COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1934 **Cir. Ct. No. 2013CV190**

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

KAY MESSLING AND RUSSELL MESSLING,

PLAINTIFFS-APPELLANTS,

V.

IOWA-GRANT SCHOOL DISTRICT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Reversed and cause remanded with directions*.

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. This case involves an incentive that the Iowa-Grant School District offered to one of its long-time teachers, Kay Messling, to encourage her to retire early. It appears to be undisputed that the District offered Kay this incentive so that the District could save money by replacing Kay

with a lower paid teacher. Kay accepted the offer and retired. The Messlings allege that, after Kay retired, the District failed to fully deliver on a promised incentive, set forth in a Memorandum of Understanding (MOU), relating to health care expenses.

¶2 Both parties moved for summary judgment based on competing interpretations of the meaning of the MOU. The circuit court agreed with the District's interpretation and, under that interpretation, it was undisputed factually that the District did not violate the agreement. Accordingly, the circuit court granted summary judgment in favor of the District. On this topic, we reverse the circuit court. As explained below, the Messlings prevail because they present a reasonable plain meaning interpretation of the disputed MOU language and the District does not. Under that plain meaning interpretation, it is undisputed that the District breached the agreement.

¶3 On appeal the District renews its alternative argument that it is entitled to summary judgment because the notice of claim requirements set forth in WIS. STAT. § 893.80(1d)(a) (2013-14)[1] were not satisfied. The circuit court failed to address this threshold topic. We address this topic on appeal because the material facts on this topic are undisputed and the question whether the District had actual notice sufficient to satisfy § 893.80(1d)(a) is easily answered based on the evidence submitted by the parties on summary judgment. Thus, as explained below, we conclude that the District had reasonably prompt actual notice of the Messlings' claims, and that the Messlings have carried their statutorily imposed

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

burden of demonstrating that the District was not prejudiced by the fact that the Messlings failed to serve the District with written notice within 120 days of when the claim arose. Accordingly, we reverse summary judgment in favor of the District and remand with directions that the circuit court enter summary judgment in favor of the Messlings and determine damages consistent with this opinion.

BACKGROUND

¶4 Kay Messling was employed by the District as a school teacher. In June 2007, at age 60, Kay retired pursuant to an agreement that included the early retirement incentive at issue here. The incentive was set forth in a MOU, an agreement between Kay and the District. In part, the MOU provided that Kay would receive "family health and medical insurance with premiums fully paid by the [District] from September 1, 2007 through August 31, 2015." This and other language, according to the Messlings, amounted to a promise that Kay would receive health insurance benefits until August 31, 2015, as if she had not retired until that date.

¶5 At the time of Kay's retirement in 2007, the District's insurance provider was WEA Trust. In 2010, the District changed providers to Dean Health Plan (Dean). In 2011, providers changed again to CESA 3 Consortium (CESA). The CESA plan, beginning in January 2012, was a dual choice plan that allowed participants to elect either Dean Health Plan or Medical Associates of Dubuque as their provider. Kay carried her husband, Russell, on her family insurance plan with Dean Health Plan.

¶6 Sometime in late 2011 or early 2012, Kay learned that the District was no longer treating Kay as if she was a non-retired employee for health insurance purposes. According to the Messlings, they began to incur expenses

they would not have incurred had the District continued to report Kay to Dean as non-retired.

¶7 In December 2013, the Messlings filed a breach of contract claim against the District alleging that the District failed to comply with the terms of the MOU. The Messlings and the District filed cross-motions for summary judgment. In its motion for summary judgment, the District contended that the Messlings failed to provide the District with timely written notice of their breach of contract claim, as required by WIS. STAT. § 893.80(1d)(a), and that the District fully complied with the terms of the MOU. In response, the Messlings contended that they provided actual notice to the District within the requirements of § 893.80(1d)(a), including that the District was not prejudiced by the Messlings failure to provide written notice of their claim. Without explanation, the court did not address the threshold notice of claim issue. Instead, the circuit court granted the District's motion for summary judgment on the MOU issue. The court also denied the Messlings' motion for summary judgment. Kay appeals.

DISCUSSION

I. Breach of Contract

A. Applicable Standards of Review and Principles of Law

¶8 We review a circuit court's grant of summary judgment using the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate if the record reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See, e.g.*, ***Lambrecht v. Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶9 This dispute concerns the proper interpretation of the MOU. "The interpretation of a contract is a question of law that we review independently of the circuit court." ***BV/B1, LLC v. InvestorsBank***, 2010 WI App 152, ¶19, 330 Wis. 2d 462, 792 N.W.2d 622. The goal of contract interpretation is "to determine and give effect to the parties' intention." ***Solowicz v. Forward Geneva Nat'l, LLC***, 2010 WI 20, ¶34, 323 Wis. 2d 556, 780 N.W.2d 111 (quoting another source). If the contractual language is unambiguous, the court is to construe the contract according to its literal terms, ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998), giving terms their plain and ordinary meaning. ***Huml v. Vlazny***, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807. In addition, "[w]hen possible, contract language should be construed to give meaning to every word, 'avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage.'" ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶45, 326 Wis. 2d 300, 786 N.W.2d 15 (quoting another source). Especially pertinent here, "[c]ontractual provisions must be interpreted within the context of the contract as a whole." ***MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust***, 2015 WI 49, ¶43, 362 Wis. 2d 258, 864 N.W.2d 83.

B. Meaning of MOU

¶10 As we have seen, the MOU dispute concerns an incentive that the District offered to Kay to encourage her to retire early. Addressing Kay as "you," the MOU agreed to by the parties reads in pertinent part:

> [Y]ou and/or your surviving spouse will receive family health and medical insurance with premiums fully paid by the Iowa-Grant School District from September 1, 2007 through August 31, 2015.

> The insurance coverage will be under the same plan as is provided to the [union] members[2] at the same time and you will be carried on the District's census as an active employee until August 31, 2015. Should there be any changes in policy conditions, such as deductibles, covered conditions, drug card surcharges, etc., the same changes will be applicable to your insurance coverage.

Shortly after this agreement was reached, Kay retired.

¶11 We begin by focusing our attention on the first three clauses of the above block quote:

> (1) "[Y]ou and/or your surviving spouse will receive family health and medical insurance with premiums fully paid by the Iowa-Grant School District from September 1, 2007 through August 31, 2015."
>
> (2) "The insurance coverage will be under the same plan as is provided to the [union] members at the same time."
>
> (3) "[Y]ou will be carried on the District's census as an active employee until August 31, 2015."

¶12 The Messlings argue that, read together, these three clauses plainly say that Kay will receive health care benefits as if she had remained a non-retired union member from her retirement in 2007 through August 31, 2015. We agree that this is a reasonable reading of the language.

¶13 The time frame is clear: "September 1, 2007 through August 31, 2015." The substance of the promise is clear on its face with one exception we discuss below: "[Y]ou and/or your surviving spouse will receive family health and medical insurance with premiums fully paid by the [District]" and "[t]he insurance coverage will be under the same plan as is provided to the [union]

[2] The actual term in the agreement is "IGEAPSSP members." For ease of discussion, we use the phrase "[union] members."

members at the same time." That is, the District plainly agreed to pay Kay's premiums and provide her with the same health care benefits it would provide to "[union] members" during the time frame of the agreement.

¶14 Considered in isolation, the phrase "[union] members" does not plainly refer to currently employed teachers union members. However, there are three reasons why we conclude that "[union] members" means currently employed (i.e., non-retired) union members.

¶15 First, at oral argument we engaged in extensive questioning as to whether "[union] members," as that phrase is used in the MOU, means non-retired members of Kay's teachers union. The District's attorney eventually agreed that, as used here, "[union] members" refers to union members who are currently working for the District.

¶16 Second, the District provides no reasonable alternative meaning. For example, the District never explained what benefit Kay would receive if her "insurance coverage [was] under the same plan as is provided to the [retired union] members." Seemingly, a promise to treat a retiree like a retiree gives nothing. Indeed, counsel for the District was uncertain whether there even is such a thing as a retired union member.[3]

¶17 Third, the proposition that "[union] members" is a reference to non-retired union members is supported by the *mechanism* the District chose to

[3] Counsel for the Messlings stated that it is "entirely possible" a retiree could remain a member of the union. It does not matter whether retirees always or sometimes are union members. Our concern here is the meaning of the phrase "[union] members" *as used in this contract.* And, as we explain in the text, the only reasonable reading of the phrase in this context is that it means non-retired union members.

effectuate its promise to provide Kay with the same health insurance benefits provided to "[union] members." The District promised to carry Kay "on the District's census as an *active employee* until August 31, 2015" (emphasis added). It is undisputed that the term "District's census" means what the words suggest in the context of this part of the MOU addressing health care benefits. In the words of the District's attorney, the census is "a list that the District provides to the health insurance carrier that lists out the different people who are eligible and covered under the District's plan." What remains is the meaning of "active employee." If that term means non-retired employee, then it follows that the clear meaning of this third clause is that it is an agreement by the District to identify Kay to third parties as an active non-retired employee. When we read this third clause in combination with the second "[union] members" clause, it follows that the "[union] members" clause is a promise that Kay will receive health care benefits as if she were a non-retired union member from her retirement in 2007 through August 31, 2015. We next explain, based on the MOU and the record before us, why the only possible conclusion is that "active employee" has its obvious meaning—non-retired employee.[4]

[4] We stress that we do not take a position on whether the MOU actually required the District to misrepresent Kay's retirement status to any third party. We agree with the Messlings that the key to resolving this case is not how the District would go about assuring that Kay received the promised benefits, but rather the correct interpretation of what benefits the MOU promised. For the reasons explained in the text, we resolve that question in favor of the Messlings. We simply observe here that we are unable to resolve the seeming incongruity between, on the one hand, the assertions of the attorneys for both parties that the MOU does not require the District to misrepresent Kay's retirement status and, on the other hand, the plain language of the MOU and other information in the record. At oral argument we asked what it meant to list Kay as an "active employee" on the District's census. The District's attorney could tell us little about the census and nothing specific as to what it means to list a person as an "active employee" on the census, much less point to evidence in the record on this topic. The District's argument suggested, but did not clearly state, that different categories of persons listed on the census are eligible for different benefits. When we attempted to determine whether identifying Kay's status as "active employee" on the census had implications for what benefits Kay was (continued)

¶18 We pause here to make clear the flow of our analysis. Above, we have listed three reasons why we conclude that "[union] members" means currently employed—i.e., non-retired—union members. Our third reason posits that the *mechanism* the District chose to give effect to its promise informs the meaning of the promise and, more particularly, the meaning of "[union] members." The complexity here is that the parties additionally dispute the meaning of a phrase in the language used to describe the mechanism—they dispute the meaning of the phrase "active employee." Accordingly, we turn our attention to that topic.

¶19 The Messlings argue that "active employee" has a plain meaning. We agree. To state the obvious, an active employee is one actively employed and not retired. The District's contrary argument falls flat.

¶20 The District asserts that "active employee" means "eligible employee." But the District provides no authority for the proposition that one reasonable meaning of "active" is "eligible." And, the District points to no surrounding language in the MOU indicating that, in context, "active" means "eligible." That is to say, the District completely fails to explain why "active" does not mean "active" in the sense of actively employed, or why, in context, the term "active" is ambiguous, as the District appears to suggest.

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entitled to, the answers we received from the District went nowhere. The District simply clung to its position that "active employee" simply meant "eligible employee." We are less sure what to make of the explanation provided at oral argument by the Messlings' attorney. The Messlings' attorney took the position that the MOU did not require the District to lie, but his supporting explanation was not cogent, even after oral argument and further review. In sum, there may be technical reasons why listing a retired person on the District's census as "active employee" is not a misrepresentation, but, if so, the parties were unable to explain, in a way that we could understand, why this might be true.

¶21 Rather than explain ambiguity, the District assumes ambiguity, and asks us to consider extrinsic evidence regarding the parties' intended meaning. We could reject this cart-before-the-horse approach out of hand, but we choose to comment on it further based on the extrinsic evidence the District relies on.

¶22 The extrinsic evidence the District points to is the affidavit of District Superintendent Linda Erickson. Looking to this affidavit, the District relies on Erickson's averment that "[t]he District has not historically provided primary coverage to employees and retirees participating in the District's health insurance once they turn 65 and are eligible for Medicare." However, nothing about this statement sheds light on the particular promise made to Kay, much less on the meaning of "active employee." Superintendent Erickson does not suggest that, historically, the promise to treat retirees as "active employees" meant that such employees would simply be "eligible employees," whatever that might mean. In fact, nothing in Erickson's affidavit ties her description of historical practice to the language used by the District to make the promises to Kay in the MOU.

¶23 Indeed, during oral argument the District's attorney conceded: "I guess [Erickson's] affidavit doesn't directly address the term active." Later, in response to the statement, "I think what Judge Higginbotham is saying is that you didn't point to anything in that affidavit that ties this history [Erickson avers] about to the meaning of this contract language," the District's attorney responds, "Fair enough." And, shortly after that, the District's attorney effectively conceded that he could point to nothing else in the record supporting the view that the parties intended the term "active employee" to mean "eligible employee."

¶24 There are other problems with the District's reliance on the Erickson affidavit for supplying meaning to the term "active employee." For example, the

affidavit speaks to how some retirees have been treated with respect to Medicare when they turn 65. But the promise to Kay included the promise to report her as an "active employee" for several years before she turned 65. The District does not explain how Erickson's statement about historical practice with regard to retirees 65 and older gives meaning to the phrase "active employee" as it applies to persons under 65 years of age.

¶25 We could go on. But the bottom line is that nothing in the District's arguments supports a conclusion that the term "active employee" is ambiguous or that, even if there were ambiguity, there is any evidentiary support for interpreting the term to mean "eligible employee."

¶26 Returning to the more general dispute regarding the three clauses we list above, the District repeatedly asserts that its obligation in the MOU was merely to provide family health and medical insurance to the Messlings at the District's expense. *See supra* paragraph 11. But this is nothing more than a summary of the first clause of the promise. The question here is whether the subsequent "[union] members" and "active employee" clauses mean that the District agreed to provide health care benefits to Kay as if she had remained employed by the District until August 31, 2015. As we have demonstrated, on this topic the District's argument breaks down entirely.

¶27 We have thus far addressed the three clauses we separate out in a listing in *supra* paragraph 11. There is an additional clause in the block quote in paragraph 10 above. It reads: "Should there be any changes in policy conditions, such as deductibles, covered conditions, drug card surcharges, etc., the same changes will be applicable to your insurance coverage." According to the District, this clause provides an alternative basis for concluding that the MOU does not

promise to provide Kay with the same health care benefits as non-retired District teachers.

¶28 The District asserts that this language informed Kay that she was subject to "changes in the policy conditions" and the "terms of the insurance coverage." This language leads, so the argument goes, to a Dean document relating to Medicare and the fact that, as to *retirees*, Dean coverage is secondary to Medicare when retirees turn 65. The apparent gist of the argument is that this fourth clause informed Kay that she would be treated like a retired teacher when she turns 65. This argument is seriously flawed.

¶29 Contrary to the repeated assertions by the attorney for the District during oral argument, this argument is not independent of our conclusion with respect to the first three clauses. If those clauses promise that Kay will be treated like a non-retired teacher for purposes of health care benefits, then it makes no sense to say that the fourth clause tells her something different.

¶30 And, as the Messlings argue, the plain meaning of the fourth clause is completely consistent with a promise to treat Kay like a non-retired teacher for purposes of health care benefits. There is no dispute that non-retired teachers are subject to "changes in policy conditions, such as deductibles, covered conditions, drug card surcharges, etc." The fourth clause does nothing more than make clear that future changes affecting non-retired teachers "will be applicable to" Kay.

¶31 Even after several attempts, we were unable to elicit from the District's attorney a cogent explanation as to why the fourth clause provided a stand-alone basis for ruling in favor of the District. We are satisfied that the reason our effort was fruitless is because this "alternative" argument is meritless.

¶32 To sum up, the Messlings present a reasonable plain meaning argument that supports the view that the District promised that Kay would retire early, she would "receive family health and medical insurance with premiums fully paid by the [District]" and "[t]he insurance coverage [would] be under the same plan as is provided to the [non-retired union] members at the same time." Moreover, the District promised that this benefit would last until August 31, 2015. The District's argument, on the other hand, withers under scrutiny. The District fails to present an alternative reasonable reading of the disputed contract language, much less support any alternative reading with a persuasive argument.

C. Damages for the District's Breach

¶33 In briefing and during oral argument, the parties addressed some aspects of the alleged difference between what the District was obligated to provide to Kay and what the District actually provided. At the same time, we understand the parties to agree that factual issues remain with respect to the proper amount of damages owed the Messlings if they ultimately prevail in this litigation. Earlier in this litigation, the Messlings' requested relief included specific performance because the end date of the pertinent part of the MOU, August 31, 2015, was in the future. At oral argument, we clarified that, if this litigation was resolved in the Messlings' favor after that date, the Messlings would be requesting only money damages as measured by health care expenses the Messlings incurred because of the District's failure to abide by the MOU. So far as we understand the damages issue, on remand the circuit court must determine the difference between health care expenses the Messlings actually incurred and the health care expenses they would have incurred if the District had fulfilled its promise that Kay will receive health care benefits as if she had remained a non-retired union member from her retirement in 2007 through August 31, 2015.

II. Notice Requirement Under WIS. STAT. § 893.80(1d)(a)

¶34 As we have indicated, the District moved for summary judgment on two alternate grounds. We addressed above the District's claim that it did not breach the terms and conditions of the MOU. The alternate ground was that the notice requirements of WIS. STAT. § 893.80(1d)(a), governing notice of circumstances of claim on a governmental entity, were not satisfied. The circuit court chose not to address this threshold issue. On appeal, the District does not present any argument on the topic, except to request that, in the event we reverse on the breach of contract claim, we remand for the circuit court to take up the issue. The Messlings asked us at oral argument to resolve this issue based on the evidence submitted on summary judgment before the circuit court.

¶35 Rather than remand, in the interests of judicial efficiency we will resolve the issue because the summary judgment record is before us, we find no material facts in dispute, and the ultimate question is one of law. While the parties have not briefed the topic on appeal, it was briefed and argued before the circuit court and the parties had the opportunity to address it at oral argument on appeal. Having reviewed the evidence submitted on summary judgment, we conclude that there is no dispute that the requirements of the notice of claim statute were satisfied.

¶36 The notice of claim statute at issue in this case can be found at WIS. STAT. § 893.80(1d)(a), which states in pertinent part:

> **(1d)** 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 … 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 … 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 ….

In sum, the Messlings were statutorily required to serve written notice of their claim to the District within 120 days of the event giving rise to the claim. However, failure to do so is not fatal as long as the District had actual notice of the claim and the Messlings can demonstrate that the District was not prejudiced because of the failure to serve written notice on the District within 120 days from the time the claim arose. In addition, although we do not readily discern a clear basis for its interpretation in the statutory language regarding actual notice, we are obligated to follow the statement in ***Elkhorn Area School District v. East Troy Community School District***, 110 Wis. 2d 1, 2, 327 N.W.2d 206 (Ct. App. 1982) (interpreting WIS. STAT. § 893.80(a) (1979-80), which contains the same language as § 893.80(1d)(a)), that a party fails to "comply" with § 893.80(1)(a) when it fails to show that the governmental body had "actual knowledge" of the claim within 120 days after the event giving rise to it.

¶37 The Messlings concede that they failed to serve the District with written notice of their claim within 120 days of the event giving rise to the claim. However, the Messlings contend that the District had actual notice within the 120-day period and was not prejudiced, and as a result the notice of claim provision was satisfied.

¶38 We resolve this dispute by examining the summary judgment record to determine: (1) the date of the event giving rise to the Messlings' breach of contract claim; (2) the earliest date on which the District had actual notice of the

Messlings' claim; and (3) whether the District was prejudiced by the Messlings' failure to serve written notice of their claim within 120 days. Based on our review of the record, we conclude that: (1) January 29, 2012 is the date on which the event occurred giving rise to the Messlings' claim; (2) the District had actual notice of the Messlings' claim at the earliest by February 26, 2012, and, in any case, no later than March 11, 2012; and (3) the record is devoid of any evidence that the District was prejudiced by the Messlings' failure to serve the District with written notice of their claim within 120 days.

¶39 The District contends that November 1, 2011, is the date on which the Messlings had notice of the circumstances giving rise to their breach of contract claim. The District picks this date because Kay asserted in this litigation, specifically in responding to a request to admit made by the District, that this was the date when her husband, Russell, began incurring out of pocket medical expenses that should have been paid by the District. However, the Messlings contend that the November 1 date was merely the date that Dean later used to calculate, on a *retroactive* basis, the starting date for Dean to provide Russell with coverage secondary to Medicare, and was not a date on which the Messlings learned anything about the changes in insurance coverage.

¶40 For their part, the Messlings contend that the triggering event giving rise to their claim occurred on January 29, 2012, when Dean sent a letter to Russell informing him that Dean was no longer the primary insurance carrier because Russell was enrolled in a "retiree plan," which according to the plan made Medicare the primary carrier. We agree with the Messlings.

¶41 As the Messlings argue, the District's contention that the Messlings first had notice of their claim on November 1, 2011, is completely unsupported. It

rests on the false premise that Kay "admitted" to notice of the District's alleged breach on November 1, when in fact all that she "admitted" as pertinent here was that this was the date that Dean later gave as the commencement of the period in which Russell was required to pay his out of pocket expenses. If the summary judgment record reflects evidence of some pertinent event of which the Messlings were supposedly aware on or about November 1, 2011, the District failed to point that out to the circuit court and it is not evident from the summary judgment materials.

¶42 In contrast, the Messlings' argument that their claim arose when Dean sent a letter to Russell on January 29, 2012, informing him of the changes in insurance carriers and coverage is supported by evidence in the record. Therefore, we conclude that the event giving rise to the Messlings' breach of contract claim against the District occurred on January 29, 2012.

¶43 We also conclude that there is no dispute in the evidence submitted by the parties that the District had actual notice of the Messlings' claim starting within one month of this date, beginning on February 26, 2012, and ending no later than March 11, 2012. We select March 11, 2012, because that is the date of a letter in evidence from Kay to the District, on which Erickson is copied, requesting that the District correct Kay's change in coverage from a "retired policy" to "active insurance" and indicating that the Messlings can "no longer let this go without taking care of it." Additional evidence in the record includes at least seven pieces of correspondence between the Messlings and the District relating to the claim, beginning with a February 26, 2012 email from Kay to Judy Reddy, a representative of the District regarding the change in coverage. In that email, Kay states, "I am hoping you have had our insurance changed from a retirement insurance policy, which it shouldn't be, to an active policy which it

should be." Subsequent correspondence between the Messlings and the District regarding the change in coverage occurred on March 8, March 11, March 16, March 22, March 28, and April 17. This correspondence demonstrates that the District had actual notice of the Messlings' claim reasonably promptly following the time when the claim arose.

¶44 Having determined that the District had actual notice and received it within 120 days of when the claim arose, we must determine whether there is any dispute from the submitted evidence on the question of whether the District suffered prejudice by the lack of timely written notice. *See* WIS. STAT. § 893.80(1d)(a). The onus is on the Messlings to demonstrate that the District did not suffer prejudice. *See* ***Elkhorn***, 110 Wis. 2d at 5. Based on the summary judgment record, we conclude that the Messlings have shown that the District was not prejudiced by the lack of timely written notice served on the District.

¶45 The Messlings actively argued the point before the circuit court, and were able to point to evidence that includes the seven pieces of correspondence between the Messlings and the District showing that the Messlings took quick action, after learning of the insurance dispute, to inform the District of their concerns and vigorously attempted to resolve the issue with the District over a four-month period. There is no reasonable argument that these communications were not directly on topic, so as to constitute a notice of the claim at issue. This evidence supports the conclusion that the District had an ample, early opportunity to investigate the Messlings' complaint and to settle the matter. This is in keeping with the underlying purpose for requiring notice of claims to governmental entities. *See* ***Townsend v. Neenah Joint Sch. Dist.***, 2014 WI App 117, ¶22, 358 Wis. 2d 618, 856 N.W.2d 644 (noting that notice requirements give the

governmental entity a chance to investigate potential claims, and to "compromise and budget for settlement").

¶46 In contrast, the District had nothing at all to say on the topic of prejudice before the circuit court, and we have searched the evidence without locating any suggestion of prejudice from the absence of service of written notice within 120 days.

¶47 At oral argument on appeal, the District's comments on this topic were truncated and lacked reference to factual submissions supporting the District's position that the Messlings have failed to carry their burden of showing a lack of prejudice.

¶48 In sum, we conclude that the undisputed evidence demonstrates that the notice of claim requirements under WIS. STAT. § 893.80(1d)(a) were met.

CONCLUSION

¶49 For these reasons, we conclude that the evidence submitted on summary judgment is undisputed that the District breached the MOU and that notice of claim requirements under WIS. STAT. § 893.80(1d)(a) were met. Accordingly, we reverse and remand for the circuit court to enter an order of summary judgment in favor of the Messlings and determine damages consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

Not Recommended for publication in the official reports.