STATE OF MICHIGAN

COURT OF APPEALS

ANDREA JONES, Plaintiff-Appellee,	UNPUBLISHED June 26, 2012
v	No. 304155 Oakland Circuit Court
CITY OF PONTIAC, Defendant-Appellant.	LC No. 2010-112962-NO

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right an order partially denying its motion for summary disposition in this suit brought under the highway exception to governmental immunity. We agree with defendant's argument that plaintiff did not comply with the statutory notice requirements of MCL 691.1404 for asserting a claim under the highway exception, so we reverse and remand for entry of an order granting defendant's motion for summary disposition in its entirety.[1]

This Court reviews de novo the denial of a motion for summary disposition under MCR 2.116(C)(7) brought on the basis of governmental immunity. *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009). To defeat such a motion, the plaintiff must allege facts stating a claim under an exception to governmental immunity. *Id*. When reviewing a defendant's motion for summary disposition on the basis of governmental immunity, this Court accepts the plaintiff's well-pleaded factual allegations as true and construes them in the plaintiff's favor, "unless the movant contradicts such evidence with documentation." *Id*. (footnote omitted). "Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence." *Id*. (footnote omitted).

[1] Portions of plaintiff's brief on appeal are not prepared in conformity with our court rules. The statement of facts is argumentative, so much so that it contains multiple citations to case law. See MCR 7.212(C)(6) and (D)(1). Additionally, some of the case law mentioned contains no citations.

Under the Governmental Tort Liability Act, MCL 691.1401 *et seq*., governmental agencies (which include municipalities) are protected from tort liability if they are engaged "in the exercise or discharge of a governmental function." *Roby v Mount Clemens*, 274 Mich App 26, 29; 731 NW2d 494 (2007) (footnote omitted). However, MCL 691.1402[2] contains a highway exception to governmental immunity and provides:

> 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(e).

To recovery under the highway exception, the injured person must notify the governmental agency within 120 days of the injury's occurrence of: (1) "the exact location and nature of the defect," (2) "the injury sustained," and (3) "the names of the witnesses known at the time by the claimant." See MCL 691.1404(1). The notice must be served personally or by certified mail, return receipt requested, upon any individual "who may lawfully be served with civil process directed against the governmental agency[.]" MCL 691.1404(2). For a city, service may be made on the mayor, city clerk, or city attorney. See MCR 2.105(G)(2). The notice must be served within 120 days of the injury's occurrence, even if the governmental agency suffers no actual prejudice from late notification. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

The primary purposes of the notice requirement are "(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." *Plunkett*, 286 Mich App at 176-177 (footnote omitted). This Court has also stated:

> "[A] notice of injury and defect will not be regarded as insufficient because of a failure to comply literally with all the stated criteria. Substantial compliance will suffice." Therefore, all that is required to create a legally sufficient notice is that the plaintiff substantially comply with the notice requirement, and the 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 . . . ." [*Plunkett*, 286 Mich App at 178, quoting *Hussey v Muskegon Hts*, 36 Mich App 264, 269; 193 NW2d 421 (1971); *Jones v Ypsilanti*, 26 Mich App 574, 584; 182 NW2d 795 (1970) (footnotes omitted).]

[2] MCL 691.1401-1402a was amended by 2012 PA 50, effective March 13, 2012. Because plaintiff's cause of action arose from events occurring on August 30, 2008, the former text of MCL 691.1401-1402a applies.

Notice from an average citizen "need only be understandable and sufficient to bring the important facts to the governmental entity's attention." *Plunkett*, 286 Mich App at 176 (footnote omitted).

We hold that plaintiff's September 12, 2008, letter did not substantially comply with the notice requirements of MCL 691.1404.[3] First, plaintiff's September 12, 2008, letter was not properly served. Plaintiff sent a letter addressed to 47450 Woodward Avenue, Pontiac's city hall, "Attention: Risk Management." Though the letter was sent by certified mail with return receipt requested, the letter was not addressed to the mayor, city clerk, or city attorney, as required by MCR 2.105(G)(2).

Second, plaintiff did not describe the exact location of the defect. In her letter, plaintiff specified that the incident occurred on the city sidewalk, directly across the street from 47200 Woodward in Pontiac. She also said that the defect was "across the street from the school administration building (where the sign is located) and on the side of the Phoenix Building." However, the school administration building's property at 47200 Woodward covers a large area, with the sidewalk covering some 340 feet. Additionally, although plaintiff specified that the defective sidewalk was across the street from where "the sign" is located, there was more than one sign located along this stretch of sidewalk and roadway. And, the record establishes that there are two "Phoenix Buildings" across the street from the school administration building, so even using the "Phoenix Building" as a reference point does not limit the location specifically enough. See *Thurman v City of Pontiac*, ___ Mich App ___; ___ NW2d ___ (Docket No. 300396, issued February 14, 2012), slip op, pp 2-3.[4]

Finally, plaintiff attached photographs to her letter that were taken the day after she fell. Of the photos submitted with the letter, two have circles that depict two different areas; one is a close-up picture of an obviously cracked and uneven sidewalk, while the other includes a fire

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[3] Plaintiff also claims to have sent a letter to defendant dated October 23, 2008, but it was not sent by certified mail, return receipt requested. In fact, defendant asserts that it never received this second letter. MCL 691.1404(2) is "straightforward, clear, unambiguous, and not constitutionally suspect[,]" so it should be "enforced as written." See *Rowland*, 477 Mich at 219. MCL 691.1404(2) explicitly requires that notice must be served personally or by certified mail. Because the October 23, 2008 letter was not properly served under MCL 691.1404(2), we will not consider the information in plaintiff's second letter when determining if plaintiff met the notice requirements.

[4] *Burise v City of Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009) is of no assistance to plaintiff. In that case our Court held that plaintiff's first notice was deficient because of the failure to name known witnesses, but plaintiff then cured that defect within 120 days of the injury. *Id*. at 652. Importantly, the *Burise* Court examined both notices given during the 120-day period for compliance with the statute and held that the first notice could not be considered because it did not independently comply with the statute. *Id*. at 655. Here, plaintiff's second purported notice cannot be considered because it did not comply with the statute as it minimally was neither personally served nor mailed by certified mail to the appropriate person.

hydrant, a streetlight with a red banner attached, and a church further down the street on the left side. However, nothing alerted defendant as to which area was the one where the defect existed that allegedly caused plaintiff's fall. Indeed, it was not until her deposition that she verified which area was the location of her fall.

Finally, plaintiff did not name any witnesses in her notice to defendant even though it was undisputed that defendant's husband was walking with her when she was injured. In addition, plaintiff provided three other names (in addition to her husband's) in her responses to defendant's interrogatories. Yet, defendant failed to specify any witnesses. For these reasons, we hold that plaintiff's letter did not substantially comply with the statutory notice requirements of MCL 691.1404(1). The trial court's order to the contrary is reversed.[5]

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan

[5] Because of our resolution on this issue, we need not address defendant's remaining arguments.