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STATE OF MICHIGAN

IN THE SUPREME COURT

MOHAMED MAWRI,

Plaintiff-Appellant,

v

CITY OF DEARBORN,

Defendant-Appellee.

_____/

SUPREME COURT
APR 2010
FILED

Supreme Court
Case No. 139647

Court of Appeals
Case No. 283893

Wayne Circuit Court
Case No 06-617502-NO

BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL, AND MICHIGAN TOWNSHIPS ASSOCIATION

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STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This brief amici curiae is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Stephen K. Postema, city attorney, Ann Arbor; Randall L. Brown, city attorney, Portage; Lori Grigg Bluhm, city attorney, Troy; Eric D. Williams, city attorney, Big Rapids; Clyde J. Robinson, city attorney, Kalamazoo; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, City of Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Andrew J. Mulder, city attorney, Holland; and William C. Mathewson, general counsel, Michigan Municipal League.

The Michigan Municipal League Liability and Property Pool (Pool) is sponsored by the Michigan Municipal League. Only those municipalities that are members of the

League may purchase Pool insurance. The Pool exists to serve municipalities only, pursuant to a statutorily authorized intergovernmental contract for a municipal group self-insurance pool. MCLA 124.5; MSA 5.4085(6.5).

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan (including both general law and charter townships), joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the State of Michigan. This brief amici curiae is authorized by the Board of Directors of the Michigan Townships Association.

STATEMENT OF THE ISSUES

I. DID PLAINTIFF FAIL TO PROVIDE LEGALLY SUFFICIENT NOTICE OF HIS CLAIM?

II. IS PLAINTIFF'S CLAIM BARRED BY THE TWO-INCH RULE?

III. IS PLAINTIFF'S CLAIM BARRED BY THE NATURAL ACCUMULATION DOCTRINE?

STATEMENT OF FACTS

Amici Curiae, the Michigan Municipal League, Michigan Municipal League Liability and Property Pool, and Michigan Townships Association, rely on the Counter-Statement of Facts as set forth in the Brief of Defendant-Appellee City of Dearborn.

ARGUMENT

A CONDITION PRECEDENT TO SUIT AGAINST A MUNICIPALITY UNDER MCL 691.1402 HAS NOT BEEN SATISFIED WHEN THE STATUTORY NOTICE REQUIRED BY MCL 691.1404 DOES NOT CONTAIN INFORMATION CONCERNING THE EXACT LOCATION AND NATURE OF THE DEFECT THAT GIVES RISE TO THE ALLEGED LIABILITY.

During the evening hours of March 2, 2006, plaintiff-appellant, Mohamed Mawri, allegedly injured himself when he fell while walking down a sidewalk in the City of Dearborn. By correspondence dated May 26, 2006, an attorney acting on behalf of Mr. Mawri notified defendant-appellee, the City of Dearborn, of the incident that had occurred eighty-five days earlier. (Appellant's Apx, 33a) That correspondence informed the City of counsel's representation of Mr. Mawri "for injuries he sustained when he fell on a defective side-walk on March 2nd, 2006 in the area of 5034 Middlesex, Dearborn, Michigan." It further noted counsel's understanding that the area had since been repaired, stating that plaintiff "fell due to the defective side-walk, fracturing his right hip, necessitating surgery." Counsel asked the City to consider his letter as "statutory notice." The identified location, 5034 Middlesex, was Mr. Mawri's residence.

Suit was commenced against the City of Dearborn approximately one month later, on June 20, 2006. As in his notice, plaintiff alleged that on March 2, 2006, Mr. Mawri was injured outside of 5034 Middlesex when he "tripped over a defective sidewalk". Complaint, ¶¶ 4, 5. The Complaint did not otherwise describe the condition of the sidewalk, or the location of the injury.

However, plaintiff's position during the course of the litigation was that the fall had not occurred "in the area" of his own home at 5034 Middlesex as his statutory notice and complaint had alleged, but in front of his neighbor's home, located at 5026 Middlesex. Plaintiff contended that the incident occurred by a tree in front of the home at 5026 Middlesex. Describing the defect which allegedly caused his fall, he contended that the roots of this tree had caused a discontinuity in the slab which had allowed ice to accumulate. Significantly, neither the "statutory notice" nor the complaint mentioned either the sidewalk in front of 5026 Middlesex, a tree, a discontinuity, or an icy condition.

The City of Dearborn is a governmental entity, entitled to the statutory governmental immunity provided by the Legislature in MCL 691.1407(1), which provides:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

This language has been recognized to be the "broadest possible language," subject to only a few narrowly drawn statutory exceptions. *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984). One of those narrowly drawn exceptions is the "highway exception" on which plaintiff relies to avoid the immunity otherwise available to the City of Dearborn. MCL 691.1402 provides, in pertinent part:

> (1) Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or property damage to his or her property by reason of a failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. * * *

In *Scheurman v Department of Transportation*, 434 Mich 619, 630; 456 NW2d 66 (1990), this Court explained that the highway exception "waives the absolute immunity of governmental units with regard to defective highways under their jurisdiction," that it is regarded "as a narrowly drawn exception to a broad grant of immunity," and that "there must be strict compliance with the conditions and restrictions of the statute." One of those conditions and restrictions is the "notice of injury" provision of MCL 691.1404:[1]

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[1] The "notice of injury" requirement set forth in §1404 must be distinguished from the provisions of §1403 which speak to the knowledge possessed by the governmental agency of the defect which allegedly caused the injury. §1403, which is sometimes also referred to as a "notice" provision, states as follows: "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." See also, MCL 691.1402a(1) regarding, *inter alia,* the duty of a municipal corporation with regard to the maintenance of sidewalks which are adjacent to county highways, which also speaks to knowledge (notice) of the injury causing defect. In his Appellant's Brief, plaintiff confuses or conflates these provisions. The issue before the Court concerns notice of the claim.

> (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 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.
>
> (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 its Opinion released on August 6, 2009, the Michigan Court of Appeals ruled that plaintiff's complaint against the City of Dearborn should have been dismissed by the trial court because the substance of the statutory notice provided to the City did not comply with the statutory requisites and, accordingly, the City's immunity had not been successfully avoided. The Court of Appeals ruled that the notice given to the City had provided an incorrect location and had failed to give any description of the nature of the defect. Thus it had not specified "the exact location and nature of the defect." Plaintiff sought leave to appeal to this Court, asking that it consider, *inter alia,* whether the notice provided by plaintiff was sufficient to satisfy the requirements of §1404. Leave to appeal

was granted on December 18, 2010.[2] The concise answer to plaintiff's inquiry is, "No", notice was not sufficient.

§1404(1) provides that "[a]s a condition to any recovery" a person relying on the "highway exception" to avoid a governmental agency's immunity must serve notice within 120 days from the time of the injury, specifying "the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." Pursuant to §1404(2), that notice is to be served on anyone "who may lawfully be served with civil process directed against the governmental agency." With regard to a

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[2] In his Application for Leave to Appeal, plaintiff also raised issues concerning whether immunity ever applied when the defect was present for at least 30 days prior to the injury [citing §1402a], and whether immunity applied where the dangerous condition was created by a city's intentional or reckless act [citing §1407(2) and (3)]. In his Appellant's Brief, plaintiff has omitted the issue regarding immunity for intentional torts, while otherwise expanding on the issues that were raised on his application, asserting that the "two-inch" rule of §1402a(2) did not preclude suit because he had raised a question of fact as to the scope of the discontinuity, that the natural accumulation rule did not apply because the defect was persistent, and that this Court should overrule *Rowland v Washtenaw County Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). Although the ruling of the Court of Appeals concerned the notice requirements of §1404, and this brief is confined to that issue, amici do note that issues regarding §1402a(2) are presently before this Court in *Gadigan v City of Taylor*, 282 Mich App 179; 774 NW2d 352 (2008); *lv granted* 774 NW2d 689 (2009). Regarding that issue, plaintiff's evidence did not rebut the two-inch rule as he failed to establish some aspect of the defect that distinguished it from the typical cases in which the inference of §1402a(2) was intended to apply. To the extent that there may have been a discontinuity in width, this is not the discontinuity that allegedly constituted a defect. Rather, that was only the height discontinuity. Further, with regard to notice of the defect, the question is not whether the City had notice of the discontinuity, but whether it had notice that the imperfection rendered the sidewalk not reasonably safe and convenient for public travel. *Wilson v Alpena County Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006).

city, MCR 2.105(G) identifies those persons as "the mayor, the city clerk, or the city attorney." In the case at bar, the Court of Appeals ruled that notice had been served on the city attorney, and no question as to the timeliness of notice has been raised before this Court. Nor has a question been raised regarding the adequacy of that notice insofar as the statute requires specification of the injury and the identity of any known witnesses. Rather, the question of notice resolved by the Court of Appeals and presented to this Court for review concerns only the failure of the notice to specify "the exact location and nature of the defect."

Acknowledging the statutory requirements, plaintiff argues that they were satisfied because his notice was specific enough as to the location to allow "the defect" to be found so that an investigation could be commenced, arguing that the notice gave the general area of "the defect" and the additional information that "the defect" had been recently repaired. Given that the notice did not identify or describe the defect to which the notice alluded, and that it contained an incorrect address, it is difficult to discern how the City was to locate the alleged cause of plaintiff's injury, particularly as sidewalk repairs throughout the neighborhood had recently occurred. And, indeed, the inadequate description of the defect is, itself, adequate support for the dismissal of plaintiff's complaint as §1404 requires that the notice specify the nature of the defect. The notice provided absolutely no description of the defect. These insufficiencies, alone or in combination, were fatal to plaintiff's claim, as the Court of Appeals correctly held.

Notwithstanding the obvious failure of the plaintiff to satisfy the notice requirements of §1404, he argues that the Court of Appeals erred and should be reversed, suggesting that the existence of a police report can and did cure the defects in his statutory notice, that substantial compliance should be deemed sufficient, and that his claim could be saved if this Court were to overrule *Rowland v Washtenaw County Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). However, each of these contentions is unavailing and should be rejected.

The record reflects that the Dearborn Police were called to respond to an incident that occurred at 5034 Middlesex on March 2, 2006, and the incident report thereafter prepared contains the following narrative:

> I responded to above location for a slip and fall on a city sidewalk. Upon arrival, I spoke to Mawri. Mawri stated he slipped and fell on the sidewalk in front of 5026 Middlesex because the sidewalk was covered with ice. Mawri was complaining of pain on the left side of his body from the fall. Mawri was transported to Oakwood Hospital by rescue 1 for treatment. Sgt. Tobias notified and on scene.
>
> Cpl. Guzik, evidence tech, responded and took pictures of the sidewalk.
>
> (Appellant's Apx, p 11a)

Even were it assumed that the statutory notice provided to the City of Dearborn in the correspondence dated May 26, 2006 could be supplemented by additional documentation, such documentation would necessarily have to have been served on the City in the statutorily specified manner. Statements contained in a police report, even

those which are attributed to the injured party, cannot suffice. First of all, any statements made to the police officer were not served on "the mayor, the city clerk, or the city attorney" as required by §1404(2) and MCR 2.105(G). Specification of the identity of those limited persons who can receive notice on behalf of the city serves the purpose of ensuring that responsible city officials (the mayor, the city clerk, or the city attorney) have all of the information and will be responsible for seeing that those who need the information, actually receive it. That various city employees may have different parts of the statutorily required information does not suffice.

Moreover, §1404 requires that the notice be provided by the injured person, and while that notice may be provided by someone acting on the injured person's behalf, this would not include police officers. Nor, in any event, does the narrative contained in the police report relied on by plaintiff in the case at bar cure the defects in the subsequent statutory notice. While that narrative may create ambiguity concerning the location of the incident (since it conflicts with the location included in the statutory notice), that ambiguity cannot substitute for the statutory requirement of an exact location. Surely plaintiff would not concede that a police report which contradicts the correct location noted in his statutory notice could defect the sufficiency of that notice. Nor can it cure the incorrect or inadequate information contained in the statutory notice. Likewise, the information set forth in the police report regarding a fall on an icy sidewalk cannot be utilized to help (or hurt) plaintiff regarding compliance with §1404. That report cannot

help him by providing information concerning the nature of the defect which had been omitted in the statutory notice; nor could it have hurt him if it had set forth a defect contrary to that which may have been included in the statutory notice. In other words, a police incident report is simply not a part of the statutory notice required by §1404, which notice must stand or fall on its own substantive statements. See, *e.g.*, *Raboczkay v City of Taylor*, CA #277772 (7/15/08), discussed in the City of Dearborn's Appellee Brief, pp 13-15.

Plaintiff also argues that the notice he did provide substantially complied with the statutory requisites and should suffice to allow his claim to proceed. This argument is inconsistent with the specific statutory language and its use of the phrase "exact location and nature of the defect". As noted in the Appellee Brief submitted in this matter by the City of Dearborn, the history of notice provisions regarding highway defects demonstrates that the Legislature understood what it was doing when it added the word "exact" to the statutory language. Although substantial compliance may have sufficed under the language of other notice statutes, it does not suffice under the current law.

Moreover, even if substantial compliance were an appropriate consideration, the notice provided by plaintiff did not substantially comply with the substantive statutory requirements. That notice is deficient and, contrary to plaintiff's argument, did not satisfy the purpose of the notice requirement. In *Harrington v City of Battle Creek*, 288 Mich 152; 284 NW 680 (1939), this Court considered the plaintiff's claim made during the

litigation itself, that she had stepped into a shallow hole in the public walk and had caught her toe beneath a protruding edge, causing her to fall. This was not, however, the description of the defect that had been set forth in the required notice to the City, which notice was found to be deficient, barring plaintiff's suit. The Court explained:

> Had the notice of claim stated the nature of the defect and cause of injury, as set forth in the amended declaration, there might be liability. [citation omitted] The variance between the notice of claim and the amended declaration was of substance, and as the initial step by plaintiff to fasten liability failed, all subsequent action based thereon lacked the necessary starting point. The city was entitled to notice of the claimed defect upon which liability was sought at the trial.
>
> * * *
>
> The claim filed with the city by plaintiff stated no liability on the part of the city. The purpose of the notice to the city is not alone to afford opportunity for investigation but as well to confine plaintiff substantially to the character of the defect alleged in the notice and claimed to have caused injury and consequent liability of the city.
>
> (288 Mich, 155-156)

So too, in the case at bar, the plaintiff's notice was deficient. It failed to provide any description of any defect in the sidewalk whatsoever, and certainly no description of the defect which had allegedly caused plaintiff to fall. Indeed, plaintiff's initial complaints to both the police and the medical providers appears to have been simply the presence of an icy sidewalk which caused him to fall. Assuming that the alleged defect on which he relied during litigation would have sufficed to implicate the liability allowed under §1402, it was not described in the notice required by §1404. This was a fatal

defect, as discussed in Justice Kelly's partial dissent in *Rowland v Washtenaw County Rd Comm*, 277 Mich 197, 250; 731 NW2d 41 (2007):

> To be sufficient under MCL 691.1404(1), notice must include four components: (1) the exact location of the defect; (2) the exact nature of the defect; (3) the injury sustained; and (4) any witnesses known at the time of the notice. The above quoted letters do not satisfy all four requirements. Glaringly absent is the second requirement. Nowhere in the material provided to defendant did plaintiff indicate the nature of the defect.
>
> Reference to the defect appears in her complaint, where plaintiff claims that she was injured when she tripped and fell on "broken, uneven, dilapidated, depressed and/or potholed areas" in the roadway and crosswalk. But no such information is included in either the notice or the FOIA request. In fact, the notice does not even hint at the conditions alleged in the lawsuit. Nothing found there gives rise to an inference that plaintiff encountered a pothole, and nothing indicates that plaintiff's injuries were caused by broken pavement. [footnote omitted]
>
> MCL 691.1404(1) specifies that the notice contain an "exact" statement of the defect. Because plaintiff's notice contains no reference at all to the defect, it certainly does not rise to the level of an exact statement. MCL 691.1404(1) utilizes the mandatory word "shall" in setting forth the four required components of notice. Plaintiff's failure to meet one of the four statutory requirements cannot be excused. Consequently, her claim must be dismissed. * * * [footnote omitted]

The circumstances of *Rowland*, as discussed above, cannot be distinguished from those in the case at bar where, like the *Rowland* notice, the notice contained no indication of the nature of the defect. Indeed, even though the allegations of the plaintiff's Complaint could not cure the substantive defect in the statutory notice, it is noteworthy that by the time the Complaint was filed in *Rowland*, the defect had been described. In the case at bar the Complaint filed by plaintiff still contained no description of the defect

which had allegedly caused plaintiff's injuries. This undeniable fact, particularly when coupled with the insufficiency of the notice's identification of the location of the defect, necessarily defeated plaintiff's claim, as discussed in cases such as *Barribeau v City of Detroit*, 147 Mich 119; 110 NW 512 (1907); *Overton v City of Detroit*, 339 Mich 650; 64 NW2d 572 (1954); and *Smith v City of Warren*, 11 Mich App 449; 161 NW2d 412 (1968). In language particularly appropriate to the circumstances presented in the case at bar, and as subsequently quoted in the more recent precedent, the *Barribeau* Court explained the importance of the requirement that the notice contain a clear description of the place of the injury, as well as its cause:

> * * * The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular 'venue' of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury. The nature of the defect stated may aid in locating the place, and the place may be stated with such particularity that a very general statement of the defect (cause of the injury) may be aided. [citation omitted] But to be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself. [citations omitted] This rule permits a construction of the statute provision which does not emasculate it and one which is in accord with the opinions of this court in *Brown v City of Owosso*, 126 Mich 91; 85 NW 256; *Tattan v city of Detroit* and *Osterreich v City of Detroit, supra*. When 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.
>
> (147 Mich, 125-126)

Barribeau was quoted in *Overton v City of Detroit, supra*, where the Court held that the notice that had been provided was deficient, noting that the description of the location did not aid in identifying the defect, and that the description of the defect did not aid in identifying the location. It concluded:

> Appellee's notice of claim failed to meet this test. The defect, if any, was comparatively easy to describe, and it is difficult to understand how appellee failed to make any reference to the location in the claim filed April 1, 1949, and in her signed statement of April 4, 1949, as later established by her testimony in March, 1953, that: 'On Bates a little south of Larned, there is a pole and next to the pole there is a defect in the walk.' Parol evidence was required in this case 'to determine both the place and the nature of the defect' and, applying the test set forth in *Barribeau v City of Detroit, supra*, there is but one conclusion, namely: A reasonable notice was not given to the city.
>
> (339 Mich, 659)

Accordingly, even if substantial compliance were sufficient, plaintiff's notice in the case at bar cannot be deemed sufficient under the dictates of §1404. For reasons unclear, plaintiff identified the wrong address as the location of the defect, did not describe the defect with any particularity whatsoever, and omitted reference to either a tree or a raised slab. Certainly parol evidence was required in order to identify both the location and the nature of the defect, and the notice was fatally defective. As in *Overton, supra*, "[a] reasonable notice was not given to the City."

As the final argument in his Appellant's Brief, plaintiff has suggested that this Court overrule its opinion in *Rowland v Washtenaw County Rd Comm*, 477 Mich 197;

731 NW2d 41 (2007), wherein this Court held that the plaintiff's failure to file her statutory notice within the 120-day period provided by §1404 was fatal to her claim, regardless of whether the governmental agency had suffered actual prejudice as a result of the untimely filing. In the alternative, plaintiff suggests that this Court hold the notice requirements of §1404 to be unconstitutional, as treating victims of governmental negligence differently than victims of private negligence. These arguments, which were not included in his Application for Leave to Appeal to this Court, are unsound and irrelevant to the circumstances of this case.

First of all, it is significant that the basis of the dismissal in this case is *not* the untimely filing of the statutory notice. Yet, it was the untimely notice that was at the heart of the discussion in *Rowland*, as well as the basis of the constitutional rationale discussed in *Hobbs v Department of State Highways*, 398 Mich 90; 247 NW2d 754 (1976) and *Brown v Manistee County Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), which opinions were overruled by *Rowland*. *Hobbs, supra* and *Brown, supra*, had required a showing of actual prejudice in cases involving the untimely provision of notice, premised on the concern that, without such a showing, the timing requirement would be constitutionally infirm. No similar concerns were expressed regarding the substance, as opposed to the timing, of the required notice.

As noted above, however, it is not the timeliness of the notice that is at issue in the case at bar, but only the substance of that notice. Neither *Hobbs* nor *Brown* required a

showing of actual prejudice when the notice was substantively deficient, and the constitutional concerns articulated in those cases related only to the question of the shortened period of time within which to provide notice, and not to its substantive provisions. Indeed, in *Rowland* the content of the notice was substantively defective and, in partial dissent, Justice Kelly objected to reaching the constitutional issue when dismissal of the plaintiff's complaint could have been premised on the same deficiencies as those present in the case at bar.[3] See also, the statements set forth in *Mauer v Topping*, 480 Mich 912; 739 NW2d 625 (2007).

Thus, notwithstanding the plaintiff's invitation to reconsider the ruling in *Rowland*, this case does not present an opportunity to do so since the holding in *Rowland* is not implicated in the circumstances of this case and its overruling would not effect this case. The legislative waiver of immunity set forth in §1402 is conditioned on compliance with the substantive provisions of the notice requirement articulated in §1404. Those substantive requirements were not satisfied in either the timely filed notice, or, for that matter, in the Complaint subsequently filed by plaintiff. This case presents no occasion

---

[3] "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. The lower courts erred in reaching the actual prejudice issue, as does the majority in this Court. The matter should be decided only on the basis of the deficiency of the contents of the notice. * * *" 477 Mich, 248 (Kelly, J.)

for reconsidering this Court's precedent, none of which imposed an actual prejudice requirement in these circumstances.

Finally, were it necessary to demonstrate actual prejudice, it would be present in every case in which the statutory notice did not sufficiently describe either the location of the accident or the nature of the defect. The immunity provided to a governmental agency by the Governmental Tort Liability Act is essentially immunity from suit, not merely immunity from liability. Thus, whenever a governmental entity is required to proceed to suit in order to learn the information about the incident which will be necessary to defend itself, it has suffered actual prejudice which the notice requirement was designed to prevent. Any time an injured person is allowed to proceed to suit without having first provided notice that confines a plaintiff to the location and character of the defect alleged in the notice, it has suffered the prejudice which the notice requirement was intended to avoid.

Indeed, this case presents a good example of the purpose intended to be served by the notice requirement. Plaintiff allegedly fell on a public sidewalk on the street where he resided. His notice to the City of Dearborn (as well as the allegations of his subsequent Complaint) stated that the fall had occurred in "the area" of his own home. Neither of the documents described the defect that caused the fall. However, during trial proceedings plaintiff claimed that he actually fell in front of his neighbor's home. In the meantime, and before any notice had been given, any imperfections in the sidewalk along plaintiff's

street had been repaired. Moreover, plaintiff had apparently told the police that he had slipped on ice. During the trial proceedings, however, he blamed a discontinuity caused by a tree. His notice had mentioned neither a tree nor a discontinuity.

If a plaintiff is allowed to amplify and/or change the assertions made in a statutorily required notice, defending this type of case will become nearly impossible and the intended narrowness of the highway exception, and the limited liability permitted therein, will be nullified.

RELIEF REQUESTED

Amici, the Michigan Municipal League, Michigan Municipal League Liability and Property Pool, and Michigan Townships Association, respectfully request that this Court affirm the ruling of the Michigan Court of Appeals.

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