

***In the Supreme Court***

Appeal from the Court of Appeals  
 Hon. Kurtis T. Wilder, P.J., Hon. Patrick M. Meter, Hon. Deborah A. Servitto

SUPREME COURT

APR - 2018

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 MOHAMMAD MAWRI,

Plaintiff-Appellant,

v

CITY OF DEARBORN,

Defendant-Appellee.

TERM

**Supreme Court No. 139647**

Court of Appeals No. 283893

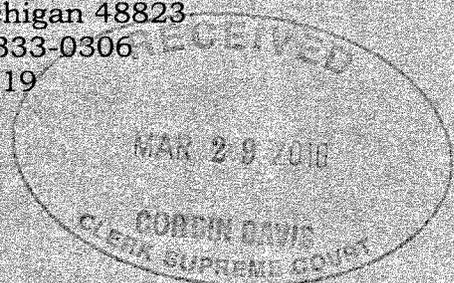
Wayne County Circuit Court  
No. 06-617502-NO

**BRIEF OF MDTC AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-  
 APPELLEE, CITY OF DEARBORN'S, BRIEF ON APPEAL**

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**STATEMENT OF APPELLATE JURISDICTION**

This matter comes before this Court following an August 6, 2009 opinion of the Court of Appeals reversing the Trial Court's Order denying Defendant-Appellee's Motion for Summary Disposition. *Mawri v City of Dearborn*, unpublished opinion of the Court of Appeals, issued August 6, 2009 (Docket No. 283893).

Plaintiff-Appellant filed an Application for Leave to Appeal, which was granted by Order of this Court on December 18, 2009. Jurisdiction in this Court is proper pursuant to MCR 7.301 and MCR 7.302.

**STATEMENT OF QUESTIONS PRESENTED**

I. WHETHER THIS COURT SHOULD AFFIRM THE COURT OF APPEALS DETERMINATION THAT THE PLAINTIFF'S NOTICE GIVEN UNDER MCL 691.1404(1) WAS DEFICIENT WHERE THE PLAINTIFF'S NOTICE PROVIDED AN INCORRECT LOCATION OF THE ACCIDENT AND WHERE THE NOTICE FAILED TO SPECIFY THE EXACT NATURE OF THE ALLEGED SIDEWALK DEFECT

Plaintiff-Appellant says:	"No."
Defendant-Appellee says:	"Yes."
The Trial Court would presumably say:	"No."
The Court of Appeals would presumably say:	"Yes."
Amicus Curiae says:	"Yes."

II. WHETHER THIS COURT SHOULD DENY PLAINTIFF'S ARGUMENT THAT THE NOTICE REQUIREMENTS OF MCL 691.1404(1) ARE WAIVED WHEN THE CITY ALLEGEDLY HAD NOTICE OF THE DEFECT FOR MORE THAN 30 DAYS WHERE THIS ISSUE WAS NEVER ADDRESSED BY THE LOWER COURTS AND WHERE SUCH AN INTERPRETATION WOULD REQUIRE THIS COURT TO RE-WRITE MCL 691.1404(1)

Plaintiff-Appellant says:	"No."
Defendant-Appellee says:	"Yes."
The Trial Court would presumably say:	"Unknown."
The Court of Appeals would presumably say:	"Unknown."
Amicus Curiae says:	"Yes."

III. WHETHER THIS COURT SHOULD DENY PLAINTIFF'S ARGUMENT THAT THE "ACTUAL PREJUDICE" STANDARD SHOULD APPLY WHEN A PLAINTIFF FAILS TO STRICTLY COMPLY WITH THE SPECIFIC NOTICE REQUIREMENTS OF MCL 691.1404(1) AND THAT THE HOLDING IN *ROWLAND V WASHTENAW CO RD COMM* SHOULD BE OVERTURNED WHERE: (1) THIS ISSUE WAS NEVER ADDRESSED BY THE LOWER COURTS, (2) THE "ACTUAL PREJUDICE" STANDARD DOES NOT APPLY TO THE SPECIFIC NOTICE REQUIREMENTS OF MCL 691.1404(1), AND (3) THE INSERTION OF AN "ACTUAL PREJUDICE" STANDARD INTO MCL 691.1404(1) WOULD RE-WRITE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTE

Plaintiff-Appellant says:	"No."
Defendant-Appellee would presumably say:	"Yes."
The Trial Court would presumably say:	"Unknown."
The Court of Appeals would presumably say:	"Unknown."
Amicus Curiae says:	"Yes."

**STATEMENT OF INTEREST**

The Michigan Defense Trial Counsel (“MDTC”) is an organization consisting primarily of civil defense attorneys in the State of Michigan. The MDTC has as one of its organizational goals to support improvements in the adversary system of jurisprudence and the operation of the courts. The MDTC serves its membership through programs of continuing education and also serves the defense bar by appearing as amicus curiae in cases such as this.

**STATEMENT OF FACTS**

Amicus curiae relies upon the Statement of Facts as set forth the City of Dearborn's Brief on Appeal.

## ARGUMENT

I. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS DETERMINATION THAT THE PLAINTIFF'S NOTICE GIVEN UNDER MCL 691.1404(1) WAS DEFICIENT WHERE THE PLAINTIFF'S NOTICE PROVIDED AN INCORRECT LOCATION OF THE ACCIDENT AND WHERE THE NOTICE FAILED TO SPECIFY THE EXACT NATURE OF THE ALLEGED SIDEWALK DEFECT

### **A. Introduction**

The Court of Appeals correctly determined in this case that the Plaintiff's notice of injury to the City of Dearborn was insufficient to meet the plain and unambiguous requirements of MCL 691.1404(1) where the notice does not provide the correct location of the slip and fall accident and where the notice does not describe the exact nature of the defect. Therefore, this determination should properly be affirmed.

A ruling on a Motion for Summary Disposition is reviewed de novo on appeal. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). A motion brought under MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires the consideration of all documentary evidence filed or submitted by the parties. *Id.*

Questions of statutory interpretation are also reviewed de novo on appeal. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When interpreting the meaning of a statute, the court's main objective is to ascertain and give effect to the Legislature's intent. *Id.* The first step is to determine whether the language of the statute is plain and unambiguous. *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277

Mich App 192, 202; 745 NW2d 125 (2007). If the language is unambiguous, the court must assume that the Legislature intended its plain meaning and must apply the statute's language as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Every word must be assumed to have some meaning, and every provision must be given effect, if possible. *Danse Corp v Madison Heights*, 466 Mich 175, 182; 644 NW2d 721 (2002).

**B. MCL 691.1404(1) clearly and unambiguously requires an injured person to provide the exact location and nature of the defect in his or her notice to the governmental agency**

The governmental tort liability act, being MCL 691.1401 *et seq.*, provides broad tort immunity to governmental agencies. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202, 248-250; 731 NW2d 41 (2007). More specifically, MCL 691.1402a(1) provides that municipal corporations have no duty to repair or maintain areas outside the improved portion of the highway designed for vehicular travel. Sidewalks are specifically identified in this statute as being an area outside the improved portion of the highway designed for vehicular travel. There is an exception to this immunity, though, if the municipal corporation knew or should have known of the defect within 30 days prior to the occurrence and the defect is the proximate cause of the claimed injury. MCL 691.1402a(1)(a-b). Under such circumstances, the injured person may seek redress. *Id.*

As a *condition precedent* to seeking redress for injuries occurring on a municipal sidewalk, however, the injured person *shall* provide the municipal

corporation with the notice required by MCL 691.1404(1). This statute 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.)

Based on the plain and unambiguous language of MCL 691.1404(1), the notice requirement is a “condition” to allowing the injured person to seek redress in avoidance of governmental immunity. Moreover, MCL 691.1404(1) explicitly sets forth the required content of the notice and states that the notice *shall* contain the following: (1) the exact location and nature of the defect, (2) the injury sustained, and (3) the names of any witnesses known at the time by the claimant.

Importantly, there is no dispute in this Court that these notice requirements must be fulfilled before a claimant can proceed with litigation against the municipal corporation. In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 203-204, 248-250; 731 NW2d 41 (2007), the clear majority of this Court acknowledged that a claimant’s notice must comply with the specific notice requirements before the claimant can proceed with litigation against the governmental agency.

**C. The Plaintiff's notice to the City of Dearborn does not comply with the requirements of MCL 691.1404(1) where the notice provides the wrong location of the incident and where the notice fails to state the exact nature of the sidewalk defect**

The issue presented in this case is whether the Plaintiff's notice, provided to the City of Dearborn in May of 2006<sup>1</sup>, meets the strict requirements of MCL 691.1404(1). The Court of Appeals properly determined that the notice does not meet those requirements for two reasons. First, the notice fails to set forth the exact location of the defect. In fact, the notice is misleading in that it provides the *wrong* location. Second, the notice fails to state the exact nature of the defect at issue. The notice provides only a vague description that there is a defect with the sidewalk, but fails to specify the "exact" nature of the defect as required by the statute.

***1. The Plaintiff provided an inaccurate statement of the location of the defect***

As to the location of the defect, the notice at issue provides that the incident occurred in the area of 5034 Middlesex, Dearborn, Michigan.<sup>2</sup> It is undisputed in this case that 5034 Middlesex is the address where the Plaintiff was residing at the time. But, the Plaintiff testified that the accident occurred in front of his neighbor's house.<sup>3</sup> Moreover, the police report taken in this matter reflects that the Plaintiff told the responding officer that the accident occurred in front of his neighbor's house located at 5026 Middlesex.<sup>4</sup> Thus, the Plaintiff was aware of the exact location on the night of the incident. The

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<sup>1</sup> See Plaintiff-Appellant's Appendix at p 33a.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at p 55a.

<sup>4</sup> *Id.* at p 11a.

Plaintiff was clearly not confused about the location of the incident in any way. Despite the fact that the Plaintiff clearly knew the accident occurred in front of 5026 Middlesex, the Plaintiff provided the *wrong* address in the notice given to the City of Dearborn. Therefore, the Plaintiff failed to provide to the City the *exact* location of the defect as required by MCL 691.1404(1).

As noted in *Bruise v City of Pontiac*, 282 Mich App 646, 655; 766 NW2d 311 (2009) (citing *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000)), the Legislature's repeated use of the word "shall" indicates that the requirements set forth in MCL 691.1404(1) are mandatory. Thus, it is mandatory for the Plaintiff to provide in his notice to the City the "exact" location of the defect.

There is little case law interpreting the meaning of the term "exact". In *Ketchum v City of Grand Rapids*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2009 (Docket No. 282455), the Court, citing the *Random House Webster's College Dictionary* (1977), stated that the term "exact" means "strictly accurate or correct" and "precise, as opposed to approximate".<sup>5</sup> The *Ketchum* Court, relying on this Court's holding in the case of *Barribeau v City of Detroit*, 147 Mich 119, 126; 110 NW 512 (1907), went on to adopt the holding in *Barribeau* that "[w]hen parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has not been given to the city".

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<sup>5</sup> See also *Botsford v Charter Twp of Clinton*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2007 (Docket No. 272513) (concluding that the term "exact" as it is used in the notice requirement contained in MCL 691.1406, is defined as "strictly accurate or correct").

Here, the Plaintiff did not give a “strictly accurate or correct” description of the location of the defect. Indeed, the Plaintiff, despite being clearly aware of the accurate location of the defect, provided an incorrect location of the defect in his notice to the City of Dearborn. Thus, even under the standard set forth in *Barribeau, supra*, a case relied upon by the Plaintiff in his Brief on Appeal, the Plaintiff’s notice is insufficient.

One of the purposes of the notice requirement is to “provide the governmental agency with an opportunity to investigate the claim while the evidentiary trail is still fresh and, additionally, to remedy the defect before other persons are injured. *Hussey v City of Muskegon Heights*, 36 Mich App 264, 267-268; 193 NW2d 421 (1971). Here, the Plaintiff’s notice wholly failed in giving the City an opportunity to investigate the defect where the City was not provided an accurate statement as to the location of the defect. Indeed, had the City inspected the sidewalk in front of 5036 Middlesex, the City would not have been able to locate and inspect the defect that allegedly caused the Plaintiff’s fall. The Plaintiff himself admits that the defect was not in front of this address.

The Plaintiff further argues that the location given substantially complied with the notice requirement of MCL 691.1404(1). In making this argument, Plaintiff relies on such cases as *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969) (holding that “[o]ur courts are inclined to favor a liberal construction of notice requirements so long as they tend in that direction *and are not misleading*”) (emphasis added). Again, the problem with

the Plaintiff's argument in this case is not that his notice was inexact, but rather, that his notice was exact *and incorrect*. Consequently, the Plaintiff's notice does not meet the standard set forth in *Meredith* because the notice was misleading.

It is further respectfully submitted that under the plain language of the notice statute, it is not sufficient to "substantially" comply with the requirements. Rather, the plain language of the statute requires that the injured person provide the "exact" location of the defect. The language of the statute is plain and unambiguous. The statute requires identification of the "exact" location of the defect. Thus, since this language is unambiguous, the court must assume that the Legislature intended its plain meaning and must apply the statute's language as written. *Roberts v Mecosta Co. Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). There is simply no indication from the plain language of the statute that it permits, or that the Legislature intended, anything less than a statement of the exact location of the defect. Had the Legislature intended a lesser standard, it could have easily incorporated language to that effect. For example, the Legislature could have required the injured person to provide an approximate location of the defect. Alternatively, the Legislature could have explicitly stated that substantial compliance with the notice provision is sufficient.<sup>6</sup> Here, the Legislature chose to require an

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<sup>6</sup> Indeed, there are other statutes wherein the Legislature has specifically stated that substantial compliance is sufficient. See, *i.e.*, MCL 570.1302(1) (providing that substantial compliance with the provisions of the construction lien act are sufficient for the validity of a construction lien); MCL 29.11 (providing that substantial compliance with certain sections of the fire prevention code are sufficient to give full force and effect to an order of the state fire marshal).

injured person to state the exact location of the defect in the notice provided to the governmental agency. Thus, the intent of the Legislature is clear that nothing short of this requirement will suffice.

Finally, the Plaintiff argues that the City was given sufficient notice of the defect by virtue of the police report and by virtue of its own records that the sidewalk in this general area was repaired. There are conflicting Court of Appeals cases addressing this issue, see *i.e.*, *Chambers v Wayne Co Airport Authority*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277900) (holding that an internal report prepared by the airport authority could be considered in determining the sufficiency of notice under the building exception to governmental immunity); *Raboczkay v City of Taylor*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket No. 277772) (holding that a police officer's incident report cannot be considered in determining whether notice in compliance with MCL 691.1404(1) was given by the injured person); *Kulhanek v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2010 (Docket No. 288382) (holding that actual knowledge of the incident by a state agency does not excuse the injured person from complying with the notice requirements of MCL 691.1404(1)); *Woods v City of Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2009 (Docket No. 283781) (holding that notice of the defect given to the investigating police officer could not substitute for the notice required under MCL 691.1404(1), which is required to be given by the injured person).

Turning to the plain language of the notice statute, it is clear that reports made by persons other than the injured person cannot be considered in determining the sufficiency of the notice given pursuant to MCL 691.1404(1). This statute explicitly states that the notice must come from the injured person. 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.)

MCL 691.1404(3) reiterates that the notice must come from the injured person. This subsection provides in relevant part:

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. 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. (Emphasis added.)

Based on the plain language of the statute, a notice complying with the terms of MCL 691.1404(1) must come from “the injured person”. There simply is no language in the provision that allows the injured person to meet the requirements of this provision by relying on some other source of alleged notice.

**2. The Plaintiff's description of the nature of the defect is also insufficient**

The Plaintiff's notice also fails to meet the requirements of MCL 691.1404(1) where the notice does not state the exact nature of the defect. In his notice to the City, the Plaintiff simply states that he was injured as a result of a "defective side-walk".<sup>7</sup> The Plaintiff fails to provide any description of the defect being claimed, let alone the "exact" nature of the defect.

Plaintiff relies upon the cases of *Tattan v City of Detroit*, 128 Mich 650; 87 NW 894 (1901), *Jones v City of Ypsilanti*, 26 Mich App 574; 182 NW2d 795 (1970), and *Hussey v City of Muskegon Heights*, 36 Mich App 264; 193 NW2d 421 (1972) for the proposition that the description of the defect as a "defective sidewalk" is sufficient to meet the notice requirement. A more careful review of these decisions, however, reveals that these cases do not properly support this position. In *Tattan*, this Court was called upon to determine whether a notice given by the Plaintiff met the requirements of the city charter, which mandated that the notice contain "the time, place and cause of such injury and the nature thereof". Thus, the charter provision at issue in *Tattan* was substantially different than the requirements of MCL 691.1404(1) where the notice provision applicable to this case requires a statement of the "exact" nature of the defect.

In *Jones*, the Court of Appeals did hold that the description contained in the notice of a "defective sidewalk" was sufficient. *Id.* at 583. But, the Court's determination was premised upon the fact that the notice also provided a

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<sup>7</sup> Plaintiff-Appellant's Appendix at p 33a.

specific description of the location of the defect. *Id.* at 583-584. Here, the notice given by the Plaintiff did not provide an accurate description of the specific location of the defect. In fact, the location given was not correct. Therefore, the holding in *Jones* does not apply to this case where the facts are significantly distinguishable.

Finally, in *Hussey*, the Court of Appeals reached its conclusion that the description “defect in the sidewalk” was sufficient to comply with the terms of MCL 691.1404(1) upon a rationale that “deficiencies in a notice of injury and defect are not of jurisdictional import, and an injured person may not be denied his day in court on that account absent a showing by the governmental agency that it has been thereby prejudiced”. *Id.* at 270. Thus, this part of the holding in *Hussey* is clearly contrary to the majority holding in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 203-204, 248-250; 731 NW2d 41 (2007). As stated in Justice Kelly’s opinion in *Rowland*, where a plaintiff fails to satisfy the statutorily required notice specifying the exact location and nature of the defect, the governmental agency need not show actual prejudice and is entitled to judgment as a matter of law. *Rowland* at 248.

Importantly, in the case of *Barribeau v City of Detroit*, 147 Mich 119; 110 NW 512 (1907), this Court reviewed the sufficiency of a notice that provided a description of the defect as “a defective and improperly constructed sidewalk” and held that this description was insufficient. This case involved the Court’s interpretation of the city charter requirement that a claimant give notice of the “time, place, and cause of such injury and the nature thereof”. Thus, the

notice requirement at issue in *Barribeau* was less stringent than the notice requirement contained in MCL 691.1404(1). Despite containing a less stringent requirement, this Court still held that the description of the defect as “a defective and improperly constructed sidewalk” was insufficient to meet the requirements of the city charter. The Court reasoned that absent parol evidence as to the exact location and description of the defect, the city did not have reasonable notice of the defect. Here, just as in *Barribeau*, the City of Dearborn did not have sufficient notice where: (1) the location of the defect that was given was inaccurate, and (2) there is no description given of the exact nature of the defect. Thus, here, just as in *Barribeau*, the notice is insufficient.

This Court noted in *Barribeau* that the purpose of such notice requirements is not only to give the government entity a chance to investigate the incident, but also to confine the plaintiff to a particular “venue” of injury. *Id.* at 125. This consideration is equally true today as it was in 1907. Indeed, as evidenced in this case, the Plaintiff in this case has tried to change the “venue” of injury. Although the Plaintiff claimed in his notice that his injury occurred in front of 5034 Middlesex, he then tried to change the venue of injury during litigation and contended that the incident occurred in front of 5026 Middlesex. Thus, by giving an incorrect statement of the location of the defect, the Plaintiff has frustrated the intent of the notice statute. Moreover, the deficiency in the Plaintiff’s notice is particularly egregious where it is clear based on the police report that there was no confusion on the part of the Plaintiff as to where the defect was actually located. The Plaintiff knew the

defect was located in front of 5026 Middlesex. Therefore, the Plaintiff's failure to provide the exact location of the defect in combination with his failure to provide an exact description of the nature of the defect renders his notice insufficient under the terms of MCL 691.1404(1) and the Court of Appeals properly determined that judgment as a matter of law should be granted in favor of the City.

II. THIS COURT SHOULD DENY PLAINTIFF'S ARGUMENT THAT THE NOTICE REQUIREMENTS OF MCL 691.1404(1) ARE WAIVED WHEN THE CITY ALLEGEDLY HAD NOTICE OF THE DEFECT FOR MORE THAN 30 DAYS WHERE THIS ISSUE WAS NEVER ADDRESSED BY THE LOWER COURTS AND WHERE SUCH AN INTERPRETATION WOULD REQUIRE THIS COURT TO RE-WRITE MCL 691.1404(1)

Plaintiff suggests that if the requirements of MCL 691.1402a and MCL 691.1403 are met, then the notice requirement of MCL 691.1404(1) is somehow waived or inapplicable. This argument is contrary to the plain language of the governmental tort liability act, and more specifically, the express terms of MCL 691.1404(1).

MCL 691.1402a(1) provides in relevant part:

Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:

(a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

(b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.

Thus, under this provision, municipal corporations have no duty to repair or maintain areas outside the improved portion of the highway designed for vehicular travel. Sidewalks are specifically identified in this statute as being an area outside the improved portion of the highway designed for vehicular travel. There is an exception to this immunity, though, if the

municipal corporation knew or should have known of the defect within 30 days prior to the occurrence and the defect is the proximate cause of the claimed injury.

MCL 691.1403 provides that a governmental agency is not liable for injuries caused by a defective highway unless the agency knew, or should have known, of the existence of the defect and had reasonable time to repair it. This provision further provides that knowledge and time to repair are presumed if the defect existed for a period of 30 days or longer. The statute reads:

No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

MCL 691.1404(1) then places a condition precedent on a claim brought pursuant to the terms of MCL 691.1402a and MCL 691.1403 by requiring notice to the governmental agency before the injured party may seek recovery for the claimed injury. 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.)*

Thus, contrary to the Plaintiff's argument, there is nothing in any of the above-cited statutes that excuses the Plaintiff from the notice requirements of

MCL 691.1404(1) if the requirements of MCL 691.1402a and MCL 691.1403 are met. Rather, MCL 691.1402a and MCL 691.1403 impose additional requirements in order for a claimant to prevail on a claim brought against a governmental agency in avoidance of immunity. Matters of statutory interpretation are questions of law to be reviewed on appeal under a de novo standard. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 739; 641 NW2d 567 (2002). As noted above, a clear and unambiguous statute must be applied as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

Not only is the Plaintiff's argument contrary to the plain language of the governmental tort liability act; it is completely unsupported by any case law. The only case cited by the Plaintiff is *Gadigian v City of Taylor*, 282 Mich App 179; 774 NW2d 352 (2008). The *Gadigian* Court did not discuss the issue raised by the Plaintiff, however. In fact, the only issue in *Gadigian* was whether the plaintiff presented sufficient evidence to rebut the statutory inference that the City maintained the sidewalk in reasonable repair. Therefore, the *Gadigian* decision does not support the Plaintiff's claim that when the requirements of MCL 691.1402a and MCL 691.1403 are met, the injured person is somehow excused from following the notice requirements set forth in MCL 691.1404(1).

It is not enough for a party to simply announce a position on appeal and leave it to the court to rationalize the basis for the claim and search for authority to support the claim. *Mudge v Macomb Co*, 458 Mich 87, 105; 580

NW2d 845 (1998). The appellant must “prime the pump” before the “appellate well begin[s] to flow”. *Id.* Thus, if an issue is inadequately briefed, the appellate court need not reach it. *Id.* Here, the Plaintiff has made a vague and unexplained argument that the satisfaction of the requirements of MCL 691.1402a and MCL 691.1403 somehow waive or excuse the notice requirements of MCL 691.1404(1). But, the Plaintiff cites no case law, statute, rule, or treatise to support this claim and provides no coherent legal analysis to support this argument. Therefore, this argument should be rejected. And, as discussed above, such an interpretation of the governmental tort liability act would be contrary to the plain and unambiguous language of the act.

In addition, it should be noted that this issue was never addressed by the Trial Court or the Court of Appeals in this matter. This Court may, in its discretion, decline to review an issue that was not addressed by the lower courts and where the issue is only addressed by a party in a cursory fashion. *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 350; 685 NW2d 221 (2004).

III. THIS COURT SHOULD DENY PLAINTIFF'S ARGUMENT THAT THE "ACTUAL PREJUDICE" STANDARD SHOULD APPLY WHEN A PLAINTIFF FAILS TO STRICTLY COMPLY WITH THE SPECIFIC NOTICE REQUIREMENTS OF MCL 691.1404(1) AND THAT THE HOLDING IN *ROWLAND V WASHTENAW CO RD COMM* SHOULD BE OVERTURNED WHERE: (1) THIS ISSUE WAS NEVER ADDRESSED BY THE LOWER COURTS, (2) THE "ACTUAL PREJUDICE" STANDARD DOES NOT APPLY TO THE SPECIFIC NOTICE REQUIREMENTS OF MCL 691.1404(1), AND (3) THE INSERTION OF AN "ACTUAL PREJUDICE" STANDARD INTO MCL 691.1404(1) WOULD RE-WRITE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTE

It is the contention of the Plaintiff that his failure to provide the specific information required by MCL 691.1404(1) is excused unless the City can show that it has been actually prejudiced by the Plaintiff's failure to provide a conforming notice. Plaintiff further claims that the holding of *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007) should be overturned. These arguments lack merit where this case does not involve an issue regarding whether the notice was timely. Therefore, the *Rowland* decision and application of the "actual prejudice" standard simply do not apply.

Plaintiff cites the cases of *Hobbs v Michigan State Hwy Dep't*, 398 Mich 90; 247 NW2d 754 (1976) and *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996) for the proposition that a non-conforming notice is not a bar to proceeding with a claim under the highway exception to governmental immunity unless the governmental agency can show that it was actually prejudiced by the failure to provide a conforming notice. What the Plaintiff fails to recognize, however, is that the actual prejudice standard, which was subsequently overruled in *Rowland*, does not apply to claims that the notice failed to provide the specific information required by MCL 691.1404(1). Rather,

this standard was applied when the notice required by MCL 691.1404(1) was untimely. See *Hobbs* at 95-96; *Brown* at 356-357. Likewise, the majority opinion in *Rowland* addressed, and actually overruled, the actual prejudice standard in the context of a claim that the notice given under MCL 691.1404(1) was untimely. *Rowland* at 200, 213.

Justice Kelly's opinion in *Rowland* addressed the issue of actual prejudice when the notice provided to the governmental agency is timely, but fails to meet the other requirements of the statute. Justice Kelly wrote:

Plaintiff failed to supply defendant with the statutorily required notice specifying "the exact location and nature of the defect, the injuries sustained, and the names of the witnesses known at the time by the claimant." MCL 691.1404(1). Therefore, defendant did not need to show actual prejudice arising from untimeliness of the notice. [*Rowland* at 248.]

Here, the Plaintiff failed to supply the City with a notice specifying the exact location and nature of the defect. Therefore, the notice is insufficient and the issue of actual prejudice is irrelevant because the timeliness of the notice is not at issue.

Furthermore, based on the plain and unambiguous language of MCL 691.1404(1), it is clear that the Legislature intended complete compliance with the notice requirements set forth therein. There is no indication in this statute that the Plaintiff is not required to comply fully and completely with the requirement to state: (1) the exact location and nature of the defect, (2) the injury sustained, and (3) the names of any witnesses known at the time by the claimant.

And finally, this issue was never addressed by the lower courts. Therefore, this Court may, in its discretion, decline to review this issue. *Taxpayers of Michigan Against Casinos, supra*, at 350.

**RELIEF REQUESTED**

Based on the foregoing, Amicus Curiae MDTC respectfully requests this Court affirm the ruling of the Court of Appeals.

Respectfully submitted,

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