COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 13, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 94-2489

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ANGELA VAN ESS,

Plaintiff-Respondent,

v.

BOARD OF REGENTS OF THE UNIV. OF WISCONSIN SYSTEM, UNIV. OF WISCONSIN SYSTEM ADMINIS. BOARD OF REGENTS,

Defendant-Appellant,

DR. MUSA S. KAMARA, ROBERT SEVERSON, BRIAN HELLER, DENNIS PURDUE, JEFFREY HARDY, BONNIE HANSON and SECURITY LIFE INSURANCE COMPANY OF AMERICA, STUDENT ASSURANCE SERVICES,

Defendants.

APPEAL from an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The Board of Regents for the University of Wisconsin System appeals an order that denied the Board's motion for summary judgment. Angela Van Ess sued the Board for injuries she suffered when a stool collapsed under her in a classroom at the University of Wisconsin, Eau Claire. The Board sought summary judgment on the ground that sovereign immunity protected it from this class of tort lawsuits. The trial court ruled that the legislature had consented to permitting litigants to sue the Board, thereby abrogating the Board's common law sovereign immunity, by enacting the notice of claim statute setting preconditions for lawsuits against state officers and employees. *See* § 893.82, STATS. On appeal, the Board argues that the notice of claim statute does not constitute a legislative consent to suit and abrogate the Board's immunity.

In response, Van Ess argues that the notice of claim statute does constitute a legislative consent for litigants to sue the Board. She also argues that the Board has forfeited its formerly held sovereign immunity by virtue of the fact that it now qualifies as an "independent going concern," having acquired new powers under § 36.11, STATS., that amount to "independent proprietary functions and powers." The trial court correctly denied summary judgment if there were disputes of material fact or if the Board did not deserve judgment as a matter of law. ***Powalka v. State Mut. Life Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). We conclude that the Board does not qualify as an "independent going concern" and that the notice of claim statute did not legislatively abrogate the Board's sovereign immunity. We therefore reverse the trial court order and remand the matter with directions to dismiss the Board from the lawsuit.

Neither of Van Ess' arguments barred summary judgment. First, we have previously ruled that the Board of Regents enjoys sovereign immunity. *See* ***Graney v. Board of Regents***, 92 Wis.2d 745, 750-51, 286 N.W.2d 138, 142 (Ct. App. 1979). The ***Graney*** court held that the Board did not function as an "independent going concern"—a variety of state agency that lacks sovereign immunity. ***Graney*** also implicitly held that the "independent going concern" standard is basically a restatement of the "independent proprietary functions and powers" standard. In other words, state agencies that possess such "independent proprietary functions and powers" have the attributes of and

qualify as "independent going concerns." We reject Van Ess' claim that § 36.11, STATS., requires otherwise. We see nothing in § 36.11 that grants the Board functions or powers of a nature and degree sufficient to qualify as "independent proprietary functions and powers" under ***Graney***. As a consequence, the Board continues to not qualify as an "independent going concern." The legislature therefore forfeited none of the Board's sovereign immunity by enacting § 36.11.

Second, the Wisconsin Supreme Court has held that notice of claim statutes do not implicitly strip the state or state agencies of sovereign immunity. *See* ***Fiala v. Voight***, 93 Wis.2d 337, 346-47, 286 N.W.2d 824, 829-30 (1980). Rather, such statutes are sovereign immunity neutral, in the absence of an express legislative declaration to the contrary. They simply furnish a condition precedent to suits against state officers and employees, who have no sovereign immunity. We see no substantive difference between the notice of claim statute the supreme court examined in ***Fiala*** and the statute the trial court considered in denying the Board's summary judgment motion. As a result, ***Fiala*** controls, and the Board continued to enjoy the immunity that the sovereign has always enjoyed under the common law. In sum, the trial court should have granted the Board summary judgment dismissing it from Van Ess' lawsuit.

By the Court.—Order reversed and cause remanded with directions to dismiss the Board from the lawsuit.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.