STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0528

William A. McClendon,
Appellant,

vs.

Thomas Roy, et al.,
Respondents.

Filed November 18, 2019
Affirmed
Connolly, Judge

Washington County District Court
File No. 82-CV-18-4284

William A. McClendon, Stillwater, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Liz Kramer, Solicitor General, St. Paul, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Pro se appellant challenges the district court's dismissal of his complaint for failure to state a claim upon which relief can be granted. He argues that the district court erred in (1) determining that sovereign immunity bars his strict liability claims under Minnesota's dog-bite statute, (2) determining that qualified immunity bars his section 1983 claim, (3) failing to consider his motion to amend the complaint, and (4) dismissing his complaint for failure to state a claim upon which relief can be granted. Because the district court did not err, we affirm.

FACTS

This case arises from two altercations that occurred while pro se appellant William McClendon was an inmate at Minnesota Correctional Facility—Stillwater. Appellant's complaint references surveillance videos that captured both altercations and that "substantiate [appellant's] allegations." Respondents submitted these videos to the district court, which considered them when deciding respondents' motion to dismiss.[1]

The first incident took place on June 5, 2017. Appellant punched another inmate, knocking him to the floor. Appellant and a third inmate began to punch and kick the second inmate repeatedly. Corrections officers responded to the disturbance. The first officer who arrived on the scene sprayed chemical irritant toward appellant and the third inmate, but

[1] As the district court recognized, a court can consider materials referenced in the complaint without converting a motion to dismiss to a motion for summary judgment. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004); *In re Individual 35W Bridge Litig.*, 787 N.W.2d 643, 647 (Minn. App. 2010).

they continued to attack the second inmate. Several more corrections officers arrived, including Officer Brian McCarthy. McCarthy was a designated canine handler, and he brought a canine to the scene and directed its actions. Upon the arrival of the additional officers, the third inmate ceased his attacks and lay on the floor. Appellant, however, continued to punch the second inmate. An officer then grabbed appellant and pulled him away from the second inmate. Appellant braced himself against an open cell door and stepped forward while the officer tried to secure him. McCarthy released the canine, which bit appellant on the leg. Appellant sustained injuries to his right thigh as a result.

The second altercation occurred three days later, on June 8, 2017. Officer Ronald Braithwaite was escorting appellant to the Health Services Department to receive treatment for his dog-bite injuries. As Braithwaite walked in front of appellant, another inmate struck appellant, knocked him to the floor, and punched him repeatedly. Braithwaite turned around and moved toward the inmates while using his radio. He maneuvered behind the assailant for a couple seconds and then pulled him off appellant. Appellant sustained injuries to his head and face.

Appellant commenced this action in September 2018. For his injuries from the dog bite, he named as defendants McCarthy, Minnesota Department of Corrections Commissioner Thomas Roy, Warden Eddie Miles, and Captain Byron Matthews. He alleged that McCarthy "either negligently and/or maliciously" released the canine when appellant already had disengaged from the altercation and was not resisting the corrections officers. The claims against McCarthy were strict liability under Minnesota's dog-bite statute, Minn. Stat. § 347.22 (2018); claims under 42 U.S.C. § 1983 (2012) for violations

of the Fourth and Eighth Amendments of the United States Constitution and articles V and X of the Minnesota Constitution; and state tort claims for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, assault, and battery. Appellant alleged that Roy, Miles, and Matthews were vicariously liable for McCarthy's actions because they were the "legal owner, or keeper, or harborer's [sic] of the Canine."

For his injuries from the other inmate, appellant brought a negligence claim against Braithwaite. He alleged that Braithwaite "either negligently or maliciously" allowed the other inmate to assault him repeatedly and failed to intervene. In doing so, Braithwaite allegedly breached his duty to protect appellant and to ensure appellant's safety.

Respondents filed a motion to dismiss the action for failure to state a claim upon which relief can be granted. Appellant withdrew his section 1983 claims against Roy, Miles, and Matthews that were based on vicarious liability. He also withdrew his section 1983 claims against McCarthy for violations of the Fourth Amendment of the United States Constitution and for violations of the Minnesota Constitution.

The district court scheduled a hearing on respondents' motion to dismiss for January 18, 2019. On January 9, 2019, appellant filed a notice of motion and motion to amend the complaint. In this notice, appellant declared that he would move for an order permitting him to amend his complaint at the January 18 hearing or soon thereafter. He indicated that he would amend the caption in the complaint to include that all defendants were being "sued in their individual capacities." Appellant took no further steps after filing this motion, and he did not appear at the hearing on January 18. The district court never considered the motion to amend.

The district court granted respondents' motion to dismiss. It determined that sovereign immunity barred the claim under the dog-bite statute, as a suit against officers of the Department of Corrections acting in their official capacities is considered a suit against the state itself. It also dismissed the section 1983 claim for violation of the Eighth Amendment as barred by sovereign immunity and qualified immunity. The court dismissed most of the state tort claims for insufficient allegations in the complaint. For intentional infliction of emotional distress, appellant made conclusory allegations and did not allege that he suffered severe emotional distress. For negligent infliction of emotional distress, appellant failed to allege any physical manifestations of emotional distress. In respect to the negligence claim against Braithwaite, the complaint did not allege facts that gave rise to a duty for Braithwaite to protect appellant. Finally, the court dismissed the remaining state tort claims as barred by official immunity. This appeal follows.

D E C I S I O N

On appeal from the dismissal of a complaint for failure to state a claim upon which relief can be granted under Minnesota Rule of Civil Procedure 12.02(e), we review de novo whether the complaint "sets forth a legally sufficient claim for relief." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). "We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Id.* "A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Id.* at 603. We are not, however, bound by legal conclusions in the complaint. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

I.

Appellant argues that sovereign immunity does not bar his strict liability claims under Minnesota's dog-bite statute. The statute creates a cause of action against the owner of a dog who attacks or injures a person without provocation. Minn. Stat. § 347.22. It defines "owner" as including "any person harboring or keeping a dog." *Id.* The district court dismissed appellant's claims on the grounds that sovereign immunity bars a statutory claim against state officials acting within the scope of their employment. We review the applicability of immunity de novo. *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 599 (Minn. 2016).

Sovereign immunity "precludes litigation against the state unless the state has consented to suit." *Nichols v. State*, 858 N.W.2d 773, 775 (Minn. 2015). Sovereign immunity may apply even though the state itself is not the named defendant. It also bars claims against departments of the state. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908 (1984); *Khalifa v. State*, 397 N.W.2d 383, 389 (Minn. App. 1986). Suits against officers of the departments acting in their official capacities are considered suits against the department itself. *Khalifa*, 397 N.W.2d at 389-90. In summary, a claim against state officials carrying out their official responsibilities is a claim against the state that is protected by sovereign immunity. *Pennhurst*, 465 U.S. at 121, 104 S. Ct. at 919. Respondents are all state employees working for the Department of Corrections. Appellant's action is against respondents in their official capacities. The claims against Roy, Miles, and Matthews are all based on their positions with the department. McCarthy released the canine while he was acting within his duties as a

corrections officer and canine handler. Accordingly, unless the state has consented to suit for claims under the dog-bite statute, sovereign immunity bars those claims.

The Minnesota Supreme Court has abolished sovereign immunity for common-law tort claims, but the immunity still exists for claims created by statute. *Nichols*, 858 N.W.2d at 775 (citing *Nieting v. Blondell*, 235 N.W.2d 597, 603 (Minn. 1975)). The legislature, nevertheless, can waive the state's sovereign immunity for statutory claims. *Id.* Minn. Stat. § 645.27 (2018) provides a framework for determining whether a statute waives the state's sovereign immunity from liability for a statutory claim. *Id.* at 775-76. There are two ways for a statute to waive sovereign immunity: (1) the statute explicitly names the state, and (2) the words of the statute are "so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature." Minn. Stat. § 645.27. In other words, the statute must demonstrate "the Legislature's express intent to allow suit against the State." *Nichols*, 858 N.W.2d at 776.

The legislature's intent is not plain, clear, and unmistakable simply because the statutory language is broad. The supreme court has held that the phrase "any person, partnership, company, corporation, association, or organization of any kind" is not sufficient to waive sovereign immunity. *Id.* at 776-77. Although a reference to "any" organization could encompass the state, such language does not make legislative intent plain, clear, and unmistakable. *Id.* at 777. The legislature knows how to waive sovereign immunity because it frequently has named the state in other statutes in which it has allowed suit against the state. *Id.* Although it is still possible for a statute to waive sovereign

immunity without explicitly naming the state, *id.* at 779, caselaw indicates that it is difficult to do so.

Here, the dog-bite statute defines "owner" as "*any person* harboring or keeping a dog." Minn. Stat. § 347.22 (emphasis added). It does not explicitly name the state, nor is the language so plain, clear, and unmistakable as to leave no doubt that the legislature intended to allow suit against the state. Appellant insists that the phrase "any person" is so broad that it encompasses the state. But the supreme court rejected a similar argument in *Nichols*, when it held that a phrase even broader than "any person" was not sufficient. Because the language is not clear as to the legislature's intent, the dog-bite statute does not waive the state's sovereign immunity.

Appellant relies on *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 826-27 (Minn. 2005), to argue that the state can be liable under section 347.22. In that case, the supreme court interpreted the word "person" in section 347.22 to include "bodies politic" such as municipalities and concluded that municipal owners of a police dog can be liable under the statute. *Id.* *Hyatt* is distinguishable from the case at bar because it involved municipal liability, *id.*, whereas the rule of construction in section 645.27 applies only to the immunity of the state, and not to that of municipalities, *Nichols*, 858 N.W.2d at 776 n.5. Therefore, the fact that municipal dog owners can be liable under the dog-bite statute does not mean that the state can as well.

Additionally, appellant asserts that the Minnesota Tort Claims Act waived the state's sovereign immunity. The Tort Claims Act provides that the state is liable for injuries caused by state employees acting within the scope of their employment, when a private

individual would be liable to the claimant. Minn. Stat. § 3.736, subd. 1 (2018). This provision waives the state's sovereign immunity only for common-law tort claims. *Nichols*, 858 N.W.2d at 775. The act does not, however, waive sovereign immunity for claims based on statute. *Id.*; *see also Lund v. Comm'r of Pub. Safety*, 783 N.W.2d 142, 143 (Minn. 2010) (stating that the Tort Claims Act subjects the state to tort liability, but not to liability in other cases). The determination as to whether the state has waived its sovereign immunity for statutory claims is based on the rule of construction in section 645.27. *Nichols*, 858 N.W.2d at 775. For that reason, the Tort Claims Act does not waive the state's sovereign immunity from claims under the dog-bite statute. The district court therefore did not err in concluding that sovereign immunity bars that claim.

II.

Appellant next argues that qualified immunity does not bar his section 1983 claim against McCarthy for violation of the Eighth Amendment. 42 U.S.C. § 1983 creates a private cause of action against state officials who violate a person's constitutional rights. We need not consider the issue of qualified immunity, however, because sovereign immunity also bars this section 1983 action. As the district court recognized, neither the state nor state officials acting in their official capacities are subject to suit under section 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989); *see also Quern v. Jordan*, 440 U.S. 332, 339-45, 99 S. Ct. 1139, 1144-47 (1979) (holding that section 1983 does not abrogate the states' sovereign immunity). Had the district court granted appellant's motion to amend his complaint to sue respondents "in their individual capacities," section 1983 would apply (even though respondents were

acting within their duties as corrections officers), and we would need to evaluate qualified immunity. But, as noted above, appellant sued respondents in their official capacities. Sovereign immunity therefore bars the claim unless the state has consented to suit. *Will*, 491 U.S. at 67, 109 S. Ct. at 2310. The State of Minnesota has not waived its immunity from suit for section 1983 claims. *See Rico v. State*, 458 N.W.2d 738, 740 (Minn. App. 1990) (holding that "a state and its officers acting in their official capacity may not be sued under section 1983"), *aff'd*, 472 N.W.2d 100 (Minn. 1991). Thus, the district court did not err in dismissing appellant's section 1983 claim as barred by sovereign immunity, and it is unnecessary to determine whether respondents are entitled to qualified immunity.

III.

Appellant asserts that the district court erred by failing to consider the amended complaint that he filed on January 9, 2019, which added that he was suing respondents in their individual capacity. To begin, appellant incorrectly characterizes the document as an amended complaint. The document is clearly labeled as a notice of motion and motion to amend. Appellant maintains nonetheless that it was an amended complaint because he included the amended portion of the complaint in the motion. But in order for appellant to amend the complaint, the court first needed to grant appellant's motion. Once the other party has served a responsive pleading, a party may amend a pleading only by leave of court or by written consent of the other party. Minn. R. Civ. P. 15.01. Since respondents never gave written consent, appellant needed leave of court. We review the district court's decisions on amendments to pleadings for an abuse of discretion. *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003).

The district court did not abuse its discretion in failing to consider appellant's motion to amend because appellant did not follow the proper procedures in filing the motion. A motion to amend a pleading is a nondispositive motion. Minn. R. Gen. Prac. 115.01(a)(2). The court will not hear a nondispositive motion until the moving party, among other things, "files the documents with the court administrator at least 14 days prior to the hearing." Minn. R. Gen. Prac. 115.04(a). Appellant filed his motion with the district court on January 9, 2019. The hearing on respondents' motion to dismiss was scheduled for January 18, 2019. Since appellant filed his motion only nine days earlier, the motion was untimely as to that hearing. Furthermore, appellant did not obtain a separate timely hearing. When filing a motion, a party must obtain a hearing date and time from the court administrator and promptly give notice to the other parties. Minn. R. Gen. Prac. 115.02. Appellant neither filed a timely motion for the hearing on January 18 nor obtained a separate timely hearing date on the motion; thus, he did not follow the proper procedures for filing a motion to amend the complaint. The district court did not abuse its discretion.

IV.

Finally, appellant raises a catch-all argument that the district court erred in dismissing the complaint for failure to state a claim. He asserts that the court improperly resolved factual disputes when it dismissed the complaint. He focuses on three specific claims: (1) the claim for intentional infliction of emotional distress, (2) the claim for negligent infliction of emotional distress, and (3) the negligence claim against Braithwaite.[2]

[2] Appellant also discusses his section 1983 claim, but we have already explained that sovereign immunity bars that claim. Furthermore, appellant does not contest the district

A. Intentional infliction of emotional distress

Appellant argues that his complaint alleged sufficient facts for a claim of intentional infliction of emotional distress because there is no heightened pleading standard, so extreme factual specificity is inappropriate. There are four elements to show intentional infliction of emotional distress: (1) the conduct must be extreme and outrageous, (2) the conduct must be intentional or reckless, (3) the conduct must cause emotional distress, and (4) the emotional distress must be severe. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). The plaintiff has a heavy burden of production in the allegations to satisfy the fourth element. *Id.* at 439. The emotional distress must be "so severe that no reasonable man could be expected to endure it." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. j (1965)). "General embarrassment, nervousness and depression are not in themselves a sufficient basis for a claim of intentional infliction of emotional distress." *Strauss v. Thorne*, 490 N.W.2d 908, 913 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992). The purpose of this heavy burden is to limit claims for intentional infliction of emotional distress to "cases involving particularly egregious facts." *Hubbard*, 330 N.W.2d at 439.

Here, appellant's only allegations regarding emotional distress are that he suffered "mental and emotional trama [sic]" as a result of the dog bite. Conclusory allegations that

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court's conclusion that official immunity bars appellant's state tort claims, so we consider that issue waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that any issue not argued in a party's brief is deemed waived). Although the district court determined that official immunity bars all the state tort claims, we nonetheless will examine the three tort claims that appellant raises in his brief.

the plaintiff has suffered severe emotional distress are not sufficient to overcome a motion to dismiss. *Leiendecker v. Asian Women United of Minn.*, 834 N.W.2d 741, 754 (Minn. App. 2013), *rev'd on other grounds*, 848 N.W.2d 224 (Minn. 2014), *r'hg granted, opinion modified,* 855 N.W.2d 233 (Minn. 2014). The mere assertion that appellant suffered mental and emotional trauma is too broad and vague to establish that the emotional distress suffered was beyond what a reasonable man could be expected to endure. Therefore, appellant's complaint did not set forth a sufficient claim for intentional infliction of emotional distress. The district court did not err in dismissing that claim.

B. Negligent infliction of emotional distress

Appellant's argument regarding his claim for negligent infliction of emotional distress is largely the same—that the district court improperly required a heightened pleading standard and extreme factual specificity. There are three elements to establish a claim for negligent infliction of emotional distress: the plaintiff must have (1) been within a zone of danger of physical impact, (2) reasonably feared for his safety, and (3) suffered severe emotional distress with physical manifestations. *K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995). The third element is critical—the plaintiff cannot merely have suffered emotional distress; he must have suffered a physical manifestation of that emotional distress. *Soucek v. Banham*, 503 N.W.2d 153, 164 (Minn. App. 1993). Dismissal of claims for negligent infliction of emotional distress is proper when the plaintiff did not allege any physical injury. *Leiendecker*, 834 N.W.2d at 755.

Once again, appellant's only allegation regarding emotional distress is that he suffered mental and emotional trauma. This allegation is clearly not sufficient to establish

a claim for negligent infliction of emotional distress. There is no contention that appellant sustained any physical manifestation of his emotional distress. As such, the district court did not err in dismissing that claim.

C. Negligence

Finally, appellant argues that the district court erred in dismissing his negligence claim against Braithwaite because it addressed foreseeability instead of determining whether a special relationship existed between appellant and Braithwaite. There are four elements to establish a claim for negligence: (1) duty, (2) breach of duty, (3) causation, and (4) injury. *Johnson v. State*, 553 N.W.2d 40, 49 (Minn. 1996). The existence of a duty is a question of law that is subject to de novo review. *Id.* Generally, there is no duty to protect a person from physical harm by a third person. *Id.* Such a duty arises, however, when there is a special relationship between the parties and the risk of harm is foreseeable. *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007). One special relationship giving rise to a duty to protect is that of a custodian and detainee. *Cooney v. Hooks*, 535 N.W.2d 609, 611 (Minn. 1995). This relationship exists when "a person has custody of another under circumstances in which the other person is deprived of normal opportunities of self protection." *Id.* (quotation omitted).

Appellant contends that there can be no question that there was a special relationship between him and Braithwaite. He is correct on that point, as Braithwaite was clearly a custodian, and appellant was a detainee. But the existence of a special relationship is not the end of the inquiry, as the risk of harm must be foreseeable in order for a duty to protect to arise. *Bjerke*, 742 N.W.2d at 667. The foreseeability of an injury is a threshold question

related to duty. *Domagala v. Rolland*, 805 N.W.2d 14, 27 (Minn. 2011). Ordinarily, foreseeability in the context of duty is reviewed de novo. *Warren v. Dinter*, 926 N.W.2d 370, 378 (Minn. 2019). "In close cases, the issue of foreseeability should be submitted to the jury." *Id.* (quoting *Domagala*, 805 N.W.2d at 27). In a prison setting, the "duty to protect an inmate from violence arises when the jailer knows or, in the exercise of reasonable care, should know of the danger of attack." *Cooney*, 535 N.W.2d at 611. When the prison has no reason to believe that another inmate presents a physical threat to anyone, then it does not owe a duty to protect the detainee from that inmate. *Id.* at 612.

Here, we review the issue of foreseeability de novo because the case is not close. Appellant does not allege any facts showing that the risk of harm was foreseeable. The complaint does not claim that Braithwaite knew or had any reason to know that the other inmate would assault appellant. The surveillance video shows that the assailant attacked appellant without warning after Braithwaite had walked past the assailant. Braithwaite immediately moved toward the altercation, used his radio, and pulled the assailant off appellant. Because none of the facts alleged indicate that the assault was foreseeable, Braithwaite did not owe a duty to protect appellant. Therefore, the district court did not err in dismissing appellant's negligence claim.

Affirmed.