No. 17-20259

IN THE UNITED STATES COURT OF APPEALS FOR THE 5TH 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' REPLY BRIEF

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TABLE OF AUTHORITIES

To The Honorable United States Court of Appeals: Appellants' Emily-Jean Aguocha-Ohakweh, et al., by and through the attorney subscribed below, hereby file the following single reply to all Appellees' responses.

ARGUMENT

State-created danger doctrine principles adopted by this Court in *Whitton*, and by the 11th Circuit in *Weidman*, applies in this case.

The fifth circuit has neither adopted nor rejected the state-created danger doctrine. *Breen v. Tex. A&M Univ.*, 485 F.3d 325, 328 (5th Cir. 2007). Hence the principle is not precluded in this jurisdiction and is recognized by the U.S. Supreme Court. See explanations in ROA.11814; ROA.11840.

Regardless, *Whitten* and *Weidman* case incorporated state created danger principles when the Courts outlined the situation in which there exists a constitutional right to medical care actionable under 42 U.S.C. Section 1983.

Whitton principles are yet to be overturned in this circuit. Hence, it is still legally valid law in this jurisdiction, showing that 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). Appellants argued said valid fifth circuit law in their brief including under Issue 1(a)(1), as well as the required special relationship that exists in this case.

Appellees seek this Court to believe that civil rights violations cannot occur in medical settings.

Such is wrong per valid and governing cases including *Whitton*, and federal statutes – 42 U.S.C. Sections 1983 and 1985. Otherwise, patients at government hospitals lack remedy for civil rights violations sought to be criminally covered up as medically negligent actions.

Appellees did not want to provide treatment to Decedent in both hospital visits. Unfortunately amongst others, their deliberate indifferent, knowingly or intentionally wrongful actions that include activities that shock the conscience, caused severe injuries to Appellants, death to Decedent, and the subjection to or actual deprivation of all Appellants' 14th Amendment U.S. Constitutional rights, and their Federal statutory rights under HIPPA and EMTALA, with injuries actionable against applicable Appellees under Sections 1983 and 1985, and 1395dd specifically against only Ben Taub Hospital.

Since no Texas State law provides a remedy for the lack of informed consent, Appellants have a claim under 1983 against all Appellees for non-negligent (e.g. knowingly, fraudulent, intentional *et al*) failures to obtain informed consent to bodily invasive treatments - a protected U.S. Constitutional right. (ROA.12718-12719).

Any state law also does not preclude recovery for claims brought under Federal laws.

Even with any applicable state law, appellants are allowed separate recoveries under both Federal and State laws when applicable due to the different

subject matter of the claims. *NLRB v. Hearst*, 322 U.S. 111, 123 (1944) (holding that 1983 claims are federal in scope and not subject state tort law).

As argued by incorporation to the briefs per Appellants' motion to reconsider, Appellants that reside in Nigeria are subject to Texas and U.S. Jurisdictional laws via their right to consent or withhold consent on Decedent's behalf. (ROA.12720-12722) Hence, they have a statutory right of recovery under Section 1983. Appellants that reside in U.S., as citizens of a U.S. state (i.e. Texas and Minnesota) are granted statutory right of recovery under Section 1985.

Halphen's lack of immunity and basis of claims against his lies in Appellants' response to his 12(b)(6) motion. ROA.10990-10999.

Sections 1983 and 1985, grant Appellants Federal right of action against government officials or entities. Hence, absolute immunity does not apply.

Hence Appellees Halphen *et al*'s arguments on the lack of a constitutional violation or lack of claim for Appellants under Section 1983 or 1985, fails, and the denial of leave to amend petition is therefore an abuse of discretion.

There further exists strong basis for claims under Sections 1983 and 1985 claims and conspiracy claims under the statute.

The Texas Health & Safety Code Section 312.004 Co-op agreement between Texas Higher Educational Board and Affiliated Medical Services, and between Harris County Hospital District and Baylor College of Medicine requires compliance with all Constitutional, Federal, and State laws. It is also strong

evidence that federal and constitutional rights are recognized to exist for patients in medical facilities; all subject to violation by physicians and entities subject to the co-op agreement.

Coupled with its requirement to comply with policies and procedures of HCHD, and all Appellees' lack of record provision in compliance with THSC 166.046(b)(4) and HIPPA, the fact that Appellees have been silently operating with Harris Health's unconstitutional policies and procedures, are evidence of an ongoing agreement between the health care provider appellees, and evidentiary basis of the alleged Section 1983 and 1985 claims and conspiracies under such statutes.

If this Court nullifies Baylor and its employees' 11th Amendment protection, then they would be liable to Appellants under Texas Medical Liability Statute, Texas Civil Practice and Remedies Code ("TCPRC') Chapter 74 like other medical entities in Texas. *Tex. Civ. P. Rem. Code Chapter 74;* See also ROA.12492-125119. Furthermore, TCPRC Section 74.303 would be applicable for fraud and fraud conspiracy against all Appellants that lead to wrongful death and survival action claims of Appellants. *Tex. Civ. P. Rem. Code §74.303.*

Under such, Appellants would have no fraudulent misrepresentation claims activity claims under Section 1983 as TCPRC §74.303 would cover such torts. However, Appellants would have Section 1983 claims against all Appellees for

battery and battery conspiracy claims against applicable Appellees (e.g. Van Hoang, Guy, Guerra, Gupta, Halpen *et al*) due to the culpable mental state restriction of TCPRC §74.101.[1] *Tex. Civ. P. Rem. Code §74.101*.

Furthermore, Appellants would have §1985 conspiracy claims against Baylor and its employees, Halphen, Harris Health and its employees, for the forged informed consent form, the denial of medical records in violation of HIPPA, the fraudulent withholding or withdrawal of life-sustaining treatment ("DNR"), the non-negligent or knowing, intentional, and fraudulent misrepresentations within the medical records to DNR Decedent against his and his family's wishes, and the death certificate signed that precludes criminal authorities.

Therefore, Appellants would be also allowed separate recoveries under state law for the separate causes of action fraud, and conspiracies to commit fraud under TCPRC Chapter 74. *See Shannon v. Law Yone*, 950 S.W. 2d 429, 438 (Tex. App. – Forth Worth 1997, pet denied) (patient's claim that doctors used misrepresentations to keep patient involuntarily confined in psychiatric hospital was claim for fraud, not lack of informed consent); *Melissinos v. Phamaniyong*,

[1] Pursuant to TCPRC §101.057(2) and §104.002(a), Texas has no legitimate state interest in protecting individual state employees from intentional torts such as battery and assault, acts of bad faith, with conscious indifference or reckless disregard, willful or wrongful acts, or an act of gross negligence. *Tex. Civ. P. Rem. Code §§101.057(2) & 104.002(a).* Hence, Appellants are not equally protected by TCPRC 101, and possible state law claims against individual employees are to be brought under TCPRC Chapter 74.

823, S.W.2d. 339, 343-344 (Tex. App.—Texarkana 1991, writ denied) (both informed consent and fraud causes of action were properly submitted based on doctor's representation that toe would "be normal.") Appellants would also be allowed separate recoveries against Baylor, Halphen, and Baylor employee physicians under §1983 and §1985 due to the separate or federal subject matter of civil rights statutes, and the applicability of §1985 to non-governmental entities. *NLRB v. Hearst*, 322 U.S. 111, 123 (1944); *42 U.S.C. §1983* (applicable to persons acting under color of law of a state)

Individual employees are statutorily granted state agency employee status under Texas Health & Safety Code ("THSC") §312007. *TEX. HEALTH & SAFETY CODE ANN. §312.007 (Vernon 2008)* §1983 grants statutory federal right of action against them as persons acting under color of Texas state law. *42 U.S.C. §1983* Under rules of statutory construction, the statutes are construed to give valid and operative effect.

THSC §312.007 is severable due to its Texas Civil Practice and Remedies Code ("TCPRC") Chapter 104's indemnity clause caveat for individual employees only. *TEX. HEALTH & SAFETY CODE ANN. §312.007 (Vernon 2008)* Statutory indemnity of TCPRC §104.002 does not apply to state agencies (i.e. Baylor). *Tex. Civ. P. Rem. Code §104.002* Hence, the employees may be treated as state employees subject to §1983 claims, while Baylor itself is treated as a non-state

agency for the purposes of 11th Amendment and subject to suit in Federal Court under §1983 and §1985.

For these reasons above, the denial of leave to amend petition to include the proposed 13th Amendment to petition (ROA.8824-8998) is therefore an abuse of discretion, and the trial court erred in dismissing cause 4:16-cv-903 with prejudice.[2]

AML is a fatal cancer yet is treatable to remission if necessary or required course of treatment are applied. Decedent had a 50% chance of survival.

Appellee, John Halphen includes extraneous facts not on record by stating that AML is a potentially fatal caner that interferes with the production of normal red blood cells. While correct, Halphen also fails to include that AML is treatable to remission for 50% of patients above 60. American Cancer Society, Treatment Response Rates for Acute Myeloid Leukemia (2016), *available* at https://www.cancer.org/cancer/acute-myeloid/lukemia/treating/response-rates.html. Per the governing 12th amendment and proposed 13th pleading amendment, decedent was over 60 yrs old in both hospital visits.

Per the 12th amendment and proposed 13th Amendment to pleading, even with the delayed chemo in the first hospital visit, Decedent was still able to

[2] The Trial Court's order at the June 2016 status conference restricting the litigation activity to only a motion to dismiss precluded any equal protection challenges to TCPRC 101.

function after leaving Ben Taub Hospital. He received 2 out of 3 chemo treatments before being discharged early, and luckily did not overstay his visa term.

Even with the lack of chemo in the second hospital visit, Decedent fought for his life for 6 months after (a) the traumatic 03/06/2015 bronchoscopy and tracheostomy events criminally executed by incompetent and unsupervised physicians and without consent or informed consent, (b) 03/09/2015 BAL also criminally executed by incompetent and unsupervised physicians and without consent or informed consent. Decedent was even being "weaned off the ventilator" – evidence that he was breathing without constant ventilator need. On the 6th month and 1 day, after many physician Defendants including Halphen, Gupta, and Fisher received their notice of claim letters (ROA.108; ROA.8587-8589; ROA.11043-11049; ROA.12170-12186), Decedent was abruptly reported dead, without notice to the family members of his pending death.

Had Appellee physicians (e.g. Martha Mims, Ghana Khan, *et al*), properly and timely instituted chemotherapy in the first hospital visit rather than their coercive and fraudulent actions to delay or withhold chemo, Decedent would have received all 3 necessary chemo treatments and would likely have not experienced his remission in 2015. Had competent and qualified Baylor College of Medicine staff appellee physicians or specialists properly and timely examined Decedent and his records, and properly and timely instituted chemo in the second hospital visit,

Decedent would have not experienced the multiple organ failure and all injuries incurred by him and all Appellants during the second hospital visit.

Had Appellee physicians (Rajagoapalan, Guerra, Susan Eichler, Guy, Sarkar, *et al*) properly oversaw Decedent bronchoscopy procedure on 03/06/2015, the BAL on 03/09/2015, the catheter placements, and more, Decedent would not have sustained further injuries.

Amongst others, had Appellee physicians (Dr. Kass, Halphen and Fisher) properly reviewed the medical records of Decedent prior to their decision to DNR him, they would have noticed the lack of consent to the 03/06/2015 and 03/09/2015 procedures. They would also have inquired and noted the lack of medical records provided to Decedent's family members as required by HIPPA and 166.046(b)(4). Hence Decedent should not have been DNR'd.[3]

Considering that Decedent walked into Ben Taub with a treatable AML, and under the custody, dominion, and control of Appellants incurred deadly injuries; they had a constitutional obligation to provide Decedent with medical care. Even after the traumatic harm on Decedent on March 2015, the supervising staff physicians withheld medical care from Decedent by withholding dialysis as of April, rushed to DNR him without him being deemed a qualified patient, attempted to defraud Decedent's family members into illegal consent to DNR, still

[3] "DNR," for the sake of the briefs and replies, means the withholding or withdrawal of life-sustaining treatment.

disregarded necessary medical supervision for months by – for example (a) per Dr. Sharp, no brain evaluation for months until days before he was alleged to be in a persistent vegetative state on 07/09/2017, and (b) in the months during which they constantly harassed Decedent's family for illegal consent to DNR Decedent, left Decedent to be treated by physicians who examined Decedent in the last business hours of the day while they signed off on the activities of said residents the following morning. It's worth noting that as pled in the 12th Amendment and proposed 13th Amendment to pleadings, Dr. Chetta and other residents claimed that Decent was able to consent to their treatment procedures including constant administration of fentanyl. Amongst others as pled and argued, had Decedent received constitutionally entitled care, Decedent would not have expired on 09/07/2015.

Per the facts and evidence, Appellees – amongst other culpable mental states, knowingly acted to harm Decedent and his family members, deprive or subject Appellants to the deprivation of their U.S. Constitutional rights afterwards via lack of necessary treatment for injuries they caused, and rushed to terminate Decedent's life via amongst others, lack of qualification of Decedent, lack of provision of required medical records, and withholding and withdrawing necessary care including life-sustaining treatment in violation of federal and state laws.

Dr. Gupta wrongfully relied on Halphen and the ethics board's DNR recommendation. Yet, neither she nor any physician involved in the conspiracy to terminate Decedent and harm all Appellants can evade liability under any applicable state law or Section 1983.

When appellants – through their attorney – informed Barbara Minton and Baylor College of Medicine of Dr. Graham and Gupta's actions via email on September 2015, (ROA.8545-8547) Dr. Gupta should have been removed immediately from administering deadly treatment procedures or care to Decedent. Rather, she was knowingly, fraudulently, and intentionally staffed to continue to administer deadly medical treatment to Decedent, including withholding of dialysis, platelets, and administer medications without bar codes. Per the co-op agreement, it was Baylor's responsibility to staff the hospital. Gupta, in September 2015, was knowingly staffed to administer deadly treatment to Decedent; especially upon Baylor and its employees' receipt of notice of claim letters.

Appellee, John Halphen also states that the deadline to withdraw life-sustaining treatment from Decedent post the Ethics Board decision, was August 20, 2015. John Halphen dictated the deadline in a letter to Bethrand, ROA.8580, and in Decedent's medical records (ROA.3361-3362; ROA.8583-8585), and instructed the physicians that said August 20 was the last day they were required to provide medical treatment. Yet Halphen stated that the physicians did not withdraw life-sustaining treatment from Decedent after the deadline. Halphen is wrong.

First of all, defendants did withdraw life-sustaining treatment from Decedent before the August 20, 2015 deadline. They began withdrawing dialysis, pressors, and sedation as of March 2015, (ROA.8648) and specifically as of August 2015 per the ethics board decision (ROA.247; ROA.8909; ROA.8580-8585; ROA.12416-12418). As of 09/06/2015, Emily-Jean inquired from Dr. Gupta about dialysis for her father. Dr. Gupta refused to give dialysis stating that per Dr. Halphen, it was not to be given (ROA.3361-3362). Renal (i.e. Kidney) failure was listed to be one of the causes of Decedent's death in the death certificate.

Furthermore, there is also evidence of fluid overload on Decedent per the red blood cells and platelet counts in late August and early September. As of late August, Decedent was experiencing low blood cell and platelet counts (ROA.250-252; ROA.8903-8906). Then as of September 4, there was a major spike in his red blood cell and platelet count. Hence there is evidence of fluid overdose to overwork his organs including his heart. One of the causes of death per the death certificate (ROA.3470; ROA.12387) and per Dr. Gupta's call the morning of his death, was heart failure.

Halphen's response alleges that Halphen did not communicate with the treating physicians. Halphen's communication of the deadline to withhold life-sustaining treatment in the medical records, is enough evidence of communication to the physicians who review and rely on the records for treatment.

Non-decedent appellants did not receive any proper notice that he was dying. The only notice of Decedent in a dying state was when Dr. Gupta contacted Bethrand informing him that if he wanted to see his father alive, he should come to the hospital immediately. As pled in the facts of the governing and proposed pleading amendment, upon arrival, neither Dr. Gupta nor any staff or resident physicians were anywhere to be found. The nurses on staff actually informed Bethrand that Decedent was not facing immediate dying.

Even if Dr. Gupta failed to review the records to note that Appellees had not complied with Texas Health & Safety Code ("THSC") §166.046(e), hence she was required to continue providing life-sustaining treatment, per THSC §166.045(d), Dr. Gupta or any health care provider that relied on Halphen and the ethics boards wrongful THSC 166.046 procedure activities or decisions, do not evade liability. *TEX. HEALTH & SAFETY CODE ANN. §§166.046(e) & 166.045(d) (Vernon 2008)*

These are supportive evidence of actions – including conspiracy actions – by Appellees Baylor, its physicians, Halphen, and Baylor risk management executives to terminate Decedent, and amongst others knowingly subject or deprive all Appellants of their U.S. Constitutional and Federal rights.

As already argued in Issue 1(a) of their brief and in ROA.12722-12728, Appellants have no state law remedy for the lack of non-negligent failure to obtain

informed consent, including informed consent to the withdrawal or withholding of life-sustaining treatment procedures on Decedent. For a 12(b)(6) motion or even a summary judgment motion, all facts and evidence are construed in favor of the non-movant. *James v. State Farm Mut. Auto. Ins. Co.*, 743 F.3d 65, 68 (5th Cir. 2014).

Hence Appellants have pled and provided enough evidence to state applicable claims under both §1983 and §1985; and for these reasons in the sections above, the trial court erred in dismissing the §1983 and §1985 claims, and cause 4:16-cv-903 with prejudice.

There exists admissible summary judgment evidence showing that even with the lack of informed consent to withhold or withdraw life-sustaining treatment, Dr. Graham, Dr. Gupta, and Baylor physicians did wrongfully withhold and withdraw life-sustaining treatment from Decedent.

Pursuant to Federal Rules of Evidence Rule 803(4)(A) & (B), any statement made by any health care provider appellee, that is made for, and is reasonably pertinent to medical diagnosis or treatment of Decedent, or that describes Decedent's symptoms, medical history, or his sensations, or their general cause or inception, are exceptions to hearsay; hence admissible as summary judgment evidence. *Fed. R. Evid. 803(4)(A) & (B).*

Hence, the contents of the 12th amendment and proposed 13th amendment to pleadings or evidence on file regarding Decedent's condition, cause of injuries, treatments, or withdrawal or withholding of life-sustaining treatment.

The withholding or withdrawals of life-sustaining treatment order by the ethics board per ROA.8580 include orders to withhold or withdraw platelets, transfusions, and dialysis.

This is evidenced in (a) the drastically inefficient platelet transfusion to Decedent starting on 8/14/2015; (b) Dr. Gupta's lack of or delayed blood products transfusion until 8/20/2015 while Decedent was showing platelet counts 7 contrasted with the history of platelet transfusion blood transfusions if Decedent's Hbg <7 and/or Plt <10 or showed signs of bleeding; (c) Decedent's low platelet count of 7 on 8/20 with Dr. Gupta documenting that blood-transfusion remedy was not worth the risk; (d) Dr. Gupta's refusal to transfuse any platelets until Decedent bleeds, as communicated to Bethrand on 8/20/2015 over the telephone; (e) de-escalation of Decedent's care on 8/20/2015; (f) the infusion of a total of 6 units of packed red blood cells and 5 unit of platelets from 8/27/2015 – 8/31/2015, with the order for 3 units of blood and 2 units of platelets on 8/31 to counter Decedent's low platelet count of 1 (i.e. 1000) while under the watch of Dr. Graham and Gupta, with such infusion post a duration of lack of systematic transfusion leading to bleeding episodes such as Decedent's release of 25 milliliters of blood on the morning of 8/31 and 75 milliliters of blood on 9/1, and (g) Dr. Gupta's refusal to give Decedent dialysis Sept 6 citing Dr. Halphen's DNR order. All in the 12th and proposed 13th pleading amendment.

One of Decedent's causes of death per the death certificate was renal (i.e. kidney) failure. Hence there are admissible evidence for defense to Harris Health, Baylor, Dr. Gupta and Halphen's 12(b)(6) motion, and proof that the physicians did withdraw and withhold life-sustaining treatment from Decedent against Decedent and family-Appellants' wishes (ROA.8581; ROA.8578; ROA.12416-12418).

If Appellees' 12(b)(6) motions are not treated as a summary judgment per Halphen's response, then the facts in the 12th Amendment to original petition are enough to defeat the 12(b)(6) motions as they describe in detail the sequence of events.

The multiple trial court filings were warranted under the circumstance due to Appellees' evasive discovery actions, actions of sabotage encountered by Appellants in trial court, and the sanction orders by the trail court are not enough basis to dismiss the case with cause number 4:16-cv-903 with prejudice.

In regards to the sanctions and multiple filing issues, Appellants filed their case in state court. In state court, the limit to pleading amendments is only for pleadings filed 7 days before trial. *TEX. R. CIV. P. 63* Hence any appellees' issues regarding multiple pleading amendments while in state court are irrelevant.

In regards to pleadings amendment attempts in Federal Court, Plaintiffs were granted leave to file an amended pleading before the first status conference. (ROA.536) The Court then withdrew it the following day. (ROA.537)

At that time, Appellee's attorney was still trying to piece together the misappropriated approximately 26,000 pages of medical records evidence provided to Appellants pursuant to legally authorized medical records request and HIPPA laws, and subsequently produced records. *See e.g.*, ROA.13976-39978

Had Appellees provided Appellants all of Decedent's medical records in compliance with HIPPA or at least THSC 166.046(b)(4), Appellants would have been able to organize and present their case rather than rush to file suit in state court to capture statute of limitations on the violations that occurred on 12/13/2013. Rather, Appellees still provided material missing medical records, *See. e.g.* ROA.9436, to Appellants with later discovery responses as of July 25, 2017 (ROA.8532-8585); all evidence of continued violation of HIPPA laws.

Finally, the lack of medical records provided to Appellants in compliance with THSC 166.046(b)(4), as evidenced in the supplement to record (ROA.13976-39978), support that per THSC 166.046(e), Decedent was entitled to life-sustaining treatment. *TEX. HEALTH & SAFETY CODE ANN. §§166.046(e) & 166.046(b)(4) (Vernon 2008)* Halphen, Gupta, Kass, Fisher, Baylor College of Medicine and its executives and risk managers, including Barbara Minton and James Banfield, and any physicians that were part of the ethics board had a duty to review the records before their decision, and notice that medical records in compliance with THSC 166.046(e) were not provided. Hence, they were required to continue provision of

life-sustaining treatment until the earlier of (a) decedent passed naturally, or (b) 10 days after records in compliance with THSC 166.046(b)(4) were provided to non-Decedent appellants and a court order requiring for such was not yet obtained.

Without such records, all Appellants' rights to petition the government for redress of grievances allowed under the 14th Amendment and THSC 166.046(d), are precluded or significantly infringed upon, as well as Decedents' HIPPA rights. Regardless, Appellees are required by law to continue to provide life-sustaining treatment and constitutionally required medical care to Decedent, at least until the provision of records that comply with THSC 166.046(b)(4), per 166.046(e).

Finally, a docket control order in the first status conference in July, as originally anticipated, is the proper solution for control of the trial docket.

The voluminous filings are a result of Appellees constant withhold or misappropriate of evidence in violation of HIPPA and THSC 166.046(b)(4)(c), which caused Appellants to constantly rush to add to their proposed pleadings in anticipation of an unscheduled yet expected dispositive motions.

Appellants' counsel complied with the terms of the sanction order, but was unable to find a competent counsel to associate with per the order. The Counsel eventually secured lacked interest in the case, and refused to comply with the Court's order to be ready to up to speed in the case within 30 days. The Counsel made no communication with Plaintiffs, and elected to withdraw after filing

motions that jeopardized Appellants' qui tam claims. Regardless, per BEK Construction, a Court may entertain sanctions against a party. However, a Court lacks authority to issue an order that in effect infringes on Appellants' freedom of association or right to petition the government for redress of grievance. *BEK Const. V. NLRB*, 526 U.S. 516, 537-538 (2002). In light of the complex nature of the case, Appellants' counsels' knowledge of the facts and law, the effect of the *pro hac vice* revocation that rendered Appellants as *pro-se* Plaintiffs at the cancelled hearing on the motions on 03/10/2017, and subsequent disallow of said Counsel to represent Appellants at the hearing by denying and striking the *pro hac vice* motion in February 2017, ROA.12535-12583, in effect infringed on Appellants' U.S. Constitutional 1st Amendment association and petition rights. ROA.12535 even shows clear evidence of bad faith infringement or fraudulent activity in the trial court procedure, as it officially states and is signed that said Counsel is not admitted to practice law by Texas state bar. Appellants' original and current appeal counsel should have been allowed to argue the motions.

Furthermore, ROA.10040-10089 & ROA.10677-10777 shows part of the international probate matters needed to be addressed by Counsel to maintain estate administrator standing, and counsel was missing at the Sept. hearing per the letter in ROA.10111-10113. ROA.10779-10787 & ROA.10125-10132 explain some issues encountered by Appellants in trial court, actions that precluded them from

executing their 1st Amendment U.S Constitutional right to petition the government for redress of grievance, as well as claims brought as Realtors on behalf of the United States in 4:16-cv-1704.

Others off record matters that Counsel was not allowed to mention at the show cause hearings on the record include harassment of Counsel out of Court by former Harris County police in Counsel's property in HPD jurisdiction, theft of evidence pertaining to this case and Counsel's office equipment the week following the harassment activity, and more – merely acts of sabotage likely to affect Counsel's ability to present the case, remove Counsel from this case, and affect the case's outcome.[4] Hence explains the "pelican brief" and "enough is enough" statements in ROA.11820-11822, and the condition of the trial record. But Counsel managed everything.

ROA.12929-12960 and ROA.12979-12995, further explains why the *pro hac vice* denial order affects Appellants and is an infringement on their 1st Amendment U.S. Constitutional rights.

The ROA.12535, stricken from the record in bad faith by the trial court, further explains out of record trial court issues encountered by Appellants in

[4] No affidavit attesting to these sabotage matters is necessary at this point due to possible risk of loss in this case for Appellants and Counsel. This has now become a team effort for the pursuit of justice. Therefore, the focus at the moment is on the non-hearsay evidence, underlying facts, and Appellants' claims; not sabotage activity to be likely address later on the trial level if necessary.

maintain their Counsel of choice - the counsel in this appeal and who is Appellants' designated family attorney - Counsel has been admitted to Texas State Bar since November 2012. Counsel and his family has also endured multiple acts of sabotage in this case including unauthorized actions by Jack Fuerst in precluding material 42 U.S.C. § 1395dd(d)(1) claims, that contain money penalties. Attorney Fuerst made no efforts to complete his tasks per Court order, nor did he make efforts to communicate with Appellants. Appellants' appeal counsel continued and had to do the work in all cases under his contractual obligations to Appellants, and the United States of America.

Based on the sequence of activity regarding Appellants' family counsel, Jack Fuerst, and the trial court in 2017, the trial court struck the necessary *pro hac vice* motion filed in 2017 for Appellants' counsel of choice, allowed for the dismissal of attorney Jack Fuerst, and at the 03/2017 hearing, convinced Appellants' last second alternative counsel, Ms. Adelman, to withdraw her *pro hac vice* motion; rendering Appellants *pro se* against sophisticated Defendants-Appellees and their counsels.

For these reasons above, the multiple filings were warranted, the District Court abused discretion in refusing to recuse itself, and the denial of Appellants' original and current appeal counsel's 2017 *pro hac vice* motion was an abuse of discretion, and in effect infringes on Appellants' and Realtor's 1st Amendment U.S.

Constitutional right to petition the government for redress of grievances on behalf of themselves and the United States of America.

EMTALA is applicable post patient's admission to the ward.

Rights secured under sections of 42 U.S.C. §1395dd, that grant all Appellants authority to bring claims against Harris Health System, are not limited to only emergency room activities at Ben Taub Hospital, but also apply when Decedent was admitted as an inpatient to MICU or the hospital ward, and until Decedent's medical condition was stabilized. Furthermore, per literal interpretation of 42 U.S.C. §1395dd, and per the 6th and 9th Circuit's rulings on this issue, Harris Health System is subject to action under 42 U.S.C. §1395dd even after Decedent's admission to the hospital – post the emergency room visit.

The United States Supreme Court has not addressed this issue. The only issue addressed by U.S. Supreme Court is that EMTALA does not require an "improper motive;" e.g. a culpable mental state, for proof of violation. *Roberts v. Galen of Va. Inc, 525 U.S. 249 (1999)* Yet there are circuit splits in regards to the matter of applicability pre, or post admission.

The Sixth Circuit in *Thorton v. Southwest Detroit Hospital*, 895, F.2d. 1131, 1135 (6th Cir. 1990), ruled on this issue. The *Thorton* Court used a literal interpretation of EMTALA statute and reasoned that the statute prohibits a hospital from discharging a patient who came to the emergency department with an

emergency condition before the condition has been stabilized, regardless of whether the patient was admitted. *Id.* at 1135 Hence the *Thorton* Court held that "emergency care does not always stop when patient is wheeled from the emergency room into the main hospital. *Id.*

Thorton is a common-sense approach that precludes physicians and hospitals from admitting patients simply to circumvent the EMTALA statute.

The Fourth Circuit in *Bryan v. Rectors and Visitors of University of Virginia*, 95 F.3d. 349, 353 (4th Circ. 1996), held that a hospital did not violate EMTALA when an admitted patient died after physicians gave an order of DNR post about two weeks of treatment at the hospital. The *Bryan* Court stated that the purpose of EMTALA was to ensure that hospitals provide stabilization treatments to patients with emergency conditions. *Id*. at 351-52. Once a patient was admitted, a physician's failure to treat would be regulated by state tort law. *Id*. at 352. The Bryant Court analyzed the meaning of "to stabilize" per the EMTALA statute, (i.e. "to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual."), and interpreted it to mean that stabilization was only required in regards to an anticipation of transfer. *Id*. The *Bryan* Court concluded that EMTALA obligations are fulfilled upon admission, and a violation of the statue

does not occur if the patient had not been transferred or discharged, regardless of whether the patient was ever considered medically stable. *Id*. at 353.

The Ninth Circuit in *Bryant v. Adventist Health Sys. West,* 289 F.3d 1162 (9th Cir. 2002), considered the issue of when the EMTALA stabilization requirement ends. The *Bryant* Court considered both the rulings of the 4th and 6th Circuits, and expressed concern of the anomalous result-patients who would be would be protected by EMTALA after admission to the hospital if they arrived via the emergency room first, yet patients who by-passed the emergency room are unprotected. *Id.* at 1169. The Court considered the 6th Circuit's concern of hospitals admitting patients to escape liability under EMTALA with no intent to properly stabilize the patients, and created a caveat holding that a patient who was admitted to the hospital after an emergency department examination must prove that the admission was improperly motivated in order to succeed in an EMTALA claim. *Id*.

In 2003, the Center for Medicare & Medicaid services (CMS), one of the entities leveraged by the Department of Health and Human Services to enforce EMTALA requirements, addressed the Circuit Court split and adopted the Ninth Circuit's position and caveat for hospital inpatients. In CMS's applicable regulation as of 2013 required a "good faith" inpatient admission to stabilize the emergency medical condition, for the hospital to satisfy its special responsibilities

with respect to the patient. *42 C.F.R. § 489.24(a)(1)(ii); 42 C.F.R. § 489.24(d)(2)(i).*

In 2009, the Sixth Circuit again upheld its prior position in *Bryant*, holding 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). The Moses Court reached this ruling post a deep analysis of the EMTALA statute, the legislative records, and reasoned that when a patient is found to have an emergency medical condition, the hospital is obligated to provide "such treatment as required to stabilize the medical condition." *Id*. at 582.

In a case involving an emergency medical condition and transfer post emergency room visit, this Court held that a hospital's responsibility under EMTALA ends when the hospital has stabilized the patient's medical condition. *Green v. Touro Infirmary, et al.*, 992 F.2d 537, 539 (5th Cir. 1993); *See also, Jesse Liles et al v. TH Healthcare, LTD, et al.*, unpublished opinion per curiam of United States District Court Eastern District of Texas, Marshall Division, decided on 05/05/2014 (Case No. 2:2011cv00528 - Document 227) (E.D. Tex. 2014), (ROA. 12205 – 12222)

In *Jesse Liles et al v. TH Healthcare, LTD, et al.*, the U.S. District Court, Eastern District of Texas addressed whether a hospital's obligation under EMTALA applied to inpatients. The *Liles* Court made clear that "EMTALA claims

are not barred simply because a patient has been admitted to a hospital as a bona fide inpatient." *See Id.* at p.8 (*citing Bryant v. Adventist Health Sys. West,* 289 F.3d 1162 (9th Cir. 2002)) & *Harry v. Marchant,* 291 F.3d 767 (11th Cir. 2002)). *Liles* Court reasoned that "[EMTALA's] application does not turn on the administrative status of the patient but on his or her medical status." *Jesse Liles et al,* No. 2:2011cv00528 - Document 227, p.8 (E.D. Tex. 2014).

Under rules of statutory construction, it is clear from the face of the statute that U.S. Congress meant for only some sections of EMTALA to apply to the emergency department of the hospital. *See e.g. 42 U.S.C. § 1395dd(a)* (outlining medical screening requirements "In the case of a hospital that has a hospital emergency department…"); *Cf. 42 U.S.C. § 1395dd(b)(1)* ("In general If an individual… comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either…) *See also, 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, 42 U.S.C. § 1395dd(h) applies in the first hospital visit in which the residents and staff physicians harassed Decedent and his son, Bethrand, about lack of Gold Card (i.e. insurance) and means of payment while delaying or evading

chemotherapy treatment, and in the second hospital visit when the physicians and hospital staff refused to provide necessary stabilization treatment – e.g. chemotherapy - post admission, staring from when the physicians and staff dumped Decedent in the hands of unsupervised and incompetent resident-physicians, unqualified or unspecialized physicians, and pharmacists; until Decedent was killed, i.e. when it was certain that no material deterioration of his condition was likely, within reasonable medical probability, to result from or occur during the transfer of Decedent from Ben Taub Hospital.

Decedent's admission from the emergency room to MICU or hospital ward is merely an administrative status adjustment that does not preclude Harris Health System's obligations and liability under EMTALA. Therefore per U.S. District Court, Eastern District of Texas's ruling in *Jesse v. Liles,* 5th Circuit's ruling in *Green v. Touro Infirmary,* and 6th Circuit's ruling in *Moses v. Providence Hosp. and Med. Ctrs., Inc.,* 42 U.S.C. § 1395dd obligations still attached post admission.

There is also evidence to support that EMTALA applies per CMS's good faith caveat in its 2013 regulations. *42 C.F.R. § 489.24(d)(2)(i)* The pleadings and evidence show that post admission of Decedent, he was dumped Decedent in the hands of unsupervised and incompetent resident-physicians, unqualified or unspecialized physicians, and pharmacists. Therefore, there is a fact issue for a jury trial – whether Decedent's admission was a *bona fide* admission, or one for

the wrongful sake of circumventing the EMTALA statute.

Again consequently, Decedent's estate – Appellant, as well as all Appellants – because they incurred injury as a result of Appellees' violation of the EMTALA statute, all have claims against Harris Health System under 42 U.S.C. § 1395dd, for violations of the statute including *amongst others* failure to treat – e.g. (ROA. 114 – 116) – or stabilize a necessary medical condition, failure to transfer, and violation of EMTALA's section (h); all pled in the governing pleading (ROA. 57 - 133) and in the proposed pleading amendment (ROA. 8824 - 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 [42 U.S.C. § 1395dd]…") All family-appellants joined in the EMTALA claims in this appeal pursuant to Federal Rules of Appellate Procedure 3(b)(1) to secure their rights. *Fed. R. App. P. 3(b)(1)*

For these reasons above, the District Court committed reversible error in dismissing the Appellants' 42 U.S.C. §1395dd claims against Harris Health System, dismissing cause number 4:16-cv-903 with prejudice.

Harris Health System's policies and procedures subjects it to liability under §1983 and §1985

Since Harris Health System's explicit unconstitutional policies and procedures subject it to liability under §1983 and §1985 as argued in Appellants' principal brief. *Estate of Wilbert Lee Henson, et al., v. Wichita County, et al.,*

unpublished opinion per curiam of United States District Court Northern District of Texas Wichita Falls Division, decided 12/27/2013 (Case 7:06-cv-00044-BF; Document 279; pg. 7) Hence, Harris Health's specific argument conduct is flawed.

CONCLUSION & PRAYER

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, (c) denial of Counsel's *pro hac vice* in 4:16-cv-903 and 4:16-cv-1704,[5] and (d) dismissal of Appellants' claims against all Appellees and cause number 4:16-cv-903 with prejudice; and remand this case to the District Court.

[5] The Court was on record notice of evidence of fraudulent activity by its staff and Jack Fuerst, acting with conflict of interest, struck it from the record, and acted to deprive Appellants of their 1st Amendment U.S. Constitutional rights.

ROA.12548, ROA.12550, and ROA.12579-12582, and as Counsel in this appeal, support that Counsel in 12535, is the chosen Counsel by the Probate Court, Appellants, and Realtors in both cause numbers. Said Counsel has been denied admission to the Southern District of Texas twice – as recent as 11/16/2017; and must rely on either a transfer of venue or on another risky *pro hac vice* motion.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 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 6,497 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. 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_____