

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 28, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1002

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

ALLEN J. THOMAS,

Petitioner-Appellant

v.

KENNETH N. JOHNSON,

Respondent-Respondent,

RONALD W. KRUEGER,
MICHAEL J. RATKOVICH,
LYNN GEIGER,
ROBERT B. TOM
and JODY R. SIMON,

Respondents.

APPEAL from an order of the circuit court for Lincoln County:
ROBERT A. KENNEDY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Allen Thomas, an inmate in the Wisconsin State Prison system, appeals a trial court order that dismissed his lawsuit against Kenneth Johnson, in his capacity as district attorney for Lincoln County. Thomas' lawsuit alleged state tort claims and federal civil rights claims concerning his stay in the Lincoln County jail. Jailers searched Thomas' cell and turned over the material to Johnson, without obtaining a warrant. According to Thomas, jailers initiated the search when they learned of plans for violence by other inmates. With the exception of a letter which Thomas was writing his sister, Johnson ultimately returned the material to Thomas. Some of the material were letters that Thomas was writing his lawyer and that Thomas claims were therefore privileged. Thomas' lawsuit claims that Johnson, by accepting the material and reading its privileged aspects, (1) committed state torts of conversion and invasion of privacy, (2) violated his constitutional rights under the First Amendment, Fourth Amendment, Sixth Amendment, and Due Process Clause, and (3) participated in a conspiracy to deprive him of these constitutional rights. His lawsuit seeks damages under 42 U.S.C. §§ 1983 and 1985 for the constitutional claims.

Although the record does not contain a transcript of the trial court's decision, we have located the transcript in the record of a related appeal, and it reveals the trial court's rationale for its decision. See *Thomas v. Johnson*, no. 95-2264. On Johnson's motion, the trial court dismissed the state law claims on the ground that Thomas had not served a notice of claim on the attorney general. It dismissed the civil rights claims on the ground that Johnson had absolute immunity. On appeal, Thomas does not directly address the trial court's ruling on the state law tort claims. Rather, he argues that Johnson enjoys neither absolute nor qualified immunity on the federal civil rights claims and that the trial court should have permitted discovery before deciding Johnson's motion to dismiss. After reviewing the transcript, we conclude that the trial court properly analyzed the state tort claims. We also conclude that Johnson had at least qualified immunity on the federal civil rights claims. We therefore affirm the order dismissing the lawsuit and need not review the trial court's ruling that Johnson had absolute immunity.

The trial court rightly dismissed the complaint. First, Thomas did not file a notice of claim on his state law tort claims. This required their dismissal. *Ibrahim v. Samore*, 118 Wis.2d 720, 726, 348 N.W.2d 554, 557-58 (1984). Second, Johnson had qualified immunity on Thomas' § 1983 claims; Johnson's actions did not violate clearly established constitutional rights.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thomas had no such "clearly established" rights barring jailers from searching his cell and seizing the papers, or barring Johnson from accepting and reading them, unless these rights had been clearly recognized by a court with Wisconsin jurisdiction: namely, the U.S. Supreme Court, the Seventh Circuit U.S. Court of Appeals, the U.S. District Courts in Wisconsin, the Wisconsin Supreme Court, or this court. See *Jordan v. New Jersey Dept. of Corrections*, 881 F. Supp. 947, 953 (D.N.J. 1995). These courts have not established such rights for facts like Thomas has alleged; none have barred either routine cell searches for jail security or the review of mail that does not immediately reveal its privileged status to the reader. See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 525-30 (1984); *Wolff v. McDonnell*, 418 U.S. 539, 574-77 (1974); *Smith v. Shimp*, 562 F.2d 423, 426-27 (7th Cir. 1977). Read fairly, Thomas' complaint depicted a routine security search and made no claim that his mail's alleged privileged status was immediately self-evident to a reader.

Thomas cites *United States v. Cohen*, 796 F.2d 20 (2d Cir. 1986), in support of his arguments. *Cohen* held that prosecutors could not initiate warrantless searches of jail cells solely to gather evidence for criminal prosecutions. According to the Second Circuit, such searches violate the Fourth Amendment, unlike routine cell searches for jail security, which do not. Here, Thomas has no information to suggest either that Johnson ordered the search or that he ordered it for reasons other than jail security. As noted above, Thomas' complaint depicted a security search initiated when jail officials learned of a plan for violence by other inmates. As a result, Thomas has alleged no facts suggesting a *Cohen* violation. Inasmuch as Thomas had no clearly established constitutional rights in this context, he could not show that Johnson conspired under 42 U.S.C. §§ 1983 and 1985 to deprive him of those rights. Johnson thus also has no liability for the claimed conspiracy.

Finally, Thomas maintains that the trial court improperly dismissed his action before he could pursue discovery. Thomas states that discovery would have revealed the true nature of the search. This argument has no merit. First, Thomas did not raise this argument in the trial court, and we therefore do not consider it. *Wirth v. Ehly*, 93 Wis.2d 422, 443-44, 287 N.W.2d 140, 145-46 (1980). Second, this argument is irrelevant to the appeal. We are reviewing the trial court's decision to dismiss Thomas' complaint for its failure to state a claim. His complaint stands or falls by virtue of its own allegations, not by virtue of whatever facts he might learn of during discovery. This is not a case in which the trial court granted summary judgment on the

basis of undisputed facts before the parties had an adequate opportunity to discover the actual facts. Thomas had total control over what facts he chose to allege in his complaint, and the trial court accepted his allegations as factually accurate. It then held them legally insufficient to require further proceedings. Last, trial courts have no obligation to permit discovery if defendants plead immunity to plaintiffs' complaints. Immunity is a threshold question that the trial court may resolve before any discovery. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). In sum, the trial court properly dismissed Thomas' complaint.

By the Court – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.