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IN THE
COURT OF APPEALS OF INDIANA

Clarence Lowe,

Appellant-Plaintiff,

v.

Northern Indiana Commuter Transportation District,

Appellee-Defendant.

March 2, 2021

Court of Appeals Case No. 20A-CT-1584

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No. 64D02-1901-CT-682

Bailey, Judge.

Case Summary

[1] Clarence Lowe ("Lowe") sued his employer, Northern Indiana Commuter Transportation District ("NICTD"), under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et. seq., which provides a federal cause of action for railroad employees injured as a result of negligence. Lowe gave notice of his claim to the Indiana Attorney General 263 days after his alleged injury.[1] However, NICTD is a political subdivision, and the Indiana Tort Claims Act ("ITCA") requires service upon the governing body and the Indiana political subdivision risk management commission within 180 days of loss.[2] The trial court granted summary judgment to NICTD, concluding that a FELA claim is a tort claim; NICTD – although an arm of the state for Eleventh Amendment sovereign immunity purposes – is a political subdivision for tort claims purposes; Eleventh Amendment sovereignty is waived subject to compliance with ITCA; and Lowe's failure to timely provide a tort claims notice barred his claim. On appeal, Lowe presents the issue of whether summary judgment was improvidently granted, because he substantially complied with, or is not required to comply with, ITCA. We affirm.

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[1] The timing and recipient were in accordance with Indiana Code Section 34-13-3-6, which provides in pertinent part: "Except as provided in sections 7 and 9 of this chapter, a claim against the state is barred unless notice is filed with the attorney general or the state agency involved within two hundred seventy (270) days after the loss occurs."

[2] Indiana Code Section 34-13-3-8 provides in pertinent part: "Except as provided in section 9 of this chapter, a claim against a political subdivision is barred unless notice is filed with: (1) the governing body of that political subdivision; and (2) the Indiana political subdivision risk management commission created under IC 27-1-29[.]" Notice must be provided within 180 days of the loss. *Id.*

Facts and Procedural History

[2] NICTD operates a commuter train line from South Bend, Indiana to Millennium Station in Chicago, Illinois. On January 12, 2018, Lowe was working on a portion of the train track in Chicago when he allegedly sustained injuries to his shoulders. On April 3, 2018, in Cook County, Illinois, Lowe filed a FELA lawsuit against NICTD. On October 2, 2018, 263 days after Lowe's injury, Lowe served a Notice of Tort Claim on the Indiana Attorney General. On December 18, 2018, the Illinois lawsuit was dismissed with prejudice on Eleventh Amendment sovereign immunity grounds. Lowe did not appeal the dismissal.

[3] On January 18, 2019, Lowe filed a complaint in Porter County, Indiana. He alleged that NICTD failed to provide proper hydraulic equipment and he had been injured while manually hammering spikes into frozen railroad ties. The Indiana Attorney General disclaimed an interest in the lawsuit. On October 18, 2019, NICTD filed a motion for summary judgment.

[4] On July 28, 2020, the trial court conducted a hearing at which argument of counsel was heard. NICTD argued that, for sovereign immunity purposes, it was to be treated as an arm of the State, having immunity from a private citizen lawsuit in federal court or the court of another state. NICTD conceded that, in the enactment of ITCA, Indiana had waived that immunity to the extent that NICTD could be sued in Indiana subject to compliance with ITCA. According to NICTD, Lowe's FELA suit was subject to dismissal for failure to comply

with ITCA's 180-day notice requirement for suits against a political subdivision.

[5] Lowe argued that NICTD is "either a state agency or political subdivision." (Tr. Vol. II, pg. 21.) He further argued that, if NICTD is a state agency, the 270-day notice requirement was satisfied, and, if NICTD is instead a political subdivision "they lose their sovereign immunity" and the terms of ITCA could not shield against a FELA lawsuit or impose a 180-day restriction. (*Id.* at 22.) Lowe submitted a memorandum of law in which he contended that "the Supremacy Clause prevents application of Indiana's Tort Claims Act for a FELA suit," (App. Vol. II, pg. 101), and that "the Act as applied discriminates against a federally created right." (*Id.* at 102.)

[6] On July 31, 2020, the trial court granted summary judgment to NICTD. In relevant part, the trial court concluded that NICTD is statutorily defined as a political subdivision, ITCA requires the filing of a notice of a tort claim within 180 days of loss as a prerequisite to suit against a political subdivision, and ITCA is not unconstitutional as applied to Lowe. The trial court's order stated that *Januchowski v. N. Ind. Commuter Transp. Dist.*, 905 N.E.2d 1041 (Ind. Ct. App. 2009) (recognizing that the 180-day notice requirement was applicable in a suit against NICTD) was controlling authority. The order additionally stated that Lowe "simply argues that this Court should ignore controlling precedent and opinions issued by the Indiana Court of Appeals." (App. Vol. II, pg. 10.) Lowe now appeals.

Discussion and Decision

Standard of Review

[7] A trial court's order granting summary judgment comes to us "cloaked with a presumption of validity." *DiMaggio v. Rosario*, 52 N.E.3d 896, 903 (Ind. Ct. App. 2016). A party appealing from an order granting summary judgment has the burden of persuading the appellate tribunal that the decision was erroneous. *Januchowski*, 905 N.E.2d at 1045. However, where the facts are undisputed and the issue presented is a pure question of law, we review the matter de novo. *Id.* We apply the same standard as the trial court, that is, summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

Analysis

[8] As best we can discern Lowe's appellate arguments, which significantly expand upon his more concise arguments at the summary judgment hearing,[3] Lowe's primary contentions are that he complied with ITCA by giving notice to the Attorney General within 270 days of his injury or, alternatively, he is not required to comply with ITCA because (1) the State of Indiana intended a blanket waiver of its sovereign immunity with respect to FELA claims or (2) a

[3] NICTD contends that Lowe has waived certain arguments for failure to present them to the trial court. However, our review of the record reveals that Lowe briefly raised in the trial court each of those contentions for which he now presents expanded argument.

political subdivision such as NICTD lacks sovereign immunity and may not invoke a term of ITCA on grounds that it represents a qualified waiver.[4]

[9] The liability of a common carrier railroad engaged in interstate commerce for injuries to its employees is addressed by FELA, 45 U.S.C. § 51, *et. seq.*, enacted under the Commerce Clause of the United States Constitution.

> Every common carrier railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of

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[4] Lowe articulates some additional contentions, which we do not address at length, due to the lack of development of the issues and insufficient cogent reasoning. For example, he baldly asserts that enforcing the 180-day notice requirement "punishes him for exercising rights afforded by Congress" and "there is no rational basis to treat NICTD differently from the State of Indiana." Appellant's Brief at 17-18. He asserts, without developing a corresponding argument, that "the Supremacy Clause dictates that Indiana's Tort Claims Act cannot abrogate a federal law." *Id*. at 45.

He also claims, "In amending [ITCA], the legislature explicitly chose to protect the employees of commuter railroad transportation systems." Appellant's Brief at 21. He quotes the following language from Indiana Code Section 8-5-15-17:

> If the district acquires a commuter railroad transportation system and proceeds to operate the system directly, by management contract, or by lease under this chapter, the employees of the system shall be protected as follows: …
>
> (3) The board shall act in such a manner as to insure the continuing applicability to affected railroad employees of the provisions of all federal statutes applicable to them prior to April 1, 1984.

However, he does not claim to be an "affected railroad employee," i.e., an "employee of the system" acquired by NICTD, with a statutory right to "continuing applicability … of all federal statute applicable to [him] prior to April 1, 1984. *See id.*

> kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
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> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C.A. § 51. When a FELA claim is brought in state court, federal law applies to the substance of the claims, and the law of the forum controls with regard to questions of evidence and procedure. *Eversole v. Consolidated Rail Corp.*, 551 N.E.2d 846, 854 (Ind. Ct. App. 1990), *trans. denied*.

[10] "[T]he [Eleventh] Amendment reflects the constitutional principle that a State may not be sued in federal court without its consent whether the suit is brought by a foreign citizen, a citizen of another state, or the state's own citizens." *Montgomery v. Bd. of Trs. of Purdue Univ.*, 849 N.E.2d 1120, 1124 (Ind. 2006). "The powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. 706, 712 (1999). Thus, when a FELA claim proceeds in state court, "issues of sovereign immunity come into play." *Januchowski*, 905 N.E.2d at 1046. A state may only

be sued in its own state courts where it has waived sovereign immunity through a clear declaration. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

[11] In 1972, the Indiana Supreme Court abolished the doctrine of common law sovereign immunity in the State of Indiana, with some limited exceptions, deferring to the legislature to consider which types of governmental conduct would result in immunity from liability. *See Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733, 737 (1972). Then, in 1974, the Indiana Legislature enacted ITCA, which provides that governmental entities are subject to suit in Indiana state courts[5] for their torts, with certain enumerated exceptions. *See* Ind. Code § 34-13-3-3.

[12] "[A] State may prescribe the terms and conditions on which it consents to be sued." *Oshinski v. N. Indiana Commuter Transp. Dist.*, 843 N.E.2d 536, 543-44 (Ind. Ct. App. 2006). The *Oshinski* Court considered whether a FELA claim was a tort claim subject to ITCA. The Court observed that, although FELA claims are not explicitly defined as negligence claims, federal case law characterizes them as such, requiring a plaintiff to prove foreseeability, duty, breach, and causation. *Id.* at 544. "FELA actions are tort actions, [and] we hold that FELA suits against the State filed in Indiana courts are properly

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[5] With respect to courts other than Indiana courts, Indiana Code Section 34-13-3-5(f) provides: "This chapter shall not be construed as: (1) a waiver of the eleventh amendment to the Constitution of the United States; (2) consent by the state of Indiana or its employees to be sued in any federal court; or (3) consent to be sued in any state court beyond the boundaries of Indiana."

limited by the qualifications set forth in ITCA." *Id.* That is, the State had consented to be sued to the extent permitted by ITCA, but the waiver of sovereign immunity is not absolute, and an employee bringing suit under FELA against a governmental entity in Indiana must comply with ITCA. *Id.* at 545.

[13] Among the provisions of ITCA is the requirement of giving notice within 180 days of loss as a prerequisite to a lawsuit against a political subdivision. Lowe concedes, as he must, that Indiana law considers NICTD to be a political subdivision. Pursuant to Indiana Code Section 8-5-15-1:

> 'Commuter transportation system' means any rail common carrier of passengers for hire, the line, route, road, or right-of-way of which crosses one (1) or more county boundaries and one (1) or more boundaries of the state and serves residents in more than one (1) county. This system is limited to commuter passenger railroads.

[14] Indiana Code Section 8-5-15-2(b) provides: "A district shall be a distinct municipal corporation and shall bear a name including the words "commuter transportation district." The definition of "political subdivision" includes municipal corporations, I.C. § 34-6-2-110, while the definition of "state agency" for purposes of the Act specifically excludes political subdivisions, I.C. § 34-6-2-141.

[15] NICTD is supervised and managed by a board of trustees, consisting of the commissioner and four members appointed by the Governor. I.C. § 8-5-15-3. The board has power to, among other things, receive and apply for federal, state, municipal, or county funds, expend funds, acquire assets, issue revenue

bonds, and employ persons. I.C. § 8-5-15-5. Subsection (6) provides that, "as a municipal corporation" a district may "sue and be sued." "By availing the liability protections under the Tort Claims Act to commuter transportation districts created under the Transportation Act, the legislature furthered its overall purpose to preserve the operation of interstate commuter railways by protecting the financial integrity of counties served by a commuter railway." *In re Train Collision at Gary, Ind. on Jan. 18, 1993*, 654 N.E.2d 1137, 1146 (Ind. Ct. App. 1995), *trans. denied*.

[16] Lowe contends that his claim is not subject to dismissal for non-compliance with ITCA, notwithstanding the uncontested facts that NICTD is a political subdivision and its governing body and the risk management commissioner were not provided notice of Lowe's claim within 180 days of loss. He articulates several reasons for that position.

[17] Substantial Compliance. Lowe observes that two Indiana Court of Appeals cases, *Oshinksi, supra,* and *Rudnick v. N. Ind. Commuter Transp. Dist.*, 892 N.E.2d 204 (Ind. Ct. App. 2008), *trans. denied*, employed language consistent with NICTD's identity as a state agency (in the context of considering whether ITCA required notice and determining substantial compliance with notice, respectively). Therefore, according to Lowe, when he provided notice to the Attorney General within 270 days he, "at the very minimum substantially complied" with ITCA. Appellant's Brief at 17. Indiana has recognized the doctrine of "substantial compliance" under ITCA. *See City of Indianapolis v. Cox*, 20 N.E.3d 201, 208 n.4 (Ind. Ct. App. 2014), *trans. denied.* However, as Lowe

conceded at the hearing, "substantial compliance" refers to the content of a notice and not the date of service.

[18] Blanket Consent to Suit. Lowe asserts that "as a matter of *stare decisis* and presumed historical fact, the State of Indiana consented to be sued by injured workers covered by FELA, at least in its own courts, and it cannot upset [his] federally created right through local procedures." Appellant's Brief at 19. To the extent that he suggests Indiana has given consent for FELA claims to proceed without limitation, this argument of blanket consent was rejected in *Oshinski*:

> Oshinksi argues the trial court erred by granting NICTD's motion for summary judgment because he was not required to comply with the notice provision of ITCA. … In the context of this case, the term "blanket consent" refers to Indiana's complete, "no strings attached" consent to be sued in its own state courts. Here, that means consent to be sued without regard for ITCA. "Qualified consent," for purposes of this opinion, means limited consent with "strings" – here, ITCA compliance. … We find a brief history of the United State's Supreme Court's Eleventh Amendment jurisprudence instructive before analyzing further the question of blanket consent.
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> During the last several decades, the Supreme Court's Eleventh Amendment[6] jurisprudence has undergone a significant

[6] The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." As a matter of semantics, we note that it is common to refer to the states' immunity from suit in their own courts as "Eleventh Amendment immunity" even though, "The phrase is convenient shorthand but something of a

evolution. In 1964 the Court decided *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964), a FELA case which set out a two-part holding: [permitting employees of a railroad owned and operated by Alabama to bring a FELA action and holding that Alabama had waived its immunity from FELA suit even though Alabama law expressly disavowed any such waiver]. …Over the next several decades, the Court began to chip away at *Parden*, limiting its holding, and, in *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 107 S. Ct. 2941, 97 L.Ed.2d 389 (1987), it expressly overruled *Parden's* constructive waiver holding. … In *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 112 S. Ct. 560, 116 L.Ed.2d 560 (1991), the Court again addressed the states' sovereign immunity in the context of a FELA claim. Relying on *stare decisis*, *Hilton* held that FELA creates a cause of action against a state-owned railroad enforceable in state court, thus partially reaffirming *Parden*. …

In explaining its decision, the *Hilton* Court noted, "Workers' compensation laws in many States specifically exclude railroad workers from their coverage because of the assumption that FELA provides adequate protection for those workers." … The Court then specifically noted in a string cite that Indiana exempts railroad workers from recovering under state worker's compensation laws. … It is this statement from *Hilton* on which Oshinski bases his blanket consent argument.

In *College Savings Bank*, the Court spoke out more forcefully against *Parden* and seemingly drove the final nail in the sovereign immunity coffin of *Parden* by expressly overruling that decision. … On the same day that the Court decided *College Savings Bank*, however, it also decided *Alden v. Maine*, 527 U.S. 706, 119 S.Ct.

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misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 119 S.Ct. 2240, 2246, 144 L.Ed.2d 636 (1999).

2240, 144 L.Ed.2d 636 (1999), and that decision is the basis for a substantial portion of the dispute between the parties.

The *Alden* Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts," *Alden*, 527 U.S. at 712, 119 S.Ct. at 2246, and that "the State of Maine [did] not consent[] to suits for overtime pay and liquidated damages under the [Fair Labor Standards Act]." *Id.*

Alden did recognize that *Parden* had been expressly overruled. *Id.* at 732, 119 S. Ct. at 2256; however, a portion of *Alden* attempts to explain *Hilton* and specifically refers to the *Hilton* Court's mention of several states', including Indiana's, worker's compensation statutes, stating … we believe the decision is best understood not as recognizing a congressional power to subject nonconsenting States to private suits in their own courts, nor even as endorsing the constructive waiver theory of *Parden*, but as simply adhering, as a matter of *stare decisis* and presumed historical fact, to the narrow proposition that certain States had consented to be sued by injured workers covered by FELA, at least in their own courts. …

Oshinski contends that this paragraph is an "implicit reaffirmation of *Hilton*," and [read together with *Alden*] are a conclusive statement by the United States Supreme Court that Indiana has given blanket consent to suit under FELA in Indiana courts. ….

[W]e hold that Indiana has not given blanket consent to be sued under FELA in Indiana courts. Therefore, we need not decide whether or to what extent *Hilton* has been overruled. Further, we do not believe that the Supreme Court has held that Indiana has given blanket consent in this regard.

> The Supreme Court has unmistakably held that a state must issue a "clear declaration" of its consent to suit. … Pursuant to ITCA, governmental entities can be subjected to liability for tortious conduct unless the conduct is within an immunity granted by Section 3 of ITCA. .. . ITCA operates as an unequivocal statement of Indiana's consent to be sued in tort provided certain qualifications – including notice – are fulfilled. Such a limitation plainly is acceptable. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 122 S.Ct. 999, 1006, 152 L.Ed.2d 17 (2002).

Oshinski, 843 N.E.2d at 539-44.

[19] Lowe points out that *Hilton* has not been expressly overruled. But he provides no persuasive argument as to how *Hilton*'s recognition of the exclusion of a separate remedy under worker's compensation statutes would support his "no strings attached to a FELA claim" argument. He claims, in effect, that *Oshinski* was wrongly decided. We do not agree.

[20] Sovereign Immunity as Arm of the State. Lowe argues, as he did to the trial court, that, just as one cannot have his cake and eat it too, a commuter transportation district cannot be a political subdivision when defending a FELA claim, but also enjoy sovereign immunity under the Eleventh Amendment, as an arm of the state. NICTD responded that it is a state agency for Eleventh Amendment sovereign immunity purposes but, for purposes of a tort claim prerequisite, it is a political subdivision. At bottom, the question is whether NICTD can invoke a term of ITCA, enacted not by a political subdivision but by the Indiana Legislature. In other words, is the Legislature's qualified consent to be sued of any benefit to a political subdivision of the State?

[21] In answering this question, the trial court looked to *Kelley v. Michigan City*, 300 F. Supp. 2d 682, 689 (N.D. Ind. 2004), which determined that NICTD is a municipal corporation but also a state agency entitled to Eleventh Amendment immunity and that "NICTD is entitled to notice of a claim within 180 days of the occurrence." In so doing, the *Kelley* court discussed and relied upon Indiana, Illinois, United States Court of Appeals, and United States District Court cases, first addressing whether NICTD is a state agency or rather a person subject to liability under 42 U.S.C. Section 1983:

> NICTD is an Indiana municipal corporation formed pursuant to Indiana Code sections 8-5-15-3 through 8-5-15-10 for the purpose of managing funds related to commuter rail service in certain counties in northern Indiana. The Plaintiff argues that had the legislature intended to create NICTD as a state agency, it could have done so in the enabling statute. However, the Courts which have addressed this specific issue have concluded that NICTD is a state agency entitled to Eleventh Amendment immunity. *See Lewis v. Northern Indiana Commuter Transportation District*, 898 F. Supp. 596 (N.D. Ill. 1995).
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> In *Lewis*, the Court underwent an analysis of whether NICTD is a state agency and, therefore, entitled to immunity from suit in federal court under the Eleventh Amendment. The *Lewis* Court reasoned that resolution of that issue depends on whether NICTD is a state agency. "If it is, it is entitled to immunity from suit in federal court under the Eleventh Amendment. If not, we can take jurisdiction over Lewis' case." *Id.* Precedent indicates that in deciding whether an entity is immune from suit, we must determine whether it "is more like a county or city [or more] like an arm of the State." *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977) (local school board resembled a county or city more than an arm of the

> state); *see also Kashani v. Purdue University*, 813 F.2d 843, 845 (7th Cir.) (state university resembled an arm of the state more than a city or county), *cert. denied,* 484 U.S. 846, 108 S.Ct. 141, 98 L.Ed.2d 97 (1987). The *Lewis* Court used *Kashani*, a Section 1983 case in which Purdue University successfully invoked immunity under the Eleventh Amendment, as a guidepost in making their determination. *Kashani* sets forth three factors to consider: "the extent of the entity's financial autonomy from the state," its "general legal status," and "whether it serve[s] the state as a whole or only a region." 813 F.2d at 845-47. The *Lewis Court* addressed each factor in detail, concluding that, "[a]s the above analysis reveals, NICTD has attributes of both a state agency and a political subdivision." Nevertheless, we are persuaded that it is sufficiently dependent on the State of Indiana that it should be viewed as an arm of the state for Eleventh Amendment purposes." *Lewis* at 601.
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> The Court in *Gouge v. Northern Indiana Commuter Transportation District*, 670 N.E.2d 363, 369 (Ind. App. 1996), found the *Lewis* Court's reasoning persuasive and agreed with its conclusion that NICTD is a state agency. *See also*, *Phillips v. Northern Indiana Commuter Transportation District*, 1994 WL 866082 (N.D. Ind. 1994). Because NICTD's status as a state agency has been determined as such by these courts, a similar conclusion is made in this instance for the purpose of determining that NICTD is not a "person" subject to suit under 42 U.S.C. Section 1983.

300 F. Supp. 2d at 686-87. Treating NICTD as an entity with attributes of both a state agency and a political subdivision, the *Kelley* Court held that timely notice upon NICTD (within 180 days) was required:

> [A]s it relates to Defendants NICTD and Officer Warsanen, the crux of the dispute rests on timing.

> Kelley argues NICTD and Warsanen are now speaking out of both sides of their mouth. Kelley claims that because NICTD argued it was a state agency for purposes of Eleventh Amendment Immunity, that it cannot now argue that it is a political subdivision or municipal corporation for purposes of the Indiana Tort Claims Act. Under the Indiana Tort Claims Act, the notice requirement for municipal corporations is 180 days, whereas with respect to state agencies, a 270-day notice period applies. This Court has concluded that NICTD is a state agency for purpose of Eleventh Amendment immunity.
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> However, according to precedent, the notice of claims under Ind. Code 34-13-3-8 regarding a political subdivision or municipal corporation is not affected by its status as a state agency for purposes of Eleventh Amendment immunity. This is illustrious in cases where universities and colleges are arms of the state for purposes of Eleventh Amendment immunity but for purposes of notice are considered political subdivisions or municipal corporations. *See Schoeberlein v. Purdue University*, 129 Ill.2d 372, 135 Ill. Dec. 787, 544 N.E.2d 283 (1989); *Van Valkenburg v. Warner*, 602 N.E.2d 1046 (Ind. Ct. App. 1992). Thus, the NICTD is entitled to notice of a claim within 180 days of the occurrence.

300 F. Supp. 2d at 689.

[22] At the summary judgment hearing, Lowe urged the trial court to decline to adopt the reasoning of *Kelley* because it rested in part on *Lewis*. Counsel criticized *Lewis* as addressing too few factors of the *Mt. Healthy* decision (three

instead of six).[7] He characterized *Lewis* as "still good law" albeit it based upon "facts and evidence as to the lay of the land 25 years ago." (Tr. Vol. II, pg. 25.) He noted that there had not been discovery "of current affairs" of NICTD, suggesting that *Lewis* might be obsolete. (*Id.* at 26.)

[23] On appeal, Lowe renews the criticism of *Lewis*. Although he appears convinced that a proper analysis of whether an entity is a state agency must involve the examination of six factors, he does not argue that articulation of each factor is mandatory under *Mt. Healthy*. He asks that we "examine indicators of immunity" anew. Appellant's Brief at 33.

[24] That which we know from statutory guidance concerning the operations of NICTD is largely unchanged in twenty-five years. NICTD is described as a municipal corporation. I.C. § 8-5-15-2. NICTD's powers are limited to act for railroad operations purposes, serving the State of Indiana. I.C. § 8-5-15-5. NICTD can collect fares and also apply for and receive federal, state, county, and municipal funds. I.C. § 8-5-15-5(1). If NICTD dissolves, 90% of the proceeds are to be received by the State and 10% by the counties. I.C. § 8-5-15-

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[7] In *Mt. Healthy*, *supra*, the Supreme Court decided that a school board was a municipal corporation or political subdivision to which the Eleventh Amendment does not extend. 429 U.S. at 280. In examining the "nature of the entity created by state law," the *Mt. Healthy* Court considered the statutory description of the board, its subjection to "guidance" from the State Board of Education, the significant amount of money received from the State, and the board's "extensive powers" to issue bonds and to levy taxes within certain restrictions of state law. *Id.* at 280-81. The Court did not identify these considerations as mandatory factors. In utilizing three factors, *Lewis* looked to *Kashani, supra*: *"Kashani* sets forth three factors for us to consider: 'the extent of the entity's financial autonomy from the state,' its 'general legal status,' and 'whether it serve[s] the state as a whole or only a region.'" 898 F. Supp. at 599.

5(d). NICTD has authority to issue bonds subject to restriction and oversight, I.C. § 8-5-15-5.4, but cannot levy taxes. I.C. § 8-5-15-5(b). The makeup of NICTD's governing board has changed since *Lewis* in a manner that suggests greater state oversight (four members are now appointed by the Governor as opposed to two when *Lewis* was decided). I.C. § 8-5-15-3. Lowe belatedly requested additional discovery in the trial court; to the extent he now suggests that there have been factual developments of such significance to change NICTD's inter-dependence with the State, his position is unavailing. Without record development, we are simply asked to speculate on a different outcome if *Lewis* were decided today.

[25] Moreover, even if *Lewis* arguably gave short shrift to certain factors, its reasoning is not unique. The *Lewis* analysis was adopted in *Gouge v. N. Ind. Commuter Transp. Dist.*, 670 N.E.2d 363 (Ind. Ct. App. 1996). In *Gouge*, the trial court had entered a judgment against NICTD awarding FELA damages to an injured carman, but subsequently denied a petition for costs. *See id.* at 365. The appellate court presumed that the denial was based upon Indiana Trial Rule 54(D), providing that "costs against any governmental organization, its officers, and agencies shall be imposed only to the extent permitted by law." Ultimately, *Gouge* held costs could not be awarded against NICTD and, in reaching that conclusion, agreed with *Lewis* that NICTD is a government agency in the sense that it was entitled to Eleventh Amendment immunity.

> It is well-settled that the State and its agencies are not liable for ordinary court costs and fees absent specific statutory authority

> for their imposition. *State v. Eaton*, 581 N.E.2d 956, 960 (Ind. Ct. App.1991), *reh'g denied, trans. denied*; *State v. Puckett*, 531 N.E.2d 518, 527 (Ind. Ct. App. 1988). Northern Indiana is a distinct municipal corporation created by state statute. *See* Ind. Code § 8–5–15. In *Lewis v. Northern Indiana Commuter Transp. Dist.*, 898 F. Supp. 596 (N. D. Ill. 1995), the court underwent an analysis of whether Northern Indiana is a state agency and, therefore, entitled to immunity from suit in federal court under the Eleventh Amendment. We find the court's reasoning persuasive and agree with its conclusion that Northern Indiana is a state agency. *Id*. at 602.

670 N.E.2d at 369. Lowe fails to persuade us that these well-reasoned cases were wrongly decided. We are not convinced that the Indiana Legislature's characterization of NICTD as a political subdivision abrogated NICTD's entitlement to sovereign immunity as a state agency in the context of a FELA claim.

Conclusion

[26] NICTD is a political subdivision but, in the context of a FELA tort claim, is a state agency having Eleventh Amendment immunity, which was waived (on a qualified basis) with the passage of ITCA. Lowe's FELA claim is subject to ITCA, but he failed to comply with ITCA's requirement that the governing body of a political subdivision be provided notice within 180 days of a loss. Therefore, summary judgment was properly granted to NICTD.

[27] Affirmed.

Robb, J., and Tavitas, J., concur.