IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
December 17, 2019

Lyle W. Cayce
Clerk

No. 18-41182
Summary Calendar

MARIA MERCEDES CANCINO, Individually and as Representative of the Estate of Mario Martinez; JULIAN PUGA,

Plaintiffs–Appellants,

v.

CAMERON COUNTY, TEXAS; OMAR LUCIO, Individually and in his Official Capacity as Sheriff of Cameron County, Texas; ANTONIO TELLA, in his Individual and Official Capacity,

Defendants–Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:18-CV-135

Before OWEN, Chief Judge, and DENNIS and CLEMENT, Circuit Judges.

PER CURIAM:*

Maria Mercedes Cancino and Julian Puga appeal the district court's dismissal of their § 1983 claims predicated on a state-created danger theory of liability. We affirm as we have not adopted the state-created danger theory of

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

liability in this circuit and, in any event, the Plaintiffs fail to allege the "known victim" element of that theory sufficiently.

I

We accept the following allegations as true for the purposes of this appeal.[1] A jury convicted Michael Garcia of burglary and three counts of aggravated assault with a deadly weapon. Following his conviction, the Cameron County, Texas, Sheriff's Department assumed custody of Garcia while he awaited sentencing. Prior to Garcia's sentencing, Antonio Tella, an employee of the Cameron County Sheriff's Department, transported Garcia to a dental appointment in Brownsville, Texas. Garcia overpowered Tella in the dental clinic's parking lot and escaped with Tella's handgun and service belt.

After escaping from Tella, Garcia forcibly entered a home where he encountered Mario Martinez; Martinez's wife, Maria Mercedes Cancino; and Julian Puga. Garcia used Tella's handgun to shoot Martinez, who ultimately died from his wounds. Garcia then held Cancino and Puga at gunpoint and forced them to hand over the keys to a car parked at the home. Garcia left the house in the car and a high speed police chase ensued, ending in a shootout during which Garcia was fatally injured.

Puga and Cancino, acting on her own behalf and as representative of Martinez's estate, sued Cameron County, Tella, and Omar Lucio, the sheriff of Cameron County. The Plaintiffs brought claims against all three defendants under 42 U.S.C. § 1983 and also asserted claims against Cameron County under the Texas Tort Claims Act. The Plaintiffs divided their § 1983 claims into two "counts": a "state-created danger" count alleging that the Defendants

[1] *See Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999) ("We accept a plaintiff's factual allegations as true when considering motions to dismiss under [FED. R. CIV. P. 12(b)(6)]." (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993))); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

"violated the Fourteenth Amendment [c]onstitutional right to be free from state-created danger" and a "shocks the conscience" count alleging that the Defendants' actions "violated all Plaintiffs' Fourteenth Amendment right[s] . . . to life and bodily integrity because [they] shock[] the conscience."

The district court granted the Defendants' motion to dismiss all of the Plaintiffs' claims.[2] The district court dismissed the Plaintiffs' state-created danger claim on the ground that the state-created danger theory of liability has not been recognized in this circuit.[3] The district court also concluded that the Plaintiffs failed to satisfy the "known victim" element of the state-created danger theory of liability because the Plaintiffs failed to allege that the Defendants knew that the Plaintiffs themselves were foreseeable victims of Garcia's conduct.[4] The Plaintiffs appeal only the district court's dismissal of their state-created danger claim.

II

We affirm for the reasons articulated by the district court. Under the state-created danger doctrine, which has been accepted by some of our sister circuits,[5] "when state actors knowingly place a person in danger, the Due Process Clause renders them accountable for the foreseeable injuries resulting from their conduct."[6] However, our decisions "have consistently confirmed that '[t]he Fifth Circuit has not adopted the "state-created danger" theory of

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[2] *Cancino v. Cameron County Texas*, No. 1:18-CV-135, 2018 WL 6573147, at *6 (S.D. Tex. Dec. 13, 2018).

[3] *Id.* at *3.

[4] *Id.* at *4.

[5] *See, e.g.*, *Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 654 (7th Cir. 2011); *Lombardi v. Whitman*, 485 F.3d 73, 80 (2d Cir. 2007); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996); *Carlton v. Cleburne County*, 93 F.3d 505, 508 (8th Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567, 572-73 (10th Cir. 1995); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989).

[6] *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 (5th Cir. 2003).

liability.'"[7] Although we have outlined the contours of the state-created danger theory in numerous cases,[8] we have never adopted that theory "even where the question of the theory's viability has been squarely presented."[9]

This case does not squarely present the viability of the state-created danger theory, as the Plaintiffs fail to allege all of the elements of that theory set forth in our prior cases. Specifically, the Plaintiffs fail to allege that the Defendants were aware of "an immediate danger facing a known victim."[10] Although the Plaintiffs allege that the Defendants were aware of the danger that Garcia would present if he were to escape, "[t]hey do *not* allege that the [Defendants] knew about an immediate danger to [the Plaintiffs'] safety, nor can the court infer such knowledge from the pleadings."[11] It is not enough for the Plaintiffs to allege that the Defendants knew of a risk to a class of people that included the Plaintiffs, namely people whose "geographical proximity [to the dental clinic] put them in a zone of danger." Rather, to fall within the scope of the state-created danger theory as we have explained it, the Plaintiffs must allege that the Defendants were aware of the danger to the Plaintiffs themselves.

Our decision in *Saenz v. Heldenfels Bros.* makes that clear.[12] *Saenz* arose out of an accident caused by a drunk driver. The defendant police officer knew

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[7] *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 865 (5th Cir. 2012) (en banc) (alteration in original) (quoting *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010)).

[8] *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc); *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995).

[9] *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004).

[10] *Covington*, 675 F.3d at 866 (quoting *Saenz v. Heldenfels Bros.*, 183 F.3d 389, 392 (5th Cir. 1999)); *see also Lester v. City of Coll. Station*, 103 F. App'x 814, 815 (5th Cir. 2004) (per curiam) ("[E]ven if it is assumed that the state-created-danger theory applies, liability exists only if the state actor is aware of an immediate danger facing a known victim.").

[11] *Covington*, 675 F.3d at 866.

[12] 183 F.3d at 391-92.

that the driver had a history of driving while intoxicated and observed the driver driving suspiciously on the night of the accident, but decided not to investigate.[13] We upheld the district court's grant of summary judgment to the defendant officer on the ground that the officer was not "aware of an immediate danger facing a known victim."[14] Rather, the officer was aware of an increased "risk of harm to unidentified and unidentifiable members of the public"—those within a certain geographic proximity of the drunk driver.[15] Accordingly, we concluded that the officer's decision, "while imprudent and ultimately tragic, was not sufficiently willful and targeted toward specific harm to remove the case into the domain of constitutional law."[16]

The same is true here. Although the Defendants may have been aware of the risk that Garcia would pose to the unidentified individuals within a certain distance from the dental clinic if he were to escape, they were not aware of a risk of harm to the Plaintiffs themselves. Accordingly, the Defendants' decisions, while "ultimately tragic," were "not sufficiently willful and targeted toward specific harm" to fall within the ambit of the state-created danger theory of liability.[17] As a result, "even if we were to embrace the state-created danger theory, the claim would necessarily fail."[18]

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For the foregoing reasons, we AFFIRM the judgment of the district court.

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[13] *Id.* at 390.
[14] *Id.* at 391-92.
[15] *Id.* at 392.
[16] *Id.*
[17] *Id.*
[18] *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 866 (5th Cir. 2012) (en banc).