STATE OF MICHIGAN

COURT OF APPEALS

KRISTINA FORCE and MATTHEW FORCE,

Plaintiffs-Appellees,

v

CITY OF OWOSSO,

Defendant-Appellant.

UNPUBLISHED
April 15, 2004

No. 245996
Shiawassee Circuit Court
LC No. 02-007569-NO

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's denial of its motion for summary disposition under MCR 2.116(C)(7), (8), and (10). We reverse. This case arose when plaintiff Kristina Force[1] stepped off defendant's curb into a hole, causing her to fall and break her ankle.

Defendant first argues that the trial court erred when it failed to grant it summary disposition based on a city engineer's finding that the hole was less than half an inch deep. We disagree. We review de novo a trial court's decision to deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendant argues that it is entitled to summary disposition because MCL 691.1402a requires a plaintiff to demonstrate a surface discrepancy of two inches or more before a plaintiff may recover. The statute states, "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." MCL 691.1402a. By the statute's plain language, the argued depth only creates a rebuttable inference that defendant maintained the area in reasonable repair.

Moreover, defendant's argument ignores the portion of plaintiff's deposition testimony where she states that the hole in which she stepped has since been "covered over" but was at least three inches at the time she fell. While defendant's superintendent denies any knowledge of repair at the site of the fall, these issues serve only to create a genuine factual dispute about whether plaintiff's original estimate of the hole's depth was inaccurate or whether the depth of

[1] For purposes of this opinion, the term "plaintiff" refers only to Kristina Force.

the hole changed. MCR 2.116(C)(10). The cases defendant cited in its brief regarding measurement as opposed to estimate are inapposite because they involved discrepancies between measurements and estimates of an unchanged condition, not a condition before and after alteration. Therefore, defendant was not entitled to summary disposition solely on the basis of the "two-inch" rule.

Defendant next argues that the trial court erred when it denied its summary disposition motion based on plaintiff's allegedly infirm notice. We agree. According to MCL 691.1404, a plaintiff must "within 120 day from the time the injury occurred . . . serve a notice on the governmental agency of the occurrence of the injury and the defect." The statute further states that, "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. While compliance with the statute is a condition to receiving a waiver of governmental immunity, technical noncompliance with the statute will not bar recovery unless the defendant also demonstrates prejudice from the noncompliance. *Brown v Manistee Co Rd Comm*, 452 Mich 354, 358-359, 366; 550 NW2d 215 (1996).

In this case, plaintiff filed a notice that stated that, "she stepped off of the curb into a pothole directly in front of Ristro Bistro's [sic, Ristro's Bistro] on South Washington Street." Defendant claims that it sent out its superintendent to inspect and repair the pothole, but the only "pothole" he found that matched plaintiff's description was four feet out from the curb. The superintendent took pictures of the hole and repaired it. Plaintiff later pointed out the site of her fall to defendant's attorney, and explained that it had photographed and filled the wrong hole.

Defendant claims that it was prejudiced by plaintiff's failure to properly identify the exact location of the hole, because now it has no timely measurements and photographs of the particular area plaintiff later described. Plaintiff claims that defendant brought the prejudice on itself by unreasonably investigating and photographing a pothole four feet from the curb when she specifically claimed that she stepped off the curb into a pothole. While we agree that the four-foot distance from the curb does not fit the description of a single, normal step, plaintiff's vague and somewhat misleading description of the defect as a "pothole" in front of Ristro's Bistro did not convey the defect's "exact location" as the statute required.[2]

Plaintiff demonstrated her ability to provide an exact description of the site of the defect more than a year after her fall when she returned to the scene during a pause in her deposition. When the deposition resumed, she was able to describe the site's relationship to several landmarks, including the curb, a lamppost, a tree, and a gas cap with a concrete collar. Unlike her notice, this description, complete with respective measurements, would have provided the city with an exact location. Because plaintiff failed to provide these landmarks and measurements in her notice, as the statute required, defendant failed to properly investigate and understandably focused on the wrong defect.

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[2] Of course, we understand the possibility that the supervisor did not evaluate the correct area near the curb because there was no major defect in that area. Nevertheless, we resolve this factual dispute in plaintiff's favor.

The trial court excused plaintiff's failure by alluding to plaintiff's state of mind at the time of the injury and her consequential inability to immediately mark the defect's precise location. Notwithstanding any temporary shock, however, the Legislature allotted plaintiff 120 days to provide notice of the defect's exact location to defendant, and she did not comply with the statute despite her later ability to identify the site of the defect. Therefore, we will not excuse plaintiff's lack of compliance based solely on her initial shock. We might hold differently if defendant had so neglected its highway that substantial defects existed all around the site of the fall, making it impossible to point out the exact location because of the number of defects and confusion of the moment. Plaintiff did not face that challenge, however, and there was no evidence reasonably explaining why plaintiff did not more specifically identify the site of her fall within the proper time frame.

Given plaintiff's original vagueness and relatively new claim that the depth of the defect changed from over three inches to about half an inch deep, defendant would now need to defend against a defect that admittedly no longer exists.[3] Therefore, the vague description prejudiced defendant's ability to contradict plaintiff's description of the original defect, and the prejudice stemmed directly from plaintiff's failure to fulfill her statutory obligation. *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388, 391; 565 NW2d 924 (1997). Therefore, the trial court erred when it denied defendant's summary disposition motion. *Brown*, *supra* at 358-359; MCR 2.116(C)(7).

Reversed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen

[3] At oral arguments both plaintiff and defendant admitted that the defect in the road no longer exists. Plaintiff's contention that the expansion and contraction of the road may have filled in the pothole is speculative and lacks evidentiary support.