IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL & DEBORAH SCHAEFER,

ORDER

Plaintiffs,

03-C-226-C

v.

CHIPPEWA COUNTY MUNICIPALITY,

Defendant.

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Plaintiffs Michael and Deborah Schaefer are prosecuting this civil action without the assistance of counsel. In an order entered on May 8, 2003, I noted that plaintiffs' complaint was defective because plaintiff Deborah Schaefer had not signed it. I gave plaintiff Deborah Schaefer until May 22, 2003 in which to cure the defect or be subject to dismissal from the case. Instead of signing the original complaint, both plaintiffs signed and submitted an amended complaint received by the court on May 21, 2003, in which they name additional defendants and changed their request for relief to eliminate a request for compensatory and punitive damages, stating only "[w]e wish the court to hear our case, judge it on its merits and find [a] remedy for our grievances." Earlier, on May 12, 2003, plaintiffs filed a document titled "Amendment to Complaint," which was signed by plaintiff Michael Schaefer

only. This document sets out a "statement of the case" that contains more factual allegations about the basis of their complaint than either the original complaint or the May 21 amended complaint. However, this "amendment" does not include any request for relief and, like plaintiffs' original complaint, is flawed because plaintiff Deborah Schaeffer has not signed it.

Plaintiffs who prosecute lawsuits in federal court by themselves without counsel often lack a clear understanding of civil court procedure and federal court jurisdiction. The plaintiffs in this case are no exception. They are stumbling on the very first step, which is to get a proper complaint filed.

Plaintiffs may well be advised to go to the nearest legal law library and look at the Federal Rules of Civil Procedure, a book published by West Publishing Company, or to look for the rules on the internet. One web page linking to the 2003 rules online is http://www.law.cornell.edu/rules/frcp/overview.htm. In particular, plaintiffs should refer to Fed. R. Civ. P. 8(a)(requiring that a complaint contain a demand for relief), Fed. R. Civ. P. 10 (requiring a complaint to have a caption naming all parties and that the facts making up the claim be stated in numbered paragraphs), Fed. R. Civ. P. 11 (requiring a signature of all plaintiffs and certification that they have made a reasonable inquiry into the legal validity of their claims before filing the complaint), and Fed. R. Civ. P. 15 (discussing amended and supplemental pleadings).

Fed. R. Civ. P. 15 allows a plaintiff to amend his complaint once as a matter of right before the defendants file an answer, but any amendment proposed thereafter must be approved by the court. In this case, plaintiffs' first amended complaint remains flawed not only by the failure of plaintiff Deborah Shaefer to sign it, but by the absence of a request for any relief. Because a demand for relief is a basic pleading requirement central to establishing a case or controversy over which a federal court may have jurisdiction, plaintiff's first amended complaint is not an acceptable substitute for their original complaint. Therefore, I will not consider it.

With respect to plaintiff's second proposed amended complaint, I construe the proposed amendment to include a motion to amend. The motion will be denied, however, because the complaint fails to state a claim against any of the proposed named defendants and thus, would be futile.

In their second amended complaint, plaintiffs name as defendants: 1) Marge Geissler, Register of Deeds for Chippewa County; 2) Chippewa County, the municipality; 3) Howard White, a private lawyer; 4) the State of Wisconsin; and 5) Circuit Court Judge Thomas Sazama. The factual allegations making up plaintiffs' claim are as follows.

## ALLEGATIONS OF FACT

On July 15, 1996, Judge Thomas J. Sazama willfully and negligently denied plaintiff

Deborah Schaefer the ability to sit in on a hearing held in the judge's chambers with plaintiffs' lawyer and opposing counsel. This was just before the start of trial in Schaefer v. Honchell, case no. 96-CV-3. The in-chambers hearing should have been held in open court. After preventing plaintiffs from attending the chambers conference, the court erroneously issued orders that detrimentally affected them. Plaintiffs' lawyer, defendant Howard White, did not have "power of attorney." His stipulation to certain elements of the case without plaintiffs' knowledge or permission violated plaintiffs' Fourteenth Amendment rights.

Defendant Thomas Sazama violated Wisconsin state statutes and plaintiffs' constitutional rights by ordering a deed reformation on July 15, 1996, without any testimony being given or evidence found in the record to justify the order.

Defendant Marge Geissler violated state law and plaintiffs' constitutional rights by executing the deed that was unlawfully ordered by defendant Sazama, and further violated state law by executing a Wisconsin Real Estate Transfer Return and Warranty Deed.

Defendant Howard White, plaintiffs' lawyer, wilfully, knowingly and maliciously affixed his signature to a Wisconsin Real Estate Transfer Return without proper authorization or power of attorney as required by state statute and registered the documents with the Register of Deeds for Chippewa County.

Defendant Chippewa County is the government entity responsible for the acts of defendants Sazama and Geissler.

Defendant State of Wisconsin is the employing office of Circuit Court Branch II of Chippewa County and has disregarded and refused to enforce its own state statutes, leaving plaintiffs with no remedy other than to file a complaint in federal court.

## OPINION

As a general rule, federal courts have the power to hear two types of cases: 1) cases alleging a violation of the plaintiffs' constitutional rights or rights under federal law, see 28 U.S.C. § 1331; and 2) cases alleging violations of state law, where the parties are citizens of different states and the amount in controversy exceeds $75,000, see 28 U.S.C. § 1332.

Plaintiffs allege that their Fourteenth Amendment constitutional rights were violated by the actions of defendants Sazama, White and Geissler, and that as entities with supervisory responsibility, the State of Wisconsin and Chippewa County are also liable to them for the unconstitutional acts of their subordinates.

To state a valid cause of action under § 1983, plaintiffs must allege first that the defendants deprived them of a right secured by the Constitution or the laws of the United States and second that the defendants acted "under color of state law" in causing that deprivation. Starnes v. Capital Cities Media, Inc., 39 F.3d 1394, 1396 (7th Cir. 1994). In this case, plaintiffs allege that defendants deprived them of their right to due process of law by taking certain actions detrimental to them in the course of their litigating an action in the

Chippewa County circuit court. This claim is legally meritless.

The state has established a procedure for litigants to challenge the decisions of circuit court judges. If plaintiffs were unhappy with Judge Sazama's decisions in their civil action in his court, their recourse was to file an appeal with the state appellate court and, if they were not satisfied with the decision of the court of appeals, they were free to appeal again to the state's supreme court. Because litigants in state court actions have access to those avenues of relief, they cannot claim that they have been denied their right to due process. See Guenther v. Holmgreen, 738 F.2d 879, 882 (7th Cir. 1984) ("a victim of a property or liberty deprivation who has recourse to an adequate state remedy has not been denied 'due process of law'"); see also Hood v. City of Chicago, 927 F.2d 312, 314 (7th Cir. 1991) (plaintiff not deprived of liberty without due process of law where state provides adequate tort law remedies).

Even if plaintiffs had stated a viable claim of constitutional wrongdoing, they cannot sue the State of Wisconsin, Judge Sazama or Marge Geissler in federal court, because each of these proposed defendants is immune from suit. Proposed defendant Thomas Sazama is immune from suit for his judicial acts. See Forrester v. White, 484 U.S. 219, 227 (1988) (judicial immunity applies to "the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court"). Proposed new defendant Marge Geissler cannot be sued for following the judge's orders. See Henry v. Farmer City

State Bank, 808 F.2d 1228, 1238-39 (7th Cir. 1986)(official who acts in reliance on facially valid court order entitled to absolute immunity for quasi-judicial acts). And proposed new defendant "State of Wisconsin" is immune from suit under the Eleventh Amendment. See Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 62-63 (1945); Gleason v. Board of Education of City of Chicago, 792 F.2d 76, 79 (7th Cir. 1986) ("the eleventh amendment 'prohibits federal courts from entertaining suits by private parties against States and their agencies'") (quoting Alabama v. Pugh, 438 U.S. 781, 782 (1978)).

In addition, even if plaintiffs had stated a viable constitutional claim, it is unlikely that they could succeed on their claim against defendant Chippewa County Municipality. To recover damages under §1983, a plaintiff must establish each defendant's personal responsibility for the claimed constitutional deprivation. Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). The doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under §1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Therefore, plaintiffs would be able to recover damages from defendant Chippewa County Municipality only if they could prove a violation of their constitutional rights as a direct result of an official municipal policy or custom. See Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691 (1978) (municipality not liable for employees' acts unless conduct complained of results from official municipal policy or custom). Nothing in

plaintiffs' allegations suggest that Judge Sazama or plaintiffs' lawyer were carrying out official custom or policy when they took the actions about which plaintiffs complain.

Finally, proposed defendant White is not a "state actor" subject to suit for alleged violations of plaintiffs' constitutional rights under 42 U.S.C. § 1983. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Generally, a private attorney does not act under color of state law merely by representing a client in a court of law. French v. Corrigan, 432 F.2d 1211, 1214-15 (7th Cir. 1970). In some circumstances, private actors who collaborate with a state official to deny an individual his constitutional rights may be said to be acting under color of state law. See Starnes, 39 F.3d at 1397 (7th Cir. 1994); see also Kimes v. Stone, 84 F.3d 1121, 1126 (9th Cir. 1996). However, in order to succeed on such a claim, a plaintiff must allege that the "public and private actors share a common and unconstitutional goal." Starnes, 39 F.3d at 1397 (citing Cunningham v. Southlake Center for Mental Health, 924 F.2d 106, 107 (7th Cir. 1991)). A plaintiff must demonstrate that "the state officials and the private party somehow reached an understanding to deny the plaintiffs their constitutional rights." House v. Belford, 956 F.2d 711, 721 (7th Cir. 1992) (citing Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1352 (7th Cir. 1985)). Because plaintiffs' complaint fails to state a claim of constitutional wrongdoing, they cannot succeed on a claim that defendant White conspired with a state actor to deprive them of their constitutional rights. Rather, plaintiffs may have a claim against their lawyer for legal malpractice, but that

is a state law claim that must be brought in state court if plaintiffs intend to pursue the matter. The claim cannot be heard in this court under diversity jurisdiction, because the parties are not alleged to be citizens of different states.

Having found that plaintiffs' proposed second amended complaint fails to state a legally meritorious claim for relief against any of the proposed defendants, I must deny plaintiffs' motion to amend as futile. That leaves plaintiffs' first complaint as the operative pleading in this action. By this order, I have made it clear that plaintiffs' suit is highly vulnerable to a motion to dismiss brought by Chippewa County Municipality. However, although I can deny a motion to amend a complaint on the ground that the amendment is futile, it is not proper for a district judge to dismiss a paid litigant's original complaint on the court's own motion for failure to state a claim upon which relief may be granted. Instead, plaintiffs will have to serve their complaint and await defendant's response, which may well be a motion to dismiss. Alternatively, they may request that the case be dismissed voluntarily or move to amend their complaint a third time to allege a claim properly made in federal court against a defendant who is not protected from suit by the doctrines of immunity or respondeat superior.

ORDER

IT IS ORDERED that

1) unless plaintiffs request voluntary dismissal of this action, plaintiff Deborah Schaefer may have an extension of time to June 4, 2003, in which to sign the original complaint;

2) plaintiffs' "Amendment to Complaint" dated May 7, 2003 and filed with the court on May 12, 2003, will be placed in the file but will not be considered because it does not meet the basic form of pleading required by the Federal Rules of Civil Procedure;

3) plaintiffs' motion to file a second amended complaint is DENIED because the proposed amended complaint is futile; and

4) after the original complaint is signed by both plaintiffs, plaintiffs are to arrange for service of the complaint on the defendant and immediately thereafter file proof of service with the court. If, by July 8, 2003, plaintiffs fail to submit proof of service as required by Fed. R. Civ. P. 4(l) or explain their inability to do so, then the clerk of court is directed to enter judgment dismissing this case without prejudice for plaintiffs' lack of prosecution.

Entered this 27th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge