STATE OF MICHIGAN

COURT OF APPEALS

VANESSA MONTFORD, Plaintiff-Appellee,	UNPUBLISHED June 28, 2011
v	No. 297074 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellant.	LC No. 09-016032-NO

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

In this action involving the highway exception to government immunity, MCL 691.1402, defendant appeals the trial court's order that denied its motion for summary disposition. Defendant argues that plaintiff's claim is barred because she failed to accurately specify the location of the alleged sidewalk defect within 120 days of the incident, as required under the statute's notice provision, MCL 691.1404(1). For the reasons set forth below, we reverse.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff's complaint alleged that, on or about December 28, 2008, she sustained injuries when she tripped and fell on a "dilapidated, cracked and raised section of" a sidewalk in Detroit. Plaintiff's attorney sent a letter dated January 15, 2009, to defendant's law department, which provided: "Please allow this correspondence to serve as notice pursuant to MCL 691.140[4] with reference to serious and permanent injuries suffered by my client . . . ." The letter further stated that the incident occurred on an "unleveled, crumbling and broken concrete/asphalt/sidewalk in front of 14741 Kentfield Street." The attorney attached photographs showing the portion of sidewalk on which plaintiff tripped. The photographs were taken at close range, making it difficult to see the surrounding area.

After reviewing maps and records in an attempt to ascertain whether defendant has jurisdiction over the location, the principal construction inspector determined that 14741 Kentfield does not exist. He further testified, "I personally drove to Kentfield [S]treet and observed that there is no 14700 block of Kentfield Street and there are no addresses starting with 147xx on Kentfield [S]treet."

Defendant moved for summary disposition, arguing that plaintiff failed to provide an accurate address or location of the alleged defect in the notice as statutorily required. In her

response, plaintiff explained that, when she received the motion, she realized there was a transposition of numbers in the address stated in her notice. She acknowledged that the incident took place in front of 14174 Kentfield, and not 14741 as indicated in the notice. Nonetheless, she argued that defendant received sufficient notice under MCL 691.1404 because the notice included photographs of the location where she tripped and fell. She also argued that, had defendant exercised due diligence in investigating her claim, it would have discovered the error in time to allow plaintiff to cure the defect within the statutory period. Ultimately, the trial court denied defendant's motion.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 493; 791 NW2d 853 (2010). Defendant requested summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Because the trial court looked beyond the pleadings in reaching its decision, it appears the trial court relied on either MCR 2.116(C)(7) or (C)(10). *Capitol Properties Grp, LLC v 1247 Center St, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009).[1] This appeal also involves the interpretation of MCL 691.1404. "We review de novo questions of statutory interpretation." *Oshtemo Charter Twp v Kalamazoo County Road Comm'n*, 288 Mich App 296, 302; 792 NW2d 401 (2010).

III. ANALYSIS

Defendant argues that it is immune from liability because plaintiff failed to provide the exact location of the defect pursuant to the 120-day notice requirement under MCL 691.1404.

Under the governmental tort liability act, MCL 691.1401 *et seq*., a governmental agency engaged in the exercise or discharge of a governmental function is immune from tort liability unless one of the six statutory exceptions applies. *Wesche v Mecosta Cty Rd Comm'n*, 480 Mich 75, 83-84; 746 NW2d 847 (2008). The highway exception, MCL 691.1402(1), provides:

> [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

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[1] Summary disposition under MCR 2.116(C)(7) is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party has shown that the plaintiff's claim is "barred because of . . . immunity granted by law . . . ." *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may present affidavits, depositions, admissions, or other documentary evidence in support of its motion, and the contents of the complaint are accepted as true unless contrary evidence is provided. *Id*. Under MCR 2.116(C)(10), summary disposition is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). In reviewing the trial court's decision, this Court "consider[s] the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*.

> 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 government agency.

Defendant argues that the highway exception does not apply because plaintiff failed to provide adequate notice under MCL 691.1404(1), which provides:

> 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 . . . shall serve a notice on the government 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. [Emphasis added.]

At issue is whether the notice provision demands strict compliance and whether constructive notice is sufficient. In denying defendant's motion for summary disposition, the trial court stated, "I think there was constructive notice. At least it identified a location and the specific sidewalk by the photographs. I think there was adequate notice for the city to investigate it." Thus, the trial court found constructive notice to be sufficient, and imposed a requirement that governmental agencies conduct timely investigations to determine the locations of highway defects even when the plaintiff fails to specify an accurate location. In addition, although not explicitly stated, it appears that the trial court read the statute to demand only substantial compliance.

If the language of a statute is clear and unambiguous, courts presume that the Legislature intended the meaning expressed in the statute, and judicial construction is neither required nor permitted. *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008). Courts of this state have historically "enforced government immunity mandatory notice provisions according to their plain language." *Rowland v Washtenaw Cty Rd Comm'n*, 477 Mich 197, 205; 731 NW2d 41 (2007). The enumerated exceptions to the government immunity statute "are to be narrowly construed." *Maskery v Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

The *Rowland* decision addressed "whether a notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced as written." *Rowland*, 477 Mich at 200. In *Rowland*, the plaintiff served notice on the defendant 140 days after the incident. *Id.* at 201. The defendant argued that the plaintiff's failure to comply with MCL 691.1404(1), namely, the 120-day requirement, entitled it to judgment as a matter of law. *Id*. The Michigan Supreme Court agreed, holding that MCL 691.1404(1) demands strict compliance. *Id*. at 200. With this holding, the Court overruled *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), and *Hobbs v Michigan State Highway Dep't*, 398 Mich 90, 96; 247 NW2d 754 (1976), in which the Court held that, absent a showing of actual prejudice to the governmental agency, substantial compliance with the notice provision is sufficient. *Id*.

The *Rowland* Court opined that *Brown* and *Hobbs* were wrongly decided "because they were built on the argument that government immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced." *Rowland*, 477 Mich at 210. In rejecting *Brown* and *Hobbs*, the Court noted that, as an economic and social piece of legislation, there need only be a rational basis for the notice provision to survive constitutional scrutiny. *Id*. at 210-211. The Court found several rational bases for the notice provision, including "facilitate[ing] investigation, claims resolution, and rapid road repairs, as well as [] creat[ing] reserves and the like for self-insured governmental entities." *Id*. at 215. The Court stated, "common sense counsels that inasmuch as the Legislature is not even required to provide a defective highway exception to government immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits." *Id*. at 212. It further stated:

> In reading an "actual prejudice" requirement into the statute, this Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted--a notice provision with no prejudice requirement--impossible. . . . Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed. [*Id*. at 213.]

Because the Court found MCL 691.1404 to be straightforward, clear, unambiguous, and constitutionally sound, it concluded that the statute must be enforced as written. *Rowland*, 477 Mich at 219. Accordingly, the Court held that, "the statute requires notice 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*." *Id*. (emphasis in original).

In a recent order, our Supreme Court addressed an issue identical to the one here. In *Jakupovic v Hamtramck*, ___ Mich ___; ___ NW2d ___ (Docket No. 142436, issued June 1, 2011), the Supreme Court reversed this Court's decision and remanded the case for the trial court to grant summary disposition to the city of *Hamtramck*. The Supreme Court reasoned as follows:

> The Court of Appeals recognized that the plaintiff had stated the wrong address in giving notice to the defendant of an alleged defect in a sidewalk. The Court of Appeals erred by excusing this error, rather than enforcing the notice requirement found at MCL 692.1404(1) as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219 (2007). The statute requires notice of "the exact location" of the defect, and in this case, the plaintiff failed to specify the correct address where the defect was allegedly located.

A Supreme Court order constitutes binding precedent when the rationale the Court employed can be understood. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002). The Supreme Court's rationale in *Jakupovic* is clear: If a plaintiff gives an incorrect address in her notice, she fails to give the "exact location" of the defect as required by MCL 692.1404(1), and this is fatal to her claim.

In accordance with *Jakupovic* and *Rowland*, we reject the argument that plaintiff need only substantially comply with the notice provision absent prejudice to defendant. The notice must "specif[y] the exact location . . . of the defect . . . ." MCL 691.1404(1). This language is clear and unambiguous. The inclusion of the term "exact" before "location" negates the possibility that the Legislature intended erroneous, or even approximate, locations to suffice. Here, as in *Jakupovic* and *Rowland*, plaintiff's undisputed failure to strictly comply with the notice provision bars her claim.

As our Supreme Court has done in both *Jakupovic* and *Rowland*, we also reject the notion that constructive notice satisfies the statute. Here, although the term "notice" is unmodified in MCL 691.1404(1), the term "specify" in the second sentence indicates that actual, rather than constructive, notice is required. Further, reading the statute to contemplate constructive notice would nullify the term "specify." Thus, the notice provision clearly and unambiguously requires actual notice. Accordingly, the trial court erred in denying defendant's motion on the ground that defendant received constructive notice by virtue of the photographs.[2]

Finally, we observe that the trial court's flagrant attempt to rewrite the statute to impose an obligation on governmental agencies to investigate claims when they have not received a valid notice was entirely outside the trial court's authority. Unless a plaintiff satisfies the statutory notice provision, she is barred from recovery, and the governmental agency is immune from liability. Here, under either MCR 2.116(C)(7) or (C)(10), defendant is entitled to judgment as a matter of law.

Reversed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad

[2] Constructive notice is clearly inadequate under the statute. However, we also note that the close-up photographs of the sidewalk fail to show any part of the surrounding area that would allow the city to discern the sidewalk's location. Indeed, it is impossible to differentiate the photographed portion of sidewalk from any dilapidated urban sidewalk, so plaintiff's evidence would even fail to meet this invalid standard.