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United States Court of Appeals
Tenth Circuit

April 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

A. SHAW, an individual; L. SHAW, individually and as guardian of A. Shaw; M. SHAW, individually and as guardian of A. Shaw,

Plaintiffs - Appellants,

v.

CITY OF NORMAN, a municipal corporation; OFC. MICHAEL LAUDERBACK, an individual,

Defendants - Appellees.

No. 22-6106
(D.C. No. 5:21-CV-01124-J)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **MORITZ**, Circuit Judges.

During a high-speed police chase, a fleeing suspect ran a red light, hit several other vehicles, and seriously injured A. Shaw, a minor. Shaw and his guardians sued the pursuing officer and his employer under 42 U.S.C. § 1983, but the district court dismissed plaintiffs' second amended complaint with prejudice for failure to state a claim and declined to exercise jurisdiction over any remaining state-law claims.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

We reject each of plaintiffs' challenges to the district court's order. Principally, we hold that plaintiffs fail to state a substantive-due-process claim because they do not allege that the officer had time to deliberate or that he intended to harm anyone, and plaintiffs waived any challenge to the district court's ruling rejecting their state-created-danger theory of substantive-due-process liability. Additionally, they fail to state equal-protection claims because they do not allege that they were treated differently than those similarly situated. We also find no error in the district court's decisions to decline supplemental jurisdiction and deny further leave to amend. We accordingly affirm.

Background

According to plaintiffs' second amended complaint, Officer Michael Lauderback attempted to conduct a traffic stop on a pickup truck driven by Jimmy Hinson around 9:00 a.m. on a weekday morning in January 2018.[1] Hinson did not immediately stop when Lauderback initiated his lights and siren, but he did not increase his speed or take evasive action. Hinson eventually pulled into a school parking lot, where a young child exited the pickup and walked toward the school. Lauderback approached Hinson and spoke with him for approximately five minutes before returning to his patrol car to discuss matters with a second officer who had just arrived. Lauderback told the second officer that Hinson would be receiving

[1] Because this is an appeal from an order granting a motion to dismiss, we accept the facts in the complaint as true and view them in the light most favorable to plaintiffs. *See Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009).

several tickets because he ran a stop sign, lacked a driver's license, and did not have insurance.

But while Lauderback was writing the tickets, Hinson fled in his pickup. Lauderback immediately followed; he "did not have time to put on [a] seatbelt and did not have both hands on [the] steering wheel and was fumbling while calling on the radio [that] he ha[d] a runner." App. 170. Lauderback's supervisor initially told him to stop pursuing Hinson but then changed course and authorized the pursuit.

During the chase, Hinson drove recklessly and quickly, including driving across a median and crossing four lanes of traffic. He continued until he ran a red light at an intersection and struck several vehicles, including one occupied by Shaw. As a result of this incident, Shaw "suffered permanent and debilitating injuries." *Id.* at 173.

Plaintiffs then filed this § 1983 action against Lauderback and the City of Norman.[2] They alleged that Lauderback violated their Fourteenth Amendment rights to substantive due process and equal protection and asserted a claim against the City under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), alleging that Lauderback's pursuit violated official policies and that his supervisors failed to adequately train officers on such policies. Plaintiffs also asserted equal-protection and state-law negligence claims against the City.

[2] Plaintiffs' initial complaint and first amended complaint identified other defendants, including Officer Jason Brakhage. But plaintiffs named only Lauderback and the City in their second amended complaint, so those are the only defendants involved in this appeal.

The district court dismissed plaintiffs' initial complaint without prejudice, granting plaintiffs leave to amend. It further advised plaintiffs that it would not exercise supplemental jurisdiction over their state-law negligence claim if the amendment was unsuccessful. Ultimately, the district court granted defendants' motion to dismiss plaintiffs' second amended complaint for failure to state a claim. It dismissed all federal claims with prejudice and, as it had warned, declined to exercise supplemental jurisdiction over plaintiffs' remaining state-law claim.

Plaintiffs appeal.

Analysis

We review de novo a district court's order granting a motion to dismiss. *Albers v. Bd. of Cnty. Comm'rs*, 771 F.3d 697, 700 (10th Cir. 2014). To survive a motion to dismiss for failure to state a claim, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). We consider each of plaintiffs' claims in turn.

I. Substantive Due Process

Plaintiffs argue that the district court erred in dismissing their substantive-due-process claims. "Such claims 'find their basis in the Fourteenth Amendment's protections against arbitrary government power.'" *Mahdi v. Salt Lake City Police Dep't*, 54 F.4th 1232, 1236 (10th Cir. 2022) (quoting *Lindsey v. Hyler*, 918 F.3d 1109, 1115 (10th Cir. 2019)). A plaintiff asserting a substantive-due-process claim of excessive force under § 1983 "must show that the complained-of action 'shocks the conscience.'" *Id.* (quoting *Doe v. Woodard*, 912 F.3d 1278, 1300 (2019)). "'[O]nly

the most egregious official conduct' will satisfy the shocks-the-conscience test." *Id.* (alteration in original) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

Two possible standards govern the shocks-the-conscience test, and "[s]election of the appropriate standard turns on whether the state actor had time to deliberate before engaging in the complained-of conduct." *Id.* "[W]hen a government official has enough time to engage in 'actual deliberation,' conduct that shows 'deliberate indifference' to a person's life or security will shock the conscience and thereby violate the Fourteenth Amendment." *Perez v. Unified Gov't of Wyandotte Cnty.*, 432 F.3d 1163, 1166 (10th Cir. 2005) (quoting *Lewis*, 523 U.S. at 851). "*Actual deliberation* means 'more than having a few seconds to think.'" *Mahdi*, 54 F.4th at 1237 (quoting *Perez*, 432 F.3d at 1167). Indeed, we have explained that "there are two elements to the requisite deliberation." *Id.* "The first is time . . . for 'unhurried judgments' and 'repeated reflection,'" and the second "is the opportunity for attention—with no substantial 'pulls of competing obligations.'" *Id.* (quoting *Lewis*, 523 U.S. at 853).

But if there is no time or opportunity for attention, then deliberate indifference will not apply and official "conduct will shock the conscience only if it is done with the intent to harm the injured party." *Id.* at 1236–37. Stated differently, "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness" is not conscience-shocking. *Lewis*, 523 U.S. at 853. Under these principles, "we apply the intent-to-harm standard to resolve substantive-due-process

issues arising from police motor-vehicle pursuits" because such pursuits generally do not involve time to deliberate. *Mahdi*, 54 F.4th at 1237; *see also Lewis*, 523 U.S. at 854 (holding that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redress[a]ble by an action under § 1983").

Here, the district court concluded that even construing the facts in plaintiffs' favor, Lauderback had no time to deliberate when pursuing Hinson. It therefore applied the intent-to-harm standard and determined that plaintiffs failed to plausibly allege that Lauderback intended to harm anyone.

On appeal, plaintiffs argue that the district court erred in refusing to apply the lower deliberate-indifference standard. In support, they highlight the allegation in their second amended complaint that department policy prohibits officers "from embarking on a high-speed pursuit over a very minor traffic violation." Aplt. Br. 18. But even assuming such a policy would apply here, where Hinson was also suspected of fleeing from an investigative detention, it does not establish that Lauderback had time to deliberate before deciding to pursue Hinson. *See* Okla. Stat. tit. 21, § 444. At most, the allegation plaintiffs rely on suggests that Lauderback recklessly ignored department policy. But acting recklessly does not establish that Lauderback had time to deliberate. And if he did not have time to deliberate, then he cannot be liable for reckless conduct under substantive-due-process principles: "[W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness" is

not conscience-shocking.[3] *Lewis*, 523 U.S. at 853.

Plaintiffs further assert that the pursuit was unnecessary given "today's electronic world and videos." Aplt. Br. 18. They emphasize that various policies and regulations exist to protect innocent bystanders and state "that the majority of high-speed pursuits" end after "a crash with an innocent bystander." *Id.* at 18–19. Plaintiffs also contend that officers with lights and sirens "are more protected [than] the unsuspecting bystanders," and they note that Norman is a college town with young and inexperienced drivers. *Id.* at 19–20. But none of these assertions establish that Lauderback had time to deliberate. In fact, the second amended complaint suggests that Lauderback *did not* have time to deliberate: It states that immediately before the pursuit, Lauderback "did not have time to put on [his] seatbelt and did not have both hands on [the] steering wheel and was fumbling while calling on the radio" for backup. App. 170. These allegations describe a typical police chase in which Lauderback had no time to deliberate.[4] *See Mahdi*, 54 F.4th at 1237–38.

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[3] Plaintiffs relatedly suggest that Lauderback violated their substantive-due-process rights because he breached his ministerial duty to follow department policy prohibiting high-speed pursuits based on traffic violations. Yet as defendants point out, plaintiffs' state-law authorities for this point all concern negligence claims brought under state law. *See Walker v. City of Moore*, 837 P.2d 876, 877–79 (Okla. 1992); *Reeves v. City of Durant*, 435 P.3d 140, 141–43 (Okla. Civ. App. 2018); *Clark v. S.C. Dep't of Pub. Safety*, 608 S.E.2d 573, 575–76, 578–79 (S.C. 2005); *Jones v. Lathram*, 150 S.W.3d 50, 52 (Ky. 2004). So these cases do not help plaintiffs state a plausible substantive-due-process claim under § 1983 based on a theory that Lauderback had time to deliberate and acted recklessly.

[4] Plaintiffs' reference to *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), does not assist them. There, we determined that the plaintiffs stated a substantive-due-process violation because the officer's challenged conduct was conscience shocking: The officer was off duty and not responding to any call or

In sum, though "[t]here may be police-chase cases in which the deliberate-indifference standard applies," this is not one of them. *Id.* at 1237. Thus, the intent-to-harm standard applies here. *See id.* at 1236–37. Yet plaintiffs make no attempt to satisfy that standard; at most, they allege that Lauderback acted recklessly. But as explained, recklessness is not enough. *See Lewis*, 523 U.S. at 853. Plaintiffs therefore fail to state a claim for violation of their substantive-due-process rights based on a theory of either deliberate indifference or intent to harm, and we affirm the district court's ruling dismissing this claim against Lauderback on these bases.

Plaintiffs relatedly argue that the district court erred in rejecting their state-created-danger theory, which they seem to present as an alternative premise for their substantive-due-process claim. *See T.D. v. Patton*, 868 F.3d 1209, 1212 (10th Cir. 2017) (explaining that plaintiff may rely on danger-creation theory to state § 1983 substantive-due-process claim). This theory is an exception to the usual rule that the Due Process Clause does not apply to conduct of private actors. *Est. of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013). It provides that "state officials can be liable for the acts of private parties where those officials created the very danger that

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emergency, and he caused a serious accident while driving recklessly through a red light with his emergency lights on. *Browder*, 787 F.3d at 1077, 1081. As discussed, the circumstances here are notably different. Plaintiffs' reliance on *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), is similarly misplaced. In that case, the Third Circuit found that the plaintiffs plausibly alleged a substantive-due-process claim where the officer recklessly pursued "an individual suspected of a summary traffic offense when there [wa]s no pending emergency and when the suspect [wa]s not actively fleeing the police." *Sauers*, 905 F.3d at 717. The facts here are meaningfully different because Hinson was actively fleeing.

caused the harm." *Id.* To invoke the state-created-danger theory, a plaintiff must first show "affirmative conduct and private violence"—satisfied here, as the district court noted, by Lauderback's decision to pursue Hinson and Hinson's crash into the vehicle Shaw was in. *Id.* Following this initial inquiry, a plaintiff must satisfy a six-part test:

> (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendant['s] conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience[-]shocking.

Id. (first alteration in original) (quoting *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1281 (10th Cir. 2003)). The district court here concluded that plaintiffs failed to allege membership in a limited and specifically definable group, as well as conscience-shocking conduct.

On appeal, plaintiffs again emphasize Lauderback's alleged failure to follow department policy and argue that police pursuits typically end in traffic accidents involving innocent bystanders. Their opening brief cites various Fourth Amendment decisions that have no bearing on this Fourteenth Amendment case. *See, e.g.*, *Fogarty v. Gallegos*, 523 F.3d 1147, 1160 (10th Cir. 2008). It also stresses that a causal link between the danger created and the harm inflicted exists here and that, in plaintiffs' view, Lauderback's conduct was conscience-shocking because he had time to deliberate. But conspicuously absent from plaintiffs' opening brief is any challenge to the district court's ruling that they failed to allege membership in "a limited and

specifically definable group." *Est. of B.I.C.*, 710 F.3d at 1173 (quoting *Christiansen*, 332 F.3d at 1281). At best, in their reply brief, plaintiffs state that Shaw was a member of "a definable[,] limited group of unsuspecting *bystanders or drivers coming in*[*to*] *the path of the pursuit* . . . that was supposed to be protected by the creation of laws and ordinances and policies designed, if enforced, to limit officers[']conduct." Rep. Br. 14 (emphasis added). Setting aside that no such allegation appears in plaintiffs' second amended complaint,[5] the fact remains that plaintiffs failed to sufficiently raise this issue in their opening brief. They have therefore waived any such challenge. *See San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1056 (10th Cir. 2011) ("Having raised the issue insufficiently in its opening brief, [appellant] has waived it on appeal."). We accordingly affirm the district court's rejection of plaintiffs' state-created-danger theory. And because plaintiffs fail to allege a violation of their substantive-due-process rights under any theory, we conclude that the district court also correctly dismissed plaintiffs' substantive-due-process claim against the City. *See Crowson v. Wash. Cnty. Utah*, 983 F.3d 1166, 1186 (10th Cir. 2020) ("[A] claim under § 1983 against either an individual actor or a municipality cannot survive a determination that there has been no constitutional violation.").

[5] Instead, plaintiffs' complaint alleges at most that Shaw was a member of "a class of persons utilizing the streets and traffic ways." App. 164; *see also id.* at 165 (referencing "the innocent class of persons using the . . . streets and following the established traffic signs and regulations"). This is distinct from a class of individuals in the path of pursuit.

II. Equal Protection

Plaintiffs also appeal the dismissal of their equal-protection claims. The Equal Protection Clause provides "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Here, the district court rejected plaintiffs' equal-protection claims because they failed to "allege that [Lauderback] treated [Shaw] differently from others similarly situated." App. 239. Instead, the district court noted, plaintiffs alleged the opposite—that Lauderback's conduct "endangered all law-abiding drivers and pedestrians." *Id.* Thus, the district court determined that plaintiffs failed to state an equal-protection claim against Lauderback or the City.

On appeal, plaintiffs concede that they "may not have sufficiently delineated the nature of their allegations of equal protection to the district court." Aplt. Br. 27; *see also* Rep. Br. 15 ("Appellants have agreed that this cause of action was not well laid out and needed to be amended . . . ."). Nevertheless, they seek to advance a new argument on appeal, contending that Shaw has been treated differently *than Hinson* because Hinson is protected by Fourth Amendment reasonableness standards. But in addition to the obvious preservation problem, this argument fails because Shaw and Hinson are *not* similarly situated. As defendants observe, Lauderback sought to arrest Hinson and had probable cause to do so, but he did not seek to arrest Shaw or have probable cause to do so. We thus affirm the dismissal of plaintiffs' equal-protection claims against Lauderback and the City.

III. State-Law Claim and Leave to Amend

We briefly address two final matters. First, we reject plaintiffs' argument that the district court erred in dismissing their state-law claim and should have instead transferred that claim to state court. Plaintiffs point to no legal mechanism by which a federal district court can transfer state-law claims to a state court. And we see no abuse of discretion in the district court's decision to decline supplemental jurisdiction over plaintiffs' state-law claim after it had dismissed all federal claims, particularly given that it warned plaintiffs it would do so in its first dismissal order. *See Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011) ("When all federal claims have been dismissed, the court may, *and usually should*, decline to exercise jurisdiction over any remaining state claims." (emphasis added) (quoting *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998))).

Second, the district court did not err in dismissing plaintiffs' claims without providing an additional opportunity to amend. The district court found that amendment would be futile because it had already given plaintiffs a chance to amend, and plaintiffs had failed to correct the identified deficiencies. Specifically, in its first dismissal order, the district court noted that plaintiffs failed to plausibly allege (1) time to deliberate; (2) liability under the intent-to-harm standard; (3) membership in a limited and definable group for purposes of a state-created-danger theory; and (4) different treatment of similarly situated individuals for an equal-protection claim. And as we have detailed, the same deficiencies exist in plaintiffs' second amended complaint. So the district court did not err in dismissing the second amended

complaint with prejudice and denying further leave to amend. *See Moya v. Garcia*, 895 F.3d 1229, 1239 (10th Cir. 2018) (finding no error in district court's refusal to allow additional amendment because any amendment would be futile).

Conclusion

Plaintiffs fail to state a substantive-due-process claim because they do not allege that Lauderback had time to deliberate or that he intended to harm anyone—at most, they allege that he acted recklessly during a high-speed chase, which is not sufficient under Supreme Court and Tenth Circuit precedent. Additionally, plaintiffs waived any challenge to the district court's rejection of their state-created-danger theory, and they do not state any equal-protection claims because they fail to allege being treated differently than those similarly situated. Finally, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the remaining state-law claim, and it did not err in dismissing plaintiffs' second amended complaint with prejudice and denying further leave to amend. We therefore affirm.

Entered for the Court

Nancy L. Moritz
Circuit Judge