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DISTRICT II

January 24, 2024

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2022AP771

Timothy L. Smunt v. Board of Regents of the University of
Wisconsin System (L.C. #2020CV1094)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Timothy L. Smunt appeals a judgment and an order dismissing his claims against the Board of Regents of the University of Wisconsin System. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We agree with the circuit court that sovereign immunity bars all of Smunt's remaining causes of action. Accordingly, we affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Smunt is the former dean of the University of Wisconsin—Milwaukee Lubar School of Business (UWM) and a current professor. Smunt’s lawsuit alleges the following: (1) that when he returned to a faculty position after his deanship was not renewed, he did so at a lesser salary than he was assured during his contract negotiations for the deanship; (2) that UWM failed to properly advance his nomination for a distinguished professorship or the equivalent of an endowed professorship; and (3) that he is entitled to a declaratory judgment as to UWM’s obligations regarding his retirement benefits and contributions. The circuit court determined none of these matters was a “claim” within the meaning of WIS. STAT. § 775.01, and thus the causes of action were barred by sovereign immunity.

Sovereign immunity derives from WIS. CONST. art. IV, § 27, which permits the legislature to determine the manner in which suits may be brought against the State of Wisconsin. *Koshick v. State*, 2005 WI App 232, ¶6, 287 Wis. 2d 608, 706 N.W.2d 174. Here, the legislature has permitted a claimant to commence an action against the state “[u]pon the refusal of the legislature to allow a claim.”² WIS. STAT. § 775.01. A “claim,” under the statute, has a narrow meaning; for example, it does not apply to equitable claims or claims for torts. *Trempealeau Cnty. v. State*, 260 Wis. 602, 605-06, 51 N.W.2d 499 (1952).

Smunt’s remaining causes of action allege breach of contract and are not claims sounding in tort or equity. Still, the term “claim” does not encompass all amounts that might conceivably be due under an agreement. As explained in *Koshick*, the claim must be for a:

² A private bill introduced in the state senate to appropriate over \$1 million to address Smunt’s compensation dispute failed to gain the requisite votes for passage.

fixed and definite sum of money, or one that can readily be made fixed and definite, either from fixed data or agreement, or by mathematical computation or operation of law. Thus, an action of debt does not lie to recover unliquidated or unascertained damages. Further, the action cannot be maintained where the sum must be ascertained by resorting to extraneous evidence.

Koshick, 287 Wis. 2d 608, ¶11 (quoting 26 C.J.S. *Debt* § 1 (2001)).

Koshick controls this case and requires that we reject Smunt’s appeal. Smunt’s salary claim requires reference to evidence extraneous to the contract: not only a salary survey for the unspecified year when Smunt might return to faculty work, but also—according to the offer letter Smunt accepted—“Regent Policies, and UWM and UWS classification and compensation plan.”³ Smunt’s distinguished professorship claim relies on the Board’s promise to “make every effort” to secure one of a limited number of such appointments; and even on appeal Smunt is vague about what monetary amount he would have received had he been selected.⁴ Finally, Smunt argues his claim for retirement benefits was cognizable because in 2009 he was directed to use a retirement calculator on a Wisconsin Department of Employee Trust Funds website. His affidavit, however, acknowledges that he used this tool to estimate his earnings under “various retirement scenarios,” and the attached exhibit of calculations are merely estimates based on, among other things, his age at retirement and years of creditable service—all at the time

³ Even Smunt appears to acknowledge that considerations other than the salary survey were in play, as his argument that the Board of Regents had to rely on the salary survey is qualified with his statement that the designated salary had to be “within the bounds permitted by the Board rules and guidelines.”

⁴ Smunt notes that amount provided to a distinguished professor is adjusted annually and can be used for salary, fringe benefits, and associated costs of research; in his case, he suggests he could have been awarded as much as \$84,000. But he undercuts his argument regarding a “fixed sum” by asserting that it was a fact question for the jury as to how much he was entitled to. We reject Smunt’s assertion that the “cap” on the award makes his claim one for a fixed and definite sum of money within the meaning of WIS. STAT. § 775.01.

uncertain. The amounts Smunt alleges he was due are not fixed and ascertainable so as to constitute a “claim” for which the legislature has consented to be sued under WIS. STAT. § 775.01.

Based upon the foregoing,

IT IS ORDERED that the judgment and order are affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals