

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 29, 1995

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

NOTICE

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

No. 94-3312

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

VICTOR M. KENNEDY,

Plaintiff-Appellant,

v.

**ADOBE CENTER ADMINISTRATION,
CAPT. G. RAINER, JOHN DOE,
DEPARTMENT OF CORRECTIONS,
JOHN DOES and STATE OF WISCONSIN,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Victor M. Kennedy, *pro se*, appeals from an order of the circuit court dismissing his cause of action against the Administrator of the Adobe Correctional Center, Captain G. Rainer, for failure to state a claim upon which relief can be granted. Kennedy argues that the complaint is

sufficient to state a cause of action against Rainer for the violation of his equal-protection rights and for the violation of §§ 947.013 and 943.30,¹ asserting that Rainer, a state employee, violated one of his fundamental rights. We affirm.

¹ Section 947.013, STATS., provides:

Harassment. (1) In this section:

- (a) “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.
 - (b) “Credible threat” means a threat made with the intent and apparent ability to carry out the threat.
 - (c) “Personally identifiable information” has the meaning given in s. 19.62 (5).
 - (d) “Record” has the meaning given in s. 19.32 (2).
- (1m)** Whoever, with intent to harass or intimidate another person, does any of the following is subject to a Class B forfeiture:
- (a) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.
 - (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.
- (1r)** Whoever violates sub. (1m) under all of the following circumstances is guilty of a Class A misdemeanor:
- (a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.
 - (b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.
- (1t)** Whoever violates sub. (1r) is guilty of a Class E felony if the person has a prior conviction under this subsection or sub. (1r), (1v) or (1x) or s. 940.32 (2), (2m), (3) or (3m) involving the same victim

Kennedy, an inmate at the Adobe Center, claims that a female

(.continued)

and the present violation occurs within 7 years of the prior conviction.

(1v) Whoever violates sub. (1r) is guilty of a Class D felony if he or she intentionally gains access to a record in electronic format that contains personally identifiable information regarding the victim in order to facilitate the violation under sub. (1r).

(1x) Whoever violates sub. (1r) under all of the following circumstances is guilty of a Class D felony:

(a) The person has a prior conviction under sub. (1r), (1t) or (1v) or this subsection or s. 940.32 (2), (2m), (3) or (3m).

(b) The person intentionally gains access to a record in order to facilitate the current violation under sub. (1r).

(2) This section does not prohibit any person from participating in lawful conduct in labor disputes under s. 103.53.

Section 943.30, STATS., provides:

Threats to injure or accuse of crime. (1) Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime or offense, or threatens or commits any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act, is guilty of a Class D felony.

(2) Whoever violates sub. (1) by obstructing, delaying or affecting commerce or business or the movement of any article or commodity in commerce or business is guilty of a Class D felony.

(3) Whoever violates sub. (1) by attempting to influence any petit or grand juror, in the performance of his or her functions as such, is guilty of a Class D felony.

(4) Whoever violates sub. (1) by attempting to influence the official action of any public officer is guilty of a Class D felony.

acquaintance shot at him when he was outside the Adobe Center on work-release privileges and that Adobe Center personnel failed to prevent the incident. According to the complaint, Kennedy told Adobe Center personnel that the female acquaintance had recently threatened to kill him during a visit with him at the Center. Kennedy further alleges that when he discussed the threat with an unnamed staff person, he was told that he had the choice of going to work as scheduled or remaining locked up. Kennedy chose to go to work and was subsequently shot by the woman.

The issue before this court is whether Kennedy's complaint states a claim upon which relief can be granted. For the purposes of determining whether a complaint should be dismissed, "[t]he facts pleaded and all reasonable inferences from the pleadings must be taken as true." *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979). A motion to dismiss tests the legal sufficiency of the complaint. *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 683, 271 N.W.2d 368, 373 (1978). The claim is dismissed only when "it is quite clear that under no conditions can the plaintiff recover." *Morgan*, 87 Wis.2d at 731, 275 N.W.2d at 664 (quoting Clausen and Lowe, *The New Wisconsin Rules of Civil Procedure, Chapters 801-803*, 59 Marq. L. Rev. 1, 54 (1976)).

Kennedy claims that Rainer failed to "provide the plaintiff his fundamental right to be protected against violence," citing the Fourteenth Amendment equal-protection clause. See 426 U.S.C. § 1983. He also asserts that he has a fundamental right to be protected under state law, relying on §§ 947.013 and 943.30, STATS.

DeShaney v. Winnebago County, 489 U.S. 189 (1989), makes it clear that a constitutional "deprivation" only results when caused by a person acting under color of state law. In *DeShaney*, the county received numerous complaints that a father routinely beat his son. *Id.*, 489 U.S. at 191-193. Although the county took some protective measures, it never tried to remove the child from the father's custody. *Id.* Eventually, the father's beatings left the child permanently brain damaged and profoundly retarded. *Id.*, 489 U.S. at 193. *DeShaney* rejected the argument that a special relationship existed between the county and child giving rise to an affirmative constitutional duty to protect the child. *Id.*, 489 U.S. at 197-203. Here, the person who caused Kennedy's injuries was the female acquaintance, not Rainer or anybody else associated with the

Adobe Center. As was stated in *DeShaney*, “while the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.” *DeShaney*, 489 U.S. at 201.

Rainer's alleged failure to prevent the harm inflicted by the female acquaintance also does not give rise to a cause of action under § 947.013, STATS., or § 943.30, STATS. These are provisions that impose criminal liability on those who harm others. They are not a predicate for the civil claims Kennedy asserts here.

By the Court. – Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.