

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 01-0875
01-0876**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 01-0876

MICHAEL WYSOCKI,

PLAINTIFF-APPELLANT,

v.

TOWN OF KRONENWETTER,

DEFENDANT-RESPONDENT.

No. 01-0875

ELAINE WYSOCKI AND JAMES WYSOCKI,

PLAINTIFFS-APPELLANTS,

v.

TOWN OF KRONENWETTER,

DEFENDANT-RESPONDENT.

APPEALS from judgments of the circuit court for Marathon County:
GARY L. CARLSON, Judge. *Affirmed.*

¶1 CANE, C.J.¹ The Wysockis appeal from the trial court's judgments dismissing their small claims actions seeking damages against the Town of Kronenwetter and its individual board members. In their complaints, the Wysockis allege that when the Town widened Oak Road in 1997, part of their land was improperly taken and damaged during the construction process. Because the Wysockis had never filed a claim prior to commencing their lawsuits as required under WIS. STAT. § 893.80 against the Town and its board members, the circuit court dismissed their complaints. This court affirms the judgments.

¶2 The underlying facts are undisputed. In 1997, the Town widened Oak Road to four rods. As a result, the Wysockis' attorney sent a letter to the Town disputing the Town's claim that the road was four rods in width and therefore any entry upon the land outside the three rods would be considered a trespass on the Wysocki property. The Town continued to maintain that the right-of-way for this road had been four rods since 1931 and therefore completed reconstruction of the road. The Wysockis continued to assert that the reconstruction took and damaged part of their land and, in December 2000, filed small claims complaints against the Town and its board members, seeking damages because of the road reconstruction. In response, the Town filed motions seeking dismissal of the claims because the Wysockis had never filed notices of claim or a claim as required under WIS. STAT. § 893.80. The Town also sought

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). On appeal, these cases were consolidated. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

dismissal of the complaints against its board members based on the fact that they have immunity for actions taken in the exercise of their legislative and quasi-legislative functions. The circuit court granted the motions and dismissed the board members because of their governmental immunity and also dismissed the Town because the Wysockis had never filed the required notices of claim or a claim.²

¶3 It is undisputed that the Wysockis failed to file the required notices of claim or a claim. The Wysockis admitted at the motions hearing that they did not know that such a claim was required.³

² Additionally, the circuit court reasoned that even if the attorney's letter could be considered notices of claim or a claim, the Wysockis had failed to timely file a lawsuit. Because the parties do not address this issue on appeal, this court will not discuss this basis for the dismissal.

³ WISCONSIN STAT. § 893.80(1) provides in relevant part:

Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits. (1) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any ... political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the ... political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the ... corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and

(continued)

¶4 Although presented as motions to dismiss, the motions were necessarily converted to motions for summary judgment when the court received and considered the parties' affidavits. *See Johnson v. Johnson*, 179 Wis. 2d 574, 580, 508 N.W.2d 19 (Ct. App. 1993). Therefore, although the court stated it was granting motions to dismiss, for the purpose here this court treats it as granting motions for summary judgment. *Id.*

¶5 In reviewing a summary judgment, the appellate court applies the same methodology as the trial court, and its review is de novo. *Roebke v. Newell Co.*, 177 Wis. 2d 624, 632, 503 N.W.2d 295 (Ct. App. 1993). The summary judgment methodology has been repeated often in appellate court opinions, and it need not be recited again in great detail here. Essentially, summary judgment should be granted where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

¶6 WISCONSIN STAT. § 893.80(1) provides a condition precedent to commencing an action against the Town. No action may be brought or maintained against the Town unless two requirements are met: (1) service upon the Town of a notice of the circumstances of the claim, *see* WIS. STAT. § 893.80(1)(a); and (2) a subsequent claim containing claimant's address and an itemized statement of relief sought. *See* WIS. STAT. § 893.80(1)(b). Upon receipt of such claim, the Town has 120 days to accept or disallow the claim. Failure to comply with the initial notice

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

of claim requirement does not bar an action if the government had actual notice and the absence of formal notice is not prejudicial. *See* WIS. STAT. § 893.80(1)(a). However, the itemized statement of relief sought provision, § 893.80(1)(b), does not contain a similar prejudice standard. *Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis. 2d 336, 343, 515 N.W.2d 328 (Ct. App. 1994).

¶7 The purpose of WIS. STAT. § 893.80 is to afford the government an opportunity to compromise and settle the claim without litigation. *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 53, 357 N.W.2d 548 (1984). There is nothing in § 893.80 to suggest that the legislature intended any different or additional purpose for this statute. *Figgs*, 121 Wis. 2d at 53-54. Substantial, not strict, compliance with the notice statute is required. *Id.* at 55.⁴ Because the Wysockis never filed notices of claim or a claim as required under § 893.80, the trial court had no choice but to dismiss the claims against the Town.

¶8 The trial court also properly dismissed the complaints against the town board members. WISCONSIN STAT. § 893.80(4) provides in relevant part:

No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees *nor may any suit be brought against* such corporation, subdivision or agency or volunteer fire company or against *its officers, officials, agents or employees for acts done in the exercise of legislative,*

⁴ This court notes that the Wysockis do not claim the Town was estopped from using the itemized claim of relief sought requirement as a defense and, therefore, it is not an issue before this court.

quasi-legislative, judicial or quasi-judicial functions.
(Emphasis added.)

¶9 There is no question that the board members qualify for immunity in this case. The claims set forth in the complaints against the board members all stem from their actions taken to improve the public road while acting in their capacity as town board members. These decisions, while acting in a legislative or quasi-legislative capacity to approve the reconstruction of the road, are clearly immune from liability. *See Allstate Ins. Co. v. Metropolitan Sewerage Comm'n*, 80 Wis. 2d 10, 15-16, 258 N.W.2d 148 (1977). Thus, the circuit court correctly dismissed the complaints against the town board members because their acts were done in the exercise of a legislative or quasi-legislative function.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

