

STATE OF MICHIGAN
COURT OF APPEALS

SYLVIA GUTIERREZ,

Plaintiff-Appellee,

v

CITY OF SAGINAW,

Defendant-Appellant.

UNPUBLISHED

March 29, 2007

No. 272619

Saginaw Circuit Court

LC No. 05-057601-NO

Before: Zahra, P.J. and Bandstra and Owens, JJ.

PER CURIAM.

In this slip and fall case, defendant appeals as of right from the circuit court's order denying its motion for summary disposition. We reverse. This case is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff alleged that on September 2, 2004, at approximately 9:00 p.m., she was walking along a sidewalk when she caught her toe in a crack and fell, fracturing her right wrist. She brought suit, alleging that defendant failed in its duty to maintain the sidewalk. Defendant sought summary disposition on the ground that the piece of pavement in question was less than two inches above the adjacent pavement, and thus fell under the rebuttable presumption that the sidewalk was properly maintained. MCL 691.1402a(2). The trial court denied the motion, explaining as follows:

I do believe there is an issue of fact pursuant to the rebuttable presumption and the expert's affidavit and the fact that there was no inspection policy for the City to be placed on notice if this existed more than 30 days and less. So I think there's a genuine issue of material fact, and I'm denying the motion for summary disposition at this time.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). However, an exception exists for certain violations of the duty to keep a “highway in reasonable repair so that it is reasonably safe and convenient for public travel.” MCL 691.1402(1). For present purposes, “highway” includes sidewalks. *Id.*; MCL 691.1401(e). A municipality faces liability for injuries caused by defects in sidewalks if that municipality knew or should have known of the defect for at least 30 days before the incident. MCL 691.1402a(1)(a). However, “A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair.” MCL 691.1402a(b)(2). Defendant sought summary disposition solely in reliance on the two-inch rule.

Plaintiff submitted an affidavit from an investigator, reporting that “[t]his raised slab ranging from $\frac{3}{4}$ to 1 inch high traversed the entire width of the sidewalk,” that “[s]triking this undetectable obstruction due to the darkness of night caused her to lose her balance, fall and become injured,” and that “[g]ait analysis studies have shown that the average pedestrian when walking across a level surface will have a clearance between $\frac{3}{8}$ to $\frac{5}{8}$ of an inch between toe and ground.” The investigator opined, “This elevated slab was an unavoidable obstacle along her path of travel,” which “created an unreasonable risk of harm for travel at any time.” The investigator additionally asserted that “[t]he raised slab was caused by the continued growth of shallow tree roots,” and that the “displacement defect has existed for an extended period of time, well in excess of 30 days as evidenced by the slab separation and significant elevation change.”

That the defect over which plaintiff makes issue was less than two inches, thus invoking the rebuttable presumption of a sidewalk maintained in reasonable repair, is not in doubt. Thus, the question becomes whether plaintiff’s investigator set forth some factual basis for concluding that the presumption is inapplicable under the circumstances of this case. See *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987) (an affidavit’s conclusory language, and lack of factual support, rendered it insufficient for purposes of creating a genuine issue of fact).

Plaintiff’s investigator, however, only reported that the defect in question did indeed present an irregularity of less than two inches, opined that it was caused by tree roots, provided data concerning average walking patterns, and observed that plaintiff’s ability to see the defect was hindered by darkness of night. The legislative determination that a discontinuity defect in a sidewalk of less than two inches is presumptively inactionable is hardly rebutted by evidence of such obvious considerations. The statutory presumption would be eviscerated if such ordinary factors as average walking patterns, the progress of underground roots, or nighttime darkness defeated it. Plaintiff has failed to provide evidence that the surface in question presented a greater danger than any other discontinuity defect that would fall within the statutory presumption of a well-maintained sidewalk. Plaintiff has suggested no factor other than the statutorily insufficient minimal discontinuity to establish that the sidewalk was negligently maintained. Accordingly, the statutory presumption was not adequately rebutted and it remains in force.

Further, we do not accept the implied argument that the statutory presumption applies only where the municipality in question creates and administers a regular sidewalk inspection policy. Such a limitation on the presumption is not found in the statute and we will not read that limitation into it. Moreover, had the municipality been placed on notice of the discontinuity

pursuant to an inspection policy, no repair would have been required as the sidewalk is in “reasonable repair” under MCL 691.1402a (b)(2).

The trial court erred in denying defendant’s motion for summary disposition predicated on the statutory two-inch rule. We reverse.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra

I concur in result only.

/s/ Donald S. Owens