UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50581
Summary Calendar

RODOLFO BACA, by his Next
Friend and Natural Parent
George Baca, ET AL.,

Plaintiffs,

RODOLFO BACA, by his Next
Friend and Natural Parent
George Baca,

Plaintiff-Appellant,

versus

RICHARD LADD, in his
representative capacity as
Acting Director of Texas
Department of Human Resources,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Texas
(A-93-CV-345)

January 19, 1996

Before GARWOOD, WIENER and PARKER, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Rodolfo Baca (Baca) by his next friend,

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

George Baca, brought this suit against defendant-appellee Acting Director of the Texas Department of Human Resources Richard Ladd (Ladd) in his official capacity,[1] asserting federal claims arising from past and future administration of Medicaid payments on behalf of Baca. Baca appeals the district court's award to him of attorneys' fees, complaining that a larger award should have been made.

Facts and Proceedings Below

Baca is a Texas Medicaid-eligible minor who required a liver and bowel transplant to save his life. In July of 1992, Baca's physician requested funding authorization for the liver and bowel transplant from Dr. Pendergrass, the Medical Director of the National Heritage Insurance Company, the company responsible for insuring and coordinating the Texas Medicaid program. In July 1992, Dr. Pendergrass refused to authorize a bowel transplant under the Texas Medicaid program. Baca's attorney became involved in trying to persuade Dr. Pendergrass to approve the bowel transplant in early October 1992, and he threatened to file a lawsuit to ensure that Baca could obtain the needed transplants.

On December 29, 1992, Dr. Pendergrass authorized Baca's liver and bowel transplant to be performed at Children's Hospital in Pittsburgh, Pennsylvania (the Hospital), but he stated that payment would be limited to a prospective Texas Medicaid payment

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[1] Ladd asserts that he is the Commissioner of the Texas Health and Human Services Commission, not Acting Director of the Texas Department of Human Resources, but the identity of the named defendant does not affect the outcome of this appeal.

methodology. On January 4, 1993, Baca received a liver and bowel transplant at the Hospital.

After the operation, the Hospital expressed its dissatisfaction with the proposed payment limitations expressed in Dr. Pendergrass's letter of December 29. The Hospital was concerned that it would not be reimbursed at a fair rate and began negotiations with the Texas Department of Human Resources (TDHR). Dr. Pendergrass finished calculating a Diagnostic Related Group rate (DRG) for the liver and bowel transplant on January 13, 1993.

On January 19, 1993, Baca filed this lawsuit against Ladd. The lawsuit sought declaratory and injunctive relief to require the TDHR to provide reasonable payment to the Hospital for the liver and bowel transplant. The Hospital was not a party to the suit. Baca argued that his injury was continuing because he would require a lengthy post-operative stay and because he might need future care, including transportation back to the Hospital. Baca did not claim in his suit that the Hospital was or would deny him post-operative care for the performed liver and bowel transplant, instead he claimed that the Hospital would be forced to attempt to recover the cost of the transplant from him and his family and damage their credit reports.

More than three weeks after he had finished his DRG calculation, and two weeks after Baca filed suit, Dr. Pendergrass informed the Hospital that it would be reimbursed at the newly calculated DRG rate. The Hospital accepted the terms of the reimbursement the next day, on February 9, 1993. On March 15, Baca

filed a motion for interim attorneys' fees under 42 U.S.C. § 1988. Two weeks later, Ladd filed a motion to dismiss, arguing lack of personal jurisdiction, improper venue, and failure to state a claim upon which relief may be granted. Ladd also responded to the motion for attorneys' fees arguing that Baca was not a prevailing party under section 1988. The motion to dismiss was denied, but the case was transferred to Austin.

An evidentiary hearing on the issue of attorneys' fees was held by a magistrate court. The magistrate court's Report and Recommendation found Baca to be a prevailing party under section 1988 on the issue of reimbursement to the Hospital, but it limited the requested attorneys' fees. The Report and Recommendation limited attorneys' fees for several reasons, including improper documentation, failure to show why requested rates were reasonable, failure to verify time sheets, and incurring fees after TDHR had reimbursed the Hospital.

The trial court approved and adopted the magistrate court's Report and Recommendation and then dismissed the only remaining issue in the case--whether TDHR would be required to finance emergency transportation for Baca back to the Hospital in the future if medically necessary--without prejudice. Baca appealed the limitation of attorneys' fees, and Ladd filed a cross-appeal. Ladd's cross-appeal was dismissed.

Discussion

Because Ladd's cross-appeal was dismissed, the only issue properly before this Court is a review of the award of attorneys'

fees. Generally, the amount of a fee award will be overturned only if it was an abuse of discretion. *Associated Builders & Contractors, Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 379 (5th Cir. 1990). The subsidiary factual findings are reviewed for clear error. *See id.*

Baca argues that the issue of his status as a prevailing party is no longer before this Court because Ladd's cross-appeal was dismissed. This Court is mindful of the fact that, in the absence of a cross-appeal, an appellee cannot seek to alter the judgment of the district court to enlarge his own rights or lessen the rights of the appellant thereunder. *In re Toyota of Jefferson, Inc.*, 14 F.3d 1088, 1091 n.1 (5th Cir. 1994). However, if Baca was not a prevailing party, then he was entitled to no attorneys' fees under section 1988. If he was entitled to no attorneys' fees, then he could not be entitled to increase the amount of attorneys' fees awarded to him. *See Matter of Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1333 (7th Cir. 1992) (plaintiff-appellant sought on appeal an increase in the amount awarded for pre-judgment interest; defendant-appellee had standing to argue, without cross-appeal, that there should be no increase because there should have been no award of any pre-judgment interest; a party "cannot obtain a favorable alteration in the judgment without a cross-appeal . . . but it may urge in defense of the judgment any argument preserved below--even an argument the logical implications of which would call for a different judgment."). Accordingly, this Court will consider whether Baca was a prevailing party under section 1988.

To be a prevailing party, a plaintiff must prove the resolution of some dispute that affects the behavior of the defendant towards the plaintiff. *Hewitt v. Helms*, 107 S.Ct. 2672, 2676 (1987); *Rhodes v. Stewart*, 109 S.Ct. 202, 203 (1988). In 1989, the Supreme Court "reemphasized that '[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.'" *Farrar v. Hobby*, 113 S.Ct. 566, 573 (1992) (quoting *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 109 S.Ct. 1486, 1493 (1989)). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.*

A party clearly may prevail without obtaining a final judgment. *Id.* This Court has stated that *Farrar* "might suggest that a party may prevail, even in the absence of a judgment, consent decree, or direct personal benefit 'if its ends are accomplished as a result of the litigation.'" *Craig v. Gregg County*, 988 F.2d 18, 21 (5th Cir. 1993)(citations omitted). Thus, Baca suggests that he is entitled to attorneys' fees, even if he received no direct personal benefit from TDHR's reimbursement to the Hospital, because his goal of getting TDHR to reimburse the Hospital at a fair rate was achieved. Baca misreads *Craig*.[2]

The magistrate court's Report and Recommendations, which was adopted by the district court, appears to have relied on a similar reading of an unpublished opinion, altering the requirement of obtaining a direct, personal benefit to one of prevailing on a significant issue. Its apparent reliance on

In *Craig*, the plaintiff was a candidate for constable complaining about the redistricting of constable districts. *Id.* at 19. It was a close question whether or not the *Craig* plaintiff could be a prevailing party because he did not receive a judgment, consent decree, or settlement, and no new election was ordered resulting in a direct personal benefit to him. *Id.* at 20-21. But the favorable resolution in *Craig*--a realignment of the boundaries of the relevant constable district favoring the election of a black candidate--did provide *some* benefit to the plaintiff, though one less direct than if a new election had been ordered. *Id.* at 21. The plaintiff would have been able to run under the newly drawn district in the next election. In contrast, TDHR's payment of a fair reimbursement rate to the Hospital gave Baca no direct, personal benefit.

In the instant case, the requirement that a prevailing party obtain a direct, personal benefit is closely related to the

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language in *Jones v. Johnston*, No. CA2-87-220, slip op. (N.D. Tex. Dec. 1, 1988), is misplaced. In that case, a plaintiff was held to be a "prevailing party" despite the lack of direct personal benefit. The *Jones* plaintiff sought a temporary restraining order requiring the defendants to provide funding for a liver transplant that her physician opined was necessary to save her life. She obtained the temporary restraining order, but her physician then determined that she did not need a liver transplant. Nevertheless, she was held to be a prevailing party. This result can be distinguished from the instant case because her failure to obtain a direct personal benefit was the result of a factual medical mistake by her physician. No amount of diligence by her attorney could have revealed that obtaining the requested relief would not be to her benefit. The failure of Baca to obtain a direct, personal benefit on the claim of fair reimbursement to the Hospital is due to a misinterpretation of a legal standard. We neither approve nor disapprove the result in *Jones*, as it in any event presents a different set of circumstances.

mandatory alteration of a legal relationship. Baca did not alter the legal relationship between himself and Ladd because he did not have standing to complain of TDHR's reimbursement rate.[3] He lacked standing on that issue because he suffered no injury-in-fact from TDHR's failure to pay a fair reimbursement rate. Because he suffered no injury-in-fact, the elimination of any purported injury could not confer a direct, personal benefit on him. *See also Jones v. Illinois Dep't of Rehabilitation Servs.*, 689 F.2d 724, 733 (7th Cir. 1982)(stating that the court has not "dispensed with the requirement that one party have a viable claim against another before it can be considered to have prevailed.")

As a threshold matter, courts must ensure that litigants satisfy the requirements of Article III. *Simon v. Eastern Kentucky Welfare Rights Org.*, 96 S.Ct. 1917, 1924 (1976). The principal limitation imposed by the Article III standing requirement is that a litigant must show that he "himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'" *Warth v. Seldin*, 95 S.Ct. 2197 at 2205 (1975) (citations omitted).[4] Abstract, conjectural, or hypothetical injury is

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The standing issue was not well briefed by the litigants on appeal, though it was argued in the lower court. Constitutional standing limitations may not be waived, but prudential standing restrictions may. *See Rite Research Improves the Environment, Inc. v. Castle*, 650 F.2d 1312, 1320 (5th Cir. 1981) (mentioning "axiom" that prudential but not constitutional standing requirements may be waived). The actual injury requirement is constitutional, and Baca's injuries are analyzed below under Article III standing doctrine.

Article III also requires that the litigant show that (1) there is a causal connection between his injury and the putatively illegal conduct, and (2) the injury is likely to be

insufficient to confer jurisdiction on a federal court, *City of Los Angeles v. Lyons*, 103 S.Ct. 1660, 1664-65 (1983); the injury must be "distinct and palpable." *Warth v. Seldin*, 95 S.Ct. at 2206. The mere assertion of a right to have the government act in accordance with the law is insufficient, standing alone, to satisfy the Article III injury requirement. *Allen v. Wright*, 104 S.Ct. at 3326. "It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected." *Blum v. Yaretsky*, 102 S.Ct. 2777, 2783 (1982) (emphasis in original).

Prior to the change of venue, the San Antonio district court held that Baca had standing because his complaint sought a financial guarantee of post-operative transplant care, particularly future transportation to the Hospital if necessary. Standing is an issue of law, and we review it *de novo*. *United States v. $38,570 U.S. Currency*, 950 F.2d 1108, 1111 (5th Cir. 1992).

"[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues*." *Warth v. Seldin*, 95 S.Ct. at 2205 (emphasis added). Accordingly, Baca could have standing on some issues and not others. Though Baca had standing on the issue of future care and transportation, those issues were dismissed without prejudice. Consequently, the district court held him to be a prevailing party

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redressed if the court grants the requested relief. *Allen v. Wright*, 104 S.Ct. 3315, 3325 (1984).

only on the issue of reimbursement made to the Hospital. Baca does not question that holding. The focus of the prevailing party inquiry,--and whether Baca had an actual injury--then, must be on the issue of fair reimbursement to the Hospital.

Baca alleged two possible injuries-in-fact resulting from TDHR's failure to fairly reimburse the Hospital for his transplant. First, the Hospital might be forced to attempt to recover the costs of the transplant from him and his family and, thus, damage their credit reports. Second, George Baca as next friend claimed that he feared Baca's medical care givers "either consciously or unconsciously might not devote the attention needed" to Baca's care if the Hospital was not assured of being paid a fair rate.[5] These purported injuries (and the corresponding benefits of eliminating them) were speculative.

The Hospital was prohibited from seeking reimbursement from Baca for his medical care as a matter of law. 42 U.S.C § 1320a-7b(d); 42 C.F.R. § 447.15 (1993); *Pennsylvania Medical Soc'y v. Snider*, 29 F.3d 886, 889 (3d Cir. 1994); *Banks v. Secretary of Indiana Family and Social Servs. Admin.*, 997 F.2d 231, 243 (7th

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Baca's complaint and formal filings only alleged that the Hospital *might* try to recover the cost of the transplant from his family. There is no allegation that the Hospital had actually informed Baca that he would be responsible or had made or threatened any claim against him in this respect. An affidavit by his next friend, George Baca, mentioned that he *feared* the Hospital's medical personnel might not give Baca the appropriate quality of care if they knew they would not be reimbursed fairly. There is no statement that anything the Hospital (or anyone connected with it) did or said indicated that they would or might give Baca lower quality care if the Hospital were not assured of adequate compensation, or that the Hospital had ever so acted in the past.

Cir. 1993). In fact, charging Baca or his family for his transplant or requiring payment for his continued stay in the Hospital would have constituted a federal felony. *See* 42 U.S.C. §§ 1320a-7b(d)(1) & (2)(B). Because the Hospital could not (and did not) seek reimbursement from Baca for the cost of the transplant or the related post-operative in-patient care, he suffered no injury-in-fact from TDHR's failure to provide fair reimbursement to the Hospital. *See Banks v. Secretary of Indiana Family and Social Servs. Admin.*, 790 F.Supp. 1427, 1432 (N.D. Ind. 1992), *aff'd* 997 F.2d 231 (7th Cir. 1993)(stating that the existence of a suit against Medicaid recipients by Medicaid providers is necessary to establish an injury-in-fact stemming from claims of failure to pay providers).

George Baca's affidavit that he feared that the Hospital's employees might not give adequate care to Baca if they knew the Hospital would not be fairly reimbursed is also speculative and conclusional. There was no allegation of any basis for such a fear or of anything to indicate that it was other than wholly subjective and speculative.[6] Because Baca suffered no injury-in-fact from Ladd's (or the insurance company's) alleged violation, the elimination of the violation gave him no direct personal benefit, nor did it alter the legal relationship between him and Ladd.

The district court erred in determining that Baca was a

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[6] See note 5, *supra*. In fact, it was undisputed that the Hospital performed the transplant on the authorization obtained in the December 29, 1992, letter. This same letter was the basis for the Hospital's concern about its level of reimbursement. Nevertheless, the Hospital performed the transplant.

prevailing party under section 1988 on his complaint of Ladd’s failure to reimburse the Hospital at a fair rate. Consequently, Baca has not demonstrated that he is entitled to have his award of section 1988 attorneys’ fees increased.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.