RENDERED: SEPTEMBER 27, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000758-MR

PRESTONA SMITH — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 18-CI-00131

CITY OF COVINGTON, KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

SPALDING, JUDGE: Prestona Smith appeals from an order of the Kenton Circuit Court dismissing her claim for damages against the City of Covington for failure to comply with the requirements of KRS[1] 411.110 by giving notice of her claim to the

[1] Kentucky Revised Statute.

city solicitor rather than one of the individuals specified in the statute. We reluctantly affirm.

The facts are simple and undisputed. Ms. Smith apparently fell on a city sidewalk and her counsel thereafter sent a letter to Frank Warnock, Covington city solicitor, addressing her injuries and the manner in which she sustained them. She then filed this lawsuit in the Kenton Circuit Court and, upon being served, the City moved to dismiss the complaint alleging that Ms. Smith's failure to adhere to the dictates of KRS 411.110 was fatal to her claim.

On March 30, 2018, the Kenton Circuit Court entered an order dismissing the complaint holding that the letter of Ms. Smith's counsel dated October 19, 2017 sent to Mr. Warnock "did not meet the requirements set forth in KRS 411.110." Appellant moved to reconsider the dismissal. The circuit court denied that motion by an order entered May 3, 2018. The latter order clarified the basis for its decision for its holding, although it appeared confused as to the import of a letter dated April 28, 2015, in her motion to reconsider. The order held that the letter did not state the time of the incident nor the specific defect which was alleged to cause the fall of the appellant. That letter concerned a different person and an entirely separate case. The appellant included the letter in question as a part of her motion to reconsider the original order. It appears it was intended to support the contention that because counsel for Ms. Smith had notified Mr. Warnock of

claims in previous cases, that he could properly do so in this case. Nevertheless, the circuit court explained its previous ruling stating:

> City Solicitor, Frank Warnock[,] is not [an] authorized individual to receive notice. Additionally, notice to Frank Warnock in any other capacity is not sufficient as the notice is defective pursuant to the statute.

This appeal followed.

We start with an examination of the language of KRS 411.110:

> 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.

(Emphasis added.) Appellant argues that her notice to Mr. Warnock, Assistant City Manager/City Solicitor, was sufficient to satisfy the statutory requirement because the City of Covington website states that he manages the city clerks. Unfortunately, long-standing caselaw is to the contrary.

In *Wellman v. City of Owensboro*, 282 S.W.2d 628 (Ky. 1955), the former Court of Appeals considered a situation almost identical to that of Ms. Smith. Ms. Wellman argued that because the statutory language requires notice to

be given "in the manner provided for the service of notice in actions in the [Rules of Civil Procedure,]" *id.* at 629, service was necessarily proper on the attorney for the city under CR 5.02. The Court rejected that contention stating:

> We think that KRS 411.110 and CR 5.02, when construed together, mean that the notice required by the statute must be served on the 'mayor, city clerk or clerk of the board of aldermen' by delivering or mailing a copy of the notice to one of these enumerated officials. **Since this procedure was not followed, the serving of the notice on the city attorney in the present case was defective.**
>
> The gist of the matter is that conformity to the statute is a condition precedent to the right to invoke the help of the courts, and the Rules take over after the litigation starts at the time the complaint is filed.

Id. at 630 (emphasis added). Similarly, by appellant's own argument in this case, Mr. Warnock is the city solicitor and assistant city manager; he is not designated as the city clerk and thus cannot be construed to be someone to whom the statute authorizes notice to be sent.

As held in *City of Louisville v. O'Neill*, 440 S.W.2d 265, 266 (Ky. 1969), the statute requiring notice to cities concerning injury claims must be strictly complied with. Ms. Smith's failure to send her notice to a person enumerated in KRS 411.110 was not strict compliance with that statute. This is an unfortunate result that places form before substance, but one required by adherence to longstanding precedent and the literal wording of the statute. Because Mr.

Warnock is not the mayor, city clerk, or clerk of the board of aldermen, Ms. Smith's notice of claim is deficient and ineffective.

Finally, given our resolution of this case on the basis of defective notice, we need not consider appellee's contention that appellant failed to preserve or address other issues regarding the circuit court's decision.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell A. Cox
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BRIEF FOR APPELLEE:

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