STATE OF MICHIGAN

COURT OF APPEALS

KIMETA JAKUPOVIC, also known as KIIMETA JAKUPOVIC, Plaintiff-Appellee,	UNPUBLISHED December 7, 2010
v	No. 293715 Wayne Circuit Court
CITY OF HAMTRAMCK, Defendant-Appellant.	LC No. 08-019096-NO

Before: OWENS, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Defendant, City of Hamtramck (City), appeals as of right from the trial court order denying its motion for summary disposition, which was premised on governmental immunity. Plaintiff, Kimeta Jakupovic, filed suit against the City, pursuant to MCL 691.1402(1), after tripping over a damaged sidewalk and suffering numerous injuries. The City moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court denied the motion. We affirm.

I. BASIC FACTS

Jakupovic is a resident of the City of Hamtramck. On September 16, 2008, at 11:30 a.m., she was walking home from the bank. She took an unfamiliar route home and ended up on Mitchell Street in Hamtramck. She was not carrying anything and was looking straight ahead. Her left foot got caught on the sidewalk, and she tripped and fell forward, first landing on her knees, then on her arms. After lying on the sidewalk for at least 10 minutes, she got up and continued walking.

Jakupovic recognized that she was one block away from her doctor's office and so went there for treatment. Her doctor immediately took x-rays of her left arm, treated her injured knees, and called an ambulance. The ambulance took Jakupovic to Detroit Receiving Hospital where doctors determined that her left arm had multiple fractures. The day after the accident, surgeons repaired the arm. Jakupovic has since received painful physical therapy and has a constant numbness and tingling in her arm. Her surgeon advised her that the tingling sensations would remain indefinitely, that her hand would not be as it was before the accident, and that the surgically implanted metal would also remain indefinitely.

Three days after the accident, Jakupovic's son and husband took a series of photographs allegedly depicting the sidewalk where she fell. Jakupovic did not go with them to identify the location, but testified that the location was correct. These photographs were admitted for the trial court's consideration during Jakupovic's deposition on May 12, 2009. The images show a large crack in the sidewalk that was approximately three-inches deep. Jakupovic's husband and son used a tape measure in the pictures to show the depth of the crack. In her deposition, Jakupovic marked an "X" on the crack in the pictures to identify it as the place she fell. The sidewalk in the images is located just north of the driveway for 9465 Mitchell Street, but is still within the property lines of the residence.

The parties disputed the location of the defective area in relation to the neighboring properties. 9465 Mitchell is next door to 9477 Mitchell. Jakupovic alleged that the actual defect in the sidewalk was significantly closer to the front door of 9477 Mitchell than the front door of 9465 Mitchell. She also alleged that the defect was only ten feet and four inches away from the actual property line of 9477 Mitchell. Because of the alleged close proximity to both properties, Jakupovic claimed that she could not determine the exact property line that contained the defective part of the sidewalk. She also claimed that there were no other defects on the sidewalk by either property. The City disputed that this was the only defect in the area. The City also alleged that the defect was clearly on the 9564 Mitchell property and that there should have been no confusion with it being at 9477 Mitchell.

On September 26, 2008, ten days after the accident, Jakupovic's attorney served a written, pre-suit notice on the City's Clerk. It stated:

> Please be advised that Kimeta Jakupovic tripped and fell and injured herself on September 16, 2008, at approximately 1:30 p.m., on defective city sidewalk located adjacent to the aforesaid address of 9477 Mitchell, Hamtramck, Michigan. This notice is being made pursuant to the applicable ordinances and statutes with regards to defect and injury caused therein.

After receiving Jakupovic's notice, the City sent the letter to its insurance provider, a private insurance company. The insurer hired a private investigator to contact Jakupovic's attorney and request an interview with Jakupovic. The private investigator conducted the interview on December 4, 2008. Jakupovic alleges that neither the City nor its insurance company had a representative at the interview. She also alleged that the investigator took copious notes. However, no record of the interview has surfaced. During the interview, she provided the investigator with names, addresses, and phone numbers of her husband and son. She also claims to have given the investigator copies of all related medical records, including the surgical report.

