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IN THE COURT OF APPEALS OF INDIANA

Gregory Wilson, Sr., in his capacity as the Executive Director of the State of Indiana Civil Rights Commission,

Appellant-Plaintiff,

v.

Betty Jo Wilkening,

Appellee-Defendant.

July 28, 2021

Court of Appeals Case No. 20A-PL-1960

Appeal from the Lake Superior Court

The Honorable John M. Sedia, Judge

Trial Court Cause No. 45D01-1709-PL-103

Pyle, Judge.

Statement of the Case

[1] In this housing discrimination case, Gregory L. Wilson, Sr., in his capacity as the Executive Director of the State of Indiana Civil Rights Commission, ("the

Commission") appeals the trial court's grant of judgment on the evidence in favor of Betty Jo Wilkening ("Wilkening"). The Commission argues that the trial court erred in granting Wilkening's motion because the trial court misinterpreted the "shall" in INDIANA CODE § 22-9.5-6-8 to be mandatory rather than directory. For this specific statute, we agree with the Commission and, therefore, reverse and remand this case to the trial court for a new trial.

[2] We reverse and remand for a new trial.

Issue

Whether the trial court erred when it granted Wilkening's motion for judgment on the evidence.

Facts

[3] On January 18, 2017, Darrin Bowman ("Bowman") filed an administrative complaint with the Commission alleging "discrimination in the area of real estate on the basis of familial status."[1] (App. Vol. 2 at 17). Bowman's complaint specifically alleged as follows:

> a. That on December 17, 2016, [Bowman] met with [Wilkening] to view a home owne[d] by [Wilkening], located in [Lake County], which [Wilkening] had advertised for rent;

[1] Bowman's complaint "was dual filed with the U.S. Department of Housing and Urban Development[.]" (App. Vol. 2 at 19).

b. That during the course of showing the home, [Bowman] told [Wilkening] that he would have his minor children (ages 8 and 15) living with him on weekends;

c. [Wilkening] then told [Bowman] that she did not want children residing in the unit, and refused to allow him to complete a rental application, even though he was qualified and the unit was available;

d. That the following week, [Bowman's] single friend without children was shown the same unit, which was still available, and she was encouraged to apply; and

e. That [Bowman] believed that he was discriminated against because he has children.

(App. Vol. 2 at 19).

[4] The Commission initiated an investigation and assigned the case to Commission Investigator Tawanda Johnson ("Johnson"). On July 21, 2017, following Johnson's investigation, the Commission issued a Notice of Finding and Issuance of Charge ("the Notice"). The Notice concluded that "there was reasonable cause to conclude that violations of the [Indiana Fair Housing Act ("IFHA")], [INDIANA CODE § 22-9.5-1-1 *et seq*.], . . . on the basis of familial status, had occurred when [Wilkening] [had] refused to rent a home to [Bowman]." (App. Vol. 2 at 19). Wilkening elected to have the merits of the

complaint tried in a civil action rather than by one of the Commission's administrative law judges.[2]

[5] In October 2017, the Commission filed an amended complaint both on its own behalf and on behalf of Bowman. The complaint alleged that Wilkening had violated the IFHA when she had discriminated against Bowman on the basis of his familial status.[3] Wilkening filed an answer and a counterclaim in December 2017. In the counterclaim, Wilkening alleged that the Commission's claims were "groundless, unreasonable, and frivolous." (App. Vol. 2 at 31).

[6] At the July 2019 jury trial, during cross examination, Johnson testified that the Commission had neither made its determination of reasonable cause within 100 days of Bowman filing his complaint nor found that it was impracticable to make its determination of reasonable cause within the 100-day time period. *See* INDIANA CODE § 22-9.5-6-8(b) and (c). In addition, the Commission had not notified Bowman and Wilkening of the reasons for the delay. *See* INDIANA CODE § 22-9.5-6-8(b). At the end of the Commission's case in chief, Wilkening moved for judgment on the evidence on several grounds, including the Commission's failure to comply with INDIANA CODE § 22-9.5-6-8(c).

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[2] Once the Commission had made a finding that reasonable cause exists to believe that a discriminatory housing practice has occurred, the matter proceeds to an administrative hearing unless one of the parties elects to have the charge litigated in a civil action. *See* INDIANA CODE § 22-9.5-6-12.

[3] The complaint also alleged that Wilkening had violated the Indiana Civil Rights Law, *see* INDIANA CODE § 22-9-1-1 *et seq.*, and Title VIII of the Civil Rights Act of 1968, as amended, *see* 42 U.S.C. § 3610 *et seq*.

[7] In July 2019, the trial court issued an order granting Wilkening's motion for judgment on the evidence. The trial court's order provides, in relevant part, as follows:

> 3. The Commission's case adduced uncontroverted evidence that it failed, as required by I.C. 22-9.5-6-8(b) to make a determination of reasonable cause within 100 days of the filing of [the] Complaint, or, as required by I.C. 22-9.5-6-8(c), to find that it was impracticable to make the determination of reasonable cause within the 100-day time period and notify Bowman and Wilkening in writing of the reasons for the delay.
>
> 4. As a result of the Commission's failure to comply with the requirements of I.C. 22-9.5-6-8(b) and (c), Wilkening is entitled to judgment on the evidence as to the Commission's entire claim.

(App. Vol. 2 at 12).

[8] The Commission appealed the trial court's order. However, in December 2019, this Court dismissed the Commission's appeal without prejudice. Specifically, this Court's motions panel determined that the trial court's order was not a final judgment because Wilkening's counterclaim was still pending and the trial court had not in writing expressly determined that there was no just reason for delay and directed the entry of judgment. This Court's motions panel further determined that this Court lacked jurisdiction over the Commission's appeal because the trial court's interlocutory order was not appealable as a matter of right and the Commission had not sought a discretionary interlocutory appeal pursuant to Appellate Rule 14(B).

[9] In April 2020, Wilkening filed a motion for attorney fees pursuant to INDIANA CODE § 22-9.5-9-1, which authorizes the trial court to award reasonable attorney fees to the prevailing party in an IFHA case. Wilkening pointed out that, in the event the trial court awarded her the requested attorney fees, her counterclaim would become moot because the relief sought in the counterclaim was identical to the relief sought in her motion.

[10] The trial court held a hearing on Wilkening's petition in September 2020 and heard evidence that Wilkening's attorney fees had been $51,572.99. The following day, the trial court ordered the Commission to pay, pursuant to INDIANA CODE § 22-9.5-9-1, $51,572.99 for Wilkening's attorney fees.

[11] The Commission now appeals.

Decision

[12] The Commission argues that the trial court erred in granting Wilkening's motion for judgment on the evidence because it misinterpreted the "shall" in INDIANA CODE § 22-9.5-6-8 to be mandatory rather than directory. We agree.

[13] At the outset, we note that the IFHA provides that "[a] person may not refuse to sell or to rent after the making of a bona fide offer, refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, *familial status*, disability, or national origin." I.C. § 22-9.5-5-1 (emphasis added). INDIANA CODE § 22-9.5-1-2 further explains a discriminatory act based on familial status as follows:

> [A] discriminatory act is committed because of familial status if the act is committed because the person who is the subject of the discrimination is:
>
> (1) pregnant;
>
> (2) domiciled with an individual younger than eighteen (18) years of age in regard to whom the person:
>
> (A) is the parent or legal custodian; or
>
> (B) has the written permission of the parent or legal custodian for domicile with that person; or
>
> (3) in the process of obtaining legal custody of an individual younger than 18 years of age.

I.C. § 22-9.5-1-2.

[14] We further note that the purposes of the IFHA are to: (1) provide for fair housing practices in Indiana; (2) create a procedure for investigating and settling complaints of discriminatory housing practices; and (3) provide rights and remedies substantially equivalent to those granted under federal law. I.C. § 22-9.5-1-1. In addition, the IFHA borrows heavily from the federal Fair Housing Act ("the FHA"), containing many parallel provisions and similar language. *Furbee v. Wilson*, 144 N.E.3d 801, 806 (Ind. Ct. App. 2020). Further, in construing the IFHA, we look to federal statutes and case law for guidance. *Id*.

[15] We now turn to the Commission's argument that the trial court erred in granting Wilkening's motion for judgment on the evidence. Judgment on the evidence is appropriate where all or some of the issues are not supported by

sufficient evidence. *Scheffer v. Centier Bank*, 101 N.E.3d 815, 822 (Ind. Ct. App. 2018). Where the issue involves a conclusion of law based on undisputed facts, the reviewing court is to determine the matter as a question of law in conjunction with the motion for judgment on the evidence, and to this extent, the standard of review is de novo. *Id*. at 822-23 (cleaned up).

[16] This case requires us to interpret INDIANA CODE § 22-9.5-6-8, which provides, in relevant part, as follows:

> (a) The commission shall determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur.
>
> (b) The commission shall make the determination under subsection (a) not later than one hundred (100) days after the date a complaint is filed unless;
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> (1) it is impracticable to make the determination; or
>
> (2) the commission has approved a conciliation agreement relating to the complaint.
>
> (c) If it is impracticable to make the determination within the time period provided by subsection (b), the commission shall notify the complainant and respondent in writing of the reasons for the delay.

[17] Here, Bowman filed his complaint on January 18, 2017, and the Commission issued its reasonable cause determination on July 21, 2017, more than one hundred days after Bowman had filed his complaint. The Commission concedes that it did not comply with the statute. However, according to the Commission, "the 100-day rule and its notice requirements are directory and do

not create a jurisdictional issue or constitute a statute of limitations." (The Commission's Br. at 13-14). Wilkening, on the other hand, argues that the notice requirements in the statute are mandatory and the Commission's lack of compliance with them results in the failure of its claim.

[18] Statutory interpretation is a question of law reserved for the court and is reviewed de novo. *Roman Catholic Diocese of Indianapolis, Inc. v. Metropolitan School District of Lawrence Township.*, 945 N.E.2d 757, 765 (Ind. Ct. App. 2011). De novo review allows us to decide an issue without affording any deference to the trial court. *Id.* The goal of statutory interpretation is to determine, give effect to, and implement the intent of the legislature. *Indiana Civil Rights Commission v. County Line Park, Inc.*, 738 N.E.2d 1044, 1048 (Ind. 2000). The statute is examined as a whole, and it is often necessary to avoid excessive reliance on a strict literal meaning or the selective reading of individual words. *Id*. We presume that the legislature intended for the statutory language to be applied in a logical manner consistent with the statute's underlying policy and goals. *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 824 (Ind. 2019).

[19] Where, as here, the word "shall" appears in a statute, it is generally presumed to be used in its imperative sense. *Lewis v. Board of School Trustees of Charles A Beard Memorial School*, 657 N.E.2d 180, 183 (Ind. Ct. App. 1995), *trans. denied*. However, "shall" may be construed as directory instead of mandatory when "it appears clear from the context or the purpose of the statute that the legislature intended a different meaning." *Clark v. Kenley*, 646 N.E.2d 76, 78 (Ind. Ct. App. 1995), *trans. denied*. We have specifically found the term "shall" is

directory where: (1) the statute fails to specify adverse consequences; (2) the provision does not go to the essence of the statutory purpose; and (3) a mandatory construction would thwart the legislature purpose. *See State v. Langen*, 708 N.E.2d 617, 622 (Ind. Ct. App. 1999); *May v. Department of Natural Resources*, 565 N.E.2d 367, 371 (Ind. Ct. App. 1991), *trans. denied*.

[20] Applying these factors to INDIANA CODE § 22-9.5-6-8, we first note that the statute neither specifies any express or implied adverse consequences for the Commission's failure to comply with the 100-day notice provision nor contains language indicating that the 100-day deadline was intended to be jurisdictional. We further note that "the use of the qualifier, 'unless' provides an obvious hedge to be used by [the Commission] when necessary." *See U.S. v. Beethoven Associates Ltd. Partnership*, 843 F.Supp. 1257, 1261-62 (N.D. Ill. 1994) (interpreting 42 U.S.C. § 3610(a)(1)(B)(iv), which is the federal equivalent to INDIANA CODE § 22-9.5-6-8 and is set forth below).

[21] In addition, compliance with the 100-day notice provision does not go to the essence of the statute's purpose, which is to assure fair housing practices in Indiana. Indeed, in *Beethoven*, 843 F.Supp. at 1262, the federal district court explained that Congress had enacted the FHA to "express a national policy against discrimination in housing." However, as initially enacted, the FHA was found to be lacking an effective enforcement mechanism. *Id*. Congress subsequently amended the FHA, including 42 U.S.C. § 3610(a)(1)(B)(iv), to respond to the inordinate length of time involved before final resolution of these

cases. *Id.* "Therefore the purpose of the amendment was to expedite, not preclude, the claims of persons who are discriminated against." *Id.*

[22] Lastly, a mandatory construction of the word "shall" in INDIANA CODE § 22-9.5-6-8 would thwart the legislative purpose of the statute by requiring the dismissal of potentially valid IFHA cases based simply on the Commission's delay. This would be an absurd and unjust result, which would be patently inconsistent with the intent of the IFHA. *See Pabey v. Pastrick*, 816 N.E.2d 1138, 1148 (Ind. 2004) (explaining that "[i]n interpreting a statute, we must seek to give it a practical application, to construe it so as to prevent absurdity, hardship, or injustice, and to favor public convenience.") (cleaned up). For the reasons set forth above, we conclude that "shall" as used in INDIANA CODE § 22-9.5-6-8 is directory and not mandatory.

[23] Our conclusion is consistent with federal decisions construing 42 U.S.C. § 3610, which is the FHA's equivalent to INDIANA CODE § 22-9.5-6-8, and which provides in relevant part as follows:

> (iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint, . . . unless it is impracticable to do so.
>
> (C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint[,] . . . the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

42 U.S.C. §§ 3610(a)(1)(B)(iv) and (a)(1)(C).

[24] For example, in *United States v. Curlee*, 792 F.Supp. 699 (C.D. Cal. 1992), the residents of an "adults only" mobile home park filed a complaint against the park's owner for discrimination based on familial status when they were asked to move following the birth of their first child. *Curlee* at 699. The park's owner filed a motion to dismiss the residents' complaint based upon the United States Department of Housing and Urban Development's ("HUD") failure to complete its investigation within 100 days of the filing of the complaint. In addition, HUD never sent notice to the parties of its need to extend the period of investigation beyond 100 days and did not issue its determination until seventeen months after the complaint had been filed.

[25] The federal district court denied the park owner's motion to dismiss the residents' complaint, holding that the 100-day period was not mandatory and did not raise a jurisdictional issue. *Id*. at 700. The *Curlee* court specifically noted that the statute did not specify any adverse consequences for HUD's failure to comply with the 100-day notice provision. *Id,* The court also noted that "[t]o read the 100-day provision as a time bar would be to cut off the enforcement powers of the United States and complainants' rights, contrary to the purposes of the Fair Housing Amendments Act of 1988." *Id*. The court further explained that "[i]f the 100-day provision were a jurisdictional limitation, thousands of complainants might be deprived of the opportunity to avail themselves of the complaint procedure Congress enacted." *Id*. Lastly the

court concluded that HUD's failure to meet the 100-day deadline had not significantly prejudiced the owner.

[26] Similarly, in *United States v. Nally*, 867 F.Supp. 1446 (N.D. Cal. 1994), four residents of a recreational vehicle park filed complaints with HUD alleging that the park's owners had discriminated against them on the basis of their familial status. The owners filed a motion to dismiss based upon HUD's failure to complete its investigation within 100 days of the filing of the complaint. The district court denied the owners' motion and concluded that the 100-day deadline was neither a jurisdictional bar nor a statute of limitations. *Id*. at 1452. The court specifically explained that the statute included no express or implied sanctions for the failure to meet the deadline. *Id*. at 1451. In addition, the court pointed out that the purpose and policy behind the FHA was to vindicate the civil rights of complainants who were subject to housing discrimination. *Id*. According to the court, Congress had enacted the 100-day provision "to hasten, not foreclose, complainants' access to a forum." *Id*. at 1451-52. (quotation omitted). Further, "[i]f the courts were to construe the 100-day limit as a jurisdictional requirement, many potential claimants would be deprived of recovery under the [FHA] solely because of HUD's delays." *Id*. at 1452. The court further explained that "[s]uch a result would be inconsistent with the [FHA's] purpose, especially in consideration of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id*. *See also United States v. Scott*, 788 F.Supp.

1555, 1558 (D.Kan. 1992) (concluding that the statutory deadline imposed by § 3610 was not jurisdictional because the absence of statutory sanctions on HUD for violation of the time limits was persuasive as to Congress' intent and the use of the qualifier "impracticable" took the section out of the realm of mandatory provisions).[4]

[27] Because we have concluded that "shall" in INDIANA CODE § 22-9.5-6-8 is directory rather than mandatory, the Commission is correct that the trial court misinterpreted the statute and erred when it granted Wilkening's motion for judgment on the evidence. We therefore reverse and remand the case to the trial court for a new trial.[5]

[28] Reversed and remanded for a new trial.

Najam, J., and Tavitas, J., concur.

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[4] We note that in *United States v. Aspen Square Management Co., Inc.*, 817 F.Supp. 707, (N.D. Ill. 1993), *vacated*, 1993 WL 268352 (N.D. Ill. June 28, 1993), the district court held that HUD's failure to either issue its charge of discrimination or a notice of impracticability within the 100-day period acted as a jurisdictional bar to HUD's case. However, the district court in *United States v. Tropic Seas, Inc.*, 887 F. Supp. 1347, 1363 (D. Hawaii 1995) pointed out that "[e]ven assuming that *Aspen* retain[ed] any precedential value after vacatur, it appear[ed] to be contrary to the clear weight of authority from other districts, and ha[d] even been criticized by other judges in the same district."

[5] The Commission also argues that the trial court abused its discretion in ordering the Commission to pay Wilkening's attorney fees. However, the Commission further points out that, if we reverse the trial court's grant of judgment on the evidence, we "need not substantively address [the attorney fee issue] because there will not yet be a prevailing party entitled to any award of attorney fees." (The Commission's Br. 28). The Commission is correct. The trial court ordered the Commission to pay Wilkening's attorney fees pursuant to INDIANA CODE § 22-9.5-9-1, which authorizes the trial court to award reasonable attorney fees to the prevailing party in an IFHA case. Because we have reversed the trial court, Wilkening is no longer a prevailing party. Accordingly, she is also no longer entitled to attorney fees pursuant to this statute.