COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 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. 96-0959

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

STEVEN B. SKREDE, PAMELA SKREDE and WAUSAU UNDERWRITERS INSURANCE COMPANY,

Plaintiffs-Respondents,

v.

JOHN B. SPEARS, COUNTY OF VERNON and WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded with directions*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. Steven B. Skrede, a volunteer town firefighter, was seriously injured when the fire truck in which he was riding as a passenger collided with a squad car driven by Vernon County Deputy Sheriff John B. Spears, while the two vehicles were responding to the same emergency call.

Skrede and his wife[1] sued Spears, Vernon County and its insurer[2] for his injuries.

At the close of the Skredes' case, the County moved to dismiss for their failure to comply with § 893.80(1), STATS., which conditions suits against municipalities on prior service of notice and presentation (and denial) of a claim.[3] (R.27:134-38). The trial court denied the motion and the trial proceeded. The court found the driver of the fire truck to be ninety-five percent negligent and Spears to be five percent negligent. Judgment was entered in favor of the Skredes in the amount of $276,224.19 and the County appealed, renewing its argument that the Skredes failed to satisfy the notice requirements of

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[1] Pamela Skrede brought a derivative claim for loss of consortium based on her husband's injuries. Of the amount the court awarded, $25,000 represented her claim.

[2] In discussing the parties' arguments, we refer to the appellants collectively as the "County" as their positions are complementary.

[3] Section 893.80(1), STATS., provides, in relevant part:

> [N]o action may be brought or maintained against any ... governmental subdivision ... []or against any ... employe[e] of the ... subdivision ... for acts done in their official capacity or in the course of their ... employment upon a claim or a cause of action unless:
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> (a) 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 ... government subdivision ... and on the ... employe[e] .... Failure to give the requisite notice shall not bar action on the claim if the ... subdivision ... 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 ... subdivision ... or to the ... employe[e]; and
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> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk ... for the defendant ... subdivision ... and the claim is disallowed.

§ 893.80(1)(a), STATS. We agree, and we consider that to be the dispositive issue in the case.[4]

The question is one of law, involving the application of statutory provisions to a particular set of facts. We thus review the trial court's decision de novo. ***Cary v. City of Madison***, 203 Wis.2d 261, 264, 551 N.W.2d 596, 597 (Ct. App. 1996).

The Skredes, conceding that they did not serve written notice of the circumstances of their claim under § 893.80(1)(a), STATS., argue first that subsection (1)(a) has no application to their claim. They maintain that because the claim arose out of an accident involving a municipal motor vehicle, the notice issue is governed by § 345.05, STATS.[5]

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[4] The County also argues the Skredes failed to "present[]" a claim to the county clerk as required by § 893.80(1)(b), STATS. Responding, the Skredes assert that they complied with subsection (1)(b) and that their claim was eventually disallowed, although the parties do not refer us to any portion of the record where such a document or documents may be found. Moreover, neither the County nor the Skredes ever argued subsection (1)(b) to the trial court; their arguments were limited to the requirements of subsection (1)(a), concerning notice of the circumstances of the claim. We thus do not consider any subsection (1)(b) issue to be properly before us. *See* ***Wengerd v. Rinehart***, 114 Wis.2d 575, 580, 338 N.W.2d 861, 865 (Ct. App. 1983), where we recognized the "firmly established standard of judicial review" that "an appellate court will not examine contentions raised for the first time on appeal."

[5] Section 345.05, STATS., provides in part:

> (2) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by a municipality, which damage was occasioned by the operation of the motor vehicle in the course of its business, may file a claim for damages against the municipality concerned and the governing body thereof may allow, compromise, settle and pay the claim.
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> (3) A claim under this section shall be filed in the manner, form and place specified in s. 893.80....

We conclude that the Skredes waived any argument that § 893.80(1)(a), STATS., does not apply to this case. First, as the County points out, the Skredes never raised this issue in the trial court. We generally do not consider arguments raised for the first time on appeal, ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992), and the Skredes have not persuaded us that we should depart from that rule in this case.[6]

Our conclusion in this regard is bolstered by the fact that the Skredes, in arguing that § 893.80(1)(a) is inapplicable, have taken a position directly contrary to the one they advanced in the trial court. When the County raised the notice issue in its motion to dismiss the complaint, the Skredes argued at length that the motion should be denied because the County, as a

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[6] The Skredes' argument that any notice requirement is governed solely by § 345.05, STATS., is based on our statement in ***Gonzales v. Teskey***, 160 Wis.2d 1, 6, 465 N.W.2d 525, 527 (Ct. App. 1990), that "when damage results from the negligent operation of a municipally owned or operated motor vehicle, sec. 345.05, Stats.—not sec. 893.80, Stats.—applies. Section 345.05(2) requires a notice of claim but unlike sec. 893.80(1)(b) does not require a notice of injury."

The statement in ***Gonzales*** was unnecessary to our decision in that case—the only "statutory" issue was whether failure to file a claim under § 345.05, STATS., precluded action against the employee, as opposed to the municipality itself, ***Gonzales***, 160 Wis.2d at 10-12, 465 N.W.2d at 529-30—and was thus dictum. *See* ***American Family Mut. Ins. Co. v. Shannon***, 120 Wis.2d 560, 565, 356 N.W.2d 175, 178 (1984). Indeed, the statement was made in the course of a general discussion of the overall statutory scheme under which injured persons may make claims against, and eventually sue, municipalities and/or their employees. ***Gonzales***, 160 Wis.2d at 6, 465 N.W.2d at 527. And, as we went on to state in the same paragraph—and as the Skredes concede—a claim arising under § 345.05(2) still "must be filed in accordance with the requirements of § 893.80." ***Id.***

Beyond that, our statement in ***Gonzales*** was based on an older case, ***Rabe v. Outgamie County***, 72 Wis.2d 492, 241 N.W.2d 498 (1976), where the supreme court noted that § 345.05, STATS.—*as it then existed*—did not require notice of injury but only the filing of a claim. ***Id***. at 497, 241 N.W.2d at 431. At the time ***Rabe*** was decided, however, § 345.05, STATS., did not expressly refer to § 893.80, STATS.—as it does today—for the manner, form, and place for filing claims. *See* § 345.05, STATS. (1975-76). Nor does the current statute, in its reference to § 893.80, distinguish between the notice requirements of subsection (1)(a) and the claim-filing requirements of subsection (1)(b). If the legislature had intended to eliminate the subsection (1)(a) notice requirements in cases involving municipal vehicle accidents, it could have limited the cross-reference to § 893.80 accordingly.

result of its investigation of the accident, had actual notice of the Skredes' claim and the underlying facts within the meaning of subsection (1)(a). After noting that it was a "close case," the trial court agreed with the Skredes and denied the County's motion.

On this record, we believe the Skredes are judicially estopped from now arguing that § 893.80(1)(a), STATS.—the statute they relied on below—is inapplicable. Judicial estoppel is an equitable doctrine that "precludes a party from asserting a position in a legal proceeding that is inconsistent with a position previously asserted." ***Coconate v. Schwanz***, 165 Wis.2d 226, 231, 477 N.W.2d 74, 75 (Ct. App. 1991). It is based on the proposition that "`"[i]t is contrary to fundamental principles of justice ... to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court sustains the position, argue on appeal that the action was error."'" ***State v. Petty***, 201 Wis.2d 337, 345-46, 548 N.W.2d 817, 820 (1996) (quoted sources omitted).[7]

Because the facts at issue are the same here as they were in the trial court, and because the Skredes' position on appeal is plainly inconsistent with their earlier position—which they convinced the trial court to adopt—judicial estoppel is appropriately applied to their argument that § 345.05, STATS., is the controlling statute.

We thus consider the merits of the County's argument that the record is insufficient to support a determination that it had actual notice of the circumstances of the Skredes' claim within the meaning of § 893.80(1)(a), STATS. As we noted above, the Skredes argued—and the trial court agreed—that the County must be held to actual notice as the result of its investigation of the accident.

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[7] As ***Petty*** suggests, the rule seems to have particular force where a party takes one position in the trial court and another on appeal, presumably because the alleged error may not have occurred had the party not argued for it in the trial court. *See* ***State v. Gove***, 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989). This is because, as indicated above, it is considered contrary to fundamental principles of justice and orderly procedure to allow a party to affirmatively contribute to court error, and then attempt to take advantage of it. ***Id.***

We disagree. We believe the issue is controlled by ***Felder v. Casey***, 139 Wis.2d 614, 408 N.W.2d 19 (1987), *rev'd on other grounds*, 487 U.S. 131 (1988), where the Wisconsin Supreme Court held that a municipality's investigation into a charge of police brutality did not constitute actual notice of the injured party's claim under § 893.80(1)(a), STATS. The plaintiff in ***Felder***, having failed to serve the required notice, argued that his lawsuit should nonetheless be permitted to continue because the city had actual notice within the meaning of subsection (1)(a) as a result of its investigation of the incident. ***Id.*** at 628-29, 408 N.W.2d at 25-26. The court acknowledged the thoroughness of the investigation—which included several police reports prepared at the scene and extensive knowledge of the details of the incident by police, city officials and members of the city council—but rejected the argument. It noted that "[d]ocuments which have been held to constitute adequate notice have usually, at a minimum, recited the facts giving rise to the injury and have indicated an intent on the plaintiffs' part to hold the city responsible for any damages resulting from the injury." ***Id.*** at 630, 408 N.W.2d at 26.

We think the same considerations apply here. We therefore reverse the judgment and remand to the trial court with directions to enter judgment dismissing the Skredes' complaint.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.