IN THE COURT OF APPEALS OF IOWA

No. 8-363 / 07-1340
Filed October 29, 2008

ROBERT J. BRUNKHORST, individually and as representative of all similarly situated IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM MEMBERS,
Plaintiffs-Appellants,

vs.

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, THE STATE OF IOWA, GREGORY CUSACK, former Chief Executive Officer, and as representative of all Personnel of Iowa Public Employees' Retirement System, INVESTMENT BOARD OF Iowa Public Employees' Retirement System, and all ADVISORS AND CONSULTANTS of Iowa Public Employees' Retirement System,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Robert Brunkhorst appeals from the district court ruling granting the defendants' motion to dismiss. **REVERSED.**

Alexander E. Wonio and David L. Brown of Hansen, McClintock & Riley, Des Moines, for appellants.

Thomas J. Miller, Attorney General, and Mark Hunacek and Robert K. Porter, Assistant Attorneys General, for appellees.

Heard by Huitink, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Robert Brunkhorst appeals from the district court ruling granting the defendants' motion to dismiss. He contends the court erred in finding he lacked standing. Because we conclude Brunkhorst has made the required showing of standing necessary to survive a motion to dismiss, we reverse.

I. Background Facts and Proceedings. Robert Brunkhorst is a member of the Iowa Public Employees' Retirement System (IPERS), an agency charged with administering the retirement benefits of public employees of the State. Retired or vested members of IPERS who have terminated their employment with the State may request payment of their accrued retirement benefits. Any public employee who has received a refund from IPERS may buy back into the retirement system, allowing them to reinvest their refund with IPERS and be covered under the retirement plan.

In 1998 the Iowa Legislature passed House File 2496, which amended Iowa Code section 97B.74 to require that the buy-back contribution be the actuarial cost of the service purchased. *See* Iowa Code § 97B.74 (1999). Before the legislation was enacted, the buy-back contribution was only forty percent of the actuarial cost.

Although the administrative rules were modified by IPERS on December 16, 1998, to conform to the statutory change, IPERS failed to implement the change until January 14, 2004. Between July 1999 and December 2003, 3523 employees purchased service back for $18.9 million. Had the rule been implemented, IPERS would have collected an estimated additional $29.2 million, although the higher cost of buy-back may have dissuaded some

employees from purchasing back service. Because price quotes are guaranteed for a certain period of time, some employees were able to buy back service under the old calculation between January and September of 2004. Although it is unknown how many employees who purchased service back using the old quotes, if all these employees purchased service back under the old quotes, IPERS would have collected $8.6 million less than what was required by the new rule.

On January 13, 2006, Brunkhorst filed a claim with the State Appeal Board, pursuant to the Iowa Tort Claims Act, alleging a tort claim against the State and state employees as a member of a class. He claimed $37 million in property damages. His claim was denied on August 8, 2006.

On February 7, 2007, Brunkhorst filed a petition against IPERS alleging a class action suit for (1) dereliction of statutory duty and breach of fiduciary duty, (2) negligence, (3) nonfeasance, (4) misfeasance, and (5) malfeasance based on the failure to implement the new buy-back legislation in a timely manner.

On March 8, 2007, IPERS filed a motion to dismiss alleging, among other things, that Brunkhorst did not have standing to bring his claim as he could not establish he was "injuriously affected" by its actions. Brunkhorst resisted on April 12, 2007. A hearing was held on June 1, 2007.

On July 9, 2007, the district court filed its ruling, granting IPERS's motion to dismiss finding that there was "no conceivable way under the present law for the plaintiff or any member of the class to have suffered an actual or imminent injury." The court concluded Brunkhorst had no standing "to pursue the present claim." Brunkhorst appealed on August 7, 2007.

II. Scope and Standard of Review. "A motion to dismiss tests the legal sufficiency of a plaintiff's petition." *Reiff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001). Our review of a motion to dismiss is limited; it is not de novo. *Id.* "We review rulings on motions to dismiss for correction of errors at law, and we will affirm a dismissal only if the petition shows no right of recovery under any state of facts." *Id.* The district court's decision to grant a motion to dismiss is proper only when the petition, "on its face shows no right of recovery under any state of facts." *Id.* A motion to dismiss a petition should only be granted if there is no state of facts conceivable under which a plaintiff might show a right of recovery. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994) (citation omitted).

We review the petition in the light most favorable to the petitioner. *Reiff,* 630 N.W.2d at 284. We must accept as true the allegations in the petition. *Id.* Facts not alleged cannot be relied on to aid a motion to dismiss nor may evidence be taken to support it. *Id.* Facts outside of the pleadings should not be considered. *Estate of Dyer v. Krug*, 533 N.W.2d 221, 223 (Iowa 1995) (citation omitted).

III. Analysis. Brunkhorst contends the district court erred in granting the motion to dismiss on grounds that he has not shown he has standing to sue.

"Standing to sue" has been defined to mean that a party must have "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004).

> Standing is a doctrine courts employ to refuse to determine the merits of a legal controversy irrespective of its correctness, where the party advancing it is not properly situated to prosecute the

> action. When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded.

Alons v. Iowa Dist. Ct., 698 N.W.2d 858, 864 (Iowa 2005) (citation omitted). The focus is on the party, not the claim. *Id.* Even if the claim could be meritorious, the court will not hear the claim if the party bringing it lacks standing. *Id.*

To have standing, a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected. *Citizens for Responsible Choices*, 686 N.W.2d at 475. Having a legal interest in the litigation and being injuriously affected are separate requirements for standing, both of which must be satisfied. *Id.*

The district court found Brunkhorst met the first prong of the standing test, but failed in the second. It stated, "Even assuming all of plaintiff's allegations to be true, there is no conceivable way under the present law for the plaintiff or any member of the class to have suffered an actual or imminent injury." Brunkhorst challenges this finding.

Three elements must be found to confer standing:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Alons, 698 N.W.2d at 867-68 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 364 (1992)). An injury is "particularized" if it affects the plaintiff in a personal and individual way; an abstract injury is not enough. *Id.* at 868.

Furthermore, when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. *Id*. A plaintiff raising only a generally available grievance about government, claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not provide a basis for standing. *Id.* at 869. The claimed nonobservance of the law, "standing alone," affects only the generalized interest of all citizens, and such an injury is abstract in nature, which is not sufficient for standing. *Id.*

Brunkhurst argues that the court erred in finding he lacked standing because it held him to an unreasonable standard under the notice pleading rules. Iowa Rule of Civil Procedure 1.403(1) states:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or cross-petition, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the type of relief sought. Relief in the alternative or of several different types may be demanded. Except in small claims and cases involving only liquidated damages, a pleading shall not state the specific amount of money damages sought but shall state whether the amount of damages meets applicable jurisdictional requirements for the amount in controversy. The specific amount and elements of monetary damages sought may be obtained through discovery.

In notice pleading, a petition does not need to allege ultimate facts to support each element of a cause of action. *Rieff*, 630 N.W.2d at 292.

> Since the advent of notice pleading under Iowa Rule of Civil Procedure 69(a), it is a rare case which will not survive a motion to dismiss. As a result, disposition of unmeritorious claims in advance of trial must now ordinarily be accomplished by other pretrial procedures which permit narrowing of the issues and piercing of the bare allegations contained in the petition. Very little is required in a petition to survive a motion to dismiss.

Id. (citations omitted). "The petition, however, must contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition." *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004).

In his petition, Brunkhorst makes the following claim for damages:

> The failure to implement the statutory mandate has resulted in disparate contributions between members, has contributed toward the fund being considered actuarially unsound—thereby jeopardizing the benefits of Plaintiffs, and has contributed toward a need for increased and/or additional contributions from Plaintiffs and all other IPERS members in the future.

Brunkhorst further alleged: "As a direct and proximate result of Defendants' actions, Plaintiffs have been damaged." As a member of IPERS who claims he suffered pecuniary harm, Brunkhorst has standing to bring the suit. Under our notice pleading requirement, he was not required to make more than a terse statement that he was damaged. *See Brown v. North Cent. F.S., Inc.*, 173 F.R.D. 658, 673-74 (N.D. Iowa 1997) (holding "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for judgment for the relief the pleader seeks" meets the requirements to adequately plead a claim, even though the complaint simply alleged the plaintiffs "have suffered

damages"). As this is a motion to dismiss, this court must accept as true all statements in the petition. Whether Brunkhorst was actually harmed is a question of fact directed toward the merits of the lawsuit and is not appropriately addressed in a motion to dismiss. As the court said in *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991):

> [W]e certainly do not recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable. Neither do we endorse sustaining such motions, even where the ruling is eventually affirmed. Both the filing and the sustaining are poor ideas.
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> The reasons are clear enough. In the first place, in filing a motion to dismiss, a defendant gives away all the facts because in ruling on the motion well-pled facts are assumed to be true. Combined with this venerable rule is a more recent one. Under notice pleading a suit will survive a motion to dismiss whenever a valid recovery can be gleaned from the pleadings.
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> We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal. We emphasize that our determination of this appeal is no commendation for filing or sustaining the motion to dismiss.

(Citations omitted.) Because Brunkhorst made the minimum showing of standing necessary at this stage, we reverse the district court order dismissing his petition for lack of standing.

REVERSED.