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May 29, 2019

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

2018AP1096 Gary Wenzel v. Carol Kopp (L. C. No. 2017CV142)

Before Stark, P.J., Hruz and Seidl, 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).

Gary Wenzel, pro se, appeals from a summary judgment dismissing his claims of deliberate indifference to a serious medical need while incarcerated. 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 (2017-18).[1]

This matter is a continuation of a long-running dispute between Wenzel and the nurse who provided health care to Wenzel while he was housed at the Oconto County jail, the jail administrator, and the Oconto County sheriff. Wenzel commenced two previous lawsuits against the Oconto County jail and these personnel in the United States District Court for the Eastern District of Wisconsin. In his first federal lawsuit, Wenzel claimed a constitutional violation for the defendants' failing to recognize his scabies, but the federal court found as a matter of law that the defendants were entitled to summary judgment because Wenzel had failed in his heavy burden to provide evidence establishing that the defendants acted with deliberate indifference to a serious medical need. *See* ***Wenzel v. Oconto Cty. Jail***, No. 14-cv-1307-jps, 2015 WL 5824914 (E.D. Wis. Oct. 6, 2015).

The federal court in that case noted that the nurse "provided treatment to Wenzel shortly after he requested medical attention." ***Id.*** at 5. The court further stated, "Wenzel's medical records establish that [the nurse] provided care to Plaintiff numerous times … and that Wenzel was treated with at least five different medications for his condition." ***Id.*** The court also stated that Wenzel's scabies condition "had been resolved." ***Id.*** at 3. The federal court found Wenzel's complaint "is devoid of any factual allegations against [the jail administrator, the sheriff, and the jail] other than simply being named as defendants." ***Id.*** at 6. In addition, the court stated "there

[1] References to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

are no facts in the record to establish [the jail administrator's or the sheriff's] personal involvement or knowledge of the treatment Wenzel received." ***Id.***

Finally, the court concluded "'Oconto County Jail' is not a suable entity separate from Oconto County," and "even if the Court were to construe a claim against Oconto County, there are no facts available to support, nor does Wenzel even argue that a theory that the alleged deprivation of the plaintiff's constitutional rights was pursuant to a policy or custom in Oconto County." ***Id*** at 7. The court declined to exercise supplemental jurisdiction over Wenzel's state law medical malpractice claim, and the court dismissed that claim without prejudice. ***Id.***

Wenzel's second federal lawsuit involved allegations that he had been subjected to cruel and unusual punishment by being forced to clean raw sewage and waste from his Oconto County jail cell when the toilets allegedly backed up due to deficient plumbing. The federal court dismissed that case with prejudice as a sanction for Wenzel's failure to appear at a properly noticed deposition, and also based on his failure to prosecute his case and comply with court orders.

Wenzel did not appeal the federal court judgments. Rather, Wenzel commenced the present pro se lawsuit in the Oconto County Circuit Court, apparently seeking to relitigate the dismissal of his federal lawsuits in a state forum. Wenzel's state law causes of action are alleged in nonspecific fashion, and are difficult to discern, although Wenzel stated, "I want a million dollars …." Among other things, the Oconto County complaint alleges that his claims are brought on the grounds of "negligence and medical malpractice where my 8th amendments were violated for curel [sic] and unusual punishment …."

Wenzel again named as defendants the nurse and her employer,[2] the jail administrator, and the sheriff. In addition, Wenzel named as a defendant "the (County) of Oconto County." The circuit court dismissed the nurse and her employer from the lawsuit with prejudice for lack of proper service of process. Wenzel did not timely appeal the dismissal of the nurse and her employer, and we will therefore not further address Wenzel's claims against them in the present appeal.[3]

The record on appeal contains an order granting summary judgment to the remaining defendants, which states, "For the reasons stated on the record, the defendants['] Motion for Summary Judgment is GRANTED as to all claims of the plaintiff and the case is DISMISSED." However, the record on appeal contains no transcript of the summary judgment hearing. The appellant must ensure a complete record related to the issues on appeal. Missing material is assumed to support the circuit court's decision. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

In addition, Wenzel's briefs to this court contain no citations whatsoever to the record on appeal. As a general rule, we do not consider arguments based on factual assertions that are

[2] The nurse's employer provided on-site health care services to inmates at the Oconto County jail.

[3] We note that Wenzel argues in the present appeal the circuit court erred by denying his motion for default judgment as to the nurse. Wenzel claims he "did try to serve this defendant with a Summons and Complaint." However, Wenzel's argument is undeveloped and lacks any record citation. Furthermore, Wenzel failed to ensure the transcript of the hearing on the motion to dismiss the nurse and her employer was included in the record on appeal, and we therefore conclude the record supports the court's order. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). In any event, the record on appeal confirms the court entered an order for dismissal regarding the nurse and her employer. Wenzel failed to timely appeal the dismissal, and this court therefore lacks jurisdiction to further address issues regarding the nurse or her employer, including Wenzel's argument concerning default judgment.

unsupported by references to the record on appeal. *See*, *e.g.*, ***Dieck v. Antigo Sch. Dist.***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990). It is not this court's task to fish through the record in an attempt to ascertain the nature of an appellant's challenge. The appendix to Wenzel's brief to this court also improperly fails to contain citations to the record on appeal, and it appears to contain documents that are not part of the record. This court will not consider documents that are not part of the record. ***State ex rel. Wolf v. Town of Lisbon***, 75 Wis. 2d 152, 155-56, 248 N.W.2d 450 (1977).

In any event, Wenzel's present action is barred by the doctrine of claim preclusion. Claim preclusion requires an identity between the parties or their privies in the prior and present suits; prior litigation that resulted in a final judgment on the merits by a court with jurisdiction; and an identity of causes of action in the two suits. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879.

The parties to the present appeal are the jail administrator, the sheriff, and Oconto County. Wenzel previously sued the jail administrator and the sheriff in the federal lawsuits. Oconto County is in privity with the jail administrator and the sheriff because they are employees of Oconto County and Wenzel's complaints against them concern only their actions in their official capacities. *See* ***Northern States Power v. Bugher***, 189 Wis. 2d 541, 551-52, 525 N.W.2d 723 (1995). Indeed, Wenzel's complaint alleges, "The County is responsible for the actions of the employee's [sic] at the Oconto County Jail and this claim is against Oconto County & [the nurse's employer]." The jail administrator's and the sheriff's legal interests are identical to those of their employer. In his first federal court lawsuit, Wenzel sued "Oconto County Jail." The federal court noted the jail was not a suable entity separate from Oconto County. Oconto

County could have—and properly should have—been made a party to the first federal action. Thus there is an identity between the parties in this and the federal lawsuits.

The judgment of the United States District Court for the Eastern District of Wisconsin in Wenzel's first federal lawsuit was final, on the merits, not appealed, and could have involved every aspect of the present appeal. *See* ***Wisconsin Pub. Serv. Corp. v. Arby Constr., Inc.***, 2012 WI 87, ¶¶33-34, 342 Wis. 2d 544, 818 N.W.2d 863. In fact, Wenzel's first federal lawsuit could have involved every aspect of his second federal lawsuit, as Wenzel left the Oconto County jail on August 20, 2014, and the scheduling order in Wenzel's first federal lawsuit allowed for amended pleadings to be filed until January 20, 2015. *See* ***Wenzel***, No. 14-cv-1307-jps at 1.

Significantly, all three of Wenzel's lawsuits arose out of the same set of facts—i.e., actions taken by the Oconto County jail staff during Wenzel's incarceration. *See* ***Kruckenberg***, 279 Wis. 2d 520, ¶25. Indeed, Wenzel represents in his reply brief to this court that "these defendants are covering up suffering the Appellant obtained at the Oconto County jail. As a result of each of the defendants being indifferent towards his serious medical treatment … [t]he deprivation led to the filing of the 1983 civil action in Federal courts …." Accordingly, Wenzel's claims are barred by the doctrine of claim preclusion.

To the extent we can discern that Wenzel's Oconto County complaint contains any other claim, it would appear to involve the discretionary decision of the jail administrator to house Wenzel at the Shawano County jail in May 2016, where Wenzel claims the administrator somehow knew Wenzel would be injured. However, as noted above, the administrator was a party to both federal lawsuits and, to the extent this claim exists at all, Wenzel could have brought it as part of those suits. It is therefore also barred by claim preclusion. In addition,

Wenzel's claim against the jail administrator would be barred by immunity under WIS. STAT. § 893.80(4). The jail administrator exercises wide discretion in determining where to house a particular jail inmate. The Shawano County jail was one of many potential locations to house Wenzel for a period of incarceration, and there is no evidence in the record on appeal to suggest it was so dangerous as to obviate discretion.

In addition, the affidavits in support of summary judgment made it clear that the jail administrator "never sought out-of-county housing for an inmate with advance knowledge that the inmate would be injured in the out-of-county jail facility and has no knowledge that the Shawano County Jail is a … facility where jail inmates suffer injuries." Wenzel provides no citations to affidavits or other admissible evidence in the record submitted in opposition to summary judgment that would lead to a contrary inference. Furthermore, the Oconto County sheriff was not involved in the day-to-day operation of the jail, and had no role in determining where to house an Oconto County jail inmate.

In any event, as in Wenzel's federal lawsuits, there are no facts in the record on appeal to establish the sheriff or the jail administrator had personal involvement or knowledge of the treatment Wenzel received. Indeed, the record on appeal is devoid of facts as to how, when or why any respondent in the present appeal violated any state law cause of action. Irrespective of

claim preclusion, the remaining defendants were therefore entitled to dismissal and the circuit court properly granted summary judgment.[4]

Finally, Wenzel argues the circuit court erred by denying his request for substitution of judge. According to Wenzel, the court "never stated a reason to deny …. and just said denied." However, the record confirms the court determined Wenzel's request for substitution was untimely. Wenzel filed his complaint in the present case on July 27, 2017. Following a timely request for substitution of judge by the defendants, and a subsequent disqualification of another judge assigned to the matter, the present judge was assigned on November 20, 2017. Wenzel filed his request for substitution on March 5, 2018, far beyond the ten-day time period permitted by WIS. STAT. § 801.58(1) for a party to request substitution after a new judge is assigned. The court properly denied Wenzel's substitution request.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

[4] Wenzel also argues "Defendants never gave plaintiff Gary L. Wenzel Discovery in this lawsuit." However, Wenzel does not indicate what discovery he sought. Moreover, Wenzel provides no citation to the record on appeal indicating he filed a motion to compel discovery in the circuit court. Wenzel's argument is undeveloped and will not be further addressed. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Regardless, given our conclusion regarding claim preclusion, Wenzel's argument regarding entitlement to discovery is moot in any event.