STATE OF MICHIGAN

COURT OF APPEALS

ALICE M. BROWN, Plaintiff-Appellant, v CITY OF SAULT STE MARIE, ERIC FOUNTAIN, GREG SCHMITIGAL, MIKE BREAKIE, JEFF KILLIPS, and BRUCE LIPPONEN, Defendant-Appellees.	UNPUBLISHED October 20, 2016 No. 330508 Chippewa Circuit Court LC No. 14-013459-NO

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(7) (immunity granted by law). We find that plaintiff complied with the requirements of MCL 691.1404(1) when her attorney timely sent a notice letter to defendants. We reverse and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff brought suit for an alleged injury caused by a defect in a roadway within the city. Plaintiff alleges that she sustained injuries when she fell over the sheer edge of an excavated hole created by defendants. The incident occurred on May 6, 2014. Pursuant to MCL 691.1404(1), plaintiff's attorney sent the following notice to defendants in a letter dated July 23, 2014:

> This letter is sent pursuant to the relevant statutes requiring notice to a municipality of the intention to make a claim for injury and damage.
>
> My client, Alice Brown, suffered severe and permanent injuries due to the improper opening of a large, unguarded hole in the roadway and/or adjoining sidewalk by Ste. St. Marie city employees. These employees, upon information and belief, work for the Water Department.

> The conditions and events were, upon information and belief, witnessed by Mrs. Brown and her husband, Richard Brown, who reside at 210 Soba St., Ste. St. Marie, as well as a number of Water Department employees whose identity is revealed in the F.O.I.A. request forwarded to myself on July 9, 2014.
>
> Upon information and belief, certain fire and rescue personnel and/or police department personnel also may have seen the conditions and witnessed the injuries suffered by Mrs. Brown.
>
> Unless adjusted prior to suit, I will initiate the appropriate litigation on behalf of Mrs. Brown to seek an adequate award for her injury and damage suffered in this event.

Plaintiff filed a complaint on September 24, 2014. In lieu of filing an answer, defendants moved for summary disposition arguing that plaintiff's July 23, 2014 letter did not meet the statutory requirements of MCL 691.1404(1) and therefore plaintiff's claim should be dismissed. Specifically, defendants argued that the July 23, 2014 letter was not personally signed by plaintiff. According to defendant, both MCL 691.1404(1) and MCL 600.6431 contain interchangeable language requiring an injured person to personally sign the notice. Defendants cited to cases interpreting MCL 600.6431 as requiring that a plaintiff must personally sign the notice letter. Defendants then contended that the trial court should interpret those cases as applying to MCL 691.1404(1) to bar plaintiff's case. Defendants further argued that MCL 691.1404(3), which authorized an attorney or other persons to sign the notice letter on behalf of certain injured persons, was inapplicable to this case because plaintiff was 56 years old. Defendants also argued that the notice letter did not specify the injury sustained by plaintiff.

In response, plaintiff argued that contrary to defendants' assertion, there was no requirement in the statute that an injured person must sign the notice letter. Plaintiff also contended that defendants' argument that the notice was defective because it was signed by an attorney was without merit because MCL 691.1404(3) allows an attorney to sign the notice on behalf of certain categories of injured persons. Plaintiff further argued that the notice satisfied the statutory requirement of MCL 691.1404(1) because it identified the injured party and referenced a response to a FOIA request supplied to plaintiff by the City clerk. That response included "a police report identifying plaintiff's very large and deep head wound along with identifying a summary of the events," six pages of work order records, and pictures of the excavation in question. Plaintiff also argued that her notice was sufficient as to the description of the injuries by incorporating by reference, the police report that described the injury as "a very large and deep head wound."

The trial court determined that plaintiff's failure to personally sign the notice letter was a "fatal defect" because the language of the statute requires strict compliance. The court rejected plaintiff's argument that an attorney could sign on behalf of any claimant based on MCL 691.1404(3). The court noted that the Legislature specifically carved out the exception in subsection 3 for "particular cases." The court reasoned that if anyone could give notice on behalf of any claimant, then the Legislature would not have carved out the exception. The court stated that the exception allows a parent, attorney, next of friend, or a legally appointed guardian to file a notice when the injured person was under eighteen years at the time of the injury.

According to the trial court, the exception did not apply to this case because plaintiff was above the age of eighteen and was therefore, required to personally sign the notice letter. The court granted defendants' motion for summary disposition.

II. STANDARDS OF REVIEW

"This Court reviews de novo a circuit court's decision whether to grant or deny summary disposition." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012). Statutory interpretation is a question of law that is reviewed de novo on appeal. *City of Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). When construing a statute, the fundamental goal is to give effect to the intent of the Legislature, "with the presumption that unambiguous language should be enforced as written." *City of Huntington Woods v City of Oak Park*, 311 Mich App 96, 108; 874 NW2d 214 (2015). "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Id.*

III. ANALYSIS

A. PLAINTIFF'S ATTORNEY'S LETTER WAS SUFFICIENT

On appeal, plaintiff argues that the statute does not require that the notice letter must be personally signed by the injured person. "A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of an immunity granted by law." *Pew v Mich State Univ*, 307 Mich App 328, 331-332; 859 NW2d 246 (2014). The moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence that would be admissible at trial. MCR 2.116(G)(5), (6). This Court must consider this evidence and determine whether it indicates that the defendant is entitled to immunity. *Pew*, 307 Mich App at 332. The Court must also consider the contents of the plaintiff's complaint as true, unless contradicted by the documentary evidence. *Id*. "If reasonable minds could not differ on the legal effects of the facts, whether governmental immunity bars a plaintiff's claim is a question of law." *Id.*

The governmental immunity act, MCL 691.1401 et seq., provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. MCL 691.1407(1). The highway exception to governmental immunity requires a governmental agency to maintain a highway under its jurisdiction in reasonable repair so that it is reasonably safe and convenient for public travel. MCL 691.1402(1). In order to bring a claim under the highway exception, a plaintiff must first provide notice in accordance with MCL 691.1404(1), which provides as follows:

> 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 the nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

In *Rowland v Washtenaw County Road Com'n*, 477 Mich 197, 219; 731 NW2d 41 (2007), our Supreme Court stated that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly . . . it must be enforced as written."

Here, the plain language of MCL 691.1404(1) provides that the "injured person . . . *shall serve*" a notice of the injury or defect to the governmental agency within 120 days of the occurrence of the injury. (emphasis added). The statute does not define the term "to serve," and "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language[.]" MCL 8.3a. Therefore, "[i]f a statute does not define a word, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). The term "serve" means "to bring to notice, deliver, or execute as required by law." *Merriam-Webster's Collegiate Dictionary* (11th ed). Therefore, the plain meaning of the statute requires that the injured person must bring to the notice of or deliver to the governmental agency, a notice of the injury or defect within 120 days of the occurrence of the injury. In *McLean v Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013) this Court, in construing the notice requirement under MCL 691.1404(1) stated that "[a]n injured person is required to timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the nature of the defect, and the names of known witnesses."

In this case, plaintiff complied with the requirement of the statute even though the notice letter was signed by her attorney. First, the subject line of the notice letter identified that the notice concerned the injuries plaintiff sustained on May 6, 2014. Second, the letter also specified that plaintiff's attorney was acting on behalf of plaintiff when it stated: "My client, Alice Brown, suffered severe and permanent injuries due to the improper opening of a large, unguarded hole in the roadway . . . " and "Unless adjusted prior to suit, I will initiate the appropriate litigation on behalf of Mrs. Brown to seek adequate award for her injuries and damage suffered in this event." Plaintiff's letter notified defendants of her intentions to make a claim for the injury she sustained.

Further, there is nothing in the language of MCL 691.1404(1) requiring an injured person to personally sign the notice letter. Defendants argue that both MCL 691.1404(1) and MCL 600.6431 should be construed alike as requiring that the notice be personally signed by the claimant. However, while the language of MCL 600.6431[1] provides that the "notice shall be signed and verified by the claimant," MCL 691.1404(1) has no such requirement. In *Fairley v Dep't of Corrections*, 497 Mich 290; 871 NW2d 129 (2015), the Court held that the plaintiffs'

[1] MCL 600.6431 provides as follows: "No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, *which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.* [Emphasis added.]

claims against the state was barred because their notices did not comply with the requirements of MCL 600.6431 which required that the notice be "signed and verified by the claimant before an officer authorized to administer oaths." *Id.* at 293, 299-300.

Moreover, this Court has not deemed notices sent by the claimants' attorneys in other cases as deficient on the ground that it was signed by an attorney. For instance, in *McLean*, the Court found that the notice letter was sent by plaintiff's attorney when it stated as follows: "Five days later, plaintiff's attorney sent a letter addressed to 'City Manager or Mayor's Office' of defendant." *McLean*, 302 Mich App at 71. Although this Court subsequently found that the plaintiff's notice lacked sufficient description of the injury sustained, *Id.* at 78, it did not take issue with the fact that the notice was sent by the plaintiff's attorney. Similarly, in *Burise v City of Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009), the plaintiff's notice, which was sent by her attorney, reads in pertinent part, "Please be advised that we represent Wilhelmina [sic] Bruise. At approximately 12:45 p.m. on June 13, 2006, [she] slipped and fell on East Huron and Saginaw Street in the City of Pontiac while crossing Saginaw Street . . . " *Id.* at 648. In this initial notice, plaintiff did not disclose the name of any known witness but promptly sent another notice disclosing the name of the witness within 120 days of the occurrence. *Id.* This Court held that plaintiff's initial notice was defective because it did not include the name of a known witness but found that plaintiff's subsequent notice complied with the requirements of MCL 691.1404(1). *Id.* at 655.

In addition, although the trial court correctly interpreted MCL 691.1404(3) as creating an exception for certain injured persons, it wrongly interpreted MCL 691.1404(1) as requiring an injured person to personally sign the "complaint." MCL 691.1404(3) provides as follows:

> 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 of 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 . . . " [Emphasis added.]

Again, because the statute does not define the meaning of the word "filed," it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word. *Epps*, 498 Mich at 529. This is because "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language[.]" MCL 8.3a. The meaning of the term "filed" includes to "place among official records as required by law," to initiate (as a legal action) through proper formal procedure, or to submit documents necessary to initiate a legal proceeding" *Merriam-Webster's Collegiate Dictionary* (11th ed).

While MCL 691.1404(3) requires that an injured person under the age of 18 years or who is physically or mentally incapable of giving notice, must "serve" their notice not more than 180 days from the time of the injury or after the termination of the disability, it permits such notice to be "filed" by either a parent, attorney, next of friend, or legally appointed guardian of an injured person under the age of 18 years at the time of the injury. In *Blohm v Emmet County Bd Of County Road Comm'rs*, 223 Mich App 383, 386; 565 NW2d 924 (1997), this Court stated that

the notice requirement under MCL 691.1404(3) "is extended to 180 days from the date of the injury for injured persons under the age of eighteen or, if the person is physically or mentally incapable of giving notice, 180 days after the termination of the disability."

Moreover, while the service of notice within 120 days (MCL 691.1404(1)) and 180 days (MCL 691.1404(3)) requires strict compliance, the requirement that a parent, attorney, next of friend, or legally appointed guardian, may "file" such notice for an injured person under the age of 18 years, is permissive. Our Supreme Court has recognized "[t]he importance of interpreting words with a proper sensitivity to their context . . . " *Birznieks v Cooper*, 405 Mich 319, 331 n 12; 275 NW2d 221 (1979). In the context of statutory interpretation, "[t]he words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning." *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 237-238; 814 NW2d 646 (2012).

B. THE NOTICE DID NOT LACK A SUFFICIENT DESCRIPTION OF AN INJURY.

Furthermore, we find that Plaintiff's notice, when read as a whole, was sufficient to inform the defendant of the injuries suffered by plaintiff. Under MCL 691.1404(1), "[a]n injured person is required to timely notify the government agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the nature of the defect, and the names of known witnesses." *McLean v Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013). "The required information does not have to be contained within the plaintiff's initial notice; it is sufficient if a notice received by the governmental agency within the 120-day period contains the required elements." *Id.* at 74-75.

In this case, plaintiff's notice alleged that she "suffered severe and permanent damages." Moreover, plaintiff referenced the FOIA documents that were already in defendant's possession. Those documents not only explained in detail the injury that plaintiff sustained, but described in detail the location of the injury and defect. In *McLean*, this Court found that the plaintiff's description that she sustained "a significant injuries [sic]" was not sufficient under the statute and "was not remedied by clarity in any other aspects of the notice." *McLean v Dearborn*, 302 Mich App at 77. Here, plaintiff's statement of "severe and permanent damages" may have been insufficient by itself, but that insufficiency was remedied by reference to the FOIA documents. In determining the sufficiency of notice of a claim, the whole notice and all facts stated therein may be used and considered to determine whether the notice reasonably apprises the officer of the place and cause of the alleged injury. *Rule v Bay City*, 12 Mich App 503, 507-508; 163 NW2d 254 (1968). It is important to note that there was no evidence or a claim made that the defendant had difficulty locating and discerning the defect in question, yet that information was not clearly contained in the notice and would have required defendant to review the FOIA documents. Plaintiff obtained the police report and ambulance report through a FOIA request from the City on July 9, 2014; those documents were mailed by the very person that plaintiff served her notice upon on August 15, 2014. The purpose of the notice requirement is not just to afford officer of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular venue of the injury. *Id.* Here, plaintiff's notice and referenced documents clearly afford the officer opportunity for investigation and determination of venue.

Plaintiff's argument that she satisfied the notice requirement by referencing the materials forwarded to her by the City in the notice letter was sufficient for defendant to determine the location of the defect; thus, it cannot be said to be deficient in determining the specific injuries sustained.

Reversed and Remanded.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause