



IN THE COURT OF APPEALS OF IOWA

JENNIFER MATHERN, A Minor)
By Lois Betts, Her Mother and)
Next Friend, and LOIS BETTS,)

Filed March 14, 1977

Appellant,)

v.)

CITY OF WATERLOO,)

58
2-58049

Appellee.)

Appeal from Black Hawk District Court - Frank Elwood, Judge.

Plaintiff appeals from the order dismissing her personal injury action against the City of Waterloo. Affirmed.

Stanford J. Patterson of Hoxie, Gottschalk & Patterson, of Waterloo, for appellant.

Jim D. Dekoster of Swisher & Cohrt, of Waterloo, for appellee

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

OXBERGER, J.

Plaintiff Jennifer Mathern, by and through her mother and next friend, Lois Betts, appeals from the order of the trial court dismissing her petition against the City of Waterloo. We affirm.

On August 24, 1972 Jennifer, then age two and one-half, climbed a ladder to a slide located in a Waterloo city park. She fell through a hole where a rung of the ladder was missing. She allegedly suffered serious, painful and permanent injury. Her mother spoke by telephone with the Director of Parks the following day. According to the petition, she informed the director of the accident and injuries sustained by Jennifer and was assured " . . . that things would be taken care of." X. 4.

Almost two years later, August 23, 1974, the petition in this action was filed. Since § 613A.5, The Code, provides for tort liability of governmental subdivisions and requires written notice within 60 days of injury or suit within 90 days, the City of Waterloo answered claiming failure to comply with § 613A.5 limitations as an affirmative defense barring Jennifer's suit. On the same day the city filed its motion to dismiss for failure to satisfy § 613A.5, The Code.

On appeal counsel for Jennifer argues 1) the city's motion to dismiss was not timely, 2) oral notification in this circumstance was substantial compliance with § 613A.5, The Code, and 3) unless § 613A.5, The Code, limitations are tolled by minority, they are unconstitutionally violative of Jennifer's right to due process and equal protection of the law.

The trial court, noting the city's motion was filed less than four hours after the answer which itself had raised the bar of § 613A.5, The Code, gave no credence to the charge of untimeliness. We agree.

By its terms rule 104, Rules of Civil Procedure, requires every defense in law or fact to any pleading be asserted in the responsive pleading except that in subsection (b) of rule 104 a motion to dismiss such a claim *may be* filed before the answer. Further, the city's answer appears quite proper under *McCleary v. Wirtz*, 222 N.W.2d 409 (Iowa 1974). *McCleary* stated " . . . a bar of limitations is primarily an affirmative defense to be specially asserted in a separate division of the responsive pleading to the claim for relief." 222 N.W.2d at 416 quoting *Pride v. Peterson*, 173 N.W.2d 549, 554 (Iowa 1970).

Noting that the constitutionality of § 613A.5, The Code, had been upheld in *Lunday v. Vogelmann*, 213 N.W.2d 904, 908 (Iowa 1973), the trial court granted the city's motion to dismiss.

The plaintiff in *Lunday* did not assert his minority tolled the notice requirement. 213 N.W.2d at 906. That question remained open. However, during the pendency of this appeal the Supreme Court decided *Shearer v. Perry Community School District*, 236 N.W.2d 688 (Iowa 1975). *Shearer* refused to find § 613A.5, The Code, unconstitutional on its face or as applied to the minor plaintiff and refused to rule that actual oral notice of injury constituted substantial compliance with the § 613A.5, The Code, limitations. 236 N.W.2d at 692-93. Specifically *Shearer* refused to rule that minority tolled the statute. 236 N.W.2d at 694.

We are bound by *Shearer* to rule adversely to Jennifer on each major issue urged on this appeal. If this were a case of first impression, the force of the constitutional arguments and the trend in other jurisdictions - reported and reviewed in the dissents of *Lunday* and *Shearer* -

would be powerful persuasions to rule in Jennifer's favor.
213 N.W.2d at 908 and 236 N.W.2d at 694.

However, despite the obvious erosion of the solidarity of *Lunday*, a 9-1 decision, by the close majority of *Shearer*, a 5-4 decision just two years later, we are bound as an intermediate appellate court to uphold the Supreme Court's determination of the law. We affirm the trial court's dismissal of Jennifer's petition as barred by the terms of § 613A.5, The Code.

AFFIRMED.

All judges concur; DONIELSON, J., concurs in result only.