COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3185 **Cir. Ct. No. 2004CV3271**

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

STATE OF WISCONSIN EX REL. RONALD A. KEITH, SR.,

PLAINTIFF-APPELLANT,

V.

SAND RIDGE SECURE TREATMENT CENTER,
DEPARTMENT OF HEALTH AND FAMILY SERVICES,
DAVID THORNTON AND STEVE WATTERS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Ronald Keith appeals from an order dismissing his complaint. We affirm.

¶2 Keith first argues that the circuit judge should have disqualified himself under "ch. 757." We assume Keith is referring to WIS. STAT. § 757.19 (2003-04),[1] which covers disqualification of judges. Keith apparently wrote to the chief judge of the district questioning whether the assigned judge should be disqualified, but that letter is not included in the record. The record does include the chief judge's response, which stated that the assigned judge's previous employment as secretary of the Department of Corrections was no basis for disqualification unless the assigned judge believes he could not be fair. The record also includes Keith's reply to that letter, in which he stated that he was "not expressly trying to eliminate" the assigned judge; that he has reviewed "many" of the assigned judge's decisions that went to the court of appeals and were affirmed "as based upon sound judgment;" and which concluded by saying Keith "would be proud to have [the assigned judge] continue as the judge in this action."

¶3 Based on the absence in this record of any request by Keith for the assigned judge to disqualify himself, we consider Keith to be raising the issue for the first time on appeal. We usually do not consider issues for the first time on appeal, and we see no reason to depart from that practice in this case. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶4 Keith's complaint sought mainly declarative and injunctive relief against the defendant Sand Ridge Secure Treatment Center, where he is committed under WIS. STAT. ch. 980, and other defendants. The facts alleged in the complaint relate to Keith's having ordered a National Geographic book of

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

photographs of families, and the Center's actions in denying him possession of that book. The circuit court granted summary judgment in favor of the defendants. Summary judgment methodology is well established. *See, e.g.*, ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). On review, we apply the same standard the circuit court is to apply. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶5 Keith's first argument is that a policy promulgated by the Center, number SR479, is unconstitutional or otherwise legally infirm. The defendants provided the court with a copy of the policy in an affidavit in support of their summary judgment motion. The policy, broadly described, sets forth a process for reviewing reading materials and pictures that are sent to or in possession of residents of the Center, and prohibits possession of "contraband" or "counter-therapeutic material." The defendants assert they were following and applying this policy in denying Keith possession of the book he ordered. Affidavits by Center staff explained that Keith was not permitted to receive this book because it was regarded as counter-therapeutic. According to the affidavits, the photographs of children in it could be perceived as erotic by those residents of the Center who are sexually attracted to children. Keith does not appear to dispute these facts, but he does make legal arguments against the policy itself.

¶6 Keith argues that the policy, or its application to this situation, is an improper attempt at "mind control" by the Center. Keith assembles this argument from passages in various cases concerning potentially obscene materials. None of the cases he cites come even close to holding that a committed person such as Keith has a constitutional right to possess material deemed counter-therapeutic. Keith also argues that the policy is ambiguous, unworkable, and overbroad.

However, none of the examples he cites concern the portion of the policy under which he was denied possession of this book.

¶7 Keith next argues that the defendants failed to follow their own rules and policies. His first cited example is that the defendants have themselves violated policy number SR479 by allowing certain materials in the Center library, and allowing residents to possess certain other material. Keith argues that the defendants' conduct shows they apply the policy in an arbitrary, capricious, non-objective, and inconsistent manner. However, Keith's complaint did not rely on these facts or discuss any legal theory that concerned inconsistent application of the policy. Again, Keith appears to be raising this issue for the first time on appeal, and we decline to address it. *See* ***Wirth***, 93 Wis. 2d at 443-44.

¶8 Keith's second cited example of defendants not following their own rules is that they did not follow a certain procedure in the administrative code when they seized the book. This issue was raised in Keith's complaint. The defendants do not appear to dispute the fact that the rule was not followed in this case. Instead, they argue that it did not apply. The rule at issue is WIS. ADMIN. CODE § HFS 94.05, which begins by stating: "(1) No patient right may be denied except as provided under s. 51.61 (2), Stats., and as otherwise specified in this chapter." The remainder of the rule sets out policies and procedures concerning denials or limitations of patient rights.

¶9 It is clear from the context of WIS. ADMIN. CODE ch. HFS 94 that the "patient rights" referred to in that chapter are the ones specifically set forth in WIS. STAT. § 51.61(1). *See, e.g.,* § HFS 94.01(1) (purpose of the chapter is "to implement s. 51.61, Stats., concerning the rights of patients"); § HFS 94.04(1) (before or upon admission, patient shall be notified orally and given a written copy

of his or her rights in accordance with § 51.61 (1) (a)). As quoted above, the rule Keith is concerned about itself cross-references to WIS. STAT. § 51.61(2), which provides that some of the patient rights in § 51.61(1) may be denied for cause. Based on this context, we conclude the defendants were not required to use the procedures in § HFS 94.05 unless their action was a denial or limitation of a patient right conferred by § 51.61(1).

¶10 Keith's opening brief in this appeal does not explain which of those specific statutory patient rights he believes is involved in this case. The defendants' brief argues that none of these rights are involved, and Keith did not file a reply brief. We take that as a concession. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (respondent cannot complain if appellant's propositions are taken as true when unrefuted by respondent). Accordingly, we conclude that Keith's claim on this basis was properly dismissed.

¶11 Keith next argues that the affidavits of Steve Watters could not properly be relied on for summary judgment purposes because they were speculative in describing the possible problems from having this type of material in the Center, and because Watters did not claim to be a mental health expert or security expert. We reject the arguments. Watters averred that he is the director of the Center, with several years of high-level administrative experience with mental health facilities. He is sufficiently qualified to offer an expert opinion on possible security or treatment issues within his institution. Assessment of risks or other possible consequences is, by nature, partly speculative, but that goes to the weight of the evidence, not its admissibility. Keith has not directed our attention to any countering expert affidavit he submitted to show that Watters' opinion was

incorrect, and therefore Watters' opinion stands undisputed, and was available to help establish a *prima facie* defense.

¶12 To the extent Keith's brief touched on other matters we have not addressed, we reject those arguments as inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order affirmed.

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