COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 16, 1996

No. 95-2327

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

JOHN L. YOST
AND ELAINE G. YOST,

Plaintiffs-Appellants,

v.

STATE OF WISCONSIN
DEPT. OF TRANSPORTATION,

Defendant-Respondent.

APPEAL from judgments of the circuit court for Door County: JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. John and Elaine Yost appeal two judgments dismissing their two claims against the State of Wisconsin Department of Transportation. First, the Yosts' complaint alleges that the DOT's faulty construction of the highway adjacent to their property caused flooding that resulted in an inverse condemnation. The trial court dismissed this claim

because the Yosts' notice of claim under § 88.87(2)(c), STATS., 1991-92,[1] did not contain the required legal description of the lands allegedly damaged. Second, the complaint claims that by failing to provide proper drainage away from the Yosts' property, the DOT breached an agreement in the warranty deed by which the DOT had acquired part of the Yosts' land through condemnation. The trial court dismissed this claim, concluding that under the doctrine of sovereign immunity, the DOT is immune from suit. We affirm both judgments.

In 1990, the DOT acquired a portion of the Yosts' property by warranty deed under § 32.05, STATS., governing condemnation for transportation facilities. The deed included the following provision:

> By acceptance of this Deed, the Grantee [the DOT] agrees that any runoff from the Parcel granted in this Deed shall be drained away from the Grantors' remaining parcel and any runoff from Grantors' remaining parcel which has drained on or across the parcel granted in this Deed shall be drained by Grantee away from

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[1] At the time the notice of claim was given, the applicable version of § 88.87(2)(c), STATS., 1991-92, provided in relevant part:

> Whenever any county, town, city, village, railroad company or the department of transportation constructs and maintains a highway or railroad grade not in accordance with par. (a), any property owner damaged thereby may, within 90 days after the alleged damage occurred, file a claim with the appropriate governmental agency or railroad company. Such claim shall consist of a sworn statement of the alleged faulty construction and a legal description of the lands alleged to have been damaged by flooding or water-soaking. ... If the agency or company denies the claim or fails to take any action within 90 days after the filing of the claim, the property owner may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable.

The statute was amended in 1993, effective May 13, 1994. 1993 Wis. Act 456. The current statute increases the period to file a claim to three years and requires only "a description, sufficient to determine the location of the lands, of the lands alleged to have been damaged by flooding or water-soaking." Section 88.87(2)(c), STATS.

> Grantors' remaining parcel, and that Grantee shall be responsible for assuring such drainage, and shall be liabile [sic] for damages for failure to assure such drainage.

The Yosts commenced an action against the DOT to determine just compensation for the property pursuant to § 32.05, STATS. Meanwhile, the Yosts experienced problems with water drainage on their property which they attributed to the highway construction. The DOT brought a motion in limine to prevent the Yosts from presenting evidence regarding drainage problems in the condemnation case and instead suggested the Yosts had to bring a separate action under § 88.87(2)(c), STATS., 1991-92. The trial court granted the motion in limine.[2]

The Yosts filed a notice of claim pursuant to § 88.87(2)(c), STATS., 1991-92, for $405,000, the amount required to remove or reconstruct their fur processing building and driveway. When the DOT did not correct the cause of the water damage, acquire the rights to use the land for damage or overflow purposes, or deny the Yosts' claim within ninety days as required by § 88.87(2)(c), the Yosts filed the action that is now before this court.

In their complaint, the Yosts first allege that the DOT's faulty construction of the highway adjacent to their property caused flooding that resulted in an inverse condemnation. The complaint requests that a jury determine compensation. Second, the complaint alleges that the DOT breached the agreement in the warranty deed. The Yosts ask that the DOT be required to comply with the agreement to provide for water run-off away from their property. Alternatively, the Yosts seek damages for the DOT's failure to provide the proper drainage it agreed to provide in the warranty deed.

The DOT filed a motion for summary judgment that was ultimately denied by the trial court. The DOT filed a motion to reconsider that decision, objecting to the trial court's subject matter jurisdiction on grounds that there had been insufficient notice of claim under § 88.87(2)(c), STATS., 1991-92.

[2] The Yosts eventually recovered $94,000 in the condemnation case as just compensation for the property they deeded to the DOT.

The trial court denied the motion and the parties conducted a trial to the court. At the conclusion of the trial, the trial court ruled that the Yosts had not satisfied the notice of claim requirement of § 88.87(2)(c) because they had not included a legal description of the damaged property. For this reason, the trial court dismissed the claim for inverse condemnation.

The DOT also filed a motion to dismiss the Yosts' claim that DOT breached the agreement in the warranty deed, arguing the DOT has sovereign immunity from suit and that ch. 32, STATS., prohibits the Yosts' claim. The trial court granted the DOT's motion, concluding the doctrine of sovereign immunity applies and the DOT is therefore immune from suit.

On appeal, the Yosts argue their claim for inverse condemnation should not have been dismissed because they provided an adequate legal description in their notice of claim that satisfied the requirements of § 88.87(2)(c), STATS., 1991-92. Alternatively, they argue this court should retroactively apply the new version of § 88.87(2)(c), which eliminates the need for a legal description. Additionally, the Yosts argue their claim that DOT breached the agreement in the warranty deed should not have been dismissed because the DOT waived its sovereign immunity and because ch. 32, STATS., does not bar their claim. We affirm the trial court's dismissal of both claims.

INVERSE CONDEMNATION CLAIM

The parties do not dispute that the notice of claim included in the record before us was the notice the Yosts served on the DOT. At issue is whether this notice satisfies the requirements of § 88.87(2)(c), STATS., 1991-92. The construction of a statute in relation to a given set of facts is a question of law and, therefore, we need not give any deference to the trial court. ***Van v. Manitowoc Rapids***, 150 Wis.2d 929, 933, 442 N.W.2d 557, 559 (Ct. App. 1989).

Under § 88.87(2)(c), STATS., 1991-92, in effect at the time of the Yosts' claim, a property owner had to file a claim within ninety days. "Such claim shall consist of a sworn statement of the alleged faulty construction and a legal description of the lands alleged to have been damaged by flooding or water-soaking." ***Id.*** In ***Van***, 150 Wis.2d at 932, 442 N.W.2d at 558, we held that a postal address did not constitute a legal description of the property.

Additionally, we held that actual notice would not work as an alternative to providing a legal description of the property in a formal written claim. ***Id***. at 932, 442 N.W.2d at 559.

The Yosts' notice of claim for relief under § 88.87(2)(c), STATS., 1991-92, includes a sworn affidavit from John Yost in which he identifies his property using his street address and states that as a result of the lack of proper drainage away from the highway, water accumulated on his property and cement slabs next to his building cracked.[3] Attached to the notice of claim is a copy of the warranty deed the Yosts executed with the DOT. The Yosts argue:

> The Deed contains the legal description in metes and bounds of the property conveyed to the D.O.T. It is on to this property that Yost's water previously drained and from which water is now drains instead on to Yost's remaining property. The remaining property is described as "abutting real property of the owner ... in the Southeast 1/4 - Northwest 1/4, Section 14, Town 27 North, Range 25 East."

Although the warranty deed arguably constitutes a legal description of property because it references metes, bounds and other exact measurements, it describes the property the Yosts transferred to the DOT, rather than their existing property. The statute is not satisfied simply because the Yosts have provided a legal description of property that abuts their property. We conclude the Yosts have not satisfied the requirement that they include in their notice of claim a "legal description of the lands alleged to have been damaged by flooding or water-soaking." Therefore, we affirm the trial court's dismissal of the Yosts' claim for inverse condemnation.

The Yosts argue that even if their notice of claim does not satisfy the requirements of § 88.87(2)(c), STATS., 1991-92, their claim meets the requirements of the current version of § 88.87(2)(c). The Yosts urge this court to retroactively apply the current statute to their case, even though they did not

[3] Elaine Yost also filed a notice of claim that consisted of an affidavit incorporating by reference all the matters in John's notice of claim.

raise the issue of retroactive application at the trial court. They argue this court has the power to, and should, consider the issue. We recognize that although an appellate court will generally not review an issue of law raised for the first time on appeal, this rule of judicial administration does not affect the power of an appellate court to deal with the issue. ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980). However, we decline to consider the Yosts' retroactivity issue for the first time on appeal, especially when the Yosts are appellants seeking to reverse the trial court on grounds not raised at the trial court.

WARRANTY DEED CLAIM

The Yosts' second claim alleges the DOT failed to comply with the agreement in the warranty deed that requires the DOT to assure proper drainage away from the Yosts' property. The deed states that the DOT "shall be responsible for assuring such drainage, and shall be liabile [sic] for damages for failure to assure such drainage." The DOT argues this claim was properly dismissed because the DOT had properly asserted sovereign immunity. Alternatively, the DOT argues that even if it waived its defense of sovereign immunity, this court should affirm the trial court's dismissal of the claim because the Yosts' claim for breach of the agreement in the warranty deed is prohibited by ch. 32, STATS. We first address the sovereign immunity argument.

Our concept of sovereign immunity derives from art. IV, § 27, of the Wisconsin Constitution, which provides: "The legislature shall direct by law in what matter and in what courts suits may be brought against the state." ***Lister v. Board of Regents***, 72 Wis.2d 282, 291, 240 N.W.2d 610, 617 (1976). From this provision the rule developed that the state cannot be sued without its consent. ***Id***. This immunity is procedural in nature and, if properly raised, deprives the court of personal jurisdiction over the state. ***Id***. Sovereign immunity is waived if not raised in the state's responsive pleading. ***Manitowoc Co. v. Sturgeon Bay***, 122 Wis.2d 406, 411, 362 N.W.2d 432, 436 (Ct. App. 1984).

Here, the DOT in its answer to the Yosts' complaint denied any failure to comply with the warranty deed and asserted sovereign immunity on the basis of the Yosts' failure to allege authority to sue the DOT. Although the DOT raised the sovereign immunity issue in its answer, it did not move for summary judgment on the second claim until over two years later.

The Yosts do not argue that DOT lacked a valid sovereign immunity defense, noting in their response brief: "The argument related to Sovereign Immunity is not whether it exists, but whether it has been waived." Instead, the Yosts argue the DOT's delay in arguing the doctrine of sovereign immunity eliminates that defense in this case, noting that written discovery, depositions, motions and court appearances took place between the time the DOT filed its answer and its motion seeking dismissal because of sovereign immunity. In response, the DOT explains that it had no reason to aggressively pursue the sovereign immunity defense as long as plaintiffs' inverse condemnation claim was pending.

We conclude that because the DOT raised the defense of sovereign immunity in its answer to the Yosts' complaint, it did not waive its defense. The Yosts have offered no authority for their claim that extensive delay in pursuing the doctrine of sovereign immunity, as well as making formal offers of judgment, constitute a waiver of the defense. Moreover, we are not aware of any case in Wisconsin where the State properly raised the defense of sovereign immunity in its responsive pleading but was later estopped from employing the defense. Therefore, we affirm the trial court's judgment dismissing the Yosts' second claim.

Because we affirm the trial court's judgment on grounds of sovereign immunity, we do not address the DOT's alternative argument that ch. 32, STATS., prohibits the Yosts' claim for enforcement of the warranty deed.

CONCLUSION

In sum, we affirm the trial court's dismissal of the Yosts' two claims. We also note, as does the concurrence/dissent, that we too are disturbed by the DOT's actions in this case. Additionally, we recognize that the strict application of § 88.87(2)(c), STATS., 1991-92, produces a harsh result because the Yosts' notice of claim must be judged in light of the notice requirements in effect at the time they commenced their action. Fortunately, the legislature has since liberalized the notice requirements to avoid such hypertechnical procedures in future cases.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.

MYSE, J. (*concurring in part; dissenting in part*). I agree with the majority's disposition of the Yosts' cause of action for breach of the agreement in the warranty deed on grounds of sovereign immunity. Additionally, I agree that under the law as it existed at the time of this case, the Yosts' notice of claim was deficient under § 88.87(2)(c), STATS., 1991-92, because it failed to provide a legal description of the damaged property. However, I dissent because I believe we should exercise our discretion to consider an issue raised before us that was not previously raised before the trial court: retroactive application of § 88.87(2), STATS. Retroactive application of a statute is a question of law that we review de novo. ***Schulz v. Ystad***, 155 Wis.2d 574, 596, 456 N.W.2d 312, 321 (1990). Where the issue presented is a question of law, issues not raised in the trial court may nevertheless be raised and decided by this court on appeal. ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). I would exercise the discretion granted us to do so and consider whether the current version of § 88.87(2), STATS., can be applied retroactively to assess the sufficiency of the Yosts' notice of claim.

The prior version of § 88.87(2)(c), STATS., provided that claims for damage "shall consist of a sworn statement of the alleged faulty construction and a legal description of the lands alleged to have been damaged by flooding or water-soaking." In 1993, the legislature passed a new version of § 88.87(2), effective May 13, 1994, which amended sub. (c). The new § 88.87(2)(c), STATS., provides in relevant part:

> [A]ny property owner damaged by the highway or railroad grade may, within 3 years after the alleged damage occurred, file a claim with the appropriate governmental agency or railroad company. The claim shall consist of a sworn statement of the alleged faulty construction and a description, sufficient to determine the location of the lands, of the lands alleged to have been damaged by flooding or water—soaking.

The legislature also created § 88.87(2)(d), STATS., which provides:

> Failure to give the requisite notice by filing a claim under par. (c) does not bar action on the claim if the city, village,

> town, county, railroad company or department of transportation had actual notice of the claim within 3 years after the alleged damage occurred 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 city, village, town, county, railroad company or department of transportation.

The general rule is that statutes are to be construed to relate to future and not to past acts. ***Gutter v. Seamandel***, 103 Wis.2d 1, 17, 308 N.W.2d 403, 411 (1981). However, there is an exception to this rule: if a statute is procedural or remedial, rather than substantive, the statute is generally given retroactive application. ***Id.***

A portion of § 88.87(2)(c), STATS., amends the statute of limitations. This constitutes a substantive change and may not be applied retroactively. *See* ***Gutter***, 103 Wis.2d at 17, 308 N.W.2d at 411. However, the balance of §§ 88.87(2)(c) and (d), STATS., is procedural in that it deals with the nature of the claim and the requirements that must be contained within the notice. This portion of the statute is also remedial because it was designed by the legislature to remedy a problem that occured when citizens' valid claims were disallowed because of highly technical notice of claim requirements contained within the previous statute. *See* 1993 Wis. Act 456, §§ 109 Note and 110 Note; *see also, e.g.,* ***Van v. Manitowoc Rapids***, 150 Wis.2d 929, 442 N.W.2d 557 (Ct. App. 1989) (notice of claim insufficient because claimants listed merely their postal address). A statute designed to remedy such a problem should be applied retroactively. *See* ***Gutter***, 103 Wis.2d at 17, 308 N.W.2d at 411. This is consistent with the legislative purpose to resolve such problems more fairly.

The DOT argues that even if those parts of the new statute dealing with the description and actual notice are remedial, our supreme court has refused to retroactively apply one part of a statute where another part mandated a new statute of limitations. In ***Gutter***, the court stated:

> We have been given no reason—and we can find none—to read certain sentences of sec. 895.43(1)(b) as applicable retroactively and other sentences of sec. 895.43(1)(b) as applicable prospectively. We therefore conclude that sec. 895.43(1)(b), Stats. 1977, is not applicable to the plaintiffs ....

Id. at 19, 308 N.W.2d at 411-12.

The DOT argues that the new § 88.87(2), STATS., is analogous to the statute the court examined in ***Gutter*** because it contains, among provisions that are arguably procedural, a new limitations period (three years rather than ninety days). The DOT argues that because the new statute contains a new limitations period, no part of the statute, including those parts that liberalize notice requirements, can be retroactively applied. The DOT argues this court "cannot pick and choose what parts of the statute it will only apply prospectively."

I do not read ***Gutter*** so broadly. The court clearly recognized that statutes can consist of both procedural and substantive matters. In the specific statute under consideration, the court noted that it saw no reason to make retroactive application of the procedural portion of that statute. ***Gutter*** does not, however, create a bright line rule that such a statute can never be divided with the procedural portions being retroactively applied. Here, I see a

compelling reason to apply the liberalized notice requirements of § 88.87(2), STATS., retroactively. The legislature was trying to correct a problem that was resulting in serious injustice to the citizens who were precluded from making legitimate claims based on highly technical notice requirements. To effect this remedy, retroactive application is necessary and consistent with the purpose of § 88.87(2) and the presumed legislative intent in providing that actual notice is sufficient for the notice of claim.

If the notice provisions of § 88.87(2), STATS., are applied to the facts of this case, the conclusion is inescapable that the notice is sufficient. The DOT does not even argue that they did not have actual notice of the lands that were damaged by flooding, but only that the nature of the notice filed failed to meet the technical statutory requirements. Thus, the notice is sufficient under § 88.87(2)(d), STATS.[4] Moreover, the notice of claim the Yosts filed is sufficient because it contains "a description sufficient to determine the location of the lands," as required by § 88.87(2)(c), STATS. Specifically, the notice of claim clearly provides that the Yosts own the property which abuts the land described in the warranty deed attached to the notice of claim. Determining the location of the property damaged is easily done based upon the information provided in this notice of claim. I would therefore reverse the trial court's determination.

I am troubled additionally by the DOT's Herculean efforts to avoid a responsibility that it assumed by contract and is imposed upon it by law. The Yosts were damaged by flooding created by the DOT's construction of a highway. It would seem the DOT's reaction to such a claim should be to correct the problem forthwith rather than to throw a series of procedural hurdles before

[4] Indeed, there is no doubt the State had notice of the location of the Yosts' land, and, more specifically, the existence and location of the water damage. It was the State that brought the motion in limine in the condemnation action to prevent the Yosts from raising the water damage issue in the first case, suggesting instead the Yosts bring a second action for inverse condemnation.

the claimant and ultimately conclude that the claim is barred because some technical application of the law precludes consideration of the Yosts' claim. In its brief the DOT claims that it stands ready to correct the flooding problem which has concededly created damage for the appellant. I hope that without regard to the legal obligations the DOT may have, it will discharge its clear moral responsibility. One wonders if this attitude is a reflection of our obsession with legal rights and gives too little regard to our moral obligations.