

No. 20-4226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 13, 2021
DEBORAH S. HUNT, Clerk

JACQUELINE GIEBELL,

Plaintiff-Appellant,

V.

HEARTLAND DUBLIN NURSING FACILITY,

Defendant-Appellee.

ORDER

BEFORE: MOORE, WHITE, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Wm. L. Hunt

Deborah S. Hunt, Clerk

Appendix C

NOT RECOMMENDED FOR PUBLICATION

No. 20-4226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACQUELINE GIEBELL,

Plaintiff-Appellant,

V.

HEARTLAND DUBLIN NURSING FACILITY,

Defendant-Appellee.

FILED
Jul 28, 2021
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF
OHIO

ORDER

Before: MOORE, WHITE, and THAPAR, Circuit Judges.

Jacqueline Giebell, a Virginia resident proceeding pro se, appeals the district court's dismissal of her complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Giebell worked as a caregiver to Shis Kin Wu. Giebell alleged that while caring for Mr. Wu in Virginia, she observed “marks” on his body, which she reported to her boss, who was Mr. Wu’s son. Approximately five weeks later, Mr. Wu was moved to the Heartland Dublin Nursing Facility (“Heartland”) in Dublin, Ohio. Giebell alleged that when she visited Mr. Wu at Heartland in January 2018, she observed marks on his body that were identical to the marks that she had observed in Virginia, thus causing her to suspect that Mr. Wu was being abused by a member of his family. Giebell averred that she reported her “observation of abuse” to Heartland’s administrator, Cody Brown, in June 2018, but that he ignored her report. Giebell subsequently filed reports of abuse with Brown’s superior, Jason Hohlefelder, and the Ohio Department of Health. Hohlefelder determined that the marks on Mr. Wu’s body were “skin discolorations”—an

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assessment that Giebell rejects. Giebell alleged that she observed the suspicious marks on Mr. Wu's body during her subsequent visits to Heartland in May, July, and August of 2018.

On August 2, 2018, Giebell called the Dublin Police Department ("DPD") after she was unable to reach Mr. Wu while his family was visiting with him at Heartland. During that call, Giebell discovered that "there was another report involving [Mr. Wu]," which was closed after the investigator found no "obvious signs of injury or abuse to Wu." When Giebell asked a sergeant with the DPD to reopen the case, the sergeant suggested instead that she file a police report in Virginia—the jurisdiction where she first noticed the marks on Mr. Wu's body. Giebell alleged that the authorities in Virginia refused to help. Giebell also claimed that, on August 6, 2018, the DPD sent an officer to photograph the marks on Mr. Wu's body. As a result, one of Mr. Wu's family members filed a "telecommunications complaint" against Giebell, which prompted an officer with the DPD to warn Giebell that she would be charged with harassment if she attempted to contact Mr. Wu. Giebell asserted that this constituted "false detainment." The officer also informed Giebell that Mr. Wu's family had confiscated his cell phone, purportedly in violation of the Federal Nursing Home Reform Act ("FNHRA"), *see* 42 U.S.C. §§ 1395i-3 et seq. Giebell claimed that when she informed Hohlefelder "that the police had placed [her] under 'false detainment'" and that Mr. Wu's telephone access had been illegally restricted, he did nothing to remedy the situation.

According to Giebell's complaint, Mr. Wu fell and was taken to the hospital on August 22, 2018. Giebell alleged that upon Mr. Wu's return to Heartland, he was "mysteriously" placed "on hospice on [S]ept. 2nd, and . . . somehow started dying the next day on 9/3, and continued dying until close to midnight on 9/4." She alleged that Heartland placed Mr. Wu in hospice care as "retaliation and to 'dispose' of him. And to rid themselves of the abuse scandal."

In July 2020, Giebell filed this diversity action against Heartland asserting the following causes of action: (1) negligence per se based on alleged violations of the FNHRA; (2) gross negligence; (3) malice; and (4) obstruction of criminal investigations, in violation of 18 U.S.C. § 1510; and (5) retaliation against a witness, in violation of 18 U.S.C. § 1513. She sought punitive damages and injunctive relief.

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Heartland thereafter moved the district court to dismiss Giebell's complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, arguing that, as a matter of law, no actual or implied private cause of action exists under the FNHRA or the federal statutes proscribing obstruction of criminal investigations and retaliation against witnesses. Giebell opposed Heartland's motion to dismiss. The district court concluded that Giebell lacked standing to bring her state-law claims since she complained only of injuries to Mr. Wu. It also determined that Giebell possessed neither the legal authority to initiate a federal criminal prosecution against Heartland nor a private cause of action stemming from Heartland's alleged violations of the federal criminal statutes cited in her complaint. The district court therefore granted Heartland's Rule 12(b)(6) motion and dismissed Giebell's complaint with prejudice.

Giebell advances three arguments on appeal. She first argues that the district court erred by not referring her case to a magistrate judge, thereby depriving her of the procedures set forth in Rule 72 of the Federal Rules of Civil Procedure. Second, Giebell challenges the district court's determination that she lacked standing to bring her state-law claims on Mr. Wu's behalf. Lastly, and relatedly, Giebell challenges the district court's determination that she did not bring any tort claim on her own behalf.

We review de novo a district court's order dismissing a complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* As a pro se litigant, Giebell is entitled to a liberal construction of her pleadings. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

The district court first determined that Giebell lacked standing to raise her state-law claims because she failed to allege that she personally suffered an injury resulting from Heartland's conduct—i.e., that she did not suffer an injury in fact. Rather, the district court found that all of

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Giebell's state-law claims stemmed from allegations that Heartland had violated Mr. Wu's rights. We review de novo a district court's decision regarding standing. *Graveline v. Benson*, 992 F.3d 524, 531 (6th Cir. 2021).

Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies and requires that the parties have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). Article III standing requires (1) an injury in fact, (2) causation, and (3) redressability. *Id.* at 560-61. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (quotations marks and citations omitted). To be "particularized," the injury "must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. Here, the district court incorrectly determined that Giebell lacked standing, because Giebell clearly asserted in her complaint that Heartland's employees violated her federal rights and committed actionable torts against her from contacting Mr. Wu.

However, despite her standing to raise certain claims, Giebell's complaint was still subject to dismissal under Rule 12(b)(6). *See Murphy v. Nat'l City Bank*, 560 F.3d 530, 535 (6th Cir. 2009) (holding that this court may affirm on any basis supported by the record). In her appellate brief, Giebell notes that she "stated repeatedly throughout her case that her Federal Rights were violated when The Heartland administrator tried to 'trespass' her to the Dublin Police . . . and cause [her] to be falsely detained by the police and unable to call Mr. Wu." But the only federal authorities cited within Giebell's complaint are two criminal statutes and the FNHRA, none of which provides a private cause of action. *Cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017) (courts will not create a private cause of action where a statute does not itself so provide); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) (noting reluctance to infer a private right of action from a criminal prohibition alone). To the extent that Giebell intended to bring a cause of action for false imprisonment against Heartland, such a claim would be barred by the one-year statute of limitations set forth in Ohio Revised Code § 2305.11. And while Giebell complains about the conduct of certain officers with the DPD, Heartland was the only party named as a defendant in this case.

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Giebell also challenges the district court's conclusion that she could not file suit on behalf of Mr. Wu (or presumably his estate), arguing that her alleged status as Mr. Wu's "sponsor" under Ohio Revised Code 3721.10(D) permitted her to do so. Generally, a plaintiff may not sue on behalf of a third party. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). To be sure, Rule 17 of the Federal Rules of Civil Procedure permits certain individuals—such as an executor, administrator, guardian, bailee, trustee, party with whom or in whose name a contract was made for another's benefit, or party authorized by statute—to sue in their own names without joining the person for whose benefit the action is brought. Fed. R. Civ. P. 17(a)(1)(A)-(G). But we have held that the right to proceed pro se does not extend to the representation of the interests of others. *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002) (discussing 28 U.S.C. § 1654). Thus, even if Giebell could show that she was serving in a representative capacity permissible under Rule 17, she could not do so pro se. *See id.*

Finally, Giebell's argument regarding the district court's failure to refer her case to a magistrate judge is without merit. "Congress passed 28 U.S.C. § 636(b) 'to relieve some of the burden on the federal courts by permitting the assignment of certain district court duties to magistrates.'" *Baker v. Peterson*, 67 F. App'x 308, 310 (6th Cir. 2003) (quoting *United States v. Curtis*, 237 F.3d 598, 602 (6th Cir. 2001)). However, "[t]he District Court has the discretion, but not a duty, to refer the matter to a magistrate judge." *United States v. Lewis*, 139 F. App'x 455, 459 (3d Cir. 2005). The district court did not abuse its discretion by ruling on Heartland's Rule 12(b)(6) motion in the first instance.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACQUELINE GIEBELL,

Plaintiff,

: Case No. 2:20-cv-3655

-vs-

Judge Sarah D. Morrison
Magistrate Judge Kimberly A. Jolson

HEARTLAND DUBLIN NURSING
FACILITY

:

Defendant.

OPINION AND ORDER

This matter is before the Court upon Defendant Heartland Dublin Nursing Facility's Motion to Dismiss the Complaint (ECF No. 5) and Plaintiff Jacqueline Giebell's Memorandum in Opposition (ECF No. 7). For the reasons that follow, the Court **GRANTS** Defendant's Motion.

I. FACTUAL ALLEGATIONS

The following are the factual allegations the Court is able to discern from the Complaint.

Jacqueline Giebell, a resident of Virginia, is the former caregiver and friend of Shiskin Wu.¹ (Compl., p. 5, ECF No. 1.) Ms. Giebell alleges that while she was taking care of Mr. Wu in Virginia, she reported to her boss Jen Wu that there were "marks" on Mr. Wu. (*Id.*) Approximately five weeks later, Mr. Wu was moved to

¹ Ms. Giebell refers to multiple people with the surname "Wu." To limit confusion, hereafter the Court will refer to Shiskin Wu as "Mr. Wu" and reference his family members by their full names.

Defendant Heartland Dublin Nursing Facility/HCR Manor Care (“Heartland), an Ohio corporation with its principal place of business in Ohio. (Motion, 3, ECF No. 5.)

According to Ms. Giebell, when she visited Mr. Wu in January 2018, she observed marks on him that were identical to the marks she observed in Virginia. (Compl., p. 5.) She did not report the marks to anyone at that time but observed additional marks on Mr. Wu during her visits in May, July, and August. (*Id.*)

Ms. Giebell alleges that on June 15, 2018, Mr. Wu’s power of attorney, Keui Wu, attempted to prevent Ms. Giebell from continuing to visit Mr. Wu, but Heartland intervened. (*Id.*) At the same time, Ms. Giebell reported her “observation of abuse” to a Heartland administrator, Cody Brown. (*Id.*) Ms. Giebell believes that Mr. Wu was being abused by a family member. (*Id.*) Ms. Giebell continued to file complaints of abuse of Mr. Wu with Heartland, including with Mr. Brown’s supervisor, Jason Holefelder, and the Ohio Department of Health. (*Id.*) According to Ms. Giebell, Mr. Holefelder performed an evaluation of Mr. Wu and determined the marks to be “skin discolorations.” (*Id.*) Ms. Giebell disagrees with this assessment. (*Id.*)

On August 2, 2018, Ms. Giebell called the Dublin Police Department after being unable to reach Mr. Wu while his family was visiting. (*Id.*) During that call, Ms. Giebell discovered that “there was another report involving [Mr. Wu].” (*Id.*) Ms. Giebell requested that “Sgt. Krayner”² reopen the case but he instead suggested that

² Ms. Giebell refers only to the title and last name of the police officers she references in the Complaint.

Mr. Giebell document the abuse in Virginia and make a report in that jurisdiction. (*Id.* at 6.) Ms. Giebell attempted to do so but was denied. (*Id.*) Nevertheless, Sgt. Krayner allowed Ms. Giebell to document the abuse in Virginia. (*Id.*)

On August 6, "Officer Jones" was sent out to photograph the complained of marks on Mr. Wu. (*Id.*) As a result, Keui Wu made a "telecommunications complaint" to the Dublin Police. (*Id.*) "Officer Traves" then warned Ms. Giebell not to contact Mr. Wu or she would be charged with harassment. (*Id.*) He also informed her that Mr. Wu's family had taken his cellphone. (*Id.*) Ms. Giebell then proceeded to file an incident report about her conversation with Officer Traves. (*Id.*) She also talked to "Sgt. Rice" who was "very hateful and threatened" her. (*Id.*)

Mr. Holefelder allowed Ms. Giebell to visit Mr. Wu on August 18. (*Id.* at 7.) Ms. Giebell told Mr. Holefelder that the police had restricted her telephone access to Mr. Wu. (*Id.*) She alleges that eventually the Dublin Police dismissed the warning of Officer Traves because "the legal dept. of the police had sided with [her and] because [Mr. Wu] was competent." (*Id.*)

On August 22, Mr. Wu fell and was taken to the hospital. (*Id.*) Mr. Wu was then "mysteriously put back on hospice on sept. 2nd, even though he had handled being on hospice fine from 8/5 until he fell, he somehow started dying the next day on 9/3, and continued dying until close to midnight on 9/4." (*Id.*) Ms. Giebell believes that Mr. Wu was signed into hospice as "retaliation and to 'dispose' of him. And to rid themselves of the abuse scandal." (*Id.* at 8.) She also alleges that it was Heartland's intention to declare Mr. Wu incompetent even though he was

competent. (*Id.*)

On July 20, 2020, Plaintiff filed a pro se Complaint alleging negligence per se, gross negligence, malice, obstruction of criminal investigations, and retaliation against a witness. She requests \$200,000 in punitive damages and that “a case be reopened on Mr. Shiskin Wu.” (*Id.* at 10.) The Court has diversity subject matter jurisdiction to hear this case pursuant to 28 U.S.C. § 1332.

On August 19, 2020, Heartland filed a motion to dismiss for failure to state a claim upon which relief may be granted. (ECF No. 5.) Ms. Giebell responded on August 31. (ECF No. 7.) This matter is now ripe for review.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations and quotations

omitted). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Directv, Inc. v. Treesh*, 487 F.3d, 471, 476 (6th Cir. 2007).

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

These standards apply equally when the plaintiff is pro se. Although a pro se litigant is entitled to a liberal construction of her pleadings and filings, she still must do more than assert bare legal conclusions, and the “complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.” *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005).

III. ANALYSIS

A. Tort Claims

Ms. Giebell alleges state law claims for negligence per se based on Heartland’s alleged violation of the Federal Nursing Home Reform Act, 42 U.S.C. § 1395i-3, gross negligence, and malice. The injury she complains of is the alleged abuse and subsequent death of Mr. Wu. It is apparent in both her Complaint and Memorandum in Opposition that she is bringing these claims in her own name but attempting to represent Mr. Wu’s interests. (Compl., p. 5; Memo. Opp., 14, ECF No. 7.) She believes that her “sponsor status” allows her to act on his behalf. She is wrong.

“Article III of the Constitution limits federal courts’ jurisdiction to certain ‘Cases’ and ‘Controversies.’” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). “One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.” *Id.* (internal quotations omitted). “[W]hen a plaintiff’s standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to [herself] that is likely to be redressed by a favorable decision.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). “Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.” *Id.* Here, Ms. Giebell does not allege any injury to herself, she complains only of injury to Mr. Wu.

While 28 U.S.C. § 1654 “permit[s] individual parties to plead and conduct their own cases personally or by counsel, [it] does not authorize a non-attorney to bring suit on behalf of a third person.” *Huntsman v. Sumner Cty. Jail*, No. 3:19-cv-1088, 2020 WL 1061886, at *2 (M.D. Tenn. Mar. 5, 2020) (internal quotations omitted). Section 1654 “does not permit plaintiffs to appear pro se where interests other than their own are at stake.” *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002) (emphasis omitted). Pro se plaintiffs typically do not have standing to advance pro se claims on behalf of family members, let alone a friend or professional client. *Id.* Additionally, the definition of “sponsor” under Ohio Rev. Code. 3721.10(D) does not confer standing on a pro se litigant to bring tort claims on another’s behalf.

Accordingly, Ms. Giebell lacks standing to bring these state law claims and

they must be **DISMISSED**.

B. Criminal Violations

Ms. Giebell also alleges violations of federal criminal statutes 18 U.S.C. § 1510 (obstruction of criminal investigations) and 18 U.S.C. § 1513 (retaliating against a witness, victim, or an informant) based on her own interactions with Heartland. Ms. Giebell possesses no private right of action against Heartland for alleged violations of federal criminal statutes. *Kafele v. Frank & Wooldridge Co.*, 108 F'Appx 307, 308 (6th Cir. 2004). Further, as a private citizen, Ms. Giebell lacks authority to initiate a federal criminal prosecution of Heartland for its alleged unlawful acts. *Id.* at 308–09. These claims also fail and must be **DISMISSED**.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion is **GRANTED**. (ECF No. 5.) As demonstrated by the Court's discussion above, allowing Plaintiff leave to amend her claims or refile her Complaint would be futile. *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 355 (6th Cir. 2014). Accordingly, the Complaint is **DISMISSED** with prejudice. (ECF No. 1.)

The Clerk is **DIRECTED** to **TERMINATE** this case from the docket of the United States District Court for the Southern District of Ohio, Eastern Division.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the
Southern District of Ohio

JACQUELINE GIEBELL,

Plaintiff

v.

HEARTLAND DUBLIN NURSING FACILITY,

Defendant

Civil Action No. 2:20-cv-3655

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

- ☐ the plaintiff (name) _____ recover from the
defendant (name) _____ the amount of
_____ dollars (\$ _____), which includes prejudgment
interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.
- ☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name) _____
_____ recover costs from the plaintiff (name) _____

☒ other: The Court grants Defendant's Motion to Dismiss. Plaintiff's Complaint is dismissed with prejudice.

This action was (check one):

- ☐ tried by a jury with Judge _____ presiding, and the jury has
rendered a verdict.
- ☐ tried by Judge _____ without a jury and the above decision
was reached.
- ☐ decided by Judge _____ on a motion for

Date: 10/27/2020

CLERK OF COURT

Theresa J. B.
Signature of Clerk or Deputy

