UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20676
Summary Calendar

ILDIS ROMAN, ET AL.,

Plaintiffs,

ILDIS ROMAN AND IRIS ROMAN,

Plaintiffs-Appellants,

versus

KATHERINE WHITMIRE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-90-419)

(July 11, 1995)

Before THORNBERRY, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Appellants, Ildis and Iris Roman, were the parents of Josue Roman, deceased. They appeal the district court's grant of summary judgment in this civil rights action. Because we agree there exists no genuine issue as to any material fact, we will affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

On March 18, 1987, Josue Roman, a first-grader at Harris Elementary School in Houston, was struck and killed by a pickup truck after he had chased a soccer ball through an open gate and into a feeder road to the East Freeway. The Romans brought suit under 42 U.S.C. §§ 1983 and 1985 against Appellee Whitmire, in her official capacity as mayor of Houston, and individually.[1] They also sued Houston Independent School District (HISD) and its employees, superintendent Dr. Joan Raymond,[2] Harris Elementary principal Gloria Howard, and teacher Michael Vowell, in their official and individual capacities.

The Romans argued in the district court that Josue had constitutionally protected liberty and property interests in his physical safety and the actions of HISD and its employees violated these rights. The district court rejected these contentions, holding that because the Romans had failed to show that HISD and its employees had instituted any constitutionally deficient policy or custom regarding student safety, HISD was entitled to summary judgment on all claims. As to the individual HISD defendants, the

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[1] The district court dismissed all claims asserted against Whitmire in her individual capacity in an order dated January 28, 1991. As to claims asserted against her in her official capacity, her motion for summary judgment as to the Romans' claims was granted, but was denied as to the survival claims asserted by Josue's estate.

[2] It appears the Romans have abandoned on appeal their complaint as it regards Raymond. As the district court correctly observed, Raymond cannot be held liable for actions of subordinates under a *respondeat superior* theory. LeFall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 525 (5th Cir. 1994).

court found they were all entitled to qualified immunity because the Romans failed to assert any facts showing they had acted with callous indifference to Josue's safety. On appeal the Romans argue the district court erred in granting summary judgment because there were material questions of fact which controverted affidavits supporting the motion for summary judgment.

II. ANALYSIS

A. Standard of Review

This court conducts a *de novo* review of a district court's grant or denial of summary judgment. Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party shows he is entitled to judgment as a matter of law. Ibid. FED. R. CIV. P. 56(e). If the moving party meets the initial burden of showing there is no genuine issue, the burden shifts to the opposing party to set forth specific facts showing the existence of a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

B. HISD

A school district is a local governing body under Monell v. Dept. of Social Servs., 436 U.S. 658 (1078). See LeFall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 525 (5th Cir. 1994). In a § 1983 action, neither a school district nor its supervisory officials may

be held liable under a theory of *respondeat superior*. Ibid. A local governing body may be liable under § 1983 if the alleged unconstitutional activity is inflicted pursuant to official policy. Johnson v. Moore, 958 F.2d 92, 93 (5th Cir. 1992). A § 1983 complaint against a municipality must identify the policy, connect it to the municipality, and show that the particular injury occurred because of the execution of the policy. Bennett v. Slidell, 728 F.2d 762, 767 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985). Municipal liability also may be predicated upon an isolated decision made by a person with power to make policy for the municipality. Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986).

The Romans' allegations that the gate had been left open on previous occasions may implicate negligence. However, the Romans have alleged no facts which would indicate that HISD or any policy-making official either implemented a policy that the gate to the feeder road should be left open, or had a practice of keeping it open. Accordingly, the Romans have failed to establish the existence of a persistent, widespread practice of school district officials or employees which is so common and well settled as to constitute a custom that fairly represents district policy. Johnson, 958 F.2d at 94. Rather, this case involves a single, isolated incident, not a custom or policy and, consequently, provides no sufficient basis to impose liability on HISD.

C. HISD Employees

The Romans argue that Josue had a constitutionally protected liberty interest in his physical safety which was violated by the HISD employees.[3] This claim is based on the Due Process Clause of the Fourteenth Amendment, which does not transform every tort committed by a state actor into a constitutional violation. DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 202 (1989). Claims grounded only in state tort law do not establish constitutional violations cognizable in a § 1983 action. Walton v. Alexander, 44 F.3d 1297, 1301 (5th Cir. 1995) (en banc). It logically follows that more than negligence is required to establish liability on the part of the HISD employees; the Romans must show that Howard or Vowell, either by action or inaction, demonstrated a deliberate indifference to Josue's constitutional rights. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 454 (5th Cir.) (en banc), *cert. denied sub nom.*, Lankford v. Doe, ___ U.S. __, 112 S.Ct. 70 (1994).[4]

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[3] Claims asserted against Howard and Vowell in their official capacities are properly treated as claims against HISD. See Hafer v. Melo, 502 U.S. 21, 25-26 (1991). As noted in our discussion above, those claims are without merit.

[4] *See and compare*, Doe, 15 F.3d at 445 (school children have a liberty interest in their bodily integrity protected by the Due Process Clause of the Fourteenth Amendment, which is violated by a school employee's physical sexual abuse); Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305 (5th Cir. 1987)(students have a due process right to be free from bodily restraint); Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir. 1984)(students have a right to be free of corporal punishment when arbitrarily or capriciously inflicted, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning).

The Romans assert the rule enunciated in Doe should apply in the instant case because the HISD employees' actions involve "placement of children of tender years in a place of imminent peril . . . caused by [an] opening from a playground onto a feeder road of an extremely active interstate highway." The summary judgment evidence shows that Howard and Vowell may have acted negligently by failing to close the gate. However, negligence alone will not trigger the due process protections of the Fourteenth Amendment. Doe, 15 F.3d at 450. Viewed in the light most favorable to the Romans, there is no evidence that either of the HISD employees acted with deliberate indifference to Josue's constitutional rights.[5]

III. CONCLUSION

The district court did not err in granting summary judgment in favor of HISD and its employees. The judgment is therefore

AFFIRMED.

[5] The Romans urge this court to consider evidence in the form of affidavits attached to their motion to amend the judgment, which were not taken into account by the district court. Although we have held in certain circumstances that the district court abuses its discretion by failing to consider affidavits attached to such motions, Ford v. Elsbury, 32 F.3d 931, 939 (5th Cir. 1994), the affidavits in the instant case do not raise a fact question demonstrating deliberate indifference, but implicate only negligence. Doe, 15 F.3d at 443.