# STATE OF MICHIGAN

# COURT OF APPEALS

RAY SCHORNAK,

Plaintiff-Appellee,

v

MARTINREA HOT STAMPINGS, INC., doing business as MARTINREA FABCO HOT STAMPINGS, INC., and WAYNE COUNTY ROAD COMMISSION,

Defendants,

v

CITY OF DETROIT,

Defendant-Appellant,

and

DOWNRIVER LAWN & LANDSCAPE, INC., doing business as BLUE WATER DISPOSAL,

Defendant/Third-Party Plaintiff,

and

GREG DAVIS LANDSCAPE SERVICES, INC.,

Defendant/Third-Party Defendant.

UNPUBLISHED
April 23, 2020

No. 347191
Wayne Circuit Court
LC No. 17-008147-NO

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Defendant, the city of Detroit, appeals as of right from an order denying its renewed motion for partial summary disposition on the basis of governmental immunity.[1] We affirm.

## I. FACTUAL BACKGROUND

This negligence action arises from a slip-and-fall, which occurred in March 2016 at a building owned by Martinrea Hot Stampings, Inc. (Martinrea), in Detroit, Michigan. Plaintiff is a security inspector, and was scheduled to inspect a fire security system at Martinrea with a coworker, Jonathan Burns (Burns). Plaintiff arrived at Martinrea and parked on the street outside of the building. The street and sidewalks were covered in snow. Plaintiff got out of his car to follow Burns into the building. Plaintiff attempted to step up onto a sidewalk, which was covered with approximately two to three inches of snow. The sidewalk outside of Martinrea's building had not been salted or shoveled, and plaintiff lost his footing when he stepped on a portion of the sidewalk that was missing a large piece of cement. Plaintiff explained his fall as follows:

> I stepped up with my left foot onto—over the curb onto the sidewalk, and when I stepped up with the next foot to get up onto the sidewalk . . . there was nothing under my foot but snow, and there was supposed to be a curb there, I think, and my foot went down and backwards. I fell forward on an angle toward [Martinrea's] door, and there was [a] fire hydrant. I tried to brace myself with my left hand. My face hit the fire hydrant. My nose hit the collar around the fire hydrant. The top of my forehead hit on the rounded part of the fire hydrant.

Burns turned around, saw plaintiff lying on the ground, and helped him stand up. Burns told plaintiff that plaintiff's eye was bleeding and walked him into Martinrea's lobby. Plaintiff informed a secretary that he slipped and fell outside the building. A security officer attempted to help plaintiff stop the bleeding from his eye and called an ambulance. Plaintiff was taken to the hospital. Plaintiff later had reconstructive surgery to repair his nose, which was broken in the fall, and received a series of treatments for an infected wound on his knee.

Plaintiff filed a negligence complaint, and defendant filed a motion for summary disposition in lieu of filing an answer. Defendant's first motion for summary disposition was denied. Defendant later filed a renewed motion for summary disposition, which was also denied. This appeal followed.

## II. STANDARD OF REVIEW

In general, this Court reviews the grant or denial of a motion for summary disposition de novo. *Value, Inc v Dep't of Treasury*, 320 Mich App 571, 576; 907 NW2d 872 (2017). Defendant moved for partial summary disposition under MCR 2.116(C)(7), premised on governmental immunity. MCR 2.116(C)(7) requires the moving party to "allege facts justifying the application of an exception to governmental immunity." *Beals v Michigan*, 497 Mich 363, 370; 871 NW2d 5

[1] "[T]his Court has jurisdiction to decide an appeal of right from an order denying governmental immunity under MCR 2.116(C)(7) . . . ." *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 436; 824 NW2d 318 (2012).

(2015). The reviewing court is required to "consider[] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id*. If no factual dispute exists, and "reasonable minds could not differ concerning the legal effect of those facts, whether the claim is barred by immunity is a question for the court to decide as a matter of law." *Id*. "The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal." *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

"A motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). A genuine issue of material fact " 'exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.' " *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018) (citation omitted). This Court also "reviews de novo questions of statutory interpretation." *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010).

## III. GOVERNMENTAL IMMUNITY

Defendant argues that the trial court erred by denying its renewed motion for summary disposition because plaintiff's negligence claim is barred by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. We disagree.

The GTLA provides governmental agencies with immunity from tort liability. MCL 691.1407. The immunity granted by the GTLA is broad, and any statutory exceptions to the rule of governmental immunity "are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). Six statutory exceptions exist to the broad grant of immunity given to governmental agencies:

> [T]he highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the government-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3). [*Goodhue v Dep't of Transp*, 319 Mich App 526, 531 n 1; 904 NW2d 203 (2017) (quotation marks and citation omitted).]

This action concerns the application of the highway exception to the GTLA, which covers actions that "include[] a bridge, sidewalk, trailway, crosswalk, or culvert on the highway." MCL 691.1401(c). The highway exception to governmental immunity, MCL 691.1402(1), states:

> 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. 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.

Governmental agencies have a duty to keep sidewalks in reasonable repair. The duty to maintain sidewalks is specifically governed by MCL 691.1402a, which states, in relevant part:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.

Defendant argues that the highway exception does not apply because plaintiff failed to provide evidence that defendant knew, or should have known, that the defect in the sidewalk existed at least 30 days before plaintiff's injury occurred, in accordance with MCL 691.1402a(2). Defendant relies on *Bernardoni v Saginaw*, 499 Mich 470, 471; 886 NW2d 109 (2016), in which our Supreme Court held that a series of photographs taken 30 days after an accident were insufficient "to establish a genuine issue of material fact regarding whether the defect existed at least 30 days *before* the accident." In *Bernardoni*, the plaintiff submitted photographs showing a raised portion of a sidewalk where the plaintiff fell and was injured. Our Supreme Court reasoned:

> The necessary inference that would connect the photographs to the sidewalk's condition 60 days earlier becomes tenable *only with additional evidence*. Absent such evidence, one can imagine any number of scenarios in which the defect formed within 60 days of when the photographs were taken. Yet plaintiff has offered no evidentiary support of any kind for her assumptions that the defect existed for the necessary amount of time. For example, she has offered no affidavits from neighbors who viewed the sidewalk 30 days before the accident, nor did she introduce expert testimony demonstrating that the sidewalk discontinuity was of a type that usually forms or enlarges over a long period of time. Such additional evidence might have narrowed or closed the inferential gap between the photographs and the conclusions plaintiff and the Court of Appeals drew from them . . . . [M]ore is needed to explain why the current condition is probative of the past condition. [*Id*. at 475-476 (emphasis added).]

This case is distinguishable from *Bernardoni* because plaintiff submitted photographs and additional evidence demonstrating that the defect existed at least 30 days before plaintiff was injured. In addition to the photographs, plaintiff presented an affidavit from Luigi Ferdinandi (Ferdinandi), who opined that the sidewalk and curb "existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before March 2, 2016." Ferdinandi's opinion was on the basis of his experience as a construction worker for a family business, which focused primarily on "commercial and residential cement work including sidewalks, driveways and roads." When paired with the photographs, Ferdinandi's affidavit suggests that the deteriorated condition of the sidewalk would have existed more than 30 days before plaintiff was injured. Thus, plaintiff presented sufficient evident to support his argument.

Nevertheless, defendant asserts that the trial court should not have considered Ferdinandi's affidavit because it constituted inadmissible expert testimony. Defendant directs this Court to MRE 702,[2] and argues that Ferdinandi's affidavit was inadmissible because it contained no facts, data, or information regarding the methods that Ferdinandi used to draw his conclusions regarding the condition of the sidewalk. However, under MCR 2.116(G)(5), the content of an affidavit need only be admissible in substance, not in form. *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). An expert witness's qualifications and descriptions of his or her methodology do not need to be incorporated into an affidavit that is submitted in response to a motion for summary disposition. *Id*. Further, whether Ferdinandi "will ultimately meet the MRE 702 requirements to be sworn as a witness is a matter reserved for trial." *Id*. The trial court did not err by considering Ferdinandi's affidavit when ruling on defendant's renewed motion for summary disposition. Under these circumstances, plaintiff presented proof that defendant knew or should have known about the condition of the sidewalk at least 30 days before plaintiff's injury. Accordingly, defendant is not entitled to summary disposition on the basis of governmental immunity.

## II. STATUTORY NOTICE

Defendant argues that the trial court erred by denying its renewed motion for summary disposition because plaintiff's notice of injury and defect did not conform to MCL 691.1404(1). We disagree.

Defendant first argues that plaintiff's notice did not conform to MCL 691.1404(1) because he did not provide a list of known witnesses. MCL 691.1404(1) states that the injured party must supply "the names of the witnesses known at the time by the claimant," in a notice to the appropriate governmental agency. The parties specifically disagree regarding whether plaintiff was required to include Burns on the list of potential witnesses, despite the fact that Burns did not actually witness plaintiff's fall. Plaintiff contends that he was not required to include Burns on a list of witnesses because Burns did not see plaintiff's fall. Conversely, defendant argues that Burns was required to be included on a list of witnesses regardless of whether he saw plaintiff's fall.

This Court has previously held that witnesses, under MCL 691.1404(1), "are those persons who witnessed the occurrence of the injury and the defect." *Milot v Dep't of Transp*, 318 Mich App 272, 278; 897 NW2d 248 (2016) (quotation marks omitted). This Court specified that " 'the

[2] MRE 702 states as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

names of the witnesses' are the names of those persons who witnessed the occurrence." *Id*. at 279-280, quoting MCL 691.1404(1). In this case, Burns attested that he did not actually see plaintiff fall:

> *Q*. Okay. What happened next?
>
> *A*. I heard a commotion behind me, so I turned around.
>
> *Q*. And [plaintiff] was on the ground.
>
> * * *
>
> *Q*. Okay. Now, you had indicated that you actually didn't observe [plaintiff] fall, correct?
>
> *A*. Correct.

Since Burns did not actually witness plaintiff's accident, plaintiff was not required to identify him in his notice of injury and defect. *Milot*, 318 Mich App at 280. Accordingly, defendant cannot convincingly argue that plaintiff's notice failed to conform to MCL 691.1404(1) for failure to identify known witnesses.

Defendant next argues that the notice of injury and defect was defective because (1) plaintiff did not personally sign the notice and (2) plaintiff did not personally serve a copy of the notice on defendant. In support of this argument, defendant directs this Court to the language of MCL 691.1404(1), which states, "[a]s a condition to any recovery for injuries . . . the injured person . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect." Defendant argues that this means plaintiff was personally responsible for signing and serving the notice.

This issue is governed by *Russell v City of Detroit*, 321 Mich App 628; 909 NW2d 507 (2017). In *Russell*, the plaintiff initiated a negligence action by filing a notice of injury and defect under MCL 691.1404(1). *Id*. at 630. The defendant argued that the plaintiff violated MCL 691.1404(1) by failing to sign and personally serve his notice of injury and defect on the defendant. *Id*. at 636-637. The defendant further contended that, "because MCL 691.1404(1) does not specifically allow for service through an attorney, an injured person over 18 must personally serve notice." *Id*. at 637. This Court disagreed, finding that the statute did not require an injured person to "personally send the notice by certified mail or to appear in person to personally serve the notice." *Id*. at 639. This Court observed that the defendant's argument ignored well-settled principles of agency, and observed that agents, including attorneys, "have the implied power to carry out all acts necessary in executing [the principal's] expressly conferred authority." *Id*. at 641. This Court opined that, to comply with MCL 691.1404(1), the notice of injury should specify that the notice is being given on behalf of the injured party. *Id*. at 641-642. Additionally, this Court addressed whether the injured party is required to sign the notice, and found that "all that is required by MCL 691.1404(1) is that the injured person *serves* the notice on the governmental agency," *id*. at 645 (emphasis added), suggesting that the injured party need not sign the notice.

Applying this Court's analysis in *Russell* to the instant case, it is clear that defendant cannot show that the notice of injury and defect failed to conform to MCL 691.1404(1). The notice was signed by plaintiff's attorney and stated that plaintiff was the claimant. The content of the notice makes it apparent that plaintiff's attorney wrote the document and submitted it on plaintiff's behalf. Thus, the service of the notice satisfied the requirements of MCL 691.1404(1). Defendant is not entitled to summary disposition on the basis of deficiencies in the notice of injury and defect, and the trial court did not err by denying defendant's renewed motion for summary disposition.

Affirmed.

/s/ Michael J. Riordan
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle