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	UNPUBLISHED August 29, 2013 No. 308772 Court of Claims LC No. 10-000020-MD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.

PER CURIAM.

Defendant appeals as of right the trial court order denying its motion for summary disposition regarding the notice requirements under the highway exception to governmental immunity, MCL 691.1404. We reverse.

I. FACTUAL BACKGROUND

Plaintiffs William and Kathryn Karwacki and several of their friends were traveling in a group of motorcyclists from Lansing to Hell, Michigan, along M-36. Plaintiffs rode together on one motorcycle and William was driving. As they were rounding a curve, William lost control of the motorcycle. Both plaintiffs were thrown from the motorcycle, which slid into the oncoming lane, struck an approaching vehicle, and then rebounded back into the original lane in which they were traveling.

Both plaintiffs were injured, and the police eventually arrived at the scene to take a report. The report listed the names of plaintiffs, the driver of the car that was struck, two motorcyclists directly involved in the accident (Michelle and Jerome Battaglia), and two motorcyclists who witnessed the accident but who were not directly involved (Kenneth Johnson and Bryan Lorion). At the crux of this appeal is that there were four other motorcyclists who were acquaintances of, and riding with, plaintiffs, but whose names did not appear in the police report or the notice plaintiffs subsequently submitted to defendant.

Pursuant to MCL 691.1404, plaintiffs sent defendant a written notice of their intent to file a claim. The notice described the location of the defect as "Place: M-36 .15 mile west of Kathryn, Unadilla Township, MI." The notice included the following identification of 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." Lastly, the notice provided the following description of the 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 . . . . Defendant had a duty to repave the surface of the highway rather than to saturate most of its surface with crack filler as it did."

Plaintiffs filed a complaint in the Court of Claims, essentially restating the allegations in the written notice. Plaintiffs' expert, however, then visited the scene and opined that "excessive rutting" may have been the proximate cause of the accident. Thus, plaintiffs filed a motion to amend their complaint. The trial court granted plaintiffs' motion, and plaintiffs filed a second amended complaint, alleging that excessive crack filler and rutting of the pavement caused the accident.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Defendant asserted that plaintiffs did not provide timely notice of the exact location and nature of the rutting and failed to name four witnesses known to plaintiffs at the time of the accident. The trial court disagreed with defendant, denying its motion for summary disposition. Defendant now appeals.

II. NOTICE REQUIREMENTS

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition, as well as "the proper interpretation and application of statutes such as the highway exception to governmental immunity." *Yono v Dep't of Transp*, 299 Mich App 102, 106; 829 NW2d 249 (2012).

B. Witnesses

A government agency is generally immune from tort liability when engaged in the discharge of a governmental function. MCL 691.1407(1). 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). A precursor to recovery, however, is that the 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) ("[n]otice 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 results 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).

The first issue in the instant case is the requirement of MCL 691.1404(1) that a claimant must "specify . . . the names of the witnesses known at the time by the claimant." A recent illustration of this requirement is *Burise v City of Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009). The plaintiff in *Burise* injured herself while stepping into a pothole. *Id.* at 647. While she submitted her initial notice to the defendant pursuant to MCL 691.1404(1), she omitted the name of a witness who was with her when she fell. *Id.* at 648. This Court found that the plaintiffs' initial notice "did not comply with the requirements set forth in MCL 691.1404(1) because plaintiff did not disclose the name of a known witness[.]" *Id.* at 652. However, because the plaintiff submitted a subsequent notice disclosing the known witness within the 120 days allotted under the statute, dismissal was not required. *Id.*

Here, in contrast, plaintiffs failed to identify four witnesses known to them at the time in their initial notice and failed to correct this error within the statutory period. Although some of the omitted witnesses may not have seen the initial moment of impact, they saw and experienced the process of the accident, with some witnessing the trajectory of airborne debris, the directions in which the motorcycles went down and slid, the conditions at the moment of impact, and what may have caused the accident. Those unnamed witnesses had knowledge of the condition of the road as plaintiffs passed over it, namely, whether there had been debris or some other dangerous condition on it. For example, the motorcyclists' group leader, whom plaintiffs failed to list as a witness, testified that he felt a loss of control over his own motorcycle due to the tar strips at the spot where the plaintiffs crashed. Also, another unnamed witness took photographs of the accident. Thus, the four, each of whom were part of plaintiffs' traveling group and known to plaintiffs, were witnesses. As such, contrary to the trial court's conclusion, the four-fellow motorcyclists omitted from plaintiffs' notice were known witnesses who should have been disclosed pursuant to MCL 691.1404(1).

Plaintiffs contend that only those who actually saw the accident and/or were involved in the accident may be deemed a "witness." An initial flaw in this argument is that all of the omitted witnesses saw or heard some part of the accident. Furthermore, MCL 691.1404(1) does

not include the restrictions plaintiffs propose. The statute does not state that witnesses must observe the initial moment of impact or that they have to be involved in the accident. "It is a well-established rule of statutory construction that this Court will not read words into a statute." *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002). The limits plaintiffs propose do not exist in the plain language of MCL 691.1404(1), and are therefore unfounded. We also note that plaintiffs' proposed class of individuals is so narrow that it unreasonably excludes anyone who missed that initial moment of the contact with whatever was the cause of the accident.[1]

Furthermore, while plaintiffs argue that there is no "outer limit" to this definition of a witness, the statute itself provides the outer limit. According to MCL 691.1404(1), only the witnesses "known at the time by the claimant" must be identified in the notice. Plaintiffs were not required to conduct an investigation to identify every person who had driven on that road, who may have seen the accident, or who may have observed the conditions that caused the accident. Rather, only the witnesses known to plaintiffs were required to be disclosed under MCL 691.1404(1). While plaintiffs allege that the other four witnesses were not known to them, that assertion is groundless. The four omitted witnesses had known plaintiffs for a number of years and were all riding together to Hell, Michigan and one was the leader of the biker group. These omitted witnesses immediately stopped after the accident and rushed to plaintiffs' aid. Moreover, as discussed above, these witnesses had relevant information about the accident. Thus, plaintiffs' contention that these were not "known" witnesses is baseless.

The dissent's conclusion that our holding creates "a virtually impossible task for a claimant" is not accurate. Our interpretation of the statute will not require that future plaintiffs identify "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," including "the weatherman." The dissent's contention leads to an absurd result and would render the statute meaningless. The dissent relies on a narrow definition of the word "witness" so that it applies only to those who see the initial moment of impact, regardless of whether they witnessed any other portion of the accident. We reiterate that plaintiffs in the instant case were *not* required to identify each and every person who may have had any

[1] Moreover, while plaintiffs rely on *Rule v Bay City*, 12 Mich App 503, 506-507; 163 NW2d 254 (1968), that reliance is misplaced. In *Rule*, the plaintiff failed to disclose that her daughter had been in the automobile and had seen the plaintiff fall. *Id.* at 506. The Michigan Supreme Court held that "[t]he mere presence of a person at the scene of an accident does not make that person a witness" and the omission was not fatal to the claim because while the daughter saw the plaintiff fall, she could not see what "caused the fall." *Id.* at 506-507. Thus, contrary to the dissent's and plaintiffs' interpretation, the 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. As noted above, the omitted witnesses in the instant matter provided testimony about the conditions surrounding the possible causes of plaintiffs' accident. Further, while the dissent attempts to diminish the information obtained from these omitted witnesses, we again note that these witnesses observed the process of the accident, as they saw the condition of the road, flying debris, and falling motorcycles.

information about the accident, no matter how attenuated. Rather, our holding pertains only to the four witnesses in this case who were present and were witnesses to some part of the incident. These witnesses were known at the time to plaintiffs as they were riding in plaintiffs' biker group, and each saw some portion of the accident or its causation.

Significantly, MCL 691.1404(1) states that the "notice *shall* specify . . . the names of the witnesses known at the time by the claimant." (Emphasis added).[2] This Court has repeatedly recognized that "shall" denotes mandatory conduct. *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010). The Michigan Supreme Court also has held that the "notice requirement found at MCL 692.1404(1)" must be enforced "as written." *Jakupovic v City of Hamtramck*, 489 Mich 939, 939; 798 NW2d 12 (2011). Thus, we hold that the four omitted riders' names should have been provided in the notice and to the extent that the trial court concluded otherwise, it erred.[3]

C. Nature of Defect

Defendant next argues that the trial court erred when it denied summary disposition on plaintiffs' added claim of the rutting of the pavement. We agree.

As illustrated above, MCL 691.1404(1) requires that the notice "shall specify the exact location and nature of the defect . . . ." It is undisputed that plaintiffs' notice did not refer to rutting. The trial court, however, allowed plaintiffs to amend their complaint and found that they were not required to identify all possible legal theories in their notice of intent and that defendant "was put on notice that – so they had the opportunity to go out immediately and investigate the claim."

The trial court's holding was in error. While the trial court found that plaintiffs were not required to identify all legal theories in their notice, the specification of the exact nature of the defect is not a legal theory but is a statutory mandate. In mischaracterizing this issue, the trial court essentially found that a notice providing the identification of one defect gives the agency notice of *any* defect in the highway at that location. Neither case law nor the statute supports such an interpretation.

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[2] There is no requirement that the witness list shall be limited to only those witnesses listed in any corresponding police report.

[3] Considering the complete absence of these names from plaintiffs' notice, we find that the notice failed the substantial compliance standard articulated in *Plunkett*, 286 Mich App at 178. Consistent with *Burise*, 282 Mich App at 652, we find that the notice "did not comply with the requirements set forth in MCL 691.1404(1) because plaintiff did not disclose the name of a known witness[.]" Because we agree with defendant's understanding of MCL 691.1404(1), we decline to address its arguments relating to the meaning of the term "witness" derived from other subsections of the statute.

While plaintiffs rely heavily on *Plunkett*, *supra*, the notice in that case is distinguishable. In *Plunkett*, 286 Mich App at 175, the plaintiff identified the cause of her accident as a standing pool of water. In her presuit notice, she alleged that this pool of water "was caused by excessive and uneven wear, and/or lack of drainage due to uneven and unreasonable wear, and/or failure to maintain the roadway in a reasonably safe manner." *Id.* The defendant contended that the plaintiff's notice was insufficient because she did not specifically mention rutting or inadequate superelevation. *Id.* at 177. Yet, this Court held that the notice was sufficient because even though it did not specifically use the words rutting or superelevation, "[t]aken as a whole . . . it adequately described the location and nature of the defect[.]" *Id.* at 178.

At issue in the instant case, however, is not the failure to use the correct terms for rutting. Rather, plaintiffs explicitly identified a significantly different defect, namely, that defendant used excessive crack filler instead of repaving the highway. Nothing in the notice warned defendant that it should inspect the road for rutting. Moreover, even if rutting was apparent on the road, defendant had no reason to suspect that it caused the accident because plaintiffs specifically alleged that it was the crack filler that caused the accident. Thus, even under the substantial compliance standard set forth in *Plunkett*, 286 Mich App at 178, plaintiffs' notice still fails because it did not "reasonably apprise" defendant of plaintiffs' rutting claim.[4]

The trial court also referenced that defendant did not challenge the order allowing the amendment of the complaint, and plaintiffs argue that enforcing the notice provision in the instant case "flies directly in the face of Michigan's longstanding history of liberal allowance of amendments" and would "mean that a plaintiff could never, ever, amend a pleading to add an allegation of negligence against a governmental entity." Plaintiffs, like the trial court, are conflating the concepts of notice and legal theories for recovery.[5] While the notice provisions of MCL 691.1404(1) require a plaintiff to specifically describe the location and nature of the defect within the allotted time, that does not prevent a plaintiff from later amending a complaint to accommodate evolving legal theories as the basis for recovery. Moreover, provisions regarding amending complaints, such as MCR 2.118(A), provide that a trial court should grant amendments freely when justice requires. Yet, those are separate and distinct requirements, wholly unrelated to the notice requirement set forth in MCL 691.1404(1). The notice provisions

[4] Further, *Hussey v City of Muskegon Hts*, 36 Mich App 264, 270; 193 NW2d 421 (1971), is distinguishable because it required a showing of prejudice, which is no longer required, as recognized in *Rowland*, 477 Mich at 200. Additionally, *Jones v City of Ypsilanti*, 26 Mich App 574, 584; 182 NW2d 795 (1970), is unavailing because rather than specifically identifying a different defect, the claimant in *Jones* used broad terms to describe the defect as "defective sidewalk."

[5] Also, MCR 2.116(D)(3) states that the issue "of governmental immunity may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401."

preclude an action when there has been deficient notice, regardless of whether plaintiffs could have added a claim under amendment rules.[6]

III. CONCLUSION

Because plaintiffs failed to provide adequate notice pursuant to MCL 691.1404(1), we find that the trial court erred in denying defendant's motion for summary disposition. We reverse. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Riordan

[6] We also note that adopting plaintiffs' argument would eviscerate the notice requirement of MCL 691.1404(1). A plaintiff could specify the exact location and nature of a potential defect and then purposefully take advantage of the liberal amendment rules to add claims for additional defects, outside of the statutory notice period, thereby subverting notice requirements.