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

v.

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

v.

MARTHA P. MIMS; SANTIAGO LOPEZ; ANISHA GUPTA; WILLIAM ROBERT GRAHAM; LYDIA JANE SHARP; XIAOMING JIA; SUDHA YARLAGADDA; ANITA 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 CUNTY HOSPITAL DISTRICT; JOHN MICHAEL HALPHEN; BARBARA JOHNSON

Defendants – Appellees

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF OF APPELLEE'S JOHN MICHAEL HALPHEN, M.D.

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Certificate of Interested Parties

(1) No. 17-20259, *Emily-Jean Aguocha-Ohakweh, et al. v. Baylor College of Medicine, Harris Health System, et al*., Fifth Circuit Court of Appeals.

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

Appellants (Plaintiffs):
Bethrand Ohakweh
Emily-Jean Aguocha-Ohakweh
Philomina Ohakweh
Cynthia Chizoba Ohakweh
Obinna Ohakweh
Chukwunenye Ohakweh
Chisom Ohakweh,
Decedent, Doctor Alphaeus Ohakweh

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Additional Appellees (Defendants):
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Joslyn Fisher
Anisha Gupta
William Robert Graham
Wayne X. Shandera
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Veronica Vittone
Jared Jung-Taek Lee
Holly J. Bentz
Doris Lin
Christina C. Kao
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Additional Appellees (Defendant):
Harris County Hospital District, d/b/a Harris Health System, d/b/a Ben Taub Hospital

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/s/ John R. Strawn, Jr.
John R. Strawn, Jr.
Attorney of record for Defendant-Appellee
John Michael Halphen, M.D.

Statement Regarding Oral Argument

Appellee Dr. Halphen believes that the facts and legal arguments are adequately presented in the briefs and record, and that the District Court's dismissal of the Appellees' claims should be affirmed without oral argument. However, Appellee would request the opportunity to present oral argument if the Court determines that the decisional process would be aided by oral argument.

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Rules

Statutes

Defendant-Appellee JOHN MICHAEL HALPHEN, M.D. ("Dr. Halphen"), in his individual and official capacities, files this brief in response to the brief filed by Appellants Emily-Jean Aguocha-Ohakweh, et al ("Plaintiffs"). Dr. Halphen respectfully shows the following:

Counter-Statement of the Issues for Review

1. Did Plaintiffs fail to plead a 42 U.S.C. § 1983 claim against Dr. Halphen because Plaintiffs failed to allege that Dr. Halphen violated any rights secured by the Constitution or the laws of the United States?

2. Did Plaintiffs fail to adequately allege any conspiracy on the part of Dr. Halphen to violate Mr. Ohakweh's civil rights because they failed to adequately allege any underlying violation of Mr. Ohakweh's rights?

3. To any extent that Plaintiffs purported to assert claims under 42 U.S.C. § 1983 against Dr. Halphen in his official capacity, were those claims also barred by the Eleventh Amendment?

4. To any extent that Plaintiffs purported to assert claims under 42 U.S.C. § 1983 against Dr. Halphen in his individual capacity, were those claims also barred by the doctrines of absolute and qualified immunity?

5. To any extent that Plaintiffs purported to assert any claims under the Emergency Treatment and Active Labor Act ("EMTALA") against Dr. Halphen,

were those claims properly dismissed because EMTALA creates no private right of action against individual physicians?

6. To any extent that Plaintiffs purported to assert any state law claims against Dr. Halphen, were these claims, including any declaratory judgment claim, non-suited or, alternatively, properly dismissed under Tex. Civ. Prac. & Rem. Code §101.106(f)?

Statement of the Case

Plaintiffs originally brought claims in Texas state court against nineteen (19) healthcare providers, their employer Baylor College of Medicine ("Baylor"), and the Harris Health System for medical negligence allegedly resulting in the death of Plaintiff's decedent Aphaeus Ohakweh. Plaintiffs also sued Dr. Halphen, an employee of the University of Texas Health Science Center-Houston, based solely upon his role as the chairman of the Harris Health System Ethics Committee. Prior to removal of the state case to federal court below on April 4, 2016, Plaintiffs amended their state court petition at least twelve times. After removal, Plaintiffs moved for leave to file a thirteenth amended complaint. Plaintiffs then proceeded to file more than forty different versions of their proposed thirteenth amended complaint. The District Court ultimately denied Plaintiffs' motion for leave to file their thirteenth amended complaint.

On March 24, 2017, District Judge Alfred Bennett granted Dr. Halphen's motion to dismiss. Plaintiffs appealed.

I. Facts

Plaintiffs' decedent Aphaeus Ohakweh was admitted to Ben Taub Hospital[1] on March 4, 2015, in need of treatment for AML – acute myeloid leukemia – a potentially fatal cancer that interferes with the production of normal red blood cells.[2] On March 6, 2015, while being intubated, Mr. Ohakweh's oxygen levels dropped significantly. Though an emergency tracheostomy was performed, he sustained anoxic brain damage. Mr. Ohakweh's condition made it impossible to treat his AML with chemotherapy. He lapsed into a persistent vegetative state and remained hospitalized at Ben Taub until his death due to AML on September 7, 2015.

As the result of Mr. Ohakweh's persistent vegetative state, his treating physicians recommended that no further measures be undertaken to resuscitate Mr. Ohakweh in the event that his condition declined further. Though informed of this recommendation, Mr. Ohakweh's family representatives refused to authorize this level of care.

[1] Ben Taub is one of the Harris County Hospital District's public hospitals. The hospital is staffed with faculty physicians, residents and fellows from Baylor College of Medicine.

[2] Mr. Ohakweh was originally diagnosed with AML and treated with chemotherapy in an earlier Ben Taub admission in December 2013.

After weeks of continued supportive care with no improvement to Mr. Ohakweh's condition, the Harris Health System convened an Ethics Committee in July 2015 pursuant to Texas Health & Safety Code section 166.046. Dr. Halphen chaired this Committee.

On July 24, 2015, the Ethics Committee met with the patient's family representatives and the treating physicians. After considering the facts, the Committee recommended that no heroic resuscitation efforts be implemented for Mr. Ohakweh, due to his persistent vegetative state and the very high likelihood that Mr. Ohakweh's condition would in no event improve. The family representatives were advised of the right to transfer Alphaeus Ohakweh to other facilities, and also of their right to appeal the Ethics Committee decision to the Texas probate court within ten (10) days. Dr. Halphen even postponed implementation of decision for an additional week to give the family more time to consider all relevant factors.

After the family declined to transfer Mr. Ohakweh or to agree to the proposed level of care, the Ethics Committee voted to authorize the treating physicians not to institute further dialysis or CPR. The family representatives were advised of the Ethics Committee's determination, which became effective August 20, 2015. See 12th Pet. (ROA.208-285, at 39-41). Plaintiffs admit they received

the notification of this determination from the Ethics Committee. 12th Pet. (ROA.208-285, at 41). Plaintiffs filed no appeal with the probate court.

Notably – consistent with the Ethics Committee's recommendations – no medical care was ever withdrawn from Mr. Ohakweh. The Plaintiffs' decedent Mr. Ohakweh ultimately passed away on September 7, 2015.

Prior to the convening of the Ethics Committee, Dr. Halphen had no interaction or involvement with Mr. Ohakweh, his family or his physicians. In particular, Dr. Halphen was not involved in treatment decisions, the bronchoscopy, the tracheostomy or any other medical care provided to the decedent. Dr. Halphen never rendered any medical treatment of any type to Mr. Ohakweh.

II. Procedural history

A. Procedural history of the case below, No. 4:16-cv-903

Plaintiffs filed their Original Petition on December 21, 2015, in Harris County district court and subsequently amended their petition twelve times before the case was removed to federal court. Plaintiffs' 12th Amendment to Original Petition ("12th Petition") (Exhibit No. 1, pages 152-229) (ROA.208-285) was the operative pleading at the time of removal, and remained the live pleading at the time of the orders subject of this appeal.

The 12th Petition named Baylor, 18 Baylor physicians and Baylor Risk Management Department employee Barbara Johnson as Defendants. In addition,

the Petition named the Harris County Hospital District ("HCHD") and John Michael Halphen, M.D., as Defendants. Plaintiffs alleged that "Defendants negligently, gross negligently (sic), intentionally, knowingly, maliciously or with criminal negligence killed" Mr. Ohakweh while acting in a conspiracy to deprive him of his constitutional rights. (ROA.208-285, p. 46).

After the case below was removed to federal court, Plaintiffs filed a Motion for Leave to Amend Petition ("Motion for Leave") on May 13, 2016, (ROA.419-420) and attached as Ex. A their proposed Thirteenth Amendment to Original Petition ("13th Petition"). (ROA.421-532). The proposed amendment sought to: (1) add twenty additional Baylor physicians and a second risk management employee as Defendants, (2) add seven additional HCHD employees as Defendants, and (3) assert numerous new causes of action not found in the 12th Petition.

After filing the Motion for Leave, Plaintiffs then proceeded to file five "amended" versions of the original, proposed 13th Petition originally attached as Ex. A to the Motion. On June 3, 2016, the Court held a status conference. At this conference, the District Court directed Plaintiffs' counsel to file the final version of the 13th Amended Petition within fourteen days. (Minute Entry of 6/3/16 at ROA.12). Beginning on June 7, 2016, Plaintiffs filed eight "corrected" versions of the proposed 13th Petition during this fourteen-day period. The last of these was

the "8th Corrected Exhibit A," filed at 4:32 a.m. on Friday June 17th. (ROA.3473-3612).

Defendants filed Responses in Opposition to Plaintiffs' May 13th Motion for Leave addressing the "8th Corrected 13th Petition." (ROA.4014-118, 4119-37, 4138-46). At a subsequent August 26, 2016 status conference, the Court stayed the case and ordered that no additional filings be made until further notice. (Minute Entry of 8/26/16, at ROA.30).

On August 31, 2016, the District Court denied the Motion for Leave to file the 13th Petition. (ROA.9030-9033). The Court determined that the state and federal law causes of action which would be asserted against the proposed new Defendants were futile. *Id.* The Court also held that Plaintiffs' proposed additional causes of action, including the purported causes under the Federal Declaratory Judgment Act, the Fair Debt Collection Act, the Texas Human Resources Code, as well as purported claims for class action certification, breach of fiduciary duty and conspiracy, would be futile. *Id.*

On August 31, 2016, the District Court granted Defendants permission to file dispositive motions directed to the 12th Petition. (ROA.9030-9033). Despite the District Court's earlier August 26th stay of additional filings, however, between August 31st and September 15th Plaintiffs' counsel filed an additional thirty (30) motions, notices or proposed orders, including multiple Motions to

Consolidate. (ROA.9034-10122 and ROA.10125-10145). Plaintiffs' last Motion to Consolidate, filed September 8, 2016, sought to consolidate the action below with another action in the Southern District which the Plaintiff's counsel had by then filed, No. 4:16-cv-1704. (ROA.10090-10110).

B. Procedural history of the separate case, No. 4:16-cv-1704

On April 30, 2016, approximately one month after the case below was removed to federal court, Plaintiffs filed a separate sealed complaint against Defendants purporting to bring action under the Federal False Claims Act ("FCA"), 31 U.S.C. § 3729. Defendants had no notice of this filing. The sealed complaint was assigned Civil Action No. 4:16-mc-964) (ROA.13170-13236). Ultimately, the Department of Justice declined to intervene, permitting Plaintiffs to pursue the case.

While the original complaint in No. 4:16-mc-964 apparently remained under seal, unsealed pleadings (beginning with Mr. Adimora-Nweke's June 10, 2016 Motion to Appear Pro Hac Vice) were filed in a case numbered 4:16-cv-1704. (Doc. #2). This case was assigned to Judge Vanessa Gilmore. Defendants also were not served in No. 4:16-cv-1704, and filings in that case were made without the Court's receiving responses from Defendants.

Plaintiffs filed a Motion for Leave to Amend Pleading to file a First Amended Complaint on June 10, 2016 (Doc. #3). The Court granted this Motion

on June 13th. (Doc. #4). Plaintiffs also filed a Second Motion for Leave to Amend Pleading to file a Second Amended Complaint on August 27, 2016 (ROA.13274-13384). The Court granted this Motion on August 30th. (ROA.13716).

In their Second Motion for Leave to Amend Pleading No. 4:16-cv-1704, Plaintiffs requested in their Prayer section that the "Court grant their motion for leave to amend pleading," to file the attached Ex. A as their "Amended Pleading." (ROA.13274-13384). The Ex. A originally attached to the Second Motion, styled a Second Amendment to False Claims Act Complaint, was 105 pages in length and sought recovery under the FCA, an analogous Texas false claims act and an anti-kickback statute. (ROA.13274-13384 at 5, 108-109. Plaintiffs filed this Second Motion for Leave to Amend in No. 4:16-cv-1704 on August 27, 2016 – before the Court below issued its August 31, 2016 Order denying Plaintiffs' leave to amend to file the 13th Petition No. 4:16-cv-903.

After Judge Gilmore granted Plaintiffs' Second Motion for Leave to Amend No. 4:16-cv-1704 on August 30th, and after Plaintiffs' counsel received the August 31st Order in the action below denying leave to amend in No. 4:16-cv-903, Plaintiffs' counsel then filed a Second Amendment to Original Complaint in No. 4:16-cv-1704 on September 8, 2016. (ROA.13717-13893). This proposed amended complaint, however, was not the 105-page amended complaint previously

attached as Ex. A to the Second Motion for Leave to Amend. Instead, the proposed amended complaint Plaintiffs filed in No. 4:16-cv-1704 was a 177-page instrument containing – not only all the factual allegations from the 13th Petition in the case below, No. 4:16-cv-903, but also all of the new causes of action and almost all the additional parties[3] whom Plaintiffs unsuccessfully sought to add per their Motion for Leave filed in No. 4:16-cv-903. *See id.* (As noted, in its August 31, 2016 order, the Court below denied leave to file these new allegations against these proposed additional defendants.).

In other words – after being denied leave to amend to add these parties and claims in the Court below – Plaintiffs' counsel relabeled the denied 13th Petition in No. 4:16-cv-903 as Plaintiffs' Second Amendment to Original Complaint No. 4:16-cv-1704, tacked on additional claims and parties, and then filed it in Judge Gilmore's court in No. 4:16-cv-1704. Plaintiffs' counsel also did not seek leave from Judge Gilmore to substitute this entirely new pleading as the purported Second Amended Complaint.

[3] The Second Amendment to Original Complaint sought recovery under the Federal Declaratory Judgment Act, the Fair Debt Collection Act, Chapter 166 of the Health & Safety Code, the Texas Constitution, Chapter 102 of the Texas Human Resources Code, breach of fiduciary duty, battery, fraudulent misrepresentation and 42 USC § 1985 conspiracy, along with a class certification. (ROA.13717-13893). The Court below denied Plaintiffs leave to file these amendments. (ROA.9030-9033, at 2-3). This purported Second Amendment to Original Complaint also named all seven HCHD employees, and all but four of the twenty Baylor physicians, whom Plaintiffs had proposed, but were denied leave, to add in the 13th Petition in the Court below.

In addition, on August 31, 2016 – the same day that Plaintiffs' counsel received notice that the Motion for Leave in No. 4:16-cv-903 was denied – Plaintiffs filed a Motion for Declaratory Judgment (ROA.13615-13715) and Motion for Class Certification (ROA.13572-13597) in No. 4:16-cv-1704. These motions were virtually identical to the same types of motions that Plaintiffs' counsel had already filed in the action below prior to the termination of those District Court proceedings.[4]

C. Additional procedural history in the case below, No. 4:16-cv-903

On September 9, 2016, the Court below conducted a scheduled motion hearing. (Minute Entry of 6/3/16, at ROA.12). Plaintiffs' counsel Mr. Adimora-Nweke failed to attend.[5] The Court then issued a show cause order (ROA.10123-10124) requiring Plaintiffs' counsel to appear and show why he should not be held

[4] Plaintiffs' counsel also filed a motion in Judge Gilmore's Court to transfer No. 4:16-cv-1704 to the Court below. (ROA.13244-13250) Plaintiffs argued transfer was proper "in order not (sic) to avoid unnecessary cost or delay in litigating over the same matter, against the same parties yet in two different proceedings ... ." *See* (ROA.13244-13250, at 3). Judge Gilmore denied the motion, stating "[t]he motion to consolidate must be filed in Cause No. 16-903." *See* (ROA.13273).
Defendants also filed a Joint Response to Plaintiffs' Corrected Motion to Consolidate in the action below requesting (1) that No. 4:16-cv-1704 be consolidated with No. 4:16-cv-903 in Judge Bennett's Court, (2) that the 177-page Second Amendment to Original Complaint, (ROA.13717-13893) filed in No. 4:16-cv-1704 be stricken and that the operative complaint in No. 4:16-cv-1704 be the Second Amendment to False Claims Act Complaint, Exhibit A to (ROA.13276-13383) and (3) that service of process on all Defendants and discovery be stayed until Defendants had the opportunity to file dispositive motions. *See* (ROA.10146-10162).

[5] Plaintiffs' counsel subsequently filed a letter seeking to explain his absence, stating that he believed there was no hearing on the docket and that he was attending to "international matters." (ROA.10111-10115).

in contempt for violating the Court's August 26 Order staying the case,[6] and also for failing to appear at the September 9, 2016 hearing.

On September 20, 2016, the Court found Plaintiffs' counsel in contempt and entered a sanctions order requiring counsel to (1) pay a $500.00 fine, (2) attend a class for electronic case filing, and (3) secure associate counsel who was admitted to practice in the Southern District of Texas and Board Certified. (Minute Entry of 9/20/16, at ROA.35). The Order also warned that counsel's Pro Hac Vice status would be revoked if he failed to strictly comply. (ROA.10673-10674).[7] On September 21, 2016, the Court issued an Order staying the case for an additional sixty days, excepting from this Order the previously-granted leave to file dispositive motions addressing the Plaintiffs' 12th Petition. (ROA.10778).

On October 14, 2016, Defendants filed their dispositive motions, including the Baylor Defendants' Motion to Dismiss the 12th Petition Pursuant to Rule 12(b) (ROA.10788-10878), the Harris County Hospital District's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b) (ROA.10879-10901), and John Halphen, M.D.'s Rule 12(b)(6) Motion to Dismiss (ROA.10902-10923). On October 27, 2016, the Court conducted a status conference and clarified that

[6] The Court observed that Plaintiffs' counsel had filed eighteen different Motions and Amendments/Supplements to his Motions in the nine days following the August 26 Order staying any additional filings. (Notably, the Court had entered August 26 order specifically to address Plaintiffs' counsel's excessive filings. (ROA.10123-10124)).

[7] The Court further explained that "Mr. Adimora-Nweke's actions were hindering the effective administration of this case and bordering on open disrespect for this Court and its orders." (ROA.10673-10674).

Plaintiffs would be permitted to file *one* response to each of the Defendant's Motion to Dismiss and that each Defendant would then be allowed to file *one* reply to the response.[8] Subsequently, Plaintiffs' counsel filed a Response to Baylor Defendants' Motion to Dismiss (ROA.11014-11035), a Response to Harris County Hospital District's Motion to Dismiss (ROA.10924-10944), and a Response to John Michael Halphen, M.D.'s Motion to Dismiss (ROA.10957-10967). However, Plaintiffs' counsel also filed a total of thirty-six other documents relating to Defendants' Motions to Dismiss during the Stay period.[9]

[8] At the October 27 conference, the Court also granted Plaintiffs' counsel partial relief from the earlier September 20 Sanctions Order, in that the Court no longer required that Plaintiffs' counsel associate with co-counsel who was Board-Certified. However, the Court maintained that Plaintiffs' counsel must associate with co-counsel who was admitted to practice in the Southern District of Texas. (*See* Minute Entry of 10/27/16, at ROA.37).

[9] Other than Plaintiffs' Responses to Defendants' Motions to Dismiss, Plaintiffs' counsel also filed the following documents:

- Ten filings constituting either Amended or Supplemental Responses to the Defendants' Motions to Dismiss or Sur-replies to Defendants' Replies to Plaintiffs' Responses to Defendants' Motions to Dismiss, (ROA.10945-48, ROA.10949-52, ROA.10953-56, ROA.10968-89, ROA.10990-1001, ROA.11002-13, ROA.11813-19, ROA.11820-23, ROA.11824-27 and ROA.11839-75);
- Ten filings described as "exhibits" to and "evidence" for the Responses to Defendants' Motions to Dismiss, (*see* Sealed Event, ROA.38), ROA.11036-325, ROA.11326-420, ROA.11421-45, ROA.11446-51, ROA.11458-500, ROA.11501-609, ROA.11610-709, ROA.11710-84, and ROA.11785-804);
- An affidavit for attorney fees, (ROA.11828-29);
- Nine "joinder" motions, (ROA.11876-905, ROA.11906-35, ROA.11936-66, ROA.11967-98, ROA.12002-08, ROA.12010-13, ROA.12014-20, ROA.12031-37, and ROA.12038-42), which seek to name virtually the same group of Baylor physicians and HCHD employees for whom leave to add was previously denied, and a 42 USC § 1985 cause of action for which leave to amend was denied; and
- Six proposed orders (ROA.12009, ROA.12021-22, ROA.12023-24, ROA.12025-26, ROA.12027-28 and ROA.12029-30).

Defendants filed their individual Replies to Plaintiffs' Responses to Defendants' Motions to Dismiss, *i.e.*, the Harris County Hospital District's Reply to Plaintiffs' Response to Motion to Dismiss (ROA.11452-11457), the Baylor Defendants' Reply to Plaintiffs' Response to Baylor Defendants' Motion to Dismiss (ROA.11805-11812), and John Halphen, M.D.'s Reply in Support of 12(b)(6) Motion to Dismiss (ROA.11830-11838). On November 28, 2016, Defendants also filed a Joint Motion to Strike or Clarify the Status of Plaintiffs' Filings during the 60 Day Stay Order, requesting the Court strike Plaintiffs' unauthorized filings or clarify whether Defendants should respond to them. (ROA.12069-12075). The Court granted Defendants' Joint Motion to Strike the thirty-six additional filings made in violation of the stay. (ROA.12077).

On December 2, 2016, the Court issued another show cause order, (ROA.12445-12446), requiring the Plaintiffs and Plaintiffs' counsel to appear on December 9, 2016.[10] After questioning Plaintiffs' counsel regarding his violation of the September 20th Sanctions Order and his violation of the September 21st Order staying the case, the Court revoked Plaintiffs counsel's Pro Hac Vice status

[10] The December 2nd Show Cause Order stated that Plaintiffs' counsel failed to comply with the September 20th Sanctions Order by failing to associate with new counsel, and had also violated the September 21st Order staying the case by filing thirty-six unauthorized documents.

and allowed Plaintiffs thirty days to obtain new counsel.[11] (Minute Entry of 12/9/16, at ROA.45).

On December 13, 2016, Judge Gilmore likewise revoked Mr. Adimora-Nweke's Pro Hac Vice status in No. 4:16-cv-1704. Judge Gilmore also consolidated No. 4:16-cv-1704 with the lead case No. 4:16-cv-903 for further proceedings in Judge Bennett's Court. (ROA.12461).

D. Post-consolidation procedural history

Plaintiffs' new counsel Jack N. Fuerst appeared for Plaintiffs on January 12, 2017. (Minute Entry of 1/12/17, at ROA.45). The Court permitted Plaintiffs' counsel thirty days to become familiar with the case, and scheduled a motion hearing for March 10, 2017. On February 14, 2017, however, Mr. Fuerst filed a Motion to Withdraw as Counsel of Record, stating that he was unable to effectively communicate with Plaintiffs. (ROA.12529-12532). Also on February 14, 2017, attorney Juliana Adelman filed a Motion to Appear Pro Hac Vice for Plaintiffs. (ROA.12533).[12]

While Mr. Fuerst was still Plaintiffs' appointed counsel, he filed a Motion to Cancel Service of Summons in Civil Action, and requested that the Court cancel

[11] The Court discussed events leading to its decision and explained that Plaintiffs' counsel's actions, 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. ..." (ROA.12457-12459, at 3).

[12] Ms. Adelman appears to have been associated with Plaintiffs' previous counsel Mr. Adimora-Nweke in that her address information stated that she could be reached "c/o Ernest C. Adimora-Nweke, Jr." at "Adimora Law Firm PLLC."

the service of summons in No. 4:16-cv-1704 for James Banfield, a Baylor Risk Management Department employee, because service on this party was in error. (ROA.12584-12586). Mr. Fuerst also filed the Plaintiffs' Unopposed Motion to Withdraw Second Amendment to Original Complaint, requesting that the Court strike the 177-page Second Amendment to Original Complaint (ROA.13717-13893) in No. 4:16-cv-1704 because it was filed without leave. (ROA.12588-12592). The Court granted both Motions. (ROA.12601-12602 and ROA.12642). The Plaintiffs' First Amended Complaint Doc. #6, thus became the operative petition in No. 4:16-cv-1704.[13]

On February 22, 2017, former Plaintiffs' counsel Mr. Adimora-Nweke filed another Motion to Appear Pro Hac Vice, (ROA.12535) – even though his Pro Hac Vice status had previously been revoked. The Court entered an Order March 7, 2017 denying Mr. Adimora-Nweke's Motion and two supplements to this Motion, (ROA.12536-12583 and ROA.12603-12607) for the same reasons detailed in the Court's earlier Order. (ROA.12457-12460). The Court also instructed the Clerk's

[13] The Court issued an Order granting Plaintiffs' Unopposed Motion to Withdraw Second Amendment to Original Complaint because Plaintiffs had only been granted leave to file the 105-page amended complaint – rather than the 177-page amended complaint filed without leave. (ROA.12601-12602). The Court's March 2 Order not only struck the 177-page Second Amendment to Original Complaint, (ROA.13717-13893), but also revoked leave to file the previously attached 105-page Second Amendment to False Claims Act Complaint. (ROA.13274-13384). Thus, the operative pleading in No. 4:16-cv-1704 became Plaintiffs' First Amended Complaint. (Doc. #6.)

office to refuse documents that Mr. Adimora-Nweke attempted to file. (ROA.12639-12640).

At a March 10, 2017 hearing, the Court considered Mr. Fuerst's Motion to Withdraw as well as Ms. Adelman's Motion to Appear Pro Hac Vice. After hearing arguments of counsel, the Court allowed Mr. Fuerst to withdraw as attorney of record, (ROA.12641), and also allowed Ms. Adelman to withdraw her Motion to Appear Pro Hac Vice. (Minute Entry of 3/10/17, at ROA.47). Plaintiffs were granted ten additional days from the date of hearing to obtain new counsel.

E. Dismissal of claims in No. 4:16-cv-903 and notice of appeal

On March 24, 2017, the Court considered and granted the Baylor Defendants' Motion to Dismiss the 12th Petition Pursuant to Rule 12(b), (ROA.12685-12688) the Harris County Hospital District's Motion to Dismiss, (ROA.12693-12697), and John Halphen, M.D.'s Motion to Dismiss, (ROA.12689-12692).

Plaintiffs Emily-Jean Aguocha-Ohakweh and Bethrand Ohakweh, acting as pro se litigants, filed two Motions for Relief from Judgment on April 7, 2017. (ROA.12698-12708 and ROA.12709-12732).[14] On April 10, 2017, the Court

[14] Former Plaintiffs' counsel Mr. Adimora-Nweke continued to file or attempt to file several documents after the Court revoked his Pro Hac Vice status. (*See* ROA.12645-84, ROA.12698-708, ROA.12709-732, and ROA.12733-849**).** The Court issued another show cause order requiring Mr. Adimora-Nweke to appear on April 18, 2017 to show cause why he should not be held in contempt and subject to monetary penalties and imprisonment for his continued unauthorized filings in violation of the Court's Order revoking his Pro Hac Vice status.

denied the Plaintiffs' Motions for Relief from Judgment, stating that Plaintiffs failed to identify any adequate grounds for reconsideration or relief. (ROA.12850-12851). The Court also denied the Plaintiffs' Motion to Amend Pleading (ROA.12733-12849), in the consolidated action No. 4:16-cv-1704 (ROA.12852).

On April 11, 2017, Plaintiffs filed a Notice of Appeal of the Orders of Dismissal and of the Orders denying Motion for Relief from Judgment in No. 4:16-cv-903. (ROA.12855-12858).[15]

Summary of Argument

Plaintiffs' live pleading in the District Court used the term "Defendants" indiscriminately in setting out the Plaintiffs' purported causes of action alleged. Given an extremely liberal reading of Plaintiffs' 12th Petition, the causes of action asserted against Dr. Halphen consisted of alleged violations of 42 U.S.C. 1983 and related conspiracy claims. Although other causes of action, including EMTALA, the declaratory judgment claims and state law claims appeared to be asserted only against Harris Health and Baylor parties, Dr. Halphen also addresses those claims here in an abundance of caution.

At bottom, the action below was no more than a purported medical negligence claim which the Plaintiffs sought to somehow recast alleged as federal

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(ROA.12853-54). Mr. Adimora-Nweke appeared at the show cause hearing on April 18, 2017, and the Court declined to order additional sanctions based on Mr. Adimora-Nweke's assurances that he would no longer attempt any filings because he no longer represented the Plaintiffs.

[15] Claims remain in No. 4:16-cv-1704.

constitutional deprivation. For the following reasons, Plaintiffs failed to state any claim on which relief could be granted, and the District Court's dismissal was proper:

1. Plaintiffs failed to adequately plead a 42 U.S.C. § 1983 claim against Dr. Halphen because Plaintiffs failed to allege that Dr. Halphen violated any rights secured by the Constitution or laws of the United States. Because there is no constitutional right to healthcare, Dr. Halphen could not have violated Mr. Ohakweh's rights.

2. Plaintiffs failed to adequately allege any conspiracy on the part of Dr. Halphen to violate Mr. Ohakweh's civil rights.

3. To any extent that Plaintiffs purported to assert 42 U.S.C. § 1983 claims against Dr. Halphen in his official capacity, those claims are barred by the Eleventh Amendment.

4. To any extent that Plaintiffs purported to assert 42 U.S.C. § 1983 claims against Dr. Halphen in his individual capacity, these claims are barred by the doctrines of absolute and qualified immunity.

5. To any extent that Plaintiffs purported to assert any claims under the Emergency Treatment and Active Labor Act ("EMTALA") against Dr. Halphen, those claims were properly dismissed because EMTALA creates no private right of action against individual physicians.

6. To any extent that Plaintiffs purported to assert state law claims against Dr. Halphen, those claims, including any declaratory judgment act claims, have been non-suited, or alternatively, were properly dismissed under Tex. Civ. Prac. & Rem. Code §101.106(f).

7. Dr. Halphen cannot have converted his Motion to Dismiss into a summary judgment motion because Dr. Halphen's Motion did not attach or incorporate anything outside the pleadings.

8. Judge Bennet did not abuse his discretion in denying leave to file a Thirteenth Amended Complaint.

Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), a complaint must meet two criteria: (1) it must assert a legally plausible claim, and (2) it must set forth sufficient factual allegations to support the claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Frith v. Guardian Life Ins. Co. of Am.*, 9 F.Supp.2d 734, 737-38 (S.D. Tex. 1998) (explaining that dismissal can be based on either a lack of cognizable legal theory or the absence of sufficient facts alleged under a legal theory). Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. 1949. Plausibility, not possibility or even conceivability, is required to survive a Rule 12(b)(6) motion to dismiss. *Twombly*, 550 U.S. at 556-67; *Iqbal*, 129 S. Ct. at 1950-51. Plausibility will not be found where the claim alleged in the complaint is based solely on legal conclusions or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Nor will plausibility be found where the complaint "'pleads facts that are merely consistent with a defendant's liability'" or where the complaint sets out "'naked assertions devoid of further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557).

