

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP179

Cir. Ct. No. 2006CV1217

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ANNETTE GOODSON,

PLAINTIFF-APPELLANT,

V.

UNIVERSITY OF WISCONSIN HOSPITALS & CLINICS AUTHORITY,

DEFENDANT,

FRANK J. SALVI, M.D.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Annette Goodson appeals an order dismissing her complaint against Frank Salvi, M.D. The issue is whether Goodson has a viable cause of action against Salvi under 42 U.S.C. § 1983. We conclude that she does not, and therefore affirm.

¶2 Goodson alleged that Salvi, while employed as a physician by the State of Wisconsin, sexually assaulted her during a physical examination at the University of Wisconsin Hospital and Clinics. She based her 42 U.S.C. § 1983 claim on his alleged violation of her equal protection right, as a woman, under the Fourteenth Amendment. The trial court concluded on undisputed facts that Salvi was not acting under “color of state law” when he allegedly committed the assault, and dismissed the claim on Salvi’s summary judgment motion. Goodson appeals that determination.¹

¶3 To recover under 42 U.S.C. § 1983, a plaintiff must establish that the named defendant violated a federally secured right while acting under the “color of state law.” See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). “[U]nder color of state law” is defined as a “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law....” *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 65 n.3, 384 N.W.2d 333 (1986) (quoting *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds*, *Monell v. Department of Soc. Serv. of N.Y.*, 436 U.S. 658 (1978)). Because the material facts are not disputed, whether Salvi acted under color of

¹ The trial court also dismissed Goodson’s state law claims against Salvi. She does not dispute the dismissal of those claims in her appeal.

state law is a question of law that we decide de novo. See *Bantz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991).

¶4 In *West v. Atkins*, 487 U.S. 42 (1988), the United States Supreme Court held that under certain conditions a treating physician, while acting in the capacity of a state employee, acts under color of state law. *Id.* at 54-57. The Supreme Court held dispositive the fact that the plaintiff was a prisoner with no access to medical treatment from any source other than the state, and the fact that the state had a constitutional duty to provide the plaintiff with medical treatment and had chosen the defendant physician as its agent in fulfilling that duty. *Id.* at 54-57. Neither circumstance was present in this case. Neither the State nor Salvi had a legal duty to provide Goodson with treatment, and there is no dispute that Goodson could have sought treatment from a private physician. Consequently, Salvi was not acting as the State's agent in fulfilling a duty the State owed Goodson, and therefore his alleged actions were not fairly attributable to the State for purposes of 42 U.S.C. § 1983 liability. Accordingly, in treating Goodson, Salvi was not acting under color of state law.

¶5 Goodson also contends that, as a matter of law, Salvi's alleged conduct violated her equal protection rights. The circuit court determined that it was not necessary to decide that issue, and we agree. The conclusion that Salvi did not act under color of state law resolves the case in his favor, regardless whether Goodson could prove a constitutional violation.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

