STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH BARNOSKY, Plaintiff-Appellant,	UNPUBLISHED July 30, 2013
v	No. 310311 Wayne Circuit Court
CITY OF WYANDOTTE, Defendant-Appellee.	LC No. 12-001669-NO

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant in this slip and fall action. We affirm.

STATEMENT OF FACTS

Plaintiff sued the City of Wyandotte for damages from injuries suffered in a slip and fall accident on a city sidewalk. On February 8, 2009, plaintiff was walking down the sidewalk along Vinewood when she lost her balance, fell, and suffered a compound fracture of her right wrist that required open surgery to set the bones and the use of implants to facilitate healing.

On February 21, 2009, plaintiff's counsel sent a notice of her injury and claim to defendant via certified mail. The notice stated in pertinent part:

> This letter is being sent pursuant to MCL 102.1 for the required 60 day written notice of an injury caused by defective sidewalk and/or failure to maintain said sidewalk free from obstruction, ice or snow. Specifically Ms. Barnosky fell due to the above mentioned sidewalk defect or hazardous condition on February 8, 2009, on Vinewood near the Bacon Memorial Library.
> It is my understanding that this matter has already been referred to the City's liability carrier, Travelers Insurance. Please advise same of this letter of representation. Feel free to contact me with any questions.

The reference to prior contact with the liability carrier was memorialized by a "Claim Acknowledgment" form completed by an employee of defendant's insurance carrier following a telephone call from the plaintiff on February 8, 2009. Under description of accident, the form

states: "Clmt, Debbie Barnowski, allegedly slipped on ice on sidewalk and fell, fracturing her wrist." Under "accident location" the form states: "Bacon Memorial Library Wyandotte, MI".

On February 7, 2012, the last date within the statute of limitations, Plaintiff filed suit against Wyandotte under the highway exception to governmental immunity, MCL 691.1402a. The next month, defendant moved for summary disposition, asserting that plaintiff's claim was barred because she had failed to comply with the notice requirements of MCL 691.1404(1). The circuit court granted defendant's motion and this appeal followed.

ANALYSIS

Plaintiff argues the trial court erred in concluding that plaintiff's statutory notice was deficient because her notice specified the location and nature of the defect in compliance with MCL 691.1404(1). We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Snead v John Carlo, Inc*, 294 Mich App 343, 353; 813 NW2d 294 (2011). Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) and the trial court granted defendant's motion. However, defendant's motion should have been brought pursuant to MCR 2.116(C)(7), which states that an order granting a motion for summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law . . . " *Snead*, 294 Mich App at 354 (citation omitted). "If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart." *Detroit News, Inc v Policemen and Firemen Retirement System of City of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002) (citation omitted). Thus, this Court reviews defendant's motion as if it were brought pursuant to MCR 2.116(C)(7).

Governmental immunity is a question of law that is reviewed de novo. *Willett v Charter Tp of Waterford*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Under a motion for summary disposition pursuant to 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, admissions, or other documentary evidence submitted by the parties." *Id*. (citation omitted). If no material 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 government immunity is an issue of law. *Id*. If a pertinent factual dispute exists, summary disposition is not appropriate. *Snead*, 294 Mich App at 354.

"The government tort liability act, MCL 691.1401 *et seq.*, provides broad immunity for governmental agencies when they are engaged in governmental functions." *Burise v City of Pontiac*, 282 Mich App 646, 652; 766 NW2d 311 (2009). However, there are exceptions to governmental immunity, which are to be narrowly construed. *Id*. Under the highway exception, a governmental agency having jurisdiction over a particular highway has a duty to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. MCL 691.1402(1); *Thurman v City of Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012). This includes sidewalks. *Id*.

Nevertheless, before the highway exception can apply, the plaintiff must timely notify the governmental agency of the injury and highway defect. *Burise*, 282 Mich App at 652-653. MCL 691.1404(1) 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, 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.

The Supreme Court has determined that this statute is "straightforward, clear, unambiguous, and not constitutionally suspect[,]" and "must be enforced as written." *Rowland v Washtenaw Co Rd* Comm, 477 Mich 197, 219; 731 NW2d 41 (2007). The notice need not be provided in a particular form, rather, it is sufficient if it is timely and contains the requisite information. *Plunkett v Dep't of Transportation*, 286 Mich App 168, 176; 779 NW2d 263 (2009). "[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," and thus, "a liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman from some technical defect." *Id*. In addition, "notice" may be comprised of more than one document or type of document taken together and viewed as a whole. *Id*. at 178 (concluding that plaintiff's statement of the defect combined with the police report's description of its location constituted sufficient notice). "The 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." *Id*.

In the instant case, plaintiff's notice failed to sufficiently specify the location and nature of the defect, as required by MCL 691.1404(1). The Claim Acknowledgement Report memorializes the claimant's statement that the accident happened at "Bacon Memorial Library" but offers no additional description. The February 21, 2009 letter states that the location was "on Vinewood near the Bacon Memorial Library." However, this does not inform the recipient which block of Vinewood it occurred on, i.e. whether the block directly in front of the library or another "near[by]" block nor which side of the street it occurred on.

Moreover, the letter did not describe the nature of the defect, leaving readers of the notice to wonder whether plaintiff attributes her injury to a structural defect of the sidewalk (and if so, what kind), or an accumulation of ice and snow, or both. 176-177.

In *Thurman*, 295 Mich App at 383, the plaintiff notified the defendant in writing that he tripped on an allegedly defective sidewalk while "walking east on Huron Street" and that his injury occurred at "35 Huron, Pontiac, Michigan." This Court reversed the lower court's denial of the defendant's motion for summary disposition, and held that the plaintiff's notice did not specify the exact location of the alleged defect within the meaning of MCL 691.1404(1). *Id*. at 386-387. The plaintiff's notice did not specify whether the defect was on 35 East Huron Street or 35 West Huron Street, both of which were actual addresses in the city of Pontiac. *Id*. at 386. Moreover, the plaintiff's notice did not specify whether the defect was on the north or south side of Huron Street. *Id*. Therefore, the defendant was entitled to summary disposition. *Id*. at 387

We conclude that this case is similar to and controlled by *Thurman*. We reject plaintiff's argument that a photo submitted with her brief to the trial court, showing an area of sidewalk that appears to have been replaced at some point demonstrates that defendant was able to locate and repair the defect as a result of plaintiff's notice letter. First, plaintiff has not offered any evidence to support the claim made by her counsel that the section of sidewalk that has since been repaired is the location of her fall. Second, plaintiff has not offered any evidence to support her claim that it was her notice that resulted in the city replacing this section of the sidewalk. As this Court has held, "[s]ince the notice must describe the place of injury sufficiently to make it identifiable from the notice itself, it is immaterial whether or not the city has repaired the defect." *Dempsey v City of Detroit*, 4 Mich App 150, 152; 144 NW2d 684 (1966).

The lower court properly granted defendant's motion for summary disposition because plaintiff's notice did not sufficiently identify the location and nature of the defect as required by MCL 691.1404(1).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause