IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
May 3, 2018

Lyle W. Cayce
Clerk

No. 17-20259

EMILY-JEAN AGUOCHA-OHAKWEH, on behalf of herself and Philomina Ohakweh, Bethrand Ohakweh, Cynthia Chizoba Ohakweh, Obinna Ohakweh, Chukwunenye Ohakweh, and Chisom Ohakweh as family members of Decedent, and on behalf of Decedent, Doctor Alphaeus Ohakweh; BETHRAND OHAKWEH,

Plaintiffs–Appellants

v.

HARRIS COUNTY HOSPITAL DISTRICT, doing business as Harris Health System, doing business as Ben Taub Hospital; BAYLOR COLLEGE OF MEDICINE; PRALAY KUMAR SARKAR; ANISHA GUPTA; VAN VI HOANG; ELIZABETH S. GUY; MARTHA P. MIMS; JOSLYN FISHER; WAYNE X. SHANDERA; WILLIAM ROBERT GRAHAM; XIAOMING JIA; ANITA V. KUSNOOR; VERONICA VITTONE; HOLLY J. BENTZ; JARED JUND-TAEK LEE; CHRISTINA C. KAO; DORIS LIN; SUDHA YARLAGADDA; BARBARA JOHNSON; SANTIAGO LOPEZ; LYDIA JANE SHARP; JOHN MICHAEL HALPHEN, Medical Doctor/Juris Doctor,

Defendants–Appellees

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United States of America, ex rel, EMILY-JEAN AGUOCHA-OHAKWEH, ex rel, BETHRAND OHAKWEH, ex rel

Plaintiffs–Appellants

v.

MARTHA P. MIMS; SANTIAGO LOPEZ; ANISHA GUPTA; WILLIAM ROBERT GRAHAM; LYDIA JANE SHARP; XIAOMING JIA; SUDHA YARLAGADDA; ANITA V. KUSNOOR; VERONICA VITTONE; JARED JUNG-TAEK LEE; WAYNE X. SHANDERA; HOLLY J. BENTZ; DORIS

LIN; ELIZABETH S. GUY; VAN VI HOANG; CHRISTINA C. KAO; PRALAY KUMAR SARKAR; JOSLYN FISHER; BAYLOR COLLEGE OF MEDICINE; HARRIS COUNTY HOSPITAL DISTRICT; JOHN MICHAEL HALPHEN; BARBARA JOHNSON,

Defendants–Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-903; 4:16-CV-1704

Before OWEN, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:*

This is a wrongful death case in which the decedent's family members allege that Baylor College of Medicine, Harris County Hospital District, and multiple doctors "negligently, gross negligently, recklessly, gross recklessly, intentionally, knowingly, or maliciously killed" the decedent as part of a conspiracy to deprive him of his constitutional rights. Because the Ohakwehs have failed to state a claim upon which relief may be granted, we AFFIRM the district court's orders dismissing all claims.

I. BACKGROUND

Mr. Alphaeus Ohakweh was admitted to Ben Taub Hospital in the Harris County Hospital District for acute myeloid leukemia treatment. During an intubation procedure, Mr. Ohakweh's oxygen levels dropped and he

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* Pursuant to 5TH CIR. R. 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 CIR. R. 47.5.4.

sustained brain damage. Shortly thereafter, Mr. Ohakweh entered a vegetative state and passed away.

Mr. Ohakweh's family members (collectively, "the Ohakwehs") filed a petition in Harris County district court accusing the hospital and the doctors of killing Mr. Ohakweh as part of a conspiracy to deprive him of his constitutional rights. The Ohakwehs amended this petition twelve times before the case was removed to federal court.[1] After removal, the Ohakwehs filed a separate sealed complaint under the False Claims Act, 31 U.S.C. § 3729 (2009). The court later consolidated the two cases.

The Ohakwehs' Twelfth Amended Petition (the operative petition at the time of the dismissal order) names as defendants Baylor College of Medicine, eighteen Baylor doctors, one Baylor Risk Management employee, the Harris County Hospital District, and the Harris County Hospital District Ethics Director. The petition includes constitutional claims for violations of Mr. Ohakweh's Fifth and Fourteenth Amendment rights under 42 U.S.C. § 1983 (1996), a claim for conspiracy to violate 42 U.S.C. § 1983, state law claims under the Texas Tort Claims Act ("TTCA"), TEX. CIV. PRAC. & REM. CODE ANN. § 101.001 (Tex. 2010), and a claim for violations of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 § U.S.C. 1395dd (2011).

In response to the petition, each defendant moved to dismiss for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The district court granted each motion, finding that the Ohakwehs failed to plead

[1] In federal court the Ohakwehs' counsel filed a Thirteenth Amended Petition, and then corrected it over the course of eight additional filings. After these filings, the court stayed the case and ordered that no additional filings be made, yet counsel filed 30 additional motions. Counsel then failed to attend a scheduled hearing to discuss the excessive filings, and the court issued a show-cause order, found counsel in contempt, and entered sanctions. The court later allowed counsel to respond to defendants' motions to dismiss, but in addition to the permitted responses, counsel filed 36 unauthorized documents. The court finally revoked counsel's pro hac vice status, and the Ohakwehs retained new counsel.

any plausible claims. The Ohakwehs filed two motions for relief from judgment, which the district court denied. The Ohakwehs then timely appealed both the dismissal orders and the order denying relief from judgment.

II. DISCUSSION

We review a district court's order denying relief from judgment for abuse of discretion, *In re Pettle*, 410 F.3d 189, 191 (5th Cir. 2005), and a district court's grant of a motion to dismiss de novo, *Loupe v. O'Bannon*, 824 F.3d 534, 536 (5th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Although a complaint 'does not need detailed factual allegations,' the 'allegations must be enough to raise a right to relief above the speculative level.'" *Turner v. Lieutenant Driver*, 848 F.3d 678, 685 (5th Cir. 2017) (quoting *Twombly*, 550 U.S. at 555). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Id.* (quoting *Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009)).

In this case, each of the Ohakwehs' claims falls short of meeting this pleading standard.

The Ohakwehs first allege violations of the decedent's Fifth and Fourteenth Amendment rights under 42 U.S.C. § 1983. Section 1983 provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. Here, the Ohakwehs allege that "Defendants, acting under color of Texas State law, did not provide decedent-plaintiff with proper necessary treatment and deprived him of his right to life, and right to proper health care treatment activities protected" under federal law. The gravamen of the Ohakwehs' complaint seems to be that Defendants

failed to timely provide Mr. Ohakweh with chemotherapy and conducted an unnecessary bronchoscopy. In essence, the Ohakwehs question the medical professionals' treatment decisions which they claim resulted in Mr. Ohakweh's death. Unsuccessful medical treatment, however, "does not give rise to a § 1983 cause of action." *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (per curiam) (citing *Johnson v. Treen,* 759 F.2d 1236, 1238 (5th Cir. 1985)). "Nor does mere negligence, neglect or medical malpractice." *Id.* (cleaned up). As the district court correctly noted, the Ohakwehs "are attempting to recast allegations of medical negligence as federal constitutional deprivations." Section 1983 is not, however, a proper vehicle for their claims.[2]

Along the same lines, the Ohakwehs claim that Defendants conspired to violate § 1983. But "a conspiracy claim is not actionable without an actual violation of section 1983." *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995) (quoting *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990)). Further, "[p]laintiffs who assert conspiracy claims under civil rights statutes must plead the operative facts upon which their claim is based. Bald allegations that a conspiracy existed are insufficient." *Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Par.*, 289 F. App'x 22, 33 (5th Cir. 2008) (quoting *Lynch v. Cannatella,* 810 F.2d 1363, 1369–70 (5th Cir. 1987)). Because the Ohakwehs neither state a plausible claim to relief under § 1983, nor point to any facts plausibly supporting the existence of a conspiracy, the district court properly dismissed their constitutional claims.

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[2] The Ohakwehs also claim that *Miller ex. rel Miller v. HCA, Inc.*, 118 S.W.3d 758 (Tex. 2003) created an unconstitutional doctrine under which "a person is not entitled to life-sustaining treatment once their prognosis is dim." But *Miller* is inapposite: that case considered the "narrow question" of whether Texas law recognized a claim for battery or negligence when physicians performed resuscitative medical treatment on a premature infant without parental consent. *See* 118 S.W.3d at 761.

The Ohakwehs also bring state law claims for negligence, accusing Defendants of proximately causing Mr. Ohakweh's death by wrongfully withholding chemotherapy and initiating an unnecessary bronchoscopy. But the district court properly dismissed each of these claims as well.

First, Harris Country Hospital District is a governmental unit immune from suit under the TTCA. *See Martinez v. Val Verde Cty. Hosp. Dist.,* 140 S.W.3d 370, 371 (Tex. 2004) (explaining that hospital districts receive governmental immunity). So is Baylor College of Medicine. *See Klein v. Hernandez*, 315 S.W.3d 1, 5 (Tex. 2010) (explaining that Baylor is a state agency for the purpose of providing medical services at Ben Taub). And unless the TTCA expressly waives immunity, courts lack subject matter jurisdiction over tort claims against governmental units. *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 224–25 (Tex. 2004) (citations omitted). The party suing a governmental unit bears the burden of pleading facts that affirmatively demonstrate jurisdiction by alleging a valid waiver of immunity. *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Here the Ohakwehs plead no facts alleging a valid waiver of immunity. Because of this, the district court properly dismissed their state law claims against both the Harris County Hospital District and Baylor College of Medicine.

Likewise, the district court properly dismissed the Ohakwehs' state law claims against the hospitals' employees. If, under the TTCA, a suit is filed against both a governmental unit and any of its employees, "the employees shall be immediately dismissed on the filing of a motion" by the governmental unit. TEX. CIV. PRAC. & REM. CODE § 101.106(e). Because both the Harris County Hospital District and Baylor filed motions to dismiss their employees under this TTCA section, the district court properly dismissed these claims.

The Ohakwehs also raise claims under EMTALA, alleging that the Harris County Hospital District discriminated against Mr. Ohakweh for, among other things, lack of insurance. EMTALA requires a hospital with an emergency department to provide "an appropriate medical screening examination within the capability of the hospital's emergency department." 42 U.S.C. § 1395dd(a). The statute focuses on hospital screening and admittance—it is not a federal malpractice statute. *See Marshall v. East Carroll Parish Hosp.*, 134 F.3d 319, 322 (5th Cir. 1998). And although the Ohakwehs claim Harris County Hospital District discriminated against Mr. Ohakweh for lack of insurance, they do not plead any facts tending to show he was denied appropriate screening or admission on this basis. Their complaint focuses instead on the hospital's treatment-related decision to complete a bronchoscopy rather than immediately proceed with chemotherapy. But EMTALA does not give rise to medical malpractice or healthcare liability suits.[3] *See id.* Thus the district court properly dismissed the EMTALA claims.

Finally, the district court did not abuse its discretion by denying the Ohakwehs' Rule 60(b) motion for relief from judgment. Rule 60(b) relief is "an extraordinary remedy." *Pettle*, 410 F.3d at 191 (quoting *Carter v. Fenner,* 136 F.3d 1000, 1007 (5th Cir. 1998)). In this case, the district court properly dismissed each of the Ohakwehs' claims, and nothing in the record indicates that the "extraordinary remedy" of relief from judgment would be proper.

[3] To the extent that the Ohakwehs are attempting to bring a medical malpractice or healthcare liability suit, they plead no specific facts that would allow a court to reasonably infer that the defendants are liable for the misconduct alleged. "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Turner*, 848 F.3d at 685 (quoting *Beavers*, 566 F.3d at 439).

III. CONCLUSION

For the foregoing reasons the district court properly granted Defendants' motions to dismiss and denied the Ohakwehs' motions for relief from judgment. We AFFIRM the district court order in all respects.