

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 12, 1996

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

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No. 96-1827

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JANE PECKHAM,

Plaintiff-Appellant,

v.

COURTNEY SPITZ,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

DEININGER, J.¹ Jane Peckham appeals from an order dismissing her small claims action against her former parole officer, Courtney Spitz. The trial court granted summary judgment to Spitz for Peckham's failure to comply with § 893.82, STATS.² Peckham contends on appeal that because Spitz was not

¹ This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

² Section 893.82, STATS., provides in relevant part:

(3) [N]o civil action ... may be brought against any state ...

acting in her capacity as a state employee when the claim arose, § 893.82 does not apply. Alternatively, Peckham argues that the State denied her access to funds she needed in order to send her notice of claim by certified mail, and thus Spitz should be precluded from raising noncompliance with § 893.82.

We conclude that the trial court was correct in dismissing Peckham's claim because she did not establish compliance with § 893.82, STATS., and further because her cause of action is barred on public policy grounds. Accordingly, we affirm.

BACKGROUND

Peckham filed a small claims summons and complaint alleging that Spitz "accepted \$2,000 from [Peckham] and ... failed to return the money or provide the services as agreed upon" Spitz moved for summary judgment, claiming that Peckham had failed to comply with § 893.82(3), STATS. The motion was supported by the affidavit of a paralegal in the Department of Justice, whose duty it is to receive and record notices of claim under the statute, stating that no notice had been received from Peckham on this claim. Peckham responded with a brief and various "exhibits" which make clear that the basis of
(. . . continued)

employe[e] ... for or on account of any act growing out of or committed in the course of the discharge of the ... employe[e]'s ... duties ... unless within 120 days of the event causing the injury ... giving rise to the civil action ... the claimant ... serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury ... and the names of the persons involved, including the name of the state ... employe[e] ... involved....

....

- (5) The notice under sub. (3) shall be sworn to by the claimant and shall be served upon the attorney general at his or her office in the capitol by certified mail.

her suit is to obtain \$2,000 which she allegedly paid to Spitz as a bribe to avoid parole revocation proceedings. Peckham claimed to have attempted to file a notice of claim form from the Dane County jail but was taken to prison before verifying that it was sent.

A court commissioner granted the summary judgment motion, and Peckham sought a trial de novo under § 799.207(3), STATS. Spitz then renewed her summary judgment motion. Peckham countered with a brief and numerous additional exhibits purporting to show that a proper notice specifying the \$2,000 claim against Spitz had been mailed from the Dane County jail, and further that a prison official at Taycheedah Correctional Institution, where Peckham was later incarcerated, had thwarted her efforts to obtain funds for certified mailing. Spitz filed affidavits averring that some of Peckham's documents bore forged signatures.

The circuit court concluded that Peckham had provided "no admissible evidence of compliance with [§ 893.82, STATS.]" and granted summary judgment to Spitz dismissing the action.

ANALYSIS

We review summary judgment de novo, applying the same standard as the trial court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Germanotta v. National Indem. Co.*, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984); § 802.08(2), STATS. We view the facts in the light most favorable to the nonmoving party. *State Bank of La Crosse v. Elsen*, 128 Wis.2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1986).

Peckham first argues that § 893.82, STATS., does not apply to this action because Spitz's alleged acceptance of the bribe was outside the scope of her state employment. "Scope of employment," however, is not determinative of § 893.82's applicability. Section 893.82(3) applies to "'act[s] growing out of ... the discharge' of [the employee's] duties," and encompasses a broader range of

transactions than does "scope of employment."³ *Ibrahim v. Samore*, 118 Wis.2d 720, 729, 348 N.W.2d 554, 559 (1984).

Spitz was employed by the State to act as Peckham's parole officer. Her official duties included periodically meeting with Peckham and assessing the appropriate level of supervision for her and making recommendations regarding Peckham's parole status. *See* WIS. ADM. CODE § DOC 328.04(4) & (2)(p). But for this relationship growing out of Spitz's official duties, Peckham would have had no occasion to offer \$2,000 to Spitz. The alleged transaction was predicated entirely on Spitz's employment as Peckham's parole officer. Thus we conclude that § 893.82(3), STATS., applies to this action.

The trial court determined, and we agree, that there is no dispute that a notice of claim based on this alleged transaction between Peckham and Spitz was not timely served on the Attorney General. Peckham argues, however, that the State caused her noncompliance by thwarting her efforts to comply with § 893.82(3), STATS., and that Spitz should thus be estopped from asserting the statute as a bar to the claim.⁴

Section 893.82(3), STATS., is jurisdictional and strict compliance is required. *See Ibrahim*, 118 Wis.2d at 726, 348 N.W.2d at 557-58. The requirements of the statute cannot be waived and "no basis exists for the equitable doctrine of estoppel." *Oney v. Schrauth*, 197 Wis.2d 891, 904, 541 N.W.2d 229, 233 (Ct. App. 1995). Thus, whatever justification Peckham may wish to show for not complying with § 893.82 would not alter the fact of her noncompliance, which is "fatal to [her] claim." *Id.*

³ "Scope of employment" generally applies in respondeat superior contexts such as the public employee indemnity statute. *See* § 895.46(1)(a), STATS., which requires indemnity for a public employee against whom judgment is entered for "acts committed while carrying out duties as an ... employe[e] and the jury or the court finds that the defendant was acting within the scope of employment."

⁴ On this issue there *is* a factual dispute in that Spitz filed affidavits to show that certain of Peckham's exhibits were forged. As we discuss, however, a determination of whether Peckham's exhibits are genuine is not necessary to a disposition of the summary judgment motion.

Furthermore, even if we were to be persuaded that there was some showing Peckham might make in order to avoid dismissal under § 893.82, STATS., we would still affirm the dismissal of her claim against Spitz. Peckham's cause of action is based upon an alleged \$2,000 payment made to induce Spitz not to perform her lawful duty as a parole officer. Contracts based on an illegal arrangement are unenforceable:

A contract is illegal where its formation or performance is expressly forbidden by a civil or criminal statute or where a penalty is imposed for doing the act agreed upon. Such a contract is void and courts will leave the parties where they find them.

Hiltpold v. T-Shirts Plus, Inc., 98 Wis.2d 711, 716-17, 298 N.W.2d 217, 220 (Ct. App. 1980). The agreement alleged by Peckham constitutes bribery of a public employee, in violation of § 946.10, STATS.⁵ It is plainly illegal and any relief for its breach is barred.

We conclude that Peckham's claim is "legally insufficient [because] it is quite clear that under no circumstances can [she] recover," *Green Spring Farms*, 136 Wis.2d at 317, 401 N.W.2d at 821. We therefore affirm the dismissal of her claim.

By the Court. — Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

⁵ Section 946.10(1), STATS., provides in relevant part:

Whoever does ... the following is guilty of a Class D felony:

- (1) Whoever, ... with intent to induce [a public] employe[e] to do or omit to do any act in violation of the ... employe[e]'s lawful duty transfers ... to the ... employe[e] ... any property ... which the ... employe[e] is not authorized to receive ...