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

Court of Claims No. 18-000028-MZ
Filed under AO 2019-6

Plaintiff's Reply to Defendant's Supplemental Brief

ORAL ARGUMENT REQUESTED

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Date: October 4, 2021

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ARGUMENT

Plaintiff intends to be brief in his reply, because the question before this Court has been clearly answered by the legislature's words. The language that controls this case is located in MCL 691.1404(1), and states

> (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.

The language could not be more direct. "As a condition to any recovery" (as opposed to "as a condition to commencing an action") an injured party must, within 120 days, serve a notice "of the occurrence of the injury and the defect" (as opposed to a notice "of an intent to commence an action). Here, Plaintiff, well within 120 days, filed his complaint that without dispute informed the defendant of the 1.) occurrence of his injury and 2.) the defect.

In an attempt to make this simple provision seem far more complicated than it is, Defendant cites to this Court's statement (in a case that had nothing to do with MCL 691.1404) that a notice is "information, [a] warning, or [an] announcement of something impending; notification ...." *Crooked Creek, LLC v Cass Co Treasurer,* _ Mich _, n 24 (2021) (Docket No. 159856), quoting *Random House Webster's College Dictionary* (1999). Defendant then builds off that statement to say on page 7 of its brief that "[a]pplying this definition, the 'notice' required by MCL 691.1404 is merely an advanced warning to the government that a highway-defect lawsuit may be filed."

Unfortunately for Defendant, the statute tells us what the claimant must place the government on notice of, and it decidedly does not include a "warning…that a highway-defect lawsuit may be filed."

MCL 691.1404(1) specifies several things that the notice must include, and an intent to commence an action is not one of them. The statute first states that there must be a notice "of the occurrence of the injury and the defect." It then states in the next sentence 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."

If the legislature has explicitly told the public what the notice must include, it is not the job of this Court to graft on additional language to transform a notice of injury and defect into a notice of intent to sue. "This Court recognizes the maxim expressio unius est exclusion alterius; that the express mention in a statute of one thing implies the exclusion of other similar things." *Bradley v Saranac Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997).

Plaintiff agrees with many of the broad arguments Defendant relies upon, but simply disagrees with the outcome that Defendant believes should occur upon applying those principles. For example, Defendant states that "[S]ound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence." *People v Gardner*, 482 Mich 41, 58-59 (2008), quoting *Donajkowski v Alpena Power Co*, 460 Mich 243, 258 (1999). Agreed. This Court is required to look at the legislature's words and Plaintiff is asking nothing more than that. Under those words, Plaintiff timely complied with the notice requirement in MCL 691.1404.

Similarly, Defendant believes that it is aided by this Court's opinion in *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143, 150-151 (2000), in which it stated that "we refuse to impose upon the people of this state our individual determinations of proper public policy, relating to the availability of lawsuits arising from injuries on the public highways. Rather, we seek to faithfully construe and apply those stated public policy choices made by the Legislature when it drafted the statutory language of the highway exception." Again, Plaintiff agrees. The legislature made a public policy determination that a claimant had to notify the state within 120 days of "the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." Such a notice is "a condition to any

recovery." Plaintiff placed the state on notice within 120 days and the legislature has deemed that he has thus met his condition of recovery.

While Defendant asserts that it is not this Court's constitutional role to insert its own public policy views into this dispute, it nonetheless asks this Court to do just that. Defendant contends that to accept Plaintiff's interpretation would undermine the entire purpose of the statutory notice requirement because, in Defendant's view, the purpose must be to allow the state to do things like investigate the merits of a claim, engage in pre-suit discovery, and collect and preserve evidence for some undefined period of time before the commencement of an action. The argument does not hold up to the slightest bit of scrutiny.

If this Court were to accept Defendant's argument and hold that a notice must precede a complaint so as to give the state an opportunity to engage in some hypothetical pre-suit conduct, then this Court must be prepared to say how long a litigant must wait in between the filing of those two documents. One of the most common questions that this Court asks litigants at oral argument is along the lines of "what is the rule that we should adopt?" That is the exact question Plaintiff's counsel is left with when reading Defendant's interpretation of MCL 691.1404. If an attorney files a notice on Monday, must he or she wait until Tuesday to file the complaint? That would technically render the notice a "pre-suit notice" but would functionally prevent the state from engaging in any pre-suit activity related to the case. Should counsel, therefore, have to wait a week? A month? And how is the analysis complicated when the notice is filed in the court of claims? Must counsel then wait until the clerk of the court serves that notice on the state *and then* give the state more time for that pre-suit investigation? The questions could go on and on, and this Court (if it accepts defendant's interpretation) must be prepared to either answer them now or must leave those questions to the lower courts to figure out. Similarly, denying this application would continue to leave those questions unanswered, risking the creation of a morass of decisions until some future date.

The rule that applies here need not create any of the questions that arise from Defendant's approach (and, those questions are best left for a legislature that has contemplated them, such as in the case of the medical malpractice notice of intent requirement). The statute provides

the rule in plain terms. If, within 120 days, the claimant places the state on notice of the injury, the defect and the known witnesses, then that condition for recovery has been met *regardless of the form the notice takes.* As the Court of Appeals has stated, "[n]otice need not be provided in any particular form and is sufficient if it is timely and contains the requisite information." *McLean v City of Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013), citing *Burise v Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). In concluding otherwise here, the Court of Claims reversibly erred.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, as well as those reasons set forth in Plaintiff's application for leave to appeal and his supplemental brief in support of that application, Plaintiff respectfully requests that this Honorable Court grant this application for leave to appeals. Alternatively, Plaintiff requests that this Court reverse the grant of summary disposition in favor of Defendant and remand to the Court of Claims 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 1,339 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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