COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2767

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

LAONA STATE BANK,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed*.

Before Vergeront, Roggensack and Deininger, JJ.

DEININGER, J. Laona State Bank appeals a judgment dismissing its action against the State of Wisconsin. The Bank's complaint alleges that the State is liable for the consequences flowing from the failure by a Department of Transportation employee to list the Bank as a secured party on the certificate of title to a motor home. This error allegedly caused the Bank to lose its priority lien

status, resulting in a loss of $7,300. The trial court granted the State's motion to dismiss, concluding that the State has sovereign immunity from liability for the negligence of its employees on the present facts. The trial court denied the Bank's motion to reconsider and its request for leave to amend its complaint, concluding that amending the complaint would be "fruitless." The Bank appeals only the trial court's denial of leave to amend its complaint. We conclude that the trial court erred in refusing to allow the Bank to amend its complaint, but that the error is harmless. Accordingly, we affirm the judgment of dismissal.

BACKGROUND

The case is before us at the motion to dismiss stage. Accordingly, we take as true the allegations of the Bank's complaint. Laona State Bank was listed as a secured party on the Michigan title of a motor home owned by William and Patricia Bailey. The Baileys applied for a Wisconsin title and registration for the vehicle. The application properly listed Laona State Bank as a secured party, and the Bank subsequently received a Confirmation of Security Interest Perfection from the State showing that its lien on the motor home had been recorded with the Wisconsin Department of Transportation (DOT). The actual Wisconsin certificate of title, however, did not list the Bank as a secured party. Under the heading "Secured Party" on the title, Laona State Bank is not named, and only the words "Previously Titled in MI" appear.

After the Wisconsin title was issued to the Baileys, a different bank, Headwaters State Bank, obtained a security interest in the motor home, without notice or knowledge of Laona State Bank's lien. Headwaters perfected its security interest and became the sole secured party shown on the title. William Bailey subsequently sold the motor home and paid the $7,300 proceeds of sale directly to

Headwaters State Bank. Meanwhile, Laona State Bank, unaware that its lien on the motor home had not been perfected and that Headwaters had acquired priority lien status, commenced a replevin action. Both Baileys then filed voluntary bankruptcy petitions.

When its efforts to either collect the amount due from the Baileys or to repossess the vehicle proved unsuccessful, the Bank filed a claim for damages in the amount of $7,300 with the State Claims Board.[1] The Bank contended that the State was liable for the financial loss it had incurred due to the DOT's failure to properly record its lien on the title to the Baileys' motor home. The Claims Board denied the Bank's claim because "there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and the claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles." A bill was thereafter introduced into the legislature to authorize payment of the claim, but it failed to pass.

On May 20, 1996, the Bank filed its complaint in this action seeking a money judgment in the amount of $7,300 against the State. On September 30, 1996, the court granted the State's motion to dismiss the Bank's action.[2] The trial court concluded that it lacked personal jurisdiction over the State because of the State's sovereign immunity from suits sounding in tort. The Bank moved for reconsideration of the dismissal order and requested leave to amend its complaint

[1] *See* § 16.007, STATS.

[2] Even though the trial court granted the State's motion to dismiss on September 30, 1996, we concluded in a previous order that the September 30 order granting the State's motion was not final in that it did not dismiss the complaint. A Judgment of Dismissal was entered on June 20, 1997, from which Laona State Bank appeals.

in order to plead a claim against the State for money had and received.[3] The court concluded in an order entered on November 12, 1996, that an amendment to the complaint to recast the action as one seeking to collect a debt against the State would be "fruitless." The Bank appeals the trial court's refusal to allow it to file an amended complaint.

ANALYSIS

Generally, the decision of a trial court to grant or deny leave to amend a complaint is discretionary, and we will not reverse a discretionary decision unless the trial court misuses that discretion. ***Finlay v. Culligan,*** 201 Wis.2d 611, 626, 548 N.W.2d 854, 860-61 (Ct. App. 1996). We may find an erroneous exercise of discretion, however, if the record demonstrates that the trial court applied the wrong legal standard or acted without authority. ***Id***. at 626-27, 548 N.W.2d at 860-61. Whether the court acted within its authority in denying the Bank the opportunity to amend its complaint is a question of law which we decide de novo. *See* ***State v. Bender***, 213 Wis.2d 338, 341, 570 N.W.2d 590, 592 (Ct. App. 1997). Whether a claim is barred by sovereign immunity and whether a complaint states a claim for which relief can be granted are also questions of law we review de novo. ***Erickson Oil Prods., Inc. v. State,*** 184 Wis.2d 36, 42, 516 N.W.2d 755, 756 (Ct. App. 1994).

The Bank concedes that the State has sovereign immunity from suits in tort, and thus it does not contest the dismissal of its original complaint. The Bank, however, contends that it should be permitted to file an amended complaint

[3] The Bank's motion to reconsider and for leave to amend is not in the record before us on appeal. The Bank sets forth in its brief the allegations it contends it would have made had the court granted leave to amend.

alleging that the State is liable as a debtor to the Bank for the $40 filing fee which the State received, but did not earn, when it issued a certificate of title that failed to list the Bank's lien. To that claim, the Bank would couple a claim in the amended complaint for "consequential damages" of $7,300 which allegedly flowed from the DOT's error.

We conclude that, at the time it requested to do so, the Bank was entitled to amend its complaint, and that the trial court therefore erred in denying the request. Section 802.09(1), STATS., provides, in part, that: "A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order …." No scheduling order setting a different deadline for amended pleadings is contained in the record. The Bank's original summons and complaint were filed on May 20, 1996, and its absolute right to amend "once as a matter of course" did not expire until November 20, 1996. Thus, the trial court lacked the authority to deny the Bank the opportunity to amend its complaint when it entered its November 12, 1996 order.[4] *See* ***Kox v. Center for Oral and Maxillofacial Surgery***, No. 97-3045, slip op. at 8 (Wis. Ct. App. March 26, 1998, ordered published April 29, 1998) (holding that a plaintiff's right to amend a complaint within six months is "an absolute right that ends only with the pleader's exercising it or with the passage of six months' time"); ***Welzien v. Kapec***, 98 Wis.2d 660, 661, 298 N.W.2d 98, 98 (Ct. App. 1980) (plaintiff may amend complaint once within six months of filing summons and complaint "as a matter of right"); *see*

[4] The Bank could have filed an amended complaint without requesting leave of the court. *See* ***Welzien v. Kapec***, 98 Wis.2d 660, 661 n.2, 298 N.W.2d 98, 99 (Ct. App. 1980). Even though the court had granted the State's motion to dismiss, the action was still pending in the trial court. *See* note 2, above.

also ***Estate of Kitzman v. Kitzman,*** 163 Wis.2d 399, 403, 471 N.W.2d 293, 295 (Ct. App. 1991).

The State argues that the trial court properly exercised its discretion in denying the Bank's request for leave to amend its complaint because the proposed amended complaint fails to state a claim upon which relief can be granted. In support of this argument, the State cites ***Troutman v. FMC Corp.***, 115 Wis.2d 683, 689, 340 N.W.2d 581, 584-85 (Ct. App. 1983), but in ***Troutman***, the motion for leave to amend was made when "[t]he case was already a year old." ***Id***. at 690, 340 N.W.2d at 585. The State's reliance on a federal precedent for the same proposition, ***Chaveriat v. Williams Pipe Line Co.***, 11 F.3d 1420, 1430 (7th Cir. 1993), suffers from a similar infirmity—there, the request came several years into the litigation. In short, the State cites no statute or case law establishing that a court may, in its discretion and absent a scheduling order (which was not a consideration here), preclude a plaintiff from filing an amended complaint within six months of the commencement of an action.

Even though we conclude that the Bank should have been permitted to file an amended complaint, we agree with the trial court that an effort by the Bank to clothe the State's tort in other garments would have been "fruitless." As we discuss below, an amended complaint containing the allegations described in the Bank's brief to this court would have been equally as vulnerable to a motion to dismiss as was its original complaint. We will not reverse a judgment and remand for proceedings in the trial court which we conclude will lead to the same result as

that presently before us.[5] In other words, the trial court's error in denying the Bank leave to amend its complaint was harmless. *See* section 805.18(2), STATS., ("No judgment shall be reversed or set aside … for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment ….").

The Bank's amended complaint would have alleged that the State was unjustly enriched by accepting the $40 filing fee and then not performing the task for which that fee was paid. The complaint would have also alleged that it suffered $7,300 in consequential damages arising out of the same transaction. The Bank argues that since the State does not have sovereign immunity from suit on the $40 unjust enrichment claim, it therefore lacks immunity for the consequential damages claim as well, since the two claims cannot be split and must be tried before a court as one cause of action. We conclude, however, that even if the Bank could have gotten the $40 nose of its lawsuit into court, its entire $7,300 camel need not have been admitted.

The State's defense of sovereign immunity flows from the Wisconsin Constitution, article IV, § 27, which provides that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against

[5] The trial court clearly indicated in its order of November 12th that it viewed the basis of the Bank's action to be "the State[']s alleged negligence, and not due in any part to the State[']s indebtedness." An amended complaint would thus have suffered the same fate as the Bank's original complaint, although we would then have had the benefit of being able to review an actual document in the record as opposed to the hypothetical amended complaint described to us in the Bank's brief. Had the Bank's amended complaint been filed, and its dismissal by the trial court appealed to this court, we would decide de novo whether the amended complaint stated an actionable claim against the State, just as we do in this opinion, below.

the state." This language has been repeatedly construed to mean that the legislature has the exclusive right to consent to a suit brought against the State. ***State ex rel. Teaching Assistants Ass'n v. University of Wisconsin-Madison,*** 96 Wis.2d 492, 509, 292 N.W.2d 657, 665 (Ct. App. 1980); *see also* ***Lister v. Board of Regents,*** 72 Wis.2d 282, 291, 240 N.W.2d 610, 617 (1976). Additionally, legislative consent to suits must be clear and express. ***Fiala v. Voight,*** 93 Wis.2d 337, 342-43, 286 N.W.2d 824, 827 (1980).

In sections 16.007 and 775.01, STATS., the State has "consented" to suit by establishing a claims procedure. ***Erickson,*** 184 Wis.2d at 54, 516 N.W.2d at 761. Under § 16.007, a party may present a claim to the State Claims Board. The board holds a hearing and recommends to the legislature whether to grant or deny the claim. Section 775.01, STATS., provides that "[u]pon the refusal of the legislature to allow a claim against the state the claimant may commence an action against the state …." This section has been interpreted as giving the State's consent to be sued on some causes but not others. ***Boldt v. State,*** 101 Wis.2d 566, 572-73, 305 N.W.2d 133, 138 (1981); *see also* ***Carlson v. Pepin County,*** 167 Wis.2d 345, 481 N.W.2d 498 (Ct. App. 1992). In ***Cords v. State,*** 62 Wis.2d 42, 50, 214 N.W.2d 405, 410 (1974), the court discusses the State's susceptibility to suit under a predecessor to § 775.01, STATS.:

> As for statutory consent by the state to suit in tort, this court has found none. Sec. 285.01 [now § 775.01,] Stats., has been interpreted as limited to claims for which if valid would render the state a debtor to the claimant. Sec. 270.58 [now § 895.46] has also been interpreted not to be a consent by the state to be sued in tort.

(Footnote omitted); *see also* ***Carlson,*** 167 Wis.2d at 356, 481 N.W.2d at 502-03. Thus, the State would not be immune from suit on the Bank's properly pled claim against the State for the recovery of money had and received, which renders the

State a debtor. ***Boldt,*** 101 Wis.2d at 573, 305 N.W.2d at 138; ***Trempealeau County v. State,*** 260 Wis. 602, 605-06, 51 N.W.2d 499, 500-01 (1952).

The only amount received by the State under the Bank's proposed amended allegations is the $40 filing fee, which the State concedes the Bank might "one day" be able to recover. However, the State asserts that we (and the trial court) are precluded from addressing the $40 claim because no claim was presented to the Claims Board for a refund of the $40 fee, nor was this claim the subject of a failed bill in the legislature. We agree. Allegations in an amended complaint regarding the State's wrongful retention of the $40 fee would not state a claim upon which relief could presently be granted against the State. *See* ***Polk County v. State Pub. Defender***, 188 Wis.2d 665, 675, 524 N.W.2d 389, 393 (1994). In order to sue for the $40 filing fee, the Bank must first pursue that claim via the statutory claims procedure set forth in §§ 16.007 and 775.01, STATS. *See* ***State v. P.G. Miron Const. Co.,*** 181 Wis.2d 1045, 1053, 512 N.W.2d 499, 503 (1994).

The Bank acknowledges that the claim it filed with the Claims Board makes no specific mention of the $40 filing fee. It contends, however, that the $40 claim is subsumed within its $7,300 claim "because it is no longer unjust for the State to retain a $40.00 fee after paying the damages for failure to earn that fee." The essence of the Bank's somewhat strained argument on this point is that the State cannot require bifurcation of the Bank's claim "by alleging [the Bank] is seeking $7,340.00 rather than $7,300.00; or that the grievance should have been initially presented as a $40.00 claim," because that would require, impermissibly, the "splitting of its cause of action." We have stated above our conclusion that a claim for refund of the $40 fee was not presently actionable because of the Bank's failure to comply with §§ 16.007 and 775.01, STATS., regarding such a claim. We

also conclude, however, that even if the Bank were permitted to sue for a fee refund, the $7,300 consequential loss claim would be subject to dismissal on sovereign immunity grounds.

We acknowledge that a single demand cannot be split so as to constitute the basis of more than one suit. *See* ***Cohan v. Associated Fur Farms, Inc.,*** 261 Wis. 584, 597, 53 N.W.2d 788, 795 (1952), *quoting* 2 FREEMAN, LAW OF JUDGMENTS, (5th ed.), p. 1255, § 596 ("'That a single or entire demand cannot be split so as to constitute the basis of more than one suit, and that the recovery upon any part of such demand merges the whole and bars another action for the remainder, is not disputed ....'"). Indeed, Wisconsin law treats "all claims arising out of one transaction or factual situation as being part of a single cause of action and ... require[s] them all to be litigated together." ***Juneau Square Corp. v. First Wis. Nat'l Bank,*** 122 Wis.2d 673, 682, 364 N.W.2d 164, 169 (Ct. App. 1985), *citing* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982); ***DePratt v. West Bend Mut. Ins. Co.,*** 113 Wis.2d 306, 311-12, 334 N.W.2d 883, 885-86 (1983).

The Bank cites the foregoing principles and reasons that:

> Since the elements of failure to properly register a security interest coincide exactly with the failure to earn a recording fee for such security interest, the rule against splitting a cause of action would extend the waiver of sovereign immunity with respect to refund of the filing fee to the consequences of failing to earn that fee."

We disagree. It does not necessarily follow from the rule against splitting a cause of action that the State's waiver of sovereign immunity must be enlarged because of the rule. We conclude that the State cannot be deemed to have consented to a waiver of its immunity from suit on a tort claim merely because the tort claim derives from the same factual situation which also, arguably, gives rise to a claim for indebtedness. Put another way, the rule against "splitting a claim" does not

trump the doctrine of sovereign immunity. Even if the Bank had met the statutory requirements for bringing suit on its $40 unjust enrichment claim, and had it then joined the $40 claim with its $7,300 claim for consequential damages, the latter claim would still be subject to dismissal since it remains a tort claim for which the State has not consented to be sued. *See* ***Cords,*** 62 Wis.2d at 50, 214 N.W.2d at 410.

Finally, as additional support for its position, the Bank claims that the holding in ***Luber v. Milwaukee County,*** 47 Wis.2d 271, 283, 177 N.W.2d 380, 386 (1970), would require the State to face liability for its consequential loss of $7,300, because of the relationship between that loss and the underlying $40 claim for money had and received. Again, we disagree. ***Luber*** has no application on the present facts. The supreme court in ***Luber*** analyzed consequential damages in the context of eminent domain. We have previously concluded that ***Luber*** is to be construed narrowly, and that its holding should not be extended beyond its particular facts. ***Hasselblad v. City of Green Bay,*** 145 Wis.2d 439, 443-44, 427 N.W.2d 140, 142 (Ct. App. 1988).

CONCLUSION

Even though the Bank was entitled to file an amended complaint containing the allegations it describes in its brief to this court, it suffered no harm from the trial court's order denying its request for leave to amend. We have reviewed the allegations which the Bank claims it would have pled in its proposed amended complaint, and we conclude that the claims the Bank wished to plead are not ones for which relief could be granted against the State of Wisconsin. We therefore affirm the judgment dismissing this action.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.