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COMMONWEALTH OF KENTUCKY
CALLOWAY CIRCUIT COURT
CASE NO. 19-CI-00270

SUSAN HOOD PLAINTIFF

v. **CITY DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

CITY OF MURRAY, KENTUCKY
and CITY OF MURRAY PUBLIC WORKS
and UTILITIES DEFENDANTS

Come the Defendants, City of Murray, Kentucky, and City of Murray Public Works and Utilities, (herein after collectively referred to as "Defendants"), by and through counsel, and for their Memorandum in Support of Motion for Summary Judgment, hereby state as follows:

INTRODUCTION

On July 9, 2019, Plaintiff filed suit asserting a negligence claim against the City of Murray, Kentucky and its Public Works and Utilities Department alleging that she sustained injuries when she stepped on a water meter located in a grass strip between the sidewalk and Oliver Street in Murray, Calloway County Kentucky. (Complaint, ¶ 3). Defendants are entitled to summary judgment because they did not have actual or constructive knowledge of the allegedly defective meter lid. Moreover, Defendants are entitled to immunity in accordance with the Claims Against Local Governments Act, KRS 65.200, *et seq.*

STATEMENT OF FACTS

On the morning of September 5, 2018, Plaintiff went for a walk with her daughter in the City of Murray, Kentucky. (Deposition of Susan Hood, January 7, 2020, 59-60). It was a beautiful and clear morning. (Id.). When Plaintiff got to Olive Street, she asserts that her foot touched the lid of a meter adjacent to the sidewalk and then slid right into the meter hole. (Hood depo., p. 60). Prior to stepping onto the meter lid, Plaintiff looked down and observed that the lid was correctly

sitting on top of the meter. (Hood depo., p. 69-70). She did not notice any issues with the meter or it's lid. (Hood depo., pp. 99-100). Following Plaintiff's slip-and-fall into the meter hole, City personnel, Roger Hale, Tommy Ross, and Brad House, responded to the area to inspect the meter.

Notwithstanding that fact that the meter appeared in good visible condition to Plaintiff, she contends one City employee stated that the meter had a crack in the rim preventing it from closing and another City employee stated that the meter lid was not secured due to dirt, grass, and other debris preventing a seal. (Hood depo., p. 73, 75). And Plaintiff is unaware of when the meter was last inspected by the City. (Hood depo., p. 124).

The type of meter jar Plaintiff fell into was an older clay meter jar. (Deposition of Roger Hale, December 15, 2020, p. 20). The City has regularly started to replace such meter jars with either concrete or plastic jars. (Hale depo., p. 20; Deposition of Tommy Ross, December 15, 2020, p. 21-23, 30). However, because the concrete and plastic meter jars are expensive, the City replaces them on an as-needed basis. (Hale depo., p. 20). For example, the City will replace clay meter jars with concrete or plastic jars when an individual is landscaping their yard or repaving their driveway. (Hale depo., pp. 20-21). Meter jars are also replaced when they no longer register or stop working, or when they are found to be damaged. (Deposition of Brad House, September 24, 2020, pp. 12-13; Ross depo., pp. 7-9). Damage to the meter, jar, or lid is usually reported by the meter reader; however, it may also be detected by abnormal meter readings. (Ross depo., pp. 7-9).

Prior to Plaintiff's fall, the City had not received any prior complaints regarding the meter jar or lid in question. (Hale depo., at 21; House depo., at 18-19; Ross depo., at 24-25). Nonetheless, the City replaced the subject meter jar with a concrete meter jar after Plaintiff's fall, simply because it was an old clay meter (not due to any material defect in the meter). (Hale depo., pp. 12-13). In fact, the rim and lid of the meter were not broken, and Roger Hale, an inspector for the City who

examined the meter in question after Plaintiff's alleged slip-and-fall, did not have any trouble securing the lid to the jar of the water meter. (Hale depo., pp. 12-13). Likewise, Tommy Ross, a City meter technician, responded to the location of the meter in question after the incident and the rim and lid of the meter jar appeared to be in working condition without any defects. (Ross depo., pp. 16, 23). Brad House, another City employee who is responsible for connecting and disconnecting water services, also examined the meter components after the incident and determined that it did not need to be replaced due to any material defect. (House depo., p. 17). The meter had been read monthly without any City meter reader reporting any complaints regarding the physical condition of the meter, with the last meter read occurring just 21 days prior, on August 15, 2018. (Ross depo., pp. 24-25, 37; Meter Reading Record, attached hereto as "Exhibit A").

LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Rule 56.02 of the Kentucky Rules of Civil Procedure provides that "[a] party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof." Further, Rule 56.03 provides that summary judgment should be rendered "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." While summary judgment is to be "cautiously applied and should not be used as a substitute for trial," it is an appropriate mechanism to be used "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991).

ARGUMENT

1. **Defendants are entitled to summary judgment because Plaintiff failed to present evidence that the City had actual or constructive notice that the meter lid was not secured.**

Defendants can only be liable for failing to maintain the meter jar and components in a reasonably safe condition if they had actual or constructive notice that the meter lid was not secured. Indeed, under Kentucky law "liability depends on whether the [Defendants] had any actual notice of the condition or whether the condition had existed for a sufficient length of time to charge [Defendants] with constructive notice." *Louisville Water Co. v. Cook*, 430 S.W.2d 322, 324 (Ky. 1968). In the instant action, Defendants had neither constructive nor actual notice of the alleged defective condition of the water meter.

In order to meet her burden of proof, Plaintiff must establish the date that the water meter lid became unsecure. Recently, in *Penix v. Mt. Sterling Water & Sewer*, the Kentucky Court of Appeals affirmed the Montgomery Circuit Court's entry of summary judgment in favor of a utility company where the plaintiff injured her foot and leg after stepping into a Mount Sterling city water meter because the plaintiff failed to present any evidence of when the meter lid became unsecured. No. 2017-CA-001661-MR, 2020 WL 3605843, *3 (Ky. App. June 26, 2020).[1] The Court of Appeals held that the plaintiff could not prove constructive notice without establishing the date that the meter lid was unsecured, stating:

> [t]o establish constructive notice, [the plaintiff] needed to present evidence showing how long the meter cover was unsecured. [The plaintiff] presents no such evidence. Although her testimony is sufficient to create a genuine issue whether the meter cap was unsecured on the date of her injury, it establishes nothing about the condition of the meter cap prior to the date of the accident.

[1] Pursuant to CR 76.28(4)(c), a copy of *Penix*, an unpublished Kentucky appellate decision in relied upon in this section, is attached hereto as "Exhibit B".

Id. at *2 (citing *Louisville Water Co.*, 430 S.W.2d at 324.); *see also Bland v. City of Mt. Washington*, No. 2011-CA-001239-MR, 2012 WL 2892362, (Ky. App. July 13, 2012) (holding plaintiff was required to produce testimony as to how long the meter cover remained off the meter hole to establish that the City of Mt. Washington, Kentucky had constructive notice of the defect).[2]

At the outset, there is no evidence that the meter was defective. Three different City employees examined the meter and its components following Plaintiff's fall and determined that the rim and lid of the meter intact and appeared to be in working condition without any defects. (Hale depo., pp. 12-13; Ross depo., pp. 16, 23; House depo., pp. 17). City personnel were also able to secure the meter lid after Plaintiff's alleged slip-and-fall into the meter hole. (Hale depo., pp. 12-13). Consequently, there is no evidence that the meter was defective prior to or on the date of Plaintiff's fall.

However, even assuming that the meter was defective on the date of Plaintiff's fall for purposes of this motion, City Defendants are nonetheless entitled to summary judgment as it is indisputable that City Defendants had no actual nor constructive notice that the meter lid was not secured. Even Plaintiff did not notice any issues with the water meter or its lid. (Hood depo., pp. 99-100). The meter was also read monthly without any City meter reader reporting any complaints regarding the physical condition of the meter. (Ross depo., pp. 24-25, 37). Additionally, City Defendants had received no complaints or calls regarding any defect to the meter between the last time it was inspected on August 15 and Plaintiff's fall on September 5. (Hale depo., p. 21; House depo., pp. 18-19; Ross depo., pp. 24-25; Exhibit A. Thus, it is undisputed that City Defendants did not have actual nor constructive knowledge of the allegedly unsecured meter lid.

[2] Pursuant to CR 76.28(4)(c), a copy of *Bland*, an unpublished Kentucky appellate decision relied upon in this section, is attached hereto as "Exhibit C".

Furthermore, Plaintiff has not, nor can she, establish the length of time that the meter was allegedly unsecured. "To establish constructive notice, [the plaintiff] needed to present evidence showing how long the meter cover was unsecured." *Louisville Water Co.*, 430 S.W.2d at 324. Plaintiff presents no such evidence. Like in *Penix*, Plaintiff's testimony establishes nothing about the condition of the meter lid prior to the date of the accident and she has no further evidence. Plaintiff has therefore failed to establish that Defendants even had constructive knowledge of the allegedly unsecured meter lid.

It is anticipated that Plaintiff will contend grass and other debris around the meter lid rendered the lid unsecured; however, Defendants are still entitled to summary judgment as there is no evidence of record that such condition existed, and if it did, for how long. Over a period of time, debris naturally accumulates between the rim and lid of a water meter box. (House depo., pp. 20-21). Debris, consisting of mainly vegetation and dirt, may be deposited between the rim and lid of a water meter box when property owners mow their yard or perform other landscaping activity. (Id. at 15). Grass may also grow over a meter lid. (Hale depo., pp. 15-16). Water meter readers remove dirt or debris from meter lids and rims when they perform their monthly meter reading. (Ross depo., at 36-37). However, in some instances dirt and debris does not have to be removed because it does not impact the condition of the meter lid. (*Id.*). Dirt and debris accumulate within the thirty days between monthly meter readings. (House depo., p. 22). Specific to the water meter box in question, even if dirt, grass, or debris accumulated since the last meter reading, 21 days prior, the record is devoid of any evidence that Defendants or their agents were either alerted to the issue within that 21 days nor that Defendants otherwise had any reason they should have been looking at that meter in between meter readings. Consequently, Plaintiff has not established that

Defendants had constructive knowledge of the grass or debris, which allegedly rendered the meter lid unsecure.

As Plaintiff has not established that Defendants had actual or constructive knowledge of the alleged defect, Defendants are entitled to judgment as a matter of law.

2. Defendants are immune from tort in accordance with the Claims Against Local Governments Act, and as a result, Defendants are entitled to summary judgment.

Regardless of the Defendants' notice of the allegedly defective meter lid, they cannot be liable for their decision regarding how to allocate their resources for meter repairs or for their alleged failure to inspect the existing meter. The Claims Against Local Governments Act (hereinafter referred to as "CALGA") provides that "[e]very action in tort against any local government in this Commonwealth for … personal injury … proximately caused by … [a]ny defect or hazardous condition in public lands, buildings or other public property … shall be subject to the provisions of KRS 65.2002 to 65.2006." KRS 65.2001. The term "local government" includes "any city incorporated under the law of this Commonwealth, the offices and agencies thereof …". KRS 65.200. KRS 65.2003 provides:

> Notwithstanding KRS 65.2001, a local government **shall not be liable** for injuries or losses resulting from:
> …
> (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:
> …
> (d) **The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources**; or
> (e) **Failure to make an inspection.**

(Emphasis added). The Kentucky Court of Appeals interpreted this statute to provide municipal immunity for cities' decisions regarding how to allocate resources for infrastructure repairs or for its failure to inspect existing infrastructure. *See, Russell v. City of Owensboro*, 2012-CA-002006-MR, 2014 WL 1407238, at *4 (Ky. App. Apr. 11, 2014).[3]

In *Russell*, the plaintiff was walking on a sidewalk in Owensboro when she allegedly tripped due to a two-inch break in the sidewalk that caused her to fall and sustain injuries. *Russell*, 2014 WL 1407238, at *1. The plaintiff filed a negligence action against the City of Owensboro and the City filed an answer asserting the affirmative defense that the plaintiff' s action was barred by CALGA. The trial court agreed with the City and entered summary judgment in favor of the City based on CALGA. *Id.* The Court of Appeals affirmed the ruling of the trial court, noting:

> The City's Sidewalk Plan requires the City to conduct an annual inventory of its sidewalks and prioritize each sidewalk for repairs and replacement. Because of the lack of funds and resources, the plan does not require immediate repair of all sidewalks. Its policy determinations pursuant to the Sidewalk Plan regarding the allocation of resources have "some resemblance (as in function, effect, or status)" to a legislative act and, therefore, are properly considered quasi-legislative within the meaning of KRS 65.2003. This fact situation falls squarely within KRS 65.2003(3)(d) and (e), which state a local government shall not be liable for injuries resulting for any claim arising from "[t]he exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources" or the "[f]ailure to make an inspection." **Based on the clear statutory language, the City cannot be liable for its decision regarding how to allocate its resources for sidewalk repairs or its failure to inspect existing sidewalks.**

Id. at 4-6 (internal citation omitted).

Like all Kentucky cities, the City of Murray has a limited budget and must determine how to allocate resources for repairs to its infrastructure. Similar to the City of Owensboro's utilization of a sidewalk plan to conduct annual inventory of its sidewalks and prioritize sidewalks for repairs

[3] Pursuant to CR 76.28(4)(c), a copy of the *Russell,* an unpublished Kentucky appellate decision in relied upon in this section, is attached hereto as "Exhibit D."

and replacement, Defendants prioritized meter replacement to make best use of its limited resources. The City's decision not to allocate resources for the upkeep, repair, or design improvement of the water meter jar and components in question was a discretionary, quasi-legislative decision.[4] Although the City did not replace all clay meter jars with concrete or plastic jars at one time, they regularly replaces due to the costs associated with new meters, they are regularly replaced when an individual is landscaping their yard or repaving their driveway, a meter is damaged, or a meter stops working. (Hale depo., pp. 20-21; House depo., pp. 12-13; Ross depo., pp. 7-9, 21-23, 30). As such, the City of Murray is entitled to immunity from said decision not to inspect or allocate repairs for the subject water meter box.

City of Murray Public Works and Utilities is also entitled to immunity from the City of Murray's decision. The Public Works and Utilities Department is an agency of the City owned by the City. It does not operate like a corporation nor a business; it is merely a division of the City. The Mayor and City Council of Murray oversee the operations and direction of the Public Works and Utilities Department. All Public Works and Utilities Department employees are employees of the City of Murray. The City of Murray pays the wages of Public Works and Utilities Department employees, and Murray City Council approves the hiring, raises, retention and termination of all Public Works and Utilities Department employees. Consequently, City of Murray Public Works and Utilities qualifies as an agency and is entitled to immunity pursuant to KRS 65.200, *et seq.* Accordingly, Plaintiff's claims against City of Murray Public Works and Utilities must also be dismissed as a matter of law.

[4] This statement shall not be construed as an admission of liability by Defendants but only as it applies to Defendants' lack of liability under CALGA.

CONCLUSION

For the foregoing reasons, the Plaintiffs' claims against Defendants must be dismissed, and Defendants are entitled to judgment as a matter of law. An order granting such relief is attached hereto.

Respectfully submitted,

KEULER, KELLY, HUTCHINS,
BLANKENSHIP & SIGLER, LLP
100 SOUTH FOURTH STREET, SUITE 400
PADUCAH KY 42001
PHONE (270) 448-8888
FAX (270) 448-0998

By: /s/ Kristen N. Worak
Stacey A. Blankenship
Kristen N. Worak

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2021, I electronically filed the foregoing with the Clerk of the Court, which will send notice to the following:

DAVID C. TROUTMAN
MARK EDWARDS
EDWARDS & KAUTZ, PLLC
P.O. BOX 1837
PADUCAH, KY 42002
dtroutman@edwardsandkautz.com
Attorneys for Plaintiff

By: /s/ Kristen N. Worak
Kristen N. Worak