IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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D.B., by his next friend, KURTIS B.,
JENNIFER B. and KURTIS B.,

OPINION and ORDER

Plaintiffs,

11-cv-773-bbc

v.

JAMES KOPP, JAN MORAVITS,
LISA RINIKER, GRANT COUNTY
and GRANT COUNTY DEPT. OF SOCIAL SERVICES,

Defendants.

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Plaintiff D.B. is a minor who alleges that he was charged with sexual assault for "playing doctor" with other children when he was six years old. He and his parents have brought this civil rights action under 42 U.S.C. § 1983 against the assistant district attorney assigned to the case (defendant Lisa Riniker), a police officer and county employee who investigated the case (defendants James Kopp and Jan Moravits), along with Grant County and its Department of Social Services.

In an opinion and order dated April 11, 2012, I dismissed plaintiffs' complaint for failure to state a claim upon which relief may be granted, but I gave plaintiffs leave to file an amended complaint. Although I believed it was "highly unlikely that plaintiffs [could] save their claims with additional allegations," I could not "say that it would be impossible for them to do so." Dkt. #53 at 18.

Plaintiffs have filed an amended complaint that includes few new factual allegations, but they replaced almost all of the legal theories in the original complaint with new ones. In particular, plaintiffs are asserting claims against the individual defendants for malicious prosecution; for violations of their rights to equal protection of the laws under a "class of one" theory, to procedural and substantive due process and to freedom from cruel and unusual punishment; and for violations of state law. In addition, plaintiffs have included claims for municipal liability against defendants Grant County and Grant County Department of Social Services. Defendants have filed motions to dismiss the amended complaint, which are ready for decision.

Unfortunately for plaintiffs, their new claims are no stronger than the claims in their original complaint. With respect to their equal protection claim, plaintiffs do not identify the discriminatory conduct with any specificity in their complaint. They allege that plaintiff D.B. "was forced into the county court system," but two other children involved were not, even though they committed the same acts. Am. Cpt. ¶¶ 43-44, dkt. #59. However, as I noted in the April 11 order and plaintiffs acknowledge in their brief, defendant Riniker is entitled to absolute immunity for her decision to charge D.B. Van de Kamp v. Goldstein, 555 U.S. 335, 340-43 (2009). I understand from plaintiffs' brief that they are challenging defendants Moravits's and Kopp's decision to investigate D.B. but not the other children. Because defendants assume that the investigation could be a sufficient injury to establish an equal protection violation, I will do the same. Defendants raise several arguments in response to plaintiffs' equal protection claim, but I need consider only one of them:

plaintiffs have failed to show in their complaint that defendants lacked a rational basis for their conduct. St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639 (7th Cir. 2007) ("In order to survive a motion to dismiss for failure to state an equal protection claim, 'a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.'") (quoting Wroblewski v. City of Washburn, 965 F.2d 452, 460 (7th Cir. 1992)). In particular, plaintiffs admit in their amended complaint that an adult witnessed D.B.'s conduct, but not the conduct of the other children. Am. Cpt. ¶ 14, dkt. #59. That is sufficient to establish a rational basis for any differential treatment.

Plaintiffs' remaining claims are frivolous. The scope of their procedural due process claim is unclear, but whatever conduct they are challenging, the claim fails because they do not identify any additional process that plaintiff D.B. should have received. Taake v. County of Monroe, 530 F.3d 538, 543 (7th Cir. 2008); Goros v. County of Cook, 489 F.3d 857, 859-60 (7th Cir. 2007). Plaintiffs repeat allegations about defendants' improper motive, but motive is irrelevant under the due process clause. Miller v. Dobier, 634 F.3d 412, 415 (7th Cir. 2011).

With respect to plaintiffs' substantive due process claim, it is impossible to tell from the amended complaint what plaintiffs believe that any of the defendants did to violate this right. In their brief, plaintiffs suggest that defendants violated their "parental rights," but still do not identify any particular actions of defendants, saying only that defendants "insert[ed] a six-year old boy into the criminal justice system . . . to appease politicians" and

"terrorized" plaintiff D.B. Plts.' Br., dkt. #65, at 15-16.

The Court of Appeals for the Seventh Circuit has recognized that parents have a constitutional right to raise their children. E.g., Doe v. Heck, 327 F.3d 492, 517–18 (7th Cir. 2003). As plaintiffs acknowledge, most claims for interference with familial relations involve a parent's loss of custody or limitations on custody, even if only temporarily, e.g., Siliven v. Indiana Dept. of Child Services, 635 F.3d 921, 928-29 (7th Cir. 2011); Brokaw v. Mercer County, 235 F.3d 1000, 1019 (7th Cir. 2000), but plaintiffs do not allege that the parents ever lost custody of D.B., even for a moment. Although plaintiffs may be correct that the court of appeals has not held that loss of custody is an element of the claim, the court has held that mere questioning of a child is not sufficient, Hanson v. Dane County, Wisconsin, 608 F.3d 335, 338-39 (7th Cir. 2010), except in some cases in which the questioning occurs outside the presence of the parents. Heck, 327 F.3d at 522-23. Because plaintiffs do not allege that Jennifer B. and Curtis B. were separated from D.B., that D.B. was questioned outside their presence or that they were otherwise prevented from raising D.B. as they saw fit, this claim fails as well.

With respect to plaintiffs' claim under the Fourth Amendment for malicious prosecution, it is not clear whether such a claim may be brought in this circuit. Compare Ray v. City of Chicago, 629 F.3d 660, 664 (7th Cir. 2011) (dismissing Fourth Amendment malicious prosecution claim on ground that "individuals do not have a 'federal right not to be summoned into court and prosecuted without probable cause, under either the Fourth Amendment or the Fourteenth Amendment's Procedural Due Process Clause'") (quoting

Tully v. Barada, 599 F.3d 591, 594 (7th Cir. 2010)), with Johnson v. Saville, 575 F.3d 656, 663 (7th Cir. 2009) (stating that court of appeals had "left open the possibility of a Fourth Amendment claim against officers who misrepresent evidence to prosecutors"). However, even if I assume that a malicious prosecution claim could be brought, plaintiffs have alleged no facts suggesting that defendants "seized" plaintiff D.B. within the meaning of the Fourth Amendment.

Plaintiffs acknowledge that a seizure does not occur unless the defendant uses physical force against the plaintiff or the plaintiff submits to defendant's assertion of authority. Plts.' Br., dkt. #65, at 19 (citing California v. Hodari D., 499 U.S. 621, 626 (1991)). However, they go on to argue that plaintiff D.B. was "forced to submit to authority" when defendants Kopp and Moravits recommended charges against D.B. and ignored evidence that was favorable to D.B. Plaintiffs seem to assume that a seizure is synonymous with any adverse action by an officer, but that is incorrect. An "assertion of authority" is not a seizure under the Fourth Amendment unless it restrains the plaintiff's freedom of movement. United States v. Griffin, 652 F.3d 793, 798-801 (7th Cir. 2011); Bielanski v. County of Kane, 550 F.3d 632, 637 (7th Cir. 2008). Because none of plaintiffs' allegations suggest that any of defendants restrained plaintiffs' freedom of movement, this claim must be dismissed as well.

Plaintiffs acknowledge in their brief that they cannot bring a claim under the Eighth Amendment because plaintiff D.B. was never convicted, Rice ex rel. Rice v. Correctional Medical Services, 675 F.3d 650, 664 (7th Cir. 2012), but they argue that they may bring

a claim under the Fourteenth Amendment for unlawful "punishment." Again, plaintiffs do not identify the specific conduct by defendants that constitutes punishment. To the extent they mean to argue that defendants' investigation was a punishment, they cite no authority for that proposition and they not developed their argument. In any event, this aspect of the Fourteenth Amendment is limited to persons in state custody. Brokaw, 235 F.3d at 1018 n.14. Because plaintiffs do not allege that plaintiff D.B. was arrested or otherwise taken into custody, they have no claim under the Fourteenth Amendment.

Without a viable claim against any of the individual defendants, plaintiffs' federal claims against the municipal defendants must be dismissed as well. Houskins v. Sheahan, 549 F.3d 480, 493-94 (7th Cir. 2008).

This leaves plaintiffs' state law claims. Generally, when all federal claims have been dismissed, a district court should decline to exercise jurisdiction over any remaining state law claims. Segal v. Geisha NYC LLC, 517 F.3d 501, 506 (7th Cir. 2008). However, one exception to the general rule exists when the state law claims have no merit or where resolving the remaining claims would contribute to judicial economy. In re Repository Technologies, Inc., 601 F.3d 710, 724-25 (7th Cir. 2010).

In the April 11, 2012 order, I concluded that plaintiffs' state law claims should be dismissed both because plaintiffs failed to follow Wisconsin's notice of claim requirements under Wis. Stat. §§ 893.80 and 893.82 and because plaintiffs failed to state a claim upon which relief may be granted. In their briefs in support of their motions to dismiss the amended complaint, defendants raise no arguments about the merits of the state law claims;

they argue only that the state law claims should be dismissed again for plaintiffs' failure to comply with the notice of claim requirements. In response, plaintiffs "agree to dismissal" of their state law claims against defendant Riniker, Plts.' Br., dkt. #66, at 6, so I see no reason to decline jurisdiction over that claim to allow resolution by the state courts. However, with respect to defendants Moravits and Kopp, plaintiffs say that they are in the process of completing the notice of claim requirements and would like an opportunity to present those claims. Defendants do not argue that state law prohibits plaintiffs from complying with the notice of claim requirements now, so it would be premature to dismiss those claims with prejudice. Accordingly, I decline to exercise supplemental jurisdiction over plaintiffs' state law claims against defendants Moravits and Kopp. Plaintiffs may pursue those claims in state court. Because defendants have not developed any argument regarding the merits of plaintiffs' state law claims in the amended complaint, I decline to address that issue.

In dismissing plaintiffs' federal claims, I do not mean to suggest that any of defendants' actions were wise or appropriate. It seems to make little sense to prosecute a six-year old boy for sexual misconduct. Although it is impossible to know from the complaint the reasons why defendants acted as they did, if plaintiffs' allegations are true, they suggest an exercise of poor judgment at best. However, 42 U.S.C. § 1983 does not create a cause of action for bad decisions, but only for clearly established violations of constitutional rights against state actors who are not immune from suit. Because plaintiffs have not stated a plausible claim for relief under the Constitution despite multiple attempts to do so, I must

grant the motion to dismiss plaintiffs' federal claims.

ORDER

IT IS ORDERED that

1. Defendant Lisa Riniker's motion to dismiss, dkt. #61, is GRANTED.

2. The motion to dismiss filed by defendants Jan Moravits, James Kopp, County of Grant, Wisconsin and Grant County Department of Social Services, dkt. #63, is GRANTED with respect to plaintiffs D.B.'s, Jennifer B.'s and Kurtis B.'s federal claims against those defendants.

3. I decline to exercise supplemental jurisdiction over plaintiffs' state law claims against defendants Moravits and Kopp. Those claims are DISMISSED WITHOUT PREJUDICE to plaintiffs' refiling them in state court.

4. The clerk of court is directed to enter judgment accordingly and close this case.

Entered this 3d day of August, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge