IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CT-295

Clarence Lowe,
Appellant,

–v–

Northern Indiana Commuter Transportation District,
Appellee.

Argued: September 16, 2021 | Decided: December 16, 2021

Appeal from the Porter Superior Court
No. 64D02-1901-CT-682
The Honorable Jeffrey W. Clymer, Judge

On Petition to Transfer from the Indiana Court of Appeals
Case No. 20A-CT-1584

Opinion by Justice Slaughter

Chief Justice Rush and Justices David, Massa, and Goff concur.

Slaughter, Justice.

Clarence Lowe, an employee of the Northern Indiana Commuter Transportation District, claims he was injured at work. We must decide whether the District, which operates a government-owned railroad, is a "state agency" or "political subdivision" under the Indiana Tort Claims Act. If the District is a state agency, the Act requires that pre-suit notice be served within 270 days of the injury; if it is a political subdivision, pre-suit notice must be served within 180 days. We hold that the District is a political subdivision under the Act. Thus, it was entitled to notice within 180 days of Lowe's alleged injury. Because Lowe did not provide notice until 263 days after his injury, his notice was untimely, and his suit is time-barred.

I

In early 2018, Clarence Lowe was working for the District, which owns and operates a passenger rail line between Chicago and South Bend. Lowe claims he was injured while manually hammering spikes into frozen track ties. He sent a notice of tort claim to the Indiana attorney general, who received the notice 263 days after Lowe's injury. The attorney general responded that the State of Indiana "does not appear" to have "any connection with this case" because the State was not a named party. Lowe then filed a complaint against the District under FELA, the Federal Employers' Liability Act. The District moved for summary judgment, arguing that although Indiana has waived sovereign immunity for FELA actions, such suits are subject to the Indiana Tort Claims Act. The District further argued that for purposes of the Act, it is a political subdivision, not a state agency, and because Lowe failed to serve it with a notice of tort claim within 180 days after his injury, the Act bars his FELA claim. The trial court granted summary judgment to the District and against Lowe.

Lowe appealed, and the court of appeals affirmed, concluding that the District is a political subdivision under the Act, and that his notice of tort claim was untimely. *Lowe v. N. Indiana Commuter Transp. Dist.*, 167 N.E.3d 290, 291–92 (Ind. Ct. App. 2021). Lowe then sought transfer, which we granted to answer this important question of first impression, thus

vacating the appellate opinion. *Lowe v. N. Indiana Commuter Transp. Dist.*, 169 N.E.3d 1119 (Ind. 2021).

II

FELA, codified at 45 U.S.C. §§ 51–60, makes a common-carrier railroad liable for injuries an employee suffers on the job due to the railroad's negligence. *Beckley v. Beckley*, 822 N.E.2d 158, 161 (Ind. 2005) (citing *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994)). On summary judgment, the District argued that Lowe's FELA claim was time-barred because he failed to comply with the 180-day notice requirement in Indiana's Tort Claims Act. Summary judgment is appropriate where there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. *Griffin v. Menard, Inc.*, 175 N.E.3d 811, 813 (Ind. 2021). Here, the parties do not raise disputed issues of fact; what they dispute, as a matter of law, is whether the Act applies and, if so, which notice requirement governs.

As a threshold matter, we ask first whether the Act applies to FELA suits against state entities and hold that it does. Lowe argues that the Act cannot apply to a FELA lawsuit because a state statute cannot abrogate a right to file an action granted by a federal statute. But he cites no case from any jurisdiction holding that a state's tort-claims act does not apply to a FELA action. To the contrary, we note at the outset that Congress enacted FELA under its Article I powers. See, e.g., *Parden v. Terminal Railway of the Alabama State Docks Dep't*, 377 U.S. 184, 190–92 (1964), overruled on other grounds by *College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). Congress does not have the power under Article I to subject nonconsenting states to private suits for damages in state courts. *Alden v. Maine*, 527 U.S. 706, 712 (1999). To determine whether Indiana has consented to suit under FELA, and under what circumstances, we would turn to the Act. *Esserman v. Indiana Dep't of Env't Mgmt.*, 84 N.E.3d 1185, 1190 (Ind. 2017). Thus, the mere fact that FELA is a federal statute does not automatically exclude from consideration the procedural constraints of our state's Tort Claims Act. We note further that Lowe has not argued that FELA preempts the Act; nor have we discerned from FELA's text that Congress intended to occupy the field of negligence claims against railway employers. Thus, we see no

reason not to apply here the general rule allowing states to "apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law". *Howlett v. Rose*, 496 U.S. 356, 372 (1990); accord *Mondou v. New York, New Haven, & Hartford Railroad Co.*, 223 U.S. 1, 2, 59 (1912) (requiring states to adjudicate issues under FELA assuming "their jurisdiction, as prescribed by local laws, is adequate to the occasion").

Finding no reason under federal law to bypass our Tort Claims Act, we turn to its text. By its own terms, the Act applies to "a claim or suit in tort", Ind. Code § 34-13-3-1(a), against governmental entities and their employees, *Burton v. Benner*, 140 N.E.3d 848, 852 (Ind. 2020). We find the reasoning in *Oshinski v. Northern Indiana Commuter Transportation District*, 843 N.E.2d 536 (Ind. Ct. App. 2006), persuasive. There, our court of appeals concluded that the Act applies to FELA claims against the District because the Act governs tort claims against governmental entities, and FELA claims are tort claims. *Id.* at 543–44. Although FELA does not use the word "tort", by its terms, it applies to causes of action arising from "negligence". 45 U.S.C. § 51. And negligence is a type of tort. *Oshinski*, 843 N.E.2d at 544 (citing *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29, 32 (1944), and *Simpson v. N.E. Illinois Reg'l Commuter R.R. Corp.*, 957 F. Supp. 136, 138 (N.D. Ill. 1997)). A later court of appeals opinion, *Rudnick v. Northern Indiana Commuter Transportation District*, 892 N.E.2d 204, 207 (Ind. Ct. App. 2008), relying on *Oshinski*, also applied the Act in a FELA suit against the District. We follow these cases and hold that where, as here, a state entity is sued under FELA, the Act applies.

Next, we ask whether the District is a state agency or political subdivision under the Act. We hold that the legislature defines the District as a political subdivision for purposes of the Act, and thus Lowe was subject to its 180-day notice requirement. We then address Lowe's arguments that even if the Act applies to FELA claims against state entities in general, we should not apply the Act's 180-day notice requirement here. Finding Lowe's arguments unavailing, we affirm the trial court's order granting summary judgment to the District.

A

The parties agree that Lowe did not serve a tort-claims notice until 263 days after his alleged injury. Whether his notice was timely turns on which provision of the Act applies. Under Indiana Code subsection 34-13-3-8(a), a would-be claimant must give notice within 180 days to a "political subdivision"; under subsection 34-13-3-6(a), on the other hand, a would-be claimant has 270 days to give notice to a "state agency". The Act defines both terms. A political subdivision is one of thirteen categories, including a "separate municipal corporation". I.C. § 34-6-2-110(5). Here, Lowe concedes that the District is a political subdivision under the Act: "[The District] is defined by Indiana's legislature as a political subdivision under the [Act]". Lowe's concession follows from the District's enabling statute, which defines the District as a "distinct municipal corporation". I.C. § 8-5-15-2(b). We thus treat a "distinct" municipal corporation as a "separate" municipal corporation under the Act and hence a political subdivision. As a political subdivision, the District is not a state agency. I.C. § 34-6-2-141.

Prior Indiana opinions involving FELA claims against the District are inconsistent as to whether the District is a state agency or political subdivision under the Act. In *Oshinski*, 843 N.E.2d at 539, our court of appeals concluded in dicta that the District is a state agency: "The parties do not dispute, the trial court found, and we agree that [the District] is a state agency." But *Oshinski* cited *Gouge v. Northern Indiana Commuter Transportation District*, 670 N.E.2d 363 (Ind. Ct. App. 1996), which did not address the Act. *Oshinski*, 843 N.E.2d at 539. Rather, *Gouge* concluded the District is a state agency under Trial Rule 54(D) (permitting award of costs against state agency only if specifically authorized by law). *Gouge*, 670 N.E.2d at 368–69. Because *Oshinski* relied on a case interpreting a trial rule and not the Act's plain text, we part ways with *Oshinski* on this point.

Instead, we share the view of two more recent appellate cases, *Rudnick*, 892 N.E.2d at 204, and *Januchowski v. Northern Indiana Commuter Transportation District*, 905 N.E.2d 1041 (Ind. Ct. App. 2009). *Rudnick*, in dicta, said that the definition of "political subdivision" includes municipal corporations under Indiana Code section 34-6-2-110, and that the District

is a separate municipal corporation according to its enabling statute. 892 N.E.2d at 209 n.3. *Rudnick* went on to note that the Act's definition of "state agency" specifically excludes political subdivisions under section 34-6-2-141. *Ibid.* And the *Januchowski* court, again in dicta, relied on *Rudnick* to find that the District is a political subdivision. 905 N.E.2d at 1044 n.1.

Lowe contends that if the Court holds that the District is a political subdivision, it should do so only prospectively and not as to Lowe. According to Lowe, *Oshinski* set out a clear rule of law that he was entitled to rely on. We disagree. *Oshinski*'s conclusion that the District is a state agency is dicta. Moreover, even had that been *Oshinski*'s holding, it would have been called into question by the later reasoning in *Rudnick* and *Januchowski*. Prospective application is an extraordinary measure that we decline to apply here.

Because the District is a political subdivision, Lowe needed to provide notice within 180 days of his injury, but he did not. Thus, his notice was untimely, and his suit is barred.

B

Despite the Act's plain terms and Lowe's concession that the District is a political subdivision under the Act, Lowe argues that he is not subject to the 180-day requirement. First, he argues that he substantially complied with the Act by filing within 270 days. Second, he argues that he is entitled to relief under the Eleventh Amendment for alternative reasons: either Indiana consented to suit under FELA or the District cannot enjoy sovereign immunity as an arm of the state under the Eleventh Amendment while simultaneously being a political subdivision under the Act. Because we find Lowe's arguments unavailing, he is not entitled to relief.

1

Indiana Code section 34-13-3-8(a) provides that:

> [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;

within one hundred eighty (180) days after the loss occurs.

Here, this means Lowe needed to provide notice to the District's governing body and Indiana's political subdivision risk management commission within 180 days. He did not do so but instead provided notice to the attorney general within 270 days. In other words, he noticed the wrong actor and observed the wrong timeframe. Yet on appeal, Lowe argues that providing notice to the attorney general fewer than 270 days after his accident substantially complied with the Act. But our substantial-compliance doctrine is clear: substantial compliance is a question of content not timing. See, e.g., *Collier v. Prater*, 544 N.E.2d 497, 499 (Ind. 1989) ("[N]otice is sufficient if it substantially complies with the content requirements of the statute."); *City of Indianapolis v. Cox*, 20 N.E.3d 201, 208 n.4 (Ind. Ct. App. 2014) ("While . . . non-compliance is sometimes excused where the plaintiff has substantially complied with the [Act] . . . notice must still be timely."). Lowe conceded at the summary-judgment hearing that under existing precedent, substantial compliance concerns the notice's content, not its timing. We see no reason to revisit our settled doctrine. Because Lowe's notice was untimely (occurring after 180 days), he did not substantially comply, and he is not entitled to relief on this basis.

2

Lowe's second and third arguments rest, in substantial part, on concepts of sovereign immunity developed in federal courts. He argues that Indiana has consented to suit under the relevant federal statute, FELA, and thus waived sovereign immunity. He also argues that the District cannot enjoy sovereign immunity as an arm of the state under the Eleventh Amendment while simultaneously being a political subdivision under the Act. Because Lowe's arguments and desired application of sovereign immunity confuse its two distinct bases—one under federal law for federal courts and one under state law for state courts—we find his

arguments unavailing. Moreover, even under the doctrinal framework he would have us use, that of Eleventh Amendment immunity jurisprudence, we find that Lowe's arguments would fail.

State sovereign immunity, as a general term, protects states within our federal system in four vital ways: it protects states from suits by their own citizens or those of another state in federal court; it protects states from suits by their own citizens or those of another state in other state courts; it protects states from being sued by citizens of other states in their own courts; and it protects states from being sued by their own citizens in their own courts. See, e.g., *Alden*, 527 U.S. at 712; accord *Esserman*, 84 N.E.3d at 1188–89. Federal sovereign-immunity doctrine derives from the constitution and the plan of the convention. See, e.g., *Alden*, 527 U.S. at 713, 730. This basis of sovereign immunity is often referred to as "Eleventh Amendment immunity"—a useful, but incomplete, shorthand because its protections "neither derive[] from, nor [are] limited by, the terms of the Eleventh Amendment." *Id.* at 713. This body of Eleventh Amendment immunity doctrine ensures that federal courts do not dislodge states as the national government's co-sovereigns, and thereby breach the delicate federal-state balance established by our framers.

At the same time, states like Indiana, as sovereigns in their own right, have developed their own sovereign-immunity doctrines for use in their own courts. Indiana adopted the principle of sovereign immunity from its very beginning. *Esserman*, 84 N.E.3d at 1189. Under this common-law doctrine, the state and its various entities generally could not be sued in tort. *Ibid.* Our Court eventually abolished this immunity in *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972), with narrow exceptions inapplicable here, but the legislature replaced it in 1974 with a limited immunity from tort claims via the Act. *Esserman*, 84 N.E.3d at 1190. Thus, when applying our state's sovereign-immunity doctrine vis-à-vis tort claims, where we once looked to our common-law tradition, we now look to the Act.

Alden v. Maine does not alter the fact that federal law and state law provide two independent bases of sovereign immunity. There the Supreme Court corrected the misapprehension that the "Eleventh

Amendment is inapplicable in state courts." 527 U.S. at 735. Although Lowe does not argue this, *Alden*'s statement, taken in isolation, could be understood to require state courts to analyze the sovereign-immunity claims of their states under federal Eleventh Amendment jurisprudence. But that is not the holding in *Alden*. There the Supreme Court applied Eleventh Amendment sovereign-immunity principles on review of a state-court decision to protect a state from suit in its own courts. *Id.* at 712. In other words, *Alden* permits states to claim sovereign immunity under the Eleventh Amendment—but it does not require that they do so. *Alden* instead discussed with approval the "distinction drawn between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign". *Id.* at 739. Likewise, the Maine Supreme Court's opinion made clear its view that Eleventh Amendment immunity was not "directly applicable" to its proceedings, although its state sovereign-immunity doctrine, at least as relevant there, coincided with federal Eleventh Amendment doctrine. *Alden v. State*, 715 A.2d 172, 174 (Me. 1998).

Here, Lowe sued the District in an Indiana court. Yet his sovereign-immunity arguments tend to ignore state-law concepts of sovereign immunity and would require our courts to apply federal Eleventh Amendment immunity instead. But we are not a federal court. And Lowe fails to argue, let alone persuade us, that an Indiana court is beholden to police its exercise of jurisdiction against its sovereign state in the same way that a federal (or a sister state court) must. Nor does he point to a case where we, as Maine's supreme court did, have identified our state's sovereign-immunity doctrine as mirroring that of the federal constitution's. He thus waives these arguments and cannot prevail. But even had he raised them, we would be hard-pressed to find that the primary concern permeating Eleventh Amendment immunity—protecting states as sovereigns in the federal system—justifies a federal mandate that state courts adjudicating private suits against their respective states must apply federal sovereign-immunity principles in lieu of their state's own protections. Cf. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 765 (2002) (endorsing the view that the purpose of sovereign-immunity doctrine is to afford states the "respect owed them as joint

sovereigns") (cleaned up). Thus, Lowe's last two arguments, both premised on Eleventh Amendment jurisprudence, must fail. And as we find below, even were we—a sovereign state's highest court—beholden to the federal courts' Eleventh Amendment jurisprudence, we would still find Lowe's arguments without merit.

a

Lowe argues that Indiana has given a blanket consent to be sued under FELA, notwithstanding the Act, because it owns a railroad operated in two states and has incorporated by reference federal protections for railroad employees. Lowe makes the type of constructive-waiver argument from *Parden*, 377 U.S. at 192, that the Supreme Court expressly overruled in *College Savings Bank*, 527 U.S. at 680. In *Parden*, the Court held that Alabama had constructively waived its immunity from suit under FELA:

> [B]y enacting [FELA] . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

377 U.S. at 192. The Court soon began limiting *Parden* until it finally overruled its last vestige—the constructive-waiver reasoning—in *College Savings*. There the Court explained that *Parden*'s "constructive-waiver experiment" was "ill conceived" and an "anomaly" in its sovereign-immunity jurisprudence. *College Savings*, 527 U.S. at 680. Thus, the Court concluded that it would not try to "salvage any remnant" of *Parden*'s constructive-waiver analysis. *Ibid.*

The Court's post-*Parden* case law makes clear that a state can waive its sovereign immunity (under Eleventh Amendment doctrine) only by "clear declaration". See, e.g., *id.* at 675–76. Here, Lowe points to nothing that we can construe as Indiana's "clear declaration" that it is consenting to suit—and thus waiving any vestige of sovereign immunity—under FELA. Accord *Oshinski*, 843 N.E.2d at 543–44 (holding that "Indiana has not

given blanket consent to be sued under FELA in Indiana courts" because Indiana's consent to be sued is subject to the Act's requirements). Thus, even were we to apply the federal courts' Eleventh Amendment jurisprudence, Lowe's argument would fail.

Lowe also seems to argue that the Supreme Court has already held that Indiana has waived its immunity from FELA suits. His argument rests on *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), which is now understood to have held, based on stare decisis, that "certain States had consented to be sued by injured workers covered by . . . FELA", *Alden*, 527 U.S. at 737–38. But Lowe does not cite any authority for the proposition that Indiana is one of the "certain States" that *Hilton* continued to hold had waived immunity, and we are aware of none. Thus, this argument also fails.

Moreover, to the extent Lowe asks us to hold that Indiana waived immunity as a matter of Indiana law, we decline to do so. Lowe seems to rely on our precedent in *Esserman v. Indiana Department of Environmental Management* for the proposition that Indiana can waive immunity in any manner that "clearly evince[s]" or "unequivocally express[es]" its intention to do so. He then suggests that by enacting Indiana Code section 8-5-15-17, the legislature clearly evinced its intent to waive immunity from suits arising under all federal statutes applying to railroad employees. But section 8-5-15-17 merely requires the District's board to "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". I.C. § 8-5-15-17(3). While this statute reflects the legislature's desire to protect railroad employees, it does not "clearly evince" or "unequivocally express" doing so at the expense of the state's sovereign immunity. Cf. *Esserman*, 84 N.E.3d at 1192 (explaining that Indiana's False Claims and Whistleblower Protection Act did not clearly evince or unequivocally express the legislature's waiver of sovereign immunity because it did not, for instance, name the state, its agencies, or its officials as permissible defendants). Lowe is not entitled to relief on this ground.

b

Finally, Lowe argues that the Act should not apply to his claim against the District because if it is a political subdivision under the Act, it cannot simultaneously be an arm of the state for Eleventh Amendment purposes. As with Lowe's consent argument, his argument here assumes incorrectly that Indiana courts apply federal Eleventh Amendment jurisprudence to adjudicate all questions of state sovereignty. We do not. But even if we did, Lowe cites no authority holding that a state entity cannot be an arm of the state under the Eleventh Amendment while also a political subdivision under the Act (or under any state's tort-claims act). Instead Lowe discusses *Lewis v. Northern Indiana Commuter Transportation District*, 898 F. Supp. 596 (N.D. Ill. 1995), a district court case holding the opposite. There the court explained that although the Act defined the District as a political subdivision, it was a state agency for purposes of Eleventh Amendment immunity. *Id.* at 601–02. In doing so, the court relied in part on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Lewis*, 898 F. Supp. at 600. In *Mt. Healthy*, the state legislature had defined local school boards as political subdivisions. 429 U.S. at 280. But the Supreme Court nonetheless asked whether the local school board was "more like a county or city" or "an arm of the State" under its Eleventh Amendment immunity doctrine, ultimately holding that the board was not an arm of the state. *Id.* at 280–81.

Lewis also relied on the Seventh Circuit's analysis in *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1987). 898 F. Supp. at 600. There the court was tasked with deciding whether a public university was an arm of the state for Eleventh Amendment purposes. *Kashani*, 813 F.2d at 845. While deciding "the nature of the entity created by state law", the court encountered statutes that sometimes referred to the university as a state agency and sometimes, including under the Act, as a political subdivision. *Id.* at 847 (quoting *Mt. Healthy*, 429 U.S. at 280). The Seventh Circuit thus "look[ed] to substance rather than form" to hold that Purdue was an arm of the state. *Id.* at 847–48. If Lowe's contention were true, that is, if an entity's status under state statute governed the entity's status under the Eleventh Amendment, the *Lewis* and *Kashani* courts would have looked no further. But they did look further, thus showing that an entity may be an

arm of the state in federal courts for Eleventh Amendment purposes while simultaneously a political subdivision in state courts for other purposes.

Alternatively, Lowe argues that *Lewis* was wrongly decided. We are not persuaded this is so. But even if we were, federal courts, not state courts, are better positioned to define the contours of federal jurisdiction under the Eleventh Amendment. And the federal courts that have addressed whether the District is an arm of the state for Eleventh Amendment purposes have held that it is. See *Kelley v. City of Michigan City*, 300 F. Supp. 2d. 682, 687 (N.D. Ind. 2004); *Lewis*, 898 F. Supp. at 602; *Phillips v. N. Indiana Commuter Transp. Dist.*, No. 2:92-CV-286, 1994 WL 866082, at *3 (N.D. Ind. May 11, 1994). Even if we agreed that *Lewis* was wrongly decided, as a state court properly exercising jurisdiction here, we have no reason to police how a federal court exercised federal jurisdiction there.

* * *

Under the Act, the District is a political subdivision, and any claim against it is barred unless a claimant provides notice within 180 days of the injury. Lowe's arguments neither legally nor factually excuse his failing to provide timely notice. Thus, we affirm the trial court's grant of summary judgment for the District and against Lowe.

Rush, C.J., and David, Massa, and Goff, JJ., concur.

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