

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP431

Cir. Ct. No. 2002CV3480

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

NORMAN C. GREEN, JR.,

PLAINTIFF-APPELLANT,

V.

GERALD A. BERGE AND MARK CARPENTER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. This is an appeal by prisoner Norman Green from a judgment dismissing his 42 U.S.C. § 1983 action. We reverse the dismissal as to two claims.

¶2 We first conclude that many of Green’s arguments are not properly before us because he did not timely appeal from the order that dismissed many of his claims on summary judgment. Although the respondents’ brief on appeal does not make that argument, failure to timely appeal is a jurisdictional defect, and we are required to inquire into our own jurisdiction. *See State ex rel. Teaching Assistants Ass’n v. University of Wisconsin-Madison*, 96 Wis. 2d 492, 495, 292 N.W.2d 657 (Ct. App. 1980).

¶3 For purposes of analyzing the timeliness issue, it is sufficient background to say that Green alleged several claims against several defendants, including Mark Carpenter. In its order entered March 2, 2006, the circuit court dismissed all of Green’s claims except one against Carpenter. As to that claim, the court ruled in Green’s favor as to liability, leaving damages to be determined later. Eventually a trial was held on damages, after which the circuit court entered a judgment dismissing the claim. Green filed a notice of appeal from that judgment, which commenced the present appeal.

¶4 An appeal as a matter of right may be taken only from a final order or judgment. WIS. STAT. § 808.03(1) (2007-08).¹ An order or judgment is final if it “disposes of the entire matter in litigation as to one or more of the parties.” *Id.* The summary judgment order of March 2, 2006, was final as to all defendants except Carpenter, because it disposed of the entire matter in litigation as to those parties. Even though one claim against defendant Carpenter would continue, Green could have appealed at that time as to the other defendants. Green’s notice

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of appeal from the post-trial judgment was filed in February 2007, and was therefore not filed within the required ninety-day period after the March 2006 dismissal order. *See* WIS. STAT. § 808.04(1). A timely notice of appeal is necessary to give the court jurisdiction. WIS. STAT. RULE 809.10(1)(e).

¶5 In addition, Green's appeal from the post-trial judgment does not bring the final portions of the March 2006 order before us, because an appeal brings before us only prior *nonfinal* orders or judgments. WIS. STAT. RULE 809.10(4). The only nonfinal decisions against Green in the circuit court's March 2, 2006 order were the ones that dismissed claims against Carpenter. Those decisions were not final because, as to Carpenter, the entire matter in litigation had not been disposed of, because damages on the one claim had not been decided.

¶6 For these reasons, we conclude that the only issues argued by Green as an appellant that we may address are the ones that relate to claims against Carpenter. To the extent that some of those claims may have been alleged against multiple defendants, they survive at this point only as against defendant Carpenter.

¶7 The claim against Carpenter that went to trial was based on Green's allegation that Carpenter, a corrections sergeant at the Wisconsin Secure Program Facility where Green was an inmate, illegally seized a letter he ultimately intended to mail to a state legislator. On summary judgment, the court ruled that Carpenter violated Green's First Amendment rights by this action.

¶8 We turn now to the merits of Green's arguments. Green first argues that, although he prevailed as to liability on a First Amendment theory, the circuit court should also have reviewed Carpenter's actions using other constitutional theories like freedom of association and equal protection. However, Green does

not explain how conclusions in his favor on these theories would change the ultimate outcome. Green has not explained how liability for the same conduct on multiple theories would affect the ultimate damage amount. A greater number of successful liability theories does not necessarily mean the plaintiff is entitled to greater damages.

¶9 We next turn to issues arising from the trial for damages on that claim. Green first argues that the circuit court erred by dismissing his state claims against Carpenter. Initially, on summary judgment, the circuit court dismissed all his state claims for failure to file a notice of claim. However, in the defendants' motion for reconsideration, the defendants conceded that Green had indeed filed a notice of claim. The circuit court reinstated the state claims as to only Carpenter. However, before trial, the court held that Green waived his state claims by not providing proposed jury instructions or verdict questions on them before trial. The court also expressed its belief that this ruling was probably not prejudicial because it did not appear that these claims would lead to Green recovering more damages than he could under the federal claim that was being tried.

¶10 In Green's opening brief on appeal, he does not explain how this decision was prejudicial. Carpenter responds that this decision was harmless because Green has not shown that he would have been able to recover additional damages based on the state claims. In his reply, Green argues that under the state law claims he could seek damages for emotional stress and mental anguish, but cites no law to that effect. Therefore, we conclude that dismissal of the state claims was harmless error.

¶11 Green next argues that the circuit court erroneously denied his request to present witnesses that he intended as substitutes for state-employee

witnesses he originally named on his witness list, but who he could not afford to pay for. Green first named these witnesses after the pretrial order's deadline for naming witnesses. Green argues that it would not have burdened the court to hear these witnesses because the court already expected three other witnesses, and it would not have burdened Carpenter because Carpenter had ample time to depose them before trial. However, neither of these arguments directly addresses the real question, whether the court erred in standing by the witness list deadline. Green does not assert that he sought or was granted permission to add witnesses after that deadline. Under this circumstance, we conclude Green has not shown that the court improperly exercised its discretion.

¶12 Green next argues that the court erred by answering the first question in the special verdict, instead of having the jury answer it. That question was: "What sum of money will fairly and reasonably compensate [Green] for any injury he suffered as a result of the violation of his constitutional rights?" The court's answer was "\$1.00." Green argues that the circuit court erred because in reaching this conclusion it relied in part on Carpenter's assertion that damages for mental and emotional strain are not available to Green under 42 U.S.C. § 1997e(e). That statute provides: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

¶13 Green argues that this statute cannot properly be applied to claims, such as his First Amendment claim, that by their very nature would *never* involve allegations of physical injury, thus leaving the plaintiff without remedy. This argument overlooks the fact that the statute still permits a First Amendment plaintiff to recover actual economic damages such as, for example, the replacement cost of a prisoner's reading materials that were improperly destroyed.

In addition, the statute does not appear to bar a First Amendment plaintiff from obtaining injunctive relief to prevent future violations. Finally, Green's argument assumes, without directly arguing, that, in the absence of the statute, he would have been entitled to seek damages for mental or emotional injury on a First Amendment claim.

¶14 Ultimately, we understand the circuit court's decision to have been that Green did not present evidence of actual economic damages, and therefore he was entitled to only nominal actual damages of \$1. Green does not argue that he presented evidence of economic damages, and he has not persuaded us that he was otherwise entitled to damages for mental or emotional injury.

¶15 We turn now to Green's arguments about various other claims. In its order of March 2006 that ruled in Green's favor on liability for the claim against Carpenter that went to trial on damages, the court also dismissed numerous other claims on the ground that they failed to state a claim.

¶16 For the purpose of testing whether a claim has been stated, the facts pleaded must be taken as admitted. *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979). The purpose of the complaint is to give notice of the nature of the claim, and the purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the claim. *Id.* Because the pleadings are to be liberally construed, a claim is legally insufficient and should be dismissed only if it is quite clear that under no conditions can the plaintiff recover. *Id.* The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but unreasonable inferences and legal conclusions need not be accepted. *Id.*

¶17 Green argues that the court erred by dismissing count eleven in his supplemental complaint. As to Carpenter, that count alleged that he seized documents from Green's cell that were related to an earlier conduct report (no. 1335163). Green alleged that this was an unreasonable seizure and denied him meaningful access to the courts. The circuit court dismissed this count for failure to state a claim. It concluded that a prison inmate's cell is not protected by the Fourth Amendment, and, as to access to courts, that Green had failed to allege how Carpenter's acts prevented Green from "effectively litigating a meritorious suit he is highly likely to have in the future."

¶18 On appeal, Green's opening brief does not appear to dispute the Fourth Amendment conclusion or the legal standard the court applied to his courts-access claim. He argues only that the seizure of the documents prevented him from seeking further review of the earlier conduct report because the seized documents were ones he would have been required to present to the court to show exhaustion of administrative remedies. This argument does not address how meritorious Carpenter's acts prevented Green from litigating a challenge to the earlier conduct report. Therefore, we reject the argument.

¶19 Green next argues that the court erred by dismissing count twelve, in which he alleged that on April 5, 2002, while Green was asleep, Carpenter banged on his door, and then shortly after that gave Green an unjustified warning of future disciplinary action over the intercom. He further alleged that Carpenter then had a surveillance camera placed in Green's cell. The circuit court dismissed this count for failure to state a claim. The court wrote, "it is hard to see how either of these acts amount to constitutional violations unless they were designed to discourage Plaintiff from seeking judicial relief or in retaliation for doing so." The court stated that Green "makes no such allegations."

¶20 On appeal, Green asserts that Carpenter’s acts “can only be construed as retaliatory” in response to his inmate complaint over Carpenter’s seizing of the letter to the legislator, which was underway through the administrative process at the time of the alleged incident. Carpenter’s response on appeal essentially repeats the circuit court’s discussion. We conclude that Green prevails as to this claim. The circuit court and Carpenter appear to accept that if Carpenter’s alleged actions were retaliatory, Green states a constitutional claim. We conclude that Green sufficiently alleged retaliation. Retaliation is a reasonable inference from the historical facts alleged. Furthermore, even if we were to conclude that Green must expressly use the term “retaliation,” the complaint describes his appeal to the corrections complaint examiner as “stressing ... that the warning was a false one and a form of retaliation and harassment on the part of Sgt. Carpenter.”

¶21 Green next argues that the circuit court erred by dismissing count fifteen. In that count Green alleged that, at Carpenter’s request, several other staff members seized from Green’s cell 444 legal documents related to this case. The documents were later returned, but, reading the complaint liberally, it appears they may have been held as long as twenty-two days, and were returned by staff who determined they were legitimate after Green filed a motion in circuit court seeking a restraining order. The circuit court perceived this as another claim based on Fourth Amendment and access to courts theories, and held that it failed to state a claim on both theories.

¶22 On appeal, Green argues that it is also an Eighth Amendment claim against a cell search intended only to harass. He cites a case which states that, as of the early 1990s, “it was clearly established that retaliatory searches can form the basis of an eighth amendment claim.” *Harding v. Vilmer*, 72 F.3d 91, 92 (8th Cir.

1995). In response, Carpenter's brief makes only a one-sentence argument that repeats the circuit court's conclusion and does not address the Eighth Amendment argument. We take this as a concession that count fifteen may state an Eighth Amendment claim. *See Charolais Breeding Ranches v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (respondents cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute). Therefore, we reverse as to this claim.

¶23 Green next argues that the court erred by dismissing count nineteen. In that count, Green alleged that Carpenter refused to pick up his outgoing legal mail for a court date several days later. The circuit court dismissed this count for failure to state a claim because Green does not allege that this action actually caused his mail to be received late in a manner that caused him injury. On appeal, Green does not argue that the court used an incorrect legal test, or that the complaint did, indeed, allege a specific harm. Therefore, we affirm as to this claim.

¶24 To the extent we have not addressed other claims Green argued in his brief, that is because those claims were not against Carpenter, and this appeal is limited only to claims against Carpenter, for the jurisdictional reason we discussed above.

¶25 In summary, as to Green's arguments regarding dismissal of his claims against defendants other than Carpenter, those claims are not properly before us in this appeal because it is not timely from the final order dismissing those defendants. As to Green's arguments regarding dismissal of his claims against Carpenter, we affirm, except as to counts twelve and fifteen, on which, as discussed in ¶¶19-22, we reverse and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

