2021 WL 135846
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United States District Court, W.D. Washington.

SKYCORP LTD, Plaintiff,
v.
KING COUNTY, Defendant.

CASE NO. C20-1632-JCC
|
01/14/2021

John C. Coughenour, UNITED STATES DISTRICT JUDGE

ORDER

***1** This matter comes before the Court on King County's motion to dismiss (Dkt. No. 9). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part the motion for the reasons explained herein.

I. BACKGROUND

Plaintiff, who is "in the business of demolishing buildings and removing construction and demolition debris," challenges the validity of a portion of King County's solid waste flow control ordinance—specifically, the provision addressing the disposal of construction and demolition ("C&D") debris. (Dkt. No. 1 at 3.) In general, King County's flow control ordinance mandates that solid waste generated within the unincorporated areas of the county, or any other jurisdiction with a solid waste interlocal agreement with King County, be disposed of at a "facility designated by [King County] to receive the particular waste" unless "the division director has provided written authorization" for disposal to a non "county-designated disposal facility." King County Code (KCC) § 10.08.020. As applied to C&D waste, the ordinance requires that "generators, handlers and collectors of mixed and nonrecyclable C&D waste generated within the county's jurisdiction [ ] deliver, or ensure delivery to, a designated C&D receiving facility specified by the division director." KCC § 10.30.20. Plaintiff asserts that King County has "approved only four private **landfills** for depositing [such C&D] debris." (Dkt. No. 1 at 4.)

In July 2020, the King County Division of solid waste issued a citation to Plaintiff for a violation of the County's ordinance. (*Id.* at 4.) Plaintiff took C&D waste that it generated "within the territorial borders of King County to a site" in Naches, Washington that was not designated by King County to accept such waste. (*Id.*) A King County Hearing Examiner affirmed the County's imposition of a $100 fine for the offense. (*Id.* at 5.)

Plaintiff, in challenging the ordinance, filed a complaint with this Court seeking a declaratory judgment invalidating KCC Section 10.30.20 on the basis that it violates the dormant Commerce Clause of the United States Constitution, violates the Due Process Clause of the Fourteenth Amendment, is not authorized under King County's police power, and violates the Privileges and Immunities Clause of Article I, Section 12 of the Washington constitution. (*Id.* at 5–13.) King County moves to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 9.)

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Id.* (quoting *Twombly*, 550 U.S. at 555).

III. DISCUSSION

A. Dormant Commerce Clause

***2** "The dormant Commerce Clause is a limitation upon the power of the States, which prohibits discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015). To determine whether a law violates the dormant Commerce Clause, courts "first ask whether it discriminates on its face against interstate commerce." *United Haulers Ass'n v.*

Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338–39 (2007).

Plaintiff concedes that KCC Section 10.30.20 does not discriminate on its face against interstate commerce. (Dkt. No. 12 at 12.) [1] Instead, it proffers two arguments challenging the validity of the ordinance: (1) Because KCC Section 10.30.20 dictates that extraterritorial disposal facilities otherwise capable of taking C&D waste generated in King County first be approved by a King County solid waste division director before receiving such waste, the ordinance impermissibly regulates extraterritorial conduct and (2) the interstate burden imposed by the ordinance is "excessive in relation to putative local benefits." (*Id.*) For the reasons described below, the Court finds neither argument persuasive.

1. *Regulation of extraterritorial conduct*

As the Ninth Circuit recently indicated, "the relevant question here is whether the ordinance *directly* regulates the interstate or extraterritorial aspect of the...business." *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 445 (9th Cir. 2019) (emphasis added). " '[E]ven when a state law has significant extraterritorial effects, it passes Commerce Clause muster when, as here, those effects result from the regulation of in-state conduct.' " *Id.* (quoting *Chinatown Neighborhood Ass'n v. Harris*, 764 F.3d 1136, 1145–46 (9th Cir. 2015)).

Plaintiff suggests that *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018) is controlling. In *Daniels Sharpsmart*, the Ninth Circuit found that a California regulation requiring the incineration by out-of-state medical waste facilities of waste generated within California violated the dormant Commerce Clause. *Id.* at 615–16. But the case is distinguishable. In *Daniels Sharpsmart*, the state had no in-state medical waste disposal facilities capable of providing the incineration services required by the regulation. *Id.* Therefore, the sole focus of the regulation was, effectively, extraterritorial activity. *Id.* at 612.

Here, all of the approved facilities for C&D waste generated in King County are located *within* Washington, and so is the unapproved site that Plaintiff ultimately disposed of the C&D waste that resulted in the citation at issue in this case. (*See* Dkt. Nos. 1 at 4, 13 at 6.) Moreover, the purpose of the ordinance is to regulate the disposition of C&D waste that is generated *locally*. Therefore, the extraterritorial regulatory impact of KCC Section 10.30.20 is merely incidental to its local regulatory impact. This is insufficient to establish a violation of the dormant Commerce Clause.

2. *Excessive burden*

If a state law is not facially discriminatory and has no direct extraterritorial regulatory impact, it will still violate the dormant Commerce Clause if its burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011) (quotation marks omitted) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). This balancing requires "sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978). Plaintiff argues that KCC Section 10.30.20 "fails to advance a legitimate local interest" or "produce local benefits that outweigh the burden on commerce." (Dkt. No. 12 at 16.) The Court disagrees.

***3** As stated, the purpose of KCC Section 10.30.20 is to assure that "there will be C&D disposal facilities to serve King County...C&D is recycled to the maximum extent feasible...and that C&D disposal is subject to King County's strict environmental controls." KCC § 10.30.10. This is a legitimate local interest. *See United Haulers Ass'n*, 550 U.S. at 346–47 (noting that a flow control ordinance that increases recycling "confer[s] significant health and environmental benefits upon the citizens of the [c]ounties" subject to the ordinance).

For Plaintiff to state a claim for relief, then, the complaint must allege facts showing the burdens on interstate commerce from the ordinance "clearly" exceed these local benefits. *Sullivan*, 662 at 1271. Plaintiff's complaint fails to meet this standard. In fact, it contains no specific allegation suggesting how the ordinance burdens interstate commerce. (*See generally* Dkt. No. 1.) Plaintiff's opposition brief is similarly deficient, instead simply alleging a lack of putative benefit, without any supporting facts. (Dkt. No. 12 at 17.) This is insufficient to defeat a motion to dismiss for failure to state a claim.

In addition, the Court finds that leave to amend Plaintiff's complaint would be inappropriate, since any amendment

would be futile in this instance. *See Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("Where the legal basis for a cause of action is tenuous, futility supports the refusal to grant leave to amend.").

Accordingly, the Court GRANTS King County's motion to dismiss Plaintiff's dormant Commerce Clause claim without leave to amend.

B. Due Process Clause

The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The Clause confers both procedural and substantive rights. *United States v. Salerno*, 481 U.S. 739, 746 (1987). Plaintiff asserts that KCC Section 10.30.20 violates its substantive due process rights because it owns [2] the C&D waste at issue and the ordinance irrationally limits how it may dispose of that property. (Dkt. No. 1 at 8.)

A substantive due process violation requires a deprivation of life, liberty, or property in such a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *Salerno*, 481 U.S. at 746. At a minimum, Plaintiff must demonstrate that KCC Section 10.30.20 "serves no legitimate governmental purpose." *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008). While Plaintiff's complaint states as much, (*see* Dkt. No. 1 at 8), to survive a motion to dismiss, it must also provide sufficient facts to support that allegation, *Iqbal*, 556 U.S.at 678. Neither Plaintiff's complaint nor its opposition brief contains such facts. (*See generally* Dkt. Nos. 1, 12.) Nor does the Court expect that Plaintiff could establish such facts through amendment. The legitimate governmental purpose of King County's C&D waste disposal ordinance is clear: to preserve and protect "public health, welfare and safety" through "assur[ing] that there will be C&D disposal facilities to serve King County...C&D is recycled to the maximum extent feasible...and that C&D disposal is subject to King County's strict environmental controls." *See* KCC §§ 10.04.010, 10.30.10. This is a legitimate government interest that the ordinance's C& D provisions rationally relate to.

***4** Accordingly, the Court GRANTS King County's motion to dismiss Plaintiff's Due Process claim without leave to amend.

C. Claims Brought Under State Law

Because Plaintiff's remaining claims are based on state law, consistent with 28 U.S.C. § 1367(c)(3), the Court exercises its discretion to dismiss them as outside the scope of the Court's supplemental jurisdiction. *See Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1091 (9th Cir. 2008) ("In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.").

IV. CONCLUSION

For the foregoing reasons, King County's motion to dismiss (Dkt. No. 9) is GRANTED in part and DENIED in part. Plaintiff's First and Second Claims are DISMISSED with prejudice. Plaintiff's Third and Fourth Claims are DISMISSED without prejudice.

DATED this 14th day of January 2021.

A

John C. Coughenour

UNITED STATES DISTRICT JUDGE

All Citations

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Footnotes

1 Accordingly, any reliance by Plaintiff on *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.* to support its dormant Commerce Clause argument, is misplaced, as *C & A Carbone, Inc.* addressed a facially discriminatory flow control ordinance. *See* 511 U.S. 383, 389 (1994).

2 There is some question whether Plaintiff, in fact, owns the waste it seeks to dispose of. While the complaint indicates that "Plaintiff is the owner of the waste it seeks to deposit," it also indicates that "it has entered into contracts to demolish and remove debris from locations within King County." (Dkt. No. 1 at 3, 8.) As Plaintiff explains in its response brief, the demolition contracts that it enters into transfer ownership of the structure to Plaintiff prior to demolition. (Dkt. No. 12 at 20.) King County questions whether this is sufficient to establish Plaintiff's ownership of the debris, in light of Washington law suggesting that Plaintiff may be unable to transfer ownership of the waste. (Dkt. No. 13 at 8–9.) Regardless, Plaintiff's complaint fails to establish a violation of substantive due process, irrespective of who owns the waste, as described below.

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UNPUBLISHED
Court of Appeals of Michigan.

KRISTINE SCIARROTTA-HAMEL, Plaintiff-Appellee,
v.
CITY OF DEARBORN, Defendant-Appellant.

No. 350953
|
January 14, 2021

Wayne Circuit Court LC No. 18-005572-NO

Before: LETICA, P.J., and GLEICHER and O'BRIEN, JJ.

Opinion

PER CURIAM.

***1** Defendant, the City of Dearborn, appeals as of right the trial court's denial of its motion for summary disposition under MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact) regarding a lawsuit filed by plaintiff, Kristine Sciarrotta-Hamel, after she tripped and fell on the municipality's sidewalk. We affirm.

I. BACKGROUND

On May 17, 2017, plaintiff and her boyfriend, Craig Carpenter, took a post-dinner stroll in plaintiff's neighborhood, located in defendant city. Plaintiff and Carpenter walked for about an hour, during which time daylight had turned to dusk. Plaintiff was walking on the side of the street closest to the homes on Olmstead Street, while Carpenter walked next to her, on the side closest to the street. The couple had walked this route previously, but not frequently. Both of them were walking straight ahead and plaintiff was not looking down at her feet. Between 8:30 and 9:00 p.m., as the couple passed the duplex on 22238/40 Olmstead Street heading towards 22252 Olmstead Street, plaintiff's toe caught the tip of a jagged, uneven, and elevated sidewalk panel, causing her to fall. Plaintiff landed in the middle of a driveway connected to the public sidewalk of 22252 Olmstead Street. As a result of her fall, plaintiff suffered severe injuries.

According to both plaintiff and Carpenter, no artificial or ambient street lighting illuminated the street at the time of the incident, concealing the discontinuity from detection. [1] Carpenter attested that he personally measured the vertical discontinuity in the sidewalk with a tape measure, prior to its replacement, and found it to be over two inches from the top of the adjoining panel. Neither plaintiff nor Carpenter had ever noticed the elevated sidewalk previously.

The day after plaintiff's fall, a neighbor contacted defendant to report that a tree in front of 22238 Olmstead had lifted a sidewalk, resulting in a three-inch difference in the sidewalk and a neighbor's fall. The following day, defendant's employee, Douglas Derr, whose job functions included inspecting sidewalks, visited the location. Derr concluded that the situation was a trip hazard and required cold patching of two sidewalk panels. The request was made and by June 2nd, the cold patch was in place.

Derr further testified that he lived in the area and would drive his truck around looking for obvious defects that were normally "two inches maybe," including areas that were cold patched; however, he had never noticed the elevated sidewalk at issue.

***2** On June 6, 2017, plaintiff sent a timely notice to defendant, explaining that she had tripped and fallen over an "uneven sidewalk" on May 17, 2017, which was located "in front of the home with a common address of 22252 Olmstead, Dearborn, Michigan." Plaintiff provided color photographs of both the uneven sidewalk and measurement of the vertical discontinuity. Plaintiff sent a second notice on August 23, and a third notice in early September, 2017, each containing the same address location and color photographs.

After receiving plaintiff's second notice, defendant's legal department asked Derr to investigate. Derr did so and provided an update, noting that plaintiff's photograph was "a good example."

The next day, the legal department asked Derr to obtain "a clear photo of the sidewalk with a ruler ...." In the event that doing so required removal of the cold patch and replacing it, Derr should proceed. Armed with plaintiff's written notice and the photographs, Derr returned and chiseled away the cold patch as best as he could. Using the same angle as plaintiff and selecting the highest spot, Derr photographed the vertical discontinuity between the sidewalk panels, estimating that it was approximately one inch.

Plaintiff's sidewalk safety liability expert, Steven Ziemba, reviewed the record evidence and opined that the raised sidewalk exhibited a height differential estimated at greater than two inches, was in unreasonable repair, and was a hazard. Ziemba also opined that the dangerous condition of the sidewalk, namely, the exposed, jagged face of the raised panel with its sharp edges, "would not be seen by plaintiff or her friend as they walked in the near dark evening hours." Ziemba opined that the rising panel was in existence for more than 30 days as it was caused by tree-root growth, a common problem that defendant needed to address.

In June 2018, defendant fully demolished and replaced the defective sidewalk panel, and an adjoining one, with concrete. On July 11, 2019, defendant conducted a land survey; it revealed that the defective panel responsible for plaintiff's fall was actually located in front of 22238/40 Olmstead, and not the adjacent property at 22252 Olmstead.

In May 2018, plaintiff filed suit, seeking damages for injuries the incident caused. After discovery, defendant filed for summary disposition based on governmental immunity. Defendant argued plaintiff's suit was barred by: (1) the "two-inch rule" under MCL 691.1402a(3)(a), as plaintiff presented no evidence to show that the sidewalk's vertical discontinuity was two inches or more, and, therefore, plaintiff failed to overcome the statutory rebuttal presumption that defendant had fulfilled its duty to reasonably maintain its sidewalk; (2) the alleged defect was open and obvious under MCL 691.1402a(5), as plaintiff's photographs demonstrated that a person of ordinary intelligence would have discovered the defect upon casual inspection; and (3) plaintiff's pre-suit notice was deficient under MCL 691.1404(1) because she provided the wrong address of 22252 Olmstead Street rather than 22238/40 Olmstead Street, where the defect was actually located. After a hearing, the trial court rejected defendant's arguments and denied its motion.

This appeal as of right followed.

II. STANDARD OF REVIEW

We review de novo the trial court's decision on a motion for summary disposition as well as the applicability of immunity. See *Moraccini v City of Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10). Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred because of immunity granted under the law. *Id*. We consider all documentary evidence in a light most favorable to the nonmoving party under MCR 2.116(C)(7). *Id*. "If there is no 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." *Id*. (quotation marks omitted). "But when a relevant factual dispute does exist, summary disposition is not appropriate." *Id*.

***3** "Under MCR 2.116(C)(10), summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (quotation marks omitted). We "must review the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. (quotation marks omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks omitted). A court may not "make findings of fact; if the evidence before it is conflicting, summary disposition is improper." *Id*. (quotation marks and emphasis omitted).

The Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., generally immunizes governmental agencies from tort liability, subject to certain enumerated exceptions, when they are "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1).

The scope of governmental immunity is construed broadly, while the exceptions are narrowly interpreted. *Milot v Dep't of Transp*, 318 Mich App 272, 276; 897 NW2d 248 (2016).

One such exception is the "highway exception," which permits claims arising from defective highways. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). "This includes sidewalks." *Thurman v City of Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012); see also MCL 691.1401(c). More specifically, "[a] municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair." MCL 691.1402a(1).

III. TWO-INCH RULE

Defendant first argues that the trial court erred when it determined as a matter of law that plaintiff rebutted the statutory presumption that defendant had maintained its sidewalk in reasonable repair because plaintiff failed to produce evidence that the vertical discontinuity of the sidewalk panels leading to her fall was at least two inches. We disagree.

The GTLA provides:

> (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:
>
> (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(3) and (4).]

In short, MCL 691.1402a(3) "provides that a discontinuity defect of less than 2 inches creates a rebuttable inference that the municipality maintained the sidewalk in reasonable repair, as is required by MCL 691.1402(1); this is the statutory two-inch rule." *Moraccini*, 296 Mich App at 396.

Here, the trial court properly determined that plaintiff presented evidence in order to overcome the two-inch rule statutory presumption as a matter of law. Viewing the evidence in the light most favorable to plaintiff, the photographs plaintiff provided and Carpenter's affidavit [2] demonstrated that the vertical discontinuity was at least two inches in height. Carpenter's affidavit and plaintiff's photographs were also properly considered over Derr's competing photographs. Aside from the trial court's obligation to view the evidence in the light most favorable to the nonmoving party, Derr's photographs did not depict the vertical discontinuity that plaintiff tripped over. While it was the correct area of the sidewalk, Derr's testimony and photographs established that the cold patch had to be chiseled away in order to measure the discontinuity. The trial court correctly observed that Derr's measuring tape clearly rested atop the cold-patch debris. Therefore, plaintiff's photographs and Carpenter's affidavit provided the only accurate measurements of the sidewalk defect that caused plaintiff's fall. Based on this evidence, summary disposition was inappropriate because plaintiff was able to overcome the statutory presumption.

***4** Defendant, however, challenges plaintiff's method of measurement, asserting that plaintiff's photographs show an individual pushing a ruler, instead of a tape measure, into the seam between the sidewalk panels. Resultantly, defendant contends that the images captured depict the distance between the bottom of the seam and the elevated panel rather than the vertical discontinuity difference between the panel. But, assuming for the sake of argument that plaintiff's photographs did not measure the vertical discontinuity accurately, there was still ample record evidence establishing that plaintiff overcame the two-inch presumption. Carpenter's affidavit regarding his measurement of the panel with a tape measure, Ziemba's affidavit regarding the estimated height differential, and the inadequacy of Derr's photographs of the sidewalk defect were sufficient for plaintiff to establish that the vertical discontinuity was at least two inches. Thus, we find no error in the trial court's determination.

IV. OPEN AND OBVIOUS

Defendant next argues that the trial court erred when it found there was a question of material fact as to whether the sidewalk defect was open and obvious. We disagree.

The GTLA provides:

> In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious. [MCL 691.1402a(5).]

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). This is an objective test. *Id*. Therefore, "the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008).

Here, there was a genuine issue of material fact as to whether the sidewalk defect was open and obvious. First, Derr, whose position with defendant required him to identify obvious sidewalk defects, never discovered the defect while driving through the neighborhood. Moreover, during yearly pavement inspections, defendant's inspectors looked for obvious sidewalk defects while driving. Based on this testimony, it is reasonable to presume that, had the sidewalk defect been open and obvious, either the inspectors or Derr would have discovered it. And, while Derr did not believe that the sidewalk defect was two inches or more, his testimony regarding his job duties and his failure to spot the defect prior to plaintiff's fall was, at minimum, enough to create a genuine issue of material fact.

Second, Ziemba's affidavit also created a genuine issue of material fact regarding whether the defect was open and obvious. Ziemba, plaintiff's expert, testified that plaintiff and Carpenter would not have been able to identify the defect walking in near darkness. This was also sufficient to create a genuine issue of material fact as to whether the defect was objectively open and obvious, as there was no indication that Carpenter or plaintiff were not of ordinary intelligence. *Slaughter*, 281 Mich App at 479; *Lanctoe*, 492 Mich at 461.

Defendant, however, asserts that the darkness of the evening was not a unique circumstance that would refute the open and obvious nature of the sidewalk defect, citing to *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997). In *Singerman*, the plaintiff was a business invitee playing hockey at an arena owned by the defendant *Id*. at 136-137, 139. The plaintiff saw another player shoot the hockey puck towards him, but, due to poor lighting, was unable to react as he normally would to avoid being struck. *Id*. at 138. Relevantly, our Supreme Court stated that the lack of proper lighting was itself "an open and obvious danger which the invitee might reasonably be expected to discover."[3] *Id*. at 141.

***5** We have recently examined the effect of darkness in addressing the question of whether a danger was open and obvious. In *Blackwell v Franchi*, 318 Mich App 573; 899 NW2d 415 (2017), remanded on other grounds 502 Mich 918; 914 NW2d 900 (2018), the plaintiff fell down an eight-inch drop off when entering the defendants' mud room. *Id*. at 574-575. The area was unlighted and the plaintiff presented eyewitness evidence that the drop-off was concealed by the darkness. *Id*. at 577-578. The record also contained photographs demonstrating that the drop-off was difficult to see with sufficient lighting. *Id*. at 578. We concluded that the testimony and the photographs "clearly demonstrated a question of fact about whether an average user acting under the conditions existing when plaintiff approached the mud room would have been able to discover the drop-off upon casual inspection." *Id*.

This case is closer to the situation in *Blackwell* than it is to *Singerman*. In this case, plaintiff's expert attested that

the hazardous condition, the defective sidewalk panel, was concealed by the lack of natural lighting or streetlights. This is different than *Singerman*, where the open and obvious hazardous condition was the darkness itself. Plaintiff here presented evidence from her expert that the condition would have been concealed with darkness, and Derr's testimony also indicated that it was possible that the defect would have been concealed during the daylight. This is similar to *Blackwell*, where the plaintiff presented evidence that the drop-off was concealed by the darkness and would have been difficult to see even with sufficient lighting. Given this evidence, and that we have previously recognized that darkness may impair a plaintiff's visibility to the extent that an otherwise observable danger no longer qualifies as open and obvious, *Abke v Vandenberg*, 239 Mich App 359, 363-364; 608 NW2d 73 (2000), we cannot conclude that the trial court erred when it determined plaintiff had presented evidence creating a genuine issue of material fact as to whether the defect was open and obvious.

Defendant further argues that the trial court should not have found that there was an issue of fact regarding its immunity under MCR 2.116(C)(7), and, instead, should have held an evidentiary hearing to resolve the factual dispute regarding its open and obvious defense. Defendant relies on our determination that, under MCR 2.116(C)(7), in contrast to MCR 2.116(C)(10), the trial court should "hold an evidentiary hearing for the purpose of obtaining such factual development as is necessary to determine" whether a government agency's action was subject to an exception to governmental immunity. *Dextrom v Wexford Cty*, 287 Mich App 406, 432; 789 NW2d 211 (2010). In *Dextrom*, there was a question of fact as to whether the defendants' operation of a **landfill** was subject to the proprietary function exception to governmental immunity. *Id*. This is once again distinguishable from the issue here. There was no dispute that the sidewalk exception to governmental immunity applied to plaintiff's suit and that defendant was entitled to raise the open and obvious defense. See MCL 691.1402a(5). No further factual development was required over these legal principles. Because the law permits defendant to raise an open-and-obvious defense, whether defendant will be able to successfully establish this defense remains a fact question for the jury. [4]

***6** Accordingly, the trial court did not err in determining that there was a genuine dispute of material fact under MCR 2.116(C)(10), regarding whether the sidewalk's defect was open and obvious. See *Gillette*, 327 Mich App at 19.

V. NOTICE

Lastly, defendant argues that plaintiff's pre-suit notice was fatally flawed because it provided the wrong address as it indicated that the sidewalk defect was at 22252 Olmstead Street rather than its actual location of 22238/40 Olmstead Street. We disagree.

The GTLA requires that:

> [a]s a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, ... shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall *specify the exact location* and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. [MCL 691.1404(1) (emphasis added).]

"It is well established that statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate." *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 714-715; 822 NW2d 522 (2012). Thus, a plaintiff's "[f]ailure to provide adequate notice under this statute is fatal to [the] plaintiff's claim against a government agency." *Russell v City of Detroit*, 321 Mich App 628, 633; 909 NW2d 597 (2017) (quotation marks and citation omitted).

Notably, "[t]he statute does not delineate the form of the notice ... except that it must ... contain the identified information." *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). Moreover, "[t]he sufficiency of the notice is judged on the entire notice and all the facts stated

therein." *Russell*, 321 Mich App at 633. "Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects." *Id*. (quotation marks and citation omitted). Finally,

> when notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect. The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured. [*Plunkett v Dep't of Transp*, 286 Mich App 168, 176-177; 779 NW2d 263 (2009).]

Defendant contends that plaintiff's notice was fatally defective because plaintiff provided an incorrect address as demonstrated by the land survey it undertook two years after plaintiff's fall. Defendant relies on this Court's opinion in *Thurman* and our Supreme Court's order in *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011), rec den 490 Mich 895; 804 NW2d 732 (2011). Defendant's reliance is misplaced.

In *Thurman*, this Court determined that the plaintiff failed to give adequate notice when he described the defective sidewalk at "35 Huron, Pontiac, Michigan," without specifying whether it was at 35 West Huron or 35 East Huron, or whether it was on the north or south side of Huron street. *Id*. at 386. This Court also determined that the plaintiff's photographs were insufficient to cure his defective notice because they were untimely submitted. *Id*.

***7** In this case, in direct contrast to *Thurman*, plaintiff's timely notice stated that she "tripped and fell over an uneven sidewalk" "located in front of the home with a common address of 22252 Olmstead, Dearborn, Michigan." Plaintiff further stated that she was "enclosing photographs of the defective sidewalk." [5]

Defendant does not dispute that it received plaintiff's notice, including two photographs. Cf. *Russell*, 321 Mich App at 635 n 1 (declining to consider photographs that the defendant alleged it had never received). Even before receiving plaintiff's notice, defendant had been informed about the defective sidewalk in front of 22238 Olmstead. Armed with plaintiff's notice, including the photographs, Derr, defendant's sidewalk technician, located the defective sidewalk panel, testifying: "That seemed like that was the only raised area at that location." Another of defendant's employees also confirmed that plaintiff's notice was sufficient for defendant to identify and repair the defect. And, the following year, defendant removed and replaced the defective sidewalk panel. Thus, plaintiff's notice satisfied the principal purposes underlying the statute. See *Plunkett*, 286 Mich App at 176-177.

Defendant is correct that its subsequent land survey revealed the defective sidewalk was actually located on the property of 22238/40 Olmstead, not 22252 Olmstead. Thus, plaintiff's notice did not provide the precise address of the defect. But the plain statutory language requires a plaintiff to specify "the exact location ... of the defect," not an exact address of the defect. Although providing an address is one route to pinpointing an exact location, it is not the only one. To the extent plaintiff's listing the adjacent address created an ambiguity regarding the defect's exact location, plaintiff remedied it through the photographs depicting landmarks and identifying features, which served to identify the defective sidewalk's exact location. *Russell*, 321 Mich App at 633-635.

Jakupovic is likewise inapposite. There, the Supreme Court overturned this Court's unpublished decision, holding:

> The Court of Appeals recognized that the plaintiff had stated the wrong address in giving notice to the defendant of an alleged defect

> in a sidewalk. The Court of Appeals erred by excusing this error, rather than enforcing the notice requirement found at MCL 692.1404(1) as written. The statute requires notice of "the exact location" of the defect, and in this case, the plaintiff failed to specify the correct address where the defect was allegedly located. [*Id.* (citation omitted).]

This Court's *Jakupovic* opinion described the plaintiff's notice as stating:

> the defect was "adjacent to aforesaid address of 9477 Mitchell Street, Hamtramck, Michigan." Her January complaint again stated the defect was "adjacent to aforesaid address of 9477 Mitchell Street, Hamtramck, County of Wayne, State of Michigan." It also stated "in front of aforesaid address of 9477 Mitchell." In fact, the alleged defect was in front of 9465 Mitchell Street, which was immediately next to 9477 Mitchell. [*Jakupovic v City of Hamtramck*, unpublished per curiam opinion of the Court of Appeals, issued December 7, 2010 (Docket No. 293715), p 6., rev'd 489 Mich at 939.]

***8** Because plaintiff's notice in this case was later shown to provide an incorrect address as the location of the sidewalk defect, defendant suggests *Jakupovic* controls the outcome here. It does not. The *Jakupovic* plaintiff stated that the defect was adjacent to the incorrect address, suggesting that the correct address was ascertainable and could have been provided. In this case, however, absent a land survey, no one knew the exact address of the defective sidewalk panel. And, more to the point, despite defendant's focus on the incorrect address, the statute requires plaintiff to provide defendant a notice specifying "the exact location" of the defect. MCL 691.1404(1). Again, viewing the entire notice, plaintiff included the address of the home that shared the sidewalk panel along with photographs containing unique landmarks and identifying features. *Russell*, 321 Mich App at 633. And to the extent that including an incorrect adjacent address to mark the location of the actual defect created an ambiguity, plaintiff's photographs with their landmarks and identifying features sufficed because, as Derr testified, it "seemed like that was the only raised area at that location." *Id.* at 633-634. Accordingly, plaintiff's notice specified the exact location of the defect, and, therefore, plaintiff complied with MCL 691.1404(1). *Russell*, 321 Mich App at 633.

Affirmed.

Anica Letica

Elizabeth L. Gleicher

O'BRIEN, J. (concurring in part and dissenting in part).

I take no issue with the majority's conclusions with respect to the two-inch rule and notice, but I would conclude that the two-inch or more height differential between the sidewalk slabs that caused plaintiff to fall was open and obvious. I therefore respectfully dissent to that portion of the majority opinion.

At her deposition, plaintiff testified that she did not see the defect in the sidewalk before she fell because she was looking ahead and was not looking at the ground. Craig Carpenter, who was walking with plaintiff when she fell, similarly testified that he and plaintiff were talking while they walked, and that he did not notice the defect because he was looking ahead. Plaintiff testified that she never looked at the sidewalk after she fell, and Carpenter testified that he did not look at the sidewalk until the day after plaintiff's fall when he went back to the sidewalk and "[s]aw that the sidewalk had been raised," meaning one slab was higher than the other slab. Neither testified at their depositions that they did not see the defect in the sidewalk because it was hidden or concealed by darkness. [1]

On this record, I would conclude that the two-inch or more height differential between the slabs of the sidewalk was open and obvious. As the majority notes, "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). The test is objective, so "the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d

287 (2008). Photos of the height differential between the slabs show that height difference was quite large, and, in my opinion, reasonable minds could not differ that an average person with ordinary intelligence walking on the sidewalk would have discovered the height differential upon casual inspection. Plaintiff and Carpenter each testified that they did not see the height differential because they were looking ahead instead of at the ground, and neither testified that darkness precluded them from observing the condition had they looked. On these facts, I would conclude that the height differential between the sidewalk slabs that caused plaintiff to fall was open and obvious. See *Buhl v City of Oak Park*, 329 Mich App 486, 522; 942 NW2d 667 (2019) (holding that a defect in a sidewalk was open and obvious because the plaintiff "testified that nothing was obscuring her view and that she did not discern the differing heights only because she was looking at the store rather than the ground," not because anything "precluded her from being able to see the condition if she had looked").

***9** The majority concludes that there is a question of fact whether the defect in the sidewalk was open and obvious based on (1) the testimony of Douglas Derr and defendant's inspectors that they never discovered the defect and (2) the affidavit of plaintiff's expert, Steve Ziemba. I do not believe that either source of evidence supports the majority's conclusion.

First addressing the testimony of Derr and defendant's inspectors, they all testified that, before plaintiff's fall, they would drive through the neighborhood where plaintiff fell looking for obvious defects in the sidewalks, but never saw the defect that caused plaintiff to fall. Based on this, the majority concludes that "it is reasonable to presume that, had the sidewalk defect been open and obvious, either the inspectors or Derr would have discovered it." Yet whether a condition is open and obvious depends on "whether a reasonable person *in the plaintiff's position* would have foreseen the danger[.]" *Slaughter*, 281 Mich App at 479 (emphasis added). People driving on the road next to a sidewalk, even if looking at the sidewalk, are obviously in a different position than a person walking on the sidewalk—the person driving is significantly less able to perceive the condition of the sidewalk than someone walking on it. In my view, evidence that people driving on a road next to a sidewalk failed to discover a defect in the sidewalk is not probative of whether the defect would have been open and obvious to a person walking on the sidewalk, and therefore does not create a question of fact whether the defect was open and obvious.

Next addressing Ziemba's affidavit, the majority concludes that it creates a question of fact because "Ziemba, plaintiff's expert, testified that plaintiff and Carpenter would not have been able to identify the defect walking in near darkness." This is presumably based on Ziemba's stand-alone statement:

> The exposed face of the raised slab is jagged with sharp edges, sufficient to grab or catch the tip of one's shoe causing one to trip. This creates a dangerous condition *which would not be seen by plaintiff or her friend as they walked in the near dark evening hours*. [Emphasis added.]

I disagree with the majority's characterization of this statement as Ziemba stating that plaintiff and Carpenter were "walking in near darkness," and I further disagree with the majority's later characterization of this statement as Ziemba "attest[ing] that the hazardous condition, the defective sidewalk panel, was concealed by the lack of natural lighting or streetlights."[2] I respectfully suggest that Ziemba's mention of "the near dark evening hours" is a clear reference to the time at which plaintiff and Carpenter were walking, not a testament to how darkness impeded plaintiff's ability to see the defect at that time. Indeed, it is unclear how Ziemba could have opined about how dark it was when plaintiff fell or how that darkness may have impaired a person's vision. The only evidence that Ziemba reviewed about the conditions at the time of plaintiff's fall were the depositions of plaintiff and Carpenter. In those depositions, Carpenter testified that plaintiff fell between 8:30 and 9 o'clock and, when asked if it was light out, responded that "[i]t was dusk," and plaintiff agreed with Carpenter's testimony. Nothing in those statements suggest that plaintiff and Carpenter were "walking in near darkness" or that the hazardous condition was hidden by a lack of light, but they do suggest that the time the two were walking was "in the near dark evening hours," which is what Ziemba stated.[3]

***10** Thus, I do not read Ziemba's affidavit as "attest[ing] that the hazardous condition ... was concealed by the lack of natural lighting or streetlights," and I do not believe that there is any evidence in the record to support such a conclusion. The evidence only supports that plaintiff and Carpenter were walking in the evening hours. This in turn does not, by itself, support an inference that the defect in the sidewalk was obscured by a lack of light. Without any evidence that a lack of light impaired plaintiff's ability to see the defect in the sidewalk, the height differential between the slabs of the sidewalk was open and obvious for the reasons explained above. [4]

A premises possessor may nevertheless be liable for an open and obvious condition if the condition was unreasonably dangerous or effectively unavoidable. *Hoffner*, 492 Mich at 463. Clearly, the defect in this case was neither. A two-inch height differential between sidewalk slabs is an everyday occurrence that does not "impose an unreasonably high risk of severe harm," *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001), sufficient to render the condition unreasonably dangerous, see *Weakley v City of Dearborn Hts*, 240 Mich App 382, 385-387; 612 NW2d 428, 431 (2000), remanded on other grounds 463 Mich 980 (2001) (holding that "uneven pavement" did not present an unreasonable risk of harm). Likewise, the defect in the sidewalk was not effectively unavoidable as plaintiff could have walked around the defect, walked on the sidewalk across the street, or taken a different route. See *Hoffner*, 492 Mich at 469 (explaining that "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be required or compelled to confront a dangerous hazard"). Thus, the open-and-obvious defect in the sidewalk did not have any special aspects that would otherwise render defendant liable.

For these reasons, I respectfully dissent to the majority's holding that there is a question of fact whether the defect in the sidewalk was open and obvious.

Colleen A. O'Brien

All Citations

Not Reported in N.W. Rptr., 2021 WL 138702

Footnotes

1 Defendant argued below, and continues to argue on appeal, that the lighting conditions were not as dark as plaintiff described. Specifically, defendant provided data from the U.S. Naval Observatory, which demonstrates that sunset was at 8:50 p.m. and twilight lasted until 9:22 p.m. on May 17, 2017. Defendant also asserted that residential areas in the city had street lights. However, we are obligated to review the evidence in the light most favorable to plaintiff.

2 Defendant argues that Carpenter's affidavit should be disregarded because Carpenter did not provide accompanying photographs of his measurement. However, Carpenter would have been permitted to testify about his personal knowledge without photographic proof of his measurement. See MRE 602.

3 *Singerman* is a plurality opinion in which three justices dissented as to whether the open and obvious nature of the condition foreclosed all liability for defendant. *Singerman*, 455 Mich at 146-148 (MALLETT, C.J., concurring in part and dissenting in part). However, there was no dispute that the darkness was an open and obvious danger. See *id*.

4 This differs from the issue of whether plaintiff could overcome the two-inch rule, which the trial court properly determined was a matter of law. The statute specifies that the two-inch rule is a rebuttal presumption the plaintiff must overcome. MCL 691.1402a(4). In contrast, the open and obvious question is a factual one. See *Buhl v City of Oak Park*, 329 Mich App 486, 520-522; 942 NW2d 667 (2019), lv gtd __ Mich __; 941 NW2d 58 (2020) (examining whether there was a genuine issue of material fact as to whether a defect was open or obvious).

5 This was the language in plaintiff's first two notices. Plaintiff's third notice read that she tripped and fell over a vertical discontinuity and dangerous condition in the sidewalk, ... as reflected in the attached photographs .... The uneven sidewalk over which [she] fell is located in front of the home with a common address of 22252 Olmstead, Dearborn, Michigan.

1 After their depositions, Carpenter and plaintiff each submitted an affidavit in which they averred, “At the time of [plaintiff's] fall, there was no street, ambient or artificial lighting on Olmstead to illuminate the sidewalk,” and that they did not see the defect in the sidewalk because “[t]he lack of natural, ambient or artificial light effectively hid or concealed the vertical discontinuity from detection.” Carpenter and plaintiff's averments in their affidavits that the lack of light is why they did not see the defect in the sidewalk contradicts their deposition testimony that they did not see the defect because they were looking ahead instead of at the ground. “It is well settled that a party may not create an issue of fact by submitting an affidavit that contradicts prior deposition testimony.” *Atkinson v City of Detroit*, 222 Mich App 7, 11; 564 NW2d 473 (1997).

2 This latter statement seems to conflate Ziemba's opinion with statements made by plaintiff and Carpenter after Ziemba formed his opinion. After plaintiff and Carpenter testified at their depositions, they signed affidavits in which they each averred, “At the time of [plaintiff's] fall, there was no street, ambient or artificial lighting on Olmstead to illuminate the sidewalk.” Ziemba did not review those affidavits when he formed his opinion, however, because they were signed on September 16, 2019—four days after Ziemba signed his affidavit. Moreover, Ziemba in his affidavit listed the materials that he reviewed to form his opinion, and plaintiff's and Carpenter's affidavits were not listed. In the materials that Ziemba did review, neither plaintiff nor Carpenter mentioned that their vision was impeded by a lack of light at the time plaintiff fell.

3 The trial court appeared to also interpret Ziemba's statement as attesting to the time at which plaintiff and Carpenter were walking; the court stated that “plaintiff's liability expert[ ] opined that the dangerous condition caused by the raised slab would not have been seen by the plaintiff or Mr. Carpenter *as they walked in the evening hours*.” (Emphasis added.)

4 Even assuming that the majority is correct in its construing of Ziemba's statement, I would conclude that Ziemba's single sentence in his affidavit would not create a genuine issue of fact as to whether the defect in the sidewalk was open and obvious; the sentence was a single conclusory allegation and was devoid of detail that would permit the conclusion that the defect in the sidewalk was such that an average person with ordinary intelligence would not have discovered it upon casual inspection. Accord *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996) (“Plaintiff's affidavit did not satisfy her burden as the opposing party; rather, it constituted mere conclusory allegations and was devoid of detail that would permit the conclusion that there was such conduct or communication of a type or severity that a reasonable person could find that a hostile work environment existed.”).