STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA COLFLESH and DANNY COLFLESH, Plaintiffs-Appellees, v VILLAGE OF LEXINGTON, Defendant-Appellant.	UNPUBLISHED February 12, 2013 No. 307727 Sanilac Circuit Court LC No. 11-033897-NO

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) on the basis of governmental immunity. Because plaintiff's[1] notices described the exact location and nature of the alleged defect, but failed to provide the names of the known witnesses as required by MCL 691.1404(1), we reverse and remand for entry of summary disposition in favor of defendant.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of plaintiff's trip and fall on a sidewalk in defendant Village of Lexington on August 7, 2010. Plaintiff suffered injuries as a result of her fall, including a broken left wrist. Within approximately one week after the incident, plaintiff submitted to defendant an incident report using defendant's standard "Incident Report" form. The report described the location of the incident as "in front of Old Fudge Shop" and included a "Description of Incident" that stated: "Walking on side walk twisted left foot on unlevel side walk fell." On or about September 1, 2010, plaintiff sent a letter to defendant that further described the incident and stated, in pertinent part:

> [Plaintiff] suffered a broken left wrist, sprained right wrist, injuries to her left foot and left ankle, and injuries to both knees when she fell on an uneven

[1] Because plaintiff Danny Colflesh's claim is derivative of plaintiff Patricia Colflesh's claim, our reference to "plaintiff" refers to Patricia only.

> sidewalk in front of 7296 Huron Avenue in downtown Lexington. [Plaintiff] is unable to return to her work for the foreseeable future due to her disabling wrist injuries.
>
> There were people in the vicinity when [plaintiff] fell but she is not able to identify any witnesses who may have seen her fall at this time.

On March 25, 2011, plaintiff filed this action against defendant, alleging that it failed to maintain the sidewalk in a reasonably safe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing that it was immune from liability and that the highway exception to governmental immunity, MCL 691.1402(1), was inapplicable because plaintiff failed to comply with the notice of injury requirement set forth in MCL 691.1404. In particular, defendant argued that plaintiff failed to identify the witnesses who saw her fall notwithstanding that she knew that people had witnessed her fall because her daughter and two grandsons were with her when she fell. Defendant also argued that plaintiff failed to specify the exact location of the defect given that plaintiff provided more specific information regarding the location of the defect during her deposition and that the address known as 7296 Huron Avenue spans the length of two buildings. Further, defendant contended that plaintiff's description of the defect as an uneven or unlevel sidewalk failed to sufficiently specify the nature of the defect.

In response, plaintiff argued that her notices satisfied the purpose of the notice requirement because they were sufficient to allow defendant an opportunity to investigate her claim and remedy the defect. Plaintiff contended that this Court has previously held that a notice indicating that the defect was "in front of" a particular address was sufficient to specify the exact location of the defect. Plaintiff also argued that her notices did not simply state that a defect existed, but rather, they described the nature of the defect as an unlevel or uneven sidewalk. Further, with respect to the identification of witnesses, plaintiff argued that defendant's own standard "Incident Report" form did not request the identity of witnesses. Plaintiff also contended that defendant had failed to identify any authority supporting the dismissal of a claim based on the failure to identify witnesses.

Defendant filed a reply brief, arguing that plaintiff's failure to identify the known witnesses alone required the dismissal of her claim. Defendant contended that a plaintiff's failure to comply with the notice requirement of MCL 691.1404(1) requires dismissal regardless of prejudice. Defendant asserted that plaintiff's failure to provide notice of her family members who witnessed her fall until more than one year after the incident deprived defendant of its ability to investigate the circumstances surrounding the incident. Defendant also argued that not only did plaintiff fail to provide the names of the known witnesses, but she misrepresented that there were no known witnesses. Further, defendant contended that plaintiff failed to specify the exact location and nature of the defect because 7296 Huron Avenue consists of two separate buildings, rendering plaintiff's description of the location too expansive.

Following oral argument, the trial court denied defendant's motion. With respect to the location and nature of the defect, the court stated:

> [T]his is an area of commercial buildings in downtown Lexington. It's not like it's a home with a big expansive yard that all has one address, it's a

> commercial group of commercial buildings in a row and this ones [sic] . . . is defined as 7296 Huron Avenue. I certainly think that is a specific enough location to satisfy this statutory requirement. Uneven sidewalk is also exactly what they're saying occurred. I don't know how it could be described any better then [sic] that in the notice. Of course more details could come out in a deposition, so I think the . . . the nature of the defect is also adequate . . . .

Further, regarding the failure to identify the known witnesses, the trial court reasoned:

> Well I think that these are . . . if I understood it from the deposition they didn't say that they saw the actual occurrence, the trip on the object or the uneven sidewalk, just saw the result of the falling, so I don't think that . . . they were not actual witnesses to the striking of the uneven portion of the sidewalk so I . . . think that they satisfied that portion of the statute as well.

Thereafter, the trial court entered a written order denying defendant's motion.

II. STANDARD OF REVIEW

We review de novo as a question of law the applicability of governmental immunity. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). We also 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). "A motion for summary disposition pursuant to MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Miller v Lord*, 262 Mich App 640, 643; 686 NW2d 800 (2004) (quotation marks and citation omitted). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion under subrule (C)(10) is properly granted if "there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. LEGAL ANALYSIS

Under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, municipalities are generally immune from tort liability if they are "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); see also *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). Pursuant to the "highway exception" to governmental immunity, a plaintiff may recover damages for bodily injury suffered as a result of a municipality's failure to maintain a highway in reasonable repair so that it is reasonably safe

for public travel. MCL 691.1402(1). At the time of plaintiff's fall, MCL 691.1402(1) provided,[2] in relevant part:

> (1) [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*. . . . [Emphasis added.]

A "highway" includes a sidewalk. See former MCL 691.1401(e).[3] "[B]efore the highway exception can apply, the plaintiff must timely notify the governmental defendant of his or her claim in accordance with MCL 691.1404(1)." *Thurman v Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012). MCL 691.1404(1) provides, in pertinent part:

> 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*. [Emphasis added.]

Defendant argues that the trial court erroneously denied its motion for summary disposition because plaintiff's notices did not describe the exact location and nature of the defect. With respect to the nature of the defect, the incident report described the defect as an "unlevel side walk" and plaintiff's September 1, 2010, letter to defendant described the defect as an "uneven sidewalk." Defendant contends that those descriptions were not sufficiently specific because plaintiff testified during her deposition that the uneven or "unlevel" sidewalk occurred where concrete abutted brick pavers. Merely because plaintiff provided more information regarding the nature of the defect during her deposition, however, did not render her notices fatally defective. Plaintiff sufficiently described the nature of the defect as an uneven or "unlevel" sidewalk that caused her ankle to twist, resulting in her fall. Thus, plaintiff's explanation accurately described the exact nature of the defect. The additional information provided during plaintiff's deposition that the defect existed at the point where the concrete abutted brick pavers did not render plaintiff's initial description of the nature of the defect as an uneven or "unlevel" sidewalk inaccurate. Thus, plaintiff's notices were sufficient to apprise defendant of the exact nature of the defect.

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[2] MCL 691.1402 was amended pursuant to 2012 PA 50, effective March 13, 2012, but the amendment is inapplicable in this case because plaintiff's fall occurred before the effective date of the amendment. See *Moraccini v City of Sterling Hts*, 296 Mich App 387, 393 ns 3 & 4; 822 NW2d 799 (2012).

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

Defendant also argues that plaintiff failed to sufficiently describe the exact location of the defect. Plaintiff identified the location of the defect in the incident report as "in front of Old Fudge Shop" and in her September 1, 2010, letter she identified the location as the "sidewalk in front of 7296 Huron Avenue." Defendant asserts that plaintiff's description was insufficient because 7296 Huron Avenue is too expansive a description and plaintiff could have provided more information, such as referencing a tree and a set of steps near the location of her fall. Again, the fact that plaintiff provided more information regarding the location of the defect during her deposition did not render the description of the location provided in her notices fatally deficient. Read together, plaintiff's notices described the location of the defect as the sidewalk in front of the Old Fudge Shop, located at 7296 Huron Avenue. Because the notices included the address where the alleged defect was located and specified that the defect was "in front of" that address, plaintiff's notices sufficiently described the exact location of the defect. See *Hussey v Muskegon Hts*, 36 Mich App 264, 268; 193 NW2d 421 (1971) ("[The plaintiffs'] description of the defect as a 'defect in the sidewalk' in front of 2042 Peck Street is adequate.")

Defendant further contends that plaintiff's notices were deficient because plaintiff failed to identify the witnesses known to her. As previously stated, MCL 691.1404(1) requires that a plaintiff provide notice specifying "the names of the witnesses known at the time by the claimant." Plaintiff's September 1, 2010, letter to defendant stated, "[t]here were people in the vicinity when [plaintiff] fell but she is not able to identify any witnesses who may have seen her fall at this time." Contrary to that assertion, plaintiff testified during her deposition that her daughter and two teenage grandsons were walking behind her in a single-file line and all three observed her fall. She claimed that her daughter screamed "mom" immediately as plaintiff struck the sidewalk. Plaintiff maintained that all three family members told her that they had seen her "go down" and all three assisted her to her feet afterward. Plaintiff further testified that her grandsons helped her identify the exact location of her fall as she was sitting on nearby steps after her fall. Thus, contrary to plaintiff's assertion in her September 1, 2010, letter, plaintiff was able to identify witnesses who saw her fall, but she failed to do so.

Plaintiff's failure to provide the names of the known witnesses as mandated by MCL 691.1404(1) required the dismissal of her claim. In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), our Supreme Court held that because "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect . . . it must be enforced as written." The Court also 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; 822 NW2d 747 (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 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) (stating that this Court erred by excusing a defect in the notice "rather than enforcing the notice requirement . . . as written.")

In *Burise v Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009), this Court discussed and applied our Supreme Court's holding in *Rowland*. This Court held that the plaintiff's initial notice was defective because it did not include the name of a known witness to the plaintiff's fall. Because the plaintiff served a supplemental, legally sufficient notice identifying the witness within the statutory timeframe, however, this Court held that she had complied with the notice requirement of MCL 691.1404(1). *Id*. at 655. In this case, plaintiff did not provide a legally sufficient notice identifying the known witnesses. In fact, she indicated in her September 1, 2010, letter that although there were people in the vicinity when she fell, she was unable to identify anyone who may have seen her fall. Plaintiff's subsequent deposition testimony demonstrates that that representation was plainly false.

In denying defendant's motion for summary disposition, the trial court stated that plaintiff did not testify during her deposition that her family members had witnessed "the actual occurrence, the trip on the object or the uneven sidewalk." The trial court reasoned that plaintiff's family had merely witnessed "the result of the falling" and "were not actual witnesses to the striking of the uneven portion of the sidewalk." The trial court's reasoning was erroneous. MCL 691.1404(1) does not require that a witness observe the actual striking of the injured person's body with the alleged defect. The trial court erred by reading such a requirement into the statutory language. "Nothing [should] be read into a clear statute that is not within the manifest intention of the Legislature, as derived from the language of the statute itself, and courts may not speculate about the probable intent of the Legislature beyond the language expressed in the statute." *King v Reed*, 278 Mich App 504, 513; 751 NW2d 525 (2008) (citations omitted). The statute requires that a plaintiff provide a notice specifying "the names of the witnesses known at the time by the claimant." MCL 691.1404(1). Plaintiff testified that her daughter and her two grandsons were with her when she fell and witnessed her actual fall. Thus, MCL 691.1404(1) required plaintiff to provide a notice that included the names of those witnesses.

Plaintiff argues that because she provided all the information that defendant requested in its standard incident report form, defendant cannot claim that the information provided was statutorily deficient. Plaintiff's argument is misplaced because notwithstanding the incident report, plaintiff's September 1, 2010, letter to defendant stated that it "serves as [her] notice of the injury and the defect." The letter provided additional information not requested in the incident report and falsely indicated that plaintiff was not able to identify any witnesses who may have seen her fall. Thus, even though the incident report did not request the names of known witnesses, plaintiff thereafter falsely stated that she could not identify any witnesses. Accordingly, because plaintiff failed to satisfy MCL 691.1404(1) by providing the names of the witnesses known to her, the trial court erred by denying defendant's motion for summary disposition.

We reverse and remand for entry of summary disposition in defendant's favor. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher