# STATE OF MICHIGAN

# COURT OF APPEALS

VERNA SPAYTH,

Plaintiff-Appellee,

v

CITY OF ANN ARBOR,

Defendant-Appellant.

UNPUBLISHED
December 7, 2010

No. 292460
Washtenaw Circuit Court
LC No. 08-001000-NO

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying its motion for summary disposition based on governmental immunity. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case concerns the notice provision of the highway exception to governmental immunity. MCL 691.1404. The facts are not in dispute. The only issue is whether the written notice plaintiff provided was adequate.

Plaintiff, a wheelchair user, was allegedly injured while navigating defendant's ramped sidewalk at the curb cut leading to a crosswalk on August 25, 2008. On September 22, 2008, plaintiff's counsel sent a letter to defendant, giving notice of plaintiff's intent to file suit. The letter identified "a theory of general negligence for failing to maintain/construct/design sidewalks . . . located near street address 700 Packard, Ann Arbor, Michigan." The letter further stated that plaintiff "suffered injury." On October 2, 2008, plaintiff filed suit alleging, in relevant part, that the incident occurred on a public sidewalk "located near the cross section of Packard and State Streets" and that as plaintiff "was attempting to navigate her power chair down a curb and into the street, she was thrown from her chair due to uneven portions of concrete, steep incline and slope." The complaint identified plaintiff's injuries with specificity.

Defendant moved for summary disposition, arguing that plaintiff failed to comply with the notice requirements of MCL 691.1404 and that as a result, defendant was unable to identify the exact location of the alleged defect. Defendant did not argue that the information in the

complaint could not be combined with that of the letter, but instead asserted that the information was insufficient even when both documents were considered together. In her response brief, plaintiff included two photographs of the site that clarified the location.[1]

The trial court disagreed with defendant's argument. Under *Burise v Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009), the plaintiff did not have to include all the information in her first notice as long as all the required information was given within the 120-day time limit. The *Burise* Court found the location of the defect sufficiently identified where it was said to be between two addresses. The trial court found the location given in this case—a steep and uneven ramp near 700 Packard—similarly sufficient.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Statutory interpretation is a question of law that is also considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

The governmental immunity act, MCL 691.1401 *et seq*., provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. MCL 691.1407(1). The highway exception to governmental immunity, MCL 691.1402(1), requires a governmental agency to maintain a highway under its jurisdiction in reasonable repair so that it is reasonably safe and convenient for public travel. The definition of "highway" includes sidewalks. MCL 691.1401(e).

To bring a claim under the highway exception, a plaintiff must first provide notice in accordance with MCL 691.1404(1), which provides in relevant part:

> 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.* [Emphasis added.]

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200; 731 NW2d 41 (2007), our Supreme Court stated that, at least as regards the highway exception to governmental immunity, there must be strict compliance with the conditions and restrictions of the statute. Substantial compliance is not sufficient. *Id*.

As noted above, the complaint identified the location of the defect as a public sidewalk "near 700 Packard" and "near the cross section of Packard and State Streets," and that plaintiff

---

[1] These photographs were not supplied within 120 days of the accident, and thus cannot be considered part of plaintiff's original notice. See MCL 691.1404(1).

was going "down a curb and into the street." The nature of the defect is identified as "uneven portions of concrete, steep incline and slope."

In *Smith v City of Warren*, 11 Mich App 449, 451; 161 NW2d 412 (1968), this Court held the location was insufficiently identified by "Thirteen Mile Road and Hoover, near the address of 11480 Thirteen Mile Road" because it failed to specify which of the four corners of the named intersection was involved. In *Burise*, which the trial court here found analogous, photographs were included with the written description, and the defect was identified as "an extremely deep, wide and long pothole that had been in disrepair." The trial court here erred in comparing the single-address description provided in the present case with the description *and photographs* provided in *Burise*; rather, we find *Smith* is analogous. It would have been simple enough for plaintiff to include a photo with her letter, or a diagram with an "x" on it. Plaintiff's counsel's motion argument that this description was "the best that we can do" is unpersuasive. Plaintiff's later efforts to show and explain where the defect was demonstrates that much more could have been done. The map defendant provides shows that "near 700 Packard" describes a large portion of sidewalk. And plaintiff never stated in her letter or complaint that she was going down the curb-cut ramp. From her description, she could as well have been going over the curb itself.

Finally, the nature of the defect is also inadequate. Uneven concrete is ubiquitous and that allegation by itself does establish the existence of a defective condition making the sidewalk unreasonably dangerous. The steepness of the slope is, as defendant points out, a design issue and not actionable. *Hanson v Mecosta Co Rd Comm*, 478 Mich 492; 638 NW2d 396 (2002). The trial court erred in holding that plaintiff's notice was sufficient.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly