COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 1998

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 97-1130

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

BRUCE A. RUMAGE,

PLAINTIFF-APPELLANT,

V.

GARY A. MCCAUGHTRY, KATHLEEN BERKLEY, M. J., NURSE, AND JOHN DOE, DOCTOR,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

PER CURIAM. Bruce Rumage, *pro se*, appeals from a judgment and order dismissing his complaint against an unnamed nurse employed at Waupun Correctional Institution (WCI), an unnamed doctor employed at WCI, an unnamed person identified as "John Doe," the health services manager at WCI,

and the warden. The issue is whether the trial court properly dismissed Rumage's cause of action. We conclude that it did, and therefore affirm.

Rumage's hand was crushed in a freight elevator at WCI on October 25, 1994. He brought this action against the respondents, contending that they violated his civil rights by failing to provide him with proper medical treatment and by showing deliberate indifference to his medical needs.[1] The trial court dismissed the case because Rumage had failed to comply with the notice of claim statute, § 893.82(3), STATS., had failed to state a claim under federal law, 42 U.S.C. § 1983, and had failed to personally serve three of the parties.

The trial court properly dismissed the state law claim. A complaint bringing a state law claim for damages is subject to dismissal if it does not allege compliance with § 893.82(3), STATS. ***Yotvat v. Roth***, 5 Wis.2d 357, 360-61, 290 N.W.2d 524, 527 (1980). Although Rumage filed a notice of claim, he did not do so until December 11, 1995, more than a year after the injury. A claimant is required to file a written notice of claim "within 120 days of the event causing the injury…." Section 893.82(3). Rumage's failure to timely comply with the notice of claim statute is fatal to his state law claim.

The trial court also properly dismissed the federal claim against the warden and director of health services. In order to maintain a claim under 42 U.S.C. § 1983, Rumage needed to allege facts showing that each of the respondents was personally involved in, directly responsible for or acquiesced in the acts perpetrated against him. *See* ***Adickes v. S.H. Kress & Co.,*** 398 U.S. 144,

[1] On appeal, Rumage also argues that he was denied access to the courts. Because he did not raise this argument before the trial court, we do not consider it.

150 (1970). McCaughtry's only involvement was his receipt of a letter from Rumage in which Rumage asserted that he had been denied medical treatment for his injury. McCaughtry promptly responded to the letter, informing Rumage that he had the first available appointment with a specialist at University Hospital and, in the meantime, was free to see the doctor on staff at WCI. McCaughtry's direct involvement was minimal and a claim against him may not be based on his supervisory status over subordinate employees. *See* ***Monell v. New York City Dep't of Soc. Servs.***, 436 U.S. 658, 694, n.58 (1978), *cited with approval in* ***Saenz v. Murphy***, 153 Wis.2d 660, 673-74, 451 N.W.2d 780, 785 (Ct. App. 1989), *rev'd on other grounds*, 162 Wis.2d 54, 469 N.W.2d 611 (1991).

Even if the warden had been directly involved in providing Rumage health care, the trial court properly dismissed the federal law claim against McCaughtry and Berkley because they were not "deliberately indifferent" to "serious medical needs." *See* ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976) (where a claim for violation of civil rights involves allegations that a prisoner was denied medical care, the prisoner must allege and prove that each defendant was deliberately indifferent to his serious medical needs). It was undisputed that Rumage's injury involved no broken bones, no ligament instability, no loss of sensation, and no damage to his range of motion. The swelling, decreased grip strength, and pain of which he complained were being treated by the prison doctors, and he was scheduled to visit a specialist at the first available time. The trial court properly concluded that Rumage did not have "a serious medical need" and that the respondents were not "deliberately indifferent" to his medical condition.

Finally, Rumage's federal law claims against "John Doe" and the unnamed doctor and nurse were properly dismissed because Rumage failed to

timely identify and personally serve them. The trial court ordered Rumage to identify and serve any additional parties to this action by December 10, 1996. Rumage did not do so. Because Rumage failed to identify the unnamed parties and failed to serve them as required by § 801.11, STATS., the service statute, the trial court properly dismissed these parties.[2]

By the Court.—Judgment and order affirmed.

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

[2] The trial court suggested in its oral decision that dismissal was also proper on the grounds of issue or claim preclusion because Rumage had brought a previous suit alleging that the warden, deputy warden and the health services manager at a different institution, Oshkosh Correctional Institution, had failed to meet his medical needs. Rumage told the court that the prior claim was based on a different set of facts, not the elevator accident. Because we do not have the record in that case before us at this time, we cannot address whether the case before us is barred on the grounds of issue preclusion.