MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

City of Indianapolis,
Appellant-Defendant,

v.

John P. Young, Special Administrator of the Estate of Etta Fairchild,
Appellee-Plaintiff.

February 5, 2021

Court of Appeals Case No. 20A-CT-513

Interlocutory Appeal from the Marion Superior Court

The Honorable Cynthia J. Ayers, Judge

Trial Court Cause No. 49D04-1311-CT-42524

Mathias, Judge.

[1] The City of Indianapolis ("City") appeals the trial court's order denying its motion for summary judgment. In that motion, the City claimed immunity

under the Indiana Tort Claims Act ("ITCA") for damages Etta Fairchild ("Fairchild") suffered after she fell on a City sidewalk. On appeal, the City argues that its policy decisions regarding sidewalk repair are entitled to discretionary immunity.

[2] Concluding that the City is not entitled to immunity for operational decisions made concerning the report of the defective sidewalk, we affirm.

Facts and Procedural History

[3] In 2012, the City and Citizens Gas Company were involved in a construction project near Fairchild's home at 3608 Wellington Avenue. On May 31, 2012, Fairchild contacted the City to report that the sidewalk near her home on Wellington Avenue was covered with a piece of plywood and was in defective condition.

[4] An employee from the Department of Public Works (DPW) determined that Citizens Gas had an open right-of-way permit allowing it to complete excavation at 3620 Wellington Avenue, near Fairchild's home. The permit required Citizens Gas to fully restore the sidewalk by June 8, 2012. Therefore, the City did not take any additional action with regard to Fairchild's complaint concerning the sidewalk's hazardous condition.

[5] On June 18, 2012, Fairchild reported to the City that there was a large hole in the sidewalk near her home that was covered by a wood plank. Fairchild believed it was hazardous and might cause someone to trip. A DPW employee

inspected the sidewalk two days later. The employee reported that a sidewalk panel was missing and assigned the sidewalk-repair project a priority 1 rating, meaning the sidewalk was assigned the highest priority for repair due to its hazardous condition.

[6] In September 2012, Fairchild fell on the sidewalk just north of 3608 Wellington Avenue. The fall caused injuries to her left leg and hip. The City received notice of her fall on September 12, and the sidewalk was repaired the next month.

[7] In 2013, Fairchild filed a complaint against the City in Marion Superior Court, and she amended her complaint on March 5, 2014. Fairchild's amended complaint alleged that she tripped as a result of the sidewalk's condition. She claimed that the City breached its duty to promptly repair the sidewalk and warn individuals of its dangerous condition. Fairchild alleged that she suffered injury and incurred damages as a result of the City's negligence. In response, the City claimed that it was immune from Fairchild's claims pursuant to the ITCA.

[8] Sadly, Fairchild passed away during these proceedings. John Young was appointed as special administrator of her estate, and on October 2, 2018, he was substituted as the named plaintiff in this case. The parties filed numerous continuances and this case lingered on the trial court's docket for over five years before the City filed a motion for summary judgment on February 18, 2019.

[9] In that motion, the City claimed its "policy regarding sidewalk repair is entitled to discretionary immunity." Appellant's App. p. 43. In support, the City designated evidence of its five-year plan, formulated in 2010, for constructing and repairing City sidewalks. When the Mayor's Action Center receives reports of needed sidewalk repairs, the Action Center generates work orders to DPW to investigate. The DPW inspector assigns a priority rating for repair after investigating the condition of the sidewalk. The rating system consists of an analysis of the money available for repair versus the urgency of the needed repair. Sidewalks with the same priority rating are typically repaired in the order in which the sidewalks are entered into the DPW system. However, because DPW projects are underfunded, the cost of sidewalk repairs is balanced against the funds needed for completing other DPW projects, such as chuckhole repairs, sign repairs, guardrail repairs, and storm-sewer repairs.

[10] The trial court held a hearing on the City's motion on August 14, 2019, and the court denied the motion on October 3.[1] The court concluded that summary judgment was improper due to genuine issues of material fact, including: whether the City followed its own policy in evaluating the need to accelerate repair to the sidewalk and length of time between the City's awareness of the

[1] The trial court granted Citizen's Gas's motion for summary judgment after concluding that Citizen's had no duty to maintain or repair the sidewalk at issue. Citizen's designated evidence that its permit only allowed it to perform work on the street near 3620 Wellington Avenue and it did not perform any work on the sidewalk at issue. Appellant's App. pp. 16-24.

hazardous condition of the sidewalk and the date of Fairchild's fall.[2] The City asked the court to certify its order for interlocutory appeal. The trial court granted the City's motion to certify. Our court accepted jurisdiction of the City's interlocutory appeal in April 2020.

Standard of Review

[11] Our standard of review on summary judgment is well-settled:

> The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law.

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[2] The court also concluded that the City's immunity defense is inapplicable to Fairchild's claim that the City was negligent by failing to provide adequate warnings of the dangerous condition of the sidewalk. The parties do not focus on this finding in their briefs. However, without addressing whether its claim of immunity is applicable to the failure to warn claim, City observed that "'[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.'" *Roumbos v. Samuel G. Vazanellis & Thiros & Stracci, PC*, 95 N.E.3d 63, 66 (Ind. 2018) (quoting Restatement (Second) of Torts § 343(A)(1) (1965)). Because we conclude that the City is not entitled to immunity for failing to take action on Fairchild's May 31, 2012 complaint that the sidewalk in question was defective, whether the City had a duty to warn of the sidewalk's condition is an issue for resolution in subsequent proceedings.

A House Mechs., Inc. v. Massey, 124 N.E.3d 1257, 1262 (Ind. Ct. App. 2019) (quoting *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016) (internal citations omitted)).

Discussion and Decision

[12] Under the ITCA, "governmental entities can be subject to liability for tortious conduct unless the conduct is within an immunity granted by" Indiana Code section 34-13-3-3. *Veolia Water Indianapolis, LLC v. Nat'l Tr. Ins. Co.*, 3 N.E.3d 1, 5 (Ind. 2014). In pertinent part, "[a] governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the … [t]he performance of a discretionary function." Ind. Code § 34-13-3-3(7). Whether an act is discretionary "is a question of law for the court's determination." *Peavler v. Bd. of Comm'rs of Monroe Cnty.,* 528 N.E.2d 40, 46 (Ind. 1988). The entity seeking immunity bears the burden to demonstrate that "the challenged act or omission was a policy decision made by consciously balancing risks and benefits." *Id.* Moreover, "[d]iscretionary immunity must be narrowly construed because it is an exception to the general rule of liability." *Id.*

[13] In *Peavler*, our supreme court adopted the "planning-operational test" for determining whether a function is discretionary under the ITCA. *City of Indianapolis v. Duffitt*, 929 N.E.2d 231, 236 (Ind. Ct. App. 2010) (citing *Peavler,* 528 N.E.2d at 42). The test is designed to "insulate[] only those significant policy and political decisions which cannot be assessed by customary tort

standards." *Peavler*, 528 N.E.2d at 45. Specifically, the *Peavler* Court held that governmental entities are not liable for negligence arising from decisions which are made at the planning level, as opposed to an operational level. *Id.* at 45-46. Our court has previously expounded on the differences:

> [I]f the decision of the governmental entity was a "planning" activity, that is a function involving the formulation of basic policy characterized by official judgment, discretion, weighing of alternatives, and public policy choices, then the decision is discretionary and immune under [Indiana Code § 34-13-3-3(7)]. Government decisions about policy formation which involve assessment of competing priorities, a weighing of budgetary considerations, or the allocation of scarce resources are also planning activities. On the other hand, if the function is "operational," for example decisions regarding only the execution or implementation of already formulated policy, the function is not discretionary under the statute and no immunity attaches.

Duffitt, 929 N.E.2d at 236 (citations omitted).

[14] In support of its claim of immunity, the City relies on *Duffitt*. In that case, the City received a complaint of a sidewalk in hazardous condition. The City inspected the sidewalk in August 2006 and issued a work order for repair with a priority 1 rating. Over a year later, on October 20, 2007, Duffitt fell on the sidewalk that had not been repaired. She suffered physical injuries from the fall and filed a complaint for damages against the City.

[15] The City filed a motion for summary judgment claiming discretionary function immunity under the ITCA. With its motion, the City designated evidence describing its priority rating system for sidewalk repairs, its limited budget for DPW projects, and its decision to empower the operations manager with the discretion to prioritize sidewalk repair. *Id.* at 234–35. The City also designated evidence that on the date the relevant sidewalk was inspected, the City had ninety-three sidewalks with a Priority 1 rating and approximately 357 open DPW Priority 1 projects. *Id.* at 235. The trial court denied the City's motion.

[16] The City appealed, and our court reversed the trial court's decision. *Id.* at 242. In finding the City was entitled to summary judgment, we reviewed prior decisions involving governmental claims of immunity where plaintiffs were injured after a fall caused by a defective sidewalk. *Id.* at 237. In doing so, we found that when failure to repair the sidewalk was the result of balancing public policy factors and weighing budgetary considerations in the allocation of the governmental entity's resources, the repair decision was discretionary and thus immune for tort liability. *Id.* (citing *City of Terre Haute v. Pairsh*, 883 N.E.2d 1203 (Ind. Ct. App. 2008), *trans. denied*; *City of Crown Point v. Rutherford*, 640 N.E.2d 750, 752 (Ind. Ct. App. 1994), *trans. denied*). On the other hand, when the failure to repair was not the product of a conscious balancing of risks and benefits but instead placed the onus on the homeowner to apply for sidewalk repair, we found no immunity. *Id.* at 237 (citing *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1119 (Ind. Ct. App. 1995), *trans. denied*.

[17] Applying the planning-operational test, the *Duffitt* court noted that although sidewalks with the same priority were generally repaired in the same order in which they were entered into the DPW system, city managers further prioritized sidewalk repairs by "conducting a cost-benefit analysis with due consideration for budgetary concerns and competing projects." *Id.* at 237. Our court concluded that the city's prioritization scheme was a decision entitled to discretionary immunity under the planning-operational test.[3] *Id.* at 238.

[18] Six years later, our supreme court applied the planning-operational test in *City of Beech Grove v. Beloat*, 50 N.E.3d 135 (Ind. 2016). In that case, the City of Beech Grove delayed routine maintenance on Main Street because the city intended to reconstruct the entire street. In June 2012, Beloat was crossing Main Street and stepped slightly outside of the crosswalk to avoid a truck that had stopped a few feet into the crosswalk area. Beloat inadvertently stepped into a hole on the roadway. Her foot was wedged in the hole and she heard a snapping noise. Beloat was taken to the hospital where she learned that her leg was broken. *Id.* at 137. Beloat sued the city, alleging that it negligently failed to

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[3] The City's interpretation of *Duffit* would extend immunity to all acts or omissions involving sidewalk repair because the City was engaged in "planning" activities when it established its policy for prioritization of sidewalk repair. The City is entitled to immunity for planning activities, but as we noted above, "if the function is "operational," for example decisions regarding only the execution or implementation of already formulated policy, the function is not discretionary under the statute and no immunity attaches." *Duffit*, 929 N.E.2d at 236. Although the City would be entitled to immunity for prioritizing a sidewalk repair over another, if the decision involved conducting a cost-benefit analysis, *see id.* at 237, a DPW worker's failure to enter the needed sidewalk repair into the City's prioritization system would not.

maintain Main Street. The city claimed it was immune from liability under the ITCA. The trial court denied the city's motion for summary judgment and the city appealed.

[19] Our supreme court reiterated that although a governmental entity does not need to demonstrate that it "considered and rejected the specific improvements alleged," to establish discretionary function immunity, the entity "must demonstrate that 'conscious balancing' took place.'" *Id.* at 142 (quoting *Voit v. Allen Cnty.*, 634 N.E.2d 767, 770 (Ind. Ct. App. 1994), *trans. denied)*). Conscious balancing "can be shown by evidence that the governmental entity considered improvements of the general type alleged in [the plaintiff's] complaint." *Id.* (citation omitted).

[20] Ultimately, our supreme court observed that the city did not need to designate evidence that it considered whether to fill the specific hole that allegedly caused Beloat's injury. However, the city did need to establish that the "Main Street Project was implemented instead of general road repairs, such as filling pot holes, and that the costs and benefits of this decision were weighed." *Id.* at 142–43. Because the city failed to designate such evidence, our supreme court affirmed the trial court's denial of its motion for summary judgment. *Id.* at 143; *see also Scott v. City of Seymour*, 659 N.E.2d 585, 591 (Ind. Ct. App. 1995) (holding that "[p]ublic policy decisions committed to a board or commission and entitled to discretionary immunity must be made in public in the manner provided by law, not on an informal basis outside of the public record").

[21] Here, the City relies almost exclusively on the *Duffitt*'s holding that the priority rating system utilized by the City to prioritize sidewalk repairs is a policy decision, which is entitled to immunity. However, unlike the circumstances presented in *Duffitt*, the City failed to initially assign a priority repair rating to the sidewalk in front of Fairchild's home after she reported the defect on May 31, 2012.

[22] Fairchild designated evidence that she made complaints about the sidewalk in front of her home for "an extended period of time" before the City inspected the sidewalk and assigned a priority rating for repairs.[4] Appellant's Br. at 15. The City admittedly did not inspect the sidewalk for repair after Fairchild's May 31, 2012 complaint based on its belief that Citizens Gas would make any necessary repairs by June 8, 2012, after completing nearby excavation work. The City classifies this belief as "reasonable."[5] Appellant's Br. at 7. However, the permit allowed the company to make one "asphalt cut in *street*" at 3620 Wellington

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[4] The report the City received concerning Fairchild's September 2012 fall on the sidewalk stated that Fairchild had "fallen on a broken sidewalk that has been previously reported two years ago[.]" Appellee's App. p. 7. But the City designated evidence that there was no complaint made about the defective sidewalk before Fairchild's May 31, 2012 complaint. Appellant's App. p. 238. The City argues that the evidence Fairchild relies on to establish that the City had reports of the defective nature of the sidewalk prior to May 31, 2012, is inadmissible hearsay. Because the City's knowledge of whether the sidewalk was defective prior to May 31, 2012, is not dispositive of our resolution of the immunity question presented in this appeal, we need not consider the City's hearsay argument, which was not raised as a separate issue in its brief.

[5] During the summary judgment proceedings, Citizen's Gas submitted Allen Barker's affidavit, in which Barker stated that the work performed was drilling a hole into the street to test for gas leaks. Barker stated that Citizen's Gas did not perform any work on the sidewalk. Barker's affidavit is not in the record before us. But the trial court referenced his statements in its order denying the City's motion for summary judgment, but also granting Citizen's motion for summary judgment. Appellant's App. pp. 16-24.

Avenue. Appellant's App. p. 84 (emphasis added). There is no mention of the sidewalk in the permit. Whether the City reasonably believed that Citizens Gas would repair the sidewalk defect reported by Fairchild is a factual question to be resolved by a trier of fact.

[23] In sum, in responding to Fairchild's May 31, 2012 complaint, the City did not follow the decision-making process that our court determined was entitled to immunity in *Duffitt*. *See Duffitt*, 929 N.E.2d at 242. Moreover, the City did not designate any evidence to establish that its decision to rely on Citizens Gas to repair the sidewalk was a policy decision made by a conscious balancing of risks and benefits. *See Greathouse*, 616 N.E.2d at 366–67 (explaining that the "critical inquiry associated with the [planning-operational] test is 'not merely whether judgment was exercised but whether the nature of the judgment called for policy considerations'" (quoting *Peavler*, 528 N.E.2d at 45)). And the DPW Manager's decision after receiving Fairchild's May 31, 2012 complaint that the defective sidewalk did not need to be inspected and assigned a priority repair rating is an operational decision that is also not entitled to immunity. *See Duffitt*, 929 N.E.2d 238 (explaining that "decisions based upon professional judgment rather than policy are not entitled to discretionary immunity" (citing *Peavler*, 528 N.E.2d at 47)). For all of these reasons, we conclude that the City's decision to rely on Citizens Gas to repair the sidewalk is an "operational" decision that does not entitle the City to immunity under the ITCA.

Conclusion

[24] The City is not entitled to immunity for its failure to follow its own priority rating procedure for defective sidewalks after Fairchild complained of the sidewalk's defective condition on May 31, 2012. We therefore affirm the trial court's order denying the City's motion for summary judgment.

[25] Affirmed.

Altice, J. and Weissmann, J. concur.