Order

Michigan Supreme Court
Lansing, Michigan

June 11, 2025

166619

KENNETH MANN,
Plaintiff-Appellant,

v

SC: 166619
COA: 361637
Wayne CC: 21-003705-NO

CITY OF DETROIT,
Defendant-Appellee.

_____/

On January 22, 2025, the Court heard oral argument on the application for leave to appeal the November 2, 2023 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(I)(1). In lieu of granting leave to appeal, we REVERSE Part II(B)(2) of the judgment of the Court of Appeals and REMAND this case to the Wayne Circuit Court for further proceedings consistent with this order. Defendant, the city of Detroit (the city), is not entitled to summary disposition under MCR 2.116(C)(7) because the metal stub at issue was a sidewalk defect under MCL 691.1402a.

We review de novo a trial court's decision on a motion for summary disposition, as well as the legal question of whether governmental immunity applies in a case. *Ray v Swager*, 501 Mich 52, 61-62 (2017). MCR 2.116(C)(7) allows for summary disposition when a claim is barred by "immunity granted by law." When reviewing a motion brought under MCR 2.116(C)(7), the "contents of the complaint are accepted as true unless contradicted by the documentation submitted by the movant." *Sunrise Resort Ass'n, Inc v Cheboygan Co Rd Comm*, 511 Mich 325, 333 (2023) (quotation marks and citation omitted). Unless an exception applies, the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides immunity from tort liability for governmental agencies "engaged in the exercise or discharge of a governmental function." *Ray*, 501 Mich at 62; MCL 691.1407(1). This immunity is broad, and the statutorily created exceptions to immunity are narrowly construed. See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618 (1984).

In this case, plaintiff was walking along the sidewalk when he tripped over a circular metal stub that was 5 inches high and 4 inches wide. The metal stub was paved into, and protruding from, the sidewalk. Plaintiff fell backward and struck his head and back on the

pavement, seriously injuring himself. Plaintiff sued the city, and at issue here is whether the sidewalk exception to the GTLA, MCL 691.1402a, is applicable to his claim.

Historically, municipalities may have been held liable for defective public sidewalks under the highway exception to governmental immunity, MCL 691.1402, because the GTLA previously defined the term "highway" to include sidewalks, see MCL 691.1401, as amended by 2001 PA 131, and provided a two-inch rule that protected municipalities from liability for *de minimis* defects in public sidewalks, see MCL 691.1402a, as added by 1999 PA 205. See, e.g., *Robinson v City of Lansing*, 486 Mich 1, 5 (2010) (deciding whether the two-inch rule of former MCL 691.1402a(2) applied to sidewalks adjacent to state highways or only to sidewalks adjacent to county highways). In 2012, MCL 691.1402a was amended to impose an affirmative duty on municipalities to maintain all public sidewalks in reasonable repair. MCL 691.1402a(1), as amended by 2012 PA 50. MCL 691.1402a now provides, 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.
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> (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
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> * * *
>
> (5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious. [MCL 691.1402a, as amended by 2016 PA 419.]

This case asks us to determine whether the metal stub was a "defect" or "dangerous condition" "in the sidewalk" for purposes of MCL 691.1402a(3). In short, the answer is yes. Because the stub measured 5 inches tall, it created a "vertical discontinuity defect of 2 inches or more." See MCL 691.1402a(3)(a).[1] Further, the metal stub was embedded into

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[1] The dissent reasons that our conclusion would destroy a municipality's immunity from liability for injuries sustained if a pedestrian, for example, walked into a no-parking or bus stop sign. Not so. The statute refers to a "vertical *discontinuity defect*." A discontinuity

the sidewalk's concrete in the middle of the pedestrian pathway. Therefore, it created a "dangerous condition in the sidewalk itself." See MCL 691.1402a(3)(b).[2]

The city contends that the definition of "sidewalk" in MCL 691.1401(f) as a "*paved* public sidewalk" (emphasis added) limits its liability to defects in the sidewalk's pavement. But the language the Legislature used in MCL 691.1402a(3)—"vertical discontinuity . . . in the sidewalk" and "dangerous condition in the sidewalk itself"—does not limit its application to the pavement itself. The reference to "a paved public sidewalk" in MCL 691.1401(f) merely serves to limit municipalities' liability to paved public sidewalks, as opposed to unpaved or private sidewalks.

This specific fact pattern distinguishes the present case from the precedent relied upon by the Court of Appeals majority and places the metal stub at issue squarely within the scope of MCL 691.1402a(3). The Court of Appeals majority erred by focusing its analysis on factually distinguishable precedents, rather than examining the statutory language to ascertain and effectuate the Legislature's intent. See *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 410 (2022). Recognizing this unique hazard as actionable under MCL 691.1402a(3) not only aligns with the Legislature's intent to impose liability for sidewalk defects but also underscores the city's failure to address a safety risk embedded in the middle of the pedestrian pathway.

Furthermore, this conclusion is consistent with this Court's holding in *LaMeau v Royal Oak*, 490 Mich 949 (2011). In that case, which was decided prior to the revisions to MCL 691.1402a in 2012, the plaintiff died as a result of running into a guy wire, which was suspended above and anchored to a sidewalk. See *LaMeau v Royal Oak*, 289 Mich App 153, 160, 169 (2010), rev'd 490 Mich 949 (2011); see also *LaMeau*, 289 Mich App at

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indicates an irregularity or a lack of continuity, and a defect is "an imperfection or abnormality that impairs quality." Merriam-Webster.com Dictionary, defect <https://www.merriam-webster.com/dictionary/defect> (accessed May 30, 2025) [https://perma.cc/XC46-6VB8]. It is not irregular or abnormal to find a sign mounted 7 feet in the air. It is, however, irregular and abnormal to find a 5-inch metal stub embedded in the sidewalk.

[2] The dissent faults this Court for determining that the metal stub was simultaneously a "vertical discontinuity defect of 2 inches or more in the sidewalk" and a "dangerous condition in the sidewalk itself." It reasons that the one hazard cannot be both. However, MCL 691.1402a(3) provides that the presumption of reasonable repair can be rebutted by showing that the injury was caused by "1 *or both* of the following" conditions: "[a] vertical discontinuity defect of 2 inches or more in the sidewalk" or "[a] dangerous condition in the sidewalk . . . other than solely a vertical discontinuity." (Emphasis added.) Here, clearly the facts show a dangerous condition (metal stub) that also created a vertical discontinuity of 2 or more inches.

187 (TALBOT, P.J., dissenting). This factual difference is significant because the anchor in *LaMeau* did not interact directly with the plaintiff, distinguishing it from the instant case, in which the embedded defect was the direct cause of harm.

The trial court correctly denied the city's motion for summary disposition under MCR 2.116(C)(7) by concluding that the metal stub was a sidewalk defect under MCL 691.1402a. Accordingly, we reverse Part II(B)(2) of the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for further proceedings consistent with this order.

We do not retain jurisdiction.

WELCH, J. (*concurring*).

I concur fully with the majority order. I write separately only to say that the object at issue in this case, as shown in the image below, is plainly a "defect in the sidewalk" and certainly the type of hazard that the Legislature intended to guard against when it enacted MCL 691.1402a.

A metal pipe filled with cement protrudes from the center of a sidewalk panel. An ordinary 12-ounce soda can is placed next to the pipe for scale, showing that the pipe is slightly taller and about twice as wide as the can.

ZAHRA, J. (*dissenting*).

I dissent from the majority's decision to reverse the judgment of the Court of Appeals. The Court of Appeals correctly concluded that the signpost at issue was not part of the sidewalk itself, and therefore the sidewalk exception to governmental immunity is inapplicable. Because I agree with the Court of Appeals that defendant is entitled to summary disposition, I would deny leave to appeal.

I. BACKGROUND

On April 1, 2019, plaintiff, Kenneth Mann, was walking on Greenfield Road near Puritan Avenue in the city of Detroit. As he was walking, he looked behind him to see whether a bus was coming. He then tripped over a metal post stub that was protruding from the sidewalk in front of him. The stub was over five inches tall and four inches wide and was the remnant of a street sign installed before the sidewalk existed, when the area was grass-covered.

Plaintiff sued the defendant city of Detroit, alleging that it failed to maintain the sidewalk in reasonable repair as required by MCL 691.1402a of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. Defendant moved for summary disposition under MCR 2.116(C)(7) based on immunity under the GTLA, arguing that the hazard was open and obvious and that the sidewalk exception to immunity did not apply because the signpost was not itself part of the sidewalk. The trial court denied defendant's motion, finding that genuine issues of material fact existed regarding whether the sidewalk was maintained in reasonable repair under MCL 691.1402a. In doing so, the trial court agreed with plaintiff that the protrusion from the sidewalk constituted an imperfection in the sidewalk itself.

In an unpublished per curiam opinion, the Court of Appeals reversed the trial court and remanded for entry of an order granting summary disposition in favor of defendant.[3] A majority of the Court of Appeals agreed with defendant that the signpost was not part of the sidewalk and therefore no exception to governmental immunity applied. A dissenting judge would have affirmed the trial court's ruling denying summary disposition to defendant.

Plaintiff sought leave to appeal in this Court, and we ordered oral argument on the application, asking the parties to address whether the sidewalk exception applies to the metal pole protruding from the sidewalk.[4]

II. ANALYSIS

Under the GTLA, governmental agencies enjoy "broad immunity from tort liability . . . whenever they are engaged in the exercise or discharge of a governmental function[.]"[5] There are several narrow exceptions to this grant of immunity. At issue in

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[3] *Mann v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued November 2, 2023 (Docket No. 361637).

[4] *Mann v Detroit*, 513 Mich 1120 (2024).

[5] *Plunkett v Dep't of Transp*, 286 Mich App 168, 181 (2009) (quotation marks and citation omitted; alteration in original); see also MCL 691.1407(1) ("Except as otherwise provided

this case is the "sidewalk exception" set forth in MCL 691.1402a, which provides in relevant part as follows:

> (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.
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> (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.
>
> (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.
>
> (5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious.

MCL 691.1401(f) defines "sidewalk" (except as used in MCL 691.1401(c)) as "a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel."

Pursuant to this framework, it is only where a defect constitutes part of the sidewalk itself that a court will proceed to analyze whether a plaintiff has satisfied the requirements

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in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.").

of MCL 691.1402a(3)(a) and (b),[6] under which a plaintiff must rebut the presumption that a municipal corporation maintained the sidewalk in reasonable repair. Consequently, if the signpost at issue in this case is not part of the sidewalk, then we need not consider whether the conditions set forth in MCL 691.1402a(3)(a) and (b) have been satisfied. A majority of this Court reverses the judgment of the Court of Appeals, holding that defendant is not entitled to summary disposition under MCR 2.116(C)(7) because the remnants of the signpost at issue constitute a sidewalk defect under MCL 691.1402a. I would instead deny leave to appeal.

It is unnecessary for the Court to identify exactly what types of sidewalk defects fall within the scope of MCL 691.1402a to resolve this case. This is because the signpost sticking out of the sidewalk was not itself part of the sidewalk, a prerequisite for application of the sidewalk exception. The defect at issue was a significant stub or base of a signpost that stood markedly above the sidewalk. It consisted of a conspicuous metal cylinder that protruded from the sidewalk. The post did not operate as a footpath indistinguishable from the cement pavement itself but consisted of a raised and prominent object on top of the walking path. Under these facts, I conclude that the post was distinct from the sidewalk rather than part of the sidewalk itself. Notably, the highway exception expressly excludes from the definition of a "highway" (which incorporates sidewalks) objects including a "utility pole."[7] The fact that a utility pole is specifically excluded from the definition of a highway suggests that the remainder of the pole at issue here likewise does not fall under the sidewalk exception.[8]

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[6] Pursuant to MCL 691.1402a(1), a municipal corporation has a duty to "maintain *the sidewalk* in reasonable repair." (Emphasis added.) A defendant is liable for breach of this duty only if a plaintiff can show that at least 30 days before his injury, the municipal corporation "knew or, in the exercise of reasonable diligence, should have known of the existence of the defect *in the sidewalk*." MCL 691.1402a(2) (emphasis added). I agree with the Court of Appeals that the key inquiry is whether *the sidewalk* is defective, necessitating a threshold inquiry of whether the signpost at issue is itself part of the sidewalk.

[7] MCL 691.1401(c).

[8] Nor do any other applicable statutes support the majority's holding. The definition of a "sidewalk" set forth in MCL 691.1401(f) extends to the surface that is designed for pedestrian use, without indication that it extends to objects that are located on top of the paved path. And MCL 691.1402a(3)(b), which the majority applies, requires a dangerous condition to be "in the sidewalk itself."

Even if one accepts that the definition of a sidewalk includes items embedded in it, like the post in this case, the majority order remains illogical. First, the order holds that this sidewalk falls within the very narrow exception to governmental immunity because, at five

As the Court of Appeals noted, caselaw also supports its holding. In *LaMeau v Royal Oak*,[9] this Court declined to expand the definition of "sidewalk" to a guy wire that was connected to the end of the sidewalk. Despite the fact that the end of the guy wire was cemented in the sidewalk, this Court adopted the position of the dissent in the Court of Appeals that the anchor and the wire extending from it were not "part of the sidewalk" and that "sidewalk defects [are limited] to imperfections occurring in the walkway itself."[10] In *Weaver v Detroit*,[11] the Court of Appeals held that a streetlight pole was not part of a "highway" under the highway exception to governmental immunity.[12] And in *Ali v*

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inches in height, it created a "vertical discontinuity defect of 2 inches or more" under MCL 691.1402a(3)(a). By this logic, every signpost embedded in a municipal sidewalk would create a hazard for which the municipality is not immune. Had plaintiff sustained injury by walking into a post identifying the area as a bus stop or a no-parking zone, the municipality would not be immune, because the post on which the sign is attached would create a "vertical discontinuity defect of 2 inches or more . . . ." But this is clearly not what the Legislature intended when creating this narrow exception to the broad grant of governmental immunity. As previously mentioned, MCL 691.1401(c) excludes from the definition of highways and sidewalks objects such as utility poles, thus suggesting that other poles on and around highways and sidewalks are outside the highway exception to governmental immunity. Alternatively, the majority order focuses on MCL 691.1402a(3)(b), claiming that immunity is waived because the signpost was "[a] dangerous condition in the sidewalk itself . . . ." But MCL 691.1402a(3)(b) requires more. This dangerous condition must be "of a particular character other than solely a vertical discontinuity." *Id.* But what is the danger of which plaintiff complains? It is nothing more than the fact that the post protrudes from the cement to a height greater than two inches. Contrary to the majority's assertion, I do not claim that a hazard can never simultaneously constitute a "vertical discontinuity defect of 2 inches or more in the sidewalk" and a "dangerous condition in the sidewalk itself." As the majority notes, the language of MCL 691.1402a(3) provides that the presumption of reasonable repair can be rebutted by showing that the injury was caused by "1 *or both*" of these categories. I note only that the majority order articulates no dangerous condition in the sidewalk itself other than the claim of vertical discontinuity. That is, the majority order does not explain why the stub at issue in this case is dangerous apart from the extent of its vertical discontinuity, blending MCL 691.1402a(3)(a) and (b) together.

[9] *LaMeau v Royal Oak*, 490 Mich 949 (2011).

[10] *LaMeau v Royal Oak*, 289 Mich App 153, 187-188 (2010) (TALBOT, J., dissenting), rev'd 490 Mich 949 (2011).

[11] *Weaver v Detroit*, 252 Mich App 239, 245 (2002).

[12] See MCL 691.1402(1).

Detroit,[13] the Court of Appeals held that a bus passenger shelter that collapsed on the plaintiff did not fall under the highway exception, because the exception did not "include fixtures attached to the sidewalk." The Court of Appeals there explained that the "Legislature's exclusion of light poles and trees from the scope of the highway exception evinces its intent that the exception not include fixtures."[14]

This caselaw is generally supportive of the Court of Appeals' holding here. The signpost is not an imperfection in the walkway itself, and it did not become part of the sidewalk merely because its base was embedded in the sidewalk. Although this caselaw was decided under a former version of the highway exception and the current sidewalk exception is contained in an independent and more detailed provision, the highway exception similarly provided, then as now, that "[e]ach 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."[15] And the prior version of MCL 691.1401(c), then codified at MCL 691.1401(e), also defined "highway" to include a "sidewalk."[16] Thus, the prior version of the highway exception required a city to maintain a sidewalk in reasonable repair, just as the current version of the sidewalk exception does. The cited decisions therefore remain instructive.

The majority order claims that the result reached in the instant case is consistent with this Court's holding in *LaMeau*, because in that case, it was the suspended guy wire that was connected to an anchor cemented in the sidewalk that fatally injured the plaintiff's decedent. But this distinction seems to require that the defect must be embedded in the sidewalk *and* the embedded portion of the object must cause the injury. As the Court of Appeals acknowledged, it is unclear under the majority's logic "the exact point at which an object that is embedded into the sidewalk—but also extends above the sidewalk—would be akin to the stub in this case and at which point it would be similar to the guy wire in *LaMeau*."[17] If the majority's holding is that an object must be fully embedded in a sidewalk in order for it to fall under the sidewalk exception, then the post here would not satisfy this standard given that only the base of the post was embedded in the sidewalk. If the majority's holding is that the embedded portion of the object must cause the injury, this

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[13] *Ali v Detroit*, 218 Mich App 581, 588 (1996).

[14] *Id*. at 589 (citation omitted).

[15] MCL 691.1402(1) (emphasis added). The version of this passage in effect before March 25, 1996, was identical but for its reference to "any highway" rather than "a highway." See 1990 PA 278; 1996 PA 150.

[16] See 1986 PA 175; 2012 PA 50.

[17] *Mann*, unpub op at 6 n 3.

standard is still not satisfied if it was the portion of the post that protruded into the air that caused plaintiff to fall. The Court of Appeals made this same point, noting that "if we were to apply the dissent's logic to this case, we would have to conclude that the portion of the sign post that is connected to, but nevertheless above, the sidewalk is not part of the sidewalk and, therefore, [plaintiff] was not injured by what the dissent believes is a sidewalk defect."[18]

Ultimately, this is a fact-specific issue that the Court of Appeals appropriately resolved under the applicable statutory framework. I would conclude that the metal post at issue in this case was not part of the sidewalk itself, ending the inquiry under MCL 691.1402a. Because the Court of Appeals reached the correct result, I would deny leave to appeal.

HOOD, J., did not participate because the Court considered this case before he assumed office.

[18] *Id.*

STATE OF MICHIGAN

COURT OF APPEALS

KENNETH MANN,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
November 2, 2023

No. 361637
Wayne Circuit Court
LC No. 21-003705-NO

Before: SHAPIRO, P.J., and M. J. KELLY and CAMERON, JJ.

PER CURIAM.

In this suit to recover damages for injuries caused by an allegedly defective sidewalk, defendant, the City of Detroit (the City), appeals as of right the trial court order denying its motion for summary disposition under MCR 2.116(C)(7) of plaintiff Kenneth Mann's claim for damages under the sidewalk exception to the governmental tort liability act (GTLA), MCL 691.1401, *et. seq*. Because the trial court erred by determining that the City was not entitled to summary disposition, we reverse and remand for entry of an order granting summary disposition to the City.

I. BASIC FACTS

Mann was walking on a sidewalk near the intersection of Greenfield Road and Puritan Avenue in Detroit, Michigan, when he tripped over what he described as a "pole that was sticking out of the sidewalk." Mann fell and was injured as a result of his fall. The metal pole, also referred to in this opinion as a metal stub, is the remains of a signpost that was partially removed, and it is embedded in the middle of the sidewalk. The pole is over 5 inches higher than surface of the sidewalk.

In March 2021, Mann filed a complaint against the City of Detroit, alleging that it breached its statutory duty under MCL 691.1402a(1). In response, the City filed a motion for summary disposition under MCR 2.116(C)(7), arguing that (1) the danger posed by the signpost stub was

open and obvious and (2) the defect was not part of the sidewalk.[1] Following argument on the motion, the trial court determined that the "protrusion from the walkway sidewalk is an imperfection in the walkway itself," that "a sidewalk defect of a vertical discontinuity of two inches or more as stated in the statute, is always open and obvious, thus, [the defense of open and obvious] is a violation of public policy," and that there was a question of fact as to whether the danger was open and obvious or had special aspects.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

The City argues that the trial court erred by denying its motion for summary disposition. The court's denial of a motion for summary disposition is reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). We also review de novo questions of government immunity. *Petersen Fin LLC v Kentwood*, 326 Mich App 433, 441; 928 NW2d 245 (2018). This Court also reviews de novo the proper interpretation of statutes. *State Farm Fire & Cas Co v Corby Energy Servs*, Inc, 271 Mich App 480, 483; 722 NW2d 906 (2006). Summary disposition under MCR 2.116(C)(7) is appropriate when immunity is granted by law. When reviewing a (C)(7) motion, this Court considers the documentary evidence submitted by the parties. *Estate of Miller v Angels' Place, Inc*, 334 Mich App 325, 329; 964 NW2d 839 (2020). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the nonmoving party. *Id*. at 330. "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, whether summary disposition is proper is a question of law for the Court." *Id*.

B. ANALYSIS

"Under the GTLA, governmental agencies and their employees are generally immune from tort liability when they are engaged in the exercise or discharge of a governmental function." *Roy v Swager*, 501 Mich 52, 62; 903 NW2d 366 (2017); MCL 691.1407(1). The immunity conferred by the GTLA is broad, and, although there are several exceptions, the exceptions are "narrowly construed." *Plunkett v Dept' of Transp*, 286 Mich App 168, 181; 779 NW2d 263 (2009). At issue in this case is the "highway exception" under MCL 691.1402, which provides that a plaintiff may recover damages "resulting from a municipalities failure to keep highways—including sidewalks—in reasonable repair and in a condition reasonably safe and fit for travel . . . ." *Bernardoni v City of Saginaw*, 499 Mich 470, 473; 886 NW2d 109 (2016) (quotation marks and citation omitted). More specifically, a municipality "in which a sidewalk is installed adjacent to a municipal, county, or state highway" has a duty to maintain such a sidewalk "in reasonable repair." MCL 691.1402a(1). For a plaintiff to successfully argue a claim of this nature, he or she must show that at least 30 days before the occurrence of the injury, the municipality knew, or should have known, of the existence of the defect in the sidewalk. MCL 691.1402a(2). Moreover, the

[1] The City also argued lack of notice; however, it withdrew that part of its argument from consideration during oral argument on its motion. Therefore, we will not address that argument in this opinion.

plaintiff must rebut the statutory presumption that the municipality maintained the sidewalk in reasonable repair. MCL 691.1402a(3). The presumption may be rebutted if the plaintiff shows that a proximate cause of the injury was one 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. [MCL 691.1402a(3).]

Finally, our Legislature has provided that municipalities may assert "any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious." MCL 691.1402a(5).

1. OPEN AND OBVIOUS

We first address the City's argument that it is not liable for Mann's injuries because the metal stub that he tripped over was open and obvious. The trial court found that applying the open and obvious defense to a claim brought under MCL 691.1402a violated public policy. As indicated above, however, our Legislature has expressly stated that the common-law defense of open and obvious is expressly available to municipalities. MCL 691.1402a(5). "[W]here the language of the statute is clear, it is not the role of the judiciary to second-guess a legislative policy choice; a court's constitutional obligation is to interpret, not rewrite, the law." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Thus, whether a statute is "fair" or "unfair" is not a proper consideration for this Court. *Id*. Instead, "it is for the Legislature, not this Court, to address the policymaking considerations that are inherent in statutory lawmaking." *Brickey v McCarver*, 323 Mich App 639, 647; 919 NW2d 412 (2018).

The court also found that there was a question of fact as to whether the danger was open and obvious. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). The test requires an inquiry of "the objective nature of the condition of the premises at issue." *Id*. (quotation marks and citation omitted). Until recently, our Supreme Court held that whether a danger is open and obvious must be analyzed under the element of duty, and that, in cases where the danger was open and obvious, a premises possessor would only be liable if the plaintiff provided "evidence of special aspects of the condition." *Lugo v Ameritch Corp, Inc*, 464 Mich 512, 514, 516-517; 629 NW2d 384 (2001). However, our Supreme Court overruled that precedent in *Kandil-Elsayed v F & E Oil, Inc*, ___ Mich ___, ___; ___ NW2d ___ (2023) (Docket Nos 162907 & 163430); slip op at 2. In *Kandil-Elsayed*, the Court explained that, under the common law, "the open and obvious nature of a condition is relevant to breach and the parties' comparative fault." *Id*. Moreover, the Court expressly overruled the special-aspects doctrine, explaining that "when a land possessor should anticipate the harm that results from an open and obvious condition, despite its obviousness, the possessor is not relieved of the duty of reasonable care." *Id*. The *Kandil-Elsayed* summarized the current state of the law as follows:

> a land possessor owes a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land. If the plaintiff establishes that the land possessor owed plaintiff a duty, the next step in the inquiry is whether there was a breach of that duty. Our decision does not alter the standard of reasonable care owed to an invitee, . . . Rather, as has always been true, a land possessor need only exercise reasonable care under the circumstances. As part of the breach inquiry, the fact-finder may consider, among other things, whether the condition was open and obvious and whether, despite its open and obvious nature, the land possessor should have anticipated harm to the invitee. If breach is shown, as well as causation and harm, then the jury should consider the plaintiff's comparative fault and reduce the plaintiff's damages accordingly. A determination of the plaintiff's comparative fault may also require consideration of the open and obvious nature of the hazard and the plaintiff's choice to confront it. [*Id*. at ___; slip op at 43-44.]

Under the *Kandil-Elsayed* framework, questions of material fact remain as to whether the City breached its duty and whether Mann was comparatively at fault. The dangerous condition was a metal stub that was over 5 inches high. It was in the middle of the sidewalk near a bus stop. The height and placement of the metal stub are relevant to whether the condition was open and obvious, i.e., whether "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." See *Hoffner*, 492 Mich at 461. There is some evidence to suggest that the City did not exercise reasonable care under the circumstances; specifically, the defect has existed for at least 13 years. Yet, there is also some evidence to suggest that, even if the City breached its duty, a jury may find that Mann was comparatively negligent because he tripped over the metal stub without seeing it because he was looking backward while he was walking. Because factual questions remain, notwithstanding that the court applied the now-overruled framework set forth by *Lugo* and its progeny, we conclude that the trial court did not err by denying summary disposition on the question of whether the hazardous condition was open and obvious.

2. NATURE OF DEFECT

Next, we consider the City's argument that the highway exception does not apply because the metal stub is not part of the sidewalk. Under MCL 691.1402a(1), the City has a duty to "maintain the *sidewalk* in reasonable repair." (Emphasis added). It is not liable for a breach of that duty unless Mann proves that at least 30 days before his injury, the City "knew or, in the exercise of reasonable diligence, should have known of the existence of the defect *in the sidewalk*." MCL 691.1402a(2). The term "sidewalk" is defined as "a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel." MCL 691.1401(f).[2]

[2] The dissent claims that the question to be answered is "whether an object *embedded in* the concrete sidewalk and creating a five-inch vertical discontinuity in the middle of the sidewalk is 'in the sidewalk.' " Respectfully, we disagree. The question is whether *the sidewalk* is defective,

Mann argues that the signpost is part of the sidewalk because it is embedded in the sidewalk. He points to no language in the GTLA to support that position. Further, he does not point to any caselaw supporting his interpretation. In contrast, the City identifies two cases which it contends support its position that the sign post is not part of the sidewalk. We address each case in turn.

First, in *LaMeau v Royal Oak*, 289 Mich App 153, 169; 796 NW2d 106 (2010), overruled by 490 Mich 949 (2011), the Court considered whether the City of Royal Oak was liable for injuries caused by a "guy wire" that was anchored in the sidewalk at one end. The majority concluded, in relevant part, that the embedded anchor and guy wire "were part of the sidewalk" because they did not involve external conditions, such as ice, snow, or oil, and because the anchor and guy wire were not fixtures attached to the sidewalk after its construction. *Id*. at 170-171. The Court concluded that liability for defects in the sidewalk existed "even if the defect in the sidewalk is occasioned by the presence of a structure that the municipality would normally not have a duty to maintain in reasonable repair." *Id*. at 171. The Supreme Court, however, overruled the majority, and adopted the dissenting opinion. *LaMeau v Royal Oak*, 490 Mich 949 (2011). Unlike the majority, the dissent expressly found that the pole and the guy wire extending from it were not "part of the sidewalk." *LaMeau*, 289 Mich App at 187 (TALBOT, J., dissenting). Moreover, the dissent noted that "sidewalk defects [were limited] to imperfections occurring in the walkway itself." *Id*. at 188, citing *Buckner Estate*, 480 Mich 1243, 1244; 747 NW2d 231 (2008). Although Mann argues on appeal that this case is distinguishable from *LaMeau* because the defect is "embedded in the middle concrete," the *LaMeau* dissent adopted by the Supreme Court found no liability despite the fact that the anchor for the guy wire was embedded in the sidewalk. Mann offers no rationale for why an external object embedded in concrete results in liability when it is in the center of the sidewalk as opposed to the sidewalk's edge, and we can discern no meaningful distinction between the defect in this case and the defect in *LaMeau*.

We recognize that Mann tripped over the protruding portion of the defect, whereas the plaintiff in *LaMeau* was killed when he came into contact with the guy wire extending over the sidewalk. The *LaMeau* plaintiff, however, would not have been injured but for the fact that the guy wire was anchored in the sidewalk on one side and on a utility pole on the other side. See *LaMeau*, 289 Mich App at 169. Thus, like the sign post in this case, the guy wire was, in fact,

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which requires an analysis of whether the sign post is considered to be part of the sidewalk. As noted above, "sidewalk" is statutorily defined as "a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel." MCL 691.1401(f). The definition, notably, does not indicate that a sidewalk consists of both the paved portion of the sidewalk and any object embedded in that paved portion. In prior cases, this Court has determined that objects—such as the accumulation of ice and snow—*on* the sidewalk are not part of the sidewalk. See *LaMeau*, 289 Mich App at 170-171. Likewise, we conclude that the statutory definition does not include distinct objects—such as sign posts—embedded in the sidewalk.

attached to the sidewalk, and it would be disingenuous to argue that the *LaMeau* plaintiff was killed by a defect that was not, in any way, connected to the sidewalk.[3]

Next, in *Weaver v City of Detroit*, 252 Mich App 239, 246; 651 NW2d 482 (2002), the Court concluded that a streetlight pole was not part of a "highway."[4] In that case, the Court held that "the plain language of the statute does not support the conclusion that streetlight poles are included within the definition of the term 'highway.' " *Id*. *Weaver*, therefore, stands for the proposition that in order for a defect to be considered part of the sidewalk, it must first satisfy the statutory definition of sidewalk. In this case, Mann suggests that the sign post is part of the sidewalk because it is embedded in the middle of the sidewalk. However, "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). As noted above, the relevant statutory definition of sidewalk refers, generally, to "a paved public sidewalk intended for pedestrian use . . ." MCL 691.1401(f). A sign post, regardless of whether it is maintained in pristine condition or—as in this case—is cut down so that only a metal stub remains—is not a paved public sidewalk intended for pedestrian use.

Finally, we find persuasive the decision in *Ali v City of Detroit*, 218 Mich App 581; 554 NW2d 384 (1996). In *Ali*, a bus passenger shelter collapsed on the plaintiff. *Id*. at 584. One of the issues involved in the appeal was whether plaintiff's claim fell within the highway exception to governmental immunity. MCL 691.1402(1). This Court held that the highway exception did not "include fixtures attached to the sidewalk." *Ali*, 218 Mich App at 588. This Court reasoned that the "Legislature's exclusion of light poles and trees from the scope of the highway exception evinces its intent that the exception not include fixtures." *Id*. at 589 (citation omitted). Moreover, the bus passenger shelter was "a freestanding structure" that was "linked with the sidewalk solely

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[3] The dissent attempts to distinguish *LaMeau* by asserting that the plaintiff was injured by a guy wire that was "several feet" above the sidewalk rather than by an object "in" or "on" the sidewalk. Yet, the guy wire in *LaMeau* was not just an object existing several feet above the sidewalk. Rather, it was anchored to (i.e. imbedded in) the sidewalk itself. *LaMeau*, 289 Mich App at 160. The fact that the injury was not caused by the plaintiff tripping over the anchored part of the wire as opposed to the part of the wire that was stretched above the sidewalk is, therefore, a distinction without meaning. Indeed, if we were to apply the dissent's logic to this case, we would have to conclude that the portion of the sign post that is connected to, but nevertheless above, the sidewalk is not part of the sidewalk and, therefore, Mann was not injured by what the dissent believes is a sidewalk defect. Further, it is unclear under the dissent's logic the exact point at which an object that is embedded into the sidewalk- but also extends above the sidewalk-would be akin to the stub in this case and at which point it would be similar to the guy wire in *LaMeau*. For instance, if the sign post had not been cut and Mann was injured by a fully functional sign post and sign, would the dissent still claim that Mann's injuries were caused by a defect in the sidewalk, notwithstanding that he would have collided with an object separate and distinct from the sidewalk, albeit one that was embedded in the concrete? Because we see no meaningful distinction between an anchored guy wire and an embedded sign post, we cannot ascribe to the dissent's strained analysis of *LaMeau*.

[4] The term "highway" as used in the GTLA, by definition, includes sidewalks. MCL 691.1401(c).

by its placement." *Id*. Considering that the highway exception must be narrowly construed, the Court concluded "that it does not encompass bus passenger shelters that are attached to the sidewalk." *Id*. We conclude that a sign post—even one that is cut down—is a separate fixture that is attached to the sidewalk. It does not become part of the sidewalk merely by being embedded in the concrete of the sidewalk.

In light of the statutory definition of sidewalk and the above caselaw, we are constrained to rule that a sign post is not part of the sidewalk. Regardless of how irresponsible the City may be for allowing a metal stub that is over five inches high to exist in the middle of its sidewalk (and near a bus stop), the Legislature has determined that no liability exists under the present circumstances.

Reversed and remanded for entry of an order granting summary disposition to the City. We do not retain jurisdiction. No taxable costs are awarded. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Thomas C. Cameron

STATE OF MICHIGAN

COURT OF APPEALS

KENNETH MANN,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
November 2, 2023

No. 361637
Wayne Circuit Court
LC No. 2021-003705-NO

Before: SHAPIRO, P.J., and M. J. KELLY and CAMERON, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. The question is whether an object *embedded in* the concrete sidewalk and creating a five-inch vertical discontinuity in the middle of the sidewalk is "in the sidewalk" for purposes of the highway exception to governmental immunity. The injury-causing object is the remnant of a street sign installed before the sidewalk existed, when the area was grass-covered. When the sidewalk was being constructed, the old street sign was supposed to be removed. However, for reasons unknown, rather than removing the entire sign, the sign was cut five inches above the ground and the stub was left in place when the sidewalk was poured. It appears that the stub itself, which is four inches in diameter, was also filled with concrete when the sidewalk was poured, as shown below:[1]

[1] The pop can in front of the pipe is for scale and is not otherwise relevant to this case.

The majority agrees that the sidewalk in question is a "sidewalk" for purposes of applying the highway exception to governmental immunity. MCL 691.1401(c), (f). MCL 691.1402a(1) provides that "[a] municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair." (Emphasis added).

MCL 691.1402a(3) grants municipal corporations a rebuttable presumption of reasonable repair, which may be rebutted by (a) "a vertical discontinuity defect of 2 inches or more in the sidewalk," or (b) a "dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity."

It is undisputed that the discontinuity that caused plaintiff's injury was greater than two inches. However, the majority concludes that the discontinuity is not "in the sidewalk." I disagree. The five-inch pipe is unquestionably "in the sidewalk"—it is bound to the sidewalk by concrete, partially submerged beneath the concrete surface, immobile, and unremovable unless the sidewalk slab is replaced.[2]

The majority bases its decision on a misreading of *LaMeau v Royal Oak*, 490 Mich 949 (2011). The facts in *LaMeau* were far afield from those presented in the instant case. In that case, the plaintiff was not injured because he struck or tripped over anything "in," or even "on," the sidewalk. Rather, he was injured while riding a motor scooter when his head and neck struck a guy wire several feet *above* the sidewalk. The wire ran from a point several yards up a nearby utility pole and stretched diagonally to the ground where the wire was anchored to the far edge of the sidewalk. Plaintiff made no contact with the anchor nor was there a claim that the surface intended for walking caused his injury; the injury was caused by the guy wire exclusively. See *LaMeau v Royal Oak*, 289 Mich App 153, 158-162; 796 NW2d 106 (2010), overruled by 490 Mich 949 (2011). In adopting the Court of Appeals dissent, the Supreme Court rejected the claim that, because one end of the guy wire was anchored to the edge of the sidewalk, this somehow transformed the entire guy wire into something "in" the sidewalk. See *id*. at 170. Common sense reveals that a wire several feet above a sidewalk is not "in" the sidewalk.[3]

The majority relies on the fact that, in *LaMeau*, the Court rejected the argument that the wire was "connected" to the sidewalk. However, the object in the instant case was not merely "connected" to the sidewalk; it was *embedded in* the concrete. In *LaMeau*, the only portion of the guy wire in *LaMeau* that was actually in contact with the sidewalk was the anchor, which played no role in the plaintiff's injury. Moreover, in *LaMeau*, there was no vertical discontinuity, let alone one greater than two inches in the sidewalk.

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[2] According to Dictionary.com, the word "in," when used as a preposition, means "inclusion with a space, a place or limits." Dictionary.com, *In* <https://www.dictionary.com/browse/in> (accessed October 23, 2023).

[3] *LaMeau* made no comment as to whether the anchor would have been considered "in" the highway if the plaintiff had tripped over the anchor rather than striking the elevated guide wire.

The majority also relies on *Weaver v Detroit*, 252 Mich App 239, 246; 651 NW2d 482 (2002), which held that a streetlight pole was also not part of the "highway." *Weaver*, as well as *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), on which it was based, rested on the fact that traffic signs and streetlight poles are not within the *roadbed designed for travel*. But here, the remnant of the street sign was actually in the middle of the sidewalk. Despite the fact that utility poles or streetlight poles are not deemed part of the highway in and of themselves, if the five-inch-high remnant of one was embedded in the middle of the roadbed, it would plainly render the roadway itself defective.[4]

For these reasons, I would affirm the denial of summary disposition.

/s/ Douglas B. Shapiro

[4] I also do not find persuasive the majority's reliance on *Ali v Detroit*, 218 Mich App 581, 588; 554 NW2d 384 (1996), which held only that a freestanding structure does not constitute a defect in the sidewalk. The pipe in this case was neither a structure nor freestanding.