STATE OF MICHIGAN

COURT OF APPEALS

DEBRA WALSH BROWN, Guardian of PAIGE E. WALSH a/k/a PAIGE WALSH BROWN, Plaintiff-Appellant,	UNPUBLISHED October 11, 2011
v	No. 298809 Macomb Circuit Court
CITY OF NEW BALTIMORE, Defendant-Appellee.	LC No. 2010-001032-NO

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Debra Walsh Brown, as the guardian of the minor child Paige E. Walsh (herein "the minor child"), challenges the grant of summary disposition in favor of the city of New Baltimore (hereinafter "the City") in this personal injury action brought pursuant to the highway exception to governmental immunity. Brown specifically takes exception to the trial court's determination that her claim cannot be sustained based on the failure to provide the requisite notice to the City of the incident and injury. We affirm.

The minor child was injured while bicycling when she allegedly struck a raised portion of a concrete sidewalk on June 4, 2005. Brown retained counsel on October 28, 2005, and forwarded a letter to the homeowner at the site of the accident, notifying him of the incident and the child's injuries. On February 14, 2006, the homeowner's insurance adjuster established that the accident occurred on a public sidewalk, not on the homeowner's property. The City was notified by Brown of the incident on March 8, 2006. After Brown initiated the lawsuit, the City sought summary disposition contending that Brown had failed to provide the requisite statutory 180-day notice. The trial court granted summary disposition based on the untimely notice provided.

This Court reviews a trial court's ruling to grant a motion for summary disposition and questions of statutory interpretation de novo.[1] Summary disposition is appropriate if "the undisputed facts establish that the moving party is entitled to immunity granted by law."[2]

[1] *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).

In accordance with the highway exception to governmental immunity[3], if a public sidewalk is not kept in reasonable repair persons injured by the defective sidewalk may sue the local government responsible for its maintenance.[4] The statutory subsection comprises "a narrowly drawn exception to a broad grant of immunity," requiring "strict compliance with conditions and restrictions of the statute."[5]

The relevant statutory provision detailing the notice requirement for claims by minors states:

> If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required . . . not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required . . . not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. The provisions of this subsection shall apply to all charter provisions, statutes and ordinances which require written notices to counties or municipal corporations.[6]

Our Supreme Court has determined that the language of this statutory provision "is straightforward, clear, unambiguous, and not constitutionally suspect. . . . [and] that it must be enforced as written."[7] Where statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute.[8]

Walsh was 13 years old at the time of her injury. By statute, she was required to serve notice on the City not more than 180 days after her accident, unless precluded by mental or physical incapacity.[9] As it is undisputed that Brown did not serve notice on the City within the requisite time period, the trial court properly granted summary disposition in favor of the City.

Although Brown contends that the factual circumstances of this case are distinguishable because it involves a minor child who lacked the legal capacity to provide notice or initiate the

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[2] *Id.*

[3] MCL 691.1402(1).

[4] *Chaney v Dep't of Transp*, 447 Mich 145, 172 n 2; 523 NW2d 762 (1994).

[5] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158-159; 615 NW2d 702 (2000).

[6] MCL 691.1404(3).

[7] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), citing MCL 691.1404.

[8] *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007).

[9] MCL 691.1404(3).

lawsuit, the statute directly addresses this concern by permitting notice to be provided by a "parent, attorney, next friend or legally appointed guardian."[10] Brown further argues that, because of her injuries, the minor child was incapable of providing notice within the statutory period, thus giving rise to a factual issue to be decided by a jury. The burden was on Brown to demonstrate the existence of a disability that prevented the giving of notice.[11] Contrary to her allegations, the medical records fail to raise a genuine issue of material fact with regard to the ability to provide notice. Immediately following the accident the minor child was observed by medical personnel to be "in good spirits, awake, alert with complaint of tenderness across the chin and upper jaw region" and able to describe the events leading to her injury. It is also undisputed that Brown managed to retain an attorney and provide notice within the statutory period to the homeowner originally believed to be responsible for site of the minor child's injury. Because there is no evidence that the minor child was incapacitated, there was no question of fact for a jury to decide.

Brown next suggests that the 180-day notice period is tolled by the statutory provision impacting accrual of actions due to the disability of infancy, which states that if the person bringing a lawsuit was a minor when a claim accrued, "the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run."[12] Brown mistakenly contends that a statutory notice period should be treated in the same manner as a statute of limitations.[13] Because the statute at issue[14] comprises a notice requirement and is not a statute of limitation or repose, the cited tolling provision[15] is inapplicable. Even if a conflict were found to exist between the statutes, we would be required to resolve the matter in favor of the notice provision[16], as "a specific statute supersedes a contradictory general statute."[17]

Brown also contends her suit should not be dismissed based on substantial compliance as the City received actual notice of her claim on March 8, 2006. As the accident occurred on June 4, 2005, it was necessary that notice be provided by early November 2005 to be timely. Brown admits that notice to the City did not occur for an additional four months, which is well outside the statutory mandate and cannot be construed as either timely or substantially compliant.[18]

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[10] *Id*.

[11] *Michonski v Detroit*, 162 Mich App 485, 490-491; 413 NW2d 438 (1987).

[12] MCL 600.5851(1).

[13] *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 599; 560 NW2d 644 (1996).

[14] MCL 691.1404(3).

[15] MCL 600.5851(1).

[16] MCL 691.1404(3).

[17] *Payton v Detroit*, 211 Mich App 375, 393-394; 536 NW2d 233 (1995).

[18] *Rowland*, 477 Mich at 200-201.

Brown also suggests that the City should be estopped from arguing preclusion based on the failure to provide timely notice, alleging the City's imputed waiver of the notice requirement by engaging in negotiations regarding the child's injuries. Specifically:

> Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts.[19]

Contrary to Brown's contention, there is no evidence that the City caused Brown to delay in filing suit. The correspondence from the municipality's insurer establishes that the parties discussed how the accident happened, but gives no indication that the City waived the notice requirement. In addition, as the deadline for provision of notice had already expired before Brown contacted the City; the City could not have made any representations that would have caused Brown's reliance and resultant failure to comply with the deadline.

Finally, Brown contends that recent case law strictly construing notice provisions should not be applied retroactively as a violation of her due process rights. Our Supreme Court has explicitly overruled earlier decisions, which held that the government must demonstrate that it was actually prejudiced by lack of notice for a case to be dismissed for failure to comply with a statutory provision.[20] This Court has stated:

> [R]etroactive application of a judicial decision will only violate due process when it acts as an ex post facto law. However, the ex post facto rule applies only to criminal cases, not to civil cases. Nevertheless, retroactive application of a judicial decision can be "problematic" to due process requirements if it is unexpected and indefensible in light of the law existing at the time of the conduct.[21]

As the recent decision by our Supreme Court did not announce a new rule it is entitled to full

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[19] *Id.*, quoting *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994).

[20] *Rowland*, 477 Mich at 200.

[21] *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 292; 590 NW2d 612 (1998) (internal citations omitted).

retroactive effect.[22] We are bound by that decision.[23]

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[22] *Rowland*, 477 Mich at 221-223.

[23] *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008).