# STATE OF MICHIGAN

# COURT OF APPEALS

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| MICHAEL BOWERS,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>November 18, 2010 |
| v | No. 293965<br>Court of Claims |
| DEPARTMENT OF TRANSPORTATION,<br><br>Defendant-Appellee. | LC No. 08-000091-MD |

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendant in this action brought pursuant to the highway exception to governmental immunity. We affirm.

On May 27, 2006, plaintiff was traveling eastbound on I-94 on a motorcycle. According to plaintiff, he was traveling at approximately 65 mph as he entered the exit ramp from I-94 to 21 Mile Road. He lost control of his motorcycle, left the ramp, and went into the grassy ditch beside the ramp. After plaintiff was taken to the hospital, his son and his friend, Dean DeAngelo, arrived at the scene and took photographs of the ramp, including the portion of the ramp plaintiff later claimed was the defective pavement that caused him to lose control of his motorcycle. According to plaintiff, he first saw DeAngelo's photographs about a week after the accident.

Within days of the accident, plaintiff consulted an attorney who sent an investigator out to the exit ramp on June 1, 2006, to take photographs and a videotape of the ramp. On June 21, 2006, plaintiff's liability expert received a packet in the mail from plaintiff's attorney that included the photos taken by DeAngelo on the date of the accident, the photos and video of the ramp taken by the investigator, and a copy of the UD-10 Traffic Crash Report.

On June 29, 2006, plaintiff filed a notice of injury and highway defect pursuant to MCL 691.1404. The notice contained the following description of the location and nature of the defect:

> On or about May 27, 2006, Michael C. Bowers was caused to lose control of his motorcycle due to pavement defects then and there existing on the eastbound I-94 exit ramp to 21 Mile Road in Macomb County.

The notice contained the following statement regarding witnesses:

> There was a witness in the vehicle in front of Mr. Bowers and a witness in a vehicle traveling behind Mr. Bowers. Unfortunately, the Chesterfield Township Police Report does not reflect the identity of said witnesses, despite the fact that the police talked to at least the following [sic] witnesses. We will endeavor to identify such witnesses through investigation.

Neither the police report nor any of the photographs taken on the day of the accident were attached to the notice.

Defendant received the notice on July 17, 2006. An investigator for defendant was sent to the 21 Mile Road exit ramp to conduct a scene investigation on October 14, 2006. The investigator obtained a copy of the UD-10 Traffic Crash Report, which contained a description of the accident:

> Veh #1 cycle existing 21 mi (E.B.) and went off roadway and loss [sic] control of cycle on gravel shoulder.

The diagram of the ramp in the report depicts the motorcycle traveling in stages and coming to rest near the top of the ramp in the grassy area between the ramp and close to 21 Mile Road. However, the written description of the accident location provided in the report states that the accident occurred a quarter of a mile south of 21 Mile Road. Consequently, the investigator, unaware of the exact location of and nature of the alleged defect, took photographs of the entire 21 Mile Road exit ramp.

On the date of the accident, plaintiff told the investigating officer and his treating orthopedist that gravel on the road caused his accident. The UD-10 Traffic Crash Report provides the assessment of the officer at the scene that plaintiff lost control of his motorcycle on the "gravel shoulder." The orthopedic surgeon who treated plaintiff on the date of the accident wrote in the medical records that plaintiff stated that he "hit gravel and went flying airborne . . . off his motorcycle into a ditch." Similarly, the report by the EMS technicians who took plaintiff to the emergency room wrote, "Ejection from motorcycle on off ramp . . . hitting gravel . . ." And, in his first response to defendant's interrogatory to describe "any condition, natural or otherwise, which played a part in the incident," plaintiff responded "[l]oose gravel."

Plaintiff alleged in his complaint that gravel, as well as "potholes, depressions, cracks, subsidences and other defects" caused him to "take evasive action to avoid the area, and lose control of the motorcycle. At his December 22, 2008, deposition, plaintiff testified that he told the officer who responded to the accident that he hit "bad road, gravel." He testified that the gravel was "on the road." He explained:

> I just told them there was loose gravel. He said what happened? I said I hit the bad road of the gravel and stuff."

When asked if he told the officer about "broken concrete or anything like that," he stated that "[g]ravel [is] probably what I just told him." Plaintiff testified that he was trying to shake his motorcycle out of the "rut" in the pavement before encountering gravel on the road. He

maintained at his deposition that it was a stretch of broken concrete and poorly maintained pavement on the exit ramp that caused his accident, in conjunction with the gravel.

After conducting discovery and twice deposing plaintiff, defendant filed a motion for summary disposition arguing that plaintiff's pre-suit notice was per se defective because it did not specify the exact location and nature of the defect or identify the two material witnesses who arrived at the accident scene later that day to pick up plaintiff's motorcycle and photograph the ramp. Specifically, defendant alleged that the notice provided no information whatsoever as to the nature of the "pavement" defect or where on the one-quarter mile long exit ramp the alleged defect could be found.

Defendant argued that plaintiff did not comply with the notice provision – or even substantially comply with it – and that defendant was prejudiced by that failure. It maintained that the notice not only failed to apprise defendant of the nature and location of the alleged defect, but that no photograph of the scene portrayed the location of the motorcycle or any evidence of what caused the accident.

Plaintiff responded by arguing that he substantially complied with the notice provision and that defendant was apprised of the exact location and nature of the defect because it investigated and photographed the same defects on the ramp that he claimed were the cause of the accident.

Following a hearing on the motion, the trial court issued a written opinion and order granting defendant's motion on the ground that plaintiff failed to comply with the notice provision. The court stated in part:

> Defendant Michigan Department of Transportation moved for summary disposition pursuant to MCR 2.116(C)(7), asserting plaintiff's Notice of Intent pursuant to MCL 691.1404 (NOI), required by MCL 691.1404 [sic], provided insufficient facts showing the "exact location and nature of the defect" as required by MCL 691.1404(1).
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> Plaintiff's NOI described the location of the motor vehicle accident where plaintiff was injured, allegedly because of defective highway conditions, as "pavement defects then and there existing on the eastbound I-94 ramp to 21-Mile Road in Macomb County."
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> Defendant principally relies on the Michigan Supreme Court's decision in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 197 (2007).
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> The Court noted, at p 205, the bases for the statutory claim limitation period including ". . . facilitating meaningful investigations regarding the conditions at the time of injury and allowing for quick repair so as to preclude other accidents . . ."

> The Court further noted that the language of the statute, MCL 291.1404(1) is ". . . straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly . . . it must be enforced as written." *Rowland,* at 218.
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> The word "exact" is not term of art and may be construed according to its dictionary definition. *Roberson Builders, Inc v Larson*, 482 Mich 1138; 758 NW2d 284 (2008). According to the online Merriam-Webster Dictionary, http://merriam-webster.com/dictionary/exact (accessed July 15, 2009), the word "exact" is defined as: "exhibiting or marked by strict, particular, and complete accordance with act or a standard; marked by thorough consideration or minute measurement of small factual details."
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> Given the meaning, tone and the scope of the *Rowland* opinion, this court cannot but conclude that the description of the location set forth in plaintiff's NOI is technically insufficient and does not comply with the Supreme Court's interpretation and [sic] of MCL 391.1401(1) and the opinion's directions to the trial courts.

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant because the notice, taken as a whole, sufficiently informed defendant of the exact location of the defect that led to plaintiff's injury. The trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Grimes v Mich Dep't of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, 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). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact." *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997) (citation omitted). Granting summary disposition is inappropriate "if a material factual dispute exists such that factual development could provide a basis for recovery[.]" *Id*. However, if there are no disputed material facts, "and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred [by governmental immunity] is a question for the court as a matter of law." *Id*. Plaintiff bears the burden of proving the claimed exception to governmental immunity. *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987). Plaintiff may not merely rely on unsupported speculation or conjecture in opposing defendant's motion for summary disposition. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). Issues of statutory interpretation are also reviewed de novo. *Id*.

"The governmental tort liability act (GTLA) [MCL 691.1401, *et seq.*] 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,* 475 Mich at 76-77, quoting MCL 691.1407(1). The act provides several exceptions to governmental immunity, and this case concerns the highway exception. *Id.* at 77. This exception, set forth in MCL 691.1402(1), provides in part:

> [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. 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.

The Michigan Supreme Court ruled that "the 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). "Because [MCL 691.1402(1)] is a narrowly drawn exception to a broad grant of immunity, there must be strict compliance with the conditions and restrictions of the statute. Thus, we are compelled to strictly abide by these statutory conditions and restrictions in deciding" whether summary disposition was appropriate. *Id.* at 158-159 (citation omitted).

A plaintiff pursuing liability under the highway exception must follow the requirements set forth in MCL 691.1404(1), which necessitates that a claimant provide the governmental agency with notice of his or her claim:

> 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.

Legislative acts requiring notice of defective highway conditions serve "(1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured." *Plunkett v Dep't of Transportation,* 286 Mich App 168, 176-177; 779 NW2d 263 (2009). Additionally, in *Barribeau v Detroit,* 147 Mich 119, 125-126; 110 NW 512 (1907), the Supreme Court stated:

> 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

[1] MCL 691.1401(d) defines "governmental agency" as "the state or a political subdivision."

> 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. . . .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. (Citations omitted.)

The Supreme Court recently made clear that the plain language of MCL 691.1404 must be enforced, not rough approximations of its provisions. "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, it must be enforced as written." *Rowland v Washtenaw Co Rd Comm*, 477 Mich. 197, 219; 731 NW2d 41 (2007). In arriving at this conclusion, the Court opined that, "inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits." *Id.* at 212. These pronouncements militate against liberally excusing notice failures. The Supreme Court specifically overruled *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), which engrafted "an 'actual prejudice' requirement into the [notice] statute," requiring the governmental agency to demonstrate actual prejudice in order to bar a plaintiff's claim where the plaintiff's notice failed to comply with the notice requirements. *Id.* at 213-214.

In the present case, defendant maintained that plaintiff's notice, while timely filed, was deficient because it failed to specify the exact nature of the defect, location of the defect, and known witnesses.[2] The *Rowland* majority addressed the timeliness issue, but declined to address whether the plaintiff's notice was otherwise deficient based on its contents. *Id.* at 204 n 5.

The primary goal when interpreting statutory language "is to discern the intent of the Legislature as expressed in the text of the statute. Where the language is clear and unambiguous, our inquiry ends and we apply the statute as written." *Grimes*, 475 Mich at 76 (citations omitted). "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Words and phrases are "construed and understood according to the common and approved usage of the language[.]" MCL 8.3a. "As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it

[2] The trial court's opinion concludes that plaintiff failed to provide notice of the exact location of the defect and, therefore, did not address the additional notice requirements.

is clear that something different was intended." *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d 119 (1999) (citations omitted). When defining words in a statute, this Court must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Id.*, quoting *Bailey v United States,* 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, [] or when it is *equally* susceptible to more than a single meaning." *Mayor of City of Lansing v Mich Pub Service Comm,* 470 Mich 154, 166; 680 NW2d 840 (2004), quoting *Klapp v United Ins Group Agency,* 468 Mich 459, 467; 663 NW2d 447 (2003). When a term is defined in the statute, that definition controls; undefined terms are given "their ordinary meanings[,]" and "[a] dictionary may be consulted if necessary." *Haynes v Neshewat,* 477 Mich 29, 36; 729 NW2d 488 (2007).

MCL 691.1404(1) provides that "[a]s a condition to recovery . . . the injured person . . . shall serve a notice . . . The notice shall specify the exact location and nature of the defect . . ." The use of the word "shall" indicates that the requirements set forth are mandatory. *Walters v Nadell,* 481 Mich 377, 383; 751 NW2d 431 (2008) In *Rowland,* 477 Mich at 217, the Court held that the statute was clear and unambiguous, and that it required "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." *Rowland,* 477 Mich at 219.

In this case, plaintiff's description of the "exact nature" of the defect was "pavement defects." This description failed to describe a defect, other than a bare assertion that a defect existed. A description of a defect's "nature" would have to be more than simply calling it "a defect." The notice did not provide a description, size, or any other information to allow defendant to determine exactly what the pavement defects were. Similarly, plaintiff's description of the "exact location" of the defect was "eastbound I-94 exit ramp to 21 Mile Road in Macomb County." Testimony established that the exit ramp is one-quarter of a mile long. The notice did not contain any references to any specific defect in the one-quarter mile long exit ramp. Rather, the notice referred only to "pavement defects." Plaintiff's notice did not attach any of the photographs taken of the scene on the day of the accident. Although the notice mentions a police report with regard to potential witnesses to the accident, the report was not attached to the notice. Further, the notice did not refer to the report with regard to the location and nature of the defect. It is impossible to tell from the meager description where to begin looking, or to what claims plaintiff could be limited in subsequent litigation. When viewed as a whole, it cannot reasonably be stated that plaintiff's notice complied with the content requirements of MCL 691.1404(1). Indeed, at least with regard to the highway exception to governmental immunity, the *Rowland* Court has stated that there must be strict compliance with the conditions and restrictions of the statute. Since then, cases construing the highway exception have strictly adhered to the letter of the statute, and this Court remains bound by *Rowland's*

insistence on strict compliance with the statutory requirements.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad