

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 2005

Cornelia G. Clark
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. 2004AP2183

Cir. Ct. No. 2003SC1120

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KIRK BINTZLER,

PLAINTIFF-APPELLANT,

V.

WARDEN THOMAS BORGEN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

¶1 DEININGER, P.J.¹ Kirk Bintzler appeals a judgment dismissing his small claims action seeking back pay and reinstatement of certain prison

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

privileges. Bintzler claims the circuit court erred in concluding that this action was barred because he did not file a timely notice of claim under WIS. STAT. § 893.82(3). Because Bintzler seeks to recover money from the State of Wisconsin without first having complied with WIS. STAT. §§ 16.007 and 775.01, we conclude that this action is barred by the doctrine of sovereign immunity. We therefore affirm the judgment dismissing this action.

BACKGROUND

¶2 At the time of the events leading to this action, and at the time of its filing, Bintzler was an inmate of a Wisconsin correctional institution. He filed a small claims action against Thomas Borgen, warden of the Fox Lake Correctional Institution, seeking the reinstatement of his prison job and back pay for lost wages. Bintzler alleged that, in September of 2002, Borgen set aside a conduct report issued against Bintzler in May of that year. At the same time, Borgen allegedly instructed prison staff to make Bintzler “whole” by giving him the back pay he would have earned from his prison job had he not been terminated from it on account of the conduct report.

¶3 Bintzler attached to his complaint a copy of a notice of claim he filed with the Wisconsin Attorney General’s office pursuant to WIS. STAT. § 893.82(3). The notice is dated October 3, 2003, and alleges that a deputy warden upheld the rejection of Bintzler’s claim for back pay that he had filed via the Inmate Complaint Review System (ICRS). Bintzler also filed copies of his ICRS complaint, dated September 1, 2003, and of the Inmate Complaint Examiner’s recommendation for rejection of the complaint, dated September 10, 2003, on the grounds that Bintzler’s complaint was not timely. Bintzler also attached documents to his small claims complaint from an earlier ICRS complaint he had

filed in 2001. Bintzler was successful on that occasion in obtaining a back pay award of \$598.50.

¶4 Warden Borgen responded to Bintzler's small claims complaint with a motion to dismiss. The warden maintained that Bintzler's notice of claim had not been timely filed and that the warden was immune from Bintzler's suit for back pay under the doctrine of sovereign immunity. The circuit court granted the motion, concluding that Bintzler had failed to file his notice of claim within 120 days of his 2001 award of back pay, which the court understood to be the event causing the injury about which Bintzler now complained. Bintzler appeals the subsequently entered judgment of dismissal.

ANALYSIS

¶5 We first note that the warden acknowledges on appeal that his counsel in the circuit court proceedings, and the circuit court as well, may have misunderstood Bintzler's present claim. Bintzler is suing to recover back pay he sought in 2003 stemming from the warden's action in setting aside a conduct report in September of 2002. He is not suing for additional back pay relating to the 2001 award, as the circuit court appears to have concluded.² The warden contends, however, that despite the apparent misunderstanding of the nature and chronology of Bintzler's present claim in the circuit court, we should still affirm the dismissal because the circuit court reached the correct result, although perhaps

² The circuit court's apparent misreading of the basis for Bintzler's present complaint is understandable. Bintzler attached documentation relating to his 2001 award of back pay, which appears to have been wholly unrelated to his present claim. He apparently attached the 2001 documents to serve as precedent or authority in support of his 2003 claim, but this is not readily apparent from Bintzler's submissions.

for the wrong reason. *See State v. Rognrud*, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990).

¶6 We appreciate the warden's candor and his assistance in explicating Bintzler's claim and the circuit court proceedings. We also agree that, as the respondent, the warden may advance any theory or rationale that will permit us to affirm the circuit court's action, even if it was not the grounds upon which the circuit court relied. *See Doe v. General Motors Acceptance Corp.*, 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7. The warden advances five alternative grounds for affirming the dismissal of Bintzler's complaint: (1) Bintzler failed to name the warden, the person he is now suing, in his notice of claim, as required under WIS. STAT. § 893.82; (2) Bintzler fails to state a claim against the warden; (3) Bintzler failed to timely exhaust his administrative remedies; (4) Bintzler fails to state a claim because he is not entitled to back pay as a matter of law; and (5) Bintzler's back pay claim is barred by the doctrine of sovereign immunity. We agree with the warden's last contention and conclude that Bintzler has not satisfied the statutory requirements for bringing what is, in essence, a breach of contract claim for money damages against the State of Wisconsin.³

³ Our resolution of this appeal on sovereign immunity grounds does not mean that we have concluded the warden's other arguments for affirming the appealed judgment lack merit. For example, our review of the record satisfies us that, at the time he filed his action in the circuit court, Bintzler was a "prisoner" within the meaning of the Wisconsin Prisoner Litigation Reform Act. In order to pursue his current action, therefore, Bintzler was required to submit with his initial pleading proof that he exhausted his administrative remedies. *See* WIS. STAT. § 801.02(7)(b), (c). The materials attached to Bintzler's complaint suggest that he failed to timely pursue administrative relief, and thus, his complaint was subject to dismissal on that ground. *See id. and Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002). Because we conclude that Bintzler's suit is barred by sovereign immunity, however, it is not necessary for us to address the warden's argument on this point or the other alternative rationales he advances for affirming the appealed judgment.

¶7 The defense of sovereign immunity flows from the Wisconsin Constitution, article IV, § 27, which provides that “[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state.” This language has been repeatedly construed to mean that the legislature has the exclusive right to consent to a suit brought against the State. *State ex rel. Teaching Assistants Ass'n v. Univ. of Wisconsin-Madison*, 96 Wis. 2d 492, 509, 292 N.W.2d 657 (Ct. App. 1980). Because whether a claim is barred by sovereign immunity is a question of law that we decide de novo, *Erickson Oil Prods., Inc. v. State*, 184 Wis. 2d 36, 42, 516 N.W.2d 755 (Ct. App. 1994), the fact that the circuit court did not address the issue presents no impediment to our first deciding it on appeal.

¶8 Even though Bintzler has sued Warden Borgen and not the State of Wisconsin, the doctrine of sovereign immunity is still implicated. If a legal 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.” *Lister v. Board of Regents*, 72 Wis. 2d 282, 292, 240 N.W.2d 610 (1976) (citation omitted). If a judgment for a plaintiff would require a payment from State funds, sovereign immunity bars the action unless the State has waived the defense.⁴ *Wisconsin Retired Teachers Ass'n, Inc. v. Employee Trust Funds Bd.*, 207 Wis. 2d 1, 28, 558 N.W.2d 83 (1997). Bintzler is seeking back pay for the allegedly wrongful termination of his inmate employment at a Wisconsin state prison. Defendant Borgen is an officer and employee of the State of Wisconsin, and thus any award

⁴ The State, acting through the warden, has not waived the defense of sovereign immunity. The defense was pled and argued in the warden’s motion to dismiss.

of back pay to Bintzler would be paid to him from the state treasury, rendering his claim essentially one against the State. *See Lister*, 72 Wis. 2d at 293; *cf. Luder v. Endicott*, 253 F.3d 1020 (7th Cir. 2001) (analyzing prisoners’ claim for overtime pay under Eleventh Amendment bar against suits for damages brought against a state in federal court).

¶9 In Wisconsin, claims for back pay stemming from allegedly wrongful termination of employment sound in contract.⁵ *See Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 575-76, 335 N.W.2d 834 (1983). A valid breach of contract claim where the plaintiff seeks monetary damages may be deemed to render the State “a debtor,” and such claims are actionable, but only if certain conditions are met. *See Brown v. State*, 230 Wis. 2d 355, 367, 602 N.W.2d 79 (Ct. App. 1999). The legislature has established procedures in WIS. STAT. §§ 16.007 and 775.01 for persons seeking to collect money from the State. These sections have been interpreted as giving legislative consent for the State to be sued for money damages for an alleged breach of contract. *Brown*, 230 Wis. 2d at 371-73; *see also Boldt v. State*, 101 Wis. 2d 566, 572-73, 305 N.W.2d 133 (1981). Before commencing suit, however, the legislature requires a party to present a

⁵ We note that Bintzler’s claim is for back-pay during a period he claims to have been wrongfully denied the opportunity to continue working at a prison job. His claim is *not* a claim under WIS. STAT. ch 109 for unpaid wages for hours he claims to have worked, which, if he were a state employee, would not be barred by sovereign immunity. *See German v. Wisconsin Department of Transportation*, 2000 WI 62, 235 Wis. 2d 576, 612 N.W.2d 50.

We note further that Bintzler makes no allegation in the present suit that Warden Borgen, acting under the color of state law, violated any rights accorded Bintzler under the U.S. Constitution or other federal law. The sovereign immunity analysis we employ here would not apply to such a claim. Finally, the present action seeks money damages, not certiorari review of the administrative decisions denying Bintzler the compensation he seeks. Bintzler may have been entitled to obtain review (and possible reversal) of the administrative denial of his back-pay claim, provided he properly exhausted his administrative remedies and timely sought judicial review.

claim to the State Claims Board, which then must recommend to the legislature whether the claim should be granted or denied. *See* § 16.007. Then, “[u]pon the refusal of the legislature to allow a claim against the state[,] the claimant may commence an action against the state....” Section 775.01. Failure to comply with these procedures is fatal to a legal action seeking to collect the amount claimed. *See Brown*, 230 Wis. 2d at 364-69.

¶10 Bintzler did not allege in his complaint that he complied with the cited statutory procedures for pursuing a monetary claim against the State, and we find nothing in the record to indicate that he did so. Because he did not comply with the conditions the legislature has placed on its consent for the State to be sued for monetary damages, Bintzler’s present action is barred by sovereign immunity. Accordingly, the circuit court did not err in ordering the action dismissed.⁶

CONCLUSION

¶11 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

⁶ Bintzler’s complaint also sought non-monetary relief, specifically, restoration of his prison job and reassignment to a single-occupancy cell. The circuit court noted in its written decision that Bintzler’s non-monetary claims had become moot because he had by then been transferred to the Wisconsin Secure Program Facility in Boscobel, where policies regarding work and cell assignments were considerably different than at Fox Lake. Our appellate correspondence file indicates that Bintzler is now incarcerated at an out-of-state federal prison. We therefore agree that his non-monetary claims are moot. Moreover, we note that claims for “specific performance” are also barred by the doctrine of sovereign immunity, because, unlike monetary claims addressed under WIS. STAT. §§ 16.007 and 775.01, the legislature has not consented to be sued for such relief. *See Brown v. State*, 230 Wis. 2d 355, 371-73, 602 N.W.2d 79 (Ct. App. 1999).

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

