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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE ESTATE OF BRITTANY
ZIMMERMANN by its Special Administrator,
KEVIN ZIMMERMANN, JEAN ZIMMERMANN, and
KEVIN ZIMMERMANN,

Plaintiffs,

Case No. 08-CV-349-BBC

v.

DANE COUNTY and RITA GAHAGAN,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF 12(b)(6) MOTION TO DISMISS

INTRODUCTION

The plaintiffs have brought a federal claim alleging a violation of Brittany Zimmermann's constitutional rights caused by Dane County's alleged failure to send help when she dialed 911. However, the Supreme Court and the Seventh Circuit have repeatedly held that the government has no obligation under the Constitution to protect individuals from the actions of third parties. Therefore, Dane County moves to dismiss the plaintiffs' claims under Fed. R. Civ. P. 12(b)(6).

ALLEGATIONS OF THE COMPLAINT

The complaint sets forth the following allegations, which are accepted as true for the purposes of this motion only:

Brittany Zimmermann was a tenant at 517 W. Doty Street in Madison, Wisconsin. [Comp. ¶ 12] On April 2, 2008, an intruder gained entry to the home and assaulted and murdered her. [Comp. ¶ 15] During the course of the assault, Zimmermann placed a call to the Dane County 911 Communications Center which was handled by dispatcher Rita Gahagan. [Comp. ¶ 21] This call lasted approximately 90 seconds. [Comp. ¶ 22] Using equipment at the Center, Gahagan was able to identify Zimmermann's name, number and location. [Comp. ¶ 23] Information was obtained during the call which should have led Gahagan to reasonably believe that police services were needed. [Comp. ¶ 27] Dane County 911 Communications Center rules required Gahagan to dispatch police to the location. [Comp. ¶ 27] However, Gahagan negligently hung up on Zimmerman, did not send authorities to her location, and did not call Zimmermann back. [Comp. ¶ 28]

Kevin and Jean Zimmermann are the parents of Brittany Zimmermann, and Kevin is the Special Administrator of the Estate of Brittany Zimmerman. [Comp. ¶¶ 4, 6] They have brought claims against Dane County and Rita Gahagan pursuant to 42 U.S.C. § 1983. [Comp. ¶¶ 1, 35-42] They allege that the defendants, "acting under color of law, regulations and ordinances of Dane County, negligently, recklessly, intentionally and in bad faith deprived Brittany Zimmermann of her rights, privileges and immunities secured and guaranteed to her by the Fifth and Fourteenth Amendments of the United States Constitution in that they deprived her of her right to life and liberty." [Comp. ¶ 36] In addition, the plaintiffs have alleged that Dane County had a practice of allowing the 911

Communications Center to be understaffed, undertrained, and improperly supervised.

[Comp. ¶ 40]

STANDARD FOR GRANTING MOTION UNDER FED. R. CIV. P. 12(b)(6)

When considering a motion to dismiss for failure to state a claim, the court must accept as true all well-pleaded allegations in the plaintiff's complaint and the inferences reasonably drawn from those allegations. *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555, 1558 (7th Cir. 1991). Dismissal is proper where "the plaintiff has failed to allege any set of facts upon which relief may be granted." *Id.* Although the court should give the pleadings a liberal construction, it is not required to accept legal conclusions alleged or inferred from the pleaded facts. *Id.* at 1559.

ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE THE COUNTY TO PROVIDE COMPETENT RESCUE SERVICES.

The Seventh Circuit has said that the United States Constitution does not require municipalities to rescue persons in distress. *Archie v. City of Racine*, 847 F.2d 1211, 1215 (7th Cir. 1988). In the *Archie* case, it dismissed a claim with far more egregious facts. There, a man called to request a rescue squad for a friend who was having trouble breathing. The dispatcher declined to send the rescue squad and told him to have her breathe into a paper bag. Eight hours later, the man called back to say his friend was still having trouble breathing. The dispatcher repeated his advice about the paper bag and once again refused to send the rescue squad. The woman died a few hours later. By way

of explanation for his refusal, the dispatcher said only that he did not believe the woman's problems were serious and that the man who called in was known as a "jerk."

Relying on a line of previous cases holding that "failure to rescue a person in distress does not violate the Due Process Clause," the Seventh Circuit rejected an argument by the plaintiff that a potential violation of state tort law should be considered an abuse of power by the government. *Id.* at 1215. The court noted that as far as the Constitution was concerned "[t]he government need not provide services, and...if it does provide services it need not provide them competently." *Id.* Even if liability could be shown under state law, the Constitution was not intended to enforce state law. *Id.* at 1216.

A state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules.

Id. at 1217.

The court also declined to formulate a rule that a grossly negligent rescue was a violation of the Constitution. *Archie*, 847 F.2d at 1218-20. The Constitution forbids "deliberate, unauthorized deprivations" of life or liberty without due process, but the failure to send an ambulance was not intentional as that term has been used in prior case law. *Id.* at 1218. Negligence or gross negligence cannot be the basis for a constitutional violation. *Id.* at 1219-20.

The question of whether recklessness may be the basis for a constitutional claim remains an open one. *Archie*, 847 F.2d at 1219-20. Recklessness is defined as “complete indifference to risk—when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death.” *Archie*, 847 F.2d at 1219. A reckless act is one “so dangerous that the defendant’s knowledge of the risk can be inferred.” *Id.*

The dispatcher in the *Archie* case could not be found to have acted with the intent to injure, according to the Seventh Circuit. He did not kill the victim, and his conduct was not motivated by a desire to bring about her death. *Id.* at 1218. Nor was his conduct reckless. *Id.* at 1219. He did not realize the seriousness of the victim’s situation, he did make some efforts to learn more about her health problem, and none of the information he received in response to his questions would have alerted him to the fact that her life was in danger.

Significantly, the court said that nothing in the Constitution itself requires a municipality to provide effective rescue services to those in danger. *Id.* at 1220. “[T]he government need not protect its residents from private predators or their own misfortune.” *Id.* at 1221. In so holding, the Seventh Circuit relied on several of its earlier cases, including *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983).

The *Jackson* court held that the Constitution does not require the government to provide competent rescue services when it does choose to provide them. *Jackson*, 715

F.2d at 1204-05. The ***Jackson*** case involved a situation in which a police officer happened upon a car accident where the car had burst into flames. The officer directed traffic around the wreck but never bothered to check for victims in the car. In upholding a dismissal of the claim, the court said:

[T]he Constitution is a charter of negative rather than positive liberties....The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.

Id. at 1203.

These principles are reinforced in ***Ellsworth v. City of Racine***, 774 F.2d 182 (7th Cir. 1985). The court there held that the city did not have a constitutional duty to protect an undercover policeman's wife from an assault, despite the city's knowledge of the threat to her and its voluntary agreement to provide a bodyguard for her during certain hours of the day. ***Id.*** at 186. Even assuming negligence on the part of the city, "§ 1983 'imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.'" ***Id.*** The case was properly dismissed. ***Id.***

The United States Supreme Court reached a similar conclusion in a case involving allegations of child abuse. ***DeShaney v. Winnebago County Dept. of Social Servs.***, 489 U.S. 189 (1989).

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.

Id. at 195. The purpose of the Due Process Clause is “to protect people from the State, not to ensure that the State protect[s] them from each other.” *Id.* at 196. Failure to protect an individual against violence by a private actor is not a violation of the Due Process Clause. *Id.* at 197.

Applying the foregoing principles to the present case leads to the inevitable conclusion that the complaint filed by the plaintiffs fails to state a claim against these defendants. Though the County disputes the truth of many of the allegations, the plaintiffs would not have a viable federal claim even if they were true. It has been clearly established under federal law that the Due Process Clause does not require local governments to protect citizens from harmful acts by third parties. Municipalities are not required to provide any rescue services at all. Rescue services that are provided do not have to be competent to be constitutional. Perceived deficiencies in Dane County’s 911 Communications Center cannot form the basis for a Due Process claim.

The plaintiffs make general allegations of negligence against the defendants, and they allege Gahagan had a duty to follow certain policies of the Communications Center. Though the plaintiffs may be attempting to set forth violations of state tort law in their complaint, violation of a state law would not be a matter of constitutional concern even if it could be proven. As seen in *Archie*, neither negligence nor gross negligence can be the basis of a constitutional claim.

In addition, the plaintiffs go so far as to state the defendants acted “recklessly, intentionally, and in bad faith.” [Complaint, ¶ 36] The problem with such allegations is that the facts set forth in the complaint fail to provide any basis for concluding that the defendants acted in such a fashion. As quoted above, recklessness is “complete indifference to risk—when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death.” *Archie*, 847 F.2d at 1219. The Seventh Circuit has said that mere use of the words “recklessly” and “knowingly” in a complaint is insufficient to state a claim where it is apparent that officials did not really intend that the decedent be injured or killed. *Jackson*, 715 F.2d 1200, 1202.

The allegations recited in the present complaint fall far short of demonstrating that the defendants intended for Brittany Zimmermann to be harmed. The allegations certainly give no indication that the defendants did not care whether Brittany Zimmermann lived or died. They do not even show that the defendants had any idea that her life was in danger. Under the circumstances, the plaintiffs are unable to support a claim for violation of their constitutional rights.

CONCLUSION

For the reasons stated above, the defendants respectfully request that the plaintiffs’ complaint be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

Dated this ____ day of June, 2008.

BELL, GIERHART & MOORE, S.C.

/s/ John M. Moore

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