

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30493
(Summary Calendar)

FRANK MINOR,
aka
Frank Smith, Jr.,

CELIA SMITH, on behalf of
the minor child, Tori L. Minor,
James Smith and Mitchell Minor, Jr.,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-94-283-A-M2)

(January 17, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In this action filed under the Federal Tort Claims Act, 28 U.S.C. § 2671 (FTCA), Plaintiffs-Appellants (Appellants) ask us to reverse the district court's dismissal of claims against the United States on grounds of sovereign immunity and that court's denial of Appellants' effort to add a non-diverse party as an additional defendant on state law claims. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

While fishing in South Louisiana between Baton Rouge and New Orleans, Tori Minor (Tori) and members of her family were standing on the edge of a concrete pit, or stilling basin, located adjacent to the Morganza Spillway. Tori, a minor, fell into the water, and three family members drowned trying to rescue her. Frank Minor, Jr. and others (Appellants) brought suit against the United States under the FTCA, alleging that the deaths and injuries were caused by the negligence of the United States, through the Army Corps of Engineers, in the design, construction, and maintenance of the stilling basin.

The United States moved to dismiss the claims pursuant to Fed. R. Civ. P. 12(b)(1), asserting that the district court lacked subject matter jurisdiction because the United States was statutorily immune from the claims under the Flood Control Act, 33 U.S.C. § 702c (FCA). Based on information presented in the motion to dismiss, to the effect that Boh Brothers Construction Company actually built the stilling basin, Appellants moved to add

that construction company as a defendant in the suit.

The district court granted the motion to dismiss, finding that the FCA exempted the United States from liability for damages, including personal injury and death, caused by waters in flood control structures. The district court also denied Appellants' request to add Boh Brothers Construction Company as a defendant, finding no subject matter jurisdiction over the non-federal claims against the construction company.

II

ANALYSIS

A. Immunity

"It has long been established, of course, that the United States, as sovereign, `is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). As a general rule, whenever the United States has not waived its sovereign immunity, the district court should dismiss the complaint for want of subject matter jurisdiction rather than dismissing by granting a motion for summary judgment. Broussard v. United States, 989 F.2d 171, 177 (5th Cir. 1993).

As noted, Appellants base their claims against the United States on the FTCA, which waives the sovereign immunity of the United States when federal employees have tortiously caused personal injury or property damage. 28 U.S.C. § 2671. The government asserts that the FCA explicitly retains the immunity of

the United States with respect to damages arising from flood control projects:

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

33 U.S.C. § 702c.

The Supreme Court construed the FCA's immunity provision in James v. United States, 478 U.S. 597, 106 S. Ct. 316, 92 L.Ed.2d 483 (1986), a case factually similar to the instant suit. James involved drowning deaths and injuries to recreational users of the Mississippi River Valley flood control projects in Arkansas and Louisiana. 478 U.S. at 599.

The Supreme Court concluded that the plain language of the statute outlined the government's immunity "in sweeping terms." 478 U.S. at 604. Stating that "[i]t is difficult to imagine broader language," the Court held that on its face the language covered the accidents at issue. "It requires some ingenuity to create ambiguity." 478 U.S. at 604.

The Court further determined that the terms "floods and flood waters" are not ambiguous, pointing out that the FCA concerns flood control projects designed to carry flood waters. "It is thus clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." 478 U.S. at 605 (emphasis added). Despite admitted negligence by the Corps of Engineers in the Louisiana case, see 478 U.S. at 601,

the Court held the actions barred by § 702c.

A dissent by Justice Stevens, joined by Justices Marshall and O'Connor, questioned the majority's interpretation of "damage," arguing that Congress intended the word only to cover property damage, not personal injury. As the district court noted, Appellants have extensively cited the dissent's arguments and reasoning in support of the contention that the immunity of § 702c should apply only to property damage and should not bar claims for personal injury. But this argument was specifically rejected by the James majority, see 478 U.S. at 612, and is therefore without precedential merit.

Appellants' only argument not squarely foreclosed by James is that the waters in the stilling basin at the Morganza structure were not related to flood control, thus, the deaths were not caused "from or by" "flood waters." But we addressed and rejected that same argument in Mocklin v. Orleans Levee District, 877 F.2d 427 (5th Cir. 1989).

In Mocklin, the Corps of Engineers undertook to reinforce levees on Lake Pontchartrain as part of a flood control project. Channels were dredged near the levee so that barges carrying the necessary equipment could gain access to the construction site. A child drowned after slipping from a sand bar created by the dredging. In determining whether the immunity of § 702c applied, we answered affirmatively the question whether the drowning was "from or by" "flood waters" within the meaning of § 702c.

The flotation channel in which the Mocklins allege the drowning occurred properly can be said to contain

water related to flood control. The channels were dredged because the lake was not deep enough for the barges to have access to the shore. The barges were needed to deliver the equipment and materials used in the reinforcement of the levees to prevent flooding. The channels were inescapably part of a flood control project. The inquiry ends then, and the Government is protected from "any" liability caused by these waters as it was in James.

877 F.2d at 430 (citation and footnote omitted).

The stilling basin at the Morganza Spillway is similarly "inescapably part of a flood control project." It was created in 1977 to provide erosion protection after the velocity of water pouring through the open bays during a 1973 flood caused severe scouring, or gouging out, of the land behind the bays. The government provided extensive evidence of the necessity for the stilling basin as part of the flood control structure in case the Morganza Spillway should be needed to divert flood water in the future.¹

Appellants simply assert that the waters in the basin are not related to flood control activities because the basin has never been actively employed for any flood control purpose. Under Mocklin, however, the basin is indisputably part of a flood control project.

Nevertheless, in an effort to support their argument, Appellants cite several cases in which circuit courts have held suits for injuries on flood control facilities not barred by § 702c

¹The court has authority to consider evidence beyond the pleadings when a party challenges subject matter jurisdiction. Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994).

immunity. This line of interpretation is based on a footnote in James, in which note the Supreme Court cites with apparent approval two circuit court cases that suggested that § 702c immunity is not available if a plaintiff can prove that the harm suffered as a result of a structure's operation was wholly unrelated to the structure's operation as a flood control project. James, 478 U.S. at 605 n.7.

Some controversy exists among the circuits as to the proper interpretation of this "wholly unrelated" reference. The Tenth Circuit in Boyd v. United States, 881 F.2d 895, 900 (10th Cir. 1989) rejected a literal interpretation of "wholly unrelated" and found no immunity when waters were not being actively used for flood control purposes, although the court did not attempt to delineate the necessary link between flood control activities and injuries sustained at a flood control project.

On the other hand, the Third Circuit in Dawson v. United States, 894 F.2d 70, 74 (3d Cir. 1990) strictly construed "wholly unrelated," stating, "[w]e recognize that only a narrow category of cases will satisfy this stringent standard, however this was the result desired by Congress in enacting § 702c." The Ninth Circuit in McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989) held that § 702c immunity applies when "waters contained in a federal flood control project for purposes related to flood control were a substantial factor in bringing about [the plaintiff's] injuries." 850 F.2d at 561-62. Accord, Henderson v. United States, 965 F.2d 1488, 1492 (8th Cir. 1992)

(no immunity when waters were released solely to generate electricity); Fryman v. United States, 901 F.2d 79, 81 (7th Cir.), cert. denied, 498 U.S. 920 (1990) ("If § 702c has limits, they have to do with causation.").

To the extent Appellants are embracing a Boyd-type interpretation, we have already rejected such an approach to the 'wholly unrelated' standard. "It is the operation and not the injury that must be 'wholly unrelated' to flood control for [§ 702c] not to apply." Mocklin, 877 F.2d at 430 n.6. As the operation in question, i.e., creating and maintaining the stilling basin, is not "wholly unrelated" to flood control, § 702c immunity applies in this case.

B. Jurisdiction

After the United States filed its Motion to Dismiss, Appellants moved to amend their Complaint to add Boh Brothers Construction Company as a defendant. After dismissing the claims against the United States for lack of subject matter jurisdiction, the district court denied the motion to amend, noting that Appellants "provide no basis for jurisdiction over such claims and this court can conceive of no such basis."

Appellants argue for the first time on appeal that the district court had supplemental jurisdiction over the claims against Boh Brothers under 28 U.S.C. § 1367. Appellants assert additionally that even when the claim over which the district court had original jurisdiction is dismissed, it is within the court's discretion to exercise supplemental jurisdiction.

28 U.S.C. § 1367a provides:

[i]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

The decision to exercise or decline pendent (now supplemental) jurisdiction is within the discretion of the district court. Wong v. Stripling, 881 F.2d 200, 204 (5th Cir. 1989). Under United Mine Workers v. Gibbs, 383 U.S. 715, 108 S. Ct. 618, 98 L.Ed.2d (1966), a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving supplemental state-law claims. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L.Ed.2d 720 (1988). "When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." Id.

In this case, however, the state law claims were not pending at the time of the dismissal of the federal claims; on the contrary, Appellants were still seeking permission to add the state law claims. As the district court dismissed the federal claims before ruling on the motion to amend, there were no state law claims pending at the time of the dismissal of the federal claims.

Under these circumstances, the district court ruled that it had no jurisdiction to hear the state law claims and denied the motion to amend the complaint so as to add the state law claims against the putative non-diverse defendant. The procedural posture of this case at the time of the dismissal of the federal claims makes the supplemental jurisdiction issue novel.

Novelty aside, however, even if the district court was incorrect in holding that it had no jurisdiction to hear the state law claims, dismissal of the state law claims at such an early stage in the litigation was well within the court's discretion under § 1367(c)(3), which provides that a court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction. Rhyne v. Henderson County, 973 F.2d 386, 395 (5th Cir. 1992).

AFFIRMED.