STATE OF MICHIGAN

COURT OF APPEALS

FAYTREON ONEE WEST, Plaintiff-Appellant,	UNPUBLISHED December 12, 2017
v	No. 335190 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellee.	LC No. 15-005357-NO

Before: JANSEN, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting defendant's motion for summary disposition under MCR 2.116(C)(7) of negligence claims brought by plaintiff, after she allegedly injured herself on a defect in the sidewalk within the city. We affirm.

Plaintiff claims that on May 14, 2014, at around 10:00 p.m., she tripped and fell on the darkened sidewalk as she was walking home from a store in the city of Detroit. Plaintiff immediately sustained a number of superficial injuries, including a swollen lip and broken nose. On investigation, plaintiff discovered that she had tripped in a "pothole" in the sidewalk that had been hidden beneath the water and mud covering the surface of the sidewalk. Later, plaintiff discovered that her fall had also aggravated a number of preexisting injuries. Plaintiff mailed a notice of intent to bring a claim against the city of Detroit under the highway defect exception to governmental immunity addressed to the "City of Detroit Law Department." The Law Department received the notice on August 8, 2014, and mailed plaintiff a letter of acknowledgment.

On April 21, 2015, plaintiff filed a negligence action against defendant in the circuit court. Defendant timely answered the complaint, and a year later, moved for summary disposition under MCR 2.116(C)(7). Defendant argued that plaintiff's claim was barred because plaintiff had failed to comply with the statutory notice requirement of service on the mayor, city clerk, or city attorney. Plaintiff had instead served her notice on the city's Law Department, an entity not properly served under MCL 691.1404, and according to defendant had thereby failed to meet the requirements for bringing suit under an exception to governmental immunity. The trial court agreed. Finding plaintiff's notice insufficient under MCL 691.1404, the trial court determined that defendant was entitled to governmental immunity and granted defendant's motion for summary disposition.

On appeal, plaintiff first argues that the trial court erred when it granted defendant's motion for summary disposition because the plain language of MCL 691.1404(2) does not make the method of service of notice it outlines for municipalities mandatory. We disagree.

This Court reviews de novo a motion for summary disposition pursuant to MCR 2.116(C)(7). *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). "Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are barred because of immunity granted by law." *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008) (quotation marks and citation omitted). To survive a (C)(7) motion based on governmental immunity, "the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). "The applicability of governmental immunity and its statutory exceptions are reviewed de novo," *Russell v City of Detroit*, ___ Mich App ___, ___; ___ NW2d ___ (2012) (Docket No. 332934); slip op at 2, as are questions of statutory interpretation, *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

When interpreting a statute, "our goal is to give effect to the intent of the Legislature by focusing on the statute's plain language." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 134; 860 NW2d 51 (2014). "When construing statutory language, we must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 S Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

The Governmental Tort Liability Act ("GTLA"), MCL 691.1401 *et seq*., protects a "governmental agency"[1] from tort liability where the agency is engaged in a "governmental function." "To overcome governmental immunity for tort liability, then, plaintiffs . . . who bring tort claims against a governmental defendant must either (1) plead a tort that falls within one of the GTLA's stated exceptions, or (2) demonstrate that the alleged tort occurred outside the exercise or discharge of a governmental function." *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 327; 869 NW2d 635 (2015).

Relevant to this case is the exception enumerated in MCL 691.1402a, which provides that a municipal corporation may be liable for failing to maintain in reasonable repair "a sidewalk adjacent to a municipal, county, or state highway." See *Robinson v Lansing*, 486 Mich 1, 20-21; 782 NW2d 171 (2010). However, before an injured party may sue the municipal corporation for failure to properly maintain a sidewalk, he or she must first provide notice to the governmental agency of the injury and defect under MCL 691.1404. *Milot v Dep't of Transp*, 318 Mich App 272, 277; 897 NW2d 248 (2016).

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[1] The GTLA defines "governmental agency" as "this state or a political subdivision." MCL 691.1401(a). "Political subdivision" is defined to include a "municipal corporation." See MCL 691.1401(d) and (e). Defendant qualifies as a municipal corporation. MCL 691.1401(d).

"MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect." *Rowland*, 477 Mich at 219. Thus, the statute "must be enforced as written." *Id*. In pertinent part, MCL 691.1404 provides:

> (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 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.
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> (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. In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. [Emphasis added.]

Under MCR 2.105(G)(2), "the mayor, the city clerk, or the city attorney of a city" are the individuals who may lawfully be served civil process on behalf of a municipal corporation. *Wigfall v City of Detroit*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 333448), slip op at 4.

Plaintiff argues that her service of statutory notice was sufficient because while MCL 691.1404(2) prescribes service on an individual as one means of service, the Legislature's use of the word "may" indicates that service on an individual is not the only method of serving proper notice. Rather, plaintiff argues, service of notice by other means would still be acceptable "so long as the claimant can establish [that the] municipality actually received the required notice within 120 days." We disagree. While the word "may" typically denotes a permissive statutory provision, *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008), "[a] necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole," *NL Ventures VI Farmington, LLC v Livonia*, 314 Mich App 222, 230; 886 NW2d 772 (2015) (quotation marks and citation omitted). Plaintiff's argument lacks merit because she reads MCL 691.1404(2) in isolation. When subsections (1) and (2) of MCL 691.1404 are read in conjunction with one another, it is evident that subsection (1) requires that the notice must contain specific information and must be provided within 120 days after the injury, and that subsection (2) provides that such notice must be served upon any *individual*, either personally or by certified mail, return receipt requested. The city of Detroit Law Department is not an "individual," and therefore, is not a being that "may be lawfully served with civil process against" the city. Plaintiff has therefore failed to comply with the requirements of MCL 691.1404.

Plaintiff relegates to a footnote her second argument, that "[a]t the very least, service via certified mail on the same address as the city attorney constitutes 'substantial compliance' with the notice requirement, especially since the Defendant-Appellee acknowledge[d] receipt and

accepted service." For support, plaintiff relies on this Court's opinion in *Plunkett v Dep't of Transp*, 286 Mich App 168; 779 NW2d 263 (2009). In *Plunkett*, we opined:

> [W]hen notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect. 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.
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> The requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice. . . . A notice should not be held ineffective when in substantial compliance with the law. . . . A plaintiff's description of the nature of the defect may be deemed to substantially comply with the statute when coupled with the specific description of the location, time and nature of injuries. . . . Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects. [*Id.* at 176-177 (quotation marks, citations, and alterations omitted).]

Plaintiff's reliance on *Plunkett* is misplaced. The *Plunkett* Court employed its "substantial compliance" language in reference to the requirements of MCL 691.1404(1), which governs the content requirements of the notice. The Court did not reference service of the notice in its rule statement. See *Plunkett*, 286 Mich App at 176-177 (including no reference to service of notice). The *Plunkett* Court's "substantial compliance" rule applies only to the required *content* of the notice, not to the required *service* of the notice.

Plaintiff further argues that dismissal of her claim is inappropriate because under MCR 2.105(J)(3), improper service is not fatal so long as the served party receives actual notice within the allowed time. Plaintiff's reliance on MCR 2.105(J)(3) is also misplaced. MCR 2.105(J)(3) states, "An action shall not be dismissed for improper *service of process* unless the service failed to inform the defendant of the action within the time provided in these rules for service." (Emphasis added.) Plaintiff's case involves service of statutory notice, not service of process. The Legislature specifically delineated the appropriate method of statutory service in MCL 691.1404, and MCR 2.105(J)(3) is therefore irrelevant. Furthermore, even if MCR 2.105(J)(3) applied in this instance, plaintiff only provided proof that the city of Detroit Law Department received her claim. Plaintiff failed to provide proof that "the mayor, the city clerk, or the city attorney" received her notice, which is required by the strict reading of MCL 691.1404 and MCR 2.105(G)(2). See *McLean v Dearborn*, 302 Mich App 68, 78-81; 836 NW2d 916 (2013).

Finally, plaintiff argues that the trial court should have estopped defendant from asserting lack of notice as a defense because plaintiff served her statutory defect notice in the manner instructed by the city. Again, we disagree.

We review de novo a trial court's equitable decisions, while the findings of fact supporting the trial court's decision are reviewed for clear error. *Szyszlo v Akowitz*, 296 Mich App 40, 46; 818 NW2d 424 (2012). "A finding is clearly erroneous if we are left with a definite

and firm conviction that a mistake has been made." *Elahham v Al-Jabban*, 319 Mich App 112, 120-121; 899 NW2d 768 (2017) (quotation marks and citation omitted).

"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." *Trahey v Inkster*, 311 Mich App 582, 599; 876 NW2d 582 (2015) (quotation marks and citation omitted). This Court has previously held that "[a] municipality may be subject to the doctrine of estoppel in certain situations." *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 146; 892 NW2d 33 (2016) (quotation marks and citation omitted). "A plaintiff seeking to apply the doctrine of estoppel to a municipality 'must show a good faith reliance upon the municipality's conduct, lack of actual knowledge or lack of the means of obtaining actual knowledge of the facts in question, and . . . a change in position to the extent that plaintiff would incur a substantial loss were the local government allowed to disaffirm its previous position.' " *Id*., quoting *Parker v West Bloomfield Twp*, 60 Mich App 583, 592; 231 NW2d 424 (1975).

In support of her argument for application of equitable estoppel, plaintiff directs this Court's attention to the city's website and code of ordinances, both of which plaintiff argues direct a claimant to provide statutory notice of a claim to the city's Law Department. Plaintiff claims that her reliance on the city's own resources was reasonable, and that defendant, by creating its own claims process, should be estopped from asserting improper service as a defense when that process is employed. The 1984 Detroit City Code, § 2-4-18, outlines the procedure for filing a claim against defendant. The ordinance states:

> All claims of whatever kind against the city, excluding claims by city employees arising out of the employment relationship, claims against the department of water and sewerage and undisputed claims for services, labor and materials furnished to city departments shall be first submitted to and reviewed by the law department.

The Detroit City Code, § 2-4-18, further provides that "[d]elineation of procedure for claims against city could not . . . be interpreted as freeing a claimant of his statutory duty to give verified notice to the governmental agency of the occurrence of the injury and the defect."

Neither party disputes that at the time plaintiff mailed her notice of claim, the following description of the city's claims process was provided on the city's website:

> The Claims Section investigates and attempts to resolve claims filed against the City of Detroit, involving both personal injury and property damage allegedly arising from the City's wrong doing or negligence.
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> The purpose of the Claims Section is to provide a simplified procedure for resolving legal disputes without the necessity, time and expense of our formal judicial system. Hence, the claims process serves both the needs of the claimant and the City.

The city's claims process, as described, is intended to facilitate prompt resolution of informal claims against defendant. It is not intended to assist claimants in their pursuit of claims through the judicial system. "[E]veryone dealing with a municipality and its agents is charged with knowledge of the . . . provisions of lawfully adopted ordinances." *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009). Plaintiff is therefore charged with knowledge of the provisions of Section 2-4-18 of the Detroit City Code, which provide information about the submission of claims to the city of Detroit Law Department and the caveat that "[d]elineation of procedure for claims against city could not . . . be interpreted as freeing a claimant of his statutory duty to give verified notice to the governmental agency of the occurrence of the injury and the defect." See *id.*

Regardless, it cannot be said that plaintiff justifiably relied on defendant's interpretation or misinterpretation of MCL 691.1404's requirements. Plaintiff has failed to produce evidence that she lacked actual knowledge or lacked the means of obtaining actual knowledge about the statutory requirements for serving notice on defendant. Plaintiff's notice of claim was drafted by her attorney and stated that it was submitted in accordance with MCL 691.1404 and "any applicable statues [sic], ordinances, rules or regulations." Plaintiff and her attorney were clearly aware that MCL 691.1404 dictated the proper form of their statutory notice. A reading of the plain language of the statute and our case law interpreting the statute makes clear that MCL 691.1404 requires claimants to serve notice "upon an individual . . . 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*." (Emphasis added). Plaintiff's claimed reliance on defendant's informal claims materials, despite her ability to inform herself of the statutory notice requirement, was simply not reasonable. Plaintiff's failure to comply with the requirements of MCL 691.1404 cannot be excused by application of equitable estoppel.

Plaintiff failed to comply with the statutory notice requirements of MCL 691.1404, and her claim is barred as a matter of law. *McLean*, 302 Mich App at 80. The trial court did not err when it concluded that plaintiff had failed to defeat the application of governmental immunity and granted defendant's motion for summary disposition under MCR 2.116(C)(7).

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron