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DISTRICT IV

February 13, 2025

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
Electronic Notice

Kelly Enright
Clerk of Circuit Court
Dodge County Justice Facility
Electronic Notice

Clayton Patrick Kawski
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Cory M. Welch 481266
Fox Lake Correctional Institution
P.O. Box 147
Fox Lake, WI 53933

You are hereby notified that the Court has entered the following opinion and order:

2023AP1933 Cory M. Welch v. Chris Eplett (L.C. # 2023CV140)

Before Kloppenburg, P.J., Graham, and Taylor, JJ.

Summary disposition orders 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).

Cory Welch, a prisoner housed at Fox Lake Correctional Institution, appeals pro se a circuit court order dismissing his complaint against Chris Eplett, the institution's director of education programming. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In his complaint against Eplett, Welch alleged that Eplett rescinded Welch's eligibility for a remote learning program after Welch had been accepted into the program, leaving Welch liable for program fees. Welch further alleged that Eplett was liable to him for money damages based on tort and breach of contract theories. Eplett filed an answer that contained multiple affirmative defenses, including qualified and discretionary immunity. After Eplett filed his answer, Welch filed a motion in which he requested that the circuit court screen his complaint pursuant to the screening process for prisoner complaints. The court dismissed Welch's complaint for failure to state a claim, reasoning that Eplett's alleged acts were discretionary acts entitling Eplett to immunity from suit.[2]

Welch argues that the circuit court erred by failing to follow the mandatory screening process for prisoner complaints as set forth in WIS. STAT. § 802.05(4). He also argues that the court violated his right to due process by failing to provide him with adequate notice of the court's intent to dismiss his complaint. These arguments do not persuade us that Welch is entitled to reversal of the court's dismissal order. Rather, for the reasons we now explain, we conclude that the court properly dismissed Welch's complaint for failure to state a claim.

The process for screening prisoner complaints under WIS. STAT. § 802.05(4) allows the circuit court to dismiss a complaint on certain specified grounds regardless of whether the defendant has filed a motion to dismiss. As relevant here, one of the grounds is that "[t]he action or proceeding fails to state a claim upon which relief may be granted." Sec. 802.05(4)(b)4. This

[2] We note that the circuit court's dismissal order stated that the court was granting "[d]efendant's motion to dismiss" even though Eplett had not filed a motion to dismiss. This discrepancy is not material to our analysis.

statutory provision "expressly puts prisoners on notice that a circuit court will examine the initial pleading and may, without further briefing or hearing on the matter, dismiss the complaint if the court determines that the initial pleading fails to state a claim." ***State ex rel. Schatz v. McCaughtry***, 2003 WI 80, ¶31, 263 Wis. 2d 83, 664 N.W.2d 596.

"Whether [a] complaint states a claim for relief presents a question of law, which we review de novo." ***Cook v. Public Storage, Inc.***, 2008 WI App 155, ¶19, 314 Wis. 2d 426, 761 N.W.2d 645. "We construe the complaint liberally and assume the facts pleaded are true." ***Id.***

Here, applying de novo review, we conclude that the circuit court properly dismissed Welch's complaint for failure to state a claim, although our reasoning differs from that of the circuit court.[3] More specifically, we conclude that Welch's complaint fails to state a claim because, as Eplett argues on appeal, the complaint does not include any allegation that, if true, would show compliance with the applicable notice of claim statute, WIS. STAT. § 893.82. In pertinent part, the notice of claim statute generally prohibits a claimant from bringing a civil action against a state employee for an act growing out of or committed in the course of the discharge of that state employee's duties unless, within 120 days of the event giving rise to the civil action, the claimant serves upon the state attorney general written notice of the claim and provides certain statutorily required information about the claim. Sec. 893.82(3).

Welch does not dispute that his complaint lacks any allegation related to compliance with the notice of claim statute. Rather, he argues that Eplett fails to cite authority for the rule that a

[3] *See* ***Glendenning's Limestone & Ready-Mix Co. v. Reimer***, 2006 WI App 161, ¶14, 295 Wis. 2d 556, 721 N.W.2d 704 (explaining that the court of appeals may affirm the circuit court on an alternative ground when the record is adequate and the parties have the opportunity to brief the issue).

plaintiff's complaint must allege compliance with the applicable notice of claim statute. However, this is a long-standing rule in our case law. *See* ***Yotvat v. Roth***, 95 Wis. 2d 357, 360, 290 N.W.2d 524 (Ct. App. 1980) ("A complaint which fails to show compliance with the statute … fails to state a claim upon which relief can be granted."), *superseded by statute on other grounds as stated in* ***Modica v. Verhulst***, 195 Wis. 2d 633, 641, 536 N.W.2d 466 (Ct. App. 1995); ***Elm Park Iowa, Inc. v. Denniston***, 92 Wis. 2d 723, 728, 286 N.W.2d 5 (Ct. App. 1979) (holding that notice of claim and disallowance of the claim "must be pleaded in the complaint").[4]

To be clear, the question at hand is not whether Welch actually complied with the notice of claim statute or whether information outside the record could demonstrate that he did. Rather, the question is whether his complaint states a claim upon which relief may be granted, and absent any allegation relating to compliance with the notice of claim statute, the complaint does not state a claim.

Welch may also be contending that we should not accept Eplett's notice-of-claim argument because Eplett is raising that argument for the first time on appeal. We are not persuaded. First, Eplett's notice-of-claim argument is not new insofar as his answer included the affirmative defense that "[t]his action is subject to the requirements, provisions, terms, conditions, and limitations of WIS. STAT. § 893.82." Second, we may affirm the circuit court based on an argument that a respondent raises for the first time on appeal. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78 ("[I]t is well-established

[4] The statute referenced in this case law, WIS. STAT. § 895.45, is the predecessor statute to WIS. STAT. § 893.82. The statute was renumbered by 1979 Wis. Laws, ch. 323. *See* ***Renner v. Madison Gen. Hosp.***, 151 Wis. 2d 885, 891, 447 N.W.2d 97 (Ct. App. 1989).

law in Wisconsin that an appellate court may sustain a lower court's ruling 'on a theory or on reasoning not presented to the lower court.'" (quoted source omitted)); ***State v. Truax***, 151 Wis. 2d 354, 359, 444 N.W.2d 432 (Ct. App. 1989) ("Respondents are not bound to the same constraints of the waiver rule as appellants…. We may sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether we do so *sua sponte* or at the urging of a respondent." (citation omitted)); *cf.* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (explaining that an appellate court will not "blindside trial courts with *reversals* based on theories which did not originate in their forum" (emphasis added)).[5]

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

[5] To the extent that Welch may be raising other arguments that we have not expressly addressed, we reject them as insufficiently developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (discussing the requirements for developed legal arguments).