

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHELE BOTSFORD,

Plaintiff-Appellee,

v

CHARTER TOWNSHIP OF CLINTON,

Defendant-Appellant,

and

CHARTER TOWNSHIP OF CLINTON  
BUILDING AUTHORITY,

Defendant.

UNPUBLISHED

March 20, 2007

No. 272513

Macomb Circuit Court

LC No. 05-004024-NO

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Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant Charter Township of Clinton (township) appeals as of right the trial court order denying its motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiff alleged that she was injured when she tripped and fell in a plaza or terrace area and that the fall was caused by a gap between cement slabs or flags that caused an uneven grading of the walking surface. This alleged walkway defect was located near the top of a stairway leading to the entrance-exit of the 41-B District Court, which is housed in a public building under the control of the township. Plaintiff claimed that governmental immunity did not insulate the township from liability under the public building exception to governmental immunity, MCL 691.1406. The trial court rejected the township's argument that it was entitled to summary disposition on the basis of governmental immunity because of, in part, plaintiff's failure to strictly comply with the pre-litigation notice provision found in MCL 691.1406. We affirm.

Plaintiff filed her action on October 11, 2005. In the complaint, plaintiff alleged that on April 2, 2004, she tripped and fell on a defective cement section of walkway in the area of the building's outdoor stairway, thereby injuring herself, as she was proceeding to enter the courthouse. Plaintiff maintained that there exists a series of cement steps that lead up to cement slabs or flags that are traversed when accessing the building. She asserted that the cement steps

and slabs are physically attached to and abut the building, and they must be utilized for purposes of ingress and egress. With respect to the alleged defect, plaintiff asserted:

17. That at the top of the steps there was a large gap between cement slabs causing a bi-level grading of the walking surface.

18. That at all times pertinent hereto, the difference in elevation between the cement slabs is a dangerous and/or defective condition.<sup>1</sup>

Before the litigation was commenced, plaintiff's counsel prepared and sent a notice of intent to file a claim pursuant to MCL 691.1406, which was addressed to the "Clerk of the Court, 41 B District Court, 40700 Romeo Plank Road, Clinton Twp., MI 48038-2951." The cover letter accompanying the notice is dated July 14, 2004, and the notice is stamped as being received on July 20, 2004, by the "41B District Court, Clinton Twp. Div." The notice provided in relevant part:

Please be advised that on the above date [April 2, 2004], Michele Botsford tripped and fell on the entrance stairs attached to and a part of the building known as 41 B District Court . . . .

The nature of the defect is raised cement at the top of the stairs. Ms. Botsford sustained injuries to her right hand, right middle finger, possible torn ligaments and capsule and possible nerve damage.

There are no known witnesses at this time.

In a notice dated July 29, 2004, plaintiff's counsel sent an identical notice to the one described above, except that it was addressed to the "Clinton Township Building Authority, 41 B District Court," with the street address remaining unchanged. The document is stamped as being received on July 30, 2004, by, as before, the "41B District Court, Clinton Twp. Div."<sup>2</sup>

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<sup>1</sup> Plaintiff subsequently submitted an affidavit from an architectural expert who averred that the height variation was 5/8 of an inch and constituted a defect because it created a trip point at the top of the stairs in an area highly trafficked by pedestrians. This expert viewed the premises in March of 2006, nearly two years after the accident. He further averred that the area of the defect had been in a state of disrepair for many years, not months. The township submitted the affidavit of an engineering expert who concluded that the deviation was slightly more than half an inch. This affidavit was signed on May 1, 2006. The engineer opined that, because there had been two freeze/thaw cycles since the accident two years earlier in April 2004, the true extent and amount of the deviation at the time of the accident, if the alleged defect even existed then, could not be determined. These affidavits will be discussed in more detail below.

<sup>2</sup> In a fax from the township's finance director to the township's insurance agent, dated July 26, 2004, it provides, "Following is a claim related to a fall at the Civic Center Court entrance. I have inspected the area in question and see no defective condition with the stairs or adjoining concrete. Please forward . . . for settlement or other disposition." The finance director testified (continued...)

The township filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff could not sustain and establish her claim under the public building exception to governmental immunity because (1) the notice required by MCL 691.1406 regarding a defective condition, although submitted, was not in conformity with the statute nor properly served on the township, resulting in prejudice to the township, (2) there was no evidence from which one could infer that a defect actually existed at the time of the fall, (3) plaintiff did not adequately identify the location of the incident by way of the documentary evidence, and because (4) the documentary evidence failed to establish an exception to governmental immunity. With respect to the specifics concerning the claimed defects in the notice, we shall address those below in our analysis as the same arguments are presented to us for resolution.

The focus of the hearing on the township's motion for summary disposition was the alleged defective notice. The trial court denied the township's motion, finding that proper notice was given and that, regardless, the township could not establish actual prejudice, assuming deficient notice. The trial court did not specifically address issues other than those related to the notice requirement contained in MCL 691.1406.

On appeal, the township contends that plaintiff failed to comply with the applicable notice provision contained in MCL 691.1406 by failing to identify the exact location of the claimed defect, by misidentifying the location of the occurrence as being on the stairs and not the concrete patio at the top of the stairs, by failing to identify which one of the several staircases abutting the building was being ascended at the time of the fall, by failing to identify whether plaintiff was ascending the left, center, or right side of whatever staircase was being used, and by furnishing notice to the district court as opposed to the correct entity, that being Clinton Charter Township.<sup>3</sup> Outside the context of the notice issue, the township maintains that plaintiff failed to submit competent evidence establishing the existence of a defective condition at the time of injury and failed to identify the location where the fall occurred.

This Court reviews de novo a trial court's ruling on a motion for summary disposition based on governmental immunity and brought pursuant to MCR 2.116(C)(7). *Tarlea v Crabtree*,

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(...continued)

that personnel of the 41-B District Court gave him the first notice sent by plaintiff's counsel. The finance director also received the second notice. He additionally testified that he looked around the building in the area of the stairways and could find no defect. The finance director indicated that the township's building authority technically owns the building, but the township leases it and is responsible for its upkeep. He further maintained that he has handled the township's insurance and lawsuits for over 26 years.

<sup>3</sup> In plaintiff's deposition, she testified that, at the time of the fall, she had proceeded up the stairway in front of the court entrance; she could not recall whether she ascended the stairs by walking straight up the middle of the stairway or to the left or right; she reached the top of the stairs and took about two steps before tripping; her foot had hit something on the ground (alleged defect) that tore her tennis shoe off; she threw herself sideways as she fell in order to protect her daughter, whom she was carrying; and that she extended her arm and hand to brace the fall as she hit the ground, thereby injuring her hand and fingers. Plaintiff later testified that it was a piece of raised cement that caused her to trip and fall.

263 Mich App 80, 87; 687 NW2d 333 (2004). Under MCR 2.116(C)(7), we are required to consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). This Court must consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no factual dispute, whether a plaintiff's claim is barred by governmental immunity is a question of law for the court to decide. See *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

A governmental agency is generally immune from tort liability when it is engaged in the exercise or discharge of a governmental function, subject to various exceptions. MCL 691.1407(1). The exception in MCL 691.1406 provides in pertinent part:

Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place. *As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible 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 notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. [Emphasis added.]*<sup>4</sup>

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<sup>4</sup> In general, to fall within the confines of the public building exception, a plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and that (5) the governmental agency failed to remedy the alleged defective condition after a reasonable

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MCL 691.1407 confers broad immunity, and the public building exception under MCL 691.1406 is to be narrowly drawn. *De Sanchez v Dep't of Mental Health*, 467 Mich 231, 237; 651 NW2d 59 (2002). That being said, with regard to mandatory notice provisions, including that found in MCL 691.1406, substantial compliance is sufficient. *City of Livonia v Dep't of Social Services*, 423 Mich 466, 513; 378 NW2d 402 (1985); *Meredith v City of Melvindale*, 381 Mich 572, 579-580; 165 NW2d 7 (1969); *Dreslinski v Detroit*, 37 Mich App 187, 188; 194 NW2d 551 (1971).

The township's arguments regarding compliance with the notice provision found in MCL 691.1406 lack merit. First, with respect to the township's claim that plaintiff incorrectly furnished the notice to the district court, the second notice, which was still timely, was addressed to the Clinton Township Building Authority. While apparently district court personnel first handled the notices, both were passed on to the township's finance director, who acknowledged timely receipt of both notices, and he communicated the situation multiple times to the township's insurer and other township personnel. The finance director testified that he had been handling the township's insurance and lawsuits for over 26 years.<sup>5</sup> He further testified that his office is located in the building where the fall occurred, which building has the same street address as that indicated on both notices. We conclude that, in compliance with MCL 691.1406, a notice was served on, and received by, the responsible governmental agency. Moreover, we note that this Court in *Hussey v City of Muskegon Heights*, 36 Mich App 264, 271; 193 NW2d 421 (1971), stated that "failure to serve the notice personally or by certified mail is inconsequential where . . . the notice was timely received." Here, notice was timely received by an appropriate representative of the township.

With regard to the township's assertion that plaintiff misidentified the location of the occurrence as being the stairs and not the concrete patio or plaza beyond the top of the stairs, we disagree. While the notice initially suggested a fall on the entrance stairs to the courthouse, it then specified that "[t]he nature of the defect is raised cement at the top of the stairs." The alleged defect, as reflected in the photographs, plaintiff's deposition testimony, and the experts' affidavits, is accurately described as being at the top of the stairs.

Next, as to the township's argument that the notice failed to identify which of the building's several staircases was being ascended at the time of the fall, the notice provided that the incident occurred in the stairway area of the entrance to the 41-B District Court, and while the building has multiple staircases or stairways, there is only one stairway that is the direct entrance to the court. A photograph shows the stairway in question and the entrance doors beyond the stairway, with "41-B District Court" emblazoned on the building above the entrance doors. The building, which is referred to in the record at times as the civic center, houses more than just the district court. We conclude that the notice, by referring to the entrance of the 41-B

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period of time. *De Sanchez v Dep't of Mental Health*, 467 Mich 231, 236; 651 NW2d 59 (2002).

<sup>5</sup> The township does not maintain that the finance director was not an appropriate person to receive the notice on behalf of the township under MCL 691.1406, nor that some other individual should have been provided notice.

District Court, clearly conveyed the location of the stairway at issue. We note that the finance director testified that, when he went to locate the alleged defect, he paid the “most attention to the areas closest to the 41B District Court[.]”<sup>6</sup> Additionally, the fax from the finance director to the insurance agent indicated that a fall had occurred at the court entrance and that the director inspected the stairs and adjoining concrete.

With respect to the township’s claim that the notice failed to identify whether plaintiff was ascending the stairway up the left side, center, or right side of the particular stairway, there are only a few cement patio blocks, flags, or slabs that extend the width of the top of the staircase, making it unnecessary, for purposes of locating the defect, to describe to which side of the staircase plaintiff was walking. In *Hussey, supra* at 267, this Court ruled, in the face of an argument to the contrary, that a notice sufficiently apprised the defendant of the exact location of a sidewalk defect, where the notice provided that the defect was located “on Peck Street at Johnson Drugstore and Vi and Herm’s Café, 2042 Peck Street.” The notice here was more exact than the one found acceptable in *Hussey*.

In sum, we hold that the notice specified the exact location of the alleged defect as well as the nature of the defect, thereby complying with the statutory notice requirement.<sup>7</sup> The term “exact” can be subject to varying degrees, such that, if one were to demand an exceptionally high degree of exactness, a defect could arguably have to be described by reference to its location in comparison to all surrounding monuments or objects in measurements down to “1/16 inch” increments. As noted by the trial court, “The statute doesn’t say they’ve got to give you the longitude, latitude by inches and square feet and everything in between.” We conclude that when the Legislature used the term “exact,” which is defined as “strictly accurate or correct,”<sup>8</sup> *Random House Webster’s College Dictionary* (2001), it intended that the injured party give notice sufficient to allow the controlling governmental agency to easily and readily identify the alleged defect. The notice provided here complied with the statutory mandate. Although we understand that township officials claimed an inability to locate any alleged defect, this appears to be more of a matter concerning what one considers a true defect as opposed to an inaccurate locale being given.

The township next argues that summary disposition is proper regardless of the notice issues because there is no evidence, from which an inference can be drawn, that the defect was in

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<sup>6</sup> As indicated above, the finance director testified that he could not find any defect when looking in the area.

<sup>7</sup> The township makes brief, stray arguments throughout its brief such as the claim that plaintiff failed to attach a photograph to the notice, but MCL 691.1406 does not require photographic evidence. The township also complains that plaintiff’s notices were undated; however, the notices, in both instances, were referenced attachments to cover letters that were indeed dated by plaintiff.

<sup>8</sup> Words undefined in a statute must be given their plain and ordinary meaning, which can be ascertained by looking at dictionary definitions. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

existence two years prior to plaintiff's deposition, the taking of photographs, and the inspections done by the experts. The township also contends that it had no notice, actual or constructive, of the alleged defect. We first note that, while these arguments were raised below by the township in its summary disposition brief, the parties and the trial court only focused on the notice issue at the hearing. Although the court denied the motion for summary disposition in its entirety, it did not expressly analyze the issues aside from the notice issue. We decline to reverse on the issues raised by the township. First, as indicated above, plaintiff testified that her foot hit an object a couple of steps from the top of the stairs, tearing off her shoe and causing her to fall. She further testified that she tripped on a piece of uneven or raised cement. Additionally, photographs of the area show crumbling cement and cement unevenness or height variation. Plaintiff's expert opined that the elevation between the concrete flags or slabs that caused plaintiff to trip was 5/8 of an inch and constituted a defect. He further averred that it was more likely than not that the defect existed for more than 2-1/2 years prior to his inspection. He then set forth a list of various physical and structural indicators in support of this conclusion, which included a rejection of substantial change due to two freeze/thaw cycles given the location of the concrete flags, their configuration, and the weather conditions over the past two winters. In the opinion of plaintiff's expert, the concrete terrace was in a state of disrepair for many years, and he noted that there was evidence of eroded joint filler material, indicating an ineffective repair measure taken long ago. The township's expert acknowledged a deviation between the cement flags, averring that the deviation measured slightly more than half an inch, but then asserted that because of the two freeze/thaw cycles the extent of any deviation at the time of the accident, if it even existed, could not be determined. Also, as reflected above, the finance director could not locate or identify any defect after receipt of the notices.

Within the confines of MCL 691.1406, considering plaintiff's testimony, the testimony of the finance director, the photographs, the conflicting expert opinions, and the fact that the area was heavily traversed and in plain view to township personnel, we conclude that a factual dispute exists sufficient to preclude summary disposition as reasonable minds could differ regarding whether the alleged defect existed at the time of the accident and whether the township had actual or constructive knowledge of the defect.

Finally, the township argues that summary disposition was warranted because plaintiff failed to adequately identify the location of the slip and fall by way of documentary evidence. Given plaintiff's testimony as referenced in this opinion,<sup>9</sup> and considering the testimony in the context of the other documentary evidence, the location of the accident and defect was sufficiently set forth, making summary disposition inappropriate.

Affirmed.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Kirsten Frank Kelly

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<sup>9</sup> We note that, during her deposition testimony, plaintiff placed an "X" on a photograph showing where she tripped and fell, and that photograph is part of the lower court record.