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IN THE COURT OF APPEALS OF INDIANA

Town of Cicero,
Appellant/Cross-Appellee-Defendant,

v.

Ashok K. Sethi and Meena Sethi Trust,
Appellees/Cross-Appellants-Plaintiffs.

May 23, 2022

Court of Appeals Case No. 21A-PL-1193

Appeal from the Hamilton Circuit Court

The Honorable Paul A. Felix, Special Judge

Trial Court Cause No. 29C01-1811-PL-10423

Najam, Judge.

Statement of the Case

[1] In this appeal, we consider the notice requirements of the Indiana Tort Claims Act ("ITCA") and several claims that would, if applicable, obviate those requirements. Ashok K. Sethi ("Ashok") and the Meena Sethi Trust (the "Trust") (collectively, "Sethi") filed a second amended complaint against the

Town of Cicero (the "Town") alleging fraud, constructive fraud, and unjust enrichment. The Town filed a motion for summary judgment on the fraud and constructive fraud claims. The trial court granted the Town's motion, finding that Sethi had not substantially complied with the notice requirements of the ITCA, but the court did not address Sethi's claims that the Town should be estopped from raising the notice defense and that fraudulent concealment precluded the notice defense.

[2] Sethi filed a motion to correct error. In its order granting in part Sethi's motion to correct error, the trial court found that "Sethi has designated evidence that creates a genuine issue of material fact regarding whether estoppel bars the Town's ITCA notice defense." But the court denied Sethi's motion on the fraudulent concealment issue, holding that, as a matter of law, the designated evidence did not support that claim.

[3] On appeal, the Town presents the following issue for our review:

> 1. Whether there are genuine issues of material fact regarding Sethi's estoppel claim which preclude summary judgment on the Town's defense that Sethi failed to comply with the ITCA notice requirements.

[4] Sethi cross-appeals and presents two issues for our review:

> 2. Whether there are genuine issues of material fact regarding whether Sethi substantially complied with the notice requirements under the ITCA.

3. Whether there are genuine issues of material fact regarding whether fraudulent concealment tolled the notice requirements under the ITCA.

[5] We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[6] The Trust owns commercial real estate in Cicero (the "property"). The property is commonly known as the "NRG site," where the Sethi family had operated a business and which included a large industrial building, a pole building, and a separate smokestack. In 2014, the property had been abandoned and was not insured, and the Town communicated to Sethi an interest in buying the property.

[7] In a 2015 "Comprehensive Plan" for Cicero/Jackson Township, the Town referred to the NRG site, located at 119 West Brinton Street, as a "key site" that the Town should "obtain ownership of . . . through whatever means are necessary." Appellant's App. Vol. 4 at 189. In January 2017, following an inspection at the property, the Cicero Fire Department issued an "Unsafe Building Advisory" stating that the building on Sethi's property had been "declared an unsafe building." Appellant's App. Vol. 5 at 134. Accordingly, in a letter dated January 20, the Town, by its attorney Aaron Culp, advised Sethi that the property had been "deemed by the Town [to be] in violation of" nuisance ordinances and that "the structure" on the property had been

"declared an unsafe structure."[1] Appellant's App. Vol. 3 at 46. Culp stated that Sethi had to either "secure or demolish" the structure to "eliminate" the violations. *Id.* at 46-47. And Culp stated that "[t]his order is not deemed final until confirmed by the Cicero Town Council" ("Town Council") and that a formal hearing on the matter was scheduled for February 7. *Id.* at 47.

[8] In response to the January 20 letter from Culp, Ashok told Sethi's local agent Mark Reynolds to "[g]et the property fixed." Appellant's App. Vol. 4 at 37. But two days before the February 7 demolition hearing, the building was partially damaged in a fire. Ashok did not attend the February 7 meeting, but Reynolds attended as Sethi's representative and stated that he would be talking with Ashok on his way home. Appellant's App. Vol. 2 at 154. Reynolds actively participated in the hearing and both asked and answered questions. At the conclusion of the hearing, the Town Council voted unanimously to "declare an emergency order to tear down the building, excluding the smokestack, and to clean up the debris and metal from the fire." *Id.* at 155. At a regular meeting held on February 21, the Town Council approved demolition orders prepared by Culp, which included an emergency order to demolish the building and a "non-emergency" order to demolish "any and all structures" on the property

[1] Ashok had moved from one California address to another and did not receive Culp's certified letter. However, Sethi's local agent, Mark Reynolds, and an attorney, Curt DeVoe, both received copies of the letter, and they both sent the letter to Ashok, Appellant's App. Vol. 4 at 36-37, which notified him of the February 7 hearing and of Sethi's right to appear at the hearing and be represented by counsel.

not covered by the emergency order, including the smokestack, by March 7. *Id.* at 167-68.

[9] At the meeting on February 21, the Town Council approved the minutes from the February 7 special meeting. Culp reported that Sethi was getting bids from demolition companies, and the Town Council approved the demolition orders. On April 30, Ashok wrote an email to Town Council member Dan Strong asking for copies of the demolition orders. Ashok stated that he was going to appeal the orders but also stated that he was "steaming ahead to get the Demolition Permit process moving forward." *Id.* at 175.

[10] In an email to Ashok on May 1, Culp stated:

> First, regarding appealing the demolition orders, that is not possible. As stated in my letter of January 20, 2017, any appeal of the orders was to take place at the February 7, 2017 council meeting . . . .
>
> If you wanted to challenge or otherwise appeal the orders, that was the venue for doing so. The council heard the evidence and information, including Mark's comments and input, and affirmed the demolition order. There is no mechanism for having the council go back and review its order. In addition, at that same hearing they declared that an emergency existed due to the fire that required expedited action. Regardless, the original deadline for demolition, absent any emergency, was March 9th, 2017.

Id. at 179.

[11] In an email to Culp on May 2, Ashok, an engineer, questioned the Town Council's decision to demolish the smokestack and stated, "I am questioning

the decision behind this order" and that, "it is still in a good structural condition and is not hazardous." *Id.* at 176. In response, the same day, Culp wrote:

> Regarding the smoke[]stack, it is the only structure that was not covered by the emergency declaration. Thus, while the other structures were declared unsafe and order[ed] demolished immediately on an emergency basis, the smoke[]stack was declared unsafe and ordered demolished under the ordinary, non-emergency basis. As such, while all other buildings were to be demolished immediately after the emergency declaration on February 7th, you had until March 9th to demolish the smoke[]stack. . . .

Id.

[12] In June, Ashok emailed Culp to ask whether the Town was still interested in buying the property. Culp responded that the Town was still interested but that it was waiting to see what the costs would be to address environmental concerns with the property that had been raised by the Indiana Department of Environmental Management ("IDEM"). In July, Sethi demolished the building, the pole building, and the smokestack. On August 14, Ashok met with Town Council member Brett Foster "and other representatives from the Town" to discuss the sale of the property. *Id.* at 191.

[13] After that meeting, on September 15, 2017, Ashok wrote a letter to Foster in which he expressed his frustration that there had not yet been an offer from the Town to purchase the property. Ashok also again expressed his disagreement with the demolition orders. In the letter, Ashok stated that Foster should

consider the letter a "'Complaint' to the Town Council . . . and a demand that the Town pay us for the rebuilding of the demolished property and all other costs incurred . . . by [Sethi] since February 2014[.]" *Id.* As the Town notes on appeal, in this letter, "there is no specific mention of facts or circumstances supporting an alleged fraud or constructive fraud claim, no specific mention of any alleged misrepresentations of fact or law . . . and no specific mention of any dates or times of any alleged misrepresentations or conduct made the subject of the fraud or constructive fraud allegations" in the second amended complaint. Appellant/Cross-Appellee Reply Br. at 32.

[14] In response to Ashok's email, on September 20, 2017, Town Council President Chad Amos wrote a letter to Ashok stating that "the [T]own remains very interested in acquiring your property" and also stating that the Town "does not owe the Trust any money for the demolition or any other actions on the property." Appellant's App. Vol. 2 at 192. The letter expressed the Town's interest in helping Sethi obtain funds for the environmental cleanup of the property and stated that the Trust was free to sell, lease, or otherwise transfer the property to someone else. In addition, Amos offered to enter into a memorandum of understanding with Ashok "regarding the acquisition of the property." *Id.* at 193.

[15] On September 28, 2017, Ashok wrote a letter to Amos stating that he was "pleased" that the Town was still interested in purchasing the property, but he reiterated his "demand that the Town pay [Sethi] for rebuilding of [sic] the demolished property and all other costs associated with this 'acquisitional

interest.'" Appellant's App. Vol. 6 at 89. Amos was out of town, so on the same date, Culp wrote Ashok an email in response stating, in part, that:

> There is no such thing as an "acquisitional interest" under Indiana law. In fact, in the absence of any written agreement to acquire your property, I'm at a loss as to how any such interest could even be claimed . . . . [The Town] has legal duties to oversee the public health and safety . . . . The [T]own placed you on notice that there were a number of unsafe conditions in existence on your property . . . [and] provided you with repeated extensions to achieve compliance . . . . *[A]ny claim that Cicero is liable to you or in any way owes you money for the demolition or other expenses associated with your property is without merit.* Furthermore, even if there was merit, as a governmental entity and governmental employees the town and its staff are immune to such claims under Indiana law.

Id. at 90 (emphasis added).

[16] Thus, Culp's email made clear that there was no nexus between the demolition which the City had ordered on Sethi's property and the Town's possible purchase of that property. And, again, some ten months later, in July 2019, Culp wrote Tony Jost, an attorney who was then representing Sethi, that:

> The order to demolish the building was completely unrelated to these discussions [about a possible sale of the property to the Town]. As such, the Town rejects any and all assertions by Mr. Sethi that the Town has any liability to him or any claims he wishes to make regarding his property or the demolition of his building.

Appellant's App. Vol. 2 at 91. On October 5, 2017, Ashok wrote a letter to Amos reiterating Sethi's "demand that the Town pay us for rebuilding of the demolished property and the costs incurred by us since February 2014" and alleging that Culp "did not follow the proper procedures in sending the demolition orders from the Town Council." Appellant's App. Vol. 6 at 181. Ashok also stated that Sethi had listed the property for sale "in the market place." *Id.* at 182. And Ashok stated, "We are demanding that since our demolished property is not rentable now, that the Town of Cicero pay us rent at market rates [until] the buildings are rebuilt and become rentable. We can discuss 'other costs.'" *Id.* at 183. In response, on October 9, 2017, Culp wrote another email responding to Ashok as follows:

> [Amos] forwarded your letter to me and asked me to respond to it. The council has directed me to handle all further communications with you. Per the council, please direct all future correspondence to me only. . . .
>
> Regarding your most recent letter, your request for compensation for the rebuilding of the building has already been denied. Cicero followed all applicable laws and time lines in issuing the demolition order, in providing you with notice of its order, and in holding the appropriate hearing . . . .

Id. at 92. In response to a follow-up email from Ashok, on October 10, Culp stated, "The town has rejected your complaint and request for damages. That decision is not going to change." *Id.* at 186.

[17] After multiple email exchanges with Ashok, on October 17, 2017, Culp advised Ashok by email as follows:

> As I have already addressed all of the arguments you have made to date -- many of them multiple times -- the council (which has also received copies of all these messages and my responses) has instructed me *to stop re-answering the same questions and claims*. As such, I am referring you to our previous conversations and correspondence for the answers and responses to your questions and claims.

Id. at 188 (emphasis added).

[18] On October 26, 2018, Sethi mailed to the Town Council and the Indiana Political Subdivision Risk Management Commission their "Notice of Tort Claim pursuant to Indiana Code § 34-13-3-8." Appellant's App. Vol. 3 at 11. The Notice was attached to Sethi's pro se first complaint for damages against the Town filed on November 2, 2018, alleging breach of implied contract, constructive fraud, actual fraud, and deception regarding the Town's stated intention to purchase the property, which it never did. On March 22, 2019, Sethi filed an amended complaint. Finally, on July 9, 2020, Sethi filed a second amended complaint alleging fraud, constructive fraud, and unjust enrichment/quantum meruit, which is the subject of this appeal.[2]

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[2] The grievance lurking behind Sethi's complaint is Ashok's contention that the Town repeatedly misrepresented its intent to purchase the property and that he was damaged when he performed various tasks and incurred costs, including demolition of the structures on the property in reliance on the impending purchase. Discussions between the Town and Ashok continued from 2014 to 2018, during which time

[19] In the second amended complaint, Sethi alleged in relevant part that Ashok's September 15, 2017, letter to one member of the Town Council, Foster, "constituted a tort claim notice." *Id.* at 86. Sethi's fraud claim was based on the allegation that "[t]he Town and Culp falsely back[]dated the Demolition Order to give the misleading impression that the [smokestack] was ordered to be demolished on the date of the Hearing. There was no order to demolish the [smokestack] on the day of the Hearing." *Id.* at 89. And Sethi's constructive fraud claim was based on the allegation that "[t]he Town and Culp made deceptive material misrepresentations of existing fact and law to Sethi, including that the order to demolish the [smokestack] occurred at the Hearing, evidence supported the Demolition Order, and that the Demolition Order could not be changed." *Id.* at 91. As alleged in Sethi's second amended complaint, the alleged fraudulent conduct occurred between February and June 2017. Thus, the 180-day deadline for notice under the ITCA was sometime in December 2017, at the latest.

[20] In January 2021, the Town filed a motion for summary judgment on Sethi's fraud and constructive fraud claims. The Town alleged that Sethi had not timely filed notice of those claims pursuant to the ITCA, and it designated evidence in support of that contention. In response, Sethi asserted that they had substantially complied with the ITCA's notice requirements. In the alternative,

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Ashok gave the Town access to the property to assess the cost of demolition and redevelopment and to conduct environmental assessments. But the Town never executed an offer to purchase or an agreement to purchase the property.

Sethi asserted that there were genuine issues of material fact regarding whether the Town's ITCA notice defense was barred by the doctrines of estoppel and fraudulent concealment. The trial court granted the Town's summary judgment motion and made it a final judgment pursuant to Indiana Trial Rule 56(C).

[21] Sethi then filed a motion to correct error. At the hearing on that motion, Sethi admitted that "[t]here was no formal notice filed" with respect to the fraud and constructive fraud claims. Tr. at 3. But Sethi asserted that Ashok's communications with the Town "within the 180[-]day period" and Culp's assertion of immunity to Ashok's claims regarding the demolition orders estopped the Town from asserting the ITCA notice defense. *Id.* at 4.

[22] At the conclusion of the hearing, the trial court found that "Sethi has designated evidence that creates a genuine issue of material fact regarding whether estoppel bars the Town's ITCA notice defense." Appellant's App. Vol. 7 at 25. Thus, it reversed its grant of summary judgment for the Town. But the trial court found that Sethi had not sustained their burden to show that there were genuine issues of material fact regarding their fraudulent concealment allegation. And the trial court's order was silent regarding Sethi's allegation that it had substantially complied with the notice requirements under the ITCA. This appeal and cross-appeal ensued.

Discussion and Decision

Issue One: Estoppel

[23] The Town contends that the trial court erred when it found that genuine issues of material fact regarding Sethi's estoppel claim against its ITCA notice defense preclude summary judgment for the Town on Sethi's claims of fraud and constructive fraud. As our Supreme Court has stated:

> We review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, 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 judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.* (internal citations omitted).
>
> The initial burden is on the summary-judgment movant to "demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (alterations original to *Hughley*).

[24] The ITCA 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." Ind. Code § 34-13-3-8 (2021). The notice

> must describe in a short and plain statement the facts on which the claim is based. The statement must include the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing the notice.

I.C. § 34-13-3-10. And the notice "must be in writing and must be delivered in person or by registered or certified mail." I.C. § 34-13-3-12. Compliance with the ITCA is a question of law properly determined by the court. *Brown v. Alexander*, 876 N.E.2d 376, 380 (Ind. Ct. App. 2007), *trans. denied*. "Compliance with the notice provisions of the ITCA is a procedural precedent which the plaintiff must prove and which the trial court must determine before trial." *Id.* at 383.

[25] In its motion for summary judgment, the Town alleged that Sethi had failed to comply with the notice requirements of the ITCA with respect to the fraud and constructive fraud claims. Appellant's App. Vol. 2 at 204. And, again, at the hearing on the Town's motion to correct error, Sethi admitted that they did not file a formal ITCA notice regarding those claims. With its motion, the Town

designated as evidence Town Council member Dan Strong's affidavit stating that the Town Council had received two written notices ("the ITCA notices") from Sethi in October 2018 and January 2019 that were "denominated as tort claim notices for purposes of the Indiana Tort Claims Act[.]" Appellant's App. Vol. 3 at 9. But those ITCA notices were unrelated to the fraud and constructive fraud claims asserted in Sethi's second amended complaint.

[26] In addition, Strong stated that "[a] letter[from Ashok], dated September 15, 2017, was emailed to Brett Foster, then a Town Council member, on September 17, 2017. It was not delivered [to] the Town Council, either by hand-delivery or certified or registered mail." *Id.* And attached to Strong's affidavit were copies of the October 2018 and January 2019 ITCA Notices and the September 17, 2017, email ("September email"). The Town alleged that neither the ITCA notices nor the September email constituted notice of either the fraud or constructive fraud claims alleged in the second amended complaint. Thus, the Town contended that those claims were barred under the ITCA.

[27] In response, Sethi asserted that, "[w]ithin the 180-day notice window under the ITCA, Sethi sent the Town three letters raising his claims, Sethi met with Town officials, Sethi sent the Town attorney numerous emails, the Town responded and denied Sethi's claims, and the Town notified its liability insurer of a potential claim." *Id.* at 181-82. And Sethi designated evidence to support those assertions. Sethi argued in relevant part that the Town's ITCA notice defense was barred by the doctrine of equitable estoppel.

[28] This Court recently examined the doctrine of equitable estoppel in the context of an ITCA notice defense, and we explained as follows:

> The purposes of the tort claim notice statute include informing the officials of the political subdivision with reasonable certainty about the accident and the surrounding circumstances so the political subdivision may investigate, determine its liability, and prepare a defense. *Schoettmer v. Wright*, 992 N.E.2d 702, 707 (Ind. 2013). The notice requirement helps a governmental entity investigate an allegation while the facts are still "fresh and available." *Mills v. Hausmann-McNally, S.C.*, 55 F. Supp. 3d 1128, 1134 (S.D. Ind. 2014).
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> * * *
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> The elements of equitable estoppel are: (1) a representation or concealment of a material fact; (2) made by a person with knowledge of the fact and with the intention that the other party act upon it; (3) to a party ignorant of the fact; and (4) that representation or concealment induces the other party to rely or act upon it to his detriment. *Am. Family Mut. Ins. Co. v. Ginther*, 803 N.E.2d 224, 234 (Ind. Ct. App. 2004), *trans. denied*. "The party claiming estoppel has the burden to show all facts necessary to establish it." *Story Bed & Breakfast, LLP v. Brown Cty. Area Plan Comm'n*, 819 N.E.2d 55, 67 (Ind. 2004). The State will not be estopped in the absence of clear evidence that its agents made representations upon which the party asserting estoppel relied. *Id.*
>
> In deciding whether estoppel is appropriate, we "must focus on the conduct of the governmental entity; the crucial question is whether the governmental unit had *actual knowledge of and investigated the accident and surrounding circumstances*." *Madison Consol. Sch. v. Thurston*, 135 N.E.3d 926, 929-30 (Ind. Ct. App. 2019) (emphasis added). Facts that demonstrate a governmental entity's actual knowledge, and thus potentially provide a basis to

> estop the government from raising a notice defense, include the government's prompt investigation of a claim and:
>
> > preparation of a defense or admissions of liability; letters or writings involving descriptions of the incident, causes and conditions thereof or the nature and extent of injuries; promises; payments; settlements or other conduct or acts of the defendant or his agents or of the plaintiff . . . .
>
> *Delaware Cty. v. Powell*, 272 Ind. 82, 85, 393 N.E.2d 190, 192 (1979). "[T]hese acts and conduct could constitute a waiver of notice *or create an estoppel*." *Id.* (emphasis added).
>
> *However, even these activities are insufficient to estop a government from raising a notice defense; a plaintiff is still required to comply with the notice requirement unless the actions of the government unit induced the plaintiff to believe that filing a notice of tort claim was not required*. *See Coghill v. Badger*, 418 N.E.2d 1201, 1208 n.6 (Ind. Ct. App. 1981). In other words, "[the] acts of the governmental unit *must have induced the plaintiff to believe that formal notice was unnecessary*." *Id.* (emphasis added). Under such circumstances it is appropriate to estop a government entity from raising the defense that the plaintiff did not comply with the notice requirement. *See Delaware Cty.*, 272 Ind. at 85, 393 N.E.2d at 192.

City of Columbus v. Londeree, 145 N.E.3d 827, 833-34 (Ind. Ct. App. 2020) (some emphases added). Put another way, "to establish equitable estoppel, a party's conduct 'must be of a sufficient affirmative character to prevent inquiry or to elude investigation or to mislead and hinder.'" *Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*, 134 N.E.3d 370, 383 (Ind. 2019) (quoting *Paramo v. Edwards*, 563 N.E.2d 595, 599 (Ind. 1990)).

[29] Here, on appeal, the Town notes that the first element of equitable estoppel, a representation or concealment of a material fact, requires proof of the plaintiff's "lack of knowledge and of the means of knowledge as to the facts in question[.]" *See Schoettmer*, 992 N.E.2d at 709. And the Town maintains that Sethi cannot prove estoppel because Sethi had "the means to discover the alleged facts made the subject of the fraud and constructive fraud claims." Appellant's Br. at 21. Again, Sethi's fraud claim was based on the allegation that "[t]he Town and Culp falsely back[]dated the Demolition Order to give the misleading impression that the [smokestack] was ordered to be demolished on the date of the Hearing. There was no order to demolish the [smokestack] on the day of the Hearing." Appellant's App. Vol. 3 at 89. And Sethi's constructive fraud claim was based on the allegation that "[t]he Town and Culp made deceptive material misrepresentations of existing fact and law to Sethi, including that the order to demolish the [smokestack] occurred at the Hearing, evidence supported the Demolition Order, and that the Demolition Order could not be changed." *Id.* at 91.

[30] In essence, Sethi asserted in their second amended complaint that there was a discrepancy between the action taken at the February 7 hearing and the demolition orders. But, again, Sethi's representative, Reynolds, attended and participated in that hearing, and Reynolds' knowledge of what transpired at the

hearing is imputed to Sethi.[3] Moreover, as the Town contends, the minutes of the hearing were available for public inspection under Indiana Code Section 5-14-1.5-4; the demolition orders were also available to the public, and, in any event, Sethi received the demolition orders in May 2017; and Sethi could have researched Indiana law or employed an attorney to learn of his right to appeal the demolition orders under Indiana Code Section 36-7-9-5. Thus, it cannot be said that Sethi lacked knowledge or the means of knowledge concerning the facts which underlie their fraud and constructive fraud claims. *See Schoettmer*, 992 N.E.2d at 709.

[31] Still, on appeal, Sethi contends that

> [t]hree primary fact issues barred summary judgment on the Town's ITCA notice defense. *First*, Culp falsely told Sethi the Town was immune from liability during the ITCA notice period. *Second*, during the ITCA notice period, Culp told Sethi to stop further communications. *Finally*, despite extensive communications (three letters, an in-person meeting, and innumerable emails), Culp never mentioned the ITCA, its notice requirement, or that further notice would allegedly be needed.

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[3] On April 30, 2017, Ashok wrote Town Council member Strong that, "I am not an attorney and as of right this minute, I am not going to hire one. That just adds up to my cost, which I think is wasteful." Appellant's App. Vol. 2 at 175. Then, one month later, on May 29, Ashok wrote Culp that he was appealing the Town's decision "to force the demolition of the standing structures" on the property and that, "[t]he reason for the appeal is that I was not properly represented during" the Town Council hearing on February 7, stating that neither he nor the Trust had been represented by legal counsel. *Id.* at 183. In that same letter, Ashok stated that "Reynolds was present at the [hearing] *on my behalf*" but also stated that Reynolds "had absolutely no authority" and "was merely acting as a liaison." *Id.* (emphasis added). Then, in their complaint, Sethi states that Reynolds was Sethi's "representative" at the February 7 hearing. Appellant's App. Vol. 3 at 80. And while the record is replete with evidence that Reynolds acted as Sethi's agent, in his deposition taken on November 13, 2019, Ashok described Reynolds as an agent of the Town of Cicero and also as "just a custodian." Appellant's App. Vol 4 at 36, 38.

> Under Indiana's summary judgment standard, these facts easily established genuine issues of material fact on estoppel that precluded summary judgment.

Appellee's Br. at 29-30 (emphases added). We address each contention in turn.[4]

Immunity

[32] First, Sethi's characterization of Culp's assertion of immunity as a "false statement of law" is not supported by the evidence. *Id.* at 32. In response to Ashok's general "demand that the Town pay [Sethi] for rebuilding of [sic] the demolished property and all other costs associated with this 'acquisitional interest,'" Culp stated that, "as a governmental entity and governmental employees the town and its staff are immune to such claims under Indiana law." Appellant's App. Vol. 3 at 168; Appellant's App. Vol. 6 at 89. At the time Culp made that statement, Sethi had not made any specific claim sounding in tort or other legal theory. Culp was merely responding to Ashok's bald, undifferentiated claim that the Town should pay for his alleged damages. And Indiana Code Section 34-13-3-3 provides that a governmental entity is immune to several types of claims, including claims of a loss resulting from "[t]he

[4] We note that the question on appeal is not whether the designated evidence might support Sethi's claims of fraud and constructive fraud but whether the designated evidence reveals a question of material fact concerning whether Sethi has preserved those claims.

performance of a discretionary function," which would include the Town's issuance of demolition orders to protect the public's health and safety.

[33] Nevertheless, Sethi contends that he simply asserted a tort claim and that the "ITCA does not grant the Town immunity from tort liability," Appellees' Br. at 31, a categorical statement that is incorrect. Rather, there is an entire section of the ITCA devoted to immunity of governmental entities and employees from tort claims under the Act. *See* I.C. § 34-13-3-3. In any event, because Culp's claim of immunity was merely a general denial of liability to Sethi's unspecified claim for damages, we cannot say that Culp's statement was a misrepresentation of either law or fact.[5]

[34] And, while Sethi characterizes Culp's legal opinion as a misrepresentation, Sethi had no right to rely on Culp's opinion when he merely denied liability on behalf of his client and rejected Sethi's "complaint" and "request for damages," which is what attorneys do. It cannot reasonably be said that Sethi was lulled into inaction by these statements. *See Kenworth of Indianapolis, Inc.*, 134 N.E.3d at 383.

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[5] Sethi's reliance on *Fire Ins. Exchange v. Bell*, 643 N.E.2d 310 (Ind. 1994) is misplaced. As we noted in *Wheatcraft v. Wheatcraft*, 825 N.E.2d 23, 30 (Ind. Ct. App 2005), "[e]xpressions of opinion cannot be the basis for an action in fraud," and the representation in *Fire Ins. Exchange* was a "representation of fact," not of an opinion. *Id.* at 31. Here, Culp's denial of liability was merely an opinion and not a representation of fact upon which Sethi had a right to rely and that would support an estoppel claim.

Communications with the Town

[35] Second, Ashok stated in his affidavit that he perceived Culp's October 17 email to be "a directive to stop communicating with the Town" regarding his "claims relating to the demolition." However, Culp's email first explained that he had "already addressed all of the arguments you have made to date – many of them multiple times" and then informed Sethi only that the Town Council had instructed him "*to stop re-answering the same questions and claims*." Appellant's App. Vol. 6 at 179 (emphasis added). At that point, there had been several years of correspondence between Ashok, members of the Town Council, and Culp, and Culp's statement cannot reasonably be interpreted as a categorical refusal to respond to future communications from Ashok regarding new questions or concerns.

[36] Ashok also states in his affidavit that he "relied" on Culp's statement that he would "stop re-answering the same questions or claims" when he "did not provide further notice regarding the demolition process within the 180[ ]days" following destruction of the building and the smokestack. *Id.* at 178. Sethi contends, in effect, that Ashok was induced by Culp's statement to believe that filing a notice of tort claim was not required, in other words, that Culp's email excused him from compliance with the ITCA notice requirements. Culp's email does not support that inference. While Sethi may have, in fact, relied on Culp's statement, Sethi had no *right* to rely on the statement as a legal excuse for his failure to comply with the ITCA notice requirements.

[37] In a similar vein, Sethi contends, in effect, that because Culp, the Town's attorney, had "repeatedly and emphatically rejected Sethi's claim for damages," the Town had adequate "notice of a potential tort claim" and understood that Sethi had provided "notice of a potential tort claim." Appellant's App. Vol. 3 at 86-87. And Ashok declares in his affidavit that he "believed that [he] had given the Town adequate notice of [his] claims." Appellant's App. Vol. 6 at 179. We decline to adopt a rule that a governmental unit's denial of a general claim for damages, without more, relieves the tort claimant from the ITCA notice requirements. In any event, here, Sethi's damage claim prior to suit was that the Town pay "for the rebuilding of the demolished property." Sethi's claim contained no allegation of fraud or constructive fraud, which are the only issues relevant to the Town's summary judgment motion.

180-day Deadline

[38] Third, while Sethi asserts that "Culp never mentioned the ITCA, its notice requirements, or that further notice would allegedly be needed," Indiana law does not impose an affirmative duty on the Town to advise Sethi that they were required to file notice under the ITCA within 180 days. Sethi accurately notes that our courts have found it "significant" that a plaintiff was not informed of the ITCA notice requirement in the estoppel context. Appellees' Br. at 36. But the two cases cited by Sethi, *Schoettmer* and *Thurston*, are readily distinguishable from the present case. In both cases, the governmental entities or their agents were engaged in settlement discussions with the tort claimants and induced the claimants to reasonably believe that formal ITCA notice was unnecessary. *See*

Schoettmer, 992 N.E.2d at 709; *Thurston*, 135 N.E.3d at 930. Here, there were no settlement discussions. To the contrary, the Town consistently and emphatically denied any liability for the damages claimed by Sethi. We reject Sethi's contention that the Town had a duty to inform them of the ITCA notice requirements.

Due Diligence

[39] Finally, and ultimately, even when grounds for an estoppel have been proven, "due diligence in pursuing a claim is still required of the plaintiff," and Sethi must show that they "exercise[d] due diligence in giving tort claims notice after the equitable grounds cease[d] to operate as a valid basis for causing delay." *See Davidson v. Perron*, 716 N.E.2d 29, 34-35 (Ind. Ct. App. 1999), *trans. denied*. Sethi asserted their fraud and constructive fraud claims for the first time in their second amended complaint filed in July 2020, some three years after the misrepresentations are alleged to have occurred. Ashok's own correspondence in 2017 indicates that he was on inquiry notice and that he did not lack "the means of knowledge" that with ordinary diligence would have revealed the facts he now claims as grounds for his fraud and constructive fraud claims. *See Schoettmer*, 992 N.E.2d at 709.

[40] And neither before the trial court nor on appeal has Sethi addressed either when the alleged estoppel occurred or when it ceased to operate as a valid basis for causing the delay of their ITCA notice of their fraud and constructive fraud claims, and our review of the record does not reveal that information. Sethi appears to assume that, whenever the alleged estoppel may have occurred, it

bars the ITCA notice defense altogether, once and for all, indefinitely. That is incorrect.[6] As Sethi admitted at the hearing on their motion to correct error, they did not file a formal ITCA notice asserting fraud and constructive fraud claims at any time.[7] Thus, even assuming for purposes of argument that the other elements of estoppel were satisfied here, Sethi has not designated evidence from which a trier of fact could determine whether they exercised due diligence in giving an ITCA notice within a reasonable time after the alleged equitable grounds ceased to operate as a valid basis for causing their delay in giving notice. *See Davidson*, 716 N.E.2d at 34-35.

[41] Sethi was not unfamiliar with the ITCA. Indeed, Sethi sent two formal ITCA notices to the Town in October 2018 and January 2019. Appellant's App. Vol. 3 at 11, 27. Again, neither of those notices made any reference to the fraud or constructive fraud claims alleged in Sethi's second amended complaint. So in October 2018, at the latest, Sethi knew about the ITCA and that the ITCA required written notice to the Town of any tort claims.

[42] In sum, the Town satisfied its initial burden as summary judgment movant to show that Sethi did not timely file notice under the ITCA. The burden then shifted to Sethi to designate evidence creating a genuine issue of material fact

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[6] For example, in *Schoettmer*, our Supreme Court noted that the plaintiffs "presented evidence" that they did not know that the defendant was a governmental entity until it asserted the ITCA defense in its amended answer to the complaint. 992 N.E.2d at 709.

[7] To the extent Sethi contends that Ashok's September 2017 email to Culp satisfies the ITCA requirements, we address that issue below.

regarding their equitable estoppel claim. Sethi has not presented "clear evidence" that Culp misrepresented the law or facts when he asserted that the Town was immune from liability for Sethi's claim for damages allegedly caused by the demolition on their property. *Story Bed & Breakfast, LLP*, 819 N.E.2d at 67. Sethi has not shown that they had a right to rely on Culp's statement that he would "stop re-answering the same questions and claims" as an inducement to believe that formal ITCA notice was unnecessary. *See City of Columbus*, 145 N.E.3d at 834. And the Town had no legal duty to advise Sethi of the ITCA notice requirements.

[43] The back-and-forth between Ashok and the Town occurred over a period of several years but, ultimately, and as we have stated, even assuming Sethi has established grounds for an estoppel (which they have not), Sethi did not designate evidence or even address the issue of whether they exercised due diligence in filing a ITCA notice after the alleged estoppel would have ceased to operate as a valid basis for causing delay. *See Davidson*, 716 N.E.2d at 34-35. This failure alone is fatal to Sethi's estoppel claim. Thus, we hold that Sethi has not satisfied their burden to show, and the trial court erred when it found, that there are genuine issues of material fact regarding estoppel that preclude partial summary judgment for the Town on Sethi's fraud and constructive fraud claims.

[44] We conclude that Sethi has not designated evidence from which a jury could conclude either that the Town made a misrepresentation of fact or law upon

which Sethi reasonably relied or that Sethi exercised due diligence in filing an ITCA notice, both of which are required here to perfect a bona fide estoppel claim. On remand, we instruct the trial court to enter partial summary judgment for the Town on Sethi's fraud and constructive fraud claims.

Cross-Appeal

Issue Two: Substantial Compliance

[45] On cross-appeal, Sethi contends that the trial court erred when it did not find that it had substantially complied with the ITCA notice requirement regarding their fraud and constructive fraud claims. As our Supreme Court explained in *Schoettmer*:

> "[s]ubstantial compliance with the statutory notice requirements is sufficient when the purpose of the notice requirement is satisfied." *Ind. State Highway Comm'n v. Morris*, 528 N.E.2d 468, 471 (Ind. 1988). "The purposes of the notice statute include informing the officials of the political subdivision with reasonable certainty of the accident and surrounding circumstances so that [the] political [sub]division may investigate, determine its possible liability, and prepare a defense to the claim." *Id.* "What constitutes substantial compliance, while *not a question of fact but one of law*, is a fact-sensitive determination." *Collier v. Prater*, 544 N.E.2d 497, 499 (Ind. 1989). "The crucial consideration is whether the notice supplied by the claimant of his intent to take legal action contains sufficient information for the city to ascertain *the full nature of the claim* against it so that it can determine its liability and prepare a defense." *Id.* at 500. But "mere actual knowledge of an occurrence, even when coupled with routine investigation, does not constitute substantial compliance." *Morris*, 528 N.E.2d at 470.

992 N.E.2d at 707 (emphases added).

[46] Sethi maintains that, for substantial compliance, "[t]he ITCA only requires notice of the 'loss,' which is the 'damage to property.' The damage to property here was the demolition, and Sethi's multiple communications certainly gave notice of this." Appellees' Br. at 39. Sethi also contends that their notice was timely. In particular, they assert that their "loss" occurred in July 2017, when it demolished the building and smokestack. *Id.* at 43. And "[w]ithin 180 days," Ashok "met with the Town council in person, sent the Town council three letters, and exchanged numerous emails with the Town's attorney." *Id*.

[47] We cannot agree with Sethi's contention that substantial compliance with the ITCA notice requirement under Indiana law only requires a generic notice that a "loss" has occurred, which in this case is "damage to property" caused by the demolition. Rather than merely informing the Town of their "loss" and "intent to take legal action," Sethi was required to provide "sufficient information for the [Town] to ascertain the full nature of the claim against it so that it c[ould] determine its liability and prepare a defense." *Schoettmer*, 992 N.E.2d at 707.

[48] Here, the full nature of the claims includes alleged misrepresentations of law and fact, namely, that the smokestack demolition order was backdated and that there was no right to appeal the demolition orders, which, according to Sethi, constituted fraud and constructive fraud. Sethi directs us to no designated evidence to show that, in his communications with the Town in 2017, Ashok

remotely asserted those allegations or claims. Having not been informed of the full nature of Sethi's fraud and constructive fraud claims ultimately asserted in their second amended complaint, the Town could not have assessed its liability or prepared a defense to those claims. *See id.* Thus, Sethi's purported substantial compliance with the ITCA notice requirement is insufficient as a matter of law. We hold that Sethi has not shown that a genuine issue of material fact exists regarding whether they substantially complied with the ITCA notice requirement.

Issue Three: Fraudulent Concealment

[49] Finally, Sethi contends that genuine issues of material fact exist regarding whether fraudulent concealment tolled the notice requirement under the ITCA.

> "Fraudulent concealment is an equitable doctrine that operates to estop a defendant from asserting the statute of limitations as a bar to a claim whenever the defendant . . . 'has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.'" *Doe v. Shults-Lewis Child & Family Servs., Inc.*, 718 N.E.2d 738, 744-45 (Ind. 1999) (quoting *Fager v. Hundt*, 610 N.E.2d 246, 251 (Ind. 1993)). In such cases, equity will toll the commencement of the applicable time limitation until such time as the plaintiff discovers, or in the exercise of ordinary diligence should discover, the existence of the cause of action. *Id.* The plaintiff then has "a reasonable amount of time" after that date to file his complaint.[] *Alldredge v. Good Samaritan Home, Inc.*, 9 N.E.3d 1257, 1261 (Ind. 2014) (quoting *Shults-Lewis Child & Family Servs.*, 718 N.E.2d at 745).

Lyons v. Richmond Cmty. Sch. Corp., 19 N.E.3d 254, 260 (Ind. 2014). "'[W]hen the plaintiff obtains information that would lead to the discovery of the cause of action through ordinary diligence, the statute of limitations begins to run, regardless of any fraudulent concealment perpetrated by defendant.'" *Snyder v. Town of Yorktown*, 20 N.E.3d 545, 551 (Ind. Ct. App. 2014) (quoting *Doe v. United Methodist Church*, 673 N.E.2d 839, 844 (Ind. Ct. App. 1996), *trans. denied*), *trans. denied*. While the 180-day notice requirement is a procedural precedent, it is similar in its operation and effect to a statute of limitations.

[50] Sethi maintains that there are issues of material fact regarding "whether Culp 'actively concealed an important fact with the intent to mislead or hinder' Sethi from discovering" the fraud and constructive fraud claims. Appellees' Br. at 53 (quoting *Lyons*, 19 N.E.3d at 263). And Sethi cites to designated evidence they allege supports their contentions that Culp misrepresented that: (1) the order to demolish the smokestack was "backdated" to make it appear that the order was issued at the February 7 hearing, and (2) Sethi had missed their opportunity to appeal the demolition orders. However, Sethi does not allege or designate evidence to show when they knew or could have known about the alleged fraud and constructive fraud.

[51] Hence, again and just as with their estoppel claim, Sethi has not shown when the alleged equitable grounds tolling the ITCA notice period began or ceased. Without any such designated evidence, Sethi has not shown that they filed an ITCA notice within a reasonable time. *See, e.g.*, *Snyder*, 20 N.E.3d at 551 (holding plaintiff did not prove fraudulent concealment where equitable

grounds tolling ITCA notice period ceased one year prior to date plaintiff filed ITCA notice).

[52] The evidence shows that the Town gave Sethi written notice of the February 7 hearing and advised that they had the right to appear at the hearing, to be represented by counsel, to call witnesses and cross-examine witnesses, to take the steps they deemed necessary to challenge or dispute this order, and to request a continuance of the hearing. Appellant's App. Vol. 3 at 41. Sethi was represented by Reynolds at the hearing, and the record shows that Reynolds was thoroughly familiar with the property and its condition. Reynolds actively participated in the hearing. Both the minutes of the hearing and the demolition orders were public documents. Thus, just as with Sethi's estoppel defense, it cannot be said that Sethi lacked knowledge or the means of knowledge that, with ordinary diligence, would have revealed the facts which Sethi now claims were fraudulently concealed. *See Schoettmer*, 992 N.E.2d at 709.

[53] Indeed, again, Sethi concedes that they did not file any formal ITCA notice of their fraud and constructive fraud claims. The trial court did not err when it found that, as a matter of law, Sethi's designated evidence did not show there is a genuine issue of material fact regarding Sethi's fraudulent concealment counter to the Town's ITCA notice defense.

[54] Affirmed in part, reversed in part, and remanded with instructions.

Vaidik, J., and Weissmann, J., concur.