

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-15304

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 04, 2002
THOMAS K. KAHN
CLERK

D. C. Docket No. 00-00071-CV-JTC-1

RELIANCE TRUST, as Administrator of the Estate
of Terrell Peterson, AUDRY MITCHELL, as Natural
Mother and Heir at Law for Terrell Peterson,

Plaintiffs-Appellants,

versus

GEORGIA DEPARTMENT OF HUMAN
RESOURCES, TOMMY OLMSTEAD, Individually
and as former Commissioner of the Department of
Human Resources of the State of Georgia, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(April 4, 2002)

Before BIRCH and DUBINA, Circuit Judges, and KATZ*, District Judge.

* Honorable Marvin Katz, U. S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

PER CURIAM:

This case involves the tragic death of a five-year old boy at the hands of his legal guardian. Both the boy's mother and his estate brought this action pursuant to 42 U.S.C. § 1983 alleging a violation of his substantive due process rights. The district court dismissed their amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim because the state did not have legal custody of the boy.

This court reviews the district court's dismissal of a complaint for failure to state a claim *de novo*. *White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir. 1999).

In reviewing an order granting a motion to dismiss, the appellate court must accept the factual allegations of the complaint as true and may affirm the dismissal of the complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Mescocap Ind. Ltd. v. Torm Lines, 194 F.3d 1342, 1343 (11th Cir. 1999) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984)).

In our view, the district court erred in relying exclusively on whether the state had legal custody. The proper test for a plaintiff bringing a section 1983 claim on behalf of a child is whether the state had dominion and control over the child's life and the extent of that dominion and control. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 109 S. Ct. 998 (1989); *Powell v. Georgia*

Dep't of Human Resources, 114 F.3d 1074 (11th Cir. 1997); *Wooten v. Campbell*, 49 F.3d 696 (11th Cir. 1995).

Based on the limited record before us, we are unable to determine whether the state in this case exercised sufficient dominion and control over the child that the plaintiff can properly maintain a claim for a violation of the child's substantive due process rights. Accordingly, we vacate the district court's judgment of dismissal and remand this case with the directions that the court permit the parties to engage in discovery on the question of whether the state exercised sufficient dominion and control.¹

VACATED and REMANDED.

¹ We also decline to determine whether the district court alternatively properly determined that the defendants were entitled to qualified immunity. The Supreme Court has instructed us that before we decide whether a state actor is entitled to qualified immunity, we must first determine whether the plaintiff has suffered a deprivation of a federal constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).