

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA DOOLEY,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

December 4, 1998

No. 203965

Wayne Circuit Court

LC No. 96-605926 NO

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

In this road defect action, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

I. Basic Facts And Procedural History

In March of 1994, thirty-three-year-old plaintiff was rollerblading near her northwest Detroit home, while her nine-year-old son accompanied her on foot. The two went to a neighborhood party store, after which plaintiff's son went to play with friends; plaintiff intended to rollerblade home. When plaintiff was approximately one hundred feet away from her home, she encountered two holes in the road. When she tried to "miss" the two holes, her right foot partially went into one of the holes, causing her to fall. Plaintiff broke both of her arms, one severely, when she extended them to break her fall.

According to plaintiff, the potholes in which she fell were "filled in" by defendant in either October or November of 1995. However, plaintiff testified at her deposition that the potholes were "pretty deep," at least four to five inches deep, on the day of the fall.

In February of 1996, plaintiff filed suit against defendant alleging that while rollerblading her foot slid into a chuck hole approximately one foot wide and two to three inches deep. Plaintiff further alleged that the injuries she sustained when she slipped and fell were proximately caused by defendant's failure to maintain the street in a reasonably safe condition.

In December of 1996, defendant moved for summary disposition arguing that plaintiff was precluded from bringing suit under the highway exception to governmental immunity because she failed to comply with the notice requirements of MCL 691.1404; MSA 3.996(104). In addition, defendant argued that plaintiff's claims did not fall within the highway exception to governmental immunity because defendant had no duty to maintain the street in a condition reasonably fit for the simultaneous use of rollerbladers/skaters and motor vehicles.

In response, plaintiff argued that defendant could not raise her failure to comply with MCL 691.1404; MSA 3.996(104) as a defense because it was not adequately plead as an affirmative defense. In addition, plaintiff argued that defendant could not show that it was actually prejudiced by plaintiff's non-compliance or, in the alternative, plaintiff was not required to comply with the notice requirements due to her incapacity. In addition, plaintiff contended that her claims fell within the highway exception to governmental immunity.

Following a hearing in February of 1997, the trial court took the motion under advisement. Thereafter, both parties filed supplemental briefs. In April of 1997, the trial court entered an opinion and order granting defendant's motion for summary disposition. The trial court found that because plaintiff's disability did not cause her to be incapacitated to the extent that she lacked sufficient understanding or capacity to make informed decisions regarding her own well being, plaintiff was not excused from complying with the notice requirements. In addition, the trial court found that defendant was actually prejudiced by plaintiff's failure to give notice and that defendant had properly plead non-compliance as an affirmative defense. The trial court also found that the highway exception to governmental immunity should not be extended to apply to persons rollerblading on public streets. Plaintiff filed a motion for rehearing/reconsideration that the trial court denied. Plaintiff then timely filed her claim of appeal.

II. Standard Of Review

Defendant brought its motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). As it appears that the trial court looked beyond the pleadings in making its determination, we will consider the motion granted pursuant to MCR 2.116(C)(10), *Osman v Summer Green Lawn Care*, 209 Mich App 703, 705; 532 NW2d 186 (1995). This Court reviews a grant of summary disposition de novo. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), *aff'd* 446 Mich 482 (1994).

A motion brought pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Pursuant to this court rule, summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the opposing party. *Radtke, supra*. The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The court must not make factual findings or weigh credibility in deciding a

motion for summary disposition. *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). This Court examines the facts in a light most favorable to the nonmoving party. *Id.* at 689-690.

III. The Highway Defect Exception To Governmental Immunity

A. Notice

(1) Introduction

Plaintiff's claims against defendant were brought under the highway defect exception to governmental immunity, MCL 691.1402; MSA 3.996(102). The Governmental Liability Act, MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.*, which contains this exception, also contains a notice provision that states, in pertinent part:

(1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. [MCL 691.1404; MSA 3.996(104).]

In *Hobbs v Dept of State Highways*, 398 Mich 90, 96; 247 NW2d 754 (1976), the Supreme Court found this notice provision constitutional. However, failure to comply is not necessarily fatal to a plaintiff's cause of action. Absent a showing of actual prejudice to the governmental agency, the notice provision is not a bar to a plaintiff's claim. *Id.*

(2) Defendant's Affirmative Defense

Plaintiff argues that defendant was precluded from raising the issue of non-compliance because it failed to plead lack of notice and actual prejudice as affirmative defenses. We disagree. Defendant's affirmative defenses were sufficiently plead to put plaintiff on notice that her non-compliance with the statutory notice requirements would be an issue in the case. *Hanon v Barber*, 99 Mich App 851, 855-856; 298 NW2d 866 (1980).

(3) Actual Prejudice

Plaintiff argues that the trial court erred in ruling that defendant was actually prejudiced by her failure to comply with the notice requirement. We again disagree. In *Blohm v Emmet Co Board of Co Road Commissioners*, 223 Mich App 383; 565 NW2d 924 (1997), this Court addressed the same issue presented in this case. In *Blohm*, adopting language from *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649; 213 NW2d 134 (1973), the Court explained that "prejudice" refers to "a matter which would prevent a party from having a fair trial, or matter which he could not properly contest." *Blohm, supra* at 388.

Plaintiff's fall occurred on March 6, 1994. Plaintiff gave no notice to defendant within the 120 day statutory notice period. Plaintiff filed her complaint on February 16, 1996, almost two years after the fall. The complaint stated in general the location of the pot hole; however, it appears that defendant did not learn of the exact location of the pot hole until plaintiff's deposition on May 1, 1996.

In the two-year period that followed plaintiff's fall, significant changes occurred to the area. Most notably, defendant filled the pot holes in November of 1995. In addition, according to defendant's expert, weather conditions over the two-year period would have caused significant changes in the road surface. During the winter months, repeated freezing and thawing of moisture that accumulated in the sub-surface and surface cracks would have caused changes in the roadway. Indeed, plaintiff testified at her deposition that the roadway was much worse than two years earlier when she fell. Defendant's expert opined that because of the changes in the roadway, it would be impossible to determine the condition of the roadway at the time of the accident.

In addition to the lack of evidence as to the condition of the roadway at the time of the fall, plaintiff's rollerblades were unavailable to defendant. Plaintiff testified that, approximately a week after the accident, she returned the rollerblades and other equipment to Sears. Because the rollerblades were returned within the 120-day period, it cannot be said that the loss of this evidence was causally related to the lack of notice. However, their absence, taken in conjunction with the changes in the roadway, made it virtually impossible for defendant to do any meaningful accident reconstruction. In light of the foregoing, we find that defendant was prejudiced by plaintiff's failure to give the statutory notice. We considered similar factors in *Blohm, supra* at 388-389, in which we reached the same result.¹

B. Disability

Plaintiff contends that she was excused from giving notice because the injuries she sustained rendered her disabled. We again disagree. MCL 691.1404(3); MSA 3.996(104)(3) provides:

If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. *If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. The provisions of this subsection shall apply to all charter provisions, statutes and ordinances which require written notices to counties or municipal corporations.* [Emphasis added.]

Contrary to plaintiff's assertions, there was no evidence that plaintiff was "physically or mentally incapable of giving notice." Indeed, plaintiff was physically capable of going to a store two days after her discharge from the hospital to return the rollerblades and, during this same time period, she was mentally able to place a call to defendant to complain about her fall.²

C. Conclusion

We conclude that defendant was prejudiced by plaintiff's failure to comply with the notice requirements of MCL 691.1404; MSA 3.996(104) and that this failure was not excused by any disability. Therefore, the trial court correctly granted defendant summary disposition. Because of our resolution of this issue, we find it unnecessary to address plaintiff's remaining claims on appeal.

Affirmed.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ William C. Whitbeck

¹ At oral argument, plaintiff cited this Court to *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997). Presumably, plaintiff's point was that defendant was required, under that case, to show with particularity what it actually would have done had it known of the circumstances of plaintiff's injury in order to demonstrate actual prejudice. Although we have reviewed *Pontiac School District* with this argument in mind, we are unable to see how it is even remotely relevant to the circumstances of this case; we certainly do not, therefore, view it as controlling.

² We do not find that plaintiff's call was sufficient to put defendant on notice of the incident sufficient to defeat defendant's assertion that it was prejudiced by the lack of statutory notice. The telephone call was not in compliance with the statutory requirements. There is no evidence that plaintiff informed defendant of the exact location of the fall. Plaintiff admitted that she did not follow through with the complaint to defendant.