IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2000
No. 1188

STUART C. MENDELSON, et ux.

Appellants

v.

PHILLIP GEORGE BROWN, et al.

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Nelson W. Rupp, Judge)

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

Appellants, Stuart and Joyce Mendelson, filed a complaint in the Circuit Court for Montgomery County, Maryland, against Officer Phillip G. Brown, the Montgomery County Police Department, and Montgomery County, Maryland, seeking damages for injuries that occurred when the officer's cruiser collided with Mr. Mendelson's vehicle. (E. 27-33) In its initial answer, the County set forth as a defense that "Plaintiffs have failed to satisfy statutory notice requirements." (E. 35) The County later filed an amended answer containing the same responses as the prior answer, plus defenses of governmental and official immunity, and statute of limitations. (E. 47-48) Ultimately, the County filed a motion to dismiss or for summary judgment, because the Mendelsons did not comply with the notice-of-claim requirement of the Local Government Tort Claims Act (LGTCA)[1] by serving written notice of their claims on the County Executive within 180 days of the accident. (E. 38-46) The Circuit Court granted the motion[2] and the Mendelsons noted this appeal.

QUESTIONS PRESENTED

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[1]The LGTCA appears in Md. Code Ann., Cts. & Jud. Proc. § 5-301 *et seq*. (1998 Repl. Vol.).

[2]The trial court treated the motion as one for summary judgment and entered an order reflecting the entry of summary judgment. (Apx. 26-27)

I. **In Montgomery County, may a claimant give the notice required by the LGTCA to the corporate authorities or agents of the County, rather than to the County Executive?**

II. **Did the Circuit Court properly dismiss the case where the Mendelsons did not substantially comply with the LGTCA and did not show good cause for failing to provide proper notice?**

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to this brief.

STATEMENT OF ADDITIONAL FACTS

The Mendelsons have summarized their views of the facts in their brief. A few aspects of that description require clarification before proceeding to a discussion of the merits of the case. Specifically, the letters Trigon sent to Mr. Mendelson and his attorney identified Trigon's status as the claims administrator for the County and acknowledged that the incident was being investigated. (E. 78-79) The Telephone Claim Report contains no indication that any information was forwarded to the County Executive or to anyone in a position to accept notice on behalf of the County. (E. 75) The record does not reveal that the claimants submitted any written notice to the County, but

shows only the notes of an employee taken during a telephone call. (E. 75)

Although the Mendelsons assert that the County raised the issue of notice for the first time in the motion to dismiss, the record reflects that both the original answer and the amended answer specifically identify the lack of notice. (E. 35, 48) The County will discuss any additional facts along with the analysis in the argument.

ARGUMENT

Having admittedly failed to serve the County Executive directly with written notice of their claims within 180 days of the accident, the Mendelsons contend that the telephone call to an individual in the Division of Risk Management, who then contacted the claims administrator, satisfied the notice requirement of the LGTCA. None of the theories presented support the Mendelsons' position. Rather, the Mendelsons did not substantially comply with the statute and did not show good cause for failing to do so.

I. In Montgomery County, a claimant must serve written notice of a claim on the County Executive to satisfy the LGTCA.

The Mendelsons contend that they substantially complied with the LGTCA by giving actual notice to corporate authorities of the County. In Montgomery County, however,

notice must be given to the County Executive. Moreover, neither the claims administrator nor an employee of the Division of Risk Management are corporate authorities of the County.

Using ordinary principles of statutory construction, the LGTCA does not provide for notice of a claim to be given to corporate authorities in Montgomery County.

As originally enacted, the notice requirement prohibited any action from being brought against Montgomery County for unliquidated damages unless notice was given to the County Commissioners within 90 days of the injury or damage. 1941 Md. Laws ch. 405.[3] When the Legislature amended the provision two years later to include Caroline County, Prince George's County, and municipal corporations, it recognized their differences and provided that notice must go to "the City Solicitor of Baltimore City, the County Commissioners, or the corporate authorities of the municipal corporation, as the case may be."[4] 1943 Md. Laws ch. 809.

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[3]Only this first law included an alternate form of notice by which the submission of a police report satisfied the notice requirement. (Apx. 9)

[4]As originally proposed, Baltimore City would have been included. When choosing to omit Baltimore City, the Legislature failed to delete all references to it. The Court of Appeals noticed the discrepancy in 1946 and concluded that the reference to Baltimore City could be "treated as surplusage":

> For it is apparent that when the bill was amended on the floor of the Senate on March 30 by striking

The reference to "corporate authorities" recognized that the chief executive officer of a municipal corporation may not be a commissioner or council. The phrase "as the case may be," therefore, meant that only one description would apply for an Article 25 county, the statute required service on the county commissioners; for an Article 25A county, on the county council; and for municipal corporations, on the "corporate authorities."[5] For each entity, the statute required service on the chief executive authority "as the case may be." *See* Md. Constn. Art. XI-A, § 3.

Montgomery County's form of government tracks this interpretation. When the notice requirement was enacted, the County Commissioners were the chief executive officer. Several years later, the County Council became the chief executive officer for the County. Finally, in 1968,

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> out the words "Baltimore City," the members of the Senate failed to strike out the words "the City Solicitor of Baltimore City" in the preceding sentence, and these words inadvertently remained in the bill when it was passed on April 3, the last day of the session.

Neuenschwander v. Washington Suburban Sanitary Commission, 187 Md. 67, 80, 48 A.2d 593, 600 (1946).

[5]The Court of Appeals acknowledged this concept recently: "As various entities which have no County Executive, Council, or Commissioners are deemed local governments under the LGTCA, the amended phrase 'corporate authorities' was obviously intended to have a broad meaning." *Williams v. Maynard*, 359 Md. 379, 387-388 n.6, 754 A.2d 379, 383 n.6 (2000).

Montgomery County amended its charter to divide the legislative and executive functions of the County between the Council and a County Executive, and the first County Executive took office in 1970. That same year, the Legislature amended the notice requirement in the LGTCA to reflect the change in governmental structure by adding a separate sentence that read: "In Montgomery County, such written notice shall be presented to the County Executive." 1970 Md. Laws ch. 48.[6]

Even when the Legislature introduced the waiver provision in 1972, the statute still required a claimant to present written notice to the County Executive. 1972 Md. Laws ch. 519. In a code revision and recodification of the notice provision, the Legislature established the current format:

> The notice shall be given in person or by registered mail by the claimant or his representative to the county commissioners, county council, or corporate authorities of a defendant municipal corporation or:
> (i) in Baltimore City, to the City Solicitor;
> (ii) in Howard County, to the County Executive;
> (iii) in Montgomery County, to the County Executive;
> (iv) in Prince George's County, to the County Executive.

[6]The Legislature added Howard County to the same sentence when that County established a County Executive form of government. 1971 Md. Laws ch. 110.

1978 Md. Laws ch. 770.[7] When the Legislature enacted the LGTCA in 1987, it retained this format and simply changed "municipal corporation" to "local government." 1987 Md. Laws ch. 594.[8]

General principles of statutory construction require that the statute be given its plain meaning and that it be read in context to effectuate the intent of the Legislature. *Armstead v. State*, 342 Md. 38, 56, 673 A.2d 221, 229 (1996). The interpretation given must use common sense to avoid illogical or unreasonable conclusions. *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994). Moreover, all words of a statute must be given effect and no portion of it may be rendered "meaningless, surplusage, superfluous, or nugatory." *Jung v. Southland Corp.*, 351 Md. 165, 177, 717 A.2d 387, 393 (1998) (citations omitted). Under these principles, the statute plainly has required a claimant to

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[7]Interestingly, the original bill required notice to "the county commissioners, county council, or other authority as follows" and then listed 17 counties and Baltimore City along with any additional details for service. As introduced, the proposed bill provided that, in Montgomery County, service would be on the County Executive, and it limited the "corporate authorities" to municipal corporations by including an additional numbered item that provided "any municipal corporation to the corporate authorities of the municipal corporation within 180 days." 1978 Md. Laws ch. 770.

[8]By definition, a local government includes counties, municipalities, and several other organizations. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-301(d).

serve notice of a claim on the County Executive since 1970. For almost 30 years, neither the purpose clause nor the language of the statute has reflected any intent to expand the scope of service to anyone other than the County Executive.[9]

The changes that occurred when the Legislature enacted the LGTCA did not alter the notice requirement in relation to the County, but only added specific agencies and corporations to the scope of the Act. *See* 1987 Md. Laws ch. 594; Md. Code Ann., Cts. & Jud. Proc. § 5-301(d). Many of the additional agencies have a corporate structure, with trustees and corporate officers, unlike counties and municipalities, which have a traditional governmental structure. By requiring service on "corporate authorities," the Legislature recognized that not all of the entities covered by the LGTCA had governmental structures and ensured that the form of local government would determine upon whom notice must be served. While the term "corporate authorities" may be broad enough to encompass the various entities within the definition of local government, the legislative history reflects a legislative intent to serve

[9]*See* 1970 Md. Laws ch. 48, 1972 Md. Laws ch. 519, 1978 Md. Laws ch. 770, and 1987 Md. Laws ch. 594.

no one but the County Executive in Montgomery County since 1970.

In any event, neither the claims administrator nor the Division of Risk Management qualifies as a corporate authority.

The Mendelsons refer to the definition of "corporate authority" in the context of the power exercised by government officers, rather than the individuals who may serve as the "corporate authorities". The LGTCA does not define the term, but Black's Law Dictionary (5th ed. 1979) describes "corporate authorities" as:

> The title given in statutes of several states to the aggregate body of officers of a municipal corporation, or to certain of those officers (excluding the others) who are vested with authority in regard to the particular matter spoken of in the statute. . . .

Id. at 306. Using this definition, it becomes clear that notice to a department or claims administrator does not suffice. The Montgomery County Charter identifies the holders of the legislative and executive authority of Montgomery County the County Council has the legislative powers (§ 101) and the County Executive has the executive power (§201). The only other officers identified in the Charter are the Chief Administrative Officer and the County

Attorney, both of whom the County Executive appoints.[10] *See* §§210, 213 of the Montgomery County Charter.

No language in the LGTCA permits service on a designee or agent of the corporate authorities, nor any other substitute. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-304(b). Similarly, no reference appears in the Charter to make either the Division of Risk Management or the claims administrator (an independent contractor) a corporate authority or officer of the County. This makes the Mendelsons' contact with these entities inadequate.[11] To conclude otherwise would render meaningless the clear language of the LGTCA that identifies whom to serve and would violate statutory construction principles by failing to give effect to all words of the statute. *Jung v. Southland Corp., supra*. The LGTCA plainly requires a claimant to serve notice of a claim on the County Executive in Montgomery County, and the Circuit Court correctly declined to construe corporate authorities as including a department or independent contractor.

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[10]The Mendelsons refer to § 214 of the Charter, which describes the Department of Finance, but that section does not mention any authority to receive notices of claim on behalf of the County. (Appellant's brief, p. 26)

[11]The Court of Appeals' decision in *Williams v. Maynard* does not require a different conclusion, as the issue was not before the Court for review. 359 Md. at 388 n.6, 754 A.2d at 383 n.6.

Nothing in the LGTCA suggests that ordinary agency principles will allow service of the requisite notice on anyone other than the County Executive in Montgomery County.

By enacting the LGTCA, the Legislature provided "a remedy for those injured by local government officers and employees, acting without malice in the scope of their employment, while ensuring that the financial burden of compensation is carried by the local government ultimately responsible for the public officials' acts." *Ashton v. Brown,* 339 Md. 70, 108, 660 A.2d 447, 466 (1995). In doing so, the LGTCA neither waives governmental immunity nor creates liability, but instead, obligates local governments to defend their employees and requires successful plaintiffs to execute their judgment against the local government. *Khawaja v. City of Rockville,* 89 Md. App. 314, 325-326, 598 A.2d 489, 494 (1991)[12]; *see also Williams*, 359 Md. at 394, 754 A.2d at 388. The notice requirement constitutes a condition precedent and failure to comply with it means that an individual may not sue a local government or its employees. *Williams*, 123 Md. App. at 129, 716 A.2d at 1105; *Neuenschwander*, 187 Md. at 76, 48 A.2d at 597.

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[12]Although the Court of Appeals granted a writ of certiorari, the case was dismissed before oral argument. *See* Table Dispositions, *Khawaja v. City of Rockville*, *cert. granted*, 325 Md. 551, 601 A.2d 1114, *dismissed*, 326 Md. 501, 606 A.2d 224 (1992).

Although the Mendelsons contend that notice to the County's agents satisfied the LGTCA, the statute plainly requires them to give written notice to the County Executive for Montgomery County. No language in the statute permits service on a designee or agent of the identified individuals and entities, nor any other substitute. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-304(b).[13] As a practical matter, it makes sense to limit the recipients of notice, because the main function of notice is to permit a local government or municipal corporation, large or small, to investigate the facts surrounding the claim while the evidence and witnesses' memories remain fresh, regardless of who may be handling the insurance. *See Bartens v. Mayor of Baltimore*, 293 Md. 620, 626, 446 A.2d 1136, 1138-1139 (1982). An equally important goal of the notice requirement is to allow the local government to make its own determination of whether a claim is or may become a cause of action against the local government and to begin preparing its defense,

[13]The Maryland appellate courts assume that a statute does not supersede the common law absent a clear indication of the Legislature's intent to do so. *See Edwards v. First National Bank of North East*, 122 Md. App. 96, 108, 712 A.2d 33, 39 (1998) (citations omitted). By specifying to whom notice should be given in Montgomery County, without using the language of agency, such as "or designee", the Legislature created a clear contradiction with ordinary agency principles, which reflects its intent to supersede those common law principles.

while correcting a defect if it exists to avoid additional liability.

While the claims administrator or the Division of Risk Management may have responsibility for the investigation of claims and the correction of problems, respectively, it remains within the province of the County Attorney to prepare a defense. *See* Montg. Co. Code § 20-37(e) (1994, as amended); *see also* Mont. Co. Charter § 213. By providing notice consistently to a particular individual who holds a high-level position, the local government may establish a procedure that ensures coordination among the investigator, the risk manager, those authorized to approve a settlement, and those responsible for preparing a legal defense. Absent notice within the first few months, important information may be lost, along with the opportunity to make essential plans for financing any uninsured judgment in a particular case or for correcting a defect. Neither Trigon nor the Division of Risk Management have unlimited authority to settle a claim, nor do they have responsibility for preparing a legal defense for the County. By no means do the respective duties of these entities include receipt of notice on behalf of the County.

Even an agent may bind his principal only to the extent that he has actual or apparent authority. *Progressive*

Casualty Insurance Company v. Ehrhardt, 69 Md. App. 431, 440, 518 A.2d 151, 155 (1986) (citations omitted). In the absence of actual authority, an agent may have apparent authority only if the principal knowingly allows the agent to act for him and the agent induces a third party to rely on that authority. *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 360, 612 A.2d 322, 333 (1992) (citing *Progressive, supra*). The agent's action or statement does not enlarge his own authority only the principal's action or inaction affects the agent's authority. *Id.* at 363, 612 A.2d at 334-335. Both Trigon and the Division of Risk Management represent the County in specific matters, but neither has the authority required here to accept notice on behalf of the County only the County Executive may do so.

The only authority Trigon had actual or apparent was to adjust the claim submitted by the Mendelsons. Trigon was hired within Montgomery County's implementation of its self-insurance program, which includes the authority "[t]o engage necessary claims investigators and adjusters. . . ." Montg. Co. Code § 20-37(c).[14] As an independent adjuster, Trigon cannot direct the actions of County employees to investigate the matter, nor authorize funding of an award of damages,

[14]As of July 2000, Managed Care Innovations became the claims administrator handling these claims for the County.

nor even approve a settlement above a small amount. Nothing Trigon said or did could alter the limits of its authority, and the County did nothing to authorize Trigon to act as its agent for notice purposes.

The Mendelsons argue that Trigon investigated their claims and collected all the pertinent information but did not advise them of any further requirements to preserve their claims. Yet, Trigon's role in the matter is limited to that of claims adjuster and, in that capacity, Trigon properly investigated the accident and compiled information. Even the fact that Trigon conducted an investigation does not alter the requirement that notice be sent to the County Executive. *See Williams, supra; Loewinger v. Prince George's County*, 266 Md. 316, 292 A.2d 67 (1972). At no time did Trigon encourage the Mendelsons not to provide notice to the proper individual, and Trigon did not have an obligation to provide legal advice as to how to preserve the Mendelsons' claims against the County. See *Bibum v. Prince George's County*, 85 F.Supp.2d 557, 565 (D. Md. 2000). Trigon's only responsibility and authority was to collect facts and information, which it did.

Similarly, the Division of Risk Management has authority only to oversee and administer the self-insurance

program.[15] *See* Montg. Co. Code § 20-37 (e). Its settlement authority is limited and it does not prepare the County's legal defense. In fact, many claims must be approved for payment by the self-insurance panel, and the County Attorney provides the defense of claims against participating agencies. *Id.* The form completed by an employee of the Division of Risk Management based on a telephone call does no more than a police report it gathers information from the caller. The record contains no indication that the Division engaged in any other communication with the Mendelsons or played any direct role in the investigation or assessment of their claims.[16] The record before this Court further remains devoid of any indication that the Division ever notified the County Executive or the County Attorney's Office of this claim so that the County's defense and possible liability

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[15]The Mendelsons further mention the filing of a police report as a reflection of "actual notice" to the County. The same principles discussed in this argument apply to the Department of Police the police report does not satisfy the notice requirement of the LGTCA, because the department is not a corporate authority of the County for purposes of notice.

[16]To equate a report prepared in the ordinary course of business with the notice of a claim required by the LGTCA distorts the provisions of the statute and, arguably, would place a local government on notice every time an employee is involved in an accident. This result conflicts with the Court of Appeals' admonition that "any information at all, conveyed to anyone connected with the County" will not suffice. *Loewinger,* 266 Md. at 318, 292 A.2d at 68.

could be evaluated properly. And the Division had no obligation to inform the Mendelsons of the steps required to preserve their claims against the County. *See Bibum, supra*.

Moreover, the Mendelsons have tried to apply the agency principles that exist between private parties to impute the knowledge of Trigon and the Division of Risk Management to the County Executive. Yet "it is well-established that when a private party deals with a municipal corporation, the doctrine of apparent authority is modified to accommodate the public interest." *Schaefer v. Anne Arundel County*, 17 F.3d 711, 714 (4th Cir. 1994). And "[i]t is a fundamental principle of law that all persons dealing with the agent of a municipal corporation are bound to ascertain the nature and extent of his authority." *Gontrum v. Mayor & City Council of Baltimore*, 182 Md. 370, 375, 35 A.2d 128, 130 (1943). The Mendelsons failed to ascertain the extent of Trigon's and the Division of Risk Management's authority. The Mendelsons' misunderstanding of the scope of authority held by each entity did not alter the fact that neither Trigon nor the Division of Risk Management had any authority to accept notice of the claim against the County. Rather,

the County Executive remained the sole representative of the County for notice purposes.[17]

II. The Mendelsons did not substantially comply with the notice requirement and did not show good cause for failing to provide notice properly.

The appellate courts have recognized only two exceptions to strict compliance with the notice requirement of the LGTCA when a plaintiff substantially complies with the statute, and when a plaintiff shows good cause for failing to provide notice, as long as the defendant suffered no prejudice. The first exception derives from case law, while the latter is a creature of statute. In neither circumstance has notice been approved or waived when given to an individual other than one specified in the statute. As a result, the Mendelsons' telephone call to a County department that conveyed the information to the claims administrator for investigation did not satisfy the notice requirement.

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[17]The Mendelsons also claim that the written notice does not have to be written by them to suffice. Simple logic suggests that the statute contemplates that the claimant or claimant's representative (other than a local government employee) must prepare the written notice to ensure accurate reflection of the claim. A telephone message has the potential to be misplaced or to inaccurately record the information given. The Legislature could not have meant to allow this margin of potential error that a claimant avoids by submitting a written notice prepared by the claimant or claimant's representative.

Before the enactment of the LGTCA, the Court of Appeals considered certain circumstances to reflect substantial compliance with the notice requirement and, therefore, allowed a suit to proceed. Even when the Court of Appeals has found substantial compliance, it has done so only as to the method of notice it has not waived the requirement as to the person a claimant must serve. For example, in *Jackson v. Board of County Commissioners*, a plaintiff provided oral notice to an assistant county attorney and sent written notice of a claim to the County Commissioners (who received it within the notice period), but did so using regular mail, rather than registered mail. 233 Md. 164, 166, 195 A.2d 693, 694 (1963). The Court concluded that the discrepancy did not merit dismissal of the complaint, because the plaintiff had substantially complied with the notice requirement. *Id.* at 168, 195 A.2d at 695-96. Similarly, in *Grubbs v. Prince George's County*, the Court of Appeals found that a plaintiff substantially complied with the notice requirement when notice was mailed by regular mail on the 180th day, even though it was received on the 181st day. 267 Md. 318, 324-325, 297 A.2d 754, 757-758 (1972). The statute required notice to be mailed "on or before" the 180th day, which ordinarily meant that notice was made when

it was mailed. The Court, therefore, concluded that the notice requirement was satisfied. *Id.*

The Court did not permit substituted service on an agent of a local government in either case. Ultimately, the Court made clear that direct communication with an insurance agent, even combined with actual knowledge by an employee, did not satisfy the notice requirement of the LGTCA. In *Loewinger, supra*, the plaintiff sustained injuries during medical tests at the county hospital. Although the hospital administrator had records of the incident and the liability carrier also had investigated the matter, the Court held that these actions did not suffice to give the direct notice to the County that the statute required. The Court referred to its decision in *Jackson, supra*, and distinguished the two cases, explaining that "[t]his is not to say that any information at all, conveyed to anyone connected with the County, is sufficient. There must be substantial compliance in order to give the statute effect." *Loewinger*, 266 Md. at 318, 292 A.2d at 68.

This Court recently reaffirmed that notice to a claims adjuster does not substantially comply with the statutory prerequisite. *Williams v. Montgomery County*, 123 Md. App.

at 131, 716 A.2d at 1105.[18] Williams had retained counsel and corresponded with the claims adjuster during the 180-day period and beyond, but did not give notice to the County Executive. This Court cited *Loewinger* as precluding substantial compliance based upon communication with an insurer. In addition, this Court distinguished substantial compliance from the good cause exception and emphasized that in no event would ignorance of the law excuse a party who has counsel from failing to satisfy the clear requirement of the statute. *Williams*, 123 Md. App. at 134, 716 A.2d at 1107.

Like the plaintiffs in *Loewinger* and *Williams*, the Mendelsons failed to serve the only agent of Montgomery County that the statute identifies as the proper recipient of notice under the LGTCA. Contacts with the County's claims administrator and information given to the Division of Risk Management over the telephone do not override the clear statutory requirement.[19]

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[18]The issue was not before the Court of Appeals, so its comment that *Loewinger* may need review does not affect the result in this case. *See Williams*, 359 Md. at 388 n.7, 754 A.2d at 384 n.7.

[19]The Mendelsons mistakenly assert that the County implicitly admitted in *Williams, supra*, that notice could be given to the Division of Risk Management. The County has argued consistently that notice must be served upon the County Executive. The extent of the deviation from that position occurred in relation to commenting in *Williams* that

The same flaw appears in the Mendelsons' attempt to establish good cause for failing to serve notice on the County Executive. The Mendelsons contend that the information given to the Division over the telephone and transmitted to Trigon established good cause for their failure to comply with the statute. The plain language of the LGTCA does not provide that notice may be given to an agent of the local government, or that knowledge of the claim by anyone connected with the County satisfies the notice requirement. Instead, the statute specifically identifies the high-level individuals upon whom notice must be served. Md. Code Ann., Cts. & Jud. Proc. § 5-304. In no case have the appellate courts approved any substituted service, and the Mendelsons' failure to consult the statute did not establish good cause for failing to comply with it.

The statute explicitly requires both that the claimant show good cause for failure to give notice and that no prejudice will result to the defendant:

> Notwithstanding the other provisions of this section, unless the defendant can

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the Division had received no direct correspondence from Mr. Williams along with a supposition that the Division was the only agency *even remotely* appropriate to receive notice in place of the County Executive. As noted above, this issue was not before the Court of Appeals for review. *Williams, supra*.

> affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown the court may entertain the suit even though the required notice was not given.

Md. Code Ann., Cts. & Jud. Proc. § 5-304(c). Although no particular criteria exist for establishing good cause under the LGTCA, this Court has found guidance in the description used by a Texas court:

> The term "good cause" for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.

Madore v. Baltimore County, 34 Md. App. 340, 345, 367 A.2d 54, 57 (1976) (citations omitted); *see also Heron v. Strader*, 361 Md. 758, 761 A.2d 56 (2000) (reciting the reasonable diligence standard).

In *Madore*, this Court reviewed a case for the first time using the waiver provision. In doing so, the Court adopted the standard used by the Texas court, noting that "the legislature made no attempt to define what constitutes good cause, but clearly committed that determination to the discretion of the court." 34 Md. App. at 344, 367 A.2d at 57. Ordinarily, a court does not abuse its discretion

unless it makes a decision that is manifestly unreasonable or based upon untenable grounds. *In Re Don Mc.*, 344 Md. 194, 201, 686 A.2d 269, 272 (1996). Applying the good cause standard, this Court concluded that the trial court did not abuse its discretion by finding that a plaintiff who was in and out of the hospital for surgery during the 180-day period and could have contacted an attorney, but did not, had not shown good cause for failing to comply with the notice requirement. *Madore*, 34 Md. App. at 346, 367 A.2d at 58.

Consistent with this Court's lead, the United States District Court for Maryland later adopted the view that the trial court has sole discretion to decide whether a claimant has shown good cause. *Downey v. Collins*, 866 F. Supp. 887, 889 n.7 (D. Md. 1994) (quoting *Madore*, 34 Md. App. at 342, 367 A.2d at 57). In *Downey*, the district court recognized the dual elements of the waiver clause. Although the defendant conceded that no prejudice had occurred due to the absence of notice, the plaintiff had failed to show good cause why notice was not given during the notice period. *Id*. at 889. Specifically, the plaintiff gave two reasons for his delay in giving notice. First, he said that he did not know of his injury until he learned of a witness' testimony. Second, he argued that the county employees had

failed to respond to his requests for certain materials. The District Court noted that, when the plaintiff discovered the witness, there remained adequate time in which to provide the requisite notice. With knowledge of the witness as an appropriate trigger for giving notice, waiting for additional materials was not persuasive. The Court, therefore, found that neither reason established good cause for the plaintiff's failure to comply with the notice requirement. *Id.* at 890.

The United States Court of Appeals for the Fourth Circuit also has reviewed a trial court's waiver of the notice requirement and adhered to the abuse of discretion standard in evaluating the decision on appeal. In *Westfarm Associates Limited Partnership v. Washington Suburban Sanitary Commission*, a plaintiff in an environmental contamination suit failed to give notice to the WSSC within 180 days of the injury as required by the LGTCA. 66 F.3d 669, 676 (4th Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996). The plaintiff explained to the district court that it exercised due diligence in investigating the contamination and, due to the nature of the injury, it was not possible to learn of the WSSC's involvement earlier than it did. The district court concluded that this showed good cause for failing to give notice. In addition, because WSSC

had participated in discovery before it was made a party, it suffered no prejudice. On appeal, the Fourth Circuit found no abuse of discretion. *Id.* at 677.

In the present case, the Circuit Court found no evidence of good cause for the Mendelsons' failure to give proper notice. The contention that the Division of Risk Management had knowledge of the claim, and that the claims administrator had conducted an investigation and obtained all relevant information regarding the claim, did not reflect that the Mendelsons exercised the level of reasonable diligence that the courts require to meet this element of the waiver. If anything, the information compiled by the adjuster shows only that the County may not have been prejudiced by the lack of notice. An ordinarily prudent plaintiff, however, would consult the statute and comply with the plain language of the law, which this Court has described as clear and not burdensome. *Williams v. Montgomery County*, 123 Md. App. at 134, 716 A.2d at 1107. A reasonably diligent claimant would not rely upon a claims administrator or a County employee to determine whether all necessary steps had occurred. The facts of this case simply do not show good cause for the Mendelsons' failure to comply with the clear notice requirement, and do not satisfy the statutory precondition to filing an action in court.

Nor is the County estopped from asserting the failure of the Mendelsons to give proper notice under the LGTCA. Generally, estoppel requires voluntary conduct that precludes a party from asserting a defense, because an innocent party has been misled to his detriment. *DeBusk v. Johns Hopkins Hospital*, 105 Md. App. 96, 104, 658 A.2d 1147, 1151 (1995) (citations omitted). The doctrine "prevent[s] a party from asserting his rights where it would be inequitable and unconscionable to assert those rights." *Savonis v. Burke*, 241 Md. 316, 319, 216 A.2d 521, 523 (1966). Ordinarily, an express inducement or promise must have misled the innocent party estoppel will not protect a party who simply misunderstood and could have resolved the ambiguity himself. *Mayor of Cumberland v. Beall*, 97 Md. App. 597, 604-605, 631 A.2d 506, 510, *cert. denied*, 333 Md. 200, 634 A.2d 61 (1993) (citing *Bertonazzi v. Hillman*, 241 Md. 361, 216 A.2d 723 (1966) (no estoppel when agent did not expressly agree to waive statute of limitations)); *Chandlee v. Shockley*, 219 Md. 493, 150 A.2d 438 (1959) (estoppel applied to principal whose agent induced the claimant to delay filing suit by saying it was not necessary to do so). In fact, the estoppel may be limited to the scope of the agent’s apparent authority as held out by the principal.

Beall, supra.[20] As discussed in Argument I, *supra*, the authority of the County's "agents" was extremely limited and did not extend to receiving notice of a claim against the County.

Much like the plaintiff in *Downey*, the Mendelsons had the information they needed to provide notice they knew that their claims involved the County and a County employee. Yet, they failed to protect their right to file suit. As emphasized by this Court in *Williams*, a claimant's failure to consult the Maryland Code does not establish good cause for failing to comply with a clear prerequisite. 123 Md. App. at 134, 716 A.2d at 1107. The Mendelsons incorrectly viewed their contacts with the claims administrator and a county agency as equal to the notice required to preserve their right to bring an action in court, but the statute simply does not permit this means of escaping the notice requirement. The record contains no specific promise or

[20]In fact, when a party asserts the defense of statute of limitations, an intentional or negligent misrepresentation must have misled the plaintiff, which the plaintiff then relied upon. *Johns Hopkins Hospital v. Lehninger*, 48 Md. App. 549, 559-560, 429 A.2d 538, 544, *cert. denied*, 290 Md. 717 (1981). The courts have deferred to the Legislature's determination of an adequate period of time in which to file suit. Because the Court of Appeals has likened the notice requirement in the LGTCA to a statute of limitations, this principle provides useful guidance regarding whether estoppel applies in the current case. *Neuenschwander, supra*.

inducement that could support an estoppel, but reflects only that the Mendelsons misunderstood the scope of Trigon's and the Division's authority. Because the Mendelsons did not show good cause for failing to comply with the notice requirement, the Circuit Court did not abuse its discretion when it entered summary judgment in favor of the County.

CONCLUSION

The Circuit Court correctly determined that the Mendelsons did not satisfy the statutory prerequisite to filing suit in this case, which required them to send written notice to the County Executive within 180 days of the injury. The Mendelsons' telephone call to the Division of Risk Management and communications with an independent claims administrator did not substantially comply with the LGTCA, nor did the Mendelsons establish good cause for failing to comply with the notice requirement. Any authority of the County's "agents" was limited and did not include acceptance of notice under the LGTCA, so the County was not estopped from seeking the dismissal. The Circuit Court

correctly interpreted the statute and properly exercised its discretion, and this Court should affirm the Circuit Court's order of judgment in the case.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX

Excerpts of Maryland Constitution:

Article XI-A, § 3. Legislative bodies; chief executive officers; enactment, publication and interpretation of local laws.

Every charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said City or County. Such legislative body in the City of Baltimore shall be known as the City Council of the City of Baltimore, and in any county shall be known as the County Council of the County. The chief executive officer, if any such charter shall provide for the election of such executive officer, or the presiding officer of said legislative body, if such charter shall not provide for the election of a chief executive officer, shall be known in the City of Baltimore as Mayor of Baltimore, and in any County as the President or Chairman of the County Council of the County, and all references in the Constitution and laws of this State to the Mayor of Baltimore and City Council of the City of Baltimore or to the County Commissioners of the Counties, shall be construed to refer to the Mayor of Baltimore and City Council of the City of Baltimore and to the President or Chairman and County Council herein provided for whenever such construction would be reasonable. From and after the adoption of a charter by the City of Baltimore, or any County of this State, as hereinbefore provided, the Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said City or County including the power to repeal or amend local laws of said City or County enacted by the General Assembly, upon all matters covered by the express powers granted as above provided, and, as expressly authorized by statute, to provide for the filling of a vacancy in the County Council by special election; provided that nothing herein contained shall be construed to authorize or empower the County Council of any County in this State to enact laws or regulations for any incorporated town, village, or municipality in said County, on any matter covered by the powers granted to said town, village, or municipality by the Act incorporating it, or any subsequent Act or Acts amendatory thereto. Provided, however, that the charters for the various Counties shall specify the number of days, not to exceed forty-five, which may but need not be consecutive, that the County Council of the Counties may sit

in each year for the purpose of enacting legislation for such Counties, and all legislation shall be enacted at the times so designated for that purpose in the charter, and the title or a summary of all laws and ordinances proposed shall be published once a week for two successive weeks prior to enactment followed by publication once after enactment in at least one newspaper of general circulation in the county, so that the taxpayers and citizens may have notice thereof. The validity of emergency legislation shall not be affected if enacted prior to the completion of advertising thereof. These provisions concerning publication shall not apply to Baltimore City. All such local laws enacted by the Mayor of Baltimore and City Council of the City of Baltimore or the Council of the Counties as hereinbefore provided, shall be subject to the same rules of interpretation as those now applicable to the Public Local Laws of this State, except that in case of any conflict between said local law and any Public General Law now or hereafter enacted the Public General Law shall control.

Excerpts of Maryland Annotated Code:

Cts. & Jud. Proc. § 5-301. Definitions.

* * *

(d) Local government. "Local government" means:

(1) A chartered county established under Article 25A of the Code;

(2) A code county established under Article 25B of the Code;

(3) A board of county commissioners established or operating under Article 25 of the Code;

(4) Baltimore City;

(5) A municipal corporation established or operating under Article 23A of the Code;

(6) The Maryland-National Capital Park and Planning Commission;

(7) The Washington Suburban Sanitary Commission;

(8) The Northeast Maryland Waste Disposal Authority;

(9) A community college or board of trustees for a community college established or operating under Title 16 of the Education Article, not including Baltimore City Community College;

(10) A county public library or board of trustees of a county public library established or operating under Title 23, Subtitle 4 of the Education Article; (11) The Enoch Pratt Free Library or

Board of Trustees of the Enoch Pratt Free Library;

(12) The Washington County Free Library or the Board of Trustees of the Washington County Free Library;
(13) A special taxing district;
(14) A nonprofit community service corporation incorporated under Maryland law that is authorized to collect charges or assessments;
(15) Housing authorities created under Article 44A of the Code;
(16) A sanitary district, sanitary commission, metropolitan commission, or other sewer or water authority established or operating under public local law or public general law;
(17) The Baltimore Metropolitan Council;
(18) The Howard County Economic Development Authority;

(19) The Howard County Mental Health Authority;
(20) A commercial district management authority established by a county or municipal corporation if provided under local law;
(21) The Baltimore City Police Department; and
(22) A regional library resource center or a cooperative library corporation established under Title 23, Subtitle 2 of the Education Article.

Cts. & Jud. Proc. § 5-304. Actions for unliquidated damages.

(a) Notice required. Except as provided in subsection (c) of this section, an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 180 days after the injury.

(b) Manner of giving notice.
(1) Except in Anne Arundel County, Baltimore County, Harford County, and Prince George's County, the notice shall be given in person or by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, by the claimant or the representative of the claimant, to the county commissioner, county council, or corporate authorities of a defendant local government, or:
(i) In Baltimore City, to the City Solicitor;

(ii) In Howard County, to the County Executive; and

(iii) In Montgomery County, to the County Executive.

(2) In Anne Arundel County, Baltimore County, Harford County, and Prince George's County, the notice shall be given in person or by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, by the claimant or the representative of the claimant, to the county solicitor or county attorney.

(3) The notice shall be in writing and shall state the time, place, and cause of the injury.

(c) Waiver of notice requirement. Notwithstanding the other provisions of this section, unless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown the court may entertain the suit even though the required notice was not given.

Montgomery County Charter

Sec. 101. County Council.

All legislative powers which may be exercised by Montgomery County under the Constitution and laws of Maryland, including all law making powers heretofore exercised by the General Assembly of Maryland but transferred to the people of the County by virtue of the adoption of this Charter, and the legislative powers vested in the County Commissioners as a District Council for the Montgomery County Suburban District, shall be vested in the County Council. The legislative power shall also include, but shall not be limited to, the power to enact public local laws for the County and repeal or amend local laws for the County heretofore enacted by the General Assembly upon the matters covered by Article 25A, Annotated Code of Maryland, 1957, as now in force or hereafter amended, and the power to legislate for the peace, good government, health, safety or welfare of the County. Nothing herein contained shall be construed to authorize or empower the County Council to enact laws or regulations for any incorporated town, village or municipality in said County on any matter covered by the powers granted to said town, village or municipality by the act incorporating it or any subsequent act or acts amendatory thereto.

Sec. 201. Executive Power.

The executive power vested in Montgomery County by the Constitution and laws of Maryland and by this Charter shall be vested in a County Executive who shall be the chief executive officer of Montgomery County and who shall faithfully execute the laws. In such capacity, the County Executive shall be the elected executive officer mentioned in Article XI-A, Section 3, of the Constitution of Maryland. The County Executive shall have no legislative power except the power to make rules and regulations expressly delegated by a law enacted by the Council or by this Charter.

Sec. 210. Chief Administrative Officer.

The County Executive shall appoint a Chief Administrative Officer subject to confirmation by the Council. The Chief Administrative Officer shall be a professionally qualified administrator who shall serve at the pleasure of the County Executive, with compensation determined by the County Executive subject to the approval of the Council.

Sec. 213. County Attorney.

The County Executive shall appoint a County Attorney, subject to confirmation by the Council. The County Attorney shall be the chief legal officer of the County, conduct all the law business of the County, be a legal advisor to the Council, and be the legal advisor to the County Executive, all departments, and other instrumentalities of the County Government. The County Attorney shall represent the County in all actions in which the County is a party. The County Attorney and the staff of the office shall engage in no other law practice. The County Attorney may, with the approval of the Council, temporarily employ special legal counsel to work on problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the County Attorney. The County Attorney shall serve at the pleasure of the County Executive but, upon request, shall be entitled to a public hearing before the Council prior to dismissal from office.

§ 20-37. Comprehensive insurance and self-insurance program.

(a) It is the policy of the county government to provide an adequate comprehensive insurance program to compensate for injury to persons or damage to property resulting from negligence or other wrongful acts of the county's public officials, employees and agents and to provide protection for property of the county and for officials, employees, and agents acting within the scope of their duties.

(b) The county is hereby authorized and empowered to adopt or install a plan or system of group health and life insurance and group hospitalization in cooperation with the employees or any portion thereof in any office, agency or branch of the government of the county and with paid employees of quasi-public corporations engaged in the performance of governmental functions, such as fire departments, whenever it may deem such to be advisable in the interest of the health, comfort and welfare of the county.

(c) The county is further authorized and empowered to provide for an adequate comprehensive insurance program to compensate for injury or death of persons or damage to property resulting from negligence, deprivation of civil rights, malpractice or any other type of civil or tortious action resulting from the negligence or wrongful act of any public official, agent or employee within the scope of official duties. The county is also hereby authorized and empowered to provide for an adequate comprehensive insurance program including but not limited to comprehensive general liability, auto, fire, boiler, workmen's compensation and comprehensive auto liability. The insurance program may be provided by purchase of insurance coverage from insurance companies authorized to do business in the State of Maryland or it may be provided by a self-insurance program funded by appropriations by the county council or by a combination of purchased insurance coverage and self-insurance, subject to the granting of all necessary approvals by the State of Maryland for the self-insuring of workmen's compensation and comprehensive auto liability coverage. The insurance program shall provide for defense of claims as well as compensation for damages and the county is authorized within the limits of appropriations of the funded insurance program to engage necessary claims

investigators and adjusters, to provide for defense with attorneys to be selected as provided in the charter, and to settle claims and pay lawful judgments.

(d) The county is further authorized to cooperate with and enter into agreements with participating agencies, including, but not limited to, the Montgomery County Board of Education, the fire departments and rescue squads, Montgomery College, the Montgomery County Revenue Authority, the housing opportunities commission, any bi-county agency, any municipality or any other governmental agency within or without the State of Maryland, for the purpose of obtaining and providing comprehensive insurance coverage in the most economical manner. A participating agency includes the public officials, employees and agents of the participating agencies.

(e) A self-insurance program is established subject to the following conditions:

(1) The self-insurance program shall be known as the Montgomery County self-insurance program. Regulations governing the administration of the Montgomery County self-insurance fund shall be approved by the chief administrative officer of Montgomery County.

(2) The county attorney shall provide defense for claims against each participating agency, its public officials, employees and agents and shall consult with and advise counsel for each participating agency as to the status of each claim against the participating agency. Legal counsel for the participating agency may elect to enter into the defense of any claims against the participating agency, but such participation shall not be funded out of the self-insurance program unless authorized by the county attorney.

(3) Insurance protection furnished to the participating agencies by the Montgomery County self-insurance program will not be less than the coverage provided under the independent insurance programs of the participating agencies when they begin to receive coverage from the fund.

(4) The county council, upon the recommendation of the county executive, shall annual appropriate to the Montgomery County self-insurance program sufficient funds to provide for the program’s premium cost, claim expense and adequate claims reserves in addition to providing for the

operating requirements of the program's risk management operation.

(5) An interagency insurance panel is established to advise the participating agencies on risk management and all aspects of a comprehensive loss control program for the county self-insurance program. The panel will prepare standardized procedures for review and approval by the chief administrative officer of the county. The panel will consist of one (1) representative each from the participating agencies; the county representative be the director of the Montgomery County department of finance, who shall serve as chairperson of the panel. The representative from each other participating agency shall be designated by the administrative officer of the participating agency. Such appointments shall remain in effect until such time as the county's finance director is advised that a new appointment to the panel has been made.

(6) The interagency insurance panel shall prepare an annual budget for the Montgomery County self-insurance program, which shall include a list of charge-backs required to provide insurance coverage to those county departments and funds that currently are charged by the county's finance department for their insurance coverage. The interagency insurance panel shall also include in the budget the amount which is required to adequately fund the county self-insurance program's unencumbered claims reserve according to the standards contained in this chapter. The panel shall contract with an insurance consultant as necessary to assist them in setting the claims reserve requirement and rate estimates contained in their recommended budget. The proposed budget of the Montgomery County self-insurance program shall be submitted to the administrative officer of each participating agency by the interagency insurance panel no later than November first of each year. Any comments which these officials wish to make on the proposed budget of the county self-insurance program shall be returned to the interagency insurance panel by November twelfth of that year. The interagency insurance panel shall submit the proposed budget of the county self-insurance program along with all comments received

from administrative officers, if any, to the county executive, not later than December first of that year. The interagency insurance panel shall also prepare a list of all safety related expenses which they feel should be placed in the budgets of participating agencies along with a detailed justification for such expenses. This list shall accompany the proposed budget of the county self-insurance program throughout the budgetary process.

(7) Copies of all meeting minutes and applicable status reports prepared by the interagency insurance panel shall be provided to the administrative officer of each participating agency. Copies of all standardized procedures developed by the interagency insurance panel, in accordance with the requirements of this chapter, shall be provided to the administrative officer of each participating agency, following their approval by the interagency insurance panel and the chief administrative officer of the county.

(f) (1) Subject to appropriations, the county may, by order of the county executive, provide for securing the county self-insurance program in whole or in part by the establishment of trust funds or escrow funds, with or without credit support, in an aggregate amount not to exceed ten million dollars ($10,000,000.00).

(2) a. The form of credit support for the county self-insurance program may include but is not limited to a line or lines of credit with one (1) or more financial institutions in an amount not to exceed ten million dollars ($10,000,000.00). The county executive may enter into a contract or contracts for the line or lines of credit under which the county may borrow the sums, from time to time and upon its full faith and credit, under the terms and conditions as may be appropriate in the judgment of the county executive, to implement the purposes of this article.

b. The provisions of chapter 11B of this Code do not apply to the selection by the county executive of a financial institution to furnish a line of credit.

c. Any advances under the line or lines of credit, together with any interest on the

advances, are payable from unlimited ad valorem taxes levied upon all assessable property within the corporate limits of the county. In each and every fiscal year that any advances under the line or lines of credit are or will be outstanding, the county must levy or cause to be levied ad valorem taxes upon all the assessable property within the corporate limits of the county in rate and amount sufficient when combined with other available revenues to provide for the payment, when due, of the principal of and interest on the advances becoming due in the fiscal year. In the event the proceeds from the taxes levied and other available revenues in any fiscal year are inadequate for the payment, additional taxes must be levied in the succeeding fiscal year to make up the deficiency.

(g) This chapter, or any regulations adopted under this chapter, does not constitute or must not be interpreted as a waiver of the right of the county to rely on and raise the defense of sovereign or governmental immunity on behalf of the county or any participating agency when the county or the participating agency deems it appropriate.