COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0342-FT **Cir. Ct. No. 00-CV-187**

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

THOMAS MOULLETTE,

PLAINTIFF-RESPONDENT,

V.

CITY OF RICE LAKE AND TRANSIT MUTUAL INSURANCE CORPORATION OF WISCONSIN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Barron County: FREDERICK A. HENDERSON, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The City of Rice Lake and Transit Mutual Insurance Corporation of Wisconsin (collectively, the City) appeal a judgment

awarding Thomas Moullette $75,000 for personal injuries.[1] The City claims the trial court erred by denying its motion to dismiss because: (1) Moullette failed to comply with the notice of claim statute, WIS. STAT. § 893.80[2]; (2) the record does not support the application of equitable estoppel; and (3) fundamental fairness does not bar its defense. We conclude that Moulette's notice of claim failed to comply with § 893.80, and the elements of equitable estoppel were not proved. We further conclude that the City's § 893.80 defense does not violate principles of fundamental fairness. Therefore, we reverse the judgment.

BACKGROUND

¶2 In May 1997, Moullette suffered injuries when a city bus caused a multiple vehicle collision involving Mollette's truck. In an October 9, 1998 letter, the City's insurance company tendered a settlement offer of $2,500. The letter stated that "[g]iven the extensive history of back problems you have had … it is not reasonable to attribute all of your current back problems or all of your potential future back problems to this one accident." Moullette rejected the offer and stated that he would be seeking legal representation regarding his claim. Moullette told the insurance company that the offer was not even "in the same ballpark." He believed the parties had reached an impasse in settlement negotiations.

¶3 On January 15, 1999, Moullette served the City with a notice of claim pursuant to WIS. STAT. § 893.80. Under the paragraph entitled "Claim for

[1] This is an expedited appeal under WIS. STAT. RULE 809.17.

[2] All statutory references are to the 1999-2000 version unless otherwise noted.

Relief," it sought "[r]eimbursement of medical expenses incurred, wage loss and compensation for personal injuries sustained in the accident as a result of the negligence of the Rice Lake City bus driver who caused the impact to occur which resulted in injury and damage to Thomas Moullette." It made no claim for any specific amount of money.

¶4 On May 23, 2000, Moullette filed suit. On July 10, the City filed its answer in which it denied, among other things, that Moullette properly served a notice of claim under WIS. STAT. § 893.80. On July 28, the City moved for summary judgment of dismissal for failure to comply with § 893.80. The trial court ruled that the City was estopped from claiming a defense under § 893.80, because "even though the plaintiff did not make a dollar amount demand as required by statute, it seems to me that as in the [***Fritsch v. St. Croix Cent. Sch. Dist.***, 183 Wis. 2d 336, 515 N.W.2d 328 (Ct. App. 1994)] case, if we ruled in favor of the defense, that would work a serious injustice …."

STANDARD OF REVIEW

¶5 When reviewing a summary judgment, we perform the same function as the circuit court and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

DISCUSSION

1. Compliance with WIS. STAT. § 893.80

¶6 Moullette does not dispute that his notice of claim failed to specify any dollar amount as required by WIS. STAT. § 893.80. He contends, however,

that his notice of claim is in substantial compliance and satisfies the rquirements of § 893.80. We disagree.

¶7 WISCONSIN STAT. § 893.80[3] imposes a condition precedent to the right to maintain an action. ***Mannino v. Davenport***, 99 Wis. 2d 602, 614, 299 N.W.2d 823 (1981). Substantial compliance with § 893.80 is required. ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶28, 235 Wis. 2d 610, 612 N.W.2d 59. The "notice must 1) state a claimant's address, 2) include an itemized statement of the relief sought, 3) be presented to the appropriate clerk, and 4) be disallowed by the governmental entity." ***Id.***

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[3] WISCONSIN STAT. § 893.80 provides in part:

> (1) 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; and
>
> (b) 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.

¶8 Here, the dispute centers on the second requirement, the itemized statement of relief sought. This statement must request a specific dollar amount. "[A] dollar amount of a damage claim must be stated in a notice of claim in order to give the municipality a meaningful and knowledgeable opportunity to settle the claim." ***Figgs v. City of Milwaukee***, 121 Wis. 2d 44, 54, 357 N.W.2d 548 (1984). "This court has in numerous cases held that implicit in the claim statute is the requirement that a claim set forth a specific dollar amount." ***Gutter v. Seamandel***, 103 Wis. 2d 1, 9, 308 N.W.2d 403 (1981). Because Moullette's notice of claim lacked a specific dollar amount, it failed to comply with WIS. STAT. § 893.80.

¶9 Moullette argues, nonetheless, that if the parties are adequately informed as to the facts of the claim, and are so far apart in their offers and demands as to have reached an impasse, the inclusion of a specific dollar amount is immaterial to fulfilling the statutory purpose of affording the municipality an opportunity to settle and avoid litigation. He contends that a specific dollar amount "under these unique circumstances" would not have aided settlement and, therefore, is unnecessary.

¶10 We are unpersuaded. Moullette's assertion would have the court analyze the status of negotiations in order to determine whether the itemized statement of relief substantially complies with WIS. STAT. § 893.80. Moulette cites no precedent for his novel approach and, consequently, we reject it.

¶11 The two cases Moullette cites do not support his argument. The first, ***DNR v. City of Waukesha***, 184 Wis. 2d 178, 199, 515 N.W.2d 888 (1994), involved the following itemized statement for relief: "DNR proposes a $500 per day liquidated penalty for each day of violation of any term of the final judgment.

… On forfeitures, DNR proposes $20,000 … for the past five years of radium violations."

¶12 Our supreme court approved of this notice of claim. The forfeiture identified a specific dollar amount. Also, the court concluded, "while the penalty provision is listed as a daily fee, rather than as a specific dollar amount, this is as specific as possible given the state's intention to penalize the city if the city fails in the future to comply with the judgment …." ***Id.*** Because the itemized statement was "as specific as possible," the court determined that it complied with WIS. STAT. § 893.80.

¶13 Moulette also relies on ***State v. Town of Linn***, 205 Wis. 2d 426, 556 N.W.2d 394 (Ct. App. 1996). This case held that the State's letter to the municipality that it must comply with the revised code or face possible action clearly defined the equitable relief sought and satisfied the second requirement under WIS. STAT. § 893.80(1)(b). ***Id.*** at 439.

¶14 Neither case, however, supports Moullette's proposition that the status of the parties' negotiations relieves the claimant from specifying a dollar amount. We conclude that Moullette's notice of claim fails to itemize relief as specifically as possible under the circumstances. It does not provide a method for calculating damages, as the notice did in ***Waukesha***, and it does not request a specific form of equitable relief, as in the ***Town of Linn***. Because Moullette's general request for "reimbursement of medical expenses incurred, wage loss and compensation for personal injuries sustained in the accident" is not "as specific as possible," *see* ***Waukesha***, 184 Wis. 2d at 199, it does not substantially comply with WIS. STAT. § 893.80.

2. Estoppel

¶15 Next, the City argues that the trial court erroneously applied the doctrine of equitable estoppel to prevent it from asserting a defense based upon a defective notice of claim. We agree.

¶16 A decision whether to grant equitable relief is addressed to trial court discretion. *See* ***Lueck's Home Imp., Inc. v. Seal Tite Nat'l, Inc.***, 142 Wis. 2d 843, 847, 419 N.W.2d 340 (Ct. App. 1987). Discretionary decisions are sustained if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson,*** 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶17 Equitable estoppel has four elements: "(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). "When the facts and reasonable inferences therefrom are not disputed, it is a question of law whether equitable estoppel has been established." ***Id.*** at 8. "This court determines questions of law independent of the circuit court …." ***Id.***

¶18 "[O]nce the elements of equitable estoppel have been established as a matter of law, the decision to actually apply the doctrine to provide relief is a matter of discretion." ***Nugent v. Slaght***, 2001 WI App 282, ¶30, 249 Wis. 2d 220, 638 N.W.2d 594.

> [E]stoppel may be available as a defense against the government if the government's conduct would work a

> serious injustice and if the public interest would not be unduly harmed by the application of estoppel. In each case the court must balance the public interests at stake if estoppel is applied against the injustice that might be caused if it is not.

Milas, 214 Wis. 2d at 14 (citations omitted). The court must first determine whether the elements of estoppel are met before it applies estoppel to a municipality. *See* ***id.***

¶19 Moullette relies on ***Fritsch*** to support his contentions. In ***Fritsch***, the claimant was instructed to deal with the insurance company, which paid a portion of her property damage claim and incidentals, while disallowing other portions. ***Id.*** at 345-46. "With regard to the wage loss claim, Fritsch was told that it would be recalculated and included in the final settlement amount after the completion of Fritsch's medical treatment." ***Id.*** at 341. Fritsch was not represented by counsel, and the insurer maintained contact with her over the next two and one-half years, to "discuss resolution" of her claim, up to approximately 120 days before the expiration of the statute of limitations. ***Id.***

¶20 Fritsch filed suit, without presenting the school district with the itemized list of relief sought. ***Id.*** at 341-42. We affirmed the trial court's application of the doctrine of estoppel because Fritsch had been induced by the insurer to allow the time for filing a claim under WIS. STAT. § 893.80 to expire. ***Id.*** at 342-43.

