

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Borrello, PJ, and Jansen and Bandstra, JJ

ARTHUR WHITMORE and
ELAINE WHITMORE,

Supreme Court Docket No. 142106

Plaintiffs-Appellees,

Court of Appeals Docket No. 289672

v

CHARLEVOIX COUNTY ROAD
COMMISSION, a governmental entity,

Charlevoix County Circuit Court
Case No. 08-014922-NO

Defendant-Appellant.

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**DEFENDANT-APPELLANT CHARLEVOIX COUNTY
ROAD COMMISSION'S SUPPLEMENTAL BRIEF ON APPEAL**

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

FILED

JUN 15 2011

**CORBIN R. DAVIS
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TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

INTRODUCTION 1

QUESTION PRESENTED FOR REVIEW 3

STATEMENT OF FACTS 5

SUPPLEMENTAL ARGUMENT..... 8

 I. THE LOWER COURTS ERRED IN FINDING THAT THE
 REQUIREMENTS OF MCL 691.1403 WERE SATISFIED..... 8

 A. The Historical Underpinnings of the Actual or Constructive
 Knowledge Requirement. 8

 B. Recent Case Law Construing MCL 691.1403. 10

 C. Analysis..... 11

RELIEF REQUESTED..... 14

INDEX OF AUTHORITIES

Cases

Canon v Thumudo, 430 Mich 326, 344 n10; 422 NW2d 688 (1988) 8

Dewey v City of Detroit, 15 Mich 307 (1867) 8

Kurzer v Oakland Co Rd Comm, unpublished opinion per curiam of the Court of Appeals,
issued February 8, 2011 (Docket No. 295412) 10

Mack v City of Detroit, 467 Mich 186, 198 n15; 649 NW2d 47 (2002)..... 8, 11

McCummings v Hurley Medical Ctr, 433 Mich 404; 446 NW2d 114 (1989) 8

Whitmore v Charlevoix Co Rd Comm, ____ Mich ____; 796 NW2d 463 (2011)..... 3, 11

Whitmore v Charlevoix Co Rd Comm, unpublished opinion per curiam of the Court of
Appeals, issued October 7, 2010 (Docket Nos. 289672, 291421) 6

Wilson v Alpena Co Rd Comm, 474 Mich 161, 168; 713 NW2d 717 (2006)..... 6, 13, 14

Statutes

MCL 691.1402 5

MCL 691.1403 1, 3, 5, 7, 8, 10, 11, 13, 14

1879 PA 244 9

Other Authorities

Cooperrider, Luke K., *The Court, The Legislature, and Governmental Tort Liability In
Michigan*, 72 Mich L R 187, 193 (1973) 8, 9

INTRODUCTION

Defendant Charlevoix County Road Commission (the "Road Commission") submits this Brief as a supplement to its Application for Leave to Appeal. This Court's Order dated May 4, 2011, permitted the filing of Supplemental Briefs within 42 days from that date.

Naturally, the Road Commission continues to rely upon the authorities and reasoning provided in its Application for Leave to Appeal. This Brief attempts to further develop that reasoning, and offers the context of an additional Court of Appeals decision applying the actual or constructive knowledge requirement of MCL 691.1403. This Brief also provides a historical perspective on the requirement of actual or constructive knowledge in connection with liability imposed for alleged highway surface defects.

At the end of the day, the pleadings and record in this case demonstrate that although Plaintiffs' Complaint contains some conclusory assertions that generically regurgitate the language of MCL 691.1403, the factual basis supporting the allegations of actual or constructive knowledge is that this highway had been repaired by the Road Commission in the past, and had been scheduled for maintenance in the future. Contrary to the requirement of the statute, there is no fact pleaded by the Plaintiffs demonstrating that the Road Commission knew, or should have known, of a particular defect that rendered the highway not reasonably safe for travel, and which is alleged to have caused this crash. Nor is there any fact pleaded to support the further necessary allegation that the Road Commission, armed with either actual or constructive knowledge of the specific defect, had a reasonable time prior to the crash in which to complete repairs. In short, Plaintiffs' claim fails because the threshold of MCL 691.1403 has not been crossed.

Defendant-Appellant Charlevoix County 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-Appellant 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.

QUESTION PRESENTED FOR REVIEW

This Court's May 4, 2011 Order indicated that at oral argument, "the parties shall 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.'" *Whitmore v Charlevoix Co Rd Comm*, _____ Mich ____; 796 NW2d 463 (2011). In keeping with the Court's Order, this Supplemental Brief addresses the single question posed by the Court. However, in the Defendant-Appellant's Application for Leave to Appeal, three issues were presented for review. Those issues are:

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

Defendant-Appellant Road Commission says, "Yes."

The Circuit Court said, "No."

Plaintiffs-Appellees are expected to say, "No."

The Court of Appeals majority and dissent said, "No."

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

Defendant-Appellant Road Commission says, "Yes."

The Circuit Court said, "No."

Plaintiffs-Appellees are expected to say, "No."

The Court of Appeals majority and dissent said, "No."

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

Defendant-Appellant Road Commission says, "Yes."

The Circuit Court said, "No."

Plaintiffs-Appellees are expected to say, "No."

The Court of Appeals majority said, "No."

The Court of Appeals dissent said, "Yes."

STATEMENT OF FACTS

The Road Commission's Application for Leave to Appeal contains a detailed Statement of Facts with record references, and the Road Commission continues to rely upon that statement. What follows here may assist the Court by honing those facts to the few most necessary to address the specific issue identified in the May 4, 2011 Order; namely, whether the plaintiffs have demonstrated that the knowledge requirement of MCL 691.1403 has been met.

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 to Application for Leave to Appeal ("AFLTA"), 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 to AFLTA, at ¶ 15).** As a result of striking the pothole, the Complaint alleges that the plaintiffs were thrown to the ground and dragged, where they sustained injuries. **(Exhibit 4 to AFLTA, 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. **(Exhibit 4 to AFLTA, ¶¶ 30, 44).**

The Road Commission moved for summary disposition, presenting essentially three broad arguments. For purposes of this Supplemental Brief, which in accordance with this Court's May 4, 2011 Order limits the discussion to the MCL 691.1403 issue, the Circuit Court denied summary disposition to the Road Commission, concluding:

THE COURT: Well, O.K., 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 to AFLTA, at 25).

The Court of Appeals affirmed the Circuit Court's conclusion in an unpublished decision. The Court recognized that *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006), is the controlling precedent, and acknowledged that pursuant to *Wilson* and the highway exception to governmental immunity,

[w]hen 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 Co Rd Comm, unpublished opinion per curiam of the Court of Appeals, issued October 7, 2010 (Docket Nos. 289672, 291421), at *1 (quoting *Wilson*, 474 Mich at 169) **(Exhibit 3 to AFLTA, at 2)**. Nevertheless, the majority opinion rejected the Road Commission's § 1403 argument predicated on the lack of actual or constructive knowledge of the defect alleged to have caused the accident. To support its rejection of that argument, the Court observed that the plaintiffs had "alleged that defendant had actual and constructive knowledge of the pothole, which they described 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.

SUPPLEMENTAL 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 on the Plaintiffs' Complaint in full 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 a specific pothole that rendered the highway not reasonably safe for public travel, that caused the Plaintiffs' crash, and that was the result of inadequate maintenance or repair of the highway surface. A party suing a governmental entity is required to plead and prove facts in avoidance of immunity, because governmental immunity is not merely an affirmative defense, but a characteristic of government. *Mack v City of Detroit*, 467 Mich 186, 198 n15; 649 NW2d 47 (2002) (overruling *McCummings v Hurley Medical Ctr*, 433 Mich 404; 446 NW2d 114 (1989)). In other words, after *Mack*, it is settled that "[a] plaintiff . . . bears the burden of pleading facts in the complaint which show that the action is not barred by the governmental immunity act." *Id.* at 198 n15 (quoting *Canon v Thumudo*, 430 Mich 326, 344 n10; 422 NW2d 688 (1988)).

A. The Historical Underpinnings of the Actual or Constructive Knowledge Requirement.

The concept that a governmental defendant can be held liable in tort arising from a highway defect only where there was prior knowledge of the defect has existed from almost the inception of highway liability. As recounted in his often-cited law review article, Professor Cooperrider observed that the first Michigan case to imply a possible public liability for "nonrepair of public facilities" was *Dewey v City of Detroit*, 15 Mich 307 (1867). Cooperrider, Luke K., *The Court, The Legislature, and Governmental Tort Liability In Michigan*, 72 Mich L R 187, 193 (1973). **(Exhibit 1)**. In *Dewey*, the plaintiff had tripped over a loose plank in a city

sidewalk. The trial court instructed the jury that “the city would be liable only if it had had notice of the defect and that notice might be inferred if the defect were open and notorious, or of longstanding and of such character that it would naturally arrest the attention of persons passing by.” Cooperrider, *supra*, at 193 (**Exhibit 1**). Justice Campbell, writing for the majority of the Supreme Court, approved the jury’s instruction, deflecting plaintiff’s counsel’s contention that the notice requirement was too restrictive with the observation that “sidewalk repairs were required by the city charter to be made under the supervision of street commissioners, that there were only two commissioners for the entire city, and that, as a practical matter, the commissioners could not be expected to be aware of defects that were not apparent to every ordinary observer, since the walks in a city the size of Detroit covered ‘many scores, and probably several hundreds of miles.’” *Id.* at 193-194. In short, the concept that public liability in connection with alleged highway defects can only arise where the governmental entity has sufficient prior notice of the defect is a staple of immunity jurisprudence in Michigan.

Similarly, in one of the earliest iterations of the statutory highway exception to governmental immunity, the May 29, 1879 enactment of Public Act No. 244, section 4 made all actions brought pursuant to the statute subject “to the proviso that ‘it must be shown that such township, village, city, or corporation has had reasonable time and opportunity after such highway, street, crosswalk or culvert became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein.’” *Id.* at 206 (**Exhibit 1**).

Thus, regardless of whether public highway liability was at the time a creature of common law or statute, the concept of prior notice and failure to act reasonably given that notice has always been prerequisite.

B. Recent Case Law Construing MCL 691.1403.

Recently, the Court of Appeals issued an unpublished decision applying MCL 691.1403 to a factual scenario similar to the one presented here. In *Kurzer v Oakland Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2011 (Docket No. 295412), the Court of Appeals reversed a trial court determination that there was a genuine issue of fact concerning the requirements of MCL 691.1403. Similar to the plaintiffs in the instant case, plaintiff Charles Kurzer was injured following a motorcycle accident. He alleged that the accident “occurred as a result . . . of numerous large potholes within the traveled portion of the highway[.]” *Id.* at *1. **(Exhibit 2)**. The Road Commission sought summary disposition in part based on its argument that *Kurzer* had failed to demonstrate that the Road Commission had notice of the allegedly defective condition, and that Kurzer had not provided sufficient evidentiary support for the allegation that the roadway at issue was not reasonably safe for public travel. Kurzer had testified at his deposition that he was “on his motorcycle when the front tire jerked downward, causing him to lose his grip on the handlebars and fall.” *Id.* at *2. He testified that a pothole precipitated the accident, but that he never saw the pothole. *Id.* at *2. His evidence consisted of photographs of the roadway depicting an “obviously rough road.” *Id.* at *2.

Upon examining the photographs, however, the Court of Appeals concluded that they did not “reveal any part of the roadway that is so defective to make it not reasonably safe and convenient for public travel.” *Id.* at *2. Additionally, even if the plaintiff had offered sufficient evidence to identify an actionable road defect, the Court concluded that it was nothing more than pure speculation and conjecture that the Road Commission had actual or constructive notice of the alleged defect. *Id.* at *2. Although there was evidence that “the road was in poor condition over a period of time, making for a generally bumpy ride,” the Court determined that “notice of a

general bumpy condition is not the equivalent of notice of a specific pothole of such dimensions that would render the roadway unsafe or inconvenient for public travel.” *Id.* at *2.

C. Analysis.

Pursuant to *Mack v City of Detroit*, quoted above, it is the plaintiff’s burden to plead facts demonstrating that an exception to immunity applies. Put slightly differently, because immunity is a fundamental characteristic of government, a complaint that does not plead facts demonstrating why immunity does not apply fails to state a claim upon which relief can be granted. *Mack*, 467 Mich at 198 n15.

The trial court in this case concluded that the requirements of MCL 691.1403 had been satisfied because this is a “pothole case,” and the Road Commission “understood that the road needed to be repaired” because it had patched the pothole twice “since the day of the accident and then completely re-did it shortly thereafter.” (**Exhibit 5 to AFLTA, at 25**). The Court of Appeals affirmed the trial court’s decision, commenting that the Plaintiffs had pled sufficient facts to demonstrate the applicability of the highway exception based on the allegations that 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. *Id.*

Respectfully to the lower courts, the Plaintiffs’ self-serving and wholly conclusory factual allegations do not demonstrate that the requirements of MCL 691.1403 have been satisfied. The paper-thin nature of the allegations was revealed in the exchange between the Circuit Court and Plaintiffs’ counsel in which the Court pressed counsel as to whether specific

facts had been pled that would support the conclusory allegations. First, Plaintiffs pointed to the recitation in the Complaint of the statutory language:

MR. MICHAEL: Absolutely, Your Honor. We indicate that the Road Commission had its duty [sic] to maintain the road under it's [sic] jurisdiction of reasonable repair so that 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 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.

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 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 to AFLTA, at 22-25).

At the end of the day, then, when pressed to identify the specific facts underpinning the conclusory allegations in the Complaint that the Road Commission had actual or constructive knowledge of the alleged defect, Plaintiffs' counsel identified only that (1) the Road Commission publicly acknowledged it was going to resurface the road in the future, and (2) it had repaired potholes on that road in the past. The shortcomings of the Plaintiffs' factual allegations to satisfy MCL 691.1403 are manifest. The fact that a county road commission schedules a highway to 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 highway, in its present condition, is reasonably safe for vehicular travel. See *Wilson*, 474 Mich at 168. Nor does it offer any comment upon whether the Road Commission knew or should 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.

The factual underpinnings for the allegations that the requirements of MCL 691.1403 have been satisfied amount to that the Road Commission had repaired potholes along Advance Road in the past, and had scheduled Advance Road for maintenance in the future. Even if true, those considerations are immaterial to the § 1403 prerequisites, and are insufficient to demonstrate that the elements required by § 1403, as interpreted by this Court in *Wilson v Alpena Co Rd Comm*, have been satisfied.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons and authorities, Defendant Charlevoix County 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 this appeal.

DATED: June 15, 2011



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THE COURT, THE LEGISLATURE, AND GOVERNMENTAL TORT LIABILITY IN MICHIGAN

Luke K. Cooperrider*

I. THE ERA OF CAMPBELL AND COOLEY

A. *The Original Image of the Problem: Nonfeasance and Mere Neglect, Misfeasance and Trespass, Independent Public Officers, and Legislative Decisions*

IN 1961, when Justice Edwards of the Michigan supreme court said, "From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan,"¹ he went on to say that he was eliminating from the law of Michigan "an ancient rule inherited from the days of absolute monarchy,"² a "whim of long-dead kings."³ Justice Carr, dissenting, agreed that the doctrine in question "came to us as a part of the common law,"⁴ for which reason he thought it was protected by the reception clause of the Constitution of 1850⁵ from the overruling action of the court. If the learned justices had looked more closely, they would have discovered that their statements were not historically accurate. The doctrine of "governmental immunity," as it has been known in recent years—that is, the rule that governmental entities are immune from tort liability for the acts of their employees whenever the injury-causing activity is "governmental" in nature or involves the performance of a "governmental function"—is not, so far as the law of Michigan is concerned, "ancient." It did not exist in 1850 and therefore can scarcely "have come to us as part of the common law" or by inheritance from monarchs, absolute or otherwise. Rather it was imported into the law of Michigan in the first two decades of the twentieth century by a generation of judges and lawyers who found it easier to read about the law in Judge Dillon's treatise on municipal corporations than to track down their own legal heritage. The instruments

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1. *Williams v. City of Detroit*, 364 Mich. 231, 250, 111 N.W.2d 1, 20 (1961).

2. *Williams v. City of Detroit*, 364 Mich. 231, 250, 111 N.W.2d 1, 20 (1961).

3. *Williams v. City of Detroit*, 364 Mich. 231, 258, 111 N.W.2d 1, 28 (1961).

4. *Williams v. City of Detroit*, 364 Mich. 231, 240, 111 N.W.2d 1, 5 (1961).

5. MICH. CONST. sched. § 1 (1850): "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature."

weight of American authority, which had in turn been influenced by that decision. If one is inclined to speculate about unexpressed premises, it may be that the judges saw the problem of imperfect rural highways as one of the common perils of the times, which the community dealt with as best it could through the efforts of its members, and that their sense of justice did not strongly suggest that the community be required to assume the costs of individual misfortunes arising from a risk to which all were exposed.

A few years later, in *City of Detroit v. Corey*,³⁴ the city was again before the court, this time as a result of an injury suffered by one Corey, who drove his wagon into a Grand River Street excavation that had been made and left unprotected by a contractor who was building a sewer for the city. The court rejected the city's "independent contractor" defense and held it liable. The court argued that, although the city streets were public highways, the sewers were the city's private property, and the people of the state at large had no interest in them.³⁵ The grant of power to the city to locate sewers in its streets was therefore a grant for private purposes, and the donee of such a power, whether it be a corporation or an individual, took it subject to the conditions that it shall be so executed as not unnecessarily to interfere with the rights of the public and that all proper measures be taken to guard against accidents to persons lawfully using the highway. Such an obligation is binding upon the donee personally and cannot be divested by delegating the execution of the power to another.³⁶

The first case to imply a possible public liability for *nonrepair* of public facilities was *Dewey v. City of Detroit*.³⁷ Plaintiff had tripped on a loose plank in a city sidewalk. The trial judge told the jury that the city would be liable only if it had had notice of the defect and that notice might be inferred if the defect were open and notorious, or of long standing and of such character that it would naturally arrest the attention of persons passing by. Plaintiff's counsel argued that this condition was too restrictive, but Justice Campbell could find no fault with the charge. He did not deny the implication that liability would arise from a failure to repair after notice. He answered the plaintiff's claim of more extensive responsibility by pointing to the fact that sidewalk repairs were required by the city charter to be made under the supervision of street commissioners, that there were

34. 9 Mich. 165 (1861).

35. 9 Mich. at 184.

36. 9 Mich. at 184-85.

37. 15 Mich. 307 (1867).

only two commissioners for the entire city, and that, as a practical matter, the commissioners could not be expected to be aware of defects that were not apparent to every ordinary observer, since the walks in a city the size of Detroit covered "many scores, and probably several hundreds of miles."³⁸ He thought that the "minute daily inspection which is possible and necessary on a line of railroad, where a small break may endanger hundreds of lives, would be absurd and impracticable in relation to sidewalks."³⁹ Although it might be argued that the city could have decided to appoint more commissioners, that decision, he was firmly convinced, was legislative in character and not subject to judicial review; nor could it be made the basis of a complaint against the city.⁴⁰

Thus, in these early decisions the court had held that road and bridge maintenance in rural areas was, under Michigan statutes, the personal responsibility of certain elected officials, and not that of any public entity, so injuries arising from the lack of repair of such facilities were not a source of community liability, and further, that the charter of the city of Detroit did not impose upon the city any obligation to provide adequate drainage for its inhabitants, so the city had no liability to private parties for failure of the drainage system to conduct surface water away rapidly enough to avoid flooding. On the other hand, the court had held that the city *was* liable to a private party harmed by the negligence of the city's contractor in opening an excavation in a public street without taking the necessary precautions to prevent accidents to users of the public way and had voiced dicta to the effect that a city would be liable for harm caused by construction operations in building a sewer, or by a sewer that, because of insufficient capacity, overflowed and cast water upon private premises. In another early case, *Pennoyer v. City of Saginaw*,⁴¹ wherein plaintiff complained of ditches that cast surface water upon his premises, the court had also stated that a city would be liable for the continuance of a nuisance that it had created.

The evolving demarcation corresponded generally to the boundary between misfeasance and nonfeasance, with two jogs, one on each side of the line. The court had disclaimed power to interfere, under the warrant of an action for damages, with decisions that it viewed as within the legislative or discretionary powers entrusted to other branches of government. This idea was advanced as part of the argu-

38. 15 Mich. at 313.

39. 15 Mich. at 313.

40. 15 Mich. at 313.

41. 8 Mich. 534 (1860).

jured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction.⁹¹

In section 2 of the act similar provisions were made for injuries to horses and other animals and for injuries to vehicles and other property.⁹² A collection procedure was provided, which involved certification of the judgment to the township clerk, who was directed to collect the amount of the judgment by normal procedures of taxation.⁹³

But the draftsmen had not read the court's opinion in *Martin* with sufficient care, and the statute failed its first test in an action against a township. In *Township of Leoni v. Taylor*,⁹⁴ wherein plaintiff sought compensation for injuries to his horses arising from a defective bridge, the court read the statute, saw that it, by its terms, imposed liability only upon a township or corporation "whose duty it is to keep such bridge or culvert in repair," recalled that the *Martin* case had established that bridge and highway repair is *not* the duty of the township, and decided that the plain meaning of the statute required a decision that the township, not having acquired a repair duty, still had no liability. "The courts are not at liberty," said Justice Graves, "in order to effectuate what they may suppose to have been the intention of the Legislature, to put a construction upon the enactment not supported by the words, though the consequences should be to defeat the object of the act,"⁹⁵ and his brothers, Campbell, Christiancy, and Cooley, concurred.

The wheels ground slowly, but the legislature's eventual reaction to this decision was the enactment in 1879 of Public Act No. 244.⁹⁶ This time the terrain had been more carefully reconnoitered, and an effort was made to interdict all escape routes. The initial section of the statute was as follows:

That any person or persons sustaining bodily injury upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, crosswalks and culverts on the same in good repair, and in a condition reasonably safe and fit for travel, by the township, village, city, or corporation whose corporate authority extends over such public highway, street, bridge, crosswalk or culvert, and whose duty it is to keep the same in good

91. Act of March 15, 1861, No. 197, § 1, [1861] Mich. Acts 407.

92. Act of March 15, 1861, No. 197, § 2, [1861] Mich. Acts 408.

93. Act of March 15, 1861, No. 197, §-2, [1861] Mich. Acts 408.

94. 20 Mich. 148 (1870).

95. 20 Mich. at 155.

96. Act of May 29, 1879, No. 244, [1879] Mich. Pub. Acts 223.

repair, such township, village, city, or corporation shall be liable to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction.⁹⁷

As in the earlier statute, a second section provided the same responsibility for injury to animals and other property,⁹⁸ and in section 3 a procedure was provided for collection of the judgment.⁹⁹ In section 4 it was explicitly made "the duty of townships, villages, cities, or corporations to keep in good repair, so that they shall be safe and convenient for public travel at all times, all public highways, streets, bridges, crosswalks, and culverts that are within their jurisdiction and under their care and control, and which are open to public travel."¹⁰⁰ Moreover, the public entities upon which the duty was imposed were authorized to levy additional taxes, up to five mills, for repair purposes if other means of financing provided by law proved insufficient;¹⁰¹ it was further stipulated that "highway commissioners, street commissioners, and all other officers having special charge of highways, streets, bridges, crosswalks, or culverts, and the care or repairs thereof, are hereby made and declared to be officers of the township, village, city, or corporation wherein they are elected or appointed, and shall be subject to the general direction of such township, village, city, or corporate authorities, in the discharge of their several duties."¹⁰² All actions brought under the statute were subject to the proviso that "it must be shown that such township, village, city, or corporation has had reasonable time and opportunity after such highway, street, crosswalk or culvert became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein."¹⁰³

One hardy defense attorney argued thereafter that the 1879 statute was still ineffective to impose liability upon a township, because the repair duty continued to rest upon the highway commissioners as individuals and their office was created by the constitution, which did not subject them to the general direction of the township authorities as the statute proposed to do.¹⁰⁴ Justice Cooley, however, tendered the court's surrender. He conceded that the legislature's intent in

97. Act of May 29, 1879, No. 244, § 1, [1879] Mich. Pub. Acts 223.

98. Act of May 29, 1879, No. 244, § 2, [1879] Mich. Pub. Acts 223.

99. Act of May 29, 1879, No. 244, § 3, [1879] Mich. Pub. Acts 224.

100. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.

101. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.

102. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.

103. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 223, 224.

104. *Burnham v. Township of Byron*, 46 Mich. 555, 9 N.W. 851 (1881).

Not Reported in N.W.2d, 2011 WL 445656 (Mich.App.)
 (Cite as: 2011 WL 445656 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
 Charles W. KURZER, Plaintiff-Appellee,
 v.
 OAKLAND COUNTY ROAD COMMISSION, De-
 fendant-Appellant.

Docket No. 295412.
 Feb. 8, 2011.

Oakland Circuit Court; LC No.2008-093091-NO.

Before: TALBOT, P.J., and SAWYER and M.J.
 KELLY, JJ.

PER CURIAM.

*1 The Oakland County Road Commission ("Road Commission") appeals the denial of its motion seeking summary disposition of Charles W. Kurzer's claims of injury following an accident on his motorcycle based on the insufficiency of notice and the inapplicability of the highway exception to governmental immunity. We reverse.

Kurzer initiated this action in July 2008, alleging that a defective condition on Opdyke Road in Auburn Hills caused him to lose control of his motorcycle. According to a notice of injury sent by Kurzer's counsel to the Oakland County Clerk, "[t]he accident occurred as a result ... of numerous large potholes within the traveled portion of the highway[.]" The Road Commission sought summary disposition in accordance with MCR 2.116(C)(7) and (C)(10) based on Kurzer's failure to initially serve the proper governmental entity, with notice not coming to its attention until after the statutory notice period had expired. The Road

Commission also argued that Kurzer failed to demonstrate that it had notice of the allegedly defective condition and that Kurzer did not provide sufficient evidentiary support for his allegation that the roadway at issue was not reasonably safe for public travel. The trial court denied the motion without elaboration.

This Court reviews a trial court's decision on a motion for summary disposition de novo.^{FN1} A motion for summary disposition based on governmental immunity is decided by examining all documentary evidence submitted by the parties, accepting all well-pleaded allegations as true, and construing all the evidence and pleadings in the light most favorable to the nonmoving party.^{FN2}

FN1. *Ardt v. Titan Ins Co*, 233 Mich.App 685, 688; 593 NW2d 215 (1999).

FN2. *Tarlea v. Crabtree*, 263 Mich.App 80, 87; 687 NW2d 333 (2004).

Governmental agencies in Michigan are generally immune from tort liability for actions taken in furtherance of governmental functions.^{FN3} But there are statutory exceptions to governmental immunity for public highways that require "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."^{FN4} Liability under the highway exception does not attach

FN3. MCL 691.1407(1).

FN4. MCL 691.1402(1).

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

Not Reported in N.W.2d, 2011 WL 445656 (Mich.App.)
 (Cite as: 2011 WL 445656 (Mich.App.))

apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.^{FN5}

FN5. MCL 691. 1403.

“Statutory exceptions to the immunity of governmental agencies are to be narrowly construed.”^{FN6} “[A]n 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.”^{FN7} Merely because a road is bumpy and has required frequent patching does not necessarily indicate that the road is not reasonably safe for travel.^{FN8} The same is true for rough roads that require more attentive or careful driving.^{FN9}

FN6. *Wilson v. Alpena Co Rd Comm*, 474 Mich. 161, 166; 713 NW2d 717 (2006).

FN7. *Id.* at 168 (emphasis in the original), quoting MCL 691.1402(1).

FN8. *Id.* at 169.

FN9. *Id.* at 169-170.

*2 Kurzer testified at his deposition that he was on his motorcycle when the front tire jerked downward, causing him to lose his grip on the handlebars and fall. Kurzer believed it was a pothole that precipitated the accident, but he never saw the condition that caused that mishap. While Kurzer never returned to the accident scene to try to identify the condition, he did send his son to the area to take photographs. Despite the bumpy condition of the roadway, Kurzer stated that he was able to maintain control of his motorcycle until a pothole caused him to lose control of the motorcycle.

Kurzer provided his son's photographs, which show a stretch of obviously rough road. He asserts that the photographs “collectively ... demonstrate the exact area of the defect which caused [him] to lose control of his motorcycle.” Some of the photo-

graphs seem to suggest a precise location where the ostensibly compensable defect lay, but Kurzer neither asserts that any of the images depict the specific defect, nor does he explain how his son, who was not present when the accident occurred, could have identified the exact location. Our examination of the photographs fails to reveal any part of the roadway that is so defective to make it not reasonably safe and convenient for public travel. The only independent eyewitness to the accident testified that he was an experienced motorcyclist and opined that he could have ridden through the area where Kurzer fell “without a problem.”

Based on this evidence, the trial court erred in concluding that there was a genuine issue of fact concerning the existence of a condition that made the subject roadway not reasonably safe and convenient for public travel.

Even if the proffered photographs and innuendoes sufficiently identified an actionable road defect, Kurzer has not come forward with anything other than pure speculation and conjecture to assert that the Road Commission had actual or constructive notice of the alleged defect. Kurzer testified that he routinely traveled that stretch of roadway, but had never noticed any specific defect he could connect with his accident. There is evidence that the road was in poor condition over a period of time, making for a generally bumpy ride. But notice of a general bumpy condition is not the equivalent of notice of a specific pothole of such dimensions that would render the roadway unsafe or inconvenient for public travel.

For these reasons, we reverse the trial court's denial of summary disposition and remand this case for entry of an order granting dismissal of Kurzer's claims. Because we decide this case based on Kurzer's failure to sufficiently specify an actionable road defect or demonstrate that the Road Commission had actual or constructive notice of such alleged defect as required, we need not reach the question of whether Kurzer served his notice of injury and highway defect on the proper party.

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(Cite as: 2011 WL 445656 (Mich.App.))

Reversed.

M.J. KELLY, J. (concurring).
*3 I concur in result only.

Mich.App.,2011.
Kurzer v Oakland County Road Com'n
Not Reported in N.W.2d, 2011 WL 445656
(Mich.App.)

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