COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 24, 1996

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. 95-2896

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

DONALD BRZEZINSKI,

Plaintiff-Appellant,

v.

WAUKESHA COUNTY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Waukesha County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

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

PER CURIAM. Donald Brzezinski appeals a summary judgment that dismissed his lawsuit against Waukesha County. From July 1985 to January 1991, except for a three month period, Brzezinski served as a court reporter to some of the County's court commissioners. During that time, the County paid him for his services as an independent contractor at a daily pay rate, without paying social security tax on his behalf or providing him employee

benefits. Brzezinski's lawsuit sought a declaratory judgment that he served as a County employee while a court reporter and that the County thereby had a legal obligation to retroactively pay social security tax and employee benefits for the 1985-91 time frame. Brzezinski filed his lawsuit in January 1994, after giving the County untimely written notice of injury under § 893.80(1)(a), STATS., in May 1993.

The trial court dismissed Brzezinski's lawsuit when he provided no facts showing that the County had reasonably timely actual notice of his injury and that the County incurred no prejudice from his failure to give timely written notice of injury within 120 days. The trial court correctly granted summary judgment if the County showed no dispute of material factual dispute and deserved judgment as a matter of law. ***Powalka v. State Mut. Life Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). Brzezinski argues that material factual disputes on the actual notice and prejudice issues barred summary judgment. We reject his arguments and affirm the grant of summary judgment.

Section 893.80(1)(a), STATS., requires anyone who wants to sue a county to provide the county written notice of injury within 120 days. The statute covers Brzezinski's claim for financial benefits. *See* ***State ex rel. Auchinleck v. Town of LaGrange***, 200 Wis.2d 585, 597, 547 N.W.2d 587, 592 (1996); *see also* ***Vanstone v. Town of Delafield***, 191 Wis.2d 586, 591 n. 5, 530 N.W.2d 16, 19 n. 5 (Ct. App. 1995) (case law uses the term "notice of injury" to refer to the dictates of subsection (1)(a)). If claimants do not provide timely written notice of injury, they may still maintain their suit if the county had actual notice of injury and suffered no prejudice from the claimants' failure to give written notice. ***Nielsen v. Town of Silver Cliff***, 112 Wis.2d 574, 580-81, 334 N.W.2d 242, 245 (1983). Despite one holding to the contrary, there is apparently no requirement that counties possess actual notice within the 120-day time frame, as long as the delay is not prejudicial. *See* ***id***; *but see* ***Medley v. City of Milwaukee***, 969 F.2d 312, 320 (7th Cir. 1992) (actual notice must take place within 120 days). In fact, the Wisconsin Supreme Court has sanctioned actual notice as long as two years after the transaction out of which the cause of action arose. *See* ***Nielsen***, 112 Wis.2d at 580-81, 334 N.W.2d at 245. Brzezinski has cited no decision that has recognized a longer period as timely actual notice in lawsuits of this nature.

Brzezinski has not shown a dispute of material fact on whether the County had timely actual notice of his injury concerning employee status and associated benefits. Brzezinski furnished the trial court no information from which it could infer that the County had timely actual notice of his injury. In fact, Brzezinski had acted inconsistently in prior years. In those years, he asked the County to provide him employee benefits without asserting a legal right to them, thereby tacitly acknowledging that he lacked employee status and the corresponding legal right to such benefits. Brzezinski did give the County written notice of injury in May 1993, more than two years after the transactions underlying his claim. Under the circumstances, however, this came too late to constitute timely actual notice of injury to his then claimed legal rights. In sum, the trial court could not infer that the County had actual notice.

Brzezinski also has not shown a dispute of material fact on whether the County suffered prejudice from his failure to give timely written notice of injury. This issue's resolution depends on the County's ability to investigate transactions from 1985 to 1991 in 1993, when the County received actual notice. *See* ***Nielsen***, 112 Wis.2d at 580-81, 334 N.W,2d at 246. Brzezinski made no attempt to show that the County could still readily investigate the substance of his claims concerning the years 1985 to 1991. By virtue of its 120-day written notice requirement, the statute effectively presumes that 120 days permits ready investigation. Without information from Brzezinski showing otherwise, the trial court could not reasonably infer that Brzezinski's neglect left County prejudice free beyond the 120-day period. When Brzezinski failed to give the County timely written notice of injury, he assumed the burden to show that his neglect had not prejudiced the County. The record contains no inferences showing no prejudice. In sum, the trial court correctly granted the County summary judgment.

By the Court.—Judgment affirmed.

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