STATE OF MICHIGAN

COURT OF APPEALS

EVELYN KRICKSTEIN,

Plaintiff-Appellant,

v

CITY OF BIRMINGHAM,

Defendant-Appellee.

UNPUBLISHED
November 9, 2004

No. 249911
Oakland Circuit Court
LC No. 2003-047909-NO

Before: Cavanagh, P.J., and Kelly and H. Hood*, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition, pursuant to MCR 2.116(C)(7), in favor of defendant. We affirm.

On appeal, plaintiff concedes that she failed to comply with the 120-day notice provision of MCL 691.1040(1), but argues that the trial court erred in granting summary disposition because defendant failed to show actual prejudice as a result of the untimely notice pursuant to *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996). After de novo review to determine whether defendant was entitled to judgment as a matter of law because of immunity granted by law, we disagree. See MCR 2.116(C)(7); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

Plaintiff's claim is premised on the defective highway exception to governmental immunity, MCL 691.1402, which provides: "[E]ach 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." As a condition to recovery under this exception, the Legislature has required notice of the alleged injury and defect to be served on the appropriate governmental agency pursuant to MCL 691.1404(1), which 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) 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.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The purpose of the 120-day notice provision is to "permit a governmental agency to be apprised of possible litigation against it and to be able to investigate and gather evidence quickly in order to evaluate a claim." *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997). However, a notice deficiency is non-jurisdictional; thus, absent a showing of actual prejudice to the governmental agency, the notice provision is not a bar to the plaintiff's claim. *Brown*, *supra* at 356-357, reaffirming *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976). Actual prejudice refers to a matter that would prevent the governmental agency from being able to adequately defend itself or which would otherwise affect its entitlement to a fair trial. *Blohm*, *supra*.

After review of the record, we agree with the trial court's conclusion that defendant "has alleged and established sufficient actual prejudice due to the delay in the notice given by plaintiff." To defend itself adequately against this lawsuit, defendant needed to know in a timely manner the specific location of the alleged defect and the injury sustained by plaintiff. Defendant presented the affidavit of its city engineer establishing that it received no prior complaints about the brick paver in question or any notice from plaintiff about it until it received the notice of intent from plaintiff on February 7, 2003, which was 203 days after the alleged incident.

Moreover, plaintiff's notice, as well as her complaint, filed on February 21, 2003, did not "specify the exact location of the defect" as required by the statute. In plaintiff's notice of claim, the alleged defect was located on "a defective and broken sidewalk on the northwest corner of 15 Mile and Woodward . . . in front of Cosi." In plaintiff's complaint, the alleged defect was located on the "broken pavement and broken curb . . . alongside Cosi Restaurant." It was not clearly stated whether the defective and broken brick paver in question was on 15 Mile or Woodward or in front of or alongside Cosi. Also, the photographs, submitted as exhibits to plaintiff's response to defendant's motion, show plaintiff's blood to be at least fifteen feet away from the brick paver in question. Eventually, when defendant's engineer went to conduct a general inspection of the area, he discovered that the area had been altered. Someone, other than defendant, removed the brick paver in question, depriving defendant of the ability to properly examine the alleged defect. See *Blohm*, *supra* at 388-390. In addition, plaintiff's Polaroid photographs do not show the specifics of the alleged defect, such as the condition or the size of the brick in question at the time of the incident. Had defendant been timely put on notice before the brick in question was removed, defendant could have investigated the scene and evaluated plaintiff's claim. See *id*. at 390. Because the alleged defect that caused plaintiff's fall was never available for defendant to analyze, defendant cannot adequately defend itself at trial. Thus, defendant suffered "actual prejudice" within the meaning of *Blohm*, *supra* at 388. As such, we conclude that summary disposition was properly granted to defendant on the basis that defendant made a sufficient showing of actual prejudice.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood