COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0936

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

JOSEPH P. LAPERE,

PLAINTIFF-APPELLANT,

V.

JUNE GENGLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Joseph LaPere appeals an order dismissing his small claims action against June Gengler, a hearing examiner for the Department of Corrections (DOC). The circuit court determined that LaPere failed to comply with the notice of claim provisions found in § 893.82, STATS., by not identifying

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

the exact date of injury. We conclude that LaPere did comply with the notice of claim provisions. However, we also conclude that Gengler's actions from which LaPere seeks compensation were discretionary and therefore, she is immune from suit. Accordingly, we affirm the circuit court's order dismissing LaPere's complaint.

BACKGROUND

¶2 LaPere received a conduct report while he was an inmate at the Thompson Correctional Center (TCC). Gengler, the Superintendent of TCC, was the hearing examiner assigned to adjudicate the matter. LaPere had a due process hearing regarding the allegations of misconduct on July 30, 1996, and was found guilty on August 8, 1996.

¶3 On September 13, 1996, LaPere filed a notice of claim indicating his intent to sue Gengler.[2] On that form, LaPere listed July 30, 1996 as the date of the event giving rise to his injury, stated that Gengler had presided over a hearing held on July 30th, and stated that she had violated his rights by failing to honor certain time limits found in Wisconsin's Administrative Code and by failing to honor his request to call a staff member as a witness.

¶4 LaPere then filed a petition for a writ of certiorari seeking review of Gengler's decision. According to LaPere's complaint, the State did not contest the writ and the circuit court concluded that Gengler erred in not allowing LaPere to call a staff member as a witness. As a result of this decision, the State agreed to

[2] The Attorney General's office concedes that it received LaPere's notice of claim on September 24, 1996.

return to LaPere the good time that was taken from him when he was found guilty and to expunge the conduct report from his record.

¶5 On September 16, 1997, LaPere filed a small claims action against Gengler. He claimed that as a result of the procedural errors at the hearing, he suffered "emotionally and the loss of money." He also alleged that Gengler intentionally took these actions. On October 7, 1997, LaPere filed an amended complaint, stating that because of the original finding of guilt, he lost his job and was no longer eligible for work release. He also stated that he was transferred from a minimum security facility to medium security, and that he was prohibited from having some of his personal property at the medium security facility. As a result, he incurred costs in shipping personal property home. He claimed that these costs were incurred as a direct result of Gengler's error in misconstruing the Wisconsin Administrative Code and in finding him guilty. LaPere also alleged that he had complied with the notice of claim provisions by filing a proper notice under § 893.82, STATS.

¶6 Gengler filed a motion to dismiss on grounds that: (1) LaPere had not complied with § 893.82, STATS.; (2) he failed to state a claim for which relief could be granted because the procedural errors had already been cured; and (3) Gengler was immune from suit.

¶7 The circuit court granted Gengler's motion to dismiss because it concluded that LaPere had not complied with the notice of claim statute. On LaPere's motion for reconsideration, he produced the notice of claim and a letter from the Attorney General's office indicating that it had received his notice of claim on September 24, 1996. The circuit court denied the motion for reconsideration, however, because it concluded LaPere failed to strictly comply

with § 893.82, STATS., by not identifying the precise date of the injury. According to the court, the notice of claim alleged the incident occurred on July 30, 1996, while LaPere's complaint mentioned only August 8, 1996. LaPere appealed.

DISCUSSION

Standard of Review.

¶8 Whether a complaint states a claim upon which relief can be granted is a question of law, which we review *de novo*. *See* ***Heinritz v. Lawrence Univ.***, 194 Wis.2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995). A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *See* ***Ramsden v. Farm Credit Serv.***, 223 Wis.2d 704, 711, 590 N.W.2d 1, 4 (Ct. App. 1998). Therefore, we assume that all the facts as pled and all reasonable inferences from those facts are true. *See* ***id.***

¶9 The facts relative to LaPere's compliance with § 893.82, STATS., are undisputed; therefore, whether LaPere has complied with § 893.82 presents a question of law, which we review *de novo*. *See* ***Truttschel v. Martin***, 208 Wis.2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997). Additionally, if the material facts in regard to immunity are uncontested, whether immunity lies for a public official's discretionary acts is a question of law, which we review *de novo*. *See* ***Kimps v. Hill***, 200 Wis.2d 1, 8, 546 N.W.2d 151, 155 (1996).

Compliance With the Notice of Claim Provisions.

¶10 The State argues, and the circuit court agreed, that LaPere did not comply with § 893.82, STATS., because he failed to include the proper date of the

event causing his injury.[3] It points out that LaPere's small claims action mentions only the date, August 8, 1996, while his notice of claim states the injury occurred on July 30, 1996. Therefore, the State contends that without the August 8, 1996 date, LaPere's notice of claim cannot serve as a basis for his small claims action. We disagree.

[3] The State made several other arguments in its brief on which we need to comment. First, it argues that the appeal should be dismissed because LaPere did not appeal from a final order. This argument is without merit. LaPere's notice of appeal identifies that he is appealing from the circuit court's dismissal of his claim. LaPere could not appeal this dismissal until Gengler's counterclaim was dismissed, which occurred on March 2, 1999. Therefore, LaPere is appealing from a final order and we have jurisdiction.

Second, the State argues that LaPere's appeal should be dismissed because he failed to plead and include documentation that he exhausted his administrative remedies as required by § 801.02(7)(c), STATS. However, that statute did not become effective until approximately one year *after* LaPere filed his complaint. Counsel should be more careful when researching arguments he submits to this court for review.

Additionally, the State argues that we should construe "a copy of an entered judgment" signed by the circuit court and stamped by the clerk of courts as a notice of entry of judgment. However, the document in the record to which the State cites is entitled "Defendant's Notice and Motion of Voluntary Dismissal," which has a notation by the circuit court, was stamped by the clerk of courts, and mailed to LaPere. Nothing on the document gives notice that on a specific date a final judgment was entered. If we accept this document as a notice of entry of judgment, LaPere's appeal would be untimely because it was not filed within forty-five days of the entry of judgment. *See* § 808.04(1), STATS. The supreme court has previously held that a notice of entry of judgment must "be a formal signed and captioned document" and that statutes giving the right of appeal should be liberally construed. *See* ***Soquet v. Soquet***, 117 Wis.2d 553, 560, 345 N.W.2d 401, 404 (1984). The Defendant's Notice and Motion of Voluntary Dismissal is insufficient as a notice of entry of judgment, especially where that document does not state in its caption or elsewhere that a judgment has been entered and specify the date thereof. Additionally, the court in ***Soquet*** stated that interpreting § 808.04(1) to permit a reduction of a party's time to appeal by giving a notice of entry of judgment through informal means increases the likelihood that a party's right to appeal would be lost unwittingly. *See* ***id.*** We decline to interpret § 808.04(1) so as to unwittingly reduce LaPere's right to appeal, especially given LaPere's appearance before us *pro se*.

Finally, we note that many of the arguments listed above were not raised before the circuit court. Arguments raised for the first time on appeal are disfavored and generally not considered. *See* ***Bank One, Appleton, NA v. Reynolds***, 176 Wis.2d 218, 222, 500 N.W.2d 337, 339 (Ct. App. 1993).

¶11 LaPere claims that Gengler's procedural decisions caused him injury. Those procedural decisions were made at the July 30, 1996 hearing, as noted in LaPere's notice of claim. However, Gengler's written decision, which resulted from the hearing, was dated August 8, 1996.[4] Section 893.82(3), STATS., requires a claimant to provide the date of the event giving rise to the injury. Whether the injury occurred when Gengler made the procedural determinations at the hearing or when Gengler issued her written decision are two sides of the same coin. If we were to accept the State's contention, LaPere would be required to file two notices of claim for the same injury. The notice of claim statute does not require that. We conclude that the notice of claim was sufficient, even though in it LaPere referred to the July 30th hearing and in the complaint he referred to the August 8th decision, which resulted from that hearing. Therefore, the notice of claim satisfied the requirement in § 893.82(3) to provide the date of the injury.

¶12 Although we conclude that LaPere did comply with the notice of claim statute and that the circuit court erred in dismissing LaPere's complaint on that ground, nevertheless, we affirm the circuit court's order for dismissal. We note that if the circuit court's decision is based upon a mistaken view of the law, "the reviewing court need not reverse if it can conclude ab initio that facts of record applied to the proper legal standard support the trial court's conclusion." *See* ***State v. Pittman***, 174 Wis.2d 255, 268-69, 496 N.W.2d 74, 80 (1993). We conclude that the acts which LaPere identifies in his complaint as causing him harm were discretionary and thus, Gengler is immune from suit.

[4] LaPere submitted Gengler's written decision as an exhibit when he made his motion for reconsideration to the circuit court. The decision has a box at the top of the form that states "Hearing Date 7-30-96." However, in a box next to Gengler's signature, there is a "Date of Decision" box that is marked "8-8-96."

Discretionary Act Immunity.

¶13 Section 893.80(4), STATS., provides that no suit may be brought against a political corporation, governmental subdivision, or any agency thereof, or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. *See* § 893.80(4). These functions have long been referred to as "discretionary" acts. *See* ***Bauder v. Delavan-Darien Sch. Dist.***, 207 Wis.2d 310, 313, 558 N.W.2d 881, 882 (Ct. App. 1996). A discretionary act is one that "involves the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed [and] … the exercise of discretion and judgment in the application of a rule to specific facts." ***Lifer v. Raymond***, 80 Wis.2d 503, 511-12, 259 N.W.2d 537, 541 (1977).

¶14 There are three exceptions to the shield of discretionary act immunity: (1) when the public entity or employee engages in malicious, willful, and intentional conduct; (2) when the public entity or employee negligently performs a ministerial duty; and (3) when the public entity or employee is aware of a danger that is of "such quality that the public officer's duty to act becomes 'absolute, certain and imperative.'" *See* ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 257-58, 533 N.W.2d 759, 763 (1995) (citation omitted). We conclude that LaPere has failed to plead facts sufficient to pierce Gengler's shield of discretionary act immunity on any theory.

¶15 First, LaPere may not pierce Gengler's discretionary act immunity through the malicious conduct exception because his complaint does not contain facts sufficient to show that Gengler's conduct was malicious, willful and intentional. This exception to discretionary act immunity was first explained in

Lister v. Board of Regents, 72 Wis.2d 282, 302, 240 N.W.2d 610, 622 (1976). There, the supreme court stated that "there is no substantive liability for damages resulting from mistakes in judgment where the officer is specifically empowered to exercise such judgment." ***Id.*** at 301-02, 240 N.W.2d at 622. Additionally, "in the absence of some malicious, wilful and intentional misconduct, the policy considerations underlying the immunity principle require that the officer be free from the threat of personal liability for damages resulting from mistakes of judgment." ***Id.*** at 302, 240 N.W.2d at 622. The court also reasoned that for the purpose of imposing liability for damages, a distinction must be made between acts that constitute a mistake in judgment that are within the public officer's lawful authority, and those acts that fall outside of that authority. *See* ***id.*** Discretionary act immunity is designed to protect that conduct which falls within an officer's lawful authority. *See* ***id.*** Here, there is no allegation that Gengler was not acting within the scope of her authority.

¶16 Additionally, in ***Deegan v. Jefferson County***, 188 Wis.2d 544, 525 N.W.2d 149 (Ct. App. 1994), we explored the malicious conduct exception to discretionary immunity. In that case, Deegan sued Jefferson County and two social workers for damages after prevailing in a proceeding to terminate her parental rights to her son. *See* ***id.*** at 547, 525 N.W.2d at 151. She claimed that the social workers had "intentionally, willfully and maliciously" engaged in a conspiracy to separate her from her son. *See* ***id.*** The social workers argued that they were immune from liability for their discretionary acts and that Deegan's general allegations of malice were insufficient to pierce their immunity. *See* ***id.*** at 547-48, 525 N.W.2d at 51. We stated that "[t]aken in their entirety, Deegan's affidavits claim no more than that the defendants did not satisfactorily perform the tasks required of them under the statutes…" and that we could not draw "any

reasonable inference that [the defendants] acted maliciously or with the intent to harm her and her son…." *See* ***id.*** at 562-63, 525 N.W.2d at 157. We concluded that the circuit court's finding that the social workers failed to exercise sufficient diligence in working with Deegan did not imply malice or intent to harm. *See* ***id.*** at 563, 525 N.W.2d at 157.

¶17 Similarly, LaPere's complaint is insufficient to show malice. Although he states in his first complaint that Gengler intentionally made the procedural determinations, LaPere provides no facts to support a determination that Gengler's actions were done with the intent to harm. In essence, he claims only that Gengler "did not satisfactorily perform the tasks required" of her under the Administrative Code. *See* ***id.*** at 562, 525 N.W.2d at 157. Such general allegations are insufficient. Additionally, with respect to LaPere's writ of certiorari, the circuit court's conclusion that Gengler misapplied the law regarding LaPere's request to call a witness does not constitute malice or intent to harm. Based on LaPere's complaint and the facts of record, we cannot reasonably draw an inference that Gengler acted maliciously and with the intent to harm LaPere.

¶18 Second, LaPere cannot claim that Gengler negligently performed a ministerial duty because the procedural and substantive determinations at issue were discretionary, not ministerial. "A public officer's duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***Lister***, 72 Wis.2d at 301, 240 N.W.2d at 622. A discretionary act, on the other hand, is one that involves choice and judgment. *See* ***Santiago v. Ware***, 205 Wis.2d 295, 338, 556 N.W.2d 356, 373 (Ct. App. 1996). The determinations—how certain time limits apply to a given set of facts, whether an

inmate may call a person as a witness, and whether an inmate is guilty of the offense charged—involve the exercise of judgment. Thus, under the facts before us, we conclude that Gengler's determinations made at the hearing were acts requiring choice and judgment and are therefore immune from suit.

¶19 Finally, there is nothing pled that could be sufficient to meet the third possible method of piercing discretionary act immunity because there was no present danger that could flow from Gengler's acts which could turn an act requiring judgment into a ministerial duty.

CONCLUSION

¶20 We conclude that Gengler's determinations for which LaPere seeks compensation were discretionary acts and therefore, Gengler is immune from suit. Accordingly, we affirm the circuit court's order dismissing LaPere's complaint.

By the Court.—Order affirmed.

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