COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2041 **Cir. Ct. No. 2005SC574**

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

FREDERICK ROGERS,

PLAINTIFF-APPELLANT,

V.

DEPARTMENT OF CORRECTIONS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Frederick Rogers appeals an order that dismissed his small claims complaint against the Department of Corrections. Rogers claims the circuit court erred in dismissing this action on sovereign immunity grounds

[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.

because his "action is against a[n] employee of the Department of Corrections." He also asserts that, at issue, is the employee's breach of a ministerial duty, not a discretionary act, and further that the department's motion to dismiss was not timely filed and was filed improperly by fax. Because Rogers served the summons and complaint on the department but not on the individual employee he identifies as culpable, we conclude the circuit court did not err in dismissing this action on sovereign immunity grounds. Further, we find no basis in the record to conclude that the department's motion to dismiss was either untimely or improperly filed. Finally, our conclusion that sovereign immunity bars this action makes it unnecessary for us to determine whether Rogers' claim alleges the breach of a ministerial duty, as opposed to the negligent performance of a discretionary act. We affirm.

BACKGROUND

¶2 At the time he filed his action, Rogers was an inmate at Fox Lake Correctional Institution. His small claims summons and complaint names the "Department of Corrections" as the defendant and provides an address in Madison for the department. His complaint alleges that he "bit down on a rock in my beans, cracking and injuring my teeth." He further claims that his injury "was due to the negligence of food service to properly soak the beans." Finally, he asserts that he "suffered pain and injured a tooth," requesting $3200 in money damages.

¶3 On a "Small Claims Division Case Information Sheet" that is attached to the small claims summons and complaint, the defendant is listed as the "Department of Correction(sic)," but in a block labeled "additional names," the name "Ms. Toutant" appears. No address or other information regarding this individual is provided. A proof of service from the Dane County Sheriff's

Department shows that the summons and complaint were served on "WI Dept of Corrections" at the Madison address, and it identifies "Terri Rees" of the "Legal Office" as the "designee" at that address who accepted service on behalf of the department. There is no indication in the record that any individual by the name of "Toutant" was served with the summons and complaint.

¶4 Both the small claims summons and a separate "Notice of Hearing" establish a "return date" of July 6, 2005. On July 5, 2005, the department filed an answer that raised as an affirmative defense that "the defendant is protected from liability by the principle of sovereign immunity." On that same date, the department filed a "Brief in Support of Motion to Dismiss," in which it argued the sovereign immunity defense, as well as that Ms. Toutant was not a defendant, but even if she were, the action would not lie against her because of her entitlement to governmental immunity for her discretionary acts. Finally, the department also moved for a change of venue to Dane County, pursuant to WIS. STAT. § 801.50(3).

¶5 The department's motions were noticed for hearing on July 27, and the court minutes indicate that both parties appeared, apparently by telephone. No transcript of the hearing is in the record, but the minutes indicate that "Court finds DOC has sovereign immunity. Court grants motion to dismiss." The court entered an order stating "that the Defendant as a state agency is immune from liability under Wisconsin law," and in the order, the court granted the defense motion and dismissed Rogers' complaint. Rogers appeals.

ANALYSIS

¶6 Whether the State or one of its agencies is immune from a particular claim or action is a question of law that we decide de novo. *See* ***Erickson Oil Prods., Inc. v. State***, 184 Wis. 2d 36, 42, 516 N.W.2d 755 (Ct. App. 1994). The

defense of sovereign immunity flows from the Wisconsin Constitution, article IV, section 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. University of Wisconsin-Madison,*** 96 Wis. 2d 492, 509, 292 N.W.2d 657 (Ct. App. 1980). In other words, the State cannot be sued without its consent, and that immunity extends to its "arms or agencies." *See* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). The State has not given statutory consent to be sued in tort. *See* ***Carlson v. Pepin County***, 167 Wis. 2d 345, 356, 481 N.W.2d 498 (1992).

¶7 There can be no dispute that the present action is one seeking monetary damages from a state agency, the Department of Corrections, for a tort—the negligent preparation of food served to Rogers, which allegedly resulted in his sustaining a personal injury. As such, the trial court correctly dismissed the action against the department on sovereign immunity grounds.

¶8 Rogers claims, however, that the true defendant in this action is "Ms. Toutant," who is apparently a food service administrator at the Fox Lake Correctional Institution. Although Ms. Toutant's name appears on a "Case Information Sheet" attached to Rogers' complaint, her address is not provided, and the actual summons names only the department as a defendant. WISCONSIN STAT. § 799.05(1) and (6) require that the names and last known addresses of all parties to an action be set forth in the small claims summons. We thus agree with the department that "Ms. Toutant" is not a party to this action.

¶9 Moreover, we also agree with the department that, even if the naming of Ms. Toutant on the "Case Information Sheet" were sufficient to render her a party, the circuit court still lacked personal jurisdiction over Ms. Toutant because she was never served with the summons and complaint. Thus, the only defendant before the court in this action is the department, and as noted, the department is immune from this suit on sovereign immunity grounds.

¶10 Rogers also argues, as he did in a filing in the circuit court, that the department's motion to dismiss was untimely and improperly filed by fax. We note first that the department's answer raising the sovereign immunity defense was filed with the circuit court a day before the established "return date" in the action, and thus, the answer was timely filed and the defense timely raised. Further, we find no indication on the file-stamped answer, nor on the "Brief in Support of Motion to Dismiss" file-stamped the same day, that these documents were submitted to the clerk of court by fax. Finally, because we have no transcript of the motion hearing, we do not know whether Rogers brought his procedural objections to the court's attention during argument on the motion or what ruling the court may have made regarding the objections. Absent a transcript, we must assume that the circuit court properly chose to address the department's motion to dismiss on its merits. *See* ***D.L. v. Huebner***, 110 Wis. 2d 581, 597, 329 N.W.2d 890 (1983).

¶11 In short, there is simply no basis in the record before us to conclude other than that the department's sovereign immunity defense was properly and timely preserved by the department's filings and that the circuit court properly decided the department's motion on its merits.

¶12 Rogers also argues that Ms. Toutant had a ministerial duty to serve safe and proper food to prison inmates, and that she violated that duty because the beans that were served to Rogers allegedly contained a rock or pebble that injured his teeth. As we have explained, however, Ms. Toutant was not served as a defendant in this action, and hence, the action is against only the department and it is barred by sovereign immunity. There is no need for us to consider, therefore, whether Ms. Toutant's alleged malfeasance in the performance of her food preparation duties at the prison constituted negligence in performing discretionary duties or the violation of a ministerial duty.

CONCLUSION

¶13 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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