

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

July 20, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-2054**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**TONY WALKER,**

**PLAINTIFF-APPELLANT,**

**V.**

**DEPARTMENT OF CORRECTIONS, MICHAEL SULLIVAN,  
KEN SONDALE, GARY R. MCCAUGHTRY, TINA CROSS,  
PETER HUIBREGISE, MICHAEL HOWARD, PAMELA KNICK,  
STEVEN SCHUELER, DAVID HAUTAMAKI, SCOTT ECKSTEIN,  
GEORGE GABAY, DICK VERHAGEN, JANE GAMBLE,  
JODINE DEPPISCH, BRUCE MURASKI, DONALD STRAHOTA,  
MARK MELCHER, SGT. MCCARTHY, WCI PROPERTY ROOM,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County:  
PAUL B. HIGGINBOTHAM, Judge. *Affirmed and cause remanded with  
directions.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Tony Walker, pro se, appeals from the trial court's order dismissing his action against the Department of Corrections and some of its employees (collectively, "DOC"). Walker argues that the trial court should have granted his motion for default judgment. We disagree and affirm.

¶2 Walker first contends that the trial court should have granted his motion for default judgment because DOC did not file an answer to his amended complaint. However, a defendant may file a motion to dismiss for failure to state a claim in lieu of filing an answer. *See* WIS. STAT. § 802.06(2)(a)6 (1997-98).<sup>1</sup> This is exactly what DOC did. The trial court properly denied Walker's motion for default judgment.

¶3 Walker next argues that the trial court misused its discretion by dismissing his case against the eight additional defendants named in the amended complaint because they did not file an answer or other responsive pleading. This argument has no merit. When the trial court dismissed the claim as to the eight newly-named defendants, the time for them to file a responsive pleading had not yet run. A judge is entitled to dismiss a case without requiring a responsive pleading if the complaint fails to state a claim upon which relief can be granted. *See* WIS. STAT. § 802.05(3)(b)4. That is what the trial court did.

¶4 In his reply brief Walker argues that the trial court's decision dismissing his case was incorrect on the merits. DOC moves to strike this argument because it was raised for the first time in Walker's reply brief. We will not consider arguments raised for the first time in a reply brief. *See Henry v. General Cas. Co.*, 225 Wis. 2d 849, 868 n.10, 593 N.W.2d 913 (Ct. App. 1999).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version.

We thus grant the motion to strike the reply brief and do not consider Walker's argument further.

¶5 DOC moves for costs and reasonable attorney's fees on the grounds that this appeal is frivolous, citing WIS. STAT. § 814.025(3). That statute applies only to proceedings in the trial court. *See Bilsie v. Bilsie*, 100 Wis. 2d 342, 357, 302 N.W.2d 508 (Ct. App. 1981) (§ 814.025(3) does not permit an award of attorney's fees for a frivolous appeal). We will construe the request as made pursuant to WIS. STAT. RULE 809.25(3), which provides statutory authority to this court to award fees on appeal.

¶6 Under WIS. STAT. RULE 809.25(3)(c) 2, we conclude that this appeal is frivolous because Walker should have known that the claims made on appeal against DOC are without reasonable basis and could not be supported by a good faith argument for the extension, modification or reversal of existing law. We therefore grant the motion for costs and reasonable attorney's fees and remand to the trial court to determine the proper amount to be awarded. *See Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998).

¶7 DOC moves this court to declare this appeal a "strike" for purposes of commencing future actions. *See* WIS. STAT. § 801.02(7)(d). Pursuant to § 801.02(7)(d), a prisoner is prohibited from commencing proceedings in the trial court without the payment of fees if the prisoner has previously had three cases dismissed (three "strikes") for any of the reasons set forth in WIS. STAT. § 802.05(3)(b)1-4. DOC contends that this appeal should be declared a strike because it is frivolous under WIS. STAT. § 814.025(3) and thus meets the condition specified in § 802.05(3)(b)1.

¶8 WISCONSIN STAT. ch. 802 addresses pleadings, motions and pretrial practice in the trial court. Because ch. 802 does not apply to this court, we will construe DOC's motion to declare this appeal a strike as made pursuant to WIS. STAT. RULE 809.103(2)(a), which provides that this court shall notify the Department of Justice when an appeal brought by a prisoner is frivolous and thus counts as a strike against the prisoner. Because we have concluded that this appeal is frivolous, we grant the motion to declare this appeal a strike and will so notify the Department of Justice.

*By the Court.*—Order affirmed and cause remanded with directions.

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

