COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 13, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 95-1683

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MICHAEL R. BEHR,

Plaintiff-Appellant,

v.

DOUGLAS COUNTY, WISCONSIN,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Douglas County: JOSEPH A. MCDONALD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Michael Behr appeals a summary judgment dismissing his 42 U.S.C. § 1983 action against Douglas County. Behr argues that his pleadings state a claim upon which relief can be granted. Because Behr has failed to allege that an official policy of Douglas County resulted in a

constitutional violation, the complaint fails to state a § 1983 claim against Douglas County. We affirm the judgment of dismissal.[1]

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). A reviewing court first examines the pleadings to determine whether claims have been stated and whether material factual issues are presented. *See* ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980).[2] In reviewing the sufficiency of the complaint, we accept as true all well-pleaded facts and reasonable inferences therefrom. ***Baxter v. Vigo County School Corp.***, 26 F.3d 728, 730 (7th Cir. 1994). We are not compelled to accept conclusory allegations concerning the legal effect of the facts pled in the complaint. ***Id.***

In general, the complaint need not set out specific facts, but must provide notice of the essential elements of the claim. ***Jackson v. Marion County,*** 66 F.3d 151, 154 (7th Cir. 1995); *see also* § 802.02(1), STATS.; *cf.* ***Sutliff, Inc. v. Donovan Cos.***, 727 F.2d 648, 654 (7th Cir. 1984) (Even under notice pleading, pleader must still include either direct or inferential allegations respecting all the material elements of a claim, and bare legal conclusions attached to the narrated facts will not suffice.).

Behr argues that to state a claim for relief under 42 U.S.C. § 1983, only two elements are required: (1) the plaintiff must have been deprived of a right secured by the constitution or laws of the United States, and (2) the defendant's actions must have been taken under the color of state law, relying on ***Kramer v. Horton,*** 125 Wis.2d 177, 184-85, 371 N.W.2d 801, 805 (Ct. App. 1985), *rev'd on other grounds,* 128 Wis.2d 404, 383 N.W.2d 54 (1986)). Behr's

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[1] Behr also argues that Douglas County failed to establish a prima facie defense and that he established a material dispute of fact precluding summary judgment. Because the first issue is dispositive, we do not reach these other issues.

[2] If the complaint states a claim and the pleadings show the existence of material factual issues, the court examines the moving party's affidavits and supporting proofs to determine whether it has made a prima facie case for summary judgment. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980). However, because we conclude that the complaint fails to state a claim upon which relief may be granted, we do not reach these next steps.

analysis misses the mark. ***Kramer*** did not involve a claim against a municipality. A municipality is not liable in a § 1983 action "unless a municipal policy or custom caused the constitutional injury." ***Leatherman v. Tarrant County Narcotics, Intell. & Coord. Unit,*** 113 S.Ct. 1160, 1162 (1993); ***Monell v. DHSS,*** 436 U.S. 658, 690-91 (1978). Consequently, ***Kramer's*** analysis, albeit reversed on other grounds, is inapplicable to the case before us.

Municipalities can "be held liable under Section 1983 for constitutional violations caused by their official policies, including unwritten customs." ***Strauss v. City of Chicago,*** 760 F.2d 765, 766-67 (7th Cir. 1985). Municipalities cannot be held liable solely on a theory of *respondeat superior.* ***Id.*** at 767. Proximate causation between the policy and the injury must be present. ***Id.*** "A successful suit requires the plaintiff to establish that he was injured, and that some municipal policy, custom or practice proximately caused the injury." ***Id.*** In some circumstances, municipal § 1983 liability may be imposed for a single decision by a municipal policymaker. ***Pembauer v. City of Cincinnati,*** 475 U.S. 469, 480 (1986).

Here, Behr's complaint fails to allege any policy or custom on the part of Douglas County. It fails to allege any decision of a policymaker. The complaint's first five paragraphs allege jurisdiction and identity of parties. The next three paragraphs allege general legal conclusions that Douglas County, through its officers, acted under the color of law to deprive Behr of his First and Fourteenth Amendment rights. These allegations contravene ***Monell***, which "made very clear ... that municipalities could not be held liable solely on a theory of *respondeat superior*" in a § 1983 action. ***Strauss,*** 760 F.2d at 767. Paragraphs seven through nine generally allege willful intimidation, harassment, damage, conspiracy to do the same, fraud and perjured statements. They do not allege any official policy, unwritten custom, policymaker's decision, or make any allegation from which to infer these elements.

The next four paragraphs allege factual matters, but fail to state any claim upon which relief could be granted. Paragraph 10 alleges that Douglas County failed to remedy its illegal behavior when notified of it, and failed to respond to Behr's questions. Without stating any date, paragraph 11 alleges that Behr, after he had mailed out a publication, was taken prisoner on a Friday and held until the following Tuesday. However, paragraph 11 fails to allege that it was Douglas County that made the arrest, or that the arrest was

made without a warrant or without probable cause. At the very least, Behr must allege what made his arrest illegal and how it was a result of Douglas County's official policy or unwritten custom. *See* ***Strauss.*** Paragraph 12 alleges that Douglas County refused to take "corrective action" in response to Behr's "demand[]."

Paragraph 13 alleges that Behr was taken prisoner a second time on July 3 and held by Douglas County for approximately two weeks. The final paragraph, 14, alleges Behr's damages. Again, these paragraphs state no year, nor that the arrest was without probable cause or a warrant. It fails to identify how the arrest was illegal or how it was caused by an official policy or unwritten custom of Douglas County. "The existence of a policy that caused a plaintiff's injury is an essential part of Section 1983 liability ...." ***Strauss,*** 760 F.2d at 768. Some allegation indicating the existence of such policy must be pled.

Without some indication, apart from the fact of employment, that a policy causing plaintiff's injury might exist, the plaintiff simply cannot proceed in court against the municipality. ***Id.*** Because Behr has failed to allege that a policy existed, and has failed to make any allegation from which to infer such policy, his complaint fails to state a § 1983 claim upon which relief may be granted.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.