United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
Clerk

No. 20-10615

BERMAN DE PAZ GONZALEZ, INDIVIDUALLY AND AS HEIR AND ON BEHALF OF THE ESTATE OF BERMAN DE PAZ-MARTINEZ, EMERITA MARTINEZ-TORRES, INDIVIDUALLY AND AS HEIR AND ON BEHALF OF THE ESTATE OF BERMAN DE PAZ-MARTINEZ,

Plaintiffs—Appellants,

versus

THERESE M. DUANE; ACCLAIM PHYSICIAN GROUP, INCORPORATED; TARRANT COUNTY HOSPITAL DISTRICT, DOING BUSINESS AS JPS HEALTH NETWORK,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CV-72

Before OWEN, *Chief Judge*, and DAVIS and DENNIS, *Circuit Judges*.

W. EUGENE DAVIS, *Circuit Judge*:*

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

Plaintiffs appeal the district court's grant of Defendants' motions to dismiss. For the reasons that follow, we VACATE AND REMAND.

I. BACKGROUND

Plaintiffs, Berman DePaz Sr. and Emerita Martinez-Torres are the parents of then 21-year-old Berman DePaz. In March 2018, DePaz suffered a serious brain injury that left him in a coma. DePaz was taken to the John Petersmith Intensive Care Unit ("JPS"), a Level 1 trauma center that is part of the Tarrant County Hospital District in Fort Worth, Texas. At JPS, DePaz was kept alive by a ventilator. A day and a half after DePaz was admitted to JPS, his parents met with a chaplain to discuss how to proceed. Plaintiffs then allegedly decided with hospital staff that DePaz could stay at the hospital for seven days, after which he would be released home with the necessary equipment to keep him alive.

After this conversation, the family went home except for DePaz Sr., who stayed at the hospital with his son. Early the next morning, Doctor Therese Duane appeared in DePaz's room with a nurse interpreter, and Duane allegedly told DePaz Sr. that she had an order to disconnect DePaz from life support. DePaz Sr. protested and asked what had happened to the seven-day plan. Duane allegedly told DePaz Sr. that the doctors had met and decided to take DePaz off life support. Before DePaz Sr. could speak to the family about this change, Duane disconnected DePaz from life support, and DePaz Sr. watched his son die.

Plaintiffs filed suit individually and as heirs and on behalf of the estate of their son on January 28, 2020. They alleged state law tort claims and § 1983 civil rights claims against Duane, Acclaim Physician Group, Inc.,[1] and

[1] The parties appear to agree that Acclaim is a municipal corporation subject to § 1983 liability.

Tarrant County Hospital District (JPS) for violating DePaz's 14th Amendment due process rights. Along with their complaint, Plaintiffs attached an email containing a statement from an "Anonymous Surgical Resident" who wrote that Duane had inappropriately withdrawn life support three times from patients Duane believed were uninsured or undocumented. The email also discussed Duane's various failures in the operating room, and how Duane was dismissed from the hospital in lieu of a formal complaint to the Texas Medical Board.

All defendants filed motions to dismiss on a number of grounds that can be condensed as follows. Duane and Acclaim moved to dismiss the state law claims for a lack of waiver of Texas's sovereign immunity and failure to state a claim under the Texas Medical Liability Act. They also moved to dismiss the § 1983 claim against Duane for redundancy—i.e. a failure to identify whether Duane is sued in her official or individual capacity. Acclaim also moved to dismiss for failure to identify a policy, custom, or policymaker, and for failure to identify a constitutional violation. JPS's motion to dismiss encompassed essentially the same grounds.

The district court granted Defendants' motions. The court dismissed the state law claims based on a lack of waiver of Texas's sovereign immunity under the Texas Tort Claims Act. With respect to the § 1983 claims, the district court expressly dismissed the claims for failure to state a claim and also essentially for lack of standing which no party raised as a basis for dismissal. Plaintiffs timely appealed, challenging only the dismissal of the § 1983 claims.[2]

[2] Plaintiffs do not challenge the dismissal of the state law claims except to argue that the rulings on the state law claims should be reversed if those rulings conflict with our ruling on the federal claims.

II. DISCUSSION

A. Standard of Review

We review a district court's dismissal of a complaint for lack of subject matter jurisdiction[3] and for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) de novo.[4] A complaint survives a Rule 12(b)(6) motion when it contains facts accepted as true that "state a claim to relief that is plausible on its face."[5] The Court must view the facts "in the light most favorable to the plaintiff" and "all questions of fact and any ambiguities in the controlling substantive law must be resolved in the plaintiff's favor."[6] This Court may affirm an order on a motion to dismiss "on any basis supported by the record."[7]

B. Plaintiffs' Standing

In dismissing Plaintiffs' § 1983 claims, the district court stated, "[T]o state a § 1983 claim, plaintiffs must plead that their own rights were violated and may not claim their son's injury as their own."[8] The district court focused on the fact that the Plaintiff-parents were not injured, and the cause

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[3] FED. R. CIV. P. 12(b)(1).

