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

REPLY BRIEF OF FANNYE WILSON

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I. CONTRARY TO THE CITY OF TAMPA'S ARGUMENTS, MS. WILSON'S NOTICE OF CLAIMS COMPLIED WITH § 768.28(6), *FLA. STAT.*

In its answer brief, the City of Tampa fails to establish Ms. Wilson's notice of claims was legally insufficient. The Court should therefore reverse the dismissal of Ms. Wilson's lawsuit.

A. The City Of Tampa Does Not Address Unfavorable Case Law Or Whether It Had Constructive Knowledge Or Implied Notice Where The Incident Occurred

The City of Tampa's answer brief is most notable for that which it declines to address. First, the City of Tampa does not address the Third District's holding in *Otero* v. *City of Hialeah* that a notice of claims was sufficient where it did not provide "the precise location of the incident." 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))), or the Fourth District's holding in *Franklin* v. *Palm Beach County* that a notice of claims was sufficient despite omitting a claimant's name because "the purpose of the notice had been fulfilled," 534 So. 2d 828, 829 (Fla. 4th DCA 1988). Ultimately, *Otero* and *Franklin* alone are fatal to the City of Tampa's argument that Ms. Wilson needed to provide the precise address where the incident occurred.[1]

[1] The City of Tampa appears to have abandoned its argument that a notice of claims must include the claimant's sex and the precise time of the occurrence.

Second, the City of Tampa does not address whether it had constructive knowledge or implied notice that Ms. Wilson's accident occurred at her home on 1420 East Jean Street. *See* Initial Br. 9-11. Instead, the City of Tampa argues § 768.28, *Fla. Stat.*, does not obligate it to search public records, and the statute is strictly construed. *See* Answer Br. 8-9.

In so arguing, the City of Tampa asks and answers the wrong question: whether or not it chooses to search public records, it is the common law, not the statute, that charges the City of Tampa with such knowledge. *See Sutherland* v. *Pell*, 738 So. 2d 1016, 1017-18 (Fla. 2d DCA 1999) (constructive knowledge is a standard derived from common law); *see also U.S. Bank, N.A.* v. *Bevans*, 138 So. 3d 1185, 1188 (Fla. 3d DCA 2014) (imputing constructive knowledge through public records); *Int'l Harvester Credit Corp.* v. *Am. Nat'l Bank*, 296 So. 2d 32, 43 (Fla. 1974) (same); *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"). It is axiomatic that "[s]tatutes in derogation of the common law should be strictly construed, and should not be interpreted to displace the common law further than is necessary." *Tillman* v. *State*, 934 So. 2d 1263, 1269 (Fla. 2006). For that reason, § 768.28, *Fla. Stat.*'s silence as to the City of Tampa's constructive knowledge or implied notice is a point against it, not for it.

B. The City Of Tampa Fails To Distinguish Other Case Law

The City of Tampa's remaining arguments concern its attempts to distinguish *Vargas* v. *City of Fort Myers*, 137 So. 3d 1031 (Fla. 2d DCA 2014), *Brower* v. *State Dep't of Natural Res.*, 698 So. 2d 568 (Fla. 2d DCA 1997), *Williams* v. *Henderson*, 687 So. 2d 838 (Fla. 2d DCA 1996), and *Aitcheson* v. *Fla. Dep't of Highway Safety & Motor Vehicles*, 117 So. 3d 854 (Fla. 4th DCA 2013). *See* Answer Br. 7 nn.5-7.

First, the City of Tampa claims *Vargas* is distinguishable because it involved an accident with a municipal employee. Answer Br. 7 n.5. It is difficult to understand why that fact would make any difference, however, because that is not what this Court relied on. Instead, this Court held the notice of claims was sufficient merely because it "described the accident, Vargas's injuries, the amount of her medical bills, and that a demand was being made." 137 So. 3d at 1034.

Second, the City of Tampa claims *Brower* is distinguishable because the notice of claims cited an agency file number and prior conversation between counsel, which "suggest[ed]" the agency already knew about and was involved with the incident. Answer Br. 7 n.6. But that would be an odd suggestion to read into *Brower*, because if that were true, one would expect the plaintiff's lawyer and this Court would have addressed such actual knowledge, involvement, and oral communications in the summary judgment papers and appellate briefs.

Third, the City of Tampa claims *Williams* is distinguishable because, it speculates, "in theory, the incident could be identified through internal arrest records most-likely maintained by the [sheriff's] department." Answer Br. 7 n.5. Again, the City of Tampa is mistaken because this Court did not rely on any such records in ruling the notice of claims was sufficient.

Fourth, the City of Tampa claims *Aitcheson* is distinguishable because, despite describing the incident incorrectly, it provided the correct date and location of the event. *See* Answer Br. 7 n.7. But *Aitcheson* did not hold that the irreducible minimum information a notice of claims must provide is the date and precise location of the occurrence.

* * *

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. And 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. ALTERNATIVELY, THE TRIAL COURT ERRED WHEN IT RENDERED ITS DISMISSAL WITH PREJUDICE

Even if the notice of claims was insufficient, the trial court erred when it rendered its dismissal of the complaint with prejudice, which deprived Ms. Wilson of any opportunity to amend to allege the City of Tampa had waived or was estopped from demanding compliance with § 768.28, *Fla. Stat.*'s notice provisions.

A. Ms. Wilson And The City Of Tampa Agree The Standard Of Review Is De Novo

Ms. Wilson agrees with the City of Tampa (Answer Br. 11) that the decision whether to render dismissal of a complaint with prejudice is reviewed de novo, not for abuse of discretion. *Tsafatinos* v. *Family Dollar Stores of Fla.*, 116 So. 3d 576, 579, 582 (Fla. 2d DCA 2013) (reviewing de novo and reversing "dismissal of the breach of contract claim to the extent that such dismissal is with prejudice"). In applying de novo review, "no deference is given to the judgment of the lower courts." *D'Angelo* v. *Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003).

B. Ms. Wilson Also Agrees With The City Of Tampa That A Notice Of Claims Must Ordinarily Be Presented Timely Or Amendment Would Be Futile

Additionally, Ms. Wilson also agrees with the City of Tampa (Answer Br. 12-13) that a notice of claims must ordinarily be presented within three years, failing which a complaint should usually be dismissed with prejudice because amendment would be futile. *E.g.*, § 768.28(6)(a), *Fla. Stat.* (three years); *Brown* v.

Dep't of Corr., 701 So. 2d 1211, 1213 (Fla. 1st DCA 1997) ("Absent allegations or evidence of waiver of the notice or estoppel on the part of the State or other entity involved, 'where the time for such notice has expired so that it is apparent that the plaintiff cannot fulfill the requirement, the trial court has no alternative but to dismiss the complaint with prejudice.'" (citation omitted)).

C. Nevertheless, There Is An Ample Record Basis Upon Which To Conclude That Ms. Wilson Could Allege The City Of Tampa's Actions Would Have Led A Reasonable Person To Conclude That Further Notice Was Unnecessary

Although the City of Tampa contends there is a three-prong test for waiver or estoppel (Answer Br. 15), in reality the test is much simpler: it is simply whether the City of Tampa's actions "would have led a reasonable person to conclude that further notice was unnecessary." *Brown*, 701 So. 2d at 1213; *accord Vondrasek* v. *City of St. Petersburg*, 777 So. 2d 989, 991 (Fla. 2d DCA 2000) ("As many courts have emphasized, the notice is not intended to be a special 'gotcha' that allows governmental entities to sandbag plaintiffs; it functions as a tool to allow these entities to identify and settle claims on a timely basis without the expense of extended litigation."). Here, there is an ample record basis upon which to conclude Ms. Wilson could meet that standard.

In disputing this, the City of Tampa argues Ms. Wilson's argument was "not properly raised or developed at the motion hearing" and is substantively incorrect. Answer Br. 13. Both points are mistaken.

1. Ms. Wilson Preserved Her Waiver And Estoppel Argument

Ms. Wilson properly raised and developed her waiver and estoppel argument at the motion hearing.

Appellate preservation requires a "timely, contemporaneous objection" that "state[s] a legal ground" that is the "specific contention" asserted on appeal. *Aills* v. *Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010). "While no magic words are required to make a proper objection," the "concern articulated in the objection must be sufficiently specific to inform the court of the perceived error." *Id.* at 1109.

At the motion hearing, Ms. Wilson described extensive correspondence between her counsel and the City of Tampa. 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. Given this trial presentation, there is no question Ms. Wilson preserved her argument under *Aills*.

Moreover, Ms. Wilson also sufficiently developed the record in support of her argument. Of course, it is an appellant's duty to perfect the record on appeal. *See Applegate* v. *Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). Ms. Wilson did so here. As an initial matter, Ms. Wilson had no basis to file or in-

troduce the correspondence between her and the City of Tampa into evidence as exhibits, because the motion hearing (R. 71-102) was set on a motion to dismiss, not a motion for summary judgment or other evidentiary hearing. *See* R. 24-33, 71-102. Nevertheless, Ms. Wilson adequately described that extensive correspondence at the hearing. R. 81-87. Accordingly, the record is sufficient to allow Ms. Wilson an opportunity to amend and allege waiver and estoppel.

Importantly, 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. That is the appropriate procedure to follow on remand.

2. The City Of Tampa Cannot Distinguish Cases In Which Sovereigns Waived Or Were Estopped From Demanding Compliance With § 768.28(6), *Fla. Stat.*

As a final backstop, the City of Tampa attempts to distinguish cases in which sovereigns waived or were estopped from demanding compliance with § 768.28(6), *Fla. Stat.*,[2] because they do not involve precisely the same fact patterns. *See* Answer Br. 15 nn.11-13.

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[2] *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

But those efforts fall short because the City of Tampa is missing the forest for the trees. The point is not that the facts in those cases are identical. Rather, the point is that the facts in those cases show different ways in which sovereigns sandbagged plaintiffs from providing further notice. Here, the City of Tampa lulled Ms. Wilson into believing her notice was sufficient when it refused to deal with her current counsel until after the time to provide the notice it now wants had expired. R. 81-87. As such, the City of Tampa's actions "would have led a reasonable person to conclude that further notice was unnecessary." *Brown*, 701 So. 2d at 1213.

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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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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 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.

May 3, 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.

May 3, 2016

/s/ Thomas Burns
Thomas A. Burns