MARTIN L. VICTOR, Plaintiff, vs. STATE OF IOWA, ELWAYNE MASER, VULCRAFT CARRIER CORP., and PLYMOUTH COUNTY, IOWA, Defendants.

No. C 99-4003-MWB

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION

1999 U.S. Dist. LEXIS 23530

August 10, 1999, Decided
August 10, 1999, Filed

COUNSEL: [*1] Martin L Victor, Plaintiff, Pro se, Ames, IA.

For Martin L Victor, Plaintiff: Robert Tiefenthaler, LEAD ATTORNEY, Sioux City, IA.

For Plymouth County, Defendant: G Daniel Gildemeister, LEAD ATTORNEY, Gildemeister & Keane, Sioux City, IA.

JUDGES: PAUL A. ZOSS, MAGISTRATE JUDGE.

OPINION BY: PAUL A. ZOSS

OPINION

REPORT AND RECOMMENDATION ON DISPOSITIVE MOTIONS AND ORDER ON OTHER VARIOUS PENDING MOTIONS

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I. [*2] *INTRODUCTION*

This lawsuit arises out of a motor vehicle collision on August 16, 1996, in Plymouth County, Iowa, in the Northern District of Iowa. According to the "Investigating Officers Report of Motor Vehicle Accident," the plaintiff, Martin L. Victor ("Victor"), was driving his vehicle east on County Road C-38 in Plymouth County, Iowa, when he collided with a southbound truck driven by Ronald Swoboda ("Swoboda") and owned by the defendant Vulcraft Carrier Corp. ("Vulcraft"). The collision occurred at the intersection of County Road C-38 and U.S. Highway 75.

On August 13, 1998, Victor filed a *pro se* complaint in the United States District Court for the Southern District of Iowa, naming the State of Iowa, Plymouth County, Vulcraft, and Elwayne Maser [1] ("Maser") as defendants. Giving the allegations in the *pro se* complaint a liberal construction, *Smith v. St. Bernards Regional Medical Ctr., 19 F.3d 1254, 1255 (8th Cir.1994)*, the court interprets Victor's complaint as alleging the following: (1) that "Iowa law regarding the right to sue private property owners for negligence is unconstitutional," and that Victor should be allowed to sue Maser for acting negligently in failing to trim [*3] vegetation that obstructed his view of southbound traffic on U.S. Highway 75, (2) that the State of Iowa and Plymouth County acted negligently by failing to properly maintain a roadway, investigate the accident thoroughly, and place warning signs and markings appropriately, (3) that the highway patrol failed "to perform duties of safety officers, in assessment of dangerous conditions existing," and (4) that Vulcraft is responsible for its driver's failure to follow safety standards for commercial trucking (Doc. No. 2).

> 1 According to the complaint, Maser was the owner of property adjacent to the intersection where the collision occurred.

On September 21, 1998, the State of Iowa filed a Motion to Dismiss or Strike (Doc. No. 3). On September 23, 1998, Plymouth County filed a Motion to Dismiss (Doc. No. 4). On October 7, 1998, Vulcraft filed a motion to dismiss or, in the alternative, to transfer the case to Northern District of Iowa (Doc. No. 10). On November 19, 1998, the Honorable Robert W. Pratt ordered the case transferred to the Northern District of Iowa, ruling that under *28 U.S.C. ß 1391(a)* venue was improper in the Southern District of Iowa, and that transfer to the Northern District [*4] was proper under *28 U.S.C. ß 1404(a)*. (Doc. No. 14). Judge Pratt did not address "any other issues raised by Defendants in their motions to dismiss." *Id.* at 2. [2]

> 2 The motions filed in the Southern District at docket numbers 3, 4, and 10 have all been redocketed in the Northern District as docket number 17.

On February 11, 1999, Vulcraft filed a Motion for Summary Judgment (Doc. No. 24). On February 12, 1999, Vulcraft filed a Motion for Oral Argument on its motion (Doc. No. 28). On February 23, 1999, Plymouth County filed a motion (Doc. No. 30) asking that its motion to dismiss (Doc. No. 4) be treated as a motion for summary judgment. On March 15, 1999, Maser filed a Motion for Summary Judgment (Doc. No. 40). By order dated March 30, 1999, the Honorable Mark W. Bennett referred all of these motions to the undersigned United States Magistrate Judge for the issuance of a report and recommendation. (Doc. No. 43).

Vulcraft's Motion for Oral Argument was granted and the court held a telephonic hearing on May 10, 1999. Richard E. Mull appeared on behalf of the State of Iowa, Scott A. Hindman appeared on behalf of Maser, Jeffrey A. Sar appeared on behalf of Vulcraft, and G. Daniel Gildemeister [*5] appeared on behalf of Plymouth County. Victor failed to appear at the hearing. [3] On May 17, 1999, Plymouth County filed a supplemental memorandum in support of its motion to dismiss. (Doc. No. 55).

> 3 On April 26, 1999, the court entered an order directing Victor to inform the court by May 6, 1999, of the telephone number at which the court could reach him for the May 10, 1999, hearing. (Doc. No. 53.) Victor failed to give the court a telephone number. At the time set aside for the hearing, the conference operator who arranged the call attempted unsuccessfully to reach Victor at the telephone number he provided in his most recent filings. (*See* Doc. Nos. 32, 34-35, 46, 48.)

On May 21, 1999, the plaintiff filed a motion to amend and dismiss, asking for leave to amend his complaint to state a claim against Randall Swoboda, Vulcraft's driver, and dismissing his claims against Vulcraft. (Doc. No. 56). No party has objected to this motion, and Vulcraft and the State of Iowa have stipulated and consented to the dismissal of Vulcraft as a defendant. (Doc. Nos. 57 and 59). The motion to dismiss is granted. The motion to amend is denied for the reasons stated later in this opinion.

On May 24, 1999, [*6] the plaintiff filed a motion requesting that another hearing be scheduled on the pending motions to dismiss and for summary judgment (Doc. No. 58). This request was granted by the court on May 27, 1999 (Doc. No. 61), and this matter came on for further hearing on Friday, July 23, 1999. Robert Tiefenthaler appeared in person at the hearing on behalf of the plaintiff, and Scott A. Hindman appeared in person at the hearing on behalf of Maser. Richard E. Mull appeared by telephone on behalf of the State of Iowa, and G. Daniel Gildemeister appeared by telephone on behalf of Plymouth County.

On April 5, 1999, the plaintiff filed a motion to change venue to Cedar Rapids. (Doc. No. 46). The motion has been resisted by all of the defendants. (Doc. Nos. 47, 49, 51, and 52).

II. LEGAL ANALYSIS

A. The State of Iowa's Motion to Dismiss

In his complaint Victor alleges that the State of Iowa was negligent in failing to: (1) place proper markings and signs at the intersection of U.S. Highway 75 and County Road C-38, (2) cut tree branches that obstructed Victor's view at the same intersection, and (3) investigate thoroughly the accident that is the genesis of Victor's complaint. Victor also claims that [*7] the State of Iowa, acting through the highway patrol, was negligent in "failing to perform duties of safety officers, in assessment of dangerous conditions existing." (Complaint at 1.); *see I.C.A. ß 669.2(3)* (providing that 'claim' means "[a]ny claim against the state of Iowa for money only . . . caused by the negligent or wrongful act or omission of any employee of the state . . . ."); *I.C.A ß 669.2(4)* ("'Employee of the state' includes any one or more officers, agents, or employees of the state or any state agency . . . ."); *I.C.A. ß 80.4* (establishing Iowa state patrol in department of public safety).

The State of Iowa moved to dismiss or strike the complaint on September 21, 1998 (Doc. No. 3), alleging, *inter alia,* that the court lacks subject matter jurisdiction over Victor's claims. More specifically, the State of Iowa contends that, under the *Eleventh Amendment of the United States Constitution*, it enjoys sovereign immunity from Victor's claims.

1. Standards for motions to dismiss

In *Adler v. I&M Rail Link, L.L.C., 13 F.Supp.2d 912 (N.D. Iowa 1998)*, Judge Bennett summarized the standards for considering motions to dismiss. He stated:

> A motion to dismiss may be made, *inter alia,* [*8] for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. Such motions "can serve a useful purpose in disposing of legal issues with the minimum of time and expense to the interested parties." *Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 973 (8th Cir. 1968)*, *cert. denied, 395 U.S. 961, 89 S.Ct. 2096, 23 L.Ed.2d 748 (1969)*. The issue is not whether a plaintiff will ultimately prevail, but rather whether the plaintiff is entitled to offer evidence in support of its claims. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)*; *United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1376 (8th Cir.1989)*. In considering a motion to dismiss under *Rule 12(b)(6)*, the court must assume that all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegations. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)*; *Doe v. Norwest Bank Minn., N.A., 107 F.3d 1297, 1303-04 (8th Cir.1997)* ("In considering a motion to dismiss, we assume all facts in the complaint are true, construe the complaint in the light most favorable to the plaintiff, and affirm the dismissal only if 'it appears beyond [*9] a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief,'" quoting *Coleman v. Watt, 40 F.3d 255, 258 (8th Cir.1994)*); *WMX Techs., Inc. v. Gasconade County, Mo., 105 F.3d 1195, 1198 (8th Cir.1997)* ("In considering a motion to dismiss, the court must construe the complaint liberally and assume all factual allegations to be true."); *First Commercial Trust v. Colt's Mfg. Co., 77 F.3d 1081, 1083 (8th Cir. 1996)* (same).
>
> The court is mindful that in treating the factual allegations of a complaint as true pursuant to *Rule 12(b)(6)*, the court must "reject conclusory allegations of law and unwarranted inferences." *Silver v. H & R Block, Inc., 105 F.3d 394, 397 (8th Cir.1997)* (citing *In re Syntex Corp. Securities Litig., 95 F.3d 922, 926 (9th Cir. 1996)*); *Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir.1990)* (the court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts," citing *Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir.*

1987), and 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure ß 1357, at 595-97 (1969)); see also *LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097, 1103 (6th Cir.1995)* [*10] (the court "need not accept as true legal conclusions or unwarranted factual inferences," quoting *Morgan, 829 F.2d at 12*). Conclusory allegations need not and will not be taken as true; rather, the court will consider whether the facts alleged in the complaint, accepted as true, are sufficient to state a claim upon which relief can be granted. *Silver, 105 F.3d at 397*; *Westcott, 901 F.2d at 1488*.

The United States Supreme Court and the Eighth Circuit Court of Appeals have both observed that "a court should grant the motion and dismiss the action 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Handeen v. Lemaire, 112 F.3d 1339, 1347 (8th Cir.1997)* (quoting *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)*; accord *Conley, 355 U.S. at 45-46, 78 S.Ct. 99* ("A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief."); *Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 (8th Cir. 1997)* ("'A complaint should not be dismissed [*11] for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,'" quoting *Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982))*; *Doe, 107 F.3d at 1304* (dismissal is appropriate only if "'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief,'" quoting *Coleman, 40 F.3d at 258*); *WMX Techs., Inc., 105 F.3d at 1198* ("Dismissal should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts that would entitle relief," citing *Conley, 355 U.S. at 45-46, 78 S.Ct. 99*). The Rule does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations. *Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)*. Thus, "[a] motion to dismiss should be granted as a practical matter only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir.1995)* (internal quotation marks and ellipses omitted); accord [*12] *Parnes, 122 F.3d at 546* (also considering whether there is an "insuperable bar to relief" on the claim).

Id at 917-18.

Here, the State of Iowa claims that there is an "insuperable bar" to the plaintiff's claims against it.

2. Eleventh Amendment immunity

The *Eleventh Amendment of the United States Constitution* provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." *U.S. CONST. amend. XI*.

Although the language of the amendment, on its face, seems to bar all suits against the states in federal court, the Supreme Court has recognized certain exceptions to sovereign immunity to permit an aggrieved party to find a remedy for harmful state actions in federal court. First, by a waiver and consent that is clear and express, a state may waive sovereign immunity and consent to suit against it in federal court. *Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 882-83, 27 L.Ed. 780 (1883)*. Second, a federal statute may, under the authority of the *Fourteenth Amendment*, abrogate the *Eleventh Amendment*. *Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976)*. [*13] Finally, suit may be brought in federal court against a state officer for prospective relief for the officer's unconstitutional actions. *Ex Parte Young, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed. 714 (1908)*. Because neither the second nor the third exceptions apply to Victor's claims against the State of Iowa, [4] the court turns to a discussion of the first exception, state waiver.

4 Liberally construing Victor's *pro se* complaint, *see Smith v. St. Bernards Regional Medical Ctr., 19 F.3d 1254, 1255 (8th Cir.1994)*, one of his claims is that the State of Iowa violated his constitutional rights, giving rise to a cause of action under *42 U.S.C. ß 1983*, and that *ß 1983* abrogates the *Eleventh Amendment*. However, the Su-

preme Court has held that Congress did not intend for *ß 1983* to override the *Eleventh Amendment*. *See Will v. Michigan Dep't of State Police, 491 U.S. 58, 66-67, 70, 109 S.Ct. 2304, 2310, 105 L.Ed.2d 45 (1989)*, citing *Quern v. Jordan, 440 U.S. 332, 341, 99 S.Ct. 1139, 59 L.Ed.2d 359 (1979)*, so the second exception is inapplicable. The third exception is inapplicable to Victor's case because his complaint does not name a state officer as a defendant.

3. Whether the State of Iowa, [*14] ***in the ISTCA, consented to suit in federal court***

Eleventh Amendment immunity is absolute, and therefore protects a state against all suits in federal court, including those for monetary damages or prospective relief, whether arising under federal or state law. *See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100-01, 104 S.Ct. 900, 907-08, 79 L.Ed.2d 67 (1984)* ("*Pennhurst*"). In passing the Iowa State Tort Claims Act ("ISTCA"), the State of Iowa clearly and expressly waived its sovereign immunity and consented to being sued (*See Luncsford v. Nix, 848 F.Supp. 859, 860 (S.D. Iowa 1994))*, but not necessarily in federal court. "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." *Pennhurst, 465 U.S. at 99, 104 S.Ct. at 907*.

> Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the *Eleventh Amendment*. . . . Thus, in order for a state statute or constitutional provision to constitute a waiver of *Eleventh Amendment* immunity, it must specify the State's intention to subject itself to suit in *federal court.*

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S.Ct. 3142, 3146-47, 87 L.Ed.2d 171 (1985) [*15] (citations omitted) (emphasis in original).

While the State of Iowa, by enacting the ISTCA, waived sovereign immunity, it did not consent to suit in federal court. In fact, the act contains a clear and express provision limiting jurisdiction of suits brought under the act to "[t]he district court of the state of Iowa for the district in which the plaintiff is resident or in which the act or omission complained of occurred . . . ." [5] *I.C.A. ß 669.4*. The only mention the act makes of suits in federal court is a section announcing that the "state shall defend any employee, and shall indemnify and hold harmless an employee of the state in any action commenced in federal court under *section 1983, Title 42, United States Code . . . ." I.C.A. ß 669.20*.

> 5 If the act or omission occurred outside the state of Iowa and the plaintiff is a nonresident, then the Polk County District Court has exclusive jurisdiction. *I.C.A. ß 669.4*.

Because the ISTCA contains no clear and express waiver of the state's immunity from suit in federal court, this court cannot recognize one. Consequently, this court's lack of jurisdiction to hear any of Victor's federal or state claims against the State of Iowa constitutes [*16] an insuperable bar to those claims and mandates dismissal pursuant to *Rule 12(b)(6)*.

B. Plymouth County's Motion for Summary Judgment

Victor claims that Plymouth County was negligent in failing to: (1) install proper warning markings and signs at the intersection of U.S. Highway 75 and County Road C-38, (2) place the existing stop sign in a more adequate site, (3) cut tree branches that obstructed Victor's view at the same intersection, and (4) investigate thoroughly the accident that is the genesis of Victor's complaint. On September 23, 1998, Plymouth County filed a motion to dismiss the first and third claims against it as failing to state claims upon which relief could be granted (Doc. No. 4). On February 23, 1999, Plymouth County asked the court to treat the motion to dismiss as a motion for summary judgment. (Doc. No. 30.) This request is granted. As a part of this motion, Plymouth County also addressed the second issue, the alleged failure of the county to cut tree branches.

1. Standards for summary judgment

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment and provides that either party to a lawsuit may move for summary judgment without the need [*17] for supporting affidavits. *Fed. R. Civ. P. 56(a) & (b)*. *Rule 56* further states that summary judgment:

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

Fed. R. Civ. P. 56(c) (emphasis added). "A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, . . . and give [it] the benefit of all reasonable inferences

that can be drawn from the facts." *Lockhart v. Cedar Rapids Community Sch. Dist., 963 F. Supp. 805, 814 (N.D. Iowa 1997)* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986))*. A genuine issue of material fact is one with a real basis in the record. *Lockhart, 963 F. Supp. at 814 n.3* (citing *Matsushita, 475 U.S. at 586-87, 106 S.Ct. at 1355-56*).

The party seeking summary judgment must "'inform[ ] the district court of the basis for [its] motion and identify[] those portions of the record which show lack of a genuine issue.'" [*18] *Lockhart, 963 F. Supp. at 814* (quoting *Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992))*; *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)*. Once the moving party has met its initial burden under *Rule 56* of showing that there is no genuine issue of material fact, the nonmoving party "by affidavits or as otherwise provided in [*Rule 56*], [6] must set forth specific facts showing that there is a genuine issue for trial." *Rule 56(e)*; *Lockhart, 963 F. Supp. at 814* (citing *Matsushita, 475 U.S. at 586, 106 S. Ct. at 1356*).

> 6 E.g., by "affidavits . . . supplemented or opposed by depositions, answers to interrogatories, or further affidavits." *Fed. R. Civ. P. 56(e)*.

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the United States Supreme Court has stated that the nonmoving party must produce sufficient evidence to permit "'a reasonable jury [to] return a verdict for the nonmoving party.'" *Lockhart, 963 F. Supp. at 815* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986))*. Furthermore, the Court has held that the trial court must dispose of claims [*19] unsupported by fact and determine whether a genuine issue for trial exists, rather than "weigh the evidence and determine the truth of the matter." *Lockhart, 963 F. Supp. at 815* (citing *Anderson, 477 U.S. at 249, 106 S. Ct. at 2510-11*; *Celotex, 477 U.S. at 323-24, 106 S. Ct. at 2552-53*; and *Matsushita, 475 U.S. at 586-87, 106 S. Ct. at 1355-56*).

Thus, if a defendant shows that no genuine issue for trial exists in this case, and if the plaintiff cannot advance sufficient evidence to refute that showing, then that defendant is entitled to judgment as matter of law and the court must grant summary judgment in the defendant's favor. If, on the other hand, the court "can conclude that a reasonable trier of fact could return a verdict for [the plaintiff], then summary judgment should not be granted," *Lockhart, 963 F. Supp. at 815* (citing *Anderson, 477 U.S. at 248, 106 S. Ct. at 2510*), and the court must deny the motion for summary judgment.

In its motion to dismiss, Plymouth County argues that Victor's claims alleging the county's negligence in failing to properly mark the intersection and in failing to adequately investigate the accident fail to state claims upon which relief could be granted. [*20] The Motion for Treatment Under *Rule 56, F.R.C.P.* concentrates on Victor's claim alleging negligence for failing to maintain the intersection by cutting tree branches. Along with this later motion, Plymouth County submitted an affidavit [7] from the county engineer attesting to the fact that the view of the intersection of U.S. Highway 75 and County Road C-38 was not obstructed in any way by trees. The county also filed a Supplement to Brief in Support of Motion to Dismiss (Doc. No. 29) arguing that the county had no duty to trim any overhanging branches and that the view of the intersection, as shown by the county engineer's photographs, was not obstructed.

> 7 The affidavit (Doc. No. 31) included an attachment of three different photographs of the intersection taken from different points of view.

While there is some confusion on whether Plymouth County has raised all three of its issues in its motion for summary judgment, the court finds that this is immaterial. The Eighth Circuit has held:

> Where a motion for summary judgment is based solely on the pleadings and makes no [meaningful] reference to affidavits, depositions, or interrogatories, it makes no difference whether the motion is evaluated [*21] under *Rule 56* or *Rule 12(b)(6)* because both standards reduce to the same question. Therefore, a court should grant the motion and dismiss the action only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Handeen v. Lemaire, 112 F.3d 1339, 1347 (8th Cir. 1997) (internal citations and quotations omitted). Thus, the court will consider all of Victor's claims as coming within the purview of Plymouth County's summary judgment motion, but will consider that only the issue concerning the cutting of the tree branches is supported by material references to affidavits, depositions, or interrogatories - the other two issues will be decided solely on the pleadings.

2. Victor's claims

a. Failure to install proper warning markings and signs at the intersection

Victor argues that Plymouth County's failure to place adequate warning signs at the intersection constituted negligence. Plymouth County, on the other hand, argues that Iowa law immunizes the county from claims based upon alleged improper or inadequate signs and marking on the highway.

> The relevant Iowa law, *section 668.10(1) of the Iowa Code*, provides:
>
> In any action brought [*22] pursuant to this chapter, the state or a municipality shall not be assigned a percentage of fault for any of the following:
>
> 1. The failure to place, erect, or install a stop sign, traffic control device, or other regulatory sign as defined in the uniform manual for traffic control devices adopted pursuant to section 321.252. However, once a regulatory device has been placed, created or installed, the state or municipality may be assigned a percentage of fault for its failure to maintain the device.

