COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP678 **Cir. Ct. No. 2010CV7330**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

DAVID C. PAPPAS,

PLAINTIFF-APPELLANT,

V.

COUNTY OF MILWAUKEE, GLORIA MCCUTCHEON, SOUTH SHORE YACHT CLUB, ROBERT ARING, GARY MATTSON, NELLO COPEN, BRUCE W. NASON, DAVID A. WEHNES, MICHAEL A. DUKES, RALPH H. WINKLER, JERRY KEDZIORA, GEORGE ARTKA, JOSEPH RADOWSKI, DAVE TUCHOLKA, PETER HAASE, RUSSELL BERG, MICHAEL BLACKWOOD, KENNETH DZIUBEK AND MATTHEW FRANK,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. David Pappas, *pro se*, brought this action against: (1) Milwaukee County ("the County"); (2) Matthew Frank, as the Secretary of the Wisconsin Department of Natural Resources, and Gloria McCutcheon, as the Southeast Regional Director of the Wisconsin Department of Natural Resources (collectively "the DNR"); and (3) the South Shore Yacht Club ("SSYC"), together with fifteen current and former officers and directors of the SSYC (collectively "the SSYC defendants"). While Pappas's complaint is disorganized and difficult to follow, it generally appears to allege that the defendants have unlawfully restricted the public and Pappas from access to public lands, which they otherwise have a constitutional right to access under the public trust doctrine. Pappas appeals from an amended judgment entered after the circuit court granted the defendants' motions for judgment on the pleadings. For the reasons set forth below, we affirm.

BACKGROUND[1]

¶2 According to Pappas's complaint, the SSYC is a private yacht club that sits entirely on filled-in lakebed on the shores of Lake Michigan. Milwaukee

[1] Because the circuit court dismissed Pappas's complaint following the defendants' motions for judgment on the pleadings, we assume that the allegations in his complaint are true for the purposes of this appeal. *See* ***Heinritz v. Lawrence Univ.***, 194 Wis. 2d 606, 610, 535 N.W.2d 81 (Ct. App. 1995).

County holds title to the filled-in lakebed and has leased it to the SSYC for use as a yacht club since 1931. The current forty-year lease runs from June 1, 2002, through May 31, 2042.

¶3 The SSYC's facilities include a clubhouse, a bar and restaurant, public piers, a public pedestrian gate, and finger piers containing boat slips. The general public may access certain areas of club grounds 365 days a year, from approximately sunrise to sunset. The access point is through a public pedestrian gate that is left unlocked during staff working hours. A buzzer entry system is available for public entry during non-staff hours between sunrise and sunset. For safety reasons, public access is not permitted to the SSYC's boat hoist and refueling areas or to the finger piers where members are permitted to rent private boat slips. Signs, including explicit identification of the lakebed areas to which the public has access, are posted at the pedestrian gate.

¶4 Pappas was a member of the SSYC. He was notified by a letter, dated August 18, 2008, that his membership in the SSYC was being suspended until the next board of directors meeting, due to the behavior of his son at an SSYC event. Per a letter dated December 12, 2008, the SSYC denied Pappas's request for a boat slip in 2009 on the grounds that he had been "suspended from membership until such time as [he] appeared in front of the Board of Directors concerning the actions of your son." Pappas received another letter, dated

December 22, 2008, from SSYC's counsel, notifying him that his membership had been terminated.[2]

¶5 Based on those facts, Pappas brought a 42 U.S.C. § 1983 claim against the defendants in federal court, alleging "that defendants violated his Fourteenth Amendment rights by restricting his access to lakebed property subject to the state law public trust doctrine." ***Pappas v. Milwaukee Cnty.***, 2010WL1484234, at *1 (E.D. Wis. Apr. 12, 2010). He also brought several related state law claims. ***Id.*** The district court, describing Pappas's complaint as "confusing and repetitive," dismissed the complaint, granting the defendants' motion to dismiss, pursuant to FED. R. CIV. P. 12(b)6, for failure to state a claim. ***Id.***

¶6 In May 2010, immediately following the district court's dismissal of his complaint, Pappas filed the complaint at issue here in state court. In his state court complaint, Pappas attempts to allege that the lease between the County and the SSYC violates the public trust doctrine by prohibiting the public from accessing navigable waterways, and that the DNR impermissibly allowed the

[2] None of the letters Pappas received from the SSYC were attached to his complaint, although he referred to them in his complaint. The SSYC defendants attached the August 18, 2008 letter and the December 12, 2008 letter to their brief on their motion for judgment on the pleadings. The SSYC defendants argue that we should consider the letters because they are both referenced and relied on by Pappas in his complaint. *Cf.* ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶11, 239 Wis. 2d 78, 619 N.W.2d 271 ("When a document is attached to the complaint and made a part thereof, it must be considered a part of the pleading, and may be resorted to in determining the sufficiency of the pleadings."). Pappas does not argue that the letters attached to the SSYC defendants' motion are not the ones he received and referenced in his complaint and does not otherwise argue that it is improper for us to consider the letters. As such, we consider the letters on appeal. *See* ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument are deemed admitted).

violation by failing to enforce DNR regulations. Based upon those allegations, Pappas attempts to raise claims against all of the defendants for: violation of the public trust doctrine, public nuisance, violation of 42 U.S.C. § 1983, and trespass. He also attempts to raise claims against the SSYC defendants for breach of contract, breach of fiduciary duty, and for damages occurring as a result of a WIS. STAT. § 134.01 (2009-10)[3] civil conspiracy, all arising from the termination of his membership.

¶7 In September 2010, the defendants filed motions for judgment on the pleadings. Following a hearing on the defendants' motions, the circuit court granted the motions in a written decision, dismissing all of Pappas's claims. A judgment and an amended judgment were entered accordingly and Pappas appeals.

DISCUSSION[4]

¶8 Pappas raises five issues on appeal: (1) whether his complaint properly raises a claim for relief under the public trust doctrine; (2) whether his complaint properly raises a public nuisance claim; (3) whether his complaint properly states claims for relief for breach of contract and breach of fiduciary

[3] All references to the Wisconsin Statutes are to the 2009-10 version.

[4] We limit our review to those issues Pappas sets forth in the statement of the issues in his appellate brief. *See* WIS. STAT. § 809.19(1)(b). To the extent that he raises other issues on appeal, we do not address them because we conclude that they are not properly identified in his statement of the issues, *see* § 809.19(1)(b), or that they are otherwise inadequately briefed, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

duty; (4) whether his complaint properly sets forth a claim for damages occurring as a result of a WIS. STAT. § 134.01 conspiracy; and (5) whether his complaint properly states a claim under 42 U.S.C. § 1983.[5] We reject each of Pappas's arguments in turn below.

¶9 Motions for judgment on the pleadings are closely related to motions for summary judgment. ***Schuster v Altenberg***, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988). "First, we examine the complaint to determine whether a claim for relief has been stated." ***Id.*** The facts and all reasonable inferences pled by the plaintiff are accepted as true. *See* ***Prah v. Maretti***, 108 Wis. 2d 223, 229, 321 N.W.2d 182 (1982). The complaint is "insufficient only if 'it is quite clear that under no circumstances can the plaintiff recover.'" ***Id.*** (citation omitted). Second, if the pleadings are legally sufficient, we must determine if an issue of material fact exists by examining the responsive pleadings. ***Schuster***, 144 Wis. 2d at 228. If no issue of material fact exists, we may determine that the moving party is entitled to judgment as a matter of law. ***Id.*** Whether a claim is capable of surviving a motion for judgment on the pleadings is a question of law, which we review *de novo*. ***Freedom from Religion Found., Inc. v. Thompson***, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991).

[5] To the extent that Pappas raises claims in his complaint that we do not address on appeal, we conclude that Pappas did not contest the circuit court's decision to dismiss those claims and thereby abandoned any right to appeal them. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the trial court but not raised on appeal is deemed abandoned.).

A. Pappas's complaint does not state a claim for relief under the public trust doctrine.

¶10 Pappas first argues that his complaint properly "alleges that the defendants were all in violation of the Public Trust Doctrine set forth in Article IX, Section 1 of the Wisconsin Constitution in permitting the existence of a private, exclusive facility [the SSYC] on public trust lands." Generally speaking, Pappas contends that the County and the SSYC violated the public trust doctrine when they entered into the lease and improperly restricted the public's access to navigable waters. Pappas faults the DNR for failing to enforce the public's right to access the navigable waterways after learning of the violation. The circuit court dismissed Pappas's public-trust-doctrine claim on the grounds that Pappas failed to allege a substantive violation of law relating to the public trust doctrine. We agree with the circuit court and affirm.

¶11 The public trust "doctrine mandates that access to the state's navigable waterways be equally available to all users." ***State v. Town of Linn***, 205 Wis. 2d 426, 447, 556 N.W.2d 394 (Ct. App. 1996). The "doctrine has its roots in article IX, section 1 of the Wisconsin Constitution, under which the state holds the beds of navigable waters in trust for public use." ***ABKA Ltd. P'ship v. DNR***, 2001 WI App 223, ¶29, 247 Wis. 2d 793, 635 N.W.2d 168. "The regulation and enforcement of this public trust rests with the legislature and the DNR." ***Id.***

¶12 The public trust doctrine itself does not provide a plaintiff with an affirmative cause of action. ***State v. Deetz***, 66 Wis. 2d 1, 13, 224 N.W.2d 407 (1974). Rather, the "doctrine merely establishes standing for the state, or any person suing in the name of the state for the purpose of vindicating the public trust, to assert a cause of action recognized by the existing law of Wisconsin." ***Id.***

As such, "a general allegation of violation of the public trust doctrine, in and by itself without more, does not state a cause of action." ***Robinson v. Kunach***, 76 Wis. 2d 436, 452, 251 N.W.2d 449 (1977). "[W]e look to the statutes enacted pursuant to the public trust doctrine to determine if a cause of action exists." ***Id.*** at 451.

¶13 Pappas argues that his complaint properly sets forth a public-trust-doctrine violation pursuant to WIS. STAT. § 30.294. Section 30.294 states that "[e]very violation of [WIS. STAT. ch. 30] is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person." The supreme court has recognized that § 30.294 permits a private citizen to bring an action, pursuant to the public trust doctrine, directly against a private party for abatement of a public nuisance. ***Gillen v. City of Neenah***, 219 Wis. 2d 806, 831-32, 580 N.W.2d 628 (1998). However, by its plain terms, § 30.294 requires that a plaintiff also allege a substantive violation of ch. 30. *See* ***Gillen***, 219 Wis. 2d at 829 ("'every violation of [ch. 30] is declared to be a public nuisance'") (citation omitted); *see also* ***Rusk Cnty. DHHS v. Thorson***, 2005 WI App 37, ¶4, 278 Wis. 2d 638, 693 N.W.2d 318 ("when interpreting a statute, we begin with the plain language of the statute"). Pappas's complaint does not satisfy this requirement.

¶14 Pappas argues that his complaint properly alleges that the DNR violated WIS. STAT. § 30.03(4) when it learned of the lease between the County and the SSYC and failed to enforce "the public rights relating to navigable waters." Section 30.03(4)(a) states, in pertinent part:

> If the [DNR] learns of a possible violation of … a possible infringement of the public rights relating to navigable waters, and the [DNR] determines that the public interest may not be adequately served by imposition of a

> penalty or forfeiture, the [DNR] *may* proceed as provided in this paragraph, either in lieu of or in addition to any other relief provided by law. The [DNR] *may* order a hearing under [WIS. STAT.] ch. 227 concerning the possible violation or infringement, and *may* request the hearing examiner to issue an order directing the responsible parties to perform or refrain from performing acts in order to fully protect the interests of the public in the navigable waters. If any person fails or neglects to obey an order, the [DNR] *may* request the attorney general to institute proceedings for the enforcement of the [DNR]'s order in the name of the state.…

(Emphasis added.)

¶15 Generally, "when interpreting a statute, we … construe the word 'may' as permissive." ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2012 WI 26, ¶32, 339 Wis. 2d 125, 810 N.W.2d 465. Applying that rule of statutory construction to WIS. STAT. § 30.03(4), we conclude that the statute does not *mandate* DNR enforcement of the public right to navigable waterways, but rather gives the DNR the *discretion* to determine whether to act. Because the DNR's decision to act on a violation of the public right is discretionary, the DNR's failure to act does not violate the statute. As such, Pappas's complaint fails to set forth a proper public-trust-doctrine violation pursuant to WIS. STAT. §§ 30.294 and 30.03(4) against the DNR, and we affirm the circuit court's decision to dismiss that claim.

¶16 In so concluding, we reject Pappas's assertion that ***Baer v. Wisconsin DNR***, 2006 WI App 225, 297 Wis. 2d 232, 724 N.W.2d 638, holds that WIS. STAT. § 30.03(4) *obligates* the DNR to act on any possible violation of the public trust doctrine. The ***Baer*** court explicitly stated that it was reasonable to infer that in using the word "may" when drafting § 30.03(4):

> the legislature intended to imbue the [DNR] with a degree of prosecutorial discretion by permitting it, in individual cases, to achieve compliance with WIS. STAT. ch. 30 by

> means other than administrative enforcement actions. Such case-by-case discretion also allows the [DNR] to prioritize potential enforcement actions according to the seriousness of the violations and the resources available to prosecute them.

Baer, 297 Wis. 2d 232, ¶16. Pappas's argument that ***Baer*** stands for the proposition that § 30.03(4) imposes an affirmative "duty" upon the DNR is unfounded.

¶17 Finally, Pappas's allegations pursuant to WIS. STAT. §§ 30.294 and 30.03(4) apply only to the DNR. Neither the County nor the SSYC defendants can be said to have violated § 30.03(4) because by the statute's plain language it does not apply to those parties. Pappas makes no attempt to otherwise explain under what "existing law of Wisconsin" his public-trust-doctrine claims against the County or the SSYC defendants lie. *See* ***Deetz***, 66 Wis. 2d at 13. As such, we conclude that the circuit court properly dismissed Pappas's public-trust-doctrine claims against the County and the SSYC defendants as well.

B. Pappas's complaint does not state a public nuisance claim.

¶18 Pappas argues that the circuit court erred in dismissing his public nuisance claim on the pleadings because: (1) he has standing to make such a claim; and (2) the complaint sets forth sufficient facts from which it can be inferred that the lease between the County and the SSYC interferes with the public's right to access navigable waters. The circuit court dismissed the claim, stating that "[t]o the extent Pappas'[s] claim is based on common law nuisance … Pappas lacks standing[, and] … [t]o the extent his claim is based on the Public

Trust Doctrine, his claim fails based on the failure to allege a violation of Chapter 30."[6] We agree with the circuit court.

¶19 "A public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community." ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2002 WI 80, ¶21, 254 Wis. 2d 77, 646 N.W.2d 777. "In other words, 'a public nuisance is an unreasonable interference with a right common to the general public.'" ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶28, 277 Wis. 2d 635, 691 N.W.2d 658 (citation and brackets omitted).

¶20 Here, Pappas alleges that his public nuisance claim is sufficiently set forth by the complaint's assertion "that the maintenance of the [SSYC] as a private facility creates an unreasonable interference with the public's and Pappas'[s] interest in the use and enjoyment of the lands constituting the lakebed area." That is to say, Pappas's public nuisance claim is founded on the public's right under the public trust doctrine to access navigable waterways, and the SSYC's alleged interference with that right. However, as we set forth above, Pappas has not sufficiently alleged in his complaint that any of the defendants violated the public trust doctrine. As such, he cannot allege that the public-trust doctrine violation is a public nuisance. Consequently, we affirm the circuit court's decision to dismiss Pappas's public nuisance claim.

[6] Pappas only addresses a public nuisance claim in his appellate brief. While he occasionally references a common law nuisance claim, he only does so while referencing WIS. STAT. § 823.01, the public nuisance statute. We note that Pappas does not cite to or rely on § 823.01 in his complaint.

C. Pappas's complaint does not state claims against the SSYC defendants for breach of contract or breach of fiduciary duty.

¶21 Next, Pappas contends that his complaint properly sets forth claims for breach of contract and breach of fiduciary duty against the SSYC defendants for suspending and terminating his membership in bad faith in violation of the SSYC bylaws. However, Pappas's complaint fails to allege a violation of the SSYC bylaws.

¶22 Pappas contends that the SSYC defendants suspended and eventually terminated his membership in violation of the SSYC bylaws because the SSYC defendants: (1) did not have "cause" for his suspension and termination; (2) did not provide him with a written copy of the charges against him; (3) did not provide him with an opportunity to defend himself; and (4) exceeded the time constraints the bylaws impose on suspension. He cites to "Article III, Section 15 of the Bylaws," which he asserts state as follow:

> Section 15. Suspension and Expulsion.
>
> The Commodore may for cause suspend any member without previous notice from active participation in Club privileges until the next regular or special meeting of the Board of Directors, at which time said Board of Directors may confirm said suspension and fix a definite period therefore not to exceed one year, or may expel such member from membership by a 2/3 vote of the Board of Directors present and voting; a member suspended by the Commodore shall have sent to him or her a written copy of the charges against him or her and shall be given an opportunity to appear in person before the Board of Directors and present evidence in [sic] his or her behalf before said Board can take any formal action against him or her.

(Emphasis in the complaint omitted.)

¶23 In his complaint, Pappas acknowledges receiving a letter from the SSYC, which sets forth the reason for his suspension and asks him to come before the board of directors and explain himself. According to the complaint: "By letter dated August 18, 2008, Plaintiff was notified that he had been suspended from membership by Defendant Commodore Aring 'pursuant to Article III, Section 15 and Article I, Section 3 … until the next Board of Directors meeting on Tuesday, September 16, 2008.'" Our review of the letter revealed that it informed Pappas that his: "suspension [was] due to the egregious conduct of [his] son/guest, Christopher Pappas on August 16, 2008. His conduct resulted in the Milwaukee Police Department being called, embarrassing the Club, our members and guests during the annual Corn Roast Party." The December 12, 2008 letter referenced by Pappas in the complaint, further informed Pappas: "[i]f you wish to resume your membership privileges, you will still need to appear before the Board of Directors to explain the actions of your son during the Corn Roast."

¶24 In sum, Pappas admits in his complaint that he received written notice of his suspension, to wit, the August 18, 2008 letter. That letter implied that the suspension would remain in place until Pappas appeared to defend his son's actions before the board of directors, and the December 12, 2008 letter explicitly stated as much. Pappas does not allege that he appeared before the board of directors at any time. Further inspection of the August 18, 2008 letter reveals that it also notified Pappas of the cause for his suspension: his son's egregious conduct at a SSYC function. As such, Pappas's complaint does not properly set forth breach of contract or breach of fiduciary duty claims and we affirm the circuit court's dismissal.

D. Pappas's complaint does not state a claim for damages occurring as a result of a WIS. STAT. § 134.01. civil conspiracy.[7]

¶25 Pappas also argues that his complaint properly sets forth a claim for damages against the SSYC defendants, which he contends occurred as a result of a WIS. STAT. § 134.01 conspiracy. As grounds, Pappas generally alleges that the SSYC defendants suspended his membership in retaliation for Pappas's communications with the DNR regarding the legitimacy of the SSYC's existence. The circuit court dismissed the claim on the grounds that it was "conclusory" and failed to allege any "facts demonstrating the existence of an agreement among the defendants to work toward a common goal." We agree with the circuit court.

¶26 WISCONSIN STAT. § 134.01[8] prohibits two types of illegal activities:

> (1) [a] conspiracy by two or more persons to willfully and maliciously injure another in his or her reputation, trade, business or profession; and (2) a conspiracy by two or more

[7] The parties and the circuit court all refer to Pappas's WIS. STAT. § 134.01 claim as "a claim for conspiracy." However, there is no such thing as a civil action for conspiracy. *See* ***Malecki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis. 2d 73, 87, 469 N.W.2d 629 (1991). Rather, the statute is titled "**Injury to business; restraint of will**" and a claim filed pursuant to § 134.01 "is a claim for the damages that occurred as a result of a § 134.01 conspiracy." WIS JI—CIVIL 2820, Comment; *see also* ***Malecki***, 162 Wis. 2d at 87 ("In civil conspiracy, the essence of the action is the damages that arise out of the conspiracy, not the conspiracy itself.").

[8] WISCONSIN STAT. § 134.01 states:

> Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his or her will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.

> persons to maliciously compel another to do an act against his or her will or to prevent or hinder another from doing or performing a lawful act.

WIS JI—CIVIL 2820, Comment. A plaintiff must prove four elements in order to prevail on a claim pursuant to § 134.01: (1) that the defendants acted together; (2) that the defendants acted with a common purpose to injure the plaintiff's business or reputation; (3) that the defendants acted maliciously in carrying out the common purpose; and (4) that the acts of the defendants financially injured the plaintiff. *See* WIS JI—CIVIL 2820.

¶27 To state a claim under WIS. STAT. § 134.01, a plaintiff must plead "at a minimum, 'facts that show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end.'" *See* ***Bartley v. Thompson***, 198 Wis. 2d 323, 342, 542 N.W.2d 227 (Ct. App. 1995) (citation omitted). The complaint must allege more than just "that the defendants may have acted in concert or with a common goal." *See* ***id.*** While it is true, "that the rules of civil procedure require a plaintiff to plead only '[a] short and plain statement of the claim ... showing that the pleader is entitled to relief[,]' … 'a general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action.'" ***Id.*** (citations omitted; first ellipses and brackets in ***Bartley***).

¶28 Pappas contends that he has

> satisfied the pleading requirements for his [WIS. STAT. § 134.01] claim with one simple paragraph of his complaint:
>
> The…actions…by SSYC and its individual Board Members were part of a conspiracy by Defendant Aring and other unnamed co-conspirators to act in concert for the purpose of willfully and/or maliciously injuring Plaintiff's

> reputation and profession by preventing him from doing or performing lawful acts (i.e., the enjoyment of the rights and privileges of his membership in South Shore Yacht Club).

(Ellipses in Pappas's appellate brief.) Pappas's assertions are merely conclusory.

¶29 In his complaint, Pappas names only one member of the alleged "conspiracy," which by definition requires at least two members. He does not set forth facts tending to show that the unnamed parties entered into an agreement with each other to maliciously harm Pappas's professional reputation or his business nor does he allege any facts tending to show that the unnamed defendants even cooperated with each other. At best, he merely contends that the unnamed "defendants may have acted in concert or with a common goal." *See* ***Bartley***, 198 Wis. 2d at 342. That is not enough on which to plead a WIS. STAT. § 134.01 claim. Therefore, we affirm the circuit court.

E. Pappas's 42 U.S.C. § 1983 claim is barred by claim preclusion.

¶30 Finally, Pappas argues that his complaint sets forth sufficient facts to show that when the County entered into the lease with the SSYC it knowingly and deliberately violated the public trust doctrine, and thereby engaged in an unlawful taking of property from the public in violation of the Fifth and Fourteenth Amendments. As such, Pappas believes he has properly alleged a 42 U.S.C. § 1983 claim for a violation of the United States Constitution. We need not address the merits of Pappas's argument because we conclude that his § 1983 claim is barred by claim preclusion.

¶31 "The doctrine of claim preclusion provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences." ***Kruckenberg v. Harvey***,

2005 WI 43, ¶19, 279 Wis. 2d 520, 694 N.W.2d 879. The doctrine has three elements: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation that resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits. ***Id.***, ¶21.

¶32 Pappas does not contest that his current state court claim under 42 U.S.C. § 1983 and his prior federal court claim under § 1983 arise out the same set facts, raise the same questions of law, and involve identical parties. Rather, he claims that the federal district court's decision, dismissing his § 1983 claim on the pleadings, was not a "final judgment on the merits." He is mistaken. The supreme court has explicitly and unequivocally stated that "a dismissal for failure to state a claim *is* a judgment on the merits." ***Tietsworth v. Harley-Davidson, Inc.***, 2007 WI 97, ¶58, 303 Wis. 2d 94, 735 N.W.2d 418 (emphasis added); *see also* ***Juneau Square Corp. v. First Wis. Nat'l Bank of Milwaukee***, 122 Wis. 2d 673, 686, 364 N.W.2d 164 (Ct. App. 1985). As such, Pappas's § 1983 claim is barred by claim preclusion. *See* ***Tietsworth***, 303 Wis. 2d 94, ¶51 (stating that parties should be held "responsible for their deliberate choice of strategy" and should be prevented from presenting "piecemeal litigation").

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.