COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP140 **Cir. Ct. No. 2016CV122**

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

THE YACHT CLUB AT SISTER BAY CONDOMINIUM ASSOCIATION, INC.,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF SISTER BAY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Door County: D. T. EHLERS, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. The Yacht Club at Sister Bay Condominium Association, Inc. (the Association) appeals an order granting the Village of Sister Bay's motion to dismiss. The circuit court concluded the Village was entitled to dismissal of the Association's claims because: (1) the Association failed to provide a written notice of injury within the 120-day period set forth in WIS. STAT. § 893.80(1d)(a) (2015-16);[1] and (2) the Association failed to present evidence indicating that the Village was not prejudiced by the Association's failure to timely provide a written notice of injury.

¶2 We agree with the circuit court that the Association failed to provide the Village with a timely written notice of injury, as required by WIS. STAT. § 893.80(1d)(a). However, the court erred by determining, in the context of a motion to dismiss, that the Association was required to present evidence regarding lack of prejudice. We also reject the Village's alternative argument that dismissal was proper because the Association failed to show that it filed an itemized statement of the relief it sought, as required by § 893.80(1d)(b). Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

¶3 The following facts are taken from the Association's complaint and are accepted as true for purposes of this appeal. *See* ***John Doe 1 v. Archdiocese of Milwaukee***, 2007 WI 95, ¶2 n.2, 303 Wis. 2d 34, 734 N.W.2d 827. The Yacht Club at Sister Bay is a private condominium complex that is located in the Village

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

and administered by the Association. In 2013, the Village received a donation pledge from an anonymous individual, who stipulated the Village was to use the money to construct a performance pavilion in a public park adjacent to the Association's property. The Village accepted the pledge and began construction of the pavilion. The pavilion was designed to house a "band shell," including a stage and sound amplification equipment, and was also designed so that the structure itself would naturally amplify any noise coming from the stage.

¶4 Construction of the pavilion was completed on or about August 1, 2014, and the Village began hosting public performances at the pavilion "immediately" thereafter. These events "typically included live music performances" and often "ran well until after official park hours," occasionally as late as midnight. The performances "create[d] very loud noise, the sound of which [was] directly aimed at" the Association's property. The noise, which "can be heard by all residents and tenants" of the Association, is continuous, penetrates closed doors and windows, and is often "loud enough to cause windows and personal property to shake and shudder."

¶5 The Association attempted "to amicably resolve these issues with the Village," but the Village "consistently ignored [the Association's] pleas for assistance and remediation." Accordingly, the Association "served the Village with Notice of Claim pursuant to [WIS. STAT.] § 893.80(1d) on March 7, 2016." Copies of the March 7, 2016 notice and the certificate of service were attached to the Association's complaint.

¶6 The Association claimed the "noise pollution" generated by concerts at the performance pavilion constituted both a public and a private nuisance. As relief, the Association requested: (1) damages to compensate it for any loss in the

value of its property; (2) damages to compensate it for the "substantial annoyance and invasion it has and will continue to suffer during future operations"; and (3) an injunction "abating the nuisance-causing activities at the performance pavilion."

¶7 The Village answered the Association's complaint and asserted as an affirmative defense that the Association's claims "may be subject to the limitations, requirements and immunities contained within WIS. STAT. § 893.80, including notice and monetary caps therein." The Village also moved to dismiss the Association's complaint for failure to state a claim. As grounds for its motion, the Village argued the Association had failed to serve a written notice of injury on the Village within the 120-day period set forth in WIS. STAT. § 893.80(1d)(a). The Village also argued dismissal was warranted because the Association "never filed an itemized statement of relief sought as required by § 893.80(1d)(b)." In support of its motion, the Village filed an affidavit of Christy Sully, an employee of the Village clerk's office. Sully averred that, aside from the March 7, 2016 notice that was attached to the Association's complaint, the Association had not served any other notice of its claims on the Village or an itemized statement of the relief it sought.

¶8 In response to the Village's motion, the Association argued its March 7, 2016 notice was timely filed because the Village's ongoing use of the pavilion constituted a continuing nuisance. The Association also observed that, even where a claimant fails to provide the requisite written notice within 120 days of the event giving rise to its claim, the claim may proceed if the defendant had actual notice of the claim and was not prejudiced by the plaintiff's failure to timely provide the required written notice. In addition, the Association asserted the written notice it provided to the Village fulfilled the requirement in WIS. STAT. § 893.80(1d)(b) that a claimant provide an itemized statement of the relief sought.

The Association also moved to strike Sully's affidavit, asserting the circuit court could not consider materials outside the complaint when ruling on the Village's motion to dismiss.

¶9 Following oral argument, the circuit court granted the Village's motion and entered an order dismissing the Association's claims with prejudice. As an initial matter, the court denied the Association's motion to strike Sully's affidavit. The court asserted the Association had failed to "cite any authority for" the proposition that a court may not consider material outside the complaint when ruling on a motion to dismiss, and the court had not "seen any law that that is the circumstance."

¶10 The circuit court next concluded, based on the allegations in the Association's complaint and the attached documents, that the Association had failed to provide the Village with a written notice of injury within 120 days after the event giving rise to its claims, as required by WIS. STAT. § 893.80(1d)(a). The court noted the complaint alleged that the performance pavilion was completed in August 2014 and the Village began holding concerts in it almost immediately thereafter. However, the Association's notice of injury was not served on the Village until March 7, 2016—approximately nineteen months later. On these facts, the court concluded the notice of injury was untimely.

¶11 The court then considered whether the Association's claims could nevertheless proceed because the Village had actual notice of the claims and was not prejudiced by the Association's delay in providing the required written notice. After assuming without deciding that the Village had actual notice of the Association's claims, the court indicated the Association had "the burden to … set forth specific facts showing that there has been no prejudice to the [Village]." The

court concluded the Association had failed to meet its burden because there was "nothing in this record regarding a showing by [the Association] how the Village has not been prejudiced."

DISCUSSION

¶12 Whether a complaint states a claim upon which relief can be granted is a question of law that we review independently. *See* ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." ***Id.***, ¶19 (quoting ***John Doe 1***, 303 Wis. 2d 34, ¶12). When reviewing a circuit court's decision on a motion to dismiss for failure to state a claim, we accept the facts alleged in the complaint as true and draw all reasonable inferences from those facts in the plaintiff's favor. *See* ***id.***, ¶¶18-19. To withstand a motion to dismiss, a complaint must allege facts that, if true, "plausibly suggest a violation of applicable law." ***Id.***, ¶21.

¶13 Here, the Village's motion to dismiss asserted the Association's complaint failed to state a claim upon which relief could be granted because the Association did not comply with the notice requirements set forth in WIS. STAT. § 893.80(1d). Subsection (1d) contains "two related but distinct" notice requirements. *See* ***Townsend v. Neenah Joint Sch. Dist.***, 2014 WI App 117, ¶21, 358 Wis. 2d 618, 856 N.W.2d 644.

¶14 First, WIS. STAT. § 893.80(1d)(a) imposes a "notice of injury" requirement. *See* ***Townsend***, 358 Wis. 2d 618, ¶21. Pursuant to that requirement, "no action may be brought or maintained" against certain listed governmental bodies unless the plaintiff served "written notice of the circumstances of the claim" on the defendant "[w]ithin 120 days after the happening of the event giving

rise to the claim." Sec. 893.80(1d)(a). However, "[f]ailure to give the requisite notice shall not bar action on the claim if the [defendant] 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." ***Id.***

¶15 Second, WIS. STAT. § 893.80(1d)(b) imposes a "notice of claim" requirement. *See* ***Townsend***, 358 Wis. 2d 618, ¶21. Under that requirement, a claimant must present "[a] claim containing the address of the claimant and an itemized statement of the relief sought," to the clerk of the relevant governmental body, and the governmental body must then disallow the claim before the claimant may file suit. Sec. 893.80(1d)(b); *see also* ***Townsend***, 358 Wis. 2d 618, ¶26.

¶16 The Village argues the circuit court properly concluded the Association failed to comply with the "notice of injury" requirement in WIS. STAT. § 893.80(1d)(a) because the Association did not timely serve a written notice of injury on the Village and because the Association did not present evidence regarding lack of prejudice. The Village also argues dismissal was warranted because the Association failed to file an itemized statement of the relief it sought, as required by § 893.80(1d)(b). We address these arguments in turn.

