# STATE OF MICHIGAN

# COURT OF APPEALS

DONNA NOE,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
August 19, 2008

No. 278727
Wayne Circuit Court
LC No. 06-612135-NO

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant in this slip and fall action. We affirm.

At approximately 8:30 a.m. on December 6, 2005, plaintiff asserts she was traversing the pedestrian crosswalk on John R Street where it intersects Brady Street in defendant, city of Detroit, when she tripped and fell due to a hole in the pavement. Plaintiff was walking from a parking structure to her work place at the Detroit Medical Center's Rehabilitation Institute. Plaintiff contends her focus was on traffic rather than the roadway at the time of her fall.

Plaintiff filed her complaint, alleging defendant breached its duty to maintain the roadway in a reasonable manner in accordance with MCL 691.1402 and MCL 691.1403. Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), asserting it was entitled to governmental immunity and dismissal of plaintiff's complaint based on the alleged roadway defect being less than two inches in depth and citing MCL 691.1402a. In response, plaintiff sought to admit: (1) a police report authored by Wayne State police officer Valerie Guerriero, who witnessed plaintiff's fall, (2) an affidavit prepared by Sammie Hall, an investigator retained by plaintiff, who measured and photographed the roadway defect, and (3) the affidavit of Harold Josephs, an engineer retained by plaintiff as an expert who reviewed plaintiff's documentary evidence.

At the hearing on the summary disposition motion, the trial court ruled the proffered police report inadmissible regarding the estimated dimensions of the alleged roadway defect. The trial court also refused to admit into evidence the Josephs affidavit ruling it did not satisfy the requirements of MRE 702. Reviewing the photographs and measurements provided by Hall, the trial court noted the failure of plaintiff to demonstrate that the roadway defect was equal to or greater than two inches in depth. Consequently, the trial court granted summary disposition in

favor of defendant finding plaintiff had failed to overcome the rebuttable presumption of MCL 691.1402a(2) that defendant had adequately or reasonably maintained the roadway. Plaintiff filed a motion for reconsideration, which included an affidavit by officer Guerriero regarding the content of her police report. The trial court denied the motion for reconsideration and this appeal ensued.

Defendant sought summary disposition in accordance with MCR 2.116(C)(7), (C)(8) and (C)(10). The trial court failed to indicate under which subrule it was granting summary disposition. However, based on a review of the record summary disposition was granted in accordance with MCR 2.116(C)(10) based on the trial court's consideration of documents outside of the pleadings and its determination that defendant was not negligent in its maintenance of the crosswalk. *Glancy v City of Roseville,* 457 Mich 580, 591; 577 NW2d 897 (1998) (holding that "[t]he two-inch rule is a rule of negligence, not a common-law principle of governmental immunity").

This Court reviews de novo a trial court's grant of summary disposition. *Pusakulich v City of Ironwood,* 247 Mich App 80, 83; 635 NW2d 323 (2001). In order to survive a motion for summary disposition based on governmental immunity, a plaintiff must come forward with facts establishing an exception to governmental immunity. *Fane v Detroit Library Comm,* 465 Mich 68, 74; 631 NW2d 678 (2001). All documentary evidence is reviewed with this Court accepting the content of the complaint as true, unless affidavits or other documents submitted by the parties specifically contradict the pleadings. *Id.* Issues of statutory construction are also reviewed de novo. *Feyz v Mercy Mem Hosp,* 475 Mich 663, 672; 719 NW2d 1 (2006). This Court reviews a trial court's decision regarding the admission of evidence for an abuse of discretion. *Barnett v Hidalgo,* 478 Mich 151, 158-159; 732 NW2d 472 (2007).

Plaintiff contends the trial court erred in granting summary disposition because its finding that the roadway defect was less than two inches in depth was contrary to the evidence presented and did not correctly apply the language and intent of MCL 691.1402a. Specifically, plaintiff argues that the Hall affidavit established the depth of the roadway defect as being greater than two inches in size and that depth is not the only measurement to determine the existence of a "discontinuity." Plaintiff argues that MCL 691.1402a(2) refers only to a "discontinuity defect," which would be applicable to any defect exceeding two inches in length, width or depth in the roadway. Defendant asserts plaintiff failed to establish, through admissible evidence, that the alleged pavement defect exceeded two inches in depth and that the trial court correctly applied MCL 691.1402a(2).

"Tort immunity is broadly granted to governmental agencies when engaged in the exercise or discharge of a governmental function." *Stringwell v Ann Arbor Pub School Dist,* 262 Mich App 709, 712; 686 NW2d 825 (2004); MCL 691.1407(1). However, pursuant to MCL 691.1402(1), exceptions exist for violations of the duty to maintain a "highway in reasonable repair so that it is reasonably safe and convenient for public travel." The term "highway" is defined to include crosswalks. MCL 691.1401(e).

MCL 691.1402a provides, in relevant part:

> (1) [A] municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from a portion of a county highway outside of the

> improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death or damage, the municipal corporation knew, or in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.
>
> (b) The defect described in subdivision (a) is the proximate cause of the injury, death or damage.

However, "[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 the improved portion of the highway designed for vehicular travel in reasonable repair." MCL 691.1402a(2).

The issue presented is whether plaintiff has come forward with sufficient evidence to rebut the statutory inference that the crosswalk where plaintiff tripped and fell was in reasonable repair. Notably, the only actual measurement and photograph submitted by plaintiff of the purported defect indicated a depth discrepancy of less than two inches. The trial court relied on plaintiff's photographic representation, finding that "the picture speaks for itself" and that the impression "appears less than two inches in depth." Plaintiff responds by arguing that a genuine issue of material fact existed regarding this measurement because Hall asserted that depressions in the asphalt surrounding the defect misrepresented the actual depth of the depression. However, plaintiff failed to adequately demonstrate through admissible evidence Hall's assertion or to provide an alternative measurement reflecting Hall's opinion. As such, plaintiff did not adequately overcome the rebuttable presumption of adequate or reasonable repair by defendant.

Plaintiff further argues the trial court erred in failing to recognize that MCL 691.1402a(2) applies to any "discontinuity defect" exceeding two inches and is not restricted solely to discrepancies in depth. In support of her contention, plaintiff cites to an unpublished opinion by this Court, which does not provide "precedentially binding" authority. MCR 7.215(C)(1). Historically, development of the "two inch rule" in common law, before legislative enactment through 1999 PA 2005, interpreted the "rule" as involving a two-inch depth or height discrepancy. Specifically, *Weisse v Detroit*, 105 Mich 482, 483; 63 NW 423 (1895), involved a plank in a crosswalk raised two inches above the walkway. When abolishing the two-inch rule, the Court in *Rule v Bay City*, 387 Mich 281, 283; 195 NW2d 849 (1972) noted:

> [W]e will no longer hold as a matter of law that a depression or obstruction of two inches or less in a sidewalk may *not* be the basis for a municipality's liability for negligence.

Abrogation of the rule at common law followed various rulings, including *Harris v Detroit*, 367 Mich 526, 531; 117 NW2d 32 (1962) (Adams, J, dissenting), which recognized depth discrepancies for application of this negligence exception.

However, we are required to interpret the current statutory language of MCL 691.1402a(2), which codified the "two-inch rule." Plaintiff is correct that the relevant statutory provision fails to provide a definition of the term "discontinuity defect." Consequently, we consult a dictionary to discern the proper definition of the term. In accordance with Random House Webster's College Dictionary (2d ed, 1997), p 374, the term "discontinuity" is defined, in relevant part as: "**1**. lack of continuity; irregularity. **2.** a break or gap." While this definition does not necessarily limit itself solely to depth discrepancies, any expanded interpretation of the term to include width or length is inapplicable to the facts of this case given plaintiff's failure to establish, through admissible evidence, the measurement or size of the actual discrepancy in the crosswalk pavement. This evidentiary omission is inextricably tied to plaintiff's remaining issues on appeal pertaining to the trial court's refusal to admit into evidence the proffered police report and the Josephs affidavit.

Plaintiff alleges that Hall, Josephs and Guerriero all opined that the discontinuity in the crosswalk paving exceeded two inches in length and width dimensions and that the refusal of the trial court to admit this evidence constituted error. Specifically, in his affidavit, Hall indicated, "[b]ased on my observation, the defect was greater than two inches long and two inches wide." Guerriero estimated the size of the discontinuity as being four inches wide by four inches deep in both the police report and subsequent affidavit, submitted in conjunction with plaintiff's motion for reconsideration. Finally, Josephs in his affidavit, relying solely on "photos of the accident scene, the Affidavit of Sammie Hall, and portions of the deposition testimony of Plaintiff" opined "[t]he entire defective roadway area, including the cracked and broken asphalt, is approximately 24 inches wide by 12 inches long." Josephs further indicated, "[w]ithin the defective area, there was a hole in the walkway of irregular shape . . . . somewhat greater than 6 inches by 6 inches."

Plaintiff contends that a genuine issue of material fact exists based on these estimates regarding the size of the discontinuity in the pavement, which precluded invocation of the presumption of reasonable maintenance by defendant. However, plaintiff failed to provide any actual measurements and relies solely on opinion and conjecture in support of her allegations. Clearly, an opportunity to measure the aperture was available when Hall determined and photographed the depth of the discontinuity using a measuring tape. Actual measurements are preferred and control, as a matter of law, over estimates. *Baldinger v Ann Arbor R Co*, 372 Mich 685, 691 n 2; 127 NW2d 837 (1964). Specifically:

> The practice of permitting juries to base their verdicts upon the guesses or estimates of distances or conditions which are susceptible of actual measurement is to be condemned. It is the duty of the plaintiff who seeks to recover damages for negligence to place before the jury the actual conditions when it is within his power to do so. [*Brown v Detroit United R*, 216 Mich 582, 585; 185 NW 707 (1921), quoting *Perkins v Twp of Delaware*, 113 Mich 377, 379; 71 NW 643, 644 (1897).]

As a result, based on the factual measurement and evidence provided, the trial court did not err in granting summary disposition to defendant based on plaintiff's failure to rebut the presumption of reasonable maintenance in accordance with MCL 691.1402a(2).

We also reject plaintiff's contention on appeal that the trial court erred in refusing to admit into evidence the police report and the Josephs affidavit. At the outset, we note that statements in police reports constitute inadmissible hearsay. *Maiden v Rozwood*, 461 Mich 109, 124-125; 597 NW2d 817 (1999). Hearsay is defined by MRE 801(c) as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible except as provided within the rules of evidence. MRE 802.

The police report and subsequent affidavit provide only an opinion or estimate of the discontinuity of the pavement. Hence, the police report, if offered by plaintiff to prove the size of the pavement anomaly, clearly qualifies as hearsay. Plaintiff contends that the report is admissible in accordance with the public records exception, contained in MRE 803(8), as constituting objective data observed and recorded by a police officer.

MRE 803(8), provides:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

Notably, the police report is not admissible as evidence pursuant to subsection (A) of the evidentiary rule, because this provision "is limited to 'records or reports' describing the general activities of an agency per se." Here, plaintiff's proffered police report is only relevant to a specific, isolated event or incident and, therefore, does not fall within the exception of MRE 803(8)(A). *Solomon v Shuell*, 435 Mich 104, 130; 457 NW2d 669 (1990).

Subsection (B) of MRE 803(8) is premised on "the narrow common-law rule which limits public reports of matters observed by agency officials to reports of objective data observed and reported by these officials." *Bradbury v Ford Motor Co*, 419 Mich 550, 554; 358 NW2d 550 (1984). Plaintiff asserts the police officer's estimate of the size of the pavement discontinuity based on the officer's observation at the time of plaintiff's fall constitutes objective data, which the officer recorded as part of her duties. Contrary to plaintiff's contention, MRE 803(8)(B) is not construed to provide a blanket exception, but applies only to "matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Notably, the size of the pavement discontinuity was not a matter that the officer was required to investigate and report but was merely incidental to the officer's provision of assistance to plaintiff and general duty to document such activity. Importantly, plaintiff has failed to demonstrate that the officer's estimate of the size of the hole constituted "objective data." *Bradbury, supra* at 554. The officer's impression of the size of the hole is objective only if measured using a reliable and accurate instrument. Because plaintiff failed to establish any accurate method of determining the size of the discontinuity by the officer there existed no proper foundation for admission of the police report.

Finally, plaintiff contends the trial court erred in ruling that the affidavit provided by Josephs was inadmissible. A witness qualified as an expert may testify to knowledge by opinion

or otherwise if the testimony is based on sufficient facts, is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. MRE 702. In *Craig v Oakwood Hosp,* 471 Mich 67, 82; 684 NW2d 296 (2004), our Supreme Court stated:

> Under MRE 702, the trial court had an independent obligation to review *all* expert opinion testimony in order to ensure that the opinion testimony ... was rendered by a "qualified expert," that the testimony would "assist the trier of fact," and ... that the opinion testimony was rooted in "recognized" scientific or technical principles. These obligations applied irrespective of the type of expert opinion testimony offered by the parties. [Emphasis in original.]

In addition, MCL 600.2955 provides in pertinent part:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

We concur with the trial court's determination that the affidavit provided by Josephs was inadmissible because it was not based on sufficient facts or data and was not the product of reliable methods or principles in accordance with the requirements of MRE 702 or MCL 600.2955. In conducting his investigation, Josephs relied on the affidavit and photographs

generated by Harris and plaintiff's deposition testimony. Josephs made no personal inspection or investigation of the area. He did not conduct any measurements. Consequently, his opinion is merely speculative because it is not based on a reliable method or principle and instead relies on his credentials rather than an objective determination. Further, the statements contained in the affidavit are conclusory in nature and, therefore, insufficient to create a genuine issue of fact. *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987).

Plaintiff also contends that, even if the depth discontinuity was less than two inches, the affidavit of Josephs established that the crosswalk was unsafe for public travel. This argument fails to provide a means to address or overcome the problem regarding admissibility of the affidavit. Further, even if the affidavit were deemed admissible, Josephs fails to explain how or why a discontinuity of less than two inches is unusually or specifically dangerous. Josephs fails to explain how the discontinuity differs in any substantive manner from other pavement imperfections that could also pose a tripping hazard. Rather, he merely asserts that the area was not safe because it presented a hazard due to traffic. This is irrelevant to the actual issue presented regarding the condition of the pavement and fails to create a genuine issue of fact sufficient to rebut the inference the crosswalk was in reasonable repair.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot