COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP91 **Cir. Ct. No. 2014CV331**

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

JAY W. THORSLAND AND LISA M. THORSLAND,

PLAINTIFFS-APPELLANTS,

UNITED HEALTHCARE INS. CO.,

INVOLUNTARY-PLAINTIFF,

V.

DUANE E. WOLTER, DOUGLAS KROMREY AND DOMINIC CHRISTENSEN,

DEFENDANTS,

ROBERT SWITALLA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jay and Lisa Thorsland appeal an order dismissing their wrongful death claim against Robert Switalla. The circuit court determined dismissal was required because Switalla was an agent of the Wisconsin Department of Natural Resources (DNR), and the Thorslands failed to serve the attorney general with notice of their claim against him as required by WIS. STAT. § 893.82.[1] The Thorslands argue the circuit court erred by: (1) converting Switalla's motion to dismiss to a motion for summary judgment; (2) improperly resolving factual disputes regarding Switalla's agency; and (3) denying the Thorslands' motion to compel discovery. We reject these arguments and affirm.

BACKGROUND

¶2 The Thorslands' daughter, thirteen-year-old Sarah Thorsland, was severely injured on October 26, 2013, during a snowmobile training course offered through the DNR. She died the following day.

¶3 The course was taught by four volunteer instructors—Duane Wolter, Douglas Kromrey, Dominic Christensen, and Switalla. In January 2014, the Thorslands served the attorney general with a notice of claim regarding Wolter, Kromrey, and Christensen. They served an amended notice of claim the following month. Neither the notice of claim nor the amended notice of claim gave notice of any claim against Switalla.

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

¶4 The Thorslands filed the instant lawsuit in September 2014, naming Wolter, Kromrey, Christensen, and Switalla as defendants. The Thorslands alleged all four defendants were negligent in setting up the practical skills portion of the snowmobile training course, in which "students were allowed to operate a snowmobile supplied by the defendants," and in "administering and supervising the practical skills phase of the instruction." The Thorslands further alleged the defendants' negligence was a substantial factor in producing the accident that caused their daughter's death.

¶5 Switalla moved to dismiss the Thorslands' claim against him, citing WIS. STAT. §§ 802.06(2)(a)2. and 893.82. Switalla alleged he was acting as an agent of the DNR during the snowmobile training course. He further alleged the Thorslands had failed to serve the attorney general with notice of their claim against him within 120 days of the accident as required by § 893.82.

¶6 In support of his motion to dismiss, Switalla submitted an affidavit of Betty Kruse, a paralegal employed by the Wisconsin Department of Justice. Attached to Kruse's affidavit were the notice of claim and amended notice of claim the Thorslands had filed regarding Wolter, Kromrey, and Christensen. Both the notice and amended notice alleged that the DNR "has complete control authority [sic] over the [snowmobile training] program, specifically who participates as an instructor or apprentice."

¶7 Switalla also submitted an affidavit of Mark Little, a recreational safety warden employed by the DNR. Little averred that Switalla is "a certified volunteer snowmobile instructor" for the DNR. Little explained that the DNR certifies instructors either through an apprenticeship program and criminal background check, or through attendance at an "Instructor Certification

Academy." He further averred that, "[w]hen certified snowmobile instructors teach snowmobile safety courses, they are doing so as agents of the [DNR]."

¶8 The Thorslands opposed Switalla's motion to dismiss. They contended that, because Switalla had filed a motion to dismiss, rather than a motion for summary judgment, the circuit court could not consider any matters outside the pleadings when deciding the motion. The Thorslands further asserted that, under WIS. STAT. § 802.06(2)(b), the court could not convert Switalla's motion to a summary judgment motion without first giving them an opportunity to present evidence in opposition to summary judgment.

¶9 In the meantime, the Thorslands deposed Wolter, Kromrey, and Christensen. Switalla refused to appear for a deposition while his motion to dismiss was pending. Switalla also refused to respond to the Thorslands' written discovery requests. The Thorslands therefore moved to compel Switalla to appear for deposition and answer the written discovery. They argued, in part:

> Because [Switalla's] motion [to dismiss] goes beyond the pleadings, the Plaintiffs are entitled to present evidence of their own to show that [Switalla] was not an agent. The defense, however, has refused to produce [Switalla] for a deposition. [Switalla] wants to have his cake and eat it too. He introduces evidence beyond the pleadings, but he refuses to submit to a deposition to allow the Plaintiffs to depose him and submit evidence of their own.

¶10 Following briefing and oral argument, the circuit court granted Switalla's motion to dismiss. The court rejected the Thorslands' argument that it could not consider matters outside the pleadings, holding that limitation did not apply because Switalla had moved to dismiss based on a jurisdictional defect. Relying on Little's affidavit, the court then concluded that certified volunteer snowmobile instructors are agents of the DNR for purposes of the notice of claim

statute. The court further determined that ***Showers Appraisals LLC v. Musson Bros.***, 2013 WI 79, 350 Wis. 2d 509, 835 N.W.2d 226, a case relied on by the Thorslands, was inapplicable because it addressed agency under the governmental immunity statute, rather than the notice of claim statute. Finally, having concluded dismissal of the Thorslands' claim against Switalla was warranted, the court denied the Thorslands' motion to compel discovery. The Thorslands now appeal.

DISCUSSION

I. Consideration of matters outside the pleadings

¶11 The Thorslands first argue on appeal that the circuit court "[e]rroneously [a]pplied WIS. STAT. § 802.06" by considering matters outside the pleadings when deciding Switalla's motion to dismiss. Specifically, they argue that, by considering matters outside the pleadings, the court improperly converted Switalla's motion to dismiss to a motion for summary judgment without providing them an opportunity to present opposing evidence. This argument requires us to interpret § 802.06. Statutory interpretation presents a question of law that we review independently. ***Honeycrest Farms, Inc. v. Brave Harvestore Sys., Inc.***, 200 Wis. 2d 256, 263, 546 N.W.2d 192 (Ct. App. 1996).

¶12 WISCONSIN STAT. § 802.06(2)(a) provides that:

> Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading … shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> 1. Lack of capacity to sue or be sued.
>
> 2. Lack of jurisdiction over the subject matter.

> 3. Lack of jurisdiction over the person or property.
>
> 4. Insufficiency of summons or process.
>
> 5. Untimeliness or insufficiency of service of summons or process.
>
> 6. Failure to state a claim upon which relief can be granted.
>
> 7. Failure to join a party under s. 803.03.
>
> 8. Res judicata.
>
> 9. Statute of limitations.
>
> 10. Another action pending between the same parties for the same cause.

Section 802.06(2)(b), in turn, states in relevant part:

> If on a motion asserting the defense described in par. (a) 6. to dismiss for failure of the pleading to state a claim upon which relief can be granted, or on a motion asserting the defenses described in par. (a) 8. or 9., matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

¶13 Read together, these provisions clearly demonstrate that a motion to dismiss is confined to the pleadings only if it is based on one of three grounds: (1) failure to state a claim, *see* WIS. STAT. § 802.06(2)(a)6.; (2) res judicata, *see* § 802.06(2)(a)8.; or (3) the statute of limitations, *see* § 802.06(2)(a)9. When a motion based on one of those three grounds refers to matters outside the pleadings, the court must either exclude those matters or convert the motion to a motion for summary judgment, giving all parties reasonable opportunity to present material "pertinent to such a motion." Sec. 802.06(2)(b).

¶14 Here, however, Switalla's motion to dismiss was not based on any of the three grounds listed in WIS. STAT. § 802.06(2)(b). Switalla instead argued

dismissal was required because the Thorslands had failed to comply with the notice of claim statute, which prohibits civil actions or proceedings

> against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee'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, employee or agent involved.

WIS. STAT. § 893.82(3).

¶15 Compliance with the notice of claim statute is a condition precedent to bringing a civil action against a state officer, employee, or agent. *See* ***Ibrahim v. Samore***, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984). Where no notice of claim is timely filed, a circuit court lacks competency to exercise its subject matter jurisdiction. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶9, 273 Wis. 2d 76, 681 N.W.2d 190 (failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court's competency to exercise subject matter jurisdiction).[2] Competency goes to the circuit court's "ability to exercise the subject matter jurisdiction vested in it"—that is, the court's ability to "adjudicate the particular case before" it. ***Id.*** Because a challenge to the circuit court's competency asserts that the court has no ability to exercise its subject matter jurisdiction, we agree with Switalla that a motion to

[2] The Thorslands do not dispute that the failure to file a notice of claim when required by WIS. STAT. § 893.82 results in the circuit court losing competency to exercise its subject matter jurisdiction.

dismiss based on lack of competency falls under WIS. STAT. § 802.06(2)(a)2., which pertains to motions to dismiss for "[l]ack of jurisdiction over the subject matter." As such, a motion to dismiss based on a circuit court's lack of competency is not limited to the allegations in the pleadings, and consideration of matters outside the pleadings does not convert the motion to a motion for summary judgment.

¶16 The Thorslands argue Switalla's motion to dismiss falls under WIS. STAT. § 802.06(2)(a)6., which pertains to motions to dismiss for "[f]ailure to state a claim upon which relief can be granted." We disagree. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. To survive a motion to dismiss for failure to state a claim, a complaint must allege facts that, if true, plausibly suggest a violation of applicable law. ***Id.***, ¶21. "A dismissal for failure to state a claim is a judgment on the merits." ***Juneau Square Corp. v. First Wis. Nat. Bank of Milwaukee***, 122 Wis. 2d 673, 686, 364 N.W.2d 164 (Ct. App. 1985). Switalla's motion to dismiss did not assert that the Thorslands' claim against him failed on the merits, nor did the circuit court address the merits of the Thorslands' claim when granting Switalla's motion. Rather, Switalla's motion was based on the assertion that, because the Thorslands failed to comply with the notice of claim statute, the court lacked competency to adjudicate the merits of their claim. A motion to dismiss for failure to state a claim under § 802.06(2)(a)6. does not encompass this type of procedural defense.

¶17 The Thorslands cite ***Ibrahim***, in which our supreme court described the failure to serve a notice of claim as "jurisdictional."[3] *See* ***Ibrahim***, 118 Wis. 2d at 726. They observe that, in ***Ibrahim***, the court did not specify whether the plaintiff's failure to comply with the notice of claim statute went to the court's subject matter jurisdiction or to personal jurisdiction. Be that as it may, it does not aid the Thorslands here. Matters outside the pleadings may be raised in a motion to dismiss based on either lack of subject matter jurisdiction or lack of personal jurisdiction without the need to convert the motion to a motion for summary judgment. *See* WIS. STAT. § 802.06(2)(a)2.-3., (2)(b).

¶18 The Thorslands also observe that the ***Ibrahim*** court quoted the following passage from ***Mannino v. Davenport***, 99 Wis. 2d 602, 612, 299 N.W.2d 823 (1981): "Where a plaintiff has failed to comply with the terms of the [notice of claim] statute and this defect is properly raised by a motion for summary judgment, the defendant is entitled to prevail whether or not he has raised the matter of noncompliance in his responsive pleading." *See* ***Ibrahim***, 118 Wis. 2d at 726. The Thorslands interpret this passage to mean that a party can raise a notice of claim defense only through a summary judgment motion. However, that is not the case. In ***Mannino***, the plaintiffs argued the defendants had waived their notice of claim defense by failing to raise it in their responsive pleading. ***Mannino***, 99

[3] ***Ibrahim v. Samore***, 118 Wis. 2d 720, 348 N.W.2d 554 (1984), was decided before ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190. In ***Mikrut***, our supreme court clarified that failure to comply with statutory requirements does not deprive a circuit court of subject matter jurisdiction over an action, but it may deprive the court of competency to exercise its subject matter jurisdiction. ***Mikrut***, 273 Wis. 2d 76, ¶¶8-10. More recently, in ***City of Eau Claire v. Booth***, 2016 WI 65, ¶14, 370 Wis. 2d 595, 882 N.W.2d 738, the supreme court expressly withdrew all language from prior cases suggesting that noncompliance with state statutes results in a loss of subject matter jurisdiction, rather than a loss of competency to exercise subject matter jurisdiction.

Wis. 2d at 608. Our supreme court rejected that argument, holding the defendants properly raised the defense for the first time on summary judgment. ***Id.*** at 612. Contrary to the Thorslands' assertion, the court did not hold that a notice of claim defense may *only* be raised on summary judgment. Moreover, in ***Ibrahim***, the supreme court upheld a circuit court's decision to grant a motion to dismiss that was based on the plaintiff's failure to comply with the notice of claim statute. *See* ***Ibrahim***, 118 Wis. 2d at 722, 729.

¶19 Switalla's motion to dismiss was not one of the three types of motions listed in WIS. STAT. § 802.06(2)(b). As a result, the circuit court was not precluded from considering matters outside the pleadings when deciding his motion, and the court did not improperly convert Switalla's motion to a motion for summary judgment by considering the affidavits he submitted.

II. Determination that Switalla was an agent of the DNR for purposes of WIS. STAT. § 893.82

¶20 The Thorslands next argue the circuit court "erred in granting summary judgment because there are material facts in dispute." (Capitalization omitted.) We have already determined, however, that the circuit court did not convert Switalla's motion to dismiss to a motion for summary judgment. Instead, the court granted Switalla's motion to dismiss based on its conclusions that: (1) Switalla was an agent of the DNR for purposes of WIS. STAT. § 893.82; and (2) as a result, the court lacked competency to adjudicate the Thorslands' claim against Switalla due to their failure to comply with the notice of claim statute. We independently review these conclusions. *See* ***State v. Isaac J.R.***, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998) (application of a statute to a particular set of facts is a question of law for our independent review); ***S.R. v. Circuit Court for Winnebago Cty.***, 2015 WI App 98, ¶9, 366 Wis. 2d 134, 876 N.W.2d 147

(whether a circuit court possessed competency to adjudicate a matter is a question of law that we review independently).[4]

¶21 As noted above, WIS. STAT. § 893.82(3) requires a notice of claim to be served on the attorney general before suit can be filed against "any state officer, employee or agent." In ***Smith v. Wisconsin Physicians Services***, 152 Wis. 2d 25, 447 N.W.2d 371 (Ct. App. 1989), we held that, for purposes of § 893.82, the necessary elements of a principal-agent relationship are:

> (1) "the express or implied manifestation of one party that the other party shall act for him;" (2) "[the principal] has retained the right to control the details of the work;" and (3) "the party agreeing to perform the service is engaged in a distinct occupation or business apart from that of the person who engages the services."

Id. at 31 (quoting ***Peabody Seating Co. v. Jim Cullen, Inc.***, 56 Wis. 2d 119, 123, 201 N.W.2d 546 (1972)).

¶22 The Thorslands do not dispute that the three elements set forth in ***Smith*** are satisfied in the instant case. Instead, citing testimony from the depositions of Wolter, Kromrey, and Christensen, they argue Switalla does not qualify as an agent of the DNR under tests set forth in two other cases: ***Lamoreux v. Oreck***, 2004 WI App 160, 275 Wis. 2d 801, 686 N.W.2d 722, and ***Showers Appraisals***. However, neither of those cases is on point.

[4] The Thorslands argue the facts regarding whether Switalla was an agent of the DNR are disputed. However, we agree with Switalla that the Thorslands' "real claim … is that the circuit court looked at the wrong facts" when it determined Switalla was an agent of the DNR. As we explain below, it is undisputed that Switalla qualified as an agent of the DNR under the correct legal test for determining agency under WIS. STAT. § 893.82. *See infra*, ¶¶21-22. While the Thorslands argue certain facts show that Switalla was not an agent, those facts are not relevant to the correct test for determining agency, and, accordingly, they do not convince us the circuit court erred by granting Switalla's motion to dismiss.

¶23 In ***Lamoreux***, the issue was whether a physician qualified as an "employee" of the state for purposes of WIS. STAT. § 893.82. *See* ***Lamoreux***, 275 Wis. 2d 801, ¶¶3, 18. In addressing that issue, we held that the factors relevant to determining whether a "master/servant relationship" existed under the doctrine of respondeat superior were also relevant to determining whether the physician was a state employee under the notice of claim statute. ***Id.***, ¶¶19, 22. Here, in contrast, it is undisputed that Switalla is *not* an employee of the DNR. The issue is whether he is an *agent* of the DNR. ***Lamoreux*** is therefore inapposite.

¶24 In ***Showers Appraisals***, our supreme court considered whether a contractor was an agent of a city, such that the contractor was entitled to governmental immunity under WIS. STAT. § 893.80. ***Showers Appraisals***, 350 Wis. 2d 509, ¶¶1-2. The court did not address what is required for a person to be considered an agent of the state for purposes of WIS. STAT. § 893.82. The test set forth in ***Showers Appraisals*** is therefore irrelevant to the operative issue in this case.

¶25 Under the relevant test—that set forth in ***Smith***—is it undisputed that Switalla qualifies as an agent of the DNR for purposes of WIS. STAT. § 893.82. The Thorslands were therefore required to serve the attorney general with notice of their claim against Switalla. Because they failed to do so, the circuit court lacked competency to adjudicate their claim. *See supra*, ¶15. As a result, the court properly granted Switalla's motion to dismiss.

III. Denial of the Thorslands' motion to compel discovery

¶26 The Thorslands' final argument on appeal is that the circuit court erred by denying their motion to compel discovery. Motions to compel discovery are committed to the circuit court's discretion. ***Franzen v. Children's Hosp. of***

Wis., Inc., 169 Wis. 2d 366, 376, 485 N.W.2d 603 (Ct. App. 1992). We will uphold a discretionary decision if the circuit court "applie[d] the relevant law to facts of record using a process of logical reasoning." ***Id.*** When a circuit court fails to explain its reasoning, we may search the record to determine whether it supports the court's discretionary decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶27 Switalla argues the circuit court properly exercised its discretion by denying the Thorslands' motion to compel for three reasons. First, Switalla observes that, after a lawsuit is commenced, "any party may take the testimony of any person including a party by deposition upon oral examination." WIS. STAT. § 804.05(1). "The attendance of witnesses may be compelled by subpoena," and the attendance of a party deponent may be compelled by a notice of deposition. ***Id.*** Switalla asserts the Thorslands never subpoenaed him or served him with a notice of deposition. He therefore argues there was no basis for the circuit court to compel him to appear for a deposition. The Thorslands do not respond to this argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶28 Second, Switalla argues that, because he objected to the circuit court's competency to adjudicate the claim against him, he was not required to respond to discovery while his motion to dismiss was pending.[5] We agree. In ***Stroup v. Career Academy of Dental Technology***, 38 Wis. 2d 284, 286, 156

[5] The written discovery served on Switalla in this case was of a claimed party. Statutes pertaining to nonparty discovery, *see, e.g.*, WIS. STAT. §§ 804.09(3), 805.07(2)(b), are therefore irrelevant in the present context.

N.W.2d 358 (1968), the plaintiff served a summons and affidavit for discovery in aid of pleading on the defendants, which were out-of-state corporations. The defendants moved to quash the discovery and dismiss the lawsuit for lack of personal jurisdiction. ***Id.*** The circuit court denied the jurisdictional motion without prejudice and allowed discovery to proceed. ***Id.*** at 286-87. The supreme court reversed, stating, "Since the court must have jurisdiction to allow discovery, it follows that when an objection to jurisdiction is made, the jurisdictional issue should be tried before proceeding with discovery." ***Id.*** at 290. The court noted that "discovery examination of a party, whether in aid of pleading or otherwise, is an assumption and exercise of personal jurisdiction over the party." ***Id.*** at 289.

¶29 Similar to the defendants in ***Stroup***, Switalla has asserted the circuit court lacks competency to exercise its subject matter jurisdiction over the Thorslands' claim against him. Pursuant to ***Stroup***, we agree with Switalla that, under these circumstances, the court could not compel him to submit to discovery until after the issue of the court's competency was resolved. Furthermore, once the court properly determined it lacked competency to exercise subject matter jurisdiction over the Thorslands' claim against Switalla, it could not compel Switalla to respond to the Thorslands' discovery requests because doing so would have been an exercise of the court's subject matter jurisdiction.

¶30 The Thorslands argue ***Stroup*** is distinguishable because the out-of-state defendants in that case "faced a jurisdictional quandary: they could not move to dismiss for lack of jurisdiction *because no complaint had been filed*, and they could not move to quash or limit discovery without making a general appearance and submitting to the jurisdiction of Wisconsin." Because similar circumstances are not present in this case, the Thorslands argue ***Stroup*** is inapplicable. However, the Thorslands read ***Stroup*** too narrowly. Regardless of the particular facts of the

case, the ***Stroup*** court's basic premise was that discovery may proceed only if a court has jurisdiction. *See* ***id.*** at 289-90. Applying that premise to the instant case, discovery against Switalla could not proceed because the circuit court lacked competency to adjudicate the claim against him.

¶31 The Thorslands also argue that, because Switalla affirmatively claimed in his motion to dismiss that he was an agent of the State, the Thorslands were entitled to conduct discovery in order to test that claim. However, as Switalla points out, the written discovery the Thorslands sent him

> did not relate to the notice-of-claim question. Instead, it was garden-variety personal injury fare, seeking personal background information and facts about the accident. … Answers to that discovery would have shed no light on whether Switalla was an agent of the State. It was precisely the type of general discovery that ***Stroup*** holds must wait until jurisdiction is established.

The Thorslands do not respond to this argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 108-09.

¶32 Switalla's third argument in support of the circuit court's denial of the Thorslands' motion to compel discovery is that "[t]he facts the Thorslands would have investigated have no relevance to whether Switalla was an agent of [the] DNR." According to Switalla, the Thorslands claim they should have been permitted to investigate issues such as whether the DNR actually exercised control over Switalla, what specifications the DNR gave him about how to conduct snowmobile training classes, and how closely Switalla followed those specifications. Switalla asserts those issues "derive from the test in ***Showers Appraisals***" and are therefore irrelevant. The Thorslands yet again fail to respond to this argument. Accordingly, we deem it conceded. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 108-09.

¶33 For the foregoing reasons, we conclude the circuit court properly exercised its discretion by denying the Thorslands' motion to compel discovery.

By the Court.—Order affirmed.

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