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**DISTRICT I/II**

January 23, 2013

To:

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

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2012AP194

Margaret Bach v. Milwaukee County (L.C. #2010CV21369)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Margaret Bach appeals from an order granting the motion to dismiss of defendants Milwaukee County and several named employees (collectively, “the county defendants”), IRIS,<sup>1</sup>

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<sup>1</sup> Defendant IRIS (“Include, Respect, I Self-direct”) is a Medicaid-funded, long-term care program WDHS administers aided by an IRIS Consultant Agency and an IRIS Financial Services Agency. The Management Group is Margaret’s disabled son’s Financial Services Agency.

Wisconsin Department of Health Services (WDHS) and The Management Group, Inc. Margaret contends her complaint was wrongly dismissed because (1) the court was without jurisdiction; (2) her adult incompetent co-plaintiff son is left with no remedy for his alleged injuries; and (3) WIS. STAT. § 893.80 (2009-10)<sup>2</sup> notice of injury was not required and sovereign immunity does not apply because of alleged constitutional violations. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21. We affirm the order.

Margaret filed a personal injury lawsuit naming herself and her adult incompetent son, Aaron, as plaintiffs. Margaret is not Aaron's guardian or lawyer. The first amended complaint<sup>3</sup> alleges that the county defendants' failure to promptly provide Aaron appropriate treatment and services as required by WIS. STAT. § 51.61(1)(f) caused her and Aaron physical and emotional injury and caused her to incur property damage. Margaret then filed a motion in a separate case to consolidate that case with this one. Margaret appealed from the order denying her motion and we dismissed her appeal as being taken from a non-final order. In the meantime, the defendants in this case filed motions to dismiss, which the circuit court granted. Margaret appeals.

Margaret first contends the circuit court lacked jurisdiction to address the motions to dismiss because, she asserts, WIS. STAT. § 808.075(3) stayed all circuit court action while her appeal of the consolidation denial was pending. She is mistaken. Section 808.075(3) limits how

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

<sup>3</sup> Margaret does not appeal the denial of her motion to file a second amended complaint.

a court may proceed in a case in which an appeal is taken and the record is transmitted. There was no appeal or transmittal of the record in this case, the one involving the motions to dismiss.

Margaret next contends that the circuit court erroneously dismissed the complaint against the county defendants. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *PRN Assocs., LLC v. DOA*, 2009 WI 53, ¶26, 317 Wis. 2d 656, 766 N.W.2d 559. Our review is limited to the face of the pleadings. *Onderdonk v. Lamb*, 79 Wis. 2d 241, 245, 255 N.W.2d 507 (1977). The facts pled and all reasonable inferences are admitted as true. *Watts v. Watts*, 137 Wis. 2d 506, 612, 405 N.W.2d 303 (1987). Dismissal is proper if it appears to a certainty that the plaintiff would not be entitled to relief under any facts that could be proved. *Id.* Whether a complaint states a claim upon which relief can be granted is a question of law that we review de novo. *Id.*

The circuit court properly dismissed Aaron's claims. He neither signed the complaint nor appeared by an attorney, the guardian of his estate or a guardian ad litem, although adjudicated incompetent. *See* WIS. STAT. §§ 802.05(1), 803.01(3)(a). Furthermore, assuming that Aaron is a "patient" within the meaning of WIS. STAT. § 51.61(1), the complaint fails to allege that he did not receive prompt and adequate treatment within the limits of available state, federal and county funds. Sec. 51.61(1)(f). It also fails to allege that any administrative avenues were pursued to review funding complaints. *See* WIS. ADMIN. CODE §§ DHS 10.53 – 10.55. Parties must exhaust their administrative remedies before they come to court. *Nodell Inv. Corp. v. City of Glendale*, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977).

Margaret's claims against the county defendants also were properly dismissed because the four corners of the complaint do not establish compliance with the notice-of-injury statute.

Unless a defendant has actual notice, a suit against governmental entities may not proceed if the plaintiff fails to provide timely, proper written notice of injury and files a proper claim. WIS. STAT. §893.80(1)(a), (b). The notice-of-claim statute is a condition precedent, and the complaint does not establish that Margaret complied with the statute. See *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶19, 302 Wis. 2d 358, 735 N.W.2d 30.

Margaret also argues that WIS. STAT. § 893.80 does not apply because, if we liberally construe her complaint, she alleged constitutional violations. See *Thorp v. Town of Lebanon*, 2000 WI 60, ¶4, 235 Wis. 2d 610, 612 N.W.2d 59. She contends that her constant, unpaid care of her son equals involuntary servitude, and that their alleged difficulties constitute cruel and unusual punishment. Such legal conclusions or unreasonable inferences need not be accepted as true. See *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979).

Dismissal of the claims against WDHS also was proper. Under the doctrine of the sovereign immunity, the State or a state agency cannot be sued without its consent. See *PRN Assocs.*, 317 Wis. 2d 656, ¶51. Margaret asserts that the State waived its sovereign immunity as to both her and Aaron in WIS. STAT. § 51.61(7), the Patient's Bill of Rights. As noted, Aaron was properly dismissed. The complaint does not allege or allow for the inference that Margaret is a patient within the meaning of § 51.61.

Lastly, we affirm the dismissal of the breach-of-contract claim against The Management Group. The complaint alleges that Aaron's case manager made specific verbal promises regarding services and reimbursement but, as it fails to recite anything that might be construed as consideration, Margaret does not state a contract claim for which relief could be granted.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to  
WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*