COURT OF APPEALS
DECISION
DATED AND RELEASED

May 22, 1997

NOTICE

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. 96-3102

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

JAMES MUNROE,

PLAINTIFF-APPELLANT,

V.

OFFICER DYKSTRA AND J. WINIARSKI,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: WILLIAM G. CALLOW, Reserve Judge. *Affirmed.*

ROGGENSACK, J. James Munroe appeals from a judgment dismissing his small claims complaint against prison officials, which sought the return of one set of headphones, one cassette tape and one set of drawing ink pens or the value of that property, on the ground that Munroe failed to timely file a notice of claim pursuant to § 893.82(3), STATS., before commencing this action. Section 893.82(3) requires that the attorney general be given notice within 120

days of an alleged injury caused by a state employee. Munroe contends that the trial court erred in granting summary judgment to the State because he had filed a notice of claim within 120 days of learning the names of the state employees responsible for his injury, and could not have filed a notice of claim in compliance with the statute until he had that information. However, because the discovery rule[1] does not apply to § 893.82(3), this court concludes that the trial court properly dismissed Munroe's claim. Accordingly, the judgment is affirmed.[2]

BACKGROUND

Munroe was transferred to the Green Bay Correctional Institution (GBCI) on June 29, 1995, after a two-month period of segregation following his confinement at the Racine Correctional Institution (RCI). Munroe filed an inmate complaint on July 3, 1995, after noticing some of his personal property was missing and/or damaged during the transfer to GBCI. Munroe was informed of the names of the persons who packed his items on August 4, 1995.

On September 25, 1995, Munroe executed a notice of claim to the attorney general, but he did not serve it. On November 15, 1995, over 120 days after the loss of his property, but less than 120 days after receiving the names of the allegedly responsible parties, Munroe served his notice of claim on the attorney general by certified mail. On June 11, 1996, Munroe filed this small claims action. Respondents answered and moved for summary judgment, asserting that Munroe had failed to comply with § 893.82(3), STATS. The trial

[1] The discovery rule was first articulated in ***Hansen v. A.H. Robins Co.,*** 113 Wis.2d 550, 335 N.W.2d 578 (1983).

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

court granted their motion. Because Munroe failed to file a timely notice of claim pursuant to § 893.82(3), before filing this action, the court concluded that it lacked jurisdiction to hear this matter and dismissed Munroe's complaint. This appeal followed.

DISCUSSION

Standard of Review.

Whether Munroe complied with the notice of claim statute, § 893.82(3), STATS., is a question of law which may be resolved on summary judgment. *See* ***Sambs v. Nowak***, 47 Wis.2d 158, 164, 177 N.W.2d 144, 147 (1970). This court reviews a grant of summary judgment *de novo*, applying the same standards employed by the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the complaint[3] to determine whether it states a claim, and then review the answer to determine whether it presents a material issue of fact or law.[4] See ***id.*** If the complaint states a claim and the answer presents a material issue of fact or law, we examine the moving party's affidavits, to determine whether that party has made a *prima facie* case for summary judgment. ***Id***. If it has, we look to the opposing party's affidavits, to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id***.

[3] Under notice pleading rules, Munroe's complaint adequately plead compliance with the requirements of § 893.82(3), STATS.

[4] The legal contention set forth in the State's answer, if correct, is sufficient to defeat Munroe's claim. Therefore, issue has been joined.

Timeliness of Notice.

The State of Wisconsin is a sovereign entity which cannot be sued without its consent, or strict compliance with any conditions which it places on its consent. ***Lister v. Board of Regents***, 72 Wis.2d 282, 291, 240 N.W.2d 610, 617 (1976); ***Metzger v. Wisconsin Dep't of Taxation***, 35 Wis.2d 119, 131-32, 150 N.W.2d 431, 437 (1967). Although sovereign immunity does not extend to tort suits against state employees, the State will only indemnify judgments for acts committed within the scope of public employment when similar conditions are met. ***Carlson v. Pepin County***, 167 Wis.2d 345, 356, 481 N.W.2d 498, 503 (Ct. App. 1992); § 895.46, STATS. One of the conditions which the State places on its consent to have its employees sued is that the attorney general be notified of any pending claims in a timely manner. Section 893.82(3), STATS. Section 893.82(3) provides in part:

> Except [in medical malpractice cases], no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties, … unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding 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, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved….

The purpose of the notice of claim statute is to permit the attorney general to investigate before the facts become stale and to resolve claims without unnecessary litigation where practicable. *See* ***Lewis v. Sullivan***, 188 Wis.2d 157, 168, 524 N.W.2d 630, 634 (1994). Notice is deficient under § 893.82(3), STATS., if it fails to identify, by name, the state employee allegedly responsible for the

plaintiff's injury. ***Modica v. Verhulst***, 195 Wis.2d 633, 647, 536 N.W.2d 466, 473 (Ct. App. 1995).[5]

Munroe concedes that he failed to file a notice of his claim within 120 days after his property was lost, but he argues that the discovery rule adopted in ***Hansen v. A.H. Robins Co.,*** 113 Wis.2d 550, 335 N.W.2d 578 (1983), should be applied to toll the 120-day notice period under § 893.82, STATS., until he had learned the identity of the state employee who was allegedly responsible for losing his property. The discovery rule provides that "tort claims shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first." ***Hansen*** at 560, 335 N.W.2d at 583. In addition, "under Wisconsin law, a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury but also that the injury was probably caused by the defendant's conduct or product." ***Borello v. U.S. Oil Co.***, 130 Wis.2d 397, 411, 388 N.W.2d 140, 146 (1986).

However, this court has already rejected the notion that the discovery rule tolls the 120-day time limit of § 893.82(3), STATS., in other contexts. In ***Renner v. Madison Gen. Hosp.***, 151 Wis.2d 885, 447 N.W.2d 97 (Ct. App. 1989), for instance, we refused to excuse the failure to file timely notice when the plaintiffs did not discover that the defendant was a state employee until after the time limit had expired. And in ***Oney v. Schrauth***, 197 Wis.2d 891, 541 N.W.2d 220 (Ct. App. 1995), we held that the plaintiff's failure to timely file a notice of claim was fatal even though the plaintiff was unaware that the search of

[5] The trial court mistakenly commented that Munroe could have filed a "John Doe" notice of claim with the attorney general. However, this does not affect our analysis.

his house had been based on illegally seized evidence until after the time limit had expired. We reasoned that the plain language of § 893.82(3), contrasted with that of subsections (4)(b) and (5m), demonstrated the legislature's intent not to apply the discovery rule to subsection (3).

Section 893.82(5m), STATS., allows notice of a claim for damages for medical malpractice to be filed within 180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered. Section 893.82(4)(b) allows a claimant in an indemnification action to establish that he or she had no actual or constructive knowledge of the underlying cause of action at the time of the event, to delay the accrual of the action until the date knowledge was acquired. When words used in one subsection are not used in another subsection, this court may conclude that the legislature specifically intended a different meaning. Therefore, because of the omission of the discovery rule from the language of § 893.82(3), we concluded that the discovery rule does not apply to that subsection. *See* ***Oney,*** 197 Wis.2d at 899, 541 N.W.2d at 232. The logic of ***Oney*** extends to the facts of this case, and leads to the conclusion that the time limit for claims against state employees is not tolled until a plaintiff knew, or should have known, the identity of the alleged tortfeasor.

Applicability of Section 893.82(3), STATS.

Munroe argues, for the first time in his reply brief, that § 893.82(3), STATS., does not apply to his small claims action due to the supreme court's decision in ***Lewis v. Sullivan***. ***Lewis*** was initially brought to the attention of this court by the respondents, and we appreciate their counsel's diligence in that regard.

However, we need not address arguments raised for the first time in an appellant's reply brief. ***Schaeffer v. State Personnel Comm'n***., 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989). Because ***Lewis*** is not directly on point, and because Munroe did not argue that § 893.82(3), STATS., does not apply to his claim until his reply brief, we choose not to address that contention in this opinion.

CONCLUSION

This court concludes that Munroe failed to file a timely notice of claim as is required by § 893.82(3), STATS., and that the trial court properly found no genuine issue of material fact existed as to whether Munroe complied with § 893.82(3). Therefore, summary judgment dismissing Munroe's complaint was appropriate.

By the Court.—Judgment affirmed.

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