COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 10, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0525

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

NICK L. JERRY and
TIMOTHY C. JERRY,

Plaintiffs-Appellants,

v.

COUNTY OF BARRON,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed*.

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

PER CURIAM. Nick and Timothy Jerry appeal a judgment dismissing their adverse possession action against Barron County. The trial court dismissed the action without prejudice because it was prematurely filed. The Jerrys filed the complaint before the County had an opportunity to act on their claim. The Jerrys argue that they complied with the notice of claim statute, § 893.80(1), STATS., and that the County should be estopped from raising the

notice of claim defense because the County filed a counterclaim. We reject these arguments and affirm the judgment.

Section 893.80(1), STATS., contains two notice provisions. Subsection (a) requires notice of the "event giving rise to the claim" within 120 days of the event. That requirement is satisfied if the County had actual notice of the event and is not prejudiced by the lack of formal notice. Subsection (b) requires that a claim be filed with the county clerk itemizing the relief sought. An action may not be commenced until the claim is disallowed. The claim is deemed disallowed if it is not acted upon within 120 days after presentation. *See generally* ***Fritsch v. St. Croix Cent. Sch. Dist.***, 183 Wis.2d 336, 343, 515 N.W.2d 328, 331 (1994).

In February 1990, Attorney Owen Williams, representing the Jerrys' predecessors in title, wrote a letter to the county forester with a copy to the county board chairman in which he advised the forester of a property dispute. The Jerrys argue that this letter gave the County actual notice of the claim. Actual notice and lack of prejudice are relevant to compliance with § 893.80(1)(a), STATS., the notice of the event giving rise to the claim. Actual notice does not justify commencing an action before the County has disallowed the claim or the claim is deemed disallowed under § 893.80(1)(b), STATS. Even if the Jerrys established actual notice and lack of prejudice, a factor never mentioned in their brief, the complaint would have to be dismissed because it was filed before the claim was disallowed or deemed disallowed.

While the Jerrys' brief is unclear, they may be arguing that the complaint could be filed based on the deemed disallowance of the 1990 claim. The February 1990 letter does not constitute a claim under § 893.80(1)(b), STATS. The 1990 letter does not adequately identify the property in dispute to constitute a claim. It was not addressed to the appropriate clerk. The description of the property contained in the letter does not appear to correspond with the property description given in the Jerrys' complaint and amended complaint.

The Jerrys argue that a claim filed on the same day their complaint was filed, August 16, 1994, satisfies § 893.80(1)(b), STATS., because the County failed to act on that claim within 120 days and it was therefore deemed denied.

They argue that the defense of noncompliance with the notice of claim statute was rendered moot by the passage of the 120 days. The premature filing of a complaint before the disallowance of the claim compels dismissal of the complaint because § 893.80(1) provides that an action may not be "brought" before the claim is disallowed or deemed disallowed. *See* ***Zimke v. Milwaukee Transp. Servs., Inc.***, 99 Wis.2d 506, 512, 299 N.W.2d 600, 603-04 (Ct. App. 1980).

The County is not estopped from raising the Jerrys' premature filing of the complaint merely because the County filed a counterclaim. The Jerrys' brief does not specify the type of estoppel they claim. Equitable estoppel requires proof of detrimental reliance. ***Heideman v. American Family Ins. Group***, 163 Wis.2d 847, 860-61, 473 N.W.2d 14, 19 (Ct. App. 1991). The Jerrys cannot claim that they detrimentally relied on the County's counterclaim or on its failure to act on their claim when they prematurely filed their complaint. Judicial estoppel, on the other hand, is intended to protect against a litigant "playing fast and loose" with the courts by asserting inconsistent positions. *See* ***State v. Fleming***, 181 Wis.2d 546, 557-58, 510 N.W.2d 840, 841 (Ct. App. 1993). The County has not taken an inconsistent position merely because it has filed a counterclaim while invoking the defense of lack of compliance with § 893.80(1)(b), STATS. A party who cannot be sued because of noncompliance with a condition precedent can nonetheless assert its own claims against the opposing party.

Barron County has filed a motion requesting attorney's fees on the ground that this appeal is frivolous. Although we conclude that the issues raised on appeal are not meritorious and the Jerrys' brief contains no legal authority, we cannot conclude that the appeal was brought in bad faith or for purposes of harassment or that the arguments are so nonmeritorious as to be fairly characterized as frivolous. Therefore, we decline to find this appeal frivolous.

By the Court.—Judgment affirmed.

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