



Nuisance Concerts - Separate Events Under Wis. Stat. § 893.80(1d)

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In January 2019, the Wisconsin Supreme Court held that concert events constituting a nuisance and giving rise to a claim under Wisconsin Statute § 893.80(1d) are separate events for purposes of the 120-day deadline to file a notice of the claim.

In *Yacht Club at Sister Bay Condominium Association, Inc. v. Village of Sister Bay*,¹ the condominium association (“Association”) filed suit against the Village of Sister Bay (“Village”) in circuit court alleging that certain concerts the Village hosted in its event pavilion constituted public and private nuisances. The Village received an anonymous donation in 2013, which the donor requested be used to construct a performance pavilion in a park located near the Association residences. The Village constructed the pavilion and subsequently began holding performances there in late summer 2014. Performances included live concerts that frequently ran past park hours and late into the night. Association residents complained of music loud enough to rattle windows and travel through closed doors. On March 7, 2016, the Association delivered a notice of injury to the Village, pursuant to Wis. Stat. § 893.80(1d), claiming the noise pollution constituted a public and private nuisance. Section 893.80(1d) provides that no action may be brought against a governmental subdivision for acts done in its official capacity unless

a written notice of the injury and surrounding circumstances is delivered to the governmental subdivision within 120 days of the event giving rise to the claim. The Village moved to dismiss, arguing the Association failed to serve its notice within the 120-day timeline and to provide an itemized statement of relief sought. The circuit court granted the Village’s motion, finding that the Association did not serve timely notice to the Village. On appeal, the Court of Appeals affirmed the circuit court’s decision that notice was not timely, and also held that the previous Wisconsin Supreme Court case, *E-Z Roll Off, LLC v. County of Oneida*,² precluded the Village’s claim that each concert rising to the level of nuisance was a separate injurious event.

Granting petition for review, the Wisconsin Supreme Court considered whether the Association’s notice was timely filed pursuant to Wis. Stat. § 893.80(1d), and whether the *E-Z Roll Off* decision applied. Examining the Section 893.80(1d)(a) 120-day timing requirement, the Court sought to interpret “the happening of an event giving rise to the claim” language, and applied the common law nuisance principle that each continuance of a nuisance is a new, individual nuisance.³ Accordingly, the court determined that each concert that constituted a nuisance was a separate event for purposes of Wis. Stat. § 893.80(1d).

Next, the Court turned to *E-Z Roll Off*. In *E-Z Roll Off*, a waste removal company filed a complaint against a county alleging anti-trust law violations because the county charged the company higher tipping fees than it charged a competitor. The plaintiff company, *E-Z Roll Off*, claimed that each time it paid the higher fee, a separate anti-trust violation occurred. The *E-Z Roll Off* court rejected this argument, stating that applying the continuing violations doctrine to the anti-trust statute at issue would undermine the purpose of Wis. Stat. § 893.80(1d), which “is to afford governmental entities the opportunity to compromise and budget for potential settlement or litigation” and not to expose them to indefinite periods of liability for violations of the particular anti-trust statute.⁴

The Supreme Court distinguished *E-Z Roll Off* from the case at hand, first noting that the *E-Z Roll Off* court limited its holding to the context of anti-trust law. Moreover, the Court pointed out that the circumstances of the *Yacht Club* case did not present the same opportunity for limitless claims because the Association was not alleging that every concert constituted a nuisance. Unlike the tipping fee in *E-Z Roll Off*, each concert was a unique event. The Village would only face potential liability for those concerts that were also nuisances.

► p.24

1. *Yacht Club at Sister Bay Condo. Ass’n, Inc. v. Village of Sister Bay*, 2019 WI 4.

2. *E-Z Roll Off, LLC v. Oneida County*, 2011 WI 71, 335 Wis.2d 720, 800 N.W.2d 421.

3. *Yacht Club*, 2019 WI 4, ¶ 24.

4. *Id.* ¶32.

Ultimately, the Supreme Court reversed the Court of Appeals, in part, concluding that the purpose of Wis. Stat. § 893.80(1d) was not contravened and that *E-Z Roll Off* did not control. However, the Supreme Court still held that the Association's suit was unsuccessful.

Although each nuisance concert presented a new 120-day window for the Association to file an action under Wis. Stat. § 893.80(1d), the Association failed to file a claim within 120 days of the last nuisance event occurring. Therefore, the Supreme Court upheld

that portion of the Court of Appeals' decision finding that the requisite notice was not timely filed.

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Materials for Understanding/Regulating Siting of Wireless Telecommunications Facilities in Wake of FCC's 2018 Small Cell Order

The Federal Communications Commission's (FCC's) 2018 Small Cell Order, which largely took effect January 14, 2019, contains new and significant limitations on a municipality's ability to regulate wireless facilities in local rights-of-way (ROW). To assist our members, the League of Wisconsin Municipalities retained Attorney Anita Gallucci, Boardman & Clark, to draft a Model Ordinance

regulating the siting of wireless telecommunications facilities in local ROW that takes these changes into account. Attorney Gallucci has prepared a comprehensive memo explaining the FCC order and a Model Ordinance with supporting materials. These materials are available on the League's website under the Resources tab/ Telecommunications (Including Small Cell).



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