UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2218

September Term, 2015

CRISHAWNA SHANE JACKSON

v.

HOUSING AUTHORITY OF
BALTIMORE CITY

Eyler, Deborah S.,
Wright,
Beachley,

JJ.

Opinion by Wright, J.

Filed: December 7, 2016

This case arises from a complaint filed by Crishawna Jackson, appellant, against the Housing Authority of Baltimore City ("HABC"), appellee, on April 4, 2014, in the Circuit Court for Baltimore City. The complaint alleged negligence and violations of the Maryland Consumer Protection Act and the Baltimore City Housing Code arising out of Jackson's alleged exposure to lead paint in a property that HABC owned and operated. HABC answered Jackson's complaint, denying responsibility and negligence, and contending that she failed to comply with the notice requirement of Section 5-304 of the Local Government Torts Claim Act ("LGTCA"), codified at Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP") § 5-301 *et seq.*

On December 22, 2014, HABC filed a motion for summary judgment on the basis that Jackson failed to comply with the LGTCA's 180-day notice requirement, and HABC argued that there is no evidence that Jackson had an elevated blood lead level while living at any HABC property. A motions hearing was held on February 18, 2015. On March 13, 2015, the circuit court issued an order granting HABC's motion based on the following findings: (1) Jackson failed to substantially comply with the notice requirement of the LGTCA; (2) Jackson has not presented sufficient evidence of good cause for failure to comply with the LGTCA; and (3) HABC has demonstrated the existence of prejudice arising from Jackson's failure to comply with the LGTCA. Jackson timely appealed to this Court, presenting the following questions, which we rephrase for clarity:[1]

[1] The questions presented in Jackson's brief were as follows:

(continued…)

1. Is there an absolute requirement that substantial compliance under the LGTCA include written notice, so that oral notice of a claim made by the mother of a lead poisoned minor to the designated representative of HABC necessarily fails as substantial compliance?

2. Did the Circuit Court err when it determined whether Jackson demonstrated good cause for waiver of the notice requirements under the LGTCA rather than submitting the issue to a jury?

3. Did the trial court err as a matter of law by misinterpreting and misapplying the test for good cause under the LGTCA?

For the following reasons, we affirm the decision of the circuit court.

Facts

Jackson was born on April 6, 1993. She lived with her mother, Bridget McGraw, in a HABC property located at 1140 E. Pratt Street in Baltimore, Maryland ("Property"), for approximately three years, from 1994-1996.[2] During that time, it is alleged that the

1. Is there an absolute requirement that substantial compliance with the notice provision of the LGTCA include written notice – so that any oral notice necessarily fails as substantial compliance?

2. Given that the test for good cause under the LGTCA is the "reasonable person test," should the issue of good cause be submitted to the fact-finder when it involves a dispute of fact or when reasonable jurors could differ as to inferences that can be drawn from the facts?

3. Did the trial court err as a matter of law by misinterpreting and misapplying the test for good cause under the LGTCA?

[2] McGraw and Jackson lived in another HABC property located at 107 Albemarle Street for approximately four years, from 1989-1993. McGraw may have lived there at the time of Jackson's birth. However, Jackson conceded to the circuit court that no notice was given with respect to the 107 Albemarle Street property.

Property contained chipping, peeling, and flaking paint.[3] McGraw witnessed Jackson playing with and eating paint chips at the Property. McGraw called the housing manager to complain about the deteriorated paint. McGraw told the housing manager "that there was chipping paint at the house, that [Jackson] was eating it, and [McGraw] would sue [HABC] for exposing [Jackson] to the chipping paint." The record does not contain evidence of lead-based paint hazards within the Property.

Jackson's blood tested positive for lead several times between October 3, 1996 and August 31, 2006. The highest level readings were 41 micrograms per deciliter on October 3, 1996, and 35 micrograms per deciliter on October 9, 1996. Throughout the testing, Jackson was not living at the Property or any other HABC-owned property.

The factual assertions are based on an affidavit (the "Affidavit") executed by McGraw on January 16, 2015, describing certain events that occurred while residing at the Property. HABC argues that although the Affidavit must be accepted as true for the purpose of summary judgment, it should not be deemed sufficient to satisfy the LGTCA notice requirement.

There is no evidence in the record that prior to the summons and complaint served on April 28, 2014, any corporate authority of HABC received notice of the time, place, and cause of Jackson's injury as alleged in the affidavit.[4]

[3] As discussed *infra*, Jackson argues that the presence of paint chips equates to the presence of lead paint.

[4] The affidavit of William M. Peach, III, current Director of Housing Management Administration, states that after a search "of all of the HABC's file and (continued…)

Discussion

Where there is no genuine dispute of material fact, an appellate court reviews a trial court's grant of summary judgment under a *de novo* standard. *Koste v. Town of Oxford*, 431 Md. 14, 25 (2013) (citations omitted). Likewise, an appellate court reviews without deference a trial court's conclusion as to whether a plaintiff substantially complied with the LGTCA notice requirement. *Ellis v. Hous. Auth. of Baltimore City*, 436 Md. 331, 342 (2013) (citing *Faulk v. Ewing*, 371 Md. 284, 308 (2002)) (where the Court applied a *de novo* standard of review).

Under CJP § 5-304, a plaintiff cannot bring an action for unliquidated damages against a local government (or its employees) unless the plaintiff complies with the LGTCA statutory notice requirements. In order to fully comply with the LGTCA notice requirement, a plaintiff must provide notice: (1) in writing; (2) stating the time, place, and cause of the injury; (3) within 180 days after the injury;[5] (4) in person or by certified mail; (5) by the claimant or the representative of the claimant. CJP §§ 5-304(b) & (c)(1).

If the plaintiff does not strictly comply with the requirements enumerated under CJP § 5-304, the court may still entertain the suit if the plaintiff can show substantial

records for any complaints, letters, notices or related documentation made by [appellant] or anyone in [appellant's] family . . . none have been found."

[5] Effective October 1, 2016, the statute was modified to require notice within 1 year.

compliance.[6] *Hous. Auth. of Baltimore City v. Woodland*, 438 Md. 415, 428 (2014) (citing *Ellis,* 436 Md. at 342-43).

If the plaintiff fails to show either actual or substantial compliance with the LGTCA notice provisions, the complaint will be dismissed unless (1) the plaintiff shows good cause and (2) the local government does not "affirmatively show that its defense has been prejudiced by lack of required notice." CJP § 5-304(d). If good cause is shown, "there can be no waiver if the defendant makes an affirmative showing that its defense has been prejudiced by the plaintiff's failure to comply with the notice requirements." *Mitchell v. Hous. Auth. of Balt. City*, 200 Md. App. 176, 204 (2011) (citation omitted). The determination of whether good cause is shown is within the discretion of the trial court. *Id.* at 205 (citing *Rios v. Montgomery Cnty.*, 386 Md. 104, 121 (2005)).

As there is no dispute that Jackson failed to provide actual notice to HABC,[7] we shall focus on whether Jackson substantially complied and, if she did not, whether there was good cause for her noncompliance and whether HABC showed that it was prejudiced.

I. Oral Notice and Substantial Compliance under the LGTCA

Jackson argues that her mother's oral communication to HABC served as sufficient notice under the LGTCA because the Court of Appeals, in *Ellis,* 436 Md. at

[6] The four criteria that must be met to establish substantial compliance are discussed *infra*.

[7] It is unnecessary to consider whether Jackson's notice fully complied with the LGTCA. Oral notice may never serve as full compliance because the statute specifically calls for the notice to be "in writing." CJP § 5-304(b)(2).

331, ruled in HABC's favor for reasons unrelated to oral notice. Jackson interprets this to mean that, due to the *Ellis* Court's ruling, oral notice may satisfy substantial compliance.

The *Ellis* Court addressed four criteria that should be met for a notice requirement to substantially comply with the LGTCA: "(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[.]" *Id.* at 342-43 (citation omitted). Meanwhile, this Court has held the purpose and effect of the LGTCA notice requirement to be as follows:

> The notice requirement of Sections 5-304(a) and (b) are intended to apprise a local government "of its possible liability at a time when it 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 its responsibility in connection with it.'"

Mitchell, 200 Md. App. at 191 (quoting *Rios*, 386 Md. at 126).

Jackson's reliance on *Ellis* is misplaced. In *Ellis*, there was no need for the Court of Appeals to address the issue of whether oral notice could amount to substantial compliance, because the appellant's notice was insufficient notwithstanding the absence of a formal writing. 436 Md. at 345 ("Simply put, through her alleged oral complaint, [appellant's] mother neither explicitly nor implicitly indicated that she intended to sue HABC *regarding any injury*.") (emphasis added).

In this case, McGraw's telephone communication as relayed in her affidavit failed to substantially comply with the notice requirement because Jackson could not show that the oral notice satisfied all four criteria of substantial compliance. Even assuming that Jackson was able to show that the communication constituted some effort to provide requisite notice to HABC, it failed to provide HABC with any facts and circumstances giving rise to the claim. McGraw never provided the name of the housing manager who took her call, she failed to give specifics regarding the location of the chipping paint, and she did not state when she would be filing the lawsuit.[8] Based upon this record, Jackson failed to show that some kind of notice was "in fact" given to HABC regarding her alleged injury. *See Wyand v. Patterson Agency, Inc.*, 266 Md. 456, 460 (1972) (for a moving party to draw that she is entitled to recover as a matter of law, her "affidavit must contain evidentiary facts, not conclusions, and it should be full, certain, and exact") (citations omitted).

With regard to the fourth factor, McGraw's telephone communication failed to apprise HABC of its potential liability at a time and in a manner that would have allowed HABC to mount an investigation to determine its own liability. *See Ellis,* 436 Md. at 342-43; *contra Moore v. Noruozi*, 371 Md. 154, 179 (2002) (holding that the purpose of the notice requirement had been fulfilled because the "County received early actual knowledge of Moore's claim as to enable it, at the earliest moment, to investigate it").

There was no mention of exposure to lead paint by way of McGraw's affidavit.

[8] Although there was testing at the other property for which no notice was given, it is undisputed that no testing was performed at the property in question.

The affidavit as being her recollection of events, without the means to be verified, must be strictly construed. To do otherwise would open the door to chicanery. The lead paint testing was completed late in 1996, October 3, 1996, and October 9, 1996, and it is evident the testing was done after the oral notice given by McGraw or it would have been included in her affidavit as it would be a fact *regarding any injury*.

At argument, Jackson argued that the presence of paint chips equates to the presence of lead paint.[9] One does not follow from the other. We again reiterate that the "mere fact that most old houses in Baltimore have lead-based paint does not mean that a particular old Baltimore house has a similar deficiency." *Taylor v. Fishkind*, 207 Md. App. 121, 143 (2012) (quoting *Davis v. Goodman*, 117 Md. App. 378, 393 (1997)).

The span of 18 years between the alleged notice and Jackson's suit also negates the intended purpose of the notice requirement to prevent the evidence and recollection of witnesses from being diminished by time. *See Mitchell*, 200 Md. App. at 211 (holding that the extreme time lapse of 19 years "was a strong showing of prejudice, as [HABC] no longer had any documents or witnesses, and the mere passage of 19 years would be sufficient to dim even the brightest memory.").

For these reasons, we conclude that McGraw's oral notice, made sometime between the years of 1994 to 1996 to an unnamed employee in HABC's rental office, did not substantially comply with the LGTCA's notice requirement.

[9] Although not part of the record, we can only assume that the property was an older home or the argument is of even lesser import.

II. Good Cause for Waiver

Having determined that Jackson failed to properly provide notice pursuant to the LGTCA, we turn to the issues of whether she established good cause to excuse her noncompliance and whether the good cause issue should have been submitted to a jury. As previously stated, the LGTCA notice requirement provides, in pertinent part, that "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." CJP § 5-304(b). The requirement may be waived, however, "upon motion and for good cause shown," unless the local government makes an affirmative showing "that its defense has been prejudiced by lack of required notice." CJP § 5-304(d).

Jackson argues that HABC's motion for summary judgment was improperly granted by the circuit court because the issue of good cause should have been submitted to a trier of fact. Jackson contends that, pursuant to Article 23 of the Declaration of Rights,[10] the circuit court committed reversible error in its misinterpretation of who should decide the issue of good cause. HABC responds that the plain language and the purpose of the LGTCA's notice provision, as well as the case law surrounding it, determine that this is an issue to be decided by the judge, not the jury, before trial.

[10] Md. Const. Decl. of Rights, art. XXIII provides: "The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State . . . shall be inviolably preserved."

This Court has recently held that "[t]o require that every suit proceed to a jury for a determination of good cause would defeat the purpose of the statute." *Harris v. Hous. Auth. of Balt. City*, 227 Md. App. 617, 636, *cert. denied*, 449 Md. 418 (2016). In *Harris*, we considered the same issue:

> Our task on appeal is not "to decide 'good cause' afresh, but rather, to decide whether the trial court abused its discretion in its good cause determination." [*Hous. Auth. of Balt. City v.*] *Woodland*, 438 Md. [415,] 434, 92 A.3d 379 [(2014)] (citing *Rios v. Montgomery Cnty.*, 386 Md. 104, 121, 872 A.2d 1 (2005)). "An abuse of discretion in a ruling may be found 'where no reasonable person would **share the view taken by the trial judge.**'" *Id.* at 435, 92 A.3d 379 (quoting *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 219, 26 A.3d 352 (2011)) (emphasis added) (some internal quotations omitted).
>
> Clearly, the applicable standard of review is premised on the assumption that it is the duty of the trial court to determine whether a plaintiff has shown good cause for the failure to comply with the LGTCA's notice requirement. Appellants' contention that the judge inappropriately usurped the role of the jury is plainly without merit according to [CJP § 5-304(c)].

227 Md. App. at 636-37. Therefore, it is not an abuse of discretion for a trial judge to determine the issue of good cause. Further, as in *Harris*, Jackson's Article 23 argument is not preserved. *See id.* at 638 ("We have scoured the record without finding any instance of an argument before the circuit court concerning whether Article 23 of the Maryland Declaration of Rights requires the issue of good cause to be submitted to the jury.").

As to the issue of whether Jackson has established good cause, we turn again to our decision in *Harris*, where we considered good cause as follows:

> "A plaintiff shows good cause for his or her failure to comply with the LGTCA notice requirement where the plaintiff **'prosecute[s] 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 348 (alteration in *Ellis*) (emphasis supplied) (quoting *Rios*, 386 Md. at 141). A plaintiff suing a local government also "shows good cause for his or her failure to comply with the LGTCA notice requirement where the plaintiff reasonably relies on 'misleading' representations by a local government." *Id.* at 348-49 (quoting *Rios*, 386 Md. at 141-42). The fact that a plaintiff is a minor at the time of an injury, however, does not, by itself, constitute good cause. *Id.* at 351 (citing *Rios*, 386 Md. at 144). The trial court, knowing the context and facts of the case, is best positioned to determine good cause. *Woodland*, 438 Md. at 435 (citing *Moore v. Norouzi*, 371 Md. 154, 183 (2002)).

Id. at 638-39 (footnote omitted).

In the present case, the circuit court found that Jackson did not show good cause to excuse noncompliance with the notice requirement by considering the span of time between McGraw's oral notice and Jackson's filing of the suit. The court also appropriately considered the lack of evidence to show that McGraw proceeded with ordinary diligence in pursuing her claim, or that HABC did anything or told her anything on which she might have reasonably relied in not providing notice or pursuing the claim further. *Woodland*, 438 Md. at 413; *Moore*, 371 Md. at 179; *Mitchell*, 200 Md. App. at 208.

We agree and, thus, conclude that the circuit court "did not abuse its discretion in finding that good cause was lacking, nor did the court inappropriately step into the shoes of the jury." *Harris*, 227 Md. App. at 641. We cannot say that no reasonable person would share the view taken by the circuit court and therefore uphold the court's finding. *Woodland*, 438 Md. at 435. Furthermore, the approximately 18-year span of time between the alleged oral notice and the filing of the suit evidences lack of good

cause. *Harris*, 227 Md. App. at 641 (holding that an eight-year span of time between the alleged oral notice and the filing of suit evidences a lack of good cause).

III. Good Cause Test

Finally, Jackson avers that the circuit court erred by considering the length of time between oral notice and the filing of the complaint because the good cause test focuses on the date notice was given, and not on the date suit was filed. Jackson relies on *Rios*, *supra,* where we stated that "the notice requirement operates independent of the limitations period that applies generally to the filing of suit. Serving timely notice is essential to preserve a claimant's right to file suit at any time during the limitations period." 157 Md. App. at 480. Jackson's argument is unfounded because the notice requirement acts as a "condition [ ] precedent to maintaining [a] subsequent legal action," and in this case, the notice requirement had not been satisfied. *See id.* (quoting *Faulk*, 371 Md. at 304) (internal quotations omitted).

We maintain that the time of filing suit is patently relevant to determining the degree of a plaintiff's diligence in prosecuting her claim under the LGTCA. Both this Court and the Court of Appeals have examined the time between injury and lawsuit in analyzing good cause in the past. *See Ellis,* 436 Md. at 350 (concluding that it was not an abuse of discretion for the circuit court to find that there was no good cause when the appellants waited 18 and 11 years to sue, respectively); *see also Harris*, 227 Md. App. at 641.

The circuit court determined that good cause for waiver did not exist when McGraw complained of Jackson's alleged lead exposure sometime between 1994 and

1996, but waited until 2014 to file a complaint. It did not abuse its discretion when it considered the substantial length of time between the alleged oral complaint and the time of filing suit.

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