STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

ALICE M. BROWN,

Plaintiff/Appellee,

v.

CITY OF SAULT STE. MARIE, a Michigan municipal corporation, ERIC FOUNTAIN, GREG SCHMITIGAL, MIKE BREAKIE, JEFF KILLIPS and BRUCE LIPPONEN,

Defendants/Appellants,

_____/

S. Ct. No. 154851

MCOA No. 330508

L.C. No. 14-13459-NO

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_____/

PLAINTIFF/APPELLEE'S ANSWER TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL
and
PROOF OF SERVICE

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Statement of Appellate Jurisdiction

Plaintiff/Appellee acknowledges that the Appellant's Statement of Jurisdiction is correct. The Plaintiff/Appellee acknowledges that Defendants are challenging the unpublished decision of the Court of Appeals dated October 20, 2016. Appellee would simply assert that this Court should decline to exercise jurisdiction as no substantial question is presented and the Court of Appeals' decision is a correct statement of the law and there is no conflict between it and any other cases interpreting MCL 691.1404(1).

Statement of Question Presented

Did the Court of Appeals properly consider all of the content of Plaintiff's "notice letter" pursuant to MCL 691.1404(1) relative to identifying Plaintiff's injuries when such injuries had been witnessed by the individual Defendants and investigated by Defendant City's police department including the taking of photographs and further addressed by Defendant City's fire department through its para-medics ambulance service transporting the Plaintiff to emergency medical care? Plaintiff's notice letter included reference to FOIA materials that were provided to the Plaintiff's attorney by the very same City Clerk who received the complained-of notice

letter which referenced these same FOIA documents. There is no dispute that the notice letter was timely served within days of the reply by the Clerk to the FOIA request by Plaintiff's attorney. So that the proper question presented for this Court's review, is:

Should the Court take jurisdiction of this case in which the Plaintiff provided timely proper notice to the Defendant City of the nature Plaintiff's injury by reference to the City's own records prepared by its police, fire and water departments?

The Plaintiff/ Appellee would answer no, the Court should not exercise jurisdiction.

Defendants/Appellants would answer yes, the Court should exercise jurisdiction.

The Chippewa County Circuit Court did not address this question.

The Michigan Court of Appeals answered that the proper notice had been supplied.

No Need for Supreme Court Review

This Application for Leave suggests that somehow there is a need for further direction from the Supreme Court regarding the application of the notice requirement contained in the Michigan governmental immunity

statute, specifically MCL 691.1404(1).

This Court in *Roland* v. *Washtenaw County Road Commission*, 477 Mich 197 (2007) overruled prior cases that required a showing of actual prejudice to the government agency before a defective notice could close the Courthouse door to an injured person:

> "We conclude that the plain language of this statute should be enforced as written. Notice of the injury sustained and the highway defects must be served on a government agency within 120 days of the injury. Id. at 197"

Mrs. Brown and her attorney supplied timely notice which referred the Defendants/Appellants to their own records. The statute does not specify the form of the notice containing the required information.

In *Plunkett* v. *Department of Transportation*, 286 Mich App 168, 176-7 (2009), the Court of Appeals made clear that even a technically deficient notice is sufficient if the required information is "adequately" provided. *Plunkett* included a police report.

In *Burise* v. *City of Pontiac*, 282 Mich App 657 (2009), the Court concluded that the notice that provides the required information is not required to be in any specific form.

Thus, there are no factors included in the facts of this matter which would require application of MCR 7.305(B)(5) as the Court of Appeals'

decision is not in conflict or erroneous.

This case is unique in that there were a number of government employees present when the Plaintiff was injured. Additionally, the Defendant City of Sault Ste. Marie's police department conducted a thorough investigation and prepared a report complete with photographs of the site of Plaintiff's injury immediately after she was removed to emergency treatment.

Further, the Plaintiff's emergency treatment and transportation to the hospital to address her head wound was all conducted and documented by fire department employees, also employed by the City of Sault Ste. Marie.

This case is unique in that a complete and thorough investigation was conducted of the circumstances before Plaintiff had even received treatment of her injuries. Clearly, the purpose of the statute (to afford a timely opportunity to investigate) had been fully addressed by the Defendants' immediate response to the emergency of Plaintiff/Appellee's injury.

Court of Appeals Decision

The only issue that Appellant raises relative to the Court of Appeals decision is the question of the sufficiency of the description of Plaintiff's injury. The Court of Appeals found at page 6:

The Notice Did Not Lack a Sufficient Description of Injury

Furthermore, we find that plaintiff's notice, when read as a whole, was sufficient to inform the defendant of the injuries suffered by the plaintiff. MCL 691.1404(1), "an injured person is required to timely notify the government agency having jurisdiction over the roadway of the occurrence of the injury, the injuries sustained, the nature of the defect, and the names of the known witnesses." *McLean* v. *Dearborn*, 302 Mich App 68, 74; 836 N.W.2d 916 (2013). "The required information does not have to be contained within plaintiff's initial notice; it is sufficient if a notice received by the government agency within the 120 day period contains the required elements." Id. at 74-5

In this case, plaintiff's notice alleged that she "suffered severe and permanent injuries." Moreover, plaintiff referenced the FOIA documents that were already in defendant's possession. Those documents not only explained in detail the injuries the plaintiff sustained, but described in detail the location of the injury and defect. In *McLean,* this Court found that the plaintiff's description that she sustained "significant injuries (sic)" was not sufficient under the statute and "was not remedied by clarity in any other aspects of the notice." *McLean* v. *Dearborn*, 302 Mich App at 77. Here, plaintiff's statement of "severe and permanent injuries may have been insufficient by itself but that insufficiency was remedied in the FOIA documents. In determining the sufficiency of notice of a claim, the whole notice and all facts stated therein may be used and considered to determine whether the notice reasonably apprises the officer of the place and cause of the alleged injury. *Rule* v. *Bay City*, 12 Mich App 503, 507-508; 163 NW2d 254 (1968). It is important to note that there is no evidence or a claim made that the Defendant had difficulty locating and discerning the defect in question, yet that information was not clearly contained in the notice and would have required the defendant to review the FOIA documents. Plaintiff obtained the police report and ambulance report through a FOIA request from the city on July 9, 2015; those documents were mailed by the

> very person that plaintiff served her notice upon on August 15, 2015. The purpose of the notice requirement is not just to afford an officer of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular venue of the injury. Id. Here, plaintiff's notice in reference documents clearly afford the officer opportunity for investigation and determination of venue.

The COA Decision is Attached as Exhibit 1.

What Did the City Clerk Provide in Response to the FOIA Request?

Attached as Exhibit 2 is a complete copy of the FOIA documents provided by the Defendant City. The attached records graphically demonstrate the nature and extent of the investigation undertaken by the Defendant prior to receiving a request for records from Plaintiff's attorney. That request for records yielded the documents attached as Exhibit 2. Included in that FOIA response was a complete police report which identified witnesses and the Plaintiff's injury and the site of the excavation hole into which Plaintiff fell head first. The attached work records identified the Water Department employees who were at the site working at the time of Plaintiff's injury. The attached fire and ambulance records identify the emergency responders who tended to Plaintiff's wound and transported her to the hospital for further treatment. A casual review of these records demonstrates that they include all of the requirements necessary to satisfy the demands of MCL 691.1404(1).

Ironically, the very Clerk that responded to Plaintiff's attorney's request for records is one of the designated recipients of the notice letter and in fact, did receive the notice letter at issue in this case.

The reality is that the Defendant City and its employees knew far more about the Plaintiff's injury and all of the elements that the statute requires almost immediately after Plaintiff fell. The Defendant/Appellant's position before the Court of Appeals and this Court takes the proposition of "form over substance" to an extreme level in an effort to somehow deny justice to the Plaintiff/Appellee. Although no claim of prejudice in the investigation is required of Defendant, any review of the requirements of the statute and its purposes would demonstrate that Plaintiff's notice directing the Defendant to look at its own records satisfies the requirements. Certainly, it is an unusual circumstance where the location and nature and extent of the Plaintiff's injury and witnesses is so graphically depicted in governmental records. The purpose of Section 1404(1) is to "allow the government an opportunity to investigate." Here, the Plaintiff knew nothing that would have been informative to Defendants as the City already knew all the required information as they had opened the large, unguarded excavation hole and had employees on site who assisted the Plaintiff in returning to the surface after her fall. Mrs. Brown was then assisted by City

of Sault Ste. Marie police and fire personnel in addressing the emergency circumstances of her severe head injury.

Absent from Defendant/Appellant's filing in this Court is a contention that there was in fact any confusion or lack of knowledge of some part of Plaintiff's injury. Both the police record (large and deep head wound) and the ambulance record (facial laceration) (8 cm. lacerations/avulsion noted to left side of patient's forehead) reflect a description of Plaintiff's injuries.

There is nothing to be gained by any involvement of this Court in this issue. This case is unique, as it is a rare occurrence for the Defendant's own records to contain all the necessary information before any notice of claim by a Plaintiff. The most accurate method for Plaintiff under these circumstances to notify this government Defendant is to point to the FOIA records instead of risking a mistake in transcription from those very same records, as Plaintiff herself knew very little about the events that transpired.

THEREFORE, in conclusion, Plaintiff/Appellee respectfully requests that the Court decline to grant leave in this matter as the Court of Appeals' decision is a correct statement of the law and there is no further reason for

clarification by this Court.

Respectfully submitted,

Kirk M. Liebengood (P-28074)
Attorney for Plaintiff/Appellee

Dated: 12/20/16

PROOF OF SERVICE

On 12/20/16, 2016, I served Plaintiff/Appellee's Answer to Defendant's Application for Leave to Appeal by first-class mail to Hillary A. Ballentine, Attorney at Law, 38505 Woodward Ave., Ste. 2000, Bloomfield Hills, Michigan 48307.

Kirk M. Liebengood

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December 20, 2016

Supreme Court Clerk
P O Box 30052
Lansing, MI 48909

RE: Brown v City of Sault Ste. Marie et al #154851

Dear Clerk:

I enclose the original and 3 copies of the Plaintiff /Appellees Answer to Leave to Appeal and Proof of Service.

Sincerely,

Kirk M. Liebengood