COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 4, 1996

NOTICE

No. 95-3414

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MARGARET LAMKIN,

Plaintiff-Appellant,

v.

ST. CROIX COUNTY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for St. Croix County: C.A. RICHARDS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Margaret Lamkin appeals a summary judgment dismissing her claims against St. Croix County for social security payments and employment benefits arising out of her work as a cook at the county jail. The trial court concluded that her § 893.80, STATS., notice of injury was untimely, and because Lamkin worked as an independent contractor, her claim fails. We conclude that Lamkin's formal notice was untimely and that Lamkin fails to show a dispute of material fact whether the County had actual notice of her

claim. Because Lamkin fails to demonstrate facts to support the inference that the County had actual notice of her claim, we affirm the judgment.[1]

From 1982 to 1993, Lamkin prepared three meals a day for County jail inmates. The County provided the cooking facilities, equipment and utensils. It paid a flat wage plus $1.10 per prisoner per meal to reimburse Lamkin for the food she purchased to prepare the meals. Her salary was reported on tax form 1099, used for independent contractors, not a W-2 used for wage earners. Lamkin paid her own social security taxes, both the employer and the employee portions.

In 1993, the jail moved to a new facility and accepted the bid of a large catering company to provide food service. Because the catering service offered a job to Lamkin at too low a salary, she chose not to accept it. In August 1993, Lamkin applied for unemployment benefits and was denied. In September, DILHR reversed its determination and concluded that she was entitled to unemployment compensation because Lamkin was not an independent contractor and had rejected the lower paying job for good cause. LIRC reasoned that she had not been free from the direction and control of her employer and was not in an independently established trade, business or profession in which she was customarily engaged. The County appealed this determination, which was affirmed by the appeals tribunal on February 22, 1994.

On May 24, 1994, Lamkin served a notice of circumstances of claim and claim on the County. On October 27, 1994, Lamkin filed this action. The trial court entered summary judgment dismissing her claim on the grounds that she had not complied with § 893.80, STATS., in a timely fashion. It also concluded as a matter of law that Lamkin was an independent contractor and dismissed her complaint.

Our review of summary judgment is de novo. We apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.***, 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App.

[1] At the trial court, the parties briefed the issue of notice under § 893.80, STATS. Because it was not raised before the trial court, we do not address Lamkin's argument that the County waived its § 893.80 defense by not including it in its pleadings.

1987). Summary judgment is appropriate when material facts are undisputed and inferences that may be reasonably drawn from the facts lead only to one conclusion. ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984).

Lamkin argues that the trial court erroneously concluded that her notice of circumstances of her claim was untimely under § 893.80, STATS.[2] Neither party disputes that § 893.80(1) applies to Lamkin's claim.[3] This section provides a condition precedent to bringing an action against the County. First, it requires the claimant, within 120 days of the event giving rise to the claim, to serve written notice of the circumstances of the claim. ***Fritsch v. St. Croix Cent. Sch. Dist.,*** 183 Wis.2d 336, 343, 515 N.W.2d 328, 331 (Ct. App. 1994). Substantial, not strict, compliance with the notice statute is required. ***Id.*** at 344, 515 N.W.2d at 331. Second, the law requires the claimant to provide the claimant's address and an itemized statement for relief. ***Id.*** at 343, 515 N.W.2d at 331.

It is the first requirement that concerns us here. Lamkin argues that her written notice was timely for several reasons: (1) her "injury was the [County's] failure to properly classify [her] as an employee and [its] resulting failure to fulfill its legal obligation to withhold taxes and pay the employer's share of social security taxes"; (2) this was an ongoing injury throughout her employment; (3) the event giving rise to her claim was DIHLR's final

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[2] The "notice of the circumstances of the claim" is also referred to as notice of "injury." *See* ***Vanstone v. Town of Delafield,*** 191 Wis.2d 587, 591 n.5, 530 N.W.2d 16, 18-19 n.5 (Ct. App. 1995).

[3] Section 893.80(1), STATS., provides that "no action may be brought or maintained against any ... political corporation, governmental subdivision or agency thereof ... upon a claim or cause of action unless: Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the .... Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial ...."

Section 893.80(1)(b), STATS., contains a second requirement: "A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance."

determination in February 1994 that she was an employee, and until this decision became final, she did not have sufficient information to understand that she had a legally recognizable claim; and (4) her termination was not the event giving rise to her claim because her termination had no effect on whether she had been an employee or independent contractor.

We are unpersuaded that Lamkin's written notice was timely. Lamkin's argument essentially requires us to apply a discovery rule to her claim. Tort claims accrue on the date the injured party discovers, or with reasonable diligence should have discovered, the tortious injury, whichever comes first. ***Hansen v. A.H. Robins, Inc.,*** 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983). However, ***CLL Assocs. Ltd. Partnership v. Arrowhead Pacific Corp.,*** 174 Wis.2d 604, 617, 497 N.W.2d 115, 120 (1993), held that in contract actions, for statute of limitations purposes a cause of action accrues at the actual time of breach, rather than at the time of discovery of the breach.

Lamkin does not specifically identify the nature of her claim as tort, contract or another type of claim. Nonetheless, because her claim for compensation arose out of her employment, we conclude that her claim is contractual in nature. Therefore, because the discovery rule does not apply, the time of the actual breach of contract governs. Because her last day of employment was July 31, 1993, Lamkin's May 1994 notice was not timely under § 893.80, STATS.[4]

Lamkin argues, however, that her claim is not barred because the County had actual notice and was not prejudiced by any failure to serve a timely notice. Failure to serve timely notice does not bar the claim if the claimant demonstrates the government entity "had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial" to the entity. Section 893.80(1)(a), STATS.

[4] The alleged breach occurred sometime during her term of employment, and it is undisputed that her employment ended July 31, 1993. Therefore, her notice is untimely regardless of the precise dates of any alleged breach because the breach would necessarily occur before the last date of her employment.

The term "actual notice" in § 893.80(1)(a), STATS., is "the equivalent of actual knowledge." ***Elkhorn Area Sch. Dist. v. East Troy Community Sch. Dist.***, 110 Wis.2d 1, 5, 327 N.W.2d 206, 209 (Ct. App. 1982). This provision requires that the government entity not only have knowledge about the events for which it may be liable, but also the identity and type of damage alleged to have been suffered by a potential claimant. The purpose of the notice of injury requirement is to notify the governmental entity of the injury so that it can investigate and evaluate the circumstances of the claim. Unless the government entity has "actual knowledge" of a claim, the investigation envisioned by statute is impossible.

Lamkin argues that the County had actual notice of the circumstances of her employment because it set up the employment arrangement and had all the books and records showing how Lamkin was paid. She argues that it had notice of the circumstances of her claim because at least initially it was able to successfully defend her unemployment compensation claim, filed August 4, 1993, on the grounds that she was an independent contractor. She points out that the sheriffs for whom she worked testified extensively regarding her employment.

We conclude that Lamkin fails to demonstrate an issue of material fact that the County had actual notice of her claim. Notice of the circumstances of her employment and of her unemployment compensation claim is not the equivalent of actual knowledge of Lamkin's claim for retirement benefits, sick leave, vacation pay or other benefits. Because Lamkin fails to show any facts to support an inference that the County had actual knowledge of the type of damages alleged to have been suffered, we reject her argument that the County had actual notice. Absent actual notice, we do not reach the issue of prejudice or the issue of her employment status. *See* ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue is addressed).

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.