STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1576

Alice Peterson,
Appellant,

vs.

City of Isle,
Respondent.

Filed May 15, 2017
Reversed and remanded
Stauber, Judge

Mille Lacs County District Court
File No. 48-CV-15-920

Arlo H. Vande Vegte, Dovolas & Vande Vegte, P.L.L.C., Plymouth, Minnesota (for appellant)

Paul A. Merwin, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Stauber, Judge; and Hooten, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant challenges the summary-judgment dismissal of her personal-injury claim on grounds of statutory immunity, arguing that the district court erred because (1) she is not challenging the city's planning level activity; (2) proof of a city's actual knowledge of a defect that it created is not required to preclude immunity under

Minnesota caselaw; and (3) there is a genuine issue of material fact as to the city's actual knowledge of the defect. Because the district court erred by concluding that statutory immunity was applicable to the challenged governmental conduct, we reverse and remand for further proceedings.

FACTS

On July 12, 2014, appellant Alice Peterson injured her shoulder after she tripped on the edge of a raised sidewalk panel while walking on Main Street in Isle, Minnesota. Peterson sued respondent City of Isle, a municipal corporation, alleging that her injury was caused by the city's negligent failure to inspect, repair, and warn of the defect.

The sidewalk was constructed in 2008 under the management of a city engineer. The city contracted out the construction work, and a construction plan was developed establishing certain quality-review and warranty terms. The sidewalk was within the Minnesota Department of Transportation's (MNDOT) right-of-way jurisdiction and subject to MNDOT codes, specifications, and requirements.

After construction, in August 2009, supervising engineers performed a walk-through inspection of the project with city staff and made notes of any problems. A warranty list was created containing 19 items that required repair. Two of the items were near where Peterson tripped, but the list made no mention of the defect that caused her injury.

Peterson sought two expert opinions regarding the sidewalk. Fredrick Patch, a certified building official, concluded that the raised sidewalk panel was the result of a construction error, mismatched slopes or gradients in the original construction, which did

not meet MNDOT's specifications. Patch concluded that there "was no evidence that either settling or frost heave" caused the defect.

Jon Bogart, an engineer, found it likely that frost heave caused the defect. Bogart based his determination on a photograph showing that the sidewalk in front of a store near where Peterson tripped was ground down "presumably so that the doors could be opened." Bogart found it unlikely that the concrete was "placed so high that the doors could not be opened" and concluded that the sidewalk in front of the store was heaved up by frost over the course of the winter of 2008-2009. As such, Bogart concluded that frost heave also likely caused the defect that caused Peterson's injury.

In July 2016, the city moved for summary judgment, claiming that (1) Peterson is challenging discretionary policy decisions regarding sidewalk maintenance, and her claim is therefore barred pursuant to statutory immunity granted under Minn. Stat. § 466.03 (2016); (2) Peterson cannot put forth a prima facie case of negligence because there is no evidence that the city had actual or constructive knowledge of any problem with the sidewalk; and (3) the sidewalk defect was an open and obvious danger. The city offered evidence of its sidewalk maintenance policies and procedures.

Peterson opposed the city's motion, arguing that (1) her claim is not based upon negligence in maintaining the sidewalk, but rather negligent construction and conduct, and therefore statutory immunity is inapplicable; and (2) there is a genuine issue of material fact as to the city's actual knowledge of the defect. In her memorandum in opposition, Peterson further defined her claim, stating that "discovery in the case has demonstrated" that the sidewalk defect "arose out of the general contractor's and the

[c]ity [e]ngineer's conduct in implementation of the construction plans/specifications and contract respecting new sidewalks in 2008 and 2009." Specifically, she alleges that the "sidewalk was never built to code or to plans/specs and was also susceptible to frost heave in the first winter after its fall 2008 construction."

The district court granted summary judgment in favor of the city, finding that the city was entitled to statutory immunity. The district court acknowledged that Peterson was alleging defective construction, but concluded that there was insufficient evidence that the city created the defect and statutory immunity was applicable because the city had no actual notice of the defect. This appeal followed.

D E C I S I O N

In reviewing a grant of statutory immunity on summary judgment, "we must determine whether there are genuine issues of material fact and whether the district court erred in applying the law." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, appellate courts review de novo "whether there are any genuine issues of material fact and whether the district court erred in its application of the law to the facts." *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). Appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.*

I. Statutory Immunity – Challenged Governmental Conduct

Peterson argues that the district court erred by granting summary judgment on statutory immunity grounds. Whether certain governmental action is protected by statutory immunity is a legal question that we review de novo. *Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004). Generally, a municipality is subject to liability for torts "of its officers, employees and agents acting within the scope of their employment or duties." Minn. Stat. § 466.02 (2016). However, statutory, or discretionary, immunity is an exception to this general rule. *Minder*, 677 N.W.2d at 483-84. "Statutory immunity is based on the separation of powers and is intended to prevent judicial review, through the medium of a tort action, of executive and legislative policy-making decisions." *Id.* at 484. Statutory immunity is a threshold issue that is addressed prior to any determination of breach of duty. *Id.* at 483.

Municipalities are immune from tort liability "based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6. In defining a "discretionary function or duty," as referenced under Minn. Stat. § 466.03, subd. 6, "appellate courts distinguish between planning and operational decisions." *Minder*, 677 N.W.2d at 484. Planning decisions are protected as discretionary actions, while operational decisions relating to day-to-day operations are not protected. *Id.* Determining whether the challenged government conduct involves a planning decision or an operational decision is central to a statutory-immunity analysis. As such, "[t]he first step in analyzing a claim of statutory immunity is to identify what governmental conduct is being challenged." *Id.*

Once statutory immunity is asserted, "the plaintiff then has the burden to articulate specifically the claim that must be scrutinized to determine the immunity issue and to make some showing of fact to suggest the basis for the claim." *Gerber v. Neveaux*, 578 N.W.2d 399, 403 (Minn. App. 1998), *review denied* (Minn. July 16, 1998).

After statutory immunity was asserted, Peterson argued that the city's negligent failures "arose out of the general contractor's and the [c]ity [e]ngineer's conduct in implementation of the construction plans/specifications and contract respecting new sidewalks in 2008 and 2009." Specifically, the "sidewalk was never built to code or to plans/specs and was also susceptible to frost heave in the first winter after its fall 2008 construction," and the city engineer failed to ensure compliance with said plans/specs. In sum, the challenged governmental conduct is the construction of a defective sidewalk and subsequent failure of the city engineer to comply with quality-review and warranty inspection terms.[1]

II. Genuine Issue of Material Fact – Defective Construction

To avoid summary judgment Peterson must produce sufficient evidence of a defect either created at the time of construction or arising as a result of frost heave by August 2009. *See id.* (noting that the plaintiff must "make some showing of fact to suggest the basis for the claim").

[1] The district court determined that Peterson was challenging "the implementation of the general contractor's performance and the [c]ity [e]ngineer's judgment in implementing/enforcing construction plans/specifications and the contract provisions respecting sidewalk warranties in the fall of 2008 and late summer of 2009." This is consistent with our determination of the challenged governmental conduct.

The district court stated that Peterson's argument that the city "was the cause of the defect is supported only by one of [the] expert witnesses who concluded that the mismatched cross slopes are the cause of the defect and that the cross slopes are an original construction defect not caused by frost heave." And the district court found this opinion to be a bare conclusion insufficient to create a genuine issue of material fact. We disagree. There remains a genuine issue of material fact as to whether the city created the sidewalk defect.

Peterson's expert, Patch, provided more than a bare conclusion. Patch observed the area on two occasions and concluded that roof and surface drainage flowed away from the area of the relevant sidewalk panel and there was no "evidence that either settling or frost heave" caused the alleged defect, though he did conclude that the panels to the east "had heaved due to frost accumulation," which is consistent with the opinion of Peterson's other expert, Bogart. Patch noted that there was no evidence, such as a horizontal line along the nearby building wall, to indicate settling. He believed the two sidewalk panels at the location where Peterson tripped were constructed at different times due to the existence of "control joint material." He also noted numerous sidewalk panels in the area with excessive slope.

Peterson's other expert, Bogart, could not determine if the sidewalk construction was completed according to specifications because he could not determine whether a sand base was installed beneath the sidewalk. As the susceptibility of the underlying soil to frost heave could not be determined, Bogart based his opinion that the injurious defect likely resulted from frost heave on a photograph of a nearby defect in front of a store

entrance. Both experts concluded that frost heave caused the defect in front of the store entrance, but reached different conclusions as to the impact of that frost heave on the area where Peterson tripped.

Viewing the evidence in a light most favorable to Peterson, there is sufficient evidence to create a genuine issue of material fact as to when and how the defect came into existence. *See Commerce Bank*, 870 N.W.2d at 773 (noting that appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted"). The opinion of Patch that the raised sidewalk panel was a construction defect, and his observations supporting that opinion, are sufficient evidence to allow "reasonable persons to draw different conclusions" as to when and how the defect arose. *Schroeder*, 708 N.W.2d at 507. Given that there is sufficient evidence to create a genuine issue of material fact over whether the sidewalk defect was created during construction, it follows that there is sufficient evidence to support the claim that the defect should have been discovered by the city engineer during quality-review inspections, as the defect would have been present during those inspections.

However, Peterson has failed to present facts to support the theory that the defect arose during the first winter after construction as a result of frost heave. Though Peterson's expert, Bogart, concluded that frost heave likely caused the injurious defect, there was no opinion rendered as to exactly when this occurred, and Patch opined that the defect was not caused by frost heave. *See Gerbe*r, 578 N.W.2d at 403 (noting that the plaintiff must "make some showing of fact to suggest the basis for the claim").

III. Notice

The district court concluded that the city had no actual knowledge of the defect, so under the precedent set forth in *Minder*, Peterson's claims could not survive statutory immunity. 677 N.W.2d at 486. However, actual notice is not required if the governmental body created the defect. *See id.* at 486 (stating that a failure-to-warn claim requires that the "governmental body must have created or had actual notice of the alleged dangerous condition"); *see also Larson v. Twp. of New Haven*, 282 Minn. 447, 454, 165 N.W.2d 543, 547 (1969) (stating actual or constructive notice of a defect is not required if a municipality created the defect).[2] Therefore, based on Peterson's claim that the municipality created the defect, actual knowledge was not required in this instance.

IV. Operational or Discretionary

Having ascertained what government conduct is being challenged, and after determining both that there is sufficient evidence for the claim to survive summary judgment and that *Minder* does not bar the claim due to a lack of actual notice, it must

[2] It has been stated numerous times in Minnesota caselaw that a city's liability is limited to those instances where the city has actual or constructive notice of the dangerous condition. *See e.g.*, *Hansen v. City of St. Paul*, 298 Minn. 205, 207-08, 214 N.W.2d 346, 348 (1974) (citing *Cleveland v. City of St. Paul*, 18 Minn. 279 (1872)); *Seaton v. County of Scott*, 404 N.W.2d 396, 398 (Minn. App. 1987), *review denied* (Minn. June 25, 1987); *Johnson v. County of Nicollet*, 387 N.W.2d 209, 212 (Minn. App. 1986). But there is an exception to this general rule if the city created the condition. *Larson*, 282 Minn. at 454, 165 N.W.2d at 547; *see Cleveland*, 18 Minn. 279, 287 (stating that if condition was created with permission of the city, "the city was conclusively chargeable with notice"); *see also Kleopfert v. City of Minneapolis*, 93 Minn. 118, 121, 100 N.W. 669, 670 (1904) (stating that notice was not required where employee of city created the dangerous condition); Orville C. Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 Minn. L. Rev. 480, 518 (1942) (stating actual and constructive notice of a defect are required unless officers or employees of a municipality cause the defective condition).

next be determined whether the challenged conduct is protected discretionary conduct or unprotected operational conduct. "The issue is not whether the government action involved the exercise of discretion in a general sense, because almost every government function does involve some exercise of discretion, but rather whether the challenged activity involved a balancing of policy objectives." *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996) (quotation omitted). The burden is on the city to demonstrate facts showing it is entitled to statutory immunity. *Minder*, 677 N.W.2d at 484. Here, the city failed to show that the challenged conduct involved protected discretionary conduct.

Regarding the defective construction, Peterson does not attack the sidewalk maintenance policies or the construction plan or design. Rather, she asserts that the applicable MNDOT specifications were not followed and, therefore, the city did not implement the plan. *See Seaton*, 404 N.W.2d at 398 (stating that statutory immunity "must be narrowly construed" and that conduct putting into effect a predetermined plan constitutes an operational act).

Peterson's claim that the defect should have been discovered during inspections by the city engineer presents a more difficult determination. The city engineer's failure to comply with established quality-review procedures is an operational act. But, conversely, a claim that the city should have implemented more rigorous inspection procedures is an attack on a discretionary decision. The specific governmental action being challenged becomes crucial in these instances. *See Riedel v. Goodwin*, 574 N.W.2d 753, 756 (Minn. App. 1998) (noting that "the precise governmental conduct at issue" must be examined), *review denied* (Minn. Apr. 30, 1998). Here, Peterson's challenge is best characterized as

asserting a failure of an employee to carry out a policy by not implementing the applicable quality review procedures. As such, the governmental conduct at issue is operational, not discretionary. In sum, the conduct challenged in this case is not protected by statutory immunity.

V. Negligence - Notice of the Defect – Open and Obvious

The city argues that, even if statutory immunity is inapplicable, Peterson has failed to put forth sufficient facts to support a negligence claim because there was no actual or constructive notice of the defect, and therefore insufficient evidence of duty and breach. Further, the city argues that we should affirm because the defect was open and obvious.

Peterson argues that a genuine issue of material fact remains as to the city's actual knowledge of the defect because of "strong circumstantial proof" based on the testimony of Peterson's experts. Peterson further urges this court not to address the city's arguments concerning both the adequacy of Peterson's negligence claim and the open and obvious nature of the defect.

Generally we review only issues presented to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The district court did not address the city's arguments that Peterson failed to put forth a prima facie case of negligence and that the alleged defect was open and obvious. But the district court did conclude that there was no evidence of actual notice. As such, we shall address the issue of notice.

When, as here, there is sufficient evidence to support a claim that a municipality created a defect that is not latent, then neither actual nor constructive notice is required. *Larson*, 282 Minn. at 454, 165 N.W.2d at 547; *McDonald v. City of Duluth*, 93 Minn.

206, 209, 100 N.W. 1102, 1104 (1904); *but cf. Gerber*, 578 N.W.2d at 403-04 (affirming statutory immunity where plaintiff's negligence claim was not supported by showing of improper construction).

Lastly, the city argues that we should affirm because the defect at issue was an open and obvious danger. Peterson urges us not to address this issue, and alternatively she argues that she did not observe the defect because of distracting circumstances. The district court did not address the issue, and we shall not address whether the defect was open and obvious as a matter of law. *See Olmanson v. LeSueur Cnty.*, 693 N.W.2d 876, 881 (Minn. 2005) (stating that, generally, "whether a condition presents a known or obvious danger is a question of fact"); *Van Gordon v. Herzog*, 410 N.W.2d 405, 406 (Minn. App. 1987) (stating that distracting circumstances are factors a jury may consider in assessing the obviousness of a danger).

In sum, genuine issues of material fact remain as to whether the city created a defective sidewalk and the city engineer failed to comply with quality-review and warranty inspection terms, and said conduct is not protected by statutory immunity. On remand, Peterson's negligence claim should be limited to the specific theories of negligence put forth.

Reversed and remanded.