2024 VT 43

No. 23-AP-237

Dario Politella and Shujen Politella	Supreme Court
v.	On Appeal from Superior Court, Windham Unit, Civil Division
Windham Southeast School District et al.	May Term, 2024

Michael R. Kainen, J.

Ronald A. Ferrara and Matthew W. Goins, Law Clerk (On the Brief) of Fitts, Olson, Giddings & Ferrara, PLC, Brattleboro, for Plaintiffs-Appellants.

Kristin C. Wright of Lynn, Lynn, Blackman & Manitsky, P.C., Burlington, for Defendants-Appellees.

Charity R. Clark, Attorney General, and David McLean, Assistant Attorney General, Montpelier, for Appellee State.

PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **CARROLL, J.** Plaintiffs Dario and Shujen Politella appeal an order dismissing their amended complaint for lack of subject-matter jurisdiction. Plaintiffs' son, L.P., was mistakenly given a single dose of the Pfizer BioNTech COVID-19 vaccine at a state-sponsored vaccine clinic at L.P.'s school. Plaintiffs sued various named and unnamed state and school defendants. We conclude that defendants are immune from suit under the Federal Public Readiness and Emergency Preparedness Act (PREP Act). We therefore affirm.

I. Background

¶ 2. Plaintiffs' complaint alleged the following. Plaintiffs lived in Brattleboro with their son, L.P., who was six years old in 2021. L.P. attended Academy School in the Windham Southeast School District. The Vermont Department of Health and the school district entered into an agreement to host a COVID-19 vaccination clinic at Academy School in November 2021. Students needed parental consent to be vaccinated. Plaintiffs did not consent to have L.P. vaccinated.

¶ 3. A few days before the clinic, L.P.'s father dropped off L.P. at school and spoke with Academy School's assistant principal. Father reiterated to the assistant principal that plaintiffs did not consent to have L.P. vaccinated. The assistant principal said that he understood and stated that L.P. could not be vaccinated without plaintiffs' consent. In the same interaction, the assistant principal said that the school had not received as many vaccine registrations as he would have liked.

¶ 4. Despite the above, L.P. was vaccinated on the day of the clinic. An unidentified worker removed L.P. from class and applied a handwritten label to L.P.'s shirt that read, "L.K." and displayed "L.K's" date of birth. L.K. was a five-year-old student at Academy School who was not in L.P.'s class. L.K. had already been vaccinated the same day. L.P. "verbally protested," saying, "Dad said no." Nonetheless, clinic workers gave L.P. a stuffed animal to distract him, told L.P. that he was "a brave little boy," and administered one dose of the Pfizer BioNTech COVID-19 vaccine.[1] A clinic worker filled out a vaccine card with "L.K.'s" name, the date of administration, the vaccine lot number, and the type of vaccine dose and put the card in L.P.'s backpack. At some point, the clinic workers and school officials realized the mistake. School

[1] Plaintiffs do not name the vaccine in the original or amended complaints. Plaintiffs reference certain reports regarding the safety of the Pfizer vaccine in their motion papers. In their main appeal brief, plaintiffs appear to concede that the countermeasure involved was the Pfizer vaccine.

officials called plaintiffs to apologize. Plaintiffs removed L.P. from Academy School soon afterward. Plaintiffs did not allege that L.P. suffered harm as result of receiving the vaccine.

¶ 5. Based on these and other allegations, plaintiffs filed an eight-count complaint in the civil division. Each count was based in state law.[2] Plaintiffs named as defendants the State of Vermont and the school district, the school district superintendent, the principal and assistant principal, a teacher, the school nurse, Vermont's Deputy Health Commissioner, L.P.'s pediatrician, and five unnamed state employees or volunteers. Plaintiffs described each individual defendant as either employed by the school, the school district, the State of Vermont, or as "de facto agents of the State." Prior to answering the complaint, the State defendants moved to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. The school defendants filed an answer and moved for judgment on the pleadings. Both groups of defendants argued that they were immune from state-law claims under the PREP Act, 42 U.S.C. § 247d-6d (providing liability immunity), and therefore all claims were preempted. Plaintiffs opposed on the basis that defendants were not immune under the PREP Act and it did not preempt their claims.

¶ 6. The court concluded that the PREP Act provided immunity for State and school defendants involved in administering the vaccine to L.P., and that case law from other jurisdictions supported that conclusion. Deciding that defendants' affirmative defense of federal preemption warranted dismissal, it granted the motions to dismiss and for judgment on the pleadings, and granted plaintiffs leave to amend.

¶ 7. Plaintiffs filed an amended complaint containing a new count styled, "Private Right of Action—Constitutional." This count alleged a violation of Article 11 of the Vermont Constitution. The trial court concluded that because this claim was also based in state law, it too

[2] Plaintiffs pleaded the following causes of action: a violation of Vermont's Healthcare Bill of Rights, 18 V.S.A. § 1852, gross negligence, negligent undertaking, premises liability, battery of minor, consumer fraud, common-law fraud, and intentional infliction of emotional distress.

was preempted by the PREP Act. The court otherwise found that the amended complaint relied on the same allegations plaintiffs originally pleaded; in effect, that L.P. was wrongfully administered a COVID-19 vaccine. Concluding that it had no jurisdiction over preempted claims, the court again dismissed the amended complaint for lack of subject-matter jurisdiction and granted the motion for judgment on the pleadings. Plaintiffs appealed.

¶ 8. Plaintiffs essentially present two issues for our review: (1) defendants' alleged conduct does not fall under the PREP Act immunity provision, and (2) the PREP Act does not preempt plaintiffs' claims. They cite cases from other jurisdictions in support of their arguments. Plaintiffs contend that the court erred in dismissing the case for lack of subject-matter jurisdiction. They ask us to reverse and remand for additional proceedings.

¶ 9. We conclude that the PREP Act immunizes every defendant in this case and this fact alone is enough to dismiss the case. Plaintiffs' arguments about preemption are misplaced, and therefore we need not decide today the extent of the PREP Act's preemptive effect. We conclude that when the federal PREP Act immunizes a defendant, the PREP Act bars all state-law claims against that defendant as a matter of law. We therefore affirm the dismissal because plaintiffs have failed to state a claim upon which relief can be granted and not for lack of subject-matter jurisdiction. See State v. VanBuren, 2018 VT 95, ¶ 70, 210 Vt. 293, 214 A.3d 791 (explaining that this Court can affirm trial court's decision on any basis). For the same reason, we also affirm the court's grant of judgment on the pleadings in favor of the school defendants.

II. Discussion

A. Standard of Review

¶ 10. We review anew a trial court's decision on motions to dismiss failure to state a claim and for judgment on the pleadings. Negots. Comm. of Caledonia Cent. Supervisory Union v. Caledonia Cent. Educ. Ass'n, 2018 VT 18, ¶¶ 8, 12, 206 Vt. 636, 184 A.3d 236. We will affirm a dismissal order only when there are "no facts or circumstances" entitling the nonmoving party

to relief. Davey v. Baker, 2021 VT 94, ¶ 2, 216 Vt. 153, 274 A.3d 817 (quotation omitted). To this end, we "take all uncontroverted factual allegations of the complaint as true and construe them in the light most favorable to the nonmoving party." Caledonia Cent. Educ. Ass'n, 2018 VT 18, ¶ 10 (quotation and alteration omitted). Similarly, we will affirm a judgment on the pleadings when the movant is entitled to judgment as a matter of law on the pleadings alone. Id. We accept as true all well-pleaded factual allegations contained in the nonmoving party's pleadings, including any reasonable inferences to be drawn from them, and accept as false all contrary allegations in the movant's pleadings. Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., 2022 VT 45, ¶ 17, 217 Vt. 195, 287 A.3d 515. "The only difference between" a motion to dismiss for failure to state a claim and judgment on the pleadings "is the timing of the motion to dismiss." Hunter v. Ohio Veterans Home, 272 F. Supp. 2d 692, 694 (N.D. Ohio 2003).

B. The PREP Act

¶ 11. Congress passed the PREP Act in 2005. The Act authorizes the Secretary of Health and Human Services to issue a declaration when the Secretary makes a "determination that a disease or other health condition or threat to health constitutes a public health emergency." 42 U.S.C. § 247d-6d(b)(1). In the declaration, the Secretary "may specify[] the manufacture, testing, development, distribution, administration, or use" of a "covered countermeasure." Id. A vaccine is a covered countermeasure. Id. § 247d-6d(i)(1)(C).

¶ 12. During a public-health emergency, certain "covered persons" are immune from all claims causally related to the administration of a covered countermeasure. Id. § 247d-6d(a)(1). The immunity in § 247d-6d(a)(1) "applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with . . . dispensing, prescribing, administration, licensing, or use of such countermeasure." Id. § 247d-6d(a)(2)(B). "The Secretary controls the scope of immunity through

the declaration and amendments, within the confines of the PREP Act." Saldana v. Glenhaven Healthcare LLC, 27 F.4th 679, 687 (9th Cir. 2022) (quotation omitted).

¶ 13. The "sole exception" to the PREP Act's grant of immunity is a federal cause of action against a covered person whose "willful misconduct" causes "death or serious physical injury." Id. § 247d-6d(d)(1). An action of this type may only be filed in the U.S. District Court for the District of Columbia. Id. § 247d-6d(e)(1).

¶ 14. In March 2020, the Secretary issued a declaration addressing the COVID-19 pandemic. See Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198-01 (Mar. 17, 2020) [hereinafter March 2020 COVID-19 Declaration]. Among other provisions, the Secretary declared that covered countermeasures included "any antiviral, and other drug, any biologic, any diagnostics, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19." Id. at 15,202. The Secretary declared that administration of a covered countermeasure included "physical provision of a countermeasure to a recipient, such as vaccination . . . and . . . activities related to management and operation of programs and locations for providing countermeasures to recipients, such as decisions and actions involving security and queuing." Id. at 15,200.

¶ 15. With this background in mind, we turn to plaintiffs' amended complaint to determine whether it can survive the pleadings stage. See Huey v. Bates, 135 Vt. 160, 161, 375 A.2d 987, 988 (1977) (explaining rule that, for purposes of appellate review, motions to dismiss constitute admission that all well-pleaded facts alleged by plaintiff are true).

C. Defendants' Immunity Under the PREP Act

¶ 16. To avoid dismissal on immunity grounds, plaintiffs would have had to present well-pleaded allegations showing that (1) at least one defendant was not a covered person, (2) some conduct by a defendant was not causally related to administering a covered countermeasure, (3) the

substance injected into L.P. was not a covered countermeasure, or (4) there was no PREP Act declaration in effect at the time L.P. was injected. We address each in turn.

¶ 17. All defendants in this matter are covered persons as defined by the PREP Act. "Program planners" are covered persons under the PREP Act. 42 U.S.C. § 247d-6d(i)(2)(B)(iii). A program planner "means a State or local government, . . . a person employed by the State or local government, or other person who supervised or administered a program with respect to the administration . . . of a security countermeasure or a qualified pandemic or epidemic product." Id. § 247d-6d(i)(6). An "official, agent, or employee" of a program planner is also a covered person. Id. § 247d-6d(i)(2)(B)(v).

¶ 18. As noted above, plaintiffs named the school district, the State, and various individuals as defendants. Plaintiffs alleged that defendants were "de facto agents of the State" in the case of individual persons, or "de facto landlords of the State's vaccine clinic," in the case of the school district. Taking plaintiffs' allegations as true, the State and the school district are program planners as defined by the PREP Act, and the individual persons plaintiffs allege to be employees and "de facto agents" are agents or employees of program planners. It follows that every defendant is a covered person under the Act. See Happel v. Guilford Cnty. Bd. of Educ., 899 S.E.2d 387, 392 (N.C. Ct. App. 2024) (holding that "community group" that administered COVID-19 vaccine to student at student's school without parental consent was program planner under PREP Act), review on additional issues allowed in part, 900 S.E.2d 666 (N.C. 2024), and appeal dismissed, 900 S.E.2d 668 (N.C. 2024).

¶ 19. Plaintiffs' allegations relating to consent and alleged misconduct of defendants in vaccinating L.P. are causally related to the administration of a covered countermeasure. As disclosed in the March 2020 COVID-19 declaration, "administration" includes the "physical provision of a countermeasure to a recipient," and "activities related to management and operation of programs and locations for providing countermeasure to recipients, such as decisions and

actions involving security and queuing." 85 Fed. Reg. at 15,200. For example, plaintiffs' allegations recounting how L.P. was removed from his class and brought to the clinic are "activities related to management and operation" of a state-sponsored vaccine clinic and include "decisions and actions involving security and queuing." Id. The unidentified clinic workers present with L.P. while he was injected with the vaccine were involved in the "physical provision of a countermeasure to a patient." Id. Even the assistant principal's comments to father about L.P.'s status and his expressions of disappointment in the number of vaccine registrations are comments relating to the "administration and operation" of the clinic. Id. Despite plaintiffs' arguments to the contrary, they have alleged only tortious conduct that is causally related to the administration of the vaccine to L.P. See 42 U.S.C. § 247d-6d(a)(2)(B); see also Parker v. St. Lawrence Cnty. Pub. Health Dep't., 954 N.Y.S.2d 259, 262 (App. Div. 2012) (holding that PREP Act immunized defendants who administered covered countermeasure without parental consent).

¶ 20. Plaintiffs characterize the Pfizer BioNTech COVID-19 vaccine as "experimental," but they do not dispute that L.P. was injected with the Pfizer vaccine. Nor do they dispute that the Pfizer vaccine is a covered countermeasure. See 85 Fed. Reg. at 15,198-01 (declaring that covered countermeasures included "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom"); see also M.T. ex rel. M.K. v. Walmart Stores, Inc., 528 P.3d 1067, 1074 (Kan. Ct. App. 2023) ("Application of the PREP Act does not turn on the effectiveness of the countermeasure.").

¶ 21. Finally, as outlined above, supra, ¶ 14, there was undisputedly a COVID-19 PREP Act declaration in effect in November 2021 when the vaccine was administered to L.P.

¶ 22. Plaintiff's claims are entirely based on the alleged actions of covered persons who administered a covered countermeasure to L.P. during the effective period of a PREP Act declaration. As a result, each defendant is immune from plaintiffs' state-law claims, all of which

are causally related to the administration of the vaccine to L.P. 42 U.S.C. § 247d-6d(a)(1) (immunizing "covered person . . . from suit and liability under Federal and State law with respect to 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" (emphasis added)).

¶ 23. Other courts faced with similar facts have come to the same conclusion. In M.T. ex rel. M.K., a Walmart employee vaccinated a fifteen-year-old in Kansas without parental consent. 528 P.3d at 1071. The child's mother alleged that another Walmart employee told the child that she did not need consent because she was fifteen, which was not true under Kansas law. The mother sued Walmart under state law. The trial court dismissed all but the mother's claims relating to consent and parental rights, and both parties appealed. Id. at 1072. The appeals court concluded that Congress intended the PREP Act's immunity provision to apply to all claims based on the administration of a covered countermeasure, including those without parental consent. Id. at 1084. The court reversed and remanded with instructions to dismiss all claims. Id. at 1085.

¶ 24. In Cowen v. Walgreen Co., the plaintiff filed state-law claims against Walgreen Co. after she was administered a Moderna COVID-19 vaccine instead of a flu vaccine without her knowledge or consent and was allegedly injured. No. 22-CV-157-TCK-JFJ, 2022 WL 17640208, at *2 (N.D. Okla. Sept. 13, 2022). The plaintiff argued that defendant was not protected from liability by the PREP Act because her injuries "could have resulted from any vaccination or other medical procedure at Walgreens." Id. at *3. Sitting in diversity, the district court concluded that because the plaintiff's injuries actually resulted from the administration of the Moderna vaccine, the PREP Act applied. Id. It therefore dismissed her complaint. Id.

¶ 25. A case decided by the New York Supreme Court, Appellate Division, Parker, 954 N.Y.S.2d at 260, bears striking resemblance to the facts plaintiffs allege here. In response to an outbreak of the H1N1 influenza virus, the Secretary issued a PREP Act declaration in 2009 recommending the administration of Peramivir, an antiviral drug, as a covered countermeasure. A

vaccination clinic was held at the school of the plaintiff's child. The plaintiff did not consent to the administration of Peramivir. The child was nevertheless vaccinated. The plaintiff sued the county health department and other defendants, asserting state-law claims for negligence and battery. The Appellate Division concluded that the PREP Act's plain language expressed Congress's intent to preempt claims involving covered persons administering a countermeasure without parental consent. Id. at 263.

¶ 26. Plaintiffs' attempts to distinguish Parker are meritless. Plaintiffs focus on the fact that the defendants in Parker were "qualified persons" under the PREP Act. Id. at 261-62; see 42 U.S.C. § 247d-6d(i)(2)(iv), (i)(8) (defining qualified person, in part, as "a licensed health professional or other individual who is authorized to prescribe, administer, or dispense such countermeasures under the law of the State in which the countermeasure was prescribed, administered, or dispensed"). Plaintiffs argue that defendants in this case were not "qualified," asserting that defendants "received NO training" about consent required to administer vaccines. As discussed above, however, plaintiffs' allegations establish that defendants are all covered persons under a separate provision of the Act. Their specific training or lack thereof is irrelevant.

¶ 27. Plaintiffs also assert that Peramivir is a "traditional vaccine" whereas the Pfizer vaccine is experimental. To the extent this is an argument that the Parker court would have ruled differently if the Pfizer COVID-19 vaccine had been involved instead of Peramivir, this has no basis in the PREP Act. See M.T. ex rel. M.K., 528 P.3d at 1074 ("Application of the PREP Act does not turn on the effectiveness of the countermeasure"). The Pfizer vaccine was a covered countermeasure at the time it was administered to L.P. See supra, ¶ 20.

¶ 28. Plaintiffs argue that "the New York state of emergency was in full swing" at the time of the vaccine administration in Parker. They contrast that with the fact that Vermont's public-health emergency declaration was not in effect when L.P. was injected. True or not, this

observation is immaterial.[3] Nothing in the PREP Act turns on whether a state declaration is in effect. See 42 U.S.C. § 247d-6d(b)(1) (authorizing Federal Health and Human Services Secretary to issue declaration on "determination that a disease or other health condition or threat to health constitutes a public health emergency"). Parker and the other case law cited above support our conclusion that defendants are immune from liability under the PREP Act.

D. Preemption of State-Law Claims Against Persons Immune from Liability

¶ 29. Plaintiffs argue that their claims can nevertheless proceed because the PREP Act only preempts claims against covered persons for willful misconduct.[4] They point to various federal decisions concluding that the PREP Act does not preempt state-law claims. These cases are inapposite because they address the question of whether the PREP Act creates federal-question subject-matter jurisdiction over certain health-care-related claims. See, e.g., Solomon v. St. Joseph Hosp., 62 F.4th 54, 60-61 (2d Cir. 2023) (distinguishing between "complete preemption," which provides subject-matter jurisdiction and "ordinary preemption," which is affirmative defense). None of these cases supports the proposition that plaintiffs can proceed in state court against defendants who are completely immunized from liability under the Act. See Solomon, 62 F.4th at 60; Maglioli v. All. HC Holdings LLC, 16 F.4th 393, 406-13 (3d Cir. 2021); Mitchell v. Advanced HCS, LLC, 28 F.4th 580, 584-88 (5th Cir. 2022); Cagle v. NHC Healthcare-Maryland Heights, LLC, 78 F.4th 1061, 1065-67 (8th Cir. 2023); Saldana, 27 F.4th at 687-88.[5] These decisions hold

[3] Neither party has directed the Court to a citation supporting plaintiffs' allegation. We decline to take judicial notice of whether Vermont had a public-health emergency declaration in effect in November 2021 because the answer has no bearing on our analysis.

[4] Plaintiffs have not pleaded a willful misconduct claim.

[5] The trial court and state defendants correctly observe that these cases are largely based on allegations of nonfeasance by health-care facilities in the early days of the pandemic. They do not involve alleged misfeasance by covered persons administering covered countermeasures. While true, we think the clearer distinction is that offered by the circuit courts themselves: the PREP Act completely preempts only one claim but may provide a complete defense in state court if defendants can establish their immunity.

that absent a claim for willful misconduct, the PREP Act does not provide a basis for federal-question jurisdiction when the plaintiff has pleaded only state-law claims.

¶ 30. However, the PREP Act does contain an express preemption provision. See 42 U.S.C. § 247d-6d(b)(8) ("During 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 is in conflict with, any requirement applicable under this section."). Other state courts faced with similar facts have concluded that state-law claims against immunized defendants cannot proceed in state court in light of the PREP Act's immunity and preemption provisions, including claims based on the failure to secure parental consent. See, e.g., Happel, 899 S.E.2d at 393-94 ("We conclude that . . . the broad scope of immunity provided by the PREP Act applies to . . . [d]efendants in this case."); M.T. ex rel. M.K., 528 P.3d at 426-27 (same); Parker, 954 N.Y.S.2d at 263 (same). We agree and hold that the PREP Act's immunity and preemption provisions bar plaintiffs' state-law claims.

¶ 31. Plaintiffs have accordingly failed to state a claim upon which relief can be granted because their lawsuit cannot proceed as a matter of law. See Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420, 115 A.3d 1009 (explaining that we will uphold dismissal motion only where "it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." (quotation omitted)).

Affirmed.

FOR THE COURT:

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Associate Justice