STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE N. MCCARTHY, Plaintiff-Appellee,	UNPUBLISHED September 18, 2014
v CITY OF TRENTON, Defendant-Appellant.	No. 316600 Wayne Circuit Court LC No. 12-016668-NO

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying its motion for summary disposition based on governmental immunity. We reverse.

On December 17, 2012, plaintiff filed the present lawsuit, alleging that she fell and sustained injuries on a sidewalk in Trenton on February 5, 2012. She stated in her complaint:

> 5. The required Notice pursuant to MCL 691.1401 et seq., and, specifically, MCL 691.1404, was served upon the City Clerk and Mayor on or about February 21, 2012, which contained photographs depicting the defective sidewalk and descriptive detail reflecting its location and its defective condition of which Plaintiff complains . . . .
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> 6. The specifics of Plaintiff's injuries, as then known, were conveyed to the City's chosen representative insurance company within the time period set forth in MCL 691.1404.

Defendant filed a motion for summary disposition under MCR 2.116(C)(7), alleging that it was entitled to summary disposition because plaintiff failed to comply adequately with the notice provisions of MCL 691.1404, which states, in 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) [not applicable here] 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.

> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding.

Defendant argued that because plaintiff served her notice using first-class mail, she failed to adhere to MCL 691.1404(2). It further argued that the notice was inadequate because the initial notice, sent to defendant's mayor and city clerk, did not include information regarding plaintiff's injuries and she later provided her medical records only to defendant's insurer.

The trial court denied defendant's motion, ruling that "Plaintiff substantially complied with the statute when she mailed her initial notice via first class mail. It is undisputed that the Defendant received Plaintiff's initial notice." The court further ruled that "Plaintiff's initial notice providing that she was injured and her attorneys [sic] subsequent mailing of Plaintiff's medical bills and records upon Defendant's injurer's [sic] request within the 120 day deadline substantially complied with the notice statute."

Defendant now appeals and argues that the trial court should have granted its motion.

Summary disposition may be granted under MCR 2.116(C)(7) if there exists "immunity granted by law . . . ."

> This Court reviews de novo the trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).
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> When addressing a motion under subrule (C)(7), the trial court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). [*Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008).]

Reversal is clearly warranted by this Court's decision in *McLean v Dearborn*, 302 Mich App 68; 836 NW2d 916 (2013). In *McLean*, *id*. at 71,77, the plaintiff sent notice to the defendant within the 120-day period but failed to describe adequately the nature of her injuries. She later attempted to remedy this defect by providing notice of the injuries to the defendant's third-party claims administrator. *Id*. at 71. This Court ruled that the attempted remedy was insufficient to satisfy the requirements of MCL 691.1404 because the third-party claims administrator was not "'any individual . . . who may lawfully be served with civil process directed against the government[al] agency.'" *McLean*, 302 Mich App at 78, quoting MCL 691.1404(2). The Court rejected the argument that the third-party claims administrator was acting as the defendant's agent, because there was no written appointment or law granting the administrator authority to accept civil process. *McLean*, 302 Mich App at 79-81.

The *McLean* Court also rejected the plaintiff's attempt to rely on *Burise v Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009). In *Burise*, *id*. at 648, the plaintiff initially provided notice to the defendant in accordance with MCL 691.1404(1), but she omitted the name of a known witness. Later, but within the 120-day period, the plaintiff provided the witness's name in a claim form submitted to the defendant's representative, the Michigan Municipal Management Authority. *Burise*, 282 Mich App at 648. This Court held that the plaintiff's "subsequent communication . . . was sufficient to provide defendant with the statutorily required notice." *Id*. at 652. The *McLean* Court found *Burise* to be inapposite, stating:

> Although the supplemental notice in *Burise* was served on defendant's representative, the issue in *Burise* was whether MCL 691.1404(1) allowed piecemeal notice, not whether the service was defective. *Id*. As the *Burise* Court did not analyze whether service was proper under MCL 691.1404(2), and the opinion does not contain facts that indicate whether the defendant's representative was authorized to receive service under MCR 2.105(H)(1), we conclude that *Burise* does not aid plaintiff's position. [*McLean*, 302 Mich App at 79-80.]

Here, plaintiff's initial notice to defendant failed to set forth her injuries. She later detailed the injuries in a letter sent to defendant's insurer. Defendant makes the identical argument as that advanced in *McLean*, i.e., that "Plaintiff failed to provide notice of her injuries to any individual entitled to accept process on Defendant's behalf . . . ." In light of *McLean*, we reverse.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly