

STATE OF MICHIGAN
COURT OF APPEALS

MAUREEN KETCHUM,
Plaintiff-Appellee,

UNPUBLISHED
September 22, 2009

v

CITY OF GRAND RAPIDS,
Defendant-Appellant.

No. 282455
Kent Circuit Court
LC No. 07-001554-NO

Before: Beckering, P.J., and Wilder and Davis, JJ.

DAVIS, J. (*concurring*)

Notwithstanding the fact that the deficiency in plaintiff's notice was, under the particular circumstances of this case, merely a formality, and that dismissal on that basis exalts form over substance, I concur in reversing because this Court is required to do so.

As the majority explains, Maureen Ketchum was injured when she tripped and fell in a pothole as she attempted to cross Pearl Street NW near the Amway Grand Plaza Hotel (Amway) in downtown Grand Rapids. Plaintiff sued defendant under the highway exception to governmental immunity, MCL 691.1402(1), arguing that the pothole was a defective condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff had failed to provide it with the notice required by MCL 691.1404(1). The trial court denied that motion.

Plaintiff was required to provide notice as set forth in MCL 691.1404(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.

Plaintiff's counsel sent the following "notice of her injury and intent to make claim" to defendant:

DATE OF OCCURRENCE: March 10, 2005

LOCATION OF OCCURRENCE: North Side of Pearl Street, NW and west of the intersection of Pearl and Campau, at the entrance of the Amway Grand Hotel.

NATURE OF CLAIM: Personal Injury

INJURIES SUSTAINED: Fractured left ankle

WITNESSES KNOWN TO THE CLAIMANT AT THIS TIME: Unknown at this time.

Defendant argues that it failed to specify the nature of the defect, the location of the defect, or witnesses known to plaintiff at the time of the fall. It is not disputed, however, that the notice was timely.

As the majority explains, the notice, when read in isolation, does not contain within its four corners *any* mention of the pothole in which plaintiff fell. Therefore, this Court is required to find the notice fatally defective. I write separately to point out that, as *practical* matter, the notice was *not* defective. In particular, soon after plaintiff's fall, one of plaintiff's neighbors called defendant city and reported that a friend had fallen into the pothole and hurt herself; defendant then had no trouble finding and fixing the pothole the very next day. In other words, long before plaintiff would have been required to provide defendant with notice, and before plaintiff's timely notice was sent, defendant had already found and fixed the pothole because of its awareness of plaintiff's injury.

Even though plaintiff's "notice" did not, by itself, state the "nature of the defect," the reality of the situation is that defendant was amply on notice thereof. By the time defendant received plaintiff's notice, the defect had been fixed and no longer existed, to defendant's credit. But at that point, *no* notice would have been capable of leading anyone to something that did not exist anymore. Under existing law, plaintiff's notice was fatally deficient, but under these circumstances, such a result constitutes a triumph of form and technicality over substance.

Defendant also argues that the notice failed to identify the location of the defect with the required specificity. In particular, defendant argues that the notice might be referring to any of five entrances to the Amway Grand Hotel and might be referring to the sidewalk, curb, or street. However, the notice does in fact specify that the defect is on the "North Side of Pearl Street, NW," not the curb or the sidewalk. And the only information pertaining to five entrances to the Amway Grand Hotel from Pearl Street comes from oral arguments in the trial court, and this seems contrary to the Amway Grand Hotel's own website,¹ which discusses the existence of precisely one "Pearl Street Entrance." In the absence of evidence beyond arguments of counsel that more than one entrance is generally used for hotel patrons, "the entrance" clearly refers to the main entrance. Therefore, I agree with the trial court that the notice sufficiently described the location of the defect.

¹ See floor plans at http://www.amwaygrand.com/pdf/Hotel_Layout.pdf

I finally note that defendant contends that plaintiff's notice is also defective because it fails to list any witnesses. However, plaintiff was only required to list witnesses of which she was actually aware. *Hussey v Muskegon Heights*, 36 Mich App 264, 270-271; 193 NW2d 421 (1971). Furthermore, a person is not necessarily a "witness" just because he or she is present at or near the scene of an accident, unless he or she actually observed or was involved in the accident. Cf. *Smith v City of Warren*, 11 Mich App 449, 451-452; 161 NW2d 412 (1968) and *Rule v Bay City*, 12 Mich App 503, 506-507; 163 NW2d 254 (1968). The evidence here showed that a number of individuals observed the defect and observed plaintiff immediately after her fall, and plaintiff was certainly aware of those individuals, but none of them actually observed plaintiff's fall. I agree with the trial court that none of those individuals were "witnesses" of the kind plaintiff was required to disclose in her notice to defendant.

Notwithstanding these reservations, I must concur in this reversal.

/s/ Alton T. Davis