

Supreme Court Rules Injury Description Required in Pre-suit Notice

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The Michigan Supreme Court recently dismissed a plaintiff's claim against a municipality under the highway exception of the state's governmental immunity statute due to a lack of description in the pre-suit notice of the plaintiff's injury.

A governmental agency in Michigan is shielded from tort liability when it is engaged in the exercise or discharge of a governmental function, and its conduct does not fall within one of the statutory exceptions to immunity, MCL 691.1407(1). Under the highway exception to governmental immunity, found at MCL 691.1402(1), "[a] person who sustains bodily injury or property damage "by reason of 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 order to invoke the highway exception, however, the injured person must first provide timely notice to the governmental agency of his or her intent to file suit. The notice statute, MCL 691.1404(1), provides that "[t]he 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." Notice provisions like this are enacted by the Legislature in order to provide the State the opportunity to timely investigate and to evaluate claims, to reduce the uncertainty of the extent of future demands, or even to force a claimant into an early choice regarding how to proceed. *McCahan v Brennan*, 492 Mich 730; 822 NW2d 730 (2012).

Just last week, the Michigan Supreme Court in *Brown v City of Sault Ste Marie* held that a notice stating that the plaintiff "suffered severe and permanent injuries" was not specific enough under the statute. No other description of the injuries was provided. No other documents were attached to the notice. The notice directed the City of Sault Ste Marie, which was represented by the author, to look to documents the plaintiff received in response to a Freedom of Information Act (FOIA) request from the city to learn the identity of potential witnesses to the incident (another notice requirement), but did not state whether the FOIA documents also provided additional information regarding the plaintiff's alleged injuries.

The city moved to dismiss the suit in the trial court, arguing that the written notice did not specify the injuries sustained, as the statute requires. The trial court agreed with the city and dismissed the claim. However, the Michigan Court of Appeals reversed, concluding that “the notice did not lack a sufficient description of an injury.” The three-judge appellate court panel unanimously agreed that while “plaintiff’s statement of ‘severe and permanent damages’ may have been insufficient by itself ... that insufficiency was remedied by reference to the FOIA documents.” The appellate court found it significant that the notice was sent to the same individual that responded to the plaintiff’s FOIA request.

The city filed an application for leave to appeal to the Michigan Supreme Court, requesting the state’s highest court reverse the appellate court’s decision and hold that the plaintiff’s notice was insufficient under Michigan’s statutory scheme. The Supreme Court held oral argument on the city’s application on Jan. 10, 2018. Instead of granting leave to appeal, the Supreme Court issued an order on May 4, 2018 reversing the judgment of the appellate court and reinstating the order of the trial court granting the city’s motion for summary disposition. Six of the seven Justices agreed that “some description of the injury itself beyond merely classifying it as severe or permanent is required.” The Supreme Court also held that consideration of the FOIA documents referenced in the plaintiff’s notice “would not change the outcome” because the plaintiff “referred to those documents for the purposes of identifying witnesses, not to provide a description of the injury sustained.” Justice Richard H. Bernstein stated that he would have denied leave to appeal.

The Supreme Court’s ruling sends a clear signal to litigants that it will enforce the statutory text of the notice requirement as written, even where it leads to what many may view as a harsh result – dismissal of a plaintiff’s entire case. Municipalities should review a plaintiff’s pre-suit notice of intent to bring a claim under the highway exception to governmental immunity carefully to make sure that it is compliant with the statutory mandates.

Oftentimes, the pre-suit notice is just given a passing glance; but as the *Brown* ruling demonstrates, close attention must be paid. Apart from specifying the injury sustained, the notice must also “specify the exact location and nature of the defect” and “the names of the witnesses known at the time by the claimant.” If these items are not properly identified, the defense should consider filing a dispositive motion to dismiss the suit.

Municipalities should also carefully consider whether the plaintiff is relying on other documentation to satisfy the notice requirements. The Supreme Court left open the question of whether it is appropriate to consider documents not attached to the notice itself. Accordingly, reference to unattached documents such as a police/incident report may also be insufficient, depending upon the circumstances.

SUPREME COURT RULES INJURY DESCRIPTION REQUIRED IN PRE-SUIT NOTICE Cont.

The City of Sault Ste Marie was represented by Hilary A. Ballentine, an appellate attorney at Plunkett Cooney. She can be reached at (313) 983-4419 or hballentine@plunkettcooney.com for questions.

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