In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-20-00002-CV

T.L., A MINOR, AND MOTHER, T.L., ON HER BEHALF, Appellants

V.

COOK CHILDREN'S MEDICAL CENTER, Appellee

On Appeal from the 48th District Court
Tarrant County, Texas
Trial Court No. 048-112330-19

Dissenting Opinion by Justice Gabriel

DISSENTING OPINION

I respectfully dissent from the majority's conclusion that CCMC's treatment decision constitutes state action for purposes of Mother's § 1983 claim.[1] The procedural posture of this case presents a very narrow question that is further limited by the applicable abuse-of-discretion standard: Did Mother raise a bona fide issue as to whether CCMC—a private hospital—is a state actor that violated Mother's due-process rights, thereby showing a probable right to relief on her § 1983 claim? This is the operative question this court has been asked to answer; thus, our answer should be so limited. The sheer length of the majority opinion takes this narrow, deferential analysis far beyond the denial of a temporary injunction and gives the impression that the underlying merits of Mother's § 1983 claim have been finally decided such that little, if anything, is left for the trial court to determine. Indeed, the majority expands this court's narrow jurisdiction into an opportunity to expound on T.L.'s medical condition and the social-policy concerns raised by Mother and amici curiae. Not only is this overreach concerning in the context of the denial of a temporary injunction, but it also raises the specter of an advisory opinion.

In my opinion, because Mother did not raise a bona fide issue regarding CCMC's status as a state actor for purposes of § 1983, the trial court did not abuse its discretion by denying Mother's request for a temporary injunction. The majority holds that CCMC's conduct was fairly attributable to the state mainly because of the

[1]I use the majority's short-form references for the parties.

character of the conduct itself. I fear this holding will extend the protection of § 1983 into areas that patently are not state action merely because of the weightiness or importance of the challenged decision. And I do not deny that the decisions involved in this case are important ones. Indeed, they are among the most important and personal rights we have. But such concerns should not, standing alone, attribute private conduct to the state such that a § 1983 claim will lie against a private actor. Although counterintuitive in this case, a conclusion that CCMC is not a state actor enforces the "constitutional boundary between the governmental and the private," thereby protecting "a robust sphere of individual liberty." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

Section 1983, the basis for Mother's claims and on which she carries the burden of persuasion, excludes from its coverage "merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *see Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988). Private action may be fairly attributed to the state "in a few limited circumstances," including when the state compels the private actor to take a particular action; when the private actor performs a traditional, exclusive public function; or when the state acts jointly with the private entity. *Manhattan Cmty.*, 139 S. Ct. at 1928; *see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001); *Am. Mfrs.*, 526 U.S. at 52; *Blum v. Yaretsky*,

457 U.S. 991, 1004 (1982). The majority focuses on the public-function path to state action and concludes that because the state traditionally acts under *parens patriae* to supervise parental medical-treatment decisions and because the state traditionally regulates the process of dying under its police power, CCMC is a state actor.[2] But to qualify as a traditional, exclusive public function, the state "must have traditionally *and* exclusively performed the function." *Manhattan Cmty.*, 139 S. Ct. at 1929; *see Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). In short, a private actor performing a public function is not a state actor unless the function is the exclusive prerogative of the state. *See Yeager v. City of McGregor*, 980 F.2d 337, 340 (5th Cir. 1993) (quoting *Rendell-Baker*, 457 U.S. at 842); *see also Blum*, 457 U.S. at 1012 (White, J., concurring) ("To satisfy [the state-action] requirement, respondents must show that the [private nursing home's decision to] transfer or discharge is made on the basis of some rule of decision for which the state is responsible."). "[I]t is not enough that the function serves the public good or the public interest in some way." *Manhattan Cmty.*, 139 S. Ct. at 1928–29. This determination is a legal one. *See Rundus v. City of Dall., Tex.*, 634 F.3d 309, 312 (5th Cir. 2011); *Jennings v. Patterson*, 488 F.2d 436, 438 (5th Cir. 1974).

In my opinion, life-or-death medical decisions, which certainly involve the public good or the public interest, cannot be considered to be the exclusive province of the state such that a private actor making such a decision is effectively acting as the

[2]I note that the Court in *Brentwood Academy* recognized that its holding did not "turn on a public function test"; thus, this case is of limited application here. 531 U.S. at 303.

state. *See, e.g.*, *Blum*, 457 U.S. at 1003, 1006–09, 1012 (majority op.) (holding private nursing-home physicians and administrators, in making level-of-care decisions, were not state actors even though they operated with state subsidies under Medicaid-program requirements imposed on the state). My reading of the case law is that there is a difference between a state's interest in a decision and a state's responsibility for a decision. Here, there is no question that the state is interested in CMCC's treatment decision. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–54 (1974); *see also Modaber v. Culpeper Mem'l Hosp., Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982) ("Although health care is certainly an 'essential public service', it does not involve the 'exercise by a private entity of powers traditionally exclusively reserved to the State.'" (quoting *Jackson*, 419 U.S. at 352)). But the issue is not state interest; the issue is whether the state is ultimately responsible for the decision because the decision has traditionally and exclusively been the state's to make.

In *Blum*, the Supreme Court (in an opinion authored by then-Associate Justice William Rehnquist) concluded that a private nursing home's decisions regarding what level of care patients required were not attributable to the state because they were, at their core, private medical decisions:

> The dissent characterizes as "factually unfounded," our conclusion that decisions initiated by nursing homes and physicians to transfer patients to lower levels of care ultimately depend on private judgment about the health needs of the patients. It asserts that different levels of care exist only because of the State's desire to save money, and that the same interest explains the requirement that nursing homes transfer patients who do not need the care they are receiving. We do not suggest

> otherwise. Transfers to lower levels of care are not mandated by the patients' health needs. But they occur only after an assessment of those needs. In other words, although 'downward' transfers are made possible and encouraged for efficiency reasons, they can occur only after the decision is made that the patient does not need the care he or she is currently receiving. The State is simply not responsible for *that* decision, although it clearly responds to it. In concrete terms, therefore, if a particular patient objects to his transfer to a different nursing facility, the "fault" lies not with the State but ultimately with the judgment, made by concededly private parties, that he is receiving expensive care that he does not need. That judgment is a medical one, not a question of accounting.

457 U.S. at 1008 n.19.[3] The majority recognizes the *Blum* holding and concedes that the lion's share of medical-treatment decisions are not considered to be traditional or exclusive public functions. But because of the subject matter of this particular decision—the withdrawal of life-sustaining treatment that has been medically determined to be futile—the majority holds that CCMC's private conduct is transformed into conduct involving a traditional and exclusive state function.

I respectfully disagree. Similar to the private nursing home's decisions in *Blum*, CMCC's treatment decision regarding T.L. turned on professional medical judgments made by private parties, which were not dictated by standards established by the state.

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[3]The Washington Supreme Court appeared to disagree with *Blum* when it held that a private hospital was a state actor in refusing a relative's request to remove life support to a patient partially because the state licensed the physicians involved and carried a *parens patriae* responsibility. *In re Colyer*, 660 P.2d 738, 742 (Wash. 1983), *modified on other grounds by In re Guardianship of Hamlin*, 689 P.2d 1372, 1377–78 (Wash. 1984). I believe *Blum*'s clear pronouncements regarding private action and medical-care decisions render *Colyer* unsound, nonpersuasive authority for this court. *See Ross v. Hilltop Rehab. Hosp.*, 676 F. Supp. 1528, 1536–37 (D. Colo. 1987) (refusing to follow *Colyer*).

Id. at 1008. Although Texas by statute has established procedures under which these decisions may be made for immunity purposes, these procedures do not dictate CMCC's medical judgment; thus, these procedures do not raise a bona fide issue as to state action.[4] *See Am. Mfrs.*, 526 U.S. at 52–58; *Blum*, 457 U.S. at 1004; *see also Quinn v. Kent Gen. Hosp., Inc.*, 617 F. Supp. 1226, 1234–35 (D. Del. 1985) (holding medical-peer-review statute, conferring immunity on good-faith actions under statute, did not transform private hospital's decision into state action under § 1983). CMCC's private medical decisions regarding T.L.'s prognosis and treatment did not involve a matter traditionally and exclusively reserved to the state. *See Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 8–9 (1st Cir. 2005); *Shannon v. Shannon*, 965 F.2d 542, 547 (7th Cir. 1992); *Fonseca v. Kaiser Permanente Med. Ctr. Roseville*, 222 F. Supp. 3d 850, 861–65 (E.D. Cal. 2016) (order) (citing *Blum*, 457 U.S. at 1008). In other words, "hospital care, while serving the public, is not the exclusive prerogative of the State." *Shannon*, 965 F.2d at 547; *see also Fonseca*, 222 F. Supp. 3d at 862 ("In general, private doctors and hospitals are more commonly found not to be state actors."); *Ross*, 676 F. Supp. at 1535–37 (finding no state action under § 1983 in private hospital's failure to comply with patient's request to disconnect feeding tube).

[4]I express no opinion on the majority's argument that Mother presented a bona fide complaint that these statutory procedures did not afford her sufficient due process, redressable under § 1983. I merely conclude that because Mother has not raised a bona fide issue that CCMC is a state actor, Mother has not established a probable right to relief under § 1983 and, therefore, has not established her right to a temporary injunction.

State action is a necessary prerequisite for any claim under § 1983. *See Lugar*, 457 U.S. at 936–37; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Rundus*, 634 F.3d at 312. Mother has failed to raise a bona fide issue that CCMC, as a private hospital, is a state actor. CCMC's medical decisions, while important and related to a state interest, did not involve a function that traditionally and exclusively rests with the state. Although the majority concludes that CCMC's treatment decision constitutes state action partially in light of the important public interest in such decisions, § 1983 does not include private conduct even if "discriminatory or wrongful" and cannot encompass an action that merely "serves the public good or the public interest in some way." *Manhattan Cmty.*, 139 S. Ct. at 1928–29; *Shelley*, 334 U.S. at 13. Thus, Mother's request for a temporary injunction based on her § 1983 claim must fail based on the absence of a bona fide issue regarding state action by CCMC. *Cf. Black v. Jackson*, 82 S.W.3d 44, 54 (Tex. App.—Tyler 2002, no pet.) ("Because an allegation of state action is integral to a cause of action for constitutional violations by a private citizen, the omission of such an allegation renders Black's pleadings defective."). CCMC's action, even if considered unfair or wrongful, is "private conduct abridging individual rights"; thus, the cloak of state action does not cover CCMC's private medical decisions. *Tarkanian*, 488 U.S. at 191 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)); *see Lugar*, 457 U.S. at 936–37. Because the majority reverses the trial court's denial of a temporary injunction, I must dissent.

In closing, I am compelled to underscore a few words of caution regarding the breadth of the majority's opinion. First, I disagree with the majority's attempts to "[h]ypothetically" practice medicine to explain its conclusion that CCMC is a state actor. Such a discussion is irrelevant to the facts presented here and goes far beyond a narrow review of the denial of a temporary injunction. Second, I take issue with the majority's suggestion that based on its medical hypotheticals, the Department of Family and Protective Services could "intervene to obtain a court order granting temporary managing conservatorship" based on Mother's perceived "medical neglect" in refusing available, hypothetical medical treatment. This case involves private conduct and private medical decisions, both of which should be protected from state involvement absent some indication that T.L. is the victim of medical neglect—an assertion that has never been a part of this case. *See* Tex. Fam. Code Ann. §§ 261.101(b), 261.501, 262.102. Again, the majority has taken the presented primordium issue and expanded it into the issue that they want to address. Finally, many of the majority's holdings, even though some are superficially couched in probable-right-to-relief terms, essentially constitute final and binding decisions on the merits of Mother's § 1983 claim.[5] But "a temporary injunction hearing is not a substitute for a trial on the merits, nor does it serve the same purpose." *Dall./Fort Worth Int'l Airport Bd. v. Ass'n of Taxicab Operators, USA*, 335 S.W.3d 361, 365 (Tex.

[5]One example: "[T]he treatment decision made by the attending physician and affirmed by CCMC's ethics committee constitutes 'state action' . . . ."

App.—Dallas 2010, no pet.); *see Anderson v. Tall Timbers Corp.*, 347 S.W.2d 592, 593–94 (Tex. 1961); *Transp. Co. of Tex. v. Robertson Transps., Inc.*, 261 S.W.2d 549, 552–53 (Tex. 1953). Even questions of law may not be finally determined in a temporary-injunction proceeding. *See Dall./Fort Worth Int'l*, 335 S.W.3d at 366. Thus, I believe that the majority opinion should be read only as holding that Mother raised a bona fide issue regarding her probable right to relief under § 1983, including the questions of state action and due process, subject to further development in the trial court on the merits. *See Sw. Weather Research, Inc. v. Jones*, 327 S.W.2d 417, 421–22 (Tex. 1959); *Covington v. Ziesenheim*, 501 S.W.2d 466, 467 (Tex. App.—Fort Worth 1973, no writ) (op. on reh'g). Any broader reading of the majority would be wrong. But because I disagree with even this suggested, limited holding, I dissent.

/s/ Lee Gabriel

Lee Gabriel
Justice

Delivered: July 24, 2020