



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 18, 2024

To:

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Chippewa County Courthouse
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Electronic Notice

Anthony Russomanno
Electronic Notice

Centers for Medicare and Medicaid Services
c/o MSPRC - NGHP
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Oklahoma City, OK 73113

Wellmark
1331 Grand Avenue
Des Moines, IA 50309

You are hereby notified that the Court has entered the following an opinion and order:

2023AP551

Scott A. Lestrud v. Ashley Blackburn
(L. C. Nos. 2022CV244, 2022CV245)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Scott Lestrud and Lisa Luskey-Lestrud (collectively, “the Lestruds”) appeal the dismissal of their personal injury actions against Ashley Blackburn, the University of Wisconsin, and the State of Wisconsin (collectively, “the State defendants”). The Lestruds argue that the circuit court erred by determining that their failure to serve a timely notice of claim on the attorney general required dismissal. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

We take the following facts from the allegations in the Lestruds' complaints. Scott Lestrud was injured when Blackburn's rental vehicle negligently collided with the motorcycle he was operating. Lestrud further alleged that the University and/or the State were vicariously liable for his injuries because Blackburn was employed by either the University or the State and was acting within the scope of her employment at the time of the collision. Lisa Luskey-Lestrud was a passenger on the motorcycle, and she filed a separate action against the State defendants. The two cases were subsequently consolidated.

The State defendants filed motions to dismiss the Lestruds' complaints due to the Lestruds' failure to file a notice of claim with the attorney general within 120 days of the collision, as required by WIS. STAT. § 893.82. In addition, the University and the State contended that the claims against them should be dismissed on the ground of sovereign immunity. After a hearing, the circuit court granted the State defendants' motion to dismiss. The Lestruds now appeal.

At the outset, we note that the Lestruds have not satisfied their "burden ... to provide an appellate record to review the issues they raised on appeal." *See State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). In particular, the circuit court's order of dismissal does not specify the grounds for dismissal but instead points to the reasons for dismissal that it stated on the record at the motion hearing. The Lestruds did not include the hearing transcript in the record. We therefore have no basis to determine whether the court ruled on the

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

sovereign immunity arguments raised by the University and the State. These two defendants have renewed their sovereign immunity arguments on appeal. The Lestruds did not mention sovereign immunity in their opening brief and also failed to file a reply brief. We could affirm the dismissal of the University and the State on that basis alone. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments may be deemed conceded).

Instead, we affirm the dismissal of all three State defendants based on the Lestruds' failure to serve a timely notice of claim as required by WIS. STAT. § 893.82(3). This statute provides, in relevant part, that

no civil action or civil proceeding may be brought against any state ... employee ... for or on account of any act growing out of or committed in the course of the discharge of the ... employee's ... duties, ... unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state ... employee ... involved.

Id.

This notice of claim statute further provides that the required notice must be “sworn to by the claimant and ... served upon the attorney general at his or her office in the capitol or at the department of justice by personal service or by certified mail.” WIS. STAT. § 893.82(5).

The Lestruds argue that the Department of Justice (DOJ) received all of the details of the collision within a week of the accident when the rental car agency filed a claim, via email, with the State and attached the police report. The Lestruds further argue that the information in this email satisfied all of the purposes of the statutory notice requirement. *See Estate of Hopgood*

ex rel. Turner v. Boyd, 2013 WI 1, ¶49, 345 Wis. 2d 65, 825 N.W.2d 273 (“Notices that clearly comply with the statute not only reduce the number of meritless claims, but they also fulfill the purpose of enabling the attorney general to more effectively conduct legal business.”); *Hines v. Resnick*, 2011 WI App 163, ¶25, 338 Wis. 2d 190, 807 N.W.2d 687 (“One of the express legislative purposes of WIS. STAT. § 893.82 is ‘to ... [p]rovide the attorney general with adequate time to investigate claims which might result in judgments to be paid by the state.’”) (alteration in original; quoting § 893.82(1)(a)); *Riccitelli v. Broekhuizen*, 227 Wis. 2d 100, 116, 595 N.W.2d 392 (1999) (“The purpose of the notice of claim statute is to enable the governmental unit to investigate a claim against an employee, to avoid needless litigation, and to settle all reasonable claims.”).

The State defendants contend that the Lestruds’ argument is foreclosed by our decision in *Carlson v. Pepin County*, 167 Wis. 2d 345, 356-57, 481 N.W.2d 498 (Ct. App. 1992). In *Carlson*, we explained that the notice of claim statute for non-state governmental actors creates an exception to the 120-day notice provision when the government actor has actual notice of the claim and will not be prejudiced by the lack of a formal notice. *Id.* at 357 (citing WIS. STAT. § 893.80(1)(a) (1989-90)).² In contrast, the notice of claim statute “dealing with actions against state employees ... has no comparable exception.” *Id.* (citing WIS. STAT. § 893.82 (1989-90)). We therefore determined that compliance with § 893.82 was necessary and that the plaintiff’s failure to provide timely notice required dismissal. *Carlson v. Pepin County*, 167 Wis. 2d at 357.

² This exception to the notice of claim requirement for non-state government actors now appears in WIS. STAT. § 893.80(1d)(a).

The Lestruds contend that our decision in *Hines* breathed new life into their argument that strict compliance with WIS. STAT. § 893.82 is not necessary. In *Hines*, we addressed a subsection of § 893.82 that previously required the notice to “be served upon the attorney general at his or her office in the capitol by certified mail.” *Hines*, 338 Wis. 2d 190, ¶6 (quoting § 893.82(5) (2005-06)).³ The plaintiff instead sent the claim by certified mail addressed to the DOJ office on West Main Street. *Id.*, ¶7. The defendants moved to dismiss the plaintiff’s claim due to the failure to strictly comply with the statutory requirement that the certified mail be addressed to the attorney general’s office at the capitol. *Id.*, ¶8. In view of undisputed evidence that all certified mail was delivered to the DOJ on West Main Street, even when it was addressed to the attorney general’s capitol office, the circuit court concluded that the plaintiff had complied with § 893.82(5) (2005-06). *Hines*, 338 Wis. 2d 190, ¶9. We affirmed, explaining that “[e]nforcing literal compliance with a statute when literal compliance is impossible would, of course, be an absurd and unreasonable result.” *Id.*, ¶16.

The Lestruds argue that their “situation is akin to *Hines*” because “the DOJ would not have learned any new or additional information, compared to what it knew one week after the crash, had it learned about the crash through a timely filed notice of claim under [WIS. STAT.] § 893.82,” albeit from another party. Therefore, the Lestruds contend, enforcing strict compliance with § 893.82 would be “absurd and/or unreasonable.”

At the outset, *Hines* is inapplicable to the facts of this case. In *Hines*, we explained that strict compliance with the prior version of WIS. STAT § 893.82 was literally impossible. *Hines*,

³ This subsection has since been amended to require that the notice be “served upon the attorney general at his or her office in the capitol or at the [DOJ] by personal service or by certified mail.” WIS. STAT. § 893.82(5).

338 Wis. 2d 190, ¶16. In contrast, the Lestruds have never suggested that they faced any obstacle in timely serving a notice of claim on the attorney general as § 893.82 requires. Therefore, the Lestruds' situation is not at all akin to *Hines*.

More importantly, “the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals.” *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Thus, our decision in *Hines* does not affect our prior determination in *Carlson* that strict compliance with WIS. STAT. § 893.82 is necessary even when the attorney general has actual notice and is not prejudiced by the lack of timely notice. Indeed, our supreme court has since reiterated that “[i]t is not enough to substantially comply with [§ 893.82] by effecting actual notice, thereby fulfilling the underlying purposes of § 893.82(1).” *Sorenson v. Batchelder*, 2016 WI 34, ¶28, 368 Wis. 2d 140, 885 N.W.2d 362. Instead, “§ 893.82(5) must be strictly enforced even though enforcement produces harsh consequences.” *Sorenson*, 368 Wis. 2d 140, ¶32. The Lestruds' argument is therefore foreclosed by *Carlson* and *Sorenson*.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals