

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2003

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 Nos. 02-2368
02-2741
STATE OF WISCONSIN**

Cir. Ct. No. 02-CV-1552

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. LEON IRBY,

PETITIONER-APPELLANT,

v.

JON E. LITSCHER,

RESPONDENT-RESPONDENT.

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

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. These consolidated appeals by Leon Irby are from an order dismissing his complaint and a second order denying his motion to reconsider that decision. The issues are whether the court properly dismissed his

complaint and whether the dismissal will count as a “strike” under WIS. STAT. § 801.02(7)(d) (2001-02).¹ We affirm.

¶2 This action was commenced against respondent Jon Litscher, Secretary of the Department of Corrections, with a “complaint for writ of certiorari” filed by Irby’s attorney, Howard Eisenberg. The petition alleged the following facts. Eisenberg sent Irby a copy of a federal district court decision in a case in which Eisenberg was representing Irby and others on the issue of prison conditions at the institution formerly known as “Supermax.” Prison authorities at that institution confiscated and later destroyed the decision when another inmate, who had borrowed the decision, attempted to return it by mail to Irby. Irby pursued his administrative remedies through the Inmate Complaint Review System (ICRS). Prison system officials denied his claim, first on the ground that the decision was an unauthorized photocopy, and later on the ground that it was confiscated as an unauthorized transfer of property between inmates, contrary to WIS. ADMIN. CODE § DOC 303.40.

¶3 The complaint asserted that the Department’s confiscation of the decision was in error because Irby did not violate any statute, administrative code or policy. Further, the complaint appears to have attempted to assert that if his conduct did violate some provision, that provision is unconstitutional as applied to these circumstances because Irby had a due process right, under the state and federal constitutions, to possess a copy of a decision in which he was a party, and to share that opinion with other parties in the lawsuit and loan them such material

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

for their use.² The complaint further asserted that the Department's confiscation and destruction of the opinion, after being informed that such opinion was sent to Irby by his attorney and that Irby and the other inmate were parties to the case, was vindictive and intended to, and did, interfere with Irby's right to be represented by counsel of choice and his right to access to the courts, in violation of the federal and state constitutions.

¶4 Because Irby is a prisoner, the court conducted an *ex parte* review of the complaint upon filing, under WIS. STAT. § 802.05(3). Irby's attorney died before the circuit court rendered a decision. The court held that the complaint failed to state a claim. Irby now appeals pro se.

¶5 Irby argues that the trial court erred by not staying the case or dismissing it without prejudice upon the death of his attorney. He offers no legal authority that compels either action by the trial court. As the trial court noted in its order denying reconsideration, the court's review of the complaint was based entirely on material submitted by Irby's attorney, and therefore the loss of counsel did not affect the court's analysis.

¶6 Irby argues that the court erred by accepting Litscher's conclusion that the mailing from the other inmate violated the rule against unauthorized transfers of property, WIS. ADMIN. CODE § DOC 303.40. That rule provides: "Any inmate who gives, receives, sells, buys, exchanges, barter, lends, borrows or takes any property from another inmate without authorization is guilty of an

² We say "appears to have attempted" to make this allegation because the complaint itself says: "If Defendant's confiscation and destruction of the judicial opinion violated some [provision of law], such [provision] is unconstitutional as applied...."

offense.” Irby argues that this rule does not prohibit all transfers of property between inmates, but only unauthorized ones. He notes that under WIS. ADMIN. CODE § DOC 309.155(5), inmates “may provide legal services to other inmates except that institutions may regulate the time and place of such legal services.” It further provides: “The department is not responsible for legal materials not provided by the department that are given to other inmates.” Irby argues that these provisions authorize inmates to transfer possession of legal documents.

¶7 Litscher agrees that only unauthorized transfers are prohibited. However, he argues that because there is no administrative code provision authorizing transfer of legal materials between inmates, any transfer of legal materials is without authorization, and any such property attempted to be transferred becomes contraband that can properly be seized by the Department.

¶8 We agree that WIS. ADMIN. CODE § DOC 303.40 prohibits only unauthorized transfers. However, we read this provision to require inmates to obtain prior authorization from prison officials before sending legal materials. Therefore, if Irby truly was providing legal services, he could have gotten prior authorization to send the document to the other inmate, and the other inmate could have done likewise before mailing it to Irby. Because Irby’s certiorari complaint did not allege that the other inmate had obtained prior authorization before sending the decision back to Irby, he failed to state a claim that the ICRS decision was incorrect in concluding the transfer was unauthorized.

¶9 Irby argues that the circuit court erred by assessing Irby with a “strike” under WIS. STAT. § 802.05(3). In the first part of the argument, Irby appears to believe that a strike was assessed against him because he did not first file a notice of claim as required by statute. However, that is not what § 802.05(3)

refers to when it mentions dismissal for failure to state a claim. Failure to state a claim is a broader concept, and means there is no legal theory that allows the plaintiff to recover based on the facts alleged. *See State ex rel. Luedtke v. Bertrand*, 220 Wis. 2d 574, 578-79, 583 N.W.2d 858 (Ct. App. 1998), *aff'd* 226 Wis. 2d 271, 594 N.W.2d 370 (1999) (divided supreme court). Failure to file a notice of claim may mean that a complaint fails to state a claim, but there are also other reasons a complaint may fail to state a claim.

¶10 Irby also argues that he should not receive a strike because he prepaid his filing fee, and because the complaint was filed by his attorney, and not by Irby personally. Irby argues that imposing a strike under these circumstances does not serve the purposes the statute is intended to serve. However, we see no language in WIS. STAT. §§ 801.02(7)(d) or 802.05(3) that makes a strike depend on whether the prisoner paid the filing fee or was represented by counsel. Accordingly, the circuit court properly forwarded its order to the Department of Justice under § 802.05(3)(c).

By the Court.—Orders affirmed.

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

