

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD MARSHALL,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED

July 6, 2006

No. 267486

Wayne Circuit Court

LC No. 04-418615-NO

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Defendant City of Detroit appeals by right from the circuit court order denying its motion for summary disposition based on governmental immunity. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Plaintiff allegedly tripped and fell on a defect in a sidewalk in front of his home, striking his head and rendering him a quadriparetic. Plaintiff sued defendant under the highway exception to governmental immunity, alleging that defendant did not maintain the sidewalk in a reasonably safe condition fit for travel. Defendant moved for summary disposition under MCR 2.116(C)(7) claiming governmental immunity and arguing that plaintiff failed to provide notice of his injury as required by MCL 691.1404. Plaintiff responded that his mother-in-law had provided notice to defendant by writing a letter and that, alternatively, he was not physically able to provide notice because of his injury and was only required to provide notice under MCL 691.1404(3) within 180 days after the termination of the disability. The trial court was not “satisfied” with the affidavit of plaintiff’s mother-in-law. Apparently, the court was persuaded by the logic of plaintiff’s claim of disability but was not convinced that plaintiff had presented documentation “that state[s] affirmatively that he is disabled and incapable of giving notice” to support his claim. In an unusual and rather contradictory fashion, the court granted defendant’s motion for summary disposition “without prejudice,” stating:

It seems to me that logically if a person is quadriplegic, he or she is physically unable to give the notice, but I don’t have an opinion in light of that that indicates . . . Plaintiff, Mr. Marshall is in effect disabled and unable to give

the notice, for that reason the City's Motion for Summary Disposition is *granted without prejudice*. (Emphasis added.)

Plaintiff's attorney responded to the court's ruling by arguing that the medical documentation established plaintiff's disability. However, the court insisted on a specific documentation stating that plaintiff was physically unable to provide notice. The court explained its decision as follows:

Counsel, that's why I said it's *denied* without prejudice. If [you] would supply the appropriate Affidavit and documentation [that I am] requesting [shows] that he was unable to physically give notice and I believe that it is sufficient, I'll deny the City's motion. (Emphasis added.)

In its explanation, the court states that it *denied* defendant's motion. However, the written order that the circuit court filed states that defendant's motion is, "GRANTED AND IT IS FURTHER ORDERED AND ADJUDGED: w/o prejudice."

Plaintiff filed a motion for reconsideration 15 days after the order was issued and submitted the affidavits of two physicians, each stating that:

3. As of March 20, 2003, Mr. Marshall has been diagnosed with cervical myelopathy, central cord syndrome, and a C-2 fracture, and is near quadriplegic (quadriparetic).

4. From the time he was diagnosed with quadriparetic to date, he has been physically incapable of giving notice to any governmental agency. His disability will not terminate. It is permanent.

The trial court granted plaintiff's motion for reconsideration and denied defendant's motion for summary disposition.

Defendant now appeals by right and claims that the trial court abused its discretion by granting plaintiff's untimely motion for reconsideration and by relying on affidavits that were inadmissible because the affiants were not listed on any witness list. We disagree.

II. MOTION FOR RECONSIDERATION

A. Standard of Review

The grant of a motion for reconsideration is reviewed for an abuse of discretion. MCR 2.119(F)(3). A trial court abuses its discretion when the result is "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Franchino v Franchino*, 263 Mich App 172, 193; 687 NW2d 620 (2004).

B. Analysis

After our review of the contradictory comments and order of the trial court, it appears as if the trial court intended to deny defendant's motion without prejudice. Therefore, the trial

court did not abuse its discretion in granting plaintiff's poorly phrased motion for reconsideration. Under MCR 2.119(F)(1), a motion for reconsideration must be filed within 14 days of the order. Defendant correctly objects that plaintiff untimely filed his motion 15 days after the order. But given the trial court's conflicting comments and order, we find that plaintiff did not need a motion for reconsideration to submit the documentation that the trial court requested. Under MCR 2.119(F)(3), a motion for reconsideration is used to "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." Plaintiff's motion does not substantively show that the trial court made a palpable error or was otherwise misled. Although plaintiff captioned his motion as a motion for reconsideration, substantively plaintiff simply used the motion to submit additional documentation that the trial court requested. Accordingly, we find that the limitation period applicable to actual motions for reconsideration does not apply.

Although granting a dispositive motion without prejudice is procedurally confusing, given the trial court's explanation of its decision, it was not grossly violative of fact and logic, but rather just inaptly stated. As the trial court explained, it wanted plaintiff to submit additional documentation showing that he was disabled and that it would deny defendant's motion if it considered the submission to be sufficient. Accordingly, defendant's claim lacks merit.

III. AFFIDAVITS AND WITNESS LISTS

A. Standard Of Review

The grant of a motion for reconsideration is reviewed for an abuse of discretion. MCR 2.119(F)(3). A trial court abuses its discretion when the result is "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Franchino, supra* at 193.

B. Analysis

The trial court also did not abuse its discretion in granting plaintiff's motion for reconsideration based on the allegedly "inadmissible" affidavits of affiant physicians who were not listed on plaintiff's witness lists. The content or substance of an affidavit submitted to support or oppose a motion filed under MCR 2.116(C)(7) may be considered only to the extent that it is based on admissible evidence. MCR 2.116(G)(6). An affidavit submitted supporting or opposing a motion must be made on personal knowledge, state with particularity admissible facts, and show that the affiant, if called at trial, could competently testify to the facts asserted in the affidavit. MCR 2.119(B)(1). Under MCR.2.401(I)(2), a trial court may, but is not required to, prohibit any unlisted witness from testifying. The affidavits of the physicians facially appear to be made on personal knowledge of the medical facts asserted, and there is no indication that the affiants would not be able to competently testify to those facts at trial. Defendant has not submitted any determination by the trial court prohibiting the testimony of the physicians or the admission of their affidavits because they are not named on a witness list or because they could not be listed on an amended witness list because of some incompetence or disqualification to testify. Other than not being listed on a witness list, which can easily be accomplished by a motion to file an amended witness list, the affidavits and the affiants do not appear to be otherwise inadmissible or incompetent. Further, they need not be listed as trial witnesses to offer

admissible testimony for purposes of pre-trial issues. Accordingly, defendant's claim lacks merit.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette