STATE OF MICHIGAN

COURT OF APPEALS

JAMES D. WODTKE, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED January 18, 2011
v	No. 294322 Livingston Circuit Court
CITY OF HOWELL, Defendant-Appellee/Cross-Appellant.	LC No. 09-024257-NO

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(7). Because we conclude that plaintiff failed to give notice in compliance with MCL 691.1404(1), we affirm.

I. BASIC FACTS

In the morning of July 11, 2008, plaintiff and Anne Goulah left their apartments to walk to a gas station at the intersection of West Road and Grand River Avenue in Howell. They walked on the sidewalk bordering West Street toward Grand River Avenue. Before they reached the driveway to the house at 114 West Road, they left the sidewalk to cross the road. Plaintiff looked down to see where his feet were going, looked up to cross the street, and then he fell into a hole. Plaintiff described the hole, which was near a storm drain, as one and a half feet wide and three to four feet deep. The hole, hidden by long grass and twigs, was not visible to the naked eye.

After plaintiff got himself out of the hole, he walked back to his apartment, where he called defendant's Department of Public Works (DPW) and reported the hole. Plaintiff's telephone call was memorialized by the DPW in a complaint report. According to the complaint report:

> Resident called because he fell into a sink hole, next to a manhole on West St. near the Bay Station. The hole is about 1ft wide by 2ft deep. He banged up his knee and elbow, and doesn't want anyone else to fall into it.

Erving Suida, defendant's "DPS Superintendant," and another city employee looked at the storm drain in front of 114 West Street the same day that the DPW received plaintiff's telephone call. According to Suida, there was no sink hole to the side of the storm drain. Suida did barricade the area, however, because the "grade" to the drain was steep. Within a week, employees of defendant added a "block" to the storm drain, which had the effect of raising the drain's lid six or seven inches.

Plaintiff sued defendant for maintaining a "defective highway."[1] Defendant moved for summary disposition. It argued that the hole in which plaintiff fell was located in a berm, which is not included in the statutory definition of a "highway," MCL 691.1401(e), that plaintiff could not prove that it knew of the hole's existence and had a reasonable time to repair it, as required by MCL 691.1403, and that plaintiff failed to give notice in compliance with MCL 691.1404(1). The trial court granted summary disposition to defendant on the basis that plaintiff's telephone call to the DPW did not satisfy the requirements of MCL 691.1404(1).

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(7) if the "[t]he claim is barred because of . . . immunity granted by law . . . ." In deciding a motion for summary disposition based on MCR 2.116(C)(7), we must accept as true the allegations in the complaint unless contradicted by documentary evidence submitted by the parties. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law." *Dybata v Wayne Co*, 287 Mich App 635, 637; ___ NW2d ___ (2010).

III. ANALYSIS

Plaintiff claims that the trial court erred in granting summary disposition to defendant based on his failure to provide proper notice because he is mentally incapable of giving notice. He asserts that because his disability is ongoing, he has until 180 days after a guardian is appointed to give notice to defendant. We disagree.

Plaintiff briefly raised this issue before the trial court at the hearing on defendant's motion for summary disposition. However, plaintiff never briefed the issue in writing, and he did not direct the trial court to any record support for his claim. Under the circumstances, we conclude that plaintiff failed to properly preserve the issue for appellate review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). We, therefore, need not address the issue. *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

---

[1] Plaintiff also claimed that the condition of West Street was a nuisance per se. The trial court granted summary disposition to defendant on the nuisance per se claim, and plaintiff does not appeal the grant of summary disposition on that claim.

However, because the Court may overlook preservation requirements, *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008), we will address plaintiff's claim.

Pursuant to the governmental tort liability act, MCL 691.1401 *et seq.*, a governmental agency is generally immune from tort liability while engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). There are six statutory exceptions to governmental immunity, *Lash v Traverse City*, 479 Mich 180, 195, 195 n 33; 735 NW2d 628 (2007), including the highway exception, MCL 691.1402. Pursuant to the highway exception, a person who suffers injury caused by a governmental agency's failure 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 from the governmental agency. MCL 691.1402(1); *Burise v City of Pontiac*, 282 Mich App 646, 652; 766 NW2d 311 (2009).

However, to bring a claim under the highway exception, the injured person must provide notice to the governmental agency. MCL 691.1404(1); *Plunkett v Dep't of Transp*, 286 Mich App 168, 176; 779 NW2d 263 (2009). The purpose of the notice requirement is two-fold: "(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*, 286 Mich App at 176-177.

The notice provision, MCL 691.1404, provides:

> (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) 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.
>
> * * *
>
> (3) If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. . . .

Plaintiff's deposition testimony establishes that plaintiff suffers from mental illness. He is "manic depressive, bipolar," and takes numerous medications each day. He receives services through Community Mental Health. However, there is no evidence that plaintiff's mental illness rendered him mentally incapable of providing the notice required by MCL 691.1404(1). Notably, there is no affidavit from any mental health professional stating that plaintiff was

mentally incapable of providing the required notice. There is not even an affidavit that details plaintiff's mental abilities. In addition, plaintiff lives independently, he telephoned the DPW within hours after the fall to report the hole, and within five months of the fall he retained an attorney. These facts rebut any suggestion that plaintiff was not mentally capable of providing notice. There is simply no evidence submitted by plaintiff that would justify a trier of fact in finding that he was mentally incapable of providing the required notice. Accordingly, we reject plaintiff's argument that, pursuant to MCL 691.1404(3), he has until 180 days after a guardian is appointed to provide notice to defendant. Plaintiff, being mentally capable of providing notice, was required to give notice to defendant within 120 days after the incident. MCL 691.1404(1).

Plaintiff asserts that his telephone call to the DPW was sufficient under MCL 691.1404(1) because defendant, based on the information he gave to the DPW, was able to, and actually did, investigate and remedy the defect. We disagree.

In *Rowland*, 477 Mich at 200, our Supreme Court held that MCL 691.1404(1) must be applied as written. In doing so, it overruled case law which held that an injured person's failure to comply with the notice provision did not bar a claim brought under the highway exception absent a showing of actual prejudice to the governmental agency. *Id.* The Supreme Court stated:

> MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. . . . Thus, the statute requires notice to be given as directed, and notice is inadequate 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*. [*Id.* at 219 (emphasis in original).]

In *Burise*, 282 Mich App at 652, 655, this Court held that a notice which failed to provide the name of a known witness did not comply with MCL 691.1404(1). It reasoned:

> MCL 691.1404(1) provides that a claimant "*shall* serve a notice" and "*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." (Emphasis added.) The Legislature's repeated use of the word "shall" indicates a mandatory requirement. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). A purported notice that does not comply with the statute is insufficient. Because plaintiff did not include the name of a known witness in the initial notice, plaintiff's initial notice was defective. [*Id.* at 655.]

Plaintiff does not dispute that he failed to identify Goulah, a known witness to his fall, in his telephone call to the DPW.

We reject plaintiff's argument that because defendant did not suffer any prejudice from his failure to identify Goulah to the DPW, the information that he did provide to the DPW should be deemed sufficient notice. Our Supreme Court in *Rowland*, 477 Mich at 219, stated that MCL

691.1404(1) must be interpreted according to its plain language and that the amount of prejudice actually suffered by the governmental entity by the claimant's failure to comply with MCL 691.1404(1) is irrelevant. Plaintiff's telephone call to the DPW did not satisfy the requirements of MCL 691.1404(1), because plaintiff failed to identify Goulah, a known witness. *Burise*, 282 Mich App at 652, 655. Accordingly, plaintiff's failure to comply with the notice provision by identifying Goulah to the DPW bars his claim against defendant under the highway exception. *Rowland*, 477 Mich at 219. We affirm the trial court's order granting summary disposition to defendant.[2]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

[2] We note that we are not penalizing plaintiff "for some technical defect." Plaintiff completely failed to inform the DPW of one of the statutorily-required pieces of information.