STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE SMITH, Plaintiff-Appellee,	UNPUBLISHED April 12, 2018
v	No. 337513 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellant.	LC No. 16-000666-NO

Before: SAWYER, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition in this premises liability – governmental immunity action. We affirm.

On appeal, defendant argues that trial court erred in denying its motion for summary disposition because plaintiff failed to establish that defendant knew or should have known of the sidewalk defect at least 30 days prior to plaintiff's accident, and because plaintiff's notice of the injury and defect failed to comply with MCL 691.1404. We disagree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7). The trial court denied defendant's motion for summary disposition because the trial court found that there was a genuine issue of material fact as to whether defendant knew or should have known of the sidewalk defect at least 30 days before plaintiff's accident. The trial court also denied the motion because it found that plaintiff's notice satisfied the statutory requirements of MCL 691.1404. This Court reviews de novo a trial court's denial of a motion for summary disposition based on governmental immunity. *Maskery v Bd of Regents of Univ of Mich*, 468 Mich 609, 613; 664 NW2d 165 (2003). Whether governmental immunity and the statutory exceptions to immunity are applicable are also reviewed de novo on appeal. *Briggs v Oakland Co*, 276 Mich App 369, 371; 742 NW2d 136 (2007). When reviewing a motion for summary disposition under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of "immunity granted by law." This Court "must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). This Court must consider any affidavits, depositions, admissions, or other documentary evidence to determine whether there is a genuine issue of material fact. *Id*. at 429. If there are no facts in dispute, and "if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is

barred is an issue of law for the court." *Id*. However, dismissal is inappropriate if a question of fact exists to the extent that factual development may provide a basis for recovery. *Id*.

I. HIGHWAY EXCEPTION

The Governmental Tort Liability Act broadly grants governmental agencies immunity from tort liability so long as the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). Governmental immunity is a characteristic of government, and not an affirmative defense. *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015). However, a governmental agency can be held liable if the plaintiff pursues a claim that falls within one of the six enumerated statutory exceptions. *Moraccini v City of Sterling Heights*, 296 Mich App 387, 392; 822 NW2d 799 (2012). The highway exception to governmental immunity, which is set forth in MCL 691.1402(1), states, in relevant part:

> (1) 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.

Governmental immunity affords broad protection, and its exceptions must be narrowly construed. *Kozak v City of Lincoln Park*, 499 Mich 465, 467; 885 NW2d 443 (2016). MCL 691.1402a(1) imposes liability on a municipal corporation for its failure to maintain a sidewalk in reasonable repair. For purposes of the highway exception, a "sidewalk" is "a pedestrian way that runs alongside a public roadway." *Haaksma v City of Grand Rapids*, 247 Mich App 44, 54; 634 NW2d 390 (2001).

MCL 691.1402a(2) imposes a limitation on a municipal corporation's liability. In relevant part, MCL 691.1402a provides:

> (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.

Therefore, in order to overcome governmental immunity, the plaintiff must demonstrate that the defendant knew or should have known of the existence of the defect at least 30 days before her accident. *Bernardoni v City of Saginaw*, 499 Mich 470, 473-474; 886 NW2d 109 (2016). Alongside MCL 691.1402a is MCL 691.1403, which states that there is a conclusive presumption that a defendant has knowledge of the defect "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." *Bernardoni*, 499 Mich at 474, quoting MCL 691.1403. Satisfaction of MCL 691.1403 will also satisfy the notice requirement of MCL 691.1402a(2). See *Robinson v City of Lansing*, 486 Mich 1, 19; 782 NW2d 171 (2010) ("MCL 691.1402a(1)(a) and MCL 691.1403 are

virtually identical; they both limit a municipality's liability to instances in which the municipality knew or should have known of the defect at least 30 days before the injury took place.").[1]

Defendant argues that for the purposes of MCL 691.1402a, plaintiff failed to submit adequate evidence that establishes that defendant had actual or constructive knowledge of the existence of the defect at least 30 days before plaintiff's accident. While there is no evidence that defendant had actual knowledge of the defect at least 30 days before plaintiff's accident, under MCL 691.1403, as applied to MCL 691.1402a; *Bernardoni*, 499 Mich at 474, defendant's constructive knowledge must be conclusively presumed. The Google picture from August 2015 demonstrates that the raised sidewalk was sufficiently substantial that it would have been readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place." MCL 691.1403. Although it is impossible to discern from the August 2015 Google picture alone whether the vertical discontinuity of 2 inches or more existed at the time the photograph was taken, it is clear that the condition took a significant amount of time to develop as demonstrated from the growing grass.

In addition to the August 2015 Google picture, plaintiff proffered an affidavit from Jeffrey Bartrem, a building inspector, which stated the defect "presented a clear and present hazard" to pedestrians and appeared to have been present for "many years." Defendant argues that plaintiff's engineering expert is irrelevant because he is not a sidewalk expert and that his opinion, which was based on his inspection of the sidewalk after plaintiff's accident, amounts to pure speculation. However, under MCR 2.116(G)(6), the content of an affidavit must be admissible in substance, not form. *Dextrom*, 287 Mich App at 428. It is not mandatory that an expert's qualifications and methods be incorporated into an affidavit that is submitted in opposition to a motion for summary disposition. *Id*. Whether Bartrem will ultimately satisfy the MRE 702 requirements to be sworn in as a witness is an issue reserved for trial.[2] *Id*. Therefore, in considering a motion for summary disposition under MCR 2.116(C)(7), the trial court did not err in considering Bartrem's affidavit. Accordingly, plaintiff has sufficiently demonstrated that

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[1] MCL 691.1402a(1)(a) no longer exists in content because the statute was recently amended. However, the language appears similar to the current statute, MCL 691.1402a(2).

[2] MRE 702, which governs the admissibility of expert testimony at trial, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

defendant knew or should have known of the sidewalk defect at least 30 days before her accident.

In addition to the 30-day knowledge requirement, plaintiff must also rebut the presumption that defendant has maintained the sidewalk in reasonable repair by proffering evidence of facts that show that a proximate cause of plaintiff's injury was a "vertical discontinuity defect of 2 inches or more in the sidewalk," or "[a] dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity," or both. MCL 691.1402a(3)(a) and (b). Whether the plaintiff has rebutted this presumption is a question of law. MCL 691.1402a(4).

With regard to the presumption that defendant maintained the sidewalk in reasonable repair pursuant to MCL 691.1402a(3), plaintiff properly rebutted this presumption by offering evidence of facts that her injury was proximately caused by a "vertical discontinuity defect of 2 inches or more in the sidewalk." Under MCL 691.1402a(3), plaintiff is required to show that a proximate cause of plaintiff's injury was a "vertical discontinuity defect of 2 inches or more in the sidewalk," that existed at least 30 days prior to her injury. Although the only temporal condition imposed on plaintiff is found in subsection (2), subsection (3)(a) defines the "defect" necessary to satisfy subsection (2). Therefore, plaintiff must show that her injury was the result of tripping over a 2 inch vertical discontinuity in the sidewalk. While it is impossible to discern from the August 2015 Google picture the exact height of the discontinuity, the trial court was presented with Bartrem's affidavit, which stated that the discontinuity was 3 inches high and that the defect appeared to have been present for "many years."[3] Plaintiff also proffered images—taken one week after the accident—showing that the vertical discontinuity measured approximately 2½ inches. It is clear from the August 2015 Google picture that this defect took time to develop given that grass has grown around the area. In light of the evidence, the trial court did not err in finding that plaintiff had rebutted the presumption of reasonable repair. Accordingly, defendant is not entitled to summary disposition because plaintiff established that defendant knew or should have known of the sidewalk defect at least 30 days before plaintiff's accident, and because plaintiff properly rebutted the presumption that defendant maintained the sidewalk in reasonable repair.

II. PLAINTIFF'S NOTICE LETTER

Defendant argues that plaintiff's claim is barred by governmental immunity because she failed to comply with the notice requirements of MCL 691.1404.

In order to sue a municipality for its failure to maintain a sidewalk in reasonable repair, the plaintiff must provide the defendant with notice of an injury and defect as a condition to

[3] Although Bartrem's affidavit states that there was a vertical discontinuity of three inches in the sidewalk, it appears from the November 2015 pictures that the vertical discontinuity is closer to two and one half inches.

recovery. MCL 691.1404(1); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200; 731 NW2d 41 (2007). In relevant part, MCL 691.1404(1) provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.[4]

The language of the statute is clear, and must be enforced as written, which means that noncompliance with this provision requires dismissal of the plaintiff's claim. *Rowland*, 477 Mich at 200. However, notice does not require a particular form, and will be sufficient so long as it is timely and contains the requisite information. *McLean v Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013).

Defendant argues that plaintiff herself was required to serve defendant notice. However, plaintiff complied with the requirements of the statute even though the notice letter was served by her attorney because there is nothing in the language of MCL 691.1404(1) that requires an injured person to personally serve the notice letter. MCL 691.1404 only requires that plaintiff "timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury," and provide an adequate description of "the injury sustained, the nature of the defect, and the names of known witnesses." *McLean*, 302 Mich App at 74. Further, this Court has not concluded that notices sent by the plaintiffs' attorneys are defective on the basis that they were served by an attorney rather than the plaintiff. In *McLean*, the plaintiff's attorney sent the defendant a notice that is substantially similar to the notice in this case. *Id*. at 71. The plaintiff's notice was ultimately deemed defective, not because it was sent by her attorney, but because it lacked sufficient details of the injury she sustained. *Id*. at 77-78. In *Burise v City of Pontiac*, 282 Mich App 646, 655; 766 NW2d 311 (2009), this Court took issue with the plaintiff's notice because it failed to include the name of a known witness, not because her attorney sent the letter to the City of Pontiac.

Defendant next argues that plaintiff's notice did not comply with MCL 691.1404 because she did not name witnesses known at the time of the alleged accident. However, the relevant witnesses under MCL 691.1404 are individuals "who witnessed the occurrence" of the injury and the defect. *Milot v Dep't of Transp*, 318 Mich App 272, 280; 897 NW2d 248 (2016). In other words, the plaintiff's notice must include the names of "witnesses who have pertinent information about the accident itself." *Id*. at 278. In this case, there were no witnesses to plaintiff's accident, nor did anyone inspect the sidewalk defect. According to plaintiff's deposition testimony, her mother was in the car, but did not see her trip. Although there were people on the sidewalk, plaintiff contends that their backs were turned away from her. Further,

[4] Subsection 3 refers to injured claimants who are under 18 years old and is not relevant to this case.

since plaintiff caught herself before falling to the ground, she asserts that no one inspected the defect. Therefore, plaintiff's notice satisfied MCL 691.1401(1) because the statute did not require plaintiff to identify anyone as a witness to her accident. Accordingly, defendant is not entitled to summary disposition because plaintiff's notice satisfied the statutory requirements of MCL 691.1404 for bringing suit under the highway defect exception to governmental immunity.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray