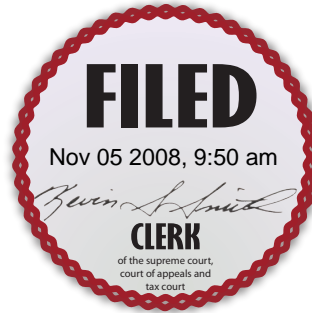


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

CARMEN R. POSEY
Pendleton, Indiana

MICHAEL F. DeBONI
NATHANIEL M. JORDAN
Yoder, Ainlay, Ulmer & Buckingham
Goshen, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CARMEN R. POSEY,)
)
Appellant-Plaintiff,)
)
vs.) No. 20A03-0804-CV-167
)
ELKHART COUNTY SHERIFF'S)
DEPARTMENT,)
)
Appellee-Defendant.)

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George Biddlecome, Judge
Cause No. 20D03-0511-PL-389

November 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Carmen R. Posey, *pro se*, appeals the trial court's grant of summary judgment in favor of the Elkhart County Sheriff's Department.

We affirm.

ISSUES

Whether Posey's claims are barred by the statute of limitations and for noncompliance with the notice requirement of the Indiana Tort Claims Act.

FACTS

This action commenced on November 22, 2005, when Posey filed a complaint against the Elkhart County Sheriff's Department ("Sheriff's Department") and the Elkhart County Drug Task Force ("Drug Task Force"). Posey alleged that on March 26, 2002, the Sheriff's Department and Drug Task Force conducted a drug raid of his residence and confiscated several items of his personal property, including a 2000 Chevrolet 2500 series 4 x 4 truck. The record reveals that on an undetermined date prior to selling the truck, the Elkhart County Sheriff advertised its sale in a local newspaper. On December 19, 2003, the Elkhart County Sheriff sold Posey's truck at auction. On November 5, 2004, nearly a year after the truck was sold, the trial court ordered a number of Posey's possessions returned, including the truck. On January 19, 2005, Posey filed tort claim notice stating his intention to seek reimbursement of the value of the truck.

On October 2, 2007, the Sheriff's Department and Drug Task Force filed a motion for summary judgment. On November 30, 2008, the trial court conducted a hearing on

the matter. On February 27, 2008, the trial court issued an order wherein it stated, in pertinent part, the following:

9. Although [Posey] acknowledges that the sale of the truck occurred on December 19, 2003, he argues that he was not required to file notice of his tort claim until he had actual knowledge of the sale of the truck. The cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered, that an injury had been sustained as a result of the tortious act of another. Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992). It is not necessary that the extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred. Monsanto Co. v. Miller, 455 N.E.2d 392, 394 (Ind. Ct. App. 1983).

10. Here, the taking of [Posey's] property occurred on March 26, 2002, and [Posey] was aware then that the truck had been seized and it is the court's opinion that any cause of action which [Posey] may have had accrued at that time. Even if the alleged conversion did not occur until December 19, 2003, [Posey]'s cause of action was certainly ripe at that time. Moreover, the impending notice of sale of the truck at Sheriff's auction was published and [Posey] was put on notice. [Posey's] loss took place no later than December 19, 2003, and at that time the Indiana Tort Claims Act notice period began to run. There is no support for [Posey]'s contention that his lack of actual knowledge that the truck had been sold tolled the notice period of the Indiana Tort Claims Act. Accordingly, [Posey's] January 19, 2005, tort claim notice clearly fell outside of the statutory notice period and was not timely filed.

(Order 3-4). Thus, the trial court found that Posey's conversion and illegal seizure claims were barred and granted summary judgment in favor of the Sheriff's Department and Drug Task Force. Posey now appeals.

DECISION

Posey challenges the trial court's grant of summary judgment. Specifically, he argues that the Sheriff's Department fraudulently concealed his claims from his knowledge, thereby tolling the running of the statute of limitations. We disagree.

Our standard of review for a trial court’s grant of a motion for summary judgment is well settled. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(c); *Mangold ex rel. Mangold v. Ind. Dep’t of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. *Id.* Our review of a summary judgment motion is limited to those materials designated to the trial court. *Id.*

The Indiana Tort Claims Act (“the Act”) applies to all torts committed against persons or property; thus, Posey’s claims that the Sheriff’s Department illegally seized and wrongfully converted his truck fall under the Act. *See Holtz v. Board of Comm’rs of Elkhart County*, 560 N.E.2d 645 (Ind. 1990); *Irwin Mortgage Corp. v. Marion County Treasurer*, 816 N.E.2d 439, 446 (Ind. Ct. App. 2004). Under the Act, a claim against a political subdivision is barred unless notice is filed with the governing body of that political subdivision and the Indiana political subdivision risk management commission within one hundred eighty (180) days after the loss¹ occurs. Ind. Code § 34-13-3-8(a).

Compliance with the notice provisions of the [Act] is a procedural precedent which the plaintiff must prove and which the trial court must determine before trial. *Indiana Dep’t of Highways v. Hughes*, 575 N.E.2d 676, 678 (Ind. Ct. App. 1991), *trans. denied*. Indeed, when a plaintiff fails to give the required notice, the defendant has an affirmative defense which must be raised in a responsive pleading to the plaintiff’s complaint. *Thompson v. City of Aurora*, 263 Ind. 187, 194-195, 315 N.E.2d 839, 843 (1975). Once the defendant raises failure to comply with the [Act]’s notice requirements as an affirmative defense, the burden shifts to the plaintiff to prove compliance. *Id.*

¹ The Act defines “loss” as “injury to or death of a person or damages to property.” I.C. § 34-6-2-75.

Davidson v. Perron, 716 N.E.2d 29, 34 (Ind. Ct. App. 1999), *trans. denied*.

Here, the record reveals that the Sheriff's Department and Drug Task Force seized Posey's truck from his residence on March 26, 2002, and sold it at auction on December 19, 2003. Posey filed his tort claim notice on January 19, 2005 – nearly three years from the date of seizure and over two years from the date of sale. These facts notwithstanding, Posey contends that his tort claim notice was timely filed because the conversion of the truck actually occurred on November 5, 2004, the date on which the trial court ordered it returned. He cites *French v. Hickman Moving and Storage*, 400 N.E.2d 1384 (Ind. Ct. App. 1980), in support of this proposition.

In *French*, the bailor-plaintiff sought compensatory and punitive damages from the bailee-defendants, two moving and/or storage companies, for selling her property without giving her proper notice. The defendants filed motions to dismiss, arguing that more than two years had elapsed since the sale of the plaintiff's property. The trial court agreed and granted the defendants' motions, concluding that the plaintiff's claims were barred by the statute of limitations. On appeal, a panel of this court found that (1) the bailee-defendants' act of selling the plaintiff's property constituted an exercise of dominion over personal property to the exclusion of the plaintiff's rights, and (2) the injury to the bailor-plaintiff's property occurred – and the two-year statute of limitations started to run – at the time of said conversion. *Id.* at 1388.

In its brief, the Sheriff's Department contends, and we must agree, that Posey's reliance on *French* is entirely misplaced. It notes,

[T]here is no indication in *French* that conversion took place at any time other than at the time of the sale of the bailed foods. In reality, *French* cuts against [Posey's] argument. It indicates that the alleged conversion of [Posey]'s truck happened no later than the time of the December 19, 2003, sale and that his cause of action and notice period began to run no later than the time of sale. And because it illustrates that the timing of notice to [Posey] was immaterial to this determination, it is clear that [Posey's] alleged lack of knowledge of the sale cannot toll his notice and filing deadlines.

Sheriff's Department's Br. at 8-9.

At the latest, Posey's "loss" occurred on December 19, 2003, when his truck was sold at auction. Under the Indiana Tort Claims Act, he was required to file his tort claim notice within 180 days of that date. He failed to do so and did not file his tort claim notice until January 19, 2005. Thus, we must conclude that Posey's illegal seizure and wrongful conversion claims were untimely and therefore, properly barred for noncompliance with the notice requirement of the Indiana Tort Claims Act.

Moreover, Posey's claims are barred by the two-year statute of limitations for conversion and illegal seizure claims. I.C. § 34-11-2-4. Under Indiana law, the statute of limitations "begins to run at the time when a complete cause or right of action arises or when a person become liable to an action." *French*, 400 N.E.2d at 1388. "This general rule has been interpreted to mean that the statute commences to run when the injurious action occurs though the plaintiff may not learn of the act until later." *Id.* The Indiana Supreme Court has held that "the cause of action of a tort claim accrues . . . when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." *Wehling*, 586 N.E.2d at 843.

It is undisputed that the Sheriff's Department and Drug Task Force seized Posey's truck from his residence on March 26, 2002. Although he did not file his complaint until November 22, 2005, Posey contends that his claims are not barred by the statute of limitations. Again, citing *French*, Posey attempts to invoke an exception to the statute of limitations. In *French*, we acknowledged that where an act of conversion has been fraudulently concealed from the plaintiff-bailor's knowledge, Indiana recognizes an exception to the rule that the statute of limitations commences to run immediately upon a wrongful conversion of the subject of a bailment. That said, however,

to remove a case from the operation of the statute of limitations because of concealment of the cause of action, there must be some affirmative act which amounts to more than passive silence. The acts relied upon must have been employed to prevent inquiry or elude investigation, or calculated to mislead and hinder the plaintiff from obtaining information, by the use of ordinary diligence, that a right of action exists.

French, 400 N.E.2d at 1389. Posey cannot meet this burden.

Posey's own appendix contains documentary evidence indicating that prior to the sale of his truck at auction, the Elkhart County Sheriff advertised the sale in the local newspaper. (Ex. B, Posey's App. 25). Such an act can hardly have been "calculated to mislead or hinder" Posey from obtaining information that he had a right of action with regard to his truck. Posey has not demonstrated that the Sheriff's Department engaged in any action calculated to fraudulently conceal the sale of the truck from his knowledge. Thus, we conclude that the trial court properly granted summary judgment in favor of the Sheriff's Department and Drug Task Force, upon a finding that Posey's tort claims are

barred by the statute of limitations and for noncompliance with the notice requirement pursuant to the Indiana Tort Claims Act.

Affirmed.²

FRIEDLANDER, J., and BARNES, J., concur.

² In his reply brief, Posey asks us to review Indiana Code sections 34-24-1-1 and -3 “in order to establish the responsibility of the Elkhart County Sheriff’s Department to notify [him] properly” Posey’s Reply Br. at 1. These statutory provisions do not establish any duty on the part of law enforcement to notify a property owner of the impending sale of his or her seized property. Indiana Code section 34-24-1-1 simply authorizes the seizure of vehicles associated with drug dealing and possession. Indiana Code section 34-24-1-3 authorizes a prosecuting attorney to bring an action against the owner of the seized property for reimbursement of associated law enforcement costs and forfeiture.

Again, Posey’s own appendix contains documentary evidence that the Elkhart County Sheriff advertised the sale of the truck before selling it at auction. In our view, this action was sufficient to put Posey on notice of the impending sale. Through ordinary diligence, Posey could have determined that he had a right of action with regard to his truck and could have initiated timely legal action to avert its sale.