

STATE OF MICHIGAN
COURT OF APPEALS

KAREN BELL,

Plaintiff-Appellee,

V

DEPARTMENT OF NATURAL RESOURCES,

Defendant-Appellant.

UNPUBLISHED

December 11, 2012

No. 310701

Court of Claims

LC No. 11-000063-MD

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right the Court of Claims order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. Because plaintiff's notice of injury satisfied the requisites of MCL 691.1404(1) by specifying the exact location and nature of the alleged highway defect, we affirm.

This case arises out of a motorcycle accident that occurred on June 26, 2009, in Sleepy Hollow State Park, located in Laingsberg, Michigan. Plaintiff was riding as a passenger on the back of a motorcycle driven by Charles Perez when the motorcycle struck a large pothole, causing plaintiff to become pinned underneath the motorcycle. Plaintiff sustained a broken thumb and a friction burn on her foot.

On October 14, 2009, plaintiff filed a notice of claim against defendant as required by MCL 691.1404(1). The notice stated, "[t]he nature of the defect causing the accident and giving rise to [plaintiff's] claim is a large pothole located on the main drive inside Sleepy Hollow State Park approximately five (5) minutes beyond the park entrance booth after [plaintiff] gained entrance to the park." On June 23, 2011, plaintiff filed a complaint against defendant, alleging that defendant breached its duty, set forth in MCL 691.1402, to maintain the roadway in reasonable repair. Plaintiff further asserted that defendant was not entitled to governmental immunity.

Defendant moved for summary disposition on the basis that plaintiff's notice failed to satisfy MCL 691.1404(1) because it did not specify the *exact* location of the defect in the roadway. Defendant argued that because plaintiff's notice was deficient, it was immune from liability. In response, plaintiff argued that her notice sufficiently described the location of the accident and allowed defendant an opportunity to investigate her claim and remedy the defect.

The Court of Claims denied defendant's motion on the basis that plaintiff's notice satisfied the statutory requirement of specifying the exact location of the defect.

We review de novo a lower court's decision on a motion for summary disposition. *Patterson v CitiFinancial Mtg Corp*, 288 Mich App 526, 528; 794 NW2d 634 (2010). We also review de novo as a question of law the applicability of governmental immunity. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). "A motion for summary disposition pursuant to MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Miller v Lord*, 262 Mich App 640, 643; 686 NW2d 800 (2004) (quotation marks and citation omitted). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

Pursuant to the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, a governmental agency is generally immune from tort liability if it "is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Defendant, Department of Natural Resources, falls within the purview of the GTLA. *Duffy v Dep't of Nat Resources*, 490 Mich 198, 204 n 2; 805 NW2d 399 (2011). A plaintiff may pursue a claim against a governmental agency only if the claim involves one of the exceptions to governmental immunity enumerated in the GTLA. *Grimes v Dep't of Transp*, 475 Mich 72, 77; 715 NW2d 275 (2006). This case involves the "highway exception" to governmental immunity set forth in MCL 691.1402, which at the time of plaintiff's accident provided,¹ in relevant part:

(1) Except as otherwise provided in section 2a [MCL 691.1402a], each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. *A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . .* The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. [Emphasis added.]

¹ MCL 691.1402 was amended pursuant to 2012 PA 50, effective March 13, 2012, but the amendment is inapplicable in this case because plaintiff's accident occurred before the effective date of the amendment. See *Moraccini v City of Sterling Hts*, 296 Mich App 387, 393 ns 3 & 4; ___ NW2d ___ (2012).

MCL 691.1401(e)² defined a “highway” as “a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway.” “[B]efore the highway exception can apply, the plaintiff must timely notify the governmental defendant of his or her claim in accordance with MCL 691.1404(1).” *Thurman v Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012). MCL 691.1404(1) provides:

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. [Emphasis added.]

Defendant argues that the Court of Claims erroneously denied its motion for summary disposition because plaintiff’s notice did not describe the exact location of the defect that caused her injuries as required by MCL 691.1404(1). Defendant contends that plaintiff’s notice described only the general location of the alleged defect without sufficient specificity to satisfy the statute.

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), our Supreme Court opined that because “MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect . . . it must be enforced as written.” The Court further determined that the failure to comply with the provision bars a claim regardless of whether a governmental entity is actually prejudiced. *Id.* at 200, 219. Courts should not interpret the notice requirement so strictly that it would be difficult for an average citizen “to draw a good notice,” and a notice is not ineffective if it substantially complies with the statute. *Plunkett v Dep’t of Transp*, 286 Mich App 168, 177; 779 NW2d 263 (2009). A notice “need only be understandable and sufficient to bring the important facts to the governmental entity’s attention.” *Id.* at 176. “[T]o be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself.” *Rule v Bay City*, 12 Mich App 503, 508; 163 NW2d 254 (1968).

Plaintiff’s notice sufficiently “specif[ied] the exact location and nature of the defect” as required by MCL 691.1404. Plaintiff’s notice provided, in relevant part:

The claim is based on a motorcycle accident which occurred on June 26, 2009, on the main drive in Sleepy Hollow State park, located at 7835 E. Price Rd., Laingsburg, Clinton County, Michigan. The accident occurred when [plaintiff], who was riding as a passenger on Charles Perez’s motorcycle, sustained injuries after Charles Perez’s motorcycle hit a large pothole and crashed, causing the accident for which [plaintiff] sustained the claimed damages.

² Pursuant to 2012 PA 50, effective March 13, 2012, the definition of “highway” is now located at MCL 691.1401(c).

The nature of the defect causing the accident and giving rise to [plaintiff's] claim is a large pothole located on the main drive inside Sleepy Hollow State Park approximately five (5) minutes beyond the park entrance booth after [plaintiff] gained entrance to the park.

* * *

A copy of the traffic crash report is attached to this Notice of Claim, and includes additional information as part of this claim.

Both the notice and the traffic crash report listed the exact location of the park as 7835 E. Price Road. In addition, the notice identified the defect as a large pothole on the main drive located five minutes beyond the park entrance booth. Although defendant argues that the notice did not indicate whether "five minutes" referred to walking time or driving time, the notice stated that plaintiff struck the pothole approximately five minutes after she had gained entry to the park. Thus, the notice specifically referred to the amount of time that it took for plaintiff to reach the pothole while riding on the motorcycle.

Further, plaintiff's notice was sufficient to allow DNR Ranger Richard Ruff to locate and photograph the pothole within five days after defendant timely received plaintiff's notice. Thus, the notice contained a description of the defect "so definite as to enable the interested parties to identify it from the notice itself." *Rule*, 12 Mich App at 508. "The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured." *Plunkett*, 286 Mich App at 176-177. Because plaintiff's notice allowed defendant an opportunity to investigate the claim within the statutory 120-day limit and remedy the defect, it served the purposes of the notice requirement. In short, although plaintiff's notice could have provided more information, such as the distance from the entrance booth to the pothole or photographs of the pothole, it sufficiently specified the exact location and nature of the defect as required under MCL 691.1404(1). Accordingly, the Court of Claims did not err by denying defendant's motion for summary disposition.

Defendant also argues that it is entitled to governmental immunity pursuant to *Duffy*, 490 Mich 198, because plaintiff was injured on a "trailway" that was not located on a highway as required by MCL 691.1401(e). Plaintiff argues that this issue "is not properly before the jurisdiction" of this Court because defendant did not raise it in the Court of Claims. Plaintiff's argument is misplaced. Defendant's failure to raise this issue below affects whether it is preserved for our review, not whether this Court has jurisdiction to decide it. Because the order appealed from denied defendant's motion for summary disposition on the basis of governmental immunity, it was appealable as of right pursuant to MCR 7.202(6)(a)(v) and MCR 7.203(A)(1).³ Therefore, this Court has jurisdiction over defendant's appeal.

³ Plaintiff's assertion that defendant filed an application for leave to appeal rather than a claim of appeal is erroneous.

Notwithstanding that this Court has jurisdiction, because defendant did not raise this issue in the lower court, it is not preserved for our review. Issues that are not raised before, addressed, or decided by the Court of Claims are not preserved for this Court's review. *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 351; 793 NW2d 246 (2010). Generally, the "failure to timely raise an issue waives review of that issue on appeal." *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987). This Court may overlook preservation requirements, however, "if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). The failure to consider this issue will not result in manifest injustice, and consideration of the issue is not necessary for a proper determination of this case. Moreover, although the applicability of governmental immunity is a question of law, *Herman*, 261 Mich App at 143, the facts necessary to decide the issue have not been presented. In particular, it is not clear from the record whether the "main drive" on which plaintiff was injured constitutes a "railway" under MCL 691.1401(e). Accordingly, we decline to address this issue.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell

/s/ Mark J. Cavanagh

/s/ Pat M. Donofrio