Court of Appeals, State of Michigan

ORDER

Sean Hightower v Department of Transportation

Docket No. 348224

LC No. 18-000256-MD

Mark J. Cavanagh
Presiding Judge

Jane M. Beckering

Elizabeth L. Gleicher
Judges

The Court on its own motion, orders that the April 16, 2020 opinion is hereby AMENDED. The opinion is modified on section II with minor, non-substantive changes to eliminate an incomplete sentence. The opinion is amended as follows:

The old opinion read: to Hightower's brief on appeal, "once it is determined that a disability exists, the 180-day provisions is *automatically* invoked."

The new opinion reads: According to Hightower's brief on appeal, "once it is determined that a disability exists, the 180-day provisions is *automatically* invoked."

In all other respects, the April 16, 2020, opinion remains unchanged.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

April 20, 2020
Date

Chief Clerk

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

SEAN HIGHTOWER,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED
April 16, 2020

No. 348224
Court of Claims
LC No. 18-000256-MD

Before: CAVANAGH, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Sean Hightower was thrown from his bicycle when it hit a large pothole. Hightower suffered head injuries and remained hospitalized for three days. The question presented is whether Hightower timely notified defendant Michigan Department of Transportation of his personal injury claim.

The general rule is that notice of a highway defect claim must be provided within the 120 days following an injury. MCL 691.1404(1). An exception applies when "the injured person is physically or mentally incapable of giving notice." In that circumstance, the prospective plaintiff has a period of "not more than 180 days after the termination of the disability" in which to supply notice. MCL 691.1404(3).

Hightower is not eligible for this exception because he was physically and mentally capable of giving notice well within the 120-day period. We reverse the Court of Claims and remand for entry of summary disposition in favor of the Michigan Department of Transportation.

I

This case comes to us after the trial court denied the Department's motion for summary disposition, so we review the facts in the light most favorable to Hightower.

Hightower's bicycle accident occurred on May 17, 2018. The pothole he encountered was long and deep, but he was riding at night and did not notice it before his bicycle caught its edge. Hightower flew from his bike and landed hard on the ground, striking his head. An ambulance

brought him to a nearby hospital, where he was treated for a fractured nose, multiple facial lacerations, a scalp hematoma, and a possible subdural hematoma. Although Hightower lost consciousness at the scene of the accident, he was conscious by the time he arrived at the hospital. The emergency department note states: "He is oriented to person, place, and time."

Three days later, the hospital discharged Hightower. In an affidavit filed with his response to the department's motion for summary disposition Hightower averred:

> 10. Immediately following the accident, and until my discharge from the hospital, I was physically incapable of providing notice of my intent to sue the Defendant.
>
> 11. Immediately following the accident, and until my discharge from the hospital, I was mentally incapable of providing notice of my intent to sue the Defendant.
>
> 12. During my hospital stay, I remained in bed and in a comatose state from my injuries and medications, which rendered me physically and mentally incapable of providing notice to Defendant of my intent to sue.
>
> 13. My physical and mental disabilities from this accident were not terminated until after my discharge from the hospital on May 20, 2018. Simply put, I was not physically and/or mentally capable of providing Defendant notice of my intent to sue until my discharge on May 20, 2018.

Based on Hightower's affidavit and the medical record, the record supports that Hightower was physically and mentally incapable of providing notice of his May 17, 2018 accident until May 20, 2018.

Hightower signed a notice of intent to sue the department on September 4, 2018, which was 110 days from his accident and within the 120-day time limit. Hightower's attorney signed the notice two days later, on September 6, also within the 120 days. For reasons unexplained in the record, Hightower's notice was not filed in the Court of Claims until October 15, 2018—151 days after his accident and beyond the 120-day time limit.

In December 2018, Hightower filed a complaint in the Court of Claims. The department moved for summary disposition, arguing that Hightower's notice was untimely under MCL 691.1404(1). Hightower asserted that due to his disabilities following the accident, the court should apply the 180-day time limit set forth in MCL 691.1404(3). The trial court determined that Hightower had presented sufficient facts to place his capacity to provide notice in dispute and denied summary disposition.

II

The department brought its summary disposition motion under MCR 2.116(C)(7), which permits a party to seek summary disposition on the ground that a claim is barred by governmental immunity. When reviewing a (C)(7) motion, we accept all well-pleaded factual allegations as true and construe them in favor of the nonmoving party unless other evidence contradicts them.

Dextrom v Wexford Co, 287 Mich App 406, 428-429; 789 NW2d 211 (2010). If no *material* facts are in dispute, whether a claim is barred by immunity is a question of law. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). We review de novo questions of law. *Jones v Bitner*, 300 Mich App 65, 72; 832 NW2d 426 (2013).

No material facts are in dispute in this case. For the purpose of this motion, the department does not contest that Hightower was physically and mentally incapable of providing notice of his claim until May 20, 2018, the day he was discharged from the hospital. Nevertheless, the department contends, the 120-day rule applies.

Hightower argues that the plain language of MCL 691.1404(3) entitled him to the benefit of the 180-day notice period. Because he had a disability *during* the 120-day notice period, Hightower insists, the 120-day limit must yield to the longer notice period. Our starting point for considering Hightower's statutory interpretation argument is the language of the statute itself. In relevant part, MCL 691.1404 provides:

> (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.
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> * * *
>
> (3) . . . 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.[1]

Hightower contends that the words of subsection (3) are unambiguous; "If an injured person is physically or mentally incapable of giving notice," notice must be served "not more than 180 days after the termination of the disability." to Hightower's brief on appeal, "once it is determined that a disability exists, the 180-day provision is *automatically* invoked." (Emphasis in original.)

Hightower trains our attention on a single, isolated phrase—"[i]f the injured person is physically or mentally incapable of giving notice." These words mean exactly what they say, Hightower urges, affording every plaintiff who suffers from any physical or mental incapacity the opportunity to rely on the longer notice period. We do not interpret the statute in the way Hightower proposes, as we approach the task from a different perspective.

Viewed strictly in isolation, Hightower's interpretation of the key phrase might have merit. But the words on which he rests his argument are part of a larger canvas. We must consider the

[1] Subsection (2) addresses service and is not at issue here.

statute as a whole to divine the meaning of the phrase Hightower highlights. See *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) ("[W]e examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme."); *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012) ("When undertaking statutory interpretation, the provisions of a statute should be read reasonably and in context. Doing so here leads to the conclusion that MCL 600.6431 is a cohesive statutory provision in which all three subsections are connected and must be read together.").

Under the Governmental Tort Liability Act (GTLA), MCL 691.1411 *et seq*., governmental entities enjoy a "broad grant of immunity." *Hannay v Dep't of Transp*, 497 Mich 45, 61; 860 NW2d 67 (2014). The GTLA identifies only a limited number of exceptions to governmental immunity, one of which permits an injured plaintiff to pursue a claim for injuries sustained "by reason of any defective highway[.]" MCL 691.1404(1). This exception to immunity underlies Hightower's claim. But the availability of the defective highway exception is expressly conditioned on compliance with the notice provision contained in the same statutory section. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200-201; 731 NW2d 41 (2007). The default notice period set forth in that section is 120 days.[2]

MCL 691.1404(3) provides for a longer notice period applicable to a specific grouping of injured parties: those "physically or mentally incapable of giving notice." In context, that phrase is most reasonably interpreted as defining a subset of plaintiffs: those who are incapable of providing notice within the 120-day period. In other words, the most logical way to interpret subsections (1) and (3) is to read them together, since they are part of the same statute and subsection (1) specifically references an exception "otherwise provided in subsection (3)[.]" Construing the two subsections together rather than separately allows us to most accurately discern the Legislature's intent. And it is clear to us that the Legislature intended the shorter notice period to be generally applicable, with the longer period to be an alternative limited to those plaintiffs who are incapable of giving notice during the default period.

This interpretation flows naturally from both the statutory text and the overriding purposes of the GTLA's notice provision. Interpreted against the backdrop of the defective highway exception statute—which carves out a narrow exemption from immunity contingent on timely provided notice—subsection (3) applies only to those plaintiffs who were physically or mentally

[2] There is another way of looking at this issue, but it takes us to the same result. In *Fairley v Dep't of Corrections*, 497 Mich 290, 297-298; 871 NW2d 129 (2015), our Supreme Court considered the legal effect of a defective notice sent pursuant MCL 600.6431, a different notice provision contained within the GTLA. In that case, the Court explained that while the notice provision itself did not " 'confer governmental immunity,' it establishes conditions precedent for avoiding the governmental immunity conferred by the GTLA[.]" *Fairley*, 497 Mich at 297-298. Consequently, the Court held, "plaintiffs must adhere to the conditions precedent in MCL 600.6431(1) to successfully expose the defendant state agencies to liability." *Fairley*, 497 Mich at 298. The defective notices discussed in *Fairley* failed to "defeat the protection of governmental immunity" to which the defendants were entitled. *Id*. at 301. Similarly here, by failing to timely notify the department, Hightower never subjected it to any liability in the first place.

incapable of providing notice during the 120-day period. Granted, disputes may arise regarding whether a person was truly capable of providing notice within that time. For example, a person may have remained comatose until the 118th day, or confined to the hospital due to a physical disability. In such cases, the statute provides that "that issue [of disability] shall be determined by the trier of the facts." MCL 691.1404(3).

Our focus on the statutory "big picture" aligns with a primary canon of construction: the individual, discrete words or phrases of a statute must be read holistically "with a view to their place in the overall statutory scheme." *Davis v Mich Dep't of Treasury*, 489 US 803, 809; 109 S Ct 1500; 103 L Ed 2d 891 (1989); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."); *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 367-368; 917 NW2d 603 (2018) ("However, we do not read statutory language in isolation and must construe its meaning in light of the context of its use.").

The Michigan Supreme Court frequently embraces this interpretive methodology, counseling that words "must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense." *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982) (cleaned up).[3] More recently, in *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (cleaned up), the Supreme Court highlighted that the statutory language at issue in that case did not "stand alone" and "should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." Our Supreme Court continued, "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context," which requires interpreting courts to refrain from "divorc[ing]" "words and clauses . . . from those which precede and those which follow." *Id.* (cleaned up).

By reading subsections (1) and (3) *together*, the Legislature's intent becomes clear. MCL 691.1404(3) expands the notice period only for those who are incapable of complying with the 120-day period. This interpretation is in harmony with the overriding concept that exceptions to immunity are intended to be few. It also dovetails with our Supreme Court's determination that notice provisions must be strictly construed. See *Rowland*, 477 Mich at 205; *McCahan*, 492 Mich at 746 ("[W]hen the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction . . . is allowed.").

Common sense leads us to the same result. Many potential highway-defect plaintiffs who sustain injuries serious enough to warrant a lawsuit also succumb to physical or mental disabilities

[3] This opinion uses the new parenthetical "cleaned up" to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

as a result of their accidents. Given that the highway exception's first subsection establishes a 120-day notice period, we find it incomprehensible that the Legislature intended that every period of mental or physical disability, however short, would necessarily trigger the application of the extended notice timeframe. Construing subsection (3) in the manner Hightower proposes would effectively eliminate the 120-day notice period in a large number of cases. Rather, the Legislature recognized that some disabled plaintiffs might be unable to understand that they have a claim, or to contact a lawyer, within the 120-day period. For those plaintiffs, the Legislature extended the notice period to 180 days. Because fact questions may arise regarding whether a disability lasted long enough or was serious enough to render a person incapable of providing notice, the Legislature assigned to the trier of fact the task of making a decision as to which notice provision applies.

No such factual question exists here. By his own admission, Hightower was disabled for three of the 120 days in the default notice period. Hightower does not deny that he signed the notice within the 120 days, as did his attorney. These facts eliminate his eligibility to claim the longer notice period, as Hightower was unquestionably capable of providing notice within 120 days.

We reverse the Court of Claims and remand for entry of an order granting summary disposition to the Department of Transportation. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher