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STATE OF MICHIGAN

COURT OF APPEALS

BETTY WILLIAMS,

Plaintiff-Appellee,

v

CITY OF SAGINAW,

Defendant-Appellant.

UNPUBLISHED
February 20, 2020

No. 348910
Saginaw Circuit Court
LC No. 18-036643-NO

Before: FORT HOOD, P.J., and BECKERING and BOONSTRA, JJ.

BOONSTRA, J. (*dissenting*).

I respectfully dissent. I would reverse and remand for the entry of an order granting summary disposition in favor of defendant. In my view, the trial court erred by concluding that plaintiff had presented sufficient evidence to rebut the presumption of reasonable repair, and by concluding that a genuine issue of material fact existed regarding defendant's constructive notice of the defect.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

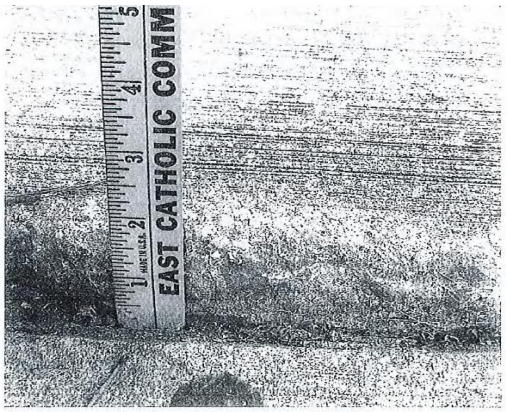
In December 2017, plaintiff tripped and fell on Michigan Avenue in Saginaw, sustaining injury. Within days after the fall, plaintiff and her granddaughter, Jimanesha Moore, returned to the site and Moore took photographs.[1] In June 2018, plaintiff filed a complaint for premises liability against defendant, alleging that she had tripped over a defect in the sidewalk that defendant knew or should have known required repair.

Defendant moved for summary disposition, arguing that plaintiff had not presented evidence that the sidewalk defect was a vertical discontinuity of more than 2 inches or that it had existed for at least 30 days prior to the accident, that plaintiff therefore had failed to overcome the

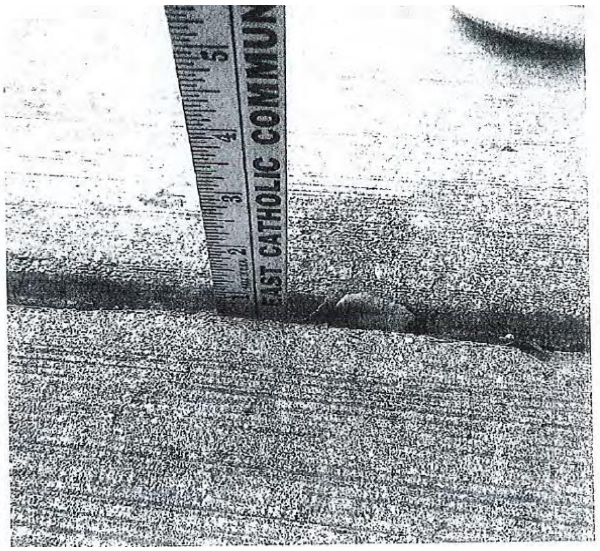
[1] Moore stated in an affidavit that this occurred on December 8, 2017, the day after the fall (as the majority opinion also reflects). Plaintiff testified in her deposition, however, that this occurred "a couple of days after [she] fell."

statutory presumptions found in MCL 691.1402a, and that defendant was entitled to governmental immunity. Defendant also argued that the defect was open and obvious. Defendant supported its motion with an inspection report prepared by a city employee, which stated that "[o]ne section of sidewalk is offset ½" . . . ," and related photographs, depicted here:[2]

Plaintiff responded to defendant's motion, appended the photographs taken by Moore, and argued that they showed that there was a vertical discontinuity of approximately 3 inches. Those photographs are depicted here:



SIDEWALK DEFECT
LOCATED IN FRONT OF MAC'S BAR
AT 118 N. MICHIGAN AVE. SAGINAW, MI.



[2] All photographs in this opinion have been cropped and resized for space reasons.

Plaintiff also attached an affidavit from Moore, which stated that she had measured "at the area where one part of the sidewalk slab in question was higher than the slab next to it," and that "[i]t appeared to be 3 inches higher than the slab next to it." Moore also stated in her affidavit: "After, [sic] I took the photos I looked nearby and there was a large tree next to this part of the sidewalk. In my opinion; [sic] the tree roots likely pushed this sidewalk slab up to this dangerous height over a long period of time of many months or years."

The majority affirms the trial court's determination that this evidence was sufficient to rebut the statutory presumption of reasonable repair, and to establish a genuine issue of material fact regarding defendant's constructive notice of the defect. I disagree in both respects.

As the majority acknowledges, the standard of review under MCR 2.116(C)(7) provides that if no genuine dispute over material facts exists, or reasonable minds could not differ as to the effect of those facts, "the question whether the claim is barred by governmental immunity is an issue of law" to be decided by the trial court. *Willett v Charter Twp of Waterford*, 271 Mich App 38, 45; 718 NW2d 386 (2006) (citations omitted). In the circumstances before us, I conclude that there is no genuine issue of material fact, and that the trial court should have determined as a matter of law that plaintiff's claim was barred by governmental immunity.

II. ANALYSIS

As the majority recognizes, the governmental tort liability act (GTLA) sets forth a number of conditions that a plaintiff must satisfy in order to recover damages for an injury related to a defective sidewalk. These include:

> (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*. [MCL 691.1402a (emphasis added).]

Moreover,

> (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court. [MCL 691.1402a(4).]

As the majority acknowledges, plaintiff did not allege a dangerous condition "other than solely a vertical discontinuity" in the sidewalk that caused her fall; therefore, plaintiff was required to rebut the presumption of reasonable repair under MCL 691.1402a(3)(a) with evidence that a vertical discontinuity of 2 inches or more existed. See *Moraccini v City of Sterling Heights*, 296

Mich App. 387, 396; 822 N.2d 799 (2012). Further, plaintiff was required to show that defendant knew or should have known of the defect at least 30 days before her fall, i.e., that the defect had existed for at least 30 days. MCL 691.1402a(2).

In my judgment, plaintiff failed as a matter of law in both respects. With regard to the height of the vertical discontinuity, defendant's inspection report affirmatively stated that "[o]ne section of sidewalk is offset by ½" . . .," i.e., that the vertical discontinuity measured only ½ inch. Therefore, without evidence that a vertical discontinuity of 2 or more inches existed at the time plaintiff fell, the presumption that defendant had maintained the sidewalk in reasonable repair would be unrebutted. *Moraccini*, 296 Mich App at 396.[3]

In response, plaintiff provided the trial court with black and white photocopies of two photographs. Those photographs show a ruler inserted into what appears to be a gap between two sidewalk slabs. While of poor quality, I find the photographs sufficient to conclusively demonstrate that the vertical discontinuity between the two slabs was less than 2 inches.[4] I further find this to be consistent with the depiction of the sidewalk in the photographs provided by defendant, and with defendant's inspection report describing the vertical discontinuity as ½ inch.

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[3] For some reason, and although plaintiff herself does not do so, the majority seems impliedly to call into question whether defendant's inspection report and photographs relate to the area where plaintiff fell, or reflect a measure of the vertical discontinuity between the sidewalk slabs (or something else). With regard to the report's statement that "[o]ne section of sidewalk is offset by ½" . . .," for example, the majority describes itself as being "unclear as to the height of the other sections of the sidewalk, and whether the city employee was measuring, and capturing in photos, the area where plaintiff fell." But the city's inspection report, which is dated December 15, 2017 (eight days after plaintiff's fall), states that it related to a citizen complaint that she had fallen "on the uneven sidewalk in front of Mac's Bar on 12/7/2017." This is precisely the area where plaintiff claims to have fallen on that date, and to which her own photographs relate. The report also does not purport to reflect a measure of one section of sidewalk while failing to measure "other sections of the sidewalk," as the majority suggests, but instead states that there was an "offset" of 1/2 inch. I know of no credible way to read that description other than that the report reflects a measure of the vertical discontinuity between the sidewalk slabs. Finally, the majority states that it "find[s] it befuddling why the ragged raised edge, as depicted in plaintiff's photograph, is not discernable in [defendant's] photographs." I would respectfully suggest that the majority's befuddlement derives not from any inconsistency between the photographs, but rather from the poor quality of plaintiff's photographs and the more distanced and wider-angle view of defendant's photographs.

[4] Even if the poor quality of plaintiff's photographs gives rise to some perception of ambiguity, this would not equate to a genuine issue of material fact regarding the measure of the alleged discontinuity. Whether the presumption of reasonable repair found in MCL 691.1402a(3)(a) has been rebutted "is a question of law for the court." MCL 691.1402a(4). We review questions of law de novo. See *Co Rd Ass'n of Mich*, 287 Mich App at 117-118. I would find, on de novo review of this issue, that plaintiff's photographs do not suffice to overcome the presumption of reasonable repair.

And I find Moore's affidavit sufficiently vague and imprecise as to be of little evidentiary significance.[5]

Where I believe the majority and the trial court have gone astray is in failing to appreciate the import of the fact that the photographs were not taken from ground level. That is, the photographs were taken from an elevation above that of the sidewalk (and above the ruler purporting to measure the vertical discontinuity of the sidewalk). The elevated camera angle distorts the perception of where the sidewalk and the ruler meet, and unless that distortion is taken into account, can create a false perception that the sidewalk level is higher on the ruler than it actually is. Once one factors in the effect of the angular distortion, there is no question in my judgment that the measure of the vertical discontinuity is less than 2 inches, and that plaintiff accordingly failed as a matter of law to rebut the statutory presumption. I therefore conclude that plaintiff's evidence was insufficient to overcome the presumption found in MCL 691.1402a(3)(a).

Additionally, plaintiff presented no evidence that the defect had existed for 30 days. Although the trial court referred to an unpublished opinion of this Court in which we held that this requirement was satisfied by evidence that the defect was caused by the growing roots of a tree, I note that in that case the plaintiff presented the trial court with photographs showing tree roots growing under the raised portion of the sidewalk, as well as a city report stating that the sidewalk had some areas of offset caused by trees. Here, Moore merely opined, based on her unsupported assertion of the presence of a "nearby large tree," that the defect had been caused by the growth of tree roots. Plaintiff provided no evidence, such as a photograph, to lend any greater specificity to the adjectives "nearby" and "large," as used in Moore's affidavit, or to otherwise support Moore's stated opinion.

No matter how favorably construed towards plaintiff, this "evidence" amounts to nothing more than pure speculation. Plaintiff did not present Moore as an expert witness and, as a lay witness, her opinion is not helpful to the determination of a fact at issue. See MRE 701; see also *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455; 540 NW2d 696 (1995). In considering evidence presented on a motion for summary disposition, a trial court should consider that evidence to the extent it would be admissible as evidence at trial. *Willett*, 271 Mich App at 45. I can discern no basis on which Moore's lay opinion of the cause of the defect would be admissible as relevant evidence. Mere speculation in an affidavit is insufficient to raise a genuine factual dispute. See *Karbel v Comerica Bank*, 247 Mich App 90, 107; 635 NW2d 69 (2001).

Further, although I agree with the majority that Moore need not have been an arborist or other relevant expert, the evidence in this case provides no factual predicate for the majority's assertion that "tree roots can be observable to the average layman if sufficiently growing out of or near a sidewalk." While that statement may be true as a general proposition, Moore's affidavit does not state that she observed tree roots *at all*, much less tree roots "growing out of or near" the sidewalk. Rather, her affidavit merely states that she observed "a large tree next to this part of the sidewalk." The majority's acceptance of this statement and the speculation that necessarily

[5] Moore's affidavit stated merely that the vertical discontinuity "appeared" to be 3 inches, and then relied on the photographs as providing the support for that characterization.

accompanies it (i.e., that the tree's roots must have pushed the sidewalk up over a period of months or years), taken to its logical conclusion, means that the mere presence of a nearby tree would always create a genuine issue of material fact concerning a municipal defendant's notice of any sidewalk defect. I would instead hold that Moore's affidavit, which only states that she saw a tree near the sidewalk and expressed a personal opinion that the tree's roots must have caused it, was not sufficient in this case to create an issue of material fact regarding defendant's constructive notice.

Because Moore's affidavit reflected mere speculation, *Karbel v Comerica Bank*, 247 Mich at 107, and plaintiff offered no other evidence that the defect had existed for at least 30 days prior to her fall, I would conclude that she has failed to demonstrate that defendant had actual or constructive notice of the defect under MCL 691.1402a(2). See *Bernardoni*, 499 Mich at 475-476 ("[P]laintiff's attempt to prove the sidewalk's past condition simply by proving its current condition fails, as more is needed to explain why the current condition is probative of the past condition.").

For these reasons, I would hold that the trial court erred by determining that plaintiff had satisfied the conditions of MCL 691.1402a and that her claim was therefore not barred by governmental immunity under the GTLA. In light of this conclusion, I would decline to address whether the defect was open and obvious.

/s/ Mark T. Boonstra