

STATE OF MICHIGAN
COURT OF APPEALS

YAHIABIN ALQASU,
Plaintiff-Appellant,

UNPUBLISHED
October 22, 2013

v

CITY OF DEARBORN,
Defendant-Appellee.

No. 310639
Wayne Circuit Court
LC No. 12-000647-NO

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

FORT HOOD, J. (*dissenting.*)

I respectfully dissent. I would reverse the trial court's order granting summary disposition and remand for further proceedings.

The parties agree that plaintiff's lawsuit is subject to the statutory notice requirement in MCL 691.1404, which 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.

Before filing this action, plaintiff's counsel provided defendant with pre-suit notice of the occurrence of plaintiff's injury and the defect. The notice stated, in pertinent part:

To satisfy this statutory notice please be advised of the following:

1. *The Exact Location of the Defect*

The incident occurred behind the Al Saad whose address is 10047 Dix Ave., Dearborn MI 48120 at the back alley way entrance. The depression is located on the south side of the driveway on Canterbury Street.

2. *The Exact Nature of the Defect*

The depression is located in the ground next to the curb of the

driveway behind the meat market. The ground begins to slope starting about 7 feet away and is 3 feet wide. Mr. Alqausu could not see the depression because it was covered in snow.

It is undisputed that the address for the Al Saad market is actually 10047 Vernon Highway, not 10047 Dix Avenue. Defendant moved for summary disposition on the ground that plaintiff failed to comply with the statutory notice requirement because his pre-suit notice contained an incorrect address for the location of the defect. The trial court agreed and granted defendant's motion.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). "[T]he determination regarding the applicability of governmental immunity and a statutory exception to governmental immunity is a question of law that is" reviewed de novo on appeal. *Snead v John Carlo, Inc.*, 294 Mich App 343, 354; 813 NW2d 294 (2011). Statutory interpretation is a question of law that is reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200; 731 NW2d 41 (2007), our Supreme Court addressed the notice requirement of MCL 691.1404 and held that the "plain language of the statute should be enforced as written[.]" The Court overruled cases holding that "absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception." *Id.* More recently, in *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012), the Supreme Court reaffirmed "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."

At issue in this case is whether plaintiff's pre-suit notice sufficiently specified "the exact location . . . of the defect" where it contained an incorrect address, but contained other information to indicate the location of the injury. I would conclude that the notice provided by plaintiff was sufficient to meet the "exact location" requirement of the statute.

The notice required by MCL 691.1404 "need not be in any particular form." *Thurman v City of Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012). In determining the sufficiency of notice of a claim, the whole notice and all facts stated therein may be considered. *Rule v Bay City*, 12 Mich App 503, 507-508; 163 NW2d 254 (1968). With respect to the "exact location" requirement, a description that places the defect somewhere near the intersection of two roads is too vague to identify the place of injury and to comply with the statute. *Dempsey v Detroit*, 4 Mich App 150, 151-152; 144 NW2d 684 (1966). A description that gives an incorrect address

without other means of identifying the location is also deficient. *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011)¹; *Thurman*, 295 Mich App at 386.

In this case, plaintiff's notice indicated that the defect was located "behind the Al Saad whose address is 10047 Dix Ave., Dearborn MI 48120 at the back alley way entrance," and further indicated that the nature of the defect, a depression, "is located on the south side of the driveway on Canterbury Street." The notice went on to describe the depression as "located in the ground next to the curb of the driveway behind the meat market." Although plaintiff gave the incorrect street name for the address of the market,² plaintiff provided further information that tied the given address to an identified business, and further narrowed the location to the south side of the entrance to the back alley off Canterbury Street behind that business. The street name accompanying the market is not the exact location of the defect and has no bearing on the location of the injury. Defendant does not allege that plaintiff failed to appropriately identify the address of the alley or that an address for the alley exists. Because plaintiff supplemented the incorrect street address with specific information for locating the defect, I would conclude that plaintiff's notice was sufficient to satisfy the exact location requirement of the statute. Regardless of which street the business fronts on, the notice indicated that the defect was located behind the building and further limited the location to a particular area behind the building. This case is distinguishable from *Jakupovic* and *Thurman* in which no such additional information was provided. Moreover, the proper street name did not directly correlate to the place of the defect, but rather, was included to place the exact location of the defect in context. Accordingly, I would reverse the trial court's order granting defendant's motion for summary disposition.

/s/ Karen M. Fort Hood

¹ Although this is only an order of the Supreme Court, such orders constitute binding precedent when the rationale can be understood. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002).

² The Al Saad market is located at the intersection of Vernor Highway and Canterbury Street, at a point where Dix Avenue transverses the intersection at an angle. The post office address for the market is 10047 Vernon Highway.