

IN THE COURT OF APPEALS OF IOWA

PAUL SOY, ELOISE SOY, GENE
KESTER, AND JANETTE KESTER,

Plaintiffs-Appellants,

vs.

CITY OF JESUP, IOWA,

Respondent-Appellee.

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Appealed from Buchanan District Court --- Robert J. Curnan, Judge.

Plaintiffs appeal from a summary judgment for the city in this action to recover for damages to plaintiffs' houses allegedly caused by a faulty city drainage line. REVERSED AND REMANDED.

David F. Dutton and James E. Gritzner of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, for plaintiffs-appellants.

Stephen J. Powell of Swisher & Cohrt, Waterloo, for defendant-appellee.

Heard en banc.

Plaintiffs, two couples who own houses in defendant City of Jesup, appeal from a summary judgment for the city in this action to recover for damages to plaintiffs' houses allegedly caused by a faulty city drainage line. On appeal, plaintiffs assert that they substantially complied with the written notice requirements of section 613A.5, The Code, for claims against a city.

On May 8, 1980, plaintiffs filed a petition seeking to recover from defendant city for the damages to their houses, which they alleged were caused by defendant city's failure to properly maintain an old tile drainage line. After plaintiffs admitted in an answer to an interrogatory that they had never given the city written notice stating the time, place, and circumstances of the damages to their houses, defendant city moved for summary judgment, citing plaintiffs' failure to comply with the written notice requirement of section 613A.5, The Code, and their failure to allege compliance. Plaintiffs then amended their petition, resisted the motion for summary judgment, and filed several affidavits. The trial court found that on the undisputed facts plaintiffs had not substantially complied with the written notice requirements of section 613A.5, The Code, and therefore their claims were barred for failure to bring suit within six months; summary judgment was accordingly entered in favor of the city.

In reviewing plaintiffs' contentions that section 613A.5 was substantially complied with, we interpret their argument as suggesting that no written notice of claim is necessary if the municipality is otherwise made aware of the nature of the claim within sixty days of the discovery of loss by the claimant. We must necessarily reject such contention. It is made clear in Shearer v. Perry Community School District, 236 N.W.2d 688, 693-94 (Iowa 1975) that actual knowledge by the municipality does not dispense with the requirement of a written notice of claim. The decision in Cook v. City of Council Bluffs, 264 N.W.2d 784, 791 (Iowa 1978) establishes that the only essential element of such writing is "the

statement of the wrongful death, loss, or injury and the identity of the damaged party or parties." Good faith reliance on oral notice to public officials does not serve to excuse the requirement of a written notice of claim. Shearer, 236 N.W.2d at 693-94.

In the present case, the claims of the plaintiffs Soy and the plaintiffs Kester are separate. Neither set of plaintiffs specifically allege in their petition, as amended, that a written notice of claim was given to the city, however, it is alleged in conclusory form that the statute was substantially complied with. In answers to interrogatories both sets of plaintiffs state that they did not present the city with written notice stating the time, place, and circumstances of the injury to their property.

In considering the motion for summary judgment, the trial court observed the requirements of Shearer that actual notice to the municipality does not dispense with the need for written notice. In apparent reliance upon the plaintiffs' answers to interrogatories the court stated in its written ruling that "it is uncontested that no written notice was given to the defendant by any of the plaintiffs." Based upon this conclusion that no written notice was given, the court sustained the motion.

On appeal, the plaintiffs assert that contrary to what the trial court stated in its ruling it does not appear without dispute that no written notice of plaintiffs' claim was given to the defendant. Our review of the record suggests that the plaintiffs are correct in this assertion. Plaintiffs' answers to those interrogatories wherein defendant inquired as to the giving of written notice of claim only answered the question which was asked. That question referred to a written notice stating the time, place, and circumstances of the injury to plaintiffs' property. Plaintiffs' response of "none" suggests only that no notice of that description had been given to defendant. This admission is not fatal to plaintiffs' claim, however, because a less descriptive written notice than the one to which

inquiry was made in the interrogatories may have been legally sufficient. This leads us to the question which is dispositive on this appeal. Was it made to appear in the resistance to the city's motion for summary judgment that a written notice of claim was given to the city in substantial compliance with section 613A.5?

Plaintiffs' resistance to the motion for summary judgment includes the affidavit of plaintiff Eloise Soy, which describes the water damage to the Soys' property, and states that the suspected cause of the damage was a city-owned drainage tile. The affidavit then states: "I presented Mayor Pentecost with a diagram which outlined the problem and the possible location of the tile line." Also presented as part of plaintiffs' resistance to the motion for summary judgment was a statement described as "statement of material facts" which stated, in part: "At the time of the meeting with the mayor in August of 1978, the Soys provided the mayor with a diagram of the problem area (see Exhibit "A", dated October 21, 1978 and noting the August meeting; affidavit of Eloise Soy, Exhibit "E")." The affidavit of Eloise Soy previously described was attached to this statement as Exhibit "E." Also attached and designated as Exhibit "A" is a diagram and narrative discussion which describes both the damages sustained by the Soys and their neighbors and the history of the city-owned drainage tile believed to be the cause of the damage. Defendant, on appeal, strenuously urges that it is not sufficiently made to appear that Exhibit "A" is a true copy of the writing which was delivered to the mayor as stated in the affidavit of Eloise Soy. While the affidavit does not specifically refer to Exhibit "A", both the affidavit and Exhibit "A" are attached to the statement of material facts as support for the allegation in paragraph four thereof that "Soys provided the mayor with a diagram of the problem area." Under the circumstances we believe the three documents must be considered in pari materia.

Because we believe that Exhibit "A", if shown to be the document which was delivered to the mayor, would provide substantial compliance with the

requirement of written notice under section 613A.5, we believe the motion for summary judgment should have been denied as to the Soys. In so holding we are not establishing with finality that Exhibit "A" is a copy of the writing delivered to the mayor. This is an issue of fact which, if disputed, must be determined by the trier of fact be it court or jury. If Exhibit "A" is found by the trier of the fact to be the writing delivered to the mayor, it substantially complies with section 613A.5. If the trier of fact finds that some other writing was delivered to the mayor then the court must determine the legal sufficiency of the other writing as an issue of law. If the trier of fact determines no writing was delivered to the municipality, plaintiffs' claims are barred.

What has previously been said in our decision disposes of the appeal as to the Soys' claims. As to the Kesters' compliance, if any, with section 613A.5, it is claimed to be vicarious through the acts of the Soys. Written notice of claim against a municipality under section 613A.5 may be presented on behalf of the claimant by another person. See Cook, 264 N.W.2d at 790. It appears from the Soys' resistance to the motion for summary judgment that they were acting for certain neighbors as well as for themselves in their communications to the city. The Kesters' home is identified in both the diagram and narrative statements attached to Soys' resistance to the motion in a manner which strongly suggests that the Kesters were among those neighbors directly affected by the problem. Under these circumstances we hold that an issue of fact is presented as to whether the notice, if any, given to the city by Soys was also on behalf of the Kesters. We reverse the trial court's order and judgment and remand the case for further proceedings in accordance with our decision.

REVERSED AND REMANDED.