

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 2016

Diane M. Fremgen
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. 2015AP2494

Cir. Ct. No. 2015SC444

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ALAN WILLIAMS GURSKY,

PLAINTIFF-APPELLANT,

v.

**CANDACE WARNER, TARA FREDLUND, LYNN DOBBERT AND
BRENDAN INGENTHRON,**

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.¹ On July 15, 2014, while incarcerated in the New Lisbon Correctional Institution, Alan Gursky filed an Inmate Complaint

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

alleging that prison staff lost his hearing aid. Gursky's inmate complaint was finally dismissed on October 13, 2014. Gursky served a notice of claim on the Wisconsin attorney general on February 11, 2015, and filed the complaint in this case in small claims court on June 18, 2015. The respondents, all employees of the Wisconsin Department of Corrections, moved to dismiss Gursky's complaint for "fail[ure] to adhere to the mandatory notice of claims requirements set forth in [WIS. STAT.] § 893.82." The circuit court granted the motion to dismiss and denied Gursky's subsequent motion for reconsideration. Gursky appeals. For the reasons stated below, I affirm.

DISCUSSION

¶2 This appeal requires us to interpret and apply WIS. STAT. § 893.82. The interpretation and application of a statute present questions of law that we review independently, while benefiting from the analysis of the circuit court. *Sorenson v. Batchelder*, 2016 WI 34, ¶10, 368 Wis. 2d 140, ___ N.W.2d ___. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). We give effect to each word in the statute that we are interpreting. *Id.*, ¶46.

¶3 WISCONSIN STAT. § 893.82 applies to claims brought against state employees. Section 893.82(2m) provides that "[n]o claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section." Section 893.82(3) provides:

(3) ... no civil action or civil proceeding may be brought against any state officer, employee ... for or on account of any act growing out of or committed in the course of the

discharge of the officer's, employee's ... duties, ... unless within 120 days of the event causing the injury, damage ... giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and circumstances of the event giving rise to the claim for injury, ... and the names of persons involved, including the name of the state officer, employee ... involved.

¶4 It is well established that “a claimant must strictly comply with the words in the statute in order to proceed with his or her claim.... Moreover, Wisconsin courts have equated strict compliance with literal adherence to the words used in the statute.” *Sorenson*, 368 Wis. 2d 140, ¶¶22-23.

¶5 Here, literal compliance with the words of the statute required that Gursky serve a notice of claim on the attorney general within 120 days of when the prison employees allegedly lost his hearing aid, before he could bring an action against them in circuit court for that loss. It is undisputed that Gursky did not do so, and therefore the circuit court properly dismissed his complaint.

¶6 Gursky's arguments to the contrary are difficult to discern. As we understand them, the gravamen of Gursky's appeal is that he should be excused from strict compliance with the 120-day rule for service of a notice of claim, because he was also required to comply with a Department of Corrections regulation that prohibits him from bringing an action against prison employees until he has exhausted his administrative remedies, meaning until his inmate complaint was finally dismissed. *See* WIS. ADMIN. CODE § DOC 310.05 (“Before an inmate may commence a civil action ... for acts or omissions committed while carrying out that person's duties ... the inmate shall exhaust all administrative remedies that the department of corrections has promulgated by rule.”).

¶7 Gursky's resort to WIS. ADMIN. CODE § DOC 310.05 to obtain relief from strict compliance with WIS. STAT. § 893.82, has no support in the language of either the statute or the rule.

¶8 First, nothing in the statute provides that the 120-day rule for service of a notice of claim does not apply to inmates until they exhaust their administrative remedies.

¶9 Second, the rule imposes exhaustion of administrative remedies as a condition precedent to the commencement of a civil action, not as a condition precedent to the service of a notice of claim. Gursky appears to argue that serving a notice of claim on the attorney general is the equivalent of commencing a civil action in circuit court. However, Gursky cites no legal authority in support of that argument, and we reject it on that basis. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). We would also reject that argument on the merits, because the service of a notice of claim is not the equivalent of commencing a civil action but is rather merely a "condition precedent to the right to maintain an action." *See Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984).

¶10 Gursky also appears to argue that the event causing the injury, from which the 120 days is computed, is not the prison employees' alleged loss of his hearing aid, but the final dismissal of his inmate complaint about that loss. Here, we understand Gursky to be suggesting that the exhaustion of administrative remedies regulation injects a tolling exception into the notice of claim provision in the statute. Again, Gursky provides no legal authority to support that proposition, which is contrary to the statute's plain language.

¶11 In sum, neither WIS. STAT. § 893.82 nor WIS. ADMIN. CODE § DOC 310.05 prevents an inmate from both (a) serving a notice of claim on the attorney general within 120 days of the event causing the inmate injury, and (b) exhausting administrative remedies before commencing an action in circuit court against the person responsible for causing that injury. To the extent that Gursky seeks to alter the statutory scheme in order to allow an inmate to serve a notice of claim after the inmate has exhausted the inmate's administrative remedies, his remedy lies with the legislature. *See Sorenson*, 368 Wis. 2d 140, ¶45 (stating that it is for the legislature to adjust the statutory scheme).

CONCLUSION

¶12 For the reasons stated, I affirm.

By the Court.—Orders affirmed.

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

