

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPHINE HERCBERG,

Plaintiff-Appellant,

v

MICHAEL S. BALDWIN, CHRISTOPHER
TRAINOR, MCCALL & TRAINOR, P.C.,
KENDALL SAILLER, and KENDALL L.
SAILLER, P.C.,

Defendants-Appellees.

UNPUBLISHED

March 21, 2006

No. 265279

Oakland Circuit Court

LC No. 2004-062215-NZ

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals from the circuit court's order that granted defendants' motions for summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff sued defendants for legal malpractice. The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001). Plaintiff contends that defendants were negligent in failing to file a claim on her behalf against the city of Berkley before the statute of limitations expired. The element of causation requires proof that but for defendants' alleged negligence, plaintiff would have been successful in the underlying action. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

The underlying claim was a negligence action against the city. “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) breach of that duty; (3) causation; and (4) damages.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Except as otherwise provided in the governmental tort liability act, “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” MCL 691.1407(1).

Each governmental agency having jurisdiction over a highway is required to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” MCL 691.1402(1). In the case of a municipality, a highway is defined as “a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway” but not alleys, trees, or utility poles. MCL 691.1401(e). Because the duty is to keep the highways in reasonable repair, not to make them reasonably safe, “municipalities have an obligation, if necessary, to actively perform repair work to keep such sidewalks in reasonable repair.” *Jones v Enertel, Inc*, 467 Mich 266, 268; 650 NW2d 334 (2002). This satisfies the duty element and brings the claim outside the scope of governmental immunity.

The plaintiff must also prove that the defect in the highway was a proximate cause of her injury. *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). Proximate cause comprises two separate elements: (1) cause in fact, which requires a showing that but for the defendant’s conduct, the plaintiff would not have been injured; and (2) legal or proximate cause, which involves examination of the foreseeability of consequences and whether a defendant should be held legally responsible for those consequences. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The issue of proximate cause is generally a question of fact. *Meek v Dep’t of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000). But if “the facts bearing upon proximate cause are not in dispute and reasonable persons could not differ about the application of the legal concept of proximate cause to those facts,” the issue is a question of law for the court. *Paddock v Tuscola & SB R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997).

In this case, the broken concrete of the handicap ramp is evidence that the city failed to maintain the sidewalk in reasonable repair. However, the unsafe condition created by that alleged breach of duty was not causally related to plaintiff’s injuries. Plaintiff observed the unsafe condition and avoided it, opting to gain access to the sidewalk at another location along the road. Photographs show that this other location was not defective or in need of repair and plaintiff does not contend otherwise. The rationale underlying plaintiff’s claim against the city seems to be that if the handicap ramp had been in reasonable repair, she would have used it and, if it was in reasonable repair, she would not have fallen. Such a conclusion is purely speculative. “To be adequate, a plaintiff’s circumstantial proof must facilitate reasonable inferences of causation, not mere speculation.” *Skinner, supra* at 164. Because the alleged defect was not a proximate cause of plaintiff’s fall and plaintiff has not shown the existence of a defect in the location where she did fall, reasonable minds could not differ in concluding that the handicap ramp’s state of disrepair was not a proximate cause of plaintiff’s injuries. Therefore, the trial court correctly determined that plaintiff would not have prevailed in her underlying negligence action against the city.

Because plaintiff would not have prevailed in the underlying action, she cannot prove that defendants' alleged negligence in allowing the statute of limitations to expire was a proximate cause of any injury. Therefore, the trial court did not err in granting defendants' motions for summary disposition. Consequently, it is unnecessary to address plaintiff's other claims of error.

Affirmed.

/s/ Janet T. Neff

/s/ Henry William Saad

/s/ Richard A. Bandstra