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

REPLY BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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Plaintiff's Failure To File A Timely Written Notice Specifying The Injury Allegedly Sustained Within That Notice Is A Fatal Deficiency Under MCL 691.1404(1) And Bars Plaintiff From Bringing A Claim Under The Highway Exception To Governmental Immunity, MCL 691.1402(1).

In its decision in *Rowland v Washtenaw County Rd Commission,* 477 Mich 197; 731 NW2d 41 (2007), this Court held that the plain language of Michigan's notice statute, MCL 691.1404(1), should be enforced as written.[1] The *Rowland* Court also emphasized the point that, inasmuch as the legislature is not required to allow for maintenance of a suit under the highway exception to governmental immunity, it surely has the authority to permit such suits only upon strict compliance with rational limits. *Rowland, supra,* at 212. The *Rowland* Court likewise declared that the notice provisions of MCL 691.1404(1) pass "constitutional muster". In particular, the *Rowland* Court said as follows about the language of and the proper interpretation and application of MCL 691.1404(1):

> MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written… Thus, the statute requires notice to be given as directed and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the name of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered*.

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[1] MCL 691.1404(1) states that:

> (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.

> Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident *even if there is no prejudice…*

477 Mich 197 at 219 (emphasis in original).

Had the court of appeals adhered to the *Rowland* holding, the result here would have been different. Thus, the Court's full review of the matter is in order, MCR 7.302(B). Disregarding *Rowland*, the court of appeals in this case failed to be guided by the plain and unambiguous language of §1404(1).

Amongst other things, the court of appeals announced that MCL 691.1404(1) allows for and recognizes various components of a notice. Specifically, the court of appeals concluded that a reference to FOIA documents, the contents of which the City was arguably aware, "remedied" the "insufficiency" in the notice itself. (Opinion, p 6). While so opining, the court of appeals essentially rejected as meaningless the undisputed fact that the written portion of Brown's notice did not state with any specificity "the injury sustained." Without offering any explanation for its deviation from the holding in *Rowland,* the court of appeals chose not to and did not enforce the notice statute as written. Thus, it is properly said that, at a minimum, the outcome of the proceedings before the court of appeals represents the commission of clear error resulting in an outcome which followed from the court of appeals' improper consideration of various items referenced within Brown's notice and purportedly demonstrating the nature of her claimed injuries.

The clear language of MCL 691.1404(1) speaks only of service of "a" notice. It contemplates the service of a single written notice, and not components or multiple parts of a notice, such as documents received in response to a FOIA request. Brown offered police and ambulance reports as "identif[ying]" her injury. (Plaintiff's Answer to Application for Leave to Appeal, 12/20/16, p 9). However, the burden imposed by MCL

691.1404(1) on a claimant to specify the precise injury sustained renders irrelevant and immaterial Brown's discussion of and reliance upon the inapposite notion of substantial compliance. The notice statute, on the one hand, creates and imposes a statutory obligation to specify the injury sustained. On the other hand, there is the distinct and disparate concept of substantial compliance. The *Rowland* Court's declaration that the language of MCL 691.1404(1) is straightforward, clear, unambiguous and not constitutionally suspect calls for the statute to be enforced as written. A court must resist any attempt to deviate onto a path equating substantial compliance with the clear and unambiguous language of MCL 691.1404(1) requiring specification of "the injury sustained."

Brown erroneously and improperly relies upon the case of the case of *Plunkett v Dept of Transportation,* 286 Mich App 168; 779 NW2d 263 (2009). (Plaintiff's Answer to Application for Leave to Appeal, p 6). That court held that a plaintiff need only substantially comply with §1404(1). The *Plunkett* court reached its result by accepting the argument that a plaintiff should not be held to the standard of a hyper technical and hyper detailed recitation of the precise location of the defect (another notice requirement). In short, the *Plunkett* court found that a plaintiff must only be required to present a sufficiently accurate description of the nature and location of the defect such that the reader is not left with any doubt as to where and what the defect is.

Curiously, the *Plunkett* court specifically noted, but ignored, the *Rowland* Court's holding that MCL 691.1404(1) is straightforward, clear, unambiguous and not constitutionally suspect. Amazingly, notwithstanding the *Rowland* court's clear and explicit instructions, the *Plunkett* court felt at liberty to conclude that, when notice is required of an average citizen for the benefit of a governmental entity, the notice need only be

understandable and sufficient to bring the important facts to the governmental entity's attention. Thus, according to the *Plunkett* court, a liberal construction of the requirements of MCL 691.1404(1) is favored to avoid penalizing a non-expert lay person for technical defect(s). In short, in contravention of the plain and clear language chosen by the legislature in enacting MCL 691.1404(1), the *Plunkett* court declared that notice of a claim under a notice statute should not be held ineffective when it is in "substantial compliance with the law…"

Brown also incorrectly relies on *Burise v City of Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009), for the proposition that "the notice that provides the required information is not required to be in any specific form." (Plaintiff's Answer to Application for Leave to Appeal, p 6). Unlike here, the issue in *Burise* was whether the original notice sent to the defendant, which did not include the name of a known witness who was with the plaintiff when she was injured, satisfied MCL 691.1404(1) where a subsequent claim form the plaintiff completed at the defendant's request supplied the witness information. That claim form was filed within the 120-day period. The *Burise* Court held that the requirements of §1404(1) had been satisfied because the second notice, sent within the requisite time frame, "contained the specific location and nature of the complained-of defect" and "described the injuries sustained by plaintiff." *Id*. at 654.

In contrast to *Burise*, the notice provided by Brown did not describe her alleged injury sustained – an indispensable requirement of § 1404(1). It merely provided a general reference to FOIA documents. But by unjustifiably expanding the "notice" to include a reference to FOIA documents, the court of appeals read the statutory notice requirement in such a fashion as to bring Brown's case within its operation. While acknowledging its

obligation to enforce MCL 691.1404(1) as written and while conceding that the statute is clear, unambiguous and not constitutionally suspect, the court of appeals reached a result that cannot be sustained under a proper reading of § 1404(1). Specifically, the court of appeals erred by construing the "notice" under § 1404(1) to include submissions other than the written notice, to wit: FOIA documents. *Burise* does not command a different conclusion.

It is within the power of the Legislature to enact notice of claim requirements on the theory that, since the liability of a municipality for tort claims is only statutory in its origin, the Legislature can attach such conditions to the right to recover from a governmental agency as the Legislature deems proper or expedient. Because MCL 691.1404(1) regarding notice is straightforward, clear, unambiguous and not constitutionally suspect, it must be enforced as written. Adherence to that approach leads to the conclusion that the pre-suit notice by Brown is fatally deficient.

For all these reasons, peremptory reversal, or alternatively leave to appeal, is proper.

RELIEF

WHEREFORE, Defendants-Appellants City of Sault Ste. Marie, Eric Fountain, Greg Schmitigal, Mike Breakie, Jeff Killips and Bruce Lipponen, respectfully request that Court peremptorily reverse the court of appeals' October 20, 2016 opinion reversing the circuit court's grant of summary disposition to Defendants and, failing that, grant Defendants leave to appeal, and enter any other relief which is proper in law and equity.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Hilary A. Ballentine

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Dated: January 10, 2016

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PROOF OF SERVICE

Marjorie E. Renaud, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on January 10, 2016, she caused to be served a copy of the Reply Brief in Support of Application for Leave to Appeal, and Proof of Service as follows

KIRK M. LIEBENGOOD (P28074) Attorney for Plaintiff-Appellee 717 Grand Traverse St. P O Box 1405 Flint, MI 48501	**Counsel was served via U.S. mail, with postage prepaid**

/s/Marjorie E. Renaud

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