ATTORNEY FOR APPELLANT

Richard Fred Johnson
Law Office of Richard Fred Johnson
Chicago, Illinois

ATTORNEY FOR APPELLEE

Aimée Rivera Cole
Travelers Staff Counsel Indiana
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Laura Johnson,
Appellant-Plaintiff,

v.

City of Michigan City,
Appellee-Defendant.

June 9, 2021

Court of Appeals Case No. 21A-CT-114

Appeal from the LaPorte Superior Court

The Honorable Michael S. Bergerson, Judge

Trial Court Cause No. 46D01-1812-CT-2294

Sharpnack, Senior Judge.

Statement of the Case

[1] Laura Johnson was injured when her bicycle struck a pothole as she rode through Michigan City, Indiana. She appeals the trial court's grant of summary judgment in favor of the City of Michigan City ("the City"). We affirm.

Issue

[2] Johnson raises one issue, which we restate as: whether the trial court erred in granting summary judgment to the City on Johnson's claim of negligence.

Facts and Procedural History

[3] The City is responsible for maintaining public streets within its boundaries, but it does not have enough money to perform all needed repairs at the same time. Its engineering staff, including City Engineer Charles Peller, analyzes street conditions using a rating system known as "Pavement Surface Evaluation and Rating," or "PASER," which has been approved by the Indiana Department of Transportation and is in use across the country. Appellant's App. Vol. 2, p. 173. The City hires a consultant to inspect its streets using the PASER criteria. The consultant looks at every street over a five-year cycle, inspecting twenty percent of the streets each year. In addition, the consultant prepares a report each year. The report helps Peller determine which street resurfacing projects to prioritize. In addition, Peller keeps track of citizen complaints about street conditions, and he considers them, along with his street inspections, when identifying priorities.

[4] Each fall, Peller creates a budget for street resurfacing projects for the following year. The City then contracts with consultants to develop plans and specifications for the projects, and once those are complete, the engineers seek approval from the City's Board of Works to put individual projects out for bids.

[5] The City has a separate process for responding to complaints about individual potholes. The Street Department receives the complaints, and someone prepares a work order to send a crew to patch the pothole.

[6] Duneland Beach Drive ("the Drive") is a two-lane street located within the City's boundaries. By early April 2017, the City had already determined that the Drive needed to be resurfaced, and Peller had asked the Board of Public Works to approve the project for bids.

[7] On April 13, 2017, a member of the LaPorte County Board of Commissioners emailed the City's mayor to complain about the Drive. He stated the road was in dire shape and asked if there were plans to repave or patch it.

[8] On May 1, 2017, the City's Board of Works issued a call for sealed bids for the resurfacing of the Drive. The deadline for bids was June 5, 2017.

[9] On May 3, the City received another emailed complaint about the Drive. The complainant stated the Drive had a severe pothole problem, and cars were weaving across lanes as they attempted to avoid the hazards. In a May 4 response to the complainant, Peller responded that the Board of Works had just approved a request to solicit bids to resurface the Drive, and the project should be completed in the summer.

[10] Meanwhile, in mid-May 2017, Johnson had arrived at her parents' house in Michigan City for an extended visit. On June 18, at 6:30 p.m., she went for a bicycle ride. At around 7:30, as Johnson rode on the Drive, she traveled on a

downhill slope and struck a large pothole. The impact propelled Johnson over her bike's handlebars and she landed on her left leg and arm, sustaining injuries.

[11] A doctor diagnosed Johnson with a tibial plateau fracture. Johnson had three surgeries on her leg, and she was unable to walk unassisted for six months. She went to physical therapy for a month and a half, but the leg injury never completely healed. Johnson's doctor told her she will have to undergo "several knee replacement surgeries in the future." Appellant's App. Vol. 2, p. 103. Johnson had been planning to join the National Guard, but her leg injury left her unable to pass the physical tests required for enlistment.

[12] The City completed the bidding process for the Drive resurfacing project after Johnson's accident and approved a contractor on July 10, 2017. The contractor completed the project by early October 2017.

[13] On December 14, 2018, Johnson sued the City, claiming negligence. On June 9, 2020, the City filed a motion for summary judgment. Johnson filed a response. The trial court held a hearing and granted the City's motion, concluding that under the circumstances of this case, the City is "immune from liability" as to Johnson's claim. *Id.* at 15. This appeal followed.

Discussion and Decision

[14] We review summary judgment decisions de novo, applying the same standard of review as the trial court. *AM Gen. LLC v. Armour*, 46 N.E.3d 436, 439 (Ind. 2015). A party moving for summary judgment must show "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as

a matter of law." Ind. Trial Rule 56(C). Upon this showing, the nonmoving party then has the burden of demonstrating there is a genuine issue of material fact. *AM Gen.*, 46 N.E.3d at 439.

[15] We construe all designated evidence and reasonable inferences therefrom in favor of the nonmoving party. *Ryan v. TCI Architects/Eng'rs/Contractors, Inc.*, 72 N.E.3d 908, 912 (Ind. 2017). The trial court's findings and conclusions on summary judgment facilitate our review but are not binding on appeal. *Cox v. N. Ind. Pub. Serv. Co., Inc.*, 848 N.E.2d 690, 695 (Ind. Ct. App. 2006).

[16] Johnson presented a negligence claim against Michigan City, and the key issue in the trial court's proceedings and on appeal is whether, under the facts and circumstances, Michigan City was immune from liability. "[T]he Indiana Tort Claims Act ["ITCA"] recognizes that state and local governments may have tort responsibility for damages flowing from negligence, but grants immunity for that negligence under certain specified circumstances." *Hochstetler v. Elkhart Cnty. Highway Dep't*, 868 N.E.2d 425, 426 (Ind. 2007). Immunity under the Act is a question of law to be determined by the court. *Id*. The ITCA's immunity provisions are in derogation of the common law, and we construe the Act narrowly against the grant of immunity. *Mangold v. Ind. Dep't of Nat. Res.*, 756 N.E.2d 970, 975 (Ind. 2001).

[17] The parties' arguments focus on Indiana Code section 34-13-3-3(7) (2016) of the ITCA,[1] which provides: "A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following: . . . [t]he performance of a discretionary function." The discretionary function provision arises from the separation of powers doctrine, based on "the fundamental idea that certain kinds of executive branch decisions should not be subject to judicial review." *Peavler v. Bd. of Comm'rs of Monroe Cnty.*, 528 N.E.2d 40, 44 (Ind. 1988). In addition, immunity from negligence cases "for basic planning and policy-making functions is necessary to avoid the chilling effect on the ability of the government to deal effectively with difficult policy issues which it confronts daily." *Id.*

[18] The Indiana Supreme Court distinguishes between a government entity's planning and operational functions to resolve claims of discretionary function immunity. *City of Beech Grove v. Beloat*, 50 N.E.3d 135, 138 (Ind. 2016). Planning activities, which are protected by Indiana Code section 34-13-3-3(7), are acts or omissions in the exercise of a legislative, judicial, or executive or planning function that involve formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing public policy. *Id.* (quotation omitted). On the other hand, if the

[1] Johnson also argues about the applicability of Indiana Code section 34-13-3-3(18), which provides immunity for design of a public highway if the loss occurs at least twenty years after the project was designed. It is unnecessary for us to address this point because we affirm the trial court's judgment under Indiana Code section 34-13-3-3(7).

function is operational, for example decisions regarding only the execution or implementation of already formulated policy, the function is not discretionary under the statute and no immunity attaches. *Voit v. Allen Cnty.*, 634 N.E.2d 767, 770 (Ind. Ct. App. 1994), *trans. denied*. If the facts allow multiple reasonable conclusions as to an element triggering the immunity, then the governmental unit has failed to establish its immunity. *Gary Cmty. Sch. Corp. v. Roach-Walker*, 917 N.E.2d 1224, 1226 (Ind. 2009).

[19] In *Lee v. Bartholomew Consolidated School Corporation*, 75 N.E.3d 518, 521 (Ind. Ct. App. 2017), the parent of a child who had been struck by a vehicle in a school crosswalk sued a city, claiming the city had failed to install proper warning signage. A trial court granted summary judgment to the city. A panel of this Court affirmed as to the sufficiency of the signage, concluding the city was entitled to immunity because it was considering installing different signage at the crosswalk in question when the accident occurred. The Court concluded the city's deliberative, policy-driven process was subject to discretionary function immunity.

[20] Similarly, in *Lee v. State*, 682 N.E.2d 576, 577 (Ind. Ct. App. 1997), *trans. denied*, a parent sued after her child died in a one-car auto accident, claiming the State of Indiana had failed to correct dangerous curves in the road and did not properly warn motorists. The trial court granted summary judgment to the State. On appeal, the Court noted that at the time the accident occurred, the State was in the midst of planning a corrective construction project for the road.

The Court concluded the planning process was the type of deliberative process that is entitled to discretionary function immunity.

[21] By contrast, in *Jacobs v. Board of Commissioners of Morgan County*, 652 N.E.2d 94, 96 (Ind. Ct. App. 1995), *trans. denied*, Jacobs claimed a county government had negligently failed to maintain a dangerous roadway and should have installed a warning sign. The county prevailed on summary judgment in the trial court, but a panel of this Court reversed. The Court determined the county was not entitled to immunity under the discretionary function provision because the government had failed to designate evidence demonstrating it implemented a "policy-oriented systemic" process to determine when a sign should be placed in a given location. *Id.* at 99.

[22] Similarly, in *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1119 (Ind. Ct. App. 1995), *trans. denied*, a panel of this Court determined a municipality was not entitled to discretionary function immunity in connection with injuries Zerkel sustained when she fell on a cracked sidewalk. The evidence demonstrated the municipality did not use a deliberative, policy-driven process to inspect and repair sidewalks. Instead, city officials waited until they received a complaint and then inspected the sidewalk. If repairs were needed, the city removed the defective sidewalk and ordered the property owner to replace it at their own expense.

[23] The facts of this case more closely resemble those of the *Lee* cases than the facts of *Jacobs* and *Town of Highland*. The City has a deliberative, systemic process to

assess and prioritize street repairs, with the assistance of a consultant. The City's engineers consider the PASER report and citizen complaints, as well as Peller's own street inspections, in setting priorities. In addition, there is no factual dispute that, prior to Johnson's accident, the City had determined the Drive needed resurfacing, and the Board of Public Works was preparing to select a contractor to perform the work. The City's planning process is the type of act intended to be protected by discretionary function immunity: a function involving the formulation of basic policy decisions characterized by weighing alternatives and choosing public policy.

[24] Johnson characterizes the City's failure to prevent her accident as operational rather than planning in nature, arguing that all the City needed to do to fix the problem was patch a pothole. We disagree. The existence of the policy for repair of streets and the current application of that policy as to Duneland Beach Drive confers immunity even as to that which would otherwise be an operational matter. *See Peavler*, 528 N.E.2d at 47 (the government is exposed to liability only when no policy oriented decision-making process has been undertaken). The City was entitled to discretionary function immunity from Johnson's negligence claim, and the trial court did not err in granting summary judgment in favor of the City.

Conclusion

[25] For the reasons stated above, we affirm the judgment of the trial court.

[26] Affirmed.

Najam, J., concurs.

Brown, J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

Laura Johnson,
Appellant-Plaintiff,

v.

City of Michigan City,
Appellee-Defendant.

Court of Appeals Case No.
21A-CT-114

Brown, Judge, dissenting.

[1] I respectfully dissent and would reverse the trial court's grant of summary judgment. In *Bules v. Marshall County*, the Indiana Supreme Court explained: "The party seeking immunity bears the burden of establishing the immunity. If the evidence permits conflicting reasonable inferences as to material facts, the governmental unit has failed to establish its immunity." 920 N.E.2d 247, 250 (Ind. 2010) (internal citations omitted) (citing *Gary Cmty. Sch. Corp. v. Roach-Walker*, 917 N.E.2d 1224, 1226 (Ind. 2009); *Hochstetler v. Elkhart Cnty. Highway Dep't*, 868 N.E.2d 425, 426 (Ind. 2007)).

[2] As the majority acknowledges, the designated materials establish that the City has a separate process for complaints about individual potholes. Johnson designated the deposition of the superintendent of Central Maintenance, Robert Zonder, who testified that Street Director David Farmer, given a "pothole in existence that was a hazard," would have addressed the problem and asphalted the pothole. Appellant's Appendix Volume III at 74. She also designated Farmer's deposition in which he testified, when shown pictures of the Drive, that sealing the cracks would have taken place before resurfacing and was not connected with resurfacing. I would find the City has failed to designate evidence that a decision to fill a pothole which poses a dangerous condition is a deliberative, policy-driven process, or that this process was entirely a planning function rather than an operational function. *See City of Beech Grove v. Beloat*, 50 N.E.3d 135, 138 (Ind. 2016) ("Planning activities include acts or omissions in the exercise of a legislative, judicial, or executive or planning function which involves formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing public policy." (internal quotations removed)). I would further find that the City, which points only to Peller's deposition in its memorandum of support of summary judgment, has not designated evidence establishing as a matter of law that the decision to resurface the Drive and when to do so, given the condition of its pavement, was the type of function that is immune. *See id.* at 138 ("The ultimate consideration is whether the action is one that was intended to be immune . . . .") (citing *Peavler v. Bd. of Com'rs of Monroe Cnty.*, 528 N.E.2d 40, 45-46 (Ind. 1988)). In any event, the fact the City made a decision to repave the

entire Drive does not mean that filling identified, dangerous potholes of which the City had actual knowledge was not an operational function.

[3] *Peavler* involved the failure to place traffic control devices warning motorists of dangerous sections of county roads, and the Indiana Supreme Court noted that the county "presented no evidence from which we can evaluate the nature of the board's conduct in failing to erect a warning sign, the potential effect of liability on county operations, or the capacity of the court to judge the county's action." 528 N.E.2d at 48. The Court has since updated its guidance in the 2016 decision of *City of Beech Grove v. Beloat*, in which it decided that the designated evidence "failed to demonstrate that the City engaged in a policy decision to implement a total reconstruction project *over carrying out* individual repairs of road damage in the relevant area." 50 N.E.3d at 136 (emphasis provided). I take this to mean that, even when a "policy oriented decision-making process has been undertaken," *Peavler*, 528 N.E.2d at 47, it may not matter to the extent the municipal body does not designate evidence of a "conscious balancing," or consideration of the two competing repairs in relation to one another. *See Beloat*, 50 N.E.3d at 142-143 ("However, a governmental entity must demonstrate that 'conscious balancing' took place, which can be shown by evidence that the governmental entity considered improvements of the general type alleged in [the plaintiff's] complaint. While the City did not need to demonstrate that it considered whether it should fill the specific hole that was alleged to have caused Beloat's injuries, it did have to make some showing that the Main Street Project was implemented instead of

general road repairs, such as filling pot holes, and that the costs and benefits of this decision were weighed. That is simply not present within this record.") (some internal quotations and citations removed).

[4] At the summary judgment stage, all facts and reasonable inferences must be drawn in favor of the non-moving party, which here was Johnson. *See id.* at 143. ("While the facts presented in this case may have made the decision on immunity a close call, in those circumstances, we err on the side of narrowly construing a finding of immunity."). Based upon the designated evidence, I would conclude that the City failed to meet its burden and would deny it summary judgment.