

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:ss	
COUNTY OF LINCOLN	)	SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY,	)	41Civ. 20-275
	)	
Plaintiff,	)	
	)	
v.	)	BRIEF IN SUPPORT OF
	)	MOTION FOR DISMISSAL OF COUNTER
DAVID TUNTLAND,	)	PURSUANT TO
	)	SDCL 15-6-12(b)(c)
Defendants.	)	
	)	

Plaintiff, Lincoln County, by and through the undersigned counsel, filed a Motion for Declaratory Relief pursuant to SDCL 15-6-12(c). Plaintiff now respectfully submits this Brief in Support of Motion for Dismissal.

**Procedural Background**

Plaintiff filed a Declaratory Relief Complaint on April 23, 2020 and served the Defendant on the same day. More than thirty days have passed since the service of the Complaint on the Defendant. Defendant filed a counterclaim alleging a First Amendment violation pursuant to 42 U.S.C. 1983. Defendant solely named Lincoln County as the defendant in his § 1983 action.

**Legal Analysis**

**A. Official Capacity Claims**

The Eleventh Amendment generally bars suits for damages against a state or state officials in their official capacities unless the state waives its sovereign immunity. *See Hansen v. South Dakota Dept. of Transp.*, 584 N.W.2d 881 (1998). *See, e.g., Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). Immunity from suit is a question of law for the court, not a question of fact for a jury to decide. *See e.g., Lopez v. Mendez*, 432 F.3d 829, 835 (8th Cir. 2005) (discussing sovereign immunity); *Entergy Ark., Inc. v. Nebraska*, 358 F.3d 528, 556 (8th Cir. 2004) (“Whether a state has waived its sovereign immunity is a question of law which we review

de novo.”). In his counterclaim, Defendant utterly fails to address how Lincoln County waived its immunity under the Eleventh Amendment. Both the Eighth Circuit and the United States Supreme Court have held that neither a state nor its officials acting in their official capacities are “persons” who may be sued for money damages in a § 1983 action. *See Lapidus v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 617 (2002); *Will*, 491 U.S. at 71; *McLean v. Gordon*, 548 F.3d 613, 618 (8th Cir. 2008). Moreover, South Dakota precedent establishes that state officials sued in their official capacities are not “persons” within the ambit of § 1983. Our Court has stated:

[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device. We hold that neither the State nor its officials acting in their official capacities are “persons” under § 1983. *Hafner*, 520 N.W.2d at 591 (quoting *Will*, 491 U.S. at 71, 109 S.Ct. at 2312, 105 L.Ed.2d at 58). Insofar as Supervisors were sued in their official capacities, they were entitled to summary judgment as a matter of law.

*Hansen v. South Dakota Dept. of Transp.*, 584 N.W.2d 881 (1998)

While the counterclaim mentions the County Commissioners, it does not name them as parties. Even if it had, the Commissioners were exercising discretionary, policy-making functions and duties, for which there can be no liability. *See Hansen v. South Dakota Dept. of Transp.*, 584 N.W.2d 881 (1998). The counterclaim alleges that Lincoln County filed a declaratory action naming Defendant, thereby violating his First Amendment rights. In his Answer to Lincoln County’s declaratory action, Defendant admits that Lincoln County falls under SDCL 21-24, a person or entity under this title. *See answer and counterclaim #2*. Pursuant to SDCL 21-24-7, interested parties must be named. Defendant was the only person known to the County who was objecting. Failing to name Defendant would render any decision of this Court inapplicable to him. Thus, State law dictated his inclusion in this action. Defendant was not,

however, required to file an Answer or otherwise participate in this action. Defendant's property, rights, or liberty are not disparately affected from any other taxpayer in Lincoln County. The only issue presented in Lincoln County's action is the legality and ability of Defendant to challenge the resolution. Accordingly, his interest is the same as any other, similarly situated taxpayer. The Board of Commissioners' actions fall within their official capacity and are protected by sovereignty. As a result, this Court should grant Lincoln County's Motion to Dismiss.

**B. Official Capacity Claims: Custom or Policy**

Defendant has not claimed or alleged that the State or Lincoln County has a custom or policy that violated his civil rights. It is Defendant's burden, however, to show that the constitutional violations alleged stem from an unconstitutional policy or custom. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)) ("Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, 'the entity's 'policy or custom' must have played a part in the violation of federal law.'"). "Assuming the existence of an unconstitutional [government] custom, a § 1983 claimant cannot recover unless the claimant also proves that the custom caused the resulting injury." *Ricketts v. City of Columbia, Mo.*, 36 F.3d 775, 779 (8th Cir. 1994). "[I]t is when execution of a government's policy or custom . . . *inflicts* the injury that the government as an entity is responsible under § 1983.'" *Id.* (quoting *Monell v. New York City Dep't of Social Serv.*, 426 U.S. 658, 694 (1977)) (alterations and emphasis retained).

Through his § 1983 action, Defendant asserts that (1) Lincoln County did not provide adequate notice to the February 18, 2020 meeting, (2) he did not have an opportunity to be heard on the Resolution, and (3) the County has sought a declaratory ruling. Each of these allegations

represents actions, not policy or custom. Therefore, Defendant has failed to state a claim on which relief can be granted.

Courts have restricted the reach of the protections of substantive due process primarily to liberties “deeply rooted in this Nation’s history and tradition[.]” *Van Orden v. Stringer*, 937 F.3d 1162, 1167 (8th Cir. 2019). These protections under the substantive due process doctrine ““have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.”” *Albright v. Oliver*, 510 U.S. 266, 272 (1994). Defendant does not make any of these claims. Further, the South Dakota Supreme Court has stated:

The finding of liability by the trial court solely on *Tri County I’s* “arbitrary and capricious” finding was wrong. As in *Chesterfield*, a “bad-faith violation of state law remains only a violation of state law” and should ““not automatically give rise to a violation of rights secured by the Constitution.”” See *Chesterfield*, 963 F.2d at 1104, 1105 (quotation omitted) (emphasis added). To allow this liability determination to stand would elevate “every violation of state law ... into a federal constitutional tort.” See *id.* at 1104 (citing *Lemke*, 846 F.2d at 472).

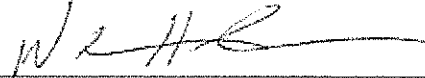
*Tri County Landfill Ass’n, Inc. v. Brule County*, 619 N.W.2d 663, 670 (S.D. 2000) (emphasis added).

Also, the Court adopted “truly irrational” as the standard for substantive due process claims. See *id.* at 669. The Court made clear that it takes exceptional circumstances and actions to rise to the level of constitutional violations of rights. Defendant’s claims fail to even rise to the level of minor procedural violations of law. Even with due deference and viewing the facts in a light most favorable to Defendant, his claims fail to show that Lincoln County acted in a truly irrational manner and were anything more than possible violations of state law. At any rate, Lincoln County denies any violations in its Complaint and Answer. In addition, Lincoln County denies that Defendant did not have notice or an opportunity to be heard. Even if that is not the case, it still fails to rise to the level of a constitutional violation as a matter of law. Accordingly, this Court should grant Lincoln County’s Motion to Dismiss.

**Conclusion**

Lincoln County is entitled to an Order dismissing the Counterclaim.

Dated this 12<sup>th</sup> day of June, 2020.



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