

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA MCLEAN,

Plaintiff-Appellee,

FOR PUBLICATION
August 1, 2013
9:00 a.m.

v

CITY OF DEARBORN,

Defendant-Appellant.

No. 309563
Wayne Circuit Court
LC No. 10-007800-NO

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

BOONSTRA, J.

Defendant appeals by right from the order of the trial court denying defendant's motion for summary disposition. Defendant moved the trial court for summary disposition pursuant to MCR 2.116(C)(7) and (10) on the grounds of governmental immunity. Because we find that the trial court erred in concluding that plaintiff had satisfied the notice requirements of MCL 691.1404(1), and the defect was not cured by subsequent communications to defendant's third party claims administrator, we reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff alleged that she tripped and fell while stepping off a sidewalk onto a road in the City of Dearborn on July 11, 2008. She stated at her deposition that her left foot "went right into that pothole" causing her to fall and sustain injuries. After attempting to ice and rest her foot, plaintiff had her husband take her to Oakwood Hospital that same day. Plaintiff stated that "They took x-rays and told me my foot was broken and that I'd have to go in and have a cast put on."

Five days later, plaintiff's attorney sent a letter addressed to the "City Manager or Mayor's Office" of defendant. The letter stated in relevant part:

RE: OUR CLIENT: PATRICIA MCLEAN; DATE OF INCIDENT: JULY 11,
2008; LOCATION OF INCIDENT: PUBLIC STREET LOCATED DIRECTLY
ACROSS FROM 1136 MASON STREET, DEARBORN, MICHIGAN 48124

Dear City Manager or Mayor:

Please be advised that my client, Patricia Mclean, sustained a significant injuries [sic] as a result of tripping and falling due to a hazardous and defective city street at the above referenced location.

* * *

On the above date, Ms. Mclean sustained the above-mentioned injuries when she tripped and fell on a defective portion of city street located directly across the street from 1136 Mason, Dearborn, Michigan. Enclosed you will find color laser copies of photographs showing the exact location where our client's injury occurred, as well as of the hazardous defect that was allowed to remain on the street.

On September 16, 2008, plaintiff's attorney responded to a communication from Ms. Flory Morisette of the Claims Department of Broadspire. The parties agree that Broadspire is defendant's third-party claims administrator (TPA). The letter stated in relevant part:

As you know, our office serves as counsel to the above client, who was seriously injured on city property on the referenced date. Pursuant to your letter dated August 7, 2008, I have enclosed multiple photographs of the exact location of the raised, defective, and uneven portion of the "highway" located directly across from 1136 Mason Street in the public street in the City of Dearborn (see attached). In addition, my client has sustained a fractured left foot and has tretated [sic] at Oakwood Hospital and will seek follow up care.

On July 8, 2010, plaintiff filed a complaint in the trial court, alleging numerous injuries, including a fractured left foot; head, neck and back injuries; injuries to the upper and lower extremities; permanent scarring; headaches; "severe shock"; "[s]evere humiliation and embarrassment"; and "severe, frequent and persistent pain" as well as aggravation of preexisting medical conditions. Plaintiff also described the defect as "a broken, deteriorated, cracked, crumbled, hole."

Defendant moved for summary disposition, arguing that plaintiff had failed to provide adequate pre-suit notice of her claim pursuant to MCL 691.1404. Specifically, defendant alleged that plaintiff had failed to adequately describe the alleged injuries sustained and the exact nature of the defect. Plaintiff responded that any defects in the original notice were cured by the subsequent letter to Broadspire.

The trial court agreed with plaintiff, concluding that the original notice sufficiently described the nature of the defect by enclosing pictures of the defect. The trial court further concluded that plaintiff's letter to Broadspire sufficiently described the nature of her injury to satisfy the notice requirement of the statute. The trial court therefore denied defendant's motion for summary disposition. Defendant moved the trial court for reconsideration, which the trial court denied. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant of summary disposition under MCR 2.116(C)(7) and (C)(10). *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010); *Maiden v Rozwood*; 461 Mich 109, 119; NW2d 817 (1999). In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true. *Smith*, 290 Mich App at 683. In reviewing a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other evidence introduced by the parties to determine whether no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. MCR 2.116(G)(4); *Maiden*, 461 Mich at 119-120. The evidence submitted must be considered "in the light most favorable to the opposing party." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011).

III. NOTICE

The governmental immunity act, MCL 691.1401 *et seq.*, provides immunity from tort claims to governmental agencies engaged in a governmental function, as well as governmental officers, agents or employees. The Legislature has set forth six exceptions to governmental tort immunity. *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). Relevant here is the "highway exception" whereupon a governmental agency can be liable for damages caused by an unsafe highway. MCL 691.1402(1) provides in relevant part:

Each governmental agency having jurisdiction over any 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. . . .

This exception is to be narrowly construed. *Grimes v Dep't of Trans*, 475 Mich 72, 78; 715 NW2d 275 (2006).

An injured person is required to timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the nature of the defect, and the names of known witnesses. MCL 691.1404(1); *Rowland v Washtenaw County Rd Comm*, 477 Mich 197, 200, 203-204, 219; 731 NW2d 41 (2007). Failure to provide adequate notice under this statute is fatal to a plaintiff's claim against a government agency. *Id.* MCL 691.1404 provides in relevant 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)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.

(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.

Notice need not be provided in any particular form and is sufficient if it is timely and contains the requisite information. *Burise v Pontiac*, 282 Mich App 646, 654; 766 NW2d 311, lv den 485 Mich 894 (2009). All of the required information does not have to be contained within the plaintiff's initial notice; it is sufficient if a notice received by the governmental agency within the 120-day period contains all of the required elements. *Id.*

MCL 691.1404 is "straightforward, clear, unambiguous" and "must be enforced as written." *Rowland*, 477 Mich at 219. Although under some circumstances this Court will conclude that a notice is sufficient despite a technical defect, see *Plunkett v Dep't of Transp*, 286 Mich App 168, 176-177; 779 NW2d 263 (2009), the plaintiff must at least "adequately" provide the required information. *Id.* "Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects." *Id.*, quoting *Jones v Ypsilanti*, 26 Mich App 574, 584; 182 NW2d 795 (170). Thus, in *Plunkett*, we found that any ambiguity in the plaintiff's description of the nature of the defect was remedied by the precise description of the defect's location, including the attached police report. *Id.* at 178-179.

A. NOTICE OF THE LOCATION AND NATURE OF THE DEFECT WAS SUFFICIENT

Here, defendant argues first that plaintiff did not describe the exact nature of the defect. We agree with the trial court that the description of the nature and location of the defect, which included color photographs of the defect, was sufficient. Although the written description of a "hazardous and defective city street," standing alone, would not provide sufficient notice of the exact nature of the defect, defendant was also provided with color photos of the defect, and a description of the defect as being located "directly across the street from 1136 Mason, Dearborn, Michigan." The pictures show a hole in the concrete surface of the road and provide landmarks, such as a light post, a large line in the concrete, and the doorway of the building directly across the street, that would assist defendant's agents in finding and repairing the defect. There are also close-up pictures of the defect. Any deficiency in the written description is therefore remedied by the inclusion of the photographs. *Plunkett*, 286 Mich App at 178-179.

We decline to accept defendant's argument that plaintiff admitted at her deposition that the photos did not accurately depict the defect. Plaintiff stated, in her deposition taken three

¹ Subsection 3 refers to injured claimants under the age of 18 and is not relevant to the instant case.

years after the accident, that the hole in the picture was not “as crumbled looking” as she recalled it looking on the day of the accident, and agreed that it did not really represent how it looked when she fell. She further stated that it looked as though it was “not as deep” and “it could have been filled in.”

The purpose of requiring notice is to provide the governmental agency with an opportunity to investigate the claim while it is fresh and to remedy the defect before another person is injured. *Plunkett*, 286 Mich App at 176-177. Nothing in MCL 691.1404, or our caselaw, indicates that a plaintiff can “undo” the sufficiency of the notice provided to a governmental agency at their deposition, especially by stating that, according to their three-year-old recollection, they remembered a pothole being deeper or more crumbled. Plaintiff did not state that the pictures *did not show* the defect or that she was *unable to state* that the defect caused her injury—instead she merely remarked that it appeared less crumbled and/or deep than she remembered. We decline to base the sufficiency of notice provided under MCL 691.1404 on the vagaries of human memory; indeed the purpose of the notice requirement is precisely to avoid the sort of imprecision that may occur when testimony is taken and evidence collected years later, by allowing claims to be investigated when they are still fresh. *Id.* The notice provided was sufficient in its description of the nature and location of the defect.

B. THE INITIAL NOTICE LACKED SUFFICIENT DESCRIPTION OF THE NATURE OF PLAINTIFF’S INJURY.

Were that the only issue with the original notice, we likely would affirm the trial court. However, defendant also argues, and we agree, that plaintiff failed to describe “the injury sustained” as required by MCL 691.1404(1). Here, plaintiff only stated in the initial notice that she received “a significant injuries [sic].” This is a significant ambiguity that is not remedied by clarity in any other aspects of the notice. As we note above, plaintiff in 2010 in fact alleged a whole host of injuries in her complaint; defendant was provided with notice of none of them. The description of plaintiff’s injury contained in the original notice was thus wholly inadequate; plaintiff cannot be deemed to have complied, substantially or otherwise, with this statutory requirement. *Plunkett*, 286 Mich App at 176-177.

Plaintiff argues that she could not provide “an expert level of commentary” on her injury a mere five days after her accident, and invites this Court to consider a scenario where she alleged that her ankle was sprained, only to lose her claim when it was discovered that her ankle was broken or that she had actually injured her tibia. Such a hypothetical situation is not before this Court. Rather, plaintiff knew, at a minimum, that she had fractured her left ankle, as she obtained medical treatment and x-rays the very day of the accident. Yet her description of her injury did not even deign to name a body part that was injured. Thus, while (and consistent with our precedents) we do not construe MCL 691.1404 in an “overly restrictive manner,” *Plunkett*, 286 Mich App at 176-177, so as to “make it difficult for the average citizen to draw a good notice,” *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969), neither do we accept plaintiff’s invitation to allow the statutory requirement to be satisfied by the mere recitation of the phrase “significant injury.” To do so would be to essentially render this aspect of the notice requirement of MCL 691.1404(1) illusory or nugatory in contravention of our canons of statutory construction. See *Aspey v Memorial Hosp*, 477 Mich 120, 132; 730 NW2d 695 (2007).

C. THE LETTER TO BROADSPIRE WAS NOT SERVED IN ACCORDANCE WITH
MCL 691.1404(2) AND MCR 2.105

Having determined that the initial notice to defendant was insufficient, we now determine whether the defect was cured by plaintiff's subsequent communication to defendant's TPA. Plaintiff is correct that all the information required by MCL 691.1404(1) does not have to be contained within the plaintiff's initial notice; it is sufficient if a notice received by the governmental agency within the 120-day period contains all of the required elements. *Burise*, 282 Mich App at 654. However, we disagree that plaintiff's letter to Broadspire can be considered "notice" to defendant under MCL 691.1402(2). The statute provides that "notice may be served upon any individual . . . who may lawfully be served with civil process directed against the government agency." *Id.* MCR 2.105(G)(2) provides that service of process may be made on "the mayor, the city clerk, or the city attorney of a city." By the plain language of this statute and court rule, service on a TPA is not sufficient. Judicial construction of MCL 691.1404 is not permitted. *Rowland*, 477 Mich at 219.

Plaintiff agrees that MCR 2.105(G)(2) does not provide for service of process on a TPA. However, plaintiff argues, for the first time on appeal, that MCR 2.105(H)(1) allows for such service in this case.² That court rule provides that service of process on a defendant may be made on "an agent authorized by written appointment or by law to receive service of process." *Id.*³ Plaintiff argues that, by virtue of Broadspire's response to plaintiff's original letter, defendant represented to plaintiff that Broadspire was defendant's agent in this matter. Plaintiff cites *Burise* in support of this claim. 282 Mich App at 655. In *Burise*, we held that a supplemental notice, *properly served*, may cure an inadequate initial notice. *Id.* Although the supplemental notice in *Burise* was served upon defendant's representative, the issue in *Burise* was whether MCL 691.1404(1) allowed piecemeal notice, not whether any service was defective. *Id.* As the *Burise* Court did not analyze whether service was proper under MCL

² Plaintiff made no such argument in the trial court. The dissent nonetheless posits that the majority wrongly responds to this argument on behalf of defendant, since defendant had not addressed the argument before the trial court. The parties indeed confined their arguments before the trial court to whether service to Broadspire was valid under MCL 691.1402(2) and MCR 2.105(G)(2). And the plain language of that statute and court rule indicate that the service was defective. Plaintiff did not raise an argument under MCR 2.105(H)(1) until this appeal. Since plaintiff had not previously raised the argument, defendant properly responded to it for the first time on appeal. A party on appeal is not precluded from urging an "alternate ground for affirmance." *In re Estate of Herbach*, 230 Mich App 276, 284; 583 NW2d 541 (1998). It is in that context that we address, and reject, plaintiff's argument. The dissent makes reference to waiver of appellate issues; indeed, if anyone, it would be *plaintiff* who waived our review of this alternate ground for affirmance by failing to raise the argument before the trial court. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). We do not find that plaintiff waived this argument; but in considering it and rejecting it, we are confident that we do not overstep the role of this Court.

³ As the dissent notes, this language also appears in MCL 600.1930.

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.

Here, there is simply no record evidence indicating that Broadspire was authorized by *written appointment* or *law* to accept service on behalf of defendant. MCR 2.105(H)(1). Plaintiff's claim appears to rest on the theory of apparent authority. *Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957), quoting 2 CJS Agency, § 96 (b), pp 1210-1211 (“Whenever the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal . . . an apparent authority results which replaces that actually conferred as the basis for determining rights and liabilities.”) However, the claim must fail in light of the clear language of the relevant court rules and MCL 691.1404(2).⁴ In the absence of any evidence of a written appointment of Broadspire as defendant's agent (for purposes of receiving service of process), or any law granting Broadspire such authority, plaintiff's letter to Broadspire simply did not function as a supplemental notice under the statute.⁵

Plaintiff again invites this Court to consider a hypothetical scenario where a defendant engages outside counsel to contact plaintiff for more information about the claim, arguably barring the plaintiff from dealing or communicating directly with the defendant. Such a situation is not before this Court; nor do the notice requirements of MCL 691.1404 or the service requirements of MCR 2.105, govern all dealings between the parties. We see no great injustice in requiring plaintiffs seeking to provide notice to defendants under the statute to serve their notices on the correct parties. Although plaintiff asserts that there “should be no requirement that the supplemental notice be served upon the same cast of persons as identified in MCR 2.105(G),” we are not in a position to re-write the statute or the court rule. We reiterate that our Supreme Court has found this notice provision to be both constitutional and unambiguous. *Rowland*, 477 Mich at 219.⁶

⁴ The dissent also appears to rely on a theory of apparent authority, as it states that language from the letter from Broadspire “permits an inference that the City had authorized Broadspire to act on its behalf” and that “a reasonable fact-finder could infer that the City granted this authority to Broadspire in a written agreement.” However, defendant's apparent appointment of Broadspire as a third party administrator in no way suggests or equates to a “written appointment . . . to receive service of process.” We reiterate that judicial construction of MCL 691.1404 and MCL 600.1930 is not permitted. *Rowland*, 477 Mich at 219.

⁵ Additionally, we note that plaintiff's letter to Broadspire was not personally served, and the record does not contain evidence indicating it was served by “registered or certified mail” as required by MCR 2.105(A). Thus, even if we found Broadspire authorized to accept service on behalf of defendant, that service would still have been defective under the relevant court rule.

⁶ This is not to say that we are without sympathy for plaintiff's position. Indeed, we are troubled by the fact that plaintiff is seemingly penalized for doing that which defendant's TPA requested (in response to plaintiff's initial inadequate notice), i.e., providing additional information, only to

Finally, plaintiff's waiver argument is simply incorrect. Plaintiff claims that defendant never raised the issue of deficient service of process until its motion for reconsideration. However, the record indicates that defendant in fact raised the issue at the motion hearing on the parties' cross-motions for summary disposition:

MR. IRVING [Attorney for defendant]: Thank you, your Honor. I just wanted to point out with respect to that second notice, we, that is Broadspire is a third-party administrator that the city has been using to adjust certain claims. We didn't get this notice from Broadspire. . . . I just wanted to point out to the Court as well that even if that, we don't concede that that's a timely or proper notice because it wasn't to the city, it was to a third party.

* * *

MR. IRVING: The statute requires service on the mayor, the clerk, or the city attorney of the notice.

Defendant also alleged in its first responsive pleading that plaintiff failed to give timely, adequate, and sufficient notice to defendant. There is no basis for concluding that defendant waived this issue, which was alleged in a responsive pleading and raised before and decided (at least implicitly) by the trial court in ruling on the parties' motions. See *Polkton Charter Twp v Pellegron*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

IV. CONCLUSION

The unambiguous language of MCL 691.1404 requires this Court to reverse the trial court's denial of summary disposition on the grounds that plaintiff failed to provide a description of the injury she allegedly suffered. Additionally, we hold that the defect in the original notice was not cured by plaintiff's subsequent communication with Broadspire.

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

/s/ Mark T. Boonstra

/s/ Christopher M. Murray

determine later that it should have provided that information not to (or only to) the requesting TPA, but rather (or additionally) to such persons as may be "lawfully served with civil process" directed against defendant. MCL 691.1404(2). However, our sympathy is offset by the sheer inadequacy of the initially provided notice, as well as by the presumption that plaintiff knows the law. *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000). Our Supreme Court has held that the applicable statute, MCL 691.1404, is "straightforward, clear, unambiguous" and "must be enforced as written." *Rowland*, 477 Mich at 219. MCR 2.105 is no less clear and unambiguous. Our decision is therefore compelled by the plain language of the statute and court rule, without regard to our sympathies.