STATE OF MICHIGAN

COURT OF APPEALS

TINA CALAMITA, Plaintiff-Appellee,	UNPUBLISHED March 18, 2003
v CITY OF ST. CLAIR SHORES, Defendant-Appellant/Third Party Plaintiff, J J & C, INC., Defendant-Appellee/Third Party Defendant.	No. 236755 Macomb Circuit Court LC No. 98-003209-NO

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

This case is before us pursuant to the Michigan Supreme Court's order directing us to consider, as on leave granted, defendant City of St. Clair Shores' interlocutory appeal of the order denying its motion for summary disposition under MCR 2.116(C)(7) and (10). *Calamita v City of St Clair Shores*, 465 Mich 872 (2001). We affirm.

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Hawkins v Mercy Health Services, Inc*., 230 Mich App 315, 324; 583 NW2d 725 (1998). In reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept the plaintiff's well-pleaded allegations as true and construe them in the light most favorable to the plaintiff. *Codd v Wayne County*, 210 Mich App 133, 134; 537 NW2d 453 (1995). To survive a motion for summary disposition on the basis of governmental immunity, a plaintiff must allege facts warranting the application of a recognized exception to governmental immunity. *Codd, supra,* 210 Mich App 134-135. When reviewing a motion for summary disposition under MCR 2.116(C)(10), we "consider all documentary evidence available to us in a light most favorable to the nonmoving party in order to determine whether there is a genuine issue with respect to any material fact." *Hawkins, supra*.

On appeal, defendant claims that the trial court erred in denying its motion for summary disposition because plaintiff failed to plead sufficient facts in avoidance of governmental immunity. We disagree.

In this case, plaintiff alleges that she suffered injuries as a result of defendant's failure to fulfill its statutory duty under MCL 691.1402(1) to maintain a sidewalk "in reasonable repair and in a condition reasonably safe and fit for travel." Plaintiff's injuries occurred when she was running near the intersection of Masonic and Harper in St. Clair Shores on the evening of January 2, 1998. Plaintiff, resuming her training regimen after the holidays, was running on a course that she and her husband had measured out through their neighborhood. Earlier that day, construction and excavation work had been performed by defendant City of St. Clair Shores and its contractor, third-party defendant J J & C, to repair a broken water/sewer line in the area adjacent to the sidewalk. As a result, the heavy construction equipment had covered portions of the sidewalk with slippery, wet mud. However, no signs or protective devices were placed in the area warning about the muddy condition of the sidewalk. As plaintiff was running on the sidewalk along Masonic "at a fast clip," in the dark, she slipped on the mud-covered sidewalk, sustaining several broken bones and other injuries to her left hand when she fell to the pavement.

Contrary to defendant's claim, there was a genuine issue of material fact whether the sidewalk was "reasonably safe and convenient for public travel." MCL 691.1402(1). Although defendant claims that there were only "trace amounts of mud" on the sidewalk, plaintiff has introduced evidence that her injuries resulted when she slipped and fell on an excess amount of mud that covered the sidewalk.[1] Besides her deposition testimony, plaintiff has submitted a photograph depicting the muddy condition of the sidewalk on the following day. Thus, plaintiff has presented sufficient evidence raising a factual question whether the sidewalk was "reasonably safe and convenient for public travel." Contrary to defendant's suggestion, it was not necessary for plaintiff to provide expert testimony in this regard.

Nonetheless, defendant contends that it was entitled to summary disposition on the basis of governmental immunity because plaintiff was "running *in the dark and at a good pace*" (emphasis in original) when she slipped on the mud-covered sidewalk. Citing *Scheurman v Dep't of Transportation*, 434 Mich 619, 630 ; 456 NW2d 66 (1990), defendant maintains that the highway exception to governmental immunity "does not place an unrealistic duty on governmental agencies to ensure travel upon the highways and sidewalks will always be safe." Given the factual record before us, we decline defendant's invitation to find that the highway exception to governmental immunity is inapplicable, as a matter of law, in this case. Although it might not have been prudent for plaintiff to run at a fast speed in the dark, the pertinent question is whether defendant maintained the sidewalk at issue in a reasonably safe condition that was "fit for travel." As the trial court properly concluded, summary disposition was inappropriate because there was a jury submissible issue about whether the sidewalk was "reasonably safe and convenient for public travel."

There is also no merit to defendant's contention that it lacked notice that the sidewalk in question was not in "a condition reasonably safe and fit for travel." In this respect, employees of

[1] The present case is distinguishable from *Haliw v Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001), where our Supreme Court reaffirmed that a plaintiff cannot recover in a claim against a governmental agency where the sole proximate cause of the slip and fall is the natural accumulation of ice or snow. *Haliw*, *supra*, 464 Mich 311. In the present case, plaintiff alleged injuries caused by third-party defendant J J & C's repair work leaving portions of the sidewalk covered in wet mud, rather than the natural accumulation of ice or snow.

J J & C gave deposition testimony indicating that defendant's employees drove its heavy equipment over the sidewalk. Viewing the evidence in a light most favorable to plaintiff, it may be reasonably inferred that defendant, by creating the muddy condition on the sidewalk, had notice of it. However, even if defendant's employees did not directly cause the hazardous condition by driving its heavy equipment over the sidewalk, there was evidence that defendant had notice of the defective condition of the sidewalk because its employees were present before and after J J & C's excavation work.[2]

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[2] We note that defendant also raises an issue on appeal contending that plaintiff's gross negligence claim fails as a matter of law. However, plaintiff's counsel conceded at oral arguments that there was no gross negligence.