COURT OF APPEALS
DECISION
DATED AND RELEASED

October 4, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2860

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

ORVILLE ONEY,

Plaintiff-Appellant,

v.

LEROY NENNIG, JR.,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Orville Oney appeals from a summary judgment dismissing his action against Leroy Nennig, Jr., a Sheboygan County sheriff's detective. The circuit court dismissed the action because Oney failed to comply with the notice of claim statute, § 893.80, STATS., and the action was barred by the two-year intentional tort statute of limitations, § 893.57, STATS. We conclude that this was correct and affirm the judgment.

On July 23, 1991, Nennig, along with another Sheboygan County sheriff's detective and a probation officer, searched Oney's house pursuant to a search warrant. Various items were seized during the search. However, no criminal charges were filed and the items were returned to Oney.

This action was commenced November 15, 1993. Oney alleged that Nennig, in conspiracy with others, fabricated statements in order to obtain the search warrant. He sought to recover for the fraud committed in obtaining the search warrant and the resulting invasion of privacy. He alleged that some items seized—a book, a magazine, a newspaper clipping, money and pictures of his daughter—were never returned to him. Nennig's answer raised as an affirmative defense Oney's failure to file a notice of claim and the statute of limitations.

When called upon to review a trial court's grant of summary judgment, we follow the same methodology as the trial court. ***Stann v. Waukesha County***, 161 Wis.2d 808, 814, 468 N.W.2d 775, 778 (Ct. App. 1991). Summary judgment methodology is set forth in § 802.08(2), Stats. ***Id.*** We review a summary judgment determination de novo, independent of the trial court's decision. ***Id.*** We examine the record to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. ***Id.*** at 815, 468 N.W.2d at 778.

Section 893.80(1), STATS., provides that no action may be brought against a governmental officer unless within 120 days after the event giving rise to the claim, written notice of the circumstances of the claim is served upon the governmental agency. If compliance with this section is challenged, the plaintiff has the burden of proof to show that a notice of circumstances was given or that there was actual notice on the part of the governmental agency and no prejudice from the lack of notice. ***Majerus v. Milwaukee County***, 39 Wis.2d 311, 317, 159 N.W.2d 86, 89 (1968).

Oney concedes that he did not timely file a notice of circumstances. He argues that § 893.80(1), STATS., does not apply to his claim because in making false statements Nennig was acting outside his official capacity and has been sued personally for his acts. Oney's argument rests on

the premise that the search warrant was invalid and Nennig therefore acted without lawful authority.

The record here establishes that Nennig was acting in his official capacity in applying for and executing the search warrant. The affidavit in support of the search warrant recites that it is made by Nennig pursuant to his duties as a sheriff detective. Making such affidavits, even if they contain false or inaccurate information, and executing search warrants are what sheriff detectives are employed to do. Thus, Nennig acted in his official capacity. *See* ***State v. Barrett***, 96 Wis.2d 174, 180, 291 N.W.2d 498, 500 (1980) (the performance of official duties is simply acting within the scope of what the agent is employed to do). Moreover, actions taken without lawful authority may still be within an officer's official capacity. ***Id.*** at 181, 291 N.W.2d at 501. Even if the search warrant had been determined to be invalid, Nennig still acted within his official capacity in executing it.[1]

Oney failed to file a notice of circumstances within 120 days of the search of his home. His action is barred for his failure to comply with a condition precedent to maintaining the action.[2] *See* ***Gonzalez v. Teskey***, 160 Wis.2d 1, 10, 465 N.W.2d 525, 529 (Ct. App. 1990).

Oney's action is also barred by the statute of limitations. Section 893.57, STATS., provides that an action to recover damages for libel, slander, invasion of privacy or other intentional tort shall be commenced within two years after the cause of action accrues or be barred. Oney argues that the six-

[1] Oney's reliance on the holding in ***Harmann v. Schulke***, 146 Wis.2d 848, 852, 432 N.W.2d 671, 673 (Ct. App. 1988), that a governmental officer does not enjoy immunity if his or her conduct is malicious, willful and intentional, is misplaced. That holding concerns immunity for acts done within an officer's official capacity and does not hold that willful or intentional acts are outside the scope of official capacity. We do not reach immunity here because the failure to file a notice of circumstances bars this action.

[2] Nennig addresses Oney's claims that the county had actual notice of the circumstances and that the statute should not be applied to him because he only learned of its existence shortly before commencing his lawsuit. While Oney made those arguments in the circuit court, he did not raise them on appeal. The correctness of the circuit court's ruling on those issues is confessed. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994).

year statute of limitations is applicable to his action since it is one based on fraud, that is, fraud to obtain the search warrant. This was not an action for fraud because the allegedly false statements were not made directly to Oney and he did not rely on them. *See* ***Peters v. Kell***, 12 Wis.2d 32, 41-42, 106 N.W.2d 407, 413-14 (1960).

Oney's complaint states a cause of action for the invasion of privacy. Oney's action was filed on November 15, 1993, and not commenced within two years of July 21, 1991.

Oney also argues that the discovery rule should apply in determining when the cause of action accrued. He claims he did not learn of the falsity of the statements in the affidavit in support of the search warrant until he was provided a copy on November 15, 1991, or thereafter.

Under the discovery rule, the cause of action accrues when the plaintiff knows to a reasonable probability, or in the exercise of reasonable diligence should have known, the fact of injury and the person who caused the injury. ***Groom v. Professionals Ins. Co.***, 179 Wis.2d 241, 247-48, 507 N.W.2d 121, 124 (Ct. App. 1993). Where, as here, the material facts and reasonable inferences to be drawn from the facts are undisputed, whether a plaintiff exercised reasonable diligence is a question of law. ***Hennekens v. Hoerl***, 160 Wis.2d 144, 161, 465 N.W.2d 812, 819 (1991).

Oney was served with the search warrant when his house was searched on July 23, 1991. At that time he was in a position to know that he was injured. It appears that he consulted with two attorneys the next day and undertook efforts to obtain the return of his property. July 23, 1991 was the day of discovering the injury.

Further, the affidavit in support of the search warrant was a public record which Oney could have earlier obtained and discovered the alleged falsehoods. "Plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars which may be inferred to be within their reach." ***Groom***, 179 Wis.2d at 251, 507 N.W.2d at 125 (quoting ***Spitler v. Dean***, 148 Wis.2d 630, 638,

436 N.W.2d 308, 311 (1989)). Oney's claim that he did not know that he could obtain a copy of the affidavit and that the attorneys he consulted did not mention that possibility does not relieve him of the duty to file his action within two years of July 23, 1991. The law does not have a different set of standards applicable to those who proceed pro se and claim ignorance of the law.

By the Court.—Judgment affirmed.

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