COURT OF APPEALS
DECISION
DATED AND RELEASED

July 5, 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. 95-0486-FT

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

GENERAL CASUALTY COMPANY OF WISCONSIN,

Plaintiff-Appellant,

v.

CITY OF MILWAUKEE,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed.*

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

SCHUDSON, J. The issue in this case is whether the notice of claim provisions of § 893.80, STATS., apply to a subrogated insurer's separate contribution/ indemnification action that arose from a City of Milwaukee police officer's uninsured motorist claim against the City of Milwaukee. We conclude that under ***DNR v. City of Waukesha***, 184 Wis.2d 178, 515 N.W.2d 888 (1994),

compliance with the notice of claim provisions was required and, therefore, we affirm.

The relevant facts are undisputed. On September 14, 1991, City of Milwaukee Police Officer Michael J. Salomone was injured while on duty by an uninsured motorist. Officer Salomone subsequently brought a claim against the City pursuant to § 66.189, STATS.[1] The City erroneously denied coverage, claiming that the City's UM coverage was excess to any UM coverage Officer Salomone carried with his personal automobile insurer, General Casualty.[2] The merits of the City's denial of Officer Salomone's claim are not at issue in this appeal. General Casualty settled with Officer Salomone for $5,500 and then brought a contribution/ indemnification action against the City. It is undisputed that General Casualty did not file a notice of claim with the City. The City brought a motion for summary judgment, alleging General Casualty's failure to comply with the notice of claim provisions of § 893.80, STATS.[3] The trial court granted the City's motion and General Casualty appeals.

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[1] Section 66.189, STATS., states:

> **Uninsured motorist coverage; 1st class cities.** A 1st class city shall provide uninsured motorist motor vehicle liability insurance coverage for motor vehicles owned by the city and operated by city employes in the course of employment. The coverage required by this section shall have at least the limits prescribed for uninsured motorist coverage under s. 632.32(4)(a) [at least $25,000 per person and $50,000 per accident].

[2] *See* ***Millers Nat'l Ins. Co. v. City of Milwaukee***, 184 Wis.2d 155, 516 N.W.2d 376 (1994) (rejecting City of Milwaukee's argument that personal automobile insurer of City of Milwaukee police officer was precluded from asserting subrogated uninsured motorist claim against the City).

[3] Section 893.80(1), Stats., states:

> **893.80 Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits. (1)** Except as provided in subs. (1m) and (1p), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of the corporation, subdivision or agency for acts done in their official

This court independently reviews a trial court's decision to grant or deny a motion for summary judgment, applying the same methodology as the trial court.[4] *See* § 802.08(2), STATS.; ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 314-315, 401 N.W.2d 816, 820 (1987). Additionally, this case involves statutory interpretation and application to a set of undisputed facts, which also commands our *de novo* review. *See* ***Pattermann v. Pattermann***, 173 Wis.2d 143, 149-150, 496 N.W.2d 613, 615 (Ct. App. 1992).

(..continued)

> capacity or in the course of their agency or employment upon a claim or cause of action unless:
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> (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 volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, 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 fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe; and
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> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the 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 defendant fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

[4] We note that General Casualty refused to file the transcript containing the trial court's oral decision, claiming that because our review is *de novo*, a transcript of the court's decision would be unnecessary. Despite the fact that our review is *de novo*, the transcript of the trial court's decision is not only helpful to our consideration of issues raised on appeal, but it also provides us with the opportunity to explain why we are agreeing or disagreeing with the holding of the trial court.

General Casualty argues that it was seeking relief against the City as an insurer under § 66.189, STATS., and, therefore, it was not required to comply with the notice of claim procedure. The Wisconsin Supreme Court's recent ruling in ***DNR v. City of Waukesha***, however, controls this case and refutes General Casualty's argument.

In ***DNR***, the supreme court acknowledged three Court of Appeals cases, ***Kaiser v. City of Mauston***, 99 Wis.2d 345, 299 N.W.2d 259 (Ct. App. 1980), ***Harkness v. Palmyra-Eagle School Dist.***, 157 Wis.2d 567, 460 N.W.2d 769 (Ct. App. 1990), and ***Nicolet v. Village of Fox Point***, 177 Wis.2d 80, 501 N.W.2d 842 (Ct. App. 1993), which had held that the notice of claim provisions were limited to claims for money damages. In ***DNR***, however, the supreme court specifically overruled those cases and held "that the notice of claim statute, sec. 893.80(1), Stats., applies *in all actions*, not just in tort actions." ***DNR***, 184 Wis.2d at 183, 515 N.W.2d at 890 (emphasis added). The court further emphasized:

> The language of the statute clearly and unambiguously makes the notice of claim requirements applicable to all actions.... Thus, we now hold that sec. 893.80 applies to all causes of action, not just those in tort and not just those for money damages.

Id. at 191, 515 N.W.2d at 893. Thus, although General Casualty attempts to frame its contribution/indemnification claim as one other than a claim for money damages based on tort, the supreme court's pronouncement encompasses the claim.[5]

The ***DNR*** decision also refutes General Casualty's argument that

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[5] Subsequently, in ***Lewis v. Sullivan***, 188 Wis.2d 157, 524 N.W.2d 630 (1994), the supreme court held that § 893.82, STATS., the notice of injury/notice of claim statute applicable to state employees, applies to claims for money damages but does not apply to claims for declaratory or injunctive relief. Decided six months after ***DNR v. City of Waukesha***, 184 Wis.2d 178, 515 N.W.2d 888 (1994), the ***Lewis*** court noted its holding in ***DNR*** and, not attempting to reconcile the two cases, simply stated: "Section 893.80(1) is not in issue in this case." ***Id.***, 188 Wis.2d at 169 n.9, 524 N.W.2d at 634 n.9.

§ 893.80(5), STATS.,[6] renders the notice of claim procedures inapplicable here. The supreme court stated:

> This interpretation ignores the plain meaning of the statute. Clearly, sec. 893.80(5), Stats., only directs that when a claim is based on another statute, the *damage limitations* of sec. 893.80(3) do not apply. *Section 893.80(5) does not say that the notice provisions of sec. 893.80(1) do not apply.*

Id. at 192-193, 515 N.W.2d at 893-894 (emphasis added; footnote omitted). Therefore, based on the supreme court's holding in ***DNR***, we conclude that the trial court properly dismissed General Casualty's claim for failure to comply with the notice of claim provisions.

Finally, in its reply brief General Casualty raises for the first time on appeal the argument that an issue of fact exists regarding whether Officer Salomone did file a notice of circumstances of claim and whether General Casualty, in essence, "inherits" the benefit of that filing by virtue of standing in Officer Salomone's shoes as a subrogated party. General Casualty also raises for the first time on appeal in the "conclusion" of its reply brief the argument that under § 893.80 any claim against a governmental entity has to be premised upon "an 'official *act*' ... by the City of Milwaukee in its official capacity." (Emphasis added.) General Casualty contends that "the appellate rules do not

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[6] Section 893.80(5), STATS., states:

> Except as provided in this subsection, the provisions and limitations of this section shall be exclusive and shall apply to all claims against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employe thereof for acts done in an official capacity or the course of his or her agency or employment. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employe thereof for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

in any way preclude the plaintiff-appellant in a de novo appeal from raising new arguments in its appellate briefs that were not raised at the trial court level." General Casualty fails, however, to recognize that "[w]e will not, as a general rule, consider arguments raised for the first time in *a reply brief*." ***Schaeffer v. State Personnel Comm'n***, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989) (emphasis added). Therefore, because we decline to consider these issues, we need not address the City's motions to strike these arguments and to file a sur-reply brief. Thus, as a formality, the City's motions are denied. Accordingly, we also deny General Casualty's motion for actual costs based on its reply to the City's motions.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.