[4] *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[6] *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986); *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001).

[7] *Walker*, 938 F.3d at 734 (quoting *Taylor v. City of Shreveport*, 798 F.3d 276, 279 (5th Cir. 2015)).

[8] The district court relied on two out of circuit district court decisions for this principle of law: *Morgan v. City of New York*, 166 F. Supp. 2d 817, 819 (S.D.N.Y. 2001); *Burrow by and through Burrow v. Posville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1208 (N.D. Iowa 1996).

of action, if any, belonged to the deceased son. Although the district court made no explicit reference to standing, we interpret the district court's conclusion that Plaintiffs failed to allege that their own constitutional rights were violated as effectively a dismissal for lack of standing.[9] On appeal, Plaintiffs characterize the district court's conclusion as one grounded in standing and argue that such a conclusion is contrary to circuit precedent that allows wrongful death and survival recovery in the civil rights context. Defendants do not argue otherwise.

This Court first addressed the issue of wrongful death and survival recovery under § 1983 in *Brazier v. Cherry*.[10] In *Brazier*, the plaintiff-widow sued a county sheriff and the chief of police for beating the plaintiff's husband to death.[11] The plaintiff-widow sought damages under § 1983 for the injuries incurred by her deceased husband as well as damages she incurred, herself, from her husband's death.[12] In evaluating plaintiff-widow's standing, we reasoned that the remedies provided by § 1983 would fail if the decedent's cause of action did not survive his death.[13] Thus, we turned to § 1988 and its gap filling provision which provides that state law, when not inconsistent with the Constitution or federal law, can be extended to civil rights actions

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[9] Our analysis would remain largely the same if the district court's order was instead interpreted as a ruling that Plaintiffs lack a cause of action. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("[S]tanding is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy . . . cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court[.]").

[10] 293 F.2d 401 (5th Cir. 1961).

[11] *Brazier*, 293 F.2d at 402.

[12] *Id.* at n.1.

[13] *Id.* at 407-09.

when the civil rights statutes are deficient in providing an adequate remedy.[14] We found that the plaintiff-widow had standing and held that § 1988 incorporated Georgia's wrongful death and survival statutes to provide full remedies to plaintiffs who assert claims for violations of constitutional rights.[15]

We revisited this issue in the context of Texas's wrongful death and survival statutes in *Rhyne v. Henderson Cty*.[16] There, the plaintiff-mother sued Henderson County and its sheriff under § 1983 for failure to provide her son, who died by suicide in jail, with reasonable medical care.[17] The *Rhyne* Court reaffirmed *Brazier* and clarified that both the wrongful death claim of plaintiffs themselves and survival claims of the decedent are available under § 1983 if state law authorizes those claims.[18] We held that the plaintiff-mother had standing to recover under § 1983 for her own injuries arising out of the wrongful death of her son because she was within the class of people entitled to recover under Texas law for the wrongful death of a child.[19]

Texas Civil Practice and Remedy Code § 71.004(a) provides a wrongful death cause of action exclusively for "the surviving spouse,

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[14] "[B]ut in all cases where [the civil rights statutes] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ." 42 U.S.C. § 1988(a); *Brazier*, 293 F.2d at 405.

[15] *Brazier*, 293 F.2d at 409.

[16] 973 F.2d 386 (5th Cir. 1992).

[17] *Rhyne*, 973 F.2d at 388.

[18] *Id.* at 390-91.

[19] *Id.* at 391.

children, and parents of the deceased." Likewise, § 71.021(b) provides a survival action for the "heirs, legal representatives, and estate of the injured person." Thus, as incorporated through § 1988, civil rights plaintiffs in Texas may recover for their own injuries and the injuries of a deceased person resulting from the constitutional violations of government actors if the plaintiffs are the surviving spouse, children, parents, heirs, legal representatives, or estate of the deceased.

Plaintiffs in this case clearly fall within the class of plaintiffs afforded a wrongful death and survival action under Texas law. They brought suit as DePaz's parents individually and as heirs and on behalf of DePaz's estate. Furthermore, they allege that a physician affiliated with a county hospital caused the death by violating DePaz's 14th Amendment due process rights. Thus, Plaintiffs have standing to bring this action.

III. Conclusion

Under our precedent, Plaintiffs have a cause of action against Defendants and standing to bring their § 1983 claims. Defendants' motions in district court and Plaintiffs' briefing on appeal raise a number of other issues regarding the § 1983 claims that we decline to address in the first instance. Therefore, the judgment of the district court is VACATED, and the case is REMANDED for further proceedings.