COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1371 **Cir. Ct. No. 2012CV414**

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

CHRISTOPHER BREKKEN,

PLAINTIFF-APPELLANT,

V.

BRUCE J. LANDGRAF,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Barron County: TIMOTHY M. DOYLE, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Christopher Brekken appeals an order dismissing his tort action against Bruce Landgraf. The circuit court dismissed the suit

because Brekken failed to comply with WIS. STAT. § 893.82,[1] the state employee notice of claim statute. Asserting that Landgraf was a "loaned employee" of Milwaukee County, Brekken argues the circuit court should have applied WIS. STAT. § 893.80, the municipal employee notice of claim statute. We reject Brekken's arguments and affirm the order.

BACKGROUND

¶2 Brekken filed the underlying action against assistant district attorney Landgraf, alleging intentional torts arising from a John Doe subpoena duces tecum. Brekken claimed that although he informed Landgraf he did not have, nor could he obtain, any records, documents, or statements that fell within the ambit of the subpoena, a bench warrant was issued at Landgraf's direction for Brekken's arrest.

¶3 Brekken alleged that Landgraf caused him to be falsely imprisoned and also "used the civil and criminal processes for purposes other than which they were designed." The complaint indicated that Brekken served Landgraf with a notice of claim pursuant to WIS. STAT. § 893.80. Landgraf moved to dismiss the complaint on the ground that Brekken failed to comply with WIS. STAT. § 893.82 prior to filing suit. After a hearing, the court dismissed the action. This appeal follows.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

¶4 Prior to filing suit against a state employee, a claimant must serve a written notice of the claim upon the attorney general's office within 120 days of the incident from which the claim arises. *See* WIS. STAT. § 893.82(3). Failure to comply with the requirements of § 893.82(3) is fatal to any claim because its requirements are jurisdictional. ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 116, 595 N.W.2d 392 (1999). Timely and proper compliance with § 893.82 must be alleged in the complaint, and failure to do so is grounds for dismissal. *See* ***Yotvat v. Roth***, 95 Wis. 2d 357, 360, 290 N.W.2d 524 (Ct. App. 1980) (analyzing predecessor statute).

¶5 Here, proper compliance with WIS. STAT. § 893.82 was not alleged in the complaint, and Brekken concedes he did not comply with the statute. Rather, based on his assertion that Landgraf was a "loaned employee," Brekken argues he properly served his notice of claim pursuant to WIS. STAT. § 893.80, the municipal employee notice of claim statute. We are not persuaded.

¶6 Brekken advances his "loaned employee" of Milwaukee County theory for the first time on appeal. In his reply brief, Brekken concedes he did not use the term "loaned employee" in the circuit court. He nevertheless contends that the "substance" of this theory was adequately raised below by his repeated references to Landgraf acting as a representative or agent of Milwaukee County. Despite Brekken's argument to the contrary, we conclude that his repeated references to Milwaukee County in the circuit court did not sufficiently raise the legal theory there. We generally do not consider issues raised for the first time on appeal, and we decline to do so here. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶7 Ultimately, Brekken offers no response countering Landgraf's argument that assistant district attorneys are state employees, not employees on loan to the counties where they work. *See* ***Brown Cnty. Attorneys Ass'n v. Brown Cnty.***, 169 Wis. 2d 737, 740, 487 N.W.2d 312 (1992). Arguments not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Because district attorneys and assistant district attorneys are employed by the state, *see* WIS. STAT. § 230.08(2)(a) and (sg), the circuit court properly dismissed the action based on Brekken's failure to comply with WIS. STAT. § 893.82.

By the Court.—Order affirmed.

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