

Appeal No. 2005AP2743

Cir. Ct. No. 2004CV162

**WISCONSIN COURT OF APPEALS
DISTRICT II**

AARON T. ROUSE,

PLAINTIFF-APPELLANT,

NETWORK HEALTH PLAN,

PLAINTIFF,

v.

**THEDA CLARK MEDICAL CENTER, INC., CHRISTOPHER
P. HUGO, M.D., MARK WESTFALL, D.O., OHIC
INSURANCE COMPANY, THOMAS L. TOLLY, M.D.,
JEFFREY S. BURKETT, M.D. AND INJURED PATIENTS &
FAMILIES COMPENSATION FUND,**

DEFENDANTS,

**UNIVERSITY OF WISCONSIN HOSPITAL & CLINICS
AUTHORITY, PATRICK KELLER, M.D., SCOTT DULL,
M.D., EVERETT HUGHES, M.D., AARON JOHNSON, M.D.,
PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,**

DEFENDANTS-RESPONDENTS.

FILED

AUG 09, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in
this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether the University of Wisconsin Hospital & Clinics Authority, a statutorily created “public body corporate and politic” that operates in many respects as a private hospital, is a “political corporation” entitled to the procedural protections afforded in WIS. STAT. § 893.80 (2003-04).¹

FACTS

In September 2004, Aaron T. Rouse initiated this medical malpractice action. The University of Wisconsin Hospital & Clinics Authority, Patrick Keller, M.D., Scott Dull, M.D., Everett Hughes, M.D., Aaron Johnson, M.D., and Physicians Insurance Company of Wisconsin, Inc. (collectively, “the UWHCA”) filed motions to dismiss, claiming that Rouse failed to file a notice of claim as required by WIS. STAT. § 893.80.² The UWHCA claimed its status as a “body corporate and politic,” *see* WIS. STAT. § 233.02(1), entitled it to the statutory immunity § 893.80 offered “political corporation[s].” The trial court agreed in a thorough and considered written decision and issued a judgment dismissing Rouse’s claims against the UWHCA.³

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Keller, Dull, Hughes and Johnson are medical employees of the hospital.

³ The trial court treated the motion as one for summary judgment because the parties submitted, and the court considered, materials outside of the pleadings.

DISCUSSION

This case presents our supreme court with the opportunity to provide definitive guidance on the status of the UWHCA for purposes of WIS. STAT. § 893.80, a recurring issue⁴ which may have broader significance. By its terms, § 893.80(1) governs claims made against volunteer fire companies organized under WIS. STAT. ch. 213, political corporations, governmental subdivisions or agencies and their officers, officials, agents or employees. A litigant cannot maintain an action against these covered entities and their employees unless the litigant provides them with the proper notice of the incident and claim. Sec. 893.80(1). The notice-of-injury provision allows governmental entities to investigate and evaluate potential claims, while the notice-of-claim provision affords those entities the opportunity to compromise and settle a claim. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶¶22, 23, 28, 235 Wis. 2d 610, 612 N.W.2d 59. The UWHCA contends that it is a political corporation afforded these protections.

The legislature has explicitly included and excluded the UWHCA within the terms of statutes covering governmental bodies,⁵ but is silent with respect to whether it should be treated as a political corporation in WIS. STAT. § 893.80. The Wisconsin Statutes do not define “political corporation” and a

⁴ The discussion at the summary judgment motion hearing indicates that this issue has arisen multiple times at the trial court level with differing results.

⁵ Compare, WIS. STAT. § 13.62(2) (including the UWHCA within the definition of state agency), WIS. STAT. § 20.9275(1)(g) (same), WIS. STAT. § 103.49(1)(f) (same) and WIS. STAT. § 25.50(1)(d) (including the UWHCA within the definition of local government) with WIS. STAT. § 16.045(1)(a) (excluding the UWHCA from the definition of agency), WIS. STAT. § 16.15(1)(ab) (excluding the UWHCA from the definition of authority, despite its name).

canvass of Wisconsin jurisprudence reveals no case law directly on point.⁶ Thus, we have no point of reference for an assessment of the UWHCA for purposes of § 893.80.

Black’s Law Dictionary treats a political corporation as a form of a public corporation created by the state as an agency in the administration of civil government. BLACK’S LAW DICTIONARY 367 (8th ed. 2004). See *Sheboygan County DHHS v. Jodell G.*, 2001 WI App 18, ¶13, 240 Wis. 2d 516, 625 N.W.2d 307 (stating that resort to a dictionary definition is appropriate where the legislature has not provided a statutory definition of a term). Treatises, in discussing the distinction between private and public corporations, offer a similar, but expanded, definition of a public corporation. 1 WILLIAM MEADE FLETCHER,

⁶ While several cases the parties cite have touched upon the notice requirement of WIS. STAT. § 893.80 and the status of the UWHCA, a precise definition for the statutory term “political corporation” has not been articulated and therefore the recurring question of whether a statutorily created entity like the UWCHA satisfies that definition remains unanswered. See *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 315-16, 159 N.W.2d 86 (1968) (accepting the plaintiff’s concession that the predecessor statute to § 893.80 applied to the Wisconsin State Armory Board which the legislature designated as a “body politic and corporate”); *Townsend v. Wisconsin Desert Horse Ass’n*, 42 Wis. 2d 414, 423, 167 N.W.2d 425 (1969) (concluding that while *Majerus* assumed the statute to apply *arguendo* to the State Armory Board, the statute did not apply to the state or a state agency as being within the term “governmental subdivision or agency thereof”); *Watkins v. Milwaukee County Civil Serv. Comm’n*, 88 Wis. 2d 411, 416-18, 276 N.W.2d 775 (1979) (determining that the Milwaukee County Civil Service Commission fit within the category of specifically enumerated bodies politic in the personal jurisdiction statute, but failing to distinguish between bodies politic and political corporations); *Hagen v. City of Milwaukee Employee’s Ret. Sys. Annuity & Pension Bd.*, 2003 WI 56, ¶¶15-16, 262 Wis. 2d 113, 663 N.W.2d 268 (holding that for purposes of the personal jurisdiction statute Milwaukee Employee’s Retirement System was a “political corporation” and body politic, noting that the Milwaukee City Charter endowed it with “all of the powers and privileges of a corporation”); *Takle v. University of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 772-73 (7th Cir. 2005) (concluding that the UWHCA, a privatized and independent entity for which the state bears no financial responsibility, is not a state entity entitled to sovereign immunity in a suit over its personnel policies); *Lewis v. Physicians Ins. Co. of Wis.*, 2001 WI 60, ¶25 and n.18, 243 Wis. 2d 648, 627 N.W.2d 484 (stating that it would not attach a nondelegable liability to doctors practicing at government-owned health care facilities such as UWHCA).

FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 58 at 790-91 (perm. ed., rev. vol. 1999), states:

[A] public corporation is one that is created for political purposes with political powers to be exercised for purposes connected with the public good in the administration of civil government.... [P]rivate corporations are those founded by and composed of private individuals, for private purposes, as distinguished from governmental purposes, and having no political or governmental duties.

1 EUGENE MCQUILLIN ET AL., THE LAW OF MUNICIPAL CORPORATIONS § 2.03 at 139 (3d ed., rev. vol. 1999), reminds us that while all municipal corporations are public corporations, all public corporations *are not* municipal corporations. Thus, as the trial court reasoned, the legislature may have used the phrase “political corporation” to include entities like the UWHCA that would not be considered a municipal corporation within the terms of the statute. Even armed with the definition these sources provide, the classification of the UWCHA proves difficult given the language of the creating statute and the powers and purposes of the entity.

WISCONSIN STAT. § 233.02(1) provides: “There is created a public body corporate and politic to be known as the ‘University of Wisconsin Hospitals and Clinics Authority.’” This suggests that the UWHCA is both a corporation and political and it may necessarily follow that it is a “political corporation” within the meaning of WIS. STAT. § 893.80. Letter from General Charles D. Hoornstra, Assistant Attorney General, to Rollie Boeding, Director of the Bureau of Risk Management (June 23, 2004) (applying this logic to the language creating the Fox River Navigational System Authority). Further, the phrase “body corporate and politic” is frequently used to create a hybrid legal entity to perform specified tasks deemed to be essential public functions. *See Kargman v. Boston Water and*

Sewer Comm'n, 463 N.E.2d 350, 353 (Mass. App. Ct. 1984) *superseded by statute on other grounds*. If the court chooses such a straightforward analysis, then its decision may have an impact on other entities containing a similar designation. See WIS. STAT. § 44.01(1) (The State Historical Society of Wisconsin); WIS. STAT. § 231.02(1) (The Wisconsin Health and Educational Facilities Authority); WIS. STAT. § 234.02(1) (The Wisconsin Housing and Economic Development Authority); WIS. STAT. § 235.02(1) (The World Dairy Center Authority).

However, our supreme court has cautioned against relying too heavily on this legislative denomination and has taught us that in determining an entity's nature, we ought to consider the powers and structure conferred. See *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 424, 208 N.W.2d 780 (1973). "Absent plain statutory direction, it devolves on the courts to decide on a case by case basis whether a particular body politic and corporate should be treated as 'more public than private.'" *Kargman*, 463 N.E.2d at 353 (citation omitted).

The legislature's treatment of the UWHCA in WIS. STAT. ch. 233 leads to conflicting impressions as to its nature. On the one hand, the UWHCA possesses several public entity characteristics. The legislature, not private individuals, created the UWHCA, WIS. STAT. § 233.02; the voting members of the UWHCA board are primarily public officials or their appointees and are immune from civil liability absent willful misconduct,⁷ *id.*; the UWHCA serves statutorily defined purposes and goals, which include delivering high quality health care to

⁷ Rouse questions whether this provision would have been necessary if the legislature intended for WIS. STAT. § 893.80 to confer immunity upon the UWHCA. However, the UWHCA does not respond to this argument in its brief.

indigent patients, supporting research and medical instruction and administering health programs, WIS. STAT. § 233.04; and the Joint Committee on Finance may review and terminate lease and affiliation agreements, WIS. STAT. § 233.05(3).

On the other hand, the legislature created the UWHCA in order to make the University of Wisconsin Hospital more competitive with private hospitals and, as the Seventh Circuit recently recognized, “[t]here is nothing governmental about a hospital.” *Takle v. University of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005). Thus, WIS. STAT. ch. 233 also authorizes the UWHCA to operate in a manner similar to a private corporation. The statute grants the UWHCA the ability to sue and be sued in its own name, *see* WIS. STAT. § 233.03(2); to buy, sell or lease real estate, § 233.03(16); to make contracts, including employment contracts, § 233.03(2) and (10), WIS. STAT. § 233.10; to issue bonds, WIS. STAT. § 233.20; to negotiate and enter into lease and affiliation agreements with the University of Wisconsin Board of Regents, WIS. STAT. § 233.04. The state does not finance the UWHCA, the state is not liable for the UWHCA’s debts, WIS. STAT. § 233.22, and neither the state nor any political subdivision is liable for UWHCA’s actions, WIS. STAT. § 233.17(1). Furthermore, the legislature did not explicitly extend to the UWHCA the benefits of WIS. STAT. § 893.80, an action it has taken with regard to other public entities. *See, e.g.*, WIS. STAT. § 198.12(2) (explicitly entitling municipal power and water districts to the safeguards contained within § 893.80).

CONCLUSION

The supreme court’s interpretation and application of WIS. STAT. § 893.80 in this case will provide needed guidance not only on the specific question of the UWHCA’s status as a “political corporation” entitled to the

statute's safeguards, but also on the more general questions of how to define "political corporation" and how to apply that definition to other statutorily created entities denominated public bodies corporate and politic. The resolution of these questions is best left to the sound judgment of the supreme court as the law-declaring and law-defining court. Accordingly, we respectfully ask the supreme court to accept jurisdiction over this appeal.