2). Ms. Kopkau specifically recalled that in the early spring 2006 a large pothole in the northbound lane of Advance Road approximately 10 to 20 feet south of its intersection with Cummings Road because it continued to "get bigger and more dangerous." (Kopkau Affidavit, ¶¶ 9-10, Tab 2). Ms. Kopkau verified that this large and dangerous pothole near the intersection of Cummings Road had been there for more than 30 days before May 28, 2006. (Kopkau Affidavit, ¶ 15, Tab 2).

By early May, the Road Commission was earnestly planning the reconstruction of Advance Road. It had researched the cost of the project in 2005, and on May 18, 2006 the Road Commission began to accept opening bids for the project. (11/08/05 Letter, FOIA Records, pp. 19-20; 05/08/06 Minutes, FOIA Records, p. 58; 05/18/06 Minutes, FOIA Records, p. 59, Tab 1). The Road Commission proposed to have the reconstruction of Advance Road complete by August 31, 2006. (05/18/06 Minutes, FOIA Records, p. 59; \*5 Notice to Bidders, FOIA Records, pp. 25-26, Tab 1).

#### *The accident on northbound Advance Road at its intersection with Cummings Road*

On May 28, 2006, Arthur Whitmore, a 62 year old gentleman, was lawfully operating a motorcycle on northbound Advance Road. (Complaint, ¶¶ 15, 19, attached to Appellee's Supplemental Brief at Tab 3). His 58 year old wife, Elaine Whitmore, was a passenger on the motorcycle. (Complaint ¶ 15, Tab 3). As the motorcycle proceeded into the curve immediately south of the intersection with Cummings Road, it struck a large, deep, long-existing pothole located on the right side of the northbound lane just before the intersection of Advance Road and Cummings Road. (Complaint ¶ 15, Tab 3). The Crash Report (known as the UD-10) identified the location of the pothole and provided a diagram of the accident scene. (UD-10 Crash Report, attached to Appellee's Supplemental Brief at Tab 4). Specially, the police officer preparing the UD-10 noted that Whitmore struck a pothole on Advance Road and the officer identified that the pothole was in the northbound lane of Advance Road situated 10 feet before the intersection with Cummings Rd. (UD-10, Tab 4).

The sudden impact caused Arthur Whitmore to lose control of the motorcycle. (Complaint ¶ 15, Tab 3). Both Arthur Whitmore and Elaine Whitmore were violently dragged and thrown from the motorcycle. (Complaint ¶ 15, Tab 3). Arthur Whitmore sustained numerous injuries in the accident, including injuries to his upper and lower extremities, shoulders, elbows and arms. (Complaint ¶ 16, Tab 3). In addition, he sustained a T-9 fracture, pulmonary effusion, pericardial effusion, a collapsed lung and other injuries requiring emergency medical treatment, hospitalization, extensive back surgeries and \*6 rehabilitation. (09/19/06 Notice). Elaine Whitmore sustained various abrasions to her upper body, abdomen, a fracture of the right wrist/arm requiring emergency medical treatment as well as subsequent medical care and rehabilitation. (Complaint ¶ 17, Tab 3). The Whitmores have well over \$100,000 in outstanding medical bills and Arthur Whitmore has not been able to return to employment since the accident.

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### *The Road Commission's post-accident reconstruction project*

Following the Whitmore's motorcycle accident, the Road Commission patched that portion of Advance Road two times, on June 5 and June 6, 2006. (FOIA Records, pp 10-11, Tab 1). The Road Commission began the Advance Road reconstruction project on June 13, 2006 and completed the portion of the project for Eveline Township on July 10, 2006 and the remainder of the Advance Road project was complete by July 21, 2006. (07/10/06 Minutes, FOIA Records, p. 61; 08/16/06 Timeline, FOIA Records, p. 12 and 2006 Construction Status, FOIA Records, p. 21, Tab 1). By the time the complete reconstruction of Advance Road had been performed - a short 43 days after Plaintiffs' accident - Arthur Whitmore was still hospitalized and Plaintiffs still had 77 days to timely provide the Road Commission notice of their injuries and the defect.

### *Plaintiffs' post-accident investigation*

Within three months of the accident, the Whitmores began to investigate whether they could pursue a claim against the Charlevoix County Road Commission. Plaintiffs served the Road Commission with FOIA requests on August 8, 2006 and October 5, 2006, \*7 which requested various documents concerning the road's maintenance history and condition. The information received in response to the FOIA requests clearly established that the Road Commission was previously aware of the state of disrepair of northbound Advance Road and had in fact dispatched road crews to patch and repair the road (including the area of the intersection where the accident had occurred) on numerous prior occasions. (FOIA Records, pp. 2-11, 38-48, Tab 1). The Road Commission patched that part of Advance Road at least twelve times in 2005. (FOIA Records, pp. 3, 38-48, Tab 1). Further, during 2006 and more than 30 days before the May 28 accident, the Road Commission had patched the road six times. (FOIA Records, pp. 2-9, Tab 1). These records also established that the Road Commission returned once again to the accident scene after the accident to patch the roadway. (FOIA Records, pp. 10-11, Tab 1).

On September 19, 2006, the Whitmores provided timely notice to the Road Commission of their injuries and the highway defect. (09/19/06 Notices). Although less than 120 days had passed since the accident, the Road Commission had already patched the road twice and then completely tore out the road and rebuilt it. Along with these notices, the Whitmores sent the Crash Report (UD-10), which identified the pothole that the Whitmores had struck and provided a diagram. (11/21/08 Hearing, p. 18; UD-10, Tab 4).

### *The litigation and appeals*

Plaintiffs timely filed suit against the Charlevoix County Road Commission on May 27, 2008. (Complaint, Tab 3). Defendant filed a Motion for Summary Disposition asserting, among other things, that Plaintiffs had failed to satisfy the notice requirements of \*8 MCL 691.1403 and 691.1404. (09/29/08 MSD). The Trial Court denied the motion and Defendant filed an appeal by right. (12/04/08 Order). While that appeal was pending, Defendant filed another Motion for Summary Disposition regarding some of the other theories raised in Plaintiffs' Complaint. (01/18/09 MSD). The Trial Court granted that motion and Plaintiffs filed an application for leave to appeal, which was later granted and consolidated with Defendant's appeal by right. (02/18/09 Order). By the time of the Trial Court's ruling on Defendant's second motion for summary disposition, it was still early in the discovery process; there had not been any depositions and no records had been produced.

The Court of Appeals issued an unpublished opinion on October 7, 2010.<sup>1</sup> In analyzing whether the Road Commission had notice of the highway defect before the accident occurred, the Court of Appeals reviewed this Court's decision in *Wilson v Alpena County Road Commission*, 474 Mich 161; 713 NW2d 717 (2006). (COA Opinion, p. 2). After reviewing the record, the Court of Appeals concluded that Plaintiffs properly alleged that the Road Commission had actual or constructive knowledge of the pothole. (COA Opinion, p. 2). The Court of Appeals, thus, affirmed the decision of the Trial Court denying summary disposition.

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Defendant filed an application to this Court, and this Court has selected this case for oral argument on the application and has permitted supplemental briefing. (05/04/11 Order). Plaintiffs did not file an answer to Defendant's application, so this "Supplemental Brief" is actually the first briefing Plaintiffs have presented to this Court. This Court also \*9 directed the parties to address "whether the plaintiffs demonstrated that the defendant 'knew, or in the exercise of reasonable diligence should have known, of the existence of the defect' that rendered the roadway not 'reasonably safe and convenient for public travel,'" citing MCL 691.1402(1), 691.1403 and *Wilson*, supra. (05/04/11 SCt Order).

## STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling under MCR 2.116(C)(7) that a claim is barred because of immunity granted by law. *Plunkett v DOT*, 286 Mich App 168, 180; 779 NW2d 263 (2009). Likewise, the courts review de novo questions of law, such as whether the highway exception applies, and interpretation of a statute, such as the meaning of MCL 691.1403. *Id.*

To survive a motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id.* The courts must accept as true the plaintiff's well-pleaded factual allegations and construe those allegations in the plaintiffs favor, unless the moving party (the governmental agency) contradicts such evidence with documentation. *Id.*

## \*10 ARGUMENT

### *I. The Court of Appeals correctly determined that Plaintiffs demonstrated, under MCL 691.1403 and *Wilson v Alpena Road Commission*, that the Road Commission had actual or constructive notice of the pothole in the roadway.*

Section 1402 of the Governmental Tort Liability Act set forth the responsibilities of the governmental agency with respect to roadways in its jurisdiction and its liabilities to injured persons:

[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.

MCL 691.1402. Before an injured person can recover damages from the governmental agency, he must demonstrate that the governmental agency had knowledge of the defective condition. MCL 691.1403. Thus Section 1403 of the Governmental Tort Liability Act provides an exception to governmental immunity when the governmental agency knew or should have known of a defect in the highway that made it unreasonably safe and fit for travel, as stated in the following:

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.**

\*11 MCL 691.1403 (emphasis added). According to the statute, therefore, a governmental agency could be liable for an injury either if it had actual notice of the existence of the defect, or if the defect had existed for at least 30 days before the injury occurred.

This Court's decision in *Wilson v Alpena County Road Commission*, 474 Mich 161, 168; 713 NW2d 717 (2006), interpreted the notice provision of Section 1403. In *Wilson*, a bicyclist was riding on Monaghan Point Road in Alpena County when "she

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had to 'snake' her way through innumerable potholes in the road." *Wilson, supra* at 163. The bicyclist sustained injuries when her bike hit one of these potholes, throwing her from the bike. *Id* at 163. The bicyclist's complaint against the road commission alleged that the "road had potholes in excess of six inches deep that had existed for more than 30 days at the time of the accident and that defendant 'failed to properly maintain Monaghan Pt. Rd. so as to be safe for vehicular travel.'" *Id* at 164. She further alleged that this roadway had been "persistently potholed and rutted" for years such that "only full resurfacing could make it safe." *Id* at 164. The bicyclist essentially argued that the road commission had a duty to resurface the road.

The road commission in *Wilson* asserted in a motion for summary disposition that it did not have notice under Section 1403 because it had "cold patched" the roadway two weeks before the bicyclist's accident and that the road commission had not received any complaints about the roadway in the two weeks following the cold patch. The plaintiff responded that the road commission had notice based on the deteriorated condition of the road itself.

\*12 In reversing the trial court's grant of summary disposition for the defendant, the court of appeals in *Wilson* held that the plaintiff sufficiently created a question of fact on notice under Section 1403.

Defendant's engineering assistant stated that because the road had fallen into such grave disrepair, the only thing that could be done at the time the accident occurred was to pulverize and reshape the roadway. Because defendant allowed the roadway to fall into such disrepair that it needed to be completely rebuilt, we find that plaintiff presented sufficient evidence that defendant breached its statutory duty to maintain a highway in reasonable repair so that it was reasonably safe and convenient for public travel. MCL 691.1402(1).

*Wilson*, 263 Mich App 141, 148; 687 NW2d 380 (2004).

This Court in *Wilson* observed that "the Legislature has waived immunity from liability for bodily injury or property damage if the road has become, through lack of repair or maintenance, not reasonably safe for public travel." *Id* at 167. The *Wilson* Court clarified that "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." *Id* at 168.

While the parties in *Wilson* agreed that the road was bumpy and required frequent patching, this Court noted that these "problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel." *Wilson, supra* at 169. For plaintiff to demonstrate that the road was so bumpy that it was not reasonably safe for travel, she would have to "present evidence that a reasonable road commission, 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. This Court observed that neither party \*13 showed that there was no question of fact on the road commission's notice of the unsafe condition, and therefore, held that both motions for summary disposition should have been denied. This Court affirmed the Court of Appeals' decision.

The decisions of the Court of Appeals and Trial Court in the instant case comport with this Court's decision in *Wilson, supra*. As discussed in detail below, the allegations and evidence presented to the Trial Court establish that the defect had existed in the roadway for more than 30 days before Plaintiffs' accident. Based on the allegations and the evidence, Defendant had both constructive and actual notice of the defect in the roadway such that the Road Commission did not keep Advance Road in reasonable repair and Advance Road was not reasonably safe and convenient for public travel. Defendant failed to present any evidence or documentation to contradict Plaintiffs' evidence, and instead relied on mere arguments that patching the road and planning a complete reconstruction of the road did not amount to notice under MCL 691.1403. (Application, pp. 3-4; Defendant's Supplemental Brief, pp 1, 13).

**A. The Road Commission had constructive notice because the pothole existed for at least 30 days prior to the accident.**

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Plaintiffs can demonstrate that the Road Commission had constructive notice of the pothole because it existed for at least 30 days prior to the accident. According to the GTLA, the Road Commission's knowledge of the defect "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." MCL 691.1403.

Here Plaintiffs presented evidence that the northbound lane of Advance Road just \*14 before the intersection with Cummings Road was so riddled with potholes that the road was not reasonably safe for travel. Plaintiffs made allegations and provided evidence that the Road Commission had notice of the defective condition because the roadway had existed in that deteriorated state for more than 30 days before Plaintiffs' accident.

Plaintiffs alleged in their complaint "That beginning in at least the year 2005, Defendant Charlevoix County Road Commission, did publicly recognize and acknowledge the need to perform various acts of maintenance and repair over the portions of the traveled portion of the roadway and roadbed of Advance Road in the Township of Eveline, County of Charlevoix, State of Michigan, including but not limited to the need for wedging, overlay, pavement repair, repaving and resurfacing of portions of Advance Road near its intersection with Cummings Road in the County of Charlevoix, State of Michigan." (Complaint ¶ 7, Tab 3). Plaintiffs further alleged that the Road Commission "had constructive notice of the presence and gravity of the defect present in the improved portion of the roadbed inasmuch as said defect had continuously existed for a period exceeding thirty (30) days in duration prior to May 28, 2006." (Complaint, ¶ 20, Tab 3).

Contrary to Defendant's argument, Plaintiffs do not contend that the anticipated road repair project alone satisfies the requirement of actual or constructive notice. Rather, Defendant's knowledge of the existence of the defect (and others like it) in the weeks and months proceeding the accident satisfies the requirements of MCL 691.1403. Plaintiffs provided the Trial Court with the sworn affidavit of a witness which further established Defendant's actual and constructive notice of the existence of the specific pothole in question more than 30 days prior to the accident.

\*15 The affidavit of Karen Kopkau averred that Ms. Kopkau traveled over that portion of Advance Road on her daily commute to work. She noted that "many areas of Advance Road had been in poor condition for an extended period of time prior to 2006, the condition of the road appeared to worsen in early 2006." (Kopkau Affidavit, ¶ 5, Tab 2). She observed that "both lanes of Advance Road, both north and south of its intersection with Cummings Road, had many potholes of varying sizes and other areas where water would pool and remain on the roadway" and that "many of the potholes in the road continued to get bigger and more dangerous in the early spring 2006." (Kopkau Affidavit, ¶¶ 6-7, Tab 2). Ms. Kopkau continued, "during this time, this portion of Advance Road was in such poor condition that I had to be especially carefully to operate my vehicle in a way which would avoid as many of the potholes as possible because I was afraid that they would cause damage to my car and possibly even cause me to lose control." (Kopkau Affidavit, ¶, Tab 2).

Ms. Kopkau identified the pothole at issue in this case, stating, "I specifically recall that a large pothole existed in the northbound lane of Advance Road approximately 10 to 20 feet south of its intersection with Cummings Road during this time" and "this particular pothole continued to get bigger and more dangerous during the early spring." (Kopkau Affidavit, ¶ 9-10, Tab 2). Ms. Kopkau also described the pothole, "I recall that this pothole was especially concerning to me because of both its size and its location in the curvy area of the northbound lane of Advance Road near the intersection with Cummings Road and she was "concerned that this pothole might cause significant damage to me, my car or its tires if I drove over it or into it and I tried to always make sure to avoid it while traveling north \*16 on Advance Road." (Kopkau Affidavit, ¶¶ 11-12, Tab 2). Ms. Kopkau described the dimensions of this pothole as "at least the size of a plate and it also appeared to be very deep." (Kopkau Affidavit, ¶ 13, Tab 2). Ms. Kopkau's affidavit noted several times that her observations of this pothole were during the early spring 2006 and that when the accident occurred, the pothole had been in the northbound lane of Advance Road just south of its intersection with Cummings Road for more than 30 days. (Kopkau Affidavit, ¶ 15, Tab 2).

The portion of Advance Road in this case was not merely a "bumpy road" as Defendant suggests. Instead, it was an extremely dangerous roadway riddled with potholes. Karen Kopkau recalled that there were not only innumerable potholes in that area,

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but that one particular pothole that was sizeable and dangerous. Her description of that particular pothole matches the police officer's description in the UD-10 - Ms. Kopkau described the pothole as 10 to 20 feet south of Advance Road's intersection with Cummings Road, while the officer stated that the pothole was 10 feet south of the same intersection. (Kopkau Affidavit, ¶ 9, Tab 2; UD-10, Tab 4). In addition, Ms. Kopkau described the pothole as being "especially concerning" due to its "location in the curved area of the northbound lane of Advance Road near the intersection with Cummings Road, while the officer drew a diagram that depicted the pothole at the curve in the road. (Kopkau Affidavit, ¶ 11, Tab 2; UD-10, Tab 4).

Based on the evidence, the Road Commission had notice that this portion of Advance Road was not just a bumpy road, but that it was a dangerous road and not reasonably safe for public travel. As stated in Ms. Kopkau's affidavit, "this portion of Advance Road was in such poor condition that I had to be especially carefully to operate \*17 my vehicle in a way which would avoid as many of the potholes as possible because I was afraid that they would cause damage to my car and possibly even cause me to lose control." (Kopkau Affidavit, ¶ 8, Tab 2).

Well before the May 28, 2006 accident, the Road Commission knew that the roadway was not safe for public travel and had patched up the roadway several times. But even with those patches, the Road Commission had slated this portion of Advance Road for a complete reconstruction, including wedging and overlaying. (FOIA Records, pp. 25-27 10/18/05 Minutes at FOIA Records, p. 54; 12/30/05 Minutes at FOIA Records, p. 56, Tab 1). It had been on the Road Commission's agenda since the year prior, but the project had not started by May 28, 2006. Instead, following Plaintiffs' tragic accident, the Road Commission patched the particular pothole twice and also completely reconstructed the road, all within 43 days of Plaintiffs' accident.

The facts of this case present a stronger basis for allowing the issue to go to a jury than the *Wilson* case. In *Wilson*, the road commission knew the road was bumpy and required frequent patching, but there was no evidence that the road was not reasonably safe for public travel. *Wilson*, 474 Mich at 169. The evidence in this case demonstrated that the road was dangerous and had been so for more than 30 days. (Kopkau Affidavit, Tab 2; FOIA Records, p. 2, Tab 1). Yet in *Wilson* this Court affirmed the denial of the summary disposition motions of both parties, noting that should defendant bring another motion for summary disposition about the notice issues, "plaintiff may attempt to defeat it by putting competent evidence in the record that defendant had notice that the road was not reasonably safe." *Wilson*, *supra* at 171. So although the plaintiff in *Wilson* did not establish \*18 as a matter of law that the road was in unreasonable repair and not reasonably safe for public travel, the plaintiff had presented enough evidence about the bumpy condition of the road to survive the defendant's motion for summary disposition.

In addition, the facts of this case are stronger because in *Wilson* the plaintiff did not present evidence that the road was not reasonably safe for public travel, Plaintiffs in this case presented the affidavit of a disinterested witness which established that the numerous potholes in the roadway were dangerous, that the potholes continued to grow larger and more dangerous during the early spring 2006, and that she specifically recalled a dangerous pothole precisely at the location where the police officer had identified the defect that caused Plaintiffs' accident. In contrast, the evidence in *Wilson* only came from the plaintiff herself and not from a disinterested witness who regularly traveled the road, such as Ms. Kopkau in this case.

And even without this affidavit, Plaintiffs presented sufficient evidence under a *Wilson* analysis to create a fact issue to deny Defendant's motion for summary disposition based on the extremely poor condition of the road that Road Commission knew about as least as early as 2005. The Road Commission had performed patchwork on April 26, 2006 after a concerned citizen complained about the 32 sizeable potholes and the pothole in this case would have been readily observable to the Road Commission personnel, just as it had been to Ms. Kopkau. (FOIA Records, pp. 2, 9, Tab 1).

Finally, this case is stronger than *Wilson* because the decision in *Wilson* arose from a motion under MCR 2.116(C)(10), whereas this appeal arose from a (C)(7) motion. According to court rules, when bringing a (C)(10) motion, the parties are required to present \*19 affidavits, depositions, admissions or other documentary evidence. MCR 2.116(G)(2). The parties in *Wilson* failed to present evidence to support their motions and those motions should have been denied. In contrast, under (C)(7), the trial court must consider the allegations in the pleadings, plus affidavits, depositions, admission, and documentary evidence. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Moreover, Defendant was required to - but

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wholly failed - to present documentation to contradict Plaintiffs' factual allegations. *Plunkett, supra* at 180; *Maiden, supra* at 119; *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994).

Contrary to Defendant's argument that the Road Commission must have notice of a "particular pothole" or the "specific pothole" (Sct App, pp. 22-23). *Wilson* does not require that the Road Commission have notice of the specific pothole. Instead, it is enough that the pothole in existed for more than 30 days - in *Wilson*, the plaintiff herself established that fact, while in this case, Ms. Kopkau and the road commission records established it. Defendant is essentially arguing that, because Advance Road was so riddled with potholes, that Plaintiffs cannot provide that the Road Commission had notice of the precise location of the pothole at issue. Under this theory, as long as the governmental agency allowed the roads to become so bad and dangerous that they could claim they did not know which of hundreds of potholes existed 30 days before the accident, then the governmental agency is not liable. This argument is not supported by MCL 691.1403 or *Wilson*.

The Affidavit of Karen Kopkau coupled with the Road Commission's records that they had recently patched this portion of Advance Road roadway and had identified this portion of Advance Road for a complete reconstruction job, demonstrates that the Road \*20 Commission had constructive notice of the defective condition of the roadway at least 30 days prior to Plaintiffs' accident.

**B. The Road Commission had actual knowledge of the defect because a citizen informed them about the poor condition of roadway, the Road Commission had already patched that area of the road on several occasions, and had slated that portion of the roadway for a complete reconstruction.**

Plaintiffs' Complaint alleged that on that portion of Advance Road there was a "large, long-existing pothole of significant depth and width dimensions present in the northbound lane of Advance Road near its intersection with Cummings Road" and that the Road Commission knew of its existence. (Complaint, ¶ 8, Tab 3). Further "in the days and weeks preceding the May 28, 2006 motor vehicle accident involving Plaintiff herein, Defendant, Charlevoix County Road Commission, did again publicly acknowledge the deteriorated physical structure of and the need for the significant maintenance to the roadbed surface designed for vehicle travel on Advance Road, including but not limited to that portion of Advance Road where the defect giving rise to the cause of action existed and was known to exist by the Defendant, Charlevoix County Road Commission." (Complaint, [1] 9, Tab 3). To that end, the Road Commission began to "facilitate the commencement of a significant road repair project for Advance Road, including that portion of Advance Road where the defect giving rise to this cause of action existed and was known to exist by the Defendant." (Complaint, ¶ 10, Tab 3).

Plaintiffs further alleged that the "Defendant, Charlevoix County Road Commission had not yet commenced its wedging, overlay, pavement repair, repaving and resurfacing \*21 work upon the roadway by May 28, 2006, even though it was long aware of the continuing need to do so." (Complaint, ¶12, Tab 3). Moreover, the Road Commission "by virtue of its prior failed attempts to repair the dangerous and defective condition upon the subject roadway as well as its solicitation of assistance to perform the repairs upon this and other portions of Advance Road did have actual notice of the presence of said highway defect." (Complaint, ¶ 20, Tab 3).

In addition to these allegations, Plaintiffs presented evidence of Defendant's actual knowledge of the defect. For instance, a citizen had contacted the Road Commission to complain about the potholes. The Road Commission's own maintenance and telephone records established that, as recently as April 21, 2006 (more than 30 days before the May 28, 2006 accident) the Road Commission had received a complaint from a citizen identifying 32 separate potholes in the same area of Advance Road where Plaintiffs were later injured. (Telephone Log, FOIA Records, p. 2, Tab 1). Although Plaintiffs concede that the Road Commission's maintenance records do not specifically identify the precise location of any one pothole which caused Plaintiffs' injuries (among the 32 potholes in existence in the one lane road at its intersection with Cummings Road), there is little question that Appellant had been aware of this dangerous condition as well as the general state of disrepair of the road itself for more than one year.

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The fact that the Road Commission had actual notice of this defect is further demonstrated by the road repair history for this portion of Advance Road. The Road Commission frequently went out to this portion of Advance Road to patch it up. There were 12 patch jobs in 2005 and 6 more in 2006 in the months leading up to the May 28, 2006 \*22 accident. When the Road Commission goes out to patch the road, the crew are not patching a single pothole, but they patch many holes, often walking alongside the truck while filling the potholes. Moreover, the Road Commission had slated Advance Road for a complete reconstruction. The Road Commission had investigated the cost of the project in 2005 and opened the project up for bids in May 2006. Shortly after Plaintiffs' accident, the Road Commission patched the defect two times, and then completely reconstructed the roadway, all within 43 days of Plaintiffs' accident.

The citizen complaint on April 21, 2006, coupled with the Road Commission numerous trips to the area in 2006 for patchwork, demonstrate that the Road Commission had actual knowledge of the defect in the roadway.

### CONCLUSION

Plaintiffs raised allegations and presented sufficient evidence to create a fact issue that the Road Commission knew or should have known of the existence of the defect in the road that made the road not reasonably safe for public travel. In fact, the Road Commission had actual or constructive notice of the pothole because it had existed for more than 30 days before the accident, as demonstrated by the affidavit of a disinterested witness who regularly traveled that road, the Road Commission's own maintenance records, the Road Commission's reconstruction project, and the telephone record of a citizen complaining about the 32 sizeable potholes in the roadway. Leading up to the accident, this portion of Advance Road was dangerous, as the numerous potholes grew bigger and more dangerous. The Trial Court correctly denied Defendant's Motion for Summary Disposition.

### \*23 RELIEF REQUESTED

Plaintiffs respectfully request that this Honorable Court deny Defendant's application for leave to appeal and affirm the Court of Appeals' and trial court's decisions denying Defendant's Motion for Summary Disposition.

Date: July 22, 2011

#### Footnotes

- 1 Although the opinion addresses several issues, Appellees will only discuss the Court of Appeals' decision as it relates to Section 1403 of the Governmental Tort Liability Act.

# APPENDIX 2

Arthur WHITMORE and Elaine Whitmore,.... 2010 WL 8025572...

2010 WL 8025572 (Mich.) (Appellate Brief)  
Supreme Court of Michigan.

Arthur WHITMORE and Elaine Whitmore, Plaintiffs-Appellees,  
v.  
CHARLEVOIX COUNTY ROAD COMMISSION,  
a governmental entity, Defendant-Appellant.

No. 142106.  
November 18, 2010.

Appeal from the Michigan Court of Appeals Borrello, PJ, and Jansen and Bandstra, JJ  
Supreme Court Docket No.  
Court of Appeals Docket No. 289672  
Charlevoix County Circuit Court Case No. 08-014922-No

**Application for Leave to Appeal on Behalf of Defendant Charlevoix County Road Commission**

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**\*1 INTRODUCTION**

Plaintiffs allege that the Charlevoix County Road Commission (the "Road Commission") breached its duty under the highway exception to governmental immunity, MCL 691.1402, and consequently can be held liable in tort for the injuries sustained when their motorcycle allegedly struck a pothole in the surface of Advance Road.

The Road Commission moved for summary disposition based on governmental immunity, arguing that (1) the plaintiffs had not pleaded, or otherwise established, that the actual or constructive knowledge requirements of MCL 691.1403 were satisfied, (2) that the notice of injury sent by plaintiffs did not satisfy the requirements of MCL 691.1404, and that (3) the allegations in plaintiffs Complaint that the Road Commission breached its § 1402 duty by failing to warn the plaintiffs of the alleged pothole did not avoid governmental immunity.

The Circuit Court denied the Road Commission's motion. On appeal from that decision, the Court of Appeals issued a split decision, with Judge Bandstra concurring in part and dissenting in part, affirming the Circuit Court's decision.

The Court of Appeals' opinion misapplies §§ 1403 & 1404, and in refusing to dismiss the "failure to warn" allegations, irreparably conflicts with this Court's decision in Nawrocki v Macomb Co Rd Comm, 463 Mich 143, 155-156; 615 NW2d 702 (2000). For the reasons discussed herein, the lower courts' decisions are in error, will create confusion in the law, and must be reversed.

**I. ORDERS BEING APPEALED AND RELIEF SOUGHT**

Defendant Charlevoix County Road Commission (the "Road Commission") appeals two orders of the Charlevoix County Circuit Court (the "Circuit Court"). The first order was entered on December 4, 2008, and denied the Road Commission's Motion for Summary Disposition asserting governmental immunity. (Exhibit 1). The second order was entered by the Circuit \*2 Court on December 18, 2008, and denied the Road Commission's Motion for Reconsideration of the December 4, 2008 order. (Exhibit 2).

The December 4, 2008 and December 18, 2008 orders were appealed, as of right, to the Court of Appeals. A divided panel of that Court, after briefing and oral argument, issued an opinion and order on October 7, 2010. (Exhibit 3). The Road Commission now appeals the October 7, 2010 opinion and order, as well.

Defendant Road Commission respectfully requests that this Court grant peremptory relief reversing the lower courts' decisions to the extent they deny summary disposition to the Road Commission. Defendant alternatively requests that this Court grant leave to appeal and thereafter reverse the portions of the lower court decisions denying summary disposition to the Road Commission. Defendant respectfully requests any additional relief that this Court deems necessary, including, but not limited to, costs and fees incurred in prosecuting this appeal.

**II. THE QUESTIONS PRESENTED FOR REVIEW**

The questions presented in this appeal are properly stated:

**A. WHETHER THE LOWER COURTS ERRED IN FINDING THAT THE REQUIREMENTS OF MCL 691.1403 WERE SATISFIED?**

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Plaintiffs-appellees will say, "No."

Defendant-appellant says, "Yes."

The Circuit Court said, "No."

The Court of Appeals said, "No."

**B. WHETHER THE LOWER COURTS ERRED IN FINDING THAT THE REQUIREMENTS OF MCL 691.1404 WERE SATISFIED?**

Plaintiffs-appellees will say, "No."

Defendant-appellant says, "Yes."

\*3 The Circuit Court said, "No."

The Court of Appeals said, "No."

**C. WHETHER THE LOWER COURTS ERRED IN REFUSING TO DISMISS PLAINTIFFS' ALLEGATIONS CONCERNING THE ALLEGED FAILURE TO "WARN" MOTORISTS OF THE CONDITION OF THE HIGHWAY?**

Plaintiffs-appellees will say, "No."

Defendant-appellant says, "Yes,"

The Circuit Court said, "No."

The Court of Appeals said, "No."

**III. GROUNDS FOR THIS APPEAL**

This appeal satisfies the criteria set forth in MCR 7.302(B). Specifically, the issues involve legal principles of major significance to the State's jurisprudence. MCR 7.302(B)(3). County road commissions are protected by governmental immunity as conferred by the Governmental Tort Liability Act, MCL 691.1401-1419. This Court has repeatedly determined that the immunity granted to government entities is broad, and the exceptions thereto must be narrowly construed. Each of the issues presented for review here, concerning knowledge, notice and the duty to warn, are integral to the protection afforded by immunity to governmental agencies. The lower courts' decisions here are erroneous, and rather than give immunity a broad application, instead undermine that protection. These issues are therefore of statewide significance to government entities, and to the citizens of the State of Michigan.

Second, the lower courts' decisions are clearly erroneous and will cause material injustice. MCR 7.302(B)(5). The lower courts' decisions with respect to actual or constructive knowledge of a defect pursuant to MCL 691.1403 mean that a road agency will be deemed to have the requisite knowledge simply by virtue of having had to repair the same highway in the past, or even more minimally, by scheduling the highway for replacement in the future. \*4 Respectfully to the lower courts, if that is indeed the knowledge standard, then there would be no road agency without actual or constructive knowledge of the defect alleged to have caused any crash. Concerning the MCL 691.1404 issue, longstanding precedent from this Court has held that a notice must be sufficient on its face to convey the statutorily required information - parol evidence must be unnecessary,

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otherwise the notice is faulty. In this case, the lower courts not only allowed the consideration of parol evidence, but did so based on the erroneous factual assumption that the police UD-10 report had been enclosed with the plaintiffs' notices. The record demonstrates that the police report was not enclosed. Lastly, the lower courts' decisions refusing to dismiss the "failure to warn" allegations from the Complaint are a direct affront to this Court's *Nawrocki* decision, and will as recognized by Judge Bandstra in partial dissent, at best create juror confusion and at worst permit the jury to predicate highway exception liability on the Road Commission's alleged failure to post a traffic sign warning of the alleged pothole. If the lower courts' decisions stand, material injustice will occur.

#### **\*5 STATEMENT OF APPELLATE JURISDICTION**

Defendant-appellant makes this Application for Leave to Appeal pursuant to MCR 7.301(A)(2), which provides jurisdiction for appeal by leave from a decision of the Court of Appeals.

The Court of Appeals Opinion and Order being appealed is dated October 7, 2010. This Application is filed within 42 days from that date, and is therefore timely pursuant to MCR 7.302(C)(2).

#### **\*6 STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY**

Plaintiffs Arthur and Elaine Whitmore allege in their Complaint that on May 28, 2006, they were traveling by motorcycle on Advance Road near its intersection with Cummings Road in Charlevoix County. (Exhibit 4, Complaint at ¶ 15). Plaintiffs allege that they struck "a large, long-existing pothole within the traveled portion of the roadway already scheduled for repair and resurfacing by defendant Charlevoix County Road Commission." (Exhibit 4, at ¶ 15). As a result of striking the pothole, the Complaint alleges that the plaintiffs were violently dragged and thrown to the ground, where they sustained injuries. (Exhibit 4, at ¶ 15).

The Complaint contains two counts brought pursuant to MCL 691.1402 - one each on behalf of Arthur and Elaine. Each count asserts identical allegations of breach of duty, including for purposes of this appeal, "failing to warn motorists of the existence of a significant, large, and long-existing pothole of significant depth and width dimensions present in the northbound lane of travel of Advance Road near its intersection with Cummings Road, within the traveled and improved portion of the roadway open to public travel and vehicular traffic, which Defendant knew to exist via actual or constructive knowledge on its part." (Exhibit 4, ¶ 30(b) and ¶ 44(b)). The Complaint also alleges that the Road Commission breached its duty by "failing to post appropriate warning signs to notify the public at large and Plaintiff ... in particular that the traveled and improved portion of Advance Road at or near its intersection with Cummings Road was in a defective and highly dangerous condition." (Exhibit 4, ¶ 30(1) and ¶ 44(1)).

The Road Commission moved for summary disposition, presenting essentially three broad arguments. First, the Road Commission argued that summary disposition must be granted based on governmental immunity as to plaintiffs' "warning" claims or other allegations involving traffic control devices, because such claims are not encompassed within the plain \*7 meaning of MCL 691.1402, the highway exception to governmental immunity. Second, the Road Commission argued that the statutory prerequisites created by MCL 691.1404 had not been satisfied, and therefore the Road Commission's immunity had not been waived. Third, the Road Commission argued that the statutory prerequisites of MCL 691.1403 had not been satisfied, and that therefore the Road Commission's immunity had not been waived.

Oral argument was held in the Circuit Court on November 21, 2008. At the conclusion of that hearing, the Court denied the Road Commission's motion. (Exhibit 5, Trx of 11/21/08 hrg).

The Road Commission filed a Claim of Appeal pursuant to MCR 7.203(A) and MCR 7.202(6)(v).

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Shortly after the Claim of Appeal was filed, the Road Commission filed a second motion in the Circuit Court challenging additional theories advanced in the Complaint on the basis that they are not actionable under the highway exception to governmental immunity. The parties stipulated to lift the automatic stay for the limited purpose of permitting the Circuit Court to address the Road Commission's Motion for Partial Summary Disposition. After a hearing, the Circuit Court granted the partial summary disposition motion. (Exhibit 6, Trx of 1/30/09 hrg.)

Plaintiffs filed an Application for Leave to Appeal, which the Court of Appeals granted. The two pending cases were then consolidated for argument and decision in the Court of Appeals.

After oral argument, the Court of Appeals issued an unpublished written decision, in which Judges Borello and Jansen concurred in full, and in which Judge Bandstra concurred in part and dissented in part. First, the majority addressed the Road Commission's MCL 691.1403 argument. The majority recognized that *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; \*8 713 NW2d 717 (2006), is the controlling precedent from this Court. The majority acknowledged that pursuant to *Wilson* and the highway exception to governmental immunity,

when a plaintiff alleges an injury resulting from a governmental agency's failure to remedy a defect in a highway, the "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." "It may be that a road can be so bumpy that it is not reasonably safe,"... "but to prove her case [a] plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it."

*Whitmore v Charlevoix Cty Rd Comm*, unpublished opinion per curiam of the Court of Appeals, decided October 7, 2010 (Docket Nos. 289672, 291421), at 1 (quoting *Wilson*, 474 Mich at 169). Nevertheless, the majority opinion rejected the defendant's § 1403 argument predicated on its lack of actual or constructive knowledge of the defect alleged to have caused the accident. To support its rejection, the majority observed that the plaintiffs had "alleged the defendant had actual and constructive knowledge of the pothole, which they describe as 'a large, long-existing pothole of significant depth and width dimensions present in the northbound lane of Advance Road near its intersection with Cummings Road.'" *Whitmore, supra* at \*1. The Court also commented that the plaintiffs had alleged that defendant had "previously failed to repair" the alleged pothole. Based simply on those allegations, the majority concluded that the Complaint sufficiently fulfilled the knowledge of defect, and actual time to repair, requirements of MCL 691.1403.

Next, the majority decision addressed the Road Commission's MCL 691.1404(1) argument. The Court described plaintiffs' notice as consisting of a "cover page and two individual notices, one describing Arthur Whitmore's injuries and the other describing Elaine \*9 Whitmore's injuries." *Id.* at \*2. The decision quoted from the individual notices, which are identical concerning the alleged pothole:

The subject accident occurred on or about May 28, 2006, on northbound Advance Road near its intersection with Cummings Road in the Township of Eveline, County of Charlevoix, State of Michigan.

The accident occurred as a result of the defective maintenance of the traveled portion of the roadway, and specifically, the presence of a large pothole within the traveled portion of the roadway which was neither marked nor identified

*Id.* at \*2. The Court then suggested that the plaintiffs had mailed the police report of the accident with the notice of the claim.<sup>1</sup>

The Court also relied upon the recent Court of Appeals decision in *Plunkett v Michigan Dep't of Transp*, 286 Mich App 168; 779 NW2d 263 (2009). According to the majority, *Plunkett* stands for the notion that only substantial compliance with the notice statute is required.

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The Court ended its analysis by stating in a cursory manner “[w]e cannot conclude that plaintiffs’ notice was defective merely because it relied on descriptions in the accompanying police report.” The obvious import to the Court’s conclusion is that the notice on its face was insufficient to comply with § 1404, and that had the Court recognized that the police report did \*10 not accompany the notice, it would have granted summary disposition to the Road Commission based on § 1404.

The Court then turned to the Road Commission’s argument concerning the plaintiffs’ allegations of “failure to warn.” The Court affirmed the denial of summary disposition as to that alleged breach of duty, finding that because plaintiffs contended that these allegations were not meant to be a separate cause of action, but simply as an item of “probative evidence that could be pursued at trial,” plaintiffs would be allowed to plead failure to warn as a breach of the duty imposed under the highway exception to immunity. The majority decision expressly commented that it did not believe that permitting the plaintiffs to allege and pursue allegations of “failure to warn” in connection with their highway exception claim was inconsistent with this Court’s decision in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000).

The majority of the Court then addressed the issues raised on appeal by the plaintiffs; namely, the trial court’s grant of summary disposition to the plaintiffs on various miscellaneous theories, such as failure to inspect the roadbed, failure to close the road, and failure to properly supervise employees. The Court observed that those claims dealt with issues “much broader than ‘the actual physical structure of the roadbed surface,’” and therefore were properly dismissed. *Whitmore, supra* at \*3.

Judge Bandstra wrote a separate partial concurrence and partial dissent, indicating that he disagreed with the majority’s conclusion concerning the “failure to warn” claim. Specifically, Judge Bandstra wrote:

First, allegations of a failure to warn need not be in a complaint to warrant the introduction of evidence regarding a failure to warn if such evidence is relevant and otherwise permissible as to a separate claim. Second and more importantly, I do not see how evidence that defendant failed to post a warning regarding the pothole is at all relevant to whether defendant acted negligently in \*11 failing to fix the pothole. At best, the majority’s decision in this regard will lead to juror confusion. At worse, it will allow the jurors to base liability on allegations that defendant failed to properly warn regarding the pothole in direct derogation of *Nawrocki*.

*Whitmore, supra* at \*4 (Bandstra, J., concurring in part and dissenting in part)

#### \*12 STANDARD OF REVIEW

The Court reviews de novo a trial court’s decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may, but is not required to, file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiffs’ complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).

#### \*13 ARGUMENT

##### I. THE LOWER COURTS ERRED IN FINDING THAT THE REQUIREMENTS OF MCL 691.1403 WERE SATISFIED

The Road Commission should have received summary disposition because the plaintiffs did not adequately plead, nor produce any material evidence in response to the Road Commission’s summary disposition motion, to show that the Road Commission had actual or constructive knowledge of the specific pothole alleged to have caused this accident, and further that the pothole

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rendered the highway not reasonably safe for public travel. Absent pleadings setting forth concrete facts to demonstrate that a Road Commission had actual or constructive knowledge of (1) the specific defect, and (2) that the defect rendered the roadway not reasonably safe for travel, combined with a reasonable time to repair, there can be no liability pursuant to MCL 691.1402.

#### A. The Law of Governmental Immunity

Governmental immunity is derived from the traditional doctrine of sovereign immunity and reflects the public policy that a governmental agency should be subject only to very limited tort liability. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000). Under the Governmental Tort Liability Act, MCL 691.1401, et seq (the "GTLA"), "governmental agencies are immune from tort liability when engaged in a governmental function." *Id.* at 156; see also, MCL 691.1407(1). This immunity extends to all governmental agencies performing governmental functions and eliminates all tort liability except as specifically provided in the statute. *Nawrocki*, 463 Mich at 156.

There are only six statutory exceptions to governmental immunity. The very existence of these exceptions "evidences a clear legislative judgment that public and private tortfeasors are to be treated differently..." *Id.* As explained at length by this Court: \*14 Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. *Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity cannot often reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.* Moreover, in our system of government, decision-making has been allocated among three branches of government - Legislative, Executive and Judicial - and in many cases decisions made by the Legislative and Executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions.

*Ross v Consumers Power*; 420 Mich 567, 618-619; 363 NW2d 641 (1984) (emphasis added). In other words, "[b]ecause immunity necessarily implies that a 'wrong' has occurred ... some tort claims, against a governmental agency, will inevitably go unremedied." *Nawrocki*, 463 Mich at 156. To summarize, [a]lthough governmental agencies may be under many duties, with regard to services they provide to the public, only those enumerated within the statutorily created exceptions are legally compensable if breached." *Id.*

These exceptions must be construed narrowly; strict compliance with their terms and conditions is mandatory. *Nawrocki*, 463 Mich at 158-159. Unless a cause of action satisfies the narrow and strictly construed requirements of one of the exceptions, the governmental agency is immune and the case fails.

#### \*15 B. The Highway Exception of § 1402 and the Knowledge and Reasonable Time to Repair Requirements of § 1403

The exception at issue in this case is the "highway exception" of MCL 691.1402. That exception states, in pertinent part: Sec. 2. (1) 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... 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.

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MCL 691.1402(1).

The highway exception is further tempered by the knowledge and reasonable time to repair requirements of MCL 691.1403: Sec. 3. 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.

*Id.*

This Court has recently elaborated on the strict limitations imposed by §§ .1402-.1403. In *Wilson v Alpena Co Rd Comm*, 474 Mich 161; 713 NW2d 717 (2006), this Court addressed “what notice of a defect in a road the governmental agency responsible for road maintenance and repair must have before it can be held liable for damage or injury incurred because of the defect.” *Id.* at 162. In the process, its discussion went beyond the mere “notice” issue by significantly \*16 clarifying the precise combination of circumstances that must be shown by a plaintiff before a county road commission may be held liable for a highway defect.

Underlying this Court's decision was a bicycle accident which occurred on a paved road in Alpena County. According to the plaintiff, Diane Wilson, she had to “snake” her way through “innumerable potholes” in the road. *Id.* Her Complaint alleged that the road “had potholes in excess of six (6) inches deep that had existed more than 30 days at the time of her accident...” *Id.* at 164. Plaintiff also argued that the road had “for years been in a condition that was dangerous to public safety because it was persistently potholed and rutted and only full resurfacing could make it safe.” *Id.*

The Road Commission moved for summary disposition asserting governmental immunity because, among other reasons, it lacked notice of a defective road so as to satisfy MCL 691.1403. The Road Commission pointed out that a road crew had “cold patched” the road two weeks before the plaintiffs accident and that it had received no complaints after the cold patching. *Id.* at 165. The plaintiff responded that the deteriorated condition of the road should be enough by itself to satisfy the notice requirement. *Id.*

In Section 3 of its Opinion, this Court summarized the state of highway exception jurisprudence. This Court wrote: Hence, the Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason.

Viewing the GTLA as a whole, it can also be seen that the converse of this statement is true: that is, the Legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel.

*Id.* at 167-168. This Court further elaborated that pursuant to MCL 691.1403, immunity is not waived unless the governmental agency had actual or constructive notice of “the defect” before \*17 the accident occurred. To determine 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).” *Id.* at 168. Stated differently, “an imperfection in the roadway will only rise to the level of a compensable ‘defect’ when that imperfection is one which renders a highway not ‘reasonably safe and convenient for public travel,’ and the government agency is on notice of that fact.” *Id.* at 168.

If the agency knows, or should have known, of the existence of the defect or condition that makes the road not reasonably safe for public travel, it has only a reasonable time to repair it. If it does not repair the defect within a reasonable time, it can be held liable for injury or damage caused by that defect. *Id.* at 169.

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In *Wilson*, this Court noted that all parties conceded “that there was notice of certain problems - that the road was bumpy and required frequent patching,” but nevertheless concluded that “these problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel.” *Id.* at 169. This Court conceded that a road could possibly be “so bumpy” that it is not reasonably safe for public travel, “but to prove her case plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it.” This Court cited *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912), where this Court had long ago adopted the eminently reasonable, common sense notion that a road in bad repair, or with rough pavement, is not per se one that is not reasonably safe for travel. As observed by the *Jones* court, and repeated in *Wilson*, “nearly all highways have more or less rough and uneven places in them, over which it is unpleasant to ride; but because they have, it does not follow that they are unfit and unsafe for travel.” *Jones*, 171 Mich at 611.

### \*18 C. Application of *Wilson* To This Case Requires Summary Disposition For The Road Commission

Application of *Wilson* should have resulted in summary disposition for the Road Commission. The holding in *Wilson* can be succinctly stated in four points:

- (1) A road commission is immune if the maintenance or repair that was done is reasonable, even if the highway is nevertheless not reasonably safe for public travel. *Wilson*, 474 Mich at 167-168.
- (2) A road commission is immune if the maintenance or repair that was done is not reasonable, but the road is nevertheless safe for public travel. *Wilson*, 474 Mich at 168.
- (3) A road commission is not immune only where the maintenance or repair that was done was not reasonable, and the road was not reasonably safe for public travel, and the defect stemmed from the failure to perform reasonable maintenance or repair, and the road commission knew or should have known of the defect, and a reasonable road commission would have recognized that the defect posed an unreasonable threat to safe public travel and would have addressed it. *Wilson*, 474 Mich at 168-169.
- (4) If all of the conditions of paragraph 3, supra, are satisfied, then the road commission has a “reasonable” amount of time to repair the defect. If it has not repaired the defect in a reasonable amount of time, only then may liability attach.

*Wilson*, 474 Mich at 169.

The key to understanding *Wilson* is to recognize that whether reasonable repair or maintenance was performed is a separate and independent question from whether the highway is reasonably safe for public travel. For immunity to be preserved, it is not necessary to answer both questions affirmatively; one or the other suffices. In other words, immunity exists where reasonable repair or maintenance is done, even if the highway is not reasonably safe for travel. Conversely, immunity exists where the highway is safe for travel, even if reasonable repair or maintenance has not been done. In a circumstance where the plaintiff has shown both the lack of reasonable maintenance or repair and that as a result, the highway is not reasonably safe for travel, the plaintiff must still overcome the additional hurdle of showing that the road commission knew or should have known of the defect and that a reasonable road commission would have recognized that it posed an unreasonable threat to safe public travel and would have addressed it. Lastly, if all of the other criteria are shown, then the Road Commission still must be given a reasonable amount of time to repair the defect.

- 1. Plaintiffs have not adequately pleaded, nor produced any material evidence to suggest, that the Road Commission had actual or constructive knowledge of the alleged defect, that the alleged defect rendered the highway not reasonably safe for travel, and that the Road Commission had a reasonable amount of time to repair the defect**

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Plaintiffs have not adequately pleaded, nor produced any material evidence to suggest, that the Road Commission had actual or constructive knowledge of the alleged defect, that the alleged defect rendered the highway not reasonably safe for travel, and that the Road Commission had a reasonable amount of time to repair the defect. The notice requirements of MCL 691.1403 cannot be satisfied through knowledge of a generally defective condition. By pleading and pointing to evidence showing only that the Road Commission may have known that potholes had developed on the road in the past, and that the road was scheduled for maintenance, does not show actual or constructive notice of the specific defect alleged to have caused this accident. In other words, plaintiffs overlook the plain language of the statute itself, which when construed narrowly (as this Court must pursuant to *Nawrocki*, 463 Mich at 155-156), refers to a single, specific defect.

To show actual or constructive notice, plaintiffs argued that the Road Commission acted in a public manner to "facilitate the commencement of a significant road repair project for Advance Road" and that this road repair was to "temporarily patch, remedy and/or repair the dangerous and defective conditions known by it to already exist." (Exhibit 4, at ¶ 10). In other \*20 words, because Advance Road was scheduled for maintenance, plaintiffs contend that the Road Commission must have known about the pothole they claim to have struck. Plaintiffs further alleged in their Complaint that in the days and weeks preceding the May 28, 2006, motor vehicle accident involving Plaintiffs herein, Defendant ... did again publicly acknowledge the deteriorated physical structure of and the need for significant maintenance to the roadbed surface designed for vehicular travel on Advance Road, including but not limited to that portion of Advance Road where the defect giving rise to this cause of action existed and was known to exist by the Defendant

(Exhibit 4, at ¶ 9). At the summary disposition hearing, plaintiffs' counsel articulated the reason why he believed the Complaint sufficiently alleged actual or constructive notice:

*THE COURT:* Alright, why don't you point out to us where in the complaint that alleges actual or constructive notice.

*MR. MICHAEL:* If the Court will indulge me a moment, Your Honor. I would indicate, perhaps, what I understand Counsel to mean, is that, the fact that I didn't say all of the magic words at one time in the same phrase.

*THE COURT:* Well -

*MR. MICHAEL:* But, clearly, we have alleged that the condition existed for more than 30 day's [sic]. That the Commission had actual and constructive notice. We indicate, sometimes it's scary to read one's own pleading's [sic], that the condition was dangerous and defective.

*THE COURT:* But, are there pled facts that would support those conclusions?

*MR. MICHAEL:* Absolutely, Your Honor. We indicate that the Road Commission had it's Duty [sic] to maintain the road under it's [sic] jurisdiction of reasonable repair so it was reasonably safe and convenient for public travel.

*THE COURT:* Well, that's a legal conclusion.

*MR. MICHAEL:* That's, actually, that's a recitation of the Statute that Counsel is indicating we are somehow short on. And, \*21 we cite the statute [sic]. We are not saying that it's a factual basis. The statute is actually indicated right there in that paragraph.

Then we go on, in the sub-paragraph's-

*MR. MILLAR:* Which paragraph were we just talking about?

*MR MICHAEL:* I'm sorry. I was referring to paragraph's [sic] 25 and 26, where the Statute is pled and the description of the Statute is indicated there.

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We indicate in paragraph 30 that they failed to maintain the improved portion of the roadway, I'm sorry, 30(A), in a reasonably safe condition. In -

*THE COURT:* But, we're talking about actual or constructive notice of the Road Commission that the defect, the cause of the accident, existed. And there's a (Inaudible), if it is ignored for 30 day's [sic] that they have such notice.

*MR. MICHAEL:* Correct.

*THE COURT:* And, I think the objection is here, is that, what is there in your complaint that would establish that the Road Commission had actual notice or that the pothole, the cause of the accident, existed more than 30 day's [sic] to trigger the presumed notice.

*MR. MICHAEL:* Okay. If that's the case, in paragraph 10, we indicate that the Road Commission had publicly acknowledge [sic] that a significant road repair project, where the defect, giving rise to this cause of action existed, and was known to exist by the Defendant and it did fail to act, temporarily patch, remedy or repair the dangerous and defective conditions known by it to already exist within the traveled portion of the roadway. And, it specifically reference [sic] the northbound lane of Advance, at it's intersection of Cumming's [sic].

The [sic] paragraph 11, four lines in, speaks to the dangerous and defective condition that was left, that being the large, long existing pothole of depth and dimensions, which had [sic] previously failed to successfully repair on a number of occasions within the improved portion of the roadway.

Paragraph 12 speaks to it again, even though it was long aware of the continuing need to so do, I think that's really a \*22 reference to the roadway as a whole. We then go on, I believe it is in paragraph -

*THE COURT:* Well, okay, let's stop here. This is a pothole case and it's clear the Road Commission understood that the road needed to be repaired. They had patched it twice since the day of the accident and then completely re-did it shortly thereafter. I mean, it's - I think there's sufficient notice and sufficient notice here that the Road Commission was on notice of the defect in the highway. So, I am going to deny the motion.

(Exhibit 5 at 22-25). So, in short, plaintiffs' counsel was unable to identify any fact pled in the Complaint to establish that the Road Commission knew about or should have known about the particular pothole that caused the accident, or that it had existed for 30 days or more. When pressed by the Court to identify specific facts, plaintiffs' counsel could come up with only that (1) the Road Commission publicly acknowledged that it was going to resurface the road in the future, and (2) it had repaired potholes on that road in the past. The Court then simply concluded that the case was a "pothole case," and that because the Road Commission had scheduled the roadway for repair, that it must have had sufficient knowledge of the defect to satisfy § 1403.

The cursory analysis employed by the Court of Appeals fares no better. Relying on cursory allegations that potholes had existed on the road in the past, and that the Road Commission's efforts to repair those potholes did not permanently prevent any future potholes, in no way shows that the Road Commission had actual or constructive knowledge of the pothole that plaintiffs allegedly struck with their motorcycle.

Plaintiffs' reliance - and the Circuit Court's apparent agreement on the fact that Advance Road was scheduled for maintenance misses the point of *Wilson*. A simple acknowledgment by a road commission that a highway will undergo repair says nothing about whether the repair and maintenance that had been done to the highway up to that point was reasonable. See *Wilson*, 474 Mich at 167-168. Nor does it say anything about whether the \*23 highway, in its present condition, is not reasonably safe for vehicular travel. See *Wilson*, 474 Mich at 168. Nor does it say anything about whether the Road Commission knew or should

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have known of the specific defect, or whether a reasonable road commission would have recognized that the defect posed an unreasonable threat to safe public travel and would have addressed it. See *Wilson*, 474 Mich at 168-169. In short, the pleadings and evidence relied upon by plaintiffs to satisfy the § 1403 criteria are completely immaterial to the § 1403 requirements. Nothing about the fact that the road had been repaired in the past, and that it was scheduled to undergo additional maintenance pleads a case, or creates an issue of fact, that the maintenance that had been done on the road was not reasonable, that the highway was not reasonably safe for travel, that the Road Commission knew or should have known both of those things, and had a reasonable time to repair the defect.

Plaintiffs' reliance on the general fact that the highway was going to be repaired to satisfy § 1403 also ignores the importance of the definite article "the" repeated four times within the pertinent statutory section. This Court has addressed this exact point. In *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), this Court was called upon to determine the meaning of the phrase "the proximate cause" as used in the MCL 691.1407(2) gross negligence exception to governmental immunity. There, the Court determined:

Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between "the" and "a." "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an)..." *Random House Webster's College Dictionary*, p. 1382. Further, we must follow these distinctions between "a" and "the" as the Legislature has directed that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language...". MCL 8.3a; MSA 2.212(1). Moreover, there was no indication that the words 'the' and 'a' in common usage meant something different at the time this statute was enacted...

\*24 *Robinson*, 462 Mich at 462. In short, this Court has concluded that in the immunity context, use of the word "the" has a specifying or particularizing effect.

In this case, the statute uses the term "the defect" four separate times. Just as in *Robinson*, the definite article "the" is combined with a singular noun ("defect"). The statute, therefore, by its plain and unambiguous language, contemplates a single, specific, particular defect, not a general tendency to deteriorate into a defective state.

The plaintiffs' argument also ignores the language of MCL 691.1403 which requires that the governmental agency both know about the defect, "and ha[ve] a reasonable time to repair the defect" prior to the injury. By providing for a "reasonable time to repair," the statute acknowledges that a governmental agency should not be forced to pay for an injury caused by a highway defect that it knew about, but did not have time to fix. This emphasis on the ability to repair demonstrates that the knowledge provisions of the statute are concerned with a specific defect that is alleged to have caused the harm - something concrete that could be remedied - rather than a generalization like the one relied upon by the plaintiffs here. In other words, the Plaintiffs' generalization is that because there is evidence that the Road Commission repaired this road in the past, and that this road was scheduled to be repaired in the future, the Road Commission should have known about and repaired - in advance of this accident - the specific pothole that is alleged to have caused plaintiffs' injuries. Such a reading of the statute flies in the face of its plain language, which focuses on a specific, particular defect that a road commission can both learn of and repair.

For these reasons, the Road Commission should have been granted summary disposition on plaintiffs' claims in total.

**\*25 II. ALTERNATIVELY, THE CIRCUIT COURT ERRED IN FINDING THAT THE REQUIREMENTS OF MCL 691.1404 WERE SATISFIED**

Defendant Road Commission should have received summary disposition, in the alternative to the plaintiffs' § 1403 shortcomings, on the basis that the notice sent by plaintiffs did not comply with the substantive requirements of MCL 691.1404. Specifically, the notice did not state the "exact" location of the defect, nor did it identify the "exact" nature of the defect. The plaintiffs' failure to provide the Road Commission with the required information is fatal to their claim.

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Pursuant to MCL 691.1404, an injured party shall:  
within 120 days from the time the injury occurred... serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

The purpose of this statutory provision is:

To furnish the municipal authorities promptly with notice that a claim for damages is made, and advise them of the time, place, nature, and result of the alleged accident, and a sufficient statement of the main facts, together with names of witnesses, to direct them to the sources of information that they conveniently may make an investigation.

*Kustasz v City of Detroit*, 28 Mich App 312, 314; 184 NW2d 328 (1970) (quoting, *Swanson v City of Marquette*, 357 Mich 424, 431; 98 NW2d 574 (1959)).

The Notice of Injury supplied by the plaintiffs here provides only generalized information concerning the location of the incident. (Exhibit 7). It does not, as required by the statute, describe the "exact" location of the defect. Case law from this Court has discussed the specificity required by a notice in the context of a highway defect claim. Even though these cases were decided under predecessor statutes to the one at issue in this case, the discussions are \*26 relevant, and the policies behind the notice requirement have not changed. In *Barribeau v City of Detroit*, 147 Mich 119; 110 NW 512 (1907), this Court held:

The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular "venue" of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole notice and all of the facts stated therein may be used and may be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury. The nature of the defect stated may aid in locating the place, and the place may be stated with such particularity that a very general statement of the defect (cause of the injury) may be aided. *Sargent v City of Lynn*, 138 Mass 599. ***But to be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself.[W]hen parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has not been given to the city.***

*Id.* at 125-126 (emphasis added; citations omitted).

Similarly, in *Ridgeway v City of Escanaba*, 154 Mich 68; 117 NW 550 (1908), this Court held:

Counsel urged that no description of the injury was necessary under the language of the statute, which he says mentions the extent of the injury, but not the nature, and he argues that this refers only to the amount of his claim. We do not so understand the statute, unless it is to be practically emasculated by construction. We must say that the Legislature intended to give to defendants in such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach. It is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments. It requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this statute that would not be applicable to any other statute of limitation. We have never held a notice ineffective when it could \*27 reasonably said to be in substantial compliance with the law, but we think that cannot be said of this notice.

*Id.* at 72-73 (emphasis added).

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In *Overton v Detroit*, 339 Mich 650; 64 NW2d 572 (1954), this Court concluded that the notice provided by the plaintiff was insufficient to satisfy the requirements of a predecessor statute to the one at issue here. In *Overton*, the plaintiff fractured her leg as she stepped from the street to the sidewalk near the corner of Bates and Lamed Streets in the City of Detroit. She filed a claim with the city the following day, establishing the location "at the sidewalk front of 28 E. Lamed, corner of Bates." *Id.* at 651. Apparently, she did not describe the nature of the alleged defect. Almost two years later, however, she filed a declaration establishing the place of the injury in specificity: "immediately in front of the building located on the southwest corner of East Lamed and Bates Street, in the City of Detroit, said building being commonly known as 28 East Lamed Street, Detroit, Michigan." *Id.* at 651-652. She described the defect as follows: "Said sidewalk was broken near the curb of Bates Street and the depression existed thereon, especially within the center of an uncovered metal pipe approximately three inches in diameter." *Id.* at 651-652.

In examining the content of her initial notice to the city, this Court concluded that it failed to satisfy the statutory requirement: The defect, if any, was comparatively easy to describe, and it is difficult to understand how appellee failed to make any reference to the location in the claim filed April 1, 1949, and that her signed statement of April 4, 1949, as later established by her testimony in March, 1953, that: "On Bates a little south of Lamed, there is a pole and next to the pole there is a defect in the walk." Parol evidence was required in this case "to determine both the place and the nature of the defect" and, applying the test set forth in *Barribeau v City of Detroit*, *supra*, there is but one conclusion, namely: A reasonable notice was not given to the city.'

*Id.* at 659.

\*28 Lastly, in *Smith v City of Warren*, 11 Mich App 449, 452; 161 NW2d 412 (1968), the Court of Appeals found that plaintiff's notice to defendants referring to an accident "at Thirteen Mile Road and Hoover, near the address of 11480 Thirteen Mile Road" was deficient.

In this case, the exact location of the defect cannot be determined through reference to the notice itself. Although the notice identifies northbound Advance Road near its intersection with Cummings Road, it does nothing to inform the Road Commission whether the alleged defect existed east or west of the intersection, two miles or two feet from the intersection, or before, after or within the intersection. It does not identify the intersecting leg where the defect was alleged to have existed. In short, parol evidence is necessary to determine where this defect is alleged to have existed. As such, the purported notice cannot pass the test of *Barribeau*, *Ridgeway*, *Overton* and *Smith*.

Aside from failing to provide the exact location of the defect, the Notice does not provide a sufficient description of the exact nature of the defect. There is no description as to the depth, width, length, general size or dimensions of the alleged pothole. Only plaintiffs would have known the exact location and description of the alleged defect, and from the Notice itself, absent parol evidence, the Road Commission would not have been able to locate this defect. Plaintiffs' Complaint, in fact, provides perhaps the most compelling reason why the description of the nature of the defect is insufficient. The Complaint alleges that the entirety of Advance Road was in need of maintenance and repair ("maintenance and repair over portions of the traveled portion of the roadway and roadbed of Advance Road," *Exhibit 4*, at ¶ 7; "deteriorated physical structure of and the need for significant maintenance to the roadbed surface designed for vehicular travel on Advance Road," *Exhibit 4* ¶ 9; "significant road repair project for Advance Road," *Exhibit 4*, at ¶ 10; "presence of the dangerous and defective condition") present in the \*29 improved portion of the roadway of Advance Road," *Exhibit 4*, at ¶ 14; "defective, dangerous and poorly maintained roadbed surface constituting within the improved surface of the roadway," *Exhibit 4*, at ¶ 18; "solicitation of assistance to perform the repairs upon this and other portions of Advance Road," *Exhibit 4*, at ¶ 20; "the dangerous conditions present upon the roadway in question," *Exhibit 4*, at ¶ 29 and 43; "failing to successfully repair some or all of the dangerous and defective conditions known to be present in the roadway," *Exhibit 4*, at ¶ 30(j) and 44(j)). Plaintiffs themselves plead that Advance Road was defective and dangerous in more than one particular location. That allegation only proves that the Road Commission needed more specific notice of the exact nature and location of the defect alleged to have caused the crash.

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While this case was pending on appeal, the Court of Appeals issued a published decision in *Plunkett v Dep't of Transportation*, 286 Mich App 168; 779 NW2d 263 (2009). *Plunkett* was cited by the Court here in connection with the § 1404 argument. The Court of Appeals in this case specifically relied on Plunkett's conclusion that a police report submitted with a statutory notice was properly considered in evaluating whether the notice itself was sufficient. Whitmore, *supra*, at \*3. This Court of Appeals panel stated that it "could not conclude that plaintiffs' notice was defective merely because it relied on descriptions in the accompanying police report." *Id.*

As an initial matter, the Road Commission disputes that it is appropriate, under the statute, to refer to outside sources to convey the information required by the statute. The longstanding case law discussed above establishes that parol evidence cannot be relied upon to meet the statutory requirements. In any event, even assuming *Plunkett* was correctly decided, the Court of Appeals conclusion here was flawed because the police report was not submitted with the notices sent to the Road Commission. The Court of Appeals based its conclusion that \*30 the police report had accompanied the notice on plaintiffs' counsel's argument at the November 21, 2008 hearing:

*THE COURT:* It says near the intersection of Cummings Road. It doesn't say whether it's north of Cumming's [sic] or south of Cumming's [sic].

*MR. MICHAEL:* It does say near and the police report, which was in the possession of the Defendant at the time they discussed the Notice of Intent, within the 120 days, indicates that it's ten feet south of the actual intersection.

Now, the northbound lane of Advance Road is 11 feet wide, at least it was. The mouth of Cumming's Road, as I understand it, is approximately 15 feet wide. So, it's I mean, we've got a 15 foot line here and it's 10 feet south.

*THE COURT:* How does the police report figure into this? Was it accompanied with the Notice of Injury?

*MR. MICHAEL:* Yes, Your Honor. We mailed it with it. And, the Defendant also had possession of it. And, as I said earlier, discussed it in open meeting, minutes of which are attached to our reply....

(Exhibit 5 at pp 17-18). The Court of Appeals here concluded that because defense counsel did not object to plaintiffs' counsel's statement at the hearing, that it must be true. The opinion cites no precedent supporting such reasoning. Nor would such a precedent make sense. There is no obligation for an attorney, at a summary disposition hearing, to contradict everything said by opposing counsel, lest it be deemed admitted. That is most certainly true when the Circuit Court record contradicts an attorney's statements, as it does in this case. The notices supplied by plaintiffs were dated September 19, 2006, and were sent to the Charlevoix County Clerk together, under one cover letter that itemized the contents of the envelope. (Exhibit 7). The police UD-10 report from the incident is not listed as an enclosure. (Exhibit 7). More importantly, the record contains a follow-up communication from the Road Commission's agent, dated October 2, 2006 (after the expiration of the 120 day period), acknowledging receipt of the \*31 notices, and requesting that plaintiffs' counsel provide some additional information, including a copy of the UD-10 report. (Exhibit 7). It could not be more clear that the UD-10 report was not included with the notices. For that matter, apart from plaintiffs' counsel's oral representations at the Circuit Court hearing and the Court of Appeal hearing, plaintiff has not made an argument, or provided any written record demonstrating, that the UD-10 report was enclosed with the original notices. For these reasons, the Court of Appeals based its conclusion on the § 1404 issue on its faulty assumption that the police report had been provided with the notices. Plaintiffs' counsel's statement notwithstanding, the admissible record proves otherwise.

In summary, the Notice of Injury does not satisfy the mandatory substantive statutory requirements of MCL 691.1404(1), and on this basis, the Road Commission should have received summary disposition.

### III. THE LOWER COURTS ERRED IN REFUSING TO DISMISS PLAINTIFFS' ALLEGATIONS CONCERNING THE ALLEGED FAILURE TO "WARN" MOTORISTS OF THE CONDITION OF THE HIGHWAY

Plaintiffs alleged, among other things, that the northbound portion of Advance Road was "without appropriate safety markings or precautions, construction zone signage and/or other markings which would have timely revealed to the traveling public, including but not limited to the Plaintiffs herein, the presence of a defective and dangerous condition which existed within the improved portion of the roadway." (Exhibit 4, at ¶ 11).<sup>2</sup> In the paragraphs containing the so-called breaches of duty, plaintiffs repeatedly reference the alleged failure to warn, or to post signage. (Exhibit 4, at ¶¶ 30(b), (1), (1), 44(b), (f), (1)). The Defendant Road Commission is \*32 immune from these claims, as well as all other "warning" claims contained in plaintiffs' Complaint.

As discussed above, plaintiffs rely solely on MCL 691.1402. MCL 691.1402 does not provide an exception to governmental immunity based on failure to post warnings, mark for known defective conditions, or alert drivers as to hazardous roadways, among other things. "It is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *Nawrocki* 463 Mich at 159 (citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27 (1995)). The clear statutory language states that a person may recover damages only if a governmental agency fails to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1).

This Court was unambiguous when it specifically addressed that a cause of action does not lie against a road commission for failure to install, maintain, repair, or improve traffic control devices, including traffic signs. *Nawrocki*, 463 Mich at 172-173 (addressing companion case *Evens v Shiawassee Co Rd Comm'rs*). Plaintiff Evens argued that the road commission owed him a duty to install additional stop signs or traffic signals at the intersection of an accident. *Id.* at 154. This Court, in overruling *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996) (where this Court initially held that there was a duty to provide adequate warning signs at known points of hazard), held that:

The...road commissions' duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage. [Citation omitted.] A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate \*33 street lighting or vegetation obstruction, fails to plead in avoidance of governmental immunity because signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel. Traffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the improved portion of the highway designed for vehicular travel.

*Nawrocki* at 183-184. Further, this Court concluded that the road commission did not have a duty to install additional traffic signs. *Id.* at 184. In similar fashion and following the holding of *Nawrocki*, this court in *Iovino v State*, 244 Mich App 711; 625 NW2d 129 (2001), changed its position on remand and held that the alleged failure to install warning devices at a railroad crossing was not within the highway exception to governmental immunity.

In this case, plaintiffs have alleged that there was improper signage along Advance Road. There is no such cause of action, and it should have been dismissed outright by the Circuit Court. Although it appears from the transcript that plaintiffs' counsel conceded at the November 21, 2008 hearing that they were not bringing a "separate" duty to warn or signage claims, there was significant confusion in the dialogue between plaintiffs' counsel and the court, such that it looks as if plaintiffs' counsel was drawing a distinction between a common law duty to warn claim, and a duty to warn claim that plaintiffs' counsel intended to frame under § 1402:

*MR. MICHAEL:* Well, your honor, as indicated in our response, we don't allege a theory of liability as to a duty to warn. We do take some issue with the fact that we still should be allowed to use that argument in terms of demonstrating their failure to repair a condition of which they had knowledge.

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... [I]f they had actual knowledge or constructive knowledge of this defect, which we allege they did, the law doesn't say that they can simply ignore the responsibility to protect the motoring public from the condition they are aware that existed in the roadway. They can't turn their heads to it.

\*34 So, while we don't believe that it is a separate claim of liability, we haven't indicated that it [sic] is. We have two Count's [sic], they are both straight Statutory Count's [sic].

I do believe that we should be permitted to argue on the basis of law as it currently exists, that their failure to warn of a condition of which they had actual or constructive notice, did, in fact, violate the Statute. But, is more importantly evidence of their knowledge and evidence of their failure to repair.

So, it's not a separate claim of liability, but I think that, I think their failure to repair it, is a violation of Statute.

*THE COURT:* But, you just said their failure to warn was a violation of the Statute.

*MR. MICHAEL:* Then, I misspoke and I apologize. I don't believe their failure to warn of the known condition violates the statute. I think, at a minimum, it's evidence of, it's evidence of the fact, if they were aware of this condition, it's evidence of the fact that they did not act to reasonably repair and maintain that road. It is not a separate theory of liability.

(Exhibit 5, at pp 10-12). So, at the end of the day, plaintiffs' counsel's position was that failing to warn of a highway defect does not violate § 1402, but that he should be allowed to present evidence to the jury of the supposed failure to warn, from which the jury could then conclude that § 1402 had been violated. Respectfully to plaintiffs' counsel, such reasoning is nonsensical. It is, in its purest form, an argument that failing to warn does not violate the statute, but that a violation of the statute can be found based on a failure to warn. Although the Circuit Court appeared fairly confident that no failure to warn could form the basis for liability, the Court's Order denied the Road Commission's motion in total.

The Court of Appeals decision simply compounds this error. As recognized in Judge Bandstra's dissent, to the extent the plaintiffs may wish to attempt to introduce evidence of the lack of warning in connection with their § 1402 claim, such an effort would be an evidentiary matter, and would not require that the failure to erect warning signage along the highway, or to \*35 otherwise warn the plaintiffs of the alleged pothole, be pleaded as a breach of the duty imposed under § 1402. More importantly, as recognized by Judge Bandstra, the failure to warn of an alleged highway defect could never be relevant or material to the Road Commission's limited duty under § 1402 to repair and maintain the physical structure of the roadbed surface, as established in *Nawrocki*.

The Road Commission is entitled to summary disposition, and it respectfully asks this Court to enter such an Order, or command the Circuit Court to do so.

**RELIEF REQUESTED**

WHEREFORE, for the foregoing reasons and authorities, Defendant Charlevoix County Road Commission respectfully requests that this Court grant preemptory relief reversing the lower courts' decisions to the extent they deny summary disposition to the Road Commission. Defendant alternatively requests that this Court grant leave to appeal and thereafter reverse the portions of the lower court decisions denying summary disposition to the Road Commission. Defendant respectfully requests any additional relief that this Court deems necessary, including, but not limited to, costs and fees incurred in this appeal.

DATED: November 17, 2010

Arthur WHITMORE and Elaine Whitmore..... 2010 WL 8025572...

Footnotes

- 1 The Court of Appeals panel's supposition was incorrect. As evidence that the police report had been mailed with the notice of claim, the Court majority simply commented that the plaintiffs' counsel had made that assertion at the summary disposition motion, and that defendant's counsel had not disputed it. With due respect to the majority, it should have been apparent from the record that the police report was not mailed with the notice of claim. The record shows that after the notice of claim was sent, a representative of the Road Commission contacted the plaintiffs' counsel and requested a copy of the police report. Had the police report been sent with the notice of intent, there obviously would have been no need for the Road Commission's representative to obtain a copy from the plaintiffs' counsel. Rather than rely on that record evidence, the majority here improperly chose to accept as true an unfounded, undocumented representation from plaintiff's counsel at the summary disposition hearing.
  - 2 There are two paragraphs labeled "11" in the Complaint. The quoted language comes from the second.
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# APPENDIX 3

2011 WL 1687629

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED Court of Appeals of Michigan.

Terry FICKE and Sherry Ficke, Plaintiffs–Appellants,

v.

LENAWEE COUNTY DRAIN COMMISSION, Lenawee County Drain Commissioner, and Lenawee County Board of County Road Commissioners, Defendants–Appellees.

Docket No. 296076.

May 3, 2011.

West KeySummary

1 Counties

Construction and maintenance of public improvements and works

The injuries suffered by city employee when he was thrown from a city-owned vehicle as it went over a roadbed depression near a county-operated drain culvert were not the result of a "sewage disposal system event" so as to have exempted employee's negligence claim against the county drain commission, arising out of its alleged failure to maintain the culvert properly, from governmental immunity. To have resulted from a "sewage disposal system event," employee's injuries were required to have been caused by an overflow or backup of a sewage disposal system onto real property. While the culvert was old and in need of repair, evidence did not indicate that flooding or backup actually occurred at the culvert leading to the depression in the roadbed.

Cases that cite this headnote

Lenawee Circuit Court; LC No. 08-003061-NI.

Before: BECKERING, P.J., and WHITBECK and M.J. KELLY, JJ.

Opinion

PER CURIAM.

\*1 Plaintiffs Terry and Sherry Ficke appeal as of right from the trial court's orders granting defendants' respective motions for summary disposition. We affirm.

I

On July 26, 2006, in the course of his employment, plaintiff Terry Ficke was riding on the spraying platform of a tractor spraying roadside weeds along Horton Road in Riga Township, "in the vicinity of the 'Goll Drain.'" The tractor was being driven by a co-worker. Plaintiffs allege that the tractor went over a roadbed depression at the Goll Drain and that, when it did so, Terry was thrown from the tractor and was seriously injured.<sup>1</sup> Plaintiffs filed the instant action, alleging that defendant Lenawee County Drain Commission and the Lenawee County Drain Commissioner (hereafter referred to collectively as the "Drain Commission") were negligent and grossly negligent in their maintenance of the Goll Drain culvert, and that defendant Board of County Road Commissioners for Lenawee County (the "Road Commission") was negligent and grossly negligent in its maintenance of the roadbed in the vicinity of the Goll Drain.

It is undisputed that plaintiffs did not provide pre-suit notice to either the Road Commission or the Drain Commission of the incident causing Terry's injuries. Consequently, the trial court granted the Road Commission's motion for summary disposition pursuant to MCR 2.116(C)(7), on the basis that plaintiffs' claims are barred by their failure to comply with the mandatory notice provisions set forth in MCL 691.1404(1). Eventually, after the completion of discovery, the trial court granted the Drain Commission's motion for summary disposition, pursuant to MCR 2.116(C)(7), (8) and (10), concluding that no "sewage disposal system event" could have occurred at the Goll Drain, so as to except the action from governmental

immunity, because that drain disposes of storm water and not sanitary sewage. This appeal followed.

## II

Plaintiffs first argue that the trial court erred by concluding that their claim against the Road Commission was barred by their failure to provide pre-suit notice to the Road Commission within 120 days of Terry's injuries. Plaintiff asserts that MCL 691.1404 is not applicable to county road commissions pursuant to MCL 691.1402, and, further, that because the notice provision applicable to suits against county road commissions, set forth in MCL 224.21, has been declared unconstitutional, there is no pre-suit notice requirement applicable to suits against county road commissions. We disagree.

This Court reviews a motion for summary disposition under MCR 2.116(C)(7) *de novo*. *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, 479 Mich. 378, 386, 738 N.W.2d 664 (2007). The Court accepts as true the contents of the complaint unless contradicted by documentation submitted by the movant, and considers all admissible affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(5); *Pusakulich v. Ironwood*, 247 Mich.App. 80, 82, 635 N.W.2d 323 (2001). Determination of the applicability of governmental immunity generally, and of the highway exception specifically, is a question of law subject to *de novo* consideration on appeal. *Phunkett v. Dep't of Trans.*, 286 Mich.App. 168, 180, 779 N.W.2d 263 (2009); *Cain v. Lansing Housing Comm.*, 235 Mich.App. 566, 568, 599 N.W.2d 516 (1999). A plaintiff suing the state has the burden of proving an exception to governmental immunity, *Michonski v. Detroit*, 162 Mich.App. 485, 490, 413 N.W.2d 438 (1987), and may not oppose summary disposition on the basis of unsupported speculation or conjecture, *Karbel v. Comerica Bank*, 247 Mich.App. 90, 97, 635 N.W.2d 69 (2001).

\*2 Generally, governmental agencies enjoy statutory immunity from tort liability when engaged in governmental functions, unless one of the narrowly drawn statutory exceptions to that immunity applies. MCL 691.1407; *Mason v. Wayne Co. Bd. of Comm'rs*, 447 Mich. 130, 134, 523 N.W.2d 791 (1994), amended 451 Mich. 1236, 549 N.W.2d 575 (1996). The highway exception to governmental immunity is set forth in MCL 691.1402(1), which provides in part:

[E]ach governmental agency having jurisdiction over any 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 liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21.* 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. [Emphasis added.]

MCL 691.1404(1) requires, "[a]s a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred ... shall serve a notice on the governmental agency of the occurrence of the injury and the defect." Specifically regarding actions brought against the boards of county road commissions, however, MCL 224.21 provides that "a board of county road commissioners is not liable for damages to person or property sustained by a person upon a county road because of a defective county road, bridge or culvert under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners."

In *Brown v. Manistee Road Comm.*, 452 Mich. 354, 356, 550 N.W.2d 215 (1996), our Supreme Court held that the 60-day notice provision set forth in MCL 224.21 was unconstitutional and thus, that “the 120-day notice provision applies in an action for personal injuries against a county road commission.” The Court explained,

We begin with the fundamental principle that governmental agencies are statutorily immune from tort liability. The Legislature has, however, provided exceptions to immunity, including liability for failure to properly maintain highways and failure to maintain county roads in reasonable repair. As a condition of this particular waiver of immunity, ... the Legislature requires notice of the alleged injury and defect to be served on the appropriate governmental agency. However, the two potentially governing statutes in this case provide different notice periods. [MCL 224.21] addressing county road commission liability, compels the injured party to file a notice of the claim with the clerk and the chairman of the board of county road commissioners within *sixty days* of the injury. [MCL 691.1404] addressing the identical liability for the state, its political subdivisions (including county road commissions), and municipal corporations, requires the injured party to file a notice of the claim with a governmental agency within *120 days* of the injury.

\* \* \*

\*3 We have previously discerned the legislative intent “to provide uniform liability and immunity to both state and local government agencies.” We, therefore, note that the distinct notice periods in the two statutes are suspect because it is clear that [MCL 691.1404] and [MCL 224.21] govern identical causes of action for defective road and highway maintenance. By providing different notice periods, the legislation divides injured persons into two classes: those injured on a defective road controlled by a county road commission and those injured on a defective road controlled by other governmental agencies. [*Id.* at 358-361, 550 N.W.2d 215 (citations omitted, emphasis in original).]

The Court concluded that the 60-day notice provision set forth in MCL 224.21 was unconstitutional, explaining:

The only purpose that this Court has been able to posit for a notice requirement is to prevent prejudice to the governmental agency:

[A]ctual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision....

Notice provisions, therefore, permit a governmental agency to gather evidence quickly in order to evaluate a claim. .... [the] defendant claims that another purpose for the notice provision is to enable the county to remedy any road defects and prevent future injury. A county cannot be prejudiced with respect to the injured party's claim, ... to enforce the notice provision because of the possibility of a future injury. A future injury does not affect a governmental agency's ability to defend itself against the original claim.

The notice provision has the same purpose, therefore, irrespective of whether the action is brought against the state, a city, township, or county road commission. However, an injured person with a negligent highway cause of action against a “political subdivision” must comply with the 120-day notice provision in [MCL 691.1404], whereas a person with an identical cause of action against a county road commission must comply with the sixty-day notice provision in [MCL 224.21]. Thus, a person injured in a county in which there is no county road commission would be required to file notice of the claim within 120 days, whereas an identical person injured in a county that has a county road commission would be required to provide notice within sixty days to the county road commissioner.

Therefore, despite a presumption of constitutionality, we are unable to perceive a rational basis for the county road commission statute to mandate notice of a claim within sixty days. During oral argument, attorney for [the] defendant asserted that one could only “surmise” that the distinction is justified by the county road commission's responsibility for “many miles of rural road.” However, we believe that there are no “facts either known or which could reasonably be assumed” that indicate a road commission requires a shorter notice period merely because it is responsible for rural roads. This fact bears no relationship to the stated purpose of the notice provision. There may be no dispute that the governmental agencies under [MCL 691.1401(e)] are likewise responsible for many miles of rural roads, highways, and streets. Accordingly, the distinct sixty-day notice provision required for claims

against a county road commission is unconstitutional. [*Id.* at 362-364, 550 N.W.2d 215 (citations omitted).]

\*4 After determining that the 120-day notice provision set forth in MCL 691.1404(1) was not unreasonably short, the Court held that the 120-day notice provision applied to the plaintiff's claim against the defendant county road commission. *Id.* at 364, 550 N.W.2d 215. The Court thus concluded by "revers[ing] the holding of the Court of Appeals that the sixty-day provision applies, and hold[ing] that the 120-day provision applies to lawsuits against a county road commission." *Id.* at 368, 550 N.W.2d 215.

Additionally, the Court in *Brown* addressed the issue whether it should overrule precedent requiring that a governmental entity show prejudice from late notice before dismissal of a claim was warranted. The Court declined to do so, and determined that the defendant road commission had not established that it suffered prejudice as a result of the plaintiff's failure to provide it with notice within the 120-day period. Thus, the Court concluded that dismissal of the complaint was not warranted in that case. *Id.* at 365-368, 550 N.W.2d 215.

In *Rowland v. Washtenaw Co. Road Comm'n*, 477 Mich. 197, 731 N.W.2d 41 (2007), our Supreme Court revisited the issue of whether a governmental agency is required to establish that it suffered prejudice resulting from the plaintiff's failure to provide notice to the governmental agency within 120 days of the injuries as required by MCL 691.1404. The plaintiff in *Rowland* filed suit against the defendant county road commission for injuries sustained in a fall as a result of a defective condition of a county road. However, she served the defendant with written notice of her claims 140 days after the injury occurred. *Id.* at 201, 731 N.W.2d 41. The Supreme Court overruled the prejudice requirement reaffirmed in *Brown*, and concluded that no showing of prejudice was necessary. The Court explained:

The issue in this case is whether a notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced as written. This statute provides in pertinent part:

As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, ... shall serve a notice on the governmental

agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

We conclude that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury. This Court previously held in *Hobbs v. Dep't of State Infra.*, 398 Mich. 90, 96, 247 N.W.2d 754 (1976), and *Brown v. Manistee Co. Rd. Comm'n*, 452 Mich. 354, 356-357, 550 N.W.2d 215 (1996), that absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception. *Those cases are overruled.*

\*5 Accordingly, the order of the trial court denying summary disposition to defendant on the basis of *Hobbs/Brown* is reversed, the judgment of the Court of Appeals affirming the trial court's order is also reversed, and the case is remanded to the trial court for the entry of an order granting defendant summary disposition because plaintiff failed to provide notice within 120 days "[a]s a condition to any recovery" for injuries she claims she sustained by reason of a defective highway. [*Id.* at 200, 731 N.W.2d 41 (emphasis added).]

The Court observed that

MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. As this Court stated in *Robertson v. DaimlerChrysler Corp.*, 465 Mich. 732, 748, 641 N.W.2d 567 (2002), "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered*. Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident *even if there is no prejudice*. [*Id.* at 219, 641 N.W.2d 567 (emphasis in original).]

The *Rowland* Court did not explicitly consider or address its holding in *Brown* that the 60-day notice provision set forth in MCL 224.21 is unconstitutional, and thus, that the 120-day provision applies to actions against county road commissions. However, it applied the 120-day notice provision to the plaintiff's claim against the Washtenaw County Road Commission. And, following *Rowland*, our Supreme Court has likewise applied that 120-day notice provision when peremptorily reversing this Court's decisions on the basis of a plaintiff's failure to provide timely notice to defendant county road commissions under MCL 691.1404, in *Maner v. Topping*, 480 Mich. 912, 739 N.W.2d 625 (2007) and *Leech v. Kramer*, 479 Mich. 858, 735 N.W.2d 272 (2007). We therefore conclude that both *Brown* and *Rowland* require that the 120-day notice provision set forth in MCL 691.1404(1) be applied to actions against county road commissions.

Plaintiffs argue that “[b]oth *Brown* and *Rowland* assumed that MCL 691.1404 would be applicable to Road Commissions, but neither case mentions MCL 691.1402(1),” and thus, that the issue of whether MCL 691.1402(1) excludes the application of the notice provisions of MCL 691.1404 to county road commissions “simply was not addressed in *Rowland* or *Brown*.” Plaintiffs are correct that neither case discusses MCL 691.1402(1). However, both *Rowland* and *Brown* unequivocally hold that the 120-day notice provision set forth in MCL 691.1404(1) applies to actions against county road commissions. This Court is bound to follow the decisions of our Supreme Court, regardless whether they are well-reasoned or whether this Court believes the decisions to be correct, unless and until they are modified or overruled by the Supreme Court. *People v. Metamora Water Service, Inc.*, 276 Mich.App. 376, 388, 741 N.W.2d 61 (2007); *O'Dess v. Grand Trunk Western R Co.*, 213 Mich.App. 694, 700, 555 N.W.2d 261 (1996). As our Supreme Court explained in *Boyd v. W.G. Wade Shows*, 443 Mich. 515, 532, 505 N.W.2d 544 (1993), overruled on other grounds, *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28, 732 N.W.2d 56 (2007):

\*6 As the Court of Appeals repeatedly noted, it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by

that authority. While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it. [Citations omitted.]

Thus, the trial court and this Court are bound by *Rowland* and *Brown* to apply the 120-day notice provision set forth in MCL 691.1404(1) to bar plaintiffs' claims against the Road Commission in the instant case. Plaintiffs' argument that those cases were wrongly decided because they failed to consider the language in MCL 691.1402(1) that the “liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided” in MCL 224.21 is properly addressed to the Supreme Court.

### III

Plaintiffs next argue that the trial court erred by granting the Drain Commission's motion for summary disposition on the basis that a “sewage disposal system event” can only result where the sewage disposal system involved carries human waste effluent. Defendant concedes that the trial court erred in this regard, but asks this Court to affirm the trial court's grant of summary disposition on the basis that plaintiff failed to establish a genuine issue of material fact as to whether a sewage disposal system event occurred causing Terry's injuries. We agree that the trial court plainly erred by concluding that there could not be a “sewage disposal system event” at the Horton Road culvert because the culvert did not carry human waste effluent. We further conclude, however, that summary disposition was proper because the evidence presented does not permit the conclusion that a “sewage disposal system event” occurred.

The question of whether an overflow, backup or flooding of a storm water drain constitutes a “sewage disposal system event” was raised before and decided by the trial court. Therefore, that issue is properly preserved for appeal. *Fast Air, Inc. v. Knight*, 235 Mich.App. 541, 549, 599 N.W.2d 489 (1999). The question of whether plaintiffs established a question of fact as to the occurrence of a “sewage disposal system event” was raised before, but

not addressed or decided by the trial court. Therefore, it is not considered preserved. *Hines v. Volkswagen of America, Inc.*, 265 Mich.App. 432, 443-444, 695 N.W.2d 84 (2005); *Fast Air*, 235 Mich.App. at 549, 599 N.W.2d 489. “However, where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded.” *Hines*, 265 Mich.App. at 443-444, 695 N.W.2d 84, citing *Peterman v. Dep’t of Natural Resources*, 446 Mich. 177, 183, 521 N.W.2d 499 (1994).

The sewage disposal system event exception to governmental immunity, MCL 691.1417, provides in part that “[a] governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency.” A “sewage disposal system event” is the overflow or backup of a sewage disposal system onto real property, but not including an overflow or backup whose substantial proximate cause is an obstruction in a service lead not caused by a governmental agency, a connection to a sewage disposal system on the affected property, or an act of war or terrorism. MCL 691.1416(k); *Linton v. Arenac County Rd. Comm.*, 273 Mich.App. 107, 115, 729 N.W.2d 883 (2006).

\*7 The trial court granted summary disposition to the Drain Commission on the basis that no “sewage disposal system event” could occur unless sewage (i.e., human waste effluent) was involved. Plainly, as the Drain Commission concedes, this was error. MCL 691.1416(j) defines “sewage disposal systems” as meaning “all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used in the collection, treatment and disposal of sewage and industrial wastes,” and as specifically including “a storm water drain system under the jurisdiction and control of a governmental agency.” *Linton*, 273 Mich.App. at 120-121, 729 N.W.2d 883; *Bosmie v. Motz Dev., Inc.*, 277 Mich.App. 277, 282, 745 N.W.2d 513 (2007). Thus, the trial court’s decision to grant the Drain Commission summary disposition on this basis was erroneous.

The Drain Commission argues that, despite the trial court’s error, this Court should affirm the grant of summary disposition because plaintiffs presented no

evidence that Terry’s injuries were the result of a “sewage disposal system event” so as to exempt their claim from governmental immunity. Although presented before it, the trial court did not reach this issue. However, as noted above, “where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded.” *Hines*, 265 Mich.App. at 443-444, 695 N.W.2d 84, citing *Peterman*, 446 Mich. at 183, 521 N.W.2d 499. Thus, this Court has the discretion to address defendant’s assertion that affirmance is warranted on alternative grounds.

A person asserting a claim under the sewage disposal system event exception to governmental immunity must show, as to the time of the event: (1) that the plaintiff suffered property damage or physical injury caused by a sewage disposal system event; (2) that the governmental agency was an appropriate governmental agency; (3) that the sewage disposal system had a defect; (4) that the governmental agency knew or in the exercise of reasonable diligence should have known about the defect; (5) that the governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct or remedy the defect; (6) that the defect was a substantial proximate cause of the event and the damage or injury; (7) through reasonable proof, ownership and the value of any damages to personal property; and (8) that the plaintiff provided notice as required by the act. MCL 691.1417(3); MCL 691.1417(4); *Linton*, 273 Mich.App. at 113-114, 729 N.W.2d 883. Thus, to prevail on their claim, then, plaintiffs must establish that the occurrence of a “sewage disposal system event” at the Horton Road culvert. MCL 691.1416(k) defines a “sewage disposal system event” as “the overflow or backup of a sewage disposal system onto real property.”

The Drain Commission asserts here, as it did below, that plaintiffs proffered no evidence that Terry’s injuries were the result of a “sewage disposal system event,” that is of “an overflow or backup,” at the Horton Road culvert. The Drain Commission again argues that the deposition testimony of the witnesses provides no basis to conclude that there was such an event; it points to testimony from the Riga Township Supervisor and the Drain Commissioner that there had been no flooding in the Goll Drain District and that they were not aware of any flooding ever occurring in the Horton Road area. Based on this testimony, the Drain Commission

asserts that, considering their respective professional positions, the fact that neither of these witnesses had any knowledge of flooding or overflows in the area constitutes circumstantial evidence that no flooding or overflows occurred. The Drain Commission further argues that a 2005 study obtained by the Drain Commission (the Spicer study) indicating that the culvert was in poor condition and recommending its replacement, does not permit such a conclusion. The Drain Commissioner explained that "poor condition" means that the culvert "probably had a life of five to ten years" and did not mean that it "was coming apart or failing at the time." Similarly, the Drain Commission asserts, that the Spicer Report recommended that various culverts be replaced because they were either undersized or at the wrong grade does not support plaintiffs' contention that a failure of the culvert caused the depression in the road leading to Terry's injuries, because, as the Township Supervisor explained, the culverts were too high and not too low. Finally, the Drain Commission reiterates that the documents cited by plaintiffs, including the minutes of the September 3, 2004 Riga Township meeting, which indicate that there were "drainage problems" in the area and mentioning that culverts need to be replaced under Horton Road do not establish the occurrence of a sewage disposal system event.

\*8 Plaintiff presented evidence that flooding can cause subsidence of the roadbed, and that there was a depression in the roadbed causing Terry's injuries. Plaintiffs also presented evidence that the culvert at issue was old and in "poor condition," that there were discussions about replacing it before July 26, 2006, that it had been replaced after Terry was injured, that the Drain Commission performed dredging work at the culvert in 1999 or 2000 to restore it to "original grade," and that the culvert was either undersized or at the wrong grade. Plaintiffs argued that the documentary evidence presented to the trial court demonstrated that there had been flooding problems in the Goll Drain district, including at sites on Horton Road. From this evidence, one can infer

that the culvert may not have been operating properly. However, while plaintiffs have established that conditions were such that an overflow or backup *could* have occurred at the location, they have not offered sufficient evidence to permit a fact-finder to conclude that an overflow or backup *did* occur. There were no reports or complaints of flooding at that location, and the Drain Commission received no requests to replace the culvert at issue here. And, while the minutes of the September 3, 2004 Riga Township meeting, indicate "drainage problems," we cannot conclude that such a mention is sufficient to permit the conclusion that there was an overflow or backup at the culvert leading to the depression in the roadbed, which caused Terry's injuries. While circumstantial evidence may be sufficient to establish a case, a party opposing a motion for summary disposition must present more than speculation or conjecture to meet its burden of establishing a question of fact sufficient to defeat a motion for summary disposition. *Karbel*, 247 Mich.App 97. "A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id.* quoting *Libralter Plastics, Inc. v. Chubb Group of Ins. Cos.*, 199 Mich.App. 482, 485, 502 N.W.2d 742 (1993). Plaintiffs' evidence here constitutes such "[a] conjecture." Consequently, we affirm the grant of summary disposition to the Drain Commission on the basis that plaintiffs failed to present sufficient evidence to establish a question of fact as to whether a "sewage disposal system event" occurred leading to plaintiffs' injuries. *Fisher v. Blankenship*, 286 Mich.App. 54, 70, 777 N.W.2d 469 (2009) ("this Court will affirm where the trial court came to the right result even if for the wrong reason"); *Hines*, 265 Mich.App. at 443-444, 695 N.W.2d 84.

Affirmed.

All Citations

Not Reported in N.W.2d, 2011 WL 1687629

#### Footnotes

1 Sherry Ficke is asserting a claim for loss of consortium.

Michigan Compiled Laws Annotated  
 Chapters 220 to 244 General Highway Law (Refs & Annos)  
 Chapter 224. Chapter IV--County Road Law  
 Chapter IV. County Road Law (Refs & Annos)

M.C.L.A. 224.21

224.21. County road commissioners; authority to obligate county, limitation; roads under construction; duty of county to keep roads in repair; actions brought against board; liability for damages

Currentness

Sec. 21. (1) A board of county road commissioners shall not contract indebtedness for an amount in excess of the money credited to the board and received by the county treasurer. However, the board may incur liability to complete roads under construction and upon contracts, after a tax is voted, to an amount not exceeding 3/4 of the tax.

(2) A county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel. The provisions of law respecting the liability of townships, cities, villages, and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control apply to counties adopting the county road system. This subsection is subject to section 82124 of part 821 (snowmobiles) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 321.82124<sup>1</sup> of the Michigan Compiled Laws, and section 81131 of part 811 (off-road recreation vehicles) of Act No. 451 of the Public Acts of 1994, being section 324.81131 of the Michigan Compiled Laws.

(3) An action arising under subsection (2) shall be brought against the board of county road commissioners of the county and service shall be made upon the clerk and upon the chairperson of the board. The board shall be named in the process as the "board of county road commissioners of the county of .....". Any judgment obtained against the board of county road commissioners in the action shall be audited and paid from the county road fund as are other claims against the board of county road commissioners. However, a board of county road commissioners is not liable for damages to person or property sustained by a person upon a county road because of a defective county road, bridge, or culvert under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners. The notice shall set forth substantially the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident, and that the person receiving the injury intends to hold the county liable for damages. This section applies to all county roads whether they become county roads under this chapter or under Act No. 59 of the Public Acts of 1915, being sections 247.418 to 247.481 of the Michigan compiled laws.

Credits

Amended by P.A. 1996, No. 23, § 1, Imd. Eff. Feb. 16, 1996.

Notes of Decisions (155)

**Footnotes**

1 So in enrolled bill; reference should be to M.C.L.A. § 324.82124.

**M. C. L. A. 224.21, MI ST 224.21**

**The statutes are current through P.A.2016, No. 406, also 408 to 411, 419, 428, 429, 431 to 434, and 437 to 450 of the 2016 Regular Session, 98th Legislature**

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## KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Negative Treatment Reconsidered by Rowland v. Washtenaw County Road Com'n. Mich., May 02, 2007

Michigan Compiled Laws Annotated

Chapter 691. Judiciary

Governmental Liability for Negligence (Refs &amp; Annos)

## M.C.L.A. 691.1404

## 691.1404. Notice of injury and highway defect

## Currentness

Sec. 4. (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

(2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. Filing of such notice shall constitute compliance with section 6431 of Act No. 236 of the Public Acts of 1961, being section 600.6431 of the Compiled Laws of 1948, requiring the filing of notice of intention to file a claim against the state. If required by the legislative body or chief administrative officer of the responsible governmental agency, the claimant shall appear to testify, if he is physically able to do so, and shall produce his witnesses before the legislative body, a committee thereof, or the chief administrative officer, or his deputy, or a legal officer of the governmental agency as directed by the legislative body or chief administrative officer of the responsible governmental agency, for examination under oath as to the claim, the amount thereof, and the extent of the injury.

(3) If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. The provisions of this subsection shall apply to all charter provisions, statutes and ordinances which require written notices to counties or municipal corporations.

Notes of Decisions (71)

M. C. L. A. 691.1404, MI ST 691.1404

The statutes are current through P.A.2016, No. 406, also 408 to 411, 419, 428, 429, 431 to 434, and 437 to 450 of the 2016 Regular Session, 98th Legislature

Michigan Compiled Laws Annotated  
Chapter 691. Judiciary  
Governmental Liability for Negligence

M.C.L.A. Ch. 691, Refs & Annos  
Currentness

Editors' Notes

P.A.1964, NO. 170, EFF. JULY 1, 1965

AN ACT to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils, and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers, employees, and volunteers and for paying damages sought or awarded against them; to provide for the legal defense of public officers, employees, and volunteers; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal acts and parts of acts. Amended by P.A.1970, No. 155, § 1, Imd. Eff. Aug. 1; P.A.1978, No. 141, § 1, Imd. Eff. May 11; P.A.1986, No. 175, § 1, Imd. Eff. July 7; P.A.2002, No. 400, Imd. Eff. May 30, 2002.

<The People of the State of Michigan enact:>

M. C. L. A. Ch. 691, Refs & Annos, MI ST Ch. 691, Refs & Annos

The statutes are current through P.A.2016, No. 406, also 408 to 411, 419, 428, 429, 431 to 434, and 437 to 450 of the 2016 Regular Session, 98th Legislature

# APPENDIX 4

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

TIM EDWARD BRUGGER, II,

Plaintiff,

CASE NO. 15-2403-NO B

v

HON. MICHAEL J. BEALE (P44233)

BOARD OF COUNTY ROAD COMMISSIONERS  
FOR THE COUNTY OF MIDLAND, AKA  
MIDLAND COUNTY ROAD COMMISSION, a  
governmental agency, et al.,

Defendant.

Donald N. Sowle (P27010)  
GRAY SOWLE & IACCO, PC  
1985 Ashland Drive, Suite A  
Mt. Pleasant, MI 48858  
(989) 772-5932

D. Adam Tountas (P68579)  
Charles F. Behler (P10632)  
Charles J. Pike (P77929)  
SMITH HAUGHEY RICE & ROEGGE  
Attorneys for Defendant Midland County Road  
Commission  
100 Monroe Center NW  
Grand Rapids, MI 49503-2802  
616-774-8000

**MIDLAND COUNTY ROAD COMMISSION'S ANSWER TO PLAINTIFF'S  
FIRST AMENDED COMPLAINT, AFFIRMATIVE DEFENSES,  
AND RELIANCE UPON JURY DEMAND**

NOW COMES the Defendant, the Midland County Road Commission ("Road Commission"), by and through its attorneys, Smith Haughey Rice & Roegge, and for its Answer to the Plaintiff's First Amended Complaint hereby states as follows:

- 1. Plaintiff is a resident of the County of Midland, Michigan.

ANSWER: Upon information and belief, admitted.

2. Defendant, Board of County Road Commissioners for the County of Midland aka Midland County Road Commission (hereinafter referred to as "Defendant Road Commission") is a governmental agency within the meaning of MCL 691.1401 et. seq. that regularly conducts business in Midland County.

**ANSWER:** Admitted that the Road Commission is a municipal corporation established under Michigan law and has its primary place of business in the County of Midland, State of Michigan. The remainder of this allegation is denied for the reason that the same is untrue in the manner and form alleged.

3. The cause of action arose in the County of Midland, State of Michigan.

**ANSWER:** Admitted.

4. That the amount in controversy exceeds the sum of \$25,000.00 and is otherwise within the jurisdiction of this Court.

**ANSWER:** The Road Commission does not contest the jurisdiction of this Court over the instant cause of action. The remainder of this allegation is neither admitted nor denied for the reason that the Road Commission lacks knowledge or information sufficient to form a belief as to the truth of the same and, therefore, the Plaintiff is left to his proofs.

5. On or about April 27, 2013, Plaintiff Tim Brugger was operating a 2011 Harley Davidson motorcycle south bound on N. Geneva Rd. near the intersection of W. Saginaw Rd.

**ANSWER:** The Road Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, leaves the Plaintiff to his proofs.

6. On said date, Plaintiff, Tim Brugger encountered a large area of N. Geneva Road which was full of potholes and uneven pavement.

**ANSWER:** The Road Commission lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, leaves the Plaintiff to his proofs. Notwithstanding, any wrongdoing on the part of the Road Commission is expressly denied for the reason that any allegations regarding the same are untrue.

7. At approximately 9:00 p.m. at the above-mentioned date and place, Plaintiff's motorcycle struck large potholes in the travel portion of the road causing him to lose control of his motorcycle, causing the motorcycle to crash, leave the roadway and come to a stop in a ditch adjacent to the roadway.

**ANSWER: This allegation is denied for the reason that the same is untrue in the manner and form alleged.**

8. At all times mentioned herein, Tim Brugger was acting in a reasonably prudent manner.

**ANSWER: This allegation is denied for the reason that the same is untrue.**

9. That at all times mentioned herein, N. Geneva Rd. near W. Saginaw Rd., is a county road, under the jurisdiction of and controlled, constructed and maintained by the Defendant Road Commission which has a duty to maintain said road in a safe and suitable condition for travel by the public.

**ANSWER: The Road Commission admits that N. Geneva Road, in the area referenced above, is a right-of-way under its jurisdiction. The balance of these allegations are denied for the reason that the same are untrue in the manner and form alleged.**

10. At all times mentioned herein, Defendant Road Commission had a statutory duty and responsibility to maintain the highway in reasonable repair so that it was reasonably safe and convenient for public travel. MCL 691.1402.

**ANSWER: This allegation states a conclusion of law and, therefore, no answer is required.**

11. The Defendant Road Commission breached that statutory duty by failing to maintain N. Geneva Rd. in reasonable repair and allowed N. Geneva rd. to deteriorate to the point that is was no longer safe and convenient for the general public and Tim Brugger specifically, to travel upon N. Geneva Rd.

**ANSWER: This allegation is denied for the reason that the same is untrue.**

12. The Defendant Road Commission's failure to maintain N. Geneva Road in reasonable repair so that it was safe and convenient for the public and Tim Brugger to travel upon N. Geneva Rd.

WILLIAM W. WOODS, A Professional Corporation

proximately caused Tim Brugger's motorcycle crash and the injuries suffered by Tim Brugger as a result of the crash.

**ANSWER:** This allegation is denied for the reason that the same is untrue in the manner and form alleged. Furthermore, any wrongdoing on the part of the Road Commission is expressly denied for the reason that any allegations regarding the same are untrue.

13. On April 27, 2013, and for a period of time prior to that date sufficient to give Defendant Road Commission notice, N. Geneva Rd. was in an unsafe and defective condition.

**ANSWER:** This allegation is denied for the reason that the same is untrue.

14. That Defendant Road Commission knew or in the exercise of reasonable diligence should have known of the existence of the defects in N. Geneva Rd. and had a reasonable time to repair the road before April 27, 2013.

**ANSWER:** This allegation is denied for the reason that the same is untrue in the manner and form alleged. Furthermore, any wrongdoing on the part of the Road Commission is expressly denied for the reason that any allegations regarding the same are untrue.

15. Defendant's statutory violations include the following acts and omissions among others:
- a. Failure to use reasonable care to make the road reasonably safe for the reasonably foreseeable purposes;
  - b. Failure to maintain the road in a reasonably safe condition by paving over or filling in potholes which were allowed to exist for an unreasonable period of time causing the road not to be reasonably safe and convenient for vehicular travel;
  - c. Failure to maintain N. Geneva Rd. in reasonable repair so it was reasonably safe and convenient for public travel.
  - d. Failure to warn the public adequately of the hazardous condition of N. Geneva Rd. at and near the area where this incident occurred; and,
  - e. Other statutory violations as may become known through.

**ANSWER:** This allegation is denied for the reason that the same is untrue.

- a. This allegation is denied for the reason that the same is untrue.
- b. This allegation is denied for the reason that the same is untrue.
- c. This allegation is denied for the reason that the same is untrue.

- d. This allegation is denied for the reason that the same is untrue.
- e. This allegation is denied for the reason that the same is untrue.

16. That by virtue of the Public Highway Exception to Governmental Immunity, MCL 691.1402, the defense of Governmental Immunity is of no force and effect.

**ANSWER:** This allegation states a conclusion of law and, therefore, no answer is required.

17. As a direct and proximate result of Defendant Road Commission's above mentioned statutory violations and failure to maintain N. Geneva Rd. in reasonable repair, Plaintiff sustained serious and permanent injuries, among others:

- a. Traumatic brain injury;
- b. Subarachnoid hemorrhage following injuries with loss of consciousness;
- c. Spleen laceration;
- d. Acute posthemorrhagic anemia;
- e. Lung contusion;
- f. Right wrist fracture;
- g. Left femur fracture requiring multiple surgeries;
- h. Phalanx fracture;
- i. Intracerebral hemorrhage;
- j. Renal contusion;
- k. Displaced spinous process fractures T3-T7;
- l. Basilar and occipital skull fracture;
- m. Multiple lacerations;
- n. Loss of hearing;
- o. Permanent and serious disfigurement;
- p. Impairment of cognitive functions; and
- q. Other injuries which are noted in voluminous medical records.

**ANSWER:** Wrongdoing or statutory violations on the part of the Road Commission are expressly denied for the reason that any allegations regarding the same are untrue. Additionally, to the extent that these allegations make reference to injuries suffered by the Plaintiff, the Road Commission lacks knowledge or information sufficient to form a belief as to the truth of the same and, therefore, leaves the Plaintiff to his proofs. The balance of these allegations, including the assertion that the Plaintiff is entitled to damages from the Road Commission, are denied for the reason that the same are untrue.

18. As a direct and proximate result of Defendant Road Commission's above mentioned statutory violations, Plaintiff has suffered the following damages including but not limited to:

- a. Pain and suffering in the past, present, and on into the future;
- b. Multiple surgeries in the past and he will undergo many surgeries in the future;
- c. A disability in the past and future which has and will prevent him from performing many of his normal activities and which has and will prevent her from enjoying the normal amenities of life;
- d. The expenditure of money for medical, hospital, prescriptions and rehabilitation services which may come due in the past as well as into the future;
- e. A loss of earnings in the past and a loss of earnings and earning capacity on into the future;
- f. Fright and shock in the past, present and into the future;
- g. Mental anguish in the past, present and into the future;
- h. Permanent scarring;
- i. Permanent loss of hearing;
- j. Embarrassment in the past, present and into the future;
- k. Closed head injury and sequelae; and
- l. All other relevant damages allowed by law which become apparent through discovery and trial.

**ANSWER:** Wrongdoing or statutory violations on the part of the Road Commission are expressly denied for the reason that any allegations regarding the same are untrue. Additionally, to the extent that these allegations make reference to injuries suffered by the Plaintiff, the Road Commission lacks knowledge or information sufficient to form a belief as to the truth of the same and, therefore, leaves the Plaintiff to his proofs. The balance of these allegations, including the assertion that the Plaintiff is

entitled to damages from the Road Commission, are denied for the reason that the same are untrue.

WHEREFORE, the Road Commission respectfully requests that this Honorable Court dismiss the Plaintiff's claims against it; award the Road Commission all costs and attorney's fees incurred in its defense of this matter; and grant any other relief deemed to be equitable and just.

DATED: June 9, 2015




---

D. Adam Fountas (P68579)  
 Charles F. Behler (P10632)  
 Charles J. Pike (P77929)  
 SMITH HAUGHEY RICE & ROEGGE  
 Attorneys for Defendant  
 100 Monroe Center NW  
 Grand Rapids, MI 49503-2802  
 616-774-8000

AFFIRMATIVE DEFENSES

NOW COMES the Defendant, the Midland County Road Commission ("Road Commission"), by and through its attorneys, Smith Haughey Rice & Roegge, and for its Affirmative Defenses to the Plaintiff's First Amended Complaint hereby states as follows:

1. While not admitting any of the allegations set forth in the Plaintiff's First Amended Complaint, the Road Commission affirmatively states that the underlying incident and any alleged resulting injuries and damages were proximately caused and/or contributed to by the negligence of the Plaintiff, and that those acts of negligence include, but not by way of limitation, at least the following:

- a. Failing to act as would a reasonable and prudent person under the circumstances then and there existing;
- b. Acting in utter disregard for his own safety and well-being;

- c. Operating a motorcycle in a negligent and unreasonable fashion;
- d. Operating a motorcycle at a speed in excess of that at which he could bring the same to stop within an assured clear distance ahead;
- e. Operating a motorcycle at a speed in excess of that reasonable under the circumstances then and there existing;
- f. Failing to take adequate and reasonable precautions for his own safety and well-being, including, but not limited to, the failure to wear a DOT-approved, Snell-approved, or other appropriate helmet and protective clothing;
- g. Failing to make adequate and reasonable observations of his surroundings, including, specifically, but not necessarily limited to, the roadway ahead;
- h. Acting in utter disregard of a known hazard or peril which was, or reasonably should have been, fully appreciated by him;
- i. Failing to keep his motorcycle under control; and
- j. Operating a motorcycle while under the influence of alcohol and/or other intoxicants.

- 2. The Plaintiff is not, or may not be, a real party in interest to all or a portion of this cause of action.
- 3. The Plaintiff has, or may have, failed to mitigate his damages.
- 4. The Plaintiff's cause of action against the Road Commission is barred under the doctrine of governmental immunity, whether at common law, pursuant to the applicable provisions of MCL 691.1402 and MCL 691.1407, or otherwise.
- 5. The Plaintiff has failed to state a valid cause of action against the Road Commission under the applicable provisions of MCL 691.1402.

6. The Plaintiff has otherwise failed to state a cause of action against the Road Commission upon which the relief requested can be granted.

7. The Road Commission is entitled to a setoff for any and all collateral insurance benefits received by the Plaintiff, or yet to be received by the Plaintiff, whether under MCL 600.6301, et. seq., or otherwise.

8. While not admitting any of the allegations set forth in the Plaintiff's First Amended Complaint, the Road Commission asserts that the Plaintiff's own conduct served as an intervening and/or superseding cause of the motorcycle crash at issue, as well as any alleged resulting damages.

9. At all times relevant hereto, the Road Commission complied with any and all legal duties owed to the Plaintiff, including those established by common law, statute, or otherwise.

10. While not admitting any of the allegations set forth in the Plaintiff's First Amended Complaint, the Road Commission asserts that the Plaintiff may be seeking to recover damages, either in whole or in part, that are not recoverable under Michigan law.

11. The Road Commission hereby objects to the misjoinder and nonjoinder of claims.

12. The Road Commission hereby reserves the right to assert additional Affirmative Defenses as the same may become known, up to and through the date of trial.

WHEREFORE, the Defendant respectfully requests that this Honorable Court dismiss the Plaintiff's First Amended Complaint, with prejudice; award the Defendant all costs and attorney's fees incurred in its defense of this matter; and grant any additional relief deemed to be equitable and just.

DATED: June 9, 2015

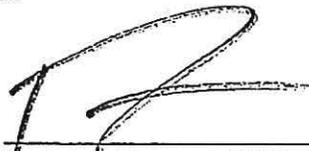


D. Adam Tountas (P68579)  
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SMITH HAUGHEY RICE & ROEGGE  
Attorneys for Defendant  
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RELIANCE ON JURY DEMAND

NOW COMES the Defendant, the Midland County Road Commission (the "Road Commission"), by and through its attorneys, Smith Haughey Rice & Roegge, and hereby asserts its reliance upon the Jury Demand filed in this matter by the Plaintiff; and hereby reserves the right to assert its own demand should that made on behalf of the Plaintiff be waived or otherwise lost.

DATED: June 9, 2015



D. Adam Tountas (P68579)  
Charles F. Behler (P10632)  
Charles J. Pike (P77929)  
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100 Monroe Center NW  
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616-774-8000

**PROOF OF SERVICE**

On June 9, 2015, the undersigned sent a copy of the foregoing instrument to all parties or attorneys of record to the above cause of action by:

- |  |   |
|--|---|
| <input checked="" type="checkbox"/> First Class Mail | <input type="checkbox"/> Certified Mail |
| <input type="checkbox"/> Facsimile                   | <input type="checkbox"/> Hand Delivery  |
| <input type="checkbox"/> Overnight Mail              | <input type="checkbox"/> Other:         |

This statement is true to the best of my information, knowledge and belief.

  
Reathel M. Brown