I. Notice of injury

A. Written notice of injury

¶17 The Association's complaint alleged that construction of the performance pavilion was completed on or about August 1, 2014, and the Village began hosting performances at the pavilion "immediately" thereafter. The complaint further alleged, and the attached documents confirmed, that the Association did not serve a notice of injury on the Village regarding the

performances until March 7, 2016—approximately nineteen months later. On these facts, the circuit court found the notice of injury was not served within 120 days of the "event" giving rise to the Association's claims—i.e., the first concert held at the pavilion. *See* WIS. STAT. § 893.80(1d)(a).

¶18 The Association contends the circuit court erred because, "[i]n the context of a continuing nuisance, each repeat is a new nuisance." In other words, the Association argues each nuisance-causing performance at the pavilion was a new "event," for purposes of WIS. STAT. § 893.80(1d)(a), "allowing a new opportunity to file a formal notice of [injury]."

¶19 This argument fails for two reasons. First, the notice of injury attached to the Association's complaint asserted the "last use of the pavilion occurred on or about September 1, 2015." Even assuming the concert on that date constituted a new "event" for purposes of WIS. STAT. § 893.80(1d)(a), the Association would have been required to serve a notice of injury regarding that concert by December 30, 2015. The Association's notice of injury was not served until March 7, 2016, and was therefore untimely, even with respect to the September 1, 2015 concert.

¶20 Second, and more importantly, our supreme court's decision in ***E–Z Roll Off, LLC v. County of Oneida***, 2011 WI 71, 335 Wis. 2d 720, 800 N.W.2d 421, forecloses the Association's argument that each nuisance-causing use of the pavilion constitutes a new "event" for purposes of WIS. STAT. § 893.80(1d)(a). E−Z Roll Off was one of several companies that hauled waste to Oneida County's solid waste facility. ***E–Z Roll Off***, 335 Wis. 2d 720, ¶4. In June 2003, the County executed an agreement with Waste Management, another waste hauler, under which the County agreed to charge Waste Management a significantly lower

tipping fee for waste delivered to the facility than it charged other haulers, including E–Z Roll Off. ***Id.***, ¶5. Although E–Z Roll Off indisputably learned of the agreement by February 2004, at the latest, ***id.***, ¶6, it did not file a notice of injury until September 28, 2005—more than 120 days later, ***id.***, ¶10.

¶21 On appeal, E–Z Roll Off argued that "each time it paid a higher tipping fee than Waste Management, a new cause of action accrued," permitting E–Z Roll Off to file a new notice of injury under WIS. STAT. § 893.80(1d)(a). ***E–Z Roll Off***, 335 Wis. 2d 720, ¶44. E–Z Roll Off argued its September 28, 2005 notice of injury was therefore timely because it was served within 120 days after E–Z Roll Off had paid a higher tipping fee than Waste Management. ***Id.*** E–Z Roll Off relied on the "continuing violation doctrine" from federal antitrust law, which holds that "each time a plaintiff is injured by an act of the defendant a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." ***Id.***, ¶45 (quoting ***Zenith Radio Corp. v. Hazeltine Research, Inc.***, 401 U.S. 321, 338 (1971)).

¶22 Our supreme court rejected E–Z Roll Off's argument that a new "event" occurred, for purposes of WIS. STAT. § 893.80(1d)(a), each time E–Z Roll Off paid a higher tipping fee than Waste Management. The court noted E–Z Roll Off had failed to cite any authority applying the continuing violation doctrine to the notice requirements in § 893.80(1d)(a). ***E–Z Roll Off***, 335 Wis. 2d 720, ¶46. The court further explained:

> More importantly, E–Z also ignores a purpose of the notice of claim statute, which is to afford governmental entities the opportunity to compromise and budget for potential settlement or litigation. If the continuing violations doctrine were to apply, it would be much more difficult for governmental entities to budget for potential litigation. For

> example, under E–Z's theory, a cause of action would accrue to E–Z each time it paid a higher tipping fee during the 10–year length of Oneida County's agreement with Waste Management. The legislature did not intend for governmental entities to be exposed to indefinite periods of liability for potential violations of [a state antitrust statute]. Such a result would be unreasonable given the purposes of the notice of claim requirements found in § 893.80.

E–Z Roll Off, 335 Wis. 2d 720, ¶46 (citation and footnotes omitted).

¶23 ***E–Z Roll Off*** demonstrates that, when a plaintiff alleges claims against a governmental entity based on a continuing course of conduct, each act in that course of conduct does not constitute a new "event," for purposes of WIS. STAT. § 893.80(1d)(a), affording the plaintiff a new opportunity to file a notice of injury. Applying ***E–Z Roll Off***'s holding to this case mandates a conclusion that the Association was not permitted to file a new notice of injury each time the Village held a nuisance-causing concert at the performance pavilion.

¶24 The Association argues ***E–Z Roll Off*** does not apply to this case because it involved antitrust claims, rather than nuisance claims. The Association suggests a different rule should apply for nuisance claims because municipalities have a duty to abate nuisances, *see* ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, ¶33, 350 Wis. 2d 554, 835 N.W.2d 160, and because every continuance of a nuisance constitutes a new nuisance, *see* ***Kull v. Sears, Roebuck & Co.***, 49 Wis. 2d 1, 9, 181 N.W.2d 393 (1970). We disagree.

¶25 Our supreme court noted in ***E–Z Roll Off*** that one of the purposes of WIS. STAT. § 893.80(1d)(a) is to "afford governmental entities the opportunity to compromise and budget for potential settlement or litigation." ***E–Z Roll Off***, 335 Wis. 2d 720, ¶46. The court observed that, if each act in a governmental entity's course of conduct gave a claimant a new opportunity to file a notice of injury, it

would be "much more difficult for governmental entities to budget for potential litigation." ***Id.*** Requiring the claimant to file a notice of injury within 120 days of the beginning of the government's allegedly unlawful course of conduct provides the government with the opportunity to investigate and limit claimed problematic conduct early on and prevents the government from being exposed to "indefinite periods of liability." *See* ***id.*** These considerations are as significant in a case involving nuisance claims—where, as the Association argues, each continued nuisance is a new nuisance—as they are in a case involving alleged antitrust violations. We therefore reject the Association's argument that ***E–Z Roll Off***'s holding is inapplicable here.

B. Actual notice and lack of prejudice

¶26 As noted above, failure to timely serve a written notice of injury on a governmental entity does not bar a plaintiff's claim if the defendant had actual notice of the claim and the plaintiff shows that any delay or failure to give the required written notice did not prejudice the defendant. WIS. STAT. § 893.80(1d)(a). Here, the circuit court assumed without deciding that the Village had actual notice of the Association's claim, but it concluded the Association had failed to "meet its burden showing lack of prejudice to the [Village]." We agree with the Association that the circuit court erred by requiring it to present evidence regarding lack of prejudice in response to the Village's motion to dismiss.

¶27 The operative issue on a motion to dismiss for failure to state a claim is whether the allegations in the plaintiff's complaint, if true, are legally sufficient to state a claim on which relief can be granted. *See* ***Data Key Partners***, 356 Wis. 2d 665, ¶19. It is well-established that a plaintiff asserting a claim against a governmental entity need not allege compliance with WIS. STAT. § 893.80(1d)(a)

in his or her complaint. *See* ***Weiss v. City of Milwaukee***, 79 Wis. 2d 213, 227, 255 N.W.2d 496 (1977); ***Rabe v. Outagamie Cty.***, 72 Wis. 2d 492, 498, 241 N.W.2d 428 (1976).[2] Instead, failure to comply with the notice requirements in § 893.80(1d)(a) "is to be pleaded as a defense by the governmental agency." ***Rabe***, 72 Wis. 2d at 498; *see also* ***Weiss***, 79 Wis. 2d at 228. The Association's failure to allege actual notice and lack of prejudice in its complaint therefore provided no basis to dismiss the complaint for failure to state a claim.

¶28 After a defendant raises a plaintiff's lack of compliance with WIS. STAT. § 893.80(1d)(a) as an affirmative defense, the plaintiff has the burden to prove "the giving of notice or actual notice and the nonexistence of prejudice." ***Weiss***, 79 Wis. 2d at 227. However, the plaintiff is not required to meet that burden in order to survive a motion to dismiss for failure to state a claim. Once again, the operative issue on a motion to dismiss is whether the allegations in the complaint "plausibly suggest" the plaintiff is entitled to relief. *See* ***Data Key Partners***, 356 Wis. 2d 665, ¶21. A plaintiff is not required to allege compliance with § 893.80(1d)(a) in his or her complaint in order to state a claim on which relief can be granted, *see* ***Weiss***, 79 Wis. 2d at 227, and a circuit court may not consider matters outside the complaint when ruling on a motion to dismiss. *See* ***Data Key Partners***, 356 Wis. 2d 665, ¶19.[3] Thus, while the Association will

[2] ***Weiss v. City of Milwaukee***, 79 Wis. 2d 213, 255 N.W.2d 496 (1977), and ***Rabe v. Outagamie County***, 72 Wis. 2d 492, 241 N.W.2d 428 (1976), refer to WIS. STAT. § 895.43, which was subsequently renumbered WIS. STAT. § 893.80. *See* 1979 Wis. Laws, ch. 323, § 29.

[3] If matters outside the pleadings "are presented to and not excluded by the court" on a motion to dismiss for failure to state a claim, the motion "shall be treated as one for summary judgment and disposed of as provided in s. 802.08." WIS. STAT. § 802.06(2)(b). The court must then give all parties "reasonable opportunity to present all material made pertinent to such a motion by s. 802.08." Sec. 802.06(2)(b). The circuit court did not follow this procedure.

ultimately have the burden to prove actual notice and lack of prejudice, the Association did not have the burden to produce evidence regarding those issues at the motion-to-dismiss stage.

¶29 Notably, whether the Village had actual notice of the Association's claims and whether the Village was prejudiced are mixed questions of fact and law. *See* ***E–Z Roll Off***, 335 Wis. 2d 720, ¶¶17-18. In ***E–Z Roll Off***, our supreme court quoted with approval the circuit court's statement that actual notice and lack of prejudice are "intensive factual inquiries that will likely require extensive discovery." ***Id.***, ¶52. Here, during the hearing on the Village's motion to dismiss, the Association correctly noted that actual notice and lack of prejudice are "fact-based inquiries," and it therefore requested an evidentiary hearing on those issues. The circuit court concluded an evidentiary hearing was unnecessary, but it then dismissed the Association's claims on the grounds that the Association had not met its "burden" to demonstrate a lack of prejudice.

¶30 In support of its decision not to hold an evidentiary hearing, the circuit court relied on ***E–Z Roll Off***, in which our supreme court agreed with the lower court that the plaintiff had "set forth no facts showing that [the defendant] suffered no prejudice" and had provided "no evidentiary citation" for its prejudice argument. ***Id.***, ¶50. Under these circumstances, the supreme court concluded the plaintiff had not met its burden "to produce evidence that the delayed notice of claim did not harm [the defendant's] ability to adequately defend its case." ***Id.***, ¶51. However, ***E–Z Roll Off*** involved a motion for summary judgment, rather than a motion to dismiss. *See* ***id.***, ¶12. Accordingly, it does not support a

conclusion that, in this case, the Association was required to present evidence regarding lack of prejudice at the motion-to-dismiss stage.[4]

II. Itemization of relief sought

¶31 In the alternative, the Village argues the Association's claims were properly dismissed because the Association failed to comply with the notice of claim requirement in WIS. STAT. § 893.80(1d)(b). Specifically, the Village argues the Association never filed an "itemized statement of the relief sought." *See* § 893.80(1d)(b).

¶32 We agree with the Village that the March 7, 2016 notice attached to the Association's complaint does not contain an itemized statement of the relief sought, for purposes of WIS. STAT. § 893.80(1d)(b). As the Village correctly observes, in order to satisfy the itemized statement requirement, a claimant must provide "a specific dollar amount." ***DNR v. City of Waukesha***, 184 Wis. 2d 178, 199, 515 N.W.2d 888 (1994) (citing ***Sambs v. Nowak***, 47 Wis. 2d 158, 165, 177 N.W.2d 144 (1970)), *abrogated on other grounds by* ***State ex rel. Auchinleck v. Town of LaGrange***, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996). This requirement applies whenever a claimant asserts a claim for compensatory

[4] The Village relies on a single case—***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 530 N.W.2d 16 (Ct. App. 1995)—in support of its argument that the Association was required to present evidence regarding lack of prejudice at the motion-to-dismiss stage. Admittedly, the ***Vanstone*** court affirmed the circuit court's order granting the Town's motion to dismiss, reasoning the Vanstones had "never demonstrated the nonexistence of prejudice to the Town." ***Id.*** at 597. However, the ***Vanstone*** court's conclusion in that regard appears to be inconsistent with the principles that: (1) a plaintiff is not required to plead compliance with WIS. STAT. § 893.80(1d)(a) in his or her complaint; and (2) a court may not consider matters outside the complaint when deciding a motion to dismiss. More importantly, there is no indication that the Vanstones challenged the circuit court's decision on the grounds that the court improperly required them to present evidence regarding lack of prejudice at the motion-to-dismiss stage. The Association has indisputably raised that argument in the instant case.

damages, even if that claim is joined with other claims seeking injunctive relief. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 596, 530 N.W.2d 16 (Ct. App. 1995); *see also* ***Figgs v. City of Milwaukee***, 121 Wis. 2d 44, 52-53, 357 N.W.2d 548 (1984). Here, the March 7, 2016 notice stated that, if the Village failed to remediate the noise pollution caused by concerts at the pavilion, the Association would file a lawsuit seeking "declaratory or injunctive relief, and damages sustained by the Association as a result of the Village's actions or omissions." The notice did not provide any indication as to the amount of the Association's damages.

¶33 Although we agree with the Village that the Association's March 7, 2016 notice did not contain an itemized statement of relief sufficient to satisfy WIS. STAT. § 893.80(1d)(b), we reject the Village's argument that the Association's claims were properly dismissed for failure to comply with that statute. The March 7, 2016 notice appears to have been intended as a "notice of injury" under § 893.80(1d)(a).[5] The "notice of claim" required by § 893.80(1d)(b) may be filed separately from the "notice of injury" required by § 893.80(1d)(a). *See* ***Vanstone***, 191 Wis. 2d at 593. There is no time limit for filing a notice of claim under § 893.80(1d)(b), *see* ***Vanstone***, 191 Wis. 2d at 593, although it must be filed and the claim disallowed before the claimant may file suit, *see* ***E–Z Roll Off***, 335 Wis. 2d 720, ¶20.

¶34 There is nothing in the Association's complaint to indicate whether, aside from the March 7, 2016 notice of injury, the Association filed a separate

[5] The March 7, 2016 notice purports to be a "notice of circumstances" filed under "section 893.80(1)(a) of the Wisconsin Statutes." WISCONSIN STAT. § 893.80(1)(a) was renumbered § 893.80(1d)(a) in 2012. *See* 2011 Wis. Act 162, § 1g.

notice of claim containing the required itemized statement of relief before it filed suit against the Village. The Village cites no authority for the proposition that the Association was required to affirmatively allege compliance with § 893.80(1d)(b) in its complaint. Under these circumstances, we cannot conclude dismissal of the Association's complaint was warranted based on the Association's alleged failure to file an itemized statement of relief. If allowed to present evidence, which it could not do at the motion-to-dismiss stage, the Association may be able to show that it provided an itemized statement to the Village separate from its March 7, 2016 notice of injury.[6]

¶35 No WIS. STAT. RULE 809.25(1) costs are awarded to either party.

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

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

[6] In support of its motion to dismiss, the Village submitted Sully's affidavit, which indicated the Association did not provide any notice of injury or claims to the Village aside from its March 7, 2016 notice of injury. However, a court may not consider matters outside the complaint when ruling on a motion to dismiss for failure to state a claim. *See* ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. If a court does consider extrinsic materials, it must treat the motion to dismiss as a motion for summary judgment and provide all parties with an opportunity to prevent relevant materials. *See* WIS. STAT. § 802.06(2)(b). As noted above, the circuit court did not follow this procedure in the present case. In fact, the court denied the Association's request to present evidence in opposition to the Village's arguments.