Appeal No. SC100110

IN THE SUPREME COURT OF MISSOURI

RACHEL SENDER,

Plaintiff/Appellant,

vs.

THE CITY OF ST. LOUIS

Defendant/Respondent.

Appeal From the Circuit Court of City of St. Louis, Missouri
The Honorable Joan L. Moriarty, Circuit Judge

BRIEF OF AMICUS CURIAE MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

Filed by Consent of All Parties

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STATEMENT OF FACTS

This is an appeal from a dismissal with prejudice by the trial court in the City of St. Louis after the court determined that a notice under section 82.210, RSMo.[1] was inadequate. Rachel Sender was injured on a bike path in Forest Park on August 12, 2018. She hired Andrew Drazen to pursue a claim against the City of St. Louis, and Drazen sent a notice letter to the Mayor on October 10, 2018, via certified mail. D46.

The City promptly received the notice. D47. Sender's notice alerted the City that Sender had suffered significant injuries – a broken clavicle and a concussion – while near the southwest corner of the Forest Park Bike Path. D46.

Sender's lawyer suggested the case "can and should be settled without the filing of a lawsuit." He offered to provide the City "with whatever information [it] may reasonably request" to assist in the evaluation of Sender's claim. D46. Counsel also provided his phone number and email address so the parties could "discuss any aspect of this claim, including disposition prior to filing suit[.]" *Id*.

The City's legal investigator, John Ruzicka, responded with a letter acknowledging the claim and requesting specific information:

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[1] All statutory citations are to RSMo. 2000. unless otherwise noted. Section 82.210 provides: No action shall be maintained against any city of this state which now has or may hereafter attain a population of one hundred thousand inhabitants, on account of any injuries growing out of any defect in the condition of any bridge, boulevard, street, sidewalk or thoroughfare in said city, until notice shall first have been given in writing to the mayor of said city, within ninety days of the occurrence for which such damage is claimed, stating the place where, the time when such injury was received, and the character and circumstances of the injury, and that the person so injured will claim damages therefor from such city.

> I have received your claim against the City of St. Louis as referenced above. I will be handling the investigation of this claim. In order to accomplish this, please furnish me with the following information on your client:
>
> 1. Date of birth
> 2. Social Security number
> 3. Medical records
> 4. Photographs
> 5. Police Report

D47.

Two days later, on October 31, 2018, Drazen emailed all responsive information he had to Ruzicka including photographs of the defect. D48. The 90-day statutory notice period expired on November 10, 2018.

In February 2019, Drazen attempted to initiate settlement discussions, sending a detailed description of Sender's injuries, medical treatment, and associated bills. D52, pp. 10-11. Ruzicka then notified Drazen on March 20, 2019 - 160 days after Drazen sent the notice letter – that the City would not accept liability:

> Because you have not specified the location with any certainty, the City of St. Louis has not been able to conduct its own complete, thorough investigation into your claim.

D49. This was the first time the City indicated any problem with the description of the location of Sender's fall.

Ruzicka testified in deposition he did nothing to investigate the claim between the notice letter and the February 2019 settlement letter. D52, p.13. When asked why he waited until March 2019 to tell Drazen of a problem with the description of the incident location, Ruzicka testified: "Well, obviously in hindsight, I probably should have contacted you

sooner, but a lot of times on injury claims I rely on attorneys to provide additional information regarding their claims before I go forward." *Id*. at 17.

After failure to make any progress toward settlement, Sender filed suit. The City moved to dismiss, alleging that the notice letter was imprecise and prevented the City from being able to conduct a proper investigation. The trial court conducted a hearing ostensibly under the guidelines of this Court's ruling in *Travis v. Kansas City*,[2] and granted the City's motion to dismiss on April 12, 2022. D42. Sender filed a Motion for Reconsideration, attaching numerous exhibits. D44. The trial court did not rule on this motion, and it was deemed denied after 90 days. Rule 78.06. This appeal followed, and the case is before this Court after opinion by the Court of Appeals, Eastern District.

[2] 491 S.W.2d 521, 524 (Mo. banc 1973)

STATEMENT OF INTEREST

The Missouri Association of Trial Attorneys (MATA) received consent to file this amicus brief from counsel for Plaintiff/Appellant Rachel Sender and counsel for Defendant/Respondent The City of St. Louis. See Rule 84.05(f)(2). The attorney for the City is Rebecca Vossmeyer.

MATA is a statewide membership association of approximately 1,300 attorneys dedicated to protecting the rights of injured individuals to pursue justice. MATA provides legal education seminars, facilitates the sharing of resources, compiles research on key legal topics, and represents its membership in the Missouri General Assembly by advocating for clients' right to seek justice through the Missouri courts and Workers' Compensation system.

MATA works to protect access to the court system by advocating against caps on damages, systems that block access to the courts for certain types of lawsuits, and tort immunity for corporations or public entities. MATA has a strong interest in this case, as upholding the dismissal could jeopardize the rights of Missouri citizens to pursue valid claims against cities and municipalities of all sizes. If municipal defendants can dispense with any investigation after receiving a notice under section 82.210, pre-suit settlements will be less frequent, thereby raising the costs of litigation. Dangerous conditions will not be repaired, endangering others who come upon defects on municipal property. Victims of municipal negligence will be forced to await highly subjective *Travis* hearings in which

the municipalities might raise any number of "deficiencies" in the notice letter. This would completely defeat the purpose of notice-of-claim statutes.

MATA supports Sender's position that the notice letter was fully compliant with section 82.210. MATA also supports Sender's position that notice under section 82.210 was not required based on the location of the incident at issue, but MATA will brief only the sufficiency of the notice.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS BECAUSE THE NOTICE GIVEN BY PLAINTIFF SUBSTANTIALLY COMPLIED WITH SECTION 82.210 RSMO, IN THAT THE NOTICE DESCRIBED THE LOCATION SUFFICIENTLY TO ALLOW THE CITY TO BEGIN ITS INVESTIGATION, AND THE CITY OF ST. LOUIS FAILED TO PROVE THE LOCATION IDENTIFIED LEFT IT UNABLE TO INVESTIGATE THE CLAIM.

a. *Standard of Review.*

Sender and the City of St. Louis have addressed the standard of review. MATA submits that the error in this case is a misapplication of law, and review is therefore de novo. *Smith v. Great American Assur. Co.*, 436 S.W.3d 700 (Mo. App. S.D. 2014).

This Court has not previously addressed the standard of review of a trial court's dismissal of a case upon finding in a *Travis* hearing that the contents of a plaintiff's section 82.210 notice were insufficient. *Travis* reached this Court after a judgment had been rendered on the pleadings. 491 S.W.2d at 521.

Lewis v. City of Marceline, 934 S.W.2d 280, 281 (Mo. banc 1996), was an appeal of a summary judgment in favor of the city. In both *Travis* and *Lewis*, this Court reversed

judgment in favor of the municipalities, finding that the notice letter had sufficiently complied with the notice statute at issue. *Travis*, 491 S.W.2d at 524; *Lewis*, 934 S.W.2d at 282.

b. *Harsh Results in Notice-of-Claim Cases are Disfavored.*

For more than 100 years, disputes over compliance with notice-of-claim statutes have been litigated in Missouri appellate courts. Slowly but inexorably, the harshness with which many courts treated miniscule mistakes in statutory notices has dissipated.

Reflective of the early, strict approach is *Hackenyos v. City of St. Louis*, 216 S.W. 986 (Mo. banc 1918), in which a sharply divided Court upheld a dismissal where the correct date of injury was *one day* after that stated in the plaintiff's notice to the city. The Court stated that "[u]nless the act is construed as mandatory, in respect to *time* of injury called for in said notice, it would leave the city to grope in the dark, and without information as to the *exact* date which the injured party intended to rely on at the trial." *Id*. at 987 (emphasis in original).

A passionate dissenting opinion – many times longer than the majority opinion – argued that liberal construction of the statute was appropriate and that "substantial compliance" should be adequate. *Id*. at 993 (Woodson, J, dissenting). Almost immediately thereafter, appellate courts went to great lengths to distinguish the particular facts in the cases before them to avoid the harsh result of *Hackenyos*. For example, in *Boyd v. Kansas City*, this Court stated that an injury date in the notice of "on or about" January 25, 1918, substantially complied with the notice statute, where the injury was *on* January 25:

> The purpose of the law was not to lay a trap for honest claimants for personal injuries against cities, but to notify such cities of the time the injury happened, within 90 days after it did happen, so that the city would have a reasonable opportunity to ascertain the facts before they were lost or obscured by the lapse of time.

237 S.W. 1001, 1006 (Mo. banc 1922).

In *Kling v. Kansas City*, the petition - filed well within 90 days of the injury - served as the statutory notice. Therein, the plaintiff asserted that her injury occurred on November 23, 1929, about 12:15 p.m., but the proof in the case was that it occurred on November 24, 1929, at 12:15 a.m. *Id*. at 412. The court discussed both *Hackenyos* and *Boyd*, and was particularly persuaded by the following from the *Hackenyos* dissent:

> It is true the notice was not given according to the letter of the statute; but, when we consider the purpose the statute was designed to accomplish, can it be seriously contended that it does not fall squarely within the spirit thereof? I think not. And as has been frequently said, by this and other courts, the spirit of a statute is the life of it and is just as much a part thereof as if it had been written therein.

61 S.W.2d 411, 413 (Mo. App. 1933)(quoting *Hackenyos*, 203 S.W. at 1000 (Woodson, J. dissenting)).

Ultimately, the court found the "clerical error" as to the time of injury stated in Kling's petition was not fatal to her cause of action. 61 S.W.2d at 415. In particular, the court noted that the time of day in the petition (12:15 p.m.) was suspect because plaintiff also asserted it was dark at the time of her injury. *Id*. Regardless, the notice given was adequate to allow the city to make an investigation.

Continuing the march away from the harsh *Hackenyos* rule, this Court decided *Brickell v. Kansas City,* 265 S.W.2d 342 (Mo. 1954). Brickell filed a lawsuit for injuries

within 90 days of her fall. She alleged compliance with section 82.210 by pointing out that within 90 days of her incident, in response to her filing of the lawsuit, a representative of the City took her deposition, in which details of the incident and her injuries emerged. *Id*. at 343. In her petition she alleged her accident happened on September 15, 1951, while in her deposition she gave a date that was four days later. *Id*.

The only issue was whether "[Brickell]'s statement, taken and reduced to writing by the city's agent within [90] days, constitute[d] *notice* (as to the 'time when') under section 82.210." *Id*. at 344 (emphasis added). Because the statute is in derogation of the common law, the *Brickell* court construed it liberally in Brickell's favor and strictly against the city:

> Liberal construction of [s]ection 82.210 requires us to hold that, in the instant circumstances, plaintiff's deposition statement (that the "time when" was September 19, 1951), given to the city within the ninety days, was substantially an amended *notice* wherein the statement as to the "time when" amended or superseded the petition's allegations as to that matter.

Id. at 345 (emphasis in original).

In *Plater v. Kansas City*, the Court held that plaintiff's filing of a petition within 90 days of the injury was sufficient notice to comply with the statute, stating:

> A more formal notice could not have been given. The purpose of the statute is to protect cities against state claims. The notice required by the statute affords a city a better opportunity to investigate the merits of claims while they are new and while witnesses are available. The purpose of the statute was fulfilled by the filing of the suit and service of the petition on the city.

68 S.W.2d 800, 803 (Mo. 1933).

c. *Travis v. Kansas City.*

This Court finally overruled *Hackenyos* when it decided *Travis v. Kansas City*, 491 S.W.2d 521, 522 (Mo. banc 1973). Travis filed a timely notice with the City of Kansas City, but indicated the date of injury was January 1 when it was actually January 6. *Id*. at 522. This Court spent the bulk of its opinion describing why the overly strict and technical approach of *Hackenyos* should no longer be followed, and in the process quoted extensively from the dissent in that case. 491 S.W.2d at 522-523. Despite a five-day discrepancy between the statutory notice and the evidence - *Hackenyos* had upheld a dismissal over a discrepancy of *one* day - the *Travis* court reversed the judgment in favor of Kansas City.

The genesis of "*Travis* hearings" was in this passage:

> As noted, the sufficiency of the notice is for the court and not the jury. . . . If the municipality believes that the content of the notice as to time of injury (or other matters) was so misleading as to have affected its legitimate right to fully investigate the occurrence and that its ability to defend against the claim has thus been limited or prejudiced, such facts should be presented to the trial court. Thereafter, a ruling as to whether or not the notice met the intent and purpose of the statute could be made after a hearing thereon. Such a procedure would not be unduly burdensome on the trial courts as the number of instances where the wrong date of injury was given would be limited, and allowing the same would avoid the automatically harsh result heretofore called for by Hackenyos.

Id. at 524.

This Court discussed *Travis* more recently in the context of a similar notice-of-claim provision, section 77.600, RSMo. 2000.[3] In *Lewis v. City of Marceline*, the Court reversed a summary judgment in favor of a municipality. 934 S.W.2d 280, 283 (Mo. banc 1996). Lewis fell as a result of stepping into a hole at a specific address in Marceline. She gave a statement to the city clerk, and the statement was transcribed by the clerk. *Id*. at 281.

First, the Court held that the "writing" requirement of section 82.210 was satisfied by the clerk's transcription of the plaintiff's statement. *Id*. at 282. The Court then reversed the trial court's ruling that the notice had "totally failed" to describe the location of the fall. Emphasizing the liberal construction of the statute in favor of plaintiffs, the Court noted it was the municipality's burden to establish the notice was "so misleading as to have affected its legitimate right to fully investigate the occurrence, and its ability to defend against the claim is limited or prejudiced as a consequence of the content of the notice[.]" *Id*.

Finally, this Court pointed out that under the facts of the case, on remand a *Travis* hearing might not be necessary. The City of Marceline's adjuster had denied the claim, because a "full investigation" showed the city was not negligent. *Id*. Similarly, in this case, Ruzicka advised Drazen of the specific information he needed to "accomplish" his investigation.

The extensive history of judicial opinions on notice-of-claim challenges would not be complete without mentioning this Court's expressed distaste for the whole notion that cities need advance notice of injury claims:

[3] The language of section 77.600 largely tracks that of section 82.210. However, section 77.600 applies to cities of the third class.

> Other jurisdictions have found that the purpose of similar statutes is to alert the city of dangerous conditions so that remedial action might be taken for the public's safety. We find no evidence in prior cases that such a purpose underlies Missouri's statutes, however, an absence of legislative history hinders any accurate assessment of the statutes objective[s]. Nevertheless, a persuasive case can be made that any original justification for the statute no longer exist. Today, our cities are allowed to purchase liability insurance, they maintain modern police and fire departments to investigate accidents and take prompt remedial action, and furthermore, all defendants are afforded protection against frivolous and fraudulent suits by our rules of civil procedure. We question the argument that, as a class, cities require the further advantages of notice of claim statutes.

Schumer By & Through Schumer v. City of Perryville, 667 S.W.2d 414, 416 n.3 (Mo. banc 1984).

d. *The Trial Court Improperly Applied Travis and its Progeny.*

The ruling in the court below brings notice-of-claim litigation full circle – unfortunately all the way back to *Hackenyos*. Here, Sender's notice letter included everything required under section 82.210. And although the City chose not to investigate the claim, the trial court levied all the consequences on Sender.

The trial court in this case held a *Travis* hearing, not to determine whether a notice was timely sent or received, but to assess whether its description of the location was sufficient to allow the City to begin its investigation. The court stated in its judgment: "The requirements as to the timing, form, and presence of notice are a condition precedent to a suit and substantial compliance will not suffice." D42. However, the trial court was not considering the "timing, form and presence of notice." On those aspects there was no dispute that Sender had complied.

Instead, the court was assessing the *content* of the notice, on which substantial compliance *is* sufficient. *Potts v. City of St. Louis*, 499 S.W.3d 388, 391-92 (Mo. App. E.D. 2016). Further, the requirements pertaining to the content of the notice are construed strictly against the municipality and liberally in favor of the plaintiff. *Id*.

The City bears the burden of proving that Sender's notice letter was ineffective under the circumstances. *Potts*, 499 S.W.3d at 392. The whole point of a *Travis* hearing is to give the municipality an opportunity to prove that the notice was "so misleading as to have affected its legitimate right to fully investigate the occurrence and that its ability to defend against the claim has thus been limited or prejudiced[.]" *Travis*, 491 S.W.2d at 524. A municipality bears the burden of proving both that the plaintiff failed to substantially comply with the statute, and that the municipality was prejudiced as a result. *Lewis*, 934 S.W.2d at 282. In this case, the City of St. Louis failed on both prongs of its burden.

e. *The City Failed to Establish Substantial Prejudice or A Lack of Opportunity to Investigate*.

The City's claim of substantial prejudice and inability to even begin its investigation is wholly unsupported by evidence or logic. Drazen sent the notice letter well within the 90-day time limit. This notice alerted the City that Sender had suffered significant injuries – a broken clavicle and a concussion – while "on/near South West corner, of the Forest Park Bike Path." The date and time were specifically stated. D46.

As stated previously, the City's legal investigator, Ruzicka, responded to the letter with a request for five specific things: date of birth, social security number, medical

records, photographs, and any police report. D49. He would use these to "accomplish" his investigation. *Id*. Critically, he asked for *nothing* in regard to the location of the fall.

The meaning of the word "accomplish" is well understood. According to Merriam-Webster.com, "accomplish" means "1. To bring about (a result) by effort; 2. to bring to completion: FULFILL; 3. To succeed in reaching (a stage in a progression)." Sender's lawyer promptly complied with Ruzicka's request on October 31, 2018 – still within the 90-day post-accident period. D48.

To this point it becomes very clear that Sender's counsel acted in accordance with the letter and the spirit of section 82.210. The City, in its initial response, gave every indication that Sender's claim was being investigated. How else could she and Drazen have interpreted the City investigator's letter? He intended to *accomplish* his investigation, and in order to do so he needed five specific things. D47.

Neither Sender nor Drazen could have known the City was actually trying to run out the clock in hopes of a successful *Travis* hearing. Experienced counsel could easily have been lulled into a sense of complacency; in fact, any reasonable person would assume the City's investigation *had begun*. However, instead of accepting Sender's offer to provide "anything [the City] may reasonably request," the City took no action on the claim. Ruzicka received a response to his request for information almost immediately, yet he never advised Drazen of any problem with the claim submission. The next time he responded to counsel was after Drazen submitted an offer to settle. D52, pp. 10-11. In his deposition Ruzicka admitted he probably should have called the lawyer. *Id*. at 17.

Even the denial of claim sent by Ruzicka undercuts the City's showing of substantial prejudice. The March 20, 2019 denial letter begins:

> Previously, you contacted this office referencing your client's claim for injuries for which you contend the City of St. Louis is liable. *The City of St. Louis takes each claim under careful consideration, and we strive to work hard for the benefit of all citizens who reside in or visit our great city*.

D49 (emphasis added). In this case, "careful consideration" and "hard work" on Sender's claim did not include any investigation until long after the 90-day period had run.

f. *Alleged Shifting Burdens*.

In its Application for Transfer to this Court, the City repeatedly asserts that the Court of Appeals' opinion imposes a burden of investigation that does not exist under the law. Any suggestion that the City has no burden to investigate a claim is put to rest by *Travis*. This Court, quoting the dissent in *Hackenyos*,[4] stated that "all of the authorities hold that [city officers] *must* arm themselves with the notice, and, with the assistance of its light, *make an investigation* and ascertain the truthfulness or the falsity of the statements contained in the notice. *Travis*, 491 S.W.2d at 523 (emphasis added).

When city officials fail to make an investigation, they fail taxpayers by exposing the municipality to liability. MATA submits that such a city also forfeits the right to assert that an investigation would have been fruitless. This case illustrates the absurdity of placing all responsibility of a perfect notice-of-claim on the person injured by a defect. Sender

[4] 203 S.W. at 1001 (Woodson, J., dissenting).

served her notice promptly.[5] One of the primary purposes of notice-of-claim statutes is to give the City an opportunity to investigate the claim and, if meritorious, negotiate a resolution without the burden and expense of a lawsuit. *Dohring v. Kansas City*, 71 S.W.2d 170, 172 (Mo. App. 1934). Drazen specifically raised this possibility. D46.

Notice statutes such as section 82.210 permit investigations before time changes the conditions, or witnesses' memories go stale. *Plater*, 68 S.W.2d at 803. "They permit the city to correct dangerous conditions promptly so as to avoid additional risk to its citizens and visitors and exposure to liability." *Findley v. City of Kansas City*, 782 S.W.2d 393, 397 (Mo. banc 1990). Fundamentally, they are *notice* provisions, not *fact* provisions. The legislature has never enacted a law requiring that municipalities know every fact about an incident within 90 days after it occurs.

Given the purposes of notice statutes, what possible societal goal is served by a city, on notice of a dangerous condition on its property, sitting on its hands hoping that no additional information arrives within 90 days of a serious incident? Here, the City of St. Louis chose to remain in the dark about a defective condition that had caused one of its residents to suffer severe injuries. It should not be rewarded for this with judgment in its favor.

Suppose the facts here were different. Consider a bicyclist who falls at night while on a city bike trail but is unsure of the location. The individual sends notice to the city

[5] *See Brickell*, 265 S.W.2d at 345 ("Plaintiff did not delay giving notice until the last or another late day of the ninety-day period as was her right. She did not postpone the city's opportunity to investigate her claim. …".)

within days of the fall and offers to meet a representative to try to pinpoint the location and repair any defect. Under the City's view of section 82.210, the bicyclist's notice is fatally defective, no cause of action exists, and the City has no obligation whatsoever to investigate.

At the risk of stating the obvious, how long would it have taken a City employee (or two) on a bicycle (or scooter, or 4-wheeler) to cover 1.5 to 2 miles on a specific section of bike path in Forest Park? This Court can certainly take notice that even at a slow biking speed, inspecting the "southwest corner" of a contained bike path – armed with photographs of the defect – would take less than 15-20 minutes. Construing the statute strictly against the City, the trial court should have found that such an inspection would have revealed the defect. Or the inspection might have revealed no defect that would have caused Sender to fall. At that point, the City either could have asked for more specific information, or simply denied the claim for lack of any negligence.

Because of this, both the trial court's focus on the sheer distance – "1/4 of the 8-mile bike path" – and the City's emphasis on the "four corners" of the notice letter, miss the mark. The City was required to show that the notice in this case was "so misleading as to have affected its legitimate right to fully investigate the occurrence," and that its ability to defend the claim is prejudiced "as a consequence of the notice." *Lewis*, 934 S.W.3d at 282. Section 82.210 "does not contemplate that the notice shall be so certain and definite in terms as to notify the city officers with such precision that they may with perfect confidence rely upon the correctness of the notice and proceed with the trial of the cause without making an investigation of the facts of the case." *Travis*, 491 S.W.2d at 523. There

was nothing "misleading" about the notice at all, and under strict construction against the City's position, the City's failure to conduct *any* investigation renders the trial court's judgment, that the notice itself made an investigation impossible, clearly erroneous.

Finally, an undercurrent to the judgment in this case is that the investigation period *ends* once day 90 arrives. In other words, if Sender gave an exact location on day 89, but the City did not find it on the bike path until day 91, the plaintiff would be out of court. Had the legislature intended that the claimant should notify the city within 90 days, *and* that the city must complete its investigation within that time, it would have included language in section 82.210 to that effect.

Nothing about the statute is inflexible other than the deadline to *provide* the notice. The word "exact" does not appear in the statute. Once the claimant serves the written notice containing the required information on the Mayor within 90 days, her obligation is satisfied. If there is then communication between the municipality and the claimant as to greater specificity, or amounts of medical bills, or photographs, nothing in the statute prohibits this exchange.

A good example of this is *Jones v. Kansas City*, 643 S.W.2d 268 (Mo. App. W.D. 1982). The plaintiff's notice indicated a nonexistent address, 4208 Pennsylvania Avenue, as the location of the injury. *Id*. at 269. There was no continuous sequence of addresses at that location, and the closest the appellant city's investigator could get was 4200 Pennsylvania. This defect, however, was not fatal:

> The record shows, however, that the investigation did not end at this point. There had been a police report of the accident provided appellant prior to the taking of respondent's

> deposition on July 14, 1978. On December 24, 1978, appellant's investigator returned to the area and the manhole with the adjacent pothole was located.

Id. at 269.

December 24, 1978 was *two years* after the date of the plaintiff's injury, and the Court of Appeals still upheld the trial court's finding that the City should have located the defect, even with the street address confusion. *Id*. at 270.

Returning to the case at bar, there is a compelling reason to believe that the City would have found the alleged defect if it had made a minimal effort at investigation. Within days of the denial of the claim, Drazen responded with additional information to help the City, and Ruzicka admitted that allowed him to find the location. D52, p.14. This fact must be construed against the City and in favor of the plaintiff.

Section 82.210 must be construed reasonably. "The City may use it as a shield, not as a sword[.]" *Snickles v. City of St. Joseph*, 122 S.W. 1122, 1124 (Mo. App. 1909). In this case, MATA respectfully suggests the statute has been used as a sword against a claimant injured on City property. The judgment should be reversed and the case remanded for trial.

CONCLUSION

Whatever the merits or necessity of notice-of-claim statutes, the legislature has set out exactly what a section 82.210 must contain. Here, Sender's counsel complied with those requirements.

This Court could not have intended *Travis* hearings to be "gotcha" hearings. The City had a considerable amount of information in its possession, including all that its investigator had requested from Drazen to accomplish an investigation. Drazen was never

requested to supplement what had been provided. This case seems to present a classic case of "sandbagging," which is universally condemned.

Counsel for Sender attempted to settle the case with the City without a lawsuit, something this Court's cases and rules encourage. Yet the City chose to ignore that opportunity and instead leaned heavily on the wording of a notice letter sent months earlier. Any clever municipality could use similar tactics. The next case might involve a city investigator who actually engages in settlement discussions – but only until day 90 passes. This is clearly using section 82.210, and *Travis* hearings, as a sword.

MATA's position is not that a particular investigation is required, or that any particular follow-up is the obligation of a municipality. If a city chooses to do no investigation and simply defend the case in court that is its prerogative. However, that choice has nothing to do with the claimant's notice letter. The City is "on notice" of a claim regardless of its decision to investigate or not investigate an incident.

Moreover, injured claimants have no control over how many investigators a city employs, nor what type of investigation it will do. The legislature has declared the claimant's duty is to notify the Mayor of the City, and here that was done. If the City intended to later prove that its ability to investigate was severely prejudiced by a misleading notice, it had to prove at least an attempt to investigate.

Here, it did not do so. Because of this, MATA respectfully suggests this Court should reverse the judgment and remand the case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 8th day of September 2023 to all counsel of record.

/s/Patrick J. Hagerty

CERTIFICATE OF COMPLIANCE

I also certify that the foregoing brief includes the information required by Rule 55.03, and complies with the limitations in Rule 84.06(b), and that the brief contains 5,805 words.

/s/Patrick J. Hagerty