

STATE OF MICHIGAN
COURT OF APPEALS

KELLI M. DAVIS,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED

August 2, 2012

No. 303893

Genesee Circuit Court

LC No. 2010-093830-NO

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order denying its motion for summary disposition pursuant to MCR 2.116(C)(7). Because the trial court did not err in denying defendant's motion, we affirm and remand to the trial court for further proceedings.

On February 13, 2010, plaintiff was walking her dog on a public sidewalk in the City of Flint when she tripped and fell on a cracked portion of the sidewalk, incurring injuries to her ankle which required surgery. According to plaintiff, her injuries occurred as a result of defendant's breach of its duties to construct, repair and maintain the sidewalk in a reasonably safe manner. Defendant moved for summary disposition in its favor contending that plaintiff did not establish that defendant had notice of the alleged defect in the sidewalk and because plaintiff's pre-lawsuit notice provided pursuant to MCL 691.1404 was statutorily insufficient. The trial court did not address whether defendant had notice of the alleged defect, but found that plaintiff's notice of the injury and alleged defect provided to defendant substantially complied with the statutory requirements and thus denied defendant's motion. This appeal followed.

We review motions for summary disposition de novo. *Oliver v Smith*, 269 Mich App 560, 563; 715 NW2d 314 (2006). Summary disposition under MCR 2.116(C)(7) may be granted when "immunity granted by law" bars a claim. In deciding a motion for summary disposition based on MCR 2.116(C)(7), we must accept as true the allegations in the complaint unless contradicted by documentary evidence submitted by the parties. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

Questions of statutory interpretation are also reviewed de novo. *Rowland v Washtenaw Co Rd Com'n*, 477 Mich 197, 202; 731 NW2d 41 (2007). When interpreting a statute, our objective is to ascertain and give effect to the intent of the Legislature. *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009). To do so, we first look to the language of the

statute. “If the language is unambiguous, we must assume that the Legislature intended its plain meaning and, accordingly, we must apply the statute's language as written.” *Id.* at 650-651.

On appeal, defendant contends that the trial court erred in holding that plaintiff’s pre-suit notice substantially complied with the statutory notice requirements. We disagree.

The governmental tort liability act, MCL 691.1401 *et seq.*, provides broad immunity for governmental agencies when they are engaged in governmental functions. There are, however, several narrowly drawn exceptions to governmental immunity, including the highway exception. MCL 691.1402(1) provides, in relevant part:

Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. 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 definition of “highway” includes sidewalks. MCL 691.1401(c). As a condition of bringing a suit against a governmental agency for failure to comply with MCL 691.1402(1), a claimant must provide notice:

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)].

MCL 691.1404 is “straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written.” *Rowland*, 477 Mich at 219. As noted in *Plunkett v Dep’t of Transp*, 286 Mich App 168, 176-77; 779 NW2d 263 (2009):

However, when 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. Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexperienced layman for some technical defect. The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured.

A plaintiff’s description of the nature of the defect may be deemed to substantially comply with the statute when “[c]oupled with the specific description of the location, time and nature of injuries . . .”

Defendant contends that plaintiff's notice, while timely received, was deficient in two respects: it failed to "specify the exact location and nature of the defect" and it failed to specify "the names of the witnesses known at the time by the claimant." The notice provided by plaintiff stated, in pertinent part:

Please take notice that on behalf of Kelli M. Davis . . . we hereby give you notice of our intent to file a claim against the City of Flint for personal injuries sustained by Kelli M. Davis, as the result of a trip and fall incident on 2/13/10, between 11:00 a.m. and 11:30 a.m. The fall occurred on a broken and cracked sidewalk located on the north side of Brimfield drive near the intersection of Burlington Drive, just south of Burlington Drive. Kelli M. Davis fell at this location while walking. Enclosed are a copy of a diagram and a copy of photographs of the subject sidewalk's location. Kelli M. Davis suffered a dislocation and fracture of the right ankle, which required surgical repair. She has not fully recovered from her injuries. She has treated at Genesys Regional Medical Center in Grand Blanc, Michigan.

The known witnesses at this time are Mary Flippen . . . and Janetta Moses . . . It is our position that the sidewalk is defective and not reasonably safe in violation of MCL 691.1401, et seq.

Attached to the notice was a diagram showing Brimfield Drive and Burlington Drive, two driveways and the corresponding addresses between which the alleged defective sideway area was located, a new section of sidewalk adjacent to the alleged defective sidewalk, and the alleged defective sidewalk itself along with the measurements of lengths of the alleged defective sidewalk and various drop depths of the alleged defective sidewalk area. Three photographs were also attached to the notice showing (1) the intersection of Burlington Drive and Brimfield Drive (2) the alleged defective sidewalk when viewed from the street, and (3) the alleged defective sidewalk when viewed when one was walking on the sidewalk toward it. All three photographs contain the same red bushes, a telephone pole and lines descending from it to the ground, and a view of a section of new sidewalk as points of reference.

The notice provided by plaintiff was more than adequate. The written notice identified the intersection, but also identified a "broken and cracked sidewalk" located on the North side of Brimfield Drive as the location of plaintiff's fall. The specific location was further identified via a very detailed drawing providing addresses on either side the alleged defective sidewalk, natural and man-made reference points, and measurements of the disparity between the broken sidewalk and the intact sidewalk surrounding it, and photographs taken from both close up and a distance, again with reference points.¹

¹ While defendant indicates that this matter is "almost identical" to this Court's decision in *Spayth v City of Ann Arbor*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 292460), that decision is unpublished and therefore not binding on this Court.

