UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0085

September Term, 2015

DAIQUAN BURRELL

v.

HOUSING AUTHORITY OF BALTIMORE CITY

Eyler, Deborah S.,
Wright,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: February 4, 2016

This case presents the straightforward application of the notice rules under the Local Government Tort Claims Act ("LGTCA"). The trial court found that the plaintiff failed to give proper, timely notice of his claim, that that failure could not be excused, and that therefore, he was precluded from bringing his suit. That decision was, in every respect correct, and is affirmed.

BACKGROUND

Daiquan Burrell filed suit in the Circuit Court for Baltimore City alleging injury as a result of lead paint poisoning that occurred while he was living, among other places, at 1058 Argyle Street and at 302 Dallas Court, both of which were operated by the Housing Authority of Baltimore City ("HABC"). Plaintiff's Complaint contained boilerplate language claiming, without providing any specifics, that he had given notice to HABC as is required under the LGTCA:

> Plaintiff has either complied or substantially complied with all relevant provisions of the Local Government Tort Claims Act. Additionally, if Plaintiff failed to comply or substantially comply with the Local Government Tort Claims Act, Plaintiff is excused by good cause for said failure.

HABC moved for summary judgment on the grounds that Plaintiff failed to give notice as required by the LGTCA. In support of its motion, HABC provided an affidavit from Mr. William M. Peach, III, who is currently the Director of Housing Management Administration within HABC. Peach attested:

- That he is, and for all relevant times was, the person within HABC to whom notice of lead paint claims would have been forwarded for investigation;

- That during his entire tenure, he does not recall receiving "*any* written notices setting forth the time, place[,] and cause of *any* alleged lead poisoning injury … for *any* claimant in *any* alleged lead poisoning case;" and

- That HABC has no record of "any complaints, letters, notices[,] or related documentation made by the Plaintiff or anyone in the Plaintiff's family … regarding Plaintiff's alleged injurious exposure to lead-based paint at the property during the time the Plaintiff claims to have lived or visited there."

(emphasis added). Peach also provided copies of documents from the relevant tenant folder, none of which indicated receipt by HABC of notice of a claim.

Plaintiff responded to HABC's motion for summary judgment and included an affidavit from Kimberly Stallings, Plaintiff's mother. Her affidavit stated:

> While I was still living at 302 South Dallas Court, on at least two occasions I notified the housing manager at my leasing office about the chipping, peeling, and flaking paint at my house at 302 Dallas Court and my concern that Daiquan had access to that chipping, peeling[,] and flaking paint. The Housing Authority had told me to make these types of complaints to the housing manager, and I followed those instructions when I made my complaint about the chipping, peeling, and flaking paint at my home.

Stallings' affidavit also described some health problems from which she had suffered and states that she was unaware either that her son's lead exposure would cause him injury and that the LGTCA required her to give timely notice of a claim as a precondition to suit.

After a hearing on the captioned Motion for Summary Judgment, the trial court issued a written opinion finding that Burrell had failed to demonstrate actual or substantial compliance with the notice requirement of the LGTCA. Moreover, the trial court found

that the Burrell had failed to show "good cause" to excuse his failure to comply with those notice requirements. As a result, the trial court granted summary judgment.[1] On appeal, Burrell challenges the dismissal of his case.

ANALYSIS

Under the LGTCA, "an action for unliquidated damages may not be brought against [the Housing Authority of Baltimore City] … unless … notice of the claim … is given within 180 days after the injury." CJP § 5-304(b)(1). "The notice shall be in writing and shall state the time, place, and cause of the injury." CJP § 5-304(b)(2). "[T]he notice shall be given to the corporate authorities of the [HABC][2]." CJP § 5-304(c)(4). There are two separate exceptions to the LGTCA notice requirement: (1) the judicially-created substantial compliance exception; and (2) the statutory "good cause" exception. Burrell claimed both exceptions applied, but despite this, the motions court awarded summary judgment to the HABC. We will review those decisions in turn.

[1] As we will discuss below, although the parties and the trial court referred to this as a summary judgment proceeding, it was not, nor was it required to be.

[2] There is no dispute that the HABC is a local government as defined by Md. Code Ann., Courts and Judicial Proceedings ("CJP") § 5-301(d) and entitled to rely upon the LGTCA. *See* CJP § 5-301(d)(15)(defining "local government" to include "[h]ousing authorities created under Division II of the Housing and Community Development Article"); HCD § 15-104 (establishing HABC within Division II of the Housing and Community Development Article). *See also Mitchell v. Housing Authority of Baltimore City*, 200 Md. App. 176 (2011) (holding that the LGTCA applies to claims against HABC).

I. SUBSTANTIAL COMPLIANCE

Burrell's first appellate challenge is that while he didn't achieve actual compliance, he substantially complied with the LGTCA's notice requirement. According to Burrell, the only defect in his notice was that it was delivered orally, not in writing. From there, Burrell argues that *Ellis v. Housing Authority of Baltimore City*, 436 Md. 331 (2013) does not foreclose a finding of substantial compliance if otherwise sufficient notice is given orally rather than in writing. If Burrell's notice was otherwise compliant we might be persuaded. But it was not.

In *Ellis*, the Court of Appeals reviewed the test to determine if a claimant substantially complied with the LGTCA's notice requirement:

> Even if a plaintiff does not strictly comply with the LGTCA notice requirement, a plaintiff substantially complies with the LGTCA notice requirement where: (1) the plaintiff makes "some effort to provide the requisite notice"; (2) the plaintiff does "in fact" give some kind of notice; (3) the notice "provides … requisite and timely notice of facts and circumstances giving rise to the claim"; and (4) the notice fulfills the LGTCA notice requirement's purpose, which is
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> > to apprise [the] local government of its possible liability at a time when [the local government] could conduct its own investigation, *i.e.*, while the evidence was still fresh and the recollection of the witnesses was undiminished by time, sufficient to ascertain the character and extent of the injury and [the local government's] responsibility in connection with it.

Ellis, 436 Md. at 342-43 (2013) (quoting *Faulk v. Ewing,* 371 Md. 284, 298-99 (2002)). Appellate courts review a trial court's determination of whether there was substantial compliance, *de novo*, without deference. *Ellis*, 436 Md. at 342.

Although Burrell claims that his notice only falls short in that it was delivered orally rather than in writing, a review of the record proves otherwise.[3] The record discloses that the only notice given to HABC was described in Burrell's mother's affidavit, and quoted in full above. She claims to have told an unidentified housing manager that there was chipping, peeling, and flaking paint in her apartment, and that she told the manager that Burrell had access to that chipping, peeling, and flaking paint.

The decision in *Ellis* demonstrates the insufficiency. In the *Ellis* case, Ellis's co-appellant, Johnson, "[1] orally complained to an HABC housing manager about chipping paint and [2] threatened to sue HABC if it did not fix the chipping paint." *Ellis*, 436 Md. at 345. The *Ellis* Court found that this was legally insufficient notice, in part, because the threat to sue did not specifically indicate that the threatened suit would be for injury from lead paint. *Id*. Although the oral complaint was identical in both cases, here, there was no threat of suit at all. As a result, we must find as a matter of law that Burrell's notice did not substantially comply with the LGTCA notice requirement. We therefore affirm the trial court.

[3] At oral argument, counsel for Burrell made the novel argument that even if his client's notice failed to achieve substantial compliance on other grounds, this Court ought to ignore those defects and provide an answer to the question of whether oral notice (as opposed to written) can suffice. We decline the invitation.

II. GOOD CAUSE

By contrast to the judicially-created substantial compliance exception, the "good cause" exception arises from statute:

> [U]nless 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.

CJP § 5-304(d). Good cause may arise when a claimant is affirmatively mislead by representations of the local government, or when serious obstacles hinder a claimant's ability or capacity to provide notice. *Rios v. Montgomery County*, 386 Md. 104, 141-42 (2005) (identifying types of obstacles that might demonstrate good cause). Although our courts haven't said precisely what good cause is, they have said what it isn't: "A plaintiff does not show good cause for his or her failure to comply with the LGTCA notice requirement where the plaintiff does not 'prosecute[] his [or her] claim with th[e] degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.'" *Ellis*, 436 Md. at 350 (quoting *Rios* 386 Md. at 141). Because the trial judge has some discretion in the good cause determination, appellate courts review those determinations deferentially and may only reverse where there is an abuse of discretion. *Ellis*, 436 Md. at 348 (citing *Prince George's County v. Longtin*, 419 Md. 450, 467 (2011)).

Burrell makes three arguments with respect to good cause: (1) that the jury, not the motions judge should have decided whether there was good cause to excuse his providing

notice; (2) that improper hearsay evidence infected the motion court's good cause determination; and (3) that the motions court erred in determining that Burrell failed to establish the existence of good cause.

A. *Who Decides Good Cause?*

Burrell argues that the jury, not the trial judge, should decide whether he demonstrated good cause for failing to satisfy the LGTCA notice. He bases this theory on two arguments, first, as a matter of interpretation; second, based on his reading of Article 23 of the Maryland Declaration of Rights.

We begin by noting that this argument is an uphill battle for Burrell. Since the inception of the good cause exception to the LGTCA notice provision in 1972, Maryland trial judges have been deciding whether there existed good cause to excuse a claimant's failure to provide notice. This practice has passed without comment in dozens of reported appellate opinions on LGTCA notice, *see, e.g., Housing Authority of Baltimore City v. Woodland,* 438 Md. 415 (2014); *Ellis v. Housing Authority of Baltimore City,* 436 Md. 331 (2013)*; Rios v. Montgomery County*, 386 Md. 104, 127 (2005), and perhaps thousands of proceedings in the trial courts of this State. This practice is justified in two respects. *First*, as a necessary corollary to the fact that LGTCA notice is a condition precedent to suit, *see, e.g., Rios,* 386 Md. at 127 (holding that LGTCA notice is a condition precedent and collecting cases) and, therefore, not a part of the case itself. *Second*, the practice is justified by the interaction between the statute and the rules of procedure. That is, the LGTCA requires a claimant to raise the issue of good cause by "motion," CJP § 5-304(d), and the

rules of procedure, define a motion as "[a]n application *to the court* for an order." Md. Rule 2-311(a) (emphasis added). Together, then these two provisions suggest that the question of good cause should be decided by the judge not the jury. Nevertheless, we will consider Burrell's two arguments for changing that practice and transferring the responsibility for determining good cause from the judge to the jury.

Burrell's first challenge proceeds in three steps: (1) this Court, in its first case interpreting the good cause exception, *Madore v. Baltimore County*, 34 Md. App. 340, 345 (1976), borrowed its definition of good cause from a pair of older Texas decisions, *Lee*[4] and *Hawkins*[5]; (2) those Texas cases, besides defining good cause, also assigned the duty to determine the existence of good cause to the jury; and therefore (3) that we ought to assign the duty to the jury too. This argument misunderstands what the *Madore* Court did. *Madore* adopted the *Lee* definition of good cause because it thought *Lee* properly described the test that the Maryland legislature intended. *Madore* didn't adopt Texas law. And it certainly didn't adopt more Texas law than it quoted. It just doesn't work that way.

But it is also worth looking below the surface of Burrell's argument. After the unnecessary detour through *Madore*, *Lee*, and *Hawkins,* Burrell argues that he generated a factual dispute as to the existence of good cause. It is this factual dispute, he argues, that is not appropriate for resolution on summary judgment and therefore his claim of good cause

[4] *Lee v. Houston Fire & Cas. Ins. Co.*, 530 S.W.2d 294, 296 (Tex. 1975).

[5] *Hawkins v. Safety Cas. Co*., 207 S.W.2d 370 (Tex. 1948).

should have been resolved by a jury not a judge. This issue however, was never really about summary judgment.

We think that this is really a problem of nomenclature. The LGTCA doesn't specify what title a plaintiff should give to the motion for application of the good cause exception for notice. CJP § 5-304(d) ("upon motion and for good cause shown"). Here, HABC captioned its opposition to Burrell's claim of good cause as a motion for summary judgment, which led the trial court to say that it was granting summary judgment, which, in turn, leads Burrell to argue that summary judgment was not appropriate because there was a genuine dispute of a material fact. The motion, however, was never really about summary judgment. Rather, it was Burrell's motion for good cause, HABC's opposition to that motion, and the trial judge's determination that Burrell had not demonstrated good cause. Secure in the knowledge that the Court of Appeals has instructed us not to "elevate form over substance" regarding the form of the motion by which the issue of good cause is brought to the trial court, *Faulk v. Ewing*, 371 Md. 284, 305 (2002), we find that erroneously discussing this as a motion for summary judgment does not convert it to one. As a result, the question wasn't whether Burrell generated a dispute of material fact. Rather, the question was whether Burrell proved that he had good cause for failing to provide notice. Nothing about that question (as opposed to when it is erroneously framed in the context of summary judgment) suggests that the determination must be made by a jury rather than a judge.

Burrell's next challenge is that allowing the judge to decide the issue of good cause deprives him of his constitutional right to trial by jury protected by Article 23 of the Maryland Declaration of Rights, which, in pertinent part provides: "The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of $15,000, shall be inviolably preserved." Md. Const., Decl. of Rts., art. 23. Thus, even if CJP § 5-304(d) is properly interpreted to allow the trial court to resolve the motion for good cause, Burrell argues that the assignment is unconstitutional. First, we note that it would be indeed surprising if, after multiple unsuccessful challenges to the constitutionality of the notice provisions of the LGTCA, that this, perhaps the fifth such constitutional challenge, was successful. *Ellis*, 436 Md. at 352-59; *Rios,* 386 Md. at 134-39. More importantly, we find that the Court of Appeals' reasoning with respect to Article 19 in *Ellis* is dispositive of Burrell's Article 23 claim here. We explain.

In *Ellis*, the Court found that the legislature's decision, through the LGTCA, was to create new potential liability against local governments where in the past there had been none. *Ellis*, 436 Md. at 354 ("Before the General Assembly enacted the LGTCA, local governments were immune from liability for torts that arose out of governmental—as opposed to proprietary—activities"). Because Article 19 only precludes the legislature from restricting preexisting causes of action, not newly created ones, it did not apply to the LGTCA. *Id*. In much the same way, it has long been held that Article 23 operates to preserve the right to trial by jury in causes of action that existed at the time of the article's

adoption, not to create a right to trial by jury in causes of action created thereafter. *See, e.g., Higgins v. Barnes*, 310 Md. 532, 542 (1987); *Knee v. Baltimore City Pass. Ry. Co*., 87 Md. 623, 624 (1898). Because, as *Ellis* held, the LGTCA created a new cause of action, Article 23 doesn't apply to it. There is no constitutional right to have good cause under CJP § 5-304(d) decided by a jury.

B. *Did Improper Hearsay Infect the Court's Good Cause Decision?*

Burrell next argues that Peach's affidavit contains inadmissible hearsay. Specifically, he argues that the trial court should not have considered the following paragraph:

> 6. Some of the HABC managers involved in the operation and/or maintenance of the property when the Plaintiff claim[s] to have resided at and/or visited there are no longer employed by HABC. In cases where I have been able to find current employees of HABC who were in any managerial capacity during the time frame referenced in Plaintiff's complaint they have been uniformly unable to recall anything about the condition of specific property during the time frames referenced in Plaintiff's Complaints.

Burrell rests his argument on the requirement that summary judgment affidavits must contain "facts as would be admissible in evidence." Md. Rule 2-501(c); *Carter v. Aramark Sports & Entm't Servs., Inc.*, 153 Md. App. 210, 232 n.4 (2003). Of course, as we discussed above, this was not a summary judgment proceeding.

We also reject Burrell's argument on its merits. *First*, it is not hearsay. It doesn't report any out-of-court statements. *Second*, even if it was hearsay, trial judges are presumed to know the law and had he believed it to be hearsay, the trial judge would not have relied

on it. *See, e.g., Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2003) ("The exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly.") (quoting *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981)). In this vein, we note that there is no indication that the judge relied on this statement in any way in making his determination. Nor is that surprising because, *third*, the statement was not relevant to the good cause determination, but rather to the question of prejudice to HABC—an issue that the trial court did not and did not have to reach. Therefore, we conclude that this contention is without merit.

C. *Did the Motions Court Err in Finding that Burrell Failed to Establish Good Cause?*

Finally, Burrell challenges the trial court's good cause determination itself. This challenge takes two forms, one legal and one factual.

We will not spend much time on Burrell's claim of legal error. The trial court, at the motions hearing said that Burrell's "action was not brought until approximately fifteen years after Plaintiff's alleged exposure." From this, Burrell postulates that the trial court mistakenly believed that rather than giving *notice* of the claim within 180 days of injury, that *suit* was required to have been filed within 180 days of the injury. Besides this minor slip of the tongue—if it even amounts to that—there is nothing in this record to suggest that the trial court did not fully understand and correctly apply the LGTCA. We reject this contention.

Finally, we arrive at the ultimate issue: whether the trial court abused its discretion in determining that Burrell did not have good cause to excuse his failure to give notice of

his claim to HABC. The record before the trial court offers four factors supporting the claim: (1) that Burrell's mother suffered from depression at the time; (2) that Burrell's mother suffered from another illness at the time; (3) that Burrell's mother was unaware of the significance of Burrell's lead exposure or that it might cause injury; and (4) that Burrell's mother was unaware of the LGTCA notice requirements. A fifth factor, Burrell's minority, is also implied. While another factfinder might have come to a different conclusion, there is nothing here to suggest that the decision here was so far from the "centermark imagined" by this Court and "beyond the fringe of what" this Court "deems minimally acceptable," so as to constitute an abuse of discretion. *See King v. State,* 407 Md. 682, 697 (2009). Therefore, we affirm the finding that Burrell did not establish good cause to excuse his failure to provide HABC timely notice of his claim.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.