

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 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. 03-0375
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-000036

**IN COURT OF APPEALS
DISTRICT III**

IRON COUNTY,

PLAINTIFF-RESPONDENT,

v.

JOHN J. KIRBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iron County:
DOUGLAS T. FOX, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. John Kirby appeals a judgment dismissing his counterclaim against Iron County seeking damages for trespass because he failed to comply with WIS. STAT. § 893.80(1)(b), the notice of claim statute.¹ Kirby

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

argues that Iron County is equitably estopped from raising its notice of claim defense. He contends that the County ignored the trial court’s scheduling orders, raising its notice of claim objection eighteen months after the dispositive motion deadline. He claims that because the County did not timely interpose its objection, it is estopped from raising § 893.80 as a defense.²

¶2 We conclude that although failure to comply with the notice of claim statute deprives the court of competency, case law supports Kirby’s argument that under certain circumstances, equitable estoppel may bar a governmental entity from raising its notice of claim defense. *See Oliveira v. City of Milwaukee*, 2001 WI 27, 242 Wis. 2d 1, 624 N.W.2d 117. We reverse the judgment dismissing Kirby’s counterclaim and remand to permit the court to consider whether equitable estoppel applies.

¶3 Iron County commenced this action against Kirby to enjoin him from interfering with a recreational trail that crossed his land along an abandoned railroad right-of-way. Kirby counterclaimed for declaratory relief and damages due to claimed trespass. The circuit court granted Kirby the declaratory relief he sought against Iron County and scheduled a trial on damages.

² Although the terms “waiver” and “estoppel” are, at times, used interchangeably, these are distinct concepts. *See* Jim Fraiser, Annotation, *Waiver of, or Estoppel to Assert, Failure to Give or Defects in Notice of Claim against State or Local Political Subdivision—Modern Status*, 64 A.L.R.5th 519, § 2[b] (1998). We conclude that the issue of equitable estoppel is dispositive and therefore limit our analysis accordingly.

¶4 Shortly before trial, the County served and filed its motion to dismiss based upon Kirby's failure to comply with WIS. STAT. § 893.80(1).³ The trial court determined that Kirby failed to comply with § 893.80(1) because its notice of claim failed to itemize the relief sought. The court held that no counterclaim for damages was ever commenced. As a result, the court concluded it lacked competency and dismissed Kirby's counterclaim.

¶5 Kirby argues that the trial court erred when it ruled, in effect, that equitable estoppel was not available to bar the County's notice of claim defense. We agree. A valid notice of claim under WIS. STAT. § 893.80(1) is a prerequisite to filing a claim, including counterclaims against the government. *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 621-22, 575 N.W.2d 712 (1998). While substantial compliance with § 893.80 is necessary, failure to comply deprives the court of competency, not subject matter jurisdiction. *Id.* at 628-30.⁴

³ WISCONSIN STAT. § 893.80(1) provides in part:

[N]o action may be brought or maintained against any ... political corporation, governmental subdivision or agency thereof ... upon a claim or cause of action unless:

....

(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 duty of a clerk ... for the defendant ... corporation, subdivision or agency and the claim is disallowed.

⁴ Compare *Sipl v. Sentry Indem. Co.*, 146 Wis.2d 459, 463, 431 N.W.2d 685 (Ct. App. 1988) (parties by agreement could not confer jurisdiction on court to grant declaratory relief pursuant to WIS. STAT. § 806.04), with *Wall v. DOR*, 157 Wis. 2d 1, 6-7, 458 N.W.2d 814 (Ct. App. 1990) (failure to timely object to court's loss of competence due to improper service constitutes waiver of objection).

“[N]o circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.” *Mueller v. Brunn*, 105 Wis. 2d 171, 176, 313 N.W.2d 790 (1982). The parties’ failure to comply with § 893.80(1) does not negate a circuit court’s jurisdiction to adjudicate the type of controversy before it; rather, it prevents the court from adjudicating the specific case before it. The court’s power to adjudicate the specific type of controversy before it is referred to as “competency.” In this context, a court loses competency when a requirement necessary for the valid exercise of that power is not satisfied. *Green County Dept. of Human Servs. v. H.N.*, 162 Wis. 2d 635, 656, n.17, 469 N.W.2d 845 (1991).

¶6 Therefore, we disagree with the County’s reliance on two cases dealing with compliance with notice and claim requirements of WIS. STAT. § 893.82, an analogous statute dealing with suits against governmental employees. *See Oney v. Schrauth*, 197 Wis. 2d 891, 904, 541 N.W.2d 229 (Ct. App. 1995); *Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984). *Oney* and *Ibrahim* held that the lack of notice was jurisdictional.⁵ Therefore, their analysis is not persuasive.

¶7 In contrast, in *Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis. 2d 336, 344, 515 N.W.2d 328 (Ct. App. 1994), we approved the application of equitable estoppel to bar a governmental body from using noncompliance with the notice of claim statute as a defense.

⁵ The terms “jurisdiction” and “competence” have been used interchangeably in the past. As a result, errors that historically may have been considered as affecting a court’s subject matter jurisdiction may probably be classified as affecting only its competency to exercise jurisdiction. *See Shopper Advertiser, Inc. v. DOR*, 117 Wis. 2d 223, 236-37, 344 N.W.2d 115 (1984) (Abrahamson, J., concurring in part and dissenting in part).

We have recognized that estoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel. In each case the court must balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied.

Id. at 345 (quoting *DOR v. Moebius Print. Co.*, 89 Wis. 2d 610, 638-39, 279 N.W.2d 213 (1979)).

¶8 Later, in *Oliveira*, 242 Wis. 2d 1, ¶16, our supreme court held that the city was estopped from asserting a WIS. STAT. § 893.80(1)(b) defense when the claimant relied on the city's representations and did not file a notice of claim to her detriment. In that case, as in *Fritsch*, "the injustice caused to the plaintiffs if they were not allowed to pursue their claim outweighs the public's interest in a formal claim in the present case." *Oliveira*, 242 Wis. 2d 1, ¶20.⁶ To the extent it may be argued that *Oney* and *Ibrahim*'s analyses cannot be reconciled with *Oliveira*, we observe that *Oliveira*, as the latest pronouncement, controls. See *Hill v. LIRC*, 184 Wis. 2d 101, 516 N.W.2d 441 (Ct. App. 1994).⁷

⁶ But see *Sambs v. Nowak*, 47 Wis. 2d 158, 167, 177 N.W.2d 144 (1970) (concluding the estoppel doctrine does not bar a governmental body from asserting defense of noncompliance with the notice of claim statute).

⁷ Also, we acknowledge that *Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis. 2d 336, 515 N.W.2d 328 (Ct. App. 1994), and *Oliveira v. City of Milwaukee*, 2001 WI 27, 242 Wis. 2d 1, 624 N.W.2d 117, do not directly confront the question how a court that lacks competence may proceed to adjudicate the controversy before it. Because *Fritsch* and *Oliveira* rely on an equitable doctrine, we assume the answer is found in the court's inherent equitable process. See *Town of Fond du Lac v. City of Fond du Lac*, 22 Wis. 2d 525, 531, 126 N.W.2d 206 (1964) (a court of equity has inherent power to fashion a remedy to particular facts). In any event, we are bound by precedent. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶9 We conclude that failure to comply with WIS. STAT. § 893.80 deprives the court of competency, not subject matter jurisdiction. If equitable estoppel elements are met, a governmental entity may be equitably estopped from raising as a defense the lack of compliance with § 893.80. *Oliveira*, 242 Wis. 2d 1, ¶20. The elements are: “action or nonaction that induces another’s reliance thereon, either in the form of action or nonaction, to his or her detriment.” *Fritsch*, 183 Wis. 2d at 344. Fraudulent conduct does not have to be shown. *Id.*

¶10 The decision to apply an equitable remedy rests within the circuit court's discretion. *Williams v. Kaerek Builders*, 212 Wis.2d 150, 162, 568 N.W.2d 313 (Ct. App. 1997). “Once 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 vs. Slaght*, 2001 WI App 282, ¶30, 249 Wis. 2d 220, 638 N.W.2d 594 (citing *Gonzalez v. Teskey*, 160 Wis. 2d 1, 13, 465 N.W.2d 525 (Ct. App. 1990) (“The ultimate determination whether to apply estoppel is addressed to the trial court's discretion.”)). Our supreme court’s general directive is that “appellate courts not apply discretionary tests in the circuit court’s stead.” *Id.*, ¶36. Therefore, on remand, the circuit court must first determine whether the elements of estoppel are met and, if so, whether it should be applied.

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

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

