No. 17-20259

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EMILY-JEAN AGUOCHA-OHAKWEH, on behalf of herself and Philomina Ohakweh, Bethrand Ohakweh, Cynthia Chizoba Ohakweh, Obinna Ohakweh, Chukwunenye Ohakweh, and Chisom Ohakweh as family members of Decedent, and on behalf of Decedent, Doctor Alphaeus Ohakweh.; BETHRAND OHAKWEH

Plaintiffs-Appellants

VS.

HARRIS COUNTY HOSPITAL DISTRICT, doing business as Harris Health System, doing business as Ben Taub Hospital; BAYLOR COLLEGE OF MEDICINE; PRALAY KUMAR SARKAR; ANISHA GUPTA; VAN VI HOANG; ELIZABETH S. GUY; MARTHA P. MIMS; JOSLYN FISHER; WAYNE X. SHANDERA; WILLIAM ROBERT GRAHAM; XIAOMING JIA; ANITA V. KUSNOOR; VERONICA VITTONE; HOLLY J. BENTZ; JARED JUND-TAEK LEE; CHRISTINA C. KAO; DORIS LIN; SUDHA YARLAGADDA; BARBARA JOHNSON; SANTIAGO LOPEZ; LYDIA JANE SHARP; JOHN MICHAEL HALPHEN, Medical Doctor/Juris Doctor

Defendants-Appellees

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United States of America, ex rel, EMILY-JEAN AGUOCHA-OHAKWEH, ex rel, BETHRAND OHAKWEH, ex rel

Plaintiffs-Appellants

VS.

MARTHA P. MIMS; SANTIAGO LOPEZ; ANISHA GUPTA; WILLIAM ROBERT GRAHAM; LYDIA JANE SHARP; XIAOMING JIA; SUDHA YARLAGADDA; ANITA V. KUSNOOR; VERONICA VITTONE; JARED JUNG-TAEK LEE; WAYNE X. SHANDERA; HOLLY J. BENTZ; DORIS LIN; ELIZABETH S. GUY; VAN VI HOANG; CHRISTINA C. KAO; PRALAY KUMAR SARKAR; JOSLYN FISHER; BAYLOR COLLEGE OF MEDICINE; HARRIS COUNTY HOSPITAL DISTRICT; JOHN MICHAEL HALPHEN; BARBARA JOHNSON

Defendants-Appellees

On Appeal from U.S. District Court, Southern District of Texas, Houston Div.
Cause No 4:16-cv-903. Hon. Alfred H. Bennett

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants hereby certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants: (1) Bethrand Ohakweh as Administrator of (2) Estate of Aphaeus Ohakweh; and (3) Emily-Jean Aguocha-Ohakweh on behalf of herself and (4) Philomina Ohakweh, Bethrand Ohakweh, (5) Cynthia Chizoba Ohakweh, (6) Obinna Ohakweh, (7) Chukwunenye Ohakweh, and (8) Chisom Ohakweh, all family members of Decedent, Aphaeus Ohakweh, and heirs of Estate of Aphaeus Ohakweh.

Appellees: HARRIS COUNTY HOSPITAL DISTRICT, doing business as Harris Health System, doing business as Ben Taub Hospital; BAYLOR COLLEGE OF MEDICINE; PRALAY KUMAR SARKAR; ANISHA GUPTA; VAN VI HOANG; ELIZABETH S. GUY; MARTHA P. MIMS; JOSLYN FISHER; WAYNE X. SHANDERA; WILLIAM ROBERT GRAHAM; XIAOMING JIA; ANITA V. KUSNOOR; VERONICA VITTONE; HOLLY J. BENTZ; JARED JUND-TAEK LEE; CHRISTINA C. KAO; DORIS LIN; SUDHA YARLAGADDA; BARBARA JOHNSON; SANTIAGO LOPEZ; LYDIA JANE

SHARP; JOHN MICHAEL HALPHEN; and all individuals and entities listed in the District Court Certificate of Interested Persons – District Court Trial Public Docket Numbers 7, 8, & 17, all hereby incorporated by reference. (ROA.357-ROA.360); (ROA.361-ROA.363); (ROA.415-ROA.418).

ENTITIES WITH INTEREST: Prescriptive Insurance Company, Ltd.; Affiliated Medical Services; University of Texas Health Science Center Houston; United States of America; and The State of Texas.

COUNSELS:

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/s/ Ernest C. Adimora-Nweke, Jr. Esq.
Counsel of Record for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request an oral argument in this case. This appeal involves, amongst others, matters of jurisdictional split within the fifth circuit. It shall require the Court to interpret the laws to establish the applicability of the U.S. Constitution and Federal Laws in the health care field.

This appeal shall require the Court to determine whether the U.S. Constitution or Federal laws imposes, amongst others, a right to medical care in a government health care institution when government employees act with the necessary culpable mental states to deprive patients and their family members or surrogates of their Constitutional Rights, and whether 42 U.S.C. § 1395dd is applicable law post a patient's admission to the hospital.

The U.S. District Courts for the Eastern District of Texas, and other Federal Circuit Courts have ruled favorably for Appellants on these issues. An oral argument on this case is critical to shed light on the issues, and shall assist this Court to resolve the issues.

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Appellants appeal 03/24/2017 orders of dismissal with prejudice on all of Appellants' claims due to Appellees' Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(6) motions by the Honorable Judge Alfred H. Bennett, in cause number 4:16-cv-903; in the U.S. District Court, Southern District of Texas, Houston Division. The District Court also reinstated its ruling in the dismissal orders that "future amendments [to pleadings] would not be in the interest of justice." ROA.12685–ROA.12688; ROA.12689-ROA.12692; ROA.12693-ROA.12697.

Appellants originally filed suit 0n 12/21/2015 in state district court. On 04/04/2016, Appellees removed the case to federal court.

The Federal District Court had jurisdiction over Appellants' matters pursuant to 28 U.S.C. §1331, as the Appellants had 42 U.S.C. §1983, §1985, and §1395dd claims.

On 12/13/2016, the District Court consolidated cause number 4:16-cv-1704 – a *qui tam* action for civil money penalties – into cause number 4:16-cv-903 "for further proceedings" ROA.12461; not "for all purposes."

On 04/11/2017, Appellants timely filed a Notice of Appeal on the District Court's 03/24/2017 orders of dismissals with prejudice on the claims for damages in cause number 4:16-cv-903. ROA.12855-ROA.12858.

This Court has jurisdiction over the appeal under 28 U.S.C. § 1291, and 28 U.S.C. § 1294(1), as the trial court's dismissal with prejudice of cause 4:16-cv-903, and denial of reconsideration, are final and appealable. *See also, Schippers v. United States*, 715 F.3d 879, 884 (11th Cir. 2013) (holding that immediate appeal is permitted whenever the underlying complaint was not consolidated with still-pending suits for *all* purposes) (emphasis added); *Road Sprinkler Fitters Local Union v. Cont'l Sprinkler Co.*, 967 F.2d 145, 148, 149 (5th Cir. 1992).

STATEMENT OF THE CASE

The material facts are found in "Facts" section of the 12th Amendment to Original Petition, all hereby incorporated by reference. ROA.215- ROA.257

Additional material facts obtained post discovery are found in the Appellants' proposed 13th Amendment to Original Petition, all hereby incorporated by reference. ROA.8827- ROA.8994

On December 21, 2015, Appellants filed their original petition in the 270th Judicial District Court, Harris County, TX. ROA.57-ROA.133

On April 4, 2016, Appellee Harris Health System ("Harris Health"), and Baylor College of Medicine ("Baylor"), removed the case to Federal Court ROA.52-ROA.56; with Appellants' 12th Amendment to Original Petition as the governing pleading. ROA.208–ROA.285.

On June 3, 2016, Appellants appeared for the FRCP Rule 26(f) joint conference meeting in this Court. Appellants were allowed only one amendment to pleading and given two weeks. No docket control order was entered.

Parties also conducted first set of discovery post the two weeks deadline given by the Court, in anticipation of Appellees' dispositive motions.

On 8/23/2016, post discovery responses from Appellees ROA.8532– ROA.8585, Appellants filed a final proposed 4th Amended Motion for Leave to Amend Petition. ROA.8824– ROA.8999

District Court denied Appellants' FRCP Rule 15(a) motion for leave to amend petition on 8/30/2016, and authorized Appellees to file their dispositive motions, with Appellants opportunity to respond. ROA.9030– ROA.9033.

Appellants filed a FRCP Rule 60(b) motion for relief from order On 09/01/2016. ROA.9246–ROA.9254

On 09/04/2016 Appellants supplemented their motion for relief from order denying them leave to amend pleading. ROA.9523–ROA.9752

On 09/13/2016, Appellants filed a second motion for relief from order denying them leave to amend pleading. ROA.10125–ROA.10137

On 08/31/2016; 09/07/2016, and 09/22/2016, Appellants filed a letter of standing of Estate of Decedent, indicating a standing issue with the Estate due to

termination of administrator authority. ROA.9242–ROA.9245; ROA.10037–ROA.10089; ROA.10675–ROA.10777

On 09/21/2016, District Court stayed the case for 60 days. ROA.10778.

On 10/14/2016, Appellees Baylor and its employees, and John Halphen ("Halphen"), filed their FRCP Rule 12(b)(6) motions to dismiss and included extrinsic evidence. ROA.10902-10922; ROA.10788–ROA.10878; ROA.10804; ROA.10911.

On 10/14/2016, Harris Health filed its FRCP Rule 12(b)(6) motion without extrinsic evidence. ROA.10879–ROA.10901

On 11/04/2016, Appellants filed their responses to Appellees, Harris Health's 12(b)(6) motion; Halphen's 12(b)(6) motion; and Baylor and its employee Defendants' 12(b)(6) motion. ROA.10968–ROA.10989; ROA.11002–ROA.10013; ROA.11014–ROA.11035.

On 11/04/2016 and 11/05/2016, Appellants filed extrinsic evidence in support of their response to Appellants' 12(b)(6) motions, including sealed evidence via motion. ROA.11036–ROA.11451; ROA.12961

On 11/08/2016, Harris Health filed a joint reply to Appellants' response to the 12(b)(6) motions on behalf of all Appellees. ROA.11452–ROA.11457.

On 11/10/2016 and 11/11/2016, Appellants filed a joint surreply to Appellees' reply to Appellants' 12(b)(6) motion responses, containing amongst

others, the criminal consent form that was not filed under seal by Appellants in the district court, and other evidence in support of their defense to non-Harris Health's FRCP 12(b)(6) motions. ROA.11458–ROA.11804; ROA.11465–ROA.11472; ROA.3458–ROA.3464.

On 11/08/2016, Appellee Baylor and its employee Defendants filed a reply to Appellants' response to the 12(b)(6) motions. ROA.11805–ROA.11812 Appellants filed a surreply the same day. ROA.11813–ROA.11819.

On 11/14/2016, Appellee Halphen filed a reply to Appellants' response to the 12(b)(6) motions. ROA.11830–ROA.11838.

Appellants supplemented their response the following day on 11/15/2016, with a more readable version of response to Baylor and its employees' 12(b)(6) motion. ROA.11839–ROA.11875.

From 11/18/2016 – 11/22/2016, Appellants filed motions and amended motions for joinder of parties and claims to join additional parties and claims, as supplement to their responses to Appellees' 12(b)(6) motions. ROA.11876–ROA.12051.

On 11/28/2016, Appellees filed a joint motion to strike or motion for the Court to clarify filings during the 60 day Stay Order. ROA.12069–ROA.12076

The District Court entered a ruling on Appellees' motion to strike the following day on 11/29/2017, striking Appellants' evidence in their FRCP Rule

12(b)(6) responses, their surreplies to Appellees' replies to the FRCP Rule 12(b)(6) motions, and the motion for joinders filed in supplement to the FRCP Rule 12(b)(6) responses. ROA.12077.

On 11/30/2016, Appellants filed a separate motion for joinder of parties and claims, and included evidence in support. ROA.12078–ROA.12421; ROA.13102-13161.

On 12/01/2016 and 12/02/2016, Appellants filed separate emergency motions for relief from strike order. ROA.12425–ROA.12432; ROA.12453–ROA.12455

On 12/09/2016, the District Court revoked Appellants' attorney's *pro hac vice* status, stayed the case for 30 days, and scheduled a status conference on 01/12/2017. ROA.12457–ROA.12460.

On 12/09/2016, the District Court in qui tam claim with cause number 4:16-cv-1704, consolidated the cause number 4:16-cv-1704 into 4:16-cv-903 for "further proceedings." ROA.12461.

On 01/12/2017, the District Court set a hearing on all the motions on file (motion for joinder of parties and claims, motions to dismiss, motion to certify class, motion for relief from strike order, and motion for relief from denial of pleading) for 3/10/2017, and gave Appellees and Appellants the opportunity to respond and reply to any outstanding motions.

On 01/27/2017, Appellees – Baylor *et al*, filed a joint response to Appellants' motion for relief from strike order, motions for joinder of parties and claims, and a moot motion to consolidate. ROA.12465–ROA.12480

Appellants filed their replies to Appellees' 01/27/2017 responses on 02/09/2017, and included arguments that the FRCP 60(b) motions for relief from orders denying leave to amend petition, and orders striking pleading and evidence, should be treated as motions for reconsideration under FRCP Rule 54(b). ROA.12481–ROA.12582.

On 02/14/2017, 02/21/2017, 02/28/2017, and prior to the 03/10/2017 hearing, Appellants' interim attorney filed various motions including a motion to withdraw as counsel. ROA.12529–ROA.12532; ROA.12584–ROA.12600

On 02/22/2017, Appellees' counsel filed a second motion to appear *pro hac vice* before the Court for the 03/10/2017 hearing, and supplemented the motion with additional procedural facts. ROA.12535–ROA.12538; ROA.12603–ROA.12638.

On 03/02/2017, the District Court granted the interim attorney's motion to withdraw pleadings on file in cause number 4:16-cv-1704. ROA.12601–ROA.12602

On 3/07/2017, the District Court denied the second *pro hac vice* motion, and struck all contents of the motion and any supplement containing evidence in support. ROA.12639–ROA.12640.

On 03/10/2017, the District Court granted the interim attorney's motions including his motion to withdraw as counsel, and the motion to cancel summons. ROA.12639–ROA.12642.

On 3/14/2017, the District Court noticed Appellants of their *pro se* status. ROA.12643–ROA.12644.

On 03/21/2017, Appellant Emily-Jean, as *pro se* Plaintiff, filed a motion for reconsideration of the denial of their attorney's *pro hac vice* status, reconsideration of the motion to strike rulings, and a letter to correct the record on pertinent facts and authorities. ROA.12645–ROA.12648. These 03/21/2017 contained the evidence of the original 26,000 pages, and first batch of medical records provided to Appellants that lacked the consent forms, and did not comply with federal and state record laws.

The District Court dismissed Appellants' claims with prejudice on 03/24/2017. ROA.12685–ROA.12697.

On 04/7/2017, Appellants filed motions for reconsiderations on the orders of dismissals with prejudice ROA.12698–ROA.12732, and motion for leave to

amend pleading in the consolidated *qui tam* case with cause number 4:16-cv-1704. ROA.12733–ROA.12849

The District Court denied both of Appellants' 04/07/2017 motions on 4/10/2017. ROA.12850–ROA.12852.

Appellants filed their notice of appeal on the civil rights claims dismissed with prejudice in cause number 4:16-cv-903, on 04/11/2017. ROA.12855-ROA.12858

There was no docket control order issued in cause number 4:16-cv-903.

Evidence including ROA.11458–ROA.11472, a material 03/06/2015 criminally fraudulent document, were on record during the dispositive orders.

RULINGS PRESENTED FOR REVIEW

Appellants appeal the 03/24/2017 orders of dismissals with prejudice on the claims for damages, order denying leave to amend petition, and order striking Appellants' evidence in defense of Appellees' motion to dismiss, entered into by the U.S. District Court, Southern District of Texas for cause 4:16-cv-903. ROA.12685-ROA.12688; ROA.12689-ROA.12692; ROA.12693-ROA.12697; ROA.9030–ROA.9033; ROA.12077.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1. Whether the District Court committed reversible error in dismissing Appellees' claims, and cause number 4:16-cv-903 with prejudice.

Sub-issues:

a. Whether Appellants have causes of action under 42 U.S.C. §1983, §1985, and §1395dd against all Appellees:

   i. Whether Decedent had a U.S. Constitutional Right to Medical Care in a government health care institution, with injuries sustained by Appellants due to the deprivation of Decedent's constitutional rights actionable under §1983.

   ii. Whether tort actions can lead to civil rights claims, with family-Appellants having standing to bring suit for §1983.

   iii. Whether Appellees are entitled to qualified immunity from the Federal claims brought under 42 U.S.C. §1983, and proposed 42 U.S.C. §1985 claims.

   iv. Whether Appellee, Baylor ("Baylor") is entitled to sovereign or qualified immunity from the Federal claims brought under 42 U.S.C. §1983, and proposed 42 U.S.C. §1985 claims.

   v. Whether Appellants have and sufficiently pled causes of action against Harris Health under 42 U.S.C. §1983 and §1985 to defeat any immunity defense.

   vi. Whether Harris Health is subject to action under 42 U.S.C. § 1395dd even after Decedent's admission to the hospital from the

emergency room visit.

Issue 2: Whether Texas State's Miller Doctrine is unconstitutional in this case for deprivation of Appellants' equal protection rights, and violation of Art. 6, Cl. 2 of the U.S. Constitution.

Issue 3: Whether the District Court committed reversible error by denying Appellants' FRCP Rule 15(a) 4th amended motion for leave to amend petition, disregarding the later argued FRCP Rule 54(b) motion for reconsideration on the denial of leave to amend pleading, and ruling on Appellees' 12(b)(6) motions; when the denied amended pleading contained additional and material facts, parties, and causes of actions obtained post discovery, that supports claims under §1395dd, §1983 and §1985.

Issue 4: Whether the District Court abused its discretion by striking Appellants' material summary judgment evidence prior to ruling on Appellees' FRCP Rule 12(b)(6) motions to dismiss, when non-Harris Health Appellees' FRCP Rule 12(b)(6) motions are treated as FRCP Rule 56 summary judgment motions pursuant to FRCP Rule 12(d), and conspiracies are alleged between Harris Health and other Appellees in the governing and proposed pleading.

SUMMARY OF THE ARGUMENTS

Appellants hereby incorporate by reference, contents of the electronic record, ROA.1–ROA.12997, on file in cause number 17-20259 in this court on 09/18/2017.

The District Court committed reversible error in dismissing Appellants' claims, and cause number 4:16-cv-903 with prejudice.

In the first and second hospital visit, Appellees significantly limited Decedent's freedom or impaired his ability to act on his own while he was in their custody, care, and control. Hence Decedent had a constitutional right to health care, with harm sustained as a result, actionable under §1983. Appellants are also not equally protected by the governing state law statute Texas Tort Claims Act ("TTCA")

Tort actions can lead to civil rights claims, with family-Appellants having standing to bring suit when the tort action trigger the deprivation of any Appellants' U.S. Constitutional or applicable Federal Statutory rights (e.g. HIPPA).

Non-Harris Health appellees are not entitled to qualified immunity from the Federal claims brought under 42 U.S.C. §1983, and proposed 42 U.S.C. §1985 claims because the Baylor physicians either failed to supervise the residents and fellows who were either incompetent in providing health care services, or

knowingly violated the law; all which subjected or caused the deprivation of Appellants' 14th Amendment U.S. Constitutional and federal statutory (e.g. HIPPA) rights.

Baylor is not entitled to sovereign or qualified immunity from the Federal claims brought under 42 U.S.C. §1983, and proposed 42 U.S.C. §1985 claims because Baylor, acting through its executives, conspired to and did violate the terms of the Texas Health and Safety Code §312.004 agreement that grants it state agency immunity status; and during which they subjected or directly cause the deprivation of Appellants' 14th Amendment U.S. Constitutional and federal statutory rights. Appellants are not equally protected the Texas Health and Safety Code §§312.006(a) & 7(a). Baylor should not be allowed to leverage the immunity as both a sword and a shield.

Appellants had claims against Harris Health (i) under 42 U.S.C. §1983, §1985, and §1395dd as pled in the governing 12th Amendment to Original Petition, and (ii) under 42 U.S.C. §1983, §1985, and §1395dd as pled in the proposed 13th Amendment to Original Petition. Furthermore, at the time of dismissal orders, Appellants had a motion for joinder of parties and claims that included claims against Harris Health under §1985, with evidence on file to support the §1985 claims.

Harris Health, as a local government entity, is subject to claims under 42

U.S.C. §1983 for injuries resulting upon Appellants, when Harris Health's customs, practices, policies and procedures are responsible for subjecting or causing the deprivation of Appellants' 14th Amendment of the U.S. Constitution and federal statutory (e.g. HIPPA) rights. Harris Health is also subject to liability under §1985 for their policies and procedures, amongst others, which it enacted and allowed upon its staff, University of Texas Health Science Center Houston ("UT Houston") physician executives – e.g. Halphen, Baylor executives, and Baylor employees, to leverage as means to conspire for the purpose of directly or indirectly depriving appellants of their 14th Amendment U.S. Constitutional and Federal statutory (e.g. HIPPA) rights.

Texas State's Miller Doctrine is unconstitutional in this case for deprivation of Appellants' equal protection rights, and violation of Art. 6, Clause 2 of the U.S. Constitution because Decedent had a U.S. Constitutional right to health care, life, and informed consent. Appellees refused to treat Decedent of the injuries that they caused, and in such failure, subjected or caused a dim prognosis that was leveraged to wrongfully directly or indirectly deprive Appellants of their U.S Constitutional rights.

Per literal interpretation of 42 U.S.C. §1395dd, and per the 5th, 6th, 9th, and 11th Circuit rulings, 42 U.S.C. §1395dd grants all Appellants authority to bring

claims against Harris Health, and the statute also apply post Decedents admission as an inpatient the hospital ward. Therefore, the District Court erred in dismissing Appellants' claims.

The loose standard of judgment for leave to amend pleadings support that the District Court the District Court should have granted Appellants their 4th Amended leave to amend petition. In the proposed 13th Amendment to Original Petition, Appellants properly pled additional claims under Texas Medical Liability Statute, and under 42 U.S.C. §1983 and §1985 against Harris Health. Hence the District Court committed reversible error in denying leave to amend pleadings, and dismissing the case with prejudice.

The District Court committed reversible by striking Appellants' evidence per its strike order as it prejudices Appellants, deprives them of their 1st Amendment right to petition for redress, terminates their conspiracy §1983 and §1985 claims against Harris Health, deprives them of their procedural rights, & hides material evidence.

ARGUMENT

Issue 1. Whether the District Court committed reversible error in dismissing Appellees' claims, and cause number 4:16-cv-903 with prejudice.

The District Court committed reversible error by dismissing Appellees' claims, and cause number 4:16-cv-903 with prejudice.

Appellees' Halphen, and Baylor and its employees' FRCP Rule 12(b)(6) motions to dismiss included extrinsic evidence. *See* ROA.10788–ROA.10877; ROA.10902–ROA.10922; ROA.10804; ROA.10911. Hence their 12(b)(6) motions are treated as summary judgment motions under FRCP Rule 56 and "all parties must be given a reasonable opportunity to present all material that is pertinent to the motion," per FRCP Rule 12(d). *Fed. R. Civ. P. Rule 12(d)*; *Fed. R. Civ. P. Rule 56*. Evidence to be considered in support or defense of a summary judgment are "particular parts of materials in the record, including… documents, electronically stored information, affidavits or declarations, admissions, interrogatory answers, or other materials." *Fed. R. Civ. P. Rule 56(c)(1)(A)*

Upon the District Court's ruling on Appellees' FRCP Rule 12(b)(6) motions, amongst others documents on file that serve as summary judgment evidence, there were material proposed pleadings on file, and evidence on file in support of the assertions in the pleadings. *See* ROA.8824-ROA.8999; ROA.8837; ROA.1471-ROA.1516; ROA.1538–ROA.1708; ROA.2923–ROA.3472; ROA.5326–

ROA.5376; ROA.8530–ROA.8598. There was also a FRCP Rule 60(b) motion for relief from order denying a 4th Amended motion for leave to amend pleading and supporting exhibits for the 60(b) motion and the 4th amended motion for leave to amend pleading. ROA.9246-ROA.9439; ROA.9462–ROA.9463; ROA.9523–ROA.9582; ROA.12481–ROA.12528; ROA.9436; ROA.9583–ROA.10026. The FRCP Rule 60(b) motion for relief from order denying Appellants' 4th Amended motion for leave to amend pleading, also contained arguments applicable to a FRCP Rule 54(b) motion to reconsider; and was later argued to be treated as a FRCP Rule 54(b) motion. ROA.12481–ROA.12490

The District Court struck Appellants' evidence filed along with their responses, and surreplies except for Exhibit 25 to Appellants' response to Baylor and its employees' 12(b)(6) motion, which was filed under seal. *See* ROA.12077-ROA.12077; Exhibit 25 to Appellants' response, ROA.13052-ROA.13100 and ROA.12961, are graphically described in the "Other Injuries" section of the governing 12th Amendment to Original Petition. ROA.91-ROA.93

Appellants filed a subsequent FRCP Rule 60(b) motion from relief from the strike order, but made arguments also applicable to an FRCP Rule 54(b) motion to reconsider. ROA.12425-ROA.12444. Appellees jointly responded. ROA.12465-ROA.12480. Appellants replied before the District Court's ruling on Appellees'

FRCP 12(b)(6) motions and sought the two FRCP Rule 60(b) motions on file – motion for relief from order denying leave to amend petition, and motion for relief from strike order, to be treated as FRCP Rule 54(b) motion for reconsiderations. ROA 12481-ROA.12528

The District Court ruled on Appellees' 12(b)(6) motions without ruling on the Rule 54(b) motions.

FRCP Rule 56 - Summary Judgment Standard

The Court reviews a District Court's grant of summary judgment *de novo*, "viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *James v. State Farm Mut. Auto. Ins. Co.*, 743 F.3d 65, 68 (5th Cir. 2014); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205–06 (5th Cir. 2007). The movant must show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. If the moving party meets the burden of establishing that there is no genuine issue, the burden shifts to the nonmoving party to produce evidence of the existence of a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1996). Non-cited record materials are summary judgment evidence. *Fed. R. Civ. P. 56(c)(3)*

Issue 1(a). Whether Appellants have causes of action under 42 U.S.C. §1983, §1985, and §1395dd against Appellees

42 U.S.C. §1983 applies injury claims from deprivation of federal statutory and U.S. Constitutional rights, by persons acting under color of state law, custom, or usage. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981).

This is a suit against government entities as THSC §§312.006(a) and 7(a) statutorily confers state agency status on Baylor and its employees. *TEX. HEALTH & SAFETY CODE ANN. §§312.006(a)&(7(a) (Vernon 2008)* Harris Health is an undisputed local government agency. Hence TTCA would normally apply.

Texas Supreme Court has also held that when tort claims do not fall within the limited waiver provision of TTCA, hence immunity bars suit against the government, the employee as has immunity on such claims regardless of whether sued in their official or individual capacity. *Franka v. Velasquez,* 332 S.W.3d 367, 381-385 (Tex. 2011)

Appellees 12th and proposed 13th Amendment to Original petition argues for culpable mental states higher than negligence, including intentional, knowing, conscious disregard, recklessness, etc. The Original and proposed 13th Amendment includes claims of battery, fraud, and conspiracies to commit such.

While TCPRC §101.026 preserves applicable immunity for individual

liability, the limited waiver of immunity under the TTCA does not apply to intentional acts. *See* Tex. Civ. Prac. & Rem. Code Ann. §101.057 (West 2011); *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014). Hence TTCA does not apply against the individual Appellees for the battery, fraud, and conspiracy to commit battery and fraud.

TTCA also does not apply to discretionary duties. *See* Tex. Civ. Prac. & Rem. Code Ann. §101.056(2) (West 2011) Texas Supreme Court holds that while medical professionals exercise considerable judgment and discretion in examining a patient, evaluating symptoms, and prescribing treatment, government-employed medical personnel are not immune from tort liability if the character of the discretion they exercise is medical and not governmental. *Kassen v. Hatley*, 887 S.W.2d 4, 9 - 11 (1994) Halphen's ethics board decision to DNR Decedent was a discretionary decision executed in his official capacity. Hence, TTCA does not apply, and all appellees.

Non-use of tangible personal property (e.g. failure to treat Decedent in the first and second hospital visit) does not create a liability under TTCA. *See Kassen v. Hartley*, 887 S.W.2d 4, 14 (Tex. 1994) (holding that a non-use of property cannot support a claim under the Texas Tort Claims Act. Section 101.021, which requires the property's condition or use to cause the injury)

Furthermore, per *University of Texas Medical Branch of Galveston v. York*, 871 S.W.2d 175, 176 (Tex. 1994), nonuse, use or misuse of information contained in records simply does not suffice as tangible personal property for purposes of waiving immunity under the TTCA. The York court ruled information in medical records as "intangible property." *Id*. at 179. Therefore, Appellants lacks claims under the governing state law for the non-negligent statements made by Baylor employees, while acting in their scope of business and in his medical records, to deprive him of medical care or life-sustaining treatment.

Consequently, Appellants are not equally protected by the governing state law; TTCA; a deprivation of their 14th Amendment U.S. Constitutional Right. Hence, §1983 and §1983 are the remedy for the lack of equal protection. *Whitton v. City of Houston*, 676 F. Supp. 137, 139 (1987) (…"It is well established that 42 U.S.C. § 1983 does not itself create substantive rights; it merely provides a remedy for federal rights established elsewhere.")

Issue 1(a)(i). Whether Decedent had a U.S. Constitutional Right to Medical Care in a government health care institution, with injuries sustained by the deprivation said rights actionable under §1983

Decedent had a 14th Amendment substantive due process right to essential medical care in the government hospital.

The Fifth Circuit in *Whitton v. City of Houston*, opined on whether there is a

constitutional right to state-provided medical care as basis for a §1983 claim. *Whitton v. City of Houston*, 676 F. Supp. 137 (1987). There must exist "a `special custodial or other relationship' between an individual and the state may trigger a constitutional duty on the part of the state to provide certain medical and other services." *Id.*, at 139; *See also, Wideman v. Shallowford Community Hospital, Inc*., 826 F.2d 1030, 1034 (11th Cir. 1987) The special relationship exists if there is an "exercise of coercion, dominion, or restraint by the state." *Whitton*, 676 F. Supp. at 139. "The state must somehow significantly limit an individual's freedom or impair his ability to act on his own before it will be constitutionally required to care and provide for that person." *Id*.

In *Whitton*, the Fifth circuit held that "The City of Houston did not exercise any degree of coercion, dominion, or restraint over her sufficient to impose on the City a constitutional duty to provide her with the medical treatment. Her physical condition was the product of her own action, not the City's, and did not occur while she was in City custody and control." *Id*. at 139.

Contrary to the facts of *Whitton*, appellees (a) exercised coercion, dominion, or restraint of Decedent in both the first and second hospital visits, further endangered Decedent's condition while he was in their custody and control, significantly limited Decedent's freedom or impaired his ability to act on his own,

and caused Appellants resulting injuries. Therefore, appellees were constitutionally required to care and provide for Decedent.

First Hospital Visit

On 12/12/2013, upon admitting Decedent to the hospital, Decedent was in appellees' custody and control. They were in charge of his safety and care. Baylor employee physicians executed the 12/19/2015 BAL for the purpose of determining the level of infection prior to expected and anticipated chemotherapy. Once sedated for the high-risk and invasive 12/19/2013 BAL performed on Decedent (a) Decedent was in a significantly more impaired position than he arrived, (b) was under the custody, control, and dominion of appellees' physicians and staff, (c) his individual freedom to act on his own significantly limited, and (d) his ability to act on his own significantly impaired.

Post the 12/19/2013 BAL and after results of the lung samples were found negative on 12/20/2013, Baylor employees should have immediately prepared and instituted chemo – the reason for the BAL and its sedation. Alternatively, they could have transferred Decedent to another facility for chemo, or discharged him to his family's custody. Rather, for two days the physicians kept Decedent at the hospital and leveraged their fiduciary position and Decedent's fear for his life to coerce payment means from Decedent and his son under allegations of possible

future need for bone marrow transplants.

Furthermore, on 12/22/2015, Dr. Mims informed Decedent and Bethrand that chemo was the "most life threatening" and inquired ability to pay. ROA.218; ROA.8618. Decedent and Bethrand informed Dr. Mims of Decedent's ability to pay for chemo. Hence the unnecessary inquiry as to payments should have ended, and chemo should have been immediately prepared and instituted.

Rather, for weeks Baylor physicians acted, either directly or indirectly, to keep Decedent institutionalized or committed at the hospital; significantly restraining his individual's freedom or impair his ability to act on his own.

From 12/26/2014 through 1/1/2014, after Decedent and Bethrand informed Dr. Mims of Decedent's ability to pay and while Decedent's physical condition deteriorated because of the lack of chemo and resulting effects of the BAL and other biopsies performed on him, Dr. Sphuler and Adams ruled Decedent ineligible for discharge (i.e. "…will need to stay inpatient"). (ROA.219; ROA.8618 – ROA. 8619) Meanwhile Baylor physicians continued to provide Decedent with blood products to maintain his platelet levels, not the necessary chemo.

Decedent lacked capacity to discharge himself from the hospital. He was also under (a) mental duress in fear of his life per the AML and lack of chemo, and the physicians' alleged need for a possible post-chemo bone marrow transplant, (b)

economic duress from incurred unnecessary expenses in multiple blood products rather than the expected chemo, and (c) physical duress due to the limited term of his immigrant Visa and its effects on his personal safety.

All of Decedent's duress and his further deteriorated condition, were created by Baylor physicians' unnecessary and high-risk BAL procedures[1], and the lack of reasonable and timely institutional of chemo post the BAL; while Decedent was under the custody and control of appellees.

Contrary to *Whitton*, the facts support that Baylor and Harris Health employees and contracted physicians, directly or indirectly, significantly limited Decedent's freedom or impaired his ability to act on his own upon the institution of sedation for the BAL and afterwards. There is evidence that they exercised significant dominion, control or restraint over Decedent.

Since the BAL sedation was instituted and executed for the purpose of chemo, and appellees exercised additional significant coercion, dominion and control afterwards the BAL to keep Decedent committed to the hospital, Decedent had a constitutionally right to essential care – including reasonably and timely chemo – upon Decedent's moment of sedation for the BAL in the hospital visit. This did not occur as Decedent ultimately received 2 out of 3 treatments of chemo

[1] ROA.10005-ROA.10012

due to the deprivation of such right; and Decedent and his family incurred resulting mental, physical, and financial harm for lack of such reasonably and timely chemo, with actions allowed under §1983.

Second Hospital Visit

The events of the second hospital visit are significantly disastrous, but clearly show that appellees were constitutionally required to care and provide for Decedent.

The key factors to consider are the culpable mental states required at each critical event that in the second hospital visit, for the §1983 claims.

Deliberate indifference, is the minimum culpable mental state for §1983 claims. *See Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994) To show deliberate indifference, "a state actor must consciously disregard a known and excessive risk to the victim's health and safety." *Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880–883 (5th Cir. 2004)

For substantive due process violations, e.g., informed consent based claims and right to life based claims, the standard has been held to deliberate indifference and shocks the conscience; depending on whether the situation is an emergency situation or a non-emergency situation. *See County of Sacremento v. Lewis*, 523

U.S. 833, 846 (1998) (holding that if deliberate indifference or recklessness occurred during an emergency, the government can be held liable only if the behavior of its officers "shocks the conscience.") *See*, *Johnson*, 38 F.3d 202-207 (5th Cir. 1994) (establishing deliberate indifference standard for a non-emergency situation where a student was hit by a stray bullet on school grounds.)[2]

Decedent was admitted to at Ben Taub on 03/04/2015, and was therefore in in appellees' custody and control. Appellees were in charge of his safety and care.

Appellees had a duty to provide said care at least upon the intentionally wrongful administration of allopurinol by Sean Riley that further increased Decedent's risk of harm and rendered him more vulnerable to danger, or upon the administration of fentanyl at 9:00am on 03/04/2015 – Decedent's moment of incapacity to consent to the bronchoscopy per the criminally fraudulent 10:10am

[2] In *Johnson*, this Court also upheld, and in concert to the Supreme Court, that "liability [for §1983 claims] may attach to the state through inaction or nonfeasance as well as through action and malfeasance." Johnson, 38 F.3d at 206 (citing *Canton v. Harris*, 489 U.S. 378, 390 (1989) (holding that failure to promulgate a policy may demonstrate deliberate indifference and be grounds for liability under Sec. 1983); and *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir.1994) (en banc), cert. denied ("We ... hold that a school official's liability arises ... when the student shows that the official, by action or inaction, demonstrates a deliberate indifference to his or her constitutional rights.")) Such is contrary to the district court's ruling that failure to treat does not amount to a §1983 claim.

informed consent form, ROA. 11467,[3] done for the purpose of course of chemo treatment; if not upon the moment Appellees and their physician employees assumed responsibility for Decedent's welfare upon his admission to the MICU.

Once Decedent was admitted to the medical intensive care unit in the Level 1 trauma hospital, where lots of qualified physicians are or should be around, and Baylor physicians noted his AML relapse and kidney matter, no qualified or necessary medical staff attended to Decedent. Rather, they assigned unsupervised residents to Decedent; with Ghana Khan knowing of his return and AML condition.

As Decedent further deteriorated without any experienced staff physician overseeing him, supervising his treatment, and administering proper diagnosis and treatment measures,[4] a resident left in charge – Dr. Uyemura – without the

[3] Per the medical records, pleadings, and photos (ROA.13052-ROA.13100; ROA.12961), during the 3/6/2015 bronchoscopy decedent was restrained while he was fighting the ventilator being shoved into him, and he was also alleged to be *lightly sedated* per the medical records, as Decedent was given a powerful sedative - fentanyl.

[4] Per the medical report's "Current Facility-Administered Medications" section, the "Provider" column, only residents were administering medication and care to Decedent from 03/04/2015 – 03/05/2015. ROA.2958–ROA.2960.
Also Per the medical report, ROA.2965–ROA.3004, "All Orders" from Decedent's arrival on 3/4/2015 until after the traumatic bronchoscopy event on 03/06/2015, were by Residents, Fellows, and Nurses – e.g. Brendan Gilmore, Nurse Raichley, Hoa Ngo Le, Van Hoang, Elaine Chang, Jacek Waszkiewicz, Mimi Pham, Ghana

necessary staff physician around to supervise her called in Sean Riley, a pharmacist. Mr. Riley, examined Decedent and stated that his kidneys were "unremarkably" fine, yet with deliberate indifference that shocks the conscience, fraudulently, knowingly or intentionally[5], gave Decedent an unnecessary and high dosage of allopurinol that he knew or should have known to harm Decedent's heart and kidneys under Decedent's fragile condition. ROA.2954 Dr. Uyemura incompetently accepted and noted the high dosage of allopurinol without confirmation with senior staff, and hours later stated that Decedent was experiencing cardiac and renal issues. ROA.2952

The unnecessary high dosage of allopurinol administered is known to have side effects of heart congestive heart failure. Evidence of the risk increase and lack of necessity for such dosage of allopurinol lies in the next day on 3/6/2015 when Dr. Yan adjusted the allopurinol dose due to Decedent's renal condition. ROA.2946.

Since Decedent was admitted for the purpose of evaluating and treating his

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Kang, & Allison Uyemura, or "Interface, Lab ln" except for an order made by Dr. Guerra on 03/05/2015 at 7:15am.

[5] This is evidence of intent to harm or kill Decedent because Decedent was said to have "acute" renal (i.e. kidney) issues upon admission, yet Mr. Riley, a pharmacist, claimed his kidney was unremarkably fine and gave him a harmful dosage of allopurinol. Further evidence is the senior staff leaving Decedent to incompetent and unsupervised physicians, and not properly sedating him right before the 03/06/2017 bronchoscopy event.

AML relapse, which was shown via acute renal (i.e. kidney) injury, and Sean Riley – a pharmacist – intentionally and wrongfully gave Decedent the high dosage of allopurinol which further exacerbated his kidney and heart issues complications hours later, Decedent had a constitutional right to medical care – including chemo – upon the wrongful administration of the allopurinol.

Decedent or anyone with common-sense would not have agreed to be operated upon or have high-risk or any health care procedures administered upon him by unqualified, incompetent, or unsupervised persons. Decedent wanted to live, not die and was under duress due to appellees. The 03/06/2015 informed consent is document is fraudulent, and is evidence of civil and criminal fraud. The 03/09/2015 BAL was done without informed consent, and while Decedent was again without capacity to consent. No capable person would agree for an incompetent physician to execute a BAL on such a wounded and immunocompromised patient as Decedent endured again on 03/09/2015. Hence, there is further evidence of intent to harm Decedent.

Decedent also had a constitutional right to medical care upon being given fentanyl for the 03/06/2015 bronchoscopy, done for purposes of chemo evaluation and treatment. Appellees also had a duty (a) to treat Decedent for the bed sores that accumulated during the following months after the 03/06/2015 event as

Appellees caused Decedent's physically immobile condition, including the affirmative harm to his private areas; (b) to continue to provide life- sustaining treatment to Decedent or transfer Decedent to a physician or facility within the hospital that will do so; (c) to continue render supervision during catheter and trachea tube placements done on Decedent post the 3/6/2015 bronchoscopy event; (d) to qualify Decedent before they began the THSC §166.046 hospital procedures; (e) to provide Decedent or Family-Appellants with medical records of Decedent in accordance with THSC §166.046(b)(4)(c) and Federal HIPPA law; and (f) to provide life-sustaining treatment until the earlier of their compliance with THSC §166.046(b)(4)(c) or Decedent expired naturally. *TEX. HEALTH & SAFETY CODE ANN. §166.046(b)(4)(c); TEX. HEALTH & SAFETY CODE ANN. §166.046(e) (Vernon 2008)* ("…the health care facility are not obligated to provide life-sustaining treatment after the 10th day after both the written decision and the patient's medical record required under Subsection (b) are provided to the patient or the person responsible for the health care decisions of the patient…")*; 45 C.F.R. 164.524(b)*

Issue 1(a)(ii). Whether tort actions can lead to civil rights claims, with family-Appellants having standing to bring suit for §1983

A detailed explanation of this issue, of all Appellants' U.S. Constitutional and Federal Statutory rights, and of a majority of Appellees' actions that subjected

or caused the deprivation Appellants' rights are found in Appellants' motion for reconsideration, ROA.12709-ROA.12730, and in "Issues 1(a)(v) and 1(a)(vi)" below; all hereby incorporated by reference. ROA.12709-ROA.12730; *Infra*. pgs. 37-52.

Issue 1(a)(iii). Whether Appellees are entitled to qualified immunity from the Federal claims brought under §1983, and proposed §1985 claims

No appellee is entitled to qualified immunity from the §1983 and §1985 claims.

§1983 and §1985 create direct right of action against government officials for civil rights violations, with only "qualified immunity" defense afforded government officials performing discretionary functions. *Scheuer v. Rhodes,* 416 U.S. 232, 240 (1974); *see also Elder v. Holloway*, 510 U.S. 510, 514 (1994).

[The doctrine of qualified immunity] protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986) To overcome the defense of qualified immunity, Plaintiffs must prove Defendants violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Gibson v. Rich*, 44 F.3d 274 (5th Cir. 1995). If reasonable public officials could differ as to whether Defendants' actions were lawful, Defendants are entitled to immunity. *Malley*, 475 U.S. at 341 (1986). "Even if a defendant's conduct actually violates a plaintiff's constitutional

rights, the defendant is entitled to qualified immunity if the conduct was objectively reasonable." *Zarnow v. City of Wichita Falls, Tex*., 500 F.3d 401, 408 (5th Cir. 2007). The Court must also consider whether Plaintiffs have raised an issue of fact regarding whether the defense of qualified immunity is unavailable because the defendant is plainly incompetent or knowingly violated the law. *Malley*, 475 U.S. at 341.

The pleadings, Appellants' responses, replies, and surreplies to Appellees' motions to dismiss, and the evidence in support show that at multiple times the incompetent or non-supervised physicians, with at least deliberate indifference that shocks the conscience, if not knowingly or intentionally, acted without supervision or with knowledge of clearly established laws, (e.g. Federal HIPPA law, U.S. Constitution, Texas Constitution, Texas State health and safety laws, policies and procedures of Harris Health, and terms of the Baylor and UT Houston's co-op agreement with Texas Board of Education and Harris County Hospital District). They amongst others (a) failed to obtain multiple informed consents before high-risk invasive procedures, (b) failed to provide essential medical care to Decedent, (c) wrongfully subjected or deprived Decedent of his life and liberty to consent or withhold consent to bodily-invasive treatments, (d) wrongfully subjected or deprived Appellants of their right to consent or withhold consent on Decedent's behalf to bodily-invasive treatments and life, (e) wrongfully subjected or deprived

Appellants of their right to consent or withhold consent on Decedent's behalf to DNR, (f) withheld and withdrew life-sustaining treatment from Decedent against his and family-Appellants' wishes, and (g) conspired or acted to subject or cause the deprivation of Appellants' HIPPA rights and their 14th Amendment rights including right to life, liberty right to informed consent to bodily invasion of Decedent, right to essential medical care without discrimination, and right to petition the government for redress of grievances.

These Appellees "must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of their charge." See *Wood v. Strickland*, 420 U.S. 308, 322 (1975). In this case, rights of the patients in the hospital. They undertook the employment role or task of providing critical care services to Decedent, and knew or reasonably should have known that their incompetency and lack of required supervision, could subject or cause the deprivation of Appellants' constitutional rights.

Therefore, the individual Appellees are liable for Appellants' resulting proximate and foreseeable damages; actionable under 42 U.S.C. §1983 and §1985.

Supervisory Liability

Supervisors are liable under §1983 and §1983 for failure to supervise or train subordinates who cause or subject the deprivation of constitutional rights. *See*

Wever v. Lincoln County, 388 F.3d 601, 606-07 (8th Cir. 2004).

The evidence shows that at multiple times, the attending and supervising physicians – acting non-negligently, with at least deliberate indifference that sometimes even shocks the conscience, if not knowingly or intentionally with intent to harm – failed to supervise the resident physicians and staff during the course of the health care services provided to Decedent and family-appellants during the second hospital visit. While Decedent was admitted at Ben Taub Hospital in the second hospital visit, the supervising physicians, who undertook the employment task to supervise the residents, staff, and health care services provided to Decedent, knew or reasonably should have known that their failure to supervise the incompetent subordinates who were performing high-risk and physically invasive procedures on Decedent in the MICU, would subject or cause the deprivation of Appellants' constitutional rights; such as right to informed consent and right to life. These supervising physicians must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of Decedents and his family. *Wood*, 420 U.S. at 322.

Their failure to supervise the residents, the staff, and the health care services provided to Decedent were proximate and foreseeable causes of the multiple subjections or causes of the deprivation of Appellants' 14th Amendment rights to

amongst others life, liberty right to informed consent before bodily invasion of Decedent, and right to essential medical care without discrimination.

Supervisor Appellees are individually liable to Appellants for proximate and foreseeable damages under 42 U.S.C. §1983 and §1985.

For detailed argument against qualified immunity of all Baylor Appellees and Halphen, see Appellants' responses to Halphen's 12(b)(6) motion, and Baylor and its employees' 12(b)(6) motion; all hereby incorporated by reference. ROA.11002–ROA.11013; ROA.11014–ROA.11035; ROA.11839–ROA.11875.

Issue 1(a)(iv). Whether Appellee, Baylor ("Baylor") is entitled to sovereign or qualified immunity from the Federal claims brought under 42 U.S.C. §1983, and proposed §1985 claims.

Baylor, a state agency pursuant to a THSC §312.004 co-op agreement, is normally immune from suits in Federal Court and immune from liability under 42 U.S.C. §1983 and §1985. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66–71 (1989) (states and state agencies are not suable "persons" under § 1983); *See also Raj v. LSU et al*, 714 F.3d 322 (5th Cir. 2013) (holding that sovereign immunity bars [plaintiff's] claims under state law; the Age Discrimination in Employment Act; and 42 U.S.C. §1983 and §1985); *U.S. Const. Amend XI*; *TEX. HEALTH & SAFETY CODE ANN. §§ 312.006(a) and §(a)(7) (Vernon 2008).*

Yet Baylor should be treated as a person, and unentitled to sovereign or immunity, for the sake of the §1983 and §1985 claims in this case because Baylor

is a state agency by a statutory required co-op contract and is therefore a real party in interest in this case, not the State of Texas. *C.f. Richardson v. S. Univ.*, 118 F.3d 450 (5th Cir. 1997) (holding that even when a plaintiff does not "name the State of Louisiana as a defendant… [his] suit ***may*** nonetheless succumb to Eleventh Amendment immunity if the State is the real party in interest.") (emphasis added). Appellants have no claims against the State of Texas; only against Baylor for actions that violate the purpose of the THSC Chapter 312 co-op statute, and the terms of the THSC §312.004 co-op agreement. *TEX. HEALTH & SAFETY CODE ANN. §312.002(b) & §312.004 (Vernon 2008).*

Baylor acting through its executive officers, non-negligently – e.g. with deliberate indifference that sometimes even shocks the conscience, knowingly or intentionally – violated the purpose of THSC Chapter 312, as well as the terms of the THSC §312.004 co-op agreement. Since THSC Chapter 312 confers state agency status to Baylor and in effect confers it sovereign immunity from suit, THSC Chapter 312 discriminates against Appellants and other similarly situated Harris County Hospital District ("HCHD") patients due to the sovereign immunity conferred Baylor by the THSC Chapter 312 and the THSC §312.004 co-op agreement.

Therefore, to protect against such discrimination in effect, which subjects or deprives Appellants and other similarly situated HCHD patients of (a) their 1st

Amendment right to petition the government for redress of grievances or redress of their harm, and (b) their 14th Amendment equal protection rights, Baylor should be treated as a private person unentitled to sovereign or immunity, for the sake of the §1983 and §1985 claims. *U.S. Const. Amend I; U.S. Const. Amend XIV, §1*

The detailed equal protection challenge to THSC Chapter 312 and an argument that Baylor should be unentitled to sovereign immunity on the §1983 and §1985 claims are in Appellants' response to Baylor and its employees' 12(b)(6) motion. ROA.11014–ROA.11035; ROA.11839–ROA.11875.

Issue 1(a)(v). Whether Appellants have and sufficiently pled causes of action against Harris Health under 42 U.S.C. §1983 and §1985 to defeat any immunity defense.

All Appellants have causes of action against Harris Health and all appellants under 42 U.S.C. §1983, while Decedent via his estate, Bethrand, Philomina, and Emily-Jean have causes of action against Harris Health and all appellants under §1985.

Appellee Harris Health did not include any extrinsic evidence in their 12(b)(6) motion. ROA.10879–ROA.10901. On 11/18/2016, the Court struck Appellants' evidence filed in their response, months before ruling on Harris Health's 12(b)(6) motion. (ROA. 12077 – 12077). Hence Harris Health's 12(b)(6)

motion is therefore treated as a standard motion to dismiss on the pleadings. *Fed. R. Civ. P. 12(b)(6)*

Standard of Review FRCP 12(b)(6) - Motion To Dismiss

The standard of appellate review for a motion to dismiss pursuant to Rule 12(b)(6) is *de novo*, and the Court will employ the same standard as the district court. *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 443 (6th Cir. 2007) The Court must accept all well-pleaded facts as true, and review them in the light most favorable to the trial court Plaintiff. *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007). The Court may not look beyond the pleadings, and dismissal will not be affirmed if the allegations in the pleading support relief on any possible theory. *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir.1992)

42 U.S.C. §1983 claims

All Appellants have causes of action under 42 U.S.C. §1983 against Harris Health for injuries sustained due to Harris Health's unconstitutional policies and procedures that subjected or caused the deprivation of (a) Decedent's substantive due process, equal protection, and petition for redress rights secured under the 14th Amendment of the U.S. Constitution, (b) non-Decedent Appellees' 14th Amendment of the U.S. Constitution equal protection and petition for redress

rights, and (c) injuries non-Decedent Appellees sustained as a result of Appellants subjection or cause of the deprivation of Decedent's 14th Amendment U.S. Constitution Substantive Due Process Rights, Privileges and Immunities, and Equal Protection Rights. *U.S. Const. Amend. XIV, §1*

42 U.S.C. §1985 claims

Harris Health is subject to liability under §1985(2) for their policies and procedures, amongst others, which it enacted and allowed upon its staff, Baylor executives, UT Houston physician executives – e.g. Halphen, and Baylor employees, to use as means to conspire for the purpose of impeding, hindering, obstructing, or defeating, the due course of justice Texas on behalf of applicable Appellants, with intent to deny to applicable Appellants the equal protection of the laws, or to them or their property for attempting to enforce their equal protection rights and the equal protection rights (e.g. right to petition the government for grievance, and right to a non-negligent failure to obtain informed consent) of other victims subject to Harris Health's the policies and procedures. *42 U.S.C. §1985(2); See also, Edwards v. South Carolina*, 372 U.S. 229 (1963) (incorporating the 1st Amendment U.S. Constitutional right to petition the government for redress of grievances against states via the 14th Amendment)

Harris Health is also subject to liability under §1985(3) for their policies and

procedures, amongst others, which it enacted and allowed upon its staff, Baylor executives, UT Houston physician executives – e.g. Halphen, and Baylor employees, to use as means to conspire for the purpose of directly or indirectly depriving appellants of their 14th Amendment U.S. Constitutional equal protection, substantive due process, and petition the government for redress of grievances. *U.S. Const. Amend. XIV, §1, 42 U.S.C. §1985(3)*; *Edwards v. South Carolina*, 372 U.S. 229 (1963)

Discussion

Appellants' 12th Amendment and proposed 13th pleading amendment contains properly alleged facts or details to warrant claims against Harris Health under §1985(2), §1985(3), and §1983. *See Scott v. Moore*, 461 F. Supp. 224, 227 (E.D. Tex. 1978), *aff'd*, 680 F.2d 979 (5th Cir. 1982), *rev'd sub nom.* (discussing the elements of a §1985(3) claim: (1) a conspiracy; (2) with intent to deprive a person, or class of persons, of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an invidious, class-based animus; (4) an act in furtherance of the conspiracy; and (5) an injury); *See also*, *Leatherman v. Tarrant County*, 507 U.S. 163 (1993) (U.S. Supreme Court rejecting the heightened pleading standard to state a claim for an unconstitutional custom or policy); *See also*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (U.S. Supreme Court citing and

extending the "plausibility standard" of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to all civil actions, requiring "enough facts to state a claim to relief that is plausible on its face.")

The proposed pleading also meets the requirements for a class certification as it pleads enough details for the requirements of FRCP Rules 23(a), 23(b)(1)(b), and 23(b)(2). *Fed. R. Civ. P. Rules 23(a), 23(b)(1)(b), and 23(b)(2)*; *See also, United Brotherhood of Carpenters and Joiners of America Local 899 v Phoenix Associates, Inc.*, 152 F.R.D. 518, 521 n.3 (SD. W. Va. 1994)

ROA.11967–ROA.11998 contains Appellants' motion to certify class. Appellants had to withdraw the motion to certify class on file because the proposed 13th Amendment to Original Petition containing the class certification elements, was not yet the governing pleading, as required per *United Brotherhood of Carpenters*. *Id.*

Harris Health's policies and procedures in regards to Advanced Directives are unconstitutional because it subjects or causes the deprivation of Appellants and their class of surrogates, their right to consent or withhold consent to the withdrawal or withholding of life-sustaining treatment. There is no compelling state interest in depriving surrogates of such right, per *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986). Harris Health is also unable to show that its Advanced

Directives policies and procedures as written are the "least restrictive means of effectuating the [State's] desired end." *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993).

An analysis of the unconstitutionality of Harris Health's policies and procedures are found in Appellants' response to Harris Health's 12(b)(6) motion, hereby incorporated by reference. ROA.10968–ROA.10989.

A further detailed explanation on Appellants' §1983 claims against Harris Health based on the policies and procedures are found in Appellants' motion for reconsideration, hereby incorporated by reference. ROA.12688-ROA.12702.

Appellants' 12th Amendment to Original Petition, ROA.208–ROA.285, and proposed pleading amendment, ROA.8824-ROA.8996, drafted post discovery of the unconstitutional policies and procedures, also state that the medical records provided to Appellants by Harris Health contained false information and were incomplete. ROA.8897 Evidence of material documents withheld lies in the original petition, where Appellants allege that there were no informed consent forms in the initially produced documents. ROA.57–ROA.133

Hence there are fact issues alleged, that defeat both a summary judgment and a motion to dismiss; and evidence provided to support that the medical records were not in compliance with THSC 166.046(b)(4)(c), in violation of Federal

Health Insurance Portability and Accountability Act of 1996 ("HIPPA" law). *TEX. HEALTH & SAFETY CODE ANN. §166.046(b)(4)(c) (Vernon 2008); 45 C.F.R. 164.524(b).*

Consequent to the withheld records, Appellants lacked information for full disclosure to decide on whether to consent or withhold consent to the withholding or withdrawal of life- sustaining treatment during the execution of the hospital/pavilion and the county ethics board 166.046 meetings. Furthermore, they were unreasonably deprived of records to timely petition the government of redress of their grievances; a deprivation of their 14th Amendment equal protection rights. *U.S. Const. Amend. XIV, §1*

Appellants' right to informed consent to withholding or withdrawal of life-sustaining treatment, right to full informed disclosure prior to invasive procedures, and right to medical records in compliance with THSC 166.046(b)(4)(c), HIPPA laws, and right to petition the government for redress of grievances, are rights secured by the 14th Amendment of the U.S. Constitution equal protection and privileges and immunities clauses, held by Decedent himself, and by Family-Appellants' class, or surrogates.

Injuries resulting from Harris Health's policies and procedures subjecting or causing of deprivation of these rights from Appellants, or being used by its staff,

Baylor physicians and executives, Halphen or any UT Health Science Center Houston staff or executives working at Harris Health facility under the THSC §312.004 co-op agreement, ROA.1540–ROA.1602; ROA.9897–ROA.9899, in furtherance of conspiracy to subject or cause the deprivation of Appellants' 14th Amendment rights, are actionable under §1983.

Injuries resulting from Harris Health enacting policies and procedures and allowing their business partners, (e.g. Halphen of UT Houston, and Baylor physician employee and executive Appellants), to leverage the policies and procedures to conspire and act in furtherance of a conspiracy with the intent to directly or indirectly deprive Appellants or anyone within their class (e.g. presumed or actual foreigners, elderly Blacks, African Americans, Nigerians, or Nigerian American patients at Harris Health Hospitals) of their 14th Amendment equal protection rights and privileges to informed consent, and to petition the government for grievance, are actionable under §1985(3).

Injuries resulting from Harris Health's policies and procedures being used as a weapon to impede, hinder, or defeat the due course of justice in United States on behalf of Appellants, with the conspirators acting with the intent to deny the non-Nigerian residents (i.e. Bethrand, Philomia, Emily-Jean, and Decedent) the equal protection of the laws, or impede, hinder, or defeat their attempts to their right - or

the right of anyone within their class – to informed consent, right to medical records under HIPPA laws, and to petition the government for grievance, are actionable under §1985(2).

The conspiracy to deprive Appellants of medical records, including the consent forms withheld pursuant to statutory discovery requirements – e.g. HIPPA laws, and the THSC §312.004 co-op agreement, with the intent to – amongst others - deprive Appellants of informed consent, and deprive them of rights to petition the government for redress, trigger claims against Harris Health under §1983 and §1985.

Furthermore, as argued in Appellants' responses to Harris Health and all Appellees' motions to dismiss, Harris Health's policies and procedures also state "Surrogate decision makers (i.e. Decedent's family members) cannot consent to the DNR." ROA.10968–ROA.10989; ROA.11002–ROA.11013; ROA.11014–ROA.11035; ROA.11839–ROA.11845.

This is also a direct contrast with THSC 166.039(b), which grants Family-Appellants and their class rights to consent to withholding of life-sustaining treatment once Decedent is deemed a qualified patient as required by *THSC 166.031(2)*; and was a means of the Baylor physicians and executives to not qualify as terminal or irreversible Decedent yet continue to withhold essential

medical care including life sustaining treatment, hence subjected or directly caused all Appellants to be deprived of their discussed 14th Amendment U.S. Constitution equal protection and privileges and immunities rights, and Decedent of his substantive due process right to life and to essential medical care, and right to petition the government for grievance.[6] *See TEX. HEALTH & SAFETY CODE ANN. §§166.039(b) & 166.031(2) (Vernon 2008)* (defining qualified patient as "patient with a terminal or irreversible condition that has been diagnosed and certified in writing by the attending physician.")

Even though Appellants ultimately elected not to consent to DNR, they were precluded of such right as of April 2015 when the medical committee began the 166.046 procedures pursuant to 166.046(a), before Decedent was ruled a qualified patient, and while Decedent was able to non-verbally communicate with Bethrand. *See TEX. HEALTH & SAFETY CODE ANN. §166.046(a) (Vernon 2008)* Hence, Appellants were deprived or subjected to the deprivation of the right to right to petition the government for grievance, and the right to informed consent or withhold consent to DNR, due to Harris Health's policies and procedures, with the resulting injuries actionable under §1983.

[6] ROA. 11002 – 11013, and ROA. 11014 – 11035 or ROA. 11839 – 11875, Appellants' responses to Halphen and Baylor's FRCP Rule 12(b)(6) motions, with contents hereby incorporated by reference, provide further explanation.

As per the facts plead in the governing and proposed pleading amendment, since Family-Appellants elected to keep Decedent in "full code," the policy then grants Appellees an avenue to not seek any informed consent from Family-Appellants in regards to the medical treatments given to Decedent to accelerate his death (i.e. as pled and provided in evidence, the bleeding of Decedent and then sudden infusion of fluids and platelets to overwork his heart and cause fluid overdose, in late August and early September). It also gives them an avenue not to execute their duty to provide essential medical care Decedent, a duty and 14th Amendment U.S. Constitutional substantive due right of Decedent due to the special relationship. It also grants Appellees an avenue not to seek informed consent from Family-Appellants to the withholding or withdrawing life-sustaining treatment from Decedent, and deprive Decedent of his fundamental right to amongst others life, privacy, and essential medical care.

Since TTCA does not equally protect Appellants due to Appellees' non-negligent, but with amongst others bad faith, deliberate indifference that sometimes shocks the conscience, knowingly, fraudulent, and intentional, conspiracy actions that resulted in the failure to obtain informed consent from Appellants, the lack of the THSC §166.046(b)(4)(c) provision in Harris Health's policies and procedures, the misuse of the medical records, and amongst others, the lack of surrogates' rights to consent to the withholding or withdrawal of life-

sustaining treatment from Decedent, directly or indirectly subjected or caused Appellants and their class to be deprived of their 14th Amendment U.S. Constitutional equal protection and due process rights.

The lack of THSC 166.046(b)(4)(c) in Harris Health's policies and procedures in regards to Advanced Directives, and Harris Health's policy and procedure that deprives surrogate decision was an avenue for Appellees to subject or cause Appellants to be subjected to the deprivation of their rights to informed consent and to the withholding or withdrawal of life-sustaining treatment secured under the 14th Amendment of the U.S. Constitution equal protection clause. The lack of THSC 166.046(b)(4)(c) in Harris Health's policies and procedures in regards to Advanced Directives, and Harris Health's policy and procedure that deprives surrogate decision was also an avenue for Appellees to subject or cause Decedent to be subjected to the deprivation of his right to life and essential medical care, and Appellants' 14th Amendment right to petition the government for redress.

The deprivation or infringement of applicable Appellants' 14th Amendment rights to equal protection of all laws in the United States including rights to informed consent for Decedent or on his behalf, rights to Decedent's medical records under HIPPA, and uninfringed or un-impeded right to petition the government for redress, due Harris Health's lack of provision of the medical

records in the policies and procedures – in compliance with THSC §166.046(b)(4)(c) and HIPPA, coupled with (a) the fraudulently 3/6/2015 bronchoscopy consent form that was withheld from Appellants in violation of Federal HIPPA laws, (b) the attempt to coerce Appellants into consenting to the withholding or withdrawal of life-sustaining treatment before and after Decedent was a qualified patient, (c) "the admit and withhold necessary emergency medical treatment" strategy Harris Health allowed their contracted staff (i.e. Baylor and UT Houston physicians and executives) to execute at Ben Taub in an attempt to circumvent EMTALA laws, and (d) the signing of Decedent's death certificate by David John Hymann – a Baylor executive – without investigation required pursuant to the terms of thereby precluding any criminal authorities from investigating the case, all because Appellants are elderly, foreigners, Nigerian Americans, Nigerians, or Black patients; are evidence that support claims under §1983, §1985(2), and §1985(3). *See* ROA.1498–ROA.1510

The injuries resulting from Harris Health's unconstitutional policies and procedures, including its use in civil and criminal conspiracies, trigger liability against Harris Health under 42 U.S.C. §1983, §1985(2), and §1985(3).

Appellants' current 12th Amendment and proposed 13th Amendment to Original Petition properly pled enough facts and allegations to support claims

under §1983, §1985(2), and §1985(3). Therefore, the district court committed reversible error in (a) denying Appellants leave to amend pleading, (b) disregarding their motion for reconsideration of the denial of leave to amend pleading, and (c) dismissing the case with cause number 4:16-cv-903 with prejudice.

Issue 1(a)(vi). Whether Harris Health is subject to action under 42 U.S.C. § 1395dd even after Decedent's admission to the hospital from the emergency room visit.

Per the 5th, 6th, 9th, and 11th Circuit's rulings, and the literal interpretation of 42 U.S.C. §1395dd, rights secured under §1395dd grant all Appellants authority to bring claims against Harris Health. The statute is also applicable post Decedent's admission as an inpatient to Ben Taub hospital ward.

In 2009, the Sixth Circuit held that hospital inpatient admission was not enough to fulfill the hospital's EMTALA stabilization obligation. *Moses v. Providence Hosp. and Med. Ctrs., Inc.*, 561 F.3d 573, 584 (6th Cir. 2009); *See also*, *Thorton v. Southwest Detroit Hospital*, 895, F.2d. 1131, 1135 (6th Cir. 1990) (holding that "emergency care does not always stop when patient is wheeled from the emergency room into the main hospital.")[7]

An explanation of the Fifth Circuit's ruling on this issue is found in

[7] The *Thorton* ruling is a common-sense approach that precludes physicians and hospitals from admitting patients simply to circumvent the EMTALA statute.

Appellants' motion for reconsideration, hereby incorporated by reference. ROA.12698-ROA.12706.

Only specific sections of EMTALA to apply to the emergency department of the hospital. *See e.g., 42 U.S.C. §1395dd(a)* ("In the case of a hospital that has a hospital emergency department…"); *Cf. 42 U.S.C. §1395dd(b)(1)* ("…If an individual… comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either…) *Cf., 42 U.S.C. §1395dd(h)* ("A participating hospital may not delay provision of an appropriate medical screening examination under subsection (a) or further medical examination and treatment required under subsection (b) in order to inquire about the individual's method of payment or insurance status).

Hence, §1395dd(b)(1) and §(h) apply (1) in the first hospital visit in which the residents and staff physicians (a) harassed Decedent and his son about lack of means of payment while delaying or evading chemotherapy treatment, and (b) in the failed to timely provide chemo for Decedent's AML; and (2) in the second hospital visit when the physicians and hospital staff refused to provide necessary stabilization treatment – e.g. chemo, via the admit and not treat strategy.

Consequently, *all* Appellants have claims against Harris Health under §1395dd, for violations of the statute including *amongst others* failure to stabilize a

necessary medical condition, failure to transfer, and violation of §1395dd(h). *See e.g.*, ROA.114–ROA.116; ROA.57-ROA.133; ROA.8824-ROA.8999; *See also, 42 U.S.C. §1395dd(d)(2)(A)* (conferring standing to bring suit to "Any individual who suffers personal harm as a direct result of a participating hospital's violation of [§1395dd]…")

The District Court committed reversible error in dismissing the Appellants' §1395dd claims against Harris Health, and dismissing cause number 4:16-cv-903 with prejudice.

Issue 2. Whether Texas State's Miller Doctrine is unconstitutional in this case for deprivation of Appellants' equal protection rights, and violation of Art. 6, Clause 2 of the U.S. Constitution.

Texas's *Miller* Doctrine states that a person is not entitled to life-sustaining treatment once their prognosis is dim. *Miller ex. rel. Miller v. HCA, Inc*., 36 S.W.3d. 187, 194 (Tex. App.— Houston 2000) This creates an 14th Amendment equal protection issue in this case because Appellees caused the injury to Decedent. Hence under Weidman, Decedent had a substantive due process right to essential medical care. Rather than providing the essential medical care, Appellants – starting from Dr. Sarkar in March, to Dr. Gupta in September, rushed to institute the THSC §166.046 withholding or withdrawal of life-sustaining treatment ("DNR") procedures a few weeks later after the 03/06/2015 bronchoscopy traumatic event, and while Decedent was not yet a qualified patient.

The physicians attempted to accelerate Decedent's death by withholding and withdrawing necessary essential medical care from Decedent (e.g. Dialysis, platelets, and blood transfusions), while making wrongful statements in Decedent's medical records that Decedent was in a persistent vegetative state.

Miller in this case discriminates in favor of a weak and helpless Decedent and family-Appellants, in favor of the wrongful physicians. Texas has no compelling interest in protecting physicians who attempt to leverage the law to terminate life, by creating a dim prognosis, when the physicians cause life-threatening injuries to patients. Furthermore, *Miller* doctrine is also unconstitutional in this case as it in effect, is contrary to federal law of *Weidman* and in violation of the supremacy clause of the U.S. Constitution. *U.S. Const., Art. VI, Cl. II; Wideman*, 826 F.2d. 1030 (11th Cir.1987)

Issue 3: Whether the District Court committed reversible error by denying Appellants' FRCP Rule 15(a) 4th amended motion for leave to amend petition, disregarding the later argued FRCP Rule 54(b) motion for reconsideration on the denial of leave to amend pleading, and ruling on Appellees' 12(b)(6) motions; when the denied amended pleading contained additional and material facts, parties, and causes of actions obtained post discovery, that supports claims under §1395dd, §1983 and §1985.

Pursuant to the loose standard of judgment for FRCP Rule 15(a) leave to amend pleadings, the District Court should have granted Appellants their 4th Amended leave to amend petition.

The Fifth Circuit supports a bias in favor of granting leave to amend

petition. *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004) "[U]nless there is a substantial reason, such as undue delay, bad faith, dilatory motive, or undue prejudice to the opposing party, the discretion of the district court is not broad enough to permit denial." *Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S. Co.*, 195 F.3d 765, 770 (5th Cir. 1999) (internal quotation marks omitted). In other words, "district courts must entertain a presumption in favor of granting parties leave to amend." *Mayeaux*, 376 F.3d at 425.

The abuse of discretion review standard applies to (a) a district court's denial of FRCP Rules 54(b) and 59(e) motion for reconsideration, *see, e.g.*, *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004); *Johnson v. Diversicare Afton Oaks LLC*, 597 F.3d 673, 677 (5th Cir. 2010), and (b) a denial of a Rule 60(b) motion for relief from a judgment. *Frazar v. Ladd*, 457 F.3d 432, 435 (5th Cir. 2006)

When judgment has been entered on the pleadings, as it was in Appellee-Harris Health's case, the standards governing this Court's review of a motion for reconsideration are the same as those governing a motion under Rule 15(a). *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981).

Appellees, Baylor and its employees, once alleged futility in their prior

response to Appellants' 1st motion for leave to amend petition. ROA.4018 The motion was superseded by a later subsequent 4th Amended motion for leave to amend petition, ROA.8824–ROA.8999, filed after first set of discovery were produced by Appellants. Appellees never alleged futility in any responses to the 4th Amended motion for leave to amend petition. The proposed pleading, ROA.8824-ROA.8996, contained additional discovered information, and would have been the first governing amendment to pleading while in Federal Court. In the order of dismissal with prejudice, the District Court cited to the order denying the 4th amended motion for leave to amend petition upon dismissing all claims and cause number 4:16-cv-903 with prejudice. ROA.9030–ROA.9033; ROA.12688; ROA.12692.

The proposed 13th Amendment to pleading contained many additional parties for the sake of the alleged Federal and State conspiracy claims (e.g. executive David John Hymann of Baylor), additional causes of action (e.g. §1985 claims and §1983 claims), and additional specific facts and details in regards to Harris Health's policies and procedures that are argued to be unconstitutional (e.g. the Advanced Directives and lack of provision of medical records pursuant to THSC 166.046(b)(4)(c)). Appellants argued the additional information as obtained upon discovery, and filed their supporting exhibits in a later filed motion for joinder of parties and claims. *See* ROA.9246-ROA.9256; ROA.9464–ROA.10026;

ROA.12303–ROA.12421; ROA.12078–ROA.12422.

In a subsequent reply to Appellees' joint response to the 60(b) relief from strike order, Appellants argued the 60(b) relief from order denying leave to amend petition to be treated as motions for reconsideration under FRCP Rule 54(b). ROA.12481–ROA.12582

Since (a) Rule 15(a) is construed liberally in favor of granting leave, (b) the liberal pleading presumption underlying rule 15(a) has been acknowledged by this Court to support a bias in favor of granting leave to amend pleading, *Mayeaux*, 376 F.3d at 425, and (c) there were additional causes of action, and material parties that lacked immunity to the §1983 and §1985 claims, the denial of the Rule 15(a) leave to amend petition in effect is an infringement on or denial of Appellants' 14th Amendment rights to petition the government for redress of grievances. *U.S. Const., Amend. XIV, §1; See also Edwards v. South Carolina*, 372 U.S. 229 (1963) (applying 1st Amendment of U.S. Constitution towards the States under the 14th Amendment Equal Protection Clause).

Even with the heightened-pleading standard for suit against government officials in their individual capacity, "pleadings must be construed so as to do justice." *Fed. R. Civ. P. 8(e) See also, GRJ Investments, v. Escambia County,* 132 F.3d 1359, 1367 (11th Cir. 1998) (holding that plaintiff must plead facts with specificity to overcome an individual capacity suit and qualified immunity

defense).

Appellees pled specific facts in the 12th and proposed 13th Amendment to Original petition, to meet the heightened-pleading burden for individual capacity cases and defeat the qualified immunity defenses. Appellants' "FACTS" sections, allege enough details –i.e. time, place, the existence of a partnership (i.e. agreement) between Baylor and Harris Health, the Texas Health and Safety Code §312.004 agreement, and the involvement of each defendant in the 12th and proposed 13th Amendment to Original Petition. The 12th Amendment even cites to specific parts of the existing fraudulent and fraudulently provided medical records.

Harris Health is a local government entity, not a human. So, it's on legal notice of the laws applicable to it per the facts and allegations in each pleading, and can or should be able to prepare a defense. Same argument applies for Baylor.

Halphen's role is detailed, with his name mentioned in the "Facts" section. Halphen is on clear notice of when he was involved, and of his involvement. Per Baylor and its employees' response, their counsel charts all their individual clients, and charges against them. Details about each Baylor staff (e.g. Joslyn Fisher, David Hymann, James Banfield, and Joseph Kass) are alleged in the Facts section and throughout the 12th amendment and proposed 13th pleading amendment. Hence, they are on notice. Furthermore, Appellants can and did plead inconsistent claims or defenses, and pled in the alternative. *Fed. R. Civ. P. 8(e)*

The Court's dismissal orders for Baylor and its defendants, and Halphen treated a Rule 56 summary judgment as a 12(b)(6) decision on the pleadings, and took all evidence in favor of the movant. The dismissal orders arbitrarily deprive Appellants of their U.S. Constitutional 1st Amendment petition rights.

Consequently, the District Court abused discretion in denying Appellants' 4th Amendment to their FRCP Rule 15(a) motion for leave to amend petition before requesting for or after ruling on Appellees' 12(b)(6) motions because the denied amendment to pleading contained additional and material facts, parties, and causes of actions obtained post discovery that supports claims under §1395dd, §1983, and §1985. and the order should be reversed.

Issue 4: Whether the District Court abused its discretion by striking Appellants' material summary judgment evidence prior to ruling on Appellees' Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(6) motions to dismiss, when non-Harris Health Appellees' FRCP Rule 12(b)(6) motions are treated as FRCP Rule 56 summary judgment motions pursuant to FRCP Rule 12(d), and conspiracies are alleged between Harris Health and other Appellees in the governing and proposed pleading.

The abuse of discretion review standard applies to (a) a district court's denial of FRCP Rules 54(b) and 59(e) motion for reconsideration, *see, e.g.*, *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004); *Johnson v. Diversicare Afton Oaks LLC*, 597 F.3d 673, 677 (5th Cir. 2010), and (b) a denial of a Rule 60(b) motion for relief from a judgment. *Frazar v. Ladd*, 457 F.3d 432, 435 (5th Cir. 2006)

The District Court abused discretion in striking Appellants' evidence in defense of the Appellees' 12(b)(6) motions. ROA.12077–ROA.12077

On 11/28/2016, Appellees filed a joint motion to strike or motion for the Court to clarify filings during the 60 day Stay Order. ROA.12069–ROA.12076

The District Court entered a ruling on Appellees' motion to strike the following day on 11/29/2017, striking Appellants' evidence to their 12(b)(6) responses, their surreplies to Appellees' replies to the 12(b)(6) motions, and the motion for joinders filed in supplement to the 12(b)(6) responses. ROA.12077

Pursuant to Court Procedure and Practices Rule B(5)(E),[8] Appellants had 21 days to respond to the motion to strike. The District Court's strike order on 11/29/2017 prejudiced Appellants by precluding their opportunity to respond to Appellants' motion to strike, and opportunity to present evidence in support of their 1983 and 1985 claims, ROA.11458–ROA.11472, which contains a material 03/06/2015 criminally fraudulent document, not filed under seal. The criminally fraudulent document is evidence proof of Appellants' §1983 and §1985 claims.

Appellants must be given reasonable time to provide this evidence in support of non-Harris Health Appellees' 12(b)(6) motions equivalent summary judgment motions[9] – i.e. Baylor and its employee defendants, and Halphen's

[8] Alfred H. Bennet, Court Procedures and Practices, Rule B(5)(E), available at http://www.txs.uscourts.gov/sites/txs/files/Bennett.pdf

[9] ROA.10788–ROA.10878; ROA.10902–ROA.10922

12(b)(6) motions that included extrinsic evidence and is treated as a FRCP Rule 56 summary judgment.[10] *Fed. R. Civ. P.* Rule 12(d)

Appellants allege a forged or criminally fraudulent document as key evidence of §1983 or both §1983 and §1985 conspiracy claims, and did provide the material document months before ruling on all the FRCP 12(b)(6) motions and while there was a FRCP Rule 60(b)/54(b) motion for reconsideration of strike order on file. The pleadings coupled with proof of an existing forged document ROA.3458–ROA.3464, their response to Harris Health's FRCP 12(b)(6) motion, and evidence in support of their defense to Harris Health's 12(b)(6) motion, are enough to present a fact issue to defeat Harris Health's 12(b)(6) motion, and the striking of the fraudulent consent evidence, ROA.11458–ROA.11495, that grievously prejudices Appellants §1983 and §1985 claims, and their 1st U.S. Constitutional petition for redress of grievance rights. *U.S. Const. Amend. I.; 42 U.S.C. §1983, 42 U.S.C §1985(2), 42 U.S.C. §1985(3)*

Against Appellees Baylor and its employee defendants, and John Michael Halphen's 12(b)(6) motions that included extrinsic evidence, the striking of all of Appellants' evidence, definitely and grievously prejudices Appellants' 1st U.S. Constitutional petition for redress of grievance rights because Appellants are thereby lacking any evidence to support the defense to or meet the evidentiary

[10] ROA.10804; ROA.10911

burden of production to defeat all non-Harris Health Appellees' summary judgment equivalent dispositive motions.[11] *See* ROA.11036–ROA.11451; ROA.11458-ROA.11804

Therefore, the reversible strike order prejudices all Appellants' §1983 and §1985 claims, their case, their procedural rights, subjects or deprives Appellants' of their 1st Amendment U.S. Constitutional Right to petition the government for redress of grievances, as it (a) precludes their response to a motion to strike, and (b) striking material evidence filed in support of their defense to dispositive motions.

The District Court's arbitrary subjection or deprivation of Appellants' U.S. Constitutional right to petition the government for redress of grievance, and preclusion of Appellants' procedural rights to 21 days response, by striking Appellees' evidence in light of §1983 conspiracy claims, and proposed §1985 conspiracy claims, *definitely* subjects or deprives Appellants 1st Amendment U.S. Constitutional right to petition the court for grievances, infringes or precludes Appellants' procedural rights to response, obstructs withholds material evidence, precludes the §1983 and 1985 claims, and is an abuse of discretion.

Wherefore the District Court committed reversible error by striking[12] all of

[11] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1996); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)
[12] (ROA. 12077)

Appellants' evidence[13] filed in support of their defenses to all Appellees' 12(b)(6) motions, and dismissing all Appellants' claims, and cause 4:16-cv-903 with prejudice.

CONCLUSION

For the foregoing reasons above and all hereby incorporated by reference, Appellants respectfully requests that this Court reverse the District court's orders in regards to (a) denial of Appellants leave to amend petition, (b) strike of Appellants' evidence in support of their defense to Halphen and Baylor and its employees' dispositive motions, and (c) dismissal of Appellants' claims against all Appellees and cause number 4:16-cv-903 with prejudice; and remand this case to the District Court.

Respectfully submitted,

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[13] (ROA. 11036 – 11451); (ROA. 11465 – 11472); (ROA. 11505 – 11804)

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2017, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished to all necessary parties or counsels via the appellate CM/ECF system.

___/s/ Ernest C. Adimora-Nweke, Jr_____

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,999 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Respectfully submitted,

___/s/ Ernest C. Adimora-Nweke, Jr_____

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that, in the foregoing brief filed using the Fifth Circuit CM/ECF document filing system, (1) the privacy redactions required by Fifth Circuit Rule 25.2.13 have been made, (2) the electronic submission is an exact copy of the paper document, and (3) the document has been scanned for viruses with the most recent version of AVG Internet Security Business Edition and is free of viruses.

___/s/ Ernest C. Adimora-Nweke, Jr_____