

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Borrello, P.J., and Jansen and Bandstra, JJ.)

Arthur Whitmore and Elaine Whitmore,

Supreme Court Docket 142106

Plaintiffs/Appellees,

Court of Appeals Docket 291421

v.

Charlevoix County Road Commission,

Charlevoix Circuit Court

08-014922-NO

Hon. Richard M. Pajtas

Defendant/Appellant.

PLAINTIFFS' SUPPLEMENTAL BRIEF

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Dated: July 22, 2011

FILED

JUL 22 2011

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

142106

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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

“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.

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 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

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, ¶¶ 5-6, 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;

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

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.

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,

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 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, 2010.¹ 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.

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

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.

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 plaintiff’s favor, unless the moving party (the governmental agency) contradicts such evidence with documentation. *Id.*

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.**

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 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.

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

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.

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

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.

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, ¶ 8, 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

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, 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

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

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

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 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

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, ¶ 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

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.

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

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

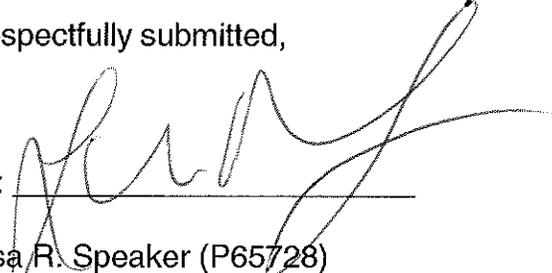
Plaintiffs raised allegations and presented sufficient evidence to create a fact issue that the Road Commission knew or should have known of the existence of the defect in the road that made the road not reasonably safe for public travel. In fact, the Road Commission had actual or constructive notice 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.

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.

Respectfully submitted,

Date: July 22, 2011

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