COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1055 **Cir. Ct. No. 2005SC4525**

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

PETER J. LONG,

PLAINTIFF-APPELLANT,

V.

CITY OF NEENAH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Peter J. Long appeals from an order dismissing his complaint against the City of Neenah in connection with his claim against the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

City for the return of $1800 in cash. The only issue is whether WIS. STAT. § 893.80(1)(a) bars that claim.[2] The circuit court ruled that it does. We affirm.

¶2 We summarized the statutory procedure required to successfully prosecute a claim against a municipality in ***Moran v. Milwaukee County***, 2005 WI App 30, ¶3, 278 Wis. 2d 747, 693 N.W.2d 121, *review denied*, 2005 WI 60, 281 Wis. 2d 115, 697 N.W.2d 473:

> Lawsuits against governmental entities like the [the City of Neenah] are regulated by WIS. STAT. § 893.80(1). It provides, with the parts material to this appeal in italics:
>
> Except as provided in subs. (1g), (1m), (1p) and (8), *no action may be brought* or maintained *against any* volunteer fire company organized under ch. 213, *political corporation, governmental subdivision or agency thereof* nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (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* volunteer fire company, *political corporation, governmental subdivision or agency* and on the officer, official, agent or employee *under s. 801.11. 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 to the defendant* fire company, *corporation, subdivision or agency* or to the defendant officer, official, agent or employee.

[2] Because we hold Long's "requisite notice" was untimely under WIS. STAT. § 893.80(1)(a), we need not address the trial court's alternate holding that Long filed this action outside of the six-month statute of limitations, § 893.80(1g), as cases should be decided on the narrowest grounds possible. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989). If a decision on one point disposes of the appeal, we will not decide the other issues raised. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

> (Italics added.) Thus, a notice is not "requisite notice" under § 893.80(1)(a) unless it:
>
> - is served in the way set out in WIS. STAT. RULE 801.11 on the ultimate defendant "[w]ithin 120 days after the happening of the event giving rise to the claim";
>
> - describes "the circumstances of the claim"; and
>
> - is signed by either the party or his or her "agent or attorney."
>
> If all of this is not done, the action must be dismissed unless the plaintiff can prove "that the delay or failure to give the requisite notice has not been prejudicial to the defendant." § 893.80(1)(a). "The plaintiff has the burden of proving the giving of notice or actual notice and the nonexistence of prejudice." ***Elkhorn Area Sch. Dist. v. East Troy Cmty. Sch. Dist.***, 110 Wis. 2d 1, 5, 327 N.W.2d 206, 208 (Ct. App. 1982).

Moran, 278 Wis. 2d 747, ¶3 (footnote omitted).

¶3 Long contends that the City became liable for the $1800 cash, which was confiscated by its police officers on July 31, 2004, when he entered a plea on December 1, 2004; charges against a passenger, Troy Armstrong, were dismissed; and the $1800 was released to Armstrong. Using that date, he asserts that his letter to the Neenah chief of police on February 17, 2005, and the mayor on March 1, 2005, were within 120 days of the date of the plea, December 1, 2004. The City counters that the statutory clock started to run on July 31, 2004, when the cash was confiscated; the 120 days in which to file a "requisite notice" expired on November 28, 2004; and Long's letters in 2005 were outside of the statutorily prescribed period in which to file notice. The circuit court agreed with the City's line of reasoning and granted its motion to dismiss. Long appeals.

¶4 As noted, the circuit court decided this case on the City's motion to dismiss for failure to comply with WIS. STAT. § 893.80(1)(a). When the defendant

moves to dismiss a complaint because the notice of claim was untimely, we look to the undisputed facts to determine whether, as a matter of law, the plaintiff gave the "requisite notice" within 120 days of the incident giving rise to his claim. *See* ***Harris v. Kritzik***, 166 Wis. 2d 689, 693, 480 N.W.2d 514 (Ct. App. 1992). This is a question that we decide de novo, without deference to the circuit court's determination. *See* ***id.*** This case turns on two things: First, what was the date of the incident giving rise to Long's claim on the $1800 in cash and, second, whether Long's delay in filing the "requisite notice" prejudiced the City.

¶5 On July 31, 2004, Long and Armstrong were in a Dodge Ram truck that a City of Neenah police officer tried to stop for speeding. Rather than comply with the officer's order they drove into a parking lot, parked the truck and dashed away on foot. When the officer arrived at the truck, she only saw one individual running away; she gave chase but was unable to catch him. A short time later, backup officers apprehended Armstrong and returned him to the scene, where the officer positively identified him as the suspect who she saw fleeing the truck.

¶6 At the scene, officers ran a check of the license plate number on the Dodge Ram truck, which came back assigned to a 1993 GMC truck owned by Armstrong. A check on the vehicle identification number showed the Dodge Ram truck registered to the City of Greenfield Police Department.[3] Armstrong was arrested for fleeing an officer and taken to the City police department. Also, arrangements were made to tow the truck from the scene. In preparation for towing, the contents of the truck were inventoried and $1800 in cash was found.

[3] Follow-up investigation with the City of Greenfield Police Department established that the truck had been sold to Armstrong in 2003.

Believing that Armstrong was the legal owner of the truck, the police gave the cash to him before he was taken to jail. At the jail, the cash was placed in an account in Armstrong's name. The following Monday, August 2, 2004, Armstrong, being no dummy, used the cash to post his bail.

¶7 City of Neenah police officers continued their investigation of the incident and learned that Long was the driver of the Dodge Ram truck. On September 4, 2004, the officers arrested him for felony fleeing an officer. Long remained in jail until December 1, 2004, when he was convicted on the charge and sentenced to prison. At the same time, pending charges against Armstrong were dismissed and the $1800 was returned to him.

¶8 Long argues that it was only after the charges against Armstrong were dismissed and the cash, previously posted as bail, was given to Armstrong that he was certain the money would not be returned to him and that is the date of the incident. This argument ignores the obvious.

¶9 When Long scurried from the scene on July 31, 2004, he knowingly abandoned $1800 in cash. He relinquished control of the cash the minute he exited the cab of the Dodge Ram truck. Long knew that Armstrong used the $1800, deposited in Armstrong's jail account, to post bail the following Monday. We agree with the circuit court that Armstrong's use of the cash was a claim of ownership by Armstrong. It was notice to Long that the cash was under someone else's control. Armstrong's ability to post bail should have piqued Long's interest as to the disposition of the cash he left in the truck. The statutory clock started to

tick no later than the day Armstrong posted his cash bail, August 2, 2004, and Long should have filed a claim for the cash no later than November 30, 2004.[4]

¶10 Long might still be able to proceed if he can prove "that the delay or failure to give the requisite notice has not been prejudicial to the defendant." WIS. STAT. § 893.80(1)(a). He has failed to do so. He has not overcome the obvious. If the City had received timely notice of Long's claim of ownership, it could have sought resolution of the competing claims of ownership in the court that granted Armstrong bail. Once the bail money was unconditionally returned to Armstrong, a court had no authority to inquire into the ownership of the bail money.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] We assume Long did not file a claim to avoid incriminating himself. Long's desire not to incriminate himself does not work to his advantage by pushing back the date of the incident to December 1, 2004, the date he finally admitted responsibility by entering a plea to the felony charge.