STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH JONES,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant,

and

JAMES JUDD,

Defendant.

UNPUBLISHED
November 17, 2005

No. 263036
Genesee Circuit Court
LC No. 04-078138-NO

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In this interlocutory appeal, defendant City of Flint appeals from the order denying its motion for summary disposition in this premises liability case involving governmental immunity. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(A) and (E).

Plaintiff tripped and fell on a portion of the sidewalk adjacent to the steps to her apartment building. A height differential existed between the side of the sidewalk and the lower threshold to the steps themselves. Plaintiff filed suit alleging that defendants[1] negligently failed to maintain the sidewalk in a reasonably safe condition, that the defective sidewalk proximately caused her injury, and that defendant was liable under the highway exception to governmental immunity.

[1] Defendant James Judd is plaintiff's landlord. Plaintiff maintained that Judd was also responsible for maintaining and repairing the allegedly defective condition. The exact extent of the parties' respective responsibilities was not determined below.

Defendant city moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). The city, citing MCL 691.1402a(2), maintained that plaintiff had failed to provide evidence to rebut the presumption that the sidewalk was maintained in reasonable repair given the less than one-inch height differential between the sidewalk slabs and the step threshold. In response, plaintiff presented photographs of the area and a report by plaintiff's expert, a safety engineering consultant, who concluded that the sidewalk was not reasonably safe. The trial court denied defendant's motion, holding that plaintiff had created a question of material fact as to whether there was a defect in the sidewalk that was known to defendant.

A decision with regard to a motion for summary disposition is reviewed de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Determination of the applicability of the highway exception is a question of law that we also review de novo. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

MCR 2.116(C)(7) provides, in part, for summary disposition where a claim is barred by immunity granted by law. In analyzing a (C)(7) motion predicated on immunity, this Court gives consideration to the affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Poppen v Tovey*, 256 Mich App 351, 353-354; 664 NW2d 269 (2003). For purposes of this subrule, the documentary evidence must be construed in a light most favorable to the nonmoving party. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen, supra* at 354, citing *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

In reviewing a motion under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Haliw v Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). Summary disposition is properly granted if there is no genuine issue with respect to any material fact. *Id*. The existence of a disputed fact must be established by admissible evidence; a mere promise to offer factual support at trial is insufficient. *Maiden*, *supra* at 121.

The governmental immunity act, MCL 691.1401 *et seq*., provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. MCL 691.1407(1). The highway exception to governmental immunity, MCL 691.1402(1), requires a governmental agency to maintain a highway under its jurisdiction in reasonable repair so that it is reasonably safe and convenient for public travel. The definition of "highway" includes sidewalks. MCL 691.1401(e).

Relevant here, MCL 691.1402a addresses, in part, municipality liability for injuries arising out of defects in a sidewalk, and it sets forth requirements that must be satisfied before

liability is incurred. The Legislature added the "two-inch" rule, MCL 691.1402a(2), to causes of action arising on or after December 21, 1999:[2]

> (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.

In the instant case, the photographs presented by the parties show a height discontinuity of less than one inch. Defendant city maintains that plaintiff's proffered evidence, including the opinion in plaintiff's expert's report, is insufficient to rebut the inference that the sidewalk was in reasonable repair. We agree.

Neither party discusses to any extent the degree of proof necessary to rebut the inference of reasonable repair. However, at the least, some analysis of why a lesser discontinuity is unusually or specifically dangerous is required so as to not render the inference essentially useless. Here, plaintiff's expert explained his conclusions as to how the differential came to exist and that the differential posed a tripping hazard. He did not, however, discuss why the differential was somehow different from other pavement imperfections that could pose a tripping hazard. Plaintiff's expert instead simply concluded that the sidewalk was not reasonably safe because it presented a tripping hazard. The failure of plaintiff's expert to provide sufficient factual support for his conclusions renders them insufficient to create a genuine issue of fact to rebut the inference that the sidewalk was in reasonable repair. See *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987) (holding an affidavit's conclusionary language and its failure to be supported by underlying facts rendered it insufficient for purposes of creating genuine issue of fact).[3]

Plaintiff also relies on certain language in the deposition of Craig Combs, a construction inspector for defendant, that areas of the sidewalk were in need of some repair when he surveyed the sidewalk in September 2003. However, Combs also stated that he used a three-eights of an inch height differential as the "disrepair" cut-off in his survey and that he did not consider the sidewalk hazardous for public travel. Thus, while Comb's testimony might be used to support a finding that the sidewalk had defects, it does not rebut the statutory inference that the sidewalk was maintained in reasonable repair.

Under the circumstances, we find that the trial court erred when it refused to grant defendant city's motion for summary disposition. Plaintiff presented insufficient evidence to rebut the inference that the sidewalk was maintained in reasonable repair. *Maiden*, *supra* at 121.

---

[2] 1999 PA 205.

[3] Moreover, we question whether the "report" by plaintiff's expert can even be considered as "admissible" evidence for purposes of summary disposition. The report is simply a letter to plaintiff's counsel; it is not in the form of an affidavit.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter