IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-01397-COA

CITY OF JACKSON — **APPELLANT/ CROSS-APPELLEE**

v.

GRACE HILTON — **APPELLEE/ CROSS-APPELLANT**

DATE OF JUDGMENT:	08/02/2019
TRIAL JUDGE:	HON. WINSTON L. KIDD
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEYS FOR APPELLANT:	KRISTEN N. BLANCHARD LOVE TIMOTHY CRAIG HOWARD
ATTORNEYS FOR APPELLEE:	YANCY B. BURNS RODERICK D. WARD III
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	ON DIRECT APPEAL: AFFIRMED. ON CROSS-APPEAL: AFFIRMED - 06/29/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BARNES, C.J., WESTBROOKS AND SMITH, JJ.

BARNES, C.J., FOR THE COURT:

¶1. Grace Hilton was out walking in Jackson, Mississippi, at 8:30 p.m. on July 27, 2000,[1] when she stepped into an uncovered water-meter opening in the sidewalk and fell down. The

[1] There is some question as to the exact date of the incident. Hilton's complaint said July 1, 2000, but at trial, she testified that the incident occurred on July 27, 2000, and that she went to the hospital the following day. Her medical records confirm that her initial emergency room visit was on July 28. For the purposes of appeal, the exact date is not relevant for jurisdictional purposes.

water meter had grass or weeds approximately one foot high growing out of it. She called the City of Jackson ("the City") the following day to alert the City about the uncovered meter. She also went to the local emergency room, complaining of arm, shoulder and neck pain; she was treated and released that same day. She went back to the emergency room one month later for numbness and pain in her neck and back, where she was again treated and released.

¶2. Hilton sent a notice of claim to the City's mayor on April 2, 2001, pursuant to the Mississippi Tort Claims Act. *See* Miss. Code Ann. § 11-46-11(1) (Supp. 2000). She subsequently filed a complaint in the Hinds County Circuit Court on June 28, 2001, alleging negligence by the City for "leaving uncovered meter holes in such a manner as to present either willful or wanton disregard for the safety of others." Hilton requested damages for alleged injuries to her neck and back, as well as "past, present and future medical, hospital and drug bills; psychological injuries and mental anguish in the past, present and future, and permanent disability, and lost wages."

¶3. On February 7, 2002, Hilton saw Dr. Carroll McLeod, seeking pain management for her reported neck and bilateral arm pain, which she told him was a result of the July 2000 fall. Dr. McLeod diagnosed her with cervical spondylosis. Because Hilton had a history of drug and alcohol abuse, Dr. McLeod treated her with steroid injections and muscle relaxers instead of narcotics.[2] However, neurosurgeons who examined Hilton determined that she

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[2] Dr. McLeod also suggested that Hilton's breast size might be contributing to her pain and recommended she consider breast reduction surgery, but Hilton declined that option.

was not a surgical candidate, and she stopped going to see Dr. McLeod as of January 2003.

¶4. A bench trial was held in May 2006, but the circuit judge later recused herself; the case was reassigned to Judge Winston Kidd. The City filed a motion to dismiss or, alternatively, for summary judgment on May 6, 2008, alleging that Hilton had not complied with the statutory notice requirements. The circuit court denied the motion on September 14, 2011.

¶5. A second bench trial was scheduled for October 2018. The day before trial, the City filed a motion to dismiss, arguing it was immune from liability under Mississippi Code Annotated section 11-46-9(1)(d) (Supp. 2000), because a municipality's maintenance of sidewalks is a discretionary function. The circuit court dismissed the motion as untimely. *See* M.R.C.P. 6(d). The court also denied the City's motion in limine to exclude testimony of Hilton's experts, Dr. Carroll McLeod, and Cathy Smith, a certified life planner.

¶6. The bench trial was held on October 18-19, 2018. Hilton testified that when she went out for a walk that evening, it was dusk, but the street lights were on. She noted that she typically did not walk on that side of the street but did so that evening because she heard voices near an abandoned house; so she "tried to avoid it by going across the street." When asked why she did not see the hole, Hilton replied, "Because it had grass in it. And it wasn't just grass in the water meter hole. There was like grass on different spots in the sidewalk[;] [so t]here was no way I could have avoided all of the grass." She also said the grass covering the meter opening was "a good foot maybe because it was tall enough that when I stepped in it[,] I couldn't see the hole." Hilton "f[e]ll in an awkward position[,] kind of like twisted

my body, and . . . landed on the right side," with her left leg "stuck in the hole." Initially, Hilton did not think she was injured; so she "dusted [herself] off" and went home. Shortly after her fall, photographs were taken of the uncovered water meter with her present; she authenticated the photographs at trial, which showed overgrown weeds growing out of the water meter hole.

¶7. Hilton testified that she had no problems with neck pain before the incident and that she is still being treated for her condition, which she claimed "has been getting worse over a period of time." On cross-examination, she testified that she went to the emergency room on July 28, 2000, with a chief complaint of "[a]rm, shoulder and neck and numbness of finger tips." Hilton admitted she had previously suffered a back injury and a stroke; she also noted she suffered from arthritis.

¶8. Depositions from 2006 and 2016 by Dr. McLeod, who had treated Hilton for her neck pain in 2002, were admitted into evidence. In his 2006 deposition, Dr. McLeod noted that Hilton's MRI "showed a disc protrusion between the sixth and seventh cervical vertebrae, the vertebrae in her neck, but no definite herniation." He opined to a reasonable degree of medical probability that the fall in 2000 aggravated her underlying "asymptomatic cervical spondylosis." Subsequently, in his 2016 deposition, when questioned whether Hilton's presentation and symptoms were consistent with the MRI's imaging, he stated, "It would've been extremely unlikely for a lady without medical – medical education to be able to draw out a C7 radicular symptoms and to match it up with her cervical MRI. . . . I think this lady started hurting. She described C7 nerve root symptoms." Thus, Dr. McLeod reiterated his

opinion "that the symptoms related to the cervical spondylosis were directly caused by that accident."

¶9. The trial court admitted Cathy Smith as an expert in "the field of vocational counseling and life care planning." Smith provided expert testimony regarding the costs of Hilton's future medical care, as recommended by Dr. McLeod. Calculating that Hilton's remaining life expectancy was 23.9 years, Smith estimated that Hilton would require $247,815.88 for future medical expenses and treatment. On cross-examination, Smith acknowledged that she did not take into account Hilton's prior medical history in calculating her life expectancy.

¶10. Albert Conley, a meter reader with the City for twenty-four years, could not recall if he was the meter reader in the area when and where Hilton fell. Conley testified that the procedure for reading the meters involved three options: (1) read the meter if it is working; (2) skip the meter if it is not in service; or (3) enter a trouble code if the top was off. He did not recall if any trouble codes were entered for that location in June or July 2000. Conley stated that once a trouble code is entered into the reader's hand-held computer, it goes to the service department to fix the issue. He also stated that a meter reader goes by every two months to check the meters. An email from a City attorney—dated April 10, 2001, after receiving Hilton's notice of claim—was entered into evidence, asking if the City had received notice of the condition of the water meter in question. A reply e-mail indicated that "five box tops" were then replaced on April 11, 2001. Conley acknowledged in his testimony that if the tops were indeed missing, a reader should have noticed the condition

under the City's policies and procedures and entered a trouble code.

¶11. At this point in the trial, Hilton's counsel requested the court to find an inference of spoliation, noting the City's failure to comply with a request to provide the trouble codes and maintenance tickets for the water meter in question, as that information "wasn't maintained and . . . was apparently destroyed." The court reserved ruling on the issue in order to provide the parties an opportunity to address the issue in their proposed findings of fact and conclusions of law.

¶12. After the circuit court denied the City's motion for a directed verdict, the City called Darrel Davis, the superintendent of the City's water department, as a witness. He testified that in 2000, he was a "senior water meter reader." Davis explained how the hand-held computers that readers use worked. He said that for any issues encountered, the reader would "key those into the hand-held device." A report was then generated "from all the issues that [the reader] ran into on that route," and those issues were passed on to the service department. Davis did not recall any trouble codes for the meter in question in June or July of 2000. He further noted that there were no records to show the trouble codes back in 2000, as the department suffered a "massive computer failure" in 2001. He also stated that the printed reports that were generated with the trouble codes were only kept for five to ten years.

¶13. At the conclusion of the bench trial, the court instructed the parties to submit proposed findings of fact and conclusions of law. On August 2, 2019, the circuit court entered its "Opinion and Order," finding that because "substantial evidence indicates that Ms. Hilton's

injuries occurred due to a concealed danger that the City created and had notice of, Ms. Hilton should prevail in her claim of negligence against the City." However, as some of Hilton's health issues were unrelated to her fall, the court only awarded Hilton damages of $100,000. The court also concluded that "a spoliation instruction regarding [a] trouble code is proper because while the City did not intentionally destroy the trouble code, it did have the trouble code in its possession well after litigation began, yet it failed to preserve the trouble code."

DISCUSSION

I. Whether the City was immune from liability as a matter of law.

¶14. The City argues that because the maintenance of sidewalks and decisions on whether to replace a water meter cover are discretionary functions, it is immune from liability. Section 11-46-9(1)(d) provides that a governmental entity and its employees will be exempt from liability "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused." Hilton asserts that the City waived this defense. The circuit court denied the City's motion to dismiss based on this issue, citing the motion's untimely filing. The court did not address the issue of waiver.

¶15. The Mississippi Supreme Court has held that because "MTCA immunity is considered to be an affirmative defense, . . . a governmental entity's immunity under the MTCA is subject to waiver." *Kimball Glassco Residential Ctr. Inc. v. Shanks*, 64 So. 3d 941, 945 (¶12) (Miss. 2011). Furthermore, in *Estate of Grimes ex rel. Grimes v. Warrington*, 982 So.

2d 365, 370 (¶27) (Miss. 2008), the supreme court held that a physician's "failure actively and specifically to pursue his MTCA affirmative defense while participating in the litigation served as a waiver of the defense." Here, the City did not assert its affirmative defense of immunity under the MTCA until the eve of the second trial, seventeen years after filing its answer to Hilton's complaint.[3] Therefore, we agree with Hilton that the City waived this defense.

II. Whether the circuit court erred in holding the City liable and in awarding Hilton damages of $100,000.

¶16. The City argues that Hilton's "negligence is an absolute bar to recovery for a known, open and obvious condition." The City also contends that its actions "were not the direct and proximate cause of Ms. Hilton's injuries and claimed damages," noting Hilton's unrelated medical conditions. Hilton cross-appeals the circuit court's damage award.

A. Negligence

¶17. A governmental entity shall not be held liable for a claim

> arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care.

Long v. Jones County, 301 So. 3d 62, 66 (¶16) (Miss. Ct. App. 2020) (quoting Miss. Code Ann. § 11-46-9(1)(v)). In holding that Hilton should prevail on her negligence claim, the

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[3] In a 2014 e-mail, city attorneys acknowledged that despite the several motions to dismiss and for summary judgment being filed, there was nothing to indicate that "discretionary function immunity was ever raised."

circuit court concluded that the evidence showed that the City "(1) created a dangerous condition on its property; (2) that it had actual and constructive notice of; and (3) that was concealed from Ms. Hilton's view[.]"

¶18. "When reviewing the factual findings of the circuit court sitting as the sole trier of fact in a bench trial, we apply the substantial-evidence standard of review." *Delta Reg'l Med. Ctr. v. Taylor*, 112 So. 3d 11, 23 (¶35) (Miss. Ct. App. 2012) (citing *Covington Cnty. v. G.W.*, 767 So. 2d 187, 189 (¶4) (Miss. 2000)). Thus, we "must accept 'that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the [circuit] court's findings of fact.'" *Univ. Med. Ctr. v. Martin*, 994 So. 2d 740, 747 (¶26) (Miss. 2008) (quoting *Scott Addison Const. Inc. v. Lauderdale Cnty. Sch. Sys.*, 789 So. 2d 771, 773 (¶8) (Miss. 2001)).

¶19. We find the circuit court's determination that the sidewalk posed a "dangerous condition" and that the City had notice of the condition is supported by the evidence. There were photographs taken shortly after Hilton's fall that showed weeds or grass growing out of and over the water-meter hole. As the court noted in its order, "the height of the grass in the hole—at least a foot at the time of Ms. Hilton's fall—likely indicates that the condition existed well before both [her] fall" and the routine inspection by the meter reader a month prior. The only evidence to refute notice was testimony by Conley, who could only state that he could not remember if he was the one who read the meter at that time. Conley also could not recall if there were trouble codes in June or July of 2000 for the meter in question.

Conley stated that had he noted a cover was missing from a meter, he would have entered a trouble code. We find the evidence supports the court's finding that the City had constructive notice of the uncovered water meter.

¶20. The circuit court also found the overgrown grass concealed the dangerous condition or defect from Hilton. The City argues that the missing water meter cover should have been open and obvious to anyone "exercising due care." As we held in *Campbell v. Harrison County Board of Supervisors*, 269 So. 3d 1269, 1274 (¶17) (Miss. Ct. App. 2018), in all but the clearest of cases, "[j]ust how open and obvious a condition may have been is a question for the [trier of fact,]" which in this case was the judge.[4] The photographic evidence showed that the hole had grass approximately one foot tall growing out of it. We find the court, as the fact-finder, did not err in its determination that the evidence supported Hilton's claim of negligence.

¶21. The City further contends Hilton failed to establish that she suffered a cognizable injury, noting Hilton was not diagnosed with cervical spondylosis until two years after the

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[4] The case cited by Hilton, *Jackson v. City of Seattle*, 131 P.2d 172 (Wash. 1942), is also instructive. The Supreme Court of Washington, addressing contributory negligence, held:

> It was not appellant's duty to searchingly scrutinize the ground on which she was about to step in alighting from respondent's bus. She had the right to assume that the carrier was discharging her at a reasonably safe place, and it was not negligence on her part to act upon the assumption *unless the danger was so open and obvious as to challenge the attention of a reasonably prudent person similarly situated*. The hole into which she stepped *was grass grown and constituted a hidden danger, not an open, obvious one*.

Id. at 176 (emphasis added).

fall. The court made no ruling with regard to Hilton's proof of injury, but the evidence shows that she made several emergency room visits in 2000, including one the day after her fall, with complaints of neck and arm pain. An MRI in October 2001 indicated a protrusion at the C5-6 level, as well as a "prominent asymmetric disc bulge and spur to the right of the midline." As discussed, Hilton was referred to Dr. McLeod in 2002, who treated her with steroid injections and pain medication. Medical records further indicated that Hilton had an MRI in 2016 showing "moderate cervical spondylosis, the worst levels at C6-7"; she was treated with a cervical epidural block and physical therapy. Therefore, we find there was evidence of an injury presented at trial.

B. Damages

¶22. Awarding Hilton damages of $100,000, the court determined that the deposition testimony of Dr. McLeod and the calculation of treatment expenses by Smith, the certified life planner, were "based upon reliable medical findings and figures." The City argues that Hilton should not have been awarded damages because the expert testimony to support damages was unreliable.

1. Dr. Carroll McLeod's Deposition

¶23. The City claims Dr. McLeod's testimony was unreliable because it was not based on a review of Hilton's prior medical records but "on what [Hilton] told him." Dr. McLeod was deposed in 2006 and again in 2016, prior to trial, and both depositions were admitted into evidence at trial. As noted, the City requested that the 2016 deposition be excluded as untimely, but the court denied its motion in limine. No objection was made as to the 2006

deposition; nor did the City object to Dr. McLeod's expert designation in anesthesiology and pain management.

¶24. In his 2006 deposition, Dr. McLeod opined that based on his examination of Hilton, she had pre-existing cervical spondylosis that was asymptomatic, and the fall likely caused the onset of her pain. Although he acknowledged that he had not examined her medical records from the initial emergency room visits, Dr. McLeod reviewed her MRI conducted at Baptist Hospital. Hilton had been referred to him from Dr. Delashmet. In his 2016 deposition, Dr. McLeod opined:

> Basically, she had a disc bulge or protrusion that was – could have been caused by her fall, could have been aggravated by her fall. . . . There's always a chance that she could have potentially had that before her fall, although she never ever complained of that before that.
>
> . . . .
>
> But more than likely, the disc bulge was caused by her, more likely than not, stepping and falling in the hole because that's when she started complaining of the pain.
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> . . . .
>
> I would say that it was a direct – I would say that the symptoms related to the cervical spondylosis were directly caused by that accident. As to whether or not the cervical spondylosis was caused by the accident or whether it was an aggravation of the cervical spondylosis, I can't comment on it. It could've been either/or.

Dr. McLeod also testified as to her future medical treatments, such as medications, physical therapy, and the need for an MRI every four to five years.

¶25. We find the record does not support the City's argument that Dr. McLeod's expert testimony was "unreliable and should not be considered." Dr. McLeod, one of Hilton's

treating physicians, based his expert opinion on the "objective findings on the MRI scans," and he stated that Hilton's MRI results were consistent with her medical complaints. With regard to the doctor's reliance on Hilton's version of her medical history, the Mississippi Supreme Court has held that "a qualified medical expert is permitted to extrapolate causation testimony from the patient's clinical picture although the medical records contain no objective medical evidence establishing causation." *Hubbard ex rel. Hubbard v. McDonald's Corp.*, 41 So. 3d 670, 678 (¶27) (Miss. 2010). Furthermore, Hilton's prior medical records were admitted into evidence and are supportive of Dr. McLeod's testimony.

2. Cathy Smith, Certified Life Planner

¶26. Over objection by defense counsel, the circuit court admitted Smith as an expert in the field of vocational consulting, as well as life care planning and cost projection. She testified that she had reviewed Dr. McLeod's deposition, as well as Hilton's medical records from Methodist University, Christ Community Health Services, Memphis Physical Therapy, Semmes-Murphy Clinic, and Dr. Ronald Terhune. Smith estimated Hilton's remaining life expectancy at 23.9 years using a life-expectancy table from the Centers for Disease Control. Based on this life expectancy, Smith projected a total cost of $76,036.18 for Hilton's "future routine medical care," $88,975.70 for medications, and "approximately $82,800.00" for recommended epidural steroid injections (three times per year over the course of her lifetime), for a total projected cost of $247,815.88. Smith acknowledged on cross-examination that she did not take into account any of Hilton's prior health issues or prior substance abuse.

¶27. The City contends that "the projections for future medical treatment by Ms. Smith lack a reliable basis." First, the City notes that the calculation of Hilton's life expectancy failed to take into account her prior drug and alcohol abuse and/or medical issues (i.e., stroke, obesity, smoking, depression). Second, the City disputes Smith's calculation for future medical costs because it was based on Dr. McLeod's testimony. Nevertheless, we find that the record indicates that the cost estimates for treatment were conservative and generally less than the cost of treatment received by Hilton to date. Smith also testified that the recommended value of the charges for the suggested medical treatment are typically stable; if anything, costs would only increase. Moreover, the City offered no evidence to refute these costs. Therefore, we find no error in the court's admitting Smith's expert testimony.

3. Hilton's Cross-Appeal

¶28. Hilton has filed a cross-appeal of the damage award, claiming that the circuit court's award of $100,000 is not supported by the evidence. Specifically, she asserts that the expert testimony "clearly proved that the value of the medical expenses for past, present and future medical treatment causally related to the injuries sustained by Hilton in the fall is $268,944.58."

¶29. We find no merit to her claim. In its determination of damages, the circuit court considered the undisputed evidence of Hilton's numerous other health ailments, "such as stroke, degenerat[ive] disc disease, arthritis, and knee pain." The court also found that Hilton had failed to demonstrate that her condition was permanently disabling, requiring the City to fund her medical care for the remainder of her life. "[A]ccepting all the evidence which

reasonably tends to support the [circuit] court's findings of facts, as well as the reasonable inferences which may be drawn therefrom," we find the court did not err in its findings. *Prayer v. Greenwood Leflore Hosp.*, 183 So. 3d 877, 884 (¶23) (Miss. 2016).

III. Whether the circuit court erred in ruling that an inference of spoliation was proper.

¶30. At trial, Hilton's counsel requested the court to find an inference of spoliation, noting that the City could not comply with a request to provide the trouble codes and maintenance tickets, as that information "wasn't maintained and . . . was apparently destroyed." The court reserved ruling on the issue, allowing the parties an opportunity to address the matter in their proposed findings of fact and conclusions of law. As noted, the court subsequently determined in its order that the loss of data regarding trouble codes during that time period entitled Hilton to an inference of spoliation. The court reasoned that although "the City did not intentionally destroy the trouble code, its gross negligence caused the trouble."

¶31. The supreme court has held, "When evidence is lost or destroyed by one party (the 'spoliator'), thus hindering the other party's ability to prove his case, a presumption is raised that the missing evidence would have been unfavorable to the party responsible for its loss." *Thomas v. Isle of Capri Casino*, 781 So. 2d 125, 133 (¶37) (Miss. 2001). This "presumption of unfavorability" allows the fact-finder "to draw a general negative inference from the act of spoliation, regardless of what the spoliator's rebuttal evidence shows." *Id*. "[W]here a (medical) record required by law to be kept is *unavailable due to negligence*, an inference arises that the record contained information unfavorable to the hospital, and the jury should be so instructed." *Id*. at 134 (¶42) (quoting *DeLaughter v. Lawrence Cnty. Hosp.*, 601 So.

2d 818, 822 (Miss. 1992)). Subsequently, in *Renner v. Retzer Resources Inc.*, 236 So. 3d 810, 815 (¶¶22-23) (Miss. 2017), the supreme court more broadly applied its holding in *Thomas*—that "[e]ven where evidence is unavailable due to negligence, an inference arises that the evidence would have been unfavorable"—to the "defendants' loss or destruction of video evidence" not required by law to be kept. (Citing *Thomas*, 781 So. 2d at 134 (¶42)).[5]

¶32. The City argues that Hilton was "not entitled to [a] negative inference regarding the loss of a computerized trouble code report or maintenance ticket, because there is no evidence of intentional or grossly negligent spoliation by the City[.]"[6] The City further claims that although a report had been identified, it "could not be retrieved through reasonable efforts." A City employee testified that a computer issue in 2001 caused a loss of data, but he did not testify precisely what data was lost. He also stated that paper records were kept no more than five years.

¶33. Yet, as the circuit court noted, the City should have been aware of the pending lawsuit beginning in April 2001 when it received Hilton's notice of claim. Indeed, the e-mail from

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[5] *Renner* recognized that "the jury is not *required* to draw an adverse inference that the evidence would have been unfavorable, but the innocent party is entitled to an instruction *permitting* the jury to draw a negative inference from spoliated evidence."

[6] In the case cited by the City, *Page v. Biloxi Reg'l Med. Ctr.*, 91 So. 3d 642, 645 (¶17) (Miss. Ct. App. 2012), this Court held that "a negative inference is only proper when a defendant intentionally or through *gross* negligence discards evidence that is the subject of litigation." (Emphasis added). In *Page*, we relied on the supreme court's decision in *Thomas*, in which it was found that the casino's actions in that case, "[i]f not intentional, . . . were at least grossly negligent." *Thomas*, 781 So. 2d at 133 (¶39). However, *Thomas* went on to emphasize *Delaughter*'s holding that the inference arises where the information is "*unavailable due to negligence*." *Id*. at 134 (¶42). Thus, although we concluded in *Page* that the "failure to establish negligence" made "the spoliation of evidence irrelevant," we reject any implication in *Page* that a finding of "gross" negligence is required.

the City attorney demonstrates the City's knowledge of the pending action. The record also indicates that the City informed Hilton's counsel in 2003 that it had the requested trouble codes from that time period, but when counsel requested the trouble codes again in 2006, the City claimed they no longer existed. Therefore, we find the court's ruling is supported by the record.

CONCLUSION

¶34. Finding no error, we affirm the circuit court's judgment awarding Hilton $100,000 in damages.

¶35. **ON DIRECT APPEAL: AFFIRMED. ON CROSS-APPEAL: AFFIRMED.**

CARLTON AND WILSON, P.JJ., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE, McCARTY, SMITH AND EMFINGER, JJ., CONCUR.