STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM KARWACKI and KATHRYN KARWACKI, Plaintiffs-Appellees, v DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.	UNPUBLISHED August 29, 2013 No. 308772 Court of Claims LC No. 10-000020-MD

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

BECKERING, P.J. (*concurring in part and dissenting in part*).

In this personal-injury action against a governmental agency based on an allegedly defective highway, the majority concludes that this case must be dismissed because plaintiffs, William and Kathryn Karwacki, failed to list all of the "names of witnesses known at the time by the claimant" in their notice submitted pursuant to MCL 691.1404(1). Plaintiffs named in their notice the police officers who conducted the on-scene investigation of the motorcycle accident at issue and all of the witnesses to the accident that the police identified in their investigation. The majority agrees with the argument of defendant, Michigan Department of Transportation (MDOT), that the word "witnesses" for purposes of MCL 691.1404(1) includes not just witnesses to the accident but also anyone who has knowledge of relevant facts concerning the accident, its aftermath, or causation. Thus, the majority concludes that because plaintiffs failed to name in the notice four of their motorcycle riding companions who were traveling ahead of them and who did not actually witness the accident in which plaintiffs' motorcycle slid out from under them on allegedly defective pavement (they saw or heard only the aftermath), but who possessed relevant information regarding the incident and its cause, plaintiffs' claim must be dismissed.

By casting such a wide net in defining the word "witnesses," the majority creates a virtually impossible task for a claimant because there may be virtually dozens of people who possess relevant facts concerning the accident and its aftermath, including on-scene gawkers, emergency-response personnel, health-care providers, rehabilitation providers, employers, friends who plaintiffs talked to about the accident or their injuries, and innumerable others. Such a broad definition is clearly at odds with the intent of the Legislature, the plain language of the notice statute, and this Court's precedent. As such, I respectfully disagree with the majority's interpretation of MCL 691.1404(1) and conclusion that plaintiffs' failed to provide proper notice

to defendants. I would affirm the trial court's denial of defendant's motion for summary disposition on the notice issue.

I concur with the majority's conclusion that the trial court erred by allowing plaintiffs to add to their highway defect claim—nearly one year into the litigation—an allegation of excessive rutting of the highway because nothing in plaintiffs' notice pursuant to MCL 691.1404(1) provided even a lay description of a rutting defect. Plaintiffs should be entitled to pursue their highway defect claim based on an allegation of excessive crack fill on the highway pavement as they fully complied with the notice statute in all respects with regard to that claim.

I. BASIC FACTS AND PROCEDURAL HISTORY

On a clear, dry afternoon on August 29, 2009, plaintiffs were traveling along M-36 in a motorcycle group from Lansing to Hell, Michigan. Plaintiffs rode together on one motorcycle that William was driving. As they were rounding a curve, William lost control of the motorcycle, which slid into the oncoming lane. Plaintiffs were thrown from the motorcycle onto the pavement. Their motorcycle skidded into the oncoming lane, struck Jesse Mowery's car, and rebounded back into the group of motorcycles, striking Michelle Battaglia's motorcycle and causing her to crash. Michelle's husband, Jerome Battaglia, was traveling on a motorcycle next to Michelle; her motorcycle struck his, but he was able to maintain control and did not crash. Fellow motorcyclists Kenneth Johnson and Bryan Lorian also witnessed the accident. Plaintiffs and Michelle were injured in the accident.

The Unadilla Township Police Department were summoned to the scene, and Sergeant Russell and Officer Trenkle investigated the accident. Russell interviewed witnesses and observed various markings on the roadway while Trenkle took photographs of the scene. The police report listed as witnesses all of the individuals identified above and summarized the officers' observations at the scene. As is apparent from deposition testimony and photographs taken at the scene, other motorcyclists were present while police and ambulance workers were there, but their names did not appear in the police report.

On December 4, 2009, within the statutory time limit of 120 days set forth in MCL 691.1404, plaintiffs sent defendant a written notice of intent to file a claim. The notice described the location as "Place: M-36 .15 mile west of Kathryn, Unadilla Township, MI," and included the following relevant paragraphs:

> Explanation: William Kirk Karwacki was the rider and Kathryn Ann Karwacki was the passenger on M-36, and when proceeding around a curve at the above time and place, encountered pavement liberally covered with crack filler which covered the majority of the northbound lane (towards Pinckney), at which time the motorcycle, which was leaned over to the right in negotiating the curve, slipped on the crack filler, fell, and slid over into the oncoming lane, coming into contact with another vehicle coming the other way.
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> * * *

Witnesses: Claimants, investigating officers Russell and Treakle, Unadilla Township Police Department, Jesse Howard Mowry, Kenneth Johnson, Jerome Battaglia, Brian Lorian [sic], Michelle Battaglia. There may have been others.

Defect: Respondent and/or contractors working under their supervision and control, applied far too much crack filler than is reasonable and proper for the cracks that were in the highway at the place where the accident occurred. Crack filler is a much slipperier surface than asphalt paving and is a distinct hazard and very dangerous for motorcycles to traverse, especially around a curve under the circumstances of this matter. Furthermore, Defendant had a duty to repave the surface of the highway rather than saturate most of its surface with crack filler as it did. Defendant knew of . . . this condition with enough time to remedy the same since its own actions in fact directly caused the condition.

On March 9, 2010, plaintiffs filed their complaint, which essentially restated the assertions made in the written notice.[1] Discovery ensued. On January 26, 2011, nearly a year into the litigation, plaintiffs moved to amend their complaint in order to add an allegation that, in addition to the application of "far too much crack filler" than was reasonable to repair cracks in the highway, excessive rutting on the road surface was a proximate cause of the accident. This new allegation was prompted by a visit to the scene by plaintiffs' expert on January 10, 2011. In a brief opposing the motion, defendant argued that there was no valid reason for the delay in raising the issue and that it was unduly prejudiced by the delay because rutting was not mentioned in the notice of intent to file claim and weather and traffic could have altered the condition of the pavement in the time since the accident. The trial court granted plaintiffs' motion to amend the complaint. Discovery continued, and the case proceeded to case evaluation, which was not successful in settling the case.

On December 14, 2011, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10) (respectively immunity, failure to state a claim, no genuine issue of material fact), asserting that because plaintiffs did not provide timely notice of "the exact location and nature" of the rutting or of four witnesses known to them, MCL 691.1404 mandated that their case be dismissed. Plaintiffs argued in response that the notice they sent reasonably apprised defendant of the nature of the claim and that the specificity of the time and location of the accident and nature of the injuries constituted substantial compliance with the statute. Plaintiffs argued in the alternative that even if the notice failed regarding rutting, it was sufficient as to the other claims and that the court had allowed them to amend their complaint by adding the rutting claim. They also stated that the notice had identified the witnesses known to plaintiffs at the time it was sent.[2]

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[1] Plaintiffs amended the complaint on April 26, 2010, naming the specific department in the caption; the original complaint had simply listed the state as defendant.

[2] Plaintiffs each submitted a sworn affidavit attesting to the fact that from August 29, 2009 to December 27, 2009, the only persons they were aware of who actually observed their motorcycle

The trial court agreed with plaintiffs that notice was sufficient as to both the nature of the defect and the witnesses known at the time. Regarding the nature of the defect, the court stated:

> I don't believe that there is a requirement that all possible legal theories be included in the notice of intent. It—by providing the location of the defect, and that was specifically spelled out in the notice of intent, and the nature of the defect, it's obviously a problem with the highway, the crack filler, the Department was put on notice . . . so they had the opportunity to go out immediately and investigate the claim. I'm sure there [are] pictures of the road that were taken by the engineer immediately after it happened.
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> So I believe the purpose of the notice to give the governmental agency an opportunity to investigate the claim while it was still fresh was accomplished and also the opportunity to remedy the defect.

Regarding the witnesses, the court said:

> So the question is, who actually is a witness? Is it anybody in the vicinity who is a witness that's required to be named, or is it just people who actually witnessed the accident? And there [are] different cases that discuss the definition of a witness, but I believe the interpretation that a witness must actually see the accident and possibly what caused it would be the witnesses to be named.
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> There [are], you know, scheduling orders and other requirements for witness lists being named later during the course of litigation. But the witnesses from the police report and the two people who were on motorcycles directly behind Plaintiff, I believe, [were] sufficient. They were present at the time of the accident, and they actually witnessed the accident. And they're the ones known to Plaintiff at the time, according to Plaintiffs' affidavit.

The trial court denied defendant's motion. This appeal followed.

Defendant contends, and the majority agrees, that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity.

II. STANDARD OF REVIEW

We review de novo both the applicability of governmental immunity and a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Roby v Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2006). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions,

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slip and go down were Jerry and Michelle Battaglia. Plaintiffs' counsel noted at the hearing that his office included the other names in the notice because they had been included in the police report.

admissions, or other documentary evidence submitted by the parties." *Pierce v City of Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005). "To overcome a motion brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Roby*, 274 Mich App at 28-29. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Pierce*, 265 Mich App at 177.

III. ANALYSIS

A. HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY

Absent the applicability of a statutory exception, the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides a broad grant of immunity from tort liability to government agencies that are engaged in the discharge or exercise of a governmental function. MCL 691.1407(1); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). Yet, there are various exceptions to governmental immunity, one of which is the highway exception. MCL 691.1402. Pursuant to this exception, if a person suffers harm caused by a government agency's failure to keep a highway in reasonable repair so that it is reasonably safe for travel, the injured party may recover the damages suffered. MCL 691.1402(1).

B. REQUISITE NOTICE PURSUANT TO MCL 691.1404(1)

As a precursor to a recovery against a governmental agency, an injured person must provide notice to the government agency pursuant to MCL 691.1404(1), which states:

> 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*. [Emphasis added.]

This Court has recognized that "[t]he principal purposes to be served by requiring notice are simply (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 v Dep't of Transp*, 286 Mich App 168, 176-177; 779 NW2d 263 (2009); see also *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997) ("Notice provisions permit a governmental agency to be apprised of possible litigation against it and to be able to investigate and gather evidence quickly in order to evaluate a claim.").

As the Michigan Supreme Court has recognized, "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). Accordingly, it must be enforced as written. *Id.* at 200, 219. If the notice fails to meet the statutory requirements, plaintiffs' claim must fail, regardless of whether it resulted in actual prejudice. *Id.* The Court recently reinforced its holding in *Rowland*, affirming "the core holding of *Rowland* that such statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is

permitted to avoid a clear statutory mandate." *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012). However, this Court has recognized the following additional precedent from our Supreme Court:

> [W]hen notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect. . . . [T]he requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice . . . . [A] notice should not be held ineffective when in *substantial compliance* with the law . . . . [*Plunkett*, 286 Mich App at 176-177 (footnotes and quotation marks omitted), citing *Brown v Owosso*, 126 Mich 91, 94-95; 85 NW 256 (1901); *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969); *Ridgeway v Escanaba*, 154 Mich 68, 73; 117 NW 550 (1908).]

At issue in this case is whether plaintiffs are entitled to continue to pursue their claims against defendant, predicated on whether they satisfied the notice statute.

1. NAMES OF THE WITNESSES KNOWN AT THE TIME BY THE CLAIMANT

Defendant first contends that plaintiffs failed to comply with MCL 691.1404(1) because they did not provide in their notice all of the witnesses known to the claimants within 120 days of their accident. Specifically, defendant contends that plaintiffs should have provided the names of four individuals who accompanied plaintiffs on their motorcycle ride on the day of the accident: Daniel Dryer, Vicki and Jim Dinverno, and Doug Smith. These individuals were all riding ahead of plaintiffs at the time of the accident. Thus, the accident happened *behind* them. They did not become aware of the accident until after they heard a loud impact, noticed "stuff flying all over the place," or saw bikes going down in their rear-view mirrors.[3] Nevertheless,

[3] The witnesses at issue were deposed in May, 2011, nearly two years after the accident. Dryer testified that he "heard like an explosion," looked in his rear-view mirror for only "just a split second" and saw plaintiffs' bike "standing straight up in the air and smoke and stuff flying all over." Vicki Dinverno, who was riding on the back of her husband's motorcycle, testified that she only heard a crash and then hit her husband on the back and told him to turn around. Jim Dinverno testified that "all of a sudden we—the wife and I heard this terrific horrible sound. It sounded like two trains colliding, and you know, I slammed on the brakes, looked in my mirror, and all I saw was stuff flying all over the place." Smith testified that he looked in his rearview mirror and "all I see is bikes going down." Defense counsel specifically asked, him, "did you see the actual accident take place or you just saw the bikes, the aftermath of it?" Smith responded, "[t]hey were going down but I'm obviously focused on keeping my bike up also…. So it's a quick glance, oh, shit, a quick glance, and then you realize what's going down."

defendant claims that they should have been named because "[t]hese unnamed witnesses, when deposed, testified about:

> (1) the observable physical condition of the Karwackis *immediately after* the accident; (2) statements made by the Karwackis *after* the accident pertaining to the extent of their injuries and also concerning how the accident occurred; (3) the weather conditions at the time of the accident; (4) the Karwacki motorcycle flying in the air *after* striking the oncoming car; and (5) the observable condition of the road where the accident took place. One witness even took photos of the accident scene (emphasis added)."

Defendant argues that because MCL 691.1404(2) authorizes an agency to examine a claimant and his witnesses under oath regarding the claim, the amount thereof, and the extent of the injury, this described subject matter necessarily defines who constitutes "witnesses" for purposes of MCL 691.1404(1), i.e., anyone with information relevant to any of these topics.

Plaintiffs contend that the term "witnesses" as set forth in MCL 691.1404(1) means those individuals who actually witnessed the accident caused by the alleged highway defect. Plaintiffs note that defendant's "completely self-created and self-serving definition" of the type of witnesses to be named has no outer limit, and that there is not one Michigan case on record that has required these types of persons to be included in a notice.

The Legislature has not defined the term "witnesses" for purposes of MCL 691.1404(1). However, this Court in *Rule v Bay City*, 12 Mich App 503, 506-507; 163 NW2d 254 (1968), addressed when a person is a witness in the context of MCL 691.1404(1). The plaintiff in *Rule* alleged that she sustained injuries because of a fall caused by "a short section of pipe being left rising vertically" from a concrete sidewalk. *Rule*, 12 Mich App at 505. The plaintiff fell within one foot of a car in which her daughter was sitting; according to the plaintiff, her daughter saw the fall but "couldn't see what caused the fall." *Id.* at 506. Although the plaintiff provided the defendant, Bay City, with a notice of intent to file her claim, she did not list any witnesses in her notice. *Id.* Notwithstanding the plaintiff's testimony that her daughter was at the scene of the accident and saw her fall, this Court held that the testimony was inadequate to establish that the plaintiff's daughter was a witness. *Id.* We explained, "[t]he mere presence of a person at the scene of an accident does not make that person a witness." *Id.* at 506-507. The necessary implication from this Court's holding in *Rule* is that to be considered a witness for purposes of the notice statute, a person must possess more than mere knowledge of relevant facts concerning the claim, including on scene or aftermath observations; rather, the person must have actually witnessed the accident itself.

This Court's interpretation of the word "witnesses" for purposes of MCL 691.1404(1), as set forth in *Rule*, has been good law for the past 45 years.[4] This interpretation is also consistent

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Defendant has not submitted any evidence to establish that at the time plaintiffs filed their notice they were aware that any of these individuals had seen either the actual accident or the aftermath.

[4] The majority asserts that plaintiffs misplace their reliance on *Rule* because the *Rule* Court "placed its emphasis on whether a witness saw the source of the accident, not the mere fact that the witness saw the actual fall[,]" and that "the omitted witnesses [in this case] provided

with the purpose of the notice statute, which is to give the government agency an opportunity to investigate the accident while the matter is still fresh and the witnesses that are available and to repair any existing defect. See *Plunkett*, 286 Mich App at 176-177; *Blohm*, 223 Mich App at 388. The notice statute is not intended to accelerate the litigation process—before it has begun—and require a potential future plaintiff to rattle off the names of every person who may possess information that may be relevant in a potential future lawsuit. As noted above, the requirement should not receive so strict—or broad—a construction as to make it difficult for the average citizen to draw a good notice. See *Plunkett*, 286 Mich App at 176-177. The plain meaning of the word "witnesses" must be construed in accordance with an average citizen's understanding of that word—being a person who witnessed the accident—not a lawyer's term of art to define all individuals who may be called to testify at trial with relevant information.

The majority's expansion of the meaning of the word "witnesses" in MCL 691.1404(1) blows the doors off the last 45 years of Michigan law. Now, a claimant stands to have his case dismissed if he fails to name anyone he is aware of (at the time he files his notice) who possesses any information relevant to a future personal-injury lawsuit arising out of the accident.[5] This

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testimony about conditions surrounding the possible causes of plaintiffs' accident." The majority's assertion is unavailing. There is a significant difference between (1) merely seeing a condition that a claimant alleges caused an accident and (2) actually seeing the accident. Under *Rule*, a person is a witness for purposes of MCL 691.1404(1) only in the latter scenario. See *id.* The individuals who defendant alleges should have been included in plaintiffs' notice were not witnesses for purposes of MCL 691.1404(1) simply because they saw the crack filler on M-36, caught a glimpse of flying debris in the aftermath of plaintiffs' fall to the pavement, or can attest to some other condition present on the day of the accident. If they are deemed witnesses for this reason, then any person at the scene of the accident who plaintiffs knew was present would be a witness for purposes of MCL 691.1404(1) because he or she would know something about some condition at the scene. This is inconsistent with *Rule* where even though the plaintiff's daughter was at the scene of the fall, the daughter was not a witness because "[t]he mere presence of a person at the scene of an accident does not make that person a witness." *Id.* at 506-507.

