STATE OF MICHIGAN

COURT OF APPEALS

ELOUNDA WATTS, Plaintiff-Appellee,	UNPUBLISHED January 17, 2013
V	No. 307686 Genesee Circuit Court
CITY OF FLINT, Defendant-Appellant.	LC No. 11-096706-NO

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion for summary disposition on the basis of governmental immunity. Because plaintiff failed to provide proper notice of her claim as required by MCL 691.1404(2), we reverse and remand for entry of judgment in defendant's favor.

We review de novo a trial court's decision on a motion for summary disposition. *Patterson v CitiFinancial Mtg Corp*, 288 Mich App 526, 528; 794 NW2d 634 (2010). We also review de novo the applicability of governmental immunity, *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004), and questions involving statutory interpretation, *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

Pursuant to the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, governmental agencies are generally immune from tort liability when engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). Under the "highway exception" to governmental immunity, a governmental agency having jurisdiction over a highway may be liable for a breach of its duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1).[1] A sidewalk is included in

[1] MCL 691.1402 was amended pursuant to 2012 PA 50, effective March 13, 2012, but the amendment is not relevant to this appeal and is inapplicable in any event given that plaintiff's trip and fall occurred on April 7, 2011, before the effective date of the amendment. See *Moraccini v City of Sterling Hts*, 296 Mich App 387, 393 ns 3 & 4; ___ NW2d ___ (2012).

the definition of "highway." See former MCL 691.1401(e).[2] In order to assert the highway exception to governmental immunity, a plaintiff must timely notify the governmental defendant of his or her claim. *Thurman v Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012). MCL 691.1404 provides, in pertinent part:

> (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, . . . 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.
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> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. . . .

Civil process on a municipal corporation is made by serving "the mayor, the city clerk, or the city attorney of a city." MCR 2.105(G)(2).

In this case, plaintiff sent her notice to the city clerk by regular, first class mail. It is undisputed that the notice was received. Plaintiff contends that because she substantially complied with the notice statute, her failure to serve the notice "either personally, or by certified mail, return receipt requested" as directed by MCL 691.1404(2) does not require the dismissal of her claim. Plaintiff relies on *Hussey v Muskegon Hts*, 36 Mich App 264, 270; 193 NW2d 421 (1971), which held that "deficiencies in a notice of injury and defect are not of jurisdictional import, and an injured person may not be denied his day in court on that account absent a showing by the governmental agency that it has been thereby prejudiced." With respect to MCL 691.1404(2) in particular, the *Hussey* Court stated that "[t]he failure to serve the notice personally or by certified mail is inconsequential where, as here, the notice was timely received." *Id.* at 271.

Because *Hussey* was decided before November 1, 1990, it is not binding on this Court. MCR 7.215(J)(1). Moreover, our Supreme Court has more recently held that because "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect . . . it must be enforced as written." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). The Court further stated that the failure to comply with the provision bars a claim regardless of whether a governmental entity is actually prejudiced. *Id*. at 200, 219. In *McCahan v Brennan*, 492 Mich 730, 733; ___ NW2d ___ (2012), the Court reiterated "the core holding of *Rowland* that . . . statutory notice requirements must be interpreted and enforced as plainly written and . . . no judicially created saving construction is permitted to avoid a clear statutory mandate." The Court further stated that "*Rowland* applies to all such statutory notice or filing

[2] Pursuant to 2012 PA 50, effective March 13, 2012, the definition of "highway" is now located at MCL 691.1401(c).

provisions," and that "when the Legislature conditions the ability to pursue a claim against the state on a plaintiff's having provided specific statutory notice, the courts may not engraft an 'actual prejudice' component onto the statute before enforcing the legislative prohibition." *Id*. at 733, 738. See also *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011) (holding that this Court erred by excusing a defect in the notice "rather than enforcing the notice requirement . . . as written.") Accordingly, to the extent that plaintiff substantially complied with MCL 691.1404(2), dismissal is nevertheless appropriate because she failed to satisfy the requisites set forth in the provision and defendant was not required to demonstrate prejudice as a result.

Plaintiff also argues that she satisfied the requirements of MCL 691.1404(2) because the provision states that "[t]he notice *may* be served upon any individual, either personally, or by certified mail, return receipt requested . . . ." (Emphasis added.) Plaintiff contends that the permissive term "may" does not require that notice be provided in the manner set forth in the statute, but rather, merely allows notice to be provided in the manner described. Plaintiff's argument lacks merit. Although the word "may" ordinarily signifies a permissive provision, *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008), "[a] necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to . . . the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). Here, reading subsections (1) and (2) of MCL 691.1404 together, it is clear that subsection (1) requires that notice containing specific information be provided within 120 days following an injury and that subsection (2) specifies the manner in which such notice is to be accomplished. Interpreting the Legislature's directive regarding the manner of service as merely permissive would frustrate the purpose of the provision. Moreover, interpreting the language "either personally, or by certified mail, return receipt requested," as merely allowing but not requiring service in such a manner would effectively render the language nugatory since service could also be accomplished by any other means. This Court should avoid interpreting statutory language in a manner that would render any part of the statute nugatory. *Michigan Properties, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012).

Finally, plaintiff's reliance on MCR 2.105(J) and *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 673-674; 413 NW2d 474 (1987), is misplaced. Those authorities stand for the proposition that if service of process is made on a defendant in a manner other than that authorized by the court rules, improper service is not a basis for dismissal if the defendant actually received notice of the action within the life of the summons. Because this case involves service of a statutory notice, not service of process, and the Legislature specifically articulated how service of the notice is to be accomplished, those authorities are inapposite.

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/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto