COURT OF APPEALS
DECISION
DATED AND RELEASED

May 1, 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. 96-3336

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

STATE OF WISCONSIN EX REL.
STEPHEN J. WEISSENBERGER,

PETITIONER-APPELLANT,

V.

LINDA BELTON, PHILLIP MACHT, AND RAYMOND WOOD,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

EICH, C.J. Stephen J. Weissenberger, appearing *pro se*, appeals from an order dismissing his petition for a writ of certiorari in which he sought to enjoin all cigarette and pipe smoking at the Wisconsin Resource Center where he was, in his words, a "patient/pre-trial detainee." The trial court dismissed the

petition, concluding that injunctive relief is not available in certiorari actions. We agree and affirm the order.

Weissenberger's petition alleged that various state and institution officials were permitting staff and inmates to smoke in certain areas within the "Sexually Violent Persons Units" at WRC to the detriment of his health and well-being and in violation of various federal and state laws and administrative rules. The relief sought was an injunction requiring the named respondents to impose a "complete ban on all cigarette/pipe smoking and paraphe[r]nalia" at the institution.

The respondents moved to dismiss, citing cases holding that the writ of certiorari is limited to testing the validity of judicial or quasi-judicial determinations on jurisdictional grounds, and that injunctive relief is not available in a certiorari proceeding. The circuit court agreed, dismissing Weissenberger's petition on that basis.

One of the so-called extraordinary writs, certiorari exists for a limited purpose; it has been said to have no legitimate use by itself other than to test the validity of a judicial determination. ***State ex rel. Gaster v. Whitcher***, 117 Wis. 668, 671-72, 94 N.W. 787, 788 (1903). The writ "bear[s] no resemblance to the usual processes of courts, by which controversies between … parties are settled by … judicial tribunals …." ***Coleman v. Percy***, 86 Wis.2d 336, 341, 272 N.W.2d 118, 121 (Ct. App. 1978) (quotations and quoted source omitted), *aff'd,* 96 Wis.2d 578, 292 N.W.2d 615 (1980). There is no "answer" or other traversing pleading in certiorari proceedings: "[T]he return to the writ is merely a certification of the record of the proceedings to be reviewed …. and does not consist of denials and … defenses." ***Consolidated Apparel Co. v. Common Council***, 14 Wis.2d 31, 36-37, 109 N.W.2d 486, 489 (1961). More to the point,

we expressly stated in ***State ex rel. Richards v. Leik***, 175 Wis.2d 446, 455, 499 N.W.2d 276, 280 (Ct. App. 1993), that "a certiorari court … cannot order the [respondents] to perform a certain act."

That is precisely what Weissenbeger seeks in this action: to "order the respondents to … ban … all cigarette/pipe smoking" at WRC. However laudable that goal, it is one that is unavailable in the proceedings Weissenberger elected to bring.

Weissenberger's brief in chief ignores the issue. It is devoted to arguing the detrimental effects of smoking and asserting that the respondents, by permitting smoking in certain areas at WRC, are violating various state laws and administrative rules. His only reference to the issue comes in his reply brief, which consists of a single citation to ***Lewis v. Sullivan***, 188 Wis.2d 157, 524 N.W.2d 630 (1994). In ***Lewis***, the supreme court stated that *pro se* complaints of prisoners must be construed liberally and that "[n]either a trial nor an appellate court should deny a prisoner's pleading based on its label rather than on its allegations. If necessary the court should relabel the prisoner's pleading and proceed from there." ***Id***. at 164-65, 524 N.W.2d at 632-33 (quotations and quoted source omitted).

We acknowledge the rule—it is one we frequently employ—but the situation in ***Lewis*** was quite different from the one before us. The pleading in ***Lewis*** was a civil complaint for "replevin" which also sought damages from several prison officials who were claimed to have improperly taken possession of the plaintiff's property. The issue before the court was whether the complaint "state[d] a claim upon which relief in the form of replevin (that is, possession of the property or the value thereof and damages for the detention), a declaratory

judgment or injunctive relief can be granted." ***Id***. at 160, 524 N.W.2d at 631. It was a case in which the court was interpreting a complaint filed in a traditional civil action to see whether it would support the civil remedies the plaintiff was seeking. Viewing the complaint liberally, the court said that it did. ***Id***. at 166-67, 524 N.W.2d at 633.

As we have said, a certiorari proceeding bears no resemblance to a civil action brought to resolve a dispute between the parties. It exists only to test the validity of judicial or quasi-judicial determinations and it neither contemplates nor authorizes the defendants/respondents to interpose any answers, denials or defenses. Treating Weissenberger's petition as a civil declaratory judgment complaint—especially at this stage of the proceedings—would go far beyond anything ordered or contemplated in ***Lewis***.

Weissenberger, whose stationery identifies him as a professional "paralegal," elected not to recast his action into proper form when the respondents pointed out the inability of his chosen remedy to achieve the ends he sought. Instead, he chose to fight the motion both in the trial court and in this court. And his tactic of waiting until his reply brief to address the sole issue on appeal—the reason underlying the trial court's dismissal of his compliant—showcases the reason for the long-recognized rule of appellate practice that we will not consider arguments raised for the first time in the appellant's reply brief:[1] such a tactic deprives the respondent of the opportunity to respond.

[1] *See* ***Northwest Wholesale Lumber v. Anderson***, 191 Wis.2d 278, 294 n.11, 528 N.W.2d 502, 508-09 (Ct. App. 1995).

Beyond that, an equally well-known rule of appellate practice is the one limiting our consideration on appeal to issues first brought before the trial court. *See* ***In re C.A.K.***, 154 Wis.2d 612, 624, 453 N.W.2d 897, 902 (1990) (appellate court will not consider an argument raised for the first time on appeal or review). According to our examination of Weissenberger's briefs to the trial court, he never asked the court to employ the ***Lewis*** rule of liberal construction of *pro se* inmate pleadings to interpret his petition into a civil complaint for declaratory or injunctive relief.

For all these reasons, we are satisfied that the trial court properly dismissed the petition.

By the Court.–Order affirmed.

Not recommended for publication in the official reports.