

STATE OF MICHIGAN
COURT OF APPEALS

MELISSA MIDDLETON, SHEILA B. MEIER,
JOAN E. DUNCAN, and ANN ZAENGLEIN,

UNPUBLISHED
April 19, 2005

Plaintiff-Appellees,

v

No. 251855
Marquette Circuit Court
LC No. 02-039972-NO

COUNTY OF MARQUETTE,

Defendant-Appellant,

and

MCCABE'S QUALITY CARPET & LINOLEUM,
INC., INTERPHASE OFFICE INTERIORS, INC.,
and HAWORTH, INC.

Defendants.¹

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order denying defendant summary disposition under MCR 2.116(C)(7).² This case arises out of plaintiffs' claims for injuries suffered while working in a county building. We affirm.

As its sole issue on appeal, defendant argues that the trial court erred in denying defendant summary disposition where plaintiffs failed to give notice of their claims brought under the "public buildings" exception of the governmental immunity act, MCL 691.1401 *et seq.*, as required by MCL 691.1406. We find no error.

¹ The claims against these additional defendants are not at issue in this appeal. Thus, use of the term "defendant" will refer solely to Marquette County.

² A "final order" appealable as of right in a civil case includes "[a]n order denying governmental immunity to a governmental party, including a governmental agency, official, or employee[.]" MCR 7.202(6)(A)(v).

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity is a question of law that is also reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc.*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

Although defendant's motion was brought under MCR 2.116(C)(10), it was later agreed that the more applicable rule was MCR 2.116(C)(7), which provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. The governmental immunity act, MCL 691.1401 *et seq.*, provides "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]" *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984); see MCL 691.1407(1). To survive a (C)(7) motion raised on these grounds, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant. MCR 2.116(G)(5); *Maiden, supra* at 119; *Smith, supra* at 616.

"When a governmental agency engages in mandated or authorized activities, it is immune from tort liability, unless the activity . . . falls within one of the other statutory exceptions to the governmental immunity act." *Ross, supra* at 620; see MCL 691.1407(1). It is not disputed that defendant is a governmental agency that was engaged in a governmental function while leasing out office space in the Marquette County Health Department Building. See MCL 691.1401(b), (d), and (f). However, the "public buildings" exception, which is to be narrowly construed, *Nawrocki v Macomb Co Rd Comm.*, 463 Mich 143, 158; 615 NW2d 702 (2000), provides that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." MCL 691.1406. If the governmental agency breaches that obligation, it is

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. [*Id.*]

However, the public buildings exception also provides as follows:

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. [*Id.*]

There is no dispute that plaintiffs failed to serve a notice on defendant that specified the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time. Thus, the issue in this case is whether this Court is bound by precedent from our Supreme Court that held that if the governmental entity suffered no actual prejudice as a result of the failure of notice, then a plaintiff may still pursue his claim notwithstanding noncompliance with the notice provision, see *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996); *Hobbs v Michigan State Highway Dep't*, 398 Mich 90; 247 NW2d 754 (1976), or whether this Court should follow the dissents in those cases and more recent case law that, according to defendant, has implicitly rejected the majority analyses of such cases and deferred instead to the clear statutory language.

This Court is bound by our Supreme Court precedent, *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000), which has held that if a governmental entity suffers no actual prejudice as a result of plaintiff's failure to give notice, then the plaintiff may still pursue his claim notwithstanding noncompliance with the notice provision. *Brown, supra* at 368-369; *Hobbs, supra* at 96.

Although plaintiffs argue that a rule of substantial compliance may be applied to evaluate their notice efforts, neither *Hobbs* nor *Brown* elucidated such a rule. In fact, in both cases the plaintiff failed to give any notice of his claim. Therefore, we cannot conclude that substantial compliance is required. Indeed, in *Brown, supra* at 368-369, the Court held that the defendant had not established that it suffered prejudice from the plaintiff's failure to serve notice within the 120-day period because the defendant road commission "repaved the road before the expiration of the notice period." Therefore, the Court presumably found it sufficient that the defendant should have had knowledge of the condition.

Defendant correctly notes that more recent Supreme Court decisions strictly enforce statutes as written, rejecting the need to show prejudice if no such standard is written into the statute. Indeed, defendant points to the recent decision in *Burton v Reed City Hosp Corp*, 471 Mich 745, 753; 691 NW2d 424 (2005), wherein the Court concluded that this Court erred in "basing its decision . . . on the alleged lack of prejudice to the defendants, a factor that is not contained in the relevant statutes." That case, however, dealt with the medical malpractice statute, not the governmental immunity statute. Accordingly, it did not have the effect of overruling the earlier cases that we are obligated to follow. In short, we agree with the trial court's observation that defendant in all likelihood will prevail in the Supreme Court, but that until it does so, we are obligated to follow precedent and rule in favor of plaintiffs.

In the present action, there is no dispute that plaintiffs failed to serve notice within the 120-day period. However, there is also no dispute that defendant has failed to show any prejudice from this omission. And further there is no dispute that defendant had knowledge of plaintiffs' injuries within the 120-day period. Thus, the trial court properly followed *Hobbs* and *Brown* to deny defendant summary disposition.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Kurtis T. Wilder