STATE OF MICHIGAN

COURT OF APPEALS

MOHAMED MAWRI,

Plaintiff-Appellee,

v

CITY OF DEARBORN,

Defendant-Appellant.

UNPUBLISHED
August 6, 2009

No. 283893
Wayne Circuit Court
LC No. 06-617502-NO

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order denying its motion for summary disposition. We reverse and remand for entry of an order granting defendant's motion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff fell on an icy sidewalk near his home on March 2, 2006, and injured his hip. On May 26, 2006, plaintiff's counsel provided defendant with a letter purporting to be notice of the incident. The text of the letter read:

> Please be advised that I represent Mohamed Mawri for injuries he sustained when he fell on a defective side-walk on March 2nd, 2006 in the area of 5034 Middlesex, Dearborn Michigan. It is my understanding that since this fall, the City has repaired the area. As indicated, my client fell due to the defective side-walk, fracturing his right hip, necessitating surgery. Please consider this statutory notice. If you need any further information please do not hesitate to contact me.

Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing, among other things, that the notice was legally insufficient. The circuit court denied the motion, holding that plaintiff had complied with the statutory notice requirement because the police investigated and took pictures, and city workers had "tagged the sidewalk" some time before the accident.

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Determination of the applicability of the highway exception to governmental immunity is a question of law which we

review de novo on appeal. *Stevenson v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004).

Defendant has a duty to keep a sidewalk in its jurisdiction "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1); see also *Listanski v Canton Twp*, 452 Mich 678, 682; 551 NW2d 98 (1996), and *Jones v Ypsilanti*, 26 Mich App 574, 581; 182 NW2d 795 (1970). Defendant does not dispute that it has jurisdiction over the sidewalk in this case. The notice provision at issue, MCL 691.1404, provides, in 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) [dealing with injured minors] 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. [Emphasis added.]

MCR 2.105(G)(2) governs service of process on cities, and provides that service of process is made by serving the summons and complaint on "the mayor, the city clerk, or the city attorney of a city." In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200, 204; 731 NW2d 41 (2007), the Supreme Court held that the notice requirement must be complied with as it is written, overruling earlier cases that had "engrafted an actual prejudice component onto the statute." *Rowland* was given full retroactivity. *Id*. at 222-223.

In this case, plaintiff served the city attorney, so proper service was given. However, the notice that was served gave the location of the defect as "in the area of 5034 Middlesex" and described the defect merely as "a defective side-walk." The police report and photographs indicate that the site of the fall was actually next door, at 5026 Middlesex. The area marked by plaintiff is next to a good-sized tree, which is immediately in front of 5026 Middlesex. In his deposition, plaintiff stated that he parked on the street "two houses away" from his house, walked up the neighbor's driveway approach, and then onto the sidewalk, walking north. He testified that he fell by the tree in front of the neighbor's house:

> *Q*. Okay. This house that's shown, when you pointed out the tree here in Exhibit 2 as being the approximate location where the accident happened on the sidewalk.
>
> *A*. Yes. Right here. Like, where the tree is and the sidewalk. That's where I fall [sic].
>
> *Q*. And that location is in front of the neighbor's house that is one house south of your house?

A. Yes.

Plaintiff's notice letter and complaint both give 5034 Middlesex as the location of the accident, and he later attempted to reconcile this discrepancy by averring that the fall occurred "between" the two addresses and having his expert aver that either address could be used to describe the location. These statements are not in accord with the photographic evidence, which shows the location to be very close to the trunk of the tree and the tree to be nearly at the midpoint of 5026 Middlesex. There is no dispute over which slab of concrete is at issue. Plaintiff essentially argues that the address he gave is close enough or that the affidavits create a question of fact regarding which address the slab abuts. However, the statute requires the "exact" location to be given, MCL 691.1404(1), and "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition . . . ." *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). The circuit court erred in finding that the address given in the notice was sufficient under the statute. It also erred in relying on the police report as giving defendant notice of the location of the defect about which plaintiff complained in his letter. The police recorded the location as 5026 Middlesex, not 5034 Middlesex. For all defendant knew, there could have been more than one defect allegedly causing more than one fall. Moreover, whatever notice the police had does not impute to being notice given to defendant.

Even if the address was "close enough," the letter to defendant does not describe the "nature of the defect" as required by MCL 691.1404(1). Plaintiff's letter simply says "defective side-walk." While this description is more specific than that given in *Rowland*, where the plaintiff merely mentioned "an incident" occurring at an intersection of named streets, see *Rowland*, *supra* at 249 (Kelly, J.), to say "defective" describes the "nature of the defect" is circular. A description of a defect's "nature" would have to be more than simply calling it "defective." An examination of the photographs shows the "defect" is not self-explanatory: there is no glaring defect, such as a missing slab or a protruding pipe. The circuit court again erred by relying on defendant's constructive notice of the problem.

In light of our decision, it is unnecessary to address defendant's other issues.

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

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto