

Jim's Perspective...

Changing Your Legal Position in a Disputed Civil Case

Great Northern Insurance Company filed a subrogation action against the Transit Authority of the City of Omaha (Metro) pursuant to the Political Subdivision Tort Claims Act (PSTCA). This subrogation claim arose out of a motor vehicle accident on October 21, 2016 involving a Metro bus. I think the bus eventually struck the Holland Performing Arts Center which is managed by the Omaha Performing Arts Society which was the named insured under the Great Northern policy. Great Northern paid the Arts Society about \$340,000.

Great Northern's attorney mailed a certified letter dated December 7, 2016, addressed to "Claims Department, Omaha Metro Transit" and titled "Statutory Notice." In part, the letter specifically stated, "Please consider this letter as notice of a potential claim against Metro." Great Northern's letter was signed for at Metro by a staff person and the letter was then delivered to Metro's director of legal/human resources. The director forwarded Great Northern's letter to outside counsel. On December 13, 2016, Metro's outside counsel sent a letter via email to Great Northern's attorney, advising that the firm represented Metro and that the firm was in receipt of the December 7th letter. Outside counsel requested in the letter that all future correspondence regarding the claim be directed to him.

Great Northern filed suit against Metro in May, 2018. Metro, as an affirmative defense to this subrogation lawsuit, argued that Great Northern's claim was not valid because Great Northern failed to comply with the notice requirements of the PSTCA. The PSTCA requires that notice of a claim must be filed with the political subdivision within one year of the date that the claim arose. In addition, Section 13-905 requires that the notice must be sent to "the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision." At Metro, this person is the executive director, and the Great Northern letter providing notice of a claim was not sent to this person.

Based on these facts, it would appear that Great Northern did not comply with the notice requirements of the PSTCA, and its lawsuit should be dismissed because proper notice was not completed within one year after the occurrence of the claim. However, there is a legal principal which generally provides that a party to a disputed claim, or a pending lawsuit, cannot appear to accept some procedural requirements applicable to the dispute, and then a year later, change their position as to application of various procedural requirements to the claim. Simply put, to allow someone to completely change their legal position on the opposing party's compliance with a procedural law (over a year after they could have raised the issue) would be unfair. Everyone involved in the litigation takes time to develop their legal arguments and the case moves forward. You can't finalize your legal arguments pertaining to statutory procedures and then one year later just change your mind and take different positions.

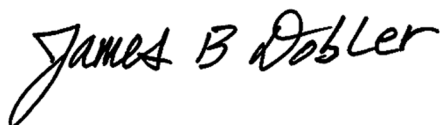
All of this illustrates a separate system of law called the Law of Equity. Law of Equity is different and separate from the Common Law. Common Law is the body of customary law

which originates with the court system and court opinions. It is developed by judges and based upon judicial decisions. Common Law originated with the *Curia Regis* (King's Court), London, England. At that time, the only legal remedies in the civil court system were based upon written laws or court decisions and involved awarding "damages" for violating Common Law. If a person sought a legal remedy that could not be resolved by awarding "damages," then no claim or lawsuit could be brought. The people of England eventually became dissatisfied with this limited system and eventually the Court of Chancery was directed to develop the legal concept of Law of Equity which was adopted in England and eventually followed in the United States.

The Law of Equity was applied by Great Northern to Metro's sudden decision (almost a year and one half after the notice of claim was submitted to Metro) to assert that Great Northern did not comply with the notice procedural provisions of the PSTCA. The legal term used to prevent Metro from arguing about the validity of the notice is called Estoppel. This principle precludes a person or other legal entity from asserting something contrary to what is implied by the previous actions or statements of that person or other legal entity. So the legal concept of Equitable Estoppel was the primary issue in the Nebraska Supreme Court case of Great Northern Ins. Co. v. Transit Authority of Omaha, 308 Neb. 916 (2021). The Court noted that six elements must generally be satisfied for the doctrine of Equitable Estoppel to apply. They are:

1. Conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
2. The intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons;
3. Knowledge, actual or constructive, of the real facts. The party asserting Equitable Estoppel must show:
4. Lack of knowledge and the means of knowledge of the truth as to the facts in question;
5. Reliance, in good faith, upon the conduct or statements of the party to be Estopped; and
6. A prejudicial change of position in reliance on the conduct of the party being estopped.

And so this case was remanded to the District Court for a determination by a jury as to whether Metro should be Equitably Estopped from asserting a faulty notice of claim under the PSTCA. Can Metro now argue the notice of claim was not addressed to the official who's duty it is to maintain the official records of the political subdivision, and is therefore void; and therefore Great Northern's claim is now nonexistent since proper notice was not given within one year of the date the claim occurred? Sit back now, as a juror. What do you think? Should Equitable Estoppel apply and bar Metro from asserting a defense to the subrogation claim based upon a faulty notice that did not comply with the PSTCA?



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