

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 6, 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**

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No. 96-0164

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**FRANCIS PENTERMAN, SR., AND  
RUTH KAMNIK,**

**Plaintiffs-Appellants,**

**DUPONT MUTUAL INSURANCE, A  
WISCONSIN INSURANCE CORPORATION,**

**Involuntary-Plaintiff,**

**v.**

**WISCONSIN ELECTRIC POWER COMPANY,  
A DOMESTIC CORPORATION**

**Defendant,**

**DANIEL M. DASHO,**

**Defendant-Respondent.**

APPEAL from an order of the circuit court for Outagamie County:  
JOHN A. DES JARDINS, Judge. *Affirmed.*

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

MYSE, J. Francis Penterman, Sr., and Ruth Kamnik appeal an order dismissing their complaint against Daniel Dasho because it failed to state a claim upon which relief could be granted and concluding that Dasho was entitled to qualified immunity from the claims. The appellants contend that the amended complaint stated a claim under 42 U.S.C. § 1983<sup>1</sup> for deprivation of constitutionally protected rights because Dasho's conduct deprived the appellants of: (1) the right of access to the courts as secured by the First and Fourteenth Amendments; (2) procedural due process; (3) protected property interests in violation of substantive due process; and (4) equal protection of the laws. We reject the appellants' arguments and affirm the order.<sup>2</sup>

The appellants commenced an action against Wisconsin Electric Power Company (WEPCo) to recover damages from "stray voltage" on their dairy farm, alleging strict liability, nuisance, negligence, trespass and statutory violations. Following preliminary discovery, the appellants filed an amended complaint adding Dasho, of the Public Service Commission's Stray Voltage Assessment Team (SVAT), as a defendant and asserting various claims against Dasho and WEPCo under 42 U.S.C. § 1983.

According to the complaint, the appellants experienced substantial problems in their dairy operation, including reduced milk production and increased death and illness of cattle. After receiving an electrical shock from the bulk tank in their milk house, Penterman investigated and believed that stray voltage was accessing the barn through WEPCo's distribution line. Penterman

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<sup>1</sup> 42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

<sup>2</sup> Penterman also contends that the trial court erred when it determined that Dasho was entitled to qualified immunity from the claims. Because we conclude that the complaint does not state a claim upon which relief could be granted against Dasho, we need not address this issue. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (only dispositive issues need be addressed).

then contacted SVAT, which contacted WEPCo. When WEPCo representatives came to the farm, they claimed the stray voltage was the result of on farm problems. Dasho later came to the farm to supervise and observe the testing. WEPCo continued to take the position that there was no utility problem and Dasho likewise represented that any utility responsibility had been fixed. Dasho then directed and supervised a limited SVAT analysis on the farm. In Dasho's report, he claimed that SVAT found no severe levels of stray voltage.

The complaint further alleged that Dasho, acting under color of state law, deliberately, intentionally and/or recklessly deprived the appellants of the constitutionally protected rights of access to the courts, substantive due process, procedural due process and equal protection. The appellants alleged that Dasho deprived them of these constitutionally protected rights by, among other things: (1) reporting information through testing he knew or should have known was improperly conducted and would produce inaccurate results; (2) attributing stray voltage to on farm causes when he knew or should have known that such an attribution was false; and (3) conspiring with and/or aiding and abetting WEPCo in its efforts to conceal evidence of utility-caused stray voltage on the farm.

Dasho moved to dismiss the amended complaint against him because he claimed it failed to state a claim upon which relief could be granted and because he was entitled to qualified immunity from the claims. The trial court granted the motion.

The issue whether the complaint states a claim upon which relief may be granted is a question of law that we review without deference to the trial court. *Koestler v. Pollard*, 162 Wis.2d 797, 802, 471 N.W.2d 7, 9 (1991). On review, we must accept as true the facts stated in the complaint and all reasonable inferences to be drawn from those facts. *Greene by Schoone v. Farnsworth*, 188 Wis.2d 365, 369, 525 N.W.2d 107, 109 (Ct. App. 1994). We will affirm the dismissal only if it is quite clear that the plaintiff cannot recover under any circumstances. *Id.*

A party asserting a claim under 42 U.S.C. § 1983 must allege (1) that some person has deprived him of a federal right, and (2) that the person who deprived him of that right acted under color of state law. *Gomez v.*

*Toledo*, 446 U.S. 635, 640 (1980). The parties do not dispute that the complaint sufficiently alleges that Dasho was acting under color of state law during the actions stated in the complaint. Therefore, we must address whether the allegations are sufficient to state a claim that Dasho deprived the appellants of a federal right.

First, the appellants contend that Dasho's conduct deprived them of the right of access to the courts. The right of access to the courts is one of the fundamental rights protected by the Constitution. *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983). The appellants contend that the allegation that Dasho, individually and in concert with WEPCo, knowingly reported that no stray voltage existed when in fact stray voltage did exist is sufficient to allege denial of access to the courts.

The appellants rely on *Ryland* and *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), for their argument. In *Ryland*, the complaint alleged that a local prosecutor murdered Ryland's daughter. The local prosecutor then prevented a full investigation by cancelling an autopsy and getting a coroner to sign a death certificate listing suicide as the cause of death. *Id.* at 969. In *Bell*, police officers shot an unarmed youth in the back killing him. The officers then planted a knife in the youth's hand and conspired to portray the killing as self-defense. *Id.* at 1216. While the youth's father filed a wrongful death action soon after the killing, the officers' cover-up and resistance prevented him from gaining access to the key facts necessary to prove such a claim. *Id.* at 1261.

The courts in both *Ryland* and *Bell* concluded that the cover-up and resistance preventing access to key facts was sufficient for a claim of denial of access to the courts. Access to the courts must be adequate, effective and meaningful. *Bell*, 746 F.2d at 1261. This constitutional right is lost where police officials shield the public and the victim's family from key facts that would form the basis of the family's claims. *Id.* The appellants argue that Dasho similarly shielded key facts which form the basis of their claim against WEPCo and therefore they were denied their constitutional right of access to the courts.

We conclude that the complaint is not sufficient to state a claim that the appellants were denied their constitutional right of access to the courts. The appellants' complaint does allege that Dasho concealed facts by reporting

that no stray voltage existed when in fact it did exist. However, both *Ryland* and *Bell* are distinguishable. In *Ryland* and *Bell*, the facts of the deaths were in the sole control of the defendants. In contrast, the facts allegedly concealed in this case were not in the sole control of Dasho. The appellants were personally involved and had firsthand knowledge of facts regarding the possibility of stray voltage. The facts known to the appellants were sufficient to enable them to obtain an expert to test for stray voltage and file a lawsuit promptly, unlike *Ryland* and *Bell*. The appellants were free to have an expert of their own choosing investigate the possibility of stray voltage. There is no allegation that Dasho attempted to prevent any additional investigation or that he concealed any physical evidence in order to prevent an investigation. The alleged concealing of facts did not deny the appellant access to the courts; at most, it hampered the discovery of evidence. Because Dasho was not in sole control of the facts allegedly concealed and because the evidence necessary to pursue a claim was readily accessible from alternate sources, this case is distinguishable from *Ryland* and *Bell* and we conclude that the complaint does not state a claim for denial of access to the courts.

The appellants next contend that the allegations were adequate to state a claim for violation of their rights to procedural due process. First, we note that the due process clause is not implicated by the negligence of an official causing unintended loss of or injury to life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Accordingly, insofar as the complaint alleges negligence, the complaint does not state a claim for deprivation of procedural due process.

The appellants, however, also alleged in their complaint that Dasho's conduct was deliberate and intentional and that he conspired with WEPCo to conceal evidence. Therefore, we address whether the appellants have stated a claim for deprivation of procedural due process based on the alleged intentional conduct.

A deprivation of a constitutionally protected property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the state fails to provide an adequate postdeprivation remedy. *Zinermon v. Burch*, 494 U.S. 113, 130 (1990); *Jones v. Dane County*, 195 Wis.2d 892, 914-15, 537 N.W.2d 74, 80 (Ct. App. 1995). Where the state cannot predict and guard in advance against a

deprivation, a postdeprivation tort remedy is all the process the state can be expected to provide, and is constitutionally sufficient. *Jones*, 195 Wis.2d at 914-15, 537 N.W.2d at 80.

The complaint includes allegations that Dasho attributed stray voltage to on farm causes when he knew such an attribution was false and that he conspired with WEPCo to conceal evidence of the stray voltage. The appellants cite *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985), for a per se rule that a conspiracy can never be characterized as random. This position was rejected in *Easter House v. Felder*, 910 F.2d 1387, 1399 (7th Cir. 1990). While a conspiracy is not random from the point of view of the conspirators, a conspiracy may be a random act, if from the point of view of the state, the state cannot anticipate or control such conduct in advance. *Id.* We conclude that the state could not be expected to predict and guard in advance against Dasho's alleged conduct. The state cannot be expected to anticipate that Dasho would conspire to conceal evidence regarding stray voltage on a farm. Because Dasho's alleged unauthorized actions are both random and unpredictable, we next look to whether the state provides an adequate postdeprivation remedy.

We conclude that the state provides adequate postdeprivation remedies. Based on Dasho's alleged conduct, the appellants would have several tort remedies available under Wisconsin law.<sup>3</sup> Postdeprivation remedies provided by the state will not be considered inadequate even if they fail to provide all the relief which may have been available had the appellants proceeded under § 1983. *Casteel v. Kolb*, 176 Wis.2d 440, 445-46, 500 N.W.2d 400, 403 (Ct. App. 1993). Because Dasho's conduct was random and unpredictable and state law provides adequate postdeprivation remedies, the process is sufficient. See *Jones*, 195 Wis.2d at 914-15, 537 N.W.2d at 80. Therefore, we conclude that the appellants have failed to state a claim for deprivation of procedural due process.

Next, the appellants contend that they stated a claim for deprivation of protected property interests in violation of substantive due process. The appellants alleged in their complaint that WEPCo and Dasho's wrongful conduct caused them

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<sup>3</sup> The appellants do not challenge the availability of state postdeprivation remedies.

substantial injury and damages including death of livestock, reduction in value of affected livestock, reduction in milk production, and reduction in value of their farm property.

Substantive due process rights are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution. *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986). The protections of substantive due process have, for the most part, been limited "to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 114 S.Ct. 807, 812 (1994). Accordingly, mere property interests are not subject to substantive due process claims. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229-30 (1985) (Powell, J., concurring); see also *Mangels*, 789 F.2d at 839; *Kauth v. Hartford Ins. Co.*, 852 F.2d 951, 956-57 (7th Cir. 1988). Because the property interests asserted by the appellants bear little resemblance to the fundamental interests that previously have been viewed as protected by the Constitution, we conclude that the appellants failed to state a claim for deprivation of substantive due process. See *Ewing*, 474 U.S. at 229-30.

Finally, the appellants contend that Dasho's conduct deprived them of the equal protection of the laws. The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Generally, equal protection claims require the complainant be a member of a cognizable class. See *Huebschen v. DHSS*, 716 F.2d 1167, 1171 (7th Cir. 1983); *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). Because the appellants are not members of a cognizable class, their equal protection claim in general would fail. However, there is an exception to the cognizable class requirement as stated in *Esmail*. *Esmail* held that unequal treatment which is motivated by vindictiveness or animosity violates the equal protection clause. *Id.* at 179. Because the appellants made no allegation that Dasho's actions were motivated by vindictiveness or animosity toward the appellants, we conclude that the appellants have failed to state a claim for violation of equal protection.

Because we conclude that the appellants' amended complaint fails to state a claim upon which relief could be granted against Dasho, we affirm the order.

*By the Court.* – Order affirmed.

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