HOOSIER LITIGATION BLOG

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Indiana Tort Claim Notice: Substantial Compliance & Standard of Review

As we've discussed, historically, lawsuits could not be brought against the sovereign. The limitation stemmed from the ancient notion that the king could do no wrong. One of the true champions of this concept of sovereign immunity, Sir William Blackstone, described it stating, "*Dei in terra: omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo*." Translating, "The king is the deputy and minister of God on earth, for every one is under him and he is subject to no one, God only excepted." This formation followed the famous enunciation of thirteenth century English judge and scholar, Henrici de Bracton, who wrote:

> *Ipse autem rex non debet ese sub homine, sed sub De et sub lege, quia lex facit regem. Attribuat res, ubi dominator voluntas et non lex.* [The king himself should not be subject to man, but to God and the law, for the law makes the king. Thefefore, the king should give to the law, what the law gives to him, namely, dominion and power: for there can be no king where will, not law, governs.]

Notably, Bracton wrote in the immediate wake of the first creation of the Magna Carta, a document stripping the English monarchy of absolute control over the state.

Despite the rejection of the view that the state was composed from divine will–instead instituting a government consent of the governed–the American democracy initially preserved the doctrine of sovereign immunity. In Indiana, the

common law doctrine of sovereign immunity remained largely intact until dramatic incursions began in 1960. The Court of Appeals of Indiana decision in *St. John Town Board v. Lambert*, provides a useful overview of the history of the decay of common law sovereign immunity in Indiana. With the final major nail in the coffin, the Indiana Supreme Court all but completely abrogated common law sovereign immunity in 1972 in *Campbell v. State*, thereby allowing the state to generally be liable in tort as any other private person. In response to *Campbell*, the Indiana General Assembly enacted the Indiana Tort Claims Act (ITCA) in 1974. The ITCA establishes procedures for suing the state and creates statutory immunities.

The most notable procedure under the ITCA is the need to file a notice of tort claim. The notice must be filed at a specified period (either 270 or 180 days, depending on whether the suit is against an instrumentality of the state or of a political subdivision) following the date of loss. Our discussion today returns in part to a prior discussion, in which we discussed the Indiana Supreme Court case *Schoettmer v. Wright*. In *Schoettmer*, the Indiana Supreme Court held that the doctrine of equitable estoppel could apply to allow a claim governed by the ITCA to proceed despite the failure to timely file a notice of tort claim.

Today's discussion returns to the topic through a decision out of the Court of Appeals of Indiana earlier this week: *Nolan v. Clarksville Police Department*. The backgrounds facts are fairly straightforward. In June 2012, a nineteen-year-old woman volunteered to play the role of a hostage in a police training exercise. In the course of that exercise, the young woman's nose was broken. The woman and her mother were told by the chief of police that the department would cover the medical expenses.

> Over the next few months, Nolan continued to contact Chief Palmer, and her mother did the same. Nolan attempted to reach him via e-mail and telephone in mid-to-late July and then went to the police station in August and tried, but was unable, to meet with him to provide medical bills. Nolan's mother e-mailed with Chief Palmer and met with him in person, at which time he told her that "the Clarksville Police would be taking care of the bills and not to worry about it." Nolan's mother later brought some bills to the police department and gave them to a receptionist, who said that she would give them to Chief Palmer. However, neither the police department nor the Town of Clarksville has ever paid any of Nolan's medical bills.

After a year and a half of being stonewalled, Nolan filed suit in early 2014. Because the case was filed more than 180 days after the injury and no tort claim notice had been filed, the police department sought summary judgment, invoking the ITCA. The trial court applied the ITCA and awarded summary judgment in

favor of the police department. The young woman appealed.

The first issue on appeal was a debate over the proper standard for reviewing the trial court's determination at summary judgment. The law is well settled that summary judgment, which looks at the documents before the trial court and asks whether, as a matter of law, one side must win, is reviewed *de novo* on appeal. Indeed, as Indiana caselaw has long recognized, the Court of Appeals applies the same standard to summary judgment as the trial court. Given this standard, there was an oddity of Indiana caselaw, stemming from the 1991 decision in *Hupp v. Hill*. In that case, the court of appeals applied the highly deferential "negative judgment" standard. The "negative judgment," sometimes called "adverse judgment," standard is generally reserved for use when reviewing an appeal from a jury verdict or bench trial. After considering the case upon which *Hupp* relied, the Court of Appeals in *Nolan*, rejected the "negative judgment" standard, instead utilizing the common *de novo* standard applicable in all other summary judgment reviews.

Turning next to whether the ITCA acts to bar the claims, the court first looked to the doctrine of substantial compliance under the ITCA. We have discussed this doctrine before in the context of an Indiana Supreme Court case finding substantial compliance even though the notice said that the plaintiff had not suffered physical injuries and the plaintiff later brought a claim for physical injuries. Here, the young woman argued that she had substantially complied with the notice requirement through her contacts with the police chief and by delivering her bills to the police station. The court of appeals recognized, "Under the doctrine of substantial compliance, the failure to fully satisfy the precise notice requirements of the ITCA is excused as long as 'the *purpose* of the notice requirement is satisfied.'" The problem for the young woman, however, is "that the doctrine can only be invoked by a claimant who has filed a timely notice-of-claim that is technically defective, not by a claimant who has filed no notice or late notice."

Notably, the doctrine of substantial compliance is founded in the actions of the injured person. With that door closed, the young woman was left looking to one of the doctrines based in the conduct of the governmental actor. Two such doctrines come readily to mind: fraudulent concealment and equitable estoppel. In a prior post, we discussed how fraudulent concealment works under the ITCA. Because there is no basis to argue fraudulent concealment in this case, and no one did, I will not reproduce that discussion here. Instead, the young woman turned to the doctrine of equitable estoppel.

"In the ITCA-notice context, the doctrine of estoppel 'focuses on representations made by the defendant or its agents to the plaintiff, which induce the plaintiff reasonably to believe that formal notice is unnecessary.'"

> Such claims generally fall into one of two categories: (1) claims that the political-subdivision defendant disguised or failed to disclose its governmental status, and (2) claims that a *known* political-subdivision defendant made a representation that led the plaintiff to believe that the matter would be settled without the need for formal, adversarial procedures, Because Nolan's claim—that she acted in reliance on Chief Palmer's statements that her medical bills would be paid—falls into the second category, the fact that "the Clarksville Police did not attempt to hide their governmental or political-subdivision status," is irrelevant.

To utilize estoppel in the ITCA context, a plaintiff "must show its (1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change [its] position prejudicially."

The Court of Appeals concluded that there was a genuine dispute of material fact, necessitating that the issue proceed to a jury to resolve whether the young woman met each element. The court found that there was evidence as to each issue that could be found in favor of the young woman. First, she was told by the chief that her bills would be covered and there is no evidenced that she knew or could have discovered that the defendants were not actually going to pay her bills. Second, she relied on the chief's representations. And third, she was prejudiced by relying on the chief's representations.

The most notable argument by the defendants was that the young woman "cannot satisfy the detrimental-reliance prongs because there is no evidence that 'she failed to file the required tort-claim notices because Chief Palmer told her Clarksville Police would pay her medical bills'—in other words, evidence that Nolan would have filed notice *but for* Chief Palmer's representations." The court rejected that argument:

> The Town does not cite, and we are not aware of, any authority that stands for the proposition that an ITCA plaintiff claiming estoppel must show that she was aware of the notice requirement and would have filed notice but for some conduct or representation by the political subdivision. Nolan need only show that she detrimentally relied upon Chief Palmer's representations. The evidence that Nolan and her mother attempted to work with Chief Palmer and to follow his instructions regarding the submission of medical bills, rather than filing a notice of claim, is sufficient to create a genuine issue of material fact on the detrimental-reliance elements.

Another interesting argument was that the defendants–the police department and the town–are distinct entities. Thus, just because estoppel may apply to the police department does not mean that it should apply to the town.

> The Town did not raise this argument in its motion for summary judgment, so it is waived. In any event, they cite no authority in support of their assertion, and we are not persuaded. Tellingly, the defendants do not allege that the Town of Clarksville was not made aware of Nolan's injury or her efforts to have her medical bills paid. In Clarksville, as in most municipalities, the town and the police department are closely affiliated, as evidenced by their admission in discovery that Chief Palmer told Nolan and her mother "that any bills that come out of [Nolan's] visit to her family doctor *should be sent to the Town of Clarksville* and if they sent them to the Police Department the office manager *would forward them to the Town's insurance representative*." Our disposition of Nolan's estoppel claim applies to both defendants.

Finding that the issues required a finder of fact to resolve, the Court of Appeals remanded the case to allow Nolan to argue to the jury that the town and police department should be estopped from invoking the notice requirement of the Indiana Tort Claims Act. My hunch is the jury (if the case does not settle first) is going to find in favor of Miss Nolan.

The town may seek transfer to the Indiana Supreme Court. Given the court's decisions on the ITCA notice requirement over the past three years, it seems highly unlikely that transfer will be granted.

Join us again next time for further discussion of developments in the law.

Sources

- *St. John Town Bd. v. Lambert*, 725 N.E.2d 507, 512–14 (Ind. Ct. App. 2000) (Robb, J.).
- *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972) (Arterburn, C.J.).
- *Schoettmer v. Wright*, 992 N.E.2d 702 (Ind. 2013) (Massa, J.).
- *Nolan v. Clarksville Police Dep't*, ---N.E.3d---, No. 10A04-1510-CT-1824, 2016 Ind. App. LEXIS 308 (Ind. Ct. App. Aug. 23, 2016) (Vaidik, C.J.).
- *Hupp v. Hill*, 576 N.E.2d 1320 (Ind. Ct. App. 1991)
- Indiana Tort Claims Act, codified at IND. CODE chapter 34–13–3.

- 1 William Blackstone, Commentaries *242 (Lewis ed. 1922).
- Colin E. Flora, *Filing Claims Against the State Government*, HOOSIER LITIG. BLOG (Aug. 17, 2012).
- Colin E. Flora, *Indiana Supreme Court Permits Application of Equitable Estoppel Doctrine to Tort Claims Act Case*, HOOSIER LITIG. BLOG (Aug. 30, 2013).
- Colin E. Flora, *Does Adding Inaccurate and Unnecessary Information in Tort Claim Notice Bar Recovery? Indiana Supreme Court Says No*, HOOSIER LITIG. BLOG (June 10, 2013).
- Colin E. Flora, *Indiana Supreme Court: Family of Disabled Student Who Choked to Death at School Will Have Day in Court*, HOOSIER LITIG. BLOG (Oct. 31, 2014).

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