

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

JACOB V. GARCIA

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STEVEN M. JACOB, APPELLANT,

V.

ERICA GARCIA, APPELLEE.

Filed September 22, 2026. No. A-25-888.

Appeal from the District Court for Lancaster County, JODI L. NELSON, Judge, on appeal thereto from the County Court in Lancaster County, RODNEY D. REUTER, Judge. Affirmed.

Steven M. Jacob, pro se.

Michael T. Hilgers, Attorney General, Cody S. Barnett, Solicitor General, and Zachary B. Pohlman for appellee.

BISHOP, WELCH, and FREEMAN, Judges.

WELCH, Judge.

INTRODUCTION

Steven M. Jacob appeals from the Lancaster County District Court’s order affirming the county court’s dismissal of his complaint against a Department of Correctional Services (DCS) employee for confiscating his 6-sided engineering scale (hereinafter referred to as a “ruler”). Jacob contends that the district court erred in (1) finding that the county court lacked subject matter jurisdiction over his 42 U.S.C. § 1983 claim, (2) failing to liberally construe his complaint in his favor, and (3) finding that he failed to state an unlawful takings claim under article I, § 21, of the Nebraska Constitution for the alleged unlawful taking of his ruler. For the reasons stated herein, we affirm.

STATEMENT OF FACTS

Jacob initially filed a claim in the small claims court alleging that DCS employee Erica Garcia wrongfully took possession of, and refused to return, Jacob's ruler, even though Jacob had previously been allowed to possess the ruler. Jacob requested the return of his ruler or compensation of \$7.98. Jacob attached a completed Nebraska DCS Grievance Form along with DCS' response which asserted that, although Jacob's purchase of the ruler was permissible pursuant to DCS' policies at the time of purchase, the ruler had since been deemed contraband and a safety threat and Jacob had been instructed "to make arrangements to release or send out" the ruler.

In March 2025, at Garcia's request, the matter was transferred from the Small Claims Court to the Lancaster County Court. Garcia then filed a motion to dismiss, alleging that the court lacked jurisdiction; that she was entitled to sovereign immunity; and, alternatively, that Jacob's complaint failed to state a claim upon which relief could be granted. Following a hearing on the motion to dismiss, the county court granted Garcia's motion to dismiss pursuant to a lack of jurisdiction and failure to state a claim for relief. Specifically, the county court found that Jacob's claims sounded in tort and that the county court lacked jurisdiction of claims falling under the State Tort Claims Act and 42 U.S.C. § 1983.

Jacob appealed the county court's dismissal to the Lancaster County District Court. Following a hearing regarding Jacob's appeal, the district court affirmed the county court's order. The district court agreed with the county court's analysis that the court lacked jurisdiction under both the STCA and under § 1983. The district court further found that Jacob's supplemental brief on appeal alleged a claim under the takings clause of the Nebraska Constitution. The district court found that "a thorough reading of [Jacob's] complaint and attachments, accepting the allegations as true and drawing all reasonable inferences in his favor reveals that the alleged taking of his ruler was not for public use, a key requirement for invocation of a claim under Art. 1, § 21 of the Nebraska Constitution." Jacob has appealed from the district court's order affirming the county court's dismissal of his complaint for lack of jurisdiction and failure to state a claim for relief.

ASSIGNMENTS OF ERROR

Jacob's assignments of error, consolidated and restated, allege that (1) the district court erred in affirming the county court's finding that it lacked jurisdiction over his § 1983 claim, (2) the district court's decision was unreasonable because it failed to liberally construe his pro se pleading in his favor, and (3) the district court erred in finding that his property was not taken for a public use and finding that he had no action under the takings clause of the Nebraska Constitution.

STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. *Doe v. State*, 312 Neb. 665, 980 N.W.2d 842 (2022). An appellate court reviews questions of law independently of the lower court's conclusion. *Id.*

Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter. *Schaeffer v. Frakes*, 313 Neb. 337, 984 N.W.2d

290 (2023). Subject matter jurisdiction is a question of law. *Id.* An appellate court independently reviews questions of law decided by a lower court. *Id.*

ANALYSIS

JURISDICTION OVER 42 U.S.C. § 1983 CLAIM

Jacob first argues that the district court erred in affirming the county court's determination that it lacked subject matter jurisdiction over his 42 U.S.C. § 1983 claim. Specifically, in relation to that portion of Jacob's complaint alleging a violation of § 1983, the Lancaster County Court determined that Nebraska county courts lack subject matter jurisdiction over actions seeking relief under federal statutory provisions such as § 1983. The Lancaster County District Court affirmed that ruling. Jacob argues that the district court's ruling affirming the county court is in error. But whether Jacob can lodge a complaint in county court grounded in § 1983 is a matter we need not decide. In this case, as we shall explain below, Jacob's styled § 1983 claim is barred by the jurisdictional doctrine of sovereign immunity. While the county court did not address this issue, an appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue. *Cappel v. State*, 298 Neb. 445, 905 N.W.2d 38 (2017).

Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter. *Id.* A state's sovereign immunity from suit is a matter of subject matter jurisdiction that an appellate court cannot ignore. *Doe v. State*, *supra*. Whether a court has subject matter jurisdiction is a threshold issue that should be resolved prior to an examination of the merits. *Id.*

Initially, we note that Jacob's complaint was filed against Garcia at the Nebraska State Penitentiary but otherwise did not specifically identify whether the action was against Garcia in her individual or official capacity. In order to sue a public official in his or her individual capacity, a plaintiff in a § 1983 action must expressly and unambiguously state so in the complaint; otherwise, it will be assumed that the defendant is being sued only in his or her official capacity. *Holmstedt v. York Cty. Jail Supervisor*, 275 Neb. 161, 745 N.W.2d 317 (2008). Therefore, we assume that Garcia was being sued in her official capacity only, as Jacob failed to expressly and unambiguously state otherwise in his complaint.

As it relates to Jacob's § 1983 claim,

Section 1983 provides a civil remedy for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law. But it does not necessarily provide a remedy for litigants seeking such remedy against a state. The enactment of § 1983 did not abrogate the State's 11th Amendment immunity, which bars such suits unless the State has waived its immunity or unless Congress has exercised its undoubted power under § 5 of the 14th Amendment to override that immunity. Here, Nebraska has not waived its sovereign immunity with regard to § 1983 suits brought against it. Nor has Congress exercised its power to override that immunity.

Cappel v. State, 298 Neb. at 451, 905 N.W.2d at 45.

Further, 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. *Id.* As such, it is no different from a suit

against the State itself. *Id.* Neither a State nor its officials acting in their official capacities are “persons” under § 1983. *Id.*

Here, because Jacob’s complaint was filed against Garcia in her official capacity, it is a suit against DCS, a state agency, and thus, the State. As such, Jacob’s § 1983 claim was barred by sovereign immunity. Jacob’s claim that the district court erred in dismissing his § 1983 claim for lack of subject matter jurisdiction fails.

LIBERAL CONSTRUCTION OF PLEADING

Jacob next assigns and argues that the district court erred in not liberally construing his complaint to also contain a claim for violation of his constitutional due process rights by not providing him with a post-deprivation hearing following the removal of his ruler. But in addressing the manner to assert constitutional claims in Nebraska, the Nebraska Supreme Court held in *Cappel v. State*, 298 Neb. 445, 458, 905 N.W.2d 38, 49 (2017):

Regarding the [appellants’] federal constitutional claims, we find that a due process violation does not create an independent cause of action for money damages. Although the Due Process Clauses in the 5th and 14th Amendments to the U.S. Constitution provide that no person shall be deprived of property without due process of law, no language in those clauses requires the payment of money damages if they are violated. Furthermore, several federal circuit courts have held that where Congress has provided 42 U.S.C. § 1983 for plaintiffs to obtain relief for the violation of constitutional rights, such is the exclusive remedy, and the plaintiff can no longer bring a direct cause of action under the U.S. Constitution.

Accordingly, § 1983 provided Jacob with the exclusive remedy for the alleged violation of the due process clause of the U.S. Constitution. But as we explained above, Jacob’s claim under § 1983 against the State is barred by sovereign immunity. Thus, having styled his complaint as he did, the district court did not err in failing to liberally read Jacob’s complaint to include a separately asserted due process clause violation as that too was covered under the § 1983 umbrella and barred by sovereign immunity.

CONSTITUTIONAL TAKINGS CLAIM

Finally, Jacob argues the district court erred in dismissing that portion of his complaint that alleged a taking under Neb. Const. art. 1 § 3. The record does not support that Jacob made this claim in the county court. And the district court’s order stated:

Further, [Jacob] alleges in his supplemental brief that his complaint sets forth a claim under Art. 1, § 21 of the Nebraska Constitution. Specifically, he claims a “taking” of his property (ruler) without just compensation. He cites this court to *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985) to support this claim.

However, a thorough reading of appellant’s complaint and attachments, accepting the allegations as true and drawing all reasonable inferences in his favor reveals that the alleged taking of his ruler was not for public use, a key requirement for invocation of a claim under Art. 1, § 21 of the Nebraska Constitution.

Jacob argues the district court erred in finding that his property was not taken for public use and dismissing that portion of his claim on that basis. But whether Garcia’s removal of Jacob’s ruler amounted to a taking for public use is a matter we need not decide. In *State v. Kalita*, 317 Neb. 906, 911, 12 N.W.3d 499, 504 (2024), the Nebraska Supreme Court held that “a basic tenet of appellate review is that an issue first be presented to and passed upon by the *trial court*. Here, that was the county court.” (Emphasis in original.)

Similarly, here, the trial court was the county court. Upon review of this record, after filing his complaint and in response to the State’s motion to dismiss for failing to state a claim upon which relief could be granted, Jacob never asserted in the county court that he was separately raising a Nebraska constitutional takings clause claim. In fact, the first time he raised that argument was in a supplemental brief to the district court, sitting as an appellate court, following the county court’s dismissal of his claim.

In *State v. Kalita*, 317 Neb. at 914, 12 N.W.3d at 506, the Nebraska Supreme Court further held:

The court’s opinion in *State v. Ledingham*, [217 Neb. 135, 347 N.W.2d 865 (1984),] authored by then Chief Justice Krivosha, elaborated on the need for the trial court to consider an issue of constitutionality in the first instance. The court explained that for the district court to properly review whether the county court abused its discretion and then for a higher appellate court to determine whether the district court—in reviewing the action of the county court—properly exercised its authority, the county court must have the first opportunity to pass upon a question. The court reasoned that “[t]o hold otherwise would require us to totally ignore the rules with regard to appellate review and make matters on appeal to the district court or on appeal to this court, in effect, *de novo*.” The court declared that “[o]nly in the most unusual of cases, and where the error is plain, should courts disregard such rules and consider constitutional issues raised for the first time on appeal to this court.”

And in *Elbert v. Young*, 312 Neb. 58, 71-72, 977 N.W.2d 892, 903 (2022), the Nebraska Supreme Court, in addressing an argument that the lower court erred in failing to find that the appellant had raised a separate and distinct claim in his complaint, held as follows:

This argument fails because [the appellant] raises it for the first time on appeal, and an appellate court will not consider an argument or theory raised for the first time on appeal. Thus, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

Having failed to raise before the county court that Jacob was attempting to separately raise a Nebraska constitutional takings clause claim in addition to his § 1983 claims, we will not consider an argument or theory raised for the first time on appeal.

CONCLUSION

In sum, we affirm the order of the Lancaster County District Court, which affirmed the order of the Lancaster County Court.

AFFIRMED.