

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2002

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. 01-2553
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-697

**IN COURT OF APPEALS
DISTRICT IV**

JESSIE L. MCSHAN,

PLAINTIFF-APPELLANT,

V.

**JERRY E. SMITH, JR., WISCONSIN
PAROLE COMMISSION, AND ARELY
GONNERING,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
ROBERT A. DE CHAMBEAU, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Jessie McShan appeals an order dismissing his complaint against the Wisconsin Parole Commission and two of its members. The issue is whether McShan's complaint states any causes of action that he should be

allowed to pursue in this proceeding. We affirm the trial court's holding that it does not.

¶2 McShan is serving an eighteen-year prison term. In 1998 the Department of Corrections transferred him to Whiteville Correctional Facility in Whiteville, Tennessee. On February 11, 2000, McShan received his first parole hearing, by telephone, and was denied parole on the same day.

¶3 McShan subsequently petitioned for certiorari review of the parole determination. The trial court affirmed the commission's decision, and McShan appealed. We affirmed the trial court in November 2001. McShan did not petition the supreme court for review.

¶4 While his certiorari appeal was pending, McShan commenced this action seeking monetary damages against the respondents, and an order immediately releasing him from prison. He alleged the following violations of state law and his state and federal constitutional rights: (1) that he did not receive a timely parole hearing; (2) that it was unlawful for the commission to conduct a telephone hearing; (3) that the commission lacked authority to conduct proceedings while he was out of state; (4) that the commission violated his equal protection rights because he was informed and believed that out-of-state prisoners never receive discretionary parole; (5) that the commission unlawfully controls transfers between in-state and out-of-state prisons; (6) that the commission was deliberately indifferent to his rights and intentionally inflicted emotional distress on him; and (7) that the commission is liable for injury caused him by Whiteville Correctional personnel. The trial court dismissed the complaint on the respondents' motion, resulting in this appeal.

¶5 A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). We review the issue *de novo*. *Id.* In doing so, we accept as true the facts stated in the complaint, along with all reasonable inferences we may draw from those facts. *Id.*

¶6 McShan is barred from pursuing the first four issues listed above. Under the doctrine of claim preclusion, a final judgment is conclusive on all subsequent actions between the same parties for any claim that was litigated or could have been litigated in the first action. *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 233, 601 N.W.2d 627 (1999). McShan either raised or could have raised all four issues in his certiorari review proceeding. Additionally, to the extent he claims a remedy for constitutional due process violations under 42 U.S.C. § 1983, his action is barred by the availability of certiorari review whether he pursued it or not. *See Lewis v. Sullivan*, 188 Wis. 2d 157, 169-70, 524 N.W.2d 630 (1994). His equal protection claim is also barred because the conclusory allegation in his complaint, based solely on information and belief, was inadequate. *See Eternalist Found., Inc. v. City of Platteville*, 225 Wis. 2d 759, 780-81, 593 N.W.2d 84 (Ct. App. 1999) (complaint of equal protection violation must allege facts tending to show plaintiff was the object of differential treatment for improper or unlawful reasons).

¶7 McShan's complaint failed to state a claim for relief on the allegation that the parole commission unlawfully controls certain prisoner placement decisions. The complaint did not allege that the commission caused McShan's placement in Whiteville or barred his return to Wisconsin. The allegations of fact in the complaint pertain solely to the parole decision.

¶8 McShan cannot pursue his tort claims against the commission and its members. The plaintiff may not proceed on tort claims against state agencies or officials without alleging compliance with the notice of injury and notice of claim provisions of WIS. STAT. § 893.82 (1999-2000).¹ See *Modica v. Verhulst*, 195 Wis. 2d 633, 641-42, 536 N.W.2d 466 (Ct. App. 1995). McShan failed to do so.

By the Court.—Order affirmed.

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

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

