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**DISTRICT IV**

April 20, 2023

To:

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Circuit Court Judge  
Electronic Notice

Robert N. Meyeroff  
Electronic Notice

Alecia Pellegrini-Kast  
Clerk of Circuit Court  
Juneau County Justice Center  
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Jonathan James Whitney  
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You are hereby notified that the Court has entered the following opinion and order:

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2022AP205

Ty J. Turner v. Benjamin G. Smith (L.C. # 2021CV76)

Before Fitzpatrick, Graham, 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).**

Ty Turner appeals a circuit court order that denied his motion for relief from an earlier circuit court order, which dismissed Turner's complaint against Benjamin Smith with prejudice. Turner's motion for relief, filed pursuant to WIS. STAT. § 806.07 (2021-22), sought to amend the dismissal order from a dismissal *with* prejudice to a dismissal *without* prejudice.<sup>1</sup> After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version.

Smith is employed by the State of Wisconsin. Turner is an inmate at the New Lisbon Correctional Institution, and he allegedly sustained injuries on January 27, 2021, as a result of following orders given by Smith.

Turner served the Wisconsin Attorney General with notice of his claim against Smith on February 26, 2021. Per the notice of claim statute, WIS. STAT. § 893.82(3m), Turner could not commence a circuit court action until the Attorney General served him with a notice of disallowance or until 120 days had elapsed, whichever occurred sooner. Turner prematurely filed a complaint in the circuit court on April 23, 2021.

Smith moved to dismiss Turner's complaint, alleging two bases for dismissal: Turner's failure to comply with the notice of claim statute and his failure to state a claim against Smith that was not barred by governmental immunity. The circuit court scheduled a hearing and set a deadline for Turner to respond to the motion to dismiss. Turner did not file any response. One week before the scheduled hearing, Smith filed a notice of non-opposition, which sought dismissal of Turner's complaint under WIS. STAT. § 805.03 based on Turner's failure to prosecute his claim. Turner did not respond to Smith's notice.

The circuit court held the scheduled hearing, but neither Turner nor his counsel appeared. Court employees attempted to reach Turner and his counsel but were unable to do so. Smith orally renewed his motion to dismiss the complaint based on Turner's failure to prosecute, in addition to the reasons set forth in his motion. In an oral ruling, the circuit court granted the motion to dismiss for failure to prosecute, and alternatively on the grounds of Turner's noncompliance with the notice of claim statute and his failure to state a claim that wasn't barred by governmental immunity.

The circuit court memorialized its decision in a written order (the “dismissal order”), which was dated July 29, 2021, and dismissed Turner’s complaint with prejudice. The dismissal order cited WIS. STAT. § 808.03(1) and indicated that it was “a final order for the purpose of appeal.” Turner did not appeal the dismissal order.

Then, nearly three months later, Turner filed a motion for relief from the dismissal order pursuant to WIS. STAT. § 806.07.<sup>2</sup> In his motion, Turner argued that the circuit court should

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<sup>2</sup> WISCONSIN STAT. § 806.07, entitled “relief from judgment or order,” provides in relevant part:

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

(2) The motion shall be made within a reasonable time .... A motion based on sub. (1)(b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

amend the dismissal order to a dismissal without prejudice for three reasons. First, Turner argued that, as a result of his failure to comply with the notice of claim statute, the court did not have jurisdiction over his complaint and had no authority to do anything other than dismiss it without prejudice; therefore, Turner reasoned, the court did not have jurisdiction to adjudicate whether his complaint stated a claim or whether he failed to prosecute that claim. Second, Turner argued that, if the court had jurisdiction over his complaint, dismissal with prejudice was an improper sanction for his failure to prosecute. Finally, Turner argued that his claim against Smith was not barred by governmental immunity.

Following a hearing, the circuit court denied Turner's WIS. STAT. § 806.07 motion. Among other things, the court concluded that Turner's failure to comply with the notice of claim statute did not deprive the court of jurisdiction to dismiss his complaint with prejudice based on Turner's failure to prosecute and failure to state a claim. It also concluded that dismissal with prejudice was an appropriate sanction for Turner's failure to prosecute, which it concluded was "egregious," and that counsel's explanations for not responding and failing to appear were contradictory, not credible, and false. The court ruled that Turner's § 806.07 motion was meritless and presented in bad faith.

On November 12, 2021, the circuit court issued a written order, which denied Turner's WIS. STAT. § 806.07 motion and sanctioned Turner's attorney by ordering him to pay \$450 in costs and fees. Turner filed a timely notice of appeal of the § 806.07 order on February 9, 2022. On appeal, Turner reiterates the same three arguments that he made in the circuit court in support of his § 806.07 motion for relief. He does not challenge the award of \$450 in costs and fees.

We begin our analysis by observing that we do not have appellate jurisdiction over the dismissal order because Turner did not timely appeal that order. *See* WIS. STAT. § 808.03(1); *see also Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752 (1972) (providing that a motion for reconsideration cannot be used to extend the time to appeal from an order if the time to appeal has expired).

Assuming without deciding that we have jurisdiction over the issues that Turner raises on appeal of the order denying his motion for relief from the dismissal order, *see Ver Hagen*, 55 Wis. 2d at 26, we affirm that order because Turner does not develop any argument that he is entitled to relief under WIS. STAT. § 806.07. In his appellate briefing, Turner argues that his complaint should not have been dismissed with prejudice. However, he does not once cite § 806.07, much less identify the subsection or subsections of § 806.07 under which he seeks relief, nor does he develop any argument that he is entitled to relief under the standards set forth in § 806.07 or that the circuit court erroneously exercised its discretion in denying his motion.<sup>3</sup> We will not develop arguments on a litigant’s behalf because doing so would require us to serve as both advocate and judge. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

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<sup>3</sup> We observe that WIS. STAT. § 806.07(1)(d) allows a circuit court to relieve a party from an order that is “void.” Although Turner’s appellate briefing does not use that term, he may be attempting to argue that the dismissal order is void because the circuit court lacked subject matter jurisdiction to dismiss his complaint with prejudice. Contrary to Turner’s argument, *Village of Trempealeau v. Mikruit*, 2004 WI 79, ¶¶8-10, 14, 273 Wis. 2d 76, 681 N.W.2d 190, clarified that a litigant’s failure to comply with a procedural statute may deprive a circuit court of competency, but not subject matter jurisdiction. Objections to competency can be waived, and lack of competency is not jurisdictional so as to render a judgment void under § 806.07(1)(d). *Id.*

IT IS ORDERED that the circuit court order is affirmed.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*