VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-01707

Dario Politella et al v. Windham Southeast School District et al

ENTRY REGARDING MOTION

Title: Motion to Dismiss; Motion for Judgment on the Pleadings ; (Motion: 2; 3)
Filer: David A. Boyd; Pietro J. Lynn
Filed Date: July 18, 2022; July 28, 2022

The motion is GRANTED.

RULING ON PENDING MOTIONS (Motion Nos. 2 and 3)

Plaintiffs Dario and Shujen Politella are the parents of six year old L.P. In an eight-count Complaint (filed May 13, 2022), they allege that various employees of both the Windham Southeast School District (collectively referred to as the "School Defendants") and the State of Vermont (collectively referred to as the "State Defendants"), acting in their official capacities, were negligent, and otherwise violated their state-protected rights when, without their permission, they administered to L.P. a COVID-19 vaccination during a school-based, state-sponsored clinic. Primarily arguing that Plaintiffs' state-law causes of action are preempted by applicable federal law, the State Defendants, prior to filing a response to the Complaint, have moved to dismiss pursuant to V.R.C.P. 12(b)(1) and 12(b)(6), and the School Defendants, after submitting their Answer (filed June 20, 2022), have filed a motion for judgment on the pleadings pursuant to V.R.C.P. 12(c). For the reasons set forth below, the State Defendants' Motion to Dismiss (No. 2) and the School Defendants' Motion for Judgment on the Pleadings (No. 3) are both *granted*.

I. Background

A court's review of either a motion to dismiss or a motion for judgment on the pleadings applies similar standards. *Messier v. Bushman*, 2018 VT 93, ¶ 9, 208 Vt. 261.

> A motion to dismiss should not be granted unless there exist no facts or circumstances under which the nonmovant may be entitled to relief. … On a V.R.C.P. 12(c) motion for judgment on the pleadings, the issue is whether, once the pleadings are closed, the movant is entitled to judgment as a matter of law on the basis of the pleadings. … For the purposes of a motion for judgment on the pleadings, all well pleaded factual allegations

> in the nonmovant's pleadings and all reasonable inferences that can be drawn therefrom are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false. … A defendant may not secure judgment on the pleadings if contained therein are allegations that, if proved, would permit recovery.

Id. (citations and quotation marks omitted).

Accordingly, a motion to dismiss or for "judgment on the pleadings is designed to test the law of the claim, not the facts which support it." *Island Industrial, LLC v. Town of Grand Isle*, 2021 VT 49, ¶ 25, 260 A.3d 372 (citation and quotation marks omitted). "A defendant may not secure judgment on the pleadings if contained therein are allegations that, if proved, would permit recovery." *Id*. ¶ 10 (citation and quotation marks omitted); *accord Endres v. Endres* 2006 VT 108, ¶ 4, 180 Vt. 640 (mem.) (Motions to dismiss for failure to state a claim are disfavored and should rarely be granted.)

The Plaintiffs' salient and well-pleaded allegations are as follows. The Politellas are the parents of six year old L.P., who at all times relevant to the Complaint attended Windham Southeast School District member, Academy School, in West Brattleboro. *See* Complaint at ¶¶ 1, 37. On Friday, November 12, 2021, Academy School conducted a COVID-19 vaccination clinic which was organized and hosted by the State and School Defendants. *See, e.g.,* Complaint at ¶¶ 15, 48. It is undisputed that the Politellas did not consent to having their son, L.P., vaccinated. *See* Complaint at ¶ 38. Despite the Politellas' withholding of their permission, and their six-year-old's objections at the time of administration, it further appears undisputed that L.P. was mistakenly administered a COVID-19 vaccination on November 12. *See* Complaint at ¶¶ 109 ("Mark Speno … sent a message to all parents in the District acknowledging that a child had been mistakenly vaccinated without consent at Academy School.") and 110 (Local paper published "Mr. Speno's apology: '[W]e are deeply sorry that this mistake happened'."); Answer at ¶¶ 109-10 (School Defendants claim insufficient knowledge and therefore deny Complaint ¶ 109 but admit ¶ 110). The Complaint contains no allegation of willful misconduct by any named Defendant.

As a result of the unauthorized vaccination of L.P., the Plaintiffs "have been traumatized, suffering mental anguish and additional educational expenses with the potential for future medical expenses." Complaint at ¶ 123. In addition, they "live with fear regarding unknown long-term adverse health effects that L.P., a young child -- having been subjected to risks associated with an investigatory vaccine of unknown safety profile, not fully understood and yet unapproved for children -- could suffer." Complaint at ¶ 122. In other words, the Complaint contains no allegation that any one of the Plaintiffs has suffered death or serious injury as a result of L.P.'s mistaken vaccination. Plaintiffs seek damages for their alleged injuries based upon the following theories: (1) violation of Vermont's Healthcare Bill of Rights, 18 V.S.A. § 1852(a)(5); (2) gross negligence; (3) negligent undertaking; (4) premises liability; (5) battery of a minor; (6) consumer fraud; (7) common law fraud; (8) negligent infliction of emotional distress. *See* Complaint at ¶ 124 *et seq.*

II. Discussion

In their submissions, the parties have addressed extensively their views of the preemptive effect of the Public Readiness and Emergency Preparedness Act, 42 U.S.C. §§ 247d-6d and 247d-6e (hereinafter the "PREP Act"), particularly whether this act partially or completely preempts all state law claims. Upon review of a number of state and federal court decisions which have examined the preemptive effect of the PREP Act upon state law claims such as the Plaintiffs', this Court finds that the Plaintiffs' Complaint must be dismissed for failure to state a viable claim for relief.

Operation of the PREP Act may be summarized as follows:

> Congress passed the PREP Act in 2005. This statute authorizes the federal Secretary of Health and Human Services ("HHS") to issue a declaration that "a disease or other health condition or other threat to health constitutes a public health emergency." 42 U.S.C. § 247d-6d(b). If applicable, the PREP Act provides immunity to "covered persons" from liability under federal and state law for "all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure." *Id.* § 247d-6d(a)(1). The PREP Act requires a causal relationship between the injury or loss and the countermeasure. *Id.* § 247d-6d(a)(2)(B). If immunity applies, the injured person may seek compensation from the Countermeasures Injury Compensation Program ("CICP"), a federal regulatory program that covers some losses associated with use of covered countermeasures. *Id.* § 247d-6e.
>
> The PREP Act provides one exception to immunity—when serious injury or death occurs through willful misconduct. In that situation the injured person or their survivors must file suit in the U.S. District Court for the District of Columbia and prove their injury by clear and convincing evidence. *Id.* § 247d-6d(c)(3), (e)(1). Furthermore the PREP Act includes an express preemption clause that reads, "no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that … is different from, or is in conflict with, any requirement applicable under this section." *Id.* § 247d-6d(b)(8).

Khalek v. South Denver Rehabilitation, LLC, 543 F.Supp.3d 1019, 1023-24 (D. Colo. 2021).

Accordingly, the PREP Act does not completely preempt all state causes of action; rather, it operates as an immunity statute which in certain cases otherwise requires an injured person to seek compensation either through CICP or, in the case of alleged "willful misconduct," to opt to bring suit in the U.S. District Court for the District of Columbia and to prove his or her claim by "clear and convincing evidence." *See, e.g., id.* at 1025 ("Indeed, the primary method for resolving claims under the PREP Act is a regulatory program, the CICP, not a federal cause of action."). As one court recently observed:

> [W]hen applicable, the PREP Act provides immunity to defendants on state law negligence claims. State law may be completely preempted when "it has been replaced

> by federal law—but this happens because federal law takes over all similar claims, not because there is a preemption defense. … Here, in addition to providing immunity, the PREP Act only supplies a limited cause of action for willful misconduct.

Parker Jr. Through Parker v. St. Jude Operating Company, LLC, 2020 WL 8362407, slip op. at *6 (D. Ore. Dec. 28, 2020) (citations and footnotes omitted); *cf. Padilla v. Brookfield Healthcare Center*, 2021 WL 1549689, slip op. at *6 (C.D. Cal. April 19, 2021) (comparing immunity under PREP Act to "a defense, not a necessary aspect of Plaintiffs' state law claims").

In this case, the Plaintiffs allege injury as a result of a countermeasure—COVID-19 vaccine administered by Covered Persons and pursuant to the PREP Act. As explained *infra,* because the PREP Act is patently applicable to Plaintiffs' stated claims, their Complaint must be dismissed.

In March 2020, the HHS Secretary declared the COVID-19 pandemic to be a public health emergency under the PREP Act. *See* Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-1, 85 Fed. Reg.15198-01 (March 10, 2020) (available on Westlaw at 2020 WL 1245193(F.R.)) (hereinafter "the Declaration"). "Covered persons" under the Declaration include the Defendants, as that term includes a state or local government program planner and a licensed health professional or other individual authorized to administer or dispense Covered Countermeasures. *See* Declaration at Section V. Furthermore, in relevant part, Declaration Section XI describes and defines "Covered Countermeasures" as follows:

> Administration of a Covered Countermeasure means physical provision of countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution, and dispensing of the countermeasures to recipients; management and operation of countermeasure programs; or management and operation of locations for purposes of distributing and dispensing countermeasures.
>
> The definition of "administration" extends only to physical provision of a countermeasure to a recipient, such as vaccination or handing drugs to patients, and to activities related to management and operation of programs and locations for providing countermeasures to recipients, such as decisions and actions involving security and queuing, but only insofar as those activities directly relate to countermeasure activities. Claims for which Covered Persons are provided immunity under the Act are losses caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a Covered Countermeasure consistent with the terms of a Declaration issued under this Act. Under the definition, these liability claims are precluded if they allege an injury caused by a countermeasure, or if the claims are due to manufacture, delivery, distribution, dispensing, or management and operation of countermeasure programs at distribution and dispensing sites.

Accordingly, it is unsurprising that the few courts which have considered the interplay between the PREP Act and a situation like the one presented in this case have concluded that the Act operates to bar state law claims. For example, in *Parker v. St. Lawrence County Public*

Health Department, 102 A.D.3d 140, 954 N.Y.S.2d 259 (N.Y. App. Div. 2012), a school nurse administered a flu vaccine to a kindergartner without permission. Parents alleged that administration of the shot constituted negligence and a battery on their child. Framing the "sole issue" as whether the PREP Act preempted plaintiffs' state law claims, the court concluded that it did, reasoning that "Congress intended to preempt all state law tort claims arising from the administration of covered countermeasures by a qualified person pursuant to a declaration by the Secretary, including one based upon a defendant's failure to consent…." *Id.* at 144 (citation omitted).

Similarly, days ago, in *Cowen v. Walgreen Co.*, 2022 WL 17640208 (N.D. Okl. Dec. 13, 2022), the plaintiff sued Walgreen drug store after an employee gave her a COVID-19 shot without permission instead of the flu vaccination she had requested. The court found plaintiff's remedy for her alleged injuries is solely through the CICP administrative program because the COVID-19 vaccine is a Covered Countermeasure under the PREP Act. Interestingly, the Oklahoma federal court further denied plaintiff leave to amend her complaint:

> While it is true that other vaccinations or procedures might have also been administered, this does not change the fact that Plaintiff's injuries actually resulted from administration of the COVID-19 vaccine. The PREP Act therefore applies …. Plaintiff has provided no caselaw to support the it-could-have-been-a-different-vaccine argument, or to show that the PREP Act did not apply in a factually similar case. In its own research, the Court found none. Because Plaintiff's claims flow directly from the administration of a qualified countermeasure, there is no plausible way that amendment would alter the outcome.

Id., slip op. at * 3 (citation omitted).

Likewise, in *Storment v. Walgreen Co.* 2022 WL 2966607 (D.N.M. July 27, 2022), the court entertained a plaintiff's negligence claim arising from injuries she sustained from falling in a parking lot after she received a COVID-19 vaccination. As in *Cowen*, the *Storment* court considered the broad impact of the PREP Act when it is applicable:

> Here, Plaintiff's Complaint alleges that she went to Walgreens for her COVID-19 vaccination, received such vaccination but then had no chairs to sit on for monitoring immediately following inoculation. … Thus, she ultimately went to the parking lot to sit in her car but became dizzy and fell before she could get seated. …. This chain of events is unfortunate and certainly deserving of a remedy, but it cannot be divorced from the administration of a covered countermeasure—the COVID-19 vaccine she received. … While it is true that other vaccinations or procedures might also leave customers dizzy, this does not change the fact that Plaintiff's injuries actually resulted from administration of the COVID-19 vaccine. The PREP Act therefore applies….

Id. slip op. at *3 (citations and text omitted). As in *Cowen*, the *Storment* court dismissed the complaint with prejudice, noting "there is no plausible way that amendment would alter the outcome." *Id.*

The parties have noted one decision in which a court has come to a contrary conclusion, *Tonkinson v. Walmart, Inc.*, 2022 WL 1266666 (Kan. Dist. Ct. April 26, 2022). In *Tomkinson*, plaintiffs claimed their 15-year-old child received a COVID-19 vaccine at a Walmart pharmacy, accompanied by her adult brother-in-law but without their parental consent. Rejecting the reasoning of the New York court in *Parker v. St. Lawrence County Public Health Department,* the *Tonkinson* court found that "[t]o the extent Plaintiffs have alleged facts regarding violations of parental rights, a right of privacy, duties to inform and to obtain legal consent, negligence, duties to refrain from misleading with regard to parental consent and records, and damages arising from such conduct regardless of the medical treatment or substance administered, those allegations are not covered by the PREP A[ct] immunity provision." *Id.*, slip op. at * 11.

With respect, this Court finds the reasoning of the *Tonkinson* court unpersuasive and contrary to Congressional intent and directives. As outlined *supra*, when applicable, the PREP Act, and the remedies it outlines, provides immunity from other state law claims. The PREP Act's "immunity of covered persons" provision states, in part, that "the sole exception to the immunity from suit and liability for covered persons set forth in subsection (a) shall be for an *exclusive Federal cause of action* against a covered person for death or serious physical injury proximately caused by willful misconduct …." 42 U.S.C. § 247d-6d(d)(1) (emphasis added). Moreover, "[d]uring the effective period of a declaration… or at any time with respect to conduct undertaken in accordance with such declaration, no State or political subdivision of a state may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that …is different from, or in conflict with any requirement applicable under this section …" and which relates to the "distribution … dispensing, or administration by qualified persons of the covered countermeasure …." 42 U.S.C. § 247d-6d(b)(8). In this Court's view, these provisions indicate, *inter alia,* that negligence and similar state law claims are displaced in favor of liability for willful misconduct causing serious injury.

Finally, the Court finds most of the remaining cases upon which the Plaintiff relies inapposite because they involve allegations unrelated either to a "Covered Person" or a "Covered Countermeasure" within the scope of the PREP Act. For example, Plaintiffs bring to the Court's attention *Saldana v. Glenhaven Healthcare LLC,* 27 F.4th 679 (9th Cir. 2022), *cert. denied*, 2022 WL 1785186 (S.Ct. Nov. 21, 2022). They appear to believe that this decision supports their argument that, despite the applicability of the PREP Act, this Court may entertain their state law claims. *See* Plaintiffs' Supplemental Filing Regarding the Law (filed Nov. 30, 2022).

In *Saldana*, relatives alleged that a nursing home resident died from COVID-19 complications. They brought suit in state court against the nursing homeowner and operator, whom they claimed "failed to adequately protect Ricardo Saldana from the COVID-19 virus." They alleged state-law claims for elder abuse, willful misconduct, custodial negligence, and wrongful death. 27 F.4th at 683. After removal, the federal district court ordered remand to the state court, an action which the Ninth Circuit affirmed because the plaintiffs' claims involved California law and did not, on their face, raise questions of federal law. *Id.* at 689. The court of appeals reasoned that "[w]hether [one of several] claims is preempted by the PREP Act turns on whether any of the conduct alleged in the complaint fits the statute's definition for such a claim," and that since the answer to that question remained outstanding, remand to state court "for lack

of federal subject matter jurisdiction based upon complete preemption was proper." *Id.* at 688; *accord Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 409 (3rd Cir. 2021).

The fact that the *Saldana* court suggested that some of the plaintiffs' state law claims may proceed in state court does not help the Plaintiffs in this case. The *Saldana* plaintiffs basically alleged a "failure to protect" from COVID-19, which is not the same as alleging harm based upon receipt of a COVID-19 vaccination. "Courts addressing similar state law claims on removal have found that such failure to act does not implicate the PREP ACT and remanded those cases to state courts." *Padilla*, 2021 WL 1549689, slip op. at *6. The reason is that an allegation that a defendant has failed to act, as compared to affirmatively administering a Covered Countermeasure vaccination, does not necessarily fall within the scope of the PREP Act. *See id.*

Thus, "'[t]he majority of courts considering this issue have held that the PREP Act does not prohibit plaintiffs from bringing state-law tort claims based on the alleged failure to use covered countermeasures or failure to implement appropriate protocols related to COVID-19, including failure to provide adequate levels of staffing and training to staff." *Lollie v. Colonnades Health Care Center Ltd. Co.*, 2021 WL 4155805, slip op. at * 3 (S.D. Tex. Sept. 13, 2021). Not only is this result harmonious with the PREP Act's provision of a federal cause of action for affirmative, "willful misconduct," but it also is in contrast to the instant Plaintiffs'' attempt to pursue state law claims in this Court. It is impermissible because plaintiffs' claims are based upon the affirmative administration of a vaccine, and not on allegations such as the negligent failure to provide one. *See, e.g., Cagle v. NHC HealthCare-Maryland Heights, LLC*, 2022 WL 2833986, slip op. at 8 (E.D. Mo. July 20, 2022) (PREP Act not implicated by claims "premised on a failure to take preventative measures to stop the spread of COVID-19, and that none of the harm alleged was causally connected to the administration or use of any covered countermeasure…"). State law remedies are not covered by the PREP Act when they involve nonfeasance. They are covered by the Act when, as here, they involve misfeasance.

III. Conclusion

Where a court dismisses a complaint pursuant to V.R.C.P. 12(b) prior to service of defendant's responsive pleading, the "proper course … is to dismiss with leave to amend." *Neal v. Brockway*, 136 Vt. 119, 122, 385 A.2d 1069 (1978); *see Ondovchik Family Limited Partnership v. Agency of Transportation*, 2010 VT 35, ¶ 7, 187 Vt. 556. Similarly, citing "Vermont's extremely liberal pleading standards," the Supreme Court recently has indicated that "[t]he standard for granting a motion for judgment on the pleadings is an exacting one, [which it] will only uphold granting … if the plaintiff's pleadings contain no allegations that if proven would permit recovery." *Huntington Ingalls Industries, Inc. v. Ace American Insurance Company*, 2022 VT 45, ¶ 17, ___ VT ___.

For the aforementioned reasons, the State Defendants' Motion to Dismiss (No. 2) and the School Defendants' Motion for Judgment on the Pleadings (No. 3) are both *granted.* In light of

the Vermont Supreme Court's directives, the Court *grants* both Defendants' motions, with leave to amend within 30 days of the date of this ruling. *See V.R.C.P.* 11(b)(2).

SO ORDERED.

Dated at Newfane, Vermont.

Michael R. Kainen
Superior Court Judge
Pursuant to V.R.E.F. 9(d)(1)(D).
Electronically Signed December 26, 2022 5:26 PM