STATE OF MICHIGAN

COURT OF APPEALS

JOHN FITZGERALD, Plaintiff-Appellee,	UNPUBLISHED February 22, 2011
v	No. 296125 Washtenaw Circuit Court
CITY OF ANN ARBOR, Defendant-Appellant.	LC No. 09-000228-NO

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying its motion for summary disposition based on governmental immunity. Defendant's motion argued that plaintiff had not satisfied the notice requirements of MCL 691.1404(1), and that defendant did not have actual or constructive notice of the condition as required by MCL 691.1403. We reverse the trial court's decision and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On July 8, 2008, plaintiff was injured when he stepped on the lid of a box containing electrical connections set flush with the sidewalk, called a "handhole," which broke underneath him, causing him to fall. Plaintiff operated a hot dog cart in Ann Arbor and he had just put it away for the evening. He was walking along the sidewalk with a woman he knew when "then next thing you know it, I was on the ground." He stated, "I was just walking on the sidewalk and the next thing, you know, the sidewalk caved in and I just flipped over and fell." In identifying photographs taken after the accident, plaintiff stated regarding the crack in the box cover, "[t]hat's where my foot went through it . . . where it's caved in where I stepped on it and fell through," and "[t]his is what the box looked like after I stepped on it, where it broke in." Plaintiff had walked back and forth in that area many times in the past and had never paid much attention to the box in the sidewalk. On July 17, 2008, plaintiff completed a claim reporting form supplied to him by defendant. On it, he described the incident: "I was walking an elderly lady to her car when I stepped on a plastic grate and it broke. This caused injury to my ankle, tore ligaments and caused other injuries to my elbows and knees."

According to defendant, the claim reporting form given to plaintiff is used "for all potential claims, including vehicle damage, personal injury, property damage, and sewer backup claims," and is accompanied by two pages of information.[1] The informational pages include sections titled, "HOW TO FILE A CLAIM," "WHAT HAPPENS AFTER A CLAIM IS FILED?," and "WHAT LEGAL NOTICES ARE REQUIRED FOR THE CITY TO PROVIDE TO POTENTIAL CLAIMANTS?" In the legal notices section, only motor vehicle no-fault and sewer backup claims are described. The form specifically marks with asterisks the information required for a sewer backup claim under MCL 691.1416–1419. The materials do not mention notice requirements associated with defective streets or highways, MCL 691.1404, or address the need to provide the names of known witnesses. Likewise, the claim reporting form does not request the names of known witnesses.

Regarding the broken cover, defendant's Field Operations Supervisor, Charles Fotjik, testified that there is no map or inventory of the handholes in the city. Fotjik did not know how many handholes there are in the city, but guessed it would be "thousands." The one that broke was of an older style that is now replaced with a whole, new box. The older boxes are not replaced systematically, but only when repairs or construction are performed in the area, or as needed when they break. Fotjik testified that he could recall one other lid that had broken in the past year. He was not aware of a handhole failure due to normal pedestrian traffic.

Defendant moved for summary disposition as described above, arguing that plaintiff had not satisfied the statutory notice requirements because he knew of an eyewitness but did not identify her within 120 days[2], and that the city had no actual or constructive notice of the condition of the box's lid until it broke. The court found defendant's claim reporting form was "deceptive" because it did not ask for all the information required by statute. The court ruled, "[w]ell, under the circumstance of this case and this form I'm going to find that the claim was not defective with regard to the notice issue. There is a genuine issue of material fact and the motion for summary disposition is denied." The court did not expressly state whether this decision was with regard to the issue of defendant's notice of the condition or the issue of plaintiff's written notice. However, implicit in the court's denial of summary disposition is its finding that notice was sufficient in both regards.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the

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[1] At the summary disposition hearing, defense counsel indicated that it is also used for sidewalk claims.

[2] At the summary disposition hearing, defense counsel stated that the claim reporting form "got [plaintiff] through the first three" requirements set forth in MCL 691.1404(1) (the location, the nature of the defect and the nature of the injury), but contended that the form "wasn't meant to be a comprehensive advice of legal rights to somebody who has a claim against the City and wants to perfect that claim."

light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

We find that the trial court erred in denying the summary disposition motion because plaintiff failed to produce any evidence that defendant had actual or constructive notice of the alleged defect.

Under MCL 691.1403:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

There is no dispute that defendant lacked actual notice. Plaintiff argues that defendant should have known of the defect had it been exercising reasonable diligence, and that it was readily apparent to an ordinarily observant person for a period of 30 days or longer. However, plaintiff provides no evidence supporting either theory. There is no evidence that the new boxes are stronger than the older boxes[3] or that the older boxes had become unsafe for pedestrian use. Based on the record in this case, plaintiff's argument that defendant was not exerting reasonable diligence is pure speculation.[4]

Likewise, the assertion that the box had a noticeable problem for more than 30 days is also speculation. Plaintiff argues that the photographs taken within a week after the accident show dried leaves and a cigarette butt inside the crack, evidencing an old crack. However, there are also dried leaves along the edges of the intact part of the lid and in a nearby sidewalk crevice. There was no testimony regarding how or when dried leaves got into the places that can be seen in the photographs. The "missing lip" of the box can, in fact, be seen jammed in between the lid and the box, and whether an ordinarily observant person would notice it missing is certainly open

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[3] Although plaintiff refers to Fotjik's deposition testimony in support of his contention that the fiberglass composite replacement handholes were stronger, Fotjik testified that he was not sure why MDOT began using the new boxes, such as whether it was due to strength, the older model being discontinued, or some other reason.

[4] Plaintiff has produced no expert testimony or other evidence to establish that defendant should have been aware of a danger posed to pedestrians by defendant's older boxes, that the handholes should be routinely inspected for their structural integrity, or that the handhole in question should have been replaced prior to the accident.

to debate. Plaintiff testified that the lid broke when he stepped on it and that he had not noticed anything wrong with the box before the incident. That evidence is uncontroverted by the photographs. Defendant's motion should have been granted on this ground.

Because we find summary disposition should have been granted due to defendant's lack of actual or constructive notice of the alleged defect as required by MCL 691.1403, we need not address defendant's arguments regarding the adequacy of plaintiff's notice under MCL 691.1404(1).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering