STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA A. RABOCZKAY and STEVEN RABOCZKAY, Plaintiffs-Appellees, v CITY OF TAYLOR, Defendant-Appellant.	UNPUBLISHED July 15, 2008 No. 277772 Wayne Circuit Court LC No. 05-514388-NO

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant City of Taylor appeals as of right the circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(7), governmental immunity. We reverse.

On December 17, 2003, plaintiff Patricia Raboczkay[1] was injured when she lost control of her vehicle and crashed into a tree after swerving toward the shoulder of the road to avoid oncoming traffic in her lane. Plaintiff sued defendant under the highway exception to governmental immunity, MCL 691.1402(1), and contended below that an area of road near the shoulder contained a defective condition that caused her to lose control of her vehicle.

On appeal, defendant argues that summary disposition should have been granted because plaintiff failed to provide timely notice in accordance with MCL 691.1404. We agree. This Court reviews a motion for summary disposition under MCR 2.116(C)(7) de novo. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). We accept as true the contents of the complaint unless contradicted by documentation submitted by the movant, and consider all admissible affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(5); *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). Issues of statutory interpretation are also reviewed de novo. *Id.* A plaintiff suing the state has the burden to prove an exception to governmental immunity, *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987), and may not oppose summary disposition on the

[1] Because plaintiff Steven Raboczkay's claims are derivative, Patricia Raboczkay will be referred to as "plaintiff."

basis of unsupported speculation or conjecture, *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

MCL 691.1407(1) provides that government agencies are immune from tort liability, subject to certain exceptions, if they are engaged in a government function, including the construction and maintenance of streets.[2] *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). MCL 691.1402(1) sets forth the highway exception to governmental immunity, and provides, in relevant part:

> A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

To bring a claim under the highway exception, a plaintiff must first provide notice in accordance with MCL 691.1404, which provides, in relevant part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> * * *
>
> (3) If the injured person . . . is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts.

When notice is not given within 120 days of the injury, therefore, the trial court must determine whether there are disputed facts regarding the plaintiff's ability to give notice under MCL 691.1404(3).

---

[2] As a municipal corporation, defendant is a government agency. MCL 691.1401(b), (d); *Warda v Flushing City Council*, 472 Mich 326, 331-332; 696 NW2d 671 (2005).

In the instant case, plaintiff provided defendant notice of the accident in a letter dated October 15, 2004. Because plaintiff provided notice more than 120 days after the accident, contrary to subsection 1404(1), she may only sustain her claim if she did so not more than 180 days after the termination of a disability that rendered her incapable of giving notice. Thus, the inquiry here is whether plaintiff sustained a disability that made her incapable of providing the required notice. Plaintiff has failed to meet this burden.

While plaintiff presented voluminous medical records below concerning her injuries and attendant complications after the accident, she failed to show any dispute concerning whether her injuries precluded her from providing notice. Specifically, plaintiff presented evidence that she: underwent several surgeries – the latest of which occurred on December 3, 2005 – to repair her fractured femur and spinal damage; developed an infection in her leg; lived in a nursing home for a few days in December 2003; attends physical therapy; uses a cane or walker; attends counseling sessions for depression, and underwent a psychiatric evaluation on May 14, 2004, regarding symptoms of "tingling/paresthesia in the entire left side of her body."

While these conditions undoubtedly caused pain and inconvenience, they do not reveal a physical or mental inability to provide notice. On the contrary, the doctor's report from plaintiff's initial admission to the hospital on December 17, 2003, described her as calm and alert. She was able to provide a cogent description of her problems in the psychiatric examination, and has been able to seek and comply with treatment. Although the trial court explained that plaintiff "was disabled and at home with the leg injuries," and "was complaining of chest pains," there is no indication how these conditions made her incapable of providing timely notice.

Plaintiff asserted that she now slept in a hospital bed in her dining room with a "porta-pottie" at her bedside, could not shower without assistance or stand for long periods of time, and required attention from her husband, Steven Raboczkay, 24 hours a day. Again, even assuming that these allegations were true, it is speculative to suppose that such complications rendered plaintiff unable to provide notice to defendant. Such speculation is insufficient to support a claim based on an exception to governmental immunity. *Karbel*, *supra* at 97. Therefore, plaintiff failed to provide notice in accordance with MCL 691.1404(3).

Plaintiff contends, and the trial court found, that Taylor police officer Brandon Seifert's incident report, created after the accident, also constituted adequate notice under MCL 691.1404. This argument also fails.

"If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible." *Brown v Mayor of Detroit*, 478 Mich 589, 593; 734 NW2d 514 (2007). The phrase "shall serve notice" is mandatory, not permissive. "'A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole.'" *Oakland Co v Michigan*, 456 Mich 144, 154 n 10; 566 NW2d 616 (1997), quoting *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). Neither the plain meaning of the statute as a whole or in any part indicates that the word shall is not mandatory. Further, "[n]otice provisions permit a governmental agency to be apprised of possible litigation against it and to be able to investigate

and gather evidence quickly in order to evaluate a claim." *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997).

Here, the incident report was prepared by a police officer. The relevant portion of MCL 691.1404 provides that it is the *injured person* who "shall serve a notice on the governmental agency of the occurrence of the injury and the defect" as a condition for recovery under the highway exception to governmental immunity. Further, no evidence was offered that the incident report was made with an eye toward future litigation. Thus, to find that the incident report satisfied the notice requirement would frustrate the purpose of this subsection.

Moreover, the incident report lacked the content needed to satisfy MCL 691.1404. "To be sufficient under MCL 691.1404(1), notice must include four components: (1) the exact location of the defect; (2) the exact nature of the defect; (3) the injury sustained; and (4) any witnesses known at the time of the notice." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 250 (Kelly, J. concurring in part and dissenting in part); 731 NW2d 41 (2007). Regarding location, although the incident report indicated the location of plaintiff's vehicle upon Seifert's arrival, the report did not specify the location of the accident. Further, the report contained no references to any specific defect or the presence of witnesses. Therefore, the trial court's finding that the incident report satisfied the requirements of MCL 691.1404 was erroneous.

Nor did Seifert's investigation of the accident scene, and resultant incident report, serve as constructive notice to defendant. "Notice to a police officer is ordinarily not notice to the municipality, except where he or she is charged with the duty of remedying or reporting defects." 19 McQuillan, Municipal Corporations (3d ed), § 54.174, pp 569-570. See *Corey v Ann Arbor*, 134 Mich 376, 378; 96 NW 477 (1903).

Similarly, in addition to being untimely, plaintiff's letter of notice also failed to meet the specificity requirements of MCL 691.1404. In *Smith v Warren*, 11 Mich App 449, 451-452; 161 NW2d 412 (1968), this Court found the plaintiff's notice was insufficient to meet the notice requirement.[3] Specifically, the plaintiff's notice in *Smith* provided: "'Physical, mental and property injuries and damages were sustained as a result of an automobile accident on January 21, 1965 at Thirteen Mile Road and Hoover, near the address of 11480 Thirteen Mile Road.'" *Id*. at 451. This Court held that the notice was defective because it failed to provide "the nature of the defect," or "the injury sustained, and the names of the witnesses known at the time by claimant." *Id*. at 451-452. Additionally, this Court noted that "[t]he notice gave neither distance nor direction from the stated address, nor the fact that the claimed defect was on the other side of the road. It fail[ed] to specify which of the four corners of the named intersection are involved. The direction in which plaintiff was traveling being unknown, it is obviously impossible to tell from this meager description where to begin looking, or to what claims plaintiff could be limited in subsequent litigation." *Id*. at 452-453.

---

[3] The statute then in effect, CL 1948, § 242.8 (Stat Ann 1958 Rev § 9.598), superceded by MCL 691.1404, similarly provided that the notice must "specify the location and nature of said defect, the injury sustained, and the names of the witnesses known at the time by claimant." *Smith v Warren*, 11 Mich App 449, 451 n 1; 161 NW2d 412 (1968).

Plaintiff's notice in this case likewise gave only a meager description of the location of the defect making it difficult, at best, to find.[4] Further, although plaintiff's notice provided witness information, it failed to describe a defect, other than its bare assertion that a defect, in fact, existed.[5] Finally, the notice did not describe the injury sustained, instead explaining that plaintiff was still investigating injuries. The trial court's conclusion that plaintiff satisfied the notice requirements of MCL 691.1404(1) was erroneous. Defendant was entitled to summary disposition.

In light of our resolution of this issue, it is unnecessary to address defendant's remaining claims on appeal.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio

[4] Plaintiff's notice described the location as "Monroe Street near I-94 in Taylor, Michigan."

[5] The description in plaintiff's notice was "a roadway/shoulder defect/defective condition."