

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RUSSELL ALLGAIER,

Plaintiff-Appellant,

v

CITY OF WARREN,

Defendant-Appellee.

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UNPUBLISHED

August 22, 2006

No. 268102

Macomb Circuit Court

LC No. 05-000127-NO

Before: Davis, P.J. and Sawyer and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's decision granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm on an alternate basis. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

**I. FACTS**

Plaintiff, who is legally blind, tripped on a portion of a city sidewalk that had a height differential between adjoining slabs of approximately one and one-half inches. Defendant's engineer testified that defendant makes repairs when there is "a minimum of three-quarters of an inch at any one point or a minimum of a half an inch across the entire confluence." The trial court held that there were issues of fact regarding (1) whether plaintiff could identify where he fell; and (2) whether plaintiff had rebutted the statutory inference in MCL 691.1402a that the sidewalk was in reasonable repair since the height differential was less than two inches. The trial court concluded that plaintiff failed to present sufficient evidence to create a genuine issue of material fact regarding notice or constructive notice. The trial court acknowledged that notice would be conclusively presumed under MCL 691.1403 if "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." However, the trial court determined that plaintiff's expert's assessment that "this damage has been in existence more than 30 days before the fall as evidenced by the deterioration and weathered driveway slab" was conclusory.

**II. STANDARD OF REVIEW**

We review de novo a trial court's grant of summary disposition. In deciding a motion under MCR 2.116(C)(10), the trial court considers the pleadings, and any affidavits, depositions,

admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

### III. ANALYSIS

Plaintiff argues that the trial court erred in determining that there was no issue of fact on the question of notice. We agree. MCL 691.1403 provides:

No governmental agency is liable for injuries or damages caused by defective highways 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.* [Emphasis added].

Photographs of the defective sidewalk that were taken within one month of plaintiff's accident depict a newer slab of sidewalk elevated more than one inch next to an older slab. Plaintiff's expert opined that the older slab sank from vehicular travel, not that the newer slab raised. To the casual observer, it would be hard to imagine this shift having occurred during July and August, which would have made up the 30 days preceding the accident. Moreover, plaintiff's expert did not point just to the weathering of the driveway as evidence of the age of the defect, but to the deterioration. While no one conclusively stated that the elevation occurred more than 30 days before plaintiff's accident, a jury could draw a reasonable inference that it was more than 30 days old based on the expert's opinions and the photographs. Accordingly, this was not a proper basis for summary disposition.

However, defendant argues in the alternative that plaintiff failed to present evidence to overcome the inference that the sidewalk was maintained in reasonable repair. We agree. MCL 691.1402a(2) provides:

(2) 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.

There is no dispute that the differential here was less than two inches. Defendant's engineer had testified that defendant would repair where a height differential exceeded three-quarters of an inch and plaintiff's expert opined that the height differential was an unreasonably dangerous condition. Thus, the trial court concluded that there was "a question of fact whether plaintiff has rebutted the inference that the sidewalk was maintained in reasonable repair."

The city engineer's testimony tended to rebut the inference that the failure to repair was reasonable where the differential was less than two inches. However, the engineer's testimony was based on defendant's adoption of a policy that repairs would be undertaken at an earlier time. If the engineer's testimony were sufficient to rebut the inference, it would not be because evidence established that the specific condition made the failure to repair unreasonable in this

instance, but solely because defendant, as a matter of policy, drew the line for repairs more narrowly than the Legislature drew the line for purposes of determining immunity. We conclude that substituting defendant's policy for the state's statutorily drawn policy is not evidence that rebuts the inference of reasonable repair drawn by the state. Thus, summary disposition should have been granted on this alternative basis.

Affirmed.

/s/ David H. Sawyer

/s/ Bill Schuette