STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case Nos. 2007AP221 and 2007AP1440

BOSTCO LLC and PARISIAN, INC.,
Plaintiffs-Appellants-Cross-Respondents,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
Defendant-Respondent-Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY
NO. 03-CV-005040, HON. JEFFREY A. KREMERS
(PRESIDING THROUGH JUDGMENT ON JURY VERDICT)
AND HON. JEAN W. DIMOTTO
(PRESIDING AFTER JUDGMENT ON JURY VERDICT)

CITY OF MILWAUKEE'S *AMICUS CURIAE* BRIEF

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INTRODUCTION

Neither WISPARK Holding, LLC., nor Saks, Inc., owned the Boston Store building, nevertheless, they served a notice and filed a claim against the Milwaukee Metropolitan Sewage District ("MMSD") under Wis. Stat. sec. 893.80(1), stating they owned the Boston Store building and it had been damaged by the deep tunnel construction project. (MMSDApp-0006, MMSDApp-0010) The actual owners of the building, Parisian, Inc. and Bostco, LLC., filed suit against the MMSD for damage without filing either a notice or claim against the MMSD. (R.369-8-9: MMSDApp-0457-58) Neither the notice nor the claim filed indicates that the claimants intend also to seek an injunctive order directing the MMDS to reline a mile-long sewer tunnel. (R.382:MMSDApp-0678) (R.347:MMSDApp-0286-88). Finally, the circuit court failed to apply immunity under sec. 893.80(4) to a discretionary decision involving maintenance.

The City of Milwaukee, as *amicus curiae,* urges this court to hold that (1) that claimants under sec. 893.80(1) are required to correctly identify themselves in the notice and claim as a precondition to filing and maintaining a lawsuit, (2) claimants seeking equitable relief under sec. 893.80(1) are required to state they are seeking that form of relief in their claim, and (3) claims arising out of discretionary decisions involving the maintenance of public works are barred by discretionary immunity.

1. Substantial compliance should not be defined so broadly as to ignore the plain words of the statute, or to make it impossible for the government to lawfully deny claims, or to create the risk that the government might pay the wrong party.

Wisconsin Stat. sec. 893.80(1) requires persons who have claims against local governmental entities to serve notices and file claims as a precondition to bringing and maintaining lawsuits. Section 893.80(1) contains two notice provisions, subsections (1)(a) and (1)(b). Each must be complied with because each serves a different purpose. *Thorp v Town of Lebanon,* 2000 WI 60, ¶ 22, 235 Wis. 2d 610, 612 N.W.2d 59; *Markweise v. Peck Foods Corp.,* 205 Wis. 2d 208, 220, 556 N.W.2d 326, 331 (Ct. App. 1996).

Wisconsin courts apply a substantial compliance test to decide whether a notice of claim complies with the provisions of sec. 893.80(1)(a), and whether a claim complies with the provisions of sec. 893.80(1)(b). In contrast, courts require governmental entities to strictly comply with the provisions of sec. 893.80(1g), to deny claims and thereby subject the claims to a six-month statute of limitations.

Subsection (1)(a) requires a claimant to serve a notice of claim within 120 days of the injury. The purpose of the notice is to allow the government to "investigate and evaluate" the potential claim. *Thorp* at ¶ 23. The statute requires a "written notice of the circumstances of the claim" that is "signed by the party, agent, or attorney." Subsection (1)(b) requires a claimant to serve the claim on the governmental entity. The purpose of the claim is to inform the

government of the possible cost of the claim so that it may either settle the claim or budget for future litigation or settlement. *State Dep't of Natural Res. v. City of Waukesha*, 184 Wis. 2d 178, 198, 515 N.W.2d 888, 896 (1994) ("*DNR* "), overruled on other grounds by *State ex rel. Auchinleck v. Town of LaGrange,* 200 Wis. 2d 585, 547 N.W.2d 587 (1996).

The Substantial Compliance Standard

A notice or claim that is defective in form or improperly served will not bar an action as long as the notice or claim substantially complies with the provisions of the municipal claims statute. Whether or not a notice or claim substantially complies depends upon whether the defective or improperly served document nevertheless fulfills the underlying purpose of the statute. In the case of the defective notice, the court will decide whether the notice was sufficient to enable the government to investigate and evaluate the potential claim. *Rouse v. Theda Clark Medical Center,* 2007 WI 87, ¶ 19, 302 Wis. 2d 358, 735 N.W.2d 30, 37; *Thorp v Town of Lebanon,* 2000 WI 60, ¶ 23-6.; *Markweise v. Peck Foods Corp.,* 205 Wis. 2d 208, 220, 556 N.W.2d 326, 331 (1996). In the case of a defective claim, the court will decide whether the claim contains sufficient information to enable the governmental entity to settle the claim or budget for future litigation or settlement. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 198, 515 N.W.2d 888, 896 (1984); *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 54, 357 N.W.2d 548 (1984).

The *City of Waukesha* case is an example of the court's application of the substantial compliance test. The court held that a letter from the Department of Justice to the Waukesha City Attorney satisfied the requirements of sec. 893.80(1)(b). To meet the requirements of the claims statute, the court reasoned that the letter must (1) identify the claimant's address; (2) contain an itemized statement of the relief sought; (3) be submitted to the city clerk; and (4) be disallowed by the city. *DNR v. City of Waukesha*, 184 Wis. 2d at 197-98, 515 N.W.2d at 895. The letter met the first requirement—claimant's address—because it contained the address of the claimant's attorney, which, the court held, is the equivalent of the claimant's address. The letter met the second requirement—relief sought—because it stated a specific dollar amount and identified the equitable relief sought. Although it was sent to the city attorney rather than to the city clerk, the letter met the third requirement—submittal to the city clerk—because the clerk would have forwarded the letter to the city attorney. Finally, the court held that the fourth requirement—disallowance—was met because the letter from the city attorney to the claimant in substance, but not explicitly, denied the claim. *Id.* at 198-202, 896-97.

The *City of Waukesha* case illustrates the extent to which a court may go to preserve a notice or claim, but no court has ever gone so far as to hold that a notice or claim that fails to state the name of the claimant substantially complies with the claims statute. The first obstacle to such a holding is that the

language of the statute requires claimants to sign the notice of claim, and thereby identify themselves. Accordingly, in *Moran v. Milwaukee County*, 2005 WI App 30, 278 Wis. 2d 747, 693 N.W.2d 121, the court was unwilling to overlook the fact that the claimant failed to sign the notice, even though she had printed her name on the notice or accident form. The second obstacle concerns the ability of the government to deny the claim. Unless claimants correctly identify themselves, the government will be unable to legally deny their claims, and if it decides to pay the claims, it might pay the wrong parties.

The Strict Compliance Standard

Courts have adopted a strict compliance test to decide whether the government has denied a claim in compliance sec. 893.80(1g), which requires the government's notice of disallowance to be "served on the claimant by registered or certified mail." In *Cary v. City of Madison,* 203 Wis. 2d 261, 551 N.W.2d 596 (Ct. App. 1996), the court held that the city's notice of disallowance sent by certified mail to the claimant's attorney did not comply with the provision requiring the notice to be served on the claimant. The court declined to follow the *City of Waukesha* holding that the attorney's address is the equivalent of the claimant's address because that case dealt with a claim, not a notice of disallowance. *Id.* at 266-67, 598.

Cary's strict compliance rule was adopted by the Supreme Court in *Pool v. City of Sheboygan,* 2007 WI 38, 300 Wis. 2d 74, 729 N.W.2d 415. In *Pool*, the city sent a certified denial letter to the clamant in accordance with

subsection (1g), but the claimant's daughter, rather than the claimant, signed the return receipt as recipient. Although the claimant had actual knowledge of the denial, the court held that the city failed to serve the notice of disallowance on the claimant, and, therefore, did not obtain the benefit of the shortened six-month statute of limitations.

Under the holdings in *Cary* and *Pool* and the holding of the circuit court, it would have been impossible for the MMSD, in this case, or any other governmental entity under similar circumstances, to deny the claim in conformity with subsection 893.80(1g).

- Had the MMSD sent a certified denial letter to the named claimant, WISPARK-Saks, it would not have denied Bostco-Parisian's claim, irrespective of Bostco-Parisian's actual knowledge.

- Had the MMDS sent a certified denial letter to WISPARK-Saks' attorneys, and, assuming Bostco-Parisian had the same attorneys, the denial would have been insufficient even though both WISPARK-Saks and Bostco-Parisian would have had actual knowledge through their attorneys, because under *City of Waukesha,* the notice of denial cannot be sent to the attorney. It must be sent to the claimant—here, WISPARK-Saks—irrespective of actual knowledge.

- Had the MMSD sent a certified denial letter to Bostco-Parisian, it could not have denied Bostco-Parisian's claim because Bostco-Parisian had not filed a claim. Moreover, the letter would not have denied WISPARK-Saks' claim,

because it was not sent to the claimant, WISPARK-Saks, irrespective of Bostco-Parisian actual knowledge.

Had the MMSD settled the claim with the claimants, the analysis would not be as complicated—MMSD would have paid the wrong parties.

Subsequently Acquired Knowledge is not Germane

Wisconsin courts have already rejected the argument that the notice's and claim's deficiencies should not be fatal to the lawsuit because the MMSD did learn, or should have learned, the correct ownership information after the false claim had been filed, or after the suit had been filed but before it had been concluded. It is well established that a claim in compliance with sec. 893.80(1)(b) must be filed and disallowed, either by the municipality or by operation of law, before the claimant can commence an action. *Zinke v. Milwaukee Transport Services*, 99 Wis. 2d 506, 299 N.W.2d 600 (1980); *Rabe v. Outagamie County*, 72 Wis. 2d 492, 241 N.W.2d 428 (1976); *Schwartz v. Milwaukee*, 43 Wis. 2d 119, 168 N.W.2d 107 (1969); *Maynard v. DeVries*, 224 Wis. 224, 272, N.W. 27 (1937).

The Wisconsin Supreme Court had the opportunity to comment on the meaning of the phrase in sec. 893.80(1), "no action shall be brought or maintained," when there were separate city and county claims statutes. The city claims statute, then sec. 62.25, stated "No action shall be maintained," whereas the county claims statute, then sec. 59.76, stated "No action shall be *brought* or maintained." (Emphasis supplied.) In *Schwartz v. Milwaukee*, the

court held that compliance with the *city claims* statute was a condition precedent to recovery, but not to commencement of the action. Accordingly, the statute would be deemed complied with so long as the claim had been filed and disallowed before the issue was brought before the court. 43 Wis. 2d at 128, 168 N.W.2d at 111. The court, however, held the word "brought" in the county claims statute meant that the failure to comply with the statute before commencement of the action was fatal notwithstanding compliance attempts afterwards. *Rabe v. Outagamie County*, 72 Wis. 2d at 498-99, 492, 241 N.W.2d at 432; *Maynard v. DeVries*, 224 Wis. at 227, 272 N.W. at 27. These holding were reaffirmed in *Zinke v. Milwaukee Transport Services*, 99 Wis. 2d at 513, 299 N.W.2d at 604.

2. Claimants seeking equitable relief that requires expenditure of public funds are required to state the form of relief they are seeking in their claims.

Section 893.80(1)(b) requires a claimant to file a claim containing "an itemized statement of the relief sought." The meaning of this phrase is explained fully in *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 54, 357 N.W.2d 548 (1984). The *Figgs* case is often cited for proposition that the phrase in the claim statute, sec. 893.80(1)(b), "itemized statement of relief sought," means that the claim must state a sum certain. Although that is true in the context of most tort actions, it is also a misleading simplification. *Figgs* points out that before the claims statute was amended, when the statute applied to tort claims only, the Legislature did not require claimants to submit any statement of the

relief sought. Presumably, the *Figgs* court reasons, the only relief sought in tort cases would be money judgments; accordingly, there would have been no need to inform the governmental unit of the "*kinds of relief* sought." (Emphasis supplied.) *Id.* at 52, 553. Once the statute was amended to apply to any claim or cause of action, the governmental unit could no longer assume that the claimant sought a money judgment exclusively. That explains "why the legislature then added the requirement that claimants inform the city precisely *what kind of relief* they sought, *i.e.*, 'an itemized statement of relief sought.'" (Emphasis supplied.) *Id.* at 52, 553, n.7. Money damage is one *form* or *kind* of relief, specific performance or injunction is another. *Id.* at 52-3, 553.

Under *Figgs*, a litigant subject to the claims statute should not be able to obtain a form or kind of relief not stated in the litigant's claim, particularly where the relief sought compels the future expenditure of public funds. Without such protection, local governments could not budget for future expenses as the Legislature intended when it adopted the claims statute. Accordingly, litigants who seek equitable relief that requires the expenditure of public funds should be required to first file claims stating the equitable relief in the itemized statement of relief sought.

3. The discretionary immunity defense under Wis. Stat. sec. 893.80(4) applies to discretionary decisions involving the maintenance of public works.

The parties to this case dispute whether discretionary decisions concerning the maintenance of pubic works are subject to the discretionary immunity defense under Wis. Stat. sec. 893.80(4). The test, however, to decide whether discretionary immunity applies to a particular decision does not exclude decisions involving maintenance. The Supreme Court has articulated the difference between discretionary and ministerial duties as follows:

> The test for determining whether a duty is discretionary (and therefore within the scope of immunity) or ministerial (and not so protected) is that the latter is found only when the duty is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion.

Kimps v. Hill, 200 Wis. 1, 10-11, 546 N.W.2d 151, 156 (1996) (citations omitted).

Decisions involving the maintenance of public work concern not only the amount of money that should be appropriated to perform maintenance, but also the time, mode, and occasion for it performance. Applying immunity to discretionary maintenance decisions is consistent with its purpose,

> . . . to ensure that courts are not called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions "furnish[] an inadequate crucible for testing the merits of social, political, or economic decisions."

Kara B. v. Dane County, 198 Wis. 2d 24, 55, 542 N.W.2d 777 (Ct. App. 1995), aff'd, 205 Wis. 2d 140, 555 N.W.2d 630 (1996) (quoting *Gordon v. Milwaukee County*, 125 Wis. 2d 62, 66, 370 N.W.2d 803 (Ct. App. 1985) (additional citation omitted)).

This court has already applied discretionary immunity to uphold the dismissal of an action brought by an inmate against a county and county sheriff for injuries he sustained when he slipped and fell in the jail shower. *Spencer v. Brown County*, 215 Wis. 2d 641, 573 N.W.2d 222 (Ct. App. 1997). This court held that the county and sheriff had no ministerial duty to construct, equip, or maintain the jail shower facility in a specific manner to make it safe. *Id.* at 648, 651-52; 225-27.

In *Spencer*, this court also held that Wisconsin's Safe Place Statute, Wis. Stat. sec. 101.11(1), which imposes a duty "to maintain . . . public buildings as to render them safe," does not impose a ministerial duty. *Id.* at 651-652; 226-27. Citing *Meyer v. Carman*, 271 Wis. 329, 73 N.W.2d 514 (1955), this court agreed with its conclusion that to keep a public building safe, "many circumstances may need to be considered in deciding what action is necessary to do so, and *such decisions involve the exercise of judgment or discretion rather than the mere performance of a prescribed task.*" *Spencer*, 215 Wis. 2d at 625; 573 N.W.2d at 226-227 ((quoting *Meyer*, 271 Wis. at 331-32, 73 N.W.2d at 515) (alteration in original)).

Finally, the Legislature has specifically excluded maintenance of public highways from the discretionary doctrine. Wis. Stat. sec. 893.83; *Morris v. Juneau County*, 219 Wis. 2d 543, 573 N.W.2d 690 (1998). Obviously, there would have been no need for the Legislature to exclude maintenance of public highways from the discretionary immunity doctrine if maintenance generally had not been included in the first place.

CONCLUSION

For these reason, this Court should hold that under secs. 893.80(1)(a) and (b), parties who were actually injured or damaged are required to serve and file notices claims, claimants who intend to seek equitable relief that compels the expenditure of public funds are required to state that form of relief in their claims, and discretionary immunity applies to discretionary maintenance decisions.

Dated at Milwaukee, Wisconsin this 5th day of December, 2008.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. secs. 809.19(8)(b) and (c), for a Brief produced with a proportional serif font. The length of this brief is 2,878 words.

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