STATE OF MICHIGAN

COURT OF APPEALS

MAUREEN KETCHUM, Plaintiff-Appellee,	UNPUBLISHED September 22, 2009
v	No. 282455 Kent Circuit Court
CITY OF GRAND RAPIDS, Defendant-Appellant.	LC No. 07-001554-NO

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendant, the City of Grand Rapids, appeals of right the circuit court order denying its motion for summary disposition, filed under MCR 2.116(C)(7) (governmental immunity). We reverse.

On March 10, 2005, plaintiff, Maureen Ketchum, tripped and fell in a pothole as she crossed Pearl Street near the Amway Grand Plaza Hotel (Amway), in Grand Rapids. She sued defendant under the highway exception to governmental immunity, MCL 691.1402(1). Defendant moved for summary disposition, arguing, inter alia, that plaintiff failed to provide it with notice as required by MCL 691.1404(1). Plaintiff made various arguments to the effect that she *had* provided satisfactory notice, or that notice was not required. The circuit court denied the motion.

Defendant argues that summary disposition was required, because plaintiff failed to provide notice in conformance with MCL 691.1404(1). We agree.

The de novo standard applies when this Court reviews a circuit court's grant or denial of summary disposition under MCR 2.116(C)(7). *Willett v Waterford Charter Twp*, 271 Mich App 38; 718 NW2d 386 (2006). Summary disposition under subrule (C)(7) is proper when a claim is barred by immunity granted by law to a defendant, and to survive a motion based on the governmental immunity of a governmental agency, the plaintiff must allege facts justifying the application of an *exception* to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001) (citations omitted). Plaintiff also bears the burden of proving the claimed exception to the governmental immunity of a governmental agency. *Michonski v City of Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987). Issues of statutory interpretation are also reviewed de novo. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138, 141; 730 NW2d 757; 25 IER Cases 727 (2006).

The governmental tort liability act (or GTLA), MCL 691.1401, *et seq*., also sometimes known as the governmental immunity act, broadly shields a governmental agency from tort liability, "if the governmental agency[1] is engaged in the exercise or discharge of a governmental function." *Grimes v Michigan Dep't of Transportation*, 475 Mich 72, 76-77; 715 NW2d 275 (2006), quoting MCL 691.1407(1). "[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000).

A claimant pursuing relief under this exception must provide notice to the governmental agency:

> 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. [MCL 691.1404(1).]

The Michigan Supreme Court recently noted that this statute is straightforward:

> MCL 691.1404 is straightforward, clean, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. As this Court stated in *Roberston v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered*. Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident *even if there is no prejudice.* [*Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007) (emphasis in original).]

Applicable principles of statutory construction are well established, and we begin, naturally, by consulting the statutory language at issue. *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; 738 NW2d 770 (2007). This Court gives effect to the Legislature's intent, as expressed in the statute's terms, giving the words of the statute their plain and ordinary meanings. *Beach v Lima Twp*, 283 Mich App 504, 522; ___

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[1] MCL 691.1401(d) defines "governmental agency" as "the state or a political subdivision." A "political subdivision" includes "a municipal corporation," MCL 691.1401(b), which is in turn includes a city, MCL 691.1401(a).

NW2d ___ (2009); MCL 8.3a. When the language poses no ambiguity, this Court need not look beyond the statute, nor construe the statute, but need only enforce the statute. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 58; 744 NW2d 174 (2007). This Court does not interpret a statute in a way that renders any statutory language surplusage. *In re LE*, 278 Mich App 1, 22-23; 747 NW2d 883, 897 (2008), citing *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002). In a statute, "shall" is mandatory. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008); *In re Estate of Kostin*, 278 Mich App 47, 57; 748 NW2d 583 (2008).

"The literal meanings of the terms 'and' and 'or' should be followed if they do not render the statute dubious." *White v Harrison-White*, 280 Mich App 383, 389; 760 NW2d 691 (2008). The word "and" reflects that all listed requisites must be met, see *Karaczewski v Farbman, Stein & Co*, 478 Mich 28, 33; 732 NW2d 56 (2007).

Where law does not define a word or phrase, a court may use a dictionary definition. *Coates v Bastian Bros*, 276 Mich App 498, 504; 741 NW2d 539 (2007). Where a non-technical word has not acquired a peculiar meaning in the law, a lay dictionary may be consulted. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276, 753 N.W.2d 207 (2008), citing MCL 8.3a. The term "nature" is a non-technical term, and it lacks a peculiar meaning in the law. It is defined as the "particular combination of qualities belonging to a . . . thing, or class by . . . constitution; native or inherent character," or as the "character, kind, or sort." *Random House Webster's College Dictionary* (1997). "Exact" is also a non-technical word, and it is defined as "strictly accurate or correct" and "precise, as opposed to approximate." *Random House Webster's College Dictionary* (1997).

Here, the statute at issue is unambiguous, *Rowland, supra* at 119, and it requires that four components be included in the notice. MCL 691.1404(1). But plaintiff's notice contains no reference to the nature of the defect. Therefore, plaintiff has failed carry her burden of demonstrating that defendant is not entitled to governmental immunity. *Michonski, supra* at 490.

Plaintiff alternatively argues that the location and defect descriptions, required by MCL 691.1404(1), should be construed together. But the Supreme Court has clearly stated the law:

> The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular 'venue' of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury. The nature of the defect stated may aid in locating the place, and the place may be stated with such particularity that a very general statement of the defect (cause of the injury) may be aided. . . . But to be legally sufficient, *a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself*. . . . This rule permits a construction of the statute provision which does not emasculate it . . . . When parol evidence is required to determine both the place and the nature of the defect, a reasonable

> notice has not been given to the city. [*Barribeau v City of Detroit*, 147 Mich 119, 125-126; 110 NW 512 (1907) (citations omitted; emphasis added).]

Even under *Barribeau*, on which plaintiff herself relies, the notice in this case is still deficient. The location and nature of the defect in this case could not be read together, because, unlike the circumstances in *Barribeau*, plaintiff's notice here did not provide a "general statement of the defect." Rather, it failed to provide *any* information about the nature of the defect.

Here, defendant went to the length of replying to plaintiff's defective notice, and requested "more specific information in order to properly investigate your client's claim," and provided plaintiff with a personal injury claim form. Plaintiff failed to respond.

This Court recently addressed a similar situation in *Burise v City of Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009). In *Burise*, a pedestrian stepped into a pothole as she crossed the street. *Id*. at 648. She gave a notice to the city, but the initial notice did not contain all of the statutorily-required information, because it did not disclose the name of a known witness. *Id*. But later, Burise completed a claim form provided by the city, and Burise included all of the statutorily-required information on that form, and filed it with the city within the 120-day period required by MCL 691.1404(1). *Id*. This Court held that the notice was sufficient for denial of the city's motion for summary disposition. *Id*. at 655.

Burise is distinguishable. In the case at bar, plaintiff failed, even when prompted, to fill-out the city's claim form, even though doing so might have cured plaintiff's deficient notice.

Defendant also argues that (1) plaintiff's notice did not comply with the statute, because it gave a deficient description of the location of the defect; (2) the trial court erred in concluding that defendant's post-accident repair of the pothole rendered plaintiff's notice sufficient; (3) the trial court erred in concluding that three individuals who assisted plaintiff after her fall were not "witnesses" within MCL 691.1404(1); (4) the trial court erred in concluding that a telephone call from plaintiff's friend to defendant's maintenance department functioned to supplement plaintiff's subsequently-served written notice; (5) the trial court erred when it concluded that plaintiff satisfied the statute because she substantially complied with its requirements; and (6) the trial court erred in holding that, even if plaintiff's notice was deficient, the claim was not precluded because "the law does not require useless expenditures of effort," and defendant had already fixed the pothole by the time the notice was provided. We need not reach these issues, because plaintiff's notice was defective for the reasons stated above.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder