

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHAEL LAMBERT,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

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UNPUBLISHED

June 27, 2013

No. 308563

Genesee Circuit Court

LC No. 10-094566-NO

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals from an order of the circuit court denying its motion for summary disposition.

Plaintiff was injured when he tripped and fell on the sidewalk in Flint. Plaintiff alleges that he tripped because of a defect in the sidewalk that was elevated and concealed by snow. As a result of his fall, plaintiff injured his left knee and was transported to the emergency room at Hurley Hospital Medical Center. On March 16, 2010, plaintiff sent defendant notice of his injury. Plaintiff attached eight pictures of the defect to his notice. Because those pictures “were of extremely poor quality,” two days later plaintiff supplemented his notice to defendant with a letter and one clear picture of the defect.

Plaintiff filed his complaint, alleging the defective-highway exception to governmental immunity because defendant failed to repair and maintain the sidewalk. Defendant subsequently filed its motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10), claiming that it lacked actual and constructive notice of the defect. The trial court found that there was a question of fact as to constructive notice and denied defendant’s motion for summary disposition. Defendant now appeals, and we affirm and remand.

Defendant first argues that it did not have notice of the defect. While plaintiff must show that defendant was on notice of the defect in order to hold defendant liable, MCL 691.1403 specifies that “knowledge and time enough to repair are conclusively presumed when the defect has been readily apparent to an ordinarily observant person for 30 days or longer.” *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 169; 713 NW2d 717 (2006). Here, plaintiff submitted Darla Lambert’s affidavit to show that the defect was apparent to her. She averred that she lived near the defect plaintiff complained of and that it had existed for approximately one year before

plaintiff was injured. Accordingly, the trial court found that there was a question of fact and denied summary disposition.

There remains the issue whether the trial court abused its discretion when it chose to consider Darla Lambert's affidavit. Defendant relies on two court rules to show that the trial court abused its discretion and that the affidavit was not admissible to establish a question of fact regarding constructive notice. First, defendant argues that plaintiff failed to file the signed affidavit with his response "at least 7 days before the hearing" pursuant to MCR 2.116(G)(1)(a)(ii). Next, defendant argues that if plaintiff were unable to procure the signed affidavit to file with his response pursuant to MCR 2.116(G), then plaintiff should have filed a separate affidavit pursuant to MCR 2.116(H) stating that Darla Lambert's affidavit could not be procured. Then the trial court could have either denied the motion or allowed plaintiff additional time.

Instead, the trial court admitted Darla Lambert's affidavit into evidence at the hearing. But it cannot be said that defendant has been prejudiced by the trial court's decision to do so. The signed affidavit presented at the hearing was identical to the affidavit filed with plaintiff's response in almost all respects. The only difference was the signature. Therefore, defendant was aware (1) that plaintiff intended to use Darla Lambert's affidavit during the hearing for summary disposition and (2) of what Darla Lambert's affidavit specifically averred.

Further, it was within the trial court's discretion to consider the affidavit. To be an abuse of discretion, the trial court's determination must fall outside the range of principled outcomes. *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011). Here, the trial court's range of principled outcomes included both admitting and excluding the affidavit. Therefore, the trial court did not abuse its discretion when it decided to consider the affidavit, and summary disposition was correctly denied.

Next, defendant also argues that it did not receive proper statutory notice from plaintiff. To bring a claim under the defective-highway exception to the act, a plaintiff must first provide a defendant with proper notice of injury and highway defect pursuant to MCL 691.1404(1). Defendant acknowledges that this issue was not initially addressed in the trial court, but urges us to address this issue "sua sponte." We decline to address it for the first time on appeal. Defendant, however, may raise this issue in the trial court as the case proceeds. We offer no opinion on plaintiff's argument that defendant waived this issue by failing to raise it in its affirmative defenses.

Affirmed. The matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ Cynthia Diane Stephens  
/s/ David H. Sawyer  
/s/ Patrick M. Meter