STATE OF MICHIGAN

COURT OF APPEALS

SYLVIA MCNARNEY, Plaintiff-Appellee,	UNPUBLISHED November 17, 2016
v	No. 328919 Washtenaw Circuit Court
CITY OF ANN ARBOR, Defendant-Appellant.	LC No. 15-000312-NO

Before: OWENS, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

In this action for tort damages against a governmental agency, defendant appeals as of right the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(7) (governmental immunity). Because plaintiff has failed to demonstrate the applicability of the highway exception to governmental immunity, we reverse and remand for entry of summary disposition in defendant's favor.

On March 21, 2014, plaintiff tripped and fell while walking along Ashley Street in Ann Arbor, Michigan. She notified defendant of her intent to sue, stating that defendant had been remiss in its maintenance of the sidewalk and that, in particular, the condition which caused plaintiff to fall was a "significant trip factor" created by cement surrounding a depressed dirt area which contained a planted tree. In other words, as set forth in her complaint, plaintiff's "path of travel" at the time of her fall was through the dirt area surrounding the tree and, as she exited the dirt area, she tripped on exposed cement which sat more than two inches higher than the dirt. Defendant moved for summary disposition under MCR 2.116(C)(7), asserting that governmental immunity barred plaintiff's claim because the dirt area in which plaintiff walked was not a "sidewalk" within the meaning of the highway exception to governmental immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*. The trial court denied defendant's motion based on the conclusion that there was "a question of fact for the jury to determine how [plaintiff] fell, where she fell, and whether she fell on the sidewalk." Defendant now appeals as of right.

On appeal, defendant argues that the trial court erred when it denied defendant's motion for summary disposition. According to defendant, the facts are not in dispute regarding the location of plaintiff's fall and, as a matter of law, the highway exception to governmental immunity does not apply because the dirt area through which plaintiff travelled was not a

"sidewalk" as defined by the GTLA. Consequently, defendant asserts that it is immune from plaintiff's tort claims and entitled to summary disposition under MCR 2.116(C)(7). We agree.

We review a trial court's grant or denial of summary disposition de novo. *Mitchell v Detroit*, 264 Mich App 37, 40; 689 NW2d 239 (2004). Likewise, "the determination regarding the applicability of governmental immunity and a statutory exception to governmental immunity is a question of law that is also subject to review de novo." *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). We also review questions of statutory interpretation de novo. *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014).

When governmental immunity bars a plaintiff's claims, summary disposition is properly granted under MCR 2.116(C)(7). *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 382; 838 NW2d 720 (2013). When deciding a motion for summary disposition under MCR 2.116(C)(7), "[t]he contents of the complaint must be accepted as true unless contradicted by the documentary evidence." *Snead*, 294 Mich App at 354. "The Court must consider affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties, to determine whether a genuine issue of material fact exists." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). "If there is no relevant factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Snead*, 294 Mich App at 354. "If, however, a pertinent factual dispute exists, summary disposition is not appropriate." *Id.* "A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010).

The GTLA "grants broad immunity to governmental agencies, extending immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Tate v Grand Rapids*, 256 Mich App 656, 658-659; 671 NW2d 84 (2003) (citation and quotation marks omitted). Exceptions to this broad grant of immunity must be narrowly construed. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). There are six statutory exceptions to governmental immunity, including the "highway exception" at issue in the present case. See MCL 691.1402; MCL 691.1402a; *Lash v Traverse City*, 479 Mich 180, 195 & n 33; 735 NW2d 628 (2007).

The highway exception "allows individuals to recover the damages suffered by him or her resulting from a municipality's failure to keep highways—including sidewalks, MCL 691.1401(c)—in reasonable repair and in a condition reasonably safe and fit for travel." *Bernardoni v Saginaw*, 499 Mich 470, __; __ NW2d __ (2016); slip op at 4 (citation and quotation marks omitted). "An action may not be maintained under the highway exception unless it is clearly within the scope and meaning of the statute." *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000). Relevant to this case, with regard to a municipal corporation's maintenance and repair of sidewalks, the GTLA provides, in part, that:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
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> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
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> (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
>
> (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
>
> (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court. [MCL 691.1402a.]

Notably, for purpose of a municipal corporation's maintenance responsibilities under the GTLA, the term "sidewalk" has been statutorily defined to mean "a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel."[1] MCL 691.1401(f).

In this case, the trial court denied defendant's motion for summary disposition because the court found that there was a question of fact about how plaintiff fell and where plaintiff fell. In actuality, these facts are undisputed. Plaintiff's notice to defendant, her complaint, and the documentary evidence presented by plaintiff in the form of a technical report from a mechanical engineer clearly establish that plaintiff walked through the dirt area that surrounded the tree. She then tripped on the exposed cement at the far side of the "dirt deformed and depressed area," where the depressed dirt and exposed cement created a vertical discontinuity of more than two inches. For purposes of its motion for summary disposition, defendant has not challenged the location or mechanics of plaintiff's fall. Because there was no question of fact, the applicability of governmental immunity to plaintiff's claim presented a question of law for the court. See *Snead*, 294 Mich App at 354.

In particular, the legal question to be decided in this case is whether plaintiff suffered injury as a result of defendant's failure to maintain "a sidewalk" in reasonable repair. See MCL 691.1402a. Clearly the answer to this question is no. Plaintiff traversed through an area covered

[1] Rather than adhering to this definition of "sidewalk" set forth in the GTLA, plaintiff provides this Court with a variety of other definitions drawn from unrelated statutory schemes, Ann Arbor's Code of Ordinances, and lay dictionaries. In light of the GTLA's express definition of the word "sidewalk," plaintiff's reliance on these outside sources is misplaced. "When a statute sets forth its own definitions of certain terms, those terms must be applied as defined." *Poboursky v Gee*, 249 Mich App 44, 46; 640 NW2d 597 (2001).

with dirt and some remnants of wood chips. Because this dirt area was not "paved,"[2] it did not constitute a "sidewalk" for purposes of MCL 691.1402a. See MCL 691.1401(f).

It follows that MCL 691.1402a does not require defendant to maintain this dirt space in reasonable repair for pedestrian use and any failure by defendant to keep the dirt area level with the adjacent sidewalk cement did not constitute a failure to "maintain the sidewalk in reasonable repair." MCL 691.1402a(1). In other words, any vertical discontinuity between the dirt and the sidewalk was not "[a] vertical discontinuity defect of 2 inches or more *in the sidewalk*."[3] See MCL 691.1402a(3)(a) (emphasis added). Plaintiff makes no effort to allege any other "dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity." MCL 691.1402a(3)(b). Thus, plaintiff has not rebutted the presumption that defendant maintained its sidewalks in reasonable repair, MCL 691.1402a(3), and she has not demonstrated the applicability of the highway exception to governmental immunity. Consequently, defendant is entitled to the protections of the GTLA, and the trial court erred by denying defendant's motion for summary disposition.

Reversed and remanded for entry of summary disposition in defendant's favor. We do not retain jurisdiction. Having prevailed in full, defendant may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering

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[2] As commonly understood, "[p]ave" is defined as "to lay or cover with material (as asphalt or concrete) that forms a firm level surface for travel." *Merriam-Webster's Collegiate Dictionary* (2014).

[3] To be "in" the sidewalk, the vertical discontinuity must be included, located or positioned within the limits of the sidewalk. See *Merriam-Webster's Collegiate Dictionary* (2014). See, e.g., *Bernardoni*, slip op at 2 (sidewalk defect involving "2.5-inch vertical discontinuity between adjacent sidewalk slabs").