STATE OF MICHIGAN

COURT OF APPEALS

MARGARET MALINASKY and VICTOR MALINASKY, Plaintiffs-Appellees, v CITY OF ROYAL OAK, Defendant-Appellant.	UNPUBLISHED November 9, 2010 No. 291922 Oakland Circuit Court LC No. 2008-093262-NO

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying its motion for summary disposition based on governmental immunity, MCR 2.116(C)(7). We remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff[1] tripped and fell on a raised slab of defendant's sidewalk next to Clawson Avenue. One slab was raised about one inch uniformly across the gap between it and the next slab. Plaintiff fell during the daytime, and conditions were dry. Plaintiff brought suit and defendant moved for summary disposition, arguing that plaintiff failed to rebut the statutory inference that the sidewalk was in reasonable repair; that plaintiff did not have notice of the condition; and that Victor Malinasky's loss of consortium claim was barred as a matter of law. Plaintiff argued that there was evidence the sidewalk was not in reasonable repair, rebutting the statutory inference arising under MCL 691.1402a(2); that there was evidence the defect existed more than 30 days, thus establishing defendant should have known of it; and that binding case law allows Victor Malinasky's derivative claim. The trial court agreed on all points, specifically finding that, although the defect was less than two inches, the statutory inference was rebutted by depositions stating the slab was raised one and one-half to two inches for its entire five-foot width; the deposition of plaintiff's daughter, who was a professional engineer in the field, in which she testified that the sidewalk was in an unreasonable state of disrepair; and plaintiff's expert, who stated that the sidewalk presented a trip hazard and so was unsafe for public travel.

[1] Because Victor Malinasky's claims are derivative, "plaintiff" in this opinion refers to Margaret Malinasky.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). We may not assess credibility or weigh competing facts when reviewing a motion for summary disposition. *Skinner*, 445 Mich at 161.

There was no discussion in the trial court about whether the sidewalk was on a county road; the court and the parties proceeded as if the statutory inference of reasonable repair, MCL 691.1402a(2), applied. It likely does not. Under *Robinson v Lansing*, 486 Mich 1; 782 NW2d 171 (2010), the "two-inch rule" of MCL 691.1402a only applies to sidewalks adjacent to "county" highways. There is no evidence in this case that Clawson Avenue is a county highway, so most likely the two-inch rule should not have been applied here.

In the absence of the statutory two-inch rule, the law that applies comes from *Rule v Bay City*, 387 Mich 281, 282; 195 NW2d 849 (1972). *Rule* abolished the common law two-inch rule, under which there was no liability for a defect of less than two inches. See *Harris v Detroit*, 367 Mich 526, 528; 117 NW2d 32 (1962). The duty that applies is for the agency to maintain the sidewalk in "reasonable repair." *Glancy v Roseville*, 457 Mich 580, 584-585; 577 NW2d 897 (1998). To successfully bring a claim, plaintiff need only show that a question of fact exists about whether the sidewalk is in reasonable repair.

We find this case is very similar to *Gadigian v City of Taylor*, 282 Mich App 179; 774 NW2d 352 (2008), on which the trial court relied heavily. In that case, the defect was the "teeter-tauter" effect of an unevenly raised slab. The expert in that case testified that this feature made it "more dangerous . . . than a sidewalk that is raised two inches or more (but consistently across)." *Id*. at 189. The decision of this Court was affirmed in outcome by our Supreme Court, although it was vacated in its reasoning as being contrary to *Robinson*. *Gadigian v City of Taylor*, 486 Mich 936; ___ NW2d ___ (2010).

As in *Gadigian*, plaintiff here presented evidence in the form of her expert's affidavit that the sidewalk was not reasonably safe for public travel because the one-inch height difference was abrupt and would not be anticipated, and the fact that the height differential was uniform meant there was "[a] lack of visual cue," distinguishing the defect from other sidewalk imperfections. It is the uniformity that makes the defect special here, whereas in *Gadigian* the *lack* of uniformity made the defect especially dangerous; however, we do not engage in such weighing of evidence when reviewing a motion for summary disposition.

Plaintiff has the burden to prove that defendant had notice of the defect in the sidewalk. Under § 2a, for the government to be liable for maintaining a sidewalk, "at least 30 days before the occurrence of the relevant injury . . . the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in the sidewalk." MCL 691.1402a(1)(a). The government is assumed to have had notice "when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place." MCL 691.1403. The trial court depended on plaintiff's expert witnesses' depositions for the evidence that the defect had existed for more than 30 days, and therefore the

government had notice of the defect. But, the trial court did not explain how plaintiff's expert witnesses' testimonies showed that an ordinarily observant person would have noticed the defect. From the plain language of the statute, there is no bright-line thirty-day rule for notice here.

Therefore, we remand to the trial court to determine whether plaintiff has met her burden of proof to show that the defect in the sidewalk would have been obvious to the ordinarily observant person for thirty days or more before the incident. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck