COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-0996 & 97-1662

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

TIMOTHY J. LIPKE,

PLAINTIFF-APPELLANT,

V.

TRI-COUNTY AREA SCHOOL BOARD AND TRI-COUNTY AREA SCHOOL DISTRICT,

DEFENDANTS-RESPONDENTS.

APPEALS from a judgment and an order of the circuit court for Waushara County: LEWIS MURACH, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

DYKMAN, P.J. Timothy Lipke appeals from a judgment dismissing his complaint against Tri-County Area School Board and Tri-County Area School District (Tri-County) for failing to bring his action within the six-

month limitation period set forth in § 893.80(1)(b), STATS., 1993-94.[1] He also appeals from an order denying his motion for reconsideration. We conclude that the trial court erred in granting Tri-County's motion to dismiss. Accordingly, we reverse the judgment and order and remand for further proceedings.

BACKGROUND

Lipke filed this action against Tri-County on December 3, 1996. In his complaint, Lipke alleged that throughout the entire 1995-96 school year, he had the highest cumulative grade point average in the Tri-County High School senior class. Tri-County was required to designate the senior with the highest grade point average as a "scholar," and that student would receive the Academic Excellence Higher Education Scholarship. *See* § 39.41, STATS. Tri-County designated a student other than Lipke as that school's scholar. Therefore, Lipke did not receive the scholarship, which would have exempted him from tuition and fees for four years at a University of Wisconsin institution.

Lipke alleged that on May 1, 1996, he served Tri-County with a notice of claim. He further alleged that Tri-County served him by mail with a notice of disallowance of this claim on May 30, 1996. Lipke sought a judgment against Tri-County for the value of the scholarship.

Tri-County filed a motion to dismiss, arguing that Lipke did not file the action within the six-month limitation period set forth in § 893.80(1)(b),

[1] Section 893.80(1)(b), STATS., 1993-94, was amended and § 893.80(1g) was created by 1995 Wis. Act 158, § 18. The six-month limitation period is now included in § 893.80(1g). Both parties use § 893.80(1)(b), STATS., 1993-94, not § 893.80(1g), in their analysis. Accordingly, we will also use § 893.80(1)(b), STATS., 1993-94, in our analysis. All further references will be to the 1993-94 statutes.

STATS. Under § 893.80(1)(b), no action on a claim may be brought after six months from the date of service of the notice of disallowance. Because Lipke's complaint stated that he was served with the notice of disallowance on May 30, 1996, Tri-County contended that the six-month limitation period expired on November 30, 1996, three days before Lipke filed his complaint.

At the January 27, 1996 motion hearing, Lipke asserted two arguments against Tri-County's motion to dismiss. First, he argued that three days should have been added to the six-month limitation period pursuant to § 801.15, STATS.[2] Second, he argued that Tri-County did not properly comply with the notice of disallowance requirements, and therefore the six-month statute of limitations was not triggered.

With regard to Lipke's first argument, the trial court requested briefing and stated that it would render a written decision. With regard to Lipke's second argument, the court stated:

> Let's leave that for another day. That would raise some issues with regard to the civil procedure section that says when you raise a defense by motion, you have to raise with it all the defenses you intend to assert in the action. Let's leave that issue for another day. Let's deal with the statute of limitations which was placed before me.

[2] Section 801.15(5)(a), STATS., states:

> (5) Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party:
>
> (a) If the notice or paper is served by mail, 3 days shall be added to the prescribed period.

In his brief to the trial court, Lipke argued that § 801.15(5), STATS., extended the applicable statute of limitations by three days in this case. Also, because the trial court indicated during the motion hearing that the issue of whether the notice of disallowance was adequate should be addressed at another time, Lipke "reserve[d] the right to raise that issue at this level if necessary."

In its written decision, the trial court determined that § 801.15(5), STATS., did not extend the statute of limitations by three days and dismissed Lipke's action as untimely. The court did not address whether the notice of disallowance was properly served upon Lipke. Lipke appeals from the trial court's judgment dismissing the action. (Appeal No. 97-0996.)

Lipke filed a motion for reconsideration. At the April 14, 1997 motion hearing, Lipke first argued that Tri-County failed to properly serve the notice of disallowance because the notice was not served by registered or certified mail. The court rejected Lipke's argument because Lipke failed to meet his burden to set forth evidentiary proof that he was not served by registered or certified mail. Lipke also renewed his argument that the statute of limitations should have been extended three days. The trial court again rejected this argument. Lipke appeals from the order denying his motion for reconsideration. (Appeal No. 97-1662.) The two appeals have been consolidated before this court.

DISCUSSION

Lipke argues that the trial court erred when it refused to consider whether Tri-County failed to properly serve the notice of disallowance. Lipke contends that his action was not barred by the six-month statute of limitations because Tri-County failed to serve the notice of disallowance by certified or registered mail.

The trial court dismissed Lipke's complaint upon Tri-County's motion to dismiss. When the defendant moves to dismiss a complaint on the grounds that the action was untimely, we look to the undisputed facts of the complaint to determine whether, as a matter of law, the plaintiff commenced the action after the statute of limitations had expired. *See* ***Harris v. Kritzik***, 166 Wis.2d 689, 693, 480 N.W.2d 514, 516 (Ct. App. 1992). This is a question that we decide *de novo*, without deference to the trial court's determination. *See* ***id.***

The six-month limitation period relied upon by the trial court is contained in § 893.80(1)(b), STATS. This section reads in relevant part:

> (1) … [N]o action may be brought or maintained against any ... political corporation, governmental subdivision or agency thereof ... upon a claim or cause of action unless:
>
> ….
>
> (b) … [T]he claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any … corporation, subdivision or agency … may be brought after 6 months from the date of service of the notice [of disallowance], and the notice [of disallowance] shall contain a statement to that effect.

Under § 893.80(1)(b), STATS., Lipke's action is time-barred if it was brought more than six months after service of the notice of disallowance. If the notice of disallowance is not properly served, however, the six-month limitation period does not apply. *See* ***Cary v. City of Madison***, 203 Wis.2d 261, 264, 551 N.W.2d 596, 597 (Ct. App. 1996). In order to be properly served, the notice of disallowance must "be served on the claimant by registered or certified mail." Section 893.80(1)(b). Substantial compliance with the statutory notice

requirements is not sufficient. *See* ***Cary***, 203 Wis.2d at 265-68, 551 N.W.2d at 597-99.

Lipke's complaint states: "[Tri-County] served Plaintiff by mail with a 'notice of disallowance' of this claim on May 30, 1996." The complaint does not state whether the notice of disallowance was served by regular mail, certified mail or registered mail. No other evidentiary facts have been submitted by the parties. Because the complaint does not state that the notice of disallowance was served by certified or registered mail, the complaint does not establish that Tri-County properly served the notice of disallowance, thus triggering the six-month limitation period of § 893.80(1)(b), STATS. Because the undisputed facts of the complaint do not establish, as a matter of law, that Lipke commenced the action after the statute of limitations had expired, we conclude that the trial court erred in granting Tri-County's motion to dismiss. *See* ***Harris***, 166 Wis.2d at 693, 480 N.W.2d at 516.

Tri-County argues that ***Cary*** is distinguishable because it does not address whether service may only be accomplished by certified or registered mail. Tri-County contends that ***Cary*** requires strict compliance only with the requirement that the notice of allowance be "served on the claimant."

Tri-County's argument is inconsistent with both the plain language of § 893.80(1)(b), STATS., and the reasoning behind ***Cary***'s strict compliance requirement. First, the statute provides that the "[n]otice of disallowance *shall* be served on the claimant by registered or certified mail." (Emphasis added.) The mandatory "shall"[3] applies both to the requirement that the notice be served by

[3] The word "shall" is presumed mandatory when it appears in a statute. ***Karow v. Milwaukee County Civil Serv. Comm'n.***, 82 Wis.2d 565, 570, 263 N.W.2d 214, 217 (1978).

registered or certified mail and to the requirement that the notice be served on the claimant.

Second, the ***Cary*** court concluded that the adoption of a strict compliance rule was consistent with the principle that notice of claims statutes should be construed so as to preserve bona fide claims. *See* ***Cary***, 203 Wis.2d at 266-67, 551 N.W.2d at 598.[4] Were we to conclude that Tri-County's substantial compliance with the service by certified or registered mail requirement was sufficient to trigger the six-month limitation period, we would extinguish Lipke's apparently bona fide claim. To do so would be contrary to the unambiguous statutory language as well as ***Cary***'s reasoning. Accordingly, we reject Tri-County's argument.

Whether Tri-County properly served the notice of disallowance, thus triggering the six-month limitation period, is directly relevant to whether Lipke's action was barred by the statute of limitations. Because we have independently concluded that Tri-County was not entitled to have the action dismissed as a matter of law, however, we do not need to address the trial court's failure to address this issue.

[4] *See also* ***Humphrey v. Elk Creek Lake Protection***, 172 Wis.2d 397, 401-02, 493 N.W.2d 241, 243 (Ct. App. 1992), which states: "[I]n looking at the requirements of a notice of claim statute like sec. 893.80(1)(b), Stats., '[a] construction which preserves a bona fide claim so that it may be passed upon by a competent tribunal is to be preferred to a construction which cuts it off without a trial.'" (Citation omitted.)

Because the trial court erred in ordering the dismissal of Lipke's complaint, we also reverse the order denying Lipke's motion for reconsideration.[5]

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

[5] Lipke also argues that the trial court erred in concluding that the three-day extension under § 801.15(5), STATS., does not apply to the § 893.80(1)(b), STATS., limitation period. Because we have disposed of Lipke's appeals on other grounds, we will not address this argument. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (we will not address other issues raised if decision on one point disposes of the appeal).