COURT OF APPEALS DECISION DATED AND FILED

June 25, 2015

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. 2014AP2790

Cir. Ct. No. 2014CV40

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

JAY R. HOEFT,

PLAINTIFF-APPELLANT,

V.

CITY OF BEAVER DAM AND MARK WILLIAMS, DIRECTOR, DEPARTMENT OF ADMINISTRATION, STATE OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Jay Hoeft's property was damaged by flooding in 2008 and purchased by the City of Beaver Dam in 2013. Hoeft seeks payment of relocation benefits from the City under WIS. STAT. ch. 32 (2013-14), specifically "loss of income from his property and related expenses resulting from

a four-year delay by [the City] in acquiring his property."[1] Hoeft also seeks compensatory and punitive damages from the City and Mark Williams, "Director, Department of Administration," pursuant to 42 U.S.C. § 1983, alleging that actions by the City and Williams, in relation to the acquisition of his property and the review of his relocation claim, violated certain federal laws and caused him to suffer monetary loss.

¶2 The circuit court granted the City's motion for summary judgment on the grounds that Hoeft failed to state "a valid cause of action." The court also granted Williams's motion to dismiss. We reject Hoeft's arguments that the circuit court erred and affirm.

BACKGROUND[2]

¶3 The facts in this background section are taken from the allegations in the seconded amended complaint. Additional undisputed facts established on summary judgment are stated in the discussion section that follows.

¶4 Jay Hoeft owned a tavern on Front Street in the City of Beaver Dam. In June 2008, a flood damaged Hoeft's property and other nearby properties. Hoeft reopened his tavern later in 2008 and closed it in 2011.

---

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Hoeft's brief contains almost no citation to the record. We admonish Hoeft that WIS. STAT. RULE § 809.19(1)(d) and (e) requires appropriate citations to the record on appeal and that references to a brief's appendix are not in conformity with the rules. *See* ***Casey v. Smith***, 2013 WI App 24, 346 Wis. 2d 111, 115 n.1, 827 N.W.2d 917.

¶5 The City purchased Hoeft's property in July 2013 at its 2008 fair market value. After the sale, Hoeft filed a claim for relocation benefits totaling $392,810.19, and was awarded $20,000.

¶6 In January 2014, Hoeft filed a complaint naming "City of Beaver Dam" as the sole defendant. Hoeft filed an amended complaint in July 2014, adding an additional claim under 42 U.S.C. § 1983 against the "State of Wisconsin Department of Commerce/Department of Administration." Hoeft filed a second amended complaint substituting "Mark Williams, Director Department of Administration State of Wisconsin," as a defendant in place of the State departments.

¶7 The City moved for summary judgment on the basis that Hoeft failed to state a claim upon which relief can be granted. Williams filed a motion to dismiss on the basis of sovereign immunity. The circuit court granted both motions, dismissing the entire action with prejudice.

DISCUSSION

¶8 Hoeft argues that the circuit court erred in granting summary judgment in favor of the City and in dismissing his claim against Williams. We reject Hoeft's arguments and affirm.

A. Summary Judgment in Favor of City of Beaver Dam

¶9 In his pleadings, Hoeft claimed that, under WIS. STAT. ch. 32, he is entitled to recover from the City "payment of his Relocation Claim in the amount [of] $392,810.19 plus additional accrued losses after date of filing along with interest [and] litigation expenses." Hoeft also claimed that he is entitled to compensatory and punitive damages pursuant to 42 U.S.C. § 1983 because the

City violated certain federal laws when, according to Hoeft, it acted maliciously with respect to the acquisition of his property and the review of his relocation claim. The circuit court granted summary judgment in favor of the City on the basis that Hoeft could not recover under either the state or federal statutes. We agree.

¶10 "We review an order for summary judgment de novo, using the same methodology as the circuit court." ***Yahnke v. Carson***, 2000 WI 74, ¶10, 236 Wis. 2d 257, 613 N.W.2d 102. "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" ***Id.*** (quoted source omitted). "Although our review is de novo, we benefit from the analyses of the circuit court ...." ***Id.***

¶11 "To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983).

¶12 With these principles of summary judgment methodology in mind, we proceed to examine each of Hoeft's claims against the City along with the defenses raised by the City on summary judgment.

1. Recovery Under WIS. STAT. ch. 32

¶13 "The Wisconsin Constitution and the United States Constitution, made applicable to the states through the Fourteenth Amendment, provide that the government may not 'take' a person's private property for public use without providing just compensation." ***Fromm v. Village of Lake Delton***, 2014 WI App 47, ¶14, 354 Wis. 2d 30, 847 N.W.2d 845; *see also* Wis. Const. art. I, § 13. "Ch. 32 of the Wisconsin statutes sets out the procedure the government must follow in acquiring such property for public use." ***Zinn v. State***, 112 Wis. 2d 417, 432, 334 N.W.2d 67 (1983). Although relocation expenses are not constitutionally required as a part of "just compensation," the legislature has imposed a statutory requirement that a "condemnor" provide to persons displaced by public projects certain relocation assistance, such as moving expenses, business replacement, and other expenses incidental to the transfer of property. *See* **City of Janesville v. CC Midwest, Inc.**, 2007 WI 93, ¶16, 302 Wis. 2d 599, 734 N.W.2d 428; WIS. STAT. §§ 32.19, 32.195.

¶14 A "condemnor" is defined in the statute as including "any state agency, political subdivision of the state or person carrying out a program or project with public financial assistance that causes a person to be a displaced person, as defined in [WIS. STAT. § 32.19(2)(e)]." WIS. STAT. § 32.185.

¶15 A "displaced person" is defined in the statute to include "any person who moves from real property or who moves his or her personal property from real property … [a]s a direct result of a written notice of intent to acquire or the acquisition of the real property, in whole or in part or subsequent to the issuance of a jurisdictional offer under this subchapter, for public purposes." WIS. STAT. § 32.19(2)(e)1.

¶16 On appeal, the City does not specifically argue that WIS. STAT. ch. 32 does not apply, and therefore we assume without deciding that the City is a "condemnor" and Hoeft is a "displaced person" as defined in WIS. STAT. ch. 32.[3]

¶17 As stated above, Hoeft seeks payment of relocation expenses from the City under WIS. STAT. ch. 32, specifically "payment of his Relocation Claim in the amount of $392,810.19 plus additional accrued losses after date of filing along with interest [and] litigation expenses." Hoeft's relocation claim itemized the following costs:

---

[3] The City did argue that Hoeft is not a "displaced person" in the circuit court, but the City does not renew this argument on appeal. However, we question whether Hoeft can sue the City for a decision made by the State.

On August 20, 2013, the Wisconsin Department of Administration issued its decision stating that it had "received [Hoeft's] relocation claim" and approved "a fixed payment of $20,000 in lieu of actual moving costs and real estate taxes." In that decision the department denied the remainder of Hoeft's claim. The decision concluded with a notice of Hoeft's appeal rights.

Correspondence ensued between Hoeft and the department culminating in a letter from the department advising Hoeft that:

> [Hoeft] has continuously failed and refused to provide any statement describing any basis for appeal of the $20,000.00 in relocation benefits which have already been paid to him as allowed by law. [Hoeft] has received notice of a denial of his appeal pursuant to s. Adm 92.18(2). [Hoeft] has not given the Department notice of any appeal, and the basis for such an appeal, pursuant to s. Adm 92.18(3).

Leaving aside Hoeft's failure to present any evidence showing that he pursued an appeal of the department's decision denying his "Relocation Claim," the key point here is that it was the State of Wisconsin Department of Administration's decision. Hoeft neither presents any evidence to the contrary nor cites any law that authorizes him to seek redress from the City for the State's decision. However, the City does not pursue this argument on appeal and, therefore, we do not decide this appeal on this basis.

Moving Costs [Wis. Stat. § 32.19(3)]:	$9,845.00
Business Replacement Costs [Wis. Stat. § 32.19(4m)] (in lieu of acquisition):	$50,000.00
Loss of Income/Delay in Relocation (Attachment A):	$275,294.00
Rent Loss [Wis. Stat. § 32.195(6)]:	$37,200.00
Real Estate Taxes, 2011, 2012 & 2013 [Wis. Stat. § 32.195(5)]:	$8,223.74
Attorney Fees and Costs:	$12,247.45

¶18 In support of its motion for summary judgment dismissing Hoeft's relocation claim, the City contends that "as a matter of law, Hoeft cannot recover damages under Wis. Stat. ch. 32," because "Hoeft received all the benefits provided by Wis. Stat. ch. 32 to which he was entitled." Specifically, the City argues that Hoeft has recovered certain costs he seeks and cannot recover the remaining itemized costs for the following reasons: (1) the Department of Administration awarded Hoeft $20,000 in lieu of actual moving costs and real estate taxes, and the $20,000 awarded exceeds the costs claimed by Hoeft for those items; (2) Hoeft did not actually replace his business and, therefore, he is not entitled to business replacement costs; (3) loss of business income is not recoverable under WIS. STAT. ch. 32; (4) Hoeft's rent loss cannot be recovered because it is not directly attributable to a public improvement project; and (5) attorney's fees and costs are not recoverable under ch. 32.

¶19 Hoeft does not dispute the City's assertions that his claims for moving costs and taxes were covered by the award, and that his claims for business replacement costs, rent loss, and attorney's fees and costs were properly denied. Therefore, we deem conceded the City's assertions as to the proper disposition of Hoeft's claims for moving costs, taxes, business replacement costs,

rent loss, and attorney's fees and costs. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted."). However, Hoeft does dispute the City's assertion that his claim for loss of business income was properly denied. We now address and reject the two grounds asserted by Hoeft in support of his position.

¶20 Hoeft asserts that the City's "delay in acquisition" of his property caused him to incur $275,294 in lost business income between 2008 and 2013. Hoeft argues that his alleged loss of business income is recoverable (1) under WIS. STAT. ch. 32, and (2) under the Wisconsin Constitution as interpreted by ***Luber v. Milwaukee Cnty.***, 47 Wis. 2d 271, 177 N.W.2d 380 (1970). As to Hoeft's first basis for his challenge to the denial of his claim for loss of business income, Hoeft does not cite any particular section of WIS. STAT. ch. 32, and we discern none, supporting his claim for loss of business income. Rather, he glosses over the statute and proceeds directly to his constitutionally based argument under ***Luber***, which we address next. Thus, Hoeft's reliance on the statute to support his claim for loss of business income fails.

¶21 As noted, Hoeft's second basis for his challenge to the denial of his claim for loss of business income is his argument that the holding in ***Luber***, as to recovery of loss of rental income, allows him to recover loss of business income because he has a "constitutional right to the recovery of such losses." As we now explain, Hoeft's reliance on this case also fails.

¶22 As a general rule, "'loss of profits are held not recoverable or provable in condemnation of an owner's interest.'" ***Dusevich v. Wisconsin Power & Light Co.***, 260 Wis. 641, 642, 51 N.W.2d 732 (1952) (quoting ***Fiorini v. City of***

Kenosha, 208 Wis. 496, 498, 243 N.W. 761 (1932)). Indeed, the United States Supreme Court has long held that "just compensation is the value of the interest taken … not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.' … Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings." ***U.S. v. Petty Motor Co.***, 327 U.S. 372, 377-78 (1946) (quoted source omitted).

¶23 Our supreme court in ***Luber*** distinguished "rental loss" from other "consequential losses," declaring rental loss "is required to be compensated under the 'just compensation' clause of art. I, sec. 13, Wisconsin Constitution."[4] 47 Wis. 2d at 277-83. The underlying rationale for this distinction is not apparent to us. However, it is controlling law, and subsequent courts have narrowly construed the ***Luber*** holding.

¶24 ***Luber*** involved the 1965 version of the statutes, which limited rental loss caused by condemnation to the loss incurred during the twelve months prior to the taking of the property. ***Id.*** at 275 n.1. The court declared that limitation on rental loss unconstitutional, but subsequently clarified that its holding is to be narrowly construed:

[4] As noted above, Hoeft conceded the City's defense against his claim for rental loss by not addressing the defense.

> The ***Luber*** holding is to be read and limited to its holding that the twelve-month limit as to rent losses allowable was constitutionally invalid. It is true, as ***Luber*** noted, that when property is taken by condemnation, "incidental damages are very apt to occur." That is not to say that a cause of action for compensation for incidental damages has been created that has no basis or relatedness to the items made compensable by sec. 32.19, Stats. It means only that payment and time limits set forth in sec. 32.19 *may* encounter constitutional difficulties, as did the twelve-month rent loss limit in ***Luber***.

Rotter v. Milwaukee Cnty. Expressway and Transp. Comm., 72 Wis. 2d 553, 562-63, 241 N.W.2d 440 (1976) (emphasis added); *see also* ***City of Janesville***, 302 Wis. 2d 599, ¶17 ("Since we determined that compensation for rental loss was constitutionally required under the just compensation clause of the Wisconsin Constitution [in ***Luber***], we held that Wis. Stat. § 32.19(4) (1965), insofar as it limited compensation for the taking to 12 months of rental losses, was unconstitutional."). Hoeft does not cite any legal authority for expanding ***Luber***'s limited holding to encompass his asserted loss of business income.

¶25 Having rejected Hoeft's only challenge to the dismissal of his relocation claim, we conclude that the City is entitled to summary judgment as to that claim.

2. Recovery Under 42 U.S.C. § 1983

¶26 "Section 1983 provides a tort remedy when the government, acting under the color of state law, deprives a person of his or her rights under federal law or the United States Constitution."[5] ***Thorp v. Town of Lebanon***, 2000 WI 60,

---

[5] 42 U.S.C. § 1983 provides:

(continued)

¶19, 235 Wis. 2d 610, 612 N.W.2d 59. "Section 1983, by itself, does not create any substantive constitutional rights." ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 472, 565 N.W.2d 521 (1997). Rather, it "merely provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States." ***Gonzaga University v. Doe***, 536 U.S. 273, 285 (2002) (quoted source omitted).

¶27 Hoeft's second claim against the City is for compensatory and punitive damages under 42 U.S.C. § 1983 on the basis that the City violated federal laws, specifically the Uniform Relocation Assistance Act (42 U.S.C. § 4601), the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121), and 49 C.F.R. 24, when it failed to "expeditiously acquire [Hoeft's] property at fair market value and to relocate him following the flood … and for the threats made to him to compel his acquiescence in the sale of his property at less than fair market value."

¶28 The City argues that it is entitled to summary judgment because these federal laws do not confer any federal rights upon Hoeft so as to support a 42 U.S.C. § 1983 claim. Hoeft counters that his claim is valid because the Department of Housing & Urban Development provided the City with a grant in June 2009 for acquisition of "these properties" and the City's "actions after

---

> Every person who, under color of any statute, ordinance, regulation, … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ….

receiving the federal grant … have denied Hoeft his rights under federal law [in] violation of § 1983." For the following reasons, we agree with the City.

¶29 The United States Supreme Court has made clear that it "reject[s] the notion that … anything short of an unambiguously conferred right [supports] a cause of action brought under § 1983." ***Gonzaga***, 536 U.S. at 283. When reviewing a 42 U.S.C. § 1983 claim, the initial inquiry is "whether Congress *intended to create a federal right*." ***Id.*** (alteration in original). The court emphasized that "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of [§ 1983]." ***Id.*** (alteration in original). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit … under § 1983 ...." ***Id.*** at 286.

¶30 Hoeft's 42 U.S.C. § 1983 claim is premised upon alleged violations of the Uniform Relocation Assistance Act, the Disaster Relief and Emergency Assistance Act, and related regulations. Hoeft broadly alleges that the City violated these statutes and regulations, and that "[u]nder these circumstances, Hoeft and the other property owners had a right to bring an action under 42 U.S.C. § 1983 to obtain those benefits." But Hoeft fails to point to any part of these statutes or regulations showing that Congress intended to create a federal right for a person in Hoeft's position to have his or her property "expeditiously acquire[d] ... at fair market value and to relocate him" or to not have alleged "threats made to him to compel his acquiescence in the sale of his property at less than fair market value."

¶31 Hoeft conclusorily alleges that the City violated 42 U.S.C. § 4601, but § 4601 merely defines various terms in the chapter. It appears that 42 U.S.C.

§ 4651, titled "Uniform policy on real property acquisition practices," may be more applicable to Hoeft's claim here, but Hoeft does not specifically allege a violation of that section. Even if he did, he would not be successful, because 42 U.S.C. § 4602 expressly states that the "provisions of section 4651 of this title *create no rights* or liabilities." (Emphasis added.)

¶32 Hoeft cites two United States Supreme Court cases, ***Wright v. City of Roanoke Redevelopment and Housing Auth.***, 479 U.S. 418 (1987) and ***Wilder v. Virginia Hospital Assn.***, 496 U.S. 498 (1990), in support of his contention that "[u]nder these circumstances, Hoeft and other property owners had a right to bring an action under 42 U.S.C. § 1983 to obtain those benefits." Neither of those cases supports Hoeft's assertion that Congress conferred a right that should have benefited Hoeft here. Those cases dealt with different federal statutes that *did* confer a federal right upon the plaintiffs in those cases.[6]

¶33 In sum, we conclude that Hoeft fails to meet his burden on summary judgment as to his 42 U.S.C. § 1983 claim against the City because he fails to demonstrate that any of the statutes or regulations that he cites unambiguously confer upon him a federal right enforceable by § 1983.

[6] ***Wright v. City of Roanoke Redevelopment and Housing Auth.***, 479 U.S. 418, 430 (1987) concerned the 1981 Brooke Amendment to the Housing Act of 1937. The United States Supreme Court held that the rent-utility benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under 42 U.S.C. § 1983. ***Id.*** at 431-32.

Wilder v. Virginia Hospital Assn., 496 U.S. 498, 501 (1990) concerned the Boren Amendment to the Medicaid Act. The United States Supreme Court held that there is "a binding obligation on States participating in the Medicaid program to adopt reasonable and adequate rates and that this obligation is enforceable under § 1983 by health care providers." ***Id.*** at 512.

B. Dismissal of 42 U.S.C. § 1983 Claim Against Williams in His Official Capacity

¶34 Hoeft also brought a 42 U.S.C. § 1983 claim against Mark Williams, "Director, Department of Administration,"[7] alleging that Williams maliciously refused "to manage grants received by the City of Beaver Dam from the Department of Housing and Urban Development … which failure constituted a violation of" the Uniform Relocation Assistance Act, the Disaster Relief and Emergency Assistance Act, and related regulations. Williams argues that sovereign immunity, which precludes suit against a state official for money damages in his official capacity under § 1983, bars Hoeft's claim. Specifically, Williams contends that, in his official capacity, he is not a "person" that can be sued under § 1983 and the State has not waived its sovereign immunity from suit. Hoeft counters that the State "waived" such immunity. As we explain below, Hoeft's argument against Williams' sovereign immunity defense fails for lack of legal support.[8]

¶35 "We review de novo a circuit court's decision granting a party's motion to dismiss for failure to state a claim. In determining whether a party has stated a claim, we are concerned only with the legal sufficiency of the complaint." ***Kohlbeck v. Reliance Const. Co., Inc.***, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277. "[A] claim should be dismissed as legally insufficient only if 'it is quite clear that under no conditions can the plaintiff recover.'" ***Morgan v.***

---

[7] Uncontested documents in the record identify Williams as a Flood Recovery Specialist in the Department of Administration.

[8] We reiterate from our discussion above that Hoeft fails to point to any federal statutes or regulations that confer upon him rights that are enforceable under 42 U.S.C. § 1983 against the City. Similarly, Hoeft fails to allege any right enforceable under § 1983 against Williams. Thus, even without sovereign immunity, Hoeft's claim against Williams fails.

Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979) (quoted source omitted).

¶36 "The concept of sovereign immunity in [Wisconsin] derives from art. IV, sec. 27 of the Wisconsin Constitution which provides: 'The legislature shall direct by law in what manner and what courts suits may be brought against the state.'" ***Lister v. Board of Regents of the University of Wisconsin System***, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). "From this provision the rule developed that the state cannot be sued without its consent." ***Id.*** "[T]he consent must be clearly and expressly stated." ***Erickson Oil Products Inc. v. State***, 184 Wis. 2d 36, 43, 516 N.W.2d 755 (Ct. App. 1994). "If the legislature has not specifically consented to the suit, then sovereign immunity deprives the court of personal jurisdiction over the State, assuming that the defense has been properly raised." ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶51, 317 Wis. 2d 656, 766 N.W.2d 559.

¶37 "The fact that the state is not named as a party defendant does not conclusively establish that the suit is not one against the state. Whether the defense of sovereign immunity may be asserted depends not so much upon the character of the parties defendant as it does upon the nature of the relief which is sought." ***Lister***, 72 Wis. 2d at 292. "When an action 'is in essence one for the recovery of money from a state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'" ***Id.*** (quoted source omitted). "[A] suit against a state official in his or her *official capacity* is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." ***Will v. Michigan Dept. of State Police***, 491 U.S. 58, 71 (1989) (emphasis added).

¶38 Here, it is undisputed that Hoeft's 42 U.S.C. § 1983 claim is against Williams in his *official* capacity as "Director, Department of Administration." Hoeft's claim against Williams is, in essence, one to recover money from the State for its alleged failures to "oversee" and "direct" the acquisition of Hoeft's property and to provide Hoeft with his requested relocation benefits. Thus, in accordance with the Wisconsin Constitution and the case law cited above, sovereign immunity deprives the court of personal jurisdiction over Williams in his official capacity.

¶39 Hoeft appears to assert that the State nevertheless "waived" immunity, but Hoeft fails to develop any pertinent argument as to waiver of *sovereign* immunity. Rather, Hoeft cites inapposite case law on municipal and public officer immunity under WIS. STAT. § 893.80,[9] and on qualified immunity, and appears to argue that Williams is not entitled to municipal and public officer immunity or to qualified immunity. But, these arguments do not respond to

---

[9] Hoeft cites to the following inapposite case law:

> ***Barillari v. City of Milwaukee***, 194 Wis. 2d 247, 533 N.W.2d 759 (1995) (public officer immunity under WIS. STAT. § 893.80(4));
>
> ***C.L. v. Olson***, 143 Wis. 2d 701, 422 N.W.2d 614 (1988) (public officer immunity);
>
> ***Holytz v. City of Milwaukee***, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), *superseded by statute as stated in* ***Legue v. City of Racine***, 357 Wis. 2d 250, 849 N.W.2d 837 (2014) (municipal government immunity);
>
> ***Scott v. Savers Property and Cas. Ins. Co.***, 2003 WI 60, ¶58, 262 Wis. 2d 127, 663 N.W.2d 715 (Abrahamson, C.J., concurring) (public officer immunity);
>
> ***Burkes v. Klauser***, 185 Wis. 2d 308, 517 N.W.2d 503 (1994) (qualified immunity for officials sued in their individual capacities).

Williams' showing of the state's *sovereign* immunity. As we explain, the concepts of municipal and public officer immunity, and of qualified immunity, are distinct from sovereign immunity and do not support Hoeft's contention that the State waived sovereign immunity.

¶40 "Municipal and public officer immunity is distinct from the constitutionally-based doctrine of sovereign immunity, a 'distinction [that] is often overlooked.'" ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶22 n.2, 253 Wis. 2d 323, 646 N.W.2d 314 (quoted source omitted). "[T]he state's sovereign immunity from suit is procedural in nature and arises from the state constitution. The immunity afforded public officers with respect to the performance of their official functions, on the other hand, is a substantive limitation on their *personal* liability for damages and is common law."[10] ***Lister***, 72 Wis. 2d at 298-99 (emphasis added). "The general rule is that a public officer is not *personally* liable to one injured as a result of an act performed within the scope of his official authority and in the line of his official duty." ***Id.*** at 300. However, municipal and public officer immunity "is not absolute" and our supreme court has recognized various exceptions to the rule of immunity, including "when a public officer engages in negligent conduct that is 'malicious, willful and intentional.'" ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 90 & n.8, 596 N.W.2d 417 (1999) (quoted source omitted). Because Williams does not assert public officer immunity, these exceptions on which Hoeft purports to rely do not apply, and are not relevant to the State's assertion of sovereign immunity.

---

[10] Municipal and public officer immunity is now codified in WIS. STAT. § 893.80. ***Bicknese v. Sutula***, 2003 WI 31, ¶67 n.3, 260 Wis. 2d 713, 660 N.W.2d 289.

¶41 Qualified immunity is yet another distinct concept applicable only when a public official is sued in his *individual* capacity. *See* ***Burkes v. Klauser***, 185 Wis. 2d 308, 325-26, 517 N.W.2d 503 (1994). "Qualified immunity is intended to protect public officials from harassing litigation so that they 'reasonably can anticipate when their conduct may give rise to liability for damages.' More specifically, qualified immunity protects government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." ***Barnhill v. Board of Regents of the UW System***, 166 Wis. 2d 395, 406, 479 N.W.2d 917 (1992) (citations omitted). Hoeft does not allege any claims against Williams in his *individual* capacity, and does not dispute that he is suing Williams only in Williams's official capacity. Thus, his resort to qualified immunity fails.

¶42 In sum, Hoeft's argument confuses the State's assertion of *sovereign* immunity with the law on municipal and public officer immunity and qualified immunity. As to the State's *sovereign* immunity, Hoeft fails to point to any fact or law supporting his assertion that the State is not entitled to sovereign immunity here. Therefore, we conclude that the circuit court properly dismissed Hoeft's claim against Williams on the basis of sovereign immunity.

CONCLUSION

¶43 For the reasons set forth above, we conclude that the circuit court did not err in granting the City's motion for summary judgment and Williams' motion to dismiss. Therefore, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.