COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2228 **Cir. Ct. No. 2007SC235**

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

DANIEL J. FOULIARD,

PLAINTIFF-APPELLANT,

V.

CLAUDIA BIERDEMANN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Daniel J. Fouliard appeals an order for summary judgment in favor of defendant court clerk Claudia Bierdemann. Fouliard brought

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin statutes are to the 2005-06 version.

this small claims action alleging that Bierdemann gave him legal advice and committed other purported wrongs, thereby hindering his litigation of an OWI case. The small claims court dismissed Fouliard's suit for several reasons, including failure to state a compensable claim (he sued under criminal statutes that do not provide a civil remedy), failure to file a notice of claim pursuant to WIS. STAT. § 893.80, and Bierdemann's quasi-judicial immunity. Fouliard contends that the notice of claim was not necessary because Bierdemann violated a ministerial duty not to give legal advice. Fouliard also asserts that because of Bierdemann's alleged ministerial duty, the circuit court erred when it concluded that Bierdemann was protected under quasi-judicial immunity. We affirm the circuit court's decision. Fouliard is incorrect when he claims that a violation of a ministerial duty renders a notice of claim unnecessary. Even were this not the case, Fouliard has not suffered any compensable damages. Having disposed of this appeal on these grounds, we need not address the issue of Bierdemann's quasi-judicial immunity.

¶2 Fouliard originally filed this action against the City of Brookfield, its Municipal Judge, Richard J. Steinberg, its court reporter, Lawrence B. Nelson, and a court clerk, Bierdemann, for their actions in a Town of Brookfield transfer case charging Fouliard with operating while under the influence of an intoxicant. Bierdemann is now the sole defendant, the others having been dismissed.

¶3 The relevant events began shortly after Fouliard's OWI case was transferred from the Town of Brookfield to the City of Brookfield. Bierdemann suggested that Fouliard file a jury demand, even though the filing deadline had already passed. Less than a week later, Bierdemann wrote Fouliard a letter, stating that she made an error allowing the jury demand, and returning his $36.00 filing fee.

¶4 Fouliard also alleged that Bierdemann misinformed him about Judge Steinberg's vacation schedule, that he was overcharged for a transcript of a court proceeding, and that Judge Steinberg's later recusal from the case due to the "contentious nature of the communication and correspondence" with Fouliard is also somehow a wrong attributable to Bierdemann.

¶5 WISCONSIN STAT. § 893.80(1) provides that no claim may be brought against a government employee for acts done in his or her official capacity unless the employee is provided notice of the claim 120 days before filing. Compliance with 893.80(1)(b) is a "necessary prerequisite to all actions brought against the entities listed in the statute … whether brought as an initial claim, counterclaim or cross-claim." ***City of Racine v. Waste Facility Siting Bd.***, 216 Wis. 2d 616, 620, 575 N.W.2d 712 (1998). The exception to this general rule is the existence of another statute with specific procedures for bringing actions against municipal entities. *See* ***Oak Creek Citizen's Action Comm. v. City of Oak Creek***, 2007 WI App 196, ¶6, 304 Wis. 2d 702, 738 N.W.2d 168, *review denied*, 2007 WI 134, ___ Wis. 2d ___, 742 N.W.2d 527. Wisconsin courts analyze claims that § 893.80 should not apply using a three-factor test:

> whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of §893.80(1) would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which § 893.80(1) was enacted would be furthered by requiring that a notice of claim be filed.

Nesbitt Farms, LLC v. City of Madison, 2003 WI App 122, ¶9, 265 Wis. 2d 422, 665 N.W.2d 379 (citation omitted).

¶6 Fouliard has not offered any statutory authority under which he is bringing his substantive claim, and as such, does not meet the first factor of the

three-factor test. Instead, he asserts that because Bierdemann allegedly violated a ministerial duty and acted outside the scope of her employment, the notice of claim requirement does not apply to her. He is wrong. *See* ***Oney v. Schrauth***, 197 Wis. 2d 891, 898-99, 541 N.W.2d 229 (Ct. App. 1995) (construing similar language in WIS. STAT. § 893.82); ***Ibrahim v. Samore***, 118 Wis. 2d 720, 725-29, 348 N.W.2d 554 (1984) (same). All of Bierdemann's actions that Fouliard complains of occurred in the course of her work as a court clerk. The fact that Fouliard does not like how Bierdemann did her job does not mean that she was not, in fact, doing her job.

¶7 Fouliard also argues that, because he is a pro se litigant, procedural requirements such as WIS. STAT. § 893.80 should not be observed, and that doing so would "circumvent justice." We first note that this court, along with the circuit court, has been remarkably tolerant of Fouliard's failure to meet procedural and briefing requirements, as well as of some actions that no reasonable person, attorney or not, would think appropriate. The circuit court noted that Fouliard's argumentative attitude and disrespectful tone in the courtroom would have landed him in jail for contempt had he been an attorney. His untoward behavior has continued on appeal, where he filed a rather juvenile letter plainly intended only as an insult to opposing counsel.

¶8 Despite all this, we and the trial court have let Fouliard present his claims, but that does not mean that he is immune from following any rule he chooses to ignore. The notice of claim statute is a procedural requirement intended to give government entities time to investigate and evaluate prospective claims before they are actually brought against them and their employees; there is no reason why Fouliard should be allowed to flout it.

¶9 As for the circumvention of justice, Fouliard speaks repeatedly of the injustice that has been done to him, but as Bierdemann points out, he is in the same position in his OWI case that he would have been if none of his interactions with Bierdemann had ever occurred. He appealed his conviction in the OWI case from the municipal court to the circuit court, where he had a jury trial and was again found guilty. That case is now on appeal. The only monetary damage Fouliard claims to have suffered is allegedly being overcharged for a transcript, the pricing of which Bierdemann has no control over. Fouliard also reminds us that faith in our justice system is damaged when governmental employees are allowed to "abuse" pro se litigants. We wholeheartedly agree but would add that damage is also done when the abuse flows in the other direction.

By the Court.—Order affirmed.

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