I.C.A. ß 668.10(1).

At first glance, it would appear that Plymouth County, as a municipal entity of the state, *see I.C.A. ß 670.1(2)*, would be immune from Victor's claim that the county acted negligently in failing to place proper warning signs at the intersection of U.S. Highway 75 and County Road C-38. *See McLain v. State, 563 N.W.2d 600, 603 (Iowa 1997)*. Additional exceptions also exist to the general rule of immunity if any of the following are satisfied: "(1) failure to maintain a device; (2) installation of a misleading sign; and (3) where the exigencies are such that ordinary care could require the State to warn of dangerous conditions by other than inanimate objects." *McLain, 563 N.W.2d at 604*. [*23] Neither the first exception, failure to maintain, nor the second exception, installing a misleading sign, is implicated by the claim that the county is negligent for failing to install warning signs and markings. The remaining exception, exigencies requiring warning of dangerous conditions by other than inanimate objects, merits some discussion.

Victor alleges in his complaint that the juncture of U.S. Highway 75 and County Road C-38 is a dangerous intersection. He supports his claim by asserting that before his accident there had been a request that the intersection be controlled and that there have been seven fatalities and fifteen serious injury accidents at the intersection in the past eight years. (Complaint at 3.) Iowa has "recognized that the State may not be exempt from tort liability if the exigencies are such that ordinary care would require the State to warn of dangerous conditions by other than inanimate devices." *McLain, 563 N.W.2d at 604*. Giving Victor the benefit of the doubt, he has arguably raised exigent circumstances as a defense to the immunity provided to the county by *I.C.A. ß 668.10(1)*.

Under a summary judgment analysis, Plymouth County has the initial burden [*24] placed on the moving party to "inform[] the district court of the basis for [its] motion and identify[] those portions of the record which show lack of genuine issue." *Lockhart, 963 F.Supp. at 814* (citations and internal quotations omitted). To carry this burden, Plymouth County argues that the exigent circumstances exception applies only where conditions are so dangerous as to require something other than an inanimate device to warn motorists, such as "where it is necessary to have a law enforcement officer or flagger on the scene, warning motorists of impending danger." (Ply. Cty. Supp. Brief at 3.) Asserting that nothing in the record indicates that the intersection of C-38 and highway 75 required such a warning, Plymouth County argues that summary judgment should be granted.

The court agrees that nothing in the record supports a claim that the conditions at the intersection were so dangerous as to require something other than an inanimate warning device. The intersection was not in a construction zone, nor was there a pre-existing accident or emergency that might have required a personal warning to motorists approaching the intersection. Plymouth County has therefore carried its [*25] burden as the moving party in a summary judgment action. Plymouth County has correctly explained the law on the exigent circumstances exception and has shown that the record contains nothing to support a contrary position. It is therefore Victor's burden, "by affidavits or as otherwise provided in [*Rule 56*], [to] set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*; *Lockhart, 963 F.Supp. at 814* (citations omitted).

Victor has produced photographs and a videotape showing the intersection at issue as well as a newspaper article about the history of Victor's case. Initially the court notes that the photos, videotape, and article have not been placed in the record in the form required by *rule 56(c)*. *See Fed. R. Civ. P. 56(c)*. [8] Even if these items were properly made a part of the record, they fail to support his claim. The photos and the videotape show an intersection not unlike any other intersection in rural Iowa. Traveling east on C-38 and arriving at the intersection, a stop sign is clearly visible, but the view looking north on U.S. Highway 75 is partially obstructed by other road signs, overhanging tree branches, and the topography. These [*26] obstructions appear to impede the view of southbound traffic on Highway 75, and probably make

the intersection a dangerous one. However, it is clear from this evidence that the intersection is not so dangerous as to require a human flagger or law enforcement officer to warn motorists of the danger.

8 In relevant part, *Federal Rule of Civil Procedure 56(c)* states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Victor's submissions do not fit into any of the above-mentioned categories.

The newspaper article does not aid Victor's cause at all. It simply describes the history of Victor's accident and of his lawsuit while giving statistics similar to those listed by Victor regarding the number of fatalities and injuries occurring at the intersection.

Since none of the *McLain* exceptions to *I.C.A. ß 668.10(1)* are applicable to these facts, summary judgment should be awarded to Plymouth County on this claim.

b. Failure to properly [*27] ***place the existing stop sign***

Victor also claims negligence on the county's part for the actual placement of the stop sign that was installed at the intersection. Specifically, he asserts that the stop sign should have been moved forward from its present location. Plymouth County again relies on *section 668.10(1)* as immunizing it from liability.

While Iowa law recognizes an exception to immunity for claims of negligent installation of a sign, Victor's claim does not fit into this exception. In *Hershberger v. Buena Vista County, 391 N.W.2d 217 (Iowa 1986)*, the Supreme Court of Iowa held that immunity did not apply to a claim of negligent installation of a sign where the county placed a right turn sign upon a road which turned left. The court later explained that the *Hershberger* ruling "did not suggest that a decision to place a traffic sign automatically carries with it a waiver of immunity under the statute." *Saunders v. Dallas County, 420 N.W.2d 468, 472 (Iowa 1988)*. Instead, the *Saunders* court noted that allegations that "come down to decisions about whether or *where* to place traffic signs . . . are precisely the ones which *section 668.10(1)* immunizes from liability." *Id.* (emphasis [*28] added).

Victor's claim is more appropriately characterized as a negligent placement claim rather than a negligent installation claim. He argues that the existing stop sign is not placed in the optimal site. This is different from an argument that the county negligently executed the installation of the sign. *See Saunders, 420 N.W.2d at 472* ("the holding in *Hershberger* is limited to complaints about the *execution* of [a decision concerning placement of road signs]." (emphasis added).

Because "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," Plymouth County's motion for summary judgment should be granted on this claim. *Handeen v. Lemaire, 112 F.3d at 1347 (8th Cir. 1997)*.

c. Failure to cut tree branches obstructing the view of the intersection

Plymouth County argues that it is immune from Victor's claim that the county was negligent in failing to cut overhanging tree branches. Alternatively, the county argued that the claim lacks merit because no branches actually obstructed the view of the intersection.

i. Immunity under I.C.A. ß 670.4

Plymouth County relies on *section 670.4 of the Iowa Code* for its claim of immunity, [*29] which exempts a municipality such as Plymouth County from liability for:

> Any claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation whether the statute, ordinance or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.

I.C.A. ß 670.4(3). Plymouth County argues that tree trimming is a discretionary function or duty, and that any claim based on an abuse of that discretion or duty is exempted by Iowa law.

The Iowa Supreme Court recently announced a change in its analysis of cases involving claims of immunity under the discretionary function or duty exception to the municipal tort claims act. Under its old analysis, the court employed the planning-operational dichot-

omy to aid in determining whether a decision challenged under *section 670* was discretionary. *See Keystone Elec. Mfg. v. City of Des Moines, 586 N.W.2d 340, 347 (Iowa 1998)*. Stated broadly, the planning level is the policy-making [*30] stage, during which a municipality enjoys immunity from liability; the operational level is the implementation of decisions made at the planning level, during which a municipality does not enjoy immunity. *Id.* "For example, in the area of highway construction and repair once the decision [has been] made to construct or repair a . . . freeway . . . . the State [is] obligated to use due care to make certain that the freeway [meets] the standard of reasonable safety for the traveling public." *Id.* (citations and internal quotations omitted). Shortly after *Keystone, in Goodman v. City of LeClaire, 587 N.W.2d 232 (Iowa 1998)*, the Iowa Supreme Court adopted a different analysis. The court noted that Iowa law on the issue of immunity for discretionary functions or duties closely follows federal law. *Id., at 235-36*. Because the United States Supreme Court had, in a series of cases, clarified its analysis on this issue, the Iowa Supreme Court decided to follow suit. *Id., at 237-38* (citing and summarizing *United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991)*; *Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)*; *United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984))*. [*31] Under this new analysis, rather than directing its inquiry at whether the action in question was undertaken at the planning or operational stage, the court focuses on: (1) whether the action is a matter of choice for the acting employee, and, (2) when the challenged conduct does involve an element of judgment, whether that judgment is of the kind that the discretionary function exception was designed to shield. *Id., at 238-40*.

According to an affidavit from the Plymouth County engineer, the county's policy regarding the trimming of trees located on private property that overhang onto public roads is to trim trees if: (1) "the trees actually overhang a public road where they may come into contact with county equipment operating on the road," or (2) "the trees or branches actually obstruct vision of a road sign (such as a stop sign)." (Rohe's Aff. at 1.) Furthermore, the county "*may* trim branches of trees because the trees may constitute an obstruction to vision of oncoming traffic at an intersection." *Id.* (emphasis added). Because Victor's complaint focuses on the obstruction of his view of traffic approaching the intersection from the south, the court need only concern itself with Plymouth [*32] County's policy for trimming trees and branches that obstruct a driver's view of oncoming traffic. Since the county's policy is that its employees "*may* trim branches of trees because the trees may constitute an obstruction to vision of oncoming traffic at an intersection," the county has given its employees discretion in implementation of this policy. Thus, the action (or inaction) of which Victor complains was a matter of choice for the county's employee.

Because the challenged conduct involves an element of judgment, the court must consider the second prong of the test adopted in *Goodman,* whether that judgment is of the kind that the discretionary function exception was designed to shield. The court in *Goodman* noted that "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulation." *Goodman, 587 N.W.2d at 238* (quoting *Gaubert, 499 U.S. at 324, 111 S.Ct. at 1274*). *Berkovitz,* the case upon which *Goodman* relies most heavily, aids in this analysis:

> The basis for the discretionary function [*33] exception was Congress' desire to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in *social, economic, and political policy* through the medium of an action in tort. *The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy*. In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment. (Emphasis supplied)

Berkovitz, 486 U.S. at 536-37, 108 S.Ct. at 1959 (citations and internal quotations omitted).

The question, then, is whether Plymouth County's policy for tree-trimming encompasses social, economic, and political considerations and therefore enjoys immunity under the discretionary function exception. The court finds that it does not. Although the county's policy regarding the trimming of trees located on private property that overhang onto public roads gives discretion to county employees regarding whether to trim the trees, the exercise of that discretion does not involve social, economic, and political policy. Accordingly, the discretionary function exception [*34] does not apply.

ii. Whether tree branches actually obstructed the intersection

Although Plymouth County has not shown that it is entitled to immunity, Plymouth County's alternative argument entitles it to summary judgment on the claim. The county has challenged the merits of whether or not

tree branches obstructed the view of the intersection of U.S. Highway 75 and County Road C-38. Specifically, the county argues that no genuine issue of material fact exists as to whether the plaintiff's view of the intersection was obstructed. To support its argument, and carry its initial burden, the county produced the affidavit from the county engineer and the pictures accompanying the affidavit. The affidavit contains a statement that Plymouth County employees have never "trimmed trees whose trunks are located on the Elwayne Maser property" (Rohe Aff. at 2), and the photographs show that the plaintiff's view of the intersection was minimally obstructed by overhanging tree branches.

With Plymouth County's showing, the burden then shifts to Victor to set forth, by affidavits or as otherwise provided in *Rule 56*, specific facts showing that there is a genuine issue for trial. To carry this burden, Victor [*35] has provided the court the photos, videotape, and newspaper article, as mentioned above. *See supra* Part II.B.2.a. As stated previously, however, Victor has failed to comply with *Rule 56(c)*, so the photos, the videotape, and the article are not part of the record. Therefore, Victor has failed to produce any evidence to permit "'a reasonable jury [to] return a verdict for the nonmoving party.'" *Lockhart, 963 F. Supp. at 815* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. However, if this evidence were made a part of the record, there would be genuine issues of fact for trial: did the tree branches adjacent to the intersection obstruct the view of traffic approaching the intersection, and was the county negligent in not trimming the tree branches.

The court will give Victor until August 13, 1999, to properly authenticate his submissions in support of his resistance to the county's motion for summary judgment. If he does so, the motion should be denied. If he fails to do so, summary judgment in favor of Plymouth County should be granted on the basis that Victor has failed to come forward with sufficient evidence to show that [*36] the intersection was actually obstructed by tree branches.

d. Failure to investigate thoroughly

Victor's final argument, that Plymouth County is negligent in failing to thoroughly investigate the accident that is the source of this lawsuit, lacks any merit. The court does not understand how the alleged negligence of the county to properly investigate the accident has harmed the plaintiff or gives rise to a cause of action against the county under Iowa law.

First, Victor has not alleged how the alleged failure of the county to thoroughly investigate the accident has harmed him in any way. Without damages, Victor has no claim against the county. *See Foggia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889, 893 (Iowa 1996)* ("It is firmly established in the case law of Iowa that the plaintiff in a negligence suit bears the burden of proof on the issues of causation and damages."); *Froman v. Perrin, 213 N.W.2d 684, 687 (Iowa 1973)* ("Plaintiff must prove defendant's negligence, proximate cause, and resulting damages.").

Second, municipalities such as Plymouth County are liable for the torts of their employees. *See I.C.A. ß 670.2*. "However, that statute does not create liability for the acts of [*37] police officers that involve mere negligence. . . ." *Morris v. Leaf, 534 N.W.2d 388, 391 (Iowa 1995)* ("Iowa courts have consistently held that law enforcement personnel do not owe a particularized duty to protect individuals; rather, they owe a general duty to the public."). While an exception to the general rule barring recovery exists if a citizen can show a special relationship between the citizen and the law enforcement officer, *see Allen v. Anderson, 490 N.W.2d 848, 856 (Iowa 1992)* (holding citizen can establish special relationship by showing either: (1) that police created situation which placed citizen's life in jeopardy, or (2) that police took citizen into custody or control), Victor has produced no such evidence. Accordingly, Victor does not have a private right of action to sue Plymouth County for negligent investigation. *See Smith v. State, 324 N.W.2d 299, 302 (Iowa 1982)* ("Police officers and other investigative agents must make quick and important decisions as to the course an investigation shall take. Their judgment will not always be right; but to assure continued vigorous police work, those charged with that duty should not be liable for mere negligence.")

Accordingly, [*38] summary judgment should also be granted on this claim.

C. Vulcraft's Motion to Dismiss and Motion for Summary Judgment (and Victor's Motion to Add Swoboda as an Additional Defendant)

On October 7, 1998, Vulcraft filed a motion to dismiss (Doc. No. 10), and on February 11, 1999, Vulcraft filed a motion for summary judgment (Doc. No. 24). Since Victor's claims against Vulcraft have been dismissed, both of these motions are denied as moot.

On May 21, 1999, Victor filed a motion seeking to add Swoboda as an additional defendant. The court must initially determine whether the proposed amendment would be futile. [9] "Leave to amend should be granted absent a good reason for the denial, such as undue delay, bad faith, undue prejudice to the nonmoving party, or futility." *Moore v. Jackson, 123 F.3d 1082, 1089 (8th Cir. 1997)* (quoting *Fuller v. Secretary of Defense of the United States, 30 F.3d 86, 88 (8th Cir. 1994)*.

> 9 Moreover, Victor has failed to comply with *L.R. 15.1*, which requires the moving party to "attach to the motion the original of the proposed amended and substituted pleading."

The statute of limitations for Victor's claim against Swoboda is two years. *See IOWA CODE ANN. ß 614.1(2)*. Victor's [*39] claim arose on August 16, 1996, and he now seeks to add Swoboda as a defendant almost three years later. Victor argues that the statute of limitations is not a bar to his claims against Swoboda because of the doctrine of "relation back of amendments." He argues that under Iowa Rule of Civil Procedure 69(e) [10] his claims against Swoboda relate back to the date of the original pleading, therefore avoiding the bar of the statute of limitations.

> 10 Victor's brief incorrectly cites to Iowa Rule of Civil Procedure 89. Rule 89 was amended and redesignated as Rule 69(e), effective January 24, 1998.

The court first notes that Eighth Circuit case law suggests that the federal rule regarding the relation back of amendments to a complaint governs this question, *see Brown v. E.W. Bliss Co., 818 F.2d 1405, 1408-09 (8th Cir. 1987)*, but in this situation this question is immaterial because, except for minor grammatical differences, the federal rule and the Iowa rule are identical. *See Fed. R. Civ. P. 15(c)*; Iowa R. Civ. P. 69(e). Iowa Rule of Civil Procedure 69(e), in relevant part, states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence [*40] set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Iowa R. Civ. P. 69(e).

Victor has obviously met the preliminary element of both rules because the claim he asserts "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Fed. R. Civ. P. 15(c)*; Iowa R. Civ. P. 69(e). As for the other requirements, nothing in the record exists to aid the court in determining whether these requirements have been met. Since the court cannot conclude on this record that Victor's claim against Swoboda would be futile, the motion to add [*41] Swoboda as a new defendant is granted, with the understanding that any problems with the statute of limitations can be raised by Swoboda after he is made a party to the lawsuit. The plaintiff is directed to file a pleading in compliance with *L.R. 15.1* by August 27, 1999, and to thereafter promptly complete service on Swoboda.

D. Maser's Motion for Summary Judgment and Victor's Constitutional Challenge

On March 15, 1999, Maser filed a motion for summary judgment, (Doc. No. 40), on Victor's claim that Maser was negligent for failing to trim trees located on Maser's property that obstructed Victor's view of U.S. Highway 75. Maser's motion simply adopts and incorporates Vulcraft's motion, memorandum (not including Vulcraft's supplemental memorandum), and accompanying affidavits. Maser's motion also summarily states that "Plaintiff's claims against Elwayne Maser are based on negligence and no evidence exists to show the alleged negligence of Mr. Maser." (Maser M. for S.J. at 1.)

Maser's summary judgment makes no meaningful reference to affidavits, depositions, or interrogatories. By incorporating Vulcraft's arguments, Maser does not address the issue of his own alleged negligence. Thus, Maser's [*42] motion will be analyzed under the standard announced in Handeen. *Handeen, 112 F.3d, at 1347 (8th Cir. 1997)* (finding if no meaningful reference made, then no difference in evaluation of summary judgment under *Rule 56* or *Rule 12(b)(6)* because both standards reduce to same question, and court should grant motion and dismiss action "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations").

In a case such as Victor's, where the complaint is based on diversity jurisdiction, the question of what law to apply is usually answered by the *Erie* doctrine, which states that the court should ordinarily apply the substantive law produced by the state legislature or the highest court of the state. *See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938)*.

In *Fritz v. Parkison, 397 N.W.2d 714 (Iowa 1986)*, the Supreme Court of Iowa found no duty, and therefore no negligence, on the part of a private property owner to

remove trees which obstructed the view of a highway. The court weighed the competing public policies of keeping highways free from obstructions and hazards versus the state's goal of encouraging [*43] the growth and cultivation of trees while simultaneously discouraging their wanton destruction. *Fritz, 397 N.W.2d, at 715-16*. In finding that the landowner owed no duty to the motorist, the court also noted that "the county and the motorists are in a much better position to take precautions sufficient to minimize any danger," as opposed to the landowner. *Id., at 716*.

In Victor's complaint, he alleges that the "Iowa law regarding the right to sue private property owners for negligence is unconstitutional." (Complaint at 1.) The court assumes that the law to which Victor refers is the *Fritz* decision. While mindful of its duty to construe *pro se* complaints liberally, it is not the job of the court to "construct arguments or theories for the plaintiff in the absence of any discussion of those issues." *Drake v. City of Fort Collins, 927 F.2d 1156, 1159 (10th Cir.1991)* (citation omitted). Besides the bare assertion that the Iowa law is unconstitutional, Victor has provided no other discussion of the issue. The court finds that nothing has been advanced to suggest that the *Fritz* case violated the United States Constitution. Accordingly, no relief could be granted against Maser in this case [*44] under the facts in this record.

E. Victor's Motion for Change of Venue

On April 5, 1999, Victor filed a motion to change venue to Cedar Rapids. (Doc. No. 46). The motion has been resisted by all of the defendants. (Doc. Nos. 47, 49, 51, and 52). The motion has no merit. No meaningful reasons have been advanced to support the motion. Furthermore, both Cedar Rapids and Sioux City are in the same judicial district. The motion is denied.

IV. CONCLUSION

Victor's Motion for Order Changing Venue (Doc. No. 46) is **denied.** His Motion to Dismiss Vulcraft as a party (Doc. No. 56) is **granted,** and his Motion to Amend Complaint (Doc. No. 56) is **granted.**

Defendant Vulcraft's Motion to Dismiss (Doc. No. 17) and Motion for Summary Judgment (Doc. No. 24) are **denied as moot.**

Defendant Plymouth County's Motion for Order Granting Permission to Treat Motion to Dismiss as a Motion for Summary Judgment (Doc. No. 30) is **granted.**

Furthermore,

IT IS RECOMMENDED that, unless any party files objections [11] to the Report and Recommendation in accordance with *28 U.S.C. ß 636(b)(1)(C)* and *Fed. R. Civ. P. 72(b)* within ten (10) days of the service of a copy of this report and recommendation, the State of Iowa's Motion to Dismiss [*45] (Doc. No. 17) be granted, Plymouth County's Motion for Summary Judgment, subject to the proper authentication of the videotape, photographs, and newspaper article, (formerly Motion to Dismiss) (Doc. No. 17) be granted in part and denied in part, and Maser's Motion for Summary Judgment (Doc. No. 40) be granted.

11 Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See Fed. R. Civ. P. 72*. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Am, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985)*; *Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990)*.

IT IS SO ORDERED.

DATED this 10th day of August, 1999.

PAUL A. ZOSS

MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT