[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-10704

Non-Argument Calendar

DIANA B. CLUFF,
Individually and as personal representative
of the Estate of Gustavo Beaz,
JACQUELINE F. BEAZ,
Individually,

Plaintiffs-Appellants,

versus

MIAMI-DADE COUNTY,
Stephen P. Clark Center,
MIAMI-DADE FIRE RESCUE DEPARTMENT,
CAPTAIN ARTIS WEST,

ALLISON AULT,
JEROME WELDON,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cv-23342-KMW

Before WILSON, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

Diana Cluff, on behalf of the estate of Gustavo Beaz, appeals the dismissal of two 42 U.S.C. § 1983 claims with prejudice at the motion-to-dismiss stage. We agree that dismissal was proper because Cluff fails to state a claim against Miami-Dade County or the individual paramedics who responded to Beaz's emergency. And it was not an abuse of discretion for the lower court to dismiss with prejudice because Cluff's request for leave to amend was procedurally deficient. We affirm the district court.

I.

Incident reports state that at 2:06 AM on April 2, 2019, the Miami-Dade County Fire Department received a medical alert that Gustavo Beaz had trouble breathing. Nine minutes later, paramedics entered Beaz's home and found him unresponsive in a

chair with foam over his nose and mouth. He was not breathing, was cold to the touch, and had no pulse. As one paramedic pulled lifesaving equipment from the ambulance, the others declared Beaz dead on arrival. They did not transport Beaz to the hospital or attempt resuscitation, though they did connect him to an EKG machine to confirm that he had no pulse.

Arguing that the incident reports were falsified, that Beaz had been alive, and that prompt action could have saved him, Beaz's daughters brought suit individually and on behalf of the estate against Miami-Dade County, its fire department, and the three paramedics. The plaintiffs voluntarily dismissed their individual claims, and all claims against Miami-Dade Fire.[1] They also do not appeal the remand of all state law claims back to state court.

That leaves two claims brought by Cluff on behalf of the estate: a § 1983 municipal liability claim against Miami-Dade County, and a § 1983 claim against the three responding

[1] Despite this voluntary dismissal, Cluff's notice of appeal stated that it was brought by "Diana B. Cluff, individually and as personal representative of the Estate of Gustavo Beaz, and Jacqueline F. Beaz," and consistently referred to the "plaintiffs." We asked the plaintiffs to confirm that they were only appealing the dismissal of claims brought by Cluff on behalf of the estate against the paramedics and Miami-Dade County, in line with their voluntary dismissal. They did so, and we issued an order appropriately clarifying the scope of the appeal. *Cluff v. Miami-Dade Cnty.*, No. 22-10704-AA, 2022 U.S. App. LEXIS 15834 (11th Cir. June 8, 2022).

paramedics. Both claims rely on alleged violations of Beaz's substantive due process rights. The district court dismissed both under Federal Rule of Civil Procedure 12(b)(6). It asserted that the paramedics had qualified immunity, and that Cluff had not demonstrated the existence of an official policy or unofficial custom underpinning municipal liability. The dismissal was with prejudice. Though Cluff's opposition to the motion to dismiss contains several requests for leave to amend, she never filed such a motion.

II.

We review de novo the dismissal of a complaint for failure to state a claim under Rule 12(b)(6). *Henley v. Payne*, 945 F.3d 1320, 1326 (11th Cir. 2019). We must accept allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Id.* But a claim must be "plausible on its face"—plaintiffs cannot rely on mere "labels and conclusions" or "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations and brackets omitted).

We review for abuse of discretion when considering a district court's denial of leave to amend. *Newton v. Duke Energy Florida, LLC*, 895 F.3d 1270, 1275 (11th Cir. 2018).

III.

The claims against the paramedics are insufficient to overcome their qualified immunity. If they acted within their

discretionary authority (which Cluff concedes when she notes that they were "all acting in the course and scope of their employment" during "all times relevant to" the complaint), the burden is on Cluff to overcome qualified immunity. *Piazza v. Jefferson Cnty.*, 923 F.3d 947, 951 (11th Cir. 2019). She must show that the paramedics violated a clearly established statutory or constitutional right. *Wood v. Moss*, 572 U.S. 744, 757 (2014).

No such right existed. In this context, first responders were "under no affirmative constitutional duty to provide any particular type of emergency medical service."[2] *Wideman v. Shallowford Cmty. Hosp., Inc.*, 826 F.2d 1030, 1036 (11th Cir. 1987). And the "fact that the County undertook to provide *some* ambulance service did not give rise to a constitutional duty to perform the particular service desired" by a plaintiff. *Id.*

Even if a cognizable right existed, there is an independent reason to dismiss Cluff's claim. She alleges throughout the complaint that the paramedics acted with "reckless disregard and/or deliberate indifference." But "deliberate indifference is insufficient to constitute a due-process violation" in these circumstances. *Nix v. Franklin Cnty. Sch. Dist.*, 311 F.3d 1373, 1377 (11th Cir. 2002) (quotation omitted). And "a negligent or grossly negligent rescue attempt by a state employee is not the equivalent

[2] The relevant context is that Beaz, like Wideman, was not a prisoner or in some other custodial relationship with the state. *Wideman*, 826 F.2d at 1035–36.

of a deprivation of right to life without due process of law." *Bradberry v. Pinellas Cnty.*, 789 F.2d 1513, 1516 (11th Cir. 1986). Conduct that is "reckless" also does not "rise to the level of culpability necessary to state a violation" of Beaz's substantive due process rights. *Waldron v. Spicher*, 954 F.3d 1297, 1310 (11th Cir. 2020). Reckless or deliberately indifferent behavior is not enough to defeat this claim of qualified immunity.

Because there is a route around qualified immunity if an official acted with a "purpose to cause harm," Cluff asks us to read her allegation that paramedics are liable for Beaz's death "because they created or enhanced the danger to his life" as a claim that they acted with a purpose to cause harm. *See L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1331 (11th Cir. 2020).

But her claims are not enough to satisfy the standard under our caselaw. We held in *Waldron* that a police officer who prevented bystanders from performing CPR on a dying victim may have been motivated by a purpose to cause harm. *Waldron*, 954 F.3d at 1311–12. But here, there is no factual basis in Cluff's complaint as pled that supports an allegation of a purpose to cause harm.

Accordingly, we hold in line with our past precedent that no actionable constitutional violation defeats the paramedics' qualified immunity defense. We affirm dismissal of Cluff's claim.

To establish municipal liability under § 1983, plaintiffs must identify a "policy or custom" that caused an injury. *Bd. of Cnty.*

Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 403 (1997) (quotation omitted). Cluff concedes that there is no official policy at play here. As for custom, a "single incident of a constitutional violation is insufficient to prove a policy or custom even when the incident involves several employees of the municipality." *Craig v. Floyd Cnty.*, 643 F.3d 1306, 1311 (11th Cir. 2011); *see also Gold v. City of Miami*, 151 F.3d 1346, 1351–52 (11th Cir. 1998) (rejecting an argument that municipal liability could attach without evidence of prior misconduct).

Even accepting all facts about the Beaz incident as true, Cluff does not plausibly allege anything beyond "labels and conclusions" to suggest a pattern of broader wrongdoing. *Iqbal*, 556 U.S. at 678 (quotation omitted). She writes that this "is not the first time" county employees committed a litany of wrongs (falsifying response times, incorrectly identifying patients as dead on arrival, etc.). But the district court is right that there is no citation to any "report," "cases involving a similar violation," or "newspaper accounts indicating even one other instance" of such conduct. In short, Cluff pled no facts to show a custom. Dismissal was proper.

IV.

Generally, a "court should freely give leave" to amend a complaint "when justice so requires." Fed. R. Civ. P. 15(a)(2). And "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Here, the lower

court dismissed both § 1983 claims with prejudice. It did not explain that decision outside a brief note in its analysis of the municipal liability claim, which states that dismissal "with prejudice" is "based on the foregoing" reasoning.

Nevertheless, dismissal with prejudice was not an abuse of discretion for a simple reason—there was no cognizable request for the court to grant. As Cluff notes, she requested leave to amend on four separate occasions throughout her response in opposition to the motion to dismiss—but never once outside of it. She had nearly three months to act between that filing on November 9, 2021 and the court's order partially granting the motion to dismiss on February 1, 2022, but chose to do nothing.

"Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly" and it is "within the discretion of the district court to deny that request *sub silentio*." *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) (quotation omitted); *see also Cita Tr. Co. AG v. Fifth Third Bank*, 879 F.3d 1151, 1157 (11th Cir. 2018). Such a "request" does not comport with the requirements of Federal Rule of Civil Procedure 7(b) and possesses "no legal effect." *Newton*, 895 F.3d at 1277. These requests are "procedurally improper," and a district court is "well within its discretion" to deny them. *Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cnty.*, 48 F.4th 1222, 1236 (11th Cir. 2022). So too here.

Because this procedural infirmity is a sufficient reason for us to uphold the district court's decision, we need not consider the sufficiency of the court's reasoning or the potential futility of any amendment.

* * *

We **AFFIRM** the district court's order dismissing Cluff's remaining federal claims with prejudice.