

STATE OF MICHIGAN
COURT OF APPEALS

TEJUANE CARROLL,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED
February 10, 2011

No. 296134
Genesee Circuit Court
LC No. 09-091252-NO

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Tejuane Carroll appeals as of right from an order granting summary disposition to the City of Flint (hereinafter “the City”) based on the failure to provide adequate notice of his claim. We affirm.

Carroll’s complaint alleges that he was injured when he fell on a snow-covered pothole in the roadway on December 8, 2008. The trial court granted summary disposition in favor of the City because Carroll failed to comply with the statutory pre-suit notice requirement.¹ Carroll contends that he substantially complied with the statutory notice requirement and that the trial court erred in dismissing his claim.

The City sought summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court did not specify the subrule under which it granted the motion, but because the court relied on evidence beyond the pleadings, it apparently granted the motion in accordance with MCR 2.116(C)(7) or (10).² Summary disposition may be granted under MCR 2.116(C)(7) when the claim is barred because of “immunity granted by law” Summary disposition may be granted under MCR 2.116(C)(10) when “there is no genuine issue of material fact, and the

¹ MCL 691.1404.

² A motion under MCR 2.116(C)(8) is limited to the pleadings alone.

moving party is entitled to judgment . . . as a matter of law.” This Court reviews a trial court’s decision on a motion for summary disposition de novo.³

The City, as a governmental agency, is generally immune from tort liability while engaged in the exercise or discharge of a governmental function.⁴ An exception to this general grant of immunity is a duty imposed on governmental agencies that have jurisdiction over a highway to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.”⁵ Liability under this exception is subject to specific statutory conditions, which provide, 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, 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.

(2) 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 governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. . . .⁶

Civil process directed against a city “may be made by serving a summons and a copy of the complaint on . . . the mayor, the city clerk, or the city attorney of a city.”⁷

It is undisputed that Carroll did not serve the required notice on the City’s mayor, city clerk, or city attorney. Instead, the notice was mailed to the City’s Risk Management Division. Before this Court, Carroll relies on a letter sent by the city attorney to her counsel, in which the city attorney acknowledged the receipt of Carroll’s January 9, 2009, letter and requested additional information about the alleged accident and injuries. Carroll did not submit the city attorney’s letter with his response to the summary disposition motion; rather, it was first submitted with Carroll’s motion for reconsideration.⁸ In reviewing a ruling on a motion for

³ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁴ See MCL 691.1407(1).

⁵ MCL 691.1402(1).

⁶ MCL 691.1404.

⁷ MCR 2.105(G)(2).

⁸ Carroll does not challenge the trial court’s denial of his motion for reconsideration.

summary disposition, this Court will not consider evidence that was first presented as part of a motion for reconsideration.⁹

Carroll further argues that use of the term “may” in the statutory subsection indicates that the service requirements in that provision are discretionary.¹⁰ We disagree. While “may” is generally recognized as designating discretion¹¹ that construction will not be employed where “to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole.”¹²

We disagree with Carroll’s suggestion that service in compliance with the statutory directive is discretionary.¹³ The relevant statute specifically requires “[a]s a condition for recovery for injuries . . .” that the injured person “shall serve a notice[.]”¹⁴ This provision unambiguously indicates that service of the required notice is mandatory. A separate subsection of the statute specifies a method for accomplishing the required service and provides that service be on “any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency”¹⁵ This Court previously considered an ordinance which provided that an aggrieved person “may make complaint . . . before the board of assessors” The Court examined the pertinent ordinances and concluded that the

[r]espondent has by ordinance, established only one procedure to review assessment, a procedure that requires a hearing before the board of assessors. The obvious inference that can be drawn is that there are no original proceedings before the board of review.¹⁶

Similarly, in this case, the obvious inference from reading the relevant statutory subsections together is that the service mandated by subsection (1) must be accomplished as provided in subsection (2).¹⁷

⁹ *Quinto v Cross & Peters Co*, 451 Mich 358, 366-367 n 5; 547 NW2d 314 (1996); *Maiden*, 461 Mich at 126 n 9.

¹⁰ MCL 691.1404(2).

¹¹ *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003).

¹² *Browder v Int’l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

¹³ MCL 691.1404(2).

¹⁴ MCL 691.1404(1).

¹⁵ MCL 691.1404(2).

¹⁶ *Fink v Detroit*, 124 Mich App 44, 50-51; 333 NW2d 376 (1983).

¹⁷ MCL 691.1404(1), (2).

Carroll argues that service on the City's Department of Street Maintenance and Risk Management Division is sufficient to satisfy the statutory requirement because those departments are the "governmental agency of the occurrence," inasmuch as the City has jurisdiction over the area and both the Department of Street Maintenance and the Risk Management Division are the City's "agents."¹⁸ Carroll emphasizes that the relevant statutory provisions do not refer to "governmental entity" or "city."¹⁹

The term "governmental agency" is statutorily defined as "the state or a political subdivision."²⁰ The definition of "political subdivision" includes a municipal corporation and "an agency [or] department . . . of a political subdivision."²¹ Although these definitions lend support to Carroll's contention that a department of a municipal corporation is a "governmental agency," they are not dispositive. The problem that arises is that Carroll brought his action against the City, not one of its divisions or departments. Because notice to "the governmental agency" is a pre-condition to recovery of damages under the statute²², a notice served on one "governmental agency" does not satisfy the requirement with respect to a different "governmental agency." In other words, Carroll cannot salvage his lawsuit against the City by claiming that notice to another governmental agency satisfied the relevant statutory requirement.²³

Carroll also argues that, at a minimum, his notice substantially complied with the statutory requirements. Carroll relies on a recent published decision by this Court that rejected the defendant's argument that the notice provided in that case did not adequately identify the allegedly defective condition and concluded that substantial compliance with the statutory requirements is sufficient.²⁴ This case is readily distinguishable as the record here does not support Carroll's contention that his notice substantially complied with the statutory requirements. Carroll did not serve the notice on the City's mayor, clerk, or city attorney. The notice merely refers to a "defective roadway," without specifying the exact nature of the defect or its precise location. The described location of the defect, "Eastbound traffic lane in the intersection of Burr Street and Lippincott Street," is 97 feet wide and a traffic lane in width. The pothole that Carroll identified in the photographs that accompanied his affidavit is in the westbound lane of Lippincott Street (in the immediate vicinity of the stop sign for southbound Burr Street.) Unlike the case he cites²⁵, Carroll's notice did not "reasonably apprise" the City of

¹⁸ MCL 691.1404(2).

¹⁹ MCL 691.1404(1), (2).

²⁰ MCL 691.1401(d).

²¹ MCL 691.1401(b).

²² MCL 691.1404(1)

²³ *Id.*

²⁴ *Plunkett v Dep't of Transp*, 286 Mich App 168; 779 NW2d 263 (2009).

²⁵ *Id.* at 178-179.

the nature and location of the alleged defect. Because Carroll did not substantially comply with the statutory requirements, the trial court did not err in granting the City's motion for summary disposition.

Affirmed.

/s/ Michael J. Talbot

/s/ David H. Sawyer

/s/ Michael J. Kelly