



Glover et al v. United States of America

2014 | Cited 0 times | D. Maryland | January 27, 2014

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Southern Division JENNIE J. GLOVER, et al., * Plaintiffs, * v. * Case No.: PWG-13-2112 UNITED STATES OF AMERICA, * Defendant. *

MEMORANDUM OPINION This Memorandum Opinion disposes of Defendant United States of America Partial Motion to Dismiss, ECF No. 9, and accompanying Memorandum, ECF No. 9-1; Plaintiff Opposition, ECF No. 11, and accompanying Memorandum, ECF No. 11-1; a Reply, ECF No. 19. A hearing is not necessary. See Loc. R. 105.6. For the reasons stated below, Partial Motion to Dismiss shall be DENIED.

I. BACKGROUND

For purposes of consideration, the facts that Plaintiffs alleged in the Complaint as true. See *Aziz v. Alcoa*, 658 F.3d 388, 390 (4th Cir. 2011). Decedents were the children of Plaintiffs Jeffrey A. McCormack and Jennie J. Glover. Compl. ¶¶ 4, 7, ECF No. 1. Because Mr. McCormack was a servicemember in the United States Armed Forces, his then-wife, Ms. Glover, received health care from the National Naval Medical Center in Bethesda, Maryland. Id. ¶ 21. Following years of infertility, Ms. Glover discovered she was

pregnant in December of 2009. Id. ¶ 20. She received an ultrasound at the NNMC, which showed a normal twin pregnancy. Id. ¶ 22. Two more ultrasounds yielded normal results: one

later in December and one in February of 2010. Id. ¶¶ 22-24. The February ultrasound was conducted and interpreted by Dr. Kimberly Hickey, id. ¶ 25, a medical doctor employed at the NNMC, id. ¶ 19.

On March 24, 2010, Dr. Hickey performed another ultrasound on Plaintiff, from which cervical measurement was normal. Id. ¶ 25. The day after the last ultrasound, Ms. Glover

reported to Triage at the NNMC with a loss of amniotic fluid, prolapsed amniotic membranes, a dilated cervix, and a problem with the membrane surrounding one of her twins, and she was



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admitted to the hospital. Id. ¶¶ 26-28. Julianne was born on March 30, 2010 and died twenty-three days later as a result of complications incident to her premature birth. Id. ¶¶ 30, 32-33. Jillian was born on April 1, 2010 and died only twenty-three minutes later, also as a result of complications incident to her premature birth. Id. ¶¶ 36-37. Both twins were born at under twenty- Id. ¶¶ 30, 36. According to Plaintiffs [h]ad defendant's employee properly interpreted the March 24, 2010 ultrasound and provided for follow-up treatment as required by the applicable standard of care, Julianne [and Jillian] would have remained in utero until a point where when born, [they] would have survived and been neurologically intact. Id. ¶¶ 34, 39.

Ms. Glover, for herself and each of the twins, filed claims with the Department of the Navy, which were denied on December 10, 2012. Id. ¶¶ 12-13. After reconsideration, the Navy issued its final denial on February 19, 2013. Id. Then, Ms. Glover timely filed two actions in the Health Care Alternative Dispute Resolution Office, which were transferred to this Court. Id. ¶ 14. Her four-count complaint against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, alleges: (1) medical malpractice (survivor action) on

behalf of the estate of Julianne, (2) wrongful death on behalf of Ms. Glover individually for the death of Julianne, (3) medical malpractice (survivor action) on behalf of the estate of Jillian, and (4) wrongful death on behalf of Ms. Glover individually for the death of Jillian. Id. Ms. Glover lists Jeffrey A. McCormack, and he did not join the administrative proceedings below. The United States filed the pending motion to dismiss Mr. McCormack as a plaintiff. That issue has been briefed fully and now is before me.

II. STANDARD OF REVIEW

A defendant can move to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) by matter jurisdiction can be based. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

However, effect, is Id.; see *Lutfi v. United States*, 527 F.3d 236, 241 (4th Cir. 2013); *Fianko v. United States*,

No. PWG-12- the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient

Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009); see *In re KBR, Inc., Burn Pit Litig.*, 925 F. Supp. 2d 752, 758 (D. Md. 2013) (quoting *Kerns*, 585 F.3d at 192). jurisdictional facts are inextricably intertwined with those [facts] central to the merits, the [district] court should resolve the relevant factual disputes only *Blitz v. Napolitano*, 700 F.3d 733, 739 (4th Cir. 2012) (quoting *Kerns*, 585 F.3d at 193). s in the *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (citations omitted).

III. DISCUSSION



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The sole issue before me is whether Jeffrey A. McCormack should be dismissed as a party to this FTCA action. The parties agree that Mr. McCormack, after receipt of appropriate notice under Maryland law, did not pursue an administrative claim and has not appeared in this lawsuit. See

In moving to dismiss, Defendant argues that Mr. Man administrative claim forever bars him from being a party against the United States with regard to (citing 28 U.S.C. § 2675(a)). Thus, according to Defendant, the United States has not waived sovereign immunity as to and therefore he must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Id. at 3. Citing *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1990), Defendant argues that the exhaustion requirement is jurisdictional. Id.; see 28 U.S.C. § 2401(b) ([A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues

In response, Plaintiffs argue that a judgment entered without benefitting Mr. McCormack could be vacated because the Maryland Wrongful Death Act requires that both parents be parties to the suit. See 2 (citing Md. Code Ann., Cts. & Jud. Proc. § 3-904(a)(1), (f); *Johnson v. Price*, 191 F. Supp. 2d 626, 629 (D. Md. 2001)). In their argument, Plaintiffs cite two related opinions authored by Chief Judge Chasanow. In each, Judge Chasanow ordered an FTCA plaintiff, bringing suit under the Maryland Wrongful Death Act, to amend his complaint Id. at 2 3 (citing *Chang-Williams v. United States*, ---- F. Supp. 2d ----, 2013 WL 4454597 (D. Md. Aug. 15, 2013); *Chang-Williams v. t of the Navy*, 766 F. Supp. 2d 604 (D. Md. 2011)). According to Ms. Glover, keeping Mr. McCormack as a plaintiff will not change the facts of the case in any way, nor will it increase the

potential exposure of th s [sic] recovery is still limited to the amount claimed on the original administrative claim forms. Id. at 3 4.

must satisfy the (citing *Muth v. United States*, 1 F.3d 246, 249 (4th Cir. 1993)). Therefore, citing the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI, cl. 2, and related case law, Defendant argues that the exhaustion requirement of the FTCA supersedes the party-in-interest requirement of the Maryland Wrongful Death Act. See Def. s Reply 2 3. Defendant argues that the Maryland Wrongful Dea Id. at 5. Last, Defendant

disagrees that its exposure to liability is not affected by Mr. McCormack remaining as a party. Id. at 7. Defendant argues that two caps apply to FTCA recovery: (1) the amount sought in the administrative complaint and (2) the amount a private individual under like circumstances would receive. Id. (citing 28 U.S.C. § 2674). Defendant argues a private individual could increase with Id. (citing Cts. & Jud. Proc. § 3-2A-09(b)(2)(ii)). 1

satisfy the jurisdictional prerequisite of filing a proper claim, unless another is legally entitled to

Muth, 1 F.3d at 249 (internal quotation marks omitted). I



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1 This argument first is raised in Defendant s Reply Brief, and only in passing. It appears to suggest that Defendant could argue for the application of a common law damages cap lower than the amount Ms. Glover sought in her administrative claims. Defendant s argument suggests that, with Mr. McCormack s participation as an additional plaintiff, the amount of recovery could rise closer to what Ms. Glover sought in her administrative claims. However, because this issue has been raised only in Defendant s Reply Brief and has not been briefed fully, it is not possible to address it meaningfully here.

recognize the potential tension between that general statement and this Co example, Chang-Williams v. United States, 2013 WL 4454597. However, I am persuaded that

Chief Judge Chasanow properly reconciled the Maryland Wrongful Death Act, the FTCA, and Fourth Circuit precedent. Defendant is correct that exhaustion is a non-waivable jurisdictional requirement. See, e.g., Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986). N was not intended as allowed claims to go forward when all of the plaintiffs have not filed separate

claims and the claims arose out of the same facts and were for the same amount of money. Chang-Williams v. United States, 2013 WL 4454597, at *23 (quoting Starr v. United States, 262 F. Supp. 2d 605, 607 (D. Md. 2003)); see Munger v. United States, 116 F. Supp. 2d 672, 676 (D. Md. 2000) Since the government was preparing for a claim from the administrator of the estate, they are not prejudiced by a claim from the parents because the standards of law are the same, even though the theories of recovery are different. .

As prior cases in this Court establish, whether Mr. McCormack individually filed a claim is not outcome determinative as to whether the jurisdictional prerequisite of exhaustion is met. Whether his claim has been presented to the agency depends not on whether he was the individual to present it, but on whether the Government has adequate notice to conduct a proper investigation into the underlying inc s value. Chang-Williams v. United States, 2013 WL 4454597, at *23 (internal citations omitted). As this Court explained in Munger and Chang-Williams, exhaustion requires that the claim, but not necessarily the claimant or the theory of recovery, be presented to the agency. See id.; Munger, 116 F. Supp. 2d at 676. Here, the United States was provided adequate notice, based on Ms. administrative claim, that a potential future action would include a wrongful death

claim under the Maryland Wrongful Death Act. The Maryland Wrongful Death Act provides shall be for the benefit of the wife, husband, parent, and child of Cts. & Jud. Proc. § 3-904(a)(1) By its plain terms, this statutory language should have provided notice to the Government that [decedents] surviving parents would be joined in any eventual lawsuit Chang-Williams v. United States, 2013 WL 4454597, at *23.

The logic of the Chang-Williams decision is amplified in this case precisely because Mr. McCormack has not shown a desire to participate. The omitted parties in Chang-Williams sought to participate in



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the lawsuit. See *Chang-Williams v. t of the Navy*, 766 F. Supp. 2d at 630 31. Because the Court held that the claims had been presented to the Navy, joinder was ordered. *Id.* Here, a judgment entered for the Plaintiffs could be vacated if Mr. McCormack is not included. See *Johnson*, 191 F. Supp. 2d at 629 (citations omitted). the court cannot accord complet when a beneficiary is excluded. Fed. R. Civ. P. 19(a)(l)(A); see also *Ward v. Walker*, 725 F. Supp. 2d 506, 510 11 (D. Md. 2010) s daughter was a necessary party to the Maryland wrongful death action); *Johnson*, 191 F. Supp. 2d at 630 (same). s inclusion protects any judgment entered for Plaintiffs, see *Walker v. Essex*, 569 A.2d 645, 648 (Md. 1990) (a judgment should not unless it include[s] the interests of), and protects the from being vexed by several suits instituted by or on behalf of different equitable plaintiffs for the same injury, when all the parties could *Univ. of Md. Med. Sys. Corp. v. Muti*, 44 A.3d 380, 389 (Md. 2012) (quoting *Walker*, 569 A.2d at 648). In contrast, preventing Ms. Glover from including Mr. McCormack, a mandatory party, because

he did not join in her administrative claims could allow his nonparticipation to bar her claims completely under the Maryland Wrongful Death Act.

Therefore, because the underlying facts of are identical to those presented through , I find that the Department of the Navy was presented with his claims, even though he was not the individual to present them. Further, when read in conjunction with the Maryland Wrongful Death Act claims afforded Defendant adequate notice as to future inclusion in this

lawsuit and the claims that would be brought for his benefit.

IV. CONCLUSION

For the reasons stated above, Defendant Partial Motion to Dismiss shall be DENIED. A separate order shall issue.

Dated: January 27, 2014 /S/ Paul W. Grimm United States District Judge jwr

