

STATE OF MICHIGAN
COURT OF APPEALS

LANA LUMETTA,

Plaintiff-Appellant,

v

LISA REAUME CROSS,

Defendant,

and

CITY OF MACOMB,

Defendant-Appellee.

UNPUBLISHED
December 28, 2010

No. 294781
Macomb Circuit Court
LC No. 2008-002272-NO

Before: MARKEY, P.J., AND WILDER AND STEPHENS, JJ.

PER CURIAM.

Plaintiff Lana Lumetta appeals by right the trial court's order granting summary disposition in favor of defendant City of Macomb (properly Charter Township of Macomb, herein Macomb) in this personal injury suit.¹ We remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

According to plaintiff, she sustained a broken pelvis and a dislocated leg when she fell after tripping on a sidewalk in front of the home of defendant Lisa Reaume Cross. Plaintiff testified in her deposition that she was wearing tennis shoes, and was walking with her three-and-one-half-year-old son and her dog.

Defendant Macomb moved for summary disposition pursuant to MCL 2.116(C)(7) and (C)(10), and sought dismissal on the grounds of governmental immunity. In support of its motion, it argued that it was afforded a rebuttable presumption that it had maintained the

¹ Plaintiff's remaining claims against defendant Lisa Reaume Cross were dismissed by stipulation.

sidewalk in reasonable repair under MCL 691.1402a because the discontinuity here was less than two inches. The trial court agreed, finding that plaintiff had not presented anything to rebut this inference.

MCL 691.1402(1) imposes a duty of care on governmental agencies to maintain sidewalks under their control in reasonable repair so that the sidewalks are reasonably safe and convenient for public travel. *Glancy v City of Roseville*, 457 Mich 580, 584; 577 NW2d 897 (1998). “A person who sustains bodily injury . . . by reason of failure of a governmental agency to keep a [sidewalk] under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.” MCL 691.1402(1). Under what is commonly known as the statutory “two-inch rule”

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. [MCL 691.1402a(2)].

However, in *Robinson v Lansing*, 486 Mich 1; 782 NW2d 171 (2010), our Supreme Court held that the two inch rule in MCL 691.1402a does not apply to sidewalks adjacent to highways other than county highways. *Id.* at 21-22. Here, the trial court, not having had the advantage of the *Robinson* decision, did not reach this issue.

Under the circumstances, a remand is appropriate. Plaintiff argues that the road adjacent to the sidewalk where she tripped is not a county highway, while defendant Macomb argues that it is. While defendant Macomb cites MCL 247.1 *et seq.* and MCL 247.651, *et seq.*, and in particular MCL 247.669,² to support its position, it is not clear that this Court has all the factual information necessary to resolve this issue. One of plaintiff’s witnesses testified that, apart from work done in the course of developing the subdivision behind her property, she had never seen Township officials doing maintenance work on the sidewalks in her subdivision, which presumably would imply that the road in question was in a platted subdivision with the streets

² MCL 247.669 provides:

The board of county road commissioners in each of the several counties shall, within 1 year from the effective date of this act, complete the taking over as county roads of all roads, streets and alleys heretofore required to be taken over as county roads by the provisions of Act No. 130 of the Public Acts of 1931, as amended, being sections 247.1 to 247.13, inclusive, of the Compiled Laws of 1948. Said board of county road commissioners in each of the several counties shall take over as county roads all streets and alleys lying outside the limits of incorporated cities and villages and dedicated to the public in recorded plats approved by said board of county road commissioners, within 30 days after the recording of the plat or the effective date of this act, whichever may be the later. Such dedicated streets and alleys, when taken over by the county road commission, shall be county roads in all respects and for all purposes and shall be classified as county primary roads or county local roads pursuant to the provisions of this act.

dedicated to the public. However, it would be improper for this Court to make such a determination on the facts presented.

The trial court relied on the two-inch rule and the corresponding inference to rule in defendant Macomb's favor. However, in the absence of the statutory two-inch rule, the applicable law 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). Thus, the duty that applies is for the agency to maintain the sidewalk in "reasonable repair." *Glancy*, 457 Mich at 584-585. To successfully bring a claim for a sidewalk adjacent to a road that is not a county road, plaintiff need only show that a question of fact exists about whether the sidewalk is in reasonable repair. Plaintiff did present some evidence tending to show that the sidewalk was not in reasonable repair, and this Court may not assess credibility or weigh competing facts when reviewing a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Thus, we remand this case to allow the trial court to decide whether *Robinson* is applicable, and if so, whether summary disposition remains appropriate.

Remanded for further proceedings. We do not retain jurisdiction. No costs are assessed to either party, a public question being involved.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens