No. 17-2279

United States Court of Appeals for the Eighth Circuit

Anmarie Calgaro

Plaintiff-Appellant

v.

St. Louis County, et al.

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA—ST. PAUL

DEFENDANTS-APPELLEES ST. LOUIS COUNTY AND LINNEA MIRSCH'S BRIEF

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Minnesota had subject-matter jurisdiction over this action under 28 U.S.C. § 1331 (2012) because the action arose under 42 U.S.C. § 1983 (2012) and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 (2012) because it is an appeal from the district court's final decision in the action. The district court entered an order granting the appellees' dispositive motions and denying the appellant's dispositive motion and a corresponding judgment on May 23, 2017. The appellant filed a notice of appeal on June 6, 2017, within the applicable thirty-day period in Fed. R. App. P. 4(a)(1)(A). The district court's order and judgment disposed of all parties' claims.

STATEMENT OF ISSUE

In this action under section 1983, Anmarie Calgaro claims that St. Louis County violated her due-process rights in connection with a decision that one of her children, E.J.K., was eligible for general assistance under Minnesota law. The issue presented by this appeal as it relates to us is whether the district court erred in granting our motion for judg-

ment on the pleadings on the grounds that the complaint fails to state a claim upon which relief can be granted.

The most apposite cases are *Monell v. Department of Social Services*, 436 U.S. 658 (1978), *Snyder v. King*, 745 F.3d 242 (7th Cir. 2014), *Vives v. City of New York*, 524 F.3d 346 (2d Cir. 2008), and *Bethesda Lutheran Homes & Services v. Leann*, 154 F.3d 716 (7th Cir. 1998). The most apposite statutes are Minn. Stat. § 256.045 (2016), Minn. Stat. § 256D.03 (2016), Minn. Stat. § 256D.05 (2016), and Minn. Stat. § 256D.10 (2016).

STATEMENT OF CASE

This appeal relates to general assistance, a state public-assistance program administered by county agencies such as the St. Louis County Department of Public Health and Human Services pursuant to the Minnesota General Assistance Act (the "Act"), Minn. Stat. §§ 256D.01–.21 (2016), and administrative rules promulgated by the Minnesota Department of Human Services ("MnDHS"), Minn. R. 9500.1200–.1272 (2013). The declaration of policy in the Act states that "eligible households unable to provide for themselves and not otherwise provided for by law who meet the eligibility requirements of [the Act] are entitled to

receive grants of general assistance necessary to maintain a subsistence reasonably compatible with decency and health," and that "[p]roviding this assistance is a matter of public concern and a necessity in promoting the public health and welfare." Minn. Stat. § 256D.01, subd. 1.

The Act goes on to state that "[a] principal objective in providing general assistance is to provide for single adults, childless couples, or *children as defined in section 256D.02, subdivision 6*, ineligible for federal programs who are unable to provide for themselves." *Id.* § 256D.01, subd. 1a(a) (emphasis added). The Act's definition of the term "child" includes, among other persons, "a person who qualifies for assistance under section 256D.05, subdivision 1, paragraph (a), clause (10)." *Id.* § 256D.02, subd. 6.

The cross-referenced provision, Minn. Stat. § 256D.05, subd. 1(a)(10),[1] covers:

> a child under the age of 18 who is not living with a parent, stepparent, or legal custodian, and only if: the child is *legally emancipated* or living with an adult with the consent of an agency acting as a legal custodian; the child is at least 16 years of age and the general assistance grant is ap-

[1] Under a recent amendment to the eligibility statute, subdivision 1(a)(10) became subdivision 1(a)(9). 2017 Minn. Laws ch. 40, art. 1, § 83. In this brief, we use the old numbering that was in effect during the period covered by the complaint.

> proved by the director of the county agency or a designated representative as a component of a social services case plan for the child; or the child is living with an adult with the consent of the child's legal custodian and the county agency.

(Emphasis added.)

For purposes of Minn. Stat. § 256D.05, subd. 1(a)(10), a "legally emancipated" child is:

> a person under the age of 18 years who: (i) has been married; (ii) is on active duty in the uniformed services of the United States; (iii) has been emancipated by a court of competent jurisdiction; or (iv) is otherwise considered emancipated under Minnesota law, and for whom county social services has not determined that a social services case plan is necessary, for reasons other than the child has failed or refuses to cooperate with the county agency in developing the plan.

Id.

State statutes and administrative rules establish a comprehensive scheme of procedural law relating to general assistance. As part of the scheme, state law provides for notice and a hearing in connection with a variety of government actions. The Act specifies, for example, that "[n]o grant of general assistance except one made pursuant to [a provision of the Act that addresses emergency general assistance] shall be reduced, terminated, or suspended unless the recipient receives notice and is afforded an opportunity to be heard prior to any action by the county

agency." *Id.* § 256D.10. To similar effect are Minn. Stat. § 256.045, subd. 3(a) (2016), and Minn. R. 9500.1211, subp. 4, which set forth detailed, exhaustive lists of the categories of government action in this area that trigger notice and a hearing.

State law does *not* provide for parental notice and a hearing, however, in connection with a county agency's decision that a child is eligible for general assistance, including a decision that a child is eligible on the grounds that he or she is "legally emancipated" within the meaning of Minn. Stat. § 256D.05, subd. 1(a)(10). *See* Minn. Stat. §§ 256.045, 256D.10; Minn. R. 9500.1211; *see also State v. Smith*, 899 N.W.2d 120, 123–24 (Minn. 2017) ("[The] canon [*expressio unius est exclusio alterius*], which applies to associated groups and series, creates a presumption that an omission in a statute is by deliberate choice, not inadvertence. Such a presumption is particularly strong when . . . a statute is uncommonly detailed and specific.") (citations and quotation marks omitted).

* * *

According to the complaint in this action, Calgaro is the biological mother of E.J.K., who was under the age of eighteen when the events

alleged in the complaint occurred.[2] (Appellant's App. 4, 19.) On some unidentified date, E.J.K. submitted a general-assistance application to the St. Louis County Department of Public Health and Human Services.[3] (*See id.* at 15–16, 38.) The department granted the application and provided general assistance to E.J.K. for some unidentified period of time thereafter. (*See id.*)

In November 2016, Calgaro commenced this action against St. Louis County, the alleged interim director of the department, Linnea Mirsch, in her official capacity,[4] and several other defendants. (*Id.* at 11–57.) As relevant here, Calgaro claims that the county violated her right to substantive due process in deciding that E.J.K. was eligible for general assistance on the grounds that E.J.K. was "legally emancipated" for purposes of Minn. Stat. § 256D.05, subd. 1(a)(10). (Appellant's App. 14–15, 20, 38, 48; Appellant's Principal Br. 25–27.) She also claims

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[2] E.J.K. is now eighteen. (*See* Appellant's App. 20, 23.)

[3] The complaint does not expressly refer to general assistance, but instead makes allegations concerning financial assistance for living expenses. (*Id.* at 15–16.) Throughout this litigation, the parties have proceeded with the understanding that the public-assistance program implicated by these allegations is general assistance.

[4] Official-capacity claims against county officials are treated as claims against the county itself. *White v. Jackson*, 865 F.3d 1064, 1075 (8th Cir. 2017).

that the county violated her right to procedural due process in making the decision without providing her notice and a hearing.[5] (Appellant's App. 14–15, 38–39, 46; Appellant's Principal Br. 45–47.)

In December 2016, we moved for judgment on the pleadings in accordance with Fed. R. Civ. P. 12(h)(2)(B) on the grounds that the complaint fails to state a claim upon which relief can be granted.[6] (St. Louis County & Linnea Mirsch's Mot. for J. on the Pleadings and Summ. J. 1–2, ECF No. 34.) The district court granted the motion and dismissed with prejudice the applicable portion of the complaint in May 2017, rul-

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[5] The complaint also asserts claims against the county arising from allegations concerning E.J.K.'s receipt of medical assistance under a separate public-assistance program and Calgaro's request for government data relating to E.J.K. as well as claims against Mirsch in her individual capacity. (Appellant's App. 11–13, 15–16, 20, 28, 34, 37–39, 49–50.) The district court granted our dispositive motion with respect to these claims in May 2017. (Appellant's Addendum 11–14.) Calgaro's opening brief contains no argument regarding these claims, so they are deemed waived and will not be discussed further here. *See Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) ("Claims not raised in an opening brief are deemed waived."); *Chay-Velasquez v. Ashcroft*, 367 F.3d 751, 756 (8th Cir. 2004) ("Since there was no meaningful argument on [a] claim in [appellant's] opening brief, it is waived.").

[6] Calgaro submitted a cross-motion for summary judgment that did not address any of her claims against the county or Mirsch. (Pl. Anmarie Calgaro's Mem. in Supp. of Summ. J. 1–42, ECF No. 46; St. Louis County & Linnea Mirsch's Mem. of Law in Opp'n to Pl. Anmarie Calgaro's Mot. for Summ. J. 1, ECF No. 54; Pl. Anmarie Calgaro's Reply Mem. in Supp. of Her Mot. for Summ. J. 1–15, ECF No. 73.) The district court denied the motion in May 2017. (Appellant's Addendum 13–14.)

ing that the complaint does not sufficiently allege that the claimed due-process violations were caused by a county policy or custom, as required under *Monell* and related cases. (Appellant's Addendum 8–11, 14.) This appeal followed. (Notice of Appeal 1, ECF No. 87; Am. Notice of Appeal 1, ECF No. 89.)

SUMMARY OF ARGUMENT

Calgaro's complaint fails to state a plausible claim that St. Louis County violated her due-process rights in connection with the decision that E.J.K. was eligible for general assistance. To the extent Calgaro claims that the alleged decision deprived her of her right to substantive due process, it fails because the complaint does not contain any factual allegations indicating that the alleged violation was caused by a county policy or custom (*see* Part II, below). To the extent she claims that the alleged absence of notice and a hearing gave rise to a violation of her right to procedural due process, it fails because any alleged violation in this regard resulted from state law that the county must follow through no choice of its own, rather than an actionable policy or custom of the

county (*see* Part III).[7] In addition, we adopt by reference the parts of the other appellees' briefs that address the limited scope of parental due-process rights and the absence of an underlying constitutional violation in this case. *See* Fed. R. App. P. 28(i).

ARGUMENT

I. Standards of review and decision

This is an appeal from the district court's decision granting our motion for judgment on the pleadings on the grounds that the complaint fails to state a claim upon which relief can be granted. The decision is subject to de novo review. *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1109 (8th Cir. 2017).

A motion for judgment on the pleadings that raises a failure-to-state-a-claim defense is subject to the same standard of decision as a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Haney v. Portfolio Recovery Assocs., L.L.C.*, 837 F.3d 918, 924 (8th Cir. 2016) (per curiam).

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[7] We raised this issue below, but the district court did not rule on the question whether state law was the moving force behind the alleged lack of notice and a hearing. (*See* Appellant's Addendum 9–11.) It is proper for us to raise the issue again here, as the district court's decision may be affirmed "on any ground supported by the record, whether or not the ground was . . . passed on by the District Court." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 910 (8th Cir. 2016) (quoting *United States v. Sager*, 743 F.2d 1261, 1263 n.4 (8th Cir. 1984)).

The ultimate question in both instances is whether the complaint contains "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a)(2).

This pleading standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 557).

"To survive a motion to dismiss"—or, in this case, a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(h)(2)(B)—"a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

II. Calgaro's claim that the county violated her right to substantive due process fails because the complaint does not plausibly allege that the claimed violation was caused by a county *policy or custom*.

Calgaro claims that St. Louis County violated her substantive due-process rights when an unidentified county employee in the St. Louis County Department of Public Health and Human Services made an allegedly erroneous decision that E.J.K. was eligible for general assistance under the portion of Minn. Stat. § 256D.05, subd. 1(a)(10), that covers children who are "legally emancipated" within the meaning of the statute. (Appellant's App. 14–15, 20, 38, 48; Appellant's Principal Br. 25–27.) There is no question that the county is not vicariously liable under section 1983 for any due-process violation committed by the employee who made the decision. The well-established rule is that "a mu-

nicipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691.

A municipality is not liable under section 1983 unless "execution of [the municipality's] policy or custom . . . inflicts the [complained-of] injury." *Monell*, 436 U.S. at 694. Thus, to proceed with her claim that the county is liable for the alleged violation of her due-process rights, Calgaro must "identify a municipal 'policy' or 'custom' that caused [her] injury." *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). In this context, the term "policy" means "an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters." *Schaffer v. Beringer*, 842 F.3d 585, 596 (8th Cir. 2016) (quoting *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999)). A "custom" is "a continuing, widespread, and persistent pattern of unconstitutional misconduct" that "cannot arise from a single act." *Bolderson v. City of Wentzville*, 840 F.3d 982, 986 (8th Cir. 2016).

The district court was correct in ruling that the complaint in this case fails to identify a county policy or custom in relation to the alleged-

ly erroneous decision that E.J.K. was eligible for general assistance. (*See* Appellant's Addendum 10–11.) The complaint does not contain any factual allegations indicating that the county has *any* policies in this regard, let alone a policy that required or otherwise caused the decision. (Appellant's App. 11–57.) Nor does it contain any factual allegations supporting the notion that the decision was part of a broader pattern of similar decisions that rises to the level of a custom. (*Id.*) And while the complaint does allege that county and department "policies, customs, practices, or procedures (or lack of procedures) . . . were the moving force behind the constitutional violations asserted in the Complaint" (*id.* at 15–16), this formulaic recitation of the policy-or-custom element of a municipal-liability claim is a prime example of the kind of allegation that is insufficient under *Twombly* and *Iqbal*.

Because the complaint does not identify any applicable county policy or custom, it does not state a plausible municipal-liability claim against the county under section 1983. As a result, this Court should affirm the district court's decision granting our motion for judgment on the pleadings and dismissing with prejudice this aspect of the complaint for failure to state a claim upon which relief can be granted. *See Ulrich*

v. Pope County, 715 F.3d 1054, 1061 (8th Cir. 2013) (affirming district court's decision granting motion to dismiss section-1983 claim against municipality because plaintiff "alleged no facts in his complaint that would demonstrate the existence of a policy or custom by [the municipality] that caused [the alleged] deprivation"); *Lee v. Pine Bluff Sch. Dist.*, 472 F.3d 1026, 1029 (8th Cir. 2007) ("The district court dismissed [plaintiff's] constitutional claim against the [municipality] . . . because the complaint alleged no policy or custom of the [municipality] that caused an alleged constitutional violation. We agree with this conclusion.").

III. Calgaro's claim that the county violated her right to procedural due process fails because the complaint does not plausibly allege that the claimed violation was caused by a *county* policy or custom.

Calgaro also claims that St. Louis County violated her procedural due-process rights because the decision that E.J.K. was eligible for general assistance was allegedly made without giving Calgaro notice and a hearing. (Appellant's App. 14–15, 38–39, 46; Appellant's Principal Br. 45–47.) As we discussed above, applicable state statutes and MnDHS rules provide for notice and a hearing in connection with many government actions relating to general assistance, but they do not provide for

parental notice and a hearing when a county agency decides that a child is eligible for general assistance under Minn. Stat. § 256D.05, subd. 1(a)(10). *See* Minn. Stat. §§ 256.045, 256D.10; Minn. R. 9500.1211. The St. Louis County Department of Public Health and Human Services has a compulsory obligation to administer general assistance in accordance with state law, including the state statutes and MnDHS rules that govern when to provide notice and a hearing. This obligation is imposed by the general-assistance statutes themselves, which provide that "[g]eneral assistance *shall* be administered by the county agencies according to law and rules promulgated by the commissioner [of MnDHS]." *Id.* § 256D.03, subd. 1 (emphasis added). "'Shall' is mandatory." Minn. Stat. § 645.44, subd. 16 (2016).

When, as here, an alleged deprivation of federal rights arises from municipal action that is taken in accordance with the commands of state law that the municipality is bound to follow through no choice of its own, it cannot be said that the deprivation was caused by a policy or custom of the municipality. "When the municipality is acting under compulsion of state . . . law, *it is the policy contained in that state . . . law*, rather than anything devised or adopted by the municipality, *that*

is responsible for the injury." *Bethesda Lutheran Homes*, 154 F.3d at 718 (emphasis added).

Although this Court has never decided whether to adopt this rule, *Slaven v. Engstrom*, 710 F.3d 772, 781 n.4 (8th Cir. 2013), several other circuit courts have done so, *see, e.g.*, *Snyder*, 745 F.3d at 247 ("[A] county 'cannot be held liable under Section 1983 for acts that it did under the command of state or federal law.'") (quoting *Bethesda Lutheran Homes*, 154 F.3d at 718); *Vives*, 524 F.3d at 353 ("[W]e agree with all circuits to address state laws mandating enforcement by municipal police officers that a municipality's decision to honor this obligation is not a conscious *choice*. As a result, the municipality cannot be liable under *Monell* in this circumstance."); *Whitesel v. Sengenberger*, 222 F.3d 861, 872 (1st Cir. 2000) ("[W]e emphasize that [municipality] cannot be liable for merely implementing a policy created by the state judiciary."); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (explaining that official's "duty in implementing [state statute] may more fairly be characterized as the effectuation of the policy of the [state] embodied in that statute, for which the citizens of a particular county should not bear singular responsibility").

A number of district courts in this circuit and the state court of appeals in Minnesota have expressed their support for the rule as well. *See, e.g.*, *Slaven v. Engstrom*, 848 F. Supp. 2d 994, 1004 (D. Minn. 2012) ("[C]ourts generally agree that municipalities and local governments cannot be held liable under § 1983 for enforcing a state law when it is required to do so."), *aff'd*, 710 F.3d 772; *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1108 (D.S.D. 1995) (rejecting section-1983 claim against school board because board "was not implementing its own policy or custom, but was enforcing the state's policy"); *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 906 (Minn. Ct. App. 1995) ("It is our conclusion that [city] is not liable [under section 1983] in this case for merely following state law.").

Courts have articulated several reasons for rejecting municipal liability under these circumstances. First, "a municipality's decision to honor [an] obligation [to take action mandated by state law] is not a conscious *choice*" on the part of the municipality. *Vives*, 524 F.3d at 353. "When state law unequivocally instructs a municipal entity to produce binary outcome X if condition Y occurs, we cannot say that the municipal entity's 'decision' to follow that directive involves the exercise of any

meaningful independent discretion, let alone final policy-making authority." *Snyder*, 745 F.3d at 249.

Second,

> It is difficult to image a municipal policy more innocuous and constitutionally permissible, and whose causal connection to [an] alleged violation is more attenuated, than the 'policy' of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a 'policy' simply cannot be sufficient to ground liability against a municipality.

Surplus Store & Exch., Inc. v. City of Delphi, 928 F.2d 788, 791 (7th Cir. 1991); *accord Maynard*, 876 F. Supp. at 1108; *Minn. Council of Dog Clubs*, 540 N.W.2d at 906; *see also Snyder*, 745 F.3d at 247 ("To say that any . . . direct causal link exists when the only local government 'policy' at issue is general compliance with the dictates of state law is a bridge too far; under those circumstances, the state law is the proximate cause of the plaintiff's injury.").

Third, "if municipalities were to be held liable every time they enforced a state law [and the enforcement gave rise to a deprivation of federal rights], the consequences would be horrendous," as "[a]ny municipality could be financially devastated by a number of such actions." *Minn. Council of Dog Clubs*, 540 N.W.2d at 906; *see also Familias Uni-*

das, 619 F.2d at 404 (explaining that "the citizens of a particular county should not bear singular responsibility" for effectuation of state policy).

Fourth, "in order to protect itself [from liability], a municipality would have to examine every statute passed by the legislature and then decide whether to enforce it. This would produce a spotty and chaotic enforcement policy throughout the state." *Minn. Council of Dog Clubs*, 540 N.W.2d at 906; *see also Bethesda Lutheran Homes*, 154 F.3d at 718 ("[O]ur position has the virtue of minimizing the occasions in which federal constitutional law, enforced through section 1983, puts local government at war with state government.").

Based on the authorities and reasoning cited above, we ask this Court to hold that the complaint in this case fails to state a plausible claim that any policy or custom of St. Louis County was the moving force behind the alleged violation of Calgaro's right to procedural due process. If the alleged lack of notice and a hearing in this case amounted to a deprivation, the deprivation was caused by a shortcoming in the state statutes and MnDHS rules that govern this issue, rather than an actionable policy or custom of the county.

CONCLUSION

The complaint in this case does not state a plausible claim that a St. Louis County policy or custom was the moving force behind the alleged due-process violations arising from the decision that E.J.K. was eligible for general assistance. The district court's decision granting our motion for judgment on the pleadings on the grounds that the complaint fails to state a claim upon which relief can be granted and dismissing with prejudice this aspect of the complaint should therefore be affirmed.

Dated: October 2, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4216 words.

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Dated: October 3, 2017

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