

STATE OF MICHIGAN
COURT OF APPEALS

YAHIBIN 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UNPUBLISHED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.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition in this action involving the highway exception to governmental immunity, MCL 691.1402. We affirm.

I. FACTUAL BACKGROUND

Plaintiff filed a complaint alleging that he had fallen outside of the "Ali Said Meat Market" located at "10047 Dix Rd, Dearborn, Michigan." Plaintiff had provided defendant with presuit notice, which in relevant part, stated:

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.

However, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10), contending that the “Al-Saad Meat Market is actually located at 10047 Vernor Highway, Dearborn, Michigan.” Because plaintiff failed to comply with the requirement of MCL 691.1404(1) to disclose the exact location of the defect, the trial court granted defendant’s motion for summary disposition. Plaintiff now appeals.

II. NOTICE

A. Standard of Review

We review de novo a trial court’s ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Statutory interpretation is a question of law that we also review de novo. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 309; 645 NW2d 34 (2002). Lastly, “the determination regarding the applicability of governmental immunity and a statutory exception to governmental immunity is a question of law that is also subject to review de novo.” *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

B. Analysis

The statutory notice requirement at issue in this case provides, in relevant 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. [MCL 691.1404.]

As the Michigan Supreme Court recognized in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), “MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect.” Recently reaffirming its holding in *Rowland*, the Court stated that “the core holding of *Rowland* [is] 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). Accordingly, we must enforce MCL 691.1404 as written. *Id.* at 200, 219. If plaintiff’s presuit notice fails to meet the statutory requirements, his claim fails, regardless of whether actual prejudice results. *Rowland*, 477 Mich at 219.

At issue in this case is whether plaintiff’s presuit notice specified “the exact location . . . of the defect[.]” It is undisputed that plaintiff provided the wrong address when attempting to specify the exact location of the defect. A similar circumstance occurred in *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011).¹ Reversing this Court’s opinion, our Supreme

¹ An order of the Supreme Court constitutes binding precedent when the rationale can be understood based on the applicable facts and reasons for the decision. *John J Fannon Co v*

Court held that because the plaintiff provided the wrong address in referencing the location of the defect, the notice was insufficient. *Id.* The Court stated that this Court “erred by excusing this error, rather than enforcing the notice requirement . . . as written” because “[t]he statute requires notice of ‘the exact location’ of the defect, and in this case, the plaintiff failed to specify the correct address where the defect was allegedly located.” *Id.*

Likewise in this case, because plaintiff provided the wrong address in his presuit notice, he failed to specify the exact location of the defect as required under MCL 691.1404. While plaintiff identified the “Al Saad” located at “10047 Dix Ave., Dearborn, MI 48120,” his accident actually occurred at the “Al Saad Meat Market” located at “10047 Vernor, Dearborn, MI 48120.”² Plaintiff, however, contends that the Al Saad Meat Market is well known, which enabled defendant to identify the location of the defect. Yet, in his presuit notice, plaintiff only referred to it as “the Al Saad,” and this reference actually augments the confusion because it conflicts with the address provided.³ Moreover, plaintiff has failed to provide any support for the proposition that this was a well-known location or that defendant should have somehow guessed that plaintiff was referring to the Al Saad Meat Market located at a different address than what plaintiff provided.⁴ The additional description of a depression “on the south side of the driveway on Canterbury Street” is likewise deficient because only a vague reference to the south side of some driveway is not information that identifies the exact location of the defect.

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). This Court has repeatedly recognized that “shall” denotes mandatory conduct. *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010). Because plaintiff failed to specify the exact location of the defect, he has failed to comply with this statutory mandate. Accordingly, we affirm the trial court’s order granting summary disposition to defendant.

Fannon Products, LLC, 269 Mich App 162, 165; 712 NW2d 731 (2005); see also *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012).

² To complicate matters even further, in his complaint plaintiff referred to “Ali Said Meat Market” located at “10047 Dix Rd” even though his presuit notice had referenced “Al Saad” located at “10047 Dix Ave.”

³ When describing the nature of the defect, plaintiff referred to “the meat market” but failed to specify if Al Saad was the meat market to which he was referring.

⁴ While plaintiff also argues that he was in substantial compliance with the notice requirements, specifying the wrong address is not sufficient compliance with the statute. See *Jakupovic, supra*.

III. CONCLUSION

Because plaintiff failed to “specify the exact location . . . of the defect” he failed to comply with the statutory mandate of MCL 691.1404 and summary disposition is therefore appropriate. We affirm.

/s/ Michael J. Riordan

/s/ Michael J. Talbot