STATE OF MICHIGAN

COURT OF APPEALS

ROBERT FOREN, Plaintiff-Appellant,	UNPUBLISHED October 23, 2014
v	No. 317773 Wayne Circuit Court
CITY OF TAYLOR, Defendant-Appellee.	LC No. 12-006841-NO

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In this trip and fall action, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On July 15, 2011, at approximately 12:30 a.m., plaintiff left his house on Woodlawn Street to go for a walk around the neighborhood. After exiting his home, plaintiff began walking north on the sidewalk toward the intersection of Woodlawn and Greenlawn streets. Upon reaching the intersection, plaintiff turned left on Greenlawn and continued walking on the left-hand side of the sidewalk heading west. Plaintiff observed a woman on a bicycle who was heading east on Greenlawn while traveling on the same side of the sidewalk. To avoid colliding with the bicyclist who was coming toward him, plaintiff moved over to the right-hand side of the sidewalk.[1] As he did so, plaintiff stubbed his toe on a raised portion of the sidewalk and fell down, resulting in various injuries.[2]

[1] Plaintiff testified that he had taken walks around the neighborhood every night since his knee surgery in 2010, and he would normally walk on the left, inner side of the sidewalk (closest to the houses) because he knew the sidewalks were uneven generally in areas closest to the curb.

[2] The record evidence reflects an increasing vertical discontinuity between sidewalk slabs, moving from the left-hand side to the right-hand side of the sidewalk, presumably due to tree roots emanating from a tree located to the right of the sidewalk.

Plaintiff initiated the instant negligence action against defendant, claiming that defendant had failed to maintain the sidewalk in reasonable repair, as required by MCL 691.1402 et seq., causing plaintiff to trip and fall. Following discovery, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not establish defendant's negligence because he could not prove that the uneven sidewalk was the proximate cause of his injuries. Rather, because plaintiff was aware of the uneven nature of the sidewalk, his own conduct of walking on that portion of the sidewalk was the sole proximate cause of his injuries. For these reasons, defendant argued, no genuine issue of material fact existed and defendant was entitled to judgment as a matter of law. MCR 2.116(C)(10).

Following a hearing, the trial court issued an order granting defendant's motion for summary disposition "for the reasons set forth in the defense brief." This appeal followed.

II. STANDARD OF REVIEW

A trial court's decision to grant summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 120. When evaluating such a motion, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Id*. Summary disposition may be granted under MCR 2.116(C)(10) if, based on "the affidavits or other documentary evidence . . . 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). A genuine issue of material fact exists when, after viewing the record in the light most favorable to the non-moving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. PROXIMATE CAUSE

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because genuine issues of material fact exist regarding whether the uneven sidewalk was a proximate cause of plaintiff's injuries. We agree.

Although the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., provides that governmental agencies are generally immune from tort liability when engaged in the exercise or discharge of a governmental function, such immunity is subject to certain exceptions. MCL 691.1407(1). One such exception is the highway exception. At the time of plaintiff's injury,[3] MCL 691.1402(1) set forth in relevant part:

[3] Plaintiff's cause of action accrued in 2011 when he was injured. See *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995), quoting *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150; 200 NW2d 70 (1972) (A cause of action for tortious injury accrues "when all of the elements of the cause of action have occurred and can be alleged in a proper complaint."). This Court has applied the versions of the highway exception and statute

> Except as otherwise provided in section 2a, 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 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.

Under MCL 691.1401(e), as it then existed, a "highway" is defined as "a public highway, road, or street that is open for public travel," expressly including "sidewalks." Consequently, where the highway exception applies, a governmental agency is subject to potential liability in tort.

"To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling& Partition Co.*, 489 Mich 157, 162; 809 NW2d 553 (2001) (citing *Roulo v Auto Club of Mich*, 386 Mich 324, 328; 192 NW2d 237 (1971)).

To prove proximate cause, a plaintiff must establish both cause-in-fact and legal cause. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Cause-in-fact "requires showing that, 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id*. Mere speculation or conjecture cannot establish cause-in-fact. *Id*. at 163-164. Legal cause relates to "the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Id*. Generally, a negligent defendant "is liable for all injuries . . . whether foreseeable or not, provided the damages are the legal and natural consequences . . . and might reasonably have been anticipated." *Price v High Pointe Oil Co.*, 493 Mich 238, 254-255; 828 NW2d 660 (2013). There may be more than one proximate cause of an injury. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 350 (1997).

Defendant maintains that, as a matter of law, plaintiff could not establish either cause-in-fact or legal cause. We disagree. Viewing the evidence in the light most favorable to plaintiff, genuine issues of material fact exist regarding both whether the raised sidewalk was a cause-in-fact and whether it was a legal cause of plaintiff's injuries.

Defendant first contends that the evidence is insufficient as a matter of law to establish cause-in-fact because plaintiff's fall resulted from his own conduct in avoiding the bicyclist by moving over to the uneven side of the sidewalk with knowledge of the sidewalk's condition. Defendant's theory is based on plaintiff's deposition testimony that the incident happened "so

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governing a municipal corporation's duty to repair sidewalks, MCL 691.1402a, that were in effect at the time of a plaintiff's injury. See *Moraccini v City of Sterling Heights*, 296 Mich App 387, 388 n 1; 822 NW2d 799 (2012). As discussed in Part IV of this opinion, we decline to decide at this juncture whether the 2012 amendments to relevant portions of the GTLA should apply to plaintiff's cause of action. See 2012 PA 50.

quick" and that the bicyclist "pushed" him over and "forced" him to the right side of the sidewalk. Defendant argues that as "but for the bicyclist's presence, [plaintiff] would not have fallen." Defendant thus suggests that plaintiff cannot prove that the raised sidewalk was a cause-in-fact. Rather, according to defendant, it was plaintiff's conduct in avoiding the bicyclist that was the "but for" cause of his injuries. Relatedly, defendant argues that plaintiff's contention that he stubbed his toe on the raised sidewalk was mere speculation or conjecture.

However, "[e]vidence of causation is sufficient if the jury may conclude that, more likely than not, but for the defendant's conduct the plaintiff's injuries would not have occurred, even if other plausible theories have evidentiary support." *Wilson v Alpena County Rd Comm*, 263 Mich App 141, 150; 687 NW2d 380 (2004), aff'd 474 Mich 161 (2006). More fundamentally, defendant's argument ignores the fact that in circumstances such as those at issue in this case, there may exist more than one cause-in-fact. *Allen*, 225 Mich App at 401-402. It is conceivable that plaintiff's fall may not have occurred "but for" *either* the uneven sidewalk or plaintiff's conduct in avoiding the bicyclist. It need not be one, to the exclusion of the other.

> Therefore, a defendant cannot escape liability for its negligent conduct simply because the negligence of others may also have contributed to the injury suffered by a plaintiff. When a number of factors contribute to produce an injury, one actor's negligence will be considered a proximate cause of the harm if it was a substantial factor in producing injury. [*Id*. at 401-402.][4]

Thus, the fact that plaintiff's conduct may have been a "but-for" cause of his fall does not negate the possibility that the uneven sidewalk also may have been a "but-for" cause.

Viewing the evidence in the light most favorable to plaintiff, we hold that reasonable minds could differ regarding whether the raised sidewalk was a "but-for" cause of plaintiff's injury, and thus that a genuine issue of material fact exists. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Plaintiff testified that he was "fully aware" of the bicyclist and "saw her coming." To avoid running into the bicyclist, plaintiff moved to the right-hand side of the sidewalk, which he normally would have avoided because he knew that the sidewalk area closest to the trees and curb were generally uneven. Plaintiff also testified several

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[4] Although the caselaw sometimes uses the term "proximate" cause when discussing the possibility of multiple "but-for" causes and the application of the "substantial factor" test, it is apparent, both from the context of those cases and otherwise, that it is the "but-for" component of the overall proximate cause analysis that is being referenced. See, e.g., *Breckins v Olympia*, 316 Mich 275, 283; 25 NW2d 197 (1946) (roughness or unevenness in floor of skating rink not negated as a proximate cause of the plaintiff's injury by the act of another skater in clipping the plaintiff's skate); 65 CJS, Negligence, § 217, p 567 ("In deciding the question of cause in fact, as an element of proximate cause, when there are multiple factors that may have combined to cause injury, the court asks whether the defendant's conduct was a material element and substantial factor in bringing about the injury."; 2 Restatement Torts, 2d, Appendix (1966), § 433, p 129 (Reprinting Reporter's Note that appeared in the 1948 Supplement to the First Restatement of Torts stating that "the 'substantial factor' element deals with causation in fact").

times that he stubbed his toe on the uneven sidewalk, which caused his fall. The evidence is thus sufficient for a fact-finder to determine that plaintiff stubbed his toe on the raised sidewalk, and that even if he would not have done so but for avoiding the bicyclist, it was the raised sidewalk that caused, or was a substantial factor in causing, his fall. This evidence is not mere speculation or impermissible conjecture. *Skinner*, 445 Mich at 163-164. Moreover, the cases that defendant cites, in arguing that plaintiff's position is speculative, are not only not binding on this Court, MCR 7.215(C)(1), MCR 7.215(J)(1), but they are wholly inapposite and distinguishable. In contrast to plaintiff in the instant case, the plaintiffs in those cases testified that they did not know what caused their falls. We conclude that plaintiff established genuine issues of material fact concerning "but-for" causation. *Id*. at 163-165.

Further, a genuine issue of material fact exists as to whether the raised sidewalk was the legal cause of plaintiff's injuries. This aspect of proximate cause "involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable." *Ridley v* Detroit, 231 Mich App 381, 389; 590 NW2d 69 (1998), rem'd 463 Mich 932 (2000). Legal cause relates to foreseeability. *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001).

Defendant argues that any alleged unevenness of the sidewalk was too remote to amount to legal cause, in light of what it characterizes as plaintiff's "sudden movement upon seeing" the bicyclist. We disagree. Even if plaintiff's avoidance of the bicyclist contributed in causing his fall, that fact would not render the unevenness of the sidewalk, as a contributing cause, too remote to constitute legal cause. Rather, it is foreseeable that an individual walking on a sidewalk could trip and fall on an uneven portion of that sidewalk while attempting to navigate around an oncoming pedestrian or bicyclist. Under those circumstances, and particularly given plaintiff's unequivocal testimony that he stubbed his toe on the uneven sidewalk while moving to avoid the bicyclist, it could just as (or more) easily be argued that the uneven sidewalk rendered the avoidance of the bicyclist "too remote" for it to constitute legal cause. It could further be argued from the evidence that it was due to the unevenness of the sidewalk, and the necessity of avoiding its raised condition on the right-hand side, that plaintiff found himself in the path of the bicyclist (on the left-hand side of the sidewalk) in the first place. Consequently, we hold that a reasonable jury could find that plaintiff's injuries in tripping and falling on the raised sidewalk "were the legal and natural consequences of [defendant's failure to maintain the sidewalks in reasonable repair] and might reasonably have been anticipated." *Price v High Pointe Oil Co*, 493 Mich 238, 254-255; 828 NW2d 660 (2013).

Additionally, the fact that plaintiff was aware of the general condition of the sidewalks in his neighborhood is a question of comparative negligence that should be left to the fact-finder, as reasonable minds could differ on plaintiff's level of fault. *Zaremba Equipment Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 33; 761 NW2d 151 (2008). Similarly, the "open and obvious" defense is inapplicable here, because plaintiff's negligence theory involves the violation of defendant's statutory duty. *Walker v City of Flint*, 213 Mich App 18, 22; 539 NW2d 535 (1995). Defendant's argument that plaintiff's conduct, in avoiding the bicyclist notwithstanding his knowledge of the unevenness of the sidewalk, bars his claim essentially asks us to apply the open and obvious doctrine, albeit by another name, in contravention of our established caselaw. We decline the invitation to do so. Rather, to the extent that plaintiff's own negligence may have contributed to the accident, such liability may be apportioned by a fact-finder according to our

comparative negligence principles. See *Rusnak v Walker*, 273 Mich App 299, 313-314; 729 NW2d 542 (2006).

The trial court erred in concluding that no genuine issues of material fact existed regarding cause-in-fact and legal cause; therefore its grant of summary disposition to defendant was improper.

IV. ALTERNATE GROUND FOR AFFIRMANCE

On appeal, defendant argues, as an alternative ground for affirming the trial court's order, that plaintiff cannot prove that defendant breached its duty to maintain the sidewalks in reasonable repair. In offering this alternative ground for affirmance, defendant argues for a retroactive application of the 2012 amendments to MCL 691.1402a. Under defendant's theory, "where the photograph [of the raised sidewalk] shows a discontinuity of exactly two inches . . . and where the record is not clear where [plaintiff] stubbed his toe," the trial court acted within its discretion in concluding, as a matter of law, that plaintiff did not rebut the statutory presumption that defendant maintained its sidewalks in reasonable repair.[5] While acknowledging that statutory amendments generally apply prospectively, defendant argues that the 2012 amendments were the "clearly intended to remedy a defect in the former version of MCL 691.1402a," such that retroactive application of the 2012 amendments is appropriate and the "current version of the statute [MCL 691.1402(a)] should control."

Plaintiff's injury occurred on July 16, 2011, and plaintiff's complaint was filed on May 5, 2012. At the time of plaintiff's injury, 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:
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> (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.

[5] Defendant acknowledges, notwithstanding its description of how the trial court exercised its discretion, that by affirming the trial court on this alternative ground, we would be employing reasoning different than that employed by the trial court.

> (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. [See 1999 PA 205.]

The statute was amended in 2012 with an effective date of March 13, 2012. See 2012 PA 50. The current version of the statute reads 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:
>
> (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.

Thus, under the previous version of MCL 691.1402a, a plaintiff may succeed on a claim for violation of the duty to maintain a sidewalk under reasonable repair, even if a vertical discontinuity is less than two inches, see *Robinson v City of Lansing*, 486 Mich 1, 12 and n 11; 782 NW2d 171 (2010), if a plaintiff can successfully rebut the statutory inference of reasonable repair. By contrast, the newer version of the statute essentially precludes recovery, absent a dangerous condition apart from mere vertical discontinuity, if the discontinuity is less than 2 inches. Further, the determination of whether what is now a presumption (rather than an inference) of reasonable repair has been rebutted is explicitly charged to the trial court as a question of law.[6]

The issue of whether plaintiff can establish defendant's breach of duty under MCL 691.1402(a), under either version of the statute, is not properly preserved for appellate review because the issue was not raised before, addressed, or decided by the trial court. *Hines v Volkswagen of America*, 265 Mich App 432, 443; 695 NW2d 84 (2005). The parties' arguments before the trial court centered on whether plaintiff could prove causation, not whether he had

[6] This Court has discussed the difference between a statutory presumption and a statutory inference with regard to MCL 691.1402a. See *Gadigan v City of Taylor*, 282 Mich App 179, 186-188; 774 NW2d 352 (2008), vacated and rem'd on other grounds 486 Mich 936 (2010). In brief, the statutory inference found in the previous statute *allows*, but does not compel, the trier of fact to find that a municipality has properly maintained its sidewalk if a discontinuity defect of less than 2 inches exists. *Id*. at 186. By contrast, a statutory presumption, unless rebutted, *requires* the trier of fact to find the presumed facts, in this case that the municipality has properly maintained its sidewalk if a discontinuity defect is less than 2 inches. *Id*. at 186-187.

established defendant's breach of its statutory duty. Although parties may argue an alternate ground for affirmance of a trial court's ruling on summary disposition, see *McLean v Dearborn*, 302 Mich App 68, 79 n 2; 836 NW2d 916 (2013), this Court will generally disregard issue preservation requirements only if the question is one of law concerning which the necessary facts have been presented. See *Duffy v Dep't of Natural Resources*, 490 Mich 198, 209 n 3; 805 NW2d 399 (2011). Here, the factual issues surrounding the application of MCL 691.1402a have not been "adequately presented and briefed" so as to allow us to make a determination on that issue. *Id*. For example, whether the defect was more, less, or exactly 2 inches in height was not argued before the trial court; nor was evidence of any other features of the defect that may be of relevance to defendant's duty to keep the sidewalk in reasonable repair.[7] Additionally, issues surrounding defendant's actual or constructive knowledge of the defect were not explored before the trial court. Nor has the trial court addressed whether the Legislature intended that its statutory inference or presumption apply to a vertical discontinuity defect as measured at the precise point of impact or otherwise. We therefore decline to entertain defendant's proposed alternate ground for affirmance at this time.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

[7] We note that plaintiff argued below that the vertical discontinuity measured "about 2 and a half inches," whereas defendant argues on appeal—arguably inconsistently within a single brief—that the vertical discontinuity measured "not two inches or more" and that it measured "exactly, or perhaps just under, two inches." From our review, the pictorial evidence is inconclusive in this regard, rendering even more appropriate our determination to defer any consideration of this issue until such time as the trial court has had occasion first to address it.