STATE OF MICHIGAN

COURT OF APPEALS

LINDA DINKINS, Plaintiff-Appellee,	UNPUBLISHED March 14, 2013
v	No. 307367 Oakland Circuit Court
CITY OF ROYAL OAK, Defendant-Appellant.	LC No. 2011-116482-NO

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying defendant's motion for summary disposition on the basis of governmental immunity. Because plaintiff failed to present evidence showing that the sidewalk on which she fell was not reasonably safe and convenient for public travel, we reverse and remand for entry of summary disposition in favor of defendant.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of plaintiff's trip and fall on a sidewalk on March 17, 2010, while walking near her home in defendant city of Royal Oak. Plaintiff tripped and fell on an uneven piece of concrete, sustaining injuries to her right hand. She filed this action against defendant pursuant to the highway exception to governmental immunity set forth in MCL 691.1402. Plaintiff alleged that defendant failed to maintain the sidewalk in reasonable repair so that it was 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 it had neither actual nor constructive notice of the alleged defect in the sidewalk. Defendant also argued that the sidewalk was not defective because the deviation in the pavement was less than one inch, and the slight deviation did not render the sidewalk unsafe or inconvenient for public travel. In response to defendant's motion, plaintiff argued that defendant had notice of the defect because neighborhood children had used the defect as a bike ramp since at least the summer before plaintiff's fall and city workers had removed a tree in front of the house next door in the month preceding plaintiff's fall. Plaintiff also argued that the sidewalk elevation constituted a defect. Plaintiff relied on the deposition testimony of James Gesquiere, a neighbor who assisted plaintiff after her fall, who testified that the height differential was "[e]nough for someone to trip on." Plaintiff also relied on the affidavit of Bradley T. Cook, an engineer, who averred that a

half-inch elevation in a concrete sidewalk is recognized as a trip hazard. The trial court denied defendant's motion on the basis that questions of fact existed regarding whether the defect in the sidewalk was unsafe and whether defendant had notice of it.

II. STANDARD OF REVIEW

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). We also review de novo as a question of law the applicability of governmental immunity. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). A motion for summary disposition under MCR 2.116(C)(7) is properly granted if a claim is barred because of immunity granted by law. *Miller v Lord*, 262 Mich App 640, 643; 686 NW2d 800 (2004). "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 under MCR 2.116(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). When reviewing a motion under subrule (C)(10), we 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 and 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).

III. LEGAL ANALYSIS

Pursuant to the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). There are certain exceptions to governmental immunity, one being the highway exception set forth in MCL 691.1402(1). *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156-157; 615 NW2d 702 (2000). 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 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.

[1] MCL 691.1402 was amended pursuant to 2012 PA 50, effective March 13, 2012.

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

Defendant first argues that the trial court erred by denying its motion for summary disposition because plaintiff cannot establish that the sidewalk was not reasonably safe and convenient for public travel. Defendant relies on the 2012 amendment of MCL 691.1402a and contends that the amendment should be applied retroactively. Pursuant to 2012 PA 50, effective March 13, 2012, MCL 691.1402a was amended to provide, in relevant part:

> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
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> (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
>
> (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
>
> (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.

Defendant argues that plaintiff failed to present evidence rebutting the presumption that it maintained the sidewalk in reasonable repair since the alleged defect was significantly less than two inches.

This Court has previously recognized that the amended version of MCL 691.1402a applies prospectively rather than retroactively, as defendant contends. In *Moraccini v City of Sterling Heights*, 296 Mich App 387, 389 n 1; 822 NW2d 799 (2012), this Court stated, "MCL 691.1402a was amended by 2012 PA 50, effective March 13, 2012. The amended version of the statute . . . is not applicable here, considering the effective date of the amendment and the earlier date of the incident." This statement is consistent with the notion that statutes are to be applied prospectively absent the Legislature's clear, direct, and unequivocal expression of intent, apparent from the context of the statute itself, that the statute apply retroactively. *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155-156; 725 NW2d 56 (2006). Here, the Legislature voiced no intent, apparent from the language of the statute, that the amendment apply retroactively. Therefore, the amendment to MCL 691.1402a is inapplicable in this case because plaintiff's trip and fall occurred before the effective date of the amendment.

Defendant next argues that plaintiff is unable to establish that the sidewalk was not reasonably safe and convenient for public travel under the preamendment version of the statute. Defendant contends that the height differential between the concrete slabs was less than one

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

inch, and plaintiff has not identified any other aspect of the condition that rendered it unsafe. In *Wilson v Alpena Co Rd Comm*, our Supreme Court interpreted the preamendment version of MCL 691.1402(1) together with MCL 691.1403, which 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.

The *Wilson* Court stated:

> We note that, pursuant to MCL 691.1403, in order for immunity to be waived, the [governmental] agency must have had actual or constructive notice of "the defect" before the accident occurred. In determining what constitutes a "defect" under the act, our inquiry is again informed by the "reasonably safe and convenient for public travel" language of MCL 691.1402(1). In other words, an *imperfection* in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not "reasonably safe and convenient for public travel," and the government agency is on notice of that fact.
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> Thus, while MCL 691.1402(1) only imposes on the governmental agency the duty to "maintain the highway in reasonable repair," in order to successfully allege a violation of that duty, a plaintiff must allege that the governmental agency was on notice that the highway contained a defect rendering it not "reasonably safe and convenient for public travel." The governmental agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair. [*Wilson*, 474 Mich at 168 (emphasis in original).]

In this case, plaintiff failed to present any evidence that the concrete slab height differential rendered the sidewalk not reasonably safe and convenient for public travel. It is undisputed that the differential was less than one inch, and plaintiff does not identify any other aspect of the sidewalk which she claims made it unsafe. Plaintiff relies on the affidavit of engineer Bradley T. Cook, who averred that a mere half-inch change in elevation in a concrete sidewalk is recognized as a trip hazard. Even if true, that assertion does not tend to show that the sidewalk on which plaintiff fell was not reasonably safe and convenient for public travel. As recognized in *Wilson*, "[n]early all highways have more or less rough and uneven places in them, over which it is unpleasant to ride; but because they have, it does not follow that they are unfit and unsafe for travel." *Id*. at 169-170, quoting *Jones v Detroit*, 171 Mich 608, 611; 137 NW 513 (1912). In fact, Gesquiere testified that there were "[a] lot of walkers in that neighborhood," and that before he realized that plaintiff had fallen, he thought that the commotion was simply kids

playing "because there's kids everywhere there." Thus, because plaintiff failed to present any evidence showing that the sidewalk was not reasonably safe and convenient for public travel, the trial court erred by denying defendant's motion for summary disposition.

Defendant next argues that the trial court erroneously denied its motion for summary disposition because plaintiff cannot establish that defendant had notice of the condition pursuant to MCL 691.1403. We need not address this argument given our determination that summary disposition was appropriate because plaintiff failed to present evidence that the sidewalk was not reasonably safe and convenient for public travel.

Reversed and remand for entry of summary disposition in favor of defendant. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto