

against the Defendant, Smyrna/Rutherford County Airport Authority, for damages that their aircraft sustained as a result of its landing gear falling into a manhole cover on property under the control and ownership of the Defendant, Smyrna/Rutherford County Airport Authority. After the trial court entered an order of voluntary dismissal, dismissing the Defendant, Rutherford County, the trial court granted summary judgment in favor of the Defendant, Smyrna/Rutherford County Airport Authority, holding that the inspection and maintenance of the manhole covers was a discretionary function for which immunity was not removed under the Tennessee Governmental Tort Liability Act and that the Defendant, Smyrna/Rutherford County Airport Authority (“Defendant”) did not have actual or constructive knowledge of the dangerous and defective condition of the manhole cover, thus relieving the Defendant of liability under the Tennessee Governmental Tort Liability Act. Plaintiffs appeal the judgment of the trial court arguing that the trial court erred in granting summary judgment in favor of the Defendant because the Defendant did have actual and/or constructive knowledge of the dangerous and defective condition of the manhole cover. For the reasons stated hereafter, we affirm the judgment of the court below.

FACTS

On September 28, 1993, Plaintiffs gave their express permission to Lawrence Jorash (“Jorash”), a certified pilot and Director of Operations and General Manager for the Defendant, to maintain and test-fly their aircraft. On the same day at approximately 5:15 p.m., as Jorash was proceeding down the taxiway with Plaintiffs’ aircraft, the aircraft rolled over a slotted manhole cover which collapsed causing the aircraft’s right main landing gear to fall into the manhole. As a result of the manhole cover’s collapse, Plaintiffs’ aircraft sustained damage.

Sometime before 5:15 p.m on September 28, 1993, two other airplanes taxied across the same manhole without incident.

Prior to Plaintiffs' accident, no manhole covers had ever cracked, collapsed or failed on Defendant's property, and no other aircraft had been damaged as a result of taxing across a manhole cover on Defendant's property. The Defendant never received any complaints, problems, or requests for maintenance or replacement regarding any of the manhole covers on Defendant's property prior to September 28, 1993.

The Defendant had not adopted or implemented a policy requiring it specially to inspect, repair or replace the manhole covers on or around its runways prior to the accident.

Plaintiffs bring this action against the Defendant for the dangerous and defective condition of Defendant's airport facility pursuant to the Tennessee Governmental Tort Liability Act, specifically T.C.A. § 29-20-204.

LAW

The issues before this Court are as follows:

- 1) Whether the trial court erred in granting summary judgment in favor of the Defendant;
- 2) Whether the Defendant is immune from liability based upon the discretionary function exception contained in T.C.A. § 29-20-205(1) and (4);
- 3) Whether the condition of the manhole cover was latent, thus relieving the Defendant of liability in this case;
- 4) Whether the Defendant had actual or constructive notice of the allegedly dangerous and defective condition of the manhole which caused the Plaintiff's injuries;
- 5) Whether the negligence of the Plaintiffs was equal to or greater than the Defendants' negligence, thus barring the Plaintiffs from recovery in this case; and
- 6) Whether the complaint fails to state a claim upon which relief may be granted.

The standards governing our review of a trial court's action on a motion for summary

judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the trial court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been met. Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn. 1995); Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991); Foley v. St. Thomas Hosp., 906 S.W.2d 448, 452 (Tenn. Ct. App. 1995); Brenner v. Textron Aerostructures, A Division of Textron, Inc., 874 S.W.2d 579, 582 (Tenn. Ct. App. 1993). Tennessee Rule of Civil Procedure 56.03 provides that summary judgment is only appropriate only where: (1) there is no genuine issue of material fact relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. Carvell, 900 S.W.2d at 26; Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that the motion satisfies these requirements. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn. 1991).

While the summary judgment procedure is not a substitute for trial, it goes to the merits of the complaint and should not be taken lightly. Byrd, 847 S.W.2d at 210; Jones v. Home Indem. Ins. Co., 651 S.W.2d 213, 214 (Tenn. 1983); Fowler v. Happy Goodman Family, 575 S.W.2d 496, 498 (Tenn. 1978); Foley, 906 S.W.2d at 452. It has been repeatedly stated by the appellate courts of this state that the purpose of a summary judgment proceeding is not the finding of facts, the resolution of disputed factual issues or the determination of conflicting inferences reasonably to be drawn from the facts. Bellamy v. Federal Express Corp., 749 S.W.2d 31, 33 (Tenn. 1988). Rather, the purpose of summary judgment is to resolve controlling issues of law. Id.

In evaluating the propriety of a motion for summary judgment, we view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. Byrd, 847 S.W.2d at 210-11. A motion for summary judgment should be granted only when both the facts and the conclusions drawn from the facts permit a reasonable person to reach but one conclusion. Id.

The case at bar falls into the category of cases covered by T.C.A. § 29-20-204 which states:

*Removal of immunity for injury from dangerous structures---
Exception---Notice required.---*

(a) Immunity from suit of a governmental entity is removed for any injury caused by the dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned and controlled by such governmental entity.

(b) Immunity is not removed for latent defective conditions, nor shall this section apply unless constructive and/or actual notice to the governmental entity of such condition be alleged and proved in addition to the procedural notice required by § 29-20-302.

T. C. A. § 29-20-204 (1980).

The legislature specifically made the removal of immunity under this statute conditional upon allegation and proof that the governmental entity knew or should have known of the condition of its public improvement causing the damages at issue. Plaintiff has the responsibility of establishing that the defect in the manhole cover was a latent one and that the Defendant had constructive and/or actual notice of this condition. See Lee v. City of Cleveland, 859 S.W.2d 347, 349 (Tenn. Ct. App. 1993); Smith v. City of Covington, 734 S.W.2d 327, 329 (Tenn. Ct. App. 1985), aff'd, 1987 WL 12494 (Tenn. June 22, 1987). Thus, if Plaintiff is unable to prove that the Defendant had actual or constructive notice of the defective and dangerous condition, then the Defendant is immune from suit. Id. This statutory requirement appears to be in accordance with common-law principles governing premises liability cases. See, e.g., Underwood v. HCA Health Servs. of Tennessee, Inc., 892 S.W.2d 423, 427 (Tenn. App. 1994) (stating that, in order to establish a *prima facie* case of premises liability, plaintiff must show that defendant had actual or constructive notice of a dangerous or defective condition).

In dealing with a motion for summary judgment, Plaintiff is responsible for showing that a genuine issue of material fact exists relative to whether or not the Defendant had actual or constructive knowledge of the defective and dangerous condition. Barnett v. Gallatin Dep't of Elec., 1991 LEXIS 833, at *2 (Tenn. Ct. App. October 23, 1991).

In Holifield v. City of Memphis, 1990 LEXIS 675 (Tenn. Ct. App. September 27, 1990), this Court faced the same issue as in the case at bar. After Holifield slipped and fell on a defective grate covering a water drain in a city park, this Court addressed the issue of whether the City of Memphis had either actual or constructive notice of the defective grate. In support of its motion to dismiss, the city offered the affidavit of its claims agent, who had the responsibility of receiving claims filed against the city. Id. *2. The city's claims agent testified that her office had never received any notice of a claim concerning the grate in question. Id. The city also offered the affidavit of its technical systems advisor for the general services division of the city, who had the responsibility of retaining records of maintenance or defects in the fountain of which the grate was a part. Id. *2-3. He testified that he personally checked the records of the general services division and found no record of any alleged defects in the grate. Id. *3. Upon consideration of the affidavits offered by the city, this Court held that the City of Memphis was without actual or constructive notice of the dangerous and defective condition of the grate; that the city's immunity had not been removed by T.C.A. § 29-20-204; and that the city was therefore entitled to judgment as a matter of law. Id.

The trial court found in this case that Defendant was entitled to immunity based upon its performance or failure to exercise a discretionary function pursuant to T.C.A. § 29-20-205. It should be noted, however, that Plaintiff's complaint was brought pursuant to T.C.A. §§ 29-20-203 and 29-20-204. These provisions indicate that a governmental entity is liable for injury caused by the defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway controlled by such entity and, further, that the governmental entity is liable for injury caused by the dangerous or defective condition of any public "structure. . .or other public improvement" owned and controlled by such entity, provided in each case that there is actual or constructive notice of such condition to the governmental entity. There is no immunity under these provisions, and the trial court was in error to apply the discretionary function exception of T.C.A. § 29-20-205. See Swafford v. City of Chattanooga, 743 S.W.2d 174 (Tenn. App. 1987).

Defendant had a duty to maintain its premises in a reasonably safe condition and this duty included the obligation to discover reasonably observable dangerous or defective conditions. It is clear that Defendant did not have actual notice of a dangerous or defective condition. The question is whether Plaintiffs met the burden of showing that Defendant had constructive notice of a dangerous or defective condition so as to effect the removal of immunity herein.

Defendant offered the deposition of Steve Fitzhugh, the Defendant's airport director, in support of its motion for summary judgment. In his deposition, Fitzhugh stated that he had been working as the Defendant's airport director since May 15, 1991. Fitzhugh testified that the Defendant never received any complaints, problems or requests for maintenance or replacement regarding any of the manhole covers on Defendant's property prior to Plaintiff's accident; that none of the manhole covers on Defendant's property had ever cracked, collapsed or failed; and that no other aircraft had been damaged as a result of taxiing across a manhole cover on Defendant's property.

On appeal, Plaintiffs contend that the Defendant had actual and/or constructive notice of the dangerous and defective condition of the manhole cover in question. In support of their argument, Plaintiffs state that the Defendant found three visibly cracked manhole covers on its property within one month after the Plaintiffs' accident; that the remains of at least two manhole covers were found at the bottom of the manhole in question after Plaintiffs' accident; that photographs of the manhole cover in question revealed noticeable cracks and obvious accumulations of rust at the crack sites; and that "simple logic mandates the conclusion that the deterioration and cracks would have developed over a long period of time." Plaintiffs offered no proof, however, to establish the applicable standard of duty incumbent upon Defendant in the examination, inspection, and discovery of latent defects of manhole grates located in the taxi-way, nor was there proof that a reasonable visual inspection would have revealed that a dangerous or defective condition existed for aircraft utilizing these areas. Because Plaintiff's assertions fail to show that the Defendant had actual or constructive notice of the defective nature of

the manhole cover in question before the accident, Plaintiffs' arguments are insufficient to show that Defendant had constructive notice of a dangerous or defective condition.

The record contains no evidence revealing that the Defendant knew or should have known of the dangerous and defective condition of the manhole cover which caused the Plaintiffs' accident. Prior to the accident, Defendant never received any complaints or requests for maintenance or replacement regarding any of the manhole covers on Defendant's property; no manhole covers had ever cracked, collapsed or failed on Defendant's property; and no other aircraft had been damaged as a result of a manhole cover on Defendant's property. In consideration of this evidence, Defendant was without actual or constructive notice of the defective and dangerous condition of the manhole cover which caused Plaintiffs' accident. Therefore, the removal of immunity provided by T.C.A. § 29-20-204 does not apply to the defective condition of the manhole cover which caused the damage to Plaintiffs' aircraft, and the Defendant is entitled to judgment as a matter of law.

Because of our disposition of the foregoing issues, we need not address the remaining issues on appeal.

The judgment of the trial court is hereby affirmed. Costs on appeal are taxed to Appellant for which execution may issue if necessary.

HIGHERS, J.

CONCUR:

KOCH, J.

LILLARD, J.