STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0097

Dorothy Dietman,
Respondent,

Victor Dietman,
Plaintiff,

vs.

City of Rochester,
Appellant.

Filed August 11, 2009
Reversed and remanded
Harten, Judge[*]

Olmsted County District Court
File No. 55-CV-07-12589

Joseph J. Osterbauer, Michelle Barone Osterbauer, Christina M. Makens, Osterbauer Law Firm, 404 Third Avenue North, Suite 201, Minneapolis, MN 55401 (for respondent)

Rylee J. Retzer, League of Minnesota Cities, 145 University Avenue West, St. Paul, MN 55103 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Harten, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

Appellant, a city, challenges the denial of its motion for summary judgment after the district court concluded that appellant is not entitled to statutory immunity in a lawsuit brought by respondent, a pedestrian who sustained medical damages from an injury caused by appellant's defective sidewalk. Because appellant had no actual notice of the sidewalk defect of which it failed to warn respondent, we reverse and remand for entry of judgment.

FACTS

In August 2006, respondent Dorothy Dietman broke her ankle when she stepped into a depression in appellant City of Rochester's downtown sidewalk. She accrued $49,000 in medical damages. She brought this action, alleging that appellant was negligent in failing to: (1) inspect the sidewalk; (2) repair the sidewalk defect; and (3) warn her of the sidewalk defect by marking it.

Appellant moved for summary judgment on the grounds that it was entitled to statutory immunity and that respondent failed to state a prima facie negligence claim. Following a hearing, the district court granted appellant summary judgment on the negligent failure to inspect and negligent failure to repair claims, but denied summary judgment on the claim of negligent failure to warn.

Appellant challenges the partial denial of summary judgment, arguing that statutory immunity protects its conduct in failing to warn respondent of the sidewalk defect.

D E C I S I O N

"Whether governmental action is protected by statutory immunity is a question of law which appellate courts review de novo." *Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004).

"If the city engineer finds that any sidewalk abutting on private property is unsafe and in need of repairs, the city engineer shall physically mark the portion or portions of sidewalk that need repair . . . ." Rochester, Minn., Code of Ordinances § 72.05. Respondent argues that appellant is liable for its failure to warn her of the defect in the sidewalk by marking it. Appellant invokes statutory immunity as set forth in Minn. Stat. § 466.03, subd. 6 (2008), providing that cities are immune from liability for claims "based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Specifically, appellant argues that, because it had no actual knowledge of the sidewalk defect prior to respondent's injury, it had no duty to warn of the defect by marking it.[1]

In *Minder*, we detailed the relationship between statutory immunity and failure to warn in the context of a motorcycle accident allegedly caused by a county's failure to warn motorists of a pothole.

> In order to analyze a failure-to-warn claim to determine whether statutory immunity applies, it is implicit in the caselaw that the governmental body must have created or had actual notice of the alleged dangerous condition. *See, e.g., Conlin* [*v. City of St. Paul*, 605 N.W.2d 396, 399 (Minn. 2000)] (city created alleged danger by oiling and sanding streets); *Steinke* [*v. City of Andover*, 525 N.W.2d 173, 174 (Minn. 1994)]

[1] Appellant does not dispute that, if it had had actual knowledge of the defect, it would have had a duty to warn pedestrians by marking the defect.

> (county constructed the drainage ditch, the alleged danger); *Olmanson v. Le Sueur County*, 673 N.W.2d 506, 510 (Minn. App. 2004) (county had constructive easement over culvert, the alleged danger); *Christensen* [*v. Mower County*, 587 N.W.2d 305, 306 (Minn. App. 1998)] (county created alleged danger by seal-coating streets); *Berg* [*v. Hubbard County*, 578 N.W.2d 12, 14 (Minn. App. 1998)] (another accident occurred and deputy sheriff informed county of the dangerous condition prior to plaintiff's accident)[, *review denied* (Minn. July 16, 1998)]; *Gutbrod* [*v. County of Hennepin*, 529 N.W.2d 720, 722 (Minn. App. 1995)] (county engineer discovered crack/rut in road a few days prior to plaintiff's accident). Put simply, a county cannot decide whether to place a warning sign near an alleged dangerous condition if it does not know the condition exists. And a county does not lose immunity merely because it failed to warn about an unknown condition.
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> Because a plaintiff that alleges a failure-to-warn claim based on constructive notice is really challenging a county's inspection and maintenance policy, a county that does not have actual knowledge of the dangerous condition will be immune from such claims where its policy balances competing social, economic, and political factors.

Minder, 677 N.W.2d at 486. It is undisputed that appellant's inspection and maintenance policy balances competing social, economic, and political factors and that appellant neither created the defect nor had actual notice of it. Actual notice is defined as notice "given directly to, or received personally by, a party." Black's Law Dictionary 1164 (9th ed. 2009). The inference that no notice of the defect was given directly to or received personally by any agent of appellant is supported by the district court's unchallenged findings that "[appellant] received no prior complaints or reports of a sidewalk problem at that location," and that "no *direct* evidence [shows] that any [of appellant's] official[s] even knew of the defect before [the date of respondent's accident.]"

The district court nevertheless denied summary judgment on statutory immunity after concluding that "a fact-finder could reasonably determine that [appellant] had notice of this defect in the summer of 2006 prior to [respondent's] fall." The district court based

this conclusion on its views that: (1) the defect must have been visible earlier in the summer; (2) the sidewalk was in a central downtown area; and (3) appellant was planning to work on that sidewalk later in the summer. But, while these views might support a finding of constructive notice, they do not support a finding of the notice required to defeat statutory immunity. *See Minder*, 677 N.W.2d at 486*; see also Krieger v. City of St. Paul*, 762 N.W.2d 274, 278 (Minn. App. 2009) (noting that a party opposing statutory immunity "relies entirely on a constructive-knowledge standard and concedes that her case fails if an actual-knowledge standard is applied" and that "[a]ctual knowledge is required"); *Prokop v. Indep. Sch. Dist. No. 625*, 754 N.W.2d 709, 715 (Minn. App. 2008) (rejecting argument that that school district "should have known" of danger because "this [argument] applies a constructive-knowledge standard [and o]ur most recent precedential case on point [*Lundstom v. City of Apple Valley*, 587 N.W.2d 517, 520 (Minn. App. 1998)] establishes that actual knowledge is required").

Even if it could be shown that appellant had constructive notice of the defect, it had no actual notice, and appellant "does not lose immunity merely because it failed to warn about an unknown condition." *Minder*, 677 N.W.2d at 486.

Reversed and remanded.

Dated:_____ _____
James C. Harten, Judge