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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000586-MR

LISA STURGILL APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
ACTION NO. 15-CI-00002

CITY OF OWENTON, KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Lisa Sturgill appeals from the Owen Circuit Court's order dismissing her personal injury case against the City of Owenton, Kentucky, for failure to strictly comply with Kentucky Revised Statutes (KRS) 411.110 in providing appropriate notice to the City. Following a careful review, we affirm.

On January 9, 2015, Sturgill filed a personal injury complaint against the City. She alleged on January 13, 2014, she sustained serious bodily injuries upon exiting a vehicle on South Main Street across from the old courthouse in the City of Owenton and stepping into a hole.

On February 3, 2015, the City filed a motion to dismiss on the basis Sturgill failed to strictly comply with the notice requirements of KRS 411.110 as established in *Louisville v. O'Neal*, 440 S.W.2d 265, 266 (Ky. 1969), and *Treitz v. City of Louisville*, 167 S.W.2d 860, 862 (Ky. 1943). KRS 411.110 provides:

> [n]o action shall be maintained against any city in this state because of any injury growing out of any defect in the condition of any bridge, street, sidewalk, alley or other public thoroughfare, unless notice has been given to the mayor, city clerk or clerk of the board of aldermen in the manner provided for the service of notice in actions in the Rules of Civil Procedure. This notice shall be filed within ninety (90) days of the occurrence for which damage is claimed, stating the time of and place where the injury was received and the character and circumstances of the injury, and that the person injured will claim damages therefor from the city.

In response, Sturgill's attorney argued a letter he sent to the Mayor of Owenton on January 30, 2014, was sufficient to comply with KRS 411.110. The pertinent portions of this letter are as follows:

> RE: My Client: Lisa Sturgill
> Type of Case: Slip and Fall
> Date of Loss: January 13, 2014
>
> . . .

> Lisa Sturgill has retained my services with respect to the personal injury she was involved in on January 13, 2014. Ms. Sturgill fell into a hole due to a defect in the public street located on South Main Street, across from the old Courthouse.

The letter did not state what injuries Sturgill suffered. While the letter implied a claim against the City could be forthcoming, it did not specifically state Sturgill would claim damages from the City.

On March 30, 2015, the circuit court granted the motion to dismiss, determining Sturgill failed to strictly comply with KRS 411.110 because "[Sturgill's] Notice to the City of Owenton, Kentucky did not attempt to describe the personal injuries which [Sturgill] sustained, nor did the Notice state that [Sturgill] would seek damages from the City of Owenton, Kentucky." This appeal followed.

Sturgill argues her notice was sufficient as a matter of law because the modern trend is to allow substantial compliance with notice statutes as evidenced by *Denton v. City of Florence*, 301 S.W.3d 23, 26 (Ky. 2009). In that case, the notice of injury indicated the accident occurred "on or about January 18, 2006." The actual date of occurrence was January 20, 2006. The Supreme Court of Kentucky found the notice satisfied the mandates of KRS 411.110. Sturgill contends *Denton* softened traditional strict compliance requirements. We believe this reading is incorrect.

> [T]he chief purpose of [KRS 411.110] is to give the city an opportunity to investigate the cause of the accident and to determine the condition of the defect complained of, at or about the time of the accident, as well as to permit an examination of the injuries alleged to have been sustained by the claimant.

Spangler's Adm'r v. City of Middlesboro, 301 Ky. 237, 239, 191 S.W.2d 414, 415 (1945). *See also Roehrig v. City of Louisville*, 454 S.W.2d 703, 704-05 (Ky. App. 1970). Kentucky courts have uniformly held KRS 411.110 requires literal compliance. Actual and constructive notice to a city are insufficient. *Denton*, 301 S.W.3d at 25; *Berry v. City of Louisville*, 249 S.W.2d 818, 819 (Ky. 1952). "The giving of notice as required by the statute is mandatory and a condition precedent to the filing of the suit." *Baldridge v. City of Ashland*, 613 S.W.2d 430, 431 (Ky. App. 1981). *See Dukes v. City of Louisville*, 415 S.W.2d 110, 112 (Ky. 1967); *Berry*, 249 S.W.2d at 819.

The reasoning behind these statements is simple. Because the Legislature does not have to allow an injured person a remedy against a city, it is entitled to limit that remedy by requiring reasonable notice of the claim; it has so provided in KRS 411.110. *City of Irvine v. Cox*, 296 Ky. 680, 682, 178 S.W.2d 199, 200 (1944). Therefore, courts are bound by the express terms of the statute regarding permission to sue a city and have no authority to provide any exceptions to strict compliance with the statutory language. *Baldridge*, 613 S.W.2d at 431; *Wellman v. City of Owensboro*, 282 S.W.2d 628, 630 (Ky. 1955). *See Hancock v.*

City of Anchorage, 299 S.W.2d 794, 795 (Ky. 1957) ("We have held consistently that compliance with the statute is a prerequisite to the right to invoke the help of the courts."); *Wellman v. City of Owensboro*, 282 S.W.2d 628, 630 (Ky. 1955) ("We may not disregard the express commands of the Legislature accompanying permission to sue a municipality."). Even where a personal injury action is timely initiated against a city, thereby providing actual notice meeting all the elements required by the statute except for service of notice on the mayor, city clerk or clerk of the board of aldermen, KRS 411.110 is not satisfied and such suits must be dismissed. *City of Elsmere v. Brown*, 297 Ky. 323, 324, 180 S.W.2d 86, 87 (1944); *Cox*, 296 Ky. at 686, 178 S.W.2d at 202; *Ballinger v. City of Harlan*, 294 Ky. 72, 170 S.W.2d 912, 913 (1943).

Sturgill's reliance on *Denton* as signaling Kentucky courts are moving away from strict compliance to substantial compliance in regard to KRS 411.110 is misplaced. In *Denton*, the Supreme Court determined a specified date—which was within two days of the actual occurrence—when combined with the language "on or about," satisfied the requirement that the time of the injury be stated in the notice. However, the Supreme Court did not imply substantial compliance was sufficient to satisfy the statute. *Denton* could be seen as expanding the meaning of "time" because in *Baldridge* a similar notice that failed to contain the "on or about" language was determined to be insufficient. However, in distinguishing

Baldridge, the *Denton* Court explicitly stated the case before it "[was] not a case of substantial compliance; it [was] one of actual compliance." *Denton*, 301 S.W.3d at 26. Therefore, while *Denton* may stand for there being a little flexibility in how certain terms—such as "time"—are interpreted by the courts, it does not hold a notice which omits required elements can still satisfy the statute.

Strict compliance with the statute "does not mean that the minutest details of the accident and injury must be given." *City of Louisville v. Verst*, 308 Ky. 46, 48, 213 S.W.2d 517, 518 (1948). Notices are sufficient so long as they include each required element. This includes requiring notice as to "the character and circumstances of the injury, and that the person injured will claim damages therefor from the city." KRS 411.110. A notice cannot be sufficient if it fails to explain and describe the personal injuries suffered. *O'Neill*, 440 S.W.2d at 266; *Treitz*, 167 S.W.2d at 862. In *City of Dawson Springs v. Reddish*, 344 S.W.2d 826, 827 (Ky. 1961), a description of injuries was deemed sufficient where the notice provided:

> You are hereby notified that on December 18th, 1956, about thirty thirty (sic) P.M., Delois Reddish, Joan Poston, Linda Lee Poston, Mary Ruty Burris, Jean Penninger and Brenda Poole, suffered injuries to their bodies, faces, heads, and limbs while riding in an automobile in Dawson Springs, Kentucky, over and along Flower Street; that Delois Reddish suffered a broken and crushed jaw, and the Burris girl was thrown through the windshield and suffered serious and painful injuries; Linda Lee Poston [s]uffered a cracked foot and

> Joan Poston a sprained arm, and all of the others suffered bruises and contusions.

In *Verst*, stating the injured person suffered "a broken hip and other injuries" was deemed sufficient. 308 Ky. at 48, 213 S.W.2d at 518.

Conversely, a notice is insufficient as to injuries suffered where it states the injured person suffered personal injuries as the result of a fall, *O'Neill*, 440 S.W.2d at 265, or "sustained serious injuries . . . [and] is still under a physician's care." *Treitz*, 167 S.W.2d at 861. Here, Sturgill's notice she suffered a "personal injury" after she "fell into a hole" is clearly insufficient to comply with KRS 411.110. It is equivalent to the faulty notices in *O'Neill* and *Treitz* which were ruled insufficient.

Sturgill's notice has an additional problem as it wholly omits any declaration she will claim damages from the City. Examples of sufficient notices are found in *Reddish* and *Verst*. "You are further notified that all of the above named persons claiming injuries and property damage will claim damages therefor from the City of Dawson Springs, Kentucky, by reason of the improper maintenance of said street." *Reddish*, 344 S.W.2d at 827. "[T]his is notice to you that I will claim damages therefor from the City of Louisville." *Verst*, 308 Ky. at 48, 213 S.W.2d at 518. A notice failing to declare the injured party will claim damages from the City is simply insufficient to comply with the statute.

Sturgill's notice of injury failed to strictly comply with the requirements of KRS 411.110 as mandated under Kentucky jurisprudence. Therefore, for the foregoing reasons, the judgment of the Owen Circuit Court dismissing Sturgill's personal injury case against the City of Owenton, Kentucky, is AFFIRMED.

KRAMER, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent. I do so because I believe Kentucky has joined other jurisdictions that recognize notice statutes such as Kentucky Revised Statute (KRS) 411.110 require strict compliance with the time for giving notice but that the sufficiency of the contents of the notice is to be determined based on the language and purpose of the statute.

Under the common law of Kentucky, cities may be liable for injuries caused by defects in streets and sidewalks and, until 1940, those injured could file an action without giving notice of the action to the city. *See e.g*. *City of Bowling Green v. Ford*, 263 Ky. 523, 92 S.W.2d 744, 745 (1936). However, the legislature deviated from that law in 1940 when it enacted KRS 411.110, which provides:

> No action shall be maintained against any city in this state because of any injury growing out of any defect in

> the condition of any bridge, street, sidewalk, alley or other public thoroughfare, unless notice has been given to the mayor, city clerk or clerk of the board of aldermen in the manner provided for the service of notice in actions in the Rules of Civil Procedure. This notice shall be filed within ninety (90) days of the occurrence for which damage is claimed, stating the time of and place where the injury was received and the character and circumstances of the injury, and that the person injured will claim damages therefor from the city.

Our task is to interpret the meaning of KRS 411.110 by applying the rules of statutory construction. "[T]he cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *MPM Financial Group, Inc. v. Morton,* 289 S.W.3d 193, 197 (Ky. 2009). The same rule of construction is codified in KRS 446.080(1) which states: "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . . ." "Because the construction and application of a statute is a question of law, it is subject to de novo review." *Richardson v. Louisville/Jefferson Cty. Metro Gov't,* 260 S.W.3d 777, 779 (Ky. 2008).

Not surprisingly given that it created a new procedural hurdle to litigants, in the early years after KRS 411.110 was enacted, plaintiffs and practitioners failed to timely serve notice to a city as required by the statute or to provide notice at all. Having had their cases dismissed by trial courts and denied the right to pursue their cause of action, those aggrieved filed appeals resulting in a line of appellate decisions construing KRS 411.110.

The earliest courts approached the question with the view that the purposes of KRS 411.110 are "to give the city an opportunity to investigate the cause of the accident and to determine the condition of the defect complained of, at or about the time of the accident, as well as to permit an examination of the injuries alleged to have been sustained by the claimant." *Spangler's Adm'r v. City of Middlesboro*, 301 Ky. 237, 239, 191 S.W.2d 414, 415 (1945). With those purposes at the forefront, the courts addressed whether an untimely notice, one improperly served, or no written notice at all could satisfy KRS 411.110.

In *Treitz v. City of Louisville*, 292 Ky. 654, 167 S.W.2d 860 (1943), the notice was not given in the ninety-day period before filing an action in court. The Court pronounced that "[t]he written statutory notice is an indispensable prerequisite to the right to maintain a suit." *Id*. at 863.

The lack of written notice within the ninety-day period again arose in *City of Irvine v. Cox*, 296 Ky. 680, 178 S.W.2d 199 (1944). In *Cox*, the plaintiff did not serve a notice on the City of Irvine as directed by KRS 411.110 but filed an action in court and served a summons on the mayor of the city within ninety days after her injury. The plaintiff argued that the filing of the action was notice itself and substantially complied with KRS 411.110.

The *Cox* Court pointed out that because:

> it is optional with the Legislature whether it will confer upon an injured person a right of action against a

> municipality, or leave him remediless, it can attach to the right conferred a limitation such as that of notice of claim, provided, however, the time for the giving of the notice is reasonable.

Id. at 682, 178 S.W.2d at 200. However, the Court suggested that timely service of a notice to the city was distinguishable from whether the content of the notice was sufficient noting that as to the latter, "all [jurisdictions] agree that the notice must *substantially comply* with the terms of the statute prescribing it." *Id*. at 683, 178 S.W.2d at 200 (emphasis added). Ultimately, the Court concluded that written notice as required by statute was a mandatory requirement and specifically rejected the notion that the law expressed in *Treitz* should be overruled "so shortly after the drying of the ink by which [it was] printed." *Id*. at 685, 178 S.W.2d at 202.

The same reasoning was followed in *Reibel v. Woolworth*, 301 Ky. 76, 190 S.W.2d 866 (1945). Although the City was aware of the defect prior to the plaintiff's injury, anything less than written notice within the ninety-day period was held to be insufficient. Actual or constructive knowledge by the city did not avoid the effect of the statute. *Id*. at 78, 190 S.W.2d at 867.

Kentucky was in-line with those jurisdictions which held that timely notice to the city is mandatory and strict compliance is required. However, those early cases cited did not address whether the *contents* of a notice must literally comply with KRS 411.110 or less exact compliance was sufficient. Other states confronted with the question of the sufficiency of the notice's contents took the

view that substantial compliance was sufficient. As explained in *Ogle v. Kansas City*, 242 S.W. 115 (Mo. App. 1922) (internal citation and quotation marks omitted) when applying a statute using nearly identical language as KRS 411.110:

> The rule is that, as to the requirement of a notice as a condition precedent to the maintenance of the action, the statute is to be strictly construed; but, where a notice has been given, its sufficiency under the statute is a remedial matter, and should be liberally construed. 28 Cyc. 1450. To be valid as a condition precedent to an action, it is essential that the prescribed notice, as to its form and contents, should at least substantially comply with the statute. Being for the benefit of the municipality, in order to put its officers in possession of the facts upon which the claim for damages is predicated, and the place where the injuries are alleged to have occurred, in order that they may investigate them and adjust them without litigation, a reasonable or substantial compliance with the terms of the statute is all that is required; and, where the notice has been given, and the notice when reasonably construed is such as to accomplish the object of the statute, it should be regarded as sufficient.

In *City of Louisville v. Verst*, 308 Ky. 46, 213 S.W.2d 517 (1948), the Court addressed the contents of the notice. In that case, timely written notice was given to the city. The Court held while the giving of written notice is mandatory and strict compliance is necessary, its contents need not contain the "minutest details of the accident and injury[.]" *Id*. at 48, 213 S.W.2d at 518.

A line of decisions after *Verst* ignored its more pragmatic approach and the concept of literal compliance crept into the content of the notice itself. In

Berry v. City of Louisville, 249 S.W.2d 818, 819 (Ky. 1952), the Court held the following notice insufficient to comply with KRS 411.110:

> Notice is hereby given to Lucille D. Ogburn, Clerk of the Board of Aldermen of the City of Louisville, Kentucky that Roy E. Berry of Louisville, Kentucky, was injured on February 4th, 1950, at or about 7:30 P.M., in front of 6206 and 6208 South Side Drive in Louisville, Kentucky; his automobile which he was driving at that time was also damaged; that he sustained injuries to his head and other bodily injuries; and that he will claim damages therefor from the City of Louisville and others.

The Court held that the notice was inadequate as it did not set forth the "character and circumstances of the injury." *Id*. The omission of any detail of how the injuries were received or whether they occurred on a street, sidewalk or curb and failure to name the thoroughfare where the injury occurred was fatal. *Id*. Without mention of *Verst*, the Court summarized the law as follows:

> The giving of notice as required by the statute is mandatory and is a condition precedent to the bringing of a suit against the City. Moreover, the City's actual or constructive notice of the defect in the thoroughfare is not a substitute for notice. Literal compliance with KRS 411.110 is necessary.

Id. (citations omitted).

Later in *City of Louisville v. O' Neill*, 440 S.W.2d 265, 266 (1969), the Court acknowledged that a conflict may exist between the law in *Verst* and *Berry*. However, it held that because *Verst* was decided before *Berry*, the *Berry* case was controlling. *Id*. The Court concluded that under the literal compliance

mandate, the notice was insufficient where it stated the person suffered personal injuries as the result of a fall. *Id.* at 265-66.

With the now aged law as precedent and specifically the law cited in *Berry*, in *Balridge v. City of Ashland*, 613 S.W.2d 430, 431 (Ky.App. 1981), this Court held it was bound by prior precedent holding that the statute required strict compliance. A notice that incorrectly gave the date of the accident as August 8, 1979 instead of August 6 or 7, 1979 (the accident occurred near midnight on August 6, 1979), was fatally defective.

The issue of the contents of KRS 411.110 notice was the subject of a judicial opinion again in 2009 when our Supreme Court rendered *Denton v. City of Florence*, 301 S.W.3d 23 (Ky. 2009). In *Denton*, the Court concluded that a notice which stated an accident occurred "on or about" a certain date was sufficient to satisfy the "time" requirement of KRS 411.110. To the extent *Baldridge* required precision as to the contents of the notice, the Court did not understand the word "time" in its literal sense but instead held the use of the phrase "on or about" satisfied the statutory requirement. The Court relied on case law interpreting the same phrase and common meaning to conclude the notice served the purpose of KRS 411.110. *Id*. at 26. Taking a slightly different view of the statute's purpose than prior Courts, the Court held it was remedial in nature "*protecting public safety*

by apprising the city as to a defective condition so they had an opportunity to investigate and correct it." *Id*. (emphasis added).

The Court clarified in its opinion that it was not deviating from prior law as to compliance with the statute's requirement that written notice be given within ninety days of the injury. It pointed out that in regard to that requirement, the "statute speaks to this point: notice must be given within ninety (90) days of the date of the incident." *Id*. However, as to the contents of the notice, I believe that Court overruled prior case law.

While early case law applying strict compliance to the written notice within the specified time in KRS 411.110 was expressly left intact by *Denton*, the Court took a more pragmatic approach than its predecessors when considering the contents of the notice. This new approach was the basis for Justice Noble's concurring opinion where it was pointed out that *Baldridge* had been implicitly overruled by the majority and, for clarification, urged the Court to expressly overrule that decision. *Id*. (Noble, J., concurring in result only). While giving notice to the City within the ninety-day period is mandatory, whether the content of that notice complies with the statute must be determined in the context of the wording of the statute and its purposes, rather than under a literal approach.

In this case, there was timely notice properly served on the City. The alleged fatal deficiency is in its content, specifically, that it did not detail Sturgill's

injury and did not state Sturgill would seek damages from the City. Each alleged flaw should be examined keeping in mind the language of the statute and its purpose.

The notice did not set forth the specific bodily injury which Sturgill received. However, she did state the "character" of her injury by informing the City that she suffered personal injury as opposed to an injury to property. Whether her injuries were severe or minor, the ability of the City to investigate and correct any defect was not impeded. The City was timely notified of the precise location of the street, its defect, and that an injury occurred affording it the opportunity to investigate and correct the defect to protect the public from injury. Sturgill's notice could have been more detailed in describing her injury, but such detail would not have furthered the purpose of the statute.

Among its requirements, KRS 411.110 requires a statement that the injured person will seek damages. While Sturgill's notice did not use the word "damages" any reasonable person could ascertain that Sturgill was going to seek damages for her injuries. She clearly informed the City that she retained legal counsel to represent her regarding her injuries which, as commonly understood, means she retained counsel to seek damages for her injuries.

KRS 411.110 is not a complete derogation of the common law regarding the liability of cities for defects in streets and sidewalks, but it is a

deviation from the common law. Although the statute expressly requires written notice within the statutory time and is mandatory, the sufficiency of that notice must be determined based on the language and purpose of the statute. I would conclude that the timely notice served by Sturgill on the City constituted actual compliance with KRS 411.110.

I would reverse and remand to permit Sturgill to pursue her claim against the City.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Randy A. Byrd Cincinnati, Ohio	Jeffrey C. Mando Covington, Kentucky