

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 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. 00-0046

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KEITH E. PISCHKE,

PLAINTIFF-APPELLANT,

v.

KEN J. SONDALLE, WARDEN,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

¶1 DEININGER, J.¹ Keith Pischke appeals an order dismissing his small claims action against Ken Sondalle, warden of the Fox Lake Correctional Institution. Pischke also appeals an order denying his motion for reconsideration.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

The circuit court dismissed Pischke's cause of action after determining that he failed to serve a notice of claim upon the attorney general as required by WIS. STAT. § 893.82. We conclude that the circuit court did not err in dismissing Pischke's action. Accordingly, we affirm the orders of the circuit court.

BACKGROUND

¶2 Keith Pischke is an inmate committed to the custody of the Wisconsin Department of Corrections. In June 1998, he was transferred from the Fox Lake Correctional Institution in Wisconsin to the North Fork Correctional Facility in Oklahoma. According to Pischke, several items of his personal property were not delivered to him after the transfer. In July 1999, Pischke filed a small claims action in the Dodge County circuit court naming Ken Sondalle, warden of the Fox Lake Correctional Institution, as the sole defendant. In his summons and complaint, Pischke asked the court to order Sondalle to return Pischke's property or, in the alternative, to pay him five hundred dollars.

¶3 In August 1999, Sondalle moved for summary judgment on the grounds that: (1) Pischke failed to serve a notice of claim upon the attorney general as required by WIS. STAT. § 893.82; (2) Sondalle cannot be held personally liable for the alleged negligence of his employees; and (3) Pischke's suit is barred by the doctrines of sovereign and public officer immunity. Sondalle's motion was supported by an affidavit of a paralegal employed by the Department of Justice in which the paralegal explained that she had "searched [her] records" and was "unable to locate a notice of claim filed with the Attorney General" by Pischke. In November 1999, the circuit court determined that Pischke had failed to serve a notice of claim as mandated by WIS. STAT. § 893.82, and the court entered an order granting Sondalle's motion for summary judgment. Pischke

subsequently submitted a motion for reconsideration in which he argued that the notice of claim requirement of § 893.82 did not apply to his suit against Sondalle. The court disagreed and denied his motion for reconsideration. Pischke appeals.

ANALYSIS

¶4 We review the circuit court's grant of summary judgment, and its denial of reconsideration, de novo, using the same methodology as the trial court. *See Envirologix Corp. v. City of Waukesha*, 192 Wis. 2d 277, 287-88, 531 N.W.2d 357 (Ct. App. 1995). Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See M&I First Nat'l Bank v. Episcopal Homes Management, Inc.*, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995); *see also* WIS. STAT. § 802.08(2).

¶5 The circuit court granted Sondalle's motion for summary judgment because it concluded that Pischke was required to comply with the notice of claim requirement set forth in WIS. STAT. § 893.82.² Although Pischke does not dispute

² WISCONSIN STAT. § 893.82 provides, in relevant part:

- (2m) No claimant may bring an action against a state officer, employe or agent unless the claimant complies strictly with the requirements of this section.
- (3) Except as provided in sub. 5m [pertaining to medical malpractice actions], no civil action ... may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties ... unless within 120 days of the event causing the injury, damage or death giving rise to the civil action ... the claimant in the action ... serves upon the attorney general written notice of a claim....
- (3m) If the claimant is a prisoner, as defined in s. 801.02(7)(a)2, the prisoner may not commence the civil

(continued)

that a notice of claim was never served on the attorney general, he contends that the circuit court erred when it concluded that § 893.82 applies to his small claims action. Specifically, Pischke contends that (1) existing caselaw indicates that § 893.82 is inapplicable to lawsuits like his, and (2) the court erroneously determined that he met the statutory definition of a “prisoner” and therefore wrongfully applied § 893.82(3m) to his action against Sondalle. We find no merit in either of Pischke’s contentions.

¶6 Pischke first argues that WIS. STAT. § 893.82 is not applicable to his suit against Sondalle. This argument is apparently based upon Pischke’s interpretation of *Felder v. Casey*, 487 U.S. 131 (1988), in which the Supreme Court concluded that Wisconsin’s notice of claim statute was inapplicable to the action before it. The cause of action at issue in *Felder*, however, involved a federal civil rights claim that was brought in state court. The Supreme Court held that Wisconsin’s notice of claim statute was preempted by federal law under those circumstances. Pischke’s suit, in contrast, is a replevin action and raises no federal civil rights issues. Pischke’s reliance on *Felder* is thus misplaced.

¶7 WISCONSIN STAT. § 893.82 plainly requires that any claimant who wishes to bring suit against a state employee must provide the attorney general with a written notice of claim, and the Wisconsin courts have consistently held that failure to give this notice is fatal to the lawsuit. *See Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984), *Oney v. Schrauth*, 197 Wis. 2d 891, 904-05, 541 N.W.2d 229 (Ct. App. 1995). The purpose behind § 893.82 is to ensure that the attorney general has the opportunity to investigate claims which

action or proceeding until the attorney general denies the claim or until 120 days after the written notice under sub. (3) is served upon the attorney general, whichever is earlier....

might result in a judgment that will be paid by the state, and strict compliance with this statute is necessary to ensure that this purpose is achieved. *See Lewis v. Sullivan*, 188 Wis. 2d 157, 168-69, 524 N.W.2d 630 (1994); *see also Oney v. Schrauth*, 197 Wis. 2d at 904. Pischke failed to file a notice of claim with the attorney general as required by § 893.82, and he has failed to convince us that his claim is exempt from the statute’s procedural requirements.

¶8 Pischke next argues that WIS. STAT. § 893.82 does not apply to his suit because he does not satisfy the statutory definition of “prisoner” set forth in § 893.82(3m) and WIS. STAT. § 801.02(7)(a)2. Pischke notes that § 893.82 distinguishes between prisoners and non-prisoners, and contends that the circuit court applied the subsection that pertains to prisoners when it determined that he was required to file a notice of claim with the attorney general. *See* § 893.82(3m). Pischke asserts, however, that he is currently incarcerated at an out-of-state facility and is therefore not a “prisoner” under § 893.82(3m). Pischke thus contends that the circuit court erred when it concluded that the notice of claim statute applied to his suit against Sondalle.

¶9 Pischke’s argument is similar to a number of recent challenges to the Prisoner Litigation Reform Act (PLRA) and its definition of “prisoner.” This court has recently determined that a person who is incarcerated in an out-of-state facility is not a “prisoner” under WIS. STAT. § 801.02(7)(a)2, a section of the PLRA. *See State ex rel. Speener v. Gudmanson*, 2000 WI App 78, No. 99-0568. Since WIS. STAT. § 893.82 incorporates the definition set forth in § 801.02(7)(a)2, there is merit to Pischke’s contention that he is not a “prisoner” under § 893.82, and that subsection (3m) of this statute does not apply to his suit against Sondalle. Nonetheless, his action is still barred by § 893.82.

¶10 Even if Pischke is not bound by the requirements set forth in WIS. STAT. § 893.82(3m), he is bound by the remaining provisions of § 893.82. Subsection (2m) explains that “[n]o claimant may bring an action against a state officer, employe or agent unless the claimant complies strictly with the requirements of this section,” and subsection (3) provides that a claimant’s suit is barred if he or she fails to file a notice of claim with the attorney general. *See* § 893.82(2m) and (3). These two subsections apply to *any* claimant who wishes to bring an action against a state employe, and the provisions unambiguously impose a “condition precedent to the right to maintain an action.” *See Lewis v. Sullivan*, 188 Wis. 2d at 168. Pischke failed to file a notice of claim as required by § 893.82(3), and his suit against Sondalle was therefore properly dismissed.³

CONCLUSION

¶11 For the reasons discussed above, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

³ Sondalle makes two additional arguments in support of the dismissal of Pischke’s action. Sondalle asserts that Pischke’s suit is barred by the doctrine of public officer immunity, and that Sondalle cannot be held personally liable for the alleged negligence of his employees under the doctrine of *respondeat superior*. Pischke has not raised or addressed these two issues on appeal, and his appeal can be resolved on the basis of his noncompliance with WIS. STAT. § 893.82. We therefore do not address Sondalle’s additional arguments.

