COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 96-2014

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

WEST MILWAUKEE EAST DEVELOPMENT, INC.,

PLAINTIFF,

V.

WEST MILWAUKEE VILLAGE AND
WEST MILWAUKEE DEVELOPMENT AUTHORITY,

DEFENDANTS-RESPONDENTS,

OGDEN DEVELOPMENT GROUP, INC.,

DEFENDANT-
THIRD PARTY PLAINTIFF-RESPONDENT,

WILSON EWING,

THIRD PARTY DEFENDANT-
RESPONDENT,

DOLORES KOKANOVIC,

INTERVENOR-APPELLANT,

ROBERT FLEISCHMAN, MAXINE FLEISCHMAN,
CHARLOTTE FLEISCHMAN, MOLLY MATHEA,

LOUIS CARL AND PETAR KOKANOVIC,

APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Dolores Kokanovic, Robert Fleischman, Maxine Fleischman, Charlotte Fleischman, Molly Mathea, Louis Carl, and Petar Kokanovic appeal from an order of the trial court granting Ogden Development Group summary judgment and dismissing their intervenor action against the Village of West Milwaukee, the West Milwaukee Community Development Authority and Ogden. The appellants, taxpayers of the Village of West Milwaukee, claim that the trial court erred: (1) in holding that their action was barred by § 893.75, STATS., from bringing suit against Ogden; (2) in holding that they lacked standing to bring suit against Ogden; and (3) in denying their motion for a temporary injunction. We affirm. Our affirmance is premised solely on the jurisdictional infirmity caused by the appellants' lack of standing to bring this action as taxpayers on behalf of the Village and, thus, we do not reach the remaining issues of the case.

On February 23, 1988, the Village entered into an agreement with Ogden to develop residential and commercial property in the Village of West Milwaukee. Under the agreement, Ogden received certain options to purchase property in blighted areas. The dispute that culminated in this lawsuit arose from a disagreement between Ogden and the Village over alleged rights under the

agreement. Subsequently, West Milwaukee East Development, which sought to buy land from the Village, filed a declaratory action asking the trial court to rule that Ogden's option-rights to a certain parcel of land under the agreement had expired. Later, the appellants moved to intervene in that action. The motion was denied by the Honorable John E. McCormick. Ogden and the Village moved for summary judgment against West Milwaukee East Development. The motion by the Village was granted, but Ogden's motion was not decided pending a proposed settlement. Prior to the hearing on those motions, the appellants filed a second motion to intervene. Reserve Judge Willis J. Zick permitted the intervention. The appellants then filed their complaint against Ogden, the Village, and the West Milwaukee Community Development Authority seeking: an accounting of the proceeds of the option agreement; declaratory judgment establishing the rights of all the parties arising from the agreement; judgment in favor of the Village for sums due the Village under the agreement; and a declaration that the agreement was void for lack of consideration.

Subsequently, Ogden filed a motion for summary judgment, claiming that the appellants' action was barred by § 893.75, STATS., which requires a challenge to the validity of a municipality contract to be filed within 60 days of the creation of the contract. Ogden also argued that the appellants lacked standing to intervene. The trial court granted the motion on both grounds. The trial court further concluded that the appellants' action was barred by § 893.75. The trial court denied the appellants' motion for an injunction.

When reviewing summary judgment, appellate courts and trial courts follow the same methodology. ***Hoglund v. Secura Ins.***, 176 Wis.2d 265, 268, 500 N.W.2d 354, 355 (Ct. App. 1993). The court first examines the complaint to see whether it states a claim and, if so, then the court examines the record to determine

whether any material fact is in dispute. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). If not, the court then determines whether a party is entitled to judgment as a matter of law. ***Id.*** Questions of law are reviewed *de novo* by the appellate court. ***Anderson v. Milwaukee Ins.***, 161 Wis.2d 766, 769, 468 N.W.2d 766, 768 (Ct. App. 1991).

This appeal does not concern the substantive issues between the Village and Ogden. Rather, it concerns whether the appellants may appear in the action as a party. The supreme court has set forth the requirements for taxpayer standing to bring suit on behalf of a municipal corporation. *See* ***Cobb v. Milwaukee***, 60 Wis.2d 99, 109–110, 208 N.W.2d 848, 853–854 (1973). The test put forth by ***Cobb*** is that a taxpayer's right to bring an action on behalf of a municipality is subject to the following conditions:

> (1) the municipality itself must have a clear right and power to sue; (2) a taxpayer cannot sue third persons in behalf of the municipality unless the bringing of such action is a duty devolving upon the municipal authorities, as to which they have no discretion and which they have refused to perform; (3) either a demand must have been made that suit be brought by the public officers of the municipality, or it must be alleged and shown that such demand would be unavailing; and (4) the action does not lie where it would be grossly inequitable to enforce the claim, nor where the basis thereof is a claim of the taxpayer's rather than that of the municipality.

Id. *See also* 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 52.17 (3d ed. 1993) (footnotes omitted).

The dispositive issue is whether the second criterion is satisfied; that is, whether the Village has failed to discharge a non-discretionary duty and, therefore, the appellants have a right to intervene in order to help direct the litigation.

The supreme court recently distinguished a non-discretionary duty from a discretionary duty by concluding that a public officer's duty is ministerial:

> "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.2d 1, 10–11, 546 N.W.2d 151, 157–158 (1996) (brackets in original; quoted source omitted).

Here, the appellants seek an accounting, a judgment for damages, and a declaratory judgment determining, among other things, that the agreement between the Village and Ogden is void. As noted, the appellants are essentially disputing the way the Village is handling its lawsuit against Ogden. How a Village prosecutes or defends lawsuits is within the Village's discretion. *See* § 61.34(1), STATS.[1] Appellants have failed to show that a non-discretionary duty has not been discharged. Accordingly, we affirm the trial court's grant of summary judgment to Ogden.[2]

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[1] Section 61.34(1), STATS., provides:

> GENERAL GRANT. Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

[2] We do not decide whether § 893.75, STATS., also bars this action. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

By the Court.—Order affirmed.

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