# STATE OF MICHIGAN

# COURT OF APPEALS

LOUISE K. OTTO

Plaintiff-Appellant,

v

THE CITY OF GROSSE POINTE, a Michigan Municipal Corporation,

Defendant-Appellee.

UNPUBLISHED
February 11, 1997

No. 187981
Wayne Circuit Court
LC No. 94-425511 NO

Before: Doctoroff, P.J., and Hood and P.J. Sullivan,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant. We affirm.

On February 18, 1994, plaintiff was walking on the west side of Kercheval Road, near the intersection of St. Clair, in Grosse Pointe. She tripped over a vertical projection of a concrete slab and injured herself. Evidence revealed that one concrete slab of the sidewalk was three-quarters of an inch higher than the adjacent slab. Plaintiff did not recall whether her foot was caught in the raised portion of the sidewalk. Prior to the fall, plaintiff had walked on the subject sidewalk regularly. Plaintiff alleged that defendant failed to maintain the sidewalk in reasonable repair so as to be reasonably safe and convenient for public travel as required by MCL 691.1402; MSA 3.996(102).

Defendant moved for summary disposition, arguing that: (1) plaintiff failed to establish a causal relationship between her fall and defendant's sidewalk; (2) the "two-inch rule" barred plaintiff's claim; and (3) defendant had no notice of the alleged defect as required for recovery under the defective highway statute. Plaintiff responded that her deposition testimony and photographs established sufficient evidence as to causation, that the "two-inch rule" had been abolished, and that she had provided the court with a report of an expert who wrote that the defect existed for longer than thirty days, giving defendant notice under the statute.

* Circuit judge, sitting on the Court of Appeals by assignment.

The trial court granted summary disposition in favor of defendant. The trial court stated that it was granting summary disposition based on defendant's argument that plaintiff had not established causation. The court did not definitively rule on defendant's "two-inch rule" argument, and the court rejected defendant's argument that it did not have notice of the defect. The court, however, stated that it was granting summary disposition "in its entirety and as to each of the arguments as set forth in defendant's motion and supporting brief."

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant on the ground that there is no genuine issue of material fact regarding causation. We disagree. We review the trial court's grant of summary disposition de novo to determine if defendant was entitled to judgment as a matter of law. *Glancy v City of Roseville*, 216 Mich App 397, 398; 549 NW2d 78 (1996).

Generally, all governmental agencies are immune from tort liability where the government agency was engaged in the exercise or discharge of a governmental function. MCL 691.1407; MSA 3.996(107). The Legislature, however, made an exception with regard to highways. The governmental agency must maintain a highway in reasonable repair so that it is reasonably safe and convenient for public travel. MCL 691.1402; MSA 3.996(102). Sidewalks are included in the definition of a "highway." MCL 691.1401(e); MSA 3.996(101)(e). Therefore, defendant may be held liable if plaintiff sufficiently established the elements of negligence. To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and, (4) damages. *Shultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Breach of the duty requires determination of a general standard of care and a specific standard of care; causation requires both cause in fact and proximate cause. See *Eichhorn v Lamphere School District*, 166 Mich App 527, 545; 421 NW2d 230 (1988).

In this case, plaintiff failed to present any evidence to establish the cause of her injuries. Evidence revealed that one concrete slab of defendant's sidewalk was three-quarters of an inch higher than the adjacent slab. Plaintiff testified that she did not remember if her foot was caught on the sidewalk. Therefore, plaintiff cannot establish that the sidewalk's elevation caused her injuries. Plaintiff's belief that her foot "must have caught" the sidewalk or her "impression" that she tripped over the sidewalk is insufficient to establish causation. The mere possibility that defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two. *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994), quoting *Jordon v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976). The trial court, therefore, properly granted summary disposition in favor of defendant.

In light of our decision regarding plaintiff's failure to establish causation, it is unnecessary to rule on the remaining two grounds on which the trial court granted summary disposition. We will, nevertheless, address plaintiff's remaining claims for purposes of clarity. Plaintiff argues that the trial court erred in indicating that summary disposition in favor of defendant was also on the ground that the "two-inch rule" precluded recovery. We agree. The "two-inch rule" was the law that a municipality is not subject to liability for negligence because of a discontinuity of two inches or less in a sidewalk. See,

e.g., *Harris v Detroit*, 367 Mich 526; 117 NW2d 32 (1962); *Berry v Detroit*, 341 Mich 702; 69 NW2d 145 (1955). In 1972, in *Rule v Bay City*, 387 Mich 281, 283; 195 NW2d 849 (1972), the Supreme Court abolished the "two-inch rule."

In *Glancy, supra*, this Court addressed, for the first time, the issue of whether the Legislature, in the 1986 amendment of the governmental immunity statute, MCL 691.1401 *et seq*.; MSA 3.996(101) *et seq*., intended to reinstate the "two-inch rule." This Court concluded that the 1986 amendment was not intended to affect municipal liability, and, therefore, *Rule* remains good law and the "two-inch rule" was not reinstated. *Glancy, supra* at 400. Accordingly, the trial court erred in granting summary disposition on the ground that the "two-inch rule" precluded defendant's liability.

Plaintiff also argues that the trial court erred in indicating that summary disposition in favor of defendant was granted on the ground that defendant did not have notice of the defect in the sidewalk. Again, we agree. No governmental agency is liable for injuries by virtue of MCL 691.1402; MSA 3.996(102), unless it knew or should have known of the existence of the defect and had reasonable time to repair the defect before the injury took place. MCL 691.1403; MSA 3.996(103). Notice may be shown by: (1) actual notice; (2) existence of the defect for over thirty days, which establishes a conclusive presumption of notice; or, (3) evidence showing that the agency should have discovered and repaired the defect in the exercise of reasonable diligence, i.e., constructive notice. *Peterson v Dep't of Transportation*, 154 Mich App 790, 795; 399 NW2d 414 (1986); *Beamon v Highland Park*, 85 Mich App 242, 245; 271 NW2d 187 (1978).

In this case, plaintiff presented the report of an expert who indicated that after a visual exam, in his view, the settlement occurred several years prior. Therefore, a reasonable inference existed that the defect in the sidewalk existed for more than thirty days, which established a conclusive presumption of notice. Accordingly, the trial court erred in granting summary disposition on the ground that defendant did not have notice of the defect in the sidewalk.

These conclusions do not, however, require reversal since summary disposition was properly granted on the causation issue.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Paul J. Sullivan