Defendant, relying on *Barribeau v City of Detroit*, 147 Mich 119, 110 NW 512 (1907), asserts that parole evidence, such as the drawing and photographs attached by plaintiff, cannot be used to provide adequate notice as to the nature and location of the defect; instead, the *notice itself* must provide the place and nature of the defect. In *Barribeau*, however, the provided notice simply asserted that an individual was injured when she fell on “a defective and improperly constructed sidewalk” located “at [the] corner of Howard and Twenty-First Street.” *Id.* at 119. Our Supreme Court ruled the notice insufficient because there were four corners at Howard and Twenty-First Streets, and not only did the street crossing have sidewalks, but also walks in front of the lots, any of which may have been where the injury occurred. The description provided in the notice was simply too vague to determine where the incident had taken place. *Id.* at 124-126. And, it may be added, there was nothing attached to the notice to provide any clarification. As noted in *Barribeau*:

The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular ‘venue’ of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably appraises the officer upon whom it is required to be served of the place and the cause of the alleged injury [*Id.* at 125].

In the instant matter, the photographs and diagram attached to and provided with the notice serve the purpose of the statute. There is no rational basis for concluding that visual clarification of plaintiff’s written words is contrary to or inconsistent with the purpose of affording defendant the opportunity for investigation. Though defendant complains of the attachments, it is hardly reasonable to complain that the notice is too detailed. And, the notice need not be provided in any particular form. *Plunkett*, 286 Mich App at 176. The notice was compliant with MCL 691.1404 for purposes of identifying the location of the alleged defective sidewalk and where plaintiff was injured, and the trial court did not err in denying summary disposition in defendant’s favor based upon inadequate notice on this issue.

Defendant next contends that the notice was deficient in that it failed to specify the names of the witnesses known at the time by the claimant. Defendant specifically references Gary Shelton, a witness plaintiff testified at deposition came to her aid after her fall, but whom she did not name in her notice.

In her notice, plaintiff named only Janetta Moses and Mary Flippen as witnesses. At her deposition, plaintiff testified that she was alone at the time of her fall, but immediately after she fell, she called her sister, Janetta Moses, to help her, as she lived nearby. According to plaintiff, Ms. Moses did not arrive prior to the arrival of the ambulance. Plaintiff could not identify who Mary Flippen was. She did, however, indicate at deposition that as she lay on the ground waiting for the ambulance and her sister, Gary Shelton was driving down the street and stopped to help her. According to plaintiff, she knew Gary from the neighborhood and he had also been friends with her boyfriend at the time. Based upon plaintiff’s testimony, defendant contends that Gary Shelton was a known witness and was required to be listed on the notice pursuant to MCL

691.1404. Because plaintiff failed to list him on her notice, defendant argues that the notice is defective and the matter must therefore be dismissed.

Again, MCL 691.1404(1) requires that a plaintiff's notice contain "the names of the witnesses known at the time by the claimant." Based on plaintiff's testimony, she clearly knew Gary Shelton's name when he assisted her as she waited for the ambulance. However, plaintiff testified that she was alone when she fell and that, to her knowledge, no one (including Shelton) saw her fall. She testified that she was on the ground and had already called her sister when cars passing by, including the one occupied by Shelton, stopped to help her as she waited for an ambulance and her sister to arrive. Gary Shelton, in fact, testified at deposition that he did not see plaintiff fall. It could be argued, then that there were no witnesses that were required to be named on the notices.

In the case of *Rule v Bay City*, 12 Mich App 503, 505; 163 NW2d 254 (1968), a pedestrian brought suit against the city after she tripped and fell on an alleged defective sidewalk. She timely served the requisite notice on the city, but named no witnesses in the notice. The city argued that the notice was defective because the plaintiff fell within a foot of a car in which her daughter was sitting, such that the plaintiff's daughter was a witness that should have been named on the notice. *Id.* at 506. This Court disagreed and found that the plaintiff was in compliance with MCL 691.1404(1), stating:

The record discloses that plaintiff's daughter was sitting in a car in the driver's seat and that plaintiff fell within a foot of the front of the car. The plaintiff testified that her daughter saw the fall. However, plaintiff also testified that her daughter couldn't see what caused the fall. None of this testimony is adequate to establish the fact of whether or not the daughter was in fact a witness. The only person who could give proper testimony on this question, namely the daughter, was not called to testify. The mere presence of a person at the scene of an accident does not make that person a witness. [*Id.* at 506-507].

Thus, where Gary Shelton was not a witness to the accident, he cannot necessarily be deemed a witness required to be named for purposes of MCL 691.1404(1).

We are fully aware of our Supreme Court's ultimate holding in *Rowland* that MCL 691.1404(1) must be enforced as written. *Rowland*, 477 Mich at 219. But, we also cannot ignore that the narrow and specific issue addressed in *Rowland* was whether an "actual prejudice" component should be read into *untimely filed* notices. And, the *Rowland* holding does not negate the long-favored judicial policy of substantial compliance with the content requirements of MCL 691.1404(1). See, e.g., *Meredith v City of Melvindale*, 381 Mich 572, 580; 165 NW2d 7 (1969)("This Court is committed to the rule requiring only substantial compliance with the notice provisions of a statute or charter"). Again, a plaintiff's notice "need only be understandable and sufficient to bring the important facts to the governmental entity's attention." *Plunkett*, 286 Mich App at 176, 178. Plaintiff here has complied with the notice requirement in MCL 691.1404(1) as it pertains to witnesses such that the trial court did not err in denying summary disposition in defendant's favor.

Defendant next contends that the matter should be dismissed because plaintiff does not have sufficient evidence to show that defendant had notice of the defect. As previously noted, however, the trial court did not decide this issue. For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Because the trial court did not address or decide this matter, there is no decision for us to review on appeal on this issue.

Affirmed and remanded to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly