

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

ALICE M. BROWN,

S. Ct. No. 154851

Plaintiff/Appellee,

MCOA No. 330508

v.

L.C. No. 14-13459-NO

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

Defendants/Appellants,

KIRK M. LIEBENGOOD (P-28074)
Attorney for Plaintiff/Appellee
P.O. Box 1405
Flint, Michigan 48501
(810) 232-6351

HILLARY A. BALLENTINE (P-69979)
Attorney for Defendants/Appellants
38505 Woodward Ave., Ste. 2000
Bloomfield Hills, Michigan 48304
(313) 983-4419



**PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF
PURSUANT TO ORDER OF JUNE 21, 2017**

Table of Contents

	Page
Introduction	1
Question Presented	1
Argument	2
Conclusion	6

Index of Authorities

Statutes

MCL 691.1404(1)

FOIA

Cases

Burise v. City of Pontiac, 282 Mich App 657(2009) 4

Plunkett v. Department of Transportation, 286 Mich App 168 (2009) 3

Introduction

This Brief is submitted consistent with the Court Order for Supplemental Briefing entered June 21, 2017. Plaintiff/Appellee incorporates the briefing previously filed in response to Defendant's Application for Leave to Appeal.

Question Presented

Did the Court of Appeals properly apply MCL 691.1401(1) "The notice shall specify . . . the injuries sustained . . ." when it concluded that the Plaintiff's notice, "when read as a whole," was adequate because the notice "referenced documents" that more fully described the Plaintiff's injuries?

Appellee says Yes.

Appellant says no.

Argument

In the trial court below, the Defendant's argument (which was rejected by the Court of Appeals) hinged upon whether or not the Plaintiff

herself was supposed to sign the notice required by the cited statute. The balance of the contentions raised were not addressed at all by the trial court as he concluded that, in fact, Plaintiff herself is supposed to sign the notice letter.

As the Court of Appeals concluded, the Plaintiff's notice letter identifying records within the control of the Defendant provided all the information required by the statute.

"MCL 691.404(1) provides: As a condition of 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.* [Emphasis added.]"

As explained in the previous briefing, the Defendant/City's own records already contained all of the necessary elements required to be supplied pursuant to the statute, at the time of the statutory notice letter.

In *Plunkett v. Dep't of Transportation*, 286 Mich App 168, 176-177; 779 NW2d 263 (2009), the Court of Appeals acknowledged, reviewed and

applied case law interpreting MCL 691.1404(1), observing:

"The Michigan Supreme Court has established that MCL 691.1404 is straightforward, clear, unambiguous and not constitutionally suspect and must be enforced as written. However, when notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. Thus, a liberal construction of the notice requirement is favored to avoid penalizing an inexperienced layman for some technical defect. The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured.

The requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice. A notice should not be held ineffective when in *substantial compliance* with the law. A plaintiff's description of the nature of the defect may be deemed to substantially comply with the statute when coupled with the specific description of the location, time and nature of injuries. Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects. [Citations, quotation marks, alterations and ellipses omitted.]" . . .

"In determining the sufficiency of the notice . . . the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury." *Plunkett*, 286 Mich App at 177 n 15.

The *Plunkett* case was offered to this Court and, after oral argument, the Application for Leave was denied in an Order entered March 11, 2011, Supreme Court # 140193.

Likewise, the *Burise v. City of Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009) case concluded that notice that provides the required information is not required to be in any specific form. This case was also offered to this Court and the Application for Leave was denied March 12, 2009 in Supreme Court case #138722 and the Motion for Reconsideration was also denied on January 29, 2010.

Curiously, Defendants here have abandoned challenging Plaintiff's notice with respect to any of the other elements required in the notice, apparently accepting the reference to FOIA documents as adequate to satisfy the location and witness identification mandates of the statute. The Defendant's own records fully and completely inform the Defendant of more than enough information to fully investigate this matter and take remedial action. In an attempt to avoid the "minefield" of litigation spawned by MCL 691.1404(1), this Plaintiff simply told the Defendant to look at the records

that had been supplied by the very same city clerk who received and responded to the FOIA letter in question.

This exercise of statutory interpretation to bar a legitimate Plaintiff's claims seems to have degenerated into an exercise of attempting to separate fly droppings from pepper. They all look the same.

This Defendant had no confusion about anything associated with the events involved or Plaintiff's injuries.

The truth of the matter here is that Defendants knew far more about Plaintiff's injury, cause, location and witnesses than Plaintiff did; thus the reference to the Defendant's own records. This is the most accurate facts Plaintiff could provide.

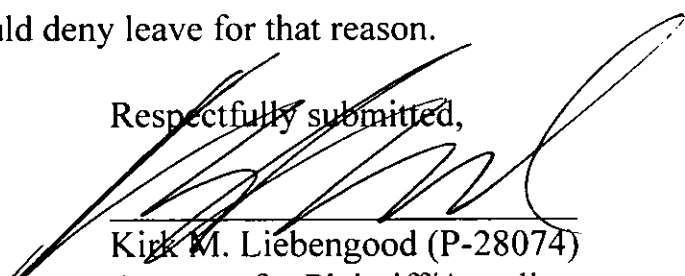
Conclusion

It is respectfully submitted that there was no error in the Court of Appeals' decision and this Court should deny leave for that reason.

Respectfully submitted,

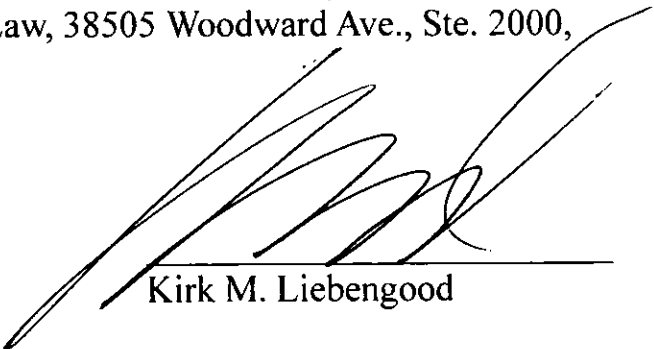
Dated: _____

8/10/17


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

PROOF OF SERVICE

On 8/10 / , 2017, I served Plaintiff/Appellee's Supplemental Brief Pursuant to Order of June 21, 2017 by first-class mail to Hillary A. Ballentine, Attorney at Law, 38505 Woodward Ave., Ste. 2000, Bloomfield Hills, Michigan 48307.



Kirk M. Liebengood

RECEIVED
AUG 14 2017
LARRY S. ROYSTER
CLERK SUPREME COURT