UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, *Plaintiffs*, v. STATE OF TEXAS, *et al.*, *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs*, v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, *et al.*, *Plaintiffs*, v. RICK PERRY, *Defendant.*	CIVIL ACTION NO. SA-11-CV-490-OLG-JES-XR [Consolidated case]
MARAGARITA V. QUESADA, *et al.*, *Plaintiffs*, v. RICK PERRY, *et al.*,	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

Defendants.	)	
	)	
	)	
JOHN T. MORRIS,	)	CIVL ACTION NO.
	)	SA-11-CA-615-OLG-JES-XR
Plaintiff,	)	[Consolidated case]
	)	
v.	)	
	)	
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
EDDIE RODRIGUEZ, *et al.,*	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
Plaintiffs,	)	[Consolidated case]
	)	
v.	)	
	)	
RICK PERRY, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFF-INTERVENORS' REPLY TO DEFENDANTS' REPSONSE IN OPPOSITION TO MOTION TO SUBSTITUTE PLAINTIFF-INTERVENOR

Dr. Wallace spent the last years of her life seeking justice for those living in Congressional District 30 and State House District 100 under the United States Constitution and §2 of the Voting Rights Act. Dr. Wallace strongly believed that these malapportioned districts violated not only her constitutional rights, but also the constitutional rights of all similarly situated voters. Dr. Wallace tragically died during the pendency of this litigation. Her daughter, Juan Wallace, now seeks to substitute as a Plaintiff-Intervenor in her mother's place to see that her work on behalf of the residents of Dallas County was not in vain.

Defendants oppose Plaintiff-Intervenors' Motion to Substitute Plaintiff-Intervenor on the basis that Dr. Wallace's claims are simultaneously not "personal injury" claims that may carry on under the Texas Survival Statute, and that they implicate an injury too personal to remedy following her death. Defendants' conflicting arguments are contrary to logic and precedent. Because Dr. Wallace's claims survive her death under federal and state law, and because the relief sought will remedy continued harms, Plaintiff-Intervenors request this Court grant their Motion to Substitute Juan Wallace, daughter of Dr. Juanita Wallace, in this case.

ARGUMENT

Contrary to defendants' assertions, it would be inconsistent with judicial precedent and the intended purpose of § 1983 to hold that Dr. Wallace's claims do not survive her death. First, Defendants contend that "[u]pon passing, a decedent can no longer be deprived of her constitutional rights", citing an Alabama decision *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979). *See* Dk. 1350, at 3. *Whitehurst* does not, in fact, stand for this proposition, but merely states that constitutional injuries to deceased persons are only actionable if they existed prior to their death. Since Dr. Wallace's constitutional injury occurred prior to her death, that point is irrelevant to this case.

Relying on *Robertson v. Wegmann,* 436 U.S. 584 (1978), the Fifth Circuit held in *Caine v. Hardy* that the survival of actions brought pursuant to 42 U.S.C. § 1983 is to be determined by the law of the forum state. *Caine v. Hardy,* 943 F.2d 1406, 1410 (5th Cir. 1991). However, two years after *Robertson,* the Supreme Court held that notwithstanding that ruling, the deterrence goals of § 1983 may require a court to allow an action to survive the death of the Plaintiff even if the action would not survive under state law. *See Carlson v. Green*, 446 U.S. 14, 24-25, (1980). In holding that the Plaintiffs' claims survived under federal common law, the *Carlson* Court

explained: "*Robertson* expressly recognized that to prevent frustrations of the deterrence goals of § 1983 … '[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him.'" *Id.,* quoting *Robertson,* 436 U.S., at 592. *See also Thomas v. Frederick*, 766 F. Supp. 540 (W.D. La. 1991) (finding that a state law provision prohibiting the award of punitive damages in § 1983 cases was inconsistent with federal law in that it "would seriously hamper the deterrence effect of section §1983" and therefore did not control) (Internal quotations and citations omitted).

Thus, Plaintiffs' contend that if the Defendants' were correct that Dr. Wallace's claims do not survive under Texas state law, federal law considerations in the circumstances of this case would nonetheless mandate allowing the substitution of her daughter, who the Defendants concede is otherwise qualified under Texas state law as a proper party to continue the claim. However, Dr. Wallace's claims in this case do survive her death under Texas' survival statute.

Defendants argue that the Texas Survival Statute enumerates the only claims surviving death to be those "for personal injury to the health, reputation, or person of an injured person." Tex. Civ. Prac. & Rem. Code §71.021(a). *Hamilton v. Rogers*, which Defendants cite to support this claim, ultimately held that the Texas survival statute was broad enough to encompass a plaintiff's employment discrimination claims under § 1983, among others. 573 F. Supp. 452, 453 (S.D. Tex. 1983). In fact, *Hamilton* looked to Texas Supreme Court precedent to determine that the Texas Survival Statute's application was not limited to those causes of action enumerated within it, noting that the Court in *Vassallo v. Nederl-Amerik Stoomv Maars Holland* had held:

> We do not . . . interpret the statute to provide for the survival of only those causes of action which existed in 1925. The purpose of the statute undoubtedly is that any couse of action, whenever arising and regardless of what law it arises under, shall not be abated by death. It was never meant to freeze the statute as of 1925, thereby rendering it necessary for the legislature to constantly adopt amendments to cover new rights as they are recognized by statute or state court decisions.

162 Tex. 52, 344 S.W.2d 421, 426 (Tex.1961) (construing the survival statute to allow for the survival of maritime claims not otherwise recognized under state law). Consistent with this broad construction of the Survival Statute, the Texas Court of Appeals has held that the "policies underlying Section 1983 clearly include . . . prevention of abuses of power by those acting under color state law," and that "none of the policies behind Section 1983 is subverted by the adoption of the State of Texas survival law. *Upton County, Tex. v. Brown,* 960 S.W. 2d 808, 818 (Tex. App. 1997). Moreover, to emphasize the necessity of survival of claims to carry out the intentions of §1983, the *Upton* court noted that "[i]t defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that . . . it meant to withdraw the protection of civil rights statutes against the peril of death." *Id.* (quoting *Clift v. Fincannon,* 657 F. Supp. 1535, 1541 (E.D. Tex. 1987)).

Further, even if the Survival Statute were as narrow as Defendants assert, the Fifth Circuit has instructed that in light of the United States Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), it could rightly be asserted that all § 1983 claims are personal injury claims. *Caine v. Hardy,* 943 F.2d 1406, 1411 (5th Cir. 1991) (en banc). The *Caine* court was charged with interpreting whether a § 1983 claim survived under a Mississippi survival statute substantially similar, but even more restrictive, than the statute at hand; and ultimately held that "it is easy to conclude that all § 1983 actions are actions 'for the recovery of damages for the commission of an injury to the person' within the scope of the state survival statute." *Id.* (quoting *Powell v. Buchanan,* 147 So. 2d 110, 111 (Miss. 1962)). Following this precedent, it would be consistent for this Court to rule that Dr. Wallace's constitutional injuries are personal injuries that "do[] not abate because of the death of the injured person. Tex. Civ. Prac. & Rem. Code §71.021(a).

Second, Defendants argue – merely sentences after contending that Dr. Wallace has not suffered "personal injury" - that Dr. Wallace's injuries are too personal to allow for the equitable relief sought in her death. Defendants purport that seeking injunctive relief or declaratory judgment is inappropriate in a survival action, citing *Plumley v. Landmark Chevrolet, Inc*., 122 F.3d 308, 312 (5th Cir. 1997) for the contention that substitution should be denied where equitable relief is sought because "there [is] no real or immediate threat of continued harm upon the decedent's death." ((Dk. 1350 at 4). The circumstances in *Plumley* are substantially distinct from the situation at hand, however, and that court's holding was fact specific, not generally applicable to all survival cases. In *Plumley*, the plaintiff and his son had been denied the purchase of a truck for which he had already contracted when defendant learned that plaintiff had AIDS. *Id.,* 122 F.3d at 312. The injunctive relief sought under the ADA was intended to right this past wrong, however, the deceased plaintiff's son had already obtained another truck. Thus, the court found no imminent harm or controversy existed to warrant equitable relief. *Id.*

The equitable relief sought in voting rights cases has much broader implications than would specific performance on a contract, or other situations in which the constitutional rights abridged caused harm only to the deceased. Challenging an unconstitutional district vindicates the rights of all living in that district. *See Baker v. Carr,* 369 U.S. 186, 207 (1962) (finding that appellants had standing "to protect or vindicate an interest of their own and of those similarly situated" where the asserted classification "disfavor[ed] the voters in the counties in which they resid[ed]"); *United States v. Hays,* 515 U.S. 737, 744-45 (1995) (acknowledging that a plaintiff's right to bring suit and the harms caused in *Shaw* claims are rights and harms shared in common with all voters residing in the malapportioned district)*; Bush v. Vera*, 517 U.S. 952, 958 (1996) (asserting the same). The right to vote in a constitutional district, therefore, is not a right

individual and personal only to Dr. Wallace, but rather a personal right shared with all voters residing in the districts that she had sought to remedy. Absent the substitution of her daughter, Juan Wallace, to carry on her mother's claims, the residents of the districts that Dr. Wallace challenged in this case do in fact face a "real or immediate threat of continued harm." *Plumley,* 122 F.3d at 312. The harms they collectively face do not abate with Dr. Wallace's death. Neither, then, should her claims.

CONCLUSION

For the reasons stated in Plaintiff-Intervenors' Motion to Substitute, this court should grant the motion and permit Juan Wallace to substitute for her mother, Dr. Wallace, as a NAACP Plaintiff-Intervenor in this action.

Dated: April 7, 2017.

Respectfully Submitted,

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