[Cite as *Cornelison v. Colosimo*, 2010-Ohio-2527.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

TED CORNELISON, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-T-0099**
- vs -	:	
THOMAS COLOSIMO, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2009 CV 1089.

Judgment: Affirmed.

David J. Betras and *Daniel P. Osman*, Betras, Maruca, Kopp, Harshman & Bernard, L.L.C., 6630 Seville Drive, #1, P.O. Box 129, Canfield, OH 44406 (For Plaintiffs-Appellants).

Abraham Cantor, Johnnycake Commons, 9930 Johnnycake Ridge Road, #4-F, Concord, OH 44060 (For Appellee-Thomas Colosimo).

Mel L. Lute, Jr., Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, OH 44720 (For Appellees-Allen Patchin, Darius Elkin, Robert Horner, and West Farmington Village).

DIANE V. GRENDELL, J.

{¶1} Plaintiffs-appellants, Ted Cornelison and Georgiann Cornelison, appeal the Judgment Entry of the Trumbull County Court of Common Pleas, in which the trial

court granted defendants-appellees' Motion for Summary Judgment. For the following reasons, we affirm the decision of the trial court.

{¶2} Prior to January 30, 2008, Cornelison served as Police Chief of West Farmington Village. On January 30, 2008, defendant-appellee, Allen Patchin, Mayor of West Farmington, informed Cornelison that his contract of employment would not be renewed. Defendant-appellee, Robert Horner, was subsequently appointed as Police Chief of West Farmington Village.

{¶3} Shortly after, defendant-appellee, Thomas Colosimo, a police officer with West Farmington, informed Patchin that he had concerns about his personal safety relative to threats he claimed were made against him by Cornelison. Colosimo further revealed concerns he had about Cornelison's execution of official duties. Ultimately, Colosimo filed charges against Cornelison at the Newton Falls Municipal Court, alleging criminal misconduct. The charges against Cornelison were eventually dismissed by the Newton Falls prosecutor without prejudice. The prosecutor stated in an affidavit that he "decided to dismiss the charges without prejudice, preferring instead to refer the matter for investigation by an outside agency, namely the Trumbull County Sheriff's Department. *** The file remains open pending further information."

{¶4} Cornelison subsequently filed a Complaint against defendants-appellees Colosimo, Patchin, West Farmington Village, Horner, and Darius Elkin (a police officer of West Farmington Village), alleging False Imprisonment; Malicious Prosecution; Intentional Infliction of Emotional Distress (IIED); Defamation; Negligence; and Deprivation of Rights. Cornelison's wife, Georgiann Cornelison, also made a claim for Loss of Consortium against the appellees.

{¶5} Appellees filed a Motion for Summary Judgment which the trial court granted on September 3, 2009.

{¶6} Cornelison timely appeals and raises the following assignments of error:

{¶7} "[1.] The trial court erred in failing to admit the Trumbull County Sheriff's Department Report in deciding the Motion for Summary Judgment.

{¶8} "[2.] The trial court erred in ruling that appellees are entitled to sovereign immunity.

{¶9} "[3.] The trial court erred in dismissing Appellants' claim for malicious prosecution.

{¶10} "[4.] The trial court erred in dismissing Appellants' §1983 claim."

{¶11} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "[t]he moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty*. (1993), 87 Ohio App.3d 704, 711 (citation omitted).

{¶12} The moving party must present specific facts showing a right to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party

is successful, the nonmoving party can prevail by presenting specific facts showing the existence of a genuine issue of material fact. Id.

{¶13} "It is well settled that, once the party moving for summary judgment meets it evidentiary burden, the party opposing the motion must then present its own evidence to show a genuine issue of fact does remain as it may not rest upon the mere allegations or denials of its pleadings." *Leader Mtge. Co. v. Haught*, 9th Dist. No. 03CA008318, 2004-Ohio-1417, at ¶9.

{¶14} Cornelison first contends that a Trumbull County Sheriff's Department Report should have been admitted and considered by the trial court in deciding the Motion for Summary Judgment. He states that the report is a business record under Evid.R. 803(6) and "therefore an exception to the hearsay rule. The trial court's exclusion of this report was prejudicial error."

{¶15} Colosimo argues that Cornelison is attempting to "use a police officer conclusion based on his investigation and statements from others identified in the police officer's report and claim it as a business record."

{¶16} Evid.R. 803(6) provides that the following is not excluded by the hearsay rule: "[a] memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

{¶17} Cornelison argues that the report "was not hearsay because it was a record of regularly conducted activity; entered by a person with knowledge of the act, event or condition; it was recorded at or near the time of the transaction; and it was authenticated by a qualified witness."

{¶18} The report does not meet the requisite elements of the Rule 803(6) exception.

{¶19} Although the affidavit of Major Thomas Stewart, which was offered with the report, provided that the report was a "true copy of the report prepared by Detective Sergeant Peter J. Pizzulo in the course and scope of his duties with the Trumbull County Sheriff's Office", the first page of the report states "[a]t the request of the Newton Falls Prosecutor and the newly appointed West Farmington Chief of Police Robert Horner[,] the Trumbull County Sheriff's Office agreed to review the complaints filed by Officer Thomas Colosimo against Former Police Chief Ted Cornelison." Additionally, Cornelison states in his reply brief that "Appellees requested that the Trumbull County Sheriff's Department conduct an investigation and write the report."

{¶20} The report included a synopsis of the case and a review of each of the complaints "broken down into single events." The report also included a list of 12 people who were "interviewed or provided information."

{¶21} The report is composed of conclusions based on numerous hearsay statements from people Pizzulo interviewed in order to compose the report. Pizzulo was not a person with knowledge of the acts, events, or conditions which are the subject matter of the report. He relied on information provided to him. Additionally, an affidavit from Pizzulo was never provided to the court.

{¶22} In *Spencer v. Lakeview School Dist*., 11th Dist. No. 2005-T-0083, 2006-Ohio-3429, at ¶39, this court found a report did not meet the business record exception finding that the "final element of Evidence Rule 803(6) regarding trustworthiness *** was not met." This court found that the maker of the report "could not testify as to which person specifically gave her what information," and held that "[i]t is precisely this 'telephone' chain of communication which the hearsay rule means to exclude due to its lack of reliability."

{¶23} The trustworthiness element has not been met in the instant case. The report was generated from interviewing multiple people, not from the first hand knowledge of Pizzulo. Additionally, the report was made upon request of the Newton Falls Prosecutor and Horner, not in the ordinary course of business.

{¶24} Moreover, it should be noted that "[i]t is well established that police reports are generally inadmissible hearsay and should not be submitted to the [finder of fact]." *State v. Granderson*, 177 Ohio App.3d 424, 2008-Ohio-3757, at ¶77, citing *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, at ¶111.

{¶25} Additionally, the incident report was not admissible as an official report as contemplated in R.C. 2317.42, which states "[o]fficial reports made by officers of this state, or certified copies of the same, on a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein." In *Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Corp*. (1975), 42 Ohio St.2d 122, 130, the court held that "[n]either the fire chief nor the deputy fire chief[, the writers of the report,] could have testified as to the contents of statements made to them during their investigation of the fire, at least for the purpose of showing the truth of facts asserted. Such evidence is not made competent by

commitment to writing in an official report, since it remains evidence not subject to cross-examination and not based on first-hand knowledge." Accordingly, the court found that it was error to admit the report.

{¶26} The instant case contains a report similar to the report in *Westinghouse*; the report is comprised of summaries of statements made by several witnesses who were interviewed during the investigation. Accordingly, the trial court was correct in excluding the report.

{¶27} Cornelison's first assignment of error is without merit.

{¶28} In his second assignment of error, Cornelison argues that the appellees were not entitled to sovereign immunity. In his third assignment of error, Cornelison contends that the trial court erred in dismissing his claim for malicious prosecution. Since these two assignments of error are interrelated, they will be addressed together.

{¶29} Cornelison also questions the constitutionality of R.C. Chapter 2744 which provides for governmental immunity. The Ohio Supreme Court in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, refused to consider the constitutionality of R.C. Chapter 2744. The Supreme Court stated: "In reviewing our precedent and that of numerous appellate courts, we conclude that this issue is one that is settled and need not be discussed any further in this case." Id. at ¶95 (citations omitted); see also, *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 670, 1995-Ohio-295 ("[w]e hold that R.C. 2744.02(B)(1) is a constitutional exercise of legislative authority which does not violate the guarantees of equal protection of the Ohio and United States Constitutions because its grant of limited immunity of political subdivisions is rationally related to legitimate state interest"). Accordingly, Cornelison's constitutionality challenge is without merit.

{¶30} We disagree with Cornelison's contention that appellees are not entitled to sovereign immunity. Further, we note that the determination of governmental immunity is a question of law to be decided by the court. See *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133; *Natale v. Rocky River*, 8th Dist. No. 90819, 2008-Ohio-5868, at ¶7 (the issue of whether the city is entitled to sovereign immunity is a question of law, so it is "particularly apt for resolution by way of summary judgment pursuant to Civ.R. 56").

{¶31} A political subdivision is "not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B); *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421.

{¶32} R.C. Chapter 2744 requires a three-tiered analysis when determining whether sovereign immunity applies to a political subdivision. *Griffits v. Newburgh Hts*., 8th Dist. No. 91428, 2009-Ohio-493, at ¶9 (citation omitted).

{¶33} We begin the analysis at the first tier by determining whether the appellees have established that they are entitled to sovereign immunity. It is undisputed that the City of West Farmington is a political subdivision. Further, "the operation of a police department and the enforcement of the law is a governmental function." *Harris v. Sutton*, 183 Ohio App.3d 616, 2009-Ohio-4033, at ¶13; R.C. 2744.01(C)(1) and (2).

{¶34} "R.C. Chapter 2744 provides nearly absolute immunity to political subdivisions in order to limit their exposure to money damages. Immunity provides a shield to the exercise of governmental or proprietary functions by a political subdivision,

unless one of the exceptions specifically recognized by statute applies." *Sabulsky v. Trumbull Cty*., 11th Dist. No. 2001-T-0084, 2002-Ohio-7275, at ¶11.

{¶35} In the second tier of the analysis, the burden shifts to the plaintiff to establish that one of the recognized exceptions to immunity applies. *Maggio v. Warren,* 11th Dist. No. 2006-T-0028, 2006-Ohio-6880, at ¶38; *Ramey v. Mudd,* 154 Ohio App.3d 582, 2003-Ohio-5170, at ¶16. If one of the exceptions applies, the court must turn to the third tier to determine whether the governmental immunity can be reinstated through one of the defenses found in R.C. 2744.03.

{¶36} The potential exceptions to immunity for a political subdivision involve: (1) the negligent operation of a motor vehicle by an employee; (2) the negligent performance of a proprietary function; (3) the negligent failure to keep public roads open and in repair; (4) injury caused by a defect on the grounds of a public building, and (5) instances in which civil liability is expressly imposed upon the subdivision by a section of the Revised Code. See R.C. 2744.02(B)(1)-(5). The record below does not support the applicability of any of these exceptions to immunity. Moreover, appellants do not even attempt to argue that any of these exceptions apply.

{¶37} In applying the foregoing, we note that courts have generally held that because R.C. 2744.02(B) includes no specific exceptions for intentional torts, political subdivisions are immune from intentional tort claims. See *Thornton v. City of Cleveland*, 176 Ohio App.3d 122, 2008-Ohio-1709, at ¶6; *Young v. Genie Indus. United States*, 8th Dist. No. 89665, 2008-Ohio-929, at ¶12. Similarly, courts have determined that no section of the Revised Code expressly imposes liability upon a public agency for infliction of emotional distress, false arrest, or malicious prosecution. See *Terry v. Columbus* (S.D.Ohio), 2008 U.S. Dist. LEXIS 52519, at *7 and *40 (under the second-

tier of the analysis, the city remains entitled to immunity on claims for infliction of emotional distress, false arrest, and malicious prosecution); *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 452, 1994-Ohio-394, (under second tier of analysis, defendant was entitled to immunity on claim of intentional infliction of emotional distress); *Ratcliff v. Darby*, Scioto App. No. 02CA2832, 2002-Ohio-6626, at ¶21 (police department immune from liability for a claim of false arrest and malicious prosecution).

{¶38} Moreover, the "tort of malicious prosecution is an intentional tort, given that malice is one of the elements of the tort: '(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused.' *Trussell v. Gen. Motors Corp*. (1990), 53 Ohio St.3d 142, *** syllabus. Since there is no exception to governmental immunity for intentional torts in R.C. 2744.02(B), *** [a political subdivision] is immune from prosecution for malicious prosecution." *Price v. Austintown Local School Dist. Bd. of Edn*., 178 Ohio App.3d 256, 2008-Ohio-4514, at ¶22. "[N]one of the exceptions to immunity under R.C. 2744.02(B) exist because the enforcement of the law by conducting a reasonable investigation, presenting evidence to the city prosecutor, and serving an arrest warrant are governmental functions." *Sutton*, 183 Ohio App.3d 616, at ¶9.

{¶39} Individual employees of a political subdivision are likewise immune from civil actions to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function. An exception to individual immunity exists, as argued in this appeal, if it can be shown that the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner or outside the scope of employment or official

responsibility. See R.C. 2744.03(A)(6)(b); *Maggio*, 2006-Ohio-6880, at ¶41 ("[e]mployees of a political subdivision are immune from liability unless the employees' acts or omissions 'were manifestly outside the scope of employment or official responsibility' or 'were with malicious purpose, in bad faith, or in a wanton or reckless manner'") (citation omitted).

{¶40} Cornelison claims that the employee-appellees "acted with malicious purpose, in bad faith, or in a wanton manner." Further, he asserts that West Farmington is not immune from liability since his injury resulted from "Elkin's, Patchin's, Horner's, or Colosimo's exercise of judgment or discretion *** exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶41} The Ohio Supreme Court has defined the term "reckless" to mean that the conduct occurred '"knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.'" *Cater* 83 Ohio St.3d at 33, citing *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 96; *O'Toole*, 2008-Ohio-2574, at paragraph three of the syllabus ("recklessness is a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in injury.").

{¶42} The Supreme Court has also held that "wanton misconduct [is] the failure to exercise any care whatsoever." *Fabrey* v. *McDonald Village Police Dept*., 70 Ohio St.3d 351, 356, 1994-Ohio-368, citing *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, at syllabus. The court has explained, '"mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the

tortfeasor.' Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury." Id., citing *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97.

{¶43} "Although the determination of recklessness is typically within the province of the jury, the standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity." *O'Toole*, 118 Ohio St.3d at 386-387.

{¶44} Cornelison attempts to support this assertion with the Trumbull County Sheriff's Office Report; however, the report, as discussed above, was inadmissible and therefore, unable to support a question of fact. Moreover, Cornelison does not state any facts or cite the record in support of his claim of recklessness against any particular appellee. In ruling on a Motion for Summary Judgment, "the court may examine all evidence properly before it. Such evidence may include pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts and written stipulations of fact." *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 51. The record does not include such evidence.

{¶45} Since the complaint fails to show sufficient factual matters identifying an exception to immunity, Cornelison has failed to demonstrate how the employee appellees' conduct rises to the level of wanton and reckless conduct. Consequently, summary judgment in their favor was proper. *See Swint v. Auld*, 1st Dist. No. C-080067, 2009-Ohio-6799, at ¶5 (appellant "pleaded no facts to support a conclusion that [appellee] had been willful and wanton" and summary judgment was upheld); *Griggy v. Cuyahoga Falls*, 9th Dist. No. 22753, 2006-Ohio-252, at ¶11 ("Appellants attempted to create a genuine issue of material fact merely by alleging that [appellees']

conduct was reckless. However, Appellants must demonstrate the existence of a genuine issue of material fact to defeat summary judgment and cannot simply rely on legal conclusions. As Appellants have failed to demonstrate the existence of a genuine issue of material fact, we find that Appellees are entitled to judgment as a matter of law ***").

{¶46} Since, as explained above, appellees are immune from liability under Chapter 2744, and since Cornelison is unable to prove any set of facts entitling him to relief, the trial court did not err in granting appellees' Motion for Summary Judgment. Accordingly, since appellees are entitled to sovereign immunity, it was also proper to dismiss Cornelison's malicious prosecution claim.

{¶47} Cornelison's second and third assignments of error are without merit.

{¶48} In his final assignment of error, Cornelison alleges that the trial court erred in dismissing his Section 1983 claim. He claims that the trial court erred when it concluded that he did not set forth facts showing the existence of an offending custom or policy.

{¶49} Section 1983, Title 42, U.S. Code, provides:

{¶50} "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ***, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ***."

{¶51} "[I]n order to establish a right to relief under Section 1983, '*** a plaintiff must plead and prove at least two elements: (1) that he has been deprived of a right

'secured by the Constitution and laws' of the United States; and (2) that the defendant deprived him of this right while acting under color of law.'" *Schwarz v. Bd. of Trustees* (1987), 31 Ohio St.3d 267, 272 (citation omitted).

{¶52} The appellees contend that Cornelison's "alleged constitutional rights violations *** were conclusory." They state that Cornelison fails to "set forth any specificity in terms of factual support that would arguably articulate a 42 USC Section 1983 violation." Further, "[m]erely setting forth a litany or making vague reference to specific federal rights which exist falls short of demonstrating specifically how those rights were implicated and ultimately interfered with by the Appellees."

{¶53} "While a plaintiff may seek redress against a governmental entity, *e.g*., a county, pursuant to Section 1983, *** an additional allegation must be included in the complaint. The complainant must assert that the action complained of was due to an established practice, policy or custom of the governmental entity. *** A plaintiff must, therefore, set forth facts showing the existence of an offending custom or policy and mere conclusory allegations are insufficient. *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 652 (citations omitted); *Maggio*, 2006-Ohio-6880, at ¶58 ("an adverse party *may not rest upon the mere allegations *** of the party's pleadings*, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial") (citation omitted). "A plaintiff must identify those specific constitutional or statutory rights of which he has been deprived." *Asher Invests. Inc. v. Cincinnati* (1997), 122 Ohio App.3d 126, 133. The Court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987); *Mitchell v. Lawson Milk Co*.

(1988), 40 Ohio St.3d 190, 193 (conclusory statements in the complaint, not supported by facts are not afforded the presumption of veracity).

{¶54} A review of the record indicates that Cornelison has failed to meet his burden; Cornelison's conclusory allegations alleged in his Complaint are insufficient to set forth an actionable claim. See *Strickler v. Waters*, 989 F.2d 1375, 1383 (4th Cir. Va. 1993) ("a vague and conclusory allegation does not state the kind of specific injury or prejudice to his litigation sufficient to survive summary judgment"). Moreover, Cornelison fails to articulate the actual "offending custom or policy" which resulted in the deprivation of a constitutional right. See *Harris v. Sutton*, 183 Ohio App.3d 616, 2009-Ohio-4033, at ¶24 ([t]he complaint fails to set forth operative facts sufficient to find that the city has an offending custom or policy that caused a violation of his rights. As a matter of law, the city could not be found to have violated Section 1983, Title 42, U.S. Code.").

{¶55} Thus, the trial court did not err in granting summary judgment on Cornelison's claims under 42 U.S.C. § 1983. *Vagas v. Hudson*, 9th Dist. No. 24713, 2009-Ohio-6794, at ¶15 ("the Vagases have not met the threshold requirement of a Section 1983 claim to factually allege the deprivation of a federal right. Although we accept the factual allegations of the complaint as true, in light of the paucity of facts, the Vagases have not set forth a claim for relief.").

{¶56} Cornelison's final assignment of error is without merit.

{¶57} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, granting summary judgment to the appellees, is affirmed. Costs to be taxed against appellants.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶58} I respectfully concur in part and dissent in part.

{¶59} I concur with the disposition of the majority with regard to appellants' state law claims and the federal claim brought under Section 1983, Title 42, U.S.Code, against Appellees West Farmington and Horner; however, I dissent with regard to the summary judgment in favor of Appellees Colosimo, Patchin, and Elkin on appellants' seventh cause of action, alleging a violation of federal civil rights laws by all defendants under the following federal statute:

{¶60} "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, *** subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Section 1983, Title 42, U.S.Code.

{¶61} Judgment in favor of Appellees West Farmington and Horner was appropriate in this matter. To assert a valid Section 1983 claim against Appellee West Farmington, appellants must set forth evidence of the policy or practice that violated their constitutional rights. The allegations in appellants' complaint fell short of this mark.

{¶62} In addition, there was evidentiary material in the form of an affidavit from Appellee Patchin that explained the role of Appellee Horner. In essence, the affidavit indicated that Appellee Horner took over as police chief at a time after the events alleged in the complaint took place. This allegation was sufficient to shift the burden to appellants with regard to the Section 1983 claim against Appellee Horner. However, appellants failed to respond with any evidentiary material concerning the claim against Appellee Horner, and, therefore, the dismissal of this claim was appropriate as to this party.

{¶63} Appellees Patchin and Elkin moved for summary judgment "on all claims." As moving parties, they bore the initial burden of showing that no genuine issue of material fact existed and that they were entitled to judgment as a matter of law. However, they presented no evidentiary material or argument in their brief in support of summary judgment on the Section 1983 claim. Appellee Colosimo also requested summary judgment on the Section 1983 claim, incorporating the affidavits filed by Appellees Patchin, Horner, Elkin, and West Farmington. With regard to the Section 1983 claim against him, Appellee Colosimo argued that he was essentially entitled to judgment on the pleadings.

{¶64} Since there was little, if any, evidentiary material submitted on behalf of Appellees Patchin, Elkin, and Colosimo with regard to the Section 1983 claim, the burden with regard to this claim never shifted to appellants. Therefore, this claim would

survive, unless the complaint failed to properly allege a cause of action under Section 1983, Title 42, U.S.Code.

{¶65} "Ohio courts have long held that in order to state a claim under Section 1983, a plaintiff must allege (1) a person acted under the color of state law and committed the conduct in controversy and (2) the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or the laws of the United States." *Ratcliff v. Darby*, 4th Dist. No. 02CA2832, 2002-Ohio-6626, at ¶31. (Citations omitted.)

{¶66} The complaint, at count 7, incorporates all of the previous allegations under the other causes of action. At paragraph 73, the complaint states that the "actions described above of Defendants *** were committed under color of law and authority as mayor and police officers for Defendant West Farmington Village, and while acting in that official capacity deprived Plaintiff Ted Cornelison rights under the laws of the State of Ohio and Constitution of the United States, in particular, the Fourth and Fourteenth Amendments and 42 U.S.C.A. 1983."

{¶67} Additionally, at paragraph 75, the complaint asserts that appellants:

{¶68} "[S]uffered damages, and was thereby deprived of rights and immunities secured to him under the laws of the State of Ohio, the Constitution of laws of the United States, including, but not limited to, Plaintiff's rights to be secure in his person and property, to be free from unlawful searches, seizures, arrests, and the excessive use of force, to be allowed his right to due process and equal protection under the laws."

{¶69} Appellee Colosimo is the only party that presented any argument at the trial court level that he was entitled to judgment on this claim. On appeal, Appellee Colosimo suggests that appellants "only set forth wholly conclusory allegations that

constitutional rights were violated with no specific factual underpinnings." Appellee Colosimo further asserts that the complaint does not state a "due process claim." He then maintains that appellants "generally assert that Cornelison has been denied due process. They do not state whether the claim arises under the procedural or substantive component of the due process clause." There is no authority cited for the prospect that alleging "procedural" versus "substantive" due process is required in this instance. Furthermore, I have found no authority that would suggest this distinction is essential or even typical under a Section 1983 claim. To the contrary, courts have accepted language with much less specificity as a viable statement of liability for a Section 1983 claim. See, e.g., *Ratcliff v. Darby*, supra, at ¶31, where the Fourth Appellate District reversed the trial court's granting of summary judgment in favor of the defendant, stating that the plaintiff "alleged in his complaint that [the defendant], while acting under the authority of state law, unjustifiably threatened him with a gun and that such action deprived him of his rights."

{¶70} Due to the lack of evidentiary material in support of the motion for summary judgment on the Section 1983 claim, I would reverse the grant of summary judgment with regard to Appellees Patchin, Elkin, and Colosimo.