

STATE OF MICHIGAN
COURT OF APPEALS

LERROY WILLIAMS and ANGELA WILLIAMS,

Plaintiffs-Appellants,

v

CITY OF PONTIAC,

Defendant-Appellee.

UNPUBLISHED

August 20, 1999

No. 207263

Oakland Circuit Court

LC No. 96-518545 NO

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order entered by the trial court granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

On March 21, 1995, plaintiff Leroy Williams¹ was driving his van eastbound on Auburn Road at 6:30 a.m. As plaintiff proceeded through the intersection of Auburn and Sanford Roads, a car traveling northbound on Sanford Road driven by Sandra McKellery struck his van, causing it to turn on its side, slide through the intersection, and turn upright again as it hit a curb. Apparently, the light at the intersection was flashing yellow for plaintiff. According to McKellery's deposition testimony, she thought the light was flashing red as she approached the intersection and she slowed down and stopped before proceeding. She also stated, however, immediately after the collision (after her car spun around) she noticed that her light was green. Plaintiff suffered rather severe injuries as a result of the collision.

The intersection was controlled by a traffic signaling device that was timed to flash red/yellow from 1:00 a.m. until 5:00 a.m. when it normally switched to a full red/yellow/green sequence. On the morning of the accident, there had been a power outage that interrupted the timing of the signal's normal cycle. When the accident occurred at 6:30 a.m., the light was apparently still flashing red/yellow, rather than going through a full red/yellow/green sequence.

Plaintiffs claim that defendant failed to maintain the traffic control device in violation of MCL 691.1402(1); MSA 3.996(102)(1), which provides, in part:

Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.

In *Pick v Szymczak*, 451 Mich 607, 624; 548 NW2d 603 (1996), our Supreme Court held that “a duty is imposed on governmental agencies to provide traffic control devices or warning signs at, or in regard to, points of hazard affecting roadways within their jurisdiction. . . . [T]he issue whether a duty arises under this standard is strictly subject to the notice requirement of § 3 of the act, MCL 691.1403; MSA 3.996(103).” MCL 691.1403; MSA 3.996(103) provides:

No governmental entity 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.

The trial court ruled that defendant did not have notice of the allegedly malfunctioning traffic signal within a reasonable time to repair the signal before plaintiff’s accident and injuries occurred. First, actual notice to the reporting police agency, the Pontiac Police Department, cannot constitute constructive notice to defendant. The police department was neither the agency which had jurisdiction over the signaling device nor an agency which had contracted to maintain that device. *Schroeder v Dep’t of Transportation*, 159 Mich App 396, 399; 405 NW2d 884 (1987).

The documents submitted by plaintiffs in response to defendant’s motion for summary disposition did not establish the existence of a genuine issue of material fact. Plaintiffs submitted the unsworn letter, and the later affidavit, of an expert that was neither listed on plaintiffs’ witness lists nor disclosed in plaintiffs’ answer to defendant’s interrogatories. The expert did not address the issue of notice that the light was operating out of sequence. The control change sheet merely noted the timing for the switch from flashing to full sequence and also did not address the notice issue. The police report including the other driver’s statement concerning the light was inadmissible under MCL 257.624; MSA 9.2324. Further, the trouble report made by the Pontiac Police Department did not indicate the time of notification to defendant of the power outage that disrupted the traffic signal’s sequence schedule.

Accordingly, plaintiffs failed to meet their evidentiary burden under MCR 2.116(G)(4) to raise a genuine issue of material fact for trial. See *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). There was no evidence from which the jury could have reasonably inferred that defendant knew or should have known of the alleged defect. Where there is no genuine issue of material fact regarding notice, the trial court may properly determine the question of notice as a

matter of law. *VanStrien v Grand Rapids*, 200 Mich App 56, 58-59; 504 NW2d 13 (1993); *Beamon v City of Highland Park*, 85 Mich App 242, 245; 271 NW2d 187 (1978). Summary disposition was properly granted to defendant under MCR 2.116(C)(10).

Affirmed.

/s/ Michael J. Kelly

/s/ Kathleen Jansen

/s/ Helene N. White

¹ In this opinion, use of the singular “plaintiff” will refer solely to Leroy Williams because he was the injured party and Angela Williams’ claim is purely derivative, that being for loss of consortium.