

STATE OF MICHIGAN
COURT OF APPEALS

RODNEY LEE SOBER,

Plaintiff-Appellee,

v

JACKSON COUNTY MEDICAL CARE
FACILITY,

Defendant-Appellant.

UNPUBLISHED
September 20, 2012

No. 306157
Jackson Circuit Court
LC No. 2010-003177-NO

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order denying its motion for summary disposition based upon governmental immunity in this personal injury action. Because plaintiff failed to provide proper notice under MCL 691.1406, we reverse.

Defendant is a county medical care facility. On April 24, 2009, while a visitor at defendant facility, plaintiff leaned against a short light post located on an outside sidewalk providing access to the facility. As he did so, the light post fell over, in turn causing plaintiff to fall and sustain injuries to his left wrist, elbow, and back.

Plaintiff alleged in his complaint that the facility where he fell was a public building and that defendant had a statutory duty to maintain the public building and to protect against dangerous and defective conditions. Plaintiff further alleged that defendant breached such duties and was negligent in failing to maintain the premises in a reasonably safe condition, which ultimately led to his injuries. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), asserting that plaintiff had not established the applicability of the public building exception to governmental immunity such that his claims were barred on grounds of immunity. The trial court found that questions of fact precluded summary disposition in defendant's favor and thus denied defendant's motion. This appeal followed.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). The determinations regarding both the applicability of governmental immunity and a statutory exception to governmental immunity are questions of law that are also subject to de novo review. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

Summary disposition in favor of a defendant is appropriate pursuant to MCR 2.116(C)(7) when the plaintiff's claim is "barred because of . . . immunity granted by law . . ." When considering a motion brought pursuant to MCR 2.116(C)(7), the contents of the complaint must be accepted as true unless contradicted by substantively admissible documentary evidence submitted by the moving party. *Snead*, 294 Mich App at 354. "This Court must consider the documentary evidence submitted for purposes of a motion brought under MCR 2.116(C)(7) relative to governmental immunity in a light most favorable to the nonmoving party. If there is no relevant factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If, however, a pertinent factual dispute exists, summary disposition is not appropriate." *Id* (internal citations omitted).

The Governmental Tort Liability Act, MCL 691.1401 et seq., provides that "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). This grant of immunity is broad in scope, subject to six statutory exceptions. *Wesche v Mecosta Co Rd Com'n*, 480 Mich 75, 84; 746 NW2d 847, 853 (2008). One of these statutory exceptions, the public building exception, is set forth in MCL 691.1406, in relevant part, as follows:

Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place.

To fall within this exception, "a plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question was open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period *or failed to take action reasonably necessary to protect the public against the condition after a reasonable period.*" *Kerbersky v N Michigan Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998)(emphasis in original).

In addition to providing for knowledge of a defective condition as a condition for recovery under the public building exception, MCL 691.1406 also contains a notice requirement:

As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible 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.

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 responsible governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding . . .

Because MCL 691.1406 is clear and unambiguous, its plain language must be enforced as written. *Ward v Michigan State University (On Remand)*, 287 Mich App 76, 81; 782 NW2d 514 (2010). The statute sets forth several clear elements required for notice:

The statute specifies who must serve the notice (“the injured person”), on whom the notice must be served (“any individual . . . who may lawfully be served with civil process directed against the responsible governmental agency”), what information the notice must contain (“the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant”), and the manner in which the notice must be served (“either personally, or by certified mail, return receipt requested”). Although the statute does not explicitly so provide, it patently implies that these elements of the required notice must be in writing. *Ward*, 287 Mich App at 81.

Here, Anna Dancy, defendant’s director of human resources, prepared an accident/incident report concerning plaintiff’s injury on the same day the incident occurred. The report provides plaintiff’s name, the location where the injury occurred, how the incident occurred, and the injuries suffered by plaintiff as a result. The report specifically states that the accident was caused by the light post giving way when plaintiff leaned on it and contains the names of witnesses to the incident. The report thus contains the requisite notice information required by MCL 691.1406. Defendant contends, however, that this report does not constitute written notice as contemplated by MCL 691.1406 because plaintiff did not serve the written notice and because the report of the incident was not served upon an individual who could be served with process. We agree.

According to MCL 691.1406, “the injured person, within 120 days from the time the injury occurred, shall serve a notice . . .” Plaintiff, the injured person, served no notice in the instant matter. Notice of plaintiff’s injury, as it were, appears in the form of an internal fill-in-the-blank form prepared by an employee of defendant, presumably in the regular course of her duties. Black’s Law Dictionary (7th ed.) defines “serve” as “to make legal delivery of.” Plaintiff did not make legal delivery of an internal incident report generated by defendant, such that it is not “a notice served by the injured person.”

Nor would plaintiff’s oral recitation of the events to Anna Dancy be considered notice in compliance with MCL 691.1406. This is necessarily so, as the injured party is required to serve “a” notice (indicating a tangible object) and the notice is to be served under this statute either personally or by certified mail to someone authorized to accept such service. One cannot serve an oral statement by certified mail and that there must be a person authorized to accept the

service indicates that the notice must consist of a written document. The statute thus patently implies that the elements of the required notice must be in writing. *Ward*, 287 Mich App at 81. Plaintiff's failure to provide notice in compliance with MCL 691.1406 bars his claim.

MCL 691.1406 also requires that any notice served by the injured person 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 responsible governmental agency . . ." MCR 2.105(G) provides that service may be made upon a governmental corporation or public body as follows:

- (1) the chairperson of the board of commissioners or the county clerk of a county;
- (2) the mayor, the city clerk, or the city attorney of a city;
- (3) the president, the clerk, or a trustee of a village;
- (4) the supervisor or the township clerk of a township;
- (5) the president, the secretary, or the treasurer of a school district;
- (6) the president or the secretary of the Michigan State Board of Education;
- (7) the president, the secretary, or other member of the governing body of a corporate body or an unincorporated board having control of a state institution;
- (8) the president, the chairperson, the secretary, the manager, or the clerk of any other public body organized or existing under the constitution or laws of Michigan, when no other method of service is specially provided by statute.

The service of process may be made on an officer having substantially the same duties as those named or described above, irrespective of title. In any case, service may be made by serving a summons and a copy of the complaint on a person in charge of the office of an officer on whom service may be made and sending a summons and a copy of the complaint by registered mail addressed to the officer at his or her office.

The singular "notice" claimed by plaintiff in this matter is the April 24, 2009 accident/incident report prepared by Anna Dancy. As the human resources director for defendant, Dancy admittedly occupies none of the roles outlined in MCR 2.105(G)(1)-(8). In his response to defendant's motion for summary disposition, plaintiff instead asserted that she "appears to be person in charge of the office responsible for taking the report, and also appears to be 'an officer having substantially the same duties as those named or described' in MCR 2.105(G)(8)." Plaintiff's hesitant claim that Ms. Dancy "appeared" to be an appropriate person upon which to serve notice is insufficient. Discovery has closed and Ms. Dancy's actual duties and/or authority have not been provided to the trial court to establish that she is, indeed, "an officer having substantially the same duties as those named or described" in MCR 2.105(G)(8). Plaintiff may not rely upon mere suppositions or appearances to support his claim. As a result, plaintiff has

failed to establish that service of any notice, were we to have found the notice proper, was made in compliance with MCL 691.1406.

Because plaintiff failed to provide proper notice under MCL 691.1406, defendant is entitled to summary disposition in its favor. This issue being dispositive, we need not consider defendant's remaining arguments on appeal.

Reversed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot