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DISTRICT IV

June 24, 2021

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

2020AP400

John Gruber v. Portage Community Schools (L.C. # 2018CV210)

Before Blanchard, Kloppenburg, and Nashold, 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).

Michael O’Grady, Crystal Thom, David Thom, and Raymond E. Boyle, Jr., appeal an order dismissing their complaint. 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 (2019-20).¹ We affirm.

The appellants are appealing the dismissal of their state law claims, which were all that remained in state court after a federal court accepted removal of their federal law claims. As to the remaining state law claims, the defendants asserted in a motion to dismiss that the appellants had not filed notices of claim under WIS. STAT. § 893.80(1d)(b). The circuit court concluded that the appellants’ response did not dispute that factual allegation and that the response instead argued only that the requirement to file such notices did not apply to their claims. The circuit court disagreed that the notice requirement did not apply and granted the motion to dismiss.

On appeal, the appellants argue that case law holds that the notice of claim requirement cannot be applied to bar claims under 42 U.S.C. § 1983. That is a correct statement of law. *See Felder v. Casey*, 487 U.S. 131 (1988). However, the appellants’ state law claims are not being

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

made under that statute. That statute is a device for making claims based on federal law, not state law. *Id.* at 139. Even though claims using § 1983 can be brought in state courts, they remain claims under federal law.

Here, the federal court accepted removal of the appellants' federal claims, leaving only state law claims in state court. The fact that the federal and state law claims were once joined together in state court does not turn the state law claims into claims under 42 U.S.C. § 1983. And, therefore, the state law claims do not have the same protection against the notice of claim requirement that federal law claims under § 1983 have under *Felder*.

The appellants also argue that the circuit court erred by dismissing defendant Mark Hazelbaker. They first assert that Hazelbaker did not file a motion to dismiss. That does not appear to be correct, as a one-page "brief" by Hazelbaker joining in the motion to dismiss made by the other defendants appears in the appellate record as item no. 48, and is also marked as document no. 123 in the circuit court record, which is how the circuit court referred to it in its memorandum decision. To the extent that the appellants are arguing that Hazelbaker's filing should not be considered a motion to dismiss because it is captioned as a "brief," we do not regard that distinction as significant in this context, when the content of the document is simple and obvious.

The appellants further argue that Hazelbaker should not have been dismissed on the notice of claim theory because he is not a government entity, and therefore the appellants were not required to file a notice of claim before filing suit against him. However, the notice of claim statute applies not only to claims against government entities, but also to claims against their agents for acts done in the course of their agency. WIS. STAT. § 893.80(1d). The appellants do

not address whether Hazelbaker, who was alleged to have acted as an attorney for certain government entities, agents, or employees, is properly considered an agent in this context.

This court need not consider undeveloped legal arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). While we make some allowances for the failings of parties who, as here, are not represented by counsel, “[w]e cannot serve as both advocate and judge.” *Id.* at 647. Here, the appellants have failed to develop their argument legally, and therefore we reject their argument regarding Hazelbaker as undeveloped.

Finally, the appellants may be arguing that the circuit court did not provide a decision with sufficient explanation. The decision was sufficient.

IT IS ORDERED that the order appealed from is summarily affirmed under 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