6

IN THE SUPREME COURT

Appeal from the Court of Appeals

Hon. Kurtis T. Wilder, P.J., Hon. Patrick M. Meter, and Hon. Deborah A. Servitto

MOHAMED MAWRI,

Plaintiff-Appellant,

vs.

CITY OF DEARBORN,

Defendant-Appellee.

SC: 139647
COA: 283893
Wayne CC: 06-617502-NO

SUPREME COURT
APR 2010
TERM

_____/

REPLY BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENTS REQUESTED

LAW OFFICE OF ERNEST F. FRIEDMAN

BY:_____
ERNEST F. FRIEDMAN (P26642)
Attorney for Plaintiff-Appellant
24567 Northwestern Highway, Suite 110
Southfield, MI 48075
(248) 350-9440/9445 tel/fax

RECEIVED
MAR 19 2010
CLERK SUPREME COURT

ARGUMENT

Plaintiff-Appellant adopts and incorporates here by reference all that is contained in the Brief of Amicus Curiae John A. Braden with the exception of Footnote 7 at page 4 because Plaintiff's affidavit was properly attested in the country of Yemen where he was at the time it was signed and attested. There is a stamp on the affidavit and it is signed by the person attesting it. (54a). An unsigned affidavit was made an exhibit because it was easier to read. They are the same affidavit. Further, the contents of the affidavit are not testimonial backfilling but rather information *supplementing testimony* which is perfectly allowed under case law. An affidavit may supplement testimony but not contradict it. The affidavit supplements Plaintiff's testimony and expands in more detail and lay person terms the precise location of the incident.

In common lay person terms stating a location as between the address of 5026 and 5034 Middlesex is sound when referring to the ***public sidewalk*** which technically has no addresses. The location of this incident is on a public sidewalk between the beginning of the property line of both these addresses and between the driveways of both these two addresses. From the aerial photograph it appears that the incident was closer toward the driveway of 5034 Middlesex then 5026 Middlesex. Plaintiff could not have been more specific in his pre-lawsuit notice letter and even if he had been Defendant would argue it was not clear enough without *an aerial photograph specifically pinpointing the location* as was required by Defendant to make its arguments in its Motion for Reconsideration.

The law should not require such an narrow hyper technical engineering level language and aerial photograph to put Defendant on pre-suit notice.

Even in a plotted area when referring to a ***public sidewalk*** area that is not directly in front of a driveway stating in the area of either of the two numerical addresses is accurate and specific enough. Public sidewalks don't have addresses. Individual homes and driveways do.

Defendant argues the correct language for referring to the location of the incident is "...on a sidewalk in front of 5026 Middlesex, located directly next door to 5034 Middlesex." (Def. Brief, p. 1). This is not correct because it would have put the incident right in front of the driveway. It did not happen right in front of any address but in the area of these two addresses.

Defendant argues "This evidence confirms that the accident occurred in front of 5026 Middlesex, and not in front of Plaintiff's home at 5034 Middlesex." (Def. Brief, p. 1, para. 1). Plaintiff's notice does not state "in front of 5034 Middlesex" but rather "in the area of 5034 Middlesex, Dearborn, Michigan". (33a). The letter further explained that "It is my understanding that since this fall, the City has repaired the area." (33a). Defendant from this language knows that it should investigate the entire area where they made recent repairs as of May 26, 2006. As the work order showed the sidewalk area was repaired on May 24, 2006. (Plaintiff Appendix 16a).

Defendant's Appendix 73b was not part of the record below and the first that it was provided to Plaintiff was when Defendant served its Michigan Supreme Court Appellee's Brief and Appendix on Plaintiff Counsel on March 11, 2010. Likewise, Defendant's Appendix 86b, 87b, and 88b were not part of the record below. (See Defendant's Exhibits to Motion for Summary and Motion for Reconsideration). Defendant's Appendix 76b, 77b, 78b, 79b, 80b, and 81b were not part of the record below.

Plaintiff-Appellant objects to Defendant attempting to expand the record and the documents made apart of Defendant's Appendix which were not part of the record as well as the arguments contained in Defendant's brief in reference to these documents should be stricken.

To describe that the incident took place in the "area of 5034 Middlesex" or "on the sidewalk between the addresses of 5026 Middlesex and 5034 Middlesex" are both correct. In

fact, in Defendant's brief it concedes that the incident was between these two addresses. Defendant states in its brief that after City Engineers took aerial photographs these photographs proved the incident took place "...fully 15 feet south of the property line ***between the two houses***". (Def. Brief, p. 7, para. 2).

Even Defendant's attempts to use proper terminology to pinpoint the location runs afoul of its own arguments.

Further, no matter what Plaintiff said in its notice letter, Defendant had already destroyed evidence and investigating the area was impossible. Where one party destroys evidence an adverse inference may be made that the evidence was prejudicial to them and against them. Lagallo v Allied (On Remand), 233 Mich App 514 (1999).

It is wholly unfair to allow Defendant under these circumstances to claim the purpose of the pre lawsuit notice requirement was never served when they made its purpose impossible by destroying the evidence.

Additionally, the police report listed two addresses as the incident site, 5034 Middlesex and 5026 Middlesex. Either numerical address or stating in the area of either numerical address should be held conclusively sound as an identifier for the incident. In the area of either address would have provided Defendant enough information to know where on that portion of the street they should investigate. Adding to that language explaining that the area was recently repaired provided Defendant enough specifics to locate the incident. So long as Defendant would have been able to find the location the specifics of the location in the pre-lawsuit notice is adequate enough. Barribeau v Detroit, 147 Mich 119 (1907); Pearll v Bay City, 174 Mich 643 (1913); Botsford v Clinton Twp, Unpublished COA No. 272513 (3/20/07); Wheeler v Detroit, 127 Mich 329, 331 (1901); Tattan v Detroit, 128 Mich 650, 651 (1901).

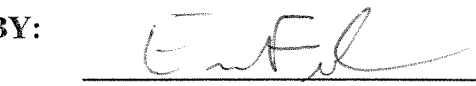
Finally, this Court should hold that where Defendant is not prejudiced a case cannot be dismissed for having not met the requisites of providing a pre-lawsuit notice and over rule the case of Rowland v Washtenaw Co Rd Comm, 477 Mich 197 (2007). In this matter, Defendant was not prejudiced at all as their city workers inspected the area before the fall and their police inspected the area on the date of the fall and took photographs as well and witness statements.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for all the reasons aforementioned and as stated in Plaintiff-Appellant's Brief and the portions of Amicus Curia John Braden's Brief adopted hereto, this Court should affirm the trial court, reverse the Michigan Court of Appeals, and allow this matter to proceed to a trial on its merits.

Respectfully submitted,

LAW OFFICE OF ERNEST F. FRIEDMAN

BY: 

ERNEST F. FRIEDMAN (P26642)
Attorney for Plaintiff-Appellant
24567 Northwestern Highway, Suite 110
Southfield, MI 48075
(248) 350-9440/445 tel/fax

DATED: March 18, 2010