

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 10, 1997

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.

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

No. 96-0775

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JAMES MUNROE,

PLAINTIFF-APPELLANT,

v.

**GARY R. MCCAUGHTRY, KATHI BERKLEY, WENDY
POLENSKA, TAMMY WESTPHAL, MARY JANSSEN, DR.
SEVERINO GOMILLA, SHARON ZUNKER, DR. GEORGE M.
DALEY, AND MICHAEL J. SULLIVAN,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MORIA KRUEGER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. James Munroe appeals from an order dismissing his complaint against various defendants associated with the Department of Corrections. We affirm.

Munroe filed his complaint in September 1994 and an amended complaint in March 1995. The amended complaint alleges that Munroe was an inmate at Waupun Correctional Institution and that he suffers from a skin disease called atopic numular eczema, which can be treated with various medications and Dove soap. With respect to the individual defendants, he alleges the following: Polenska and Westphal, both nurses, negligently failed to provide him with Dove soap and certain medications. Janssen, a nurse, negligently provided inaccurate information to an inmate complaint investigator who was investigating Munroe's complaint, and her action also violated his Eighth Amendment right to be free from deliberate indifference to his serious medical condition. Gomilla, a physician, was negligent and violated his Eighth Amendment rights by failing to provide him with Dove soap and certain medications, and by prescribing certain other medications which gave Munroe chemical burns and caused the loss of pubic hair. McCaughtry, superintendent of the institution, negligently agreed to deny Munroe Dove soap. Zunker, director of the Bureau of Correctional Health Services, negligently agreed to deny Munroe certain medications and Dove soap. Sullivan, secretary of the department, was negligent and violated his Eighth Amendment rights by denying him Dove soap.

The complaint alleges that the defendants' actions were a substantial factor in exacerbating Munroe's skin disease, thereby causing his skin to break out in large rashes and sores, causing him physical and emotional suffering. The complaint further alleges that defendant Daley, a physician, negligently failed to approve surgery to remove a "mona (lipoma)" from Munroe. Finally, the complaint alleges that Sullivan, Zunker and Daley violated his Eighth Amendment rights by hiring Gomilla, who they knew "could not pass his State Medical Examination prior to being hired by the Department of Corrections."

Munroe moved for appointment of an expert witness under § 907.06, STATS., which provides for court-appointed experts. Later, the defendants moved for summary judgment. The trial court denied Munroe's motion and did not act on the summary judgment motion. The court ordered that if Munroe did not notify the court and the parties that he had engaged the services of a medical expert within ninety days, the case would be dismissed. Munroe did not so notify the court, and, on the defendants' motion, the complaint was dismissed. Munroe appeals.

Munroe argues that the trial court erred in denying his motion for appointment of an expert because it did not give proper weight to a federal case he cited, *Smith v. Jenkins*, 919 F.2d 90 (8th Cir. 1990). While *Smith* may arguably provide support for Munroe's claim, federal rules of evidence are binding only on federal courts. FED. R. EVID. 101; see *Smith*, 919 F.2d at 93. Therefore, the trial court was not obliged to follow the *Smith* court's use of the federal analogue to § 907.06, STATS.

Munroe argues that the court should not have dismissed his complaint, even though he did not have an expert, because he could have proceeded on the theory of *res ipsa loquitor*. The defendants' brief does not address this argument. However, we reject it. As Munroe argues, one of the elements of *res ipsa loquitor* is that the event in question does not ordinarily occur in the absence of negligence. The events in this case, specifically Munroe's skin condition, alleged chemical burns and hair loss, and lack of surgery to remove a "mona (lipoma)," do not meet this standard. While negligence could be a factor, the events do not necessarily suggest negligence to a sufficient degree to proceed on this theory.

Munroe next argues that even if the court properly dismissed his state law claims for failure to obtain an expert, the court should still have allowed him to proceed on his federal Eighth Amendment claims. The defendants' brief does not address this argument. However, we reject it. To establish a violation of the Eighth Amendment for denial of medical care, the inmate must prove that the defendants showed deliberate indifference to serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Without an expert, Munroe would not be able to show that his eczema skin condition was worsened by the defendants' acts. Nor would he be able to show that any defendant violated his Eighth Amendment rights by prescribing the medications that allegedly burned him and by declining to remove the "mona (lipoma)," since such a showing would require a conclusion that the acts were not medically appropriate.

Finally, Munroe argues that we should use our power of discretionary reversal under § 752.35, STATS., because the real controversy has not been fully tried. The defendants' brief does not address this issue. The thrust of the argument seems to be that his federal claims, which he labels as "the real controversy," were not tried because of the trial court's dismissal of the case on "a technicality," apparently his failure to obtain an expert. We reject the argument because it is little more than a restatement of previous arguments.

By the Court.—Order affirmed.

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

