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DISTRICT IV

February 15, 2013

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

2011AP1902

Lance Holderness v. Tracy J. Weimer, Terri J. Soper, and Sandra K. Mosher (L.C. # 2011CV520)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Lance Holderness appeals the circuit court's order granting the defendants' motion to dismiss. 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 (2011-12).¹ We summarily reverse, and remand for further proceedings consistent with this order.

Background

For all time periods relevant to this appeal, Lance Holderness was a resident of the state-owned Wisconsin Veterans Home at King. Holderness sustained injuries when he was being transferred from his wheelchair to his bed by certified nursing assistant Tracy Weimer, an employee of Veterans Home.

Holderness filed a complaint in circuit court against Weimer and her supervisors, Terri Soper and Sandra Mosher, alleging negligence and seeking compensation for his injuries. Because the defendants are state employees, as a condition of commencing his personal injury action Holderness was required to serve a notice of claim on the state attorney general. *See* WIS. STAT. § 893.82(3).

The notice of claim in this case was prepared by attorneys from Habush, Habush & Rottier, S.C., the law firm that represents Holderness. Carla Reiersen, who is a paralegal and a notary public employed by the Habush firm, met with Holderness in his room at Veterans Home and had him read the notice of claim in her presence. She administered an oath in which Holderness swore that all of the information contained in the notice was true. The notice of claim contained the following statement:

The Notary Public who signed below has given me an oral oath to tell the truth, the whole truth and nothing but the truth so help me

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

God; and in giving this Notice to the Office of the Attorney General I did so bearing in mind the penalties of false swearing and perjury.

I hereby certify that all statements contained herein are true, and that the injuries and damage actually occurred; that I have read the above and foregoing Notice of Claim, and that the same is true to my own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, I believe the same to be true.

Holderness signed the notice of claim in Reierson's presence, and Reierson notarized it.

The defendants moved to dismiss Holderness's complaint on the ground that the notice of claim was not properly "sworn to" under WIS. STAT. § 893.82(5). The circuit court granted the defendants' motion to dismiss, and Holderness now appeals.

Issues

At issue on appeal is whether the notice of claim served on the attorney general by Holderness complied with the requirement in WIS. STAT. § 893.82(5) that the notice be "sworn to by the claimant." Also at issue is whether Holderness's complaint alleged circumstances warranting an exception to the general rule of public officer immunity.

Discussion

The legal landscape has changed since the circuit court decided this case. Recently, our supreme court issued *Estate of Hopgood v. Boyd*, 2013 WI 1, 345 Wis. 2d 65, ___ N.W. 2d ___, and that case requires reversal here. In *Hopgood*, the Wisconsin Supreme Court concluded that, under *Kellner v. Christian*, 197 Wis. 2d 183, 539 N.W.2d 685 (1995), a notice of claim must meet two requirements to be properly "sworn to by the claimant" under WIS. STAT. § 893.82(5). *Hopgood*, 345 Wis. 2d 65, ¶¶43, 52. First, the claimant must make an oath or affirmation

swearing to the truthfulness of the contents of the notice. *Id.* Second, the notice “must contain a statement showing that the oath or affirmation occurred.” *Id.*, ¶52 (citing *Kellner*, 197 Wis. 2d at 198). The supreme court further concluded in *Hopgood* that, to the extent that *Newkirk v. DOT*, 228 Wis. 2d 830, 598 N.W.2d 610 (Ct. App. 1999), appeared to expand the holding of *Kellner*, *Newkirk* misapplied *Kellner*, and the language in *Newkirk* expanding *Kellner* was withdrawn. *Hopgood*, 345 Wis. 2d 65, ¶¶43, 52.

Like Holderness, the plaintiffs in *Hopgood* were represented by the Habush law firm, and attorneys at the firm prepared the notice of claim. Except for a minor difference that does not matter,² the notice of claim language at issue in *Hopgood* was identical to the language at issue in this case. *See id.*, ¶11. The supreme court determined that the text of the notices in *Hopgood* fulfilled the requirements of *Kellner*. *Hopgood*, 345 Wis. 2d 65, ¶47. The court in *Hopgood* observed that the affidavits submitted by the notaries who had met with the claimants and administered the oaths added further support for the court’s conclusion that the notices had been properly “sworn to” under WIS. STAT. § 893.82(5). *Id.*

We note that the procedure followed by Reiersen in this case was the same as the procedure followed by the notaries who administered the oaths for the *Hopgood* plaintiffs. *See id.*, ¶¶5-10. Reiersen had Holderness read the notice, she administered an oath in which Holderness swore that all of the information contained in the notice was true, she had Holderness

² In *Estate of Hopgood v. Boyd*, 2013 WI 1, 345 Wis. 2d 65, ___ N.W. 2d ___, the notice of claim that is quoted in the opinion contains the words: “I did so bearing in mind the penalties of false swearing.” *Id.*, ¶11. The notice of claim in this case that is quoted above contains the words: “I did so bearing in mind the penalties of false swearing and perjury.”

sign the notice, and she then notarized it. Reiersen submitted an affidavit in circuit court attesting to these facts.

Applying *Hopgood*, we conclude that the notice of claim served by Holderness on the attorney general was properly “sworn to” under WIS. STAT. § 893.82(5). See *Hopgood*, 345 Wis. 2d 65, ¶¶43, 52. Holderness made an oath swearing to the truthfulness of the contents of the notice of claim, and the notice contained a statement showing that the oath occurred, thereby satisfying the requirements of *Kellner*, 197 Wis. 2d at 198. Accordingly, we reverse the order of the circuit court granting the defendants’ motion to dismiss, and remand for further proceedings consistent with this order.

We need not address the issue of whether Holderness alleged circumstances warranting an exception to the general rule of public officer immunity. This issue was not decided by the circuit court, and we leave the issue for the circuit court to address on remand.

IT IS ORDERED that the order is summarily reversed pursuant to WIS. STAT. RULE 809.21(1), and the cause is remanded for further proceedings consistent with this order.

Diane M. Fremgen
Clerk of Court of Appeals