[5] Although the majority attempts to rationalize its findings by noting that its holding pertains only to the four individuals in this case who were riding with plaintiffs and saw *or heard* parts of the aftermath of whatever caused the accident, they are nevertheless expanding the scope of the meaning of the word "witnesses" to include persons other than eyewitnesses to the accident, in contravention of *Rule*. The observations by the individuals at issue were no different in character than the daughter in *Rule*, who observed her mother falling to the pavement while she sat in a car a foot away. Not even defendant claims that these individuals witnessed any of the accident but for the aftermath. Moreover, the majority broadly includes in their definition of those who must be named any individuals "with relevant information about the accident" "or its causation" and gives as examples people who observed the condition of the roadway immediately prior to the accident, what may have caused the accident (e.g., another rider's own experience when riding over the section of roadway at issue prior to the accident), what may not have caused the accident (e.g., whether there was debris or some other dangerous condition was on the roadway), the immediate aftermath, and after-the-fact photographers. These reasons for deeming a person a witness for purposes of MCL 691.1404(1) cast a wide net for who should arguably be included in a notice. It is notable that the majority's definition of the word witnesses for purposes of

would include emergency-response personnel, police investigators, ambulance drivers and paramedics, emergency-department care providers, doctors and nurses, rehabilitation providers, employers, friends, relatives, and others who the claimant knows have viewed his injuries, the accident scene, or with whom he has discussed the accident or his injuries. Even a weatherman known by a claimant to have reported the weather for the time and location of the accident would have knowledge regarding the conditions of the accident that might be helpful to the government agency and, thus, would arguably qualify as a witness. Under the majority's overly broad assessment of who constitutes a witness for purposes of the notice requirement, it would be nearly impossible for a claimant to account for every known witness within 120 days from the time of injury; the majority's unreasonable construction of the notice requirement would lead to the unwarranted dismissal of lawsuits that are premised on the highway exception to governmental immunity. See, generally, *Turner v Mercy Hosps & Health Servs of Detroit*, 210 Mich App 345, 349-350; 533 NW2d 365 (1995) (stating that affording plaintiffs a reasonable opportunity to bring lawsuits is an important public policy). Statutory notice provisions require claimants to exercise *ordinary* diligence—not extraordinary diligence. *Rowland*, 477 Mich at 211, quoting *Ridgeway*, 154 Mich at 72-73.

Notifying governmental agencies of known witnesses to the accident allegedly caused by a defective highway is not only consistent with this Court's opinion in *Rule* but also best accomplishes the purpose of MCL 691.1404(1). It ensures that the notice requirements of MCL 691.1404(1) do not become an impracticable hurdle causing the unreasonable dismissal of claims but also imposes a reasonable obligation on claimants. An obligation to disclose the names of any person whom a claimant knows witnessed the accident is tailored to facilitate an agency's timely investigation of the incident.

Therefore, I respectfully dissent in part and would hold that plaintiffs complied with the notice requirements of MCL 691.1404(1) within the applicable 120-day period.

2. NATURE OF THE DEFECT

Defendant also argues that the trial court erred when it denied summary disposition on plaintiffs' added claim regarding rutting of the pavement at the site of their motorcycle accident. I agree with the majority that plaintiffs may not pursue a claim based on an alleged rut defect.

At the expiration of the 120-day period provided for in MCL 691.1404(1), plaintiffs had provided defendant with satisfactory notice of their intent to file a claim, describing the exact nature of the defect in the highway as the application of "far too much crack filler than is reasonable and proper for the cracks that were in the highway at the place where the accident occurred." Rutting is not mentioned at any point in plaintiffs' notice. Although this Court's decision in *Plunkett*, 286 Mich App at 178-179, illustrates that plaintiffs were not required to expressly use the term "rutting" to provide notice of such a defect, nothing in the notice can be read as even a laymen's description of rutting to reasonably apprise defendant of such a defect in the highway. Defendant had every opportunity to evaluate plaintiffs' contention that it used too

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MCL 691.1404(1) is even broader than a police investigator's for purposes of investigating the cause of an accident, as even naming all of people who the police deemed to be relevant witnesses was not good enough, according to the majority's interpretation.

much crack filler to fill cracks in the highway at the accident site, but it had no timely notice or opportunity to investigate an alleged rutting problem, which is a separate and distinct claimed defect.[6] Therefore, I agree with the majority's conclusion that plaintiffs are precluded from pursuing a claim on the basis of rutting where notice of rutting was not afforded to defendant within 120 days of the occurrence of plaintiffs' injuries.

In sum, I would affirm the trial court's denial of defendant's motion for summary disposition and allow plaintiffs to proceed with their claims against defendant except for any allegation that the highway was defective due to excessive rutting.

/s/ Jane M. Beckering

[6] A rut is defined as "a track worn by a wheel or by habitual passage." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 1092.