COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3038

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

RHONDA BROWN, DECEDENT, AND CYNTHIA BROWN, INDIVIDUALLY AND AS THE SPECIAL REPRESENTATIVE OF THE ESTATE OF RHONDA BROWN,

PLAINTIFFS,

V.

CURTIS-UNIVERSAL INC., CURTIS AMBULANCE AND ACCEPTANCE INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

CITY OF MILWAUKEE,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Reversed.*

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

PER CURIAM. Curtis-Universal, Incorporated, Curtis Ambulance and Acceptance Insurance Company appeal from the trial court's order dismissing their third-party contribution claim against the City of Milwaukee.[1] Curtis argues that the trial court erred in determining that its contribution claim against Milwaukee is subject to the notice of claim statute, § 893.80, STATS. We conclude that § 893.80 does not apply to Curtis's contribution claim. We therefore reverse.

BACKGROUND

On March, 4, 1994, Rhonda Brown died at a Milwaukee hospital, after being transported there by personnel of Curtis Ambulance. The Milwaukee police accompanied Brown and the ambulance personnel on the trip to the hospital because Brown allegedly had overdosed on cocaine and was behaving violently. The police allegedly placed Brown in restraints, and then placed her face-down on the ambulance stretcher to help control her violent thrashing. En route to the hospital, Brown experienced respiratory distress, and although she was revived at the hospital, Brown died the next day.

On February 26, 1997, Brown's mother, individually and as the special representative of Brown's estate, filed an action against Curtis, seeking to hold Curtis liable for Brown's death.[2] On May 23, 1997, Curtis filed a third-party complaint against the City of Milwaukee, seeking contribution from the City if Curtis and the City were found to be jointly liable for Brown's death.

[1] Throughout this opinion, Curtis-Universal Incorporated, Curtis Ambulance and Acceptance Insurance Company will be referred to collectively as "Curtis."

[2] The complaint was amended on June 26, 1997, to add Brown's daughter as a plaintiff.

On July 16, 1997, the City filed a motion to dismiss Curtis's third-party contribution complaint on the ground that Curtis had failed to file a notice of claim pursuant to § 893.80, STATS. The trial court granted the motion, and on September 18, 1997, dismissed Curtis's claim against the City.

DISCUSSION

Section 893.80, STATS., provides, in relevant part:

> **Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits. (1)** …[N]o action may be brought or maintained against any … political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe 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 employe 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 … corporation, subdivision or agency or to the defendant officer, official, agent or employe; and
>
> (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 … corporation, subdivision or agency and the claim is disallowed.

Curtis argues that the trial court erred in determining that its contribution claim against Milwaukee is subject to this notice of claim statute. Curtis contends that, under ***Ainsworth v. Berg***, 253 Wis. 438, 34 N.W.2d 790 (1948), *mandate*

modified, 253 Wis. 438, 35 N.W.2d 911 (1949), and ***Coulson v. Larsen***, 94 Wis.2d 56, 287 N.W.2d 754 (1980), contribution claims against the City of Milwaukee are not subject to the notice of claim statute. We agree.

In ***Coulson***, the issue presented was "whether a third-party claim against state employees for contribution as joint tortfeasors should be dismissed because no notice was served on the Attorney General pursuant to sec. 895.45, Stats." ***Coulson***, 94 Wis.2d at 57, 287 N.W.2d at 755. The notice of claim statute addressed in ***Coulson*** provided, in relevant part:

> "No civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of such officer's, employe's or agent's duties, unless within 90 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved."

Id., 94 Wis.2d at 58, 287 N.W.2d at 756 (citation omitted). The supreme court held that the foregoing statute "does not contemplate claims for contribution and that the time limitation which the section imposes is inappropriate for contribution claims." ***Id.***, 94 Wis.2d at 59, 287 N.W.2d at 756. The court explained:

> Although the cause of action for contribution has its roots in the underlying incident which gives rise to the personal injury, this court has said that a cause of action for contribution is separate and distinct from the underlying cause of action. The cause of action for contribution accrues–becomes a right enforceable in a court action–when one of the joint tortfeasors pays more than his proportionate share of the damages.

Id., 94 Wis.2d at 59–60, 287 N.W.2d at 756 (citation omitted). Here, Curtis was not sued by the plaintiffs until almost three years after "the happening of the event," *see* § 893.80(1)(a), STATS.; accordingly, it could not have given notice to the City "[w]ithin 120 days after the happening of the event giving rise" to Curtis's contribution "claim" against the City, *see* ***ibid***. Statutes must be applied with a modicum of common sense. *See* ***Kania v. Airborne Freight Corp.***, 99 Wis.2d 746, 766, 300 N.W.2d 63, 71 (1981). To impose the 120-day limitation in § 893.80(1)(a) to bar Curtis's claim, which did not arise until well after the 120 days had expired, would violate that rule. We therefore conclude that Curtis's claim for contribution is not subject to the 120-day limitation in § 893.80.

By the Court.—Order reversed.

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