

STATE OF MICHIGAN
COURT OF APPEALS

BRADLEY J. HANDLEY, next friend of MARIE
J. HANDLEY, a minor,

Plaintiff-Appellee,

v

CITY OF ANN ARBOR,

Defendant-Appellant.

UNPUBLISHED

July 30, 2009

No. 284135

Washtenaw Circuit Court

LC No. 07-000244-NO

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

In this personal injury action, defendant appeals as of right the trial court's order denying defendant's motion for summary disposition. We affirm.

I. Basic Facts and Procedural Background

This dispute arises from an accident that occurred on June 23, 2006. Plaintiff, then a 16-year-old girl,¹ was riding her bike on defendant's sidewalk. Plaintiff struck a raised slab of concrete obscured by vegetation, lost control of her bike, and hit a tree. As a result of this incident, plaintiff's hand "got smashed" between the handlebar and the tree and her hand was injured. Upon further inspection of the sidewalk, it was discovered that the slab was raised approximately 1 and 7/8ths of an inch at its greatest height, the height of which was hidden by grass and other vegetation. The slab, which was adjacent to a tree, was also broken into two pieces and was shifting such that it was no longer level.

Plaintiff filed a two-count complaint against defendant, alleging that defendant was negligent and had maintained a defective sidewalk. Subsequently, defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10) arguing that it was entitled to governmental immunity because the discontinuity in the sidewalk was less than two inches. See MCL 691.1407(1); MCL 691.1402(1); MCL 691.1402a(2). The trial court denied the motion. It

¹ Because this accident occurred when plaintiff was a minor, the trial court appointed plaintiff's father as "next friend" to represent her in this litigation. See MCR 2.201(E)(1)(b).

ruled that a material question of fact remained regarding whether plaintiff had successfully rebutted the inference in MCL 691.1402a(2) and, as a result, defendant was not entitled to governmental immunity.

II. Standard of Review

The trial court's denial of defendant's motion for summary disposition was based on the existence of a material factual dispute affecting the applicability of governmental immunity. See MCR 2.116(C)(7). Accordingly, we review the trial court's denial of summary disposition as based on MCR 2.116(C)(7). A trial court's determination under this subrule is reviewed de novo. *Roby v Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2007). "[U]nder MCR 2.116(C)(7), the plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless the movant contradicts such evidence with documentation." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, ___ Mich App ___ ; ___ NW2d ___ (2009) (footnote omitted). To survive a motion based on governmental immunity, "the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Robinson v City of Lansing*, 282 Mich App 610, 613; 765 NW2d 25 (2009).

III. Analysis

Defendant argues that plaintiff presented no supporting evidence to rebut the evidence that the sidewalk was maintained in reasonable repair. Therefore, in defendant's view, it was entitled to immunity under MCL 691.1402a(2) and the trial court erred by denying summary disposition under MCR 2.116(C)(7). We disagree.

It is generally true that government agencies are free from tort liability whenever they are engaged in the exercise or discharge of a government function. MCL 691.1407(1). There are certain exceptions to this general rule, including the highway exception to governmental immunity. Under this exception, a person who sustains bodily injury because of a governmental agency's failure to keep a highway, including a sidewalk, under its jurisdiction in "reasonable repair" and in a condition reasonably safe and fit for travel may recover damages from the governmental agency. MCL 691.1402(1). 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(2), such that liability will not attach. In other words, if the defect is less than two inches, the plaintiff's claim will be barred by governmental immunity unless the plaintiff can come forward with some evidence to rebut the inference that the city maintained the roadway in reasonable repair. See *State Farm Fire & Cas Co v Corby Energy Services*, 271 Mich App 480, 482; 722 NW2d 906 (2006).

In our opinion, plaintiff has met her burden. There is no dispute that the sidewalk in question was under defendant's jurisdiction and that the discontinuity defect was less than two inches.² Thus, the inference to be drawn under the statute is that defendant maintained the

² Although plaintiff asserts on appeal that defendant failed to produce any evidence that the

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sidewalk in reasonable repair. MCL 691.1402a(2). However, after our review of the record, it is plain that plaintiff presented a sufficient modicum of evidence to rebut this inference as to avoid having her claim barred by governmental immunity. Specifically, plaintiff proffered evidence that the height of the walkway's raised edge was obscured by vegetation and other debris so that she could not see it as she approached on her bike. Additional evidence demonstrated that the slab was broken into two pieces and shifting such that it was no longer level. When viewed in the light most favorable to plaintiff, this evidence creates a genuine issue of material fact upon which reasonable minds could differ as to whether defendant had kept the sidewalk in reasonable repair, despite the fact that the discontinuity was less than two inches. The fact that defendant has provided a defense theory differing from plaintiff's version of events is irrelevant for the purposes of summary disposition as we must accept plaintiff's version of events as true. *Marilyn Froling Revocable Living Trust, supra*. Accordingly, the trial court did not err by denying defendant's motion for summary disposition.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly

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defect is less than two inches, our review of the record reveals that plaintiff's own evidence failed to show that the defect was greater than two inches. Plaintiff's photographic evidence demonstrated that the defect was approximately 1 and 1/8ths inches where plaintiff's wheel struck the defect. For this reason, we do not consider there to be a genuine dispute regarding whether the discontinuity was less than two inches.