STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH M. MAUER, Individually and as Personal Representative of the Estate of KRISTIANA LEIGH MAUER, MINDE M. MAUER, CARL MAUER, and CORY MAUER,

Plaintiffs-Appellees,

v

ROBERT WAYNE TOPPING,

Defendant,

and

MANISTEE COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
April 7, 2005

No. 250858
Manistee Circuit Court
LC No. 02-010971-NI

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant Manistee County Road Commission[1] appeals as of right the trial court's denial of its motion for summary disposition based on governmental immunity. We affirm.

I. Facts and Procedural History

This case arises out of a January 18, 2002 traffic accident. Plaintiff Joseph Mauer was driving, with Minde, Carl, Cory, and Kristiana Mauer as passengers, when a car driven in the opposite direction crossed the centerline and forced their car off the road and into a ditch. Kristiana was killed in the accident, and the other occupants were injured. Plaintiffs later filed suit against the driver of the other vehicle and against defendant for failing to maintain the road in a reasonably safe condition.

[1] Throughout this opinion we use "defendant" to refer solely to defendant Manistee County Road Commission.

Plaintiffs' attorney notified defendant of the accident by way of a letter dated August 15, 2002. In the letter, plaintiff's attorney stated that the letter was "to put you on notice that this office is investigating the accident circumstances to determine whether litigation will be commenced for any negligence on the part of [defendant]." The letter continues, "[s]pecifically, we are looking at the condition of the road surface to determine what role it played in this tragic crash." Plaintiff's attorney also sent a copy of the police report with the letter and incorporated it by reference. Sometime after plaintiff sent the August 15, 2002 letter, defendant repaved the road.[2] On November 12, 2002, plaintiffs' filed their first complaint against defendant. In their complaint, plaintiffs alleged that defendant failed to maintain the road in reasonable repair so as to make it safe and convenient for public travel.

On July 14, 2003, defendant moved for summary disposition under MCR 2.116(C)(7), alleging that governmental immunity barred plaintiffs' claims against it. On August 28, 2003, the trial court denied the motion on the ground that further discovery was in order before resolving certain factual issues bound up with the motion. Defendant then appealed as of right. See MCR 7.203(A)(1); MCR 7.202(7)(a)(v).

II. Governmental Immunity and Notice

Defendant first contends that the trial court should have granted summary disposition in its favor because plaintiffs failed to comply with the statutorily mandated notice provisions. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). The applicability of governmental immunity is likewise a question of law reviewed de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). Finally, this Court reviews de novo the proper interpretation of a statute. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 157; 627 NW2d 247 (2001).

Governmental agencies in this state are generally immune from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). However, there is an exception for public highways, under which an injured party may hold the responsible governmental authority liable for failure to maintain the roadway "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). The statute further provides that 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." *Id.*

In addition, MCL 691.1404(1) establishes certain procedural requirements before a party may recover under the defective highway exception:

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[2] Defendant claims that the new work began on August 19, 2002, but plaintiffs' submitted an affidavit by their attorney wherein he stated that he visited the crash site on August 26, 2002, and no construction or resurfacing had yet begun.

> 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.

Subsection (3) establishes a longer notice period for minors and injured persons who are unable to give notice:

> If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) 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 by subsection (1) not more than 180 days after the termination of the disability. [MCL 691.1404(3).]

Finally, even if a plaintiff fails to give timely notice under MCL 691.1404(1), this will not serve as a complete bar to the plaintiff's claims unless the defendant suffered actual prejudice as a result of the plaintiff's failure to comply with the notice provisions. *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976) ("Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision contained in [MCL 691.1404] is not a bar to claims filed pursuant to [MCL 691.1402]."); see also *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365-368; 550 NW2d 215 (1996) (reaffirming the continuing validity of the *Hobbs* rule).[3]

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[3] Defendant invites us to hold that *Nawrocki v Macomb Cty Rd Comm'n*, 463 Mich 143; 615 NW2d 702 (2001) effectively overturned every case that does "not give broad immunity to governmental agencies," including *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976) and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365-368; 550 NW2d 215 (1996). In *Nawrocki*, our Supreme Court construed the scope of the governmental immunity exception created by MCL 691.1402. *Nawrocki*, *supra* at 157. In doing so, the Court noted that "There is one basic principle that must guide our decision today: the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Id.* at 158 (emphasis in original). This principle is not offended by the continuing validity of *Hobbs*. The Court in *Nawrocki* was construing a statute that actually created an exception to governmental immunity, whereas the Court in *Hobbs* was construing the validity of the notice provisions required by MCL 691.1404. While the application of MCL 691.1404 might indirectly affect litigation under MCL 691.1402, it cannot and does not expand or contract the scope of the exception itself. Furthermore, when ruling that actual prejudice was a necessary prerequisite to barring litigation for failing to give notice under MCL 691.1404, the *Hobbs* Court stated that "actual prejudice to the state due to lack of notice . . . is the only legitimate purpose we can posit for this notice provision." *Hobbs*, *supra* at 96. This language suggests that, without

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A. Timeliness of Notice

When the accident occurred, plaintiffs Joseph and Minde Mauer were adults and Carl, Cory, and Kristiana Mauer were under the age of eighteen. While the record does not indicate the severity of the injuries suffered by Joseph, Minde, Carl or Cory, and whether those injuries caused them to be physically or mentally incapable of giving notice under MCL 691.1404(3),[4] Kristiana was killed in the accident and, consequently, was clearly incapable of giving notice. Therefore, Joseph and Minde had 120 days, and Carl and Cory had 180 days, from the time of their injuries to give notice. MCL 691.1404(1), (3). Because she was physically incapable of giving notice, Kristiana had 180 days from the termination of her disability to give notice. MCL 691.1404(3).

The first communication between plaintiffs and defendant, which might constitute notice pursuant to MCL 691.1404(1), was the letter of August 15, 2002. Because August 15, 2002, was 210 days after the accident, any notice provided by this letter on behalf of Joseph, Minde, Carl and Cory was untimely. However, whether Kristiana gave timely notice depends on the point at which her disability was removed.[5] The disability of death is considered removed when the decedent's personal representative is appointed. *Blohm v Emmet Co Rd Comm'rs*, 223 Mich App 383, 387; 565 NW2d 924 (1997). Joseph Mauer was appointed as Kristiana's personal representative on October 30, 2002, which was after the letter of August 15, 2002 and less than two weeks before plaintiffs filed their lawsuit. In addition, the appointment of Kristiana's personal representative came after defendant already commenced repaving the road. Because defendant repaved the road before the expiration of Kristiana's notice period, it cannot establish that it suffered prejudice. *Brown*, *supra* at 368-369. Consequently, MCL 691.1404 will not serve as a bar to Kristiana's claims.

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the actual prejudice interpretation, the notice statute would not be constitutional. See *Brown*, *supra* at 367 n 18. See also *id.* at 369-374 (Riley, J. dissenting). For these reasons, we decline defendant's invitation to question the continuing validity of *Hobbs* and *Brown* absent clear guidance from our Supreme Court.

[4] MCL 691.1404(3) states that, "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." However, neither party has raised the issue, and because of our holding, we need not remand this case for findings of fact regarding these plaintiffs' injuries.

[5] Defendant argues that the language of MCL 691.1404(3), prescribing a longer notice period for injured persons who are physically or mentally incapable of giving notice, does not apply to injured persons who are under the age of eighteen at the time of the injury because the statute permits others to give notice on a minor's behalf. However, this argument requires this Court to ignore the plain meaning of MCL 691.1404(3). The statute refers to injured persons that are physically or mentally incapable of giving notice and does not refer to injured persons, other than persons under the age of eighteen, who are physically or mentally incapable of giving notice. Because the language is not ambiguous, this Court will enforce it as written. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001).

B. Prejudice

To determine whether MCL 691.1404 will bar the claims of the other plaintiffs, we must determine whether the failure to provide the statutorily mandated notice caused defendant actual prejudice. This Court has held that "[n]otice provisions permit a governmental agency to be apprised of possible litigation against it and to be able to able to investigate and gather evidence quickly in order to evaluate a claim." *Blohm*, *supra* at 388. If the failure to give notice prevented defendant from being able to investigate and gather evidence, such that defendant was deprived from having a fair trial, then prejudice will be found. *Id.* In *Blohm*, the court was presented with a case where such a long time had passed since the accident, that much of the evidence that defendant could have used at trial was lost or destroyed. *Id.* at 388-391. As a result, the *Blohm* court determined that the failure to give earlier notice prejudiced the defendant. *Id.* at 391. As already noted, defendant repaved the road sometime after plaintiffs' August 15, 2002 letter and before the filing of plaintiffs' lawsuit on November 12, 2002. Because of this repaving, defendant lost any opportunity to investigate the conditions of the road surface, which plaintiffs allege to have caused the accident. Consequently, if plaintiffs failed to give defendant notice before the road was repaved, their failure to give the proper notice prejudiced defendant and, as a result, their cause of action would be barred by MCL 691.1404.

The only notice given to defendant prior to the repaving of the road, was plaintiffs' letter of August 15, 2002 and the accompanying police report.[6] Therefore, if the letter and accompanying report did not meet the notice requirements of MCL 691.1404, summary disposition as to the claims of plaintiffs Joseph, Minde, Carl, and Cory Mauer would have been proper.

As a preliminary matter, we note that defendant argues that plaintiff's may not properly incorporate the police report into their notice, and, consequently, ask us to disregard the police report in determining whether the letter of August 15, 2002, constituted proper notice under MCL 691.1404(1). We disagree. The notice statute's purpose is to apprise the governmental agency of the possibility of litigation and enable it to investigate and gather evidence. *Blohm*, *supra* at 388. To that end, the statute requires the prospective plaintiff to provide the governmental agency with notice of the occurrence of the injury and the defect, which 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." MCL 691.1404(1). Nothing in the statute indicates that this cannot be accomplished by the incorporation of a report that adequately meets the requirements of the statute. Consequently, we hold that the police report enclosed with the letter of August 15, 2002 may properly be considered in determining whether the letter constituted proper notice under the statute.

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[6] Plaintiffs also sent defendant another letter, also dated August 15, 2002, which requested certain documents pursuant to Michigan's Freedom of Information Act. Defendant apparently received both letters on August 16, 2002.

The applicable provision of the statute states that 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." MCL 691.1404(1). The letter of August 15, 2002 reads,

> This office represents Joe Mauer and his family in connection with a serious/fatal accident which occurred on January 18, 2002 on Maple Road in Manistee County.
>
> The purpose of this letter is to put you on notice that this office is investigating the accident circumstances to determine whether litigation will be commenced for any negligence on the part of the Manistee County Road Commission. Specifically, we are looking at the condition of the road surface to determine what role it played in this tragic crash. Enclosed is a copy of the UD-10 [police accident report].

Defendant contends that this notice, even with the incorporation of the police report, is deficient because it fails to "specify the exact location and nature of the defect," as required by the statute. Defendant does not contest any other notice requirements under MCL 691.1404,[7] and we disagree that the letter and police report failed to specify the exact location and nature of the defect.

Defendant argues that a proper notice must include the exact nature of the defect, which plaintiffs' letter did not do. Defendant states that this is necessary because plaintiffs "have been ingenious and unstinting in their efforts to avoid immunity." First, we reiterate that the purpose of the notice statute is to give the governmental agency a fair opportunity to investigate and collect evidence for its defense. *Blohm*, *supra* at 388. Hence, to prevent prejudice, the notice need only be sufficient to enable the governmental agency to conduct a proper investigation. Furthermore, the statute states that the notice must state the "nature" of the defect. MCL 691.1404(1). "Nature" is defined as the "character, kind, or sort." *Random House Webster's College Dictionary* (1991). Each of these terms is general in nature and refers to a class or category rather than something more specific. Therefore, a potential plaintiff need not present a detailed description of a specific type of defect, but rather need only identify the "character, kind, or sort" of defect to satisfy the notice requirements. To hold otherwise, would be to require potential plaintiffs to conduct elaborate investigations within the relatively short timeframe envisioned by the notice statute in order to narrow the range of possible defects. This is simply not consistent with the statute's language or purpose.

Plaintiffs' letter stated that they were contemplating litigation based upon the possible negligence of the Manistee County Road Commission that contributed to a fatal accident on

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[7] However, defendant does repeatedly refer to the fact that plaintiffs' letter does not actually state that they intend to sue, but rather states that they are investigating that possibility. However, the statute does not require plaintiffs to state that they are in fact going to sue. It only requires plaintiffs to provide the governmental agency with notice regarding their injuries, the defect and the witnesses known at the time. MCL 691.1404(1).

Maple Road. Plaintiffs also stated that the negligence they were investigating related to the condition of the road surface and the accident report enclosed with the letter indicated where on Maple Road the accident occurred. Furthermore, the accident report described the road as showing "signs of age in the form of surface cracks and tire travel path 'channeling.'"[8] Taken in conjunction with the enclosed police report, the letter sufficiently identified both the exact location and "nature of the defect" to apprise defendant of possible "litigation against it and to be able to investigate and gather evidence quickly in order to evaluate" the claim. *Blohm*, *supra* at 388.

III. Pleading the Highway Exception

Defendant next argues that plaintiffs' complaint failed to set forth a theory that invokes the highway exception. We disagree.

"When bringing suit against a state agency, plaintiff must plead in avoidance of governmental immunity." *Jones v Williams*, 172 Mich App 167, 171; 431 NW2d 419 (1988). In plaintiffs' first amended complaint, the allegation of a breach of duty on defendant's part is set forth in one paragraph, including five subparagraphs:

> 19. Defendant . . . breached its duty in that it failed to construct and maintain Maple Road in reasonable repair so as to make it reasonably safe and convenient for public travel. Such failure includes, but is not limited to the following:
>
> a. Failing to construct and maintain a roadway that would be reasonably safe for public travel;
>
> b. Failing to construct and maintain a roadbed using appropriate material that would not deteriorate so as to allow grooves or channels in the roadbed that would in turn allow excessive and unsafe accumulations of ice;
>
> c. Failing to maintain the roadbed to be free of ice and snow accumulation which caused the northbound vehicle to lose control and cross the centerline.
>
> d. Failing to properly remove accumulated ice from the roadbed so as not to create a hazardous condition for motorists.

[8] Defendant contends that this statement does not actually identify a defect, because the police officer's statement that there was "channeling" is followed by the statement that "there was no change in the general roadway condition in this area that would be considered as an additional contributory factor in this crash." This statement is merely the officer's opinion about whether the stated defect actually contributed to the accident. Nevertheless, the report does identify a type of defect in the condition of the road surface.

e. Failing to prevent deterioration/failure of road surface thereby rendering it unsafe and unfit for public travel.

We note that defendant acknowledges and attempts to refute subparagraphs (a) through (d), but is silent concerning subparagraph (e). The latter, in general terms, certainly alleges a failure on the part of defendant to maintain the road "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). The allegation is substantially repeated in subparagraphs (a) through (c). Moreover, subparagraphs (c) through (e) could be read together as an assertion that defendant allowed some flaw in the road to aggravate the normal hazards of winter precipitation. See *Haliw v Sterling Heights*, 464 Mich 297, 306-308; 627 NW2d 581 (2001); *Skogman v Chippewa Co Rd Comm*, 221 Mich App 351, 354; 561 NW2d 503 (1997).

Accordingly, if allegations concerning construction, design, or simple failure to remove snow or ice are not actionable under a narrow interpretation of the highway exception, the complaint nonetheless includes allegations of a failure to maintain the road sufficient to constitute a pleading in avoidance of governmental immunity.

For these reasons, the trial court did not err in refusing to grant defendant's motion for summary disposition based on governmental immunity without further discovery.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper

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SAAD, P.J. *(dissenting):*

I respectfully dissent.

In *Haliw v Sterling Heights*, 464 Mich 297, 306-308; 627 NW2d 581 (2001), the Michigan Supreme Court made it clear that plaintiff must show that it was the combination of ice and a defect in the road that caused the accident. That is, plaintiff must show that there was a persistent defect in the road rendering it unsafe for public travel at all times, that in combination with the ice, caused the accident. Here, there is no showing that the alleged defect rendered the roadbed unsafe for travel at all times. Indeed, it is not clear that plaintiff made the allegation that there was a "persistent defect" that rendered the road unsafe for public travel "at all times." If the majority were to hold that this matter should be remanded to the trial court to determine this dispositive issue, then I would agree with a remand. However, by simply affirming the trial court, the majority instead misapprehends the holding in *Haliw* and remands this matter under the cloud of this misapprehension which will only unduly prolong and complicate this litigation. Accordingly, I dissent.

/s/ Henry William Saad