COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2026

Samuel A. Christensen
Clerk of Court of Appeals

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.

Appeal No. 2025AP1480 **Cir. Ct. No. 2024CV1024**

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

STATE OF WISCONSIN EX REL.
COLIN DOWLING,

PETITIONER-APPELLANT,

V.

CRAIG THOMPSON AND TOMMY WINKLER,

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JACOB B. FROST, Judge. *Reversed.*

Before Graham, P.J., Blanchard, and Nashold, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Chris Dowling's driving privileges in Illinois were suspended based on his conviction in Wisconsin for failing to stop his vehicle as soon as safety reasonably permitted. Dowling brought an action against Craig Thompson, who was then Secretary of the Wisconsin Department of Transportation, and Tommy Winkler, the Administrator of the Wisconsin Department of Motor Vehicles (the "DMV"). Dowling alleged that the DMV negligently breached a duty imposed by federal regulations when it mischaracterized Dowling's conviction in a report that the DMV sent to a national database, incorrectly referencing a more serious violation for which Dowling was not convicted. Dowling also alleged that the DMV negligently breached a duty imposed by WIS. STAT. § 343.36(3) (2023-24)[1] when it failed to send the pertinent Illinois agency a certified copy of Dowling's judgment of conviction and instead sent a report that erroneously identified Dowling's conviction. The circuit court dismissed the first of these claims because the court concluded that the claim is barred under the doctrine of public official immunity. The court dismissed the second claim because it concluded that Dowling's notice of claim under WIS. STAT. § 893.82(3) is insufficient as to this claim.

¶2 On appeal, Dowling argues that Thompson and Winkler waived the defense of public official immunity and that Dowling's notice of claim was sufficient. We agree with Dowling and reverse the judgment dismissing this action.

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

BACKGROUND

¶3 Dowling's pleadings allege the following, which we accept as true for purposes of this appeal.

¶4 Dowling lives in Illinois. While driving his electric vehicle on the interstate in Wisconsin, Dowling was forced to decrease his speed because of an unexpected drop in the vehicle's battery charge. A state patrol officer pulled up behind Dowling and activated the emergency lights on his patrol vehicle, signaling for Dowling to pull over. Although Dowling immediately decreased his speed and moved over onto the shoulder of the interstate, he did not stop immediately because he feared that if he did so, his vehicle would not start again due to its low charge. Instead, Dowling called 911, asked whether the officer behind him could follow him to a charging station, and was told to pull over, which Dowling then did. Dowling was issued a citation for, and subsequently convicted of, failing to stop his vehicle as soon as safety reasonably permitted, in violation of WIS. STAT. § 346.04(2t).

¶5 Approximately a month after Dowling's conviction, the DMV notified Dowling that his Wisconsin driving privileges had been revoked for six months for having been convicted of attempting to elude an officer in violation of WIS. STAT. § 346.04(3), even though, as noted above, Dowling was convicted of violating § 346.04(2t). Several days later, the DMV withdrew the revocation.

¶6 Less than a month after the DMV withdrew the revocation, Dowling received a letter from the Illinois Secretary of State Driver Services Department (DSD) stating that his Illinois driving privileges would be suspended for six months because he had been convicted outside the state of Illinois of "attempting to flee or elude a peace officer." The Illinois DSD was suspending Dowling's

driving privileges because the DMV had sent the Illinois DSD a document titled "Report Out-of-State Withdrawal" (the "withdrawal report"), which stated that the DMV had revoked Dowling's license for attempting to flee or elude a police officer. Although the DMV, after it withdrew the revocation of Dowling's Wisconsin driving privileges, sent to the Illinois DSD a document nullifying the withdrawal report, that nullification document had not yet reached the correct office at the time the Illinois DSD sent the suspension letter to Dowling. The DMV did not send to the Illinois DSD a certified copy of Dowling's record of conviction as required by WIS. STAT. § 343.36(3).[2] Dowling's counsel persuaded the DMV to fax the nullification document to the Illinois DSD, and approximately a week after Dowling was notified of the suspension, it was rescinded.

¶7 Almost three months later, however, Dowling received another notification from the Illinois DSD, again stating that his driving privileges would be suspended. This time, the Illinois DSD explained that it was suspending Dowling's driving privileges because of how the DMV had coded Dowling's conviction in a withdrawal report sent to the National Driver Register ("the Register"). The Register maintains a database used by all 50 states to identify drivers who have been convicted of federally specified offenses or have had their drivers' licenses revoked. State agencies submit reports to the Register that

[2] WISCONSIN STAT. § 343.36(3) states:

> Upon receiving a record of conviction showing that a nonresident operator of a motor vehicle has been convicted in this state of an offense which is grounds for revocation, suspension or disqualification under the laws of this state, the department shall forward a certified copy of such record to the motor vehicle administrator in the state wherein the person so convicted is a resident.

identify convictions in the respective states, using codes from the American Association of Motor Vehicle Administrators Code Dictionary (the "Code Dictionary"), and the Register maintains this information in a database that can be accessed by the state agencies. After Dowling's conviction, the DMV sent a withdrawal report to the Register in which it coded Dowling's conviction under the Code Dictionary as "U01 Fleeing or evading police or roadblock." As a result, the Illinois DSD treated Dowling's conviction as being equivalent to a conviction for violating an Illinois statute that prohibits willfully fleeing or attempting to elude a police officer, a conviction that requires suspension of the offender's driver's license.

¶8 Dowling attempted to persuade the DMV to apply a different code from the Code Dictionary to his conviction, but was unsuccessful. Dowling was able to persuade the Illinois DSD that a different code should have been used for his conviction, one that does not result in a suspension in Illinois. The Illinois DSD rescinded the second suspension of Dowling's privileges approximately two months after Dowling's privileges were suspended the second time.

¶9 Dowling originally filed a petition for mandamus after the Illinois DSD suspended his driving privileges the second time and before his driving privileges were restored. But after the second suspension was rescinded by the Illinois DSD, Dowling filed an amended petition for mandamus and complaint (the "amended complaint"), and it is the amended complaint that is operative for purposes of this appeal.

¶10 The amended complaint named as defendants Thompson and Winkler (collectively, "Thompson").[3] In the amended complaint, Dowling sought mandamus relief and damages for claims of negligence. Regarding his mandamus claim, Dowling sought a writ of mandamus to "compel the DMV to withdraw its false report to the [Register] and to correct Dowling's Wisconsin driving record to … reflect that he was not convicted of 'Attempting to elude an officer.'" For his negligence claims, Dowling alleged that the DMV violated two "mandatory, nondiscretionary" duties. First, Dowling alleged that the DMV violated federal regulations by falsely reporting to the Register that Dowling had violated code U01. And second, Dowling alleged that the DMV violated WIS. STAT. § 343.36(3) by failing to send to the Illinois DSD a certified copy of Dowling's record of conviction and by sending the erroneous withdrawal report instead (the "WIS. STAT. § 343.36(3) claim"). Dowling sought damages, including for expenses incurred as a result of the suspension of his driving privileges and for the reasonable value of legal services required to correct the various suspensions.

¶11 Thompson moved to dismiss Dowling's amended complaint for failure to state a claim, and the circuit court ultimately granted Thompson's motion in its entirety.

¶12 Regarding Dowling's mandamus claim, the circuit court agreed with Thompson that Dowling failed to show that he would suffer substantial injury without a writ of mandamus or that he lacked an alternative remedy. Dowling does not challenge on appeal the court's dismissal of his mandamus claim.

[3] Although Thompson and Winkler are named as defendants, Dowling's claims arise out of the DMV's conduct. Dowling alleged that, "[o]n information and belief, all persons acting on behalf of the DMV … were acting under the authority of Thompson and/or Winkler."

¶13 Regarding Dowling's negligence claims, after ordering two separate rounds of additional briefing, the circuit court concluded that the doctrine of public official immunity bars Dowling's claims for damages arising out the DMV's alleged negligent coding of his conviction as U01. In doing so, the court rejected Dowling's argument that Thompson waived the public official immunity defense by failing to timely raise it. The court also concluded that Dowling's WIS. STAT. § 343.36(3) claim is barred because the notice of claim that Dowling was required to file with the Wisconsin Attorney General pursuant to WIS. STAT. § 893.82(3) is insufficient.

¶14 Dowling appeals.

DISCUSSION

¶15 Dowling argues that the circuit court erred when it dismissed his negligence claims. Specifically, regarding his claim that the DMV negligently coded his conviction, he argues that the court erred because Thompson waived the defense of public official immunity by failing to timely raise it. With respect to his WIS. STAT. § 343.36(3) claim, Dowling argues that the court erred because his notice of claim is sufficient under WIS. STAT. § 893.82(3). We conclude that Thompson waived the affirmative defense of public official immunity and that Dowling's notice of claim is sufficient. Accordingly, we reverse.

¶16 Whether a complaint states a claim upon which relief can be granted is a question of law that we review independently. *See* ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. A complaint or petition "must plead facts, which if true, would entitle the plaintiff to relief." ***Id.***, ¶21. For purposes of our review, we accept as true the factual allegations in the complaint. ***Id.***, ¶18.

I. Thompson waived the defense of public official immunity.

¶17 As a general rule, public officials as individuals are immune from civil actions seeking damages arising out of the performance of their official duties. ***Lister v. Board of Regents of Univ. Wis. Sys.***, 72 Wis. 2d 282, 299, 240 N.W.2d 610 (1976). Public official immunity is a substantive, common law limitation on public officers' personal liability that is based on considerations of public policy. ***Id.*** It is an affirmative defense that the public official waives unless the official raises it in a responsive pleading or a motion filed before a responsive pleading. ***Id.*** at 299-300; WIS. STAT. § 802.06(2)(a) (stating that defenses such as lack of capacity to be sued must be raised in responsive pleading or by motion); WIS. STAT. § 802.03(3) (stating that immunity is an affirmative defense). Whether a party has waived an affirmative defense by failing to timely raise it is a question of law that we review de novo. *See* ***Rural Mut. Ins. Co. v. Peterson***, 134 Wis. 2d 165, 179-80, 395 N.W.2d 776 (1986).

¶18 On appeal, Thompson does not dispute that the defense of public official immunity is waived if not raised in a responsive pleading or a motion filed before a responsive pleading. Nor does Thompson dispute that he failed to raise this defense in either a responsive pleading or his motion to dismiss. Instead, Thompson's primary contention is that Dowling forfeited any argument that Thompson waived this defense because Dowling did not sufficiently raise a waiver argument in the circuit court. As we now explain, we reject this contention and conclude that Thompson waived the defense of public official immunity by failing to timely raise it.

¶19 In response to Dowling's amended complaint, Thompson filed a motion to dismiss. In that motion, Thompson did not assert a defense of public

official immunity or in any way address Dowling's newly added negligence claims. In Thompson's reply brief in the circuit court, he raised for the first time, in response to Dowling's negligence claims, the defense of sovereign immunity. But sovereign immunity and public official immunity "are two separate and distinct concepts." ***Lister***, 72 Wis. 2d at 298. Dowling moved to strike Thompson's argument regarding sovereign immunity, arguing that Thompson waived this argument by failing to timely assert it as part of his motion to dismiss.

¶20 The circuit court requested further briefing regarding Dowling's negligence claims and whether such claims were adequately pled. In Thompson's supplemental brief, Thompson argued for the first time that public official immunity applied. Dowling responded by arguing that Thompson waived this defense by failing to timely raise it. In doing so, however, Dowling treated public official immunity as a subset of sovereign immunity, which, under ***Lister***, is incorrect, *see* ***id.*** at 298-99, and Dowling therefore treated public official immunity as a claim of lack of personal jurisdiction, *see* ***id.*** at 296. In Thompson's supplemental reply brief, he relied on ***Lister***, correctly pointing out that public official immunity and sovereign immunity are separate concepts, and that public official immunity is founded on principles of public policy. *See* ***id.*** However, without citing any legal authority, Thompson also argued that, because public official immunity is distinct from sovereign immunity and founded on principles of public policy, Thompson did not waive the defense of public official immunity by failing to raise it in Thompson's motion to dismiss. This contradicts ***Lister***, which, as noted above, states that the defense of public official immunity is generally waived if not raised in a responsive pleading or a motion to dismiss. ***Id.*** at 299; *see also* WIS. STAT. § 802.06(2)(a).

¶21 The circuit court determined that Thompson had not waived the defense of public official immunity. The court reasoned that, because public officer immunity "is a matter of public policy, not of sovereign immunity," Dowling's "reliance on case law requiring the defense of lack of personal jurisdiction to be raised in the initial motion/pleading … is inapplicable." The court accordingly concluded that, to the extent that Dowling's argument treated public official immunity as a lack of personal jurisdiction, Dowling's waiver argument was unsupported by case law and, to the extent that his argument relied on something other than a lack of personal jurisdiction, it was undeveloped.

¶22 Contrary to the circuit court's ruling, and consistent with ***Lister*** and WIS. STAT. § 802.06(2)(a), we conclude that, by failing to raise the defense of public official immunity in its original motion to dismiss, Thompson waived this defense. We reject Thompson's arguments to the contrary.

¶23 As noted, Thompson argues that Dowling forfeited his waiver argument by failing to raise it in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (explaining the forfeiture rule: "Issues that are not preserved at the circuit court … generally will not be considered on appeal."). Thompson concedes that he raised the defense of public official immunity for the first time in his supplemental brief filed after the court requested additional briefing, and that he did not raise this defense in his motion to dismiss Dowling's amended complaint. However, Thompson argues that in response, Dowling argued that Thompson had "'waived the defense of *sovereign immunity*.'" (Emphasis in original.) Thompson further argues that because sovereign immunity and public official immunity are distinct, and because Dowling did not argue that Thompson waived public official immunity, Dowling forfeited his waiver argument.

¶24 We disagree that Dowling forfeited this argument. To be sure, Dowling did mistakenly identify public official immunity as a type of sovereign immunity and therefore as a lack of personal jurisdiction. However, as context, Thompson had earlier relied on sovereign immunity as a defense to Dowling's claims, and when Thompson later relied on public official immunity in response to the circuit court's request for supplemental briefing, Thompson did not clarify that he was raising a new argument. Nor did Thompson argue that public official immunity is different from sovereign immunity until his supplemental reply brief. In other words, it appears as though it was the very fact that Thompson did not timely raise a public official immunity defense in his initial motion to dismiss the amended complaint, and instead later argued that *sovereign* immunity applies, that resulted in Dowling treating Thompson's argument as relying on the doctrine of sovereign immunity. Moreover, Dowling nonetheless argued that Thompson "waived *any claim of immunity* by failing to timely raise it," and he did so directly after describing Thompson's argument as being that Thompson is "protected by the public officer immunity doctrine." (Emphasis added.) This sufficiently raised a waiver argument as to the defense of public officer immunity.[4]

¶25 Thompson also argues that the circuit court correctly concluded that Dowling's argument that Thompson waived the public official immunity defense was either unsupported by case law or undeveloped. As noted, case law

[4] As stated, we conclude that Dowling did not forfeit his waiver argument. However, even if he did, we would disregard forfeiture. "[W]e may still exercise our discretion in addressing [forfeited issues]. The forfeiture rule is not an inexorable command, but is instead a rule of judicial administration, and thus a reviewing court may disregard a forfeiture and address the merits of an unpreserved issue in an appropriate case." ***State v. Wilson***, 2022 WI 77, ¶35 n.7, 404 Wis. 2d 623, 982 N.W.2d 67. We would overlook forfeiture here given the circumstances described above.

establishes that public official immunity *is* an affirmative defense that can be waived, which means that Dowling's waiver argument is supported by case law. Similarly, the court's conclusion that Dowling failed to develop his argument is also unsupported. Again, Dowling did raise a waiver argument as to both sovereign immunity and public official immunity, and any lack of clarity regarding Dowling's waiver argument as to public official immunity can be attributed to Thompson's failure to timely raise this defense.

¶26 In sum, we conclude that Thompson waived the defense of public official immunity. Accordingly, the circuit court erred when it relied on public official immunity to dismiss Dowling's negligence claim arising out of the DMV's classification of Dowling's conviction using the U01 code.

II. Dowling's notice of claim was sufficient.

¶27 As stated, the circuit court dismissed Dowling's WIS. STAT. § 343.36(3) claim on the ground that Dowling failed to provide notice of this claim as required by WIS. STAT. § 893.82, the notice of claim statute. Dowling argues that the court's conclusion and dismissal were in error. We agree.

¶28 Pursuant to WIS. STAT. § 893.82, a plaintiff must file a notice of claim with Wisconsin's attorney general in order to file suit against a state officer, employee, or agent. Relevant here,

> no civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties … unless … the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death[.]

§ 893.82(3). Strict compliance is required. § 893.82(2m). We independently review the sufficiency of a notice of claim as a question of law. *See* ***Sambs v. Nowak***, 47 Wis. 2d 158, 164, 177 N.W.2d 144 (1970).

¶29 As discussed, after Thompson first moved to dismiss Dowling's amended complaint, the circuit court requested supplemental briefing. In Thompson's supplemental reply brief, he argued that Dowling failed to comply with WIS. STAT. § 893.82(3) as to Dowling's WIS. STAT. § 343.36(3) claim. After asking for additional briefing on this issue specifically, the court concluded that Dowling had not complied with § 893.82(3) with respect to his WIS. STAT. § 343.36(3) claim because the notice of claim did not specifically reference a failure under § 343.36(3) to send a copy of Dowling's record of conviction to the Illinois DSD.

¶30 Relevant here, in his amended complaint, Dowling alleged the following regarding his WIS. STAT. § 343.36(3) claim. The DMV had a duty under § 343.36(3) to send to the Illinois DSD "a certified copy of Dowling's actual record of conviction and to not send … an erroneous statement or report concerning that conviction." The DMV breached that duty by failing to send the Illinois DSD a certified copy of Dowling's record of conviction and by falsely stating that he had been convicted of attempting to elude an officer. The Illinois DSD suspended Dowling's license because the DMV failed to provide the Illinois DSD with a certified copy of Dowling's record of conviction and falsely reported Dowling's conviction to the Illinois DSD. Dowling suffered damages as a result.

¶31 Dowling's notice of claim states in relevant part that the DMV sent the withdrawal report to the Illinois DSD based on its erroneous determination that

he violated WIS. STAT. § 346.03(3) by attempting to elude an officer, and that as a result, the Illinois DSD erroneously suspended Dowling's license.

¶32 We conclude that Dowling's notice of claim provided sufficient notice under WIS. STAT. § 893.82(3). Pursuant to § 893.82(3), Dowling's notice of claim was required to state "the circumstances of the event giving rise to the claim." The notice of claim does so by stating that the DMV erroneously sent the withdrawal report to the Illinois DSD and that Dowling's license was suspended as a result. That the notice did not also specifically refer to WIS. STAT. § 343.36(3) does not render it insufficient under the notice of claim statute, which, again, requires only the inclusion of "the circumstances of the event giving rise to the claim." *See* § 893.82(3). We reject Thompson's arguments to the contrary.

¶33 Thompson argues that the notice of claim does not identify as a *breach of duty* the DMV's sending the allegedly erroneous withdrawal report to the Illinois DSD. Instead, Thompson argues, the notice of claim states that the DMV had a duty to apply an accurate code to Dowling's conviction, and that the DMV breached that duty. However, WIS. STAT. § 893.82(3) does not require that the notice of claim accurately describe all of the plaintiff's causes of action. Relevant here, it requires only that the notice of claim state "the circumstances of the event giving rise to the claim." As stated, Dowling's notice of claim does so by stating that Dowling's Illinois license was suspended because the DMV sent the erroneous withdrawal report to the Illinois DSD.

¶34 Thompson also argues that "even if the notice of claim could be read to cover a claim based on [the] DMV's sending the [withdrawal report to the Illinois DSD], Dowling's amended [complaint] did not allege such a cause of action." This assertion, however, is incorrect. Dowling's amended complaint

alleged that: (1) the DMV had a duty "to not send [the Illinois DSD] an erroneous statement or report concerning [Dowling's] conviction," (2) the DMV breached this duty "by falsely stating Dowling had been convicted of 'Attempting to elude an officer,'" and (3) Dowling's Illinois driver's license was suspended because "the [withdrawal report] sent by the DMV to [the Illinois DSD] falsely stated Dowling had been convicted of 'Attempting to elude an officer.'" Accordingly, contrary to Thompson's contention, the amended complaint alleges a cause of action arising from the DMV's sending the withdrawal report to the Illinois DSD.

CONCLUSION

¶35 For the reasons stated, we reverse the judgment dismissing this action.[5]

By the Court.—Judgment reversed.

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

[5] Dowling also argues that the circuit court erred when it dismissed his negligence claim arising out of the DMV's wrongful revocation of his Wisconsin driving privileges. We reject this argument because in his amended complaint, Dowling did not allege that the DMV negligently revoked his Wisconsin driving privileges.