COURT OF APPEALS
DECISION
DATED AND RELEASED

November 29, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0595

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

FRW CORPORATION,
a Wisconsin corporation,

Plaintiff-Respondent-
Cross Appellant,

v.

CITY OF NEW BERLIN,
a municipal corporation,

Defendant-Appellant-
Cross Respondent.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: ROGER MURPHY, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. The City of New Berlin has appealed from a judgment awarding damages in the amount of $85,770 to the respondent, FRW Corporation, pursuant to FRW's motion for summary judgment. FRW has cross-appealed from the portion of the trial court's judgment which denied its

request for prejudgment interest for the period before FRW filed a notice of claim with the city.[1] We affirm the judgment in its entirety.

The material facts of this case are undisputed. FRW owned and operated a coin laundry and dry cleaning business in a commercial building from 1969 to November 23, 1992. A second business was a tenant in the building. The city provided sewer service to the building, but water was obtained from a private well. Sewer charges made by the city included a volumetric charge based on readings from a water meter installed in the building prior to 1969. The meter measured the volume of water discharged from the building into the sewer system.

FRW paid all charges for sewer service to the building from January 1, 1981, to November 23, 1992. On November 23, 1992, FRW sold the laundry and dry cleaning business. While the sale was pending, the purchaser examined the sewer charges for the preceding years and expressed a belief that the flowage amounts recorded by the water meter were greater than could be explained by the volume of business being done in the building. The water meter was subsequently tested on November 10, 1992. Tests showed the meter to be recording at an average of 395% of the actual flowage.

On December 23, 1992, and December 30, 1992, FRW filed notices of circumstances of claim and a statement of relief sought with the city clerk pursuant to § 893.80(1)(a), STATS., seeking a refund of $85,670 for sewer service overcharges, plus $100 for the cost of testing the meter. The city disallowed the claims and this action was commenced.

Both the city and FRW sought summary judgment. When both parties move for summary judgment, it is equivalent to a stipulation of facts permitting the trial court to decide the case on the legal issues. ***Friendship Village v. City of Milwaukee***, 181 Wis.2d 207, 219, 511 N.W.2d 345, 350 (Ct. App. 1993). In reviewing a trial court's grant of summary judgment, we apply the same standards as the trial court. ***Id.***

[1] The trial court granted prejudgment interest for the period after December 1992, when a notice of claim was filed by FRW. That award has not been challenged on appeal.

The trial court determined that the city was liable to FRW for refunds of overcharges on two alternative grounds. The first ground was that the city's municipal code adopted rules of the Wisconsin Public Service Commission which required the city to conduct periodic testing of water meters, even when connected to private wells. The trial court concluded that the overcharges were undetected because the city failed to conduct these required periodic tests, necessitating repayment of the overcharges. The second basis for the trial court's award was that the overcharges resulted in rates higher than those paid by other users. The trial court agreed with FRW's argument that this constituted unlawful discrimination and necessitated a refund.

As pointed out by FRW, on appeal the city challenges only the first basis for the trial court's decision. In its brief-in-chief and reply brief, the city neither mentions nor discusses the trial court's determination that a refund was warranted based on unlawful rate discrimination.

When an appellant ignores a ground upon which the trial court relied in awarding judgment and does not refute that ground on appeal, the proposition relied on by the trial court is taken as confessed. ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). This is especially true when, as here, the respondent raises the ground relied upon by the trial court in its respondent's brief, and the appellant fails to address the argument in its reply brief. ***Id.*** Because the city did not discuss or refute the trial court's determination that a refund was warranted because FRW was charged discriminatory rates, we affirm the award of a refund.

While the city did not challenge the trial court's award of a refund based on discriminatory rates, it contends that recovery is barred by § 893.80(1)(a), STATS. Section 893.80(1)(a) provides that, with some exceptions which are not applicable here, no action may be brought or maintained against a governmental subdivision unless within 120 days after the happening of the event giving rise to the claim, a notice of the circumstances of the claim is served on the governmental subdivision.

The trial court set forth four bases for its conclusion that § 893.80(1)(a), STATS., did not bar FRW's action. One basis was that FRW filed a notice of claim within 120 days of its discovery that the water meter was giving

faulty readings. In support of its conclusion that the time for filing a notice of claim commenced with the discovery that the meter was providing inaccurate readings rather than when the overcharges occurred, the trial court cited ***Hansen v. A.H. Robins, Inc.***, 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983), which holds that tort claims accrue when an injury is discovered or with reasonable diligence should have been discovered, whichever occurs first. The city contends that the trial court erred in applying the discovery rule because this is a contract action and, pursuant to ***CLL Assocs. Ltd. Partnership v. Arrowhead Pacific Corp.***, 174 Wis.2d 604, 617, 497 N.W.2d 115, 120 (1993), the discovery rule therefore does not apply.

We reject the city's argument because this action is not a contract action. In reality, this action is one to recover a utility overcharge based on provisions of a municipal ordinance and is neither a contract action nor a tort action.

The issue of whether the "happening of the event giving rise to the claim" under § 893.80(1)(a), STATS., is the date an overcharge occurred or the date an overcharge was discovered has not been addressed and resolved by existing Wisconsin case law. *See* ***Elkhorn Area Sch. Dist. v. East Troy Sch. Dist.***, 110 Wis.2d 1, 6-7, 327 N.W.2d 206, 209 (Ct. App. 1982). Here, the trial court determined that the discovery rule should apply to § 893.80(1)(a). Since the only basis set forth by the city in its brief-in-chief for challenging this determination is the city's claim that this is an action for breach of contract, and since that argument clearly lacks merit, no basis has been shown for disturbing the trial court's determination that the discovery rule is applicable and renders FRW's claim timely. To hold otherwise would require this court to raise and develop additional arguments not raised by the city as a basis for challenging the trial court's decision. This we will not do. *See* ***State v. Pettit,*** 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).[2]

[2] In its reply brief, the city argues that FRW would have discovered the overcharges earlier if it had exercised reasonable diligence. It contends that this action therefore is barred even if the discovery rule set forth in ***Hansen v. A.H. Robins, Inc.,*** 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983), applies to § 893.80(1)(a), STATS. We will not address this argument because it was raised by the city for the first time in its reply brief. *See* ***Hogan v. Musolf***, 157 Wis.2d 362, 381 n.16, 459 N.W.2d 865, 873 (Ct. App. 1990), *rev'd on other grounds,* 163 Wis.2d 1, 471 N.W.2d 216 (1991), *cert. denied,* 502 U.S. 1030 (1992).

The final issue before us is whether FRW is entitled to prejudgment interest, as claimed in its cross-appeal. We agree with the trial court that it is not.

Prejudgment interest may be awarded when damages are either liquidated or measurable against a reasonably certain standard. ***Pollack v. Calimag***, 157 Wis.2d 222, 242, 458 N.W.2d 591, 601 (Ct. App. 1990). However, it will not be awarded when damages are determinable but "some other factor," other than a denial of liability, prevents the defendant from determining the amount that should be tendered. ***City of Merrill v. Wenzel Bros., Inc.***, 88 Wis.2d 676, 697, 277 N.W.2d 799, 808 (1979).

The most frequently stated rationale for the rule is that if the amount of damages is either liquidated or determinable by reference to an objective standard, the defendant can avoid the accrual of interest by tendering to the plaintiff a sum equal to the amount of damages. ***Johnson v. Pearson Agri-Systems, Inc.***, 119 Wis.2d 766, 771, 350 N.W.2d 127, 130 (1984). Whether prejudgment interest may be awarded presents a question of law. ***Pollack,*** 157 Wis.2d at 243, 458 N.W.2d at 601.

FRW was awarded prejudgment interest commencing in December 1992, when the defect in the water meter was discovered and its notice of claim was filed. The trial court denied prejudgment interest on the overcharges made before that date on the ground that the city was unaware of the defects in the meter until November 1992, and therefore damages were not determinable before then.

We agree with the trial court that the city's lack of knowledge of any overcharges until late 1992 constituted "some other factor" which prevented the city from determining an amount which could have been tendered as damages prior to that date. In making this determination, we reject FRW's argument that the defect in the meter and the overcharges should have been detected by the city earlier because it was the city's obligation to periodically test FRW's meter.

We conclude that under the city ordinances, it was the duty of FRW rather than the city to insure that the water meter was accurate.[3] The construction of ordinances under the facts of record presents a question of law. ***Hansman v. Oneida County***, 123 Wis.2d 511, 514, 366 N.W.2d 901, 903 (Ct. App. 1985). We therefore construe ordinances independently of the trial court. ***State v. Ozaukee County Bd. of Adjustment***, 152 Wis.2d 552, 559, 449 N.W.2d 47, 50 (Ct. App. 1989).

The rules governing interpretation of ordinances and statutes are the same. ***Id.*** Ordinances, like statutes, are to be construed to give effect to their intent. ***County of Columbia v. Bylewski***, 94 Wis.2d 153, 168, 288 N.W.2d 129, 137 (1980). The intent of a given section must be derived from the ordinance as a whole. ***Id.***

We will not look beyond the plain meaning of a statute or ordinance unless it is ambiguous. ***Town of Hudson v. Hudson Town Bd. of Adjustment***, 158 Wis.2d 263, 270, 461 N.W.2d 827, 829 (Ct. App. 1990). An ordinance or part of it is ambiguous if it is capable of being understood by a reasonably well-informed person in more than one way. ***Id.***

Ambiguity exists here because portions of the municipal code could be understood to confer responsibility for checking water meters on the city, while portions could be understood to confer this responsibility on a private well owner. *Cf.* ***id.***; ***B.A.C. v. T.L.G.***, 135 Wis.2d 280, 294, 400 N.W.2d 48, 55 (Ct. App. 1986). NEW BERLIN, WIS., CODE § 13.02(3)(j) (1984) provides:

> Each industrial user not served by the water utility shall provide a meter which reflects, with reasonable accuracy, the quantity of sewage to flow into the sanitary sewer from each of its ... buildings or premises. This meter shall be provided at user's expense.

[3] We therefore would have reversed the judgment if the city had demonstrated on appeal that the trial court erred when it determined that the overcharges constituted unlawful discrimination warranting a refund.

By obligating a private well owner to provide a meter which accurately reflects the quantity of flowage into the municipal sewer, this provision could reasonably be construed to require the owner to insure that the meter is working properly, whether by testing or any other means it deems appropriate. FRW, however, contends that it was the responsibility of the city to periodically check the meter pursuant to NEW BERLIN, WIS., CODE § 13.015 (1981). This provision is part of the section of the municipal code governing the sewer utility and provides that the sewer utility "shall be managed and operated by the Utility Committee and respective utility manager in accordance with the provisions of §§ 13.01(2) through 13.01(10) of this Code." NEW BERLIN, WIS., CODE § 13.01(8)(b) (1981), in turn, adopts various rules of the Wisconsin Public Service Commission, including WIS. ADM. CODE § PSC 185.76, which provides that "each utility shall observe" a specified test schedule for "customer meters." NEW BERLIN, WIS., CODE §§ 13.01(2) through 13.01(10) (1981) are part of the municipal code provisions regulating the city water utility.

FRW would construe NEW BERLIN, WIS., CODE § 13.02(3)(j) (1984) to mean that an industrial user not served by the water utility must provide a meter which is accurate when installed, but need not take steps to insure that its meter is accurate thereafter. We disagree. Nothing in the provision limits the industrial user's duty to provide an accurate meter to the time of installation. Rather, the only reasonable construction is that an industrial user who is not served by the water utility but releases private well water into the sewer system is required to continuously provide an accurate meter. Such a duty would require that the user check and maintain the meter.

Admittedly, NEW BERLIN, WIS., CODE § 13.015 (1981) gives rise to an ambiguity as to whether the intent of the code was to require the sewer utility to check the flowage meters of all utility users who release water into the sewer system, including those not served by the water utility. However, an established rule of statutory construction provides that the specific language of a statute should govern over the more general unless the legislature intended to make the general language controlling. ***B.A.C.***, 135 Wis.2d at 294, 400 N.W.2d at 55. Since NEW BERLIN, WIS., CODE § 13.02(3)(j) (1984) speaks specifically to the situation of an industrial user who is not served by the water utility but discharges water into the sewer system, it is the more specific of the two provisions as to the duty to provide an accurate meter. It therefore controls here.

Since it was FRW's responsibility to insure that an accurate meter was being used to measure water flowage into the sewer system and since it failed to fulfill this duty and detect the overcharges until late 1992, the city is not liable for prejudgment interest. The city did not know, and had no reason to know, of the inaccuracies in the readings and the overcharges until FRW notified it. "Some other factor" thus prevented the city from tendering damages prior to December 1992, and prejudgment interest was unwarranted.

By the Court.—Judgment affirmed.

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