On at least two occasions during the year prior to Jakupovic's injury, the owner of 9465 Mitchell Street, Miroslaw Lesinski, called the City to advise it of the damaged sidewalk in front of his home. The City did not respond after Lesinski's initial call, and on his second call advised him that he would personally have to contact and pay a contractor to fix the sidewalk. Six days after the accident, the owner of 9477 Mitchell, Kazimierz Dzieglewicz, obtained a permit to repair the damaged sidewalk. He obtained the permit as a favor to Lesinski, since they were neighbors. After receiving the permit, and without knowing about Jakupovic's accident,

Lesinski called a contractor who repaired the sidewalk in approximately October or November 2008. Lesinski's deposition indicates he thought the repair was "November or end of September." His native language was not English, but there was never any attempt to clarify whether he actually meant to say "November or end of October"—although this could be the case. Dzieglewicz supervised the entire repair.

Jakupovic filed a formal complaint against the City on December 22, 2008. The City received the complaint on January 2, 2009. It stated in relevant part:

> Defendant, City of Hamtramck, had jurisdiction in front of aforesaid address of 9477 Mitchell . . . . [T]he Plaintiff was caused to have tripped and fell upon the defective condition of the sidewalk, namely broken and raised pieces of cement which caused the sidewalk to become in disrepair and unsafe for public travel, thereby causing her to stumble and be thrown to the ground with great force and violence, and thereby causing her to have suffered severe bodily injuries. . . .
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> Plaintiff was then and there injured about the head, body, and limbs, as well as causing injuries both externally and internally, and causing the Plaintiff herein to suffer with bodily pain, disability and mental anguish . . . as well as causing the Plaintiff to suffer significant injury to her neck and back, as well as a fracture of her left radius and left ulna, all of which required surgery, and that further, said injuries are permanent and progressive in nature.

In filing her claim, Jakupovic asserted the highway exception to governmental immunity under MCL 691.1402. The City argued that Jakupovic's claim was precluded because she did not give proper notice under MCL 691.1404(1). In denying the City's motion for summary disposition, the trial court stated that Jakupovic gave adequate notice. The City appeals as of right pursuant to MCR 7.202(6)(a)(v).

II. ADEQUATE NOTICE

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). This Court's review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). This Court reviews de novo the determination of the applicability of the highway exception as a question of law. *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009).

B. THRESHOLD FOR THE HIGHWAY EXCEPTION

In general, government agencies are granted broad immunity when they are engaged in a governmental function. *Id*. at 181. There are, however, a number of exceptions to governmental immunity, including the highway exception. MCL 691.1402(1); *Lash v Traverse City*, 479 Mich

180, 195 n 33; 735 NW2d 628 (2007). A municipality has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, unless, at least 30 days before the injury, the municipality knew or, in the exercise of reasonable diligence, should have known of a defect in the sidewalk, and the defect was a proximate cause of the injury. MCL 691.1402a(1); *Robinson v City of Lansing*, 486 Mich 1, 10-11; 782 NW2d 171 (2010).

In the case at bar, Lesinski notified the City that the sidewalk was in disrepair on two different occasions. Lesinski first called the City in approximately January 2008. This was nine months prior to Jakupovic's fall. Lesinski made his second call to the City around August or September 2008. In his calls, he indicated that there was a metal pipe sticking out of the sidewalk in front of his house. Consequently, the City knew or should have known of the alleged defect at least 30 days prior to Jakupovic's injury. *Robinson*, 486 Mich at 10-11.

Because Jakupovic's claims contain the threshold requirements of the highway exception, the central issue is whether Jakupovic gave adequate notice to the City of the defect under MCL 691.1404(1).

C. THE NOTICE REQUIREMENT

An injured person must notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the nature of the defect, and the names of known witnesses, within 120 days from the time the injury occurred. MCL 691.1404(1); *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 200, 203-204, 219; 731 NW2d 41 (2007). The purposes of requiring notice are to provide the governmental agency with an opportunity to investigate the claim while it is fresh and to remedy the defect before another person is injured. *Plunkett*, 286 Mich App at 176-177. The notice need not be provided in a particular form. *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). It is sufficient if it is timely and contains the requisite information. *Id*.

Jakupovic's initial notice was dated September 26, 2008, ten days after her accident, and stated that she "tripped and fell and injured herself . . . on defective city sidewalk located adjacent to the aforesaid address of 9477 Mitchell." We hold that this written notice failed to meet the MCL 691.1404(1) standard. In *Rowland*, the Supreme Court held:

> MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. . . . Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the *exact* location and nature of the defect, the injury sustained, and the names of witnesses known at the time by the claimant, no matter how much prejudice is actually suffered. [*Rowland*, 477 Mich at 219 (emphasis added).]

Jakupovic's September 26th notice failed to specify the nature of her injuries or the exact nature of the defect. It merely stated that she "injured herself" and that the sidewalk was "defective." Summary disposition would have been appropriate if the notice inquiry ended here.

However, a plaintiff's attempt to give adequate notice is not limited to her first effort. *Burise*, 282 Mich App at 654. Rather, the requirement of MCL 691.1404(1) is satisfied so long as a plaintiff's notice is within 120 days of the injury and contains the identified information. *Id.* at 654.

In *Burise*, this Court found that the plaintiff's initial notice failed to identify the name and address of a known witness. But this Court held that the plaintiff effectively cured this defect by providing the relevant information on a claim form that the defendant sent to her. The defendant in *Burise* received this "new" information on the 120th day after the injury occurred. In affirming the trial court's denial of the defendant's motion for summary disposition, this Court held:

> A purported notice that does not comply with the statute is insufficient. Because plaintiff did not include the name of a known witness in the initial notice, plaintiff's initial notice was defective. But because plaintiff did, in fact, properly serve a legally sufficient notice within 120 days of the injury, plaintiff was in compliance with MCL 691.1404(1). [*Id.* at 655.]

Here, as in *Burise*, Jakupovic initially failed to provide adequate notice. However, she remedied this in her complaint that she served on the City on January 2, 2009. This was 108 days after the injury occurred. Jakupovic's complaint alleged:

> Defendant, City of Hamtramck, had jurisdiction in front of aforesaid address of 9477 Mitchell. . . . [T]he Plaintiff was caused to have tripped and fell upon the defective condition of the sidewalk, namely broken and raised pieces of cement which caused the sidewalk to become in disrepair and unsafe for public travel, thereby causing her to stumble and be thrown to the ground with great force and violence, and thereby causing her to have suffered severe bodily injuries. . . .
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> Plaintiff was then and there injured about the head, body, and limbs, as well as causing injuries both externally and internally, and causing the Plaintiff herein to suffer with bodily pain, disability and mental anguish . . . as well as causing the Plaintiff to suffer significant injury to her neck and back, as well as a fracture of her left radius and left ulna, all of which required surgery, and that further, said injuries are permanent and progressive in nature.

We note that although MCL 691.1404 is casually referred to as a pre-suit notice statute, there is nothing in its language requiring that adequate notice be a condition precedent to filing a lawsuit. Rather, it states:

> 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. [MCL 691.1404(1) (emphasis added).]

By contrast, we note that the language of the notice statute for medical malpractice claims, provides that "a person *shall not commence* an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(1) (emphasis added).

Jakupovic's complaint sufficiently stated the exact nature of her injuries, as well as the nature of the defect. Therefore, she remedied the elements of the defective September 26th notice within 120 days of her accident. Further, Jakupovic testified that the only possible witness to her injury was someone she thought she saw getting out of a car, but who never came to help her. Therefore, she had no known witnesses about whom she was obligated to notify the City.

The City argues that Jakupovic's husband and son should have been listed as witnesses in her initial notice. However, the City does not provide any case law to support this contention. Further, there is little reason to conclude that the plain meaning of "witnesses known at the time," under MCL 691.1404(1), refers to those persons who go to the scene of an accident several days after it occurred in order to investigate.

Alternatively, the City contends that Jakupovic should have listed the owners of 9477 and 9465 Mitchell Street (Lesinski and Dzieglewicz) as witnesses. Again, there is nothing in the plain meaning of MCL 691.1404(1) that indicates a plaintiff is to conduct her own investigation of the accident scene to determine if any witnesses unknown to her at the time of the accident would be willing to come forward. On the contrary, a plaintiff only has to provide names of "witnesses known at the time." Here, based on Jakupovic's account of the incident, there were no such witnesses. Consequently, she was not required to provide this information to the City in her notice.

The only question remaining with regard to Jakupovic's notice is whether she adequately specified the location of the defect. MCL 691.1404(1). In her September notice, she stated that the defect was "adjacent to aforesaid address of 9477 Mitchell Street, Hamtramck, Michigan." Her January complaint again stated the defect was "adjacent to the address of 9477 Mitchell, in the City of Hamtramck, County of Wayne, State of Michigan." It also stated, "in front of aforesaid address of 9477 Mitchell." In fact, the alleged defect was in front of 9465 Mitchell Street, which was immediately next to 9477 Mitchell.

"[W]hen notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention." *Plunkett*, 286 Mich App at 176. "[A] liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect." *Id*. A notice that is in substantial compliance with the law should not be held ineffective. *Id*. at 177. A plaintiff's description substantially complies with the statute when coupled with the specific description of the location, time, and nature of the injuries. *Id*.

Finding Jakupovic's notice defective simply because she gave the address of the property immediately next to the correct one would penalize her for "some technical defect." *Id*. at 176. She would have had to make an inquiry with the property owners in the area as to the ownership of the parcel with the defective sidewalk. Moreover, her assertion that the defect was "adjacent to" 9477 Mitchell Street, Hamtramck, Michigan, does not frustrate the twin aims of MCL 691.1404(1), which are to provide the governmental agency with an opportunity to investigate the claim while it is fresh and to remedy the defect before another person is injured. *Id*. at 176-177.

Further, with Jakupovic's description in hand, "men of common understanding and intelligence . . . by exercise of reasonable diligence and without other information from the plaintiff [could have found] the exact place where it is claimed the damage was received." *Berribeau v City of Detroit*, 147 Mich 119, 125; 110 NW 512 (1907). In doing so, the City would have had an opportunity to investigate the claim and remedy the defect.

The City cites an unpublished case from this Court, *Mawri v City of Dearborn*, unpublished opinion per curiam of the Court of Appeals, released August 6, 2009 (Docket No. 283893), to support its contention that Jakupovic never gave the "exact" address of the defect, and therefore her notice fails. In *Mawri*, the plaintiff's notice, as well as his later complaint, stated he fell "in the area of 5034 Middlesex, Dearborn Michigan." *Id*. The actual site of plaintiff's fall was 5026 Middlesex, the property next door to 5034. This Court held that MCL 691.1404(1) requires the "exact" location of the defect and therefore the plaintiff's notice and complaint both failed to meet the statutory requirements. *Id*. However, the Court went on to say, "Even if the address was 'close enough,' the letter to defendant does not describe the 'nature of the defect' as required by [the statute]. *Id*.

The City's reliance on *Mawri* is misguided for three reasons. First, Mawri is an unpublished opinion, and we are not bound by it. MCR 7.215(C)(1). Second, this Court left open the possibility that even if the description of the location is somewhat imprecise and merely "close enough," this flaw may not be fatal when the notice meets the rest of the requirements of MCL 691.1404(1). Finally, this Court's published analysis in *Burise* runs counter to the City's argument.

In *Burise*, the plaintiff's notice indicated that the location of the defective roadway was "between Bo's Brewery, 51 North Saginaw, and the Pontiac Osteopathic Hospital Building at 64 North Saginaw." *Burise*, 282 Mich App at 648. This was a relatively broad swath of roadway in an urban area with the potential for the presence of multiple road defects. Yet, this Court found that the plaintiff's description met the "exact" location requirement of MCL 691.1404(1). *Id*. at 654. Here, Jakupovic's description that the sidewalk defect was "adjacent to 9465 Mitchell

Street" falls within the range that this Court found acceptable in *Burise* because the area was far less broad.[1]

The City also argues that when Lesinski repaired the sidewalk within weeks after the accident, this effectively stymied the underlying policy aims of MCL 691.1404. Since the defect was gone, the City argues it could not protect itself from a lawsuit by conducting an investigation. However, even though the other portions of Jakupovic's September 26th notice were defective, her initial notice gave the City enough information about the location to allow it the opportunity to at least conduct a basic inspection. While the record does not indicate the exact time between the September 26th notice and the sidewalk repair, it does show there was a reasonable window of opportunity for the City to make an inquiry.

Further, based on Lesinski's testimony, the City had been on notice that there was a defect in front of 9465 Mitchell Street for several months. Yet, it elected not to act on Lesinski's warnings and instead told him he was responsible for the repair.

The City's final argument on appeal is that Jakupovic's oral interview with an investigator hired by the City's insurance company cannot adequately cure her initially defective notice. But because we find that her January complaint gave the City adequate notice and was timely filed under MCL 691.1404(1), we need not address this issue.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

[1] Because we hold that Jakupovic's notice met all of the requirements of MCL 691.1404(1), we need not to address whether Jakupovic met the substantial compliance standard set forth in *Plunkett*, 286 Mich App at 177.