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No. 2D15-3953

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

FANNYE WILSON,

Appellant,

v.

CITY OF TAMPA,

Appellee.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit
in and for Hillsborough County, Florida
L.T. No. 15-CA-2282, Hon. Paul Huey

INITIAL BRIEF OF FANNYE WILSON

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Statutes **Page(s)**

STATEMENT OF THE CASE AND FACTS

Statement Of The Case

While Appellant, Fannye Wilson, was picking up trash in front of her home, a storm drain suddenly and unexpectedly broke. R. 6. She fell into it and suffered serious injuries. R. 6. Appellee, the City of Tampa, and Defendant, Florida Department of Transportation ("FDOT"), were responsible for maintenance and safety of the storm drain. R. 6. To redress her injuries, Ms. Wilson sued the City of Tampa and FDOT.[1] R. 6. Relevant here, the complaint generally alleged Ms. Wilson properly filed notices of claims with the Florida Department of Financial Services and the City of Tampa pursuant to § 768, *Fla. Stat.*, and otherwise complied with all conditions precedent. R. 6, 9-14.

In response, the City of Tampa moved to dismiss, claiming the notice of claims to it failed to comply with § 768.28(6), *Fla. Stat.* R. 24-33. As grounds, the City of Tampa argued the notice of claims served upon it failed to identify (1) a specific address for the storm drain or neighboring property, (2) the precise time of the incident, or (3) Ms. Wilson's sex. R. 25. Moreover, the City of Tampa asked the trial court to dismiss with prejudice, because the three-year timeframe within which to serve a timely notice of claims had already expired. R. 28.

[1] Ms. Wilson subsequently dismissed her claims against FDOT with prejudice. R. 61. FDOT is not a party to this appeal.

The trial court convened a motion hearing, which was transcribed. R. 71-102. At the hearing, the litigants argued whether the notice of claims was sufficient and whether the City of Tampa had waived or was estopped from raising the notice issue. R. 71-102 Thereafter, the trial court entered an order dismissing the complaint (but not the case) with prejudice "because the statutorily required notice provided by Wilson to the City of Tampa is legally insufficient." R. 62. The trial court did not grant leave to amend to allege waiver or estoppel. *See* R. 62.

To preserve her appellate rights, Ms. Wilson timely filed a protective notice of appeal from the interlocutory order. R. 68-70. After this Court relinquished jurisdiction to the trial court, the trial court entered a final order, dismissed the entire case with prejudice, and entered final judgment. App. A.

Ms. Wilson now appeals the trial court's dismissal of her lawsuit with prejudice on the basis that her notice of claims was supposedly insufficient.

Statement Of The Facts

A. The Complaint And Notices Of Claims

In relevant part, the complaint alleged Ms. Wilson had "properly filed the Notice of Claims pursuant to Florida Statutes § 768, which are attached hereto and marked as Exhibit A, and otherwise complied with all conditions precedent." R. 7.

In turn, the notice of claims to the City of Tampa provided: (1) Ms. Wilson's name, her birthday, her social security number, and her lawyer's contact infor-

mation, (2) a description of the occurrence, including its date (but not the precise time), and (3) the street, city, and county where the incident occurred (but not the street's direction or number). R. 13. In describing the occurrence, the notice of claims explained Ms. Wilson "was clearing grass out of the yard, when she stepped back onto a storm drain and the grate broke." R. 13. As a result, her "left leg went down into the sewer, cutting her leg." R. 13. Relatedly, the notice of claims to the Florida Department of Financial Services provided similar information. R. 10-11.

B. The Motion To Dismiss

The City of Tampa filed an amended motion to dismiss. R. 24-28. In the motion, the City of Tampa argued that the notice of claims "served upon the City did not sufficiently provide notice to thoroughly investigate and respond" for only three reasons: it lacked (1) the precise address; (2) the precise time; and (3) the claimant's sex. R. 26. Further, the City of Tampa argued that the trial court needed to dismiss with prejudice, because the three-year timeframe within which to provide notice had already expired, which supposedly rendered any amendment futile. R. 27. Ms. Wilson did not file a written response.

C. The Motion Hearing

At the motion hearing (R. 71-102), the City of Tampa argued the notice of claims was insufficient because it lacked a precise address. R. 71-80. In doing so,

the City of Tampa did not argue the notice of claims was insufficient because it lacked a precise time or the claimant's sex. *See* R. 71-102.

In response, Ms. Wilson pointed out that, in prior correspondence not attached to the complaint, the City of Tampa had refused to respond to her notice of claims because it had claimed she was represented by another attorney. R. 81-82. In fact, Ms. Wilson described extensive correspondence between her counsel and the City of Tampa, none of which was attached to the complaint. R. 83. During this extensive correspondence, the City of Tampa had "never assert[ed] ever that there was some deficiency in the location." R. 81. Accordingly, Ms. Wilson argued that, based on this extensive correspondence, "there's really a good estoppel argument—to try to say that they haven't had a chance to investigate, when they repeatedly, repeatedly refused to deal with us, would be extremely unfair." R. 87.

Additionally, Ms. Wilson pointed out that the notice of claims stated the occurrence had occurred in "the yard," and that she lived at the property. R. 81. Accordingly, her trial counsel explained, "In five minutes I pulled up the Hillsborough County Property Appraiser's record that shows she owns the property at 1420 East Jean Street. Nothing prevented the City from investigating that to ascertain that." R. 81.

Furthermore, Ms. Wilson explained that the storm drain did not have an address, but rather was located directly in front of her property. R. 86.

At the conclusion of the hearing, the trial court mused aloud about the issue and took the motion to dismiss under advisement. R. 96-101.

D. The Order Of Dismissal

Several weeks later, the trial court entered the order of dismissal. R. 62. In the order, the trial court dismissed the complaint with prejudice "because the statutorily required notice provided by Wilson to the City of Tampa is legally insufficient." R. 62. In doing so, the trial court did not grant leave to amend to allege the City of Tampa's waiver of or estoppel from asserting the notice issue. *See* R. 62.

E. The Appeal

Ms. Wilson timely appealed from the interlocutory order of dismissal. R. 68-70. After this Court relinquished jurisdiction, the trial court subsequently entered final judgment. App. A.

SUMMARY OF ARGUMENT

1. The notice of claims provided sufficient notice to the City of Tampa. It provided Ms. Wilson's name, her birthday, her social security number, her lawyer's contact information, a description of the occurrence, its date, and the street, city, and county where it occurred. Although the notice of claims failed to provide the street's direction and number, it does not matter: the City of Tampa is charged with constructive knowledge of public records. Additionally, the identification of Ms. Wilson's sex or the precise time of the occurrence is not necessary.

2. Even if the notice of claims was insufficient, it was an abuse of discretion when the trial court dismissed the complaint with prejudice. Based on counsel's descriptions of the extensive correspondence between Ms. Wilson and the City of Tampa, it appears that Ms. Wilson might have been able to allege the City of Tampa's waiver of or estoppel from asserting the notice issue.

ARGUMENT

I. ISSUE 1: DOES A TIMELY NOTICE OF CLAIMS COMPLY WITH § 768.28(6), *FLA. STAT.*, WHEN IT LISTS (1) THE NAME OF THE CLAIMANT (BUT NOT HER SEX), (2) A DESCRIPTION OF THE OCCURRENCE, INCLUDING ITS DATE (BUT NOT THE PRECISE TIME), AND (3) THE STREET, CITY, AND COUNTY WHERE THE INCIDENT OCCURRED (BUT NOT THE STREET'S DIRECTION OR NUMBER)?

The Court should reverse the dismissal of Ms. Wilson's lawsuit because her notice of claims was legally sufficient.

Standard Of Review

"'This court reviews an order granting a motion to dismiss de novo.'" *Reyes* v. *Roush*, 99 So. 3d 586, 589 (Fla. 2d DCA 2012) (citation omitted). In doing so, this Court "give[s] no deference to the trial court's findings." *Id.* "Statutory interpretation is a question of law subject to de novo review." *Hilton* v. *State*, 961 So. 2d 284, 288 (Fla. 2007).

Merits

A. To Sue The City Of Tampa, Ms. Wilson Needed To Present Her Claim In Writing To It, As Required By § 768.28, *Fla. Stat.*

At common law, municipalities were entitled to sovereign immunity on a "confusing" and "inconsistent" basis. *Cauley* v. *City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981). But the Legislature waived municipal sovereign immunity to a significant extent in § 768.28, *Fla. Stat.* In relevant part, the statute provides:

> An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant *presents the claim in writing* to the appropriate agency, and also, except as to any claim against a municipality or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing . . . .

§ 768.28(6)(a), *Fla. Stat.* (emphasis added).

As this Court has recognized, however, the Legislature, in its wisdom, did not see fit to describe what precisely is required to present a claim in writing. *See, e.g.*, *Pearlstein* v. *Malunney*, 500 So. 2d 585, 587 (Fla. 2d DCA 1986) ("the statute does not specify any particular form for the notice beyond the requirement that it be in writing").[2] Put otherwise, although "strict compliance" with § 768.28(6)(a),

[2] *Accord Aitcheson* v. *Fla. Dep't of Highway Safety & Motor Vehicles*, 117 So. 3d 854, 856 (Fla. 4th DCA 2013) ("the form of the notice is not specified"); *Metropolitan Dade County* v. *Coats*, 559 So. 2d 71, 72 (Fla. 3d DCA 1990) ("the statute does not prescribe any particular form for furnishing notice").

Fla. Stat., "is required," the "'form of the notice is not specified.'" *Vargas* v. *City of Fort Myers*, 137 So. 3d 1031, 1034 (Fla. 2d DCA 2014).

Unfortunately, "[t]he cases to date yield no talismanic rule as to the specificity of the notice." *Id.* Instead, the only requirements are that notices of claims "'must be sufficiently direct and specific to reasonably put the department on notice of the existence of the claim and demand,'" "must be written," and must "'sufficiently describe[] or identif[y] the occurrence so that the agency may investigate it.'" *Id.* (quoting *LaRiviere* v. *S. Broward Hosp. Dist.*, 889 So. 2d 972, 974 (Fla. 4th DCA 2004), and *Aitcheson* v. *Fla. Dep't of Highway Safety & Motor Vehicles*, 117 So. 3d 854, 856 (Fla. 4th DCA 2013)).

Notices of claims have been held to be sufficient even when they failed to (1) provide "the precise location of the incident," *Otero* v. *City of Hialeah*, 731 So. 2d 116, 117 (Fla. 3d DCA 1999) (reversing grant of summary judgment to municipality (citing *Magee* v. *City of Jacksonville*, 87 So. 2d 589, 591-92 (Fla. 1956))), (2) describe the occurrence accurately, *see Aitcheson*, 117 So. 3d at 857 ("[a]lthough the notices . . . state that the injury was suffered in an automobile accident, rather than a slip and fall, we find that the notices nevertheless provided sufficient information for the agencies to investigate the claim"), or (3) include a claimant's name, *see Franklin* v. *Palm Beach County*, 534 So. 2d 828, 829 (Fla.

4th DCA 1988) (reversing dismissal because, despite notice's omission of claimant's name, "the purpose of the notice had been fulfilled").

In that regard, notices of claims provide "sufficient" information whenever they "allow the [agency] to investigate, *request more information*, and make informed decisions regarding her claim." *Otero*, 731 So. 2d at 117 (emphasis added). In fact, this Court has at least twice found a notice of claims sufficient when it did nothing more than identify the claimant, the date of the occurrence, and the agency against which the claimant sought to pursue relief. *See Brower* v. *State Dep't of Natural Res.*, 698 So. 2d 568, 569-70 (Fla. 2d DCA 1997); *Williams* v. *Henderson*, 687 So. 2d 838, 839 (Fla. 2d DCA 1996); *see also Smart* v. *Monge*, 667 So. 2d 957, 959 (Fla. 2d DCA 1996) (dictum) (explaining notice of claims that identified claimant's death, claim to be pursued, and claimant's lawyer "would have satisfied the statute").

B. The Notice Of Claims Complied With § 768.28, *Fla. Stat.*

The notice of claims was sufficient: it allowed the City of Tampa to investigate, request more information, and make informed decisions regarding her claim.

As an initial matter, the notice of claims identified Ms. Wilson's name, the date of the occurrence, how it occurred, and the street where it occurred. The City of Tampa's argument that Ms. Wilson needed to provide the number and direction of the street is misplaced, because it had constructive knowledge that Ms. Wilson

resided at 1420 East Jean Street. Specifically, because Ms. Wilson's address was contained in a public record held by the Hillsborough County Property Appraiser,[3] the City of Tampa had constructive knowledge of that information. *See U.S. Bank, N.A.* v. *Bevans*, 138 So. 3d 1185, 1188 (Fla. 3d DCA 2014) ("Striding had at least constructive knowledge of the Bank's mortgage when it purchased the property because the mortgage was recorded in the public records"); *Int'l Harvester Credit Corp.* v. *Am. Nat'l Bank*, 296 So. 2d 32, 43 (Fla. 1974) ("creditor had constructive knowledge, from the public records of the debtor's county of residence, that there was a security interest which had priority to the one it was buying"); *see also Henderson* v. *Florida*, 745 So. 2d 319, 323 (Fla. 1999) ("prosecutors are imputed with 'constructive knowledge and possession of evidence' held by other departments of the executive branch of Florida's government for discovery purposes").

Furthermore, the City of Tampa had implied notice that her injury occurred while she was working in the yard in front of her home. *See Symons Corp.* v. *Tartan-Lavers Delray Beach, Inc.*, 456 So. 2d 1254, 1257 (Fla. 4th DCA 1984) (implied notice "includes notice inferred from the fact that a person had the means of knowledge, which it was his duty to use"). Specifically, the notice of claims explained that the occurrence took place while Ms. Wilson "was clearing grass out of

[3] *See* R. 81 ("In five minutes I pulled up the Hillsborough County Property Appraiser's record that shows she owns the property at 1420 East Jean Street. Nothing prevented the City from investigating that to ascertain that.").

the yard." R. 13. If the notice of claims had meant Ms. Wilson was working in someone else's yard instead of her own, *see* R. 98 ("for all we know Ms. Wilson could be a landscaper"), it would have said "a yard" instead of "the yard." R. 13 Any contrary interpretation would be an unnatural reading of the language in the notice. *Cf. Hand* v. *Grow Constr., Inc.*, 983 So. 2d 684, 688 (Fla. 1st DCA 2008) (adopting "natural reading" of contract).

Moreover, it was impossible for Ms. Wilson to provide the precise address, because the storm drain has no address. *Cf. Jordan Chapel Freewill Baptist Church* v. *Dade County*, 334 So. 2d 661, 664 (Fla. 3d DCA 1976) ("Courts are therefore concerned with whether compliance with a County ordinance requires a violation of a state statute or renders compliance with a state statute *impossible*." (emphasis added)).

Finally, Ms. Wilson has found no Florida authority to support the City of Tampa's proposition that a notice of claims must include the claimant's sex and the precise time of the occurrence. To the contrary, notices of claims have been held to be sufficient when they failed to describe the occurrence accurately, *Aitcheson*, 117 So. 3d at 857, or omitted a claimant's name entirely (never mind his or her sex), *Franklin*, 534 So. 2d at 829.

In short, the notice of claims gave the City of Tampa every opportunity to "investigate, request more information, and make informed decisions regarding her

claim" arising from an occurrence on a specific date in the yard of her home at 1420 East Jean Street. *Otero*, 731 So. 2d at 117. Indeed, even if the City of Tampa had no constructive knowledge of Ms. Wilson's address or implied notice she was working in her own yard, nothing prevented it from "request[ing] more information" from her current trial counsel. *Id.* Accordingly, the notice of claims was sufficient, and it was error for the trial court to dismiss the complaint.

II. ISSUE 2: IF THE NOTICE OF CLAIMS WAS INSUFFICIENT, DID THE TRIAL COURT STILL ABUSE ITS DISCRETION WHEN IT DISMISSED THE COMPLAINT WITH PREJUDICE, WHICH DEPRIVED MS. WILSON OF THE OPPORTUNITY TO AMEND TO ALLEGE WAIVER OR ESTOPPEL?

Even if the notice of claims was insufficient, the trial court abused it discretion when it dismissed the complaint with prejudice and deprived Ms. Wilson of any opportunity to amend to allege the City of Tampa had waived or was estopped from demanding compliance with the notice provisions of § 768.28, *Fla. Stat.*

Standard Of Review

"Unless it appears that the privilege to amend has been abused or that the complaint is clearly unamendable, it is an abuse of discretion to dismiss a complaint with prejudice." *Hamide* v. *State Dep't of Corr.*, 548 So. 2d 877, 878 (Fla. 1st DCA 1989); *accord Countryside Christian Center, Inc.* v. *Clearwater*, 542 So. 2d 1037, 1038 (Fla. 2d DCA 1989).

Merits

When a trial court dismisses a complaint with prejudice for failure to comply with the notice provisions of § 768.28(6), *Fla. Stat.*, but the plaintiffs "may yet be able to state a basis for waiver and estoppel," a dismissal without leave to amend is an abuse of discretion. *Brown* v. *Dep't of Corr.*, 701 So. 2d 1211, 1213 (Fla. 1st DCA 1997). Moreover, if Ms. Wilson could amend and make sufficient waiver or estoppel allegations, "any inquiry into the sufficiency of the evidence to support the allegations of waiver and estoppel should be by motion for summary judgment rather than motion to dismiss." *Brown*, 701 So. 2d at 1214.

At the motion hearing, the litigants described extensive correspondence between Ms. Wilson and the City of Tampa. R. 81-89. During that correspondence, the City of Tampa had refused to respond to Ms. Wilson's notice of claims because it claimed another attorney represented her. R. 81-82. In doing so, the City of Tampa had "never assert[ed] ever that there was some deficiency in the location" provided in the notice of claims. R. 81. Accordingly, Ms. Wilson argued that, based on this extensive correspondence, "there's really a good estoppel argument—to try to say that they haven't had a chance to investigate, when they repeatedly, repeatedly refused to deal with us, would be extremely unfair." R. 87.

Indeed, on similar facts, this Court and several others have held sovereigns had waived or were estopped from demanding compliance with the notice provi-

sions of § 768.28(6), *Fla. Stat. E.g.*, *Vondrasek* v. *City of St. Petersburg*, 777 So. 2d 989, 990-91 (Fla. 2d DCA 2000) ("We conclude that the City has lost its right to complain about the adequacy of the original notice in this case."); *Bryant* v. *Duval County Hosp. Auth.*, 502 So. 2d 459, 462 (Fla. 1st DCA 1986) (sovereign's "conduct in failing to plead the notice requirement as a defense while at the same time affirmatively asserting entitlement to the section 768.28 limitation of liability, constitutes a waiver of the intention to rely on the notice provision"); *Meli* v. *Dade County School Bd.*, 490 So. 2d 120, 122 (Fla. 3d DCA 1986) (reversing summary judgment because there was a genuine dispute of fact whether sovereign waived notice).

Although that correspondence is not part of the record on appeal, it is possible that, based on it, Ms. Wilson might be able to allege sufficient facts to establish waiver of or estoppel from asserting the notice provisions of § 768.28(6), *Fla. Stat.* Accordingly, it was an abuse of discretion for the trial court to dismiss the complaint with prejudice, thereby depriving Ms. Wilson of that opportunity.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment and remand for further proceedings.

Respectfully submitted,

/s/ Thomas Burns

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19, 2016, I electronically served the following via the Florida e-portal: Kenneth W. Mastrilli (PBBLaw@lycos.com), The Pawlowski/Mastrilli Law Group, 1718 East 7th Avenue, Suite 201, Tampa, FL 33605; C. Hunter Rawls (hrawls@fulmerleroy.com), Fulmer Leroy Albee, PLC, 605 South Boulevard, Tampa, FL 33606; and Kristin Serafin Ottinger (Kristin.Serafin@tampagov.net and Imelda.Higgins@tampagov.net), City of Tampa, 315 East Kennedy Boulevard, Tampa, FL 33602.

January 19, 2016 /s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

January 19, 2016 /s/ Thomas Burns
Thomas A. Burns