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DISTRICT IV

October 6, 2015

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

2014AP1258 Gwenda F. Townsend v. City of Beloit (L.C. # 2014CV323)

Before Lundsten, Higginbotham, and Blanchard, JJ.

Gwenda Townsend appeals a summary judgment order that dismissed her personal injury claims against the City of Beloit and its insurer for failure to comply with the applicable statute of limitations. The City moves for an award of costs and attorney fees on the ground that the appeal is frivolous. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm and grant the motion for costs and attorney fees.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

An action to recover damages for injuries to the person is barred unless it is brought within three years of the date on which the injury occurred or by which the injured person had sufficient evidence (or should have discovered such evidence in the exercise of reasonable diligence) to believe that a wrong was committed by an identified person or entity. WIS. STAT. § 893.54(1); ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 312, 533 N.W.2d 780 (1995). Additionally, when the defendant in a personal injury action is a municipality, an action to recover damages is barred unless and until: (1) the plaintiff files a notice of claim describing the circumstances of the injury within 120 days of the injury; (2) the plaintiff files an itemized claim setting forth the specific relief sought; and (3) the municipality either explicitly disallows the itemized claim or fails to act upon it within 120 days, which is treated as a disallowance. WIS. STAT. § 893.80(1)(d) and (1g).

If a plaintiff has filed a timely notice of claim and an itemized claim against a municipal defendant, the three-year statute of limitations for personal injury claims is tolled for up to 120 days during the disallowance period, since a plaintiff is prohibited from filing a lawsuit against the municipality while the itemized claim is still pending. ***Colby v. Columbia Cnty.***, 202 Wis. 2d 342, 357-58, 550 N.W.2d 124 (1996). However, if the municipality serves the plaintiff with a compliant notice of the disallowance, the time for the plaintiff to initiate a personal injury lawsuit is further limited to six months after the date of service of the disallowance. WIS. STAT. § 893.80(1g). Thus, as the Wisconsin Supreme Court explained in ***Pool v. City of Sheboygan***, 2007 WI 38, 300 Wis. 2d 74, 729 N.W.2d 415, a municipality can effectively *shorten* the deadline for commencing a personal injury action when—as was the situation in that case—it sends notice of disallowance of a claim when more than six months remain on the three-year statute of limitations. ***Id.***, ¶¶15-16.

This lawsuit arose from an alleged slip and fall accident that occurred on the curb of a public sidewalk on June 11, 2010. Townsend filed a notice of claim against the City on July 14, 2010, but did not file her itemized claim until May 31, 2013, less than a month before the three-year statute on her personal injury claims was set to expire. The itemized claim was disallowed by operation of statute 120 days later, on September 28, 2013. On October 7, 2013, the City mailed Townsend a written notice of the disallowance of her claim, which she received the following day. The disallowance notice contained the standard statutory language advising Townsend that no lawsuit could be brought against the City or its officials more than six months after service of the disallowance notice. Townsend filed a complaint commencing the present lawsuit on March 18, 2014—within six months after receiving notice of the disallowance of her claim, but three years *and nine months* after the date of her injury.

Townsend's appeal rests on the misconception that her deadline under WIS. STAT. § 893.80(1g) for commencing a lawsuit against a municipality within six months after being provided with notice of the disallowance of an itemized claim *superseded* her deadline under WIS. STAT. § 893.54 for commencing a personal injury lawsuit within three years of the injury. That is plainly not true. Rather, both limitation periods applied and needed to be satisfied. *See* ***Colby***, 202 Wis. 2d at 346-47 and 357-58 (considering whether action that had been filed within six months of the disallowance of a claim under § 893.80, but more than three years after the injury, was *also* timely under § 893.54 based upon tolling). Although Townsend complied with the requirements of § 893.80, she failed to comply with the deadline set forth in § 893.54, even taking into account that the deadline was tolled. Therefore, the circuit court properly dismissed the action as time-barred.

The rules of appellate procedure authorize this court to award costs, fees, and attorney fees as a sanction for a frivolous appeal, when the appeal was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or when the party or the party's attorney knew or should have known that the appeal "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c).

Since there was no material dispute in the summary judgment materials regarding when Townsend was injured, when she filed her notice of claim and itemized claim, or when she filed her complaint, and since none of the legal authorities Townsend cites even arguably support her contention that the statute of limitations set forth in WIS. STAT. § 893.54 does not apply, we agree with the City that this appeal is frivolous. We recognize Townsend's pro se status, but the failure here is so clear cut that a sanction is appropriate. Accordingly, we grant the City's motion for an award of costs and attorney fees. The City may file a statement of costs with the clerk of this court according to the standard procedure for prevailing parties. However, because this court has no mechanism for fact finding, we remand the question of the reasonable amount of attorney fees to the circuit court.

IT IS ORDERED that the summary judgment order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that the matter is remanded to the circuit court to make a determination of the reasonable amount of attorney fees incurred by the City on this appeal.

Diane M. Fremgen
Clerk of Court of Appeals