

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 17, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 02-2366**

**Cir. Ct. No. 00-CV-397**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**BLUEBIRD RIDGE, L.L.C., GARY SUSAG AND MICHELLE  
SUSAG,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**TOWN OF SHELBY**

**DEFENDANT-RESPONDENT,**

**ABC INSURANCE COMPANY,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for La Crosse County:  
MICHAEL J. MULROY, Judge. *Affirmed in part; reversed in part and cause  
remanded.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Bluebird Ridge, LLC, and Gary and Michelle Susag (collectively, “the Susags”) appeal from the circuit court’s judgment in favor of the Town of Shelby. The issues are: (1) whether the Susags complied with the notice of claim statute, WIS. STAT. § 893.80(1)(a) and (b) (2001-02);<sup>1</sup> and (2) whether the Town of Shelby is immune from suit under WIS. STAT. § 893.80(4). We affirm the judgment in part, reverse the judgment in part and remand for further proceedings.

¶2 This case arises out of the development of a subdivision in the Town of Shelby known as “Boulder Ridge.” The developers, Gary and Michelle Susag, became embroiled in several disputes with the Town during construction of the development. They eventually commenced this action against the Town. The circuit court granted summary judgment in favor of the Town on the grounds that the Town was immune from suit and the Susags had failed to comply with the notice of claim statute.

¶3 The Susags argue that the circuit court erred in concluding that they had not complied with the notice of claim statute, WIS. STAT. § 893.80(1)(a) and (b). The circuit court concluded that they had given proper notice only for their claim that the Town had made an improper draw on a letter of credit. Under WIS. STAT. § 893.80(1)(a), the Susags’ failure to give the requisite notice is not fatal to their claim if they show that the Town had actual notice and was not prejudiced by their failure to give the requisite notice. The burden to show actual notice and no

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

prejudice rests with the plaintiff. *Weiss v. City of Milwaukee*, 79 Wis. 2d 213, 227, 255 N.W.2d 496 (1977).

¶4 We conclude that the Susags' failure to give the requisite written notice is fatal. The Susags gave notice of a specific dispute with the Town regarding the letter of credit, seeking return of the amount drawn "plus interest and costs associated with obtaining the return of the funds." The vast majority of the amount drawn was returned before the suit was filed. The Town was on notice that the Susags were claiming interest, the costs associated with obtaining return of the funds and, perhaps, some dispute as to the exact dollar amount that was drawn for completion of the road. However, the Susags filed an action with an exceptionally broad sweep, including claims for events that took place after the notice of claim was tendered, and alleged damages of more than \$683,000. Among other things, the Susags challenged the issuance of various citations and brought claims for harassment, negligent and intentional damage to real property and interference with property rights. To allow these additional claims to go forward on the premise that the Town had actual notice due to its knowledge of on-going acrimony between the parties would allow the exception to swallow the rule. And, beyond the dispute about actual notice under WIS. STAT. § 893.80(1)(a), the Susags did not provide "an itemized statement of the relief sought" with regard to these claims as required by § 893.80(1)(b). That, too, is fatal to prosecution of the additional claims.

¶5 Next, we address the Susags' argument that the circuit court should not have dismissed their claim against the Town for drawing the entire letter of credit in the amount of \$160,650. The Susags had provided the letter to the Town to ensure proper completion of roadwork in the development. They contend that the Town acted improperly because it needed only a small portion of the total

amount of money to complete the work. The circuit court concluded that the Town was immune from suit under WIS. STAT. § 893.80(4). That statute prohibits suits against local governmental bodies for intentional torts and for acts done in the exercise of legislative and judicial functions.

¶6 The circuit court erred when it concluded that the Town was immune. The Susags have brought a claim for breach of contract, not a tort claim. The Susags contend that the Town did not exercise its rights under the letter on commercially reasonable terms. The merits of their claim will depend on the language of the letter of credit, any other applicable agreements between the Susags and the Town, and the rules of contract law. It is well established that contract claims against local governmental bodies are not barred by either the immunity statute or by the common law. *Energy Complexes, Inc. v. Eau Claire County*, 152 Wis. 2d 453, 464-65, 449 N.W.2d 35 (1989). The Town contends that the Susags have not made a claim for breach of contract because the Susags did not explicitly state in their complaint that they were making a claim for breach of contract. This argument fails. Wisconsin has a notice pleading statute, so a pleading need only “notify the opposing party of the pleader’s position in the case.” *Norwest Bank Wisconsin Eau Claire v. Plourde*, 185 Wis. 2d 377, 388, 518 N.W.2d 265 (Ct. App. 1994).<sup>2</sup> Because we conclude that the Town is not immune from the Susags’ contract claim, we remand to the circuit court to reinstate the claim.

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<sup>2</sup> The Susags have also argued that, if their challenge to the credit draw sounds in tort, the Town is not immune because its actions were either ministerial or “malicious, willful and intentional,” two exceptions to the immunity statute. We do not address these arguments because we conclude that the Susags have stated a claim for breach of contract, nothing more.

*By the Court.*—Judgment affirmed in part and reversed in part and cause remanded.

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

