Sixth Circuit Re-Affirms Substantive Due Process Claims May Go Forward in Flint Water Cases. Then They Settle.

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In another of the many strands of the Flint water cases, a Sixth Circuit panel (Moore, White, JJ., Sutton, J. concurring) on August 5 reaffirmed its May 2020 decision in Waid vs. Snyder that plaintiffs plausibly alleged the City of Flint and City and State officials (including former Governor Rick Snyder) violated plaintiffs’ substantive due process rights to bodily integrity by causing, sustaining, and covering up the poisoning of an entire community with lead- and legionella-contaminated water, and that such officials are not entitled to qualified immunity. Waid was primarily based on Guertin v. Michigan, 912 F.3d 907 (6th Cir. 2019), which together set forth that to make out a substantive due process claim for bodily integrity, plaintiffs must demonstrate that government officials’ actions “shock the conscience”—i.e., they “knew of facts from which they could infer a substantial risk of serious harm, that they did infer it, and that they acted with indifference toward the individual’s rights.” In Guertin, in an opinion by Judge Griffin, the court held seven of the twelve named defendants had plausibly engaged in such “conscience shocking” behavior (two of the dismissed defendants were members of Governor Snyder’s cabinet), and in Waid, in an opinion by Judge Moore, plaintiffs plausibly alleged such conduct for all but one defendant (including Governor Snyder).
The August 5 opinion is unremarkable for its holding—defendants conceded the dispute was “functionally identical” to *Waid* and controlled the outcome. Judge Moore’s majority opinion therefore disposed of the appeal “in short order.” In just four paragraphs—two (and the longest) of which were procedural history—drawing from *Waid*, the court held plaintiffs plausibly allege substantive due process violations against, among others, former Governor Snyder, and that the case should be remanded to the district court for a determination of whether former State Treasurer Andy Dillon should be dismissed from the litigation.

The majority opinion’s subsequent four pages, by contrast, were a lively rebuttal of the “concurrence’s criticisms of *Waid*,” which the majority contextualized from the outset as “a stand it takes today after no judge of this court requested a poll for en banc rehearing of that case.” The majority opinion characterized as incorrect the concurrence’s reading of *Guertin*, framed as “requir[ing] that we treat higher-ups differently than officials making decisions on the ground.” In the majority’s view, the concurrence would substitute the court’s obligation “to closely examine the culpability of each defendant to see if they ‘personally’ committed the sort of ‘conscience-shocking’ conduct required to sustain a substantive due process claim” for its “own” test: “if officials lower in the state-wide hierarchy are entitled to immunity, then higher up government officials are entitled to immunity, too.”

Judge Sutton made clear he would have dissented in *Waid* were it before him, but because it wasn’t, he was obligated to concur in the present case. According to the concurrence, “the complaint nowhere alleges that [Snyder] knew or should have known about the risk” posed to the public by switching Flint’s water supply without a plan to update its water treatment plant. Moreover, posited the concurrence, considering that Snyder’s subordinate cabinet officials “were too far removed from the crisis to remain defendants,” the Governor presumably was “even further removed” from the conscience-shocking conduct. Thus, Governor Snyder and Treasurer Dillon—as with three high-ranking officials dismissed in *Guertin*—should have been entitled to immunity because they “were too far removed from the relevant conduct to justify allowing the claims against them to proceed.”

The majority opinion took strong issue with the concurrence. It pointed out that Governor Snyder was alleged to have: (1) “coordinated the switch to Flint River water knowing that the water would not be treated for contamination”; (2) “refused to switch Flint back to clean water, knowing that the people of Flint were being poisoned”; and (3) “hidden the full extent of the dangers and to have failed to take remedial actions.” Unlike the three high-ranking officials in *Guertin*, Governor Snyder was “named to defend his own actions, not those of his subordinates, and there is no basis for dismissing him from this case.”

Notwithstanding the preceding analyses, or perhaps in light of them, the State of Michigan recently settled the Flint water cases with plaintiffs’ counsel for $600 million, releasing all current and former State employees from any liability.

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