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OPINIONS AND ORDERS

STATUTORY PROVISIONS

OPINION OF THE INDIANA SUPREME COURT (DECEMBER 16, 2021)

IN THE INDIANA SUPREME COURT

CLARENCE LOWE,

Appellant,

v.

NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT,

Appellee.

Supreme Court Case No. 21S-CT-295

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

Before: Chief Justice RUSH and SLAUGHTER, DAVID, MASSA, and GOFF Judges.

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.

ORDER OF THE INDIANA SUPREME COURT
(JUNE 10, 2021)

IN THE INDIANA SUPREME COURT

CLARENCE LOWE,

Appellant,

v.

NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT,

Appellee.

Court of Appeals Case No. 20A-CT-01584

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

Before: Loretta H. RUSH, Chief Justice.

ORDER

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57. Being duly advised, the Court GRANTS the petition to transfer.

Done at Indianapolis, Indiana, on 6/10/2021

/s/ Loretta H. Rush
Chief Justice of Indiana

MEMORANDUM DECISION OF THE COURT OF APPEALS OF INDIANA (MARCH 2, 2021)

IN THE COURT OF APPEALS OF INDIANA

CLARENCE LOWE,

Appellant-Plaintiff,

v.

NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT,

Appellee-Defendant.

Court of Appeals Case No. 20A-CT-01584

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

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

Before: BAILEY, Judge, ROBB, J., and TAVITAS, J.

MEMORANDUM DECISION

Bailey, Judge.

CASE SUMMARY

Clarence Lowe ("Lowe") sued his employer, Northern Indiana Commuter Transportation District ("NICTD"), under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et. se*q., which provides a

federal cause of action for railroad employees injured as a result of negligence. Lowe gave notice of his claim to the Indiana Attorney General 263 days after his alleged injury.[1]

However, NICTD is a political subdivision, and the Indiana Tort Claims Act ("ITCA") requires service upon the governing body and the Indiana political subdivision risk management commission within 180 days of loss.[2] The trial court granted summary judgment to NICTD, concluding that a FELA claim is a tort claim; NICTD—although an arm of the state for Eleventh Amendment sovereign immunity purposes—is a political subdivision for tort claims purposes; Eleventh Amendment sovereignty is waived subject to compliance with ITCA; and Lowe's failure to timely provide a tort claims notice barred his claim. On appeal, Lowe presents the issue of whether summary judgment was improvidently granted, because he substantially complied with, or is not required to comply with, ITCA. We affirm.

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

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

FACTS AND PROCEDURAL HISTORY

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

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

On July 28, 2020, the trial court conducted a hearing at which argument of counsel was heard. NICTD argued that, for sovereign immunity purposes, it was to be treated as an arm of the State, having immunity from a private citizen lawsuit in federal court or the court of another state. NICTD conceded that, in the enactment of ITCA, Indiana had waived that immunity to the extent that NICTD could be sued in Indiana subject to compliance with ITCA. According to NICTD, Lowe's FELA suit was subject to dismissal for failure to comply with ITCA's 180-day notice requirement for suits against a political subdivision.

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

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

DISCUSSION AND DECISION

Standard of Review

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

Analysis

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

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

(2) a 3 political subdivision such as NICTD lacks sovereign immunity and may not invoke a term of ITCA on grounds that it represents a qualified waiver.[4]

The liability of a common carrier railroad engaged in interstate commerce for injuries to its employees is addressed by FELA, 45 U.S.C. § 51, *et. seq.*, enacted

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

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

Code Section 8-5-15-17:

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

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

under the Commerce Clause of the United States Constitution.

> Every common carrier railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be

> considered as entitled to the benefits of this chapter.

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

"[T]he [Eleventh] Amendment reflects the constitutional principle that a State may not be sued in federal court without its consent whether the suit is brought by a foreign citizen, a citizen of another state, or the state's own citizens." *Montgomery v. Bd. of Trs. of Purdue Univ.*, 849 N.E.2d 1120, 1124 (Ind. 2006). "The powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. 706, 712 (1999). Thus, when a FELA claim proceeds in state court, "issues of sovereign immunity come into play." *Januchowski*, 905 N.E.2d at 1046. A state may only be sued in its own state courts where it has waived sovereign immunity through a clear declaration. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

In 1972, the Indiana Supreme Court abolished the doctrine of common law sovereign immunity in the State of Indiana, with some limited exceptions, deferring to the legislature to consider which types of governmental conduct would result in immunity from liability. *See Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733, 737 (1972). Then, in 1974, the Indiana Legislature enacted ITCA, which provides that governmental

entities are subject to suit in Indiana state courts[5] for their torts, with certain enumerated exceptions. *See* Ind. Code § 34-13-3-3.

"[A] State may prescribe the terms and conditions on which it consents to be sued." *Oshinski v. N. Indiana Commuter Transp. Dist.*, 843 N.E.2d 536, 543-44 (Ind. Ct. App. 2006). The *Oshinski* Court considered whether a FELA claim was a tort claim subject to ITCA. The Court observed that, although FELA claims are not explicitly defined as negligence claims, federal case law characterizes them as such, requiring a plaintiff to prove foreseeability, duty, breach, and causation. *Id.* at 544. "FELA actions are tort actions, [and] we hold that FELA suits against the State filed in Indiana courts are properly limited by the qualifications set forth in ITCA." *Id.* That is, the State had consented to be sued to the extent permitted by ITCA, but the waiver of sovereign immunity is not absolute, and an employee bringing suit under FELA against a governmental entity in Indiana must comply with ITCA. *Id.* at 545.

Among the provisions of ITCA is the requirement of giving notice within 180 days of loss as a prerequisite to a lawsuit against a political subdivision. Lowe concedes, as he must, that Indiana law considers

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

NICTD to be a political subdivision. Pursuant to Indiana Code Section 8-5-15-1:

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

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

NICTD is supervised and managed by a board of trustees, consisting of the commissioner and four members appointed by the Governor. I.C. § 8-5-15-3. The board has power to, among other things, receive and apply for federal, state, municipal, or county funds, expend funds, acquire assets, issue revenue bonds, and employ persons. I.C. § 8-5-15-5. Subsection (6) provides that, "as a municipal corporation" a district may "sue and be sued." "By availing the liability protections under the Tort Claims Act to commuter transportation districts created under the Transportation Act, the legislature furthered its overall purpose to preserve the operation of interstate commuter railways by protecting the financial integrity of counties served by a commuter railway." *In re Train*

Collision at Gary, Ind. on Jan. 18, 1993, 654 N.E.2d 1137, 1146 (Ind. Ct. App. 1995), *trans. denied*.

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

Substantial Compliance. Lowe observes that two Indiana Court of Appeals cases, *Oshinksi, supra*, and *Rudnick v. N. Ind. Commuter Transp. Dist.*, 892 N.E.2d 204 (Ind. Ct. App. 2008), *trans. denied*, employed language consistent with NICTD's identity as a state agency (in the context of considering whether ITCA required notice and determining substantial compliance with notice, respectively). Therefore, according to Lowe, when he provided notice to the Attorney General within 270 days he, "at the very minimum substantially complied" with ITCA. Appellant's Brief at 17. Indiana has recognized the doctrine of "substantial compliance" under ITCA. *See City of Indianapolis v. Cox*, 20 N.E.3d 201, 208 n.4 (Ind. Ct. App. 2014), *trans. denied*. However, as Lowe conceded at the hearing, "substantial compliance" refers to the content of a notice and not the date of service.

Blanket Consent to Suit. Lowe asserts that "as a matter of *stare decisis* and presumed historical fact, the State of Indiana consented to be sued by injured workers covered by FELA, at least in its own courts, and it cannot upset [his] federally created right through local procedures." Appellant's Brief at 19. To the extent that he suggests Indiana has given consent

for FELA claims to proceed without limitation, this argument of blanket consent was rejected in *Oshinski*:

> Oshinksi argues the trial court erred by granting NICTD's motion for summary judgment because he was not required to comply with the notice provision of ITCA. . . . In the context of this case, the term "blanket consent" refers to Indiana's complete, "no strings attached" consent to be sued in its own state courts. Here, that means consent to be sued without regard for ITCA. "Qualified consent," for purposes of this opinion, means limited consent with "strings" — here, ITCA compliance. . . . We find a brief history of the United State's Supreme Court's Eleventh Amendment jurisprudence instructive before analyzing further the question of blanket consent.
>
> During the last several decades, the Supreme Court's Eleventh Amendment[6] jurisprudence has undergone a significant evolution. In 1964 the Court decided *Parden v. Terminal Railway of Alabama Docks Department*,

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[6] The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." As a matter of semantics, we note that it is common to refer to the states' immunity from suit in their own courts as "Eleventh Amendment immunity" even though, "The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 119 S.Ct. 2240, 2246, 144 L.Ed.2d 636 (1999).

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

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

statement from *Hilton* on which Oshinski bases his blanket consent argument.

In *College Savings Bank*, the Court spoke out more forcefully against *Parden* and seemingly drove the final nail in the sovereign immunity coffin of *Parden* by expressly overruling that decision. . . . On the same day that the Court decided *College Savings Bank*, however, it also decided *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), and that decision is the basis for a substantial portion of the dispute between the parties.

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

Alden did recognize that Parden had been expressly overruled. *Id.* at 732, 119 S. Ct. at 2256; however, a portion of *Alden* attempts to explain *Hilton* and specifically refers to the Hilton Court's mention of several states', including Indiana's, worker's compensation statutes, stating . . . we believe the decision is best understood not as recognizing a congressional power to subject nonconsenting States to private suits in their own courts, nor even as endorsing the constructive waiver

theory of *Parden*, but as simply adhering, as a matter of *stare decisis* and presumed historical fact, to the narrow proposition that certain States had consented to be sued by injured workers covered by FELA, at least in their own courts. . . .

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

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

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

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

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

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

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

rather a person subject to liability under 42 U.S.C. Section 1983:

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

or city more than an arm of the state); *see also Kashani v. Purdue University*, 813 F.2d 843, 845 (7th Cir.) (state university resembled an arm of the state more than a city or county), *cert. denied*, 484 U.S. 846, 108 S.Ct. 141, 98 L.Ed.2d 97 (1987). The *Lewis* Court used *Kashani*, a Section 1983 case in which Purdue University successfully invoked immunity under the Eleventh Amendment, as a guidepost in making their determination. *Kashani* sets forth three factors to consider: "the extent of the entity's financial autonomy from the state," its "general legal status," and "whether it serve[s] the state as a whole or only a region." 813 F.2d at 845-47. The *Lewis Court* addressed each factor in detail, concluding that, "[a]s the above analysis reveals, NICTD has attributes of both a state agency and a political subdivision." Nevertheless, we are persuaded that it is sufficiently dependent on the State of Indiana that it should be viewed as an arm of the state for Eleventh Amendment purposes." *Lewis* at 601.

The Court in *Gouge v. Northern Indiana Commuter Transportation District*, 670 N.E. 2d 363, 369 (Ind. App. 1996), found the Lewis Court's reasoning persuasive and agreed with its conclusion that NICTD is a state agency. *See also, Phillips v. Northern Indiana Commuter Transportation District*, 1994 WL 866082 (N.D. Ind. 1994). Because NICTD's status as a state agency has been determined as such by these courts, a similar conclusion

> is made in this instance for the purpose of determining that NICTD is not a "person" subject to suit under 42 U.S.C. Section 1983.

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

> [A]s it relates to Defendants NICTD and Officer Warsanen, the crux of the dispute rests on timing.
>
> Kelley argues NICTD and Warsanen are now speaking out of both sides of their mouth. Kelley claims that because NICTD argued it was a state agency for purposes of Eleventh Amendment Immunity, that it cannot now argue that it is a political subdivision or municipal corporation for purposes of the Indiana Tort Claims Act. Under the Indiana Tort Claims Act, the notice requirement for municipal corporations is 180 days, whereas with respect to state agencies, a 270-day notice period applies. This Court has concluded that NICTD is a state agency for purpose of Eleventh Amendment immunity.
>
> However, according to precedent, the notice of claims under Ind. Code 34-13-3-8 regarding a political subdivision or municipal corporation is not affected by its status as a state agency for purposes of Eleventh Amendment immunity. This is illustrious in cases where universities and colleges are arms of the state for purposes of Eleventh Amendment immunity but for purposes of notice are

> considered political subdivisions or municipal corporations. *See Schoeberlein v. Purdue University*, 129 Ill. 2d 372, 135 Ill. Dec. 787, 544 N.E.2d 283 (1989); *Van Valkenburg v. Warner*, 602 N.E.2d 1046 (Ind. Ct. App. 1992). Thus, the NICTD is entitled to notice of a claim within 180 days of the occurrence.

300 F. Supp. 2d at 689.

At the summary judgment hearing, Lowe urged the trial court to decline to adopt the reasoning of *Kelley* because it rested in part on *Lewis*. Counsel criticized *Lewis* as addressing too few factors of the *Mt. Healthy* decision (three instead of six).[7] He characterized *Lewis* as "still good law" albeit it based upon "facts and evidence as to the lay of the land 25 years ago." (Tr. Vol. II, pg. 25.) He noted that there had not been discovery "of current affairs" of NICTD, suggesting that *Lewis* might be obsolete. (*Id*. at 26.)

On appeal, Lowe renews the criticism of *Lewis*. Although he appears convinced that a proper analysis

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

of whether an entity is a state agency must involve the examination of six factors, he does not argue that articulation of each factor is mandatory under *Mt. Healthy*. He asks that we "examine indicators of immunity" anew. Appellant's Brief at 33.

That which we know from statutory guidance concerning the operations of NICTD is largely unchanged in twenty-five years. NICTD is described as a municipal corporation. I.C. § 8-5-15-2. NICTD's powers are limited to act for railroad operations purposes, serving the State of Indiana. I.C. § 8-5-15-5. NICTD can collect fares and also apply for and receive federal, state, county, and municipal funds. I.C. § 8-5-15-5(1). If NICTD dissolves, 90% of the proceeds are to be received by the State and 10% by the counties. I.C. § 8-5-15-5(d). NICTD has authority to issue bonds subject to restriction and oversight, I.C. § 8-5-15-5.4, but cannot levy taxes. I.C. § 8-5-15-5(b). The makeup of NICTD's governing board has changed since *Lewis* in a manner that suggests greater state oversight (four members are now appointed by the Governor as opposed to two when Lewis was decided). I.C. § 8-5-15-3. Lowe belatedly requested additional discovery in the trial court; to the extent he now suggests that there have been factual developments of such significance to change NICTD's interdependence with the State, his position is unavailing. Without record development, we are simply asked to speculate on a different outcome if *Lewis* were decided today.

Moreover, even if *Lewis* arguably gave short shrift to certain factors, its reasoning is not unique. The *Lewis* analysis was adopted in *Gouge v. N. Ind. Commuter Transp. Dist.*, 670 N.E.2d 363 (Ind. Ct. App. 1996). In *Gouge*, the trial court had entered a

judgment against NICTD awarding FELA damages to an injured carman, but subsequently denied a petition for costs. *See id.* at 365. The appellate court presumed that the denial was based upon Indiana Trial Rule 54(D), providing that "costs against any governmental organization, its officers, and agencies shall be imposed only to the extent permitted by law."

Ultimately, *Gouge* held costs could not be awarded against NICTD and, in reaching that conclusion, agreed with Lewis that NICTD is a government agency in the sense that it was entitled to Eleventh Amendment immunity.

> It is well-settled that the State and its agencies are not liable for ordinary court costs and fees absent specific statutory authority for their imposition. *State v. Eaton*, 581 N.E.2d 956, 960 (Ind. Ct. App. 1991), *reh'g denied, trans. denied; State v. Puckett*, 531 N.E.2d 518, 527 (Ind. Ct. App. 1988). Northern Indiana is a distinct municipal corporation created by state statute. *See* Ind. Code § 8-5-15. In *Lewis v. Northern Indiana Commuter Transp. Dist.*, 898 F. Supp. 596 (N. D. Ill. 1995), the court underwent an analysis of whether Northern Indiana is a state agency and, therefore, entitled to immunity from suit in federal court under the Eleventh Amendment. We find the court's reasoning persuasive and agree with its conclusion that Northern Indiana is a state agency. *Id.* at 602.

670 N.E.2d at 369. Lowe fails to persuade us that these well-reasoned cases were wrongly decided. We

are not convinced that the Indiana Legislature's characterization of NICTD as a political subdivision abrogated NICTD's entitlement to sovereign immunity as a state agency in the context of a FELA claim.

CONCLUSION

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

Affirmed.

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

ORDER OF THE COURT OF APPEALS OF INDIANA (MARCH 25, 2021)

IN THE COURT OF APPEALS OF INDIANA

CLARENCE LOWE,

Appellant,

v.

NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT,

Appellee.

Court of Appeals Case No. 20A-CT-01584

Before: Cale J. BRADFORD, Chief Judge, BAILEY, ROBB, TAVITAS, JJ.

ORDER

Appellee, by counsel, filed Motion to Publish Memorandum Decision.

Having reviewed the matter, the Court finds and orders as follows:

1. The Appellee's Motion to Publish Memorandum Decision is granted.
2. This Court's opinion heretofore handed down in this cause on March 2, 2021, marked

Memorandum Decision, is now ordered published.

3. The Clerk of this Court is directed to send copies of said opinion together with copies of this order to West Publishing Company and to all other services to which published opinions are normally sent.

Ordered 3/25/2021

Bailey, Robb, Tavitas, JJ., concur.

For the Court,

/s/ Cale J. Bradford
Chief Judge

**ORDER OF THE
PORTER COUNTY SUPERIOR COURT
GRANTING SUMMARY JUDGMENT
(JULY 31, 2020)**

IN THE PORTER SUPERIOR COURT
SITTING AT VALPARAISO, INDIANA

STATE OF INDIANA, COUNTY OF PORTER

CLARENCE LOWE,

Plaintiff,

v.

NORTHERN INDIANA COMMUTER
TRANSPORTATION DISTRICT,

Defendant.

Cause No.: 64D02-1901-CT-000682

Before: Jeffrey W. CHYMER,
Judge Porter Superior Court.

ORDER GRANTING SUMMARY JUDGMENT

On July 28, 2020 parties were in Court for a hearing on Defendant's Motion for Summary Judgment. Plaintiff appeared by Attorneys Michael Massucci and Thomas Kelliher by Zoom video. Defendant appeared by Attorney Connor Nolan.

Plaintiff's oral Motion to Strike Defendant's belated reply filed the day before the hearing is GRANTED and Exhibit is STRICKEN.

The Court commends counsel and notes that the motions and response were well written and argued. Based on the designated evidence, the Plaintiff was allegedly injured on the job working for NICTD. He then served a tort claim notice 263 days after the date of his alleged injury.

The rest of the briefing and argument is like two ships passing in the night. NICTD cites a string of opinions issued by the Indiana Court of Appeals and the Northern District of Indiana. (*see Lewis v. Northern Ind. Commuter Transp. Dist*, 898 F.Supp. 596, 601 (N. Dist. Ind. 1995)(holding that "NICTD has attributes of both a state agency and a political subdivision and it is an arm of the state for Eleventh Amendment purposes"); *Kelley v City of Michigan City*, 300 F. Supp.2d 682, 687 (N. Dist. Ind. 2004)(holding that NICTD is an arm of the state); *Oshinski v Northern Ind. Commuter Transp. Dist.*, 843 N.E.2d 536, 545 (Ind. App. 2006)(holding that FELA actions are tort actions and are subject to ITCA's qualifications); *Rudnick v Northern Ind. Commuter Transp. Dist.*, 892 N.E2d 204, 206 (Ind. App. 2008)(holding that an employee bringing suit under FELA against a governmental entity must comply with the Tort Claims Act); *Januchowski v. Northern Ind. Commuter Transp. Dist*., 905 N.E.2d 1041, 1044 (Ind. App. 2009)(Holding that the Tort Claim notice had to be filed with 180 days after the loss occurred . . . and see footnote 1 for an explanation of 180 versus 270 days). These cases consider the Eleventh Amendment and FELA claims made by NICTD employees. The latest case, in which

the Indiana Court of Appeals noted the well-reasoned trial court opinion affirming Summary Judgment in favor of NICTD with a one hundred and eighty (180) day tort claim notice provision.

In contrast, the Plaintiff cites a string of United States Supreme Court cases interpreting the Eleventh Amendment and FELA, and further asks this Court to find that the Indiana Tort Claims Act is unconstitutional as applied in this case.

The Plaintiff is simply arguing that this Court should ignore controlling precedent and opinions issued by the Indiana Court of Appeals. This Court finds the previous NICTD opinions issued by the Indiana Court of Appeals controlling and refuses to ignore them. The Plaintiff has not cited a single state or federal opinion in which NICTD was a party, where a FELA claim was being asserted and the tort claim notice issue was raised which supports his position.

It appears that the Plaintiff is arguing that the Porter Superior Court was wrong in granting Summary Judgment, and the Court of Appeals was wrong in affirming the trial Court's well-reasoned opinion in *Januchowski*. This Court finds *Januchowski* controlling and it does not find the Indiana Tort Claim Act unconstitutional as applied in this case.

Last, the Plaintiff is now asking that the Court deny the Summary Judgment to allow the parties to conduct discovery. This request to conduct discovery is DENIED because it is too late. At the commencement of the oral arguments, the Plaintiff moved orally to strike the Defendant's reply and an additional exhibit. The Court granted that motion because it was filed

the day before the hearing and the Defendant did not seek leave to file a reply.

If the Plaintiff wished to conduct discovery regarding NICTD's federal funding, he could have filed for an enlargement of time to respond under Trial Rule 56(I) and the request would have been granted.

In conclusion, the Court finds *Januchowski* controlling and it is undisputed that Plaintiff did not serve a tort claim notice until 263 days after the accident, therefore the notice was late and NICTD's Motion for Summary Judgment is GRANTED.

There is no just reason for delay and this constitutes a final appealable order.

ALL OF WHICH IS ORDERED this 31st day of July, 2020.

/s/ Honorable Jeffrey W. Chymer
Porter Superior Court II

STATUTORY PROVISIONS INVOLVED

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45 U.S. Code Chapter 2
Liability for Injuries to Employees

§ 51 - Liability of Common Carriers By Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Employee Defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of

this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 55 - Contract, Rule, Regulation, or Device Exempting from Liability; Set-Off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56 - Actions; Limitation; Concurrent Jurisdiction of Courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57 - Who Included in Term "Common Carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Title 4. State Offices and Administration
Article 12. Appropriations Management
Chapter 1. The Budget Agency

IC 4-12-1-1 Short Title; Purposes

Sec. 1.

(a) This chapter shall be known and may be cited as the budget agency law.

(b) Its general purposes and policies may be perceived only from the entire chapter, but among them are four (4) of particular significance, namely:

(1) Vesting in the budget agency duties and functions and rights and powers which make the execution and administration of all appropriations made by law the exclusive prerogative and authority of that agency, and otherwise denying such prerogative and authority to the budget committee.

(2) Designating an officer of the executive department and four (4) members of the general assembly as members of the budget committee through which they may work between regular sessions of the general assembly and cooperatively propose and recommend to the general assembly the appropriations which appear to be necessary

to carry on state government in the succeeding budget period.

(3) Giving the members of the budget committee, who are members of the general assembly, the authority to engage in activities incidental and germane to their legislative powers, including investigations of appropriations made and to be made by law, before and after sessions of the general assembly.

(4) Making the gathering of information, data, and expert opinion, with reference to the revenues of the state from current sources, and with reference to procuring additional revenues to meet appropriations which may be recommended, and making the evaluation of such data and opinion and of appropriations requested by agencies of the state, the concurrent prerogative and authority of the budget committee and the budget agency.

Formerly: Acts 1961, c.123, s.1. As amended by Acts 1977, P.L.28, SEC.1; P.L.3-1986, SEC.4.

IC 4-12-1-2 Definitions

Sec. 2. As used in this chapter unless a different meaning appears from the context:

(a) The word "committee" means the budget committee.

(b) The word "director" or the term "budget director" means the person who is director of the budget agency.

(c) The term "appointing authority" means the head of an agency of the state.

(d) The terms "agency of the state" or "agencies of the state" or "state agency" or "state agencies" mean and include every office, officer, board, commission, department, division, bureau, committee, fund, agency, and, without limitation by reason of any enumeration herein, every other instrumentality of the state of Indiana, now existing or which may be created hereafter; every hospital, every penal institution and every other institutional enterprise and activity of the state of Indiana, wherever located; the universities and colleges supported in whole or in part by state funds; the judicial department of the state of Indiana; and all non-governmental organizations receiving financial support or assistance from the state of Indiana; but shall not mean nor include cities, towns, townships, school cities, school towns, school districts, nor other municipal corporations or political subdivisions of the state.

(e) The terms "budget bill," or "budget bills," shall mean a bill for an act, or two (2) or more such bills, prepared as authorized in this chapter, by which substantially all of the appropriations are made that are necessary and required to carry on state government for the budget period, if and when such bill is, or such bills are, enacted into law.

(f) The term "budget report" shall mean a written explanation of the budget bill or bills, and a general statement of the reasons for the appropriations therein and of the sources and extent of state income to meet such appropriations, together with such further parts as are required by law.

(g) The term "budget period" means that period of time for which appropriations are made in the budget bill or budget bills.

Formerly: Acts 1961, c.123, s.2. As amended by Acts 1977, P.L.28, SEC.2; P.L.233-2015, SEC.4.

Title 8. Utilities and Transportation
Article 5. Commuter Railways
Chapter 15. Commuter Transportation Districts

IC 8-5-15-1 Definitions

Sec. 1. As used in this chapter:

"Board" means the board of trustees of the commuter transportation district.

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

"Commissioner" means the commissioner of the Indiana department of transportation.

"Cost" as applied to a railroad or railroad project includes:

(1) the cost of construction;

(2) the cost of acquisition of personal property, capital stock, land, rights-of-way, property rights, easements, and interests;

(3) the cost of demolishing or removing any buildings or structures on land so acquired,

including the cost of acquiring any lands to which such buildings or structures may be moved;

(4) the cost of relocating public roads and land, or of easements;

(5) the cost of all machinery and equipment, financing charges, interest before and during construction and for not exceeding two (2) years after the estimated date of completion of construction;

(6) the cost of engineering and legal expenses, plans, specifications, surveys, estimates of cost, traffic, and revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing or acquiring any such project;

(7) administrative expense; and

(8) such other expenses as may be necessary or incident to the construction or acquisition, of the project, the financing of the construction or acquisition, and the placing of the project in operation.

"District" means a commuter transportation district established under this chapter.

"Passenger" means a frequent user of the commuter transportation system who can demonstrate an interest and familiarity with the commuter transportation system.

"Project" or "railroad project" includes any facilities, adjuncts, and appurtenances necessary to operate a railroad, such as lines, routes, roads, rights-of-

way, easements, licenses, permits, tangible personal property, and real property. It also includes all or a majority of the outstanding capital stock of a corporation that operates a railroad.

"Revenues" means all fees, tolls, rentals, gifts, grants, money, and all other funds coming into the possession or under the control of the board by virtue of this chapter, but does not include real property or personal property other than money, nor the proceeds from the sale of bonds issued under this chapter.

[Pre-Local Government Recodification Citation: 19-5-2.6-2.]

As added by Acts 1980, P.L.8, SEC.68. Amended by P.L.64-1984, SEC.1; P.L.3-1989, SEC.63; P.L.295-2001, SEC.1; P.L.108-2019, SEC.146.

IC 8-5-15-2 Establishment; Composition; Name

Sec. 2.

(a) The district is created and shall be composed solely of counties which are served by the system and through which the system passes.

(b) A district shall be a distinct municipal corporation and shall bear a name including the words "commuter transportation district". Such municipal corporation shall include all the territory of the counties that are served by the system and through which the system passes and shall be coterminous with such counties.

[Pre-Local Government Recodification Citation: 19-5-2.6-3.]

As added by Acts 1980, P.L.8, SEC.68. Amended by Acts 1981, P.L.67, SEC.5; P.L.385-1987(ss), SEC.2; P.L.108-2019, SEC.147.

IC 8-5-15-3 Board of Trustees; Membership; Term

Sec. 3.

(a) The district shall be supervised and managed by a board of trustees, which consists of the following:

(1) The commissioner, or the commissioner's designee, who shall serve as chair of the board.

(2) Four (4) members appointed by the governor, consisting of one (1) elected official from each county that is served by the system and through which the system passes, not more than two (2) of whom may be from the same political party.

(b) Appointments to the board under subsection (a)(2) are for terms of four (4) years, except that the initial term of the initial members shall be one (1) year, two (2) years, three (3) years, and four (4) years, as determined by the governor in connection with the appointment of each such member. Each member appointed to the board under subsection (a)(2):

(1) holds office for the term of the appointment;

(2) continues to serve after expiration of the appointment until a successor is appointed and qualified;

(3) is eligible for reappointment; and

(4) may be removed from office by the governor with or without cause and serves at the pleasure of the governor.

The governor shall fill a vacancy for the unexpired term of any member appointed under subsection (a)(2).

(c) The board shall elect from among its members a vice chair, a secretary, and a treasurer.

[Pre-Local Government Recodification Citation: 19-5-2.6-4.]

As added by Acts 1980, P.L.8, SEC.68. Amended by P.L.12-1983, SEC.18; P.L.64-1984, SEC.2; P.L.385-1987(ss), SEC.3; P.L.295-2001, SEC.2; P.L.182-2009(ss), SEC.263; P.L.48-2010, SEC.1; P.L.108-2019, SEC.148.

IC 8-5-15-3 Board of Trustees; Membership; Term (Effective March 12, 2010 to April 28, 2019)

Sec. 3.

(a) The district shall be supervised and managed by a board of trustees, which consists of the following:

(1) Four (4) members, one (1) from each county that is a member of the district, appointed by that county's board of county commissioners. In the case of a member appointed or reappointed under this subdivision after December 31, 2009, the member must be a member of the board of county commissioners of the county that the member represents.

(2) Four (4) members, one (1) from each county that is a member of the district, each of whom is the president of that county's county council or another council member designated by the president as a board member.

(3) After June 30, 2010, one (1) member representing the rest of the state, appointed by the governor.

(4) After June 30, 2010, one (1) passenger member appointed by the governor. The member appointed under this subdivision must be selected from passengers who have submitted a letter of interest to the governor. To be considered for this position, a passenger must submit a letter of interest to the governor during a two (2) week period that begins, in 2010, on May 2, 2010, and, in any year after 2010 in which the term of a member appointed under this subsection expires, sixty (60) days before the expiration of the term of the member appointed under this subdivision. A member of the board serving under this subdivision is not required to submit a letter of interest to be eligible for appointment to a successive term.

(5) After June 30, 2010, one (1) member who is an employee of the district, appointed by the governor from a list of names submitted by the labor unions representing the employees of the district. Each labor union representing employees of the district may submit one (1) name to be included on the list of names under this subdivision.

(b) A member shall serve for a term of two (2) years from the beginning of the term for which the member was appointed and until a successor has qualified for the office. Each member shall serve at the pleasure of the appointing authority but is eligible for reappointment for successive terms.

(c) The members of the board shall elect for a one (1) year term:

(1) one (1) member as chairman;

(2) one (1) member to serve as vice chairman;

(3) one (1) member to serve as secretary; and

(4) one (1) member to serve as treasurer.

(d) Not later than:

(1) April 1, 2010; and

(2) in any year after 2010 in which the term of a member appointed under subsection (a)(4) expires, ninety (90) days before the expiration of the term of the board member appointed under subsection (a)(4); the district shall post in each commuter station in the district a notice of the opening on the board of trustees. The notice must announce the opening for a passenger member on the board of trustees and provide information on submitting a letter of interest. The notice must state the period in which the passenger must submit a letter of interest. The notice must remain posted until, in 2010, May 15, 2010, and, in any subsequent year in which the term of a member appointed under subsection (a)(4)

expires, the expiration of the two (2) week period described in subsection (a)(4).

(e) A member appointed under subsection (a)(4) or (a)(5) may not:

(1) vote on issues involving perceived or actual financial conflicts of interest, including personnel issues, collective bargaining, and assessment or levy of taxes; or

(2) participate in an executive session of the board under IC 5-14-1.5-6.1, on issues regarding:

(A) the discussion of strategy for:

(i) collective bargaining; or

(ii) the initiation of litigation or litigation that is either pending or has been threatened specifically in writing; as described in IC 5-14-1.5-6.1(b)(2); or

(B) the discussion of job performance evaluation of individual employees, except for a discussion of the salary, compensation, or benefits of employees during a budget process, as described in IC 5-14-1.5-6.1(b)(9).

(f) The members appointed under subsection (a)(4) and (a)(5) must reside in different counties.

[Pre-Local Government Recodification Citation: 19-5-2.6-4.]

As added by Acts 1980, P.L.8, SEC.68. Amended by P.L.12-1983, SEC.18; P.L.64-1984, SEC.2; P.L.385-1987(ss), SEC.3; P.L.295-2001, SEC.2; P.L.182-2009(ss), SEC.263; P.L.48-2010, SEC.1.

IC 8-5-15-4 Board; Powers; Meetings; Compensation

Sec. 4.

(a) The board may exercise the executive and legislative power of the district as provided by this chapter.

(b) The board shall hold regular meetings, to be held not less than four (4) times a year, and shall keep its meetings open to the public.

(c) The members of the board are entitled to reimbursement for traveling expenses and other expenses incurred in connection with the members' duties, subject to state travel policies and procedures established by the state budget agency, to be paid by the district.

(d) A majority of the members appointed to the board constitutes a quorum for a meeting. The affirmative votes of a majority of the members are necessary for any action to be taken by the board.

[Pre-Local Government Recodification Citation: 19-5-2.6-5.]

As added by Acts 1980, P.L.8, SEC.68. Amended by P.L.385-1987(ss), SEC.4; P.L.108-2019, SEC.149.

IC 8-5-15-5 Powers of Board; Dissolution of District

Sec. 5. (a) The board has all powers reasonably necessary to carry out the purpose of this chapter including the following powers:

(1) To receive federal, state, county, and municipal funds, or private contributions and disburse

them for the purpose of aiding commuter transportation systems serving the district.

(2) To monitor and evaluate the use of funds granted or distributed by the district.

(3) To apply for federal, state, municipal, or county funds for the purpose of rendering assistance to commuter transportation systems.

(4) To coordinate its plans and activities with:

(A) any public transportation authority serving one (1) or more counties that are served by the system and through which the system passes;

(B) the Indiana department of transportation;

(C) regional planning commissions serving any portion of the district;

(D) units of county and municipal government included in the district; and

(E) any regional transportation authority, transit authority, or like governmental unit in another state if the commuter transportation system crosses the boundary of the state or serves another.

(5) To purchase, lease, or lease with option to purchase capital equipment in aid of any system of commuter transportation operating in the district, and lease the equipment to the system under conditions and for a term to be determined by the board.

(6) As a municipal corporation, to sue and be sued.

(7) To conduct public hearings to accomplish the purpose of this chapter.

(8) To seek and accept the assistance of any public or publicly funded agency in carrying out its functions and duties.

(9) To enter into agreements with either private or public agencies for any purpose required to accomplish the intent of this chapter. The board may enter into a trust indenture or any other agreement with the board for depositories in order to obtain a loan or a loan guarantee under IC 5-13-12-11.

(10) To set levels of service and rates notwithstanding IC 8-3-1, for transportation of passengers subject to section 7 of this chapter.

(11) To expend funds granted to the district from any source for the purpose of paying reasonable administrative expenses.

(12) To purchase, acquire, lease, or lease with option to purchase all or any part of the assets of a railroad that is providing commuter transportation services within the district and to purchase or acquire all or any part of the issued and outstanding stock of a railroad that is providing commuter transportation services within the district.

(13) To own all or any part of the capital stock or assets of a railroad that is providing commuter transportation services within the district, and to operate either directly, by management contract, or by lease any such railroad.

(14) To issue revenue bonds of the district payable solely from revenues for the purpose of paying all or any part of the cost of acquiring the capital stock of a railroad company, all or any part of the assets of a railroad, or any property, real or personal, for the purposes of this chapter.

(15) To acquire, lease, construct, maintain, repair, police, and operate a railroad and to establish rules for the use of the railroad and other properties subject to the jurisdiction and control of the board.

(16) To acquire and dispose of real and personal property in the exercise of its powers and the performance of its duties under this chapter.

(17) To lease to others for development or operation all or any part of a railroad on such terms and conditions as the board considers advisable.

(18) To make and enter into all contracts, undertakings, and agreements necessary or incidental to the performance of its duties and the execution of its powers under this chapter.

(19) To employ, subject to sections 18 and 19 of this chapter, an executive director or manager, consulting engineers, superintendents, and such other engineers, construction and accounting experts, attorneys, and other employees and agents as may be necessary in its judgment, and to fix their compensation.

(20) To negotiate and enter into agreements for railroad trackage rights regardless of the location of the track.

(21) To authorize the Indiana department of transportation to exercise all or a part of the powers of the board under this chapter or IC 5-1.3 that are necessary or desirable to accomplish the purposes of this chapter or IC 5-1.3, subject, in each case, to the agreement of the Indiana department of transportation.

(22) To do all other acts necessary or reasonably incident to carrying out the purpose of this chapter.

(b) Notwithstanding the powers granted to the board in subsection (a), the district does not have the power to levy taxes.

(c) In the event the board of trustees determines that the commuter transportation system or the railroad owned by the district cannot continue to provide adequate transportation service, or the district is terminated, the board may, subject to the conditions of any state or federal grant used to purchase equipment or property, dispose of any properties of the district.

(d) In the event the district is dissolved, ninety percent (90%) of the proceeds shall be paid to the state and ten percent (10%) to the counties in proportion to their contributions.

(e) In the exercise of any of the powers granted to the board in subsection (a), the board is not subject to any other laws related to commuter transportation systems or railroads.

[Pre-Local Government Recodification Citation: 19-5-2.6-6.]

As added by Acts 1980, P.L.8, SEC.68. Amended by Acts 1981, P.L.67, SEC.6; P.L.12-1983, SEC.19; P.L.64-1984, SEC.3; P.L.48-1986, SEC.2; P.L.19-1987, SEC.22; P.L.385-1987(ss), SEC.5; P.L.18-1990, SEC.63; P.L.108-2019, SEC.150.

IC 8-5-15-5.4 Bonds

Sec. 5.4.

(a) The board may provide by resolution, at one (1) time or from time to time, for the issuance of revenue bonds of the district for the purpose of paying all or any part of the cost of a railroad project. The principal of and the interest on the bonds are payable solely from the revenues specifically pledged to the payment thereof. The bonds of each issue shall be dated, bear interest at any rate, and mature at a time or times not exceeding forty (40) years from the date thereof, as may be determined by the board, and may be made redeemable before maturity, at the option of the board, at such price or prices and under such terms and conditions as may be fixed by the board in the authorizing resolution.

(b) The board shall determine the form of the bonds, including any interest coupons to be attached to the bonds, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest.

(c) The bonds shall be issued in the name of the district and executed by the manual or facsimile signature of the president of the board. The manual or facsimile seal of the district shall be affixed or imprinted on the bonds and attested by

the manual or facsimile signature of the secretary of the district. However, one (1) of the signatures must be manual, unless the bonds are authenticated by the manual signature of an authorized representative of a trustee for the bondholders. Any coupons attached to the bonds must bear the facsimile signature of the treasurer of the board. In case any officer whose signature or a facsimile of whose signature appears on any bonds or coupons ceases to be an officer before the delivery of the bonds, the signature or facsimile shall nevertheless be considered valid and sufficient for all purposes the same as if he had remained in office until the delivery. The bonds must contain on their face a statement to the effect that the bonds, as to both principal and interest, are payable solely from the revenues pledged for their payment.

(d) All bonds issued under this chapter have all the qualities and incidents of negotiable instruments under the negotiable instruments law of Indiana.

(e) The bonds may be issued in coupon, registered, or book entry form, or any combination of these, as the board may determine, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds of any bonds registered as to both principal and interest.

(f) The board may sell the bonds in such manner and for such price as it may determine to be in the best interest of the district, either at public sale under IC 5-1-11 or at private sale.

(g) The board may issue bonds under this chapter only after obtaining approval of the issuance by the Indiana department of transportation. Before giving approval, the Indiana department of transportation shall give due consideration to any contract terms and conditions that impinge on the continuation of revenues for the term of any bond.

(h) This chapter constitutes full and complete authority for the issuance of bonds. No law, procedure or proceedings, publications, notices, consents, approvals, orders, acts, or things by the board or any other officer, department, agency or instrumentality of the state, county, or any municipality shall be required to issue such bonds except as may be prescribed in this chapter.

(i) Bonds issued under the provisions of this section shall constitute legal investments for any private trust funds, and the funds of any banks, trust companies, insurance companies, building and loan associations, credit unions, banks of discount and deposit, savings banks, loans and trust and safe deposit companies, rural loan and savings associations, guaranty loan and savings associations, mortgage guaranty companies, small loan companies, industrial loan and investment companies, and any other financial institutions organized under the laws of the state of Indiana.

(j) Bonds may not be sold to purchase or lease assets or purchase capital stock of a railroad unless the board has a written undertaking from the seller or lessor that the seller or lessor will take no direct action calculated to cause the reduction of levels of freight service being rendered or

revenues being generated on any such railroad for a period of time not less than the term of the bonds.

As added by Acts 1981, P.L.67, SEC.7. Amended by P.L.64-1984, SEC.4; P.L.18-1990, SEC.64; P.L.42-1993, SEC.6.

IC 8-5-15-5.5 Bonds; Security; Pledges or Assignments; Rights and Remedies of Bondholders; Depository; Expenses

Sec. 5.5.

(a) In the discretion of the board, any bonds issued under the provisions of this chapter may be secured by a trust agreement by and between the board and a corporate trustee, which may be any trust company or bank having the powers of a trust company within this state. Any resolution adopted by the board providing for the issuance of revenue bonds and any trust agreement pursuant to which the bonds are issued may pledge or assign, subject only to valid prior pledges, all or any portion of the revenues received or to be received by the board, except such part as may be necessary to pay the cost of the board's administrative expenses, operation, maintenance, and repair of the railroad, and to provide reserves required by any bond resolution adopted or trust agreement executed by the board.

(b) In authorizing the issuance of bonds, the board may limit the amount of bonds that may be issued as a first lien against the amounts pledged to the payment of those bonds, or the board may authorize the issuance from time to time thereafter of

additional bonds secured by the same lien. Additional bonds shall be issued on such terms and conditions as may be provided in the bond resolution or resolutions adopted by the board and in the trust agreement or any agreement supplemental to the trust agreement. Additional bonds may be secured equally and ratably without preference, priority, or distinction with the original issue of bonds, or may be made junior to the original issue of bonds.

(c) Any pledge or assignment made by the board under this section is valid and binding from the time that the pledge or assignment is made, and the amounts so pledged and thereafter received by the board are immediately subject to the lien of the pledge or assignment without physical delivery of those amounts or further act. The lien of the pledge or assignment is valid and binding against all parties having claims of any kind in tort, contract, or otherwise against the board or district irrespective of whether these parties have notice of the lien. Neither the resolution nor any trust agreement by which a pledge is created or an assignment made need be filed or recorded in order to perfect the resulting lien against third parties. However, a copy of the pledge or assignment shall be filed in the records of the board.

(d) Any trust agreement or resolution providing for the issuance of bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law. The pro-

visions may include, but are not limited to, covenants setting forth the duties of the board in relation to:

(1) the acquisition of property;

(2) the custody, safeguarding, investment, and application of all moneys received or to be received by the board of trustees;

(3) the establishment of funds, reserves, and accounts;

(4) the construction, improvement, maintenance, repair, operation, and insurance of the railroad project in connection with which the bonds shall have been authorized; and

(5) the rates of fees, tolls, rentals, or other charges to be collected for the use of the railroad project.

(e) It is lawful for any bank or trust company incorporated under the laws of the state, and any national banking association which may act as depository of the proceeds of bonds or other funds of the board, to furnish such indemnifying bonds or to pledge such securities as may be required by the board.

(f) Any trust agreement entered into under this section may set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders as is customary in trust agreements or trust indentures securing bonds or debentures of private corporations. In addition, such a trust agreement may contain such other provisions as the board may

deem reasonable and proper for the security of the bondholders.

(g) All expenses incurred in carrying out the provisions of a trust agreement entered into under this section may be paid from the amounts distributed to the district from the electric rail service fund, from the bond proceeds, or from revenues.

As added by Acts 1981, P.L.67, SEC.8. Amended by P.L.64-1984, SEC.5.

IC 8-5-15-5.6 Covenants With Bond Purchasers; Distributions from Electric Rail Service Fund

Sec. 5.6.

(a) The general assembly covenants with the purchasers of any bonds issued pursuant to the authority of this chapter that the taxes providing the amounts to be distributed to the district from the electric rail service fund (IC 8-3-1.5-20.6) and the commuter rail service fund (IC 8-3-1.5-20.5), which amounts are pledged to the payment of those bonds, shall not be repealed, amended, or altered in any manner that would adversely affect the levy and collection of those taxes, or change the method of fixing the rates of those taxes, so long as the principal of, or interest on, any such bonds is unpaid.

(b) The board, on behalf of the state and the district, is hereby authorized to make a similar pledge or covenant in any agreement with the purchasers of any bonds issued pursuant to the authority of this chapter.

(c) For purposes of this section, the principal of or interest on bonds or notes shall be considered paid if provision has been made for their payment in such a manner that the bonds or notes are not considered to be outstanding under the provisions of the resolution or trust agreement pursuant to which the bonds or notes are issued.

As added by Acts 1981, P.L.67, SEC.9. Amended by P.L.385-1987(ss), SEC.6.

IC 8-5-15-5.7 Commuter Transportation System Bond Fund; Reserve; Surplus

Sec. 5.7.

(a) If there are bonds outstanding issued pursuant to section 5.4 of this chapter, the treasurer of the board shall deposit in a separate and distinct fund called the commuter transportation system bond fund all amounts distributed to the district from the commuter rail service fund (IC 8-3-1.5-20.5) and the electric rail service fund established by IC 8-3-1.5-20.6.

(b) "Bond fund requirement" means the total of the following:

(1) the principal of and interest on all outstanding bonds issued pursuant to this chapter becoming due in the next twelve (12) months; plus

(2) as a reserve for such payment the amount provided in the resolutions or trust agreements pursuant to which such bonds are issued which reserve shall not in any event exceed an amount equal to two (2) times the maximum amount of principal and interest coming

due of such bonds in any subsequent year by reason of stated maturities, scheduled mandatory prepayments or by operation of any mandatory prepayments or by operation of any mandatory sinking fund (assuming for the purpose of the foregoing that all such bonds which are subject to mandatory redemption or prepayment are redeemed or prepaid in accordance with the requirements of such mandatory redemption or prepayment and further assuming that such bonds are otherwise redeemed or prepaid prior to maturity).

(c) Amounts in the commuter transportation bond fund up to the bond fund requirement shall be applied to the payment of principal of such bonds and the interest thereon and to no other purpose whatsoever. Any amount in the bond fund which exceeds the bond fund requirement may be expended by the board for any purpose authorized by this chapter.

(d) The reserve shall be held as a separate subaccount within such bond fund. To the extent authorized and directed in any resolution of the board or in any trust agreement providing for the issuance of bonds pursuant to this chapter, proceeds of such bonds may be deposited in such reserve subaccount. However, the amount so deposited when added to any amount then in such subaccount shall not exceed the maximum amount required to be in such subaccount as above provided.

As added by Acts 1981, P.L.67, SEC.10. Amended by P.L.385-1987(ss), SEC.7.

IC 8-5-15-6 Conditions on Grant

Sec. 6. Any commuter transportation system receiving assistance from a district shall, as a condition of the grant:

(1) submit its operating budget for passenger service rendered to the district for public hearings annually at least ninety (90) days before the beginning of the system's fiscal year;

(2) permit the Indiana department of transportation (IC 8-23-2) to audit the financial books and records of the system as the department would audit any intrastate railroad; and

(3) assume the responsibility for operation and maintenance of the equipment in accordance with a lease agreement executed between the system and district.

[Pre-Local Government Recodification Citation: 19-5-2.6-7.]

As added by Acts 1980, P.L.8, SEC.68. Amended by P.L.385-1987(ss), SEC.8; P.L.18-1990, SEC.65.

IC 8-5-15-7 Conflicts With Federal Law or Regulations; Levels of Services

Sec. 7.

(a) Any provision of this chapter in conflict with the Interstate Commerce Act of the United States or any other federal law or regulations governing transportation by common carrier is void, but all other provisions of this chapter shall be given

effect if possible, without the provision or provisions so voided.

(b) The board may eliminate service or reduce levels of service for the transportation of passengers or property only after obtaining approval by the Indiana department of transportation.

[Pre-Local Government Recodification Citation: 19-5-2.6-8.]

As added by Acts 1980, P.L.8, SEC.68. Amended by P.L.64-1984, SEC.6; P.L.18-1990, SEC.66.

IC 8-5-15-8 Grant of Funds

Sec. 8. The board of commissioners of any county may authorize the grant of funds to any commuter transportation system serving or passing through the county for the purchase of equipment or other capital improvements. The grants shall be made to a district for distribution to the commuter transportation systems or for purchases of equipment or capital improvements to be used on or by the systems in connection with its public transportation operation.

[Pre-Local Government Recodification Citation: 19-5-2.6-9.]

As added by Acts 1980, P.L.8, SEC.68. Amended by P.L.108-2019, SEC.151.

IC 8-5-15-9 Repealed

[Pre-Local Government Recodification Citation: 19-5-2.6-10.]

As added by Acts 1980, P.L.8, SEC.68. Amended by Acts 1981, P.L.67, SEC.11; P.L.385-1987(ss), SEC.9. Repealed by P.L.11-1993, SEC.9.

IC 8-5-15-10 Financial Records; Inspection; Publicity; Exclusion of Freight Service Costs

Sec. 10.

(a) Any commuter transportation system which receives aid from the district under this chapter must make its financial records available for inspection during normal working hours by a designated representative of the district.

(b) The district may provide any information to the general public which it develops from its review of the system's financial records which relates to the qualification for financial aid by that system.

(c) The district shall develop a formula which fairly allocates the administrative and operational costs incurred by the system between its freight service and passenger service.

(d)No state or local funds may be expended to reimburse the system for costs allocated to freight service.

As added by Acts 1981, P.L.67, SEC.12.

IC 8-5-15-11 Proceeds of Bonds; Issuance of Interim Receipts or Temporary Bonds; Mutilated, Destroyed, or Lost Bonds

Sec. 11.

(a)The proceeds of the bonds of each issue:

(1) shall be used solely for the payment of the cost of the railroad project for which the bonds have been issued; and

(2) shall be disbursed in such manner and under such restrictions, if any, as the board may provide in the resolution authorizing the issuance of the bonds or in the trust agreement securing the same.

(b) If the proceeds of the bonds of any issue, by error of estimates or otherwise, are less than the cost of the railroad project for which they have been issued, additional bonds may in like manner be issued to provide the amount of the deficit, and, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust agreement securing the bonds, the additional bonds shall be considered to be of the same issue and entitled to payment from that same fund without preference or priority of the bonds first issued.

(c) If the proceeds of the bonds of any issue exceed the cost of the railroad project for which they have been issued, the surplus shall be deposited to the credit of the sinking fund for those bonds.

(d) Before the preparation of definitive bonds, the board may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when the bonds have been executed and are available for delivery. The board may also provide for the replacement of any bonds that are mutilated, destroyed, or lost.

As added by P.L.64-1984, SEC.7.

IC 8-5-15-12 Revenue Refunding Bonds

Sec. 12.

(a)The board may provide by resolution for the issuance of revenue refunding bonds of the district or revenue advance refunding bonds of the district, payable solely from revenues, for the purpose of refunding or advance refunding any bonds then outstanding that have been issued under this chapter, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and, if considered advisable by the board, for the additional purpose of constructing improvements, extensions, or enlargements of the railroad in connection with which the bonds to be refunded have been issued.

(b)The issuance of the bonds, the maturities and other details of the bonds, the rights of the bondholders, and the rights, duties, and obligations of the board in respect to the bonds, shall be governed by this chapter insofar as it may be applicable.

As added by P.L.64-1984, SEC.8.

IC 8-5-15-13 Money Received Under This Chapter; Disposition; Depositories; Trustee; Guaranteed Investment Contract

Sec. 13.

(a) All money received under this chapter, whether as proceeds from the sale of bonds, from revenues, or otherwise:

(1) shall be considered to be trust funds to be held and applied solely as provided in this chapter; and

(2) except as provided in subsection (d), may be invested before the time when needed to the extent and in the manner provided by IC 5-13-9, insofar as applicable.

(b) The funds shall be kept in depositories as selected by the board in the manner provided by law.

(c) The resolution authorizing the issuance of bonds or the trust agreement securing the bonds must provide that any officer to whom, or any bank or trust company to which, the money is entrusted shall act as trustee of the money and shall hold and apply the money for the purposes of this section, subject to this chapter and the authorizing resolution or trust agreement.

(d) Proceeds received by the district from the sale of equipment in a sale and leaseback transaction may be invested in or used to purchase a guaranteed investment contract with an insurance company whose long term indebtedness is rated in one (1) of the two (2) highest categories by at least two (2) national rating services. The guaranteed investment contract may not exceed the term of the lease and may be assigned to secure performance of the lease.

As added by P.L.64-1984, SEC.9. Amended by P.L.19-1987, SEC.23; P.L.8-1996, SEC.11.

IC 8-5-15-14 Actions By Bondholders or Trustee; Protection and Enforcement of Rights;

Enforcement and Compelling Performance of Duties Under Chapter

Sec. 14. Any holder of bonds issued under this chapter and the trustee under any trust agreement, except to the extent the rights granted by this chapter may be restricted by the authorizing resolution or trust agreement, may, either at law or in equity, by suit, action, mandamus, or other proceedings:

(1) protect and enforce all rights under Indiana law or granted under this chapter or under the trust agreement, or the resolution authorizing the issuance of the bonds; and

(2) enforce and compel the performance of all duties required by this chapter or by the trust agreement or resolution to be performed by the board or by any officer thereof, including the fixing, charging, and collecting of fees, tolls, rentals, or other charges for the use of the railroad or railroad project.

As added by P.L.64-1984, SEC.10.

IC 8-5-15-15 Eminent Domain; Relocation Assistance; Properties in Public Use

Sec. 15.

(a) The board may exercise the power of eminent domain for the purpose of carrying out this chapter and award damages to landowners for real estate and property rights appropriated and taken. If the board cannot agree with the owners, lessees, or occupants of any real estate selected by the board for the purpose set forth in this

chapter, the board may proceed to procure the condemnation of the property under IC 32-24.

(b) Relocation assistance under IC 8-23-17 shall be provided to any person displaced under this section.

(c) If the property over and across which the railroad must be constructed and must operate is already in use or acquired for use for a public purpose, the public use or acquisition of the property is not a bar to the right of the board to condemn the property for the purpose of this chapter.

As added by P.L.64-1984, SEC.11. Amended by P.L.18-1990, SEC.67; P.L.2-2002, SEC.42.

IC 8-5-15-16 Exercise of Powers Under This Chapter for Benefit of People of Indiana; Tax Exemption

Sec. 16.

(a)The exercise of the powers granted by this chapter is in all respects for the benefit of the people of Indiana, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions.

(b)As the operation and maintenance of a railroad project by the board will constitute the performance of essential governmental functions, the board shall not be required to pay any taxes or assessments upon any railroad project or any property acquired or used by the board under this chapter, or upon the income from it, and the bonds issued under this chapter, the interest on them, the proceeds received by a holder from the sale of the bonds to

the extent of the holder's cost of acquisition, or proceeds received upon redemption before maturity or proceeds received at maturity, and the receipt of the interest and proceeds are exempt from taxation in Indiana as provided in IC 6-8-5.

As added by P.L.64-1984, SEC.12. Amended by P.L.3-1990, SEC.30.

IC 8-5-15-17 Employees of Commuter Railroad Transportation System; Protection

Sec. 17. If the district acquires a commuter railroad transportation system and proceeds to operate the system directly, by management contract, or by lease under this chapter, the employees of the system shall be protected as follows:

(1) The employees of the system must be retained to the fullest extent consistent with sound management, and those terminated or laid off must be assured priority of reemployment.

(2) The rights, privileges, and benefits of the employees under any pension or retirement plan are not affected, and the board shall assume the duties of the system under the plan.

(3) The board shall act in such a manner as to insure the continuing applicability to affected railroad employees of the provisions of all federal statutes applicable to them prior to April 1, 1984, and a continuation of their collective bargaining agreements until the provisions of those agreements can be renegotiated by representatives of the board and the representatives of those employees duly

designated pursuant to terms and provisions of the federal Railway Labor Act (45 U.S.C. 151 et seq.).

(4) The employees of the system shall receive protection no less favorable than the employee conditions provided In the Matter of the New York Dock (360 I.C.C. 60), and no person with an employment relation with the commuter transportation system on April 1, 1984, may be deprived of employment or placed in a worse position by reason of the district's acquisition of a commuter transportation system.

As added by P.L.64-1984, SEC.13.

IC 8-5-15-18 Legal Services; Attorney General

Sec. 18.

(a) Each district shall request the attorney general to perform any legal services required in providing transportation service within the district. If the attorney general is unable to perform those services, the district may, with the attorney general's approval, employ an attorney.

(b) The attorney general shall, to the extent feasible and upon request of a district, perform legal services for the district.

As added by P.L.385-1987(ss), SEC.10.

IC 8-5-15-19 Auditing Services

Sec. 19.

(a) Each district shall request the state board of accounts to perform any auditing services required

under this chapter in providing transportation service within the district. If the state board of accounts is not able to perform those services, the district may employ an auditor to perform audits for the district.

(b) The state board of accounts shall, to the extent feasible and upon request:

(1) perform auditing services for the district; and

(2) consult with the district in acquiring auditing services.

As added by P.L.385-1987(ss), SEC.11.

IC 8-5-15-20 Agreements Between District and System; Contents

Sec. 20. Any agreement between the district and the system, the principal purpose of which is to provide passenger rail service, must include the following provisions:

(1) That the replacement of capital assets employed in the provision of passenger service will be provided for prudently.

(2) That the methods of conducting and accounting for financial transactions between parties to agreements will be compatible with the fiduciary responsibilities of the district and the purposes of this chapter and follows generally accepted accounting principles.

(3) That the system shall maintain complete and accurate books and records, permit reasonable access by the district and its duly authorized representatives to the books and records of

the system, and permit the district or its representatives, at reasonable times and subject to reasonable confidentiality restrictions, to inspect the properties and operations of the system.

(4) That the system shall also provide:

(A) system performance information, which will permit an assessment of passenger service in general and service levels in particular;

(B) information concerning the operation and administration of the passenger rail service;

(C) a projection of significant operational and administrative changes scheduled to take place in the enusing fiscal year;

(D) a projection of capital expenditures scheduled to be undertaken by the system in the ensuing fiscal year; and

(E) a list of capital improvements that the system requests that the district undertake in the ensuing five (5) years.

(5) That a marketing study shall be undertaken no less frequently than every three (3) years. The study may be undertaken jointly by the system and the district. The study must measure and evaluate passenger attitudes and requirements concerning service levels, service quality, fares, and opportunities to improve service or to increase ridership.

(6) That the passenger service deficit will not exceed an agreed amount (with an allowance agreed to by the parties for variable expenses) during the term of the agreement.

As added by P.L.385-1987(ss), SEC.12.

IC 8-5-15-21 Agreements Between District and System; Property Interests; Operation

Sec. 21. Any agreement between the district and the system may include a provision that, with respect to assets owned by either party, property interests may be conveyed and responsibilities for operation and maintenance may be assigned to either party, or jointly held and exercised by either party.

As added by P.L.385-1987(ss), SEC.13.

IC 8-5-15-22 Agreements Between District and System; Service Profile

Sec. 22. Any agreement between the district and the system must include a service profile describing passenger service levels. The service profile shall be described with terms and conditions that are objective and measurable.

As added by P.L.385-1987(ss), SEC.14.

IC 8-5-15-23 Financial or Operating Agreements; Approval

Sec. 23. Any financial or operating agreement between a district and a system does not take effect until the Indiana department of transportation approves the agreement.

As added by P.L.385-1987(ss), SEC.15. Amended by P.L.18-1990, SEC.68.

IC 8-5-15-24 Financial Responsibility; Certification; Proof

Sec. 24.

(a) Before January 1 of each year, the district shall certify to the Indiana department of transportation that the district has taken action to provide financial responsibility against liability of the district under any agreement with a commuter transportation system.

(b) Proof of financial responsibility under this section may be established by proof that:

(1) a liability insurance policy is in force; or

(2) a self-insurance program is in effect.

(c) The district shall participate, if feasible, in the programs established by the political subdivision risk management commission under IC 27-1-29.

As added by P.L.385-1987(ss), SEC.16. Amended by P.L.18-1990, SEC.69.

IC 8-5-15-25 Capital Improvement Contingency Fund

Sec. 25.

(a) The capital improvement contingency fund is established for the purpose of:

(1) receiving taxes, appropriations, and other revenues;

(2) matching state or federal transportation grants made to permit the acquisition of capital assets;

(3) acquiring capital improvements or assets; or

(4) receiving, holding, and disbursing funds as a fiduciary.

(b) Money in the fund at the end of a fiscal year does not revert to the state general fund.

As added by P.L.385-1987(ss), SEC.17.

IC 8-5-15-26 Petition to Discontinue Rail Passenger Service; Acquisition of Property

Sec. 26. If a petition is filed by the system under the Interstate Commerce Act to discontinue rail passenger service, the district may take the necessary action to acquire the system's passenger and freight properties under sections 5(a)(12) and 5(a)(13) of this chapter and, if necessary, exercise the power of eminent domain under section 15 of this chapter.

As added by P.L.385-1987(ss), SEC.18.

Title 34. Civil Law and Procedure
Article 6. Definitions
Chapter 1. General Provisions

IC 34-6-1-1 Applicability of Definitions

Sec. 1. Except was otherwise provided, the definitions in this article apply throughout this entire title.

[1998 Recodification Citation: New.]

As added by P.L.1-1998, SEC.1.

IC 34-6-2-110 "Political Subdivision"

Sec. 110. "Political subdivision", for purposes of IC 34-13-3, means a:

(1) county;

(2) township;

(3) city;

(4) town;

(5) separate municipal corporation;

(6) special taxing district;

(7) state educational institution;

(8) city or county hospital;

(9) school corporation;

(10) board or commission of one (1) of the entities listed in subdivisions (1) through (9);

(11) drug enforcement task force operated jointly by political subdivisions;

(12) community correctional service program organized under IC 12-12-1; or

(13) solid waste management district established under IC 13-21 or IC 13-9.5-2 (before its repeal).

[Pre-1998 Recodification Citations: 34-4-16.5-2(a) part; 34-4-16.5-2(f).]

As added by P.L.1-1998, SEC.1. Amended by P.L.2-2007, SEC.371.

[Pre-1998 Recodification Citations: 34-4-16.5-2(a) part; 34-4-16.5-2(g).]

As added by P.L.1-1998, SEC.1. Amended by P.L.280-2001, SEC.40; P.L.133-2002, SEC.54; P.L.90-2010, SEC.6

IC 34-6-2-140 "State"

Sec. 140. "State":

(1) for purposes of section 49(b) of this chapter and IC 34-13-3, means Indiana and its state agencies; and

(2) for purposes of sections 48.5 and 71.7 of this chapter and IC 34-26-5, has the meaning set forth in IC 1-1-4-5.

IC 34-6-2-141 "State Agency"

Sec. 141. "State agency", for purposes of IC 34-13-3, means:

(1) a board;

(2) a commission;

(3) a department;

(4) a division;

(5) a governmental subdivision, including a soil and water conservation district;

(6) a bureau;

(7) a committee;

(8) an authority;

(9) a military body; or

(10) other instrumentality; of the state. However, the term does not include a political subdivision.

[Pre-1998 Recodification Citations: 34-4-16.5-2(a) part; 34-4-16.5-2(h).]

As added by P.L.1-1998, SEC.1.

IC 34-13-3-1 Applicability of Chapter

Sec. 1.

(a) This chapter applies only to a claim or suit in tort.

(b) The provisions of this chapter also apply to IC 34-30-14.

[Pre-1998 Recodification Citations: subsection (a) formerly 34-4-16.5-1; subsection (b) New.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-3 Immunity of Governmental Entity or Employee

Sec. 3.

(a) A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:

(1) The natural condition of unimproved property.

(2) The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose that is not foreseeable.

(3) The temporary condition of a public thoroughfare or extreme sport area that results from weather.

(4) The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area.

(5) The design, construction, control, operation, or normal condition of an extreme sport area,

if all entrances to the extreme sport area are marked with:

(A) a set of rules governing the use of the extreme sport area;

(B) a warning concerning the hazards and dangers associated with the use of the extreme sport area; and

(C) a statement that the extreme sport area may be used only by persons operating extreme sport equipment.

This subdivision shall not be construed to relieve a governmental entity from liability for the continuing duty to maintain extreme sports areas in a reasonably safe condition.

(6) The initiation of a judicial or an administrative proceeding.

(7) The performance of a discretionary function; however, the provision of medical or optical care as provided in IC 34-6-2-38 shall be considered as a ministerial act.

(8) The adoption and enforcement of or failure to adopt or enforce:

(A) a law (including rules and regulations); or

(B) in the case of a public school or charter school, a policy; unless the act of enforcement constitutes false arrest or false imprisonment.

(9) An act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid if the employee

would not have been liable had the statute been valid.

(10) The act or omission of anyone other than the governmental entity or the governmental entity's employee.

(11) The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law.

(12) Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.

(13) Entry upon any property where the entry is expressly or impliedly authorized by law.

(14) Misrepresentation if unintentional.

(15) Theft by another person of money in the employee's official custody, unless the loss was sustained because of the employee's own negligent or wrongful act or omission.

(16) Injury to the property of a person under the jurisdiction and control of the department of correction if the person has not exhausted the administrative remedies and procedures provided by section 7 of this chapter.

(17) Injury to the person or property of a person under supervision of a governmental entity and who is:

(A) on probation; or

(B) assigned to an alcohol and drug services program under IC 12-23, a minimum security release program under IC 11-10-8, a pretrial conditional release program under IC 35-33-8, or a community corrections program under IC 11-12.

(18) Design of a highway (as defined in IC 9-13-2-73), toll road project (as defined in IC 8-15-2-4(4)), tollway (as defined in IC 8-15-3-7), or project (as defined in IC 8-15.7-2-14) if the claimed loss occurs at least twenty (20) years after the public highway, toll road project, tollway, or project was designed or substantially redesigned; except that this subdivision shall not be construed to relieve a responsible governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.

(19) Development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communication system.

(20) Injury to a student or a student's property by an employee of a school corporation if the employee is acting reasonably under a:

(A) discipline policy adopted under IC 20-33-8-12; or

(B) restraint and seclusion plan adopted under IC 20-20-40-14.

(21) An act or omission performed in good faith under the apparent authority of a court order described in IC 35-46-1-15.1 or IC 35-46-1-15.3 that is invalid, including an arrest or imprisonment related to the enforcement of the court order, if the governmental entity or employee would not have been liable had the court order been valid.

(22) An act taken to investigate or remediate hazardous substances, petroleum, or other pollutants associated with a brownfield (as defined in IC 13-11-2-19.3) unless:

(A) the loss is a result of reckless conduct; or

(B) the governmental entity was responsible for the initial placement of the hazardous substances, petroleum, or other pollutants on the brownfield.

(23) The operation of an off-road vehicle (as defined in IC 14-8-2-185) by a nongovernmental employee, or by a governmental employee not acting within the scope of the employment of the employee, on a public highway in a county road system outside the corporate limits of a city or town, unless the loss is the result of an act or omission amounting to:

(A) gross negligence;

(B) willful or wanton misconduct; or

(C) intentional misconduct.

This subdivision shall not be construed to relieve a governmental entity from liability

for the continuing duty to maintain highways in a reasonably safe condition for the operation of motor vehicles licensed by the bureau of motor vehicles for operation on public highways.

(24) Any act or omission rendered in connection with a request, investigation, assessment, or opinion provided under IC 36-9-28.7.

(b) This subsection applies to a cause of action that accrues during a period of a state disaster emergency declared under IC 10-14-3-12 to respond to COVID-19, if the state of disaster emergency was declared after February 29, 2020, and before April 1, 2022. A governmental entity or an employee acting within the scope of the employee's employment is not liable for an act or omission arising from COVID-19 unless the act or omission constitutes gross negligence, willful or wanton misconduct, or intentional misrepresentation.

If a claim described in this subsection is:

(1) a claim for injury or death resulting from medical malpractice; and

(2) not barred by the immunity provided under this subsection; the claimant is required to comply with all of the provisions of IC 34-18 (medical malpractice act).

[Pre-1998 Recodification Citation: 34-4-16.5-3.]

As added by P.L.1-1998, SEC.8. Amended by P.L.142-1999, SEC.2; P.L.250-2001, SEC.6; P.L.280-2001, SEC.42; P.L.1-2002, SEC.144; P.L.161-2003, SEC.5; P.L.1-2005, SEC.218; P.L.208-2005, SEC.14; P.L.47-2006, SEC.48;

P.L.121-2009, SEC.15; P.L.86-2010, SEC.10; P.L.125-2011, SEC.1; P.L.122-2013, SEC.2; P.L.220-2013, SEC.2; P.L.65-2016, SEC.21; P.L.166-2021, SEC.14.

IC 34-13-3-4 Limitation on Aggregate Liability; Punitive Damages Prohibited

Sec. 4.

(a) The combined aggregate liability of all governmental entities and of all public employees, acting within the scope of their employment and not excluded from liability under section 3 of this chapter, does not exceed:

(1) for injury to or death of one (1) person in any one (1) occurrence:

(A) three hundred thousand dollars ($300,000) for a cause of action that accrues before January 1, 2006;

(B) five hundred thousand dollars ($500,000) for a cause of action that accrues on or after January 1, 2006, and before January 1, 2008; or

(C) seven hundred thousand dollars ($700,000) for a cause of action that accrues on or after January 1, 2008; and

(2) for injury to or death of all persons in that occurrence, five million dollars ($5,000,000).

(b) A governmental entity or an employee of a governmental entity acting within the scope of employment is not liable for punitive damages.

[Pre-1998 Recodification Citation: 34-4-16.5-4.]

As added by P.L.1-1998, SEC.8. Amended by P.L.108-2003, SEC.2; P.L.161-2003, SEC.6; P.L.97-2004, SEC.114.

IC 34-13-3-5 Actions Against Individual Members Not Authorized; Judgment Against or Settlement By Governmental Entity

Sec. 5.

(a) Civil actions relating to acts taken by a board, a committee, a commission, an authority, or another instrumentality of a governmental entity may be brought only against the board, the committee, the commission, the authority, or the other instrumentality of a governmental entity. A member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity may not be named as a party in a civil suit that concerns the acts taken by a board, a committee, a commission, an authority, or another instrumentality of a governmental entity where the member was acting within the scope of the member's employment. For the purposes of this subsection, a member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity is acting within the scope of the member's employment when the member acts as a member of the board, committee, commission, authority, or other instrumentality.

(b) A judgment rendered with respect to or a settlement made by a governmental entity bars an action by the claimant against an employee, including a member of a board, a committee, a

commission, an authority, or another instrumentality of a governmental entity, whose conduct gave rise to the claim resulting in that judgment or settlement. A lawsuit alleging that an employee acted within the scope of the employee's employment bars an action by the claimant against the employee personally. However, if the governmental entity answers that the employee acted outside the scope of the employee's employment, the plaintiff may amend the complaint and sue the employee personally. An amendment to the complaint by the plaintiff under this subsection must be filed not later than one hundred eighty (180) days from the date the answer was filed and may be filed notwithstanding the fact that the statute of limitations has run.

(c) A lawsuit filed against an employee personally must allege that an act or omission of the employee that causes a loss is:

(1) criminal;

(2) clearly outside the scope of the employee's employment;

(3) malicious;

(4) willful and wanton; or

(5) calculated to benefit the employee personally.

The complaint must contain a reasonable factual basis supporting the allegations.

(d) This subsection applies when the governmental entity defends or has received proper legal notice and has the opportunity to defend an employee for losses resulting from the employee's acts or

omissions. Subject to the provisions of sections 4, 14, 15, and 16 of this chapter, the governmental entity shall pay any judgment of a claim or suit against an employee when the act or omission causing the loss is within the scope of the employee's employment, regardless of whether the employee can or cannot be held personally liable for the loss.

(e) The governmental entity shall provide counsel for and pay all costs and fees incurred by or on behalf of an employee in defense of a claim or suit for a loss occurring because of acts or omissions within the scope of the employee's employment, regardless of whether the employee can or cannot be held personally liable for the loss.

(f) This chapter shall not be construed as:

(1) a waiver of the eleventh amendment to the Constitution of the United States;

(2) consent by the state of Indiana or its employees to be sued in any federal court; or

(3) consent to be sued in any state court beyond the boundaries of Indiana.

[Pre-1998 Recodification Citation: 34-4-16.5-5.]

As added by P.L.1-1998, SEC.8. Amended by P.L.192-2001, SEC.2; P.L.161-2003, SEC.7.

IC 34-13-3-6 Notice to Attorney General and State Agency Involved

Sec. 6.

(a) Except as provided in sections 7 and 9 of this chapter, a claim against the state is barred unless notice is filed with the attorney general or the

state agency involved within two hundred seventy (270) days after the loss occurs. However, if notice to the state agency involved is filed with the wrong state agency, that error does not bar a claim if the claimant reasonably attempts to determine and serve notice on the right state agency.

(b) The attorney general, by rule adopted under IC 4-22-2, shall prescribe a claim form to be used to file a notice under this section. The claim form must specify:

(1) the information required; and

(2) the period of time that a potential claimant has to file a claim.

(c) Copies of the claim form prescribed under subsection (b) shall be available from each:

(1) state agency; and

(2) operator of a state vehicle.

[Pre-1998 Recodification Citation: 34-4-16.5-6.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-7 Administrative Claim for Inmate's Recovery of Property

Sec. 7.

(a) An offender must file an administrative claim with the department of correction to recover compensation for the loss of the offender's personal property alleged to have occurred during the offender's confinement as a result of an act or omission of the department or any of its agents, former officers, employees, or contractors. A claim

must be filed within one hundred eighty (180) days after the date of the alleged loss.

(b)The department of correction shall evaluate each claim filed under subsection (a) and determine the amount due, if any. If the amount due is not more than five thousand dollars ($5,000), the department shall approve the claim for payment and recommend to the office of the attorney general payment under subsection (c). The department shall submit all claims in which the amount due exceeds five thousand dollars ($5,000), with any recommendation the department considers appropriate, to the office of the attorney general. The attorney general, in acting upon the claim, shall consider recommendations of the department to determine whether to deny the claim or recommend the claim to the governor for approval of payment.

(c) Payment of claims under this section shall be made in the same manner as payment of claims under IC 34-4-16.5-22.

(d) The department of correction shall adopt rules under IC 4-22-2 necessary to carry out this section.

[Pre-1998 Recodification Citations: 34-4-16.5-6.5(c); 34-4-16.5-6.5(d); 34-4-16.5-6.5(e); 34-4-16.5-6.5(f).]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-8 Claims Against Political Subdivisions; Notice Requirement

Sec. 8.

(a) Except as provided in section 9 of this chapter, a claim against a political subdivision is barred unless notice is filed with:

(1) the governing body of that political subdivision; and

(2) the Indiana political subdivision risk management commission created under IC 27-1-29; within one hundred eighty (180) days after the loss occurs.

(b) A claim against a political subdivision is not barred for failure to file notice with the Indiana political subdivision risk management commission created under IC 27-1-29-5 if the political subdivision was not a member of the political subdivision risk management fund established under IC 27-1-29-10 at the time the act or omission took place.

[Pre-1998 Recodification Citation: 34-4-16.5-7.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-9 Incapacitated Plaintiffs; Notice Requirement

Sec. 9. If a person is incapacitated and cannot give notice as required in section 6 or 8 of this chapter, the person's claim is barred unless notice is filed within one hundred eighty (180) days after the incapacity is removed.

[Pre-1998 Recodification Citation: 34-4-16.5-8.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-10 Notice Requirement; Form of Statement

Sec. 10. The notice required by sections 6, 8, and 9 of this chapter 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.

[Pre-1998 Recodification Citation: 34-4-16.5-9.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-11 Approval or Denial of Claim By Government Entity

Sec. 11. Within ninety (90) days of the filing of a claim, the governmental entity shall notify the claimant in writing of its approval or denial of the claim. A claim is denied if the governmental entity fails to approve the claim in its entirety within ninety (90) days, unless the parties have reached a settlement before the expiration of that period.

[Pre-1998 Recodification Citation: 34-4-16.5-10.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-12 Notice Requirements; Service

Sec. 12. The notices required by sections 6, 8, 9, and 11 of this chapter must be in writing and must be delivered in person or by registered or certified mail.

[Pre-1998 Recodification Citation: 34-4-16.5-11.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-13 Denial of Claim as Pre-requisite to Suit

Sec. 13. A person may not initiate a suit against a governmental entity unless the person's claim has been denied in whole or in part.

[Pre-1998 Recodification Citation: 34-4-16.5-12.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-14 Compromise or Settlement of Claim By Governor

Sec. 14. Except as provided in section 20 of this chapter, the governor may compromise or settle a claim or suit brought against the state or its employees.

[Pre-1998 Recodification Citation: 34-4-16.5-13.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-15 Attorney General; Powers and Duties

Sec. 15. Except as provided in section 20 of this chapter, the attorney general:

(1) shall advise the governor concerning the desirability of compromising or settling a claim or suit brought against the state or its employees;

(2) shall perfect a compromise or settlement which is made by the governor;

(3) shall submit to the governor on or before January 31 of each year a report concerning the status of each claim or suit pending against the state as of January 1 of that year; and

(4) shall defend, as chief counsel, the state and state employees as required under IC 4-6-2. However, the attorney general may employ other counsel to aid in defending or settling those claims or suits.

[Pre-1998 Recodification Citation: 34-4-16.5-14.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-16 Compromise or Settlement of Claim By Political Subdivision

Sec. 16. Except as provided in section 20 of this chapter, the governing body of a political subdivision may compromise, settle, or defend against a claim or suit brought against the political subdivision or its employees.

[Pre-1998 Recodification Citation: 34-4-16.5-15.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-17 Enforcement of Judgments Against Governmental Entities

Sec. 17. A court that has rendered a judgment against a governmental entity may order that governmental entity to:

(1) appropriate funds for the payment of the judgment if funds are available for that purpose; or

(2) levy and collect a tax to pay the judgment if there are insufficient funds available for that purpose.

[Pre-1998 Recodification Citation: 34-4-16.5-16.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-18 Time for Payment of Claim or Judgment; Interest Rate

Sec. 18.

(a) A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by the governmental entity not later than one hundred eighty (180) days after the date of settlement or judgment, unless there is an appeal, in which case not later than one hundred eighty (180) days after a final decision is rendered.

(b)If payment is not made within one hundred eighty (180) days after the date of settlement or judgment, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of six percent (6%). The governmental entity is liable for interest at that rate and from that date even if the case is appealed, provided the original judgment is upheld.

[Pre-1998 Recodification Citation: 34-4-16.5-17.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-19 Applicability of IC 34-13-3-18; Settlement

Sec. 19. Section 18 of this chapter does not apply if there is a structured settlement under section 23 of this chapter.

[Pre-1998 Recodification Citation: 34-4-16.5-17.1.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-20 Liability Insurance; Prohibitions

Sec. 20.

(a) A political subdivision may purchase insurance to cover the liability of itself or its employees, including a member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity. Any liability insurance so purchased shall be purchased by invitation to and negotiation with providers of insurance and may be purchased with other types of insurance. If such a policy is purchased, the terms of the policy govern the rights and obligations of the political subdivision and the insurer with respect to the investigation, settlement, and defense of claims or suits brought against the political subdivision or its employees covered by the policy. However, the insurer may not enter into a settlement for an amount that exceeds the insurance coverage without the approval of the mayor, if the claim or suit is against a city, or the governing body of any other political subdivision, if the claim or suit is against such political subdivision.

(b) The state may purchase insurance to cover the cyber liability of itself or its employees, including a member of a board, a committee, a commission, an authority, or another instrumentality of the state. Any liability insurance so purchased shall be purchased by invitation to and negotiation with providers of insurance and may be purchased with other types of insurance. If such a policy is purchased, the terms of the policy govern the rights and obligations of the state and the insurer with respect to the investigation, settlement, and defense of claims or suits brought against the state or state employees covered by the policy.

However, the insurer may not enter into a settlement for an amount that exceeds the insurance coverage without the approval of the governor.

(c) The state may not purchase insurance to cover the liability of the state or its employees. This subsection does not prohibit any of the following:

(1) The requiring of contractors to carry insurance.

(2) The purchase of insurance to cover losses occurring on real property owned by:

  (A) the Indiana public retirement system; or

  (B) a public pension and retirement fund administered by the Indiana public retirement system.

(3) The purchase of insurance by a separate body corporate and politic to cover the liability of itself or its employees.

(4) The purchase of casualty and liability insurance for foster parents (as defined in IC 27-1-30-4) on a group basis.

(5) A purchase of cyber liability insurance under subsection (b).

(6) The purchase of insurance required by the federal government in connection with the use of federal land for the state's wireless public safety voice and data communications system.

[Pre-1998 Recodification Citation: 34-4-16.5-18.]

As added by P.L.1-1998, SEC.8. Amended by P.L.192-2001, SEC.3; P.L.35-2012, SEC.106; P.L.148-2017, SEC.21; P.L.108-2019, SEC.241.

IC 34-13-3-21 Attorney's Fees; Allowance to Governmental Entity; Action for Abuse of Process

Sec. 21. In any action brought against a governmental entity in tort, the court may allow attorney's fees as part of the costs to the governmental entity prevailing as defendant, if the court finds that plaintiff:

(1) brought the action on a claim that is frivolous, unreasonable, or groundless;

(2) continued to litigate the action after plaintiff's claim clearly became frivolous, unreasonable, or groundless; or

(3) litigated its action in bad faith.

This award of fees does not prevent a governmental entity from bringing an action against the plaintiff for abuse of process arising in whole or in part on the same facts, but the defendant may not recover such attorney's fees twice.

[Pre-1998 Recodification Citation: 34-4-16.5-19.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-22 Persons or Entities Considered Political Subdivisions

Sec. 22.

(a) For purposes of this chapter, the following shall be treated as political subdivisions:

(1) A community action agency (as defined in IC 12-14-23-2).

(2) An individual or corporation rendering public transportation services under a contract with a commuter transportation district created under IC 8-5-15.

(3) A volunteer fire department (as defined in IC 36-8-12-2) that is acting under:

(A) a contract with a unit or a fire protection district; or

(B) IC 36-8-17.

(b) The treatment provided for under subsection (a)(2) shall be accorded only in relation to a loss that occurs in the course of rendering public transportation services under contract with a commuter transportation district.

[Pre-1998 Recodification Citation: 34-4-16.5-20.]

As added by P.L.1-1998, SEC.8. Amended by P.L.1-1999, SEC.68.

IC 34-13-3-23 Structured Settlement; Discharge; Limits

Sec. 23. (a) With the consent of the claimant, a political subdivision may compromise or settle a claim or suit by means of a structured settlement under this section.

(b) A political subdivision may discharge settlement of a claim or suit brought under this chapter by:

(1) an agreement requiring periodic payments by the political subdivision over a specified number of years;

(2) the purchase of an annuity;

(3) by making a "qualified assignment" of the liability of the political subdivision as defined by the provisions of 26 U.S.C. 130(c);

(4) payment in a lump sum; or

(5) any combination of subdivisions (1) through (4).

(c) The present value of a structured settlement shall not exceed the statutory limits set forth in section 4 of this chapter; however, the periodic or annuity payments may exceed these statutory limits. The present value of any periodic payments may be determined by discounting the periodic payments by the same percentage as that found in Moody's Corporate Bond Yield Average Monthly Average Corporates, as published by Moody's Investors Service, Incorporated.

[Pre-1998 Recodification Citation: 34-4-16.5-21.]

As added by P.L.1-1998, SEC.8.

IC 34-13-3-24 Appropriations for Payment of Claims and Expenses

Sec. 24.

(a) There is appropriated from the state general fund sufficient funds to:

(1) settle claims and satisfy tort judgments obtained against the state;

(2) pay interest on claims and judgments; and

(3) subject to approval by the budget director, pay:

(A) liability insurance premiums; and

(B) expenses incurred by the attorney general in employing other counsel to aid in defending or settling claims or civil actions against the state.

[Pre-1998 Recodification Citation: 34-4-16.5-22(a).]

As added by P.L.1-1998, SEC.8. Amended by P.L.201-2018, SEC.3.

IC 34-13-3-25 Presentation of Vouchers and Issuance of Warrants for Appropriations

Sec. 25. The attorney general shall present vouchers for the items or expenses described in section 24 of this chapter to the auditor of state. The auditor shall issue warrants on the treasury for the amounts presented.

[Pre-1998 Recodification Citation: 34-4-16.5-22(b).]

As added by P.L.1-1998, SEC.8.

Title 36. Local Government
Article 1. General Provisions
Chapter 2. Definitions of General Applicability

IC 36-1-2-10 "Municipal Corporation"

Sec. 10. "Municipal corporation" means unit, school corporation, library district, local housing authority, fire protection district, public transportation corporation, local building authority, local hospital authority or corporation, local airport authority, special service district, or other separate local governmental entity that may sue and be sued. The term does not include special taxing district.

[Local Government Recodification Citation: New.]

As added by Acts 1980, P.L.211, SEC.1.

IC 36-1-2-13 "Political subdivision"

Sec. 13. "Political subdivision" means municipal corporation or special taxing district.

[Local Government Recodification Citation: New.]

As added by Acts 1980, P.L.211, SEC.1.