COURT OF APPEALS
DECISION
DATED AND RELEASED

March 18, 1997

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.

NOTICE

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

No. 95-0023

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

State ex rel. Jerome J. Blonien,

Relator-Appellant-
Cross Respondent,

v.

Charlotte Fleischman and Peter Kokanovic,

Defendants-Respondents-
Cross Appellants,

Louis Carl, William Kanack, Frank Stoffel,
Ronald Hayward and Village of West Milwaukee,

Defendants-Respondents.

APPEAL and CROSS-APPEAL from judgments and an order of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Judgments reversed, order affirmed and cause remanded*.

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

PER CURIAM. Jerome J. Blonien appeals from grants of summary judgment in favor of Charlotte Fleischman, Peter Kokanovic, Louis Carl, William Kanack, Frank Stoffel, Ronald Hayward and the Village of West Milwaukee. Blonien filed an action on behalf of the State alleging that the above referenced village board members violated the Open Meetings Law, contrary to § 19.97, STATS.[1] Blonien claims that the trial court erred in granting the board members' motions for summary judgment. The judgments[2] were granted because Blonien had failed to comply with the notice of claim statute, § 893.80, STATS. Because the notice of claim statute does not apply to Open Meetings Law violations as recently declared in ***Auchinleck v. Town of LaGrange***, 200 Wis.2d 585, 547 N.W.2d 587 (1996), we reverse the judgments and remand for trial on the merits.

Kokanovic and Fleischman cross-appeal from an order denying their motion seeking frivolous costs and denying their motion for leave to conduct discovery on the frivolous claim. Because the complaint is not frivolous, and because the trial court did not erroneously exercise its discretion in denying the motion for leave to conduct discovery, we affirm the order.

[1] Blonien's initial complaint named only Kokanovic and Fleischman. He subsequently amended his complaint, however, to include all of the board members.

[2] One judgment was granted to Fleischman and Kokanovic. Another judgment was granted to Carl, Kanack, Stoffel, Hayward and the Village of West Milwaukee.

I. BACKGROUND

On August 17, 1992, the Village of West Milwaukee held a meeting at the village hall. Prior to this meeting, a public notice of the meeting was issued advising that the board would be considering "nominations & selections of Chairman for the various Commissions" and "nominations & selections to fill Commission vacancies on Civil Service and Zoning Board of Appeals and alternates for all Commissions." The notices did not specifically name those individuals who were being considered for these positions.

Blonien, a newspaper publisher, attended this meeting to report on the actions of the board. During the meeting, he advised the board that neither of the above referenced items had provided reasonable notice to the public of the subject matter. Despite Blonien's objections, the board proceeded to make the nominations. Kokanovic nominated Maxine Fleischman as appointee to the Zoning Board of Appeals. Maxine was board member Fleischman's mother. In turn, Fleischman nominated Delores Kokanovic as an appointee to the Civil Service Commission. Delores was board member Kokanovic's wife. Prior to this time, concerns had been raised about board members voting to appoint other family members to these positions. The question of whether board members could vote to appoint family members had been sent to the state ethics board for a determination.

Following the meeting, Blonien filed a complaint with the Milwaukee County District Attorney, alleging that Fleischman and Kokanovic had violated § 19.84, STATS., by failing to reasonably apprise the public or the media of the subject matter of the August 17, 1992, meeting. The Milwaukee County Corporation Counsel, acting for the district attorney, declined to prosecute. As a result, Blonien brought the instant action. Blonien's complaint asked the court to declare that the Open Meetings Law had been violated, to void the actions taken (the nominations), and to impose penalties pursuant to § 19.96, STATS.

Blonien filed a motion for summary judgment, which was denied because the trial court ruled that issues of fact existed. Additional summary judgment motions were filed by respondents on the basis that Blonien had failed to comply with the notice of claim statute and, therefore, his complaint

should be dismissed. The trial court, relying on ***DNR v. City of Waukesha***, 184 Wis.2d 178, 515 N.W.2d 888 (1994), granted the motion. Blonien appeals.

II. DISCUSSION

A. Appeal.

The trial court granted the defendants' motions for summary judgment on the basis that the notice of claim statute applied to "all actions" as stated in ***DNR v. City of Waukesha***. ***Id.***, 184 Wis.2d at 191, 515 N.W.2d 893. In May 1996, however, our supreme court decided ***Auchinleck***, which discussed the "all actions" language found in the ***DNR*** case. ***Auchinleck***, 200 Wis.2d at 594-97, 547 N.W.2d at 590-92. The court stated that the notice of claim statute does not apply to actions involving the Open Meetings Law because applying § 893.80, STATS., to an Open Meetings Law action would be inconsistent with the legislature's intent in enacting the Open Meetings Law. ***Id.***, 200 Wis.2d at 594, 547 N.W.2d at 590. Our supreme court specifically held that "to the extent [that the ***DNR***'s "all actions" language] is interpreted as applying to open records and open meetings actions, [it] is too broad and is withdrawn." ***Id.*** at 597, 547 N.W.2d at 592.

It is clear that ***Auchinleck***'s holding is pertinent to the instant case. The only question is whether ***Auchinleck*** should be applied retroactively. Whether to apply an appellate court's holding retroactively is a question of law. ***Schulz v. Ystad***, 155 Wis.2d 574, 596, 456 N.W.2d 312, 320 (1990).

We are guided by the relevant case law regarding retroactive application. A decision that overrules or repudiates an earlier decision is retroactive in operation. ***Fitzgerald v. Meissner & Hicks, Inc.***, 38 Wis.2d 571, 575, 157 N.W.2d 595, 596 (1968). We decline to apply a case retroactively only where there has been great reliance on the overruled decision and considerable harm or detriment could result to those who relied on the decision, when the purpose of the new ruling cannot be served by retroactivity, or when the retroactive application would place an excessive burden on the administration of justice. ***Rolo v. Goers***, 174 Wis.2d 709, 723, 497 N.W.2d 724, 730 (1993).

Based on the foregoing, we conclude that ***Auchinleck***'s ruling that § 893.80, STATS., does not apply to Open Meetings Law cases should be given retroactive effect so as to apply to the instant case. We see no reason not to apply ***Auchinleck*** retroactively here. Blonien's case was dismissed at the summary judgment stage. There is no evidence that, given this procedural setting, the parties will be harmed or placed under an excessive burden. Moreover, the purpose of the new ruling can and will be served by applying ***Auchinleck*** retroactively. Blonien's claim involves the Open Meetings Law. Our supreme court ruled that forcing complainants to comply with § 893.80 when they pursue an Open Meetings Law violation would conflict with the intent of the legislature and the public policy requiring timely access to governmental affairs. ***Auchinleck***, 200 Wis.2d at 594-97, 547 N.W.2d at 590-92. We conclude, therefore, that Blonien's case should not have been dismissed for his failure to file a notice of claim. We reverse the judgments and remand the cause for a trial on the merits.

B. Cross-Appeal.

Fleischman and Kokanovic cross-appealed from the trial court's decision denying their motion alleging that Blonien's complaint was frivolous and from the trial court's decision denying their request to conduct discovery to prove frivolousness. We affirm the trial court's order on both issues.

1. Frivolousness.

Whether an action is frivolous within the meaning of § 814.025, STATS., is a question of law that we review independently. ***Lamb v. Manning***, 145 Wis.2d 619, 628, 427 N.W.2d 437, 441 (Ct. Ap. 1988). Blonien filed the action on the basis that the notices for the board meeting were not specific enough to adequately apprise the public or the media as to what would occur at the meeting. As noted above, the notices provided that the board would be considering "nominations & selections of Chairman for the various Commissions" and "nominations & selections to fill Commission vacancies on Civil Service and Zoning Board of Appeals and alternates for all Commissions." We agree with the trial court that Blonien's action is not frivolous.

Our conclusion is based in part on an Opinion of the Attorney General. In giving direction to public officials after the Open Meetings Law was amended in 1976, the Attorney General opined:

> Where members know specific items in advance of the meeting, they should be communicated to the presiding officer who should give notice of the supplemental agenda in the manner described above. Matters of importance or of wide interest should be postponed until more specific notice can be given.
>
> Section 19.84(2), Stats., refers to the content of the required notice:
>
> (2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof.
>
> This notice should be as specific and informative as possible.

66 Op. Att'y Gen. 93, 96 (1977) (citations omitted).

The record documents that the appointment of the board members' relatives was of "wide interest" and of importance to the community. Based on the foregoing, the notices at issue in this case could arguably be viewed as violative of the Open Meetings Law because the notices were not specific enough. Accordingly, we cannot conclude that Blonien's action was frivolous.

2. Discovery.

Discovery decisions by the trial court are governed by a discretionary standard of review. ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis.2d 266, 270, 306 N.W.2d 85, 87 (Ct. App. 1981). Accordingly, we review Fleischman and Kokanovic's claim that the trial court erred in denying their discovery request under the erroneous exercise of discretion standard of review. ***Id.*** We will not find an erroneous exercise of discretion if the trial court considered the pertinent facts, applied the relevant law and used a rational process to reach a reasonable conclusion. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Fleischman and Kokanovic sought leave to allow discovery to enable them to show that Blonien filed this action in order to harass and injure them. The trial court denied the motion, ruling that discovery would not serve any useful purpose. We cannot conclude that the trial court's decision constituted an erroneous exercise of discretion. It concluded that additional discovery would not persuade it to alter its ruling on the claim of frivolousness. The trial court had a substantial evidentiary record on which it could base its conclusion. Our review of the record reveals that the trial court used a rational process to reach a reasonable conclusion. Therefore, we affirm the order.

By the Court.—Judgments reversed, order affirmed and cause remanded.

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