

# community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

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## STATUTORY NOTICE REQUIREMENT RESTORED WITH A VENGEANCE

By Mike Crow

In *Rowland v Washtenaw County Road Commission*, Lexis No. 130379, the Michigan Supreme Court discussed whether the notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced as written. Generally, governmental entities receive immunity from suit. However, several exceptions to governmental immunity exist. The defective highway exception to governmental immunity allows suit to be brought by persons injured by defective streets, roads, bridges and sidewalks.

MCL 691.1404(1) requires a person injured by a defective highway provide notice to the governmental agency of the injury and the defect within 120 days from the date the injury occurred. For the last 25 years, however, failure to comply with the notice provision resulted in dismissal of a case only when the governmental agency could show resultant prejudice. In *Rowland*, the Supreme Court overruled this precedent.

In *Rowland*, plaintiff claimed injury after tripping and falling on a defect in a roadway under the jurisdiction of the defendant. Plaintiff served notice on the defendant 140 days after the accident. Defendant filed a Motion for Summary Disposition arguing, among other things, plaintiff's failure to comply with the notice provision of MCL 691.1404(1) entitled it to summary disposition. Relying on *Hobbs v Dept of State Hwys*, 398 Mich 90 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354 (1996), the trial court determined a genuine issue of material fact existed concerning whether defendant could show prejudice and, thus, denied the Motion for Summary Disposition. The Court of Appeals affirmed the order of the trial court.

### SECRET WARDLE NOTES:

The Michigan Supreme Court's decision in the *Rowland* case represents a significant development for governmental entities. If a plaintiff fails to strictly comply with the notice provisions of MCL 691.1404(1), her defective highway claim fails. There is no requirement the governmental agency show any prejudice whatsoever.

Thus, plaintiffs seeking to bring a cause of action for a defective highway must provide notice within 120 days from the time of the injury. The notice must, "specify the exact location and nature of the defect, the injuries sustained and the names of the witnesses known at the time by the claimant..." If notice is not timely provided, plaintiff's claim is barred. Furthermore, if plaintiff's notice fails to specify the "exact location", the "nature of the defect", the "injuries sustained" or the "names of the witnesses known", plaintiff's claim is most probably barred. This requirement is retroactive and applies to all past and future claims, including pending cases.

Historically, governmental entities were forced to show plaintiff's failure to comply with the notice provision resulted in actual prejudice. This proved very difficult, except in cases where the defect was changed or altered. Now, prejudice is no longer required. The *Rowland* opinion will undoubtedly result in the dismissal of numerous pending cases involving the defective highway exception to governmental immunity. More significantly, the decision should result in a dramatic reduction in future claims, where the injured party or her attorney fails to strictly comply with the notice provisions of MCL 691.1404(1).

Finally, the *Rowland* decision should similarly impact other types of cases against governmental agencies requiring statutory notice. For example, similar notice is required to bring a claim alleging the public building exception to governmental immunity. In the end, the *Rowland* decision restores the notice requirement as a powerful defense for governmental agencies.

## CONTINUED...

In *Rowland*, the Supreme Court reviewed its prior decisions regarding notice requirements and determined them, “wrongly decided and poorly reasoned.” The legislature is not required to provide a defective highway exception to governmental immunity, so, according to the Court, it surely has the authority to allow such suits only upon compliance with rational notice limits. Providing a reasonable opportunity to investigate and evaluate claims, allowing time for creating reserves, reducing the uncertainty of future demands and even forcing a claimant to make an early choice regarding how to proceed all provide a rational basis for a notice limit. According to the *Rowland* Supreme Court, “[t]he engrafting of the prejudice requirement onto the statute was entirely indefensible.” The Michigan Supreme Court reversed the Michigan Court of Appeals and the trial court, along with 25 years of judicial precedent, and remanded the case for entry of an order dismissing plaintiff’s complaint.

The Court also analyzed whether its decision to overrule prior precedent should receive retroactive affect. The Court determined its decision simply returned the law to that which was always mandated by MCL 691.1404(1). As it was not a declaration of new law, but, “a return to an earlier rule and a vindication of controlling legal authority”, the Court gave full retroactive effect to its decision.

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