COURT OF APPEALS DECISION DATED AND FILED

June 27, 2012

Diane M. Fremgen
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.

Appeal No. 2011AP1029

Cir. Ct. No. 2009CV4790

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

MICHAEL MORACK AND MARGERY MORACK,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF WAUKESHA,

DEFENDANT-RESPONDENT,

DEBORAH A. CRNECKIY, CHANTHAMALA DENGMANIVANH, RICHARD BEHRENDT, PHETLAMPHANH BEHRENDT, ROBERT ARNELL, JULIE ARNELL, JOSEPH CALI AND DEBRA CALI,

DEFENDANTS.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. The circuit court granted the summary judgment motions of the Town of Waukesha and the Town's engineers on the basis that the Town and its engineers enjoyed immunity under WIS. STAT. § 893.80(4) (2009-10).[1] Michael and Margery Morack moved for reconsideration of the part of the decision related to the Town. The court denied the motion, ruling that the Moracks failed to comply with § 893.80(1)(a). The Moracks appeal the order granting summary judgment to the Town. We affirm.

¶2 The material facts are not in dispute. The Moracks bought a farm in the Town of Waukesha in March 1997. The farm lies below the Whispering Hills Estates subdivision. Whispering Hills was developed and built in three phases, beginning in 1993. The Moracks knew of some water problems on the land when they bought it. Since then, their property has suffered worsening flooding from Whispering Hills, particularly related to the 1994—2001 development of Phase III. The Moracks complained to the Town within months of moving in that the Whispering Hills storm water management system was inadequate. The Moracks retained an engineer and a lawyer to attempt to work with the Town. The flooding continued despite changes to landscaping and to the design and operation of the storm water management system.

¶3 In March 1999, the Moracks' counsel told the Town Board that his clients "cannot take this anymore" and would "start a legal claim." A month later, he wrote to the Town's engineers that "it is time that my clients begin moving ahead in terms of making their claims and/or initiating a lawsuit." By letter dated April 26, 1999, the Town's counsel advised the Moracks' counsel: "If you are of

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

the opinion that your clients have a claim against the Town of Waukesha, then you should follow the procedures set forth in WIS. STAT. § 893.80 regarding that claim." The Moracks did not pursue that course. Problems continued.

¶4 Six years later, in September 2005, the Moracks' counsel wrote to Whispering Hills lot owners whose properties, according to the Moracks' engineer, most negatively impacted the Moracks' property. Counsel advised the lot owners that if he did not hear from each of them "within the next two weeks, formal legal proceedings will be commenced."

¶5 In June 2009—twelve years after the Moracks purchased their property and a decade after they first threatened legal action and the Town's counsel advised them to file a WIS. STAT. § 893.80 claim, the Moracks served the Town with a notice of claim. The Town Board denied the claim, and the Moracks filed suit in the circuit court.

¶6 Their complaint against the Town sounded in nuisance, negligence, inverse condemnation and breach of covenant.[2] It alleged that Whispering Hills' storm water management system was inadequate, and that the Town had approved it and failed to maintain, inspect and manage it despite the Moracks' repeated and ongoing requests. The Town pled lack of notice. *See* ***Elkhorn Area Sch. Dist. v. East Troy Cmty. Sch. Dist.***, 110 Wis. 2d 1, 5, 327 N.W.2d 206 (Ct. App. 1982); *see also* WIS. STAT. § 893.80(1)(a).

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[2] The Moracks alleged breach of covenant because the Town is the grantee of a drainage easement from the developer of Whispering Hills. The developer retained primary responsibility to maintain, repair and reconstruct drainage structures, but granted the Town the ability and a right of access to do so. The development company eventually declared bankruptcy and the owner died in 2006.

¶7 The Town and the engineers filed motions for summary judgment. The circuit court found that the Town's role in the development of Whispering Hills' storm water management system was limited to approval of the plans and design and did not have a continuing ministerial duty to operate or to maintain it, that the approval process was a discretionary act for which the Town had immunity under WIS. STAT. § 893.80(4) and that, since the Town's engineers acted on the Town's behalf, the immunity extended to them as well. The court dismissed all of the Moracks' claims.

¶8 The Moracks moved for reconsideration only as to the Town. They argued that the circuit court erred in finding municipal immunity for inverse condemnation and breach of covenant because immunity covers only tort claims. The court recognized that dismissing those two causes of action based on discretionary-acts immunity was "an error of law." Nonetheless, the court declined to reconsider its decision because it determined that the Moracks' claims were barred by their failure to comply with WIS. STAT. § 893.80(1)(a). This appeal followed.

¶9 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard the circuit court employs. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶10 The Moracks first argue that the circuit court erred in finding that the Moracks' lawsuit was barred by WIS. STAT. § 893.80(1)(a). Under § 893.80(1)(a),

no action may be brought or maintained against any governmental subdivision unless written notice of the circumstances of the claim is served on the governmental subdivision within 120 days of the happening of the event giving rise to the claim. The Moracks assert that they provided notice of claim within 120 days of a continuing nuisance event.

¶11 The continuing-violations doctrine does not apply to the notice-of-claim statute under Wisconsin law. *See* ***E-Z Roll Off, LLC v. County of Oneida***, 2011 WI 71, ¶46, 335 Wis. 2d 720, 800 N.W.2d 421. "The manifest intent of the legislature in WIS. STAT. § 893.80 is not to expose governmental entities to potentially infinite periods of liability." ***Id.***, ¶46 n.16.

¶12 The Moracks also assert that, even if they did not provide the requisite notice, their action is not barred because the Town had actual notice such that it was not prejudiced by the lack of formal notice. *See* WIS. STAT. § 893.80(1)(a). We disagree.

¶13 It is the plaintiff's burden to prove both actual notice and that the governmental entity was not prejudiced by the failure to comply with the formal notice requirements of WIS. STAT. § 893.80(1). ***E-Z Roll Off, LLC***, 335 Wis. 2d 720, ¶¶17-18. Whether he or she has done so is a question of law. ***Olson v. Township of Spooner***, 133 Wis. 2d 371, 379, 395 N.W.2d 808 (Ct. App. 1986).

¶14 WISCONSIN STAT. § 893.80(1) is designed to ensure that the governmental entity will have enough information about the plaintiff's injury, either formally by a 120-day notice or by actual notice sufficient to avoid prejudice from the lack of formal notice, so as to be able to fully investigate "the circumstances giving rise to a claim." ***Elkhorn Area Sch. Dist.***, 110 Wis. 2d at 5. "An irreducible minimum of this enough-information requirement is that the

governmental entity know the 'type of damage alleged to have been suffered by a potential claimant.'" ***Moran v. Milwaukee Cnty.***, 2005 WI App 30, ¶7, 278 Wis. 2d 747, 693 N.W.2d 121 (citation omitted).

¶15 The circuit court concluded that the Town did not have actual notice that the Moracks would file a claim. The court was persuaded by the undisputed fact that in 1999, the Town "drew the line in the sand that said … come on, show us what you got…. [I]f you got it, then file it," such that the failure to file at that point was akin to "negative notice, okay, we really don't have [a case]."

¶16 Even accepting that the talk of litigation over the years was not idle saber-rattling, it is inescapable that the Town was prejudiced by the passage of time. "Prejudice" is the inability to adequately defend a claim. ***Olson***, 133 Wis. 2d at 380. One purpose of WIS. STAT. § 893.80 is to ensure that the governmental unit has sufficient opportunity to escape prejudice by promptly investigating claims. ***Olson***, 133 Wis. 2d at 380. Another is to afford the governmental body the opportunity to compromise and budget for potential settlement or litigation. ***E-Z Roll Off, LLC***, 335 Wis. 2d 720, ¶46.

¶17 For a whole decade after advising the Moracks to file a claim, the Town continued to work with the Moracks to improve the storm water system's design. The Town "chang[ed] plans, [made] more changes in landscaping" and took the "substantial act" of releasing the letters of credit it held against the Whispering Hills development to ensure adequate funding for remedial measures. Had the Moracks acted more promptly, the Town may have been able to mitigate damages. Indeed, the damage to the Moracks' own property may have been less. By the time the Moracks filed their notice of claim in 2009, the developer was dead, his company was bankrupt and some of the Town Board's personnel had

changed. The Moracks have not proved that the Town suffered "no prejudice" from the lack of timely formal notice. *See* ***id.***, ¶49. As we have said before, we do not enthusiastically endorse the harsh consequences produced by the requirements of WIS. STAT. § 893.80, but we are not free to ignore the plain meaning of a legislative enactment. *See* ***Elkhorn Area Sch. Dist.***, 110 Wis. 2d at 6-7.

By the Court.—Order affirmed.

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