

STATE OF MICHIGAN
COURT OF APPEALS

JOEL SUPER and MADELEINE SUPER as Next
Friend of KATERINA SUPER, a Minor,

UNPUBLISHED
July 14, 2009

Plaintiffs-Appellees,

v

No. 282636
Court of Claims
LC No. 07-000085-MZ

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant,

and

MELISSA KAE KANE,

Defendant.

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendant Michigan Department of Transportation appeals as of right the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7). We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises out of injuries allegedly sustained by the minor on August 14, 2006, after a car accident involving Melissa Kae Kane, an agent of defendant's, while she was driving defendant's vehicle. Plaintiffs asserted that defendant was liable for the minor's injuries resulting from the negligent operation of the vehicle driven by Kane. Plaintiffs filed the instant action against defendant in the Court of Claims on July 24, 2007.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiffs' claims were barred because they failed to file a notice of intention to file a claim within six months as required by MCL 600.6431(3). Plaintiffs argued that its claims were not barred because the minor tolling provision, MCL 600.5851(1), applied to the notice provisions of MCL 600.6431(3). The trial court denied defendant's motion for summary disposition finding that the notice provisions had been tolled because the claimant was a minor.

This Court reviews de novo a trial court's ruling to either grant or deny a motion for summary disposition under MCR 2.116(C)(7). *Oliver v Smith*, 269 Mich App 560, 563; 715 NW2d 314 (2006). 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. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). Proper statutory interpretation is also a question of law reviewed de novo on appeal. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).

As a general rule, a governmental agency is immune from tort liability when it is “engaged in the exercise or discharge of a governmental function.” *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007); MCL 691.1407(1). The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, broadly shields a governmental agency from tort liability and enumerates several narrowly drawn exceptions to governmental immunity, including the motor vehicle exception, which is at issue in this case. *Id.* at 202-204. The motor vehicle exception, MCL 691.1405, provides that a governmental agency is liable for bodily injury or property damage caused by the negligent operation of an agency-owned vehicle by one of its employees. The GTLA also incorporates the Court of Claims Act. MCL 691.1410(1). The Court of Claims Act provides for procedure and time limits for filing notice and a claim, as follows:

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

* * *

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action. [MCL 600.6431.]

Plaintiffs argued below and on appeal that the tolling provisions of MCL 600.5851(1) apply to the notice requirements of MCL 600.6431. MCL 600.5851(1) provides that:

Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, 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. This section does not lessen the time provided for in section 5852.

When construing a statute, this Court’s primary goal is to ascertain the legislative intent that may reasonably be inferred from the words in the statute. *Allen, supra* at 52-53; *Klida v Braman*, 278 Mich App 60, 64; 748 NW2d 244 (2008). The words and phrases of a statute should be accorded their plain and ordinary meaning, considering the context in which the words

are found. *Klida, supra*. If the statutory language is clear and unambiguous, this Court assumes that the Legislature intended its plain meaning and the statute is enforced as written. *Id.*

This Court has concluded that a statutory notice provision is not the same as a statute of limitations. *Davis v Farmers Ins Group*, 86 Mich App 45, 47; 272 NW2d 334 (1978). Statutory notice provisions provide time to investigate and appropriate funds for settlement purposes. *Id.* Statutes of limitations prevent stale claims and put an end to the fear of litigation. *Id.*

MCL 600.6431(3) serves as a notice requirement. MCL 600.6431(3) provides that if a claimant alleges property damage or personal injuries, the claimant shall file a notice of intention to file a claim or the claim itself within 6 months following the accident. This statute does not limit or curtail the allotted time that a potential litigant may bring her claim. Instead, the provision requires a timely written notice of the intention to file a claim. Accordingly, the six-month notification requirement is a notice provision and not a period of limitations. Because the plain language of MCL 600.5851(1) applies to “periods of limitations” and MCL 600.6431(3) is not a period of limitations, MCL 600.5851(1) did not apply to the notice provisions of MCL 600.6431.

Plaintiffs argue that this six-month notice requirement has deprived the minor of her rights. However, the Michigan Supreme Court has held that the Legislature is within its authority to structure governmental immunity solely as it deems appropriate. *Mack v City of Detroit*, 467 Mich 186, 202; 649 NW2d 47 (2002). In *Rowland, supra*, the Michigan Supreme Court advised that, as the Legislature is not required to provide exceptions to governmental immunity, it has the authority to allow such suits only upon compliance with rational notice limits. *Rowland, supra* at 212.

Plaintiffs’ claim for personal injuries was barred because they did not file a notice of intention to file a claim for damages within six months of the accident. The trial court erred in denying MDOT’s motion for summary disposition.

Reversed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

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DAVIS, J. (*dissenting*).

I respectfully dissent because I am not convinced that the result reached by the majority is absolutely mandated by the present state of the law, and furthermore, important policy considerations warrant the opposite result.

This case arises out of injuries sustained by Katerina Super as a result of an automobile accident. Katerina was three years old at the time. Katrina and her siblings were riding in child seats, properly restrained in the back seat of their parents' vehicle. The family was driving eastbound on I-94 in Calhoun County, near the Battle Creek rest area. At the same time, Melissa Kae Kane, an employee of the Department of Transportation (MDOT), was driving a white Department van westbound at – according to an accident reconstructionist – 92.3 MPH, apparently because she was running late. Witnesses who were also driving westbound testified that the van “flew” past them, lost control, and began rolling over. The van literally became airborne, crossed over the median, and, despite Super's father's attempts to avoid a collision, struck the Supers' car on the driver's side. The worst damage was just behind the driver's door; the passenger window on that side shattered, and the glass fragments lacerated Katrina's scalp and face. MDOT itself was fully aware of these events: three weeks after the accident, it issued a “Notice of Formal Counseling” to Kane, identifying the accident, the location, and even the police report that estimated her speed at 92 MPH. Notwithstanding these facts, and notwithstanding the lack of any legal authority mandating such a result, the majority feels

constrained to hold that MDOT is immune to the instant suit because it did not receive procedurally correct technical notice. I do not.

As the majority observes, statutes of limitations are distinct from notice provisions. Both, however, are generally regarded under Michigan law as procedural, rather than substantive. *Staff v Johnson*, 242 Mich App 521, 531; 619 NW2d 57 (2000).

Statutes of limitations are generally intended to protect would-be defendants from defending against stale claims and to punish would-be plaintiffs who fail to pursue their claims industriously. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 404 n 22; 738 NW2d 664 (2007). Early in Michigan's legal history, the power of the Legislature to enact limitations periods was "not doubted," although unless "a reasonable time within which suit may be brought" was afforded, any such statute could not be "sustained as a law of limitations." *Price v Hopkin*, 13 Mich 318, 324-325 (1865). The goal, then, is to cut off liability at some point simply by virtue of the passage of time.

Notice provisions, at least in the context of suits against public entities, are intended to protect the taxpayers from "unjust raids upon [public] treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto and the accident within reach." *Ridgeway v City of Escanaba*, 154 Mich 68, 72-73; 117 NW 550 (1908). Notice provisions are additionally intended to afford government entities the opportunity to conduct a timely investigation, particularly because the individuals who would need to conduct that investigation might not have any other way to learn of the potential liability in advance of commencement of an actual suit. See the consolidated cases of *Lisee v Secretary of State* and *Howell v Lazaruk*, 388 Mich 32, 42-44; 199 NW2d 188 (1972).

Finally, the "purpose of a savings or tolling statute for persons under a disability is to protect the legal rights of those who are unable to assert their own rights and to mitigate the difficulties of preparing and maintaining a civil suit while the plaintiff is under a disability." *Kilda v Braman*, 278 Mich App 60, 71; 748 NW2d 244 (2008), quoting 51 Am Jur 2d, Limitation of Actions, § 218, p 591. The disability here is critical: minors are unable to protect their own legal rights by themselves, and unless the minority tolling provision actually protects those rights until the minor can pursue them on his or her own, the provision fails in the essential purpose for which it was intended. See *Kilda*, pp 71-73. This does necessarily work some hardship to defendants, although any delay will likely interfere with a plaintiff's ability to put on proofs, as well. *Id.*, 73.

Even though MCL 600.5851(1) only *explicitly* makes a reference to bringing an action "although the period of limitations has run," the entire provision would be nullified if it did not also apply to notice provisions. The harm that the statute is intended to rectify – the inability of certain disabled individuals to protect their own legal rights – turns on *affording those individuals a reasonable chance to protect those rights when the disability is removed*. This is not only a statutory protection, but "an important and longstanding public policy that is clearly rooted in the law." *Kilda*, *supra* at 73 (internal quotations omitted). Although *Kilda* discussed the applicability of the statute to different causes of action, its conclusion applies equally to any procedural impediment to a disabled person's ability to be made whole: "[t]o deny minors

whose cause of action accrues during their disability the opportunity to pursue their otherwise unasserted legal rights would be the antithesis of the firmly-rooted public policy that such minors are to be protected until one year after they reach the age of majority.” *Id.*, *supra* at 74-75.

I agree that the Legislature has the power to structure governmental immunity exceptions as it sees appropriate, but I do not believe that the Legislature has done so in a way that removes the long-standing legal protections for disabled persons who cannot assert their own rights. In my view, *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), is not dispositive: it held that the Legislature could Constitutionally condition rights of action in contravention of governmental immunity on rational notice provisions irrespective of whether any prejudice would occur without that notice. *Rowland*, *supra* at 210-214. But this case is not about whether the lack of notice is prejudicial. This case is about whether a person who *has* a right but is unable to assert it because of a disability may, once the disability is removed, then have a chance to assert that right.

In short, the purpose of the minority/insanity tolling provision is to protect disabled persons from the consequences of being unable to exercise their rights on their own. It is a tradeoff, but a tradeoff that is deeply entrenched in our jurisprudence. The ultimate goal – permitting disabled persons the opportunity to bring suit – would not be served by extending one deadline until the disability is removed, but not extending another. Furthermore, this is not a case in which the claim can be said to be trumped up, nor one in which the State did not already know about the occurrence or have the superior capacity to investigate it in the first place. I have not found any cases that necessarily require the result reached by the majority, and I would not do so now.

I would affirm.

/s/ Alton T. Davis