

STATE OF MICHIGAN
COURT OF APPEALS

KYLE SPEELMAN,

Plaintiff-Appellant,

v

CITY OF LANSING,

Defendant-Appellee.

UNPUBLISHED
November 8, 2012

No. 306532
Ingham Circuit Court
LC No. 11-000226-NO

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). Plaintiff was riding his motorcycle westbound on Mount Hope Avenue in Lansing. Plaintiff was thrown from the motorcycle and injured when the front tire of his motorcycle entered a pothole. Defendant argued, and the trial court concluded, that plaintiff's claim was barred because his presuit notice failed to provide the "exact location" of the alleged highway defect that caused plaintiff's injuries and therefore did not comply with the requirements of MCL 691.1404(1). We reverse and remand.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id.* at 119. Questions of statutory interpretation are also subject to de novo review. *Plunkett v Dep't of Transp*, 286 Mich App 168, 174; 779 NW2d 263 (2009).

Michigan's governmental immunity act, MCL 691.1401 *et seq.*, provides that government agencies are immune from tort liability unless a particular exception applies. Plaintiff sued defendant under the "highway exception" to governmental liability, MCL 691.1402(1), which, among other things, requires a plaintiff to comply with certain notice provisions. The statutory provision at issue in this case, MCL 691.1404(1), provides:

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)¹ 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. [Emphasis added.]

The word “shall” indicates a mandatory requirement. *Costa v Community Emergency Med Services*, 475 Mich 403, 409; 716 NW2d 236 (2006). Consequently, the sole issue before this Court is whether plaintiff’s presuit notice adequately “specif[ied] the exact location” of the pothole alleged to have caused the accident.²

Plaintiff sent his presuit notice to the required parties. The notice provided:

PLEASE TAKE NOTICE that, pursuant to the provisions of MCLA 691.1404, notice is given to you that KYLE SPEELMAN suffered personal injuries as a result of a defect in the roadway under your care and control on September 9, 2010. The accident occurred on the roadway located at eastbound Mt. Hope Avenue near the intersection of Moores River Drive directly across from Clark Construction Company, and was caused by the following defect: Large pothole in the pavement. See photographs with pothole circled and diagram attached. Witnesses: Gayla Norris, 3333 Moores River, Apt. 8, Lansing, MI.

As a result of the accident, KYLE SPEELMAN did suffer injuries including, but not limited to, fractured right femur, severe injuries to the right leg, right arm as well as internal injuries and injuries to the spleen, kidney, liver and collapsed lung, as well as additional injuries yet to be determined.

I will assume that this Notice is compliant with MCL 691.1404 unless I am advised by your office of any deficiencies.

The notice erroneously identified the location of the pothole as “eastbound, when in fact, plaintiff was traveling westbound. However, the notice also consisted of photographs and a

¹ Subsection (3) pertains to injured plaintiffs under the age of 18. MCL 691.1404(3). Plaintiff was over age 18 at the time of the injury, so subsection (3) has no bearing on this case.

² The parties each cite several unpublished decisions of this Court in support of their respective arguments. While these may be considered “instructive or persuasive,” they are not binding precedent. MCR 7.215(C)(1); *Roberts v Saffell*, 280 Mich App 397, 407; 760 NW2d 715 (2008).

printout of an online map also depicting and pinpointing the location of the alleged defect.³ Defendant contended that the notice failed to specify the “exact location” of the alleged defect as required by MCL 691.1404(1). The trial court agreed and granted defendant’s motion.

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), our Supreme Court overruled a line of cases that held that, absent of showing of actual prejudice to the defendant-government, a plaintiff’s failure to comply with the highway exception notice provision was not fatal. *Id.* at 200. The *Rowland* plaintiff failed to provide the required notice within 120 days. *Id.* at 201. The *Rowland* Court found this error fatal to the plaintiff’s case, concluding that “MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written.” *Id.* at 219. *Rowland* did not discuss the “exact location” language at issue in this case, but it clearly dictates that MCL 691.1404 is to be enforced as written. However, contrary to plaintiff’s contention, *Rowland* did not discuss “substantial compliance” with the notice provision, but rather only removed any required showing of “actual prejudice” from its MCL 691.1404 jurisprudence.

In *Plunkett*, the defendant argued that it was entitled to summary disposition because the plaintiff’s notice was insufficient under MCL 691.1404 as it did not contain “a strictly accurate or correct identification of the alleged highway defect, and the alleged defect was not actionable under “uncontested standards for maintaining asphalt pavement.” *Id.* at 174, 179. This Court concluded that a plaintiff need only substantially comply with the notice provision, insofar as a plaintiff should not be held to the standard of a hypertechnical and hyperdetailed recitation of the precise location of the defect. *Id.* at 177-179. Rather, the plaintiff must only provide a sufficiently accurate description of the nature and location of the defect that the reader is not left with any real doubt as to where and what the defect is.

If plaintiff’s notice consisted only of the written portion, it would probably be insufficient; a wrong address, for example, does not provide the “exact location” of a defect. *Jakupovic v Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011).⁴ Here, however, when the photographs—which depict various landmarks—and the map showing where the photographs were taken are taken into consideration, the exact location and exact nature of the alleged defect are more than adequately communicated. Plaintiff cites, and we can find, no authority for the proposition that any particular portion of a notice controls in the event of an internal conflict.

³ The map, with a computer-generated “bubble” depicted upon it, appears by itself only to provide the general location; however, as we discuss, it is part of the notice, which is to be read as a whole rather than as components in isolation from each other.

⁴ The notice provided by the plaintiff in *Jakupovic* provided the wrong address, but the notice was *only* a written notice. See *Jakupovic v City of Hamtramck*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 293715).

Consequently, the fact that the written portion of the notice states the wrong road direction does not undermine the description of the exact location of the defect in the *notice as a whole*. Plaintiff's notice clearly describes the exact location of the alleged defect, and therefore plaintiff's notice complied with the requirements of MCL 691.1404(1).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Stephen L. Borrello