MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Matthew A. Disbro,
Appellant-Defendant,

v.

City of Bedford,
Appellee-Plaintiff.

December 28, 2023

Court of Appeals Case No. 23A-PL-1454

Appeal from the Lawrence Circuit Court

The Honorable Nathan G. Nikirk, Judge

Trial Court Cause No. 47C01-2304-PL-470

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

[1] Matthew Disbro appeals following the trial court's grant of the City of Bedford's ("the City") motion to dismiss a complaint he filed against the City. Disbro raises three issues, which we consolidate and restate as whether the court erred when it granted the City's motion. We affirm.

Facts and Procedural History[1]

[2] Disbro owns property in the City, and there is a retaining wall located between Disbro's property and a sidewalk owned by the City. On July 2, 2021, the retaining wall collapsed. On July 17, Disbro sent an email to Brandon Woodward, the City's Director of Planning and Zoning. In that email, Disbro "'requested that the City of Bedford review repairing this wall and pay for it.'"[2] Appellee's App. Vol. 2 at 14. Woodward responded to Disbro's email on December 21 and denied responsibility for the wall.

[3] Disbro also sent letters to Woodward on April 28 and May 2, 2022. When he did not receive a response from Woodward, Disbro sent another letter on

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[1] We have obtained many of the underlying facts from Disbro's complaint and his response to the City's motion to dismiss.

[2] Disbro has not provided a copy of that email in his record on appeal. Further, in his brief, Disbro contends that he sent his email to two City officials in addition to Woodward, that Woodward replied a few days later with a statement that he would forward the email to the Street Commissioner, and that Disbro had emailed the Street Commission himself four months later. To support those statements, he cites to page twelve of his appendix. However, there is no such corresponding information on page twelve or any other page of either Disbro's or the City's appendices.

September 15 and stated that, if the City was not going to rebuild the wall, he "will have no alternative but to file a lawsuit for the purpose of compelling the City to rebuild the wall." *Id*. at 6. The City reiterated that the retaining wall was Disbro's responsibility.

[4] On April 18, 2023, Disbro filed a complaint against the City[3] and alleged that the collapse of the retaining wall had "caused damage" to his property. Appellant's App. Vol. 2 at 6. Disbro alleged that the collapse of the wall constituted a public nuisance, and he alleged that the City had breached its duty to maintain city property. Disbro sought injunctive and monetary relief.

[5] On May 5, the City filed a motion to dismiss pursuant to Indiana Trial Rule 12(b)(6). The City asserted that Disbro had failed to comply with the Indiana Tort Claims Act ("ITCA"). In particular, the City alleged that Disbro was required to provide the City with notice of the tort claim within 180 days of July 2, 2021, but that he "did <u>not</u> submit any notice" to the City. *Id*. at 9 (emphasis in original).

[6] Disbro responded to the City's motion to dismiss and asserted that he had "substantially complied with all parts" of the ITCA. Appellee's App. Vol. 2 at 4. Specifically, he contended that he "sent an email" to City officials fifteen days after the collapse of the retaining wall. *Id*. He also asserted that, while his

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[3] Disbro also initially named the Mayor of the City as well as the City's Director of Planning and Zoning. However, those two were dismissed as parties.

email did "not explicitly state an intent to file a tort claim," it "explicitly 'requested that the City of Bedford review repairing this wall and pay for it.'" *Id*. In addition, Disbro maintained that he "was deprived of the possibility of providing a timely notice" because City officials "did not respond to [his] request until December 21, 2021[.]" *Id*. at 5. He then asserted that he did not have confirmation "that the City of Bedford would not repair the retaining wall" until eight days before the deadline under the ITCA. *Id*.

[7] Disbro further asserted in his response to the City's motion to dismiss that the City was "aware of the worsening condition of the retaining wall" because City officials "saw the wall two (2) years prior to its collapse and witnessed that the wall would collapse if no action was taken to maintain it." *Id*. Disbro contended that "there is no reason to dismiss this complaint" given his "initial email and exchange of pertinent information over time" with the City. *Id*. at 9. He also maintained that "to deny a claim like this would be to deny [him] of due process under the law, a violation of the United States Constitution's Fourteenth Amendment." *Id*. at 9.

[8] Following a hearing at which the parties presented oral argument, the court found that Disbro's email "cannot suffice as an attempt to satisfy the notice statute as it admittedly makes no reference [to] an intent to file a tort claim" against the City. Appellant's App. Vol. 2 at 15. Accordingly, the court granted the City's motion to dismiss. This appeal ensued.

Discussion and Decision

[9] Disbro appeals the trial court's grant of the City's motion to dismiss pursuant to Indiana Trial Rule 12(B)(6). As our Supreme Court has stated:

> A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint; that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief. *See Kitco v. Corp. for Gen. Trade*, 706 N.E.2d 581 (Ind. Ct. App. 1999). Thus, while we do not test the sufficiency of the facts alleged with regards to their adequacy to provide recovery, we do test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred.
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> A court should "accept[] as true the facts alleged in the complaint," *Minks v. Pina*, 709 N.E.2d 379, 381 (Ind. Ct. App. 1999), and should not only "consider the pleadings in the light most favorable to the plaintiff," but also "draw every reasonable inference in favor of [the non-moving party]." *Newman v. Deiter*, 702 N.E.2d 1093, 1097 (Ind. Ct. App. 1998).

Trail v. Boys and Girls Club of Northwest Ind., 845 N.E.2d 130, 135 (Ind. 2006). Our review of a trial court's grant or denial of a Rule 12(B)(6) motion is de novo. *Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602, 604 (Ind. 2007).

[10] On appeal, Disbro contends that the court erred for three reasons when it granted the City's motion to dismiss. First, he asserts that he substantially complied with the ITCA. Second, he contends that, even if he did not substantially comply with the ITCA, the ITCA does not apply to his public nuisance claim. And third, he contends that the City's attempt to require him

to pay for repairs to the retaining wall owned by the City amounted to a taking in violation of his constitutional rights. We address each argument in turn.

Substantial Compliance

[11] Here, Disbro first contends that the court erred when it granted the City's motion to dismiss because he substantially complied with the ITCA.[4] The notice required under the ITCA, which must be filed within 180 days of the loss, "must describe in a short and plain statement the facts on which the claim is based," including

> the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing the notice.

Ind. Code § 34-13-3-10. Also, the notice must be in writing and delivered in person or by registered or certified mail. I.C. § 34-13-3-12.

[12] Our courts have held that a liberal application of the requirements of the ITCA notice statute is proper in order to avoid denying plaintiffs an opportunity to bring a claim where the purpose of the statute has been satisfied. *Brown v. Alexander*, 876 N.E.2d 376, 381 (Ind. Ct. App. 2007), *trans. denied*. "'What

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[4] The parties agree that the City is a political subdivision within the definition of the ITCA. Both parties also agree that the date of the loss was July 2, 2021. And Disbro concedes that he did not fully comply with the ITCA.

constitutes substantial compliance, while not a question of fact but one of law, is a fact-sensitive determination.'" *Schoettmer v. Wright*, 992 N.E.2d 702, 707 (Ind. 2013) (quoting *Collier v. Prater*, 544 N.E.2d 497, 499 (Ind. 1989)).

[13] Substantial compliance with the statutory notice requirements is sufficient when the purpose of the notice requirement is satisfied. *Id*. In general, a notice that is filed within the 180-day period, informs the municipality of the claimant's intent to make a claim, and contains sufficient information which reasonably affords the political subdivision an opportunity to promptly investigate the claim will satisfy the purpose of the statute and will be held to substantially comply with it. *Collier*, 544 N.E.2d at 499. "When deciding whether there has been substantial compliance, this Court reviews whether the notice given was, in fact, sufficiently definite as to time, place, and nature of the injury." *Porter v. Fort Wayne Cmty. Sch*., 743 N.E.2d 341, 344 (Ind. Ct. App. 2001), *trans. denied*.

[14] Here, Disbro contends that his July 17, 2021, email "fulfills the purpose of and therefore substantially complies with the ITCA's notice requirement." Appellant's Br. at 11. In particular, he asserts that his email "informed the City about the damage, the location of the damage, the relevant parties of the action, the address of Plaintiff, and requested the City pay for the loss." *Id*. He also asserts that any information he did not "explicitly state in the email was already known by City officials from their prior communications with" him. *Id*. And he maintains that his email provided the City with "adequate opportunity to investigate, determine liability, and prepare a defense to" his claim. *Id*.

[15] To support his assertion, Disbro relies on this Court's opinion in *Town of Knightstown v. Wainscott*, 70 N.E.3d 450 (Ind. Ct. App. 2017). In that case, the Town of Knightstown contracted with a company to demolish a building that shared a wall with a building owned by Wainscott. *Id*. at 452. According to Wainscott, the demolition caused several hundred holes in the shared wall and several vacuum tubes were crushed, possibly releasing mercury into the soil. *Id*. Shortly after the demolition, Wainscott wrote a letter to the Town detailing the damage and outlining several steps the Town needed to take to remedy the situation. *Id*. at 452-53. Wainscott also attended a Town Council meeting a few days later and discussed the matter with the Town Council President, who assured Wainscott that the Town would fix any damage that had been caused by the Town. *Id*. at 453. Two years after the demolition began, Wainscott filed a complaint against the Town. *Id*. The Town filed a motion for summary judgment, alleging that Wainscott had failed to timely file a notice under the ITCA. *Id*. The court found that Wainscott's letter did not comply with the ITCA and granted the Town's motion to dismiss the causes of action that were covered by the ITCA. *Id*. at 454.

[16] On appeal, this Court determined that Wainscott's letter "made the Town aware that its demolition of the adjacent building had significantly damaged his property and specifically demanded repairs that the Town needed to perform." *Id*. at 458. The Court continued that the "matter was also discussed at the Town Council meeting," where the President made certain assurances. *Id*. The Court concluded that the "letter gave the Town an opportunity to promptly

investigate the issues, determine its liability, and prepare a defense." *Id.* And, while "the letter did not specifically state that it was a tort claims notice or state that Wainscott would be filing legal action, it clearly stated that the Town had damaged Wainscott's property and set out the items that the Town needed to correct." *Id*. As such, the Court held that "Wainscott substantially complied with the ITCA" because the letter "adequately informed the Town of Wainscott's intent to make a claim." *Id*.

[17] However, we find that case distinguishable from the instant case. Unlike the letter Wainscott wrote in that case, Disbro's email did not provide any indication that the Town had damaged his property or set out the items that the Town needed to correct. Rather, Disbro's email simply provided the following:

> I would like to formally request that the City of Bedford review repairing this wall and pay for it. If not, I would like to inquire as to why the City of Bedford believes it's my responsibility. I am the adjoining property owner. This—there is a large retaining wall that's starting to have problems. It was certainly having problems at that time. This retaining wall is holding dirt from my property from falling onto the public sidewalk and possibly public roadway. I am the current owner of 606 18th Street, Bedford.

Tr. at 16-17.[5]

[5] Disbro's counsel provided this language during the hearing. While we do not have a copy of the email, neither party disputes that this was an accurate representation of the contents of Disbro's email.

[18] Nothing about that email outlines the items that are required by the ITCA. The email does not describe "the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, [or] the amount of the damages sought[.]" I.C. § 34-13-3-10. Indeed, the email did not even mention that the retaining wall had collapsed or that it had caused any damage; it simply stated that the retaining wall was starting to "have problems" and that the City should "review repairing the wall and pay for it." Tr. at 16. The email also failed to make any indication, either explicitly or implicitly, that Disbro intended to take any legal action against the City.

[19] The purpose of notice to a political subdivision is to "ensure that government entities have the opportunity to investigate the incident giving rise to the claim and prepare a defense." *Schoettmer*, 992 N.E.2d at 706. And while strict compliance is not required, a claimant is still required to inform the municipality of the claimant's intent to make a claim and provide a notice that contains sufficient information that reasonably affords the municipality an opportunity to promptly investigate the claim; such notice satisfies the purpose of the statute and will be held to substantially comply with it. *See Collier*, 544 N.E.2d at 499. But, here, Disbro's email fell short of those requirements and did not provide the City with a notice that contained adequate information to allow the City to investigate the claim and prepare a defense. Again, Disbro's email only contained a vague reference to the retaining wall being in disrepair; it did not include any information about damages, and it did not contain a

specific request for the City to take any action other than for the City to "review" repairing the wall. Appellee's App. Vol. 2 at 4.

[20] We acknowledge that, following Disbro's email, the City apparently investigated the matter and determined that it was Disbro's responsibility to repair the wall. But, where a plaintiff fails to timely "file any notice of an intent to make a claim, actual knowledge of the occurrence on the part of the city, even when coupled with an investigation of the occurrence, will not suffice to prove substantial compliance." *City of Knightstown*, 70 N.E.3d at 456. Thus, the fact that the City knew of the occurrence and investigated is not enough to show that Disbro substantially complied with the ITCA. Disbro failed to substantially comply with the ITCA.

Public Nuisance Claim

[21] Disbro next contends that, even if he did not substantially comply with the ITCA, the court still erred when it dismissed his complaint because the ITCA does not apply to his public nuisance claim. Disbro's entire argument on this issue is as follows:

> The Indiana Tort Claims Act ("ITCA") only applies to "a claim or suit in tort." Ind. Code § 34-13-3-1. Furthermore, the ITCA does not apply to a claim outside the realm of torts. This Court has declined to address the question of whether a nuisance claim is subject to the ITCA. *See Town of Knightstown v. Wainscott*, 70 N.E.3d 450, 458 (Ind. Ct. App. 2017) (declining to address the question since claimant's notice was determined to be substantially compliant on appeal where trial court concluded that the claim was not subject to the ITCA). However, the

> Indiana Supreme Court has stated, "[A] public nuisance may exist without an underlying independent tort." *City of Gary v. Smith & Wesson*, 801 N.E.2d 1222, 1234 (Ind. 2003).
>
> Furthermore, it is possible that Mr. Disbro's public nuisance claim may proceed even if he made no attempt at fulfilling the notice requirements of the ITCA, as the ITCA does not apply to a claim that is not in tort. *See* I.C. § 34-13-3-1. Therefore, dismissal of Mr. Disbro's public nuisance claim was improper since it cannot be dismissed for lack of compliance with the ITCA as long as a public nuisance can exist without an underlying independent tort.

Appellant's Br. at 12-13.

[22] Disbro is correct that the ITCA "applies only to a claim or suit in tort." I.C. § 34-13-3-1(a). He is also correct that our Supreme Cour has held that "a public nuisance *may* exist without an underlying independent tort[.]" *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1234 (Ind. 2003) (emphasis added). However, our Supreme Court has also recently held that "the common law tort of public nuisance exists." *VanHawk v. Town of Culver*, 137 N.E.3d 258, 268 (Ind. 2019). The Court also stated that the "remedies available under the common law tort of public nuisance include the recovery of damages or injunctive relief to abate the nuisance." *Id*. Thus, contrary to Disbro's contentions, simply because Disbro included in his complaint a claim for public nuisance does not automatically remove that claim from the scope of the ITCA.

[23] And Disbro makes no argument as to why his particular claim does not constitute a common law tort. Here, Disbro sought both monetary and

injunctive relief in his complaint, both of which are available remedies under the common law tort of public nuisance. Because Disbro made no argument to explain why his public nuisance claim—for which he sought the remedies available under the common law tort of public nuisance—does not constitute a common law tort, he has failed to meet his burden on appeal to show that the trial court erred on this issue.

Takings Clause

[24] Finally, Disbro asserts that the trial court erred when it dismissed his complaint because the imposition on him of the cost to repair the retaining wall is "clearly a violation of the Takings Clause of both the Indiana and Federal Constitutions" since the wall is "not owned nor under the custody and control" of Disbro. Appellant's Br. at 15. However, we agree with the State that Disbro has waived this claim for our review. "It is the general rule that an argument or issue raised for the first time on appeal is waived for appellate review." *First Chicago Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020). The "crucial factor in determining whether a party may raise what appears to be a new issue on appeal is whether the other party had unequivocal notice of the existence of the issue and, therefore, had an opportunity to defend against it." *Collins Asset Group, LLC, v. Alialy*, 139 N.E.3d 712, 714-15 (Ind. 2020) (quotation marks omitted).

[25] Here, Disbro did not make any claim to the trial court regarding the Fifth Amendment or its counterpart under the Indiana Constitution. Rather, below,

Disbro asserted in his response to the City's motion to dismiss that "to deny a claim like this would be to deny Plaintiff of due process under the law, a violation of the Fourteenth Amendment." Appellee's Br. at 9. Similarly, at the hearing on the City's motion to dismiss, Disbro argued that, "if the wall is not repaired by the City" but left for Disbro to repair, "then he would be deprived of due process of law under our constitution." Tr. at 17. Thus, while he made vague arguments regarding "due process," he did not raise any specific claim regarding the Fifth Amendment or its Indiana counterpart, nor did he ever assert that the City's actions constituted a Taking.

[26] Still, Disbro contends that, because he raised a Fourteenth Amendment claim and because "the Fifth Amendment's Takings Clause is applicable to the states through the Fourteenth Amendment's Due Process Clause," he gave "unequivocal notice" of his Takings claim. Reply Br. at 10. He also contends that he properly preserved the issue because he claimed below that "the City failed to uphold their duty to maintain city property," and that his Fifth Amendment argument is "rooted in this claim." *Id*. But neither of those arguments is specific enough to give "unequivocal notice" to the City of the existence of a Takings claim. *Collins Asset Group*, 139 N.E.3d at 714. As such, we hold that Disbro has failed to preserve this issue for appeal.

Conclusion

[27] The trial court did not err when it dismissed Disbro's complaint because he did not substantially comply with the ITCA, he failed to meet his burden on appeal

to demonstrate that his public nuisance claim does not fall under the ITCA, and he failed to preserve any claim regarding the Takings Clause. We therefore affirm the trial court.

[28] Affirmed.

May, J., and Felix, J., concur.