COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 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. 97-1404

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

RICHMOND ATO YARNEY,
ATRICH TRANSPORT, INC.,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN,
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,
AND JAMES SCAFE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Richmond Ato Yarney, and Atrich Transport, Inc., appeal from a circuit court judgment in favor of the Department of Health and

Social Services (DHSS),[1] and a circuit court order dismissing with prejudice Yarney's federal and state claims against James Scafe. Yarney filed federal claims under 42 U.S.C. §§ 1981 and 1983, and state claims of malicious prosecution and intentional infliction of emotional distress against Scafe. He also filed a declaratory judgment claim against DHSS. Yarney claims that the circuit court erred in dismissing all of his claims. For the following reasons, we disagree. First, we conclude that, because Yarney failed to appeal in a timely manner from the circuit court's judgment in favor of DHSS, we cannot consider his appeal from that judgment. Second, with respect to Yarney's malicious prosecution claim against Scafe, although we ultimately conclude that the circuit court's dismissal of that claim was proper, we conclude that the circuit court erred by dismissing that claim on the basis that Yarney failed to comply with the notice of claim provisions of § 893.82, STATS. With respect to Yarney's intentional infliction of emotional distress claim against Scafe, however, we conclude that by failing to address the issue, Yarney has conceded the validity of the circuit court's finding that the claim is barred by Yarney's failure to comply with § 893.82. Finally, due, in part, to Yarney's failure to sufficiently address the immunity issue, we conclude that the circuit court properly dismissed Yarney's federal claims and state malicious prosecution claim against Scafe, because Scafe is absolutely immune from liability. Therefore, we affirm the circuit court's judgment and order.

[1] The Department of Health and Social Services was renamed the Department of Health and Family Services, effective July 1, 1996, pursuant to 1995 Wis. Act 27, §§ 9126 (19) and 9426 (16).

I. BACKGROUND.

Yarney owned and operated Atrich Transportation, Inc., which was involved in transporting individuals for medical reasons, and which received reimbursement from Medicaid. Scafe was an investigator in the Medicaid Fraud Unit of the Wisconsin Department of Justice. In May 1992, Scafe was assigned by his Unit Head to do an investigation of Atrich Transportation. Scafe's investigation revealed that Atrich failed to comply with Medicaid rules; in particular, he failed to require signed prescriptions for medical transport. Scafe reported his findings to Assistant Attorney General Juan Colas, who decided to initiate criminal proceedings. The criminal complaint, which was prepared by Colas and signed by Scafe, was issued in December 1993, charging Yarney with three counts of claim misrepresentation. Subsequent to signing the criminal complaint, Scafe organized the file and testified in Yarney's criminal proceedings on May 24, 1994.

Yarney was acquitted. Following the acquittal, Colas made a referral, based on Scafe's investigation, to DHSS. Scafe had retired prior to the referral by Colas. Following hearings, DHSS determined, in a final decision dated January 18, 1996, that Yarney had violated Medicaid regulations and had been overpaid in the amount of $74,873.90. Yarney did not appeal from DHSS's final decision.

On July 28, 1996, Yarney filed a summons and complaint, which was later amended, alleging: (1) a declaratory judgment claim against DHSS, seeking to prevent DHSS from attempting to enforce its judgment; (2) a malicious prosecution claim against Scafe; (3) an intentional infliction of emotional distress claim against Scafe; and (4) federal claims under 42 U.S.C. §§ 1981 and 1983

against Scafe. Yarney's complaint stated that he was black, and alleged that Scafe's wrongful prosecution of Yarney was motivated by racial animus and discrimination.

On December 12, 1996, the circuit court entered a judgment dismissing Yarney's complaint against DHSS. Yarney did not appeal that judgment within 90 days. On March 26, 1997, the circuit court entered an order dismissing with prejudice all of Yarney's claims against Scafe. The circuit court dismissed both of Yarney's state claims against Scafe based on Yarney's failure to file a timely notice of claim, and dismissed Yarney's federal claims after finding that Scafe was absolutely immune from liability. Yarney now appeals from the circuit court's judgment in favor of DHSS and the circuit court's order dismissing Yarney's complaint against Scafe.

II. ANALYSIS.

A. Declaratory Judgment Claim Against DHSS.

Pursuant to § 808.04(1), STATS., generally:

> An appeal to the court of appeals must be initiated within 45 days of entry of judgment or order appealed from if written notice of the entry of judgment or order is given within 21 days of the judgment or order as provided in s. 806.06(5), or within 90 days of entry if notice is not given ….

Only final judgments and orders are appealable. *See* § 808.03(1), STATS. "A final judgment or final order is a judgment, order or disposition [court record] that disposes of the entire matter in litigation as to one or more of the parties ...." ***Id.*** In cases involving multiple defendants, a judgment or order dismissing one defendant is final as to that defendant. *See* ***Culbert v. Young***, 140 Wis.2d 821,

825-27, 412 N.W.2d 551, 553-54 (Ct. App. 1987) (order disposing of the entire matter in litigation with respect to one defendant is final with respect to that defendant, but is not final with respect to remaining defendants). The circuit court judgment in favor of DHSS is dated December 12, 1996. Yarney did not appeal from that judgment within ninety days. Therefore, Yarney's appeal from the judgment in favor of DHSS is untimely, and will not be considered.

B. Section 893.82, STATS., Notice of Claim Issues.

The circuit court held that both of Yarney's state claims were barred by Yarney's failure to comply with the notice of claims provisions of § 893.82, STATS. Although we ultimately conclude, as explained later in this opinion, that the circuit court's dismissal of Yarney's malicious prosecution claim was proper, we do so on a different basis than that found by the trial court. With respect to the intentional infliction of emotional distress claim, Yarney has failed to address the circuit court's ruling. Therefore, we deem Yarney to have confessed the validity of the circuit court's holding with respect to that claim.

Section 893.82(3), STATS., states:

> [N]o civil action or civil proceeding 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 injury, damage or death giving rise to the civil action or civil proceeding, the claimant ... serves upon the attorney general written notice of [the] claim ....

This provision requires service of a notice of claim upon the accrual of the claim because,

> When all of the elements of an enforceable claim are known to the claimant, including the identity of the defendant, it is fair to require that the claimant make a reasonably diligent inquiry to determine whether the status of the defendant imposes special duties upon the claimant, such as giving notice of the injury and the claim to the appropriate agency.

Renner v. Madison Gen. Hosp., 151 Wis.2d 885, 891, 447 N.W.2d 97, 99 (Ct. App. 1989). In this case, it is undisputed that Yarney filed a notice of claim on September 15, 1994, and that, therefore, any claim accruing prior to May 18, 1994, is barred by § 893.82, STATS. "A cause of action for malicious prosecution accrues on the date the complainant was acquitted in the criminal prosecution." ***Segall v. Hurwitz***, 114 Wis.2d 471, 488-89, 339 N.W.2d 333, 342 (Ct. App. 1983) (citing ***Luby v. Bennett***, 111 Wis. 613, 616, 87 N.W. 804, 805 (1901)). Yarney was acquitted on May 25, 1994. Therefore, Yarney complied with § 893.82 with respect to his malicious prosecution claim, and, although we ultimately conclude that the circuit court's dismissal of that claim was proper, the circuit court erred by dismissing Yarney's malicious prosecution claim on that basis.[2]

The circuit court went on to state that because of Yarney's failure to comply with § 893.82, STATS., it was dismissing "all of [Yarney's] state claims." Yarney's complaint alleges state law claims against Scafe for intentional infliction of emotional distress, as well as malicious prosecution. An intentional infliction of emotional distress claim accrues on the date of injury. *See* ***Hansen v. A.H. Robins, Inc.***, 113 Wis.2d 550, 554, 335 N.W.2d 578, 580 (1983) (prior to adoption of the discovery rule, tort claims were held to accrue on the date of injury); ***Oney v. Schrauth***, 197 Wis.2d 891, 899-902, 541 N.W.2d 229, 231-32

[2] We address Yarney's malicious prosecution claim again in Section "D" of this opinion.

(Ct. App. 1995) (discovery rule does not apply to § 893.82, STATS.). With respect to Yarney's intentional infliction of emotional distress claim, the circuit court did not explicitly state why it believed that Yarney failed to comply with § 893.82. The circuit court presumably believed that the alleged injury which formed the basis for Yarney's intentional infliction of emotional distress claim occurred prior to May 18, 1994. On appeal, however, Yarney has completely failed to address the circuit court's dismissal of his intentional infliction of emotional distress claim. In ***Schlieper v. DNR***, 188 Wis.2d 318, 525 N.W.2d 99 (Ct. App. 1994), we stated:

> This court has held that respondents cannot complain if propositions of appellants are taken as confessed which respondents do not undertake to refute. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). We think the same holds true when an appellant ignores the ground upon which the trial court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling.

Id. at 322, 525 N.W.2d at 101. In this case, with respect to his intentional infliction of emotional distress claim, Yarney has ignored the ground upon which the circuit court ruled. Therefore, we deem Yarney to have confessed the validity of the circuit court's dismissal of that claim.

C. Scafe's Immunity From Yarney's Federal Claims.

The circuit court held that Scafe is immune from liability with regard to Yarney's federal claims under 42 U.S.C. §§ 1981 & 1983. On appeal, Yarney devotes barely two pages of the argument section of his seven-page brief-in-chief to this issue. Yarney's meager argument can be summarized as follows. In Yarney's view, "the case law precedent considering racially motivated violations of rights extend no [absolute] immunity *to investigators or police* only to judges

and prosecutors." (Emphasis in Yarney's brief). Therefore, because Scafe was an investigator, rather than a judge or prosecutor, the circuit court erred by holding that Scafe was immune from liability. Yarney is mistaken; the five cases which he has cited in support of this proposition do not support his claim.[3] Under federal law,

> [A] nonjudicial officer, such as an investigator for the district attorney's office, who undertakes ministerial actions intimately related to the judicial process at the express direction and control of the prosecutor, enjoys absolute immunity. Only if the investigator initiates actions on his own, or carries out the investigatory functions of the prosecutor, does he lose the absolute immunity and is entitled only to qualified immunity. The qualified immunity evaporates only if the challenged actions are deemed to be clearly violative of the complainant's rights.

Doe v. Smith, 704 F. Supp. 1177, 1187 (S.D.N.Y. 1988) (citations omitted). Thus, if Scafe undertook "ministerial actions intimately related to the judicial process at the express direction and control of the prosecutor," he is absolutely immune. *See* ***id.*** If Scafe, however, was carrying out the investigatory functions of the

[3] Three of the cases, ***United Bhd. of Carpenters & Joinders, Local 610 v. Scott***, 463 U.S. 825 (1983), ***Griffing v. Breckenridge***, 403 U.S. 88 (1971), and ***Berry v. Stevinson Chevrolet***, 804 F. Supp. 121 (D. Colo. 1992), do not at all concern the immunity of governmental investigators from liability under 42 U.S.C. §§ 1981 or 1983. Another case, ***Brummet v. Camble***, 946 F.2d 1178 (5th Cir. 1991), involved allegations against prosecutors, not investigators. The final case, ***Joseph v. Patterson***, 795 F.2d. 549 (6th Cir. 1986), instead of supporting Yarney's view that investigators are never entitled to absolute immunity in racially motivated wrongful prosecution cases, actually holds that investigators may be entitled to either absolute or qualified immunity, depending on whether they are functioning "as the alter-ego of the prosecutor." ***Id.*** at 560.

Additionally, Yarney, in his reply brief, incorrectly states that ***Hampton v. City of Chicago***, 484 F.2d 602 (7th Cir. 1973), held that police investigators are never absolutely immune from liability for racially motivated conduct under § 1981. In ***Hampton***, the plaintiff filed a 42 U.S.C. § 1983 claim against a number of police officers and prosecutors, and the court addressed whether the prosecutors were immune from liability. The court, however, did not address whether the police officers were immune, because that issue was not in dispute on appeal.

prosecutor, "he is entitled to only qualified immunity," which will not protect him if his actions are "deemed to be clearly violative of [Yarney's] rights." *See* ***id.*** The fact that Yarney has alleged that Scafe's wrongful prosecution was racially motivated is not determinative of whether Scafe is entitled to absolute or qualified immunity. Indeed, in ***Hampton v. City of Chicago***, 484 F.2d 602 (7th Cir. 1973), the Seventh Circuit Court of Appeals held that it would not "attach any weight in analyzing the immunity question to the numerous ways in which the pleadings characterize the motivation of the prosecutor as wrongful—ranging from 'sadistic' or 'racial' to the more familiar 'malicious' or 'discriminatory.'" ***Id.*** at 608.

The important issue on appeal, which Yarney completely fails to address, is not whether Scafe's actions were racially motivated, but rather, whether Scafe was performing prosecutorial or investigatorial functions when he took the actions of which Yarney complains. The State argues that Scafe was performing prosecutorial functions when he signed the criminal complaint against Yarney, and when he testified at trial. Yarney, by contrast, fails to address, with respect to any of Scafe's specific actions, whether Scafe was performing prosecutorial or investigatorial functions when he took those actions. Thus, we deem Yarney to have confessed the validity of the circuit court's and the State's position that Scafe only performed prosecutorial functions, and was therefore, absolutely immune. *See* ***Schlieper***, 188 Wis.2d at 322, 525 N.W.2d at 101.

D. Scafe's Immunity From Yarney's State Malicious Prosecution Claim.

The State argues on appeal that Scafe, in addition to being absolutely immune from liability with respect to Yarney's federal claims, is also immune from liability with respect to Yarney's state malicious prosecution claim. Yarney does not present this court with any reason to analyze the immunity issue with

respect to his state claim differently than we have analyzed the immunity issue with respect to his federal claims. Therefore, although the circuit court did not address the issue, because Yarney fails to address the issue on appeal, we conclude that Scafe is also absolutely immune from liability with respect to Yarney's state malicious prosecution claim.

III. CONCLUSION.

First, we conclude that, because Yarney failed to appeal in a timely manner the circuit court's judgment in favor of DHSS, we cannot address his appeal from that judgment. Second, with respect to Yarney's malicious prosecution claim, although we ultimately conclude that the circuit court's dismissal of the claim was proper, we conclude that the circuit court erred in finding that Yarney failed to comply with the notice of claim provisions of § 893.82, STATS. Yarney, however, by failing to address the circuit court's dismissal of his intentional infliction of emotional distress claim for his failure to comply with § 893.82, has conceded the propriety of the circuit court's dismissal of that claim. Finally, due, in part, to Yarney's failure to adequately address the issues, we conclude that the circuit court properly dismissed Yarney's federal claims and state malicious prosecution claim against Scafe, because Scafe is absolutely immune from liability. Therefore, we affirm the circuit court's judgment in favor of DHSS, and the circuit court's order dismissing all of Yarney's claims against Scafe.

By the Court.—Judgment and order affirmed.

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