ORIGINAL

SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
BOBBY FELDER,	)	
	)	
Petitioner,	)	No. 87-526
	)	
v.	)	
	)	
DUANE CASEY, ET AL.	)	
	)	
	)	

Pages: 1 through 46
Place: Washington, D.C.
Date: March 28, 1988

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 600
Washington, D.C. 20005
(202) 628-4888

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -x

BOBBY FELDER,

Petitioner,

v. No. 87-526

DUANE CASEY, ET AL.

- - - - - - - - - - - - - - - - - -x

Washington, D.C.

Monday, March 28, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 o'clock a.m.

APPEARANCES:

STEVEN H. STEINGLASS, ESQ., Cleveland, Ohio; on behalf of the petitioner.

GRANT F. LANGLEY, ESQ., City Attorney for the City of Milwaukee, Milwaukee, Wisconsin; on behalf of the respondents.

I N D E X

P R O C E E D I N G S

(11:00 A.M.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in Number 87-526, Bobby Felder versus Duane Casey, et al.

Mr. Steinglass, you may proceed whenever you are ready.

ORAL ARGUMENT OF STEVEN H. STEINGLASS, ESQUIRE

ON BEHALF OF THE PETITIONER

MR. STEINGLASS: Thank you. Mr. Chief Justice, and may it please the Court, the issue presented by this case is wehther states like Wisconsin, which opened their courts to 1983 actions, may rquire 1983 plaintiffs to comply with notice of claims statutes.

Had Bobby Felder filed this 1983 action in the federal courts he would not have been required to comply with the Wisconsin notice of claims statute.

The Wisconsin Supreme Court acknowledged this, but characterized the notice of claim requirement as a procedural requirement, and relying in part on the Tenth Amendment, held that state courts entertaining 1983 cases could require compliance with state procedural rules such as notice of claim requirements.

Despite this characterization of the notice of claim requirement as procedural, the requirement has nothing

to do with regulating the conduct of litigation in the state courts. The notice of claim statute in Wisconsin has its origin in legislation enacted in response to the Wisconsin Supreme Court's abrogation of governmental tort immunity in 1962.

In addition to partially restoring governmental immunity, the notice of claims statute established a condition precedent for commencing or maintaining civil actions in the state courts of Wisconsin against local governmental entities and their employees.

To maintain such a suit, a prospective plaintiff must serve a written notice of the circumstances of the claim within 120 days of the event giving rise to the claim. When a governmental employee is a defendant, as in the present case, the prospective plaintiff must serve the notice of claim on both the governmental entity and on all of the governmental employees in the case.

Service must be made according to the requirements of service of process for summons under Wisconsin law. In addition to the notice of the circumstances of the claim, a claimant must also present an itemized statement of the relief sought. This itemized statement of the relief sought may be in the same document, but it need not be. In cases involving damages, however, it must contain the specific sum of money sought.

At that point a claimant may not go into court. There is a 120-day waiting period. A claimant may not sue until the claim is disallowed or until the 120-day period expires. At that time there is a six-month statute of limitations under Wisconsin law within which the plaintiff -- the claimant must bring their action. The statute is broadly applicable to civil actions in the Wisconsin courts --

QUESTION: Six months from what?

MR. STEINGLASS: Six months from the date on which the claim is disallowed. If the claim is disallowed by operation of law, that is, because the common counsel has taken no steps on it, it would be six months after the expiration of the 120-day waiting period.

QUESTION: So a notice of claim must be filed within 120 days of the wrong?

MR. STEINGLASS: Correct.

QUESTION: And then after it's filed there's another 120 days?

MR. STEINGLASS: No. The way it works, Your Honor, is, the notice of claim must be filed within the 120 days of the event, the incident. The notice of claim requirement has a second part of it.

QUESTION: Right.

MR. STEINGLASS: That second notice or document

need not be filed right away. A claimant can wait. They can wait two months, three months, several months. When that second document, which contains the itemization of what they are seeking, is filed, then the 120-day waiting period begins to run so there can be a longer period of time that elapses. At that point the -- after the disallowance, of course, the six month period begins.

Now, there is some flexibility in the Wisconsin statute, and we acknowledge that when prospective plaintiffs do not file their formal statutory notice of claim within the 120-day period they may still meet the conditions of the statute if they can establish the following.

Firstly, they must establish that the entity had actual notice of the injury. Secondly, they must demonstrate that there was no prejudice. The plaintiff must prove a negative. The plaintiff must demonstrate that the defendants were not prejudiced by virtue of the absence of timely, formal statutory notice.

In the case at bar, the plaintiff would have had to have shown that the City of Milwaukee and all ten of the individual defendants, respondents in this Court, were not prejudiced by virtue of their not having received formal statutory notice within the 120-day period.

Now, the Wisconsin courts have given very little guidance as to what this prejudice requirement means or how

a plaintiff is to establish this additional element of their case, but it is important to note that the focus of that inquiry is not upon why the plaintiff did or did not file their notice of claim, but the focus is solely on the prejudice to the defendants.

QUESTION: Mr. Steinglass --

MR. STEINGLASS: Yes.

QUESTION: -- if you have actual notice, is any writing at all necessary on the part of the plaintiff?

MR. STEINGLASS: The statute does not require actual notice. The Wisconsin Supreme Court in this case held that in cases in which documents are used to provide the actual notice they must meet certain minimal requirements. The way in which they frame that leads one to conclude that under the statute something other than documents would be acceptable. In this case there weren't the kinds of formal documents that the Wisconsin Supreme Court expected.

QUESTION: It's a matter of decisional law then, you just don't know.

MR. STEINGLASS: That, I think, is the correct answer. It is petitioner's contention that the Wisconsin notice of requirement is inconsistent with Section 1983. Now, we acknowledge that this Court has never addressed a case squarely raising the question of the relationship between Section 1983 and notice of claim requirements. Nonetheless,

we believe that decisions of this Court construing essential attributions of a Section 1983 cause of action lead to the conclusion that the notice of claim requirement is improper.

QUESTION: Mr. Steinglass, let me ask before you launch into that another question about the meaning of the state statute. Does it require or apply if the suit in the state court is against the employee in his individual capacity?

MR. STEINGLASS: I believe not, Your Honor. I believe the statute refers to suits against the employee for acts done in their official capacity or in the course of their agency or employment.

QUESTION: And your suit here or the plaintiff's suit here was against employees in both their official capacity and their individual capacity?

MR. STEINGLASS: That is correct.

QUESTION: But the court below didn't make any distinction, I gather.

MR. STEINGLASS: That is also correct. That is also correct, Your Honor.

QUESTION: Did you ask the court to make such a distinctijn?

MR. STEINGLASS: Well, I think the central argument that was made in the case below was that the notice of claim requirement was simply inapplicable to 1983 cases,

and a secondary argument was that it didn't apply as a matter of state law. I don't believe the specific argument that you raise was in fact raised in the Wisconsin courts.

This Court in Wilson versus Garcia addressed the appropriate statute of limitations in Section 1983 actions and held that in each state there should be a single limitations period for 1983 litigation, and that that limitations period should be the limitations period for general personal injury actions.

The Wisconsin Court of Appeals in the present case identified the appropriate limitations period in this case as three years. The notice of claims statute, we contend, operates to cut off a plaintiff's right to sue short of that full statutory period.

Now, in support of the notice of claim requirment the Wisconsin Supreme Court identified as the primary purpose of the requirement the desire to settle disputes without resort to litigation, certainly a legitimate purpose in the abstract. However, this Court rejected that identical purpose when offered by the State of Maryland as a justification for its six-month limitation period in cases involving administrative agency allegations of employmnet discrimination in Burnett versus Gratten.

But the Court has noted that in choosing a appropriate limitations period, a different balance of

interests enters into a state decision than the appropriate balance of interests that should be considered when a court is dealing with a federally created cause of action.

QUESTION: Mr. Steinglass, is your principal complaint here the six-month statute of limitations after the notice is -- after the city counsel has refused to act or the requirement of a notice at all?

MR. STEINGLASS: No, I think this case principally involves the requirement of a notice at all. One of the ambiguities of the Wisconsin Supreme Court's decision is, they never addressed whether they believed that the six-month limitations period is applicable.

The Wisconsin Court of Appeals held it was a full three-year period, and the Wisconsin Supreme Court dismissed this case for the simple reason that the plaintiff did not file the initial notice of claim within 120 days of the incident, and did not give actual notice within the meaning of the statute.

QUESTION: So again, we don't know under Wisconsin law whether if you file the notice of claim and it's not acted on by the city council, how long thereafter you have to file?

MR. STEINGLASS: We have no definitive ruling as to what the Wisconsin Supreme Court thinks about that.

QUESTION: And you don't know why you didn't go

into federal court instead of the state court. We don't know, do we?

MR. STEINGLASS: If the notice of claim requirement applies in federal court?

QUESTION: Yes. I said, we don't know why your client chose the state court instead of the federal court?

MR. STEINGLASS: Well, Your Honor, there is nothing in the record indicating why the plainfiff chose the state courts rather than the federal courts, but Congress gave plaintiffs that choice, and that is part of our system of concurrent jurisidction, and I have practiced law in Wisconsin for many years, and the Wisconsin courts are perfectly fine courts, quite capable of dealing with 1983 issues and other federal rights, and the plaintiff made that decision.

QUESTION: It didn't turn out that way, did it?

MR. STEINGLASS: What?

QUESTION: It didn't turn out that way, did it?

MR. STEINGLASS: Well, apparently. That's why we're here today, Your Honor.

(General laughter.)

MR. STEINGLASS: That is clear.

In looking at limitations, period, this Court has required a review of the practicalities of litigation. I just want to talk about that for a moment.

QUESTION: I don't see exactly why the length of the limitations period is involved here.

MR. STEINGLASS: Well, Your Honor, it seems to us that if there is a three-year limitations period using the period identified by the Wisconsin Court of Appeals in this case, that entitles a plaintiff to wait that full period.

QUESTION: But the Supreme Court of Wisconsin never got to this question, as I understand. It could have decided it authoritatively but didn't because your client hadn't filed a notice of claim.

MR. STEINGLASS: That is correct, but the use of the notice of claim requirement to deny a right to sue before the expiration of the full limitations period cuts off the ability to go to court.

QUESTION: But we don't know whether that's true in Wisconsin or not, as I understand it.

MR. STEINGLASS: Even if the limitations period was two years, I mean, the Wisconsin court in this case saw the notice of claim issue as being dispositive.

QUESTION: Yes. Well, I thought you were about to address the suitability of different lengths of time.

MR. STEINGLASS: No, what I really was planning to address was the way in which the short notice of claim requirement placed a burden on plaintiffs who were seeking access to the state courts, and what I was going to say was,

I was going to analogize to this Court's discussion in Burnett about the practicalities of litigation and the difficulty that prospective claimants often have. They often aren't aware of the notice of claim procedure. They are not aware of the formality of the procedure. They certainly can proceed pro se. There is nothing prohibiting them from doing that, but often they are simply unaware.

QUESTION: Well, Mr. Steinglass, it does strike me that just possibly people who want to rely on state courts for their litigation and file suit there generaly speaking have to take those courts as they find them, with whatever procedural requirements those courts employ.

MR. STEINGLASS: Well, that argument can be made, but it has never been accepted with the breadth that your question suggests, Your Honor. In the FELA cases plaintiffs have been permitted to go to state court, and the mere fact that a litigant --

QUESTION: Well, of course, with the FELA one can say that Congress was addressing specifically the procedural requirements that were to be met in those cases, and I am not sure that that is the thrust of the 1983 litigation, which did seem to be addressed to opening a remedy in federal courts.

MR. STEINGLASS: Well, we certainly don't dispute that an important function of 1983 was to create access to

federal courts. In 1971 Section 1 of the Act had a jurisdictional counterpart, but Congress wrote in broad terms and established a remedy, a remedy which this Court held is available in both state and in federal courts.

I would just go back for a moment to the FELA analog and say that in FELA cases this Court has rejected, state pleading rules that were burdensome. This Court has rejected state standards dealing with the directed verdict standard. This Court has rejected state policies involving the burden of proof on releases. There have been a number of decisions in this Court in FELA litigation involving what could be characterized as procedural aspects of state law, and --

QUESTION: Well, but one can find a focus and a Congressional intent to effect those very things in that particular Act, but I am not sure one can find it in 1983.

MR. STEINGLASS: Well, I can't point to any specific intent in which Congress said state courts must here 1983 cases or if state courts do hear 1983 cases they must follow these procedures or those procedures. It is admittedly a very, very bare statute, and yet we must look at the remedy that is created and ask whether that statute should mean one thing in state court and another thing in federal court. I think the implication of the Wisconsin

decision is that 1983 will mean one thing in the state courts and one thing in the federal courts, and the result of this decision is that in Wisconsin, at least, when litigants, claimants for whatever reason do not comply with notice of claim requirements, they -- within the statutory 120-day period, they will simply not utilize the state courts. They will not take the risk.

QUESTION: Certainly you had a closely divided Wisconsin Supreme Court, didn't you?

MR. STEINGLASS: Yes, four to three, Your Honor.

QUESTION: And the three dissenters felt otherwise.

MR. STEINGLASS: That's right.

QUESTION: Distinctly felt otherwise.

MR. STEINGLASS: So did the four lower court judges, but they --

QUESTION: And some of them are pretty strong judges.

MR. STEINGLASS: That is true, but we clearly did lose in the Wisconsin Supreme Court. Of that there is no doubt.

In addition to the conflict with the notice -- with the statute of limitations principles, it is our position that the notice of claim requirement constitutes an impermissible exhaustion requirement. In Patsy this Court held that 1983 cases need not be preceded by resort to

administrative remedies, in fact, even adequate and available administrative remedies.

QUESTION: Could the Wisconsin courts just decline to entertain 1983 actions?

MR. STEINGLASS: Well, that possibility is there. The question that would raise, of course, is whether they could properly do so.

QUESTION: Is there any decision by this Court either way?

MR. STEINGLASS: Not with respect to 1983 cases, at least not directly. In both Martinez and Thiboutot this Court pointed out that the non-discrimination principle would apply, and so if the Wisconsin courts entertained the same type of claims under state law they would not be permitted to exclude 1983 cases, no squarer holding --

QUESTION: What would be the same kind of claims?

MR. STEINGLASS: Well, that's a question to which this Court has not provided a great deal of guidance. In Testa this Court observed that the Rhode Island courts in addition to entertaining Emergency Price Control Act claims -- excuse me, refused to entertain Emergency Price Control Act claims, but entertained both FLSA federal claims and other state claims.

I think the analogy in this case would be other tort actions against, or tort type actions against local

governmental defendants or entities, claims under the Wisconsin constitution. It is difficult to imagine --

QUESTION: Well, you know the Wisconsin courts entertain those.

MR. STEINGLASS: Well, the non-discrimination principle, to be sure, weights the balance very heavily in faovr of state courts entertaining cases, and I think that is how it should be. Beyond that, there is support for even the more difficult issue which this Court need not address, but at least in response to your question, Justice White, I should point out that the Connecticut courts in 1912 refused to entertain FELA cases. They disagreed with the substantive policies involved in the FELA legislation, and what this Court did in Mondou, the second Employer Liability Act case, is, they classified Connecticut's disagreement with federal law as inadmissible, and the Court stated that the existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.

We read cases like Mondou and Testa as not simply establishing a principle of non-discrimination. States are under an obligation that goes beyond simply refraining from discriminating against federal causes of action, but those issues --

QUESTION: Let's be sure about one thing. There is

no case here that you know of that says that a state court must entertain a 1983 action?

MR. STEINGLASS: That is correct. That is correct.

But as I was just indicating, the issue, the ultimate issue of the obligation of state courts as a constitutional matter or even a statutory matter to entertain federal causes of action in general or 1983 cases in particular is simply not involved in this case, because the Wisconsin courts have opened their doors and opened them widely, not as widely as we would like, as this case illustrates, but they have entertained 1983 cases. In fact, virtually every state in this country has entertained 1983 cases with very, very minimal guidance from this Court in terms of what should happen when a 1983 case is heard in the state courts. This Court has spoken to state court 1983 cases on a few occasions. In Thiboutot it required the attorney fee -- the companion attorney fee provision to apply. In Martinez versus California the Court held that when state courts entertained 1983 cases they were obligated to apply the federal immunity standard, so we have some minimal guidance which supports the proposition that when state courts entertain 1983 actions, they are required to entertain the entire cause of action with all of its attributes.

One of the attributes of 1983 is the no exhaustion policy that was established in Patsy, but in Wisconsin a claimant who beleves they have a 1983 claimand wants to pursue it in state court cannot immediately go to state court. They have to go to city hall, and then they have to wait 120 days, and they have to do that in all cases as a result of the notice of claim requirement, so the immediate access to a judicial forum that is the right of plaintiffs is 1983 cases is not available in Wisconsin.

QUESTION: Don't you have to go through every other rule of the state court?

MR. STEINGLASS: Well, I --

QUESTION: Don't you have to abide by every rule in the state court?

MR. STEINGLASS: I would say the --

QUESTION: Except this one? That is your position, isn't it?

MR. STEINGLASS: No.

QUESTION: Isn't that your position?

MR. STEINGLASS: No, there may be other rules that apply. Well, the exhaustion requirement to be sure. If the state had a policy --

QUESTION: Was that used against you?

MR. STEINGLASS: The exhaustion case --

QUESTION: Yes.

MR. STEINGLASS: -- was used against us in this case, yes.

QUESTION: And what other rule?

MR. STEINGLASS: Well, I would -- other rules that the plaintiff would not want to comply with? Rules limiting the availability of attorneys' fees and not applying federal standards.

QUESTION: Is that in this case?

MR. STEINGLASS: No, no, no other rules in --

QUESTION: What I know is what other one is wrong. You abide by all the other rules, but you say you don't have to abide by this one. Is that your position?

MR. STEINGLASS: Well, we would abide by all the rules that are properly applicable. I mean, what I have to say in response to this, Justice Marshall --

QUESTION: Is it all of the rules except this one? Yes or no.

MR. STEINGLASS: Well, in this case the plaintiff did comply with all of the Wisconsin rules, and most of the Wisconsin rules that could be classified as procedural are rules that govern the conduct of litigation, that govern what goes on once a plaintiff files a case in court. We don't argue that the Federal Rules of Civil Procedure or the Federal Rules of Evidence or the federal standard on jury unanimity apply in the state courts. Those are rules,

policies that apply to litigation, apply once the case is filed, and are uniquely by their terms applicable in federal court. They regulate essential elements of the cause of action as well.

What the Wisconsin notice of claim requirement does is, it first creates a condition that has to be complied with before one goes to court. Secondly, it creates a special set of protections for a subclass of state court defendants. Notice of claim requirements do not apply in all Wisconsin litigation. They apply only in suits against governmental employees and governmental entities, the very defendants who are most likely to be defendants in 1983 cases.

When this Court rejected the New Mexico Tort Claims Act statute of limitations in Wilson versus Garcia in favor of the general limitations period for personal injury actions, it pointed out that the use of the general limitations period would prevent states from discriminating against 1983 claimants. We believe that the notice of claim requirement places a burden on 1983 claimants that cannot be justified.

QUESTION: Congress itself has imposed that sort of a regimen on Federal Tort Claims Act cases, hasn't it? Don't you have to make an administrative claim first if you are suing the federal government?

MR. STEINGLASS: That is correct. That is correct. That is perfectly appropriate. Congress believes

that the absence of notice of claim requirements is a defect in 1983 litigation whether filed in the state or in the federal courts. Congress is free to act, and we would think that that is where the proper response should be. Notice of claim requirements are very complicated. They are very varied. And we think the Court should draw a clear bright line and simply say that notice of claim requirements are not applicable in state court 1983 litigation.

I will reserve the balance for rebuttal. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Steinglass.

We will hear now from you, Mr. Langley.

ORAL ARGUMENT OF GRANT F. LANGLEY, ESQUIRE

ON BEHALF OF THE RESPONDENTS

MR. LANGLEY: Mr. Chief Justice, and may it please the Court, petitioner did not lose this case in state court because the notice of claims statute at issue here was too difficult, too complicated, or too burdensome for him to comply with. Petitioner made no effort whatsoever to comply either before or after the city raised the defense in this case of failure to comply.

No effort whatsoever was made to comply with the statute.

QUESTION: Well, how would it have been possible

to comply afterwards with the time limit?

MR. LANGLEY: Under our notice of claims statute you have 120 days in which to file a written notice with the city. However, if you fail to do that you are not barred in bringing your action. There is an alternative, actual notice and prejudice. Once we --

QUESTION: But didn't -- I thought the state court found there wasn't actual notice here.

MR. LANGLEY: The state court found that there was neither written notice within 120 days --

QUESTION: Or actual notice.

MR. LANGLEY: -- nor actual notice. However --

QUESTION: So there was no way this plaintiff could have met the requirement.

MR. LANGLEY: What I was saying was, we raised the defense of failure to comply with this provision in three separate answers. He had his first complaint --

QUESTION: Was the suit filed within the initial 120-day period?

MR. LANGLEY: No, but actual notice --

QUESTION: No, and so since there was no actual notice, there would be no way this plaintiff could have complied, as I see it.

MR. LANGLEY: Actual notice does not have to be made within 120 days. Actual notice can be made at any

time during the overall statute of limitations. His suit was filed nine months after the incidents. When we responded to that suit we raised this issue. He had well over two years to provide actual notice to the city.

QUESTION: In your brief on Page 22 you appear to me to say that the statute requires only that the notice of claim be filed no later than 120 days before the expiration of the applicable statute of limitations. That seems sort of inconsistent with the language of the statute.

MR. LANGLEY: There are two 120-day provisions. The first is with respect to the notice of claim. The second is with respect to the claim itself. You must file a claim, the second provision, again at any time within the three-year statute of limitations, but once you file your claim, unless the city disallows the claim by formal written notice, you must wait 120 days to bring your lawsuit.

The Supreme Court of Wisconsin hasn't answered this issue, but it may be that you cannot wait more than two years and eight months to provide that claim document or you will run into a problem with the statute of limitations, but that's the 120-day limitation that we were referring to.

QUESTION: When you talk about actual notice, you are not suggesting that so long as the city knows some time during the period of the overall statute of limitations that you have a claim against them, that is actual notice,

are you? Because surely a complaint filed in the Circuit Court would be actual notice.

MR. LANGLEY: But the intent of the statute is to give the municipality an opportunity to investigate, and if appropriate, to resolve an issue such as this before litigation. If we permit simply compliance with the statute by the filing of a lawsuit, the statute itself becomes meaningless. That's the concern of the Court, and that was the concern of the Court in this case.

QUESTION: So then the state's interest is in settlement procedures?

MR. LANGLEY: The state's interest is in resolving these disputes without litigation.

QUESTION: Settlement?

MR. LANGLEY: Resolution may be by payment of the claim, by settlement, or in many instances by denial of the claim and because of the reasons for denial it does not result in a lawsuit.

QUESTION: Isn't the best characterization of that an exhaustion of remedies rule?

MR. LANGLEY: No, I don't believe so in this case that it is an exhaustion of remedies, because all the claimant is required to do is to file a document, a document. The claimant doesn't have to participate in the process.

QUESTION: Well, but the state's interest is in an

exhaustion of remedies procedure, is it not?

MR. LANGLEY: No, I don't necessarily agree with that. The state's interest is in attempting to resolve these issues short of litigation, but there is nothing in this statute that precludes a plaintiff who submits that document from bringing the lawsuit, from going into court. I agree that the statute says that after you file a claim you must wait 120 days. But there is nothing else in the procedure of responding to that claim that the claimant must participate in.

The claimant can simply ignore the process after that and file a lawsuit. The concern again of the Court in this case was that there was no attempt to comply whatsoever. The reason that Court does not require or the state does not require participation in the process is, the state does want to preserve these claims, and does want to give a claimant an opportunity to go into court, to file a lawsuit if the claimant feels that that is the only appropriate result, but in many claims, in many instances we are able to resolve these matters short of litigation. The statute works.

QUESTION: Mr. Langley, does the statute apply at all to a suit against an employee in the individual capacity of the employee?

MR. LANGLEY: That issue was not raised in this case, but I believe it does. We have to remember that as

part of this statutory scheme there is an indemnification provision. The city indemnifies its employees for acts undertaken in the scope of employment, and the introductory language of the statute talks about acts done in official capacity or in the course of their agency or employment. I believe under those circumstances even if the individual is sued as an individual and not in scope of employment, that it could reasonably be argued that the statute still applies.

QUESTION: If this claim had been filed -- if the suit had been filed in federal court, do you think that the state could apply its notice of claim statute?

MR. LANGLEY: I think -- first of all, this Court has not decided that issue. Secondly, the purposes behind the statute are important regardless of whether the litigation is brought in state court or in federal court, but I recognize that the weight of authority in the circuits and in the district courts is that it does not apply, it does not apply to a case brought in federal courts.

There is a dispute as to whether it would apply to pendent state claims. I point out here --

QUESTION: Is that because it is close to an exhaustion requirement such as the Court dealt with in Patsy?

MR. LANGLEY: There is in my judgment in reviewing those cases very little analysis of why that is the answer.

However, I believe that the purpose or the reasoning behind the Court is really the application of the 1988 analysis. They look to see whether there is a gap or a deficiency in the federal law before turning to state law, and generally the courts have held that this type of requirement does not represent a gap or deficiency in the federal law, and therefore they do not need to consider it.

QUESTION: Why is that true -- you say that is true for exhaustion, right?

MR. LANGLEY: I'm sorry.

QUESTION: You say there is no gap where the issue is exhaustion.

MR. LANGLEY: No, I'm suggesting that there is no gap where the only issue is a precondition imposed by the state in bringing a lawsuit. Here, the precondition that we have has nothing to do with the remedy itself. It in no way so long as you comply with the statute affects the remedy that the plaintiff is entitled to. Therefore, since it is not a gap in the federal law, it is not essential to a determination of the federal remedy, the federal courts have held that they don't have to look to the state claims procedure.

QUESTION: And you agree with that.

MR. LANGLEY: I think an argument can be made the other way, but in my judgment if the issue were presented to this Court the answer would be yes.

QUESTION: May I ask, I guess there are two filings, the claim itself and then the claim for damages. If the claimant asked for $10,000 in the notice, does that place a limit on what can be recovered in the Wisconsin court?

MR. LANGLEY: No, it does not. No, it does not.

QUESTION: What is the purpose of that requirement?

MR. LANGLEY: The purpose is, if a claimant, if we can assume that a claimant acts in good faith, it puts the city on notice of what the claimant values that claim at. If we, in terms of investigation, determine that this is a valid claim and we should attempt to resolve it, the claim would give us some idea of what the claimant is seeking in terms of damages. There is nothing in the statute, however, that indicates that the claimant is bound by that figure.

QUESTION: Is the figure admissible, I take it -- sort of like a settlement offer, I guess, then. Is the figure admissible in the trial later on? If the plaintiff claims more, could the defendant say, all you claimed in your notice of claim was a smaller amount?

MR. LANGLEY: In my judgment it is not. In my judgment the only way that the city can react to that is to make an offer. I don't even consider the claim an offer to the city. The city must respond with an offer, and under the statute the claimant can either accept that offer or simply wait the 120 days and file his lawsuit. It is not an

offer. It is not a matter that could be introduced in court. It is a document that simply gives the city the opportunity to, one, investigate the circumstances, and to attempt to compromise.

I would also point out that there's another important purpose behind this statute, and it's a purpose that's consistent with 1983 and the federal law. It provides us with an opportunity when we receive notice of a claim such as this to investigate and to, if necessary, take remedial action. This is a signficant public benefit to the statute. We may determine that it's appropriate to discipline an offer involved. It may be appropriate to review a policy. For example, if a case involving a strip search, a claim were filed against the city for a strip search, I think all would agree that there is nothing more degrading than a person who is subject to strip search by police officers.

In a case such as that, if we receive a claim reasonably shortly after the incident occurs, it gives us an opportunity to review the policy.

QUESTION: Mr. Langley, the city certainly can't take the position here that it didn't know enough of the underlying facts to take any action it wanted to to straighten out its police department operation.

MR. LANGLEY: That's correct in this case, but the overall purpose is to afford the city an opportunity to take

remedial actions. I agree with you that in terms of the incident we had knowledge of the incident very shortly after it occurred. Our courts said that knowledge of the incident simply was not sufficient to meet the requirements of the claim statutes, but we did have knowledge of the incident and in fact we did conduct a full investigation of the incident itself.

But again in the strip search example, if we find that there is a problem with the policy, we can rewrite policy. If we find that it's necessary we can re-educate our police officers in what the requirements of that policy are, and we can do it in such a manner that others may not suffer the same alleged injustice. That is why the statute is so important to municipalities, not only to resolve the claim before it, but also to take remedial action so that this type of incident does not occur again.

QUESTION: One difficulty with that argument is that if the statute only applies to state court litigation as most of the other courts seem to hold, I suppose the real impact is that you would just channel this litigation into the federal courts.

MR. LANGLEY: I don't believe that that will occur. The burden on the plaintiff to comply with the statute is minimal. The claimant need not hire an attorney in order to comply with the first part of the statute. You need not

conduct an investigation. You need not prepare pleadings. You don't have to do any of those things that --

QUESTION: You've got to do something within 120 days.

MR. LANGLEY: You have to do something within 120 days --

QUESTION: And a lot of people don't.

MR. LANGLEY: -- but the obligation is a minimal obligation. I think we pointed out in our brief a three sentence document that would have complied with both sections of the claims statutes. I should point out that the issue was raised with respect to that document. The document isn't directed to the employees. It is only directed to the municipality.

QUESTION: Let me modify my point. It is at least true that any plaintiff who sleeps on his or her rights for 120 days would have to go into federal court.

MR. LANGLEY: No, I don't agree with that, either.

QUESTION: Or gives actual notice and shows no prejudice, but there are risks not to go -- I mean, it is a lot safer to go into federal court.

MR. LANGLEY: It's a lot safer to go to federal court, but I think if you, in looking at the decisions of the Wisconsin Supreme Court, the risks in providing actual notice and prejudice are minimal at best. The Court has

never held --

QUESTION: The action notice has to be something more than filing a complaint, doesn't it?

MR. LANGLEY: Generally, generally counsel comply if they have not filed the notice of claim documents. They will comply with the actual notice requirement simply by filing the claim documents at any time after the running of the 120 days. In each and every instance where the Wisconsin Supreme Court has looked at the claim document it has concluded that that was actual notice, and in every instance the Court has never found that the city was prejudiced by its failure to get the notice of claim within 120 days.

QUESTION: But after the 120 days it is federal court or nothing.

MR. LANGLEY: No, again, my judgment is --

QUESTION: Well, give me the case that was over 120 days where the complainant recovered in the state court.

MR. LANGLEY: There are any number of cases where the claim was filed after 120 days -- I'm sorry, not a 1983 claim.

QUESTION: Well, that's what I'm talking about.

MR. LANGLEY: You're correct, Your Honor. In terms of what happens with the actual notice and prejudice, our Court has never addressed that issue, and it didn't

address the issue in this case because it found that there was no attempt at compliance whatsoever. Surprisingly enough, there was no attempt at compliance even though there were both federal 1983 claims and state claims. There were state claims in this litigation, and yet there was no compliance with the notice of claim or claim provision.

We don't agree that this is an immunity case, a limitation case, or an exhaustion case. In an exhaustion of administrative remedies case, you generally have a time consuming burden and potentially expensive burden placed on a claimant before that claimant goes into court. As I pointed out previously, the burden on the plaintiff or the claimant in this case is minimal. When you weigh it against the public benefits of a statute such as this, the burden is minimal.

It is not a limitation because if you do not file the notice of claim within 120 days you can still provide actual notice. So it is not an absolute bar. There was some discussion of the six-month limitation, and I would point out to the Court that the six-month limitation runs only after a claim has been filed and after the city serves notice of disallowance of the claim in which document we must state that the claimant has six months to bring the lawsuit.

The claimant already knows of the claim. We have taken steps to disallow the claim. We provide written notice,

and in that notice, which is served by certified mail, we must advise the claimant that there is six months to bring the lawsuit. If the 120-day period runs, with no notice of disallowance, that six-month limitation does not apply. It only applies where we by formal action disallow the claim and provide notice of that disallowance to the claimant.

This is not an immunity statute. The purpose of this statute is to afford municipalities an opportunity to amicably resolve disputes such as this with its citizens without going into Court. That's the purpose behind the statute, to give us an opportunity to resolve those issues.

The Wisconsin court has already recognized that federal law governs the issue of immunity, and the Wisconsin court has followed this Court in terms of immunties. We have a $25,000 limitation in state court actions. The Wisconsin court has determined that that does not apply to 1983 claims. The Wisconsin court has already determined that attorney's fees will be recoverable in 1983 claims.

I would point out also that the Wisconsin court has not addressed the appropriateness of that six-month statute of limitations that I just referred to. The court hasn't addressed that issue. It may very well be that the court will determine that six-month limitation on a claim requiring that you file a lawsuit may be an improper burden, may be an immunity that the court will not apply in 1983 litigation.

It simply hasn't addresed that question. It was not an issue in this case.

The statute, as I have pointed out, is not a trap for the unwary. There is a positive obligation placed on a municipality to call attention to the statute in its pleadings, to call attention to the failure of a claimant to comply with the statute in its pleadings. If we don't do that, the defense is waived, and that is true both with respect to the notice of claim and the claim provision.

We have the obligation to raise the defense. We have the obligation to place a claimant on notice that this statute is applicable and it must be complied with.

QUESTION: How can you comply with it after 120 days has run?

MR. LANGLEY: Again, by any type of actual notice after 120 days the Court has held that the action is not barred so long as the claimant can show that the municipality is not prejudiced. And by the way, I would suggest that the Wisconsin Supreme Court has indicated that the requirement that a claimant show no prejudice is a minimal requirement, a minimal requirement. Prejudice generally means that we haven't had the opportunity to investigate the claim.

QUESTION: Of course, there was opportunity, but may I ask one other question? What is the time period in

which after the 120, initial 120 day period has run you can comply with the statute by giving actual notice?

MR. LANGLEY: The court has held that the overall statute of limitations in Wisconsin is three years.

QUESTION: So you are telling me that any time within three years the plaintiff could have given actual notice of the claim and then filed suit?

MR. LANGLEY: I think under the circumstances of this case it is reasonable to conclude that the Court would find that we were not prejudiced, and that had he made that minimal effort --

QUESTION: If that is true, why isn't filing the complaint adequate? If you filed a complaint within three years, if all you need is actual notice, how can you better describe -- give actual notice than say, I want to sue you because this incident occurred on whatever the date was, and I got hurt, and so forth. Why isn't that actual notice?

MR. LANGLEY: In theory I agree but the statute says that a claimant can neither bring nor maintain an action without complying with the statute. The underlying purpose of the statute --

QUESTION: I understand all that, but you are telling me that actual notice within three years is all they have to do. Why can't they then dismiss the complaint and refile it the next day, say, I gave you notice yesterday?

QUESTION: I would suppose that if you are correct I don't understand why the case is even here.

QUESTION: Or even why you have a statute.

QUESTION: And you are playing fast and lose with the statute anyway by allowing actual notice instead of the specific kind of notice that is required, but you are suddenly going to stop short of allowing the complaint to be actual notice. That seems to me getting perfinicky at a very late date.

MR. LANGLEY: But that is exactly what our court has said because of the underlying purposes of the statute. They want to afford municipalities an opportunity to address these matters prior to litigation. It does no good for us the statute would be virtually worthless if all you had to do was to file a lawsuit in order to comply with the --

QUESTION: I thought the most common way of effecting a settlement is sue somebody.

MR. LANGLEY: No.

QUESTION: And I suppose you could come back and negotiate with a plaintiff who has filed a suit.

MR. LANGLEY: Your Honor, in most municipalities these claims are resolved prior to litigation.

QUESTION: I agree with you.

MR. LANGLEY: There are very few claims which are filed with the city which ultimately result in litigation.

The statute works. It works very well. Its purposes are being served by requiring this claim prior to litigation.

QUESTION: All right. Within three years the plaintiff gives what you would describe as actual notice to the city. I don't know what that is, but he gives them actual notice, and the next day he sues.

MR. LANGLEY: The next day he could not sue.

QUESTION: Well, so actual notice isn't enough, is it?

MR. LANGLEY: He would have to also comply with the second part of the statute, which is the claim provision. That second part of the statute was not at issue in this case. The court resolved the failure to comply based on the claimant's failure to provide notice of claim.

QUESTION: I take it you say, in effect then you are saying that the requirement that you give notice within 120 days is a nullity in your statute.

MR. LANGLEY: No, I cannot agree with that. I can't agree --

QUESTION: Well, if you can give actual notice two years from the event, which you say you can.

MR. LANGLEY: But the claimant also must show if he is going to rely on the actual notice provision that the municipality was not prejudiced in so doing. Again, it is a minimal burden, but that is the requirement.

QUESTION: Well, so actual notice isn't enough.

MR. LANGLEY: That's correct. He must take the additional step and show that the municipality was not burdened.

QUESTION: And you must wait 120 more days to give the municipality the opportunity to make a settlement offer?

MR. LANGLEY: To make a settlement. That's right. Once the claim document is filed, and as I pointed out normally if the 120-day time period is missed, the claim document serves as both actual notice and claim, and he must then wait 120 days prior to filing the lawsuit.

QUESTION: How is the issue whether the municipality has been prejudiced, how is that decided?

MR. LANGLEY: The question that the Court addresses --

QUESTION: As I understand it, there is an actual notice. The four months has gone by. Now there is something that you say satisfies the actual notice.

MR. LANGLEY: Right.

QUESTION: But the plaintiff nevertheless still has the burden of proving the municipality was not prejudiced.

MR. LANGLEY: Yes.

QUESTION: How does he do that?

MR. LANGLEY: The question that the court will

look at is --

QUESTION: Well, how does he get into court?

MR. LANGLEY: I'm sorry.

QUESTION: How does he get into court?

MR. LANGLEY: He simply --

QUESTION: I thought you said no lawsuit until after he has satisfied the requirement of proving that the municipality was not prejudiced. Where does he do that?

MR. LANGLEY: He would file his lawsuit after --

QUESTION: He files the lawsuit?

MR. LANGLEY: Files the lawsuit. We raise --

QUESTION: Now, wait a minute. First he gives actual notice, whatever that may be.

MR. LANGLEY: Right. And then files the lawsuit.

QUESTION: I thought he couldn't do that until he established that the municipality was not prejudiced.

MR. LANGLEY: No, in terms of the first statute, the first section --

QUESTION: No, I am talking about the second, the actual notice provision.

MR. LANGLEY: The notice provision is the first section. The claim provision is the second. If he has given us actual notice, he files the lawsuit, we raise the defense that we were prejudiced --

QUESTION: That's two different things. He gives

you actual notice and he files a lawsuit. Is that it?

MR. LANGLEY: Right.

QUESTION: How much time after he has given you actual notice does he have before he may file the lawsuit?

MR. LANGLEY: The time limit that he has to wait for filing the lawsuit does not apply to actual notice. It applies to the second part of the statute, which is the claim.

QUESTION: How much time after he has given actual notice does he have to file the lawsuit?

MR. LANGLEY: Assuming that he has complied with the claim statute, he can file the lawsuit immediately. Assuming he has complied with the second section, he can file the lawsuit immediately.

QUESTION: Including proving that the municipality was not prejudiced?

MR. LANGLEY: Yes.

QUESTION: Where has he done that?

MR. LANGLEY: He has not done that in this case. The court held that while the city was aware that there was an incident, we were not aware that this person would seek as a result of the facts of that incident to recover damages against the city.

The court held that in order to comply with the actual notice requirement you must advise the city, the

common council, and the mayor that you intend to seek to recover damages as a result of that incident.

We get notices of this type of incident or other types that could result in lawsuits throughout the departments of the city that the common council and the mayor never become aware of, so they can't afford themselves of the benefits of the statute because they are not aware that these incidents occur.

In fact, in this case there is a footnote regarding comments made by one of the aldermen who received a call about this incident and who reported it to the chief of police. He indicated that he didn't feel that this was a claim or a notice of claim, that it was nothing more than a telephone call that he had received from a constituent regarding an incident that he wanted the department to look into. He didn't believe that there was compliance with the statute as a result of the call that he received.

Again, the statute is somewhat confusing because of its two parts and the time frames contained in the two parts, but it has served its purposes well, and it is not, and I repeat, it is not a substantial burden placed on a claimant. Compliance is minimal. The problem that the claimant had in this case was simply a refusal to comply with the statute in any regard, even though the claimant was put on notice.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Langley.

Mr. Steinglass, you have three minutes remaining.

ORAL ARGUMENT OF STEVEN H. STEINGLASS, ESQUIRE

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. STEINGLASS: Thank you.

We don't dispute that the statute may work very well in Wisconsin in the traditional tort litigation for which it was adopted. In cases involving potholes, ice on the sidewalk, defective highways, the statute may work fine. There is nothing in the record and no experience to support the conclusion that it works fine in Section 1983 cases involving allegations of constitutional deprivations.

The statute is, we suggest, not a simple statute. With all respect, I have to say that the final colloquy between counsel and the court demonstrates many of the complexities of the statute. And this is a statute that an unrepresented claimant is supposed to be able to understand and comply with. I think it flies in the face of reality to conclude that it is a simple statute.

In this particular case the plaintiff was put on notice about his alleged non-compliance with the statute after his litigation was filed. At that time it was impossible for him to file a notice complying with the second part of the requirement, and wait 120 days, because by

definition that --

QUESTION: Do you mean this is the first time you knew the statute was in?

MR. STEINGLASS: I didn't try the case below but the formal notification of the statute came through the affirmative defendant.

QUESTION: But the statute has been on the books.

MR. STEINGLASS: Well, it had been on the books since 1963 but it only applied to tort litigation until 1977, and when this case was filed, Your Honor, not a single federal or state court in this country had ever in a reported decision held that notice of claims statutes in any state applied to 1983 cases. Moreover, the Federal District Courts in Wisconsin --

QUESTION: And when you filed a case you knew that you had to not apply to it, and instead of going to the federal court you went to the state court, period, end quote.

MR. STEINGLASS: That's entirely correct, Your Honor.

QUESTION: Well, what else do you have?

MR. STEINGLASS: Well, what I have is that as this Court pointed out in Robertson versus Wegman, in which the Court indicated that the issue was not whether a particular plaintiff wins or loses in terms of determining

the propriety of a state policy, but for the same reasons we would say that the issue is not whether a particular plaintiff might or might not have been able to comply with the statute. The issue is the appropriateness of the requirement in 1983 litigation and the appropriateness of the requirement in 1983 litigation not only in the Wisconsin courts but in the courts throughout the country, because any decision that this Court makes affirming the use of notice of claim requirements will in all likelihood be a binding precedent throughout the country.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Steinglass.

The case is submitted.

(Whereupon, at 11:59 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

DOCKET NUMBER: 87-526

CASE TITLE: Felder v. Casey

HEARING DATE: March 28, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the U.S. Supreme Court.

Date: 4/1/88

Margaret Daly

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D. C. 20005