¶21 Moullette contends that, like the ***Fritsch*** case, the City instructed him to deal with its insurance carrier and the insurance carrier advised him to accept its offer of $2,500 or retain counsel and litigate. He claims that when the parties reached an impasse, he was induced to believe his dealings with the City were over, as in ***Fritsch***. He argues that he was induced to believe that

"settlement discussions were over and that a specific dollar amount would not have impacted or aided negotiations under these unique circumstances." He reasons that because the City had been provided sufficient information to afford it the opportunity to settle the claim, and chose not to, it is estopped from raising the lack of a specific dollar amount in the notice of claim as a defense.

¶22 We are unpersuaded. In the ***Fritsch*** case, "Fritsch herself made an offer, providing the insurance company with at least some idea of what amount would be sufficient to settle her claim." ***Fritsch***, 183 Wis. 2d at 346. Therefore, the purpose of giving a specific demand was not the issue and the amount demanded to settle the case was known. Here, Moulette never made a specific offer to settle his claim.

¶23 Also in contrast to ***Fritsch***, Moulette was not induced to allow the time for serving a notice of claim to expire. He served a timely notice. The letters and discussions Moulette identifies do not suggest any reason to justify his conclusion that he no longer was required to follow the statutory requirements. The insurance company's offer and Moullette's rejection do not provide a reasonable basis to conclude that the requirements of the WIS. STAT. § 893.80(1)(b) are waived. Because any reliance on the City's alleged action or inaction would not have been reasonable, the elements of equitable estoppel have not been met. We conclude therefore that the trial court erroneously exercised its discretion when it applied the doctrine to bar the City's defense.

3. Fundamental Fairness

¶24 As a final response to the City's arguments, Moullette contends that fundamental fairness bars the City from asserting a WIS. STAT. § 893.80(1) defense. He argues that, under ***Figgs***, "[f]undamental fairness … is required of

city officials and their lawyers in the handling and disposition of claims." ***Figgs***, 121 Wis. 2d at 55-56; *see also* ***Strong v. Brushafer***, 185 Wis. 2d 812, 822-23, 519 N.W.2d 668 (Ct. App. 1994). Moullette complains that he served his notice of claim on January 15, 1999, and the City did not object to it until July 6, 2000, when it served an answer raising a § 893.80 defense. He argues that because the City waited a year and a half without asking for additional information or making any objection, it is fundamentally unfair to permit the City to avoid its liability.

¶25 We are unpersuaded. In ***Figgs,*** our supreme court concluded that the notice of claim was in substantial compliance with WIS. STAT. § 893.80. ***Figgs***, 121 Wis. 2d at 50. The court admonished, however, that the City's tactic, of moving to dismiss after full trial to a jury and after large sums of money were expended in the preparation for trial and trial itself, "were unseemly." ***Id.*** at 56. Here, the City raised its defense in the answer to the complaint and moved to dismiss eighteen days later. The facts in this case are not analogous to those in ***Figgs***.

¶26 Moullette also cites ***Strong***, where the city attorney was found to have engaged in improper motion practice. In that case, the plaintiff filed an amended complaint on February 4, 1991. On May 9, 1991, the trial court required all pretrial motions to be heard on or before January 16, 1992. Fifteen months later, on April 12, 1993, as the court was about to bring in the jury panel, the city attorney moved to dismiss for lack of compliance with the notice of claim statute. ***Id.*** at 818. Because the plaintiff refiled his lawsuit, the merits of the dismissal were moot and not reviewed on appeal. ***Id.*** at 818-19. The court of appeals observed, however, that the city's tactic of "'litigation-by-ambush' not only violates the concept of 'fundamental fairness,' it wastes the resources of the

parties and the trial court." ***Id.*** at 825. The court remanded to the trial court for the consideration of appropriate sanctions. ***Id.***

¶27 We conclude that ***Strong*** does not support Moullette's argument. In contrast to the facts in ***Strong***, the City promptly moved for summary judgment before any proceedings had taken place. The delay between the date of the defective notice of claim and the City's motion was of Moullette's making, not the City's, because Moullette waited from January 15, 1999, to May 22, 2000, before filing suit. Consequently, the ***Strong*** case is inapposite. We are not convinced that fundamental fairness was violated under the circumstances of this case and, therefore, we reject his argument.

By the Court.—Judgment reversed.

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