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.

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 the United States District Court
for the Southern District of Texas
Nos. 4:16-cv-903 and 4:16-cv-1704

BRIEF OF APPELLEES BAYLOR COLLEGE OF MEDICINE, ET AL.

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Certificate Of Interested Persons

The undersigned counsel of record certifies that the following listed persons 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:

Plaintiffs-Appellants ("Appellants")

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

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Defendants-Appellees (the "Baylor Appellees")

Baylor College of Medicine ("*Baylor*");
and
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; Santiago Lopez; Lydia Jane Sharp (the "*Baylor physicians*")
and
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Defendant-Appellee ("Harris County Hospital District")

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Statement Regarding Oral Argument

The Baylor Appellees believe the District Court's orders granting Appellees' motions to dismiss can be affirmed on the briefs, without oral argument. The Baylor Appellees would only request oral argument in the event the Court wishes to hear from Appellants.

This appeal involves state tort claims and federal constitutional claims arising from allegations of medical malpractice in care provided at a public hospital. Contrary to Appellants' claim, there are no "matters of jurisdictional split within the fifth circuit [sic]" on any of the issues. App. Br. at v.

Appellants' state law claims against the Baylor Appellees are barred by Texas law. Tex. Civ. Prac. & Rem. Code Ann. §§ 101.106, 101.021 (West 2011). Moreover, this Court has long recognized, and recently reaffirmed, that allegations of medical negligence do not give rise to a federal constitutional claim. *See Wilson v. Dallas Cnty. Hosp. Dist.*, No. 17-10139, __ F. App'x __, 2017 WL 4812579, at *3 (5th Cir. Oct. 24, 2017) (per curiam); *Kinzie v. Dallas Cnty. Hosp. Dist.*, 106 F. App'x 192, 195 (5th Cir. 2005); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (per curiam).

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Introduction

Ben Taub General Hospital ("Ben Taub") in Houston, Texas, is a public hospital owned and operated by the Harris County Hospital District, a political subdivision of the State of Texas. Baylor is a non-profit medical school, and its physicians provide medical care at Ben Taub. Under chapter 312 of the Texas Health and Safety Code, Baylor is a state agency, and its employees are employees of a state agency, for purposes of their services at Ben Taub.

Appellants' decedent, Aphaeus Ohakweh, came to the United States from Nigeria in March 2015, to obtain care and treatment at Ben Taub for acute myeloid leukemia (AML), a cancer of the blood cells.[1] Mr. Ohakweh had previously been treated at Ben Taub for AML in 2013 and 2014. Mr. Ohakweh lapsed into a persistent vegetative state and remained hospitalized at Ben Taub from March 2015 until he died from AML on September 7, 2015. Appellants filed suit in state court a few months later, and amended their complaint *twelve* times before the case was removed to federal court. As relevant to this appeal, Appellants' twelfth amended complaint alleged claims against the Baylor Appellees under 42 U.S.C. § 1983

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[1] AML is characterized by the rapid growth of abnormal white blood cells that accumulate in the bone marrow and interfere with the production of normal blood cells. ROA.540. Appellants pleaded below that the average time to death for someone of Mr. Ohakweh's age with AML and without treatment is 3–4 months. ROA.4016.

and under state tort law for the care that Mr. Ohakweh received at Ben Taub.

Shortly after removal, Appellants moved for leave to file a thirteenth amended complaint. Appellants then proceeded to file more than *forty* different versions of their proposed thirteenth amended complaint from May 13–August 23, 2016, adding and subtracting defendants and causes of action seemingly at random. On August 26, the District Court stopped Appellants' rapid-fire filings by ordering the case "STAYED, no additional filings allowed until further notice from the court."[2]

A few days later, the District Court denied Appellants' motion for leave to file their thirteenth amended complaint. Appellants complain on appeal about this decision, but the District Court did not abuse its discretion in denying leave. Allowing amendment would have been futile, because the additional parties and causes of action that Appellants sought to add were barred by law. Moreover, it would have prejudiced Appellees, and Appellants had already amended their complaint twelve times.

The District Court then lifted its stay order for the limited purpose of allowing Appellees to file Rule 12(b)(6) motions to dismiss the twelfth amended complaint, and for Appellants to file responses.

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[2] ROA.30 (Minute Entry 08/26/2016) (capitalization in original).

After Appellants had filed their responses, however, they filed *thirty-six* additional documents in direct violation of the District Court's stay order. Appellants complain on appeal that the District Court struck these thirty-six documents, but the court was entitled to enforce its stay order (and the documents were irrelevant to deciding the motions to dismiss anyway).

Finally, the District Court granted Appellees' motions to dismiss the twelfth amended complaint—and was right to do so. Appellants' claims against the Baylor Appellees are grounded in alleged medical negligence, and this Court has repeatedly held that alleged medical negligence does not give rise to a 42 U.S.C. § 1983 claim as a matter of law. Even if it were, the individual Baylor Appellees would be entitled to qualified immunity. Likewise, Appellants failed to state a claim under state tort law. Section 101.106(e) of the Texas Tort Claims Act ("TTCA") required dismissal of Appellants' state law claims against the individual Baylor Appellees. As to Baylor itself, the TTCA has not waived immunity from suit and liability for Appellants' claims.

The Court should thus affirm the District Court's judgment.

Jurisdictional Statement

The District Court had jurisdiction over cause number 4:16-cv-903 under 28 U.S.C. § 1331, and dismissed all of Appellants' claims under that cause number with prejudice.

While cause number 4:16-cv-903 was pending, Appellants filed cause number 4:16-cv-1704, a qui tam action, against Baylor, various Baylor physicians, the Harris County Hospital District, and others. On December 13, 2016, cause number 4:16-cv-1704 was consolidated in the District Court with 4:16-cv-903, but only for "further proceedings."[3]

Although claims remain pending in 4:16-cv-1704,[4] the Court has jurisdiction under 28 U.S.C. § 1291 over Appellants' appeal from cause number 4:16-cv-903. *See In re Transtexas Gas Corp.*, 303 F.3d 571, 577 (5th Cir. 2002) (recognizing that consolidated actions "generally retain their separate character" for purposes of appeal).[5]

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[3] ROA.12461.

[4] *See* ROA.13717-893. The United States Department of Justice declined to intervene in 4:16-cv-1704, which allowed Appellants to pursue the claim. *See* ROA.13237–243.

[5] Unless otherwise noted, internal quotation marks, alterations, and citations have been omitted from quotations, and all emphasis is added.

Statement Of Issues Presented For Review As To The Baylor Appellees[6]

Appellants' Issue 1 (restated)

Did the District Court correctly grant the Baylor Appellees' motion to dismiss the twelfth amended complaint?

Appellants' Issue 2 (restated)

The District Court did not cite or otherwise rely upon *Miller ex. rel Miller v. HCA, Inc.*, 118 S.W.3d 758 (Tex. 2003), in which the Texas Supreme Court held that Texas law did not recognize a claim by parents for battery or negligence because their premature infant was provided resuscitative medical treatment without parental consent. Are Appellants correct that *Miller* applies to this case? If so, is *Miller* unconstitutional?

Appellants' Issue 3 (restated)

Did the District Court abuse its discretion in denying Appellants leave to file a thirteenth amended complaint?

Appellants' Issue 4 (restated)

Did the District Court abuse its discretion by striking documents that Appellants filed in violation of a stay order?

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[6] Appellants' issue 1(a)(vi) concerns only Appellee Harris County Hospital District. *See* App. Br. at 10–11, 51–53.

Statement Of The Case

Appellants' brief includes numerous allegations about the "incompetent" and "criminally fraudulent" care that Mr. Ohakweh received at Ben Taub, including many allegations for which Appellants do not include any record citations whatsoever. App. Br. at 12, 27. The Baylor Appellees dispute Appellants' allegations, and would have proven the quality of the care that they provided Mr. Ohakweh, if it had been necessary. No such proof was necessary, however, as the District Court properly decided this case on the pleadings and the law.

A. Appellants amend their pleading twelve times before Appellees remove to federal court

Appellants filed their original petition in state court on December 21, 2015, accusing forty-one defendants of medical malpractice in the treatment of Mr. Ohakweh, including Baylor and thirty-seven Baylor physicians.[7]

Appellants filed their first amended petition the next day, in what was to become a flurry of twelve amended petitions, adding and subtracting various defendants in less than three months—including two different amended petitions naming different

[7] ROA.57.

defendants filed on the same day.[8] (The Baylor Appellees include a chart of the various petitions and defendants in the Appendix.)

Appellants filed their "Twelfth Amendment to Original Petition" (the "Twelfth Amended Complaint") on March 16, 2016, naming twenty-five defendants, including Baylor, eighteen Baylor physicians, and an employee of Baylor's Risk Management Department.[9] Notably, Appellants had previously non-suited "*with prejudice*" all of their state law claims against fifteen of the eighteen Baylor physicians.[10] Nonetheless, Appellants alleged in the Twelfth Amended Complaint that all of the defendants—including the previously non-suited defendants—"negligently, gross negligently [sic], intentionally, knowingly, maliciously, or with criminal negligence, killed" Mr. Ohakweh while in a conspiracy to deprive him of his constitutional rights.[11]

In addition to state law claims, the Twelfth Amended Complaint alleged causes of action against all Appellees under 42 U.S.C. § 1983, and against Harris County Hospital District under

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[8] *See* ROA.307–08 (noting that Appellants filed amended petitions on December 22 and 23, 2015; January 20, 25, 27, 29, 2016; February 1 and 8, 2016; and March 7 and 9, 2016).

[9] ROA.208.

[10] ROA.10812 (italics in original).

[11] *See* ROA.208–85.

the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd.[12] Appellants did not, however, plead any claims against Appellees under 42 U.S.C. § 1985 in the Twelfth Amended Complaint.[13]

Harris County Hospital District removed the case under federal question jurisdiction,[14] and the other Appellees consented to the removal.[15]

B. Appellants move for leave to amend their complaint a thirteenth time

Shortly after removal, on May 13, 2016, Appellants moved for leave to amend their Twelfth Amended Complaint with a proposed "Thirteenth Amendment to Original Petition" (the "proposed Thirteenth Amended Complaint").[16] As before, this proposed new complaint was only the beginning. Between 6 p.m. on May 30 and 10 a.m. on May 31, 2016, Appellants filed four different amended versions of the proposed Thirteenth Amended Complaint.[17]

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[12] ROA.262–85. EMTALA creates no private cause of action against physicians. *See* 42 U.S.C. § 1395dd(d)(2).

[13] *See* ROA.262–85.

[14] ROA.52–56.

[15] ROA.392–94; ROA.411–12.

[16] ROA.419–532.

[17] ROA.581–686, 687–793, 794–918, 919–1046; *see* ROA.1048.

Faced with this deluge, on June 2, 2016, Appellees filed a response in opposition to Appellants' motion for leave to amend, in which Appellees asked the District Court for a chance to breathe.[18] Specifically, Appellees asked the District Court to: (1) establish a new submission date for them to respond to Appellants' motion for leave to file the fourth version of the proposed Thirteenth Amended Complaint; (2) order Appellants not to file any further versions of the proposed Thirteenth Amended Complaint; and, after ruling on Appellants' motion for leave, (3) allow Appellees to "file dispositive motions under Rule 12(b) as to whichever version" of Appellants' petition became the operative complaint.[19] That same day, June 2, Appellants filed yet another version of their proposed Thirteenth Amended Complaint.[20]

1. The District Court orders Appellants to submit one proposed amendment; Appellants file thirty-six

At a June 3, 2016, scheduling conference, the District Court granted Appellants fourteen days to file an amended motion for leave with a *single, final* "[a]mended pleading to be attached," and

[18] ROA.1047–56.

[19] ROA.1049–50.

[20] ROA.1057–176.

set a motion hearing date of September 9.[21] After the scheduling conference, Appellants filed what should have been their last and final version of their proposed Thirteenth Amended Complaint.[22]

But rather than comply with the District Court's order confining them to this single filing, Appellants thereafter submitted *thirty-five* new, different versions of their proposed Thirteenth Amended Complaint between June 4 and August 23. These versions added and subtracted defendants, allegations, and causes of action willy-nilly.

- Between June 7–18, Appellants filed ten different versions of their proposed Thirteenth Amended Complaint.[23]
- From July 14–31, Appellants filed twelve more versions of their proposed Thirteenth Amended Complaint (including five versions filed on July 28 alone).[24]
- From August 1–23, Appellants filed another thirteen versions of their proposed Thirteenth Amended Complaint.[25]

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[21] ROA.12 (Minute Entry 06/03/2016); *see* ROA.9032 ("At a hearing on June 3, 2016, this Court ordered Plaintiffs to file a final version of the last proposed amendment by June 17 so that Defendants could have a chance to respond to a fixed target.").

[22] ROA.1202–328.

[23] ROA.1338–468, 1725–849, 1850–976, 1977–2110, 2113–246, 2247–378, 2379–514, 2693–833, 3473–612, 3619–761.

[24] ROA.4212–353, 4414–557, 4558–701, 4702–844, 4850–998, 5007–165, 5166–324, 5378–536, 5540–701, 5703–864, 5866–6027, 6029–190, 6192–353.

In the midst of Appellants' barrage of filings, the Baylor Appellees filed a response opposing Appellants' motion for leave to file the proposed Thirteenth Amended Complaint.[26]

On August 26, the District Court finally told Appellants "enough."

2. The District Court denies leave to amend and orders a stay to allow dispositive motion briefing

After a status conference on August 26, 2016, the District Court ordered the case "STAYED, no additional filings allowed until further notice from the court."[27]

Four days later, on August 30, the District Court entered an order denying Appellants' motion for leave to file their proposed Thirteenth Amended Complaint "because it is futile, would prejudice [Appellees], and because [Appellants] have already had multiple opportunities to amend their Petition."[28]

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[25] ROA.6359–517, 6520–678, 6680–836, 6915–7073, 7246–413, 7470–639, 7641–811, 7839–8009, 8036–206, 8208–378, 8593–767, 8824–998.

[26] ROA.4014–118. The Baylor Appellees' response targeted the eighth version of the proposed Thirteenth Amended Complaint, as it was the last version filed within the District Court's two-week deadline. *See id.* But the Baylor Appellees made their response applicable to all proposed versions of the proposed Thirteenth Amended Complaint. ROA.4017 n.4.

[27] ROA.30 (Minute Entry 08/26/2016) (capitalization in original); ROA.9029.

[28] ROA.9030–33.

The District Court held that granting leave to file the proposed Thirteenth Amended Complaint "would be futile because the additional parties and causes of action that [Appellants] seek to add are barred by law."[29] In particular, it would be futile to add federal constitutional claims "because the [Texas] Tort Claims Act, not the Constitution, is the proper avenue for relief in this medical negligence case."[30] The District Court further found "no plausible basis" for Appellants' claims of conspiracy, so "adding these causes of action would be futile as well."[31]

The District Court additionally held in its order that Appellees had been unduly prejudiced by Appellants' habitual filing of different versions of the proposed amendment to their live pleading, as well as Appellants' filing of "over a dozen different Replies, Amended Replies, and Supplemental Replies to the same pleading, and submitt[ing] over forty proposed orders to the Court."[32]

The District Court concluded that the "Twelfth Amended [Complaint] adequately presents Plaintiffs' medical negligence case, and further amendments to add additional parties and causes of

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[29] ROA.9031.

[30] ROA.9032 (citing *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Kinzie v. Dallas Cnty. Hosp. Dist.*, 106 F. App'x 192, 194 (5th Cir. 2003)).

[31] ROA.9032.

[32] ROA.9033.

action would not serve the interests of justice."[33] It thus ordered that the "operative Petition shall be the Twelfth Amended [Complaint]. Defendants may now file dispositive motions to this pleading, and Plaintiffs will have an opportunity to respond."[34]

C. Appellants violate the stay forty times within a few weeks, prompting sanctions against their counsel

The District Court noted that it had imposed its August 26, 2016, stay on non-dispositive filings "in response to [Appellant's counsel's] previous excessive filings."[35] Yet despite the stay order, Appellants filed *twenty-three* motions, notices, or proposed orders between August 31 and September 9.[36]

The District Court held a motion hearing on September 9; Appellants' counsel failed to attend the hearing.[37] The District Court entered a Show Cause Order a few days later, requiring Appellants' counsel to appear on September 20 and show cause why he should

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[33] ROA.9033.

[34] *See* ROA.9033.

[35] ROA.10123.

[36] *See* ROA.30–33 (docket entries 166–88).

[37] *See* ROA.12 (Minute Entry 06/03/2016). Appellants' counsel filed a letter explaining his absence, stating that he believed there to be nothing on the docket and that he was tending to "international matters." ROA.10111-15; *see also* ROA.10124 at n.1 (the District Court noting September 8 emails from Appellant's counsel suggesting that he "was trying to mislead the Court about his upcoming absence" at the September 9 hearing).

not be held in contempt and be subject to monetary penalties for his violations of the August 26 stay order, and his failure to appear at the September 9 hearing.[38]

Appellants filed seventeen motions, notices, or proposed orders between entry of the Show Cause Order and the September 20 hearing.[39]

As detailed in the District Court's order that followed the September 20 show cause hearing, "[d]espite the seriousness of the Show Cause Order and of the hearing itself, [Appellants' counsel] arrived late for the scheduled hearing and then proceeded to offer insubstantial explanations for his actions."[40] The District Court was "wholly unsatisfied with Mr. Adimora-Nweke's ability to be punctual to court scheduled hearings or his explanations for his multitudinous filings—which have made it impossible for opposing counsel to file a response to a fixed legal position, and thus, in turn, made it impossible" for the District Court "to issue a ruling on contested issues."[41]

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[38] ROA.10123–24.

[39] *See* ROA.33–35 (docket entries 194–97, 199–202, 204–12).

[40] ROA.10673.

[41] ROA.10673.

The District Court therefore found Appellants' counsel in contempt and imposed sanctions, including that he must: (1) personally pay a $500 fine; (2) attend a class on electronic case filing; and (3) associate with other counsel on the case who was admitted to practice in the Southern District of Texas.[42] The District Court also warned that it would revoke Appellants' counsel's pro hac vice status if he failed to strictly comply with the order or continued "to demonstrate he is incapable of following the protocols of practicing before this Court."[43]

The next day, September 21, the District Court ordered the case stayed for an additional sixty days—"with the exception of the previously granted leave to file dispositive motions to Plaintiffs' 12th Amended Complaint granted to the Defendants at the September 9, 2016 Oral Hearing."[44]

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[42] ROA.10673–674. The District Court initially also required Appellants' counsel to associate with other counsel who was both admitted to practice in the Southern District and Board Certified in Civil Trial Law. *Id.* The District Court subsequently relieved Appellants' counsel of the board certification requirement. *See* ROA.37 (Minute Entry 10/27/2016).

[43] ROA.10674. After a show cause hearing in December 2016 for additional sanctionable conduct by Mr. Adimora-Nweke, the District Court did revoke his pro hac vice status. ROA.45 (Minute Entry 12/09/2016); *see* ROA.12457–460 (explaining that the actions of Appellants' counsel, including excessive filing, "threaten the orderly administration of justice, challenge this Court's authority, and have continually disrupted the Court's ability to hold typical proceedings in the case").

[44] ROA.10778.

D. Appellees move to dismiss, and the District Court grants their motions

With Appellants' pleadings no longer a constantly moving target, the Baylor Appellees, Harris County Hospital District, and Dr. Halphen filed three separate motions to dismiss the Twelfth Amended Complaint.[45]

As permitted by the District Court's August 30 and September 21 orders, Appellants filed separate responses to the three motions to dismiss.[46] Thereafter, however, Appellants again disobeyed the District Court's stay orders by filing at least forty-five other documents during the stay period.[47] Because at least *thirty-six* of these documents related to Appellees' motions to dismiss,[48] Appellees moved to strike or clarify the status of these documents.[49] The District Court struck the documents because of Appellants' "direct violation of this Court's Order staying the case."[50]

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[45] ROA.10788–811, 10879–901, 10902–19.

[46] ROA.10924–44, 10957–67, 11014–35.

[47] *See* ROA.38–43 (docket entries 232–34, 236–39, 241–44, 246–50, 252–55, 257–81).

[48] *See* ROA.38–43.

[49] ROA.12069–74.

[50] ROA.12077 (striking docket entries 232–34, 236–39, 241–44, 246–50, 252–55, 257–61, 263–73).

The District Court granted Appellees' motions to dismiss on March 24, 2017.[51] As to the Baylor Appellees specifically, the District Court held that "Plaintiffs fail[ed] to plead any plausible claim against the Baylor Defendants" and dismissed "all claims brought against these parties."[52] The District Court further held that, "[a]s Plaintiffs have already amended their complaint twelve times, future amendments would not be in the interest of justice."[53] It thus dismissed all claims against the Baylor Appellees with prejudice.[54]

Summary Of The Argument

Appellants' scattershot list of issues on appeal can be divided into four categories relevant to the Baylor Appellees. None of Appellants' issues has any merit.

First, the District Court did not err in dismissing Appellants' Twelfth Amended Complaint. Appellants' claims against the Baylor Appellees are grounded in alleged medical negligence, and alleged

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[51] ROA.12685–88, 12693–97, 12689–92.

[52] ROA.12688.

[53] ROA.12688 (citing the District Court's order denying leave to amend (Doc. #165), order to show cause (Doc. #192), order for sanctions (Doc. #223), order to show cause (Doc. #294), and order revoking Appellants' counsel's permission to appear pro hac vice (Doc. #299)).

[54] ROA.12688.

medical negligence does not give rise to a 42 U.S.C. § 1983 claim as a matter of law. Appellants' state law claims against the Baylor Appellees are barred by Texas law, because Baylor is a state agency, and its employees are employees of a state agency, for purposes of their services at Ben Taub.

Second, despite what Appellants may believe, the District Court did not apply Texas's "*Miller* doctrine" to their claims. The doctrine recognizes an exception to the general rule imposing liability on a physician for treating a child without parental consent. *Miller* has nothing whatsoever to do with this case.

Third, the District Court did not abuse its discretion in denying Appellants leave to amend their complaint a thirteenth time to add twenty new Baylor physicians as defendants, and claims under 42 U.S.C. § 1985. It would have been futile to allow Appellants to add these new defendants and cause of action. Moreover, given Appellants' twelve previous amendments and pattern of harassing, multitudinous filings, allowing another amendment would have been unduly prejudicial to Appellees.

Fourth, the District Court did not abuse its discretion in striking thirty-six of the documents that Appellants filed in direct violation of the District Court's stay order. Striking these improperly-filed documents was the least restrictive sanction necessary to deter Appellants' ongoing inappropriate behavior—

particularly as lesser sanctions had failed to deter Appellants, and the documents were unnecessary to decide Appellees' motions to dismiss.

Argument

A. The District Court correctly dismissed Appellants' 42 U.S.C. § 1983 claims

1. The District Court applied the proper Rule 12(b)(6) standard

Appellants complain in their first issue that the District Court erred in "dismissing" their 42 U.S.C. § 1983 claims and their "proposed 42 U.S.C. § 1985 claims" against the Baylor Appellees. App. Br. at 9–11; *see id.* at 19–21.

In fact, the District Court did not "dismiss" any § 1985 claims. Appellants pleaded only *§ 1983* claims against the Baylor Appellees in their live complaint, the Twelfth Amended Complaint.[55] Appellants did not allege § 1985 claims until their proposed Thirteenth Amended Complaint, which was never filed. As relevant to this appeal, therefore, the District Court dismissed only Appellants' § 1983 claims.

Appellants also misstate the rule applicable to the District Court's order granting the Baylor Appellees' motion to dismiss the

[55] *See* ROA.262–76.

Twelfth Amended Complaint for failure to state a claim. Appellants contend that the Rule 12(b)(6) motion "included extrinsic evidence," and thus the District Court erred in deciding the motion under Federal Rule of Civil Procedure 12(b)(6) rather than Rule 56. App. Br. at 16. Appellants are wrong. The Baylor Appellees did *not* attach any extrinsic evidence to their motion to dismiss, and the motion does *not* rely upon any extrinsic evidence.[56]

Appellants are perhaps confused by the fact that the Baylor Appellees attached two of Appellants' pre-removal filings to their motion to dismiss—a notice of nonsuit and the operative complaint at the time Appellants filed their nonsuit.[57] As the notice and complaint were in the record when the Baylor Appellees moved to dismiss, they are not extrinsic evidence. *See Ruiz v. Brennan*, 851 F.3d 464, 468 (5th Cir. 2017) ("In ruling on a Rule 12(b)(6) motion, . . . we may take judicial notice of matters of public record."); *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) ("In evaluating a motion to dismiss, we may consider . . . items appearing in the record of the case.").

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[56] *See* ROA.10788–878 (Mot. to Dismiss).

[57] ROA.10812–877. The Baylor Appellees attached the notice and complaint to demonstrate that Appellants had dismissed with prejudice all state law tort claims against 16 of the individual Baylor Appellees. *See* ROA.10793.

The District Court thus correctly decided the Baylor Appellees' motion under Rule 12(b)(6).

2. Allegations of medical negligence do not give rise to a § 1983 claim

The Court reviews "a district court's grant or denial of a Rule 12(b)(6) motion, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff. However, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Wilson v. Dallas Cnty. Hosp. Dist.*, No. 17-10139, __ F. App'x __, 2017 WL 4812579, at *2 (5th Cir. Oct. 24, 2017) (per curiam).

42 U.S.C. § 1983 is not, in and of itself, a source of substantive rights, but merely provides a method for vindicating federal civil rights found elsewhere. *Baker*, 443 U.S. at 144 n.3. The statute is intended to curb "deliberate abuses of governmental power," not unintended injury. *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992).

To plead a § 1983 claim, Appellants were required to allege facts demonstrating both that (1) the Baylor Appellees violated the Constitution or federal law, and (2) that the Baylor Appellees were acting under color of state law while doing so. *Wilson*, 2017 WL 4812579, at *3. To establish a conspiracy claim under § 1983, Appellants had to show an actual violation of § 1983 and that the

Baylor Appellees agreed to commit an illegal act. *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995). The District Court correctly held that Appellants failed to meet their burden.[58]

"No general right to medical care exists." *Kinzie v. Dallas Cnty. Hosp. Dist.*, 106 F. App'x 192, 195 (5th Cir. 2005). "Unsuccessful medical treatment, acts of negligence, neglect, or medical malpractice are insufficient to give rise to a constitutional violation. Disagreement with one's medical treatment is not sufficient to state a cause of action under § 1983." *Baez v. INS*, No. 06-30112, 2007 WL 2438311, at *1 (5th Cir. Aug. 22, 2007) (per curiam) (citing *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991)).[59]

In *Kinzie v. Dallas County Hospital District*, 239 F. Supp. 2d 618 (N.D. Tex. 2003), for example, a patient received a transfusion of blood infected with HIV and alleged that the hospital failed to

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[58] The Baylor Appellees did not move to dismiss on the basis that they were not acting under color of state law. *See* ROA.10794 n.8 ("The Baylor Defendants will assume for purposes of this Motion ***only*** that the Baylor Defendants were acting under color of state law during their involvement with Mr. Ohakweh at Ben Taub . . . .") (emphasis in original).

[59] *See also Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); *Wilson*, 2017 WL 4812579, at *3 ("Allegations of medical negligence do not rise to the level of a due process claim."); *Jackson v. Schultz*, 429 F.3d 586, 590 (6th Cir. 2005) ("It is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need.").

properly screen the blood. The plaintiffs "liberally sprinkled" their complaint "with words such as 'consciously disregarded,' 'recklessly,' 'grossly negligent,' 'deliberate indifference,' 'conscious disregard,' 'intentionally,' 'callous,' and 'deliberate.'" *Id.* at 628–29. The district court recognized, however, that "a liberal reading of Plaintiff's allegations, when stripped of these descriptive words, at most, reveal[ed] negligent conduct." *Id.* at 629. This Court affirmed. *Kinzie*, 106 F. App'x at 194 (holding that the plaintiffs' allegations were "analogous to a fairly typical state-law tort claim: [the hospital] breached its duty of care to [the patient] by failing to provide safe blood.").

Likewise, Appellants (very) liberally sprinkle descriptive words throughout the Twelfth Amended Complaint, including that Appellees "negligently, gross negligently [sic], intentionally, knowingly, maliciously, or with criminal negligence killed" Mr. Ohakweh.[60] But, as the District Court held, when stripped of these descriptive words, Appellants' allegations in the Twelfth Amended Complaint "amount to, at most, negligence by the Baylor [Appellees] for their alleged failure to provide adequate medical care to decedent, Mr. Ohakweh."[61] Appellants' claim that Appellees "killed"

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[60] ROA.254.

[61] ROA.12687.

Mr. Ohakweh, for example, rests on allegations that Appellees "induc[ed] a need for" dialysis and then withheld the dialysis.[62]

"Even when taking all of [Appellants'] allegations as true, the pleaded facts, when stripped of legal conclusions, reveal, at most, a claim for negligence."[63] "[B]ecause the allegations in [Appellants'] complaint do not rise to the level of a constitutional claim, all the federal claims fall by their own weight." *Wilson*, 2017 WL 4812579, at *3 (affirming dismissal of federal claims against a hospital for an alleged "custom or policy of committing medical errors"). The District Court thus did not err in dismissing Appellants' § 1983 claims against the Baylor Appellees.

3. Neither the "special relationship" exception nor the "state-created danger" theory apply

In their issue 1(a)(i), Appellants propose two potential theories of constitutional liability. First, Appellants assert that Appellees bore an affirmative duty of care arising from the alleged "special relationship" between them and Mr. Ohakweh. Second, Appellants suggest that liability arises under the "state-created danger" theory.[64] Both of Appellants' theories fail as a matter of law.

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[62] ROA.254.

[63] ROA.12688.

[64] Appellants do not use the phrase "state-created danger" in their brief, but cite at least one case discussing the theory and assert that Appellees "intentionally . . . increased Decedent's risk of harm and rendered him more

a. A "special relationship" exists with those in state custody—not voluntary hospital patients

A general right to medical care may exist where there is "a special custodial or other relationship between the person and the state." *Kinzie*, 106 F. App'x at 195. "This special relationship exists 'only when the person is involuntarily taken into state custody and held against his will through the affirmative power of the state.'" *Id.* (quoting *Walton v. Alexander*, 44 F.3d 1297, 1304 (5th Cir. 1995) (en banc)).

The Court, sitting en banc, has held that the special relationship exception arises only in three circumstances: (1) "when the state incarcerates a prisoner"; (2) when the state "involuntarily commits someone" to a mental health institution; or (3) when the state places children in foster care. *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 856 (5th Cir. 2012) (en banc) (holding that state does not create special relationship with children attending public schools).

Appellants argue in issue 1(a)(i) that the special relationship exception should be extended to apply here because Mr. Ohakweh was "in appellees' custody and control" after his admission to Ben Taub. App. Br. at 21–31. Appellants cite two cases as putative

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vulnerable to danger." App. Br. at 26–27 (citing *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994)). The Baylor Appellees therefore address the theory.

support for their argument. *See* App. Br. at 21–22. In both cases, however, the court found *no* special relationship. *See Wideman v. Shallowford Cmty. Hosp., Inc.*, 826 F.2d 1030, 1036 (11th Cir. 1987) (holding that no constitutional right existed to provision of medical treatment and services by county and to transport by ambulance to hospital of one's choice); *Whitton v. City of Houston*, 676 F. Supp. 137, 139 (S.D. Tex. 1987) (holding that paramedics did not owe duty to provide individual with medical treatment).

Hospital treatment is "easily distinguished from the archetypical custody exception case where jail or prison officials fail to provide medical treatment to an incarcerated individual." *Peete v. Metro. Gov't of Nashville & Davidson Cnty.*, 486 F.3d 217, 223 (6th Cir. 2007) (holding that unconscious patient was not placed in custody for § 1983 purposes when paramedics restrained him in an effort to render medical treatment); *Jackson*, 429 F.3d at 590–91 (6th Cir. 2005) (holding that unconscious patient's incapacity did not render him in custody for § 1983 purposes).

An "unconscious patient in an emergency room, operating room, or ambulance controlled by state actors" is owed "state-law duties of care"; "[s]uch circumstances, however, do not trigger duties related to involuntary commitment nor do they give rise to a constitutional-level duty of care." *Shelton v. Ark. Dep't of Human*

Servs., 677 F.3d 837, 842 (8th Cir. 2012).[65] The "special relationship" exception to § 1983 thus does not apply.

b. The Court has not adopted the "state-created danger" theory, and should not do so here

While the en banc Court in *Covington* noted that "many circuits" have recognized the existence of a state-created danger theory of liability, it declined to adopt the theory. 675 F.3d at 863. Since *Covington*, "[s]ubsequent panels have repeatedly noted the unavailability of the theory." *Doe v. Columbia-Brazoria Indep. Sch. Dist. ex rel. Bd. of Trs.*, 855 F.3d 681, 688 (5th Cir. 2017); *see Paraza v. Sessions*, 680 F. App'x 345, 347 (5th Cir. 2017) (alien raising state-created danger challenge to his removal order "failed to allege a valid constitutional challenge"). Appellants offer nothing against this weight of authority, and make no argument that would justify the adoption of the state-created danger theory in this case.

Moreover, even in circuits where the state-created danger theory is recognized, the theory would not save Appellants' § 1983 claim. *See, e.g.*, *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 925–28 (10th Cir. 2012) (affirming dismissal of § 1983 claims

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[65] To hold otherwise would be to create a basis for § 1983 liability as to every emergency patient at a public hospital. *Cf. Frances-Colon v. Ramirez*, 107 F.3d 62, 64 (1st Cir. 1997) (recognizing that "[e]normous economic consequences could follow" from broadening the "special relationship" exception in such fashion).

brought by estate and family members of deceased patient against hospital and various doctors and staff, because allegations that defendants withheld seizure medication and caused patient's death by leaving him unattended were insufficient to plead the private violence required for a state-created danger claim).

4. Appellants' claims against the individual Baylor Appellees are also barred by qualified immunity

In addition to finding that Appellants did not allege a constitutional violation in the Twelfth Amended Complaint, the District Court held that Appellants' § 1983 claims against the individual Baylor Appellees are barred by qualified immunity.[66] In issue 1(a)(iii), Appellants argue that the District Court erred because "[n]o appellee is entitled to qualified immunity." App. Br. at 32–38. Appellants are again wrong.

"Qualified immunity protects public officials from suit unless their conduct violates a clearly established constitutional right." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (observing that the standard "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law"). Claims of qualified immunity require a two-step analysis. *Id.* First, a court must determine whether the plaintiff

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[66] ROA.12688 & n.5.

adduced sufficient evidence to raise a genuine issue of material fact that the defendant violated an actual constitutional right. *Id.*[67] If the answer is "no," the analysis ends. *Id.* If the answer is "yes," the court must then consider whether the defendant's actions were objectively unreasonable in light of "clearly established law" at the time of the conduct in question. *Id.*; *Barfield v. La.*, 325 F. App'x 292, 294 (5th Cir. 2009) (per curiam).

In order for a right to be clearly established, it must be clear to a reasonable official in light of the information then available that his or her conduct was unlawful. *Barfield*, 325 F. App'x at 294. "It is important to emphasize that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). There is no general constitutional right to receive medical care at a public hospital and no general constitutional right to receive non-negligent care, much less a "clearly established" constitutional right to bring a § 1983 claim for lack of care or incompetent care. *See supra* at A.2.

"There are no cases that present facts similar to [Mr. Ohakweh's] situation that would make it clear" to an objectively reasonable official in the Baylor Appellees' shoes that their conduct

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[67] "Although nominally an affirmative defense," the plaintiff has the burden to negate the assertion of qualified immunity once properly raised. *Brumfield*, 551 F.3d at 326.

was unlawful in the situation they confronted. *Carver v. City of Cincinnati*, 474 F.3d 283, 287 (6th Cir. 2007) (holding that officers who found decedent unconscious and failed to treat him or have him transported to a medical facility were entitled to qualified immunity).

In the District Court's words, "[e]ven if negligence amounted to a constitutional violation, the constitutional right violated wouldn't qualify as 'clearly established.'"[68] The District Court thus correctly held that the individual Baylor Appellees are entitled to qualified immunity.

5. Appellants' sovereign immunity argument is self-defeating

In *Klein v. Hernandez*, 315 S.W.3d 1, 8 (Tex. 2010), the Texas Supreme Court held that Chapter 312 of the Texas Health and Safety Code makes "Baylor a 'state agency' for certain purposes, including its services at Ben Taub," and makes Baylor's employees state employees for those same purposes. *See* Tex. Health & Safety Code Ann. §§ 312.006, .007 (West 2017).

In issue 1(a)(iv), Appellants argue that "Baylor should be treated as a person, and unentitled to sovereign or immunity [sic], for the sake of the § 1983 and § 1985 claims in this case because

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[68] ROA.12688 n.5.

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." App. Br. at 36–37. Frankly, Appellants' argument makes no sense.

If Appellants are arguing that Baylor should be treated as a private medical school, then Baylor and the individual Baylor Appellees are not state actors potentially subject to § 1983 liability. If Baylor is a state agency for purposes of its activities at Ben Taub, as Appellants have repeatedly alleged, Baylor is not a "person" subject to liability under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983."); *see* 42 U.S.C. § 1983 (applying to "[e]very person" who acts under color of state law).

In conceding that Baylor is a state agency for purposes of its activities at Ben Taub, therefore, Appellants are conceding yet another reason why their § 1983 claims against Baylor fail as a matter of law.

B. Appellants' state tort claims are barred as a matter of law

Appellants' brief is not a model of clarity as to what issues they are presenting for review. *See* App. Br. at 9–11. In particular, it is not clear from Appellants' "Issue 1" whether they are complaining on appeal about the District Court's dismissal of their state law tort

claims against the Baylor Appellees, or only its dismissal of their federal claims.

In their heading for issue 1(a), for example, Appellants raise only "42 U.S.C. § 1983, § 1985, and § 1395dd." *Id.* at 19 (emphasis omitted). Yet as part of issue 1(a), Appellants also claim that the "TTCA does not apply against the individual Appellees for the battery, fraud, and conspiracy to commit battery and fraud," and "does not apply to discretionary duties." *Id.* at 20. The Baylor Appellees therefore address the District Court's dismissal of Appellants' state law claims.

If a suit is filed "under [the TTCA]" against both a state agency "and any of its employees, the employees shall immediately be dismissed on a filing of a motion by the state agency." Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e) (West 2011). *All* tort theories alleged against a state agency are assumed to be under the TTCA for purposes of section 101.106, including for discretionary duties and intentional torts. *Mission Consol. Indep. Sch. Dist.*, 253 S.W.3d 653, 658–59 (Tex. 2008); *Univ. of Tex. Health Sci. Ctr. at Houston v. Crowder*, 349 S.W.3d 640, 649 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Singleton v. Casteel*, 267 S.W.3d 547, 554–55 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

Again, Baylor is a state agency, and its employees are employees of a state agency, for purposes of their services at Ben

Taub. Tex. Health & Safety Code Ann. §§ 312.006, .007 (West 2017); *Klein*, 315 S.W.3d at 8. The District Court was thus required as a matter of law to dismiss Appellants' state law claims against the individual Baylor Appellees.

Likewise, Appellants' state law claims against Baylor itself are barred by law. Baylor is immune from suit and liability and a court lacks subject matter jurisdiction for state law tort claims "unless the [TTCA] expressly waives immunity." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224–25 (Tex. 2004). In pertinent part, the TTCA "waives immunity for injuries caused by the negligent use of tangible property." *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014); *see* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (West 2011). "The limited waiver does not apply to intentional torts." *City of Watauga*, 434 S.W.3d at 589.[69] Appellants' Twelfth Complaint does not include any allegation about a condition or use of tangible property causing Mr. Ohakweh's alleged injuries.[70]

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[69] Appellants misunderstand *City of Watauga* as allowing liability for intentional torts, rather than precluding liability. *See* App. Br. at 20.

[70] *See* ROA.208–84; *see also* ROA.12687 at n.4 ("Plaintiffs['] boilerplate recitation of the words in § 101.021 of the Texas Civil Practice and Remedies Code is insufficient to bring Plaintiffs' allegation within the waiver of immunity for injuries caused by a condition or use of tangible personal property or real property because the pleadings fail to identify what property was allegedly used by a governmental unit's employee, or how such property was the instrumentality of the harm—as opposed to just being involved when the harm occurred.") (citing *Univ. of Tex. M.D. Anderson Cancer Ctr. v. King*, 329 S.W.3d 876, 881–82 (Tex. App.—Houston [14th Dist.] 2010, pet. denied)).

Appellants admit as much in their brief on appeal. *See* App. Br. at 20 (agreeing that non-use of tangible property does not allow for liability under the TTCA, "e.g. failure to treat Decedent in the first and second hospital visit").

The District Court thus did not err in dismissing Appellants' state law tort claims.

C. The "*Miller* doctrine" is irrelevant—it concerns care of newborns without parental consent

In their second issue, Appellants argue that *Miller ex. rel Miller v. HCA, Inc.*, 118 S.W.3d 758 (Tex. 2003), created a doctrine under which "a person is not entitled to life-sustaining treatment once their prognosis is dim." App. Br. at 53–54.[71] Although it is difficult to decipher Appellants' argument, they apparently contend that the District Court applied the so-called "*Miller* doctrine" in this case, and that the doctrine is unconstitutional. *See id.*

In fact, the District Court did *not* cite *Miller* in any of its dismissal orders.[72] Moreover, neither the Baylor Appellees nor the

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[71] Appellants cite the lower court opinion in their brief, rather than the Texas Supreme Court's opinion. *See* App. Br. at 53 (citing "*Miller ex. rel Miller v. HCA, Inc.*, 36 S.W.3d 187, 194 (Tex. App.—Houston 2000)"). The correct citation for the lower court's opinion is *HCA, Inc. v. Miller ex. rel Miller*, 36 S.W.3d 187 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, *Miller ex. rel Miller v. HCA, Inc.*, 118 S.W.3d 758 (Tex. 2003).

[72] *See* ROA.12685–88, 12689–92, 12693–97.

other Appellees cited *Miller* in their motions to dismiss.[73] Appellees and the District Court did not rely upon *Miller* because it has no relevance at all to this case.

Appellants are badly misreading *Miller*, which concerned the provision of life-sustaining medical treatment to a newborn infant without parental consent. As the first sentence of the Texas Supreme Court's opinion makes explicit, the "narrow question" in *Miller* was "whether Texas law recognizes a claim by parents for either battery or negligence because their premature infant, born alive but in distress at only twenty-three weeks of gestation, was provided resuscitative medical treatment by physicians at a hospital without parental consent." *Miller*, 118 S.W.3d at 761.

The *Miller* court held that the particular circumstances[74] of the case provided "an exception to the general rule imposing liability on a physician for treating a child without consent." *Id.* That exception eliminated the claim for battery. *Id.* The court further concluded

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[73] *See* ROA.10788–811; ROA.10879–901; ROA.10902–19.

[74] The *Miller* court identified two circumstances. First, there was no dispute that the infant could not be fully evaluated until birth. *Miller*, 118 S.W.3d at 761. As a result, any decisions concerning treatment for the child "would not be fully informed decisions until birth." *Id.* "Second, the evidence further established that once the infant was born, the physician attending the birth was faced with emergent circumstances—*i.e.*, the child might survive with treatment but would likely die if treatment was not provided before either parental consent or a court order overriding the withholding of such consent could be obtained."

that the plaintiffs' negligence claim, which was "premised not on any physician's negligence in treating the infant but on the hospital's policies, or lack thereof, permitting a physician to treat their infant without parental consent," failed "as a matter of law for the same reasons." *Id.*

Unlike *Miller*, this case involves allegations of "withholding and withdrawing necessary essential medical care" from a 64-year-old man suffering from cancer. App. Br. at 54. Which is why the District Court (rightly) did not cite, much less rely upon *Miller*, in dismissing Appellants' claims. Appellants' issue 2 must therefore be denied.

D. The District Court did not abuse its discretion in denying leave to file a Thirteenth Amended Complaint

Appellants complain in their third issue that the District Court erred in denying them leave to amend to file the proposed Thirteenth Amended Complaint. *See* App. Br. at 54–59.

Denial of a motion for leave to amend is reviewed for abuse of discretion. *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016). "Although leave to amend under Rule 15(a) is to be freely given, that generous standard is tempered by the necessary power of a district court to manage a case." *Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170, 177 (5th Cir. 2016). The district court "may consider a variety of factors including undue delay, bad faith or dilatory motive

on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment." *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014).

"[A] district court need not grant a futile motion to amend." *Legate*, 822 F.3d at 211. "Futility is determined under Rule 12(b)(6) standards, meaning an amendment is considered futile if it would fail to state a claim upon which relief could be granted." *Id.* at 211–12 (affirming denial of leave to amend as futile).[75]

The various iterations of Appellants' proposed Thirteenth Amended Complaint sought to add claims against twenty additional Baylor physicians for alleged medical negligence.[76] Allowing Appellants to add these claims would have been futile for the same reasons that the District Court dismissed Appellants' claims against the individual Baylor Appellees in the Twelfth Amended

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[75] The District Court gave Appellants until June 17, 2016, to file a last, final version of their motion for leave. *See* ROA.12 (Minute Entry 06/03/2016). Appellants filed an amended motion for leave (Doc. #41) on June 7, and this was the last version filed before the deadline. *See* ROA.13. The Baylor Appellees raised futility in their July 7, 2016, response to Appellants' motion for leave. *See* ROA.4017. Appellants complain that "Appellees never alleged futility in any responses to the 4th Amended motion for leave to amend petition." App. Br. at 56. But Appellants did not file the "4th Amended motion" until August 23, 2016, more than two months after the District Court's deadline. *See* ROA.8824 (Doc. # 161). In any event, the District Court was entitled to consider futility sua sponte.

[76] *See* ROA.4020–31 (summarizing Appellants' allegations).

Complaint—because allegations of medical malpractice do not rise to the level of a constitutional claim, and because Appellants' tort claims were barred by state law. *See supra* at A.2., B.

Appellants' proposed Thirteenth Amended Complaint also sought to add a new cause of action under 42 U.S.C. § 1985 against all defendants.[77] Allowing this claim would have been futile as well. § 1985 "creates a private civil remedy for three prohibited forms of conspiracy to interfere with civil rights." *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 149 (5th Cir. 2010).[78] "Plaintiffs who assert conspiracy claims under civil rights statutes must plead the operative facts upon which their claim is based. Bald allegations that a conspiracy existed are insufficient." *Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Par.*, 289 F. App'x. 22, 33 (5th Cir. 2008).[79]

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[77] *See* ROA.4020–31 (summarizing Appellants' allegations).

[78] "Subsection (1) prohibits conspiracies to prevent federal officers from performing the duties of their offices 'by force, intimidation, or threat.'" *Montoya*, 614 F.3d at 149 (quoting § 1985(1)). "Subsection (2) concerns conspiracies directed at the right of participation in federal judicial proceedings." *Id.* "Subsection (3) prohibits conspiracies to 'depriv[e] . . . any person or class of persons the equal protection of the laws' and those aimed at preventing a person from lawfully voting." *Id.* (quoting § 1985(3)) (brackets and ellipses in original).

[79] *See also Laws v. Hughes*, 616 F. App'x 200, 201 (5th Cir. 2015) (per curiam) (recognizing that "conclusory allegations that the defendants fraudulently conspired to violate" constitutional rights "fail to state a nonfrivolous claim for relief."); *Young v. Biggers*, 938 F.2d 565, 569 & n.6 (5th Cir.1991) (holding that the plaintiff failed to allege any operative facts because the complaint lacked any specific allegations connecting the defendants to a conspiracy).

But bald allegations were all that Appellants offered in their proposed Third Amended Complaint.

The Thirteenth Amended Complaint "neither elaborates nor substantiates its bald claims" that Appellees conspired with one another. *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980) (holding that complaint which neither elaborated nor substantiated bald claims that the defendants conspired with one another to commit plaintiff unlawfully to a state hospital was insufficient to state a § 1985 claim).

In addition to properly denying leave to amend on the basis of futility, the District Court did not abuse its discretion in denying Appellants leave to file their proposed Thirteenth Amended Complaint because it would prejudice Appellees, and because Appellants had already taken multiple opportunities to amend their live complaint. *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998) (holding that denial of leave to amend complaint was not abuse of discretion when plaintiffs had three opportunities to articulate damage theory adequately and failed to do so, making it unfair to subject defendant to further costs of litigation).

It would be a gross understatement to say that Appellants had ample opportunity to plead their claims against Appellees—and took more than full advantage to Appellees' prejudice. Appellants' serial filing amounted to harassment. The District Court's order denying

Appellants leave to amend their complaint a thirteenth time should be affirmed.

E. The District Court did not abuse its discretion in enforcing its stay order

In their fourth and final issue, Appellants complain about the District Court's order (ROA.12077) striking the thirty-six documents that Appellants filed after, and in addition to, their responses to Appellees' motions to dismiss. Appellants argue that the District Court abused its discretion by striking "evidence in defense of the Appellees' 12(b)(6) motions." App. Br. at 60. Appellants further complain that they should have had 21 days to respond to Appellees' motion to strike. *Id.*

No evidence was needed to decide Appellees' motions "because those motions 'are decided on the face of the complaint.'" *Wilson*, 2017 WL 4812579, at *2 (quoting *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404, 435 (5th Cir. 1990)). In any event, Appellants ignore the District Court's explanation of *why* it was striking Appellants' filings: Appellants' "direct violation of this Court's Order staying the case."[80]

District courts possess the inherent power to control their dockets. *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216,

[80] ROA.12077.

218 (5th Cir. 1998). "This includes the power to strike items from the docket as a sanction for litigation conduct." *Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010).[81] Appellants' litigation conduct was certainly worthy of such a sanction (and even more). *Cf. Chung v. KPMG LLP*, 104 F. App'x. 576, 577–78 (7th Cir. 2004) (holding that plaintiff's attempt to bring in new defendants, "coupled with her history of redundant, confusing, and harassing filings, more than adequately" supported the district court's finding of gross abuse of the judicial process, warranting sanctions of dismissal).

The District Court repeatedly warned Appellants against their multitudinous, excessive filings, and even had to sanction Appellants' counsel for his conduct. Yet Appellants continued to disregard the District Court's orders, filing at least thirty-six documents in direct violation of its stay order. Striking these improperly-filed documents was the least restrictive and most appropriate sanction. Lesser sanctions had failed to deter Appellants

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[81] *See also Adobe Sys. Inc. v. Christenson*, 891 F. Supp. 2d 1194, 1201 (D. Nev. 2012), *aff'd*, 809 F.3d 1071 (9th Cir. 2015) ("It is well-established that a district court's inherent power to control its docket and to enforce its rules includes the power to strike items from the docket as a sanction for litigation conduct. Such power is indispensable to the court's ability to enforce its orders, manage its docket, and regulate insubordinate attorney conduct."); *Powell v. Dallas Morning News L.P.*, 776 F. Supp. 2d 240, 246 (N.D. Tex. 2011) (granting motion to strike improperly filed document).

and their counsel from repeatedly engaging in inappropriate litigation conduct, and the documents stricken were unnecessary to decide Appellees' motions to dismiss.

The District Court thus did not abuse its discretion in enforcing its stay order by striking the documents filed in violation of the order.

Conclusion

The District Court's judgment should be affirmed in all respects.

November 20, 2017

Respectfully submitted,

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Certificate Of Service

I hereby certify that on November 20, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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Certificate Of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook (12-point for footnotes).

Dated: November 20, 2017

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