STATE OF MICHIGAN

COURT OF APPEALS

RONALD WILLIAMS, Plaintiff-Appellant,	UNPUBLISHED October 25, 2012
v	No. 305167 Wayne Circuit Court
TOWNSHIP OF VAN BUREN, Defendant-Appellee.	LC No. 10-006001-NO

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition for defendant pursuant to MCR 2.116(C)(7) and (C)(10) on the basis that governmental immunity bars plaintiff's claim. Because plaintiff failed to present sufficient evidence to rebut the inference that defendant maintained the sidewalk at issue in reasonable repair and failed to show that defendant had constructive knowledge of the sidewalk elevation, we affirm.

This case arises out of plaintiff's trip and fall on a sidewalk on April 12, 2009, while he was jogging near his home in defendant Van Buren Township. Plaintiff tripped and fell over an elevated portion of concrete that ran the entire width of the sidewalk and suffered a broken wrist. He filed this action against defendant, alleging that the highway exception to governmental immunity, MCL 691.1402(1), was applicable because defendant failed to maintain the sidewalk in reasonable repair so that it was reasonably safe for public travel.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing that the highway exception to governmental immunity was inapplicable because the pavement elevation was only ¾ of an inch at its highest point, thereby entitling defendant to a rebuttable inference that it maintained the sidewalk in reasonable repair because the defect was less than two inches. Defendant also argued that it had neither actual nor constructive knowledge of the defect since it had no reason to suspect that the adjacent homeowner had cut a portion of the recently-installed sidewalk in order to run a pipe underneath it extending from the home's sump pump to the gutter in the street. In response to defendant's motion, plaintiff submitted an affidavit from his construction engineering expert opining that the defect was unreasonably dangerous because the elevation had a "vertical, flat, blunt surface" which made it a "severe tripping hazard." Plaintiff also argued that defendant was presumed to have been aware of the defect because it had existed for at least 30 days before the incident. The trial court

agreed with defendant and granted the motion on the basis that the elevation was less than two inches high and was readily observable.

We review de novo a trial court's decision on a motion for summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). Likewise, "[t]he applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). A motion for summary disposition under MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law and requires that the court consider all documentary evidence submitted by the parties. *Miller v Lord*, 262 Mich App 640, 643; 686 NW2d 800 (2004). A motion pursuant to subrule (C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence, and if such material is presented, the court must consider it. MCR 2.116(G)(2); MCR 2.116(G)(5). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In reviewing a motion under subrule (C)(10), we must consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The nonmoving party may not rest on mere allegations or denials but must present "documentary evidence establishing the existence of a material factual dispute" for trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). A motion for summary disposition under subrule (C)(10) is properly granted if "there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, municipalities are generally immune from tort liability if they are engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). The highway exception to governmental immunity is applicable, however, in the narrow circumstances set forth in MCL 691.1402(1). See *id*. at 157-159 ("the statutory exceptions [to governmental immunity] are to be *narrowly* construed.") (emphasis in original). At the time of plaintiff's fall, MCL 691.1402(1) provided,[1] in relevant part:

> *Except as otherwise provided in section 2a* [MCL 691.1402a], each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for

[1] MCL 691.1401, MCL 691.1402, and MCL 691.1402a were amended pursuant to 2012 PA 50, effective March 13, 2012, but the amendment is inapplicable in this case because plaintiff's fall occurred before the effective date of the amendment. See *Moraccini v City of Sterling Heights*, ___ Mich App ___; ___ NW2d ___ (2012) (Docket No. 301678, issued May 1, 2012).

> 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. [Emphasis added.]

MCL 691.1401(e)[2] defined "[h]ighway" as "a public highway, road, or street that is open for public travel and includes . . . sidewalks[.]" Moreover, MCL 691.1402a provided, in relevant part:

> (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. *This subsection does not prevent or limit a municipal corporation's liability if both of the following are true*:
>
> (a) *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 a defect in a sidewalk,* trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.
>
> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.
>
> (2) *A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair*. [Emphasis added.]

Plaintiff first argues that the trial court erred by granting summary disposition because he presented sufficient evidence to show that the sidewalk was not maintained in reasonable repair so that it was safe for public travel and to rebut the inference of reasonable repair applicable to discontinuity defects less than two inches. Plaintiff relies on *Gadigian v City of Taylor*, 282 Mich App 179, 186-187; 774 NW2d 352 (2008), aff'd in part and vacated 486 Mich 936 (2010), in support of his argument that, unlike a rebuttable presumption, a rebuttable inference does not *compel* the trier of fact to conclude that the sidewalk was maintained in reasonable repair if the defect is less than two inches. Plaintiff's reliance is misplaced, however, because this Court's decision in *Gadigian* carries no precedential weight. While our Supreme Court affirmed the result that this Court reached in *Gadigian*, it vacated this Court's opinion "because its analysis is

[2] Pursuant to 2012 PA 50, effective March 13, 2012, the definition of "highway" is now located at MCL 691.1401(c).

dictum . . . ." *Gadigian v City of Taylor*, 486 Mich 936; 798 NW2d 738 (2010). Thus, plaintiff's reliance on this Court's analysis in *Gadigian* is unavailing.

Plaintiff also relies on the affidavit of his expert, Theodore Dziurman, who opined that the defect in the sidewalk was unreasonably dangerous. Dziurman's affidavit, provided, in relevant part:

> 3. In the above-captioned case, I have reviewed the depositions of Ronald Williams, Daniel Swallow, Alberta Williams and David Schuler along with nine (9) photographs of the at-issue raise in elevation and a copy of the Plaintiff's case evaluation summary and have formed opinions.
>
> 4. It is my professional opinion that the at-issue raise in elevation on the at-issue sidewalk created an unreasonably dangerous condition which was not in reasonable repair and was not in a condition that was safe and fit for pedestrian travel.
>
> * * *
>
> 6. Although the raise in elevation was less than two (2) inches, it was unusually, specifically and unreasonably dangerous for the following reasons:
>
> a. The purpose of a sidewalk is to allow safe pedestrian travel with an unobstructed ability to traverse the area.
>
> b. Any irregularity in the surface of the concrete of discontinuity in the flatness of the surface has the potential to cause a tripping hazard.
>
> c. Unlike a normal crack or discontinuity defect which still allows a foot to move safely and smoothly over the surface of the concrete, the at-issue elevation had a vertical, flat, blunt surface which makes it a severe tripping hazard due to the fact that striking a foot on the vertical, flat, blunt surface can cause a person to fall.
>
> d. Any elevation of less than two (2) inches is difficult to perceive as it is at an awkward height as standard steps are generally six (6) to eight (8) inches and are located where a pedestrian would expect them. Additionally, a raised two inch slab is much more readily visible than the defect at issue herein.

Dziurman's affidavit was insufficient to rebut the inference of reasonable repair. First, the affidavit primarily consisted of mere conclusory allegations that the elevation was unreasonably dangerous without providing any factual basis supporting such a conclusion. An affiant's mere conclusory statements without any supporting factual detail is insufficient to create a genuine issue of material fact for trial. *Quinto*, 451 Mich at 371-372. Moreover, Dziurman's specific allegations were insufficient to establish a genuine issue of material fact. Dziurman averred that the "elevation had a vertical, flat, blunt surface which ma[d]e it a severe tripping hazard due to the fact that striking a foot on the vertical, flat, blunt surface can cause a person to fall." The fact that the elevation had a ¾-inch vertical surface that could cause a

person to fall, however, was already accounted for in the statute. The rebuttable inference of reasonable repair provided by the statute was applicable because the discontinuity defect was less than two inches, and Dziurman failed to identify anything other than the height differential, which the statute already took into account. Thus, Dziurman's affidavit failed to rebut the inference that defendant maintained the sidewalk in reasonable repair.

Similarly, Dziurman's deposition testimony failed to create a genuine issue of material fact for trial. Dziurman did not personally observe the sidewalk, but rather, he reviewed photographs of it. When asked whether anything in the photographs, other than the elevation itself, made the condition dangerous, Dziurman responded:

> *A.* My comment is going to be that this was not a natural phenomena—well, it's indirectly a natural phenomena, but someone came in and cut a piece of the sidewalk cross-section out, and put a drain pipe underneath it.
>
> Now, you really don't run into that very often—or very seldom I guess you'd say. In this case it caused water to get underneath that small piece of concrete and force it up there in the wintertime, frost action; it's a common thing, and wasn't something that you would normally run into.
>
> I guess it was an unusual situation, it shouldn't have been done that way. And if it had not been—you know, if the guy, I assume it was the homeowner based on what I read, had dug underneath the sidewalk somehow and placed it without breaking the sidewalk up, maybe this thing never would have happened, he'd have a bigger piece of concrete slab on top of it, but he didn't do that, so . . .
>
> * * *
>
> Obviously we know this portion that was cut is raised, so that makes it dangerous. So the other two slabs, I don't know anything about them besides looking at the photographs, and doesn't [sic] seem to be any problem there.
>
> * * *
>
> So again, my opinion that I stated is water got underneath it and raised that concrete up and caused the hazard to be there.
>
> *Q.* So the vertical discontinuity, the raised slab in and of itself is the defect, correct?
>
> *A.* Yes.
>
> * * *
>
> *Q.* What's unusual about this slab?
>
> *A.* Well—

Q. Tell me again.

A. Okay. The width of the thing is obviously—looks like approximately a foot maybe wide. It was cut out, and there's a pipe underneath it that allows water to form underneath it that during the freeze/thaw cycle or freeze cycle is going to expand, and cause that piece of concrete, because it's a small piece of concrete, to raise.

Q. Right. And it's the raised nature of the small slab that resulted in it becoming a tripping hazard, correct?

A. Right. I mean, I would say most pedestrians walking on a sidewalk would not expect to find this small piece of concrete that's raised a half inch on each side or something.

Especially in a new sidewalk. Like I said, this was a relatively new sidewalk where basically you'll find very few defects other than this one maybe.

Thus, Dziurman based his opinion on the manner in which he believed the elevation had been formed, i.e., by water freezing and thawing. The cause of the elevation, however, was irrelevant to whether the condition was dangerous. Dziurman also opined that most people would not expect a raised slab of concrete in a relatively new sidewalk. Even if true, the fact that a person may not expect to come across an elevated piece of concrete is insufficient to rebut the inference that defendant maintained the sidewalk in reasonable repair since the elevation was only ¾ of an inch. The hazard at issue was the possibility that the elevation could cause someone to trip and fall, a danger that exists regardless of the age of a piece of pavement since a trip and fall is generally an unexpected occurrence. Moreover, even plaintiff admitted that if he had been looking down at the sidewalk while he was jogging, nothing would have prevented him from seeing the irregularity in the pavement. Accordingly, plaintiff failed to present sufficient evidence to rebut the inference that defendant maintained the sidewalk in reasonable repair, and the trial court properly granted defendant's motion for summary disposition on that basis.

Plaintiff also argues that summary disposition was inappropriate because defendant had constructive knowledge of the defect since it had existed for at least 30 days before his fall. MCL 691.1403 provides:

> 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*. [Emphasis added.]

Plaintiff does not argue that defendant had actual knowledge of the defect, and the evidence fails to show that defendant had actual knowledge of the sidewalk elevation. Rather, plaintiff asserts that defendant had constructive knowledge of the defect because it had existed for at least 30

days before his injury. Plaintiff failed to present evidence supporting his argument and establishing a genuine issue of material fact for trial.

Plaintiff relies on the testimony of Daniel Swallow, defendant's director of planning and economic development. Plaintiff contends that Swallow testified that the defect had existed for at least one year before the incident. To the contrary, Swallow testified that the elevated concrete did not appear to have been poured in a manner that would create the elevation. Swallow opined that the portion of the sidewalk appeared to have been cut out, turned over, and reinserted into the sidewalk. Swallow testified that the piece of concrete did not appear to be new and seemed similar in age to the adjacent portions of the sidewalk, which were at least one year old. Thus, Swallow did not testify that the defect itself had existed for at least one year. He merely opined that the concrete had been poured more than one year before plaintiff's fall.

Plaintiff also argues that his ex-wife, Alberta Williams, testified that she had seen the elevation during the Spring or Summer in the year before plaintiff's fall. Williams's testimony, however, shows that she was uncertain when she had first noticed the elevation. Williams testified that she noticed construction being performed on the portion of the sidewalk at issue but was unable to state when it had occurred:

> *Q.* Do you remember when in relation to this incident that construction was occurring?
>
> *A.* I want to say before. I'm leaning toward before.
>
> *Q.* Can you tell me how long before? Was it that spring? The previous winter?
>
> *A.* It wasn't winter.
>
> *Q.* Maybe the year before?
>
> *A.* I really couldn't answer that, not even a good educated guess to be honest.
>
> * * *
>
> *Q.* No snow when the construction was happening?
>
> *A.* Yeah. I don't know if it was like spring getting towards summer, I just know it wasn't winter for sure. I know it wasn't winter, and I don't think it was fall. I don't remember any leaves or anything like that; I'm thinking of color like oranges. I just remember it was either spring or summer.

Thus, Williams's testimony does not show that the construction occurred during the previous Spring or Summer. In fact, according to her testimony, the construction could have been performed within 30 days before the April 12, 2009, incident.

Finally, plaintiff relies on Dziurman's assertion that the portion of the sidewalk was cut, turned over, and replaced in November 2008. Dziurman averred in his supplemental affidavit that "the cut section of sidewalk was raised by ice formed by water being trapped beneath the partial concrete slab," and that "the cut sidewalk section had to have been done prior to an extended period of weather with below freezing temperatures." Dziurman's opinion was based on mere speculation regarding the manner in which the elevation was created. Dziurman admitted that he assumed that the concrete lifted as a result of "frost heave" and that the height differential had not been created at the time that the slab was reinserted into the sidewalk. Further, Dziurman testified that it was possible that the portion of concrete had been cut and replaced in March 2009, the month before plaintiff's fall. Accordingly, plaintiff failed to present evidence showing that the elevation had existed for at least 30 days before his fall. He therefore failed to establish a genuine issue of material fact regarding whether defendant had constructive knowledge of the condition.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio

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BECKERING, J. (*concurring*).

I concur in result only. Although *Gadigian v City of Taylor*, 282 Mich App 179; 774 NW2d 352 (2008), aff'd in part and vacated 486 Mich 936 (2010), is no longer binding precedent, I believe its analysis of the evidentiary standard for a "rebuttable inference" in the former version of MCL 691.1402a(2) remains sound. In any event, I agree with the majority that plaintiff, Ronald Williams, has failed to establish that defendant, Township of Van Buren, had either actual or constructive notice of the condition as required by MCL 691.1403. This case does not involve a deteriorated sidewalk but, rather, a sidewalk that has been tampered with, apparently by an adjacent homeowner in order to connect a sump pump to the gutter in the street. As aptly analyzed by the majority, plaintiff's evidence does not establish that the alleged defect existed for a period of 30 days or longer before his injury.

/s/ Jane M. Beckering