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STATE OF MICHIGAN
IN THE SUPREME COURT
(Judges Shapiro, Cameron and Letica)

NORMAN CHAMPINE,

Plaintiff-Appellant,

v.

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

MSC No. 161683

COA No. 347398

Wayne County Circuit Court
Filed under AO 2019-6

Plaintiff's Supplemental Brief in Support of his Application for Leave to Appeal

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Index of Authorities 3

Order Appealed From and Relief Sought 5

Statement of the Questions Involved 7

Statement of Facts 9

Standard of Review 21

Argument 21

I. Plaintiff's timely filed Complaint constituted compliance with the notice requirement of MCL 691.1404 21

a. Plaintiff complied with the unambiguous statutory language 22

b. There is no binding authority that compelled the deviation from the unambiguous statutory language 27

Conclusion and Relief Requested 31

RECEIVED by MSC 8/30/2021 2:33:45 PM

INDEX OF AUTHORITIES

Cases

Burise v City of Pontiac,
282 Mich App 646 (2009) 21-22, 28-30

Burton v Reed City Hosp Corp,
471 Mich 745 (2005) 26

Champine v Dept of Transp,
Opinion of the Court of Appeals (Docket No. 347398) ..... passim

Donajkowski v Alpena Power Co,
460 Mich 243 (1999) 24, 28

Glancy v City of Roseville,
457 Mich 580 (1998) 21

Goodhue v DOT,
319 Mich App 526 (2017) 27-28

Hiltz v Phil's Quality Market,
417 Mich 335 (1983) 24

Kreiner v Fischer,
471 Mich 109 (2004) 25-26

McCormick v Carrier,
487 Mich 180 (2010) 25

Milot v DOT,
318 Mich App 272 (2016) 21

Moraccini v City of Sterling Hts,
296 Mich App 387 (2012) 21

Nation v WDE Electric Co,
454 Mich 489 (1997) 24

Oakland Co v Michigan,
456 Mich 144 (1997) 26

People v Francisco,
474 Mich 82 (2006) 26

Ridgeway v Escanaba,
154 Mich 68 (1908) 22

Rowland v Washtenaw County Rd Comm'n,
477 Mich 197 (2007) 22

Scarsella v Pollak,
461 Mich 547 (2000) 26

Smith v Kowalski,
223 Mich App 610 (1997) 21

Wigfall v City of Detroit,
504 Mich 330 (2019) 29-30

Statutes

MCL 600.2301 26-27
MCL 600.2912b 23
MCL 691.1402 ..... 5, 21
MCL 691.1404 ..... passim

RECEIVED by MSC 8/30/2021 2:33:45 PM

RECEIVED by MSC 8/30/2021 2:33:45 PM

ORDER APPEALED FROM AND RELIEF SOUGHT

Plaintiff brought suit pursuant to MCL 691.1402 after being injured on I-696 when a chunk of concrete from the roadbed crashed through his windshield and struck him in the face. Following discovery, Defendant moved for summary disposition, contending that Plaintiff failed to properly file a notice in the Court of Claims before commencing suit and claiming that the notice Plaintiff did serve on Defendant was deficient. Specifically, Plaintiff had sent a notice directly to Defendant's agents instead of first filing that notice in the Court of Claims. In opposing Defendant's motion, Plaintiff argued that because his Complaint was filed in the Court of Claims prior to the expiration of the notice period, that Complaint was able to serve as his notice. The Court of Claims disagreed and issued its order granting summary disposition on December 12, 2018. The Court then denied Plaintiff's Motion for Reconsideration on January 9, 2019. Because the Court's grant of summary disposition left no remaining claims in this case, it was a final order for the purposes of appeal, pursuant to MCR 7.202(6)(a)(i). Plaintiff timely filed his claim of appeal on January 25, 2019.

The parties proceeded to oral argument at the Court of Appeals on March 4, 2020. Thereafter, the Court issued its 2-1 opinion affirming the grant of summary disposition. The majority did not rule on whether Plaintiff's notice was substantively deficient. Instead, it held that Plaintiff was required to file a notice in the Court of Claims before commencing suit and that he could not rely on his Complaint to serve as that notice despite the Complaint being filed before the expiration of the notice period. *Champine v Dept of Transp*, unpublished opinion of the Court of Appeals, issued April 16, 2020 (Docket No. 347398) (App, pp 202a-210a).

Judge Shapiro dissented. He reasoned that in certain contexts, the legislature explicitly requires that a notice be filed before a Plaintiff can commence suit, such as in a medical malpractice action. In the case of a highway defect action brought within the Court of Claims, however, the statutory authority merely requires that the Defendants be given notice of the nature and location of the defect within 120 days. There is no authority for the proposition that the Complaint itself cannot serve as that notice, and there was no dispute that Plaintiff's Complaint was

RECEIVED by MSC 8/30/2021 2:33:45 PM

filed well before the 120 days passed. Judge Shapiro then further asserted that not only should Plaintiff's Complaint have been able to serve as his notice, but that the Complaint also complied with the substantive notice requirements and adequately identified the location of the defect that caused his injuries. As a result, Judge Shapiro would have reversed the grant of summary disposition and would have remanded for further proceedings.

Plaintiff respectfully submits that both the trial court and the Court of Appeals erred in concluding that Plaintiff failed to comply with the applicable notice requirements. This Court should grant this application pursuant to the standard set forth in MCR 7.305(B)(2), as the issue presented in this application has significant public interest. In this action against the state, a Michigan resident was injured when a government entity failed to properly maintain a highway within its exclusive control. There is no question regarding that point, just as there is no question that the responsible entity was placed on notice within the applicable time period when Plaintiff commenced his action in the Court of Claims. In holding that Defendant was entitled to summary disposition on the basis of a lack of notice, both the Court of Claims and the majority of the Court of Appeals panel imposed requirements on the Plaintiff that were not contemplated by the legislature. As this Court has frequently noted, the natural state of our government is immunity and it is the right of the legislature to create an exception to that immunity. Thus far, the courts in the present case have worked in contravention of the legislature's clear intent by holding that Plaintiff's cause of action is barred despite him meeting the requirements set forth in MCL 691.1404(1).

Likewise, granting this application is proper pursuant to MCR 7.305(B)(3), as this is an issue of major significance to the State's jurisprudence. The residents of this state are entitled to clarity regarding when and how they are permitted to bring suit against a state actor that has caused injury. And while this Court has previously set forth that exceptions to governmental immunity are to be narrowly interpreted, that narrow interpretation cannot cross a line into imposing additional obligations on litigants without advance notice.

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STATEMENT OF THE QUESTION INVOLVED[1]

First Question:

Did Plaintiff satisfy the notice requirement of MCL 691.1404 when he filed his complaint in the Court of Claims prior to the expiration of the 120-day statutory notice period?

Plaintiff-Appellant answers: Yes.

Defendant-Appellee answers: No.

[1] Plaintiff limits the issue in these papers to the one issue that this Court requested be addressed in its order regarding supplemental briefing, issued on April 28, 2021. Plaintiff notes that, as he did in the Court of Appeals, he maintains that the Court of Claims further erred in holding that his notice did not sufficiently detail the location of the hazardous condition. That argument was fully presented in Plaintiff's application for leave to appeal in this Court.

RECEIVED by MSC 8/30/2021 2:33:45 PM

INTRODUCTION

On December 17, 2017, Plaintiff was severely injured when a chunk of concrete that was lifted from the poorly maintained and deteriorating roadbed on westbound I-696 crashed through his windshield and struck him in the face while he was going 70 miles per hour. Plaintiff's was at least the *fourth* such incident in just six months where an unsuspecting motorist was injured on this same roadway in the same manner. The notoriously poor condition of this stretch of freeway was well-known to MDOT and local police agencies. Marlon Spinks, an MDOT Maintenance Engineer, admitted to the police during the investigation of this incident that "there had been similar type complaints of debris coming in through people's windshields on 696" prior to the incident involving Plaintiff.

The Warren Police Department notified MDOT of this accident on the very day it occurred. Plaintiff sent his notice of the highway defect via certified mail to MDOT on December 28, 2017 (App., pp 001a-002a). MDOT acknowledged receipt on December 30, 2017 (App., p 003a). Plaintiff filed his claim in the Court of Claims on February 6, 2018, only 51 days after the incident, thus satisfying MCL 600.1404(2). Plaintiff then served MDOT with his First Amended Notice on February 7, 2018, which included a copy of the police report (App., pp 004a-014a). Finally, Plaintiff served MDOT with the Complaint on March 26, 2018. Therefore, MDOT and the Court of Claims received direct notice and were served with Plaintiff's Complaint well before expiration of the 120-day notice period.

As far as the content of the notice, Plaintiff gave the best and most specific location of the defect that was possible. The record establishes that the precise pothole that produced this concrete could not be determined, despite the best efforts of the police, which included closing the freeway to traffic and having multiple officers inspect the freeway by both foot and car. However, the crumbling and decaying road surface made it impossible to identify the "exact" pothole form where the chunk was dislodged. Indeed, the Warren Police report states there were "in excess of one thousand 'potholes'" in the area where Plaintiff was injured. Nonetheless, their conclusion was clear: "The evidence suggests

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Norman Champine was struck as a result of the concrete being kicked up from the roadway…"

STATEMENT OF FACTS

On December 17, 2017, Plaintiff Norman Champine was operating his car when he entered westbound I-696 from Gratiot Avenue. As he proceeded at the posted speed limit of 70 mph, an approximate 20-pound piece of concrete broke through his windshield and struck him squarely in the face. Most of the bones in his face from his eyebrows down were shattered and nearly all of his teeth were lost or destroyed. Not surprisingly, Plaintiff has a very limited recall of what happened after being struck, as a result of the head trauma he suffered:

Q. Okay. As far as -- just as far as the accident itself, do you have any specific memory of how it occurred?

A. No, no, I don't. I never -- if I recall I never saw the rock. I mean, obviously I would have swerved but, no, I don't recall. I don't recall it coming through. I don't recall anything.

Q. Okay.

A. I don't recall it hitting me, none of that.

Q. All right. You don't recall specifically where it happened either?

A. I don't. [App, p 044a.]

Plaintiff's lack of recollection is understandable given the serious injuries he sustained, including traumatic brain injury, multiple facial bone, nose, orbital socket and jaw fractures, loss of numerous teeth (and the eventual extraction of all of his teeth), lacerations and contusions and head trauma necessitating multiple surgeries, extended hospitalization and intensive rehabilitation.

Somehow, Plaintiff was able to maintain control of his car and exit at Mound Road. The Warren Police Department responded to a gas station just off I-696, where Plaintiff had pulled over. Evidence Technician Scott Taylor responded to the scene, took photographs and

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secured the bloody chunk of concrete that was next to Plaintiff's vehicle (App, p 056a).



Officer Taylor proceeded to the hospital and photographed Plaintiff and then went with a "slew of other officers, that's when we started going up and down 696 from I-94 to Mound to see if we could figure out where it came from." (App, p 057a.) Notwithstanding the best efforts of a small army of Warren Police Officers who completely closed down westbound I-696, the police were not able to determine the "exact" pothole from where the chunk came:

Q. What were you specifically out there to investigate? What kind of things were you looking for?

A. That's a very good question. Originally Detective Chisolm wanted me to document the potholes on 696 from I-94 to Mound to see if possibly this piece of concrete came out of. There was about four million of them ***so that absolutely was impossible to do***. I photographed a few of them and tried to take some long shot photographs of all the potholes because ***it would literally be impossible to see if that came from the ground up or to put it into a specific pothole***. We also looked up every overpass to see if there was

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any apparent signs of concrete coming off the bridge from decay. [App, p 058a.]

Officer Taylor photographed one area that showed the representative deterioration:



Warren Detective Brent Chisolm was lead in the investigation. Det. Chisholm spoke with Plaintiff at the hospital, but Plaintiff was only able to give him the general location on I-696; Plaintiff did not remember "specifically" where it happened, and he did not know what lane he was in (App, p 075a). After speaking with Plaintiff, Det. Chisolm met up with multiple additional police personnel "to do a systematic search of the freeway to try to see if we could determine ourselves where this chunk of concrete came from." The systematic search included several Warren PD vehicles and the complete shut-down of the freeway:

A. There were at least two fully marked scout cars and the evidence technician car. We blocked off the -- we started at 94, went north on 94 to 696 westbound, blocked off traffic and just started from there to look to see if we could place where maybe this chunk of concrete came from.

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And so we blocked off traffic and were trying to determine it. ***Very shortly we realized that that was not a task that was going to be possible due to the number of abnormalities in the concrete or potholes.***

* * *

Q. Okay. And you said that there were too many for you to be able to pinpoint -- I'll let you define what you saw.

A. There were a significant number of potholes, so many so that to count all the potholes and try to place a chunk of concrete over the multiple mile span would have been arduous and time intensive for the police department so ***we did not believe that we would be able to accomplish that***. [App, p 075a.]

The roadway examination also included several officers on foot, walking down the freeway:

Q. All right. So you close down traffic, shut down the freeway?

A. Yes.

Q. And then you start walking for some distance?

A. Yes.

Q. All right. And as you're walking you notice what you ultimately conclude to be thousands – potentially thousands of potholes?

A. I believe I said over 1,000 just –

Q. An estimate?

A. Yes.

Q. Maybe even a guesstimate?

A. Yeah. I counted -- again, I counted you know, a number of them and I said, well, that's clearly over 1,000 in this stretch.

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Q. Not practical to start taking this piece of concrete and trying to match it up to the potential thousands of potential points this could have come from?

A. Correct. [App, p 085a.]

Detective Chisolm then directed that an exemplar chunk of concrete be taken from the roadbed so that its markings could be compared with the markings on the chunk that came through Plaintiff's windshield. After examining the chunk in question and comparing it to the exemplar, Det. Chisolm concluded that the markings were consistent with the roadbed, as opposed to concrete from a bridge or overpass:



Chunk of concrete that struck Norman Champine

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Road bed exemplar obtained by Warren PD

As part of this analysis, Det. Chisolm also "assigned out every bridge to either some of the patrol officers, Officer Taylor, and myself and we checked all the bridges…" The conclusion was that the chunk did not come from a bridge or overpass. (App, p 076a.)

Det. Chisolm also notified MDOT of the incident the day it happened. Det. Chisolm was put in contact with Marlon Spinks, an MDOT Maintenance Engineer. Det. Chisolm and Mr. Spinks discussed the incident and whether Mr. Spinks "was aware of any prior complaints." Mr. Spinks advised that "there [had] been other similar type complaints of debris coming in through people's windshield on 696." (App, p 082a). Mr. Spinks took possession of both the injury-causing concrete and the exemplar. (App, p 082a.) The Incident Report states: "MDOT Maintenance Engineer Marlon Spinks investigated this incident for the State of Michigan, Department of Transportation. He was identified and furnished with a copy of the police report, scene photos, and the concrete rocks that were involved in the incident. Spinks took possession of the concrete for the State and advised that they would be secured by the State of Michigan as part of the chain of custody (evidence) in this matter. WPD Evidence tags #170065832.002 & .003." The final determinations of the Warren PD were: "The evidence

RECEIVED by MSC 8/30/2021 2:33:45 PM

suggests Norman Champine was struck as a result of the concrete being kicked up from the roadway…" (App, p 105a.)

MDOT Engineer Spinks has testified he learned of the incident from Warren PD on the day it happened and within a day or two drove the roadway with his foreman and "patch crew" because his supervisor told him "to go out and try to find this area." (App, p 124a). The plan was to try to find an open hole; however, when asked if it was found, Mr. Spinks replied: "It's 696. Honestly, there's a ***bunch of*** open…. There were ***open areas*** that I saw and he saw. And we were like, yeah, we need to get another round of patching going out here." (App, p 125a). Mr. Spinks also admitted to receiving a copy of the Warren police report and photographs and to retrieving the concrete chunks from the Warren police.

MDOT had been aware for a significant time of the rapidly and significantly deteriorating condition of westbound I-696 in Macomb County. In fact, a nearly identical incident happened on May 17, 2017, when a chunk of concrete came through a motorist's windshield causing serious injury:



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The day after that incident, MDOT representatives and their counsel (who is also defense counsel in the present case) met at the MSP Post and inspected the concrete at issue. Certainly, then, MDOT was on notice that the roadbed was deteriorating to the point that motorists were in danger. (App, pp 135a-140a.)

In this case, the MSP responded to Plaintiff's FOIA request by producing numerous accident reports involving cars on I-696 struck by flying concrete. The issue has also been covered regularly by the local media. (App, pp 187a-188a.) In a report from WDIV news in Detroit from May 18, 2017, it was asserted that **"**Pieces of concrete -- some weighing as much as 10 pounds -- are littered across parts of I-696 and they're creating a dangerous situation for many drivers." It further stated that in the two weeks that preceded the report, "three drivers have been involved in separate incidents of concrete slabs flying through their windshields." The report noted that "the chunks of concrete were not coming from the Hoover Street Bridge but were simply pieces of crumbling concrete breaking free from the 50-year-old highway." Finally, it concluded by reporting that "MDOT also said they recognize that the highway is past it's useful and safe lifespan, and that plans for a revitalization are in the works."

Procedural History

Only 11 days after the incident, on December 28, 2017, Plaintiff sent his first notice to MDOT via certified mail. The "green card" received back indicates it the notice was received by MDOT on December 30, 2017 (App, p 003a). The notice, sent before Plaintiff had access to the Warren PD report, stated:

> Please allow this letter to serve as notification pursuant to MCL 691.1404 of a highway defect. The location of the defect is the Hoover Road bridge over I-696 West ("overpass"), approximately above the third travel lane. Our client, Norman Champine, was operating his vehicle west on I-696 at approximately 1:45 p.m. on December 17, 2017, when a piece of concrete from the overpass came through his windshield. Mr. Champine sustained severe injuries to his face, jaw, eyes and related

areas. We are unaware of any eyewitnesses, but believe the incident was investigated by the Warren Police Department. [App, pp 001a-002a.]

On February 6, 2018, 51 days after the incident and after obtaining the Warren police report, Plaintiff filed his Complaint in the Court of Claims. It stated, in part, as follows:

> 3. On December 17, 2018 at approximate 1:40 p.m., Plaintiff was operating a motor vehicle in a westerly direction on I-696 between Gratiot and Mound when 10" x 8" x 5" jagged chunk of concrete from the roadbed weighing approximately 20lbs became dislodged and was projected like into the air and through the windshield of Plaintiff's vehicle.
>
> 4. The heavy, jagged concrete projectile smashed into Plaintiff's face causing severe trauma that included multiple facial bone, nose, orbital socket and jaw fractures; loss of numerous teeth (and the eventual extraction of all teeth); lacerations and contusions and head trauma necessitating multiple surgeries, extended hospitalization and intensive rehabilitation. One of Plaintiff's treating surgeons has indicated that Plaintiff sustained fractures to virtually every bone below his eyebrows.
>
> 5. Defendant MDOT has been aware for years of the progressively worsening condition of the roadbed of I-696, generally in both directions, between I-94 and I-75, and specifically westbound between Gratiot and Mound, and its condition of serious and dangerous disrepair since at least the beginning of 2017.
>
> 6. Stated otherwise, it would be apparent to any casual observer who travelled this section of I-696, and especially to a reasonably competent MDOT inspector, that the roadbed was failing, including significantly sized chunks/cracks forming virtually everywhere, that would

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likely result in chunks of concrete being dislodged and catapulted into the air.

7. The section of I-696 westbound from Gratiot to Mound was not reasonably safe for vehicular travel many months before the date of this incident but, in any event, longer than 30 days preceding the incident.

8. Before this incident, there were multiple instances on this section of I-696 of dislodged concrete chunks from the roadbed penetrating the passenger compartments through windshields and, in some instances, striking occupants causing serious injuries.

9. The investigation of the Warren Police Department immediately after the subject incident determined there existed, in their estimation, "in excess of one thousand 'potholes' from I-94 to Mound." These "potholes" are the result of concrete chunks being dislodged from the improved portion of the highway designed for vehicular travel; in many instances, these heavy chunks of concrete are catapulted into the air whereupon they become a dangerous threat to unsuspecting drivers and occupants.

10. The investigation of the Warren Police Department resulted in the conclusion that the chunk of concrete which severely injured Plaintiff was from the roadbed.

11. The Warren Police Department turned over to Defendant MDOT the subject piece of concrete; Plaintiff hereby gives notice to Defendant MDOT that this piece of evidence, and any related to it, be preserved.

On February 7, 2018, Plaintiff served MDOT with his First Amended Notice of Claim which restated, essentially, those details stated in his Complaint, which were supplemented with the detail learned from the police report. (App, p 004a-014a).

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After Plaintiff commenced this cause of action, the parties proceeded to discovery. Following discovery, Defendant moved for summary disposition. Defendant essentially offered two arguments in support of its motion. First, Defendant argued that because Plaintiff's notice was not sent to the Court of Claims within 120 days of the accident, Plaintiff failed to meet his statutory requirement. Defendant then argued that none of Plaintiff's pleadings in this case, which *were* filed in the Court of Claims within 120 days of the accident, satisfied the notice requirement because Plaintiff did not describe the location of the accident with sufficient specificity.

Plaintiff opposed the motion for summary disposition and argued that he was permitted to serve his notice directly on MDOT. Plaintiff further argued that because his complaint was filed before the expiration of the 120-day notice period, it was able to serve as the notice and was thus properly filed in the Court of Claims in a timely manner. Plaintiff lastly argued that the notice was sufficiently specific as to the location of the defect, particularly in light of the circumstances of the case where the investigating officers admitted that it would be impossible to locate the precise pothole that produced the offending concrete.

Without holding a hearing on the motion, the Court of Claims granted Defendant's motion for summary disposition on December 12, 2018. The Court held that summary disposition was proper because the notice was not filed in triplicate in the Court of Claims during the 120-day notice period and specifically found that the Complaint could not serve as notice. The Court then held that the notice was also deficient because it failed to identify the specific location of the highway defect. The Court later denied Plaintiff's Motion for Reconsideration on January 9, 2019. (App, pp 189a-190a).

Plaintiff appealed as of right, timely filing his claim of appeal on January 25, 2019. Plaintiff raised two issues on appeal- whether Defendant was timely served with the statutorily required notice and whether the contents of that notice met the statutory requirements. The parties proceeded to oral argument at the Court of Appeals on March 4, 2020. At oral argument, the parties focused on each of the two issues raised in Plaintiff's brief on appeal. Thereafter, the Court issued its 2-1

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opinion affirming the grant of summary disposition. The majority did not rule on whether Plaintiff's notice was substantively deficient. Instead, it held that Plaintiff was required to file a notice in the Court of Claims before commencing suit and that he could not rely on his Complaint to serve as that notice despite the Complaint being filed before the expiration of the notice period. *Champine v Dept of Transp*, unpublished opinion of the Court of Appeals, issued April 16, 2020 (Docket No. 347398) (App, pp 202a-210a).

Judge Shapiro dissented (App, pp 208a-210a). He reasoned that in certain contexts, the legislature explicitly requires that a notice be filed before a Plaintiff can commence suit, such as in a medical malpractice action. In the case of a highway defect case brought within the Court of Claims, however, the statutory authority merely requires that the Defendants be given notice of the nature and location of the defect within 120 days. There is no authority for the proposition that the Complaint itself cannot serve as that notice, and there was no dispute that Plaintiff's Complaint was filed within the notice period. Judge Shapiro then further asserted that not only should Plaintiff's Complaint have been able to serve as his notice, but that the Complaint also complied with the substantive notice requirements and adequately identified the location of the defect that caused his injuries. As a result, Judge Shapiro would have reversed the grant of summary disposition and would have remanded for further proceedings.

Thereafter, Plaintiff filed his Application for Leave to Appeal with this Court, which presented two issues for consideration. First, Plaintiff asserted that his notice was timely filed in the Court of Claims and that it was error to dismiss his claim on that basis. Second, Plaintiff asserted that his notice was sufficiently detailed in describing the location of the hazardous condition. Then, on April 28, 2021, this Court issued an order granting Plaintiff oral argument on his application and requesting supplemental briefing regarding "whether the appellant's timely filed complaint against the state constituted compliance with the notice requirement of MCL 691.1404." This brief now follows and will limit itself to that specific issue, while noting that Plaintiff maintains both of the arguments presented in his application.

RECEIVED by MSC 8/30/2021 2:33:45 PM

Further facts necessary to the resolution of the issues will be included in the discussion section below.

LEGAL STANDARD

Defendants contend that summary disposition is proper pursuant to MCR 2.116(C)(7), which provides that a motion for summary disposition may be raised where a claim is barred because of immunity. To survive a motion brought pursuant to MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). "All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party." *Smith*, 223 Mich App at 616. A plaintiff can overcome such a motion by alleging facts that support application of an exception to governmental immunity. *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009).

ARGUMENT

I. Plaintiff's timely filed Complaint constituted compliance with the notice requirement of MCL 691.1404

Generally speaking, a plaintiff may only sue a governmental entity in tort if the suit falls within one of the enumerated statutory exceptions to governmental immunity. *Moraccini v City of Sterling Hts*, 296 Mich App 387, 392; 822 NW2d 799 (2012). One such exception provides that a governmental agency with jurisdiction over a highway must maintain the traveled portion of the highway in reasonable repair. MCL 691.1402(1); *Glancy v City of Roseville*, 457 Mich 580, 584; 577 NW2d 897 (1998). "But to sue the agency for failing to maintain the highway in reasonable repair, the plaintiff must provide the agency notice of the defect within 120 days of the injury…" *Milot v DOT*, 318 Mich App 272; 897 NW2d 248 (2016). "The main purpose of this notice 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

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before other persons are injured.'" *Id.*, quoting *Burise v City of Pontiac*, 282 Mich App 646, 652; 766 NW2d 311 (2009). Here, the lower courts found that Plaintiff failed to comply with that notice requirement and that his case was thus subject to dismissal. That holding was erroneous for a variety of reasons, discussed in turn.

a. Plaintiff complied with the unambiguous statutory language

The notice requirement at issue in this case is found in MCL 691.1404(1), which 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.

Where suit is being brought against the state, as in the present case, MCL 691.1404(2) further provides that the notice must be filed with the Clerk of the Court of Claims, as opposed to being sent directly to the responsible governmental entity.

In *Rowland v Washtenaw County Rd Comm'n,* 477 Mich 197, 201; 731 NW2d 41 (2007), this Court exhaustively analyzed the public policy behind notice provisions in the context of the governmental immunity statute, MCL 691.1404(1), holding "that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury." (Emphasis added). The Court reasoned that notice to the *agency* is rational because it allows the agency to conduct its investigation while "the matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach." *Id.* 211 citing *Ridgeway v Escanaba,* 154 Mich 68, 72-73; 117 NW 550 (1908).

RECEIVED by MSC 8/30/2021 2:33:45 PM

Here, there is no dispute that Plaintiff served his notice "on the governmental agency [MDOT]" well before the 120-day period expired. However, the Court of Claims held that because the notice was not filed in the Court of Claims during that period, the notice was insufficient. As the Court of Claims and Defendant each acknowledged, Plaintiff's Complaint *was* filed in the Court of Claims within the 120-day notice period. Yet both the Court of Claims and the Court of Appeals erroneously concluded that the Complaint could not serve as the statutory notice. Notably, the Court of Appeals did not find that the Complaint failed to contain the information required to satisfy the statutory notice requirement.

In holding that a complaint cannot serve as a notice, the Court of Claims emphasized that MCL 691.1404 explicitly provides that the filing of a statutory notice is "a condition of recovery." Plaintiff does not disagree regarding the statutory language, but the Court's interpretation of that language was plainly incorrect. Nothing about the phrase "a condition of recovery" indicates that a complaint may not serve as a notice. Instead, the statute merely requires that *in order to recover* his damages, a Plaintiff must file a notice with the clerk of the Court of Claims within 120 days of the subject accident. Had the legislature intended a Plaintiff to file a notice *as a condition of commencing an action* as opposed to *as a condition of recovery,* the legislature could have done so. It did not. It was not, respectfully, the role of the Court of Claims or the Court of Appeals to insert language into the statutory requirement that was not intended by the legislature.

Lest there be any doubt regarding the plain meaning of the statute in question, this Court need only look to other statutory notice provisions. For example, MCL 600.2912b states that "a person *shall not commence* an action alleging medical malpractice against a health professional or health facility *unless* the person has given the health professional or health facility written notice under this section not less than 182 days *before the action is commenced*." (emphasis added.) Here, had the legislature intended to require a Plaintiff to file a notice before a complaint was filed, it would have written MCL 691.1404 identically to how it wrote MCL 600.2912b.

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In rejecting this argument, the majority in the Court of Appeals cited this Court's opinion in *Donajkowski v Alpena Power Co*, 460 Mich 243, 258; 596 NW2d 574 (1999) for the proposition that "legislative silence alone is not persuasive." Respectfully, it is not apparent how *Donajkowski* has any bearing on this matter. That opinion did not deal with the statutes at issue in the present case. Far more importantly, Plaintiff is not making a "legislative silence" argument but is instead arguing that under the legislature's plain language, a complaint that is filed in the notice period can fulfill the statutory requirement. It is not that the legislature has been silent, but that it has spoken and that the lower courts have thus far ignored its words.

Based on the unambiguous statutory language, Plaintiff was not precluded from filing his Complaint within the 120-day period in order to satisfy the notice requirement. Indeed, as the Court of Claims stated, it is well-established that a Plaintiff's notice "need not take any particular form." Thus, the fact that the notice took the form of a complaint is not fatal to Plaintiff's claim where the notice was timely filed. The analysis should end there. However, Plaintiff will briefly address an additional concern of the Court of Claims.

In holding that Plaintiff's Complaint could not serve as notice, the Court of Claims noted that the purpose of the notice requirement was to give the government an opportunity to investigate a claim and determine the extent of its liability. The Court of Claims then held that if a complaint was utilized as a notice, the government would not have any meaningful opportunity to do those things. The Court's reasoning is both statutorily unsupported and logically flawed. Under the Court's reasoning, Plaintiff would have been permitted to file his notice in the Court of Claims on day 120 *and then immediately file his Complaint*. Under that scenario, the government would have had no more time than it had in the present case to investigate the claim or determine its liability. The Court inserted requirements that do not exist and then dismissed Plaintiff's cause of action for failing to comply with those non-existent requirements.

As this Court explained in *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997) (citing *Hiltz v Phil's Quality Market,* 417 Mich 335, 343; 337 NW2d 237 (1983), "[i]n resolving disputed

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interpretations of statutory language, it is the function of a reviewing court to effectuate the legislative intent. If the language used is clear, then the Legislature must have intended the meaning it has plainly expressed, and the statute must be enforced as written." When considering whether the lower courts opinions in this case fulfilled that function, Plaintiff urges this Court to consider the erroneous holding in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004) and the subsequent opinion correcting that error in *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010). While those opinions did not address the statute at issue in this case, they offer important lessons on statutory interpretation that are applicable to this dispute.

The *McCormick* Court expressly overruled a prior, erroneous interpretation of the No-Fault Act that occurred in *Kreiner*. Specifically, the statutory scheme provides that to be compensable, the injured person must show that the alleged impairment "affects the person's general ability to lead his or her normal life." When *Kreiner* interpreted that phrase, it concluded "that the 'common meaning' of whether an impairment has affected 'the person's general ability to lead his or her normal life' is whether it has affected the person's general ability to conduct the course or trajectory of his or her entire normal life." *McCormick*, 487 Mich at 205, quoting *Kreiner*. The *McCormick* Court explained why that interpretation was erroneous in a passage that is particularly relevant to the question in the present case, stating:

> This "common meaning" [as described in *Kreiner*] is quite different from the actual statutory text in form and substance. Significantly, the *Kreiner* majority's interpretation of the statute interjects two terms that are not included in the statute or the dictionary definitions of the relevant statutory language: "trajectory" and "entire." Both terms create ambiguity where the original statutory text had none, and the *Kreiner* majority thus erred by selectively defining the words used in definitions of statutory terms in order to shift away from the common meaning that the words have in the context of MCL 500.3135(7). [*Id.* at 205-206.]

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Just as the *Kreiner* Court committed an error when it interjected the terms "trajectory" and "entire" into MCL 500.3135, so too was it error for the Court of Claims to interject language into MCL 691.1404(1) that was not contemplated by the legislature and that imposes a materially different procedure on claimants than the one designed by the legislature. The legislature requires claimants to provide notice within 120 days *as a condition of recovery*, whereas the Court of Appeals would require claimants to provide that notice *as a condition of commencing an action*.

Not only did the majority err in disregarding the plain language in MCL 691.1404(1), but it compounded that error when it ignored the similarly unambiguous language in MCL 600.2301, which states:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. *The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.* [emphasis added.]

This Court has previously (and frequently) held that "the Legislature's use of the word 'shall' indicates a mandatory and imperative directive." *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). See also *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006); *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000); *Oakland Co v Michigan*, 456 Mich. 144, 154; 566 N.W.2d 616 (1997). Thus, unless Defendant's substantial rights were impacted by the way in which it received notice here, any alleged defect in that notice was statutorily *required* to be disregarded.

There can be no doubt that Defendant's substantial rights were not impacted by what it alleges was a defective notice. Defendant does not deny that Detective Chisolm notified MDOT of this incident the very day that it happened. Defendant does not deny that it directly received Plaintiff's notice on December 30, 2017, which was just 13 days after the accident. Defendant does not deny that Plaintiff filed his claim with the

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Court of Claims on February 6, 2018, only 51 days after the incident. Defendant does not deny that Plaintiff served MDOT with the Complaint on March 26, 2018, only 99 days after the incident. For Defendant to now argue that Plaintiff loses because he did not file a document in the Court of Claims by Day 120 that was entitled "Notice" and that contained the identical information that was already in the Complaint is to advocate for absurdity.

Further, it is noteworthy that Defendant waited until October 11, 2018, to file its motion for summary disposition on the basis of this defective notice argument. Defendant litigated this case through the discovery process, no different than it would have had Plaintiff filed his notice in the manner championed by Defendant. There is no better indication that Defendant's "substantial rights" were not affected. Summary disposition was not sought here because Defendant was prejudiced by the notice it received. Defendant was not denied any opportunity, deprived of any piece of evidence, or prevented from its right to fairly litigate this action. Rather, this motion was filed to serve as a parachute that could help Defendant avoid liability for its clear dereliction of its statutory obligation to maintain its highways in a state of reasonable repair. It is precisely that type of technicality-driven litigation that the legislature sought to prevent through MCL 600.2301.

b. There is no binding authority that compelled the deviation from the unambiguous statutory language

Because the statutory language at issue is unambiguous, the lower courts were obligated to apply that language as written. Had they done so, Plaintiff's action would not have been dismissed. However, it should be noted that to the degree that the lower courts believed that their holdings were compelled by some binding authority, that too was incorrect.

Perhaps because the Court of Appeals is aware that the legislature knows how to impose a pre-suit notice requirement on a Plaintiff, it has previously assumed that a complaint *can* serve as a notice in the context of the highway exception to governmental immunity. In *Goodhue v*

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DOT, 319 Mich App 526; 904 NW2d 203, n4 (2017) that Court stated that it "assumed, without deciding, that the complaint qualifies as a proper notice." Here, the lower courts diverged from that assumption, without any statutory support for the diversion. In doing so, the courts reversibly erred.

In deviating from the logical assumption in *Goodhue*, the majority here held that it was bound by its prior decision in *Burise v Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009). Yet as Judge Shapiro explained in his dissenting opinion, *Burise* has no applicability to the question presented in this case. In *Burise*, the Court *was not* addressing whether a notice is a condition precedent for filing a complaint. It was, instead, addressing whether a notice that was timely filed but substantively deficient could be cured within the 120-day window. In addressing that question, the Court stated that "Accordingly, before bringing suit, a claimant must provide, within 120 days from the time of injury, notice to the governmental agency that (1) specifies the exact location and nature of the defect, (2) identifies the injuries sustained, and (3) provides the names of any known witnesses." *Id*. at 653. The Court proceeded to hold that because the Plaintiff cured the deficient contents of the notice before the expiration of the 120-day notice period, the statutory requirements were satisfied.

The majority in this case latched on to the *Burise* Court's use of the phrase "before bringing suit" to conclude that a notice was a condition precedent to filing a complaint in a highway defect case. Yet, that phrase, when examined in context, did *not* amount to a holding of the Court of Appeals, but was, rather, mere dicta. "Dicta" is defined as "opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author and not binding in subsequent cases as legal precedent." Black's Law Dictionary, 6th ed. This Court's precedent is wholly consistent with the above definition, as it has explained that a judicial comment on an issue not before the court amounts to dicta and is not binding in future cases. *Donajkowski v Alpena Power Co*, 460 Mich 243, 257-258; 596 NW2d 574 (1999). *Burise* was simply deciding whether a corrected notice filed within 120 days allowed a cause of

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action to proceed, not whether a notice and complaint had to be treated as separate documents. By relying on that language to affirm summary disposition here, the Court of Appeals clearly erred.

Just as there is no binding opinion from the Court of Appeals that supported the result in this case, there is also no opinion from this Court that supported the majority's holding. More importantly, even if the portion of *Burise* relied on by the majority did not amount to dicta, this Court of course has the ability to overrule that erroneous conclusion from the Court of Appeals. Indeed, if the majority in this case is correct in reading *Burise* as making a notice a condition precedent to filing suit, it only serves to reinforce the need for this Court to now provide clarity to the courts of this state. In short, whether the erroneous reading of MCL 691.1404(1) originated in *Burise* or in the present case is of no importance- in either instance, the misinterpretation of the unambiguous statutory language must be corrected.

Recently, this Court had the opportunity to address whether a Plaintiff complied with the notice requirements of MCL 691.1404 in *Wigfall v City of Detroit*, 504 Mich 330; 934 NW2d 760 (2019). *Wigfall* did not address the exact question posed in this application, as it was instead concerned with whether it was proper for the Plaintiff to serve its notice on the City of Detroit Law Department instead of the city's Corporation Counsel (this Court unanimously held that the notice in *Wigfall* satisfied the statutory requirement). Nonetheless, it remains instructive.

In her concurring opinion in *Wigfall*, Justice McCormack wrote:

> But at some point after acknowledging notice in these cases, one of the lawyers on the Corporation Counsel's staff came up with a wacky idea to get the lawsuit dismissed: argue that the plaintiff's notices were not compliant after all, because, instead of mailing them to the Corporation Counsel personally, at 2 Woodward Avenue, Suite 500, Detroit, MI, 48226, the plaintiffs mailed them to the Corporation Counsel's staff, the Law Department, at that same address. [*Id*. at 348.]

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Justice McCormack labeled such tactics as a "kind of pseudo technicality [that] can give lawyers a bad name." *Id*. at 349. Respectfully, similar sentiments could be expressed here, where there is total agreement that MDOT received notice in numerous forms well before the expiration of the 120-day deadline in MCL 691.1404. At a minimum, the present case demonstrates that while *Wigfall* effectively removed one absurd arrow from the government's quiver, there remain other pseudo technical arguments that government defendants will eagerly advance when attempting to evade liability.

As *Burise* stated, the main purpose of the notice provision 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." *Burise*, 282 Mich App at 652. Unfortunately, this case demonstrates that the notice provision apparently serves a secondary purpose- to act as a landmine that can result in the dismissal of a meritorious action. Unless this Court is prepared to conclude that our legislature harbored that unspoken and nefarious purpose when it enacted the notice process, the inescapable conclusion is that both governmental defendants and our courts have disregarded the legislature's intent. Thus, for the same reasons it was jurisprudentially important to reverse the decision of the Court of Appeals in *Wigfall*, the instant case likewise requires this Court to take action

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CONCLUSION AND RELIEF REQUESTED

The lower courts erred in concluding that Plaintiff failed to comply with the notice requirements of MCL 691.1404 where Plaintiff filed his Complaint in the Court of Claims before the expiration of the 120-day notice period. The unambiguous language of that statutory provision demonstrates that unlike in medical malpractice actions, a notice is not a condition precedent to commencing suit in a highway exception case. By concluding otherwise, the lower courts imposed requirements on Plaintiff above and beyond those contemplated by the legislature. Consequently, this Court should reverse the decision of the Court of Claims and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 6,987 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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Date: August 30, 2021