STATE OF MICHIGAN

COURT OF APPEALS

REBECCA CASTELLANOS,

Plaintiff-Appellee,

v

CITY OF PONTIAC,

Defendant-Appellant.

UNPUBLISHED
December 29, 2009

No. 286865
Oakland Circuit Court
LC No. 2007-082143-NO

Before: Murphy, C.J., and Meter and Beckering, JJ.

PER CURIAM.

In this "defective sidewalk" case, defendant appeals as of right the trial court's order denying its motion for summary disposition based on governmental immunity. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In plaintiff's complaint, she alleged that on August 5, 2006, she was walking along a sidewalk within defendant's jurisdiction and control "when she was caused to fall as a result of various defects including concrete irregularities involving a slab of concrete that was uneven, unstable and/or damaged, thereby causing her to fall to the ground inflicting upon her person severe, serious, permanent, and/or disfiguring injuries[.]" Defendant filed a motion for summary disposition, arguing that it was entitled to an inference that the sidewalk was kept in reasonable repair under the "two-inch" rule found in MCL 691.1402a, where the discontinuity defect was less than two inches. Defendant contended that discontinuity defects are measured only on the basis of height or vertical differences between concrete sidewalk slabs. Plaintiff argued that issues of fact existed as to whether there was a height discontinuity defect of less than two inches and that, assuming such a defect, discontinuity defects under MCL 691.1402a are not limited to height or vertical differences, but also include length and width differences. And, according to plaintiff, there was no issue of fact that the discontinuity defect exceeded two inches when measured by length, as the discontinuity ran the entire length of the concrete sidewalk slabs relative to the sides of the slabs that come together. Plaintiff also argued that, assuming an inference arose, the inference is rebuttable, and she rebutted the inference by way of an expert affidavit opining that the sidewalk was not kept in reasonable repair. Therefore, summary disposition should not be granted in favor of defendant. The trial court agreed with plaintiff's argument regarding interpretation of discontinuity defects, finding that length and width, as well as height, could be considered, and no inference arose because the discontinuity between the slabs exceeded two inches in length. The trial court also ruled that, even if the inference arose,

the affidavit from plaintiff's expert created a question of fact sufficient to rebut the inference that the sidewalk was in reasonable repair.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Also reviewed de novo are issues of statutory interpretation, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006), and governmental immunity, *Bennett v Detroit Police Chief*, 274 Mich App 307, 310-311; 732 NW2d 164 (2007). Under MCR 2.116(C)(7), summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.*

MCL 691.1402(1) imposes a duty of care on governmental agencies to maintain sidewalks under their control in reasonable repair so that the sidewalks are reasonably safe and convenient for public travel. *Gadigian v City of Taylor*, 282 Mich App 179, 182; 774 NW2d 352 (2009), lv gtd __ Mich __, issued November 19, 2009 (Docket No. 138323); MCL 691.1401(e) (defining "highway" as including sidewalks). "A person who sustains bodily injury . . . by reason of failure of a governmental agency to keep a [sidewalk] 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." MCL 691.1402(1). We note that the open and obvious danger doctrine is not applicable here because defendant has a statutory duty to maintain the sidewalks in reasonable repair. *Jones v Enertel, Inc*, 467 Mich 266, 267; 650 NW2d 334 (2002).

MCL 691.1403 provides:

> No governmental agency is liable for injuries or damages caused by defective [sidewalks] 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.

Additionally, as a condition of any recovery, the injured person must notify the governmental agency of the accident within 120 days, and he or she must "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." MCL 691.1404(1).

The "two-inch" rule, MCL 691.1402a(2), provides:

> 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.

In *Gadigian*, *supra* at 186, this Court addressed the "rebuttable inference" language in MCL 691.1402a(2), finding that the inference, when implicated and standing alone, "does not support summary disposition because the jury is still free to accept or reject the inference." The *Gadigian* panel stated that while the rebuttable inference allows the trier of fact to conclude that a municipality has properly maintained a sidewalk where there exists a discontinuity defect of less than two inches, "it does not compel the trier of fact to do so." *Id.* Inferences do not carry an obligation to find a certain fact. *Id.* A municipality may defend a negligence claim by simply relying on the statutory inference. *Id.* at 187-188. When a plaintiff submits contrary evidence, the trier of fact weighs all the evidence in reaching its verdict, and if the plaintiff fails to present contrary evidence, "the inference results in summary disposition or a directed verdict for the municipality." *Id.* at 188. In *Gadigian*, this Court held that the plaintiff "rebutted the inference . . . by presenting an affidavit signed by . . . an engineer, opining that the raised sidewalk slab 'was a trip hazard' given 'the height difference between adjoining slabs.'" *Id.* The Court noted that the expert's affidavit sufficed to rebut the statutory inference, setting forth specific facts and drawing reasonable expert conclusions based on those facts. *Id.* at 189. The *Gadigian* panel warned, "It is well settled that this Court may not assess credibility or weigh competing facts when reviewing a motion for summary disposition." *Id.* The Court concluded that, "[b]ecause the . . . affidavit tended to rebut the statutory inference that defendant maintained its sidewalk in reasonable repair, the affidavit created a jury-submissible question of fact." *Id.*

The expert affidavit offered in *Gadigian* is very comparable to the affidavit offered by plaintiff's expert here. In the case at bar, plaintiff's expert, after referencing certain facts, averred and opined in part:

> In the present case, it is my opinion, in part, that the sidewalk was not in reasonable repair for the reason that the height differential was significant (in this case, about two inches) and because the width discontinuity is also very significant (several feet across). The sidewalk height discontinuity is also non-uniform across the width of the sidewalk. One side is raised higher than the other side. Given the overall condition and nature of the sidewalk in this case, it is my professional opinion that the sidewalk was not in reasonable repair from a safety engineering standpoint. This sidewalk involves multiple hazards identified above, all of which, individually, and especially in combination with one another, result in an unreasonable danger to pedestrians.

Consistent with *Gadigian*, we may not assess the credibility of plaintiff's expert, nor may we weigh the evidence. *Gadigian* suggests that the evidentiary burden for a plaintiff to survive summary disposition in the face of an inference, standing alone, is fairly minimal, given that a jury would be permitted to completely ignore the inference if it chose to do so. We conclude that, because the affidavit from plaintiff's expert tended to rebut any presumed statutory inference that defendant maintained its sidewalk in reasonable repair, the affidavit created a jury-submissible question of fact, especially when it is considered in conjunction with plaintiff's deposition testimony explaining the fall. Accordingly, the trial court properly denied defendant's motion for summary disposition. Defendant argues, in the alternative, that even if the two-inch rule is not considered or does not provide a basis for summary disposition, the documentary evidence in general supports a conclusion that no reasonable juror would find that the sidewalk was in a state of disrepair and unreasonably dangerous. We decline to address this issue because

the arguments below focused on an analysis built around the two-inch rule, not apart from the rule, and thus the trial court did not address nor rule on the argument now being presented for the first time by defendant. Nothing in this opinion is to be read as barring defendant from raising the argument in the future should it desire.

In light of our holding, we see no need at the present time to address the question of whether a rebuttable inference arose in the first place, and we thus decline to construe MCL 691.1402a relative to whether it applies outside of height or vertical discontinuity defects. Assuming, without deciding, that an inference arose, defendant was still not entitled to summary disposition under *Gadigian*, given the expert affidavit submitted by plaintiff and plaintiff's deposition testimony.

Affirmed. We do not retain jurisdiction for purposes of any future issues that might arise in this case.

/s/ William B. Murphy
/s/ Jane M. Beckering