A statement of facts which merely creates a suspicion that the pleader might have a right of action is insufficient to overcome a motion to dismiss. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). District courts should not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions. *Gentiello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010).

Additionally, "when a plaintiff sues a public official under 42 U.S.C. § 1983, the district court must insist on a heightened pleading by the plaintiff." *Morin v.*

Caire, 77 F.3d 116, 121 (5th Cir. 1996) (citing *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995)). Heightened pleading requires allegations of facts focusing specifically on the conduct of the individual who caused the plaintiff's injury. *Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir. 1999).

Argument

Plaintiffs' brief only rarely mentions Dr. Halphen or in any way attempts to articulate how Halphen could have any liability to Plaintiffs. In fact, Plaintiffs' brief's references to Dr. Halphen are limited to the following:

- Plaintiffs appear to argue that Dr. Halphen was somehow part of a "conspiracy" with the other Defendants. Specifically, Plaintiffs' brief states, "Harris Health is also subject to liability … for their policies and procedures … which it enacted and allowed upon its staff … *e.g.*, Halphen, Baylor executives and Baylor employees to leverage as a means to conspire for the purpose of directly or indirectly depriving appellants' of their … Constitutional and Federal statutory … rights." Appellants' Br. at 25. *See also id.* at 51 (same); *id.* at 56. ("Harris Health enacting policies and procedures in allowing their business partners, (*e.g.,* Halphen … and Baylor physician employee and executive Appellants) to leverage the policies and procedures to conspire … .)."

- Plaintiffs appear to argue that their claims against Dr. Halphen are not subject to the Texas Tort Claims Act. *See* Appellants' Br. at 31 ("Halphen's ethics board decision to DNR Decedent was a discretionary decision executed in his official capacity. Hence, [the] TTCA does not apply … .").

- Plaintiffs appear to argue that Dr. Halphen somehow converted his Rule 12(b)(6) motion into dismiss into a Rule 56 summary judgment motion. *See* Appellants' Br. at 27 ("Halphen['s] … Rule 12(b)(6) motion[] to dismiss included extrinsic evidence. … Hence their 12(b)(6) motions are treated as summary judgment motions under

> FRCP Rule 56 … .”). *See also id.* at 71 (“Appellants must be given reasonable time to provide this evidence in support of non-Harris Health Appellees’ 12(b)(6) motions equivalent summary judgment motions … .”); *see id.* at 73.

- Plaintiffs appear to argue that – even given the heightened pleading required of a plaintiff when asserting claims against a public official under 42 U.S.C. § 1983 – Dr. Halphen somehow had adequate notice of his involvement in some type of conspiracy. *See* Appellants’ Br. at 69 (“Appellants’ ‘FACTS’ sections, allege enough details – *i.e.,* time, place, existence of a partnership … . Halphen’s role is detailed, with his name mentioned in the ‘Facts’ section.”).

Even if District Court accepted the allegations in Plaintiffs’ 12th Petition as true, it is undisputed that Dr. Halphen was not involved in any direct medical care provided to the decedent Mr. Ohakweh. Rather, Plaintiffs’ claims against Dr. Halphen were based solely on his service as the Chairman of Ethics Committee. Plaintiffs made no allegations that Dr. Halphen in any way participated in the medical care and treatment provided to Mr. Ohakweh. Plaintiffs also admitted that, at all relevant times, Dr. Halphen was an employee of the University of Texas Health Science Center in Houston. *See* proposed Pl. 13th Am. Compl (*See* ROA.421-532, at ¶17). The uncontroverted facts show the District Court’s order of dismissal should be affirmed.

I. Plaintiffs failed to allege a Constitutional violation as required to support a 42 U.S.C. § 1983 claim.

To state a claim under 42 U.S.C. § 1983, a plaintiff must first show a violation of the Constitution or federal law, and then also show that the violation

was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48-50 (1988). Section 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 v. McCollan*, 443 U.S. 137, 144 n.3 (1997). Before a plaintiff may successfully assert a valid section 1983 claim, he must identify facts that show a specific constitutionally protected right which has been infringed. *Graham v. Connor*, 490 U.S. 386, 394 (1989). Here, the facts that Plaintiffs alleged did not state any violation of rights protected by the United States Constitution or by federal law.

A. There exists no Constitutional right to medical treatment.

The basis for Plaintiffs' purported constitutional claims was the alleged denial of medical treatment. But there is no constitutional right to medical care. The Fifth Circuit has held that "[n]o general right to medical care exists; such a right has been found only where there exists a special custodial or other relationship between the person and the state." *Kinzie v. Dallas County Hospital District*, 106 Fed. App. 192, 195 (5th Cir. 2003) (affirming dismissal of claim asserting a constitutional right to medical care at a public hospital).[16] Moreover,

[16] In *Kinzie*, the Fifth Circuit affirmed the District Court's granting a Rule 12(b)(6) motion where plaintiff asserted a constitutional right to medical care at a hospital. The District Court stated, "Plaintiff has not provided the court with any authority which demonstrates that persons in his situation have a right to medical care under substantive due process. True, the right to medical care has been recognized, but only in situations where the state has taken affirmative steps to restrain a person's liberty, as in the case of pretrial detainees, persons in police custody,

"unsuccessful medical treatment does not give rise to a § 1983 cause of action." *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (per curiam). "[I]t is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need." *Jackson v. Schultz*, 429 F.3d 586, 590 (6th Cir. 2005) (affirming dismissal of claim against ambulance paramedics who allowed person to die in a parked ambulance even though paramedics violated fire department policies by not providing life support to shooting victim or transporting him to a hospital); *see also, e.g., McCabe v. Nassau County Medical Center*, 453 F.2d 698 (2d Cir. 1971) (absent some highly unusual factor, decisions made by doctors in a public hospital will not affect rights secured by Constitution or provide a basis for a section 1983 action).

The Due Process clause generally confers no affirmative right to governmental aid – even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. *Deshaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 195 (1988). For example, states are not constitutionally obligated to provide rescue services to their citizens – nor are they constitutionally required to provide competent rescue

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or prisoners." *Kinzie v. Dallas County Hosp. Dist.*, 239 F.Supp.2d 618, 635 (N.D. Tex. 2003). Affirming the District Court's dismissal, the Fifth Circuit noted that, although the patient's complaint used terms like "shock the conscience" and "deliberate indifference," claims regarding the hospital's failure to screen donors and test the blood were "analogous to a fairly typical state-law tort claim: [the health care provider] breached its duty of care to [the patient] by failing to provide [safe blood]." *Kinzie*, 106 Fed. App. at 194.

services when they voluntarily choose to undertake this task. *Brown v. Penn. Dep't of Health Emerg. Med. Servs. Training Inst.*, 300 F.3d 310, 320 (3rd Cir. 2002). Plaintiffs' allegations of a denial of Constitutional due process rights to medical care failed to state a section 1983 claim.

B. State law does not create federally protected rights.

It is fundamental that section 1983 protects only against the deprivation of rights secured by the Constitution and laws of the United States. *Holdiness v. Stroud*, 808 F.2d 417, 423 (5th Cir. 1993). State law claims are not cognizable under section 1983. *Wyatt v. Vole*, 994 F.2d 113, 1121 (5th Cir. 1993). Consequently, a federal civil rights action will not lie for any violation of state procedural requirements related to the Ethics Committee on which Dr. Halphen served. *See Fields v. City of South Houston*, 922 F.2d 1183, 1189 (5th Cir. 1991).

In addition, relief is unavailable under section 1983 for claims grounded only in negligence. *See Daniels v. Williams*, 474 U.S. 327, 329 (1986) (due process clause not implicated by state official's negligent act); *see also Collins v. City of Harker Heights*, 603 U.S. 115, 128 (1992). To any extent Plaintiffs' section 1983 claims purported to be based on, *e.g.*, an alleged state law claim for negligence, or on non-compliance with state statutes, such claims (even if facts underlying them occurred), would not constitute a violation of a Constitutional or federally-protected right.

Plaintiffs' purported section 1983 claims were properly dismissed.

II. Plaintiffs' conspiracy claims fail as a matter of law.

To establish a conspiracy claim under section 1983, a plaintiff must show an actual violation of section 1983 and the defendants' agreement to commit an illegal act. *Hale v. Townley,* 45 F.3d 914, 920 (5th Cir. 1995). Mere conclusory allegations of conspiracy cannot, absent reference to material facts, state a substantial claim of federal conspiracy under 42 U.S.C. § 1983. *Leggett v. Williams,* 277 Fed. App. 498, 501 (5th Cir. 2008).

Plaintiffs' section 1983 conspiracy claims failed for at least two reasons. First, Plaintiffs did not identify a cognizable constitutional deprivation related to Mr. Ohakweh's medical care. Plaintiffs' claims for Constitutional violations rest on the medical care and treatment of Mr. Ohakweh. These allegations do not support a Constitutional violation under section 1983. *See supra.* The absence of an adequately-pled predicate Constitutional violation means that the conspiracy claim must be dismissed under Rule 12(b)(6). *See, e.g., Calhoun v. Villa*, No. H-16-3001, 2017 3701971 *4 (S.D. Tex. Aug. 7, 2017) (claim for "'conspiracy to interfere with civil rights'" would be subject to dismissal under Rule 12(b)(6) because it "requires, as a predicate, a violation of a federal Constitutional right and a conspiracy to do so," and plaintiff failed to adequately plead the predicate violation of a federal Constitutional right).

Second, Plaintiffs failed to allege any facts showing the requisite agreement among Dr. Halphen and any other defendant(s). Plaintiffs simply listed alleged instances of improper medical care over the course of several months and then, in a conclusory fashion, labeled the totality of all Defendants' conduct a "conspiracy." *See* 12th Pet (ROA.208-285). Because Plaintiffs have failed to include any *specific* factual allegations describing how Dr. Halphen actually planned, agreed or conspired with others to deprive Plaintiffs of their constitutional rights, Plaintiffs' conspiracy claims failed.

III. Plaintiffs' official capacity claims are barred by Eleventh Amendment.

In the District Court, Plaintiffs sued Dr. Halphen in his official capacity. *See* 12th Pet (ROA.208-285 at 4, 54, and 55). However – even had Plaintiffs adequately pled a Constitutional violation – Dr. Halphen could not be held liable in his official capacity. An official capacity suit generally represents another way of pleading an action against a governmental entity of which the official is an agent. *Burge v. Parish of St. Tammay*, 187 F.3d 452, 466 (5th Cir. 1999). Thus, an official capacity claim is a claim against the governmental body itself.

Plaintiffs admitted in the District Court that Dr. Halphen is an employee of the University of Texas Health Science Center in Houston; this was why he served as Chair of Harris Health System's Ethics Committee. Pl. 13th Am. Compl

(ROA.421-532, at ¶17).[17] Plaintiffs' claim against Dr. Halphen in his official capacity is therefore a suit against the University of Texas Health Science Center at Houston itself. Consequently, Plaintiffs' claims against Dr. Halphen in his "official capacity" as a state employee are barred by the Eleventh Amendment.

In enacting section 1983, Congress did not explicitly and by clear language indicate on the statute's face an intent to sweep away the immunity of the states. *Quem v. Jordan,* 440 U.S.332, 345 (1979). Dr. Halphen's employer, the University of Texas Health Science Center at Houston, is indisputably an agency of the state or Texas, and possesses Eleventh Amendment immunity. Tex. Educ. Code §65.02 (identifying UTHSCH as a component of the University of Texas System); *see also e.g., O'Rourke v. U.S.*, 298 F.Sup.2d 531 (E.D. Tex. 2004). The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990).

State officials sued in their official capacity are not deemed to be "persons" subject to suit within the meaning of section 1983. The Eleventh Amendment's effect cannot be avoided by suing state employees in their official capacities; such

[17] To any extent Plaintiffs would argue that Dr. Halphen was an agent of Harris Health System, Dr. Halphen incorporated the defenses asserted by Harris Health System. Plaintiffs failed to adequately plead any facts supporting a claim that Harris Health System had an official custom or policy causing Plaintiffs to be deprived of a federally-protected right, as would be necessary to establish liability against Harris Health System, or liability against an individual acting in his official capacity for the System.

indirect pleading remains in essence a claim upon the state treasury. *Stem v. Ahearn*, 908 F.2d 1, 3 (5th Cir. 1990). Any and all of Plaintiffs' "official capacity" claims against Dr. Halphen in the District Court are barred by the Eleventh Amendment, and were properly dismissed.

IV. Plaintiffs' individual capacity claims are barred by absolute and qualified immunity

A. Absolute immunity bars individual capacity claims.

Even had Plaintiffs adequately alleged deprivation of a Constitutional right, to any extent Plaintiffs sued Dr. Halphen in an individual capacity, their claims were barred by the doctrine of absolute immunity. As noted, Plaintiffs' allegations against Dr. Halphen are based solely on his service as Chair of the Harris Health System Ethics Committee – a decision-making body charged here with making recommendations on the appropriateness of life-sustaining treatment. In chairing the Ethics Committee, Dr. Halphen exercised a function intimately related to the judicial process. Further, the Committee's decisions were appealable to a Texas court. *See, e.g.,* Tex. Health & Safety Code §§ 166.052, 166.046(g). Hence, all of Plaintiffs' claims against Dr. Halphen were based on activities that are judicial and/or quasi-judicial in nature, and are barred by the doctrine of absolute immunity.

Judges and like officials enjoy absolute immunity for judicial acts performed within their jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 554 (1967)*; Mays v.*

Sudderth, 97 F.3d 107, 110 (5th Cir.1996). The doctrine of judicial immunity is founded upon the premise that a judge, in performing his or her judicial duties, should be free to act upon his or her convictions without threat of suit for damages. *Paluch v. Rambo,* No. 11–3384, 453 Fed. App. 129, 132 (3d Cir. 2011) (quoting *Figueroa v. Blackburn*, 208 F.3d 435, 440 (3d Cir.2000)). Similarly, absolute quasi-judicial immunity protects officials who perform functions comparable to those of judges and prosecutors. *Butz v. Economou*, 438 U.S. 478, 511–17 (1978).

Under the functional approach to ascertaining quasi-judicial immunity, courts look to the nature of the function performed, not the identity or title of the actor who performed it. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). The U.S. Supreme Court identified a non-exhaustive list of factors to determine whether non-judicial actors are performing quasi-judicial functions, and thus entitled to absolute immunity:

(1) the need to assure that the individual can perform his functions without harassment or intimidation;

(2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

(3) insulation from political influence;

(4) the importance of precedent;

(5) the adversary nature of the process; and

(6) the correctability of error on appeal.

Cleavinger v. Saxner, 474 U.S. 193, 202, (1985) (citing *Butz*, 438 U.S. at 512). No one factor is controlling, and the list of considerations is not intended to be exclusive. *Mylett v. Mullican*, 992 F.2d 1347, 1352 (5th Cir. 1993).

Applying these factors compels the determination that Dr. Halphen served in a quasi-judicial capacity at the relevant time. In his role on the Ethics Committee, Dr. Halphen was tasked with resolving a difficult disagreement between a patient's physicians and the decedent's family as to what would be in the best medical interest of the patient with regard to the provision of extraordinary life-sustaining treatment. The issues before the Ethics Committee were sensitive and emotionally-charged, requiring the exercise of judgment and discretion. Decision makers on such committees must be free of harassment and intimidation. The Ethics Committee conducted hearings at which adversarial positions were presented by various medical professionals and the decedent's family representatives. The decision of the Ethics Committee was subject to review in a Texas probate court. This available appellate review both acts as a safeguard against error or unconstitutional conduct – and underscores the judicial nature of the activities undertaken by the ethics committee.

In fact, *not* extending immunity to physicians like Dr. Halphen who serve on ethics committees would result in the reluctance of physicians to accept similar

responsibilities in the future; this would only increase the likelihood that the threat of civil liability would skew the decisions of those who do serve in such capacities.

To any extent Plaintiffs purported to sue Dr. Halphen in his individual capacity, those claims were barred by the doctrine of absolute immunity.[18]

B. Qualified immunity likewise bars individual capacity claims.

Plaintiffs' action against Dr. Halphen was, at bottom, based on a disagreement with the decisions of an Ethics Committee that issued a recommendation to withhold extraordinary life-sustaining measures. This Committee was convened pursuant to Tex. Health & Safety Code § 166.046, which outlines procedures in the event of a disagreement as to treatment decisions made by or on behalf a patient. *See id.* Plaintiffs do not dispute that (1) they were given notice and an opportunity to be heard by the Ethics Committee, (2) they were given, as a courtesy, an additional week to consider the issues addressed by the Committee before the Committee took any official action, (3) Dr. Halphen followed-up with one family member personally after the Ethics Committee met in an attempt to come to an agreement regarding Mr. Ohakweh's care before the Committee took any official action, and (4) the Committee took no official action

[18] The State of Texas has clearly expressed its intent that there be immunity for physicians serving on an ethics committee. *See, e.g.,* Tex. Health & Safety Code § 166.045 ("A physician, health professional acting under the direction of a physician, or health care facility is not civilly or criminally liable or subject to review or disciplinary action by the person's appropriate licensing board if the person has complied with the procedures outlined in Section 166.046.")

for well over ten days after the Committee formally met. 12th Pet (ROA.208-285, at 39-41). *See also* Pl. 13th Am. Compl. (ROA.421-532, at ¶ 209-213).

Finally, Plaintiffs acknowledged that they were advised of their right to appeal the decision of the Committee to the Texas probate court. 12th Pet. (ROA.208-285, at 40).[19]

Plaintiffs' own allegations confirm that the Ethics Committee substantially complied with Tex. Health & Safety Code § 166.046. To any extent Plaintiffs alleged that Dr. Halphen and the Committee were negligent, or failed to comply with any state statutory requirements, these allegations were insufficient to form the basis of a federal claim because Plaintiffs' allegations did not establish that Dr. Halphen violated any recognized Constitutional right. *See Mace v. City of Palestine,* 333 F.3d 621, 623 (5th Cir. 2003) ("Qualified immunity protects public officials from suit unless their conduct violates a clearly established constitutional right"). Courts do not require that an official demonstrate he did not violate clearly established federal rights; rather, precedent places that burden upon the plaintiff. *Pierce v. Smith,* 117 F.3d 866, 872 (5th Cir. 1997). The relevant question is whether the state actor's actions were objectively reasonable in light of clearly

[19] Though Plaintiffs were advised of the right to appeal, they undertook no appeal of the Ethics Committee's determination. Exhaustion of state administrative remedies is not a prerequisite to action under the Civil Rights Act. *See Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982). But the policy of judicial administration and economy is that one should not be entitled to judicial relief for a supposed or threatened injury until administrative remedies have been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

established law at the time of the conduct in question. *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007); *see also Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008).

As explained, there is no general Constitutional right to receive medical care at a public hospital, and no general Constitutional right to receive non-negligent care – let alone any *clearly established* Constitutional right to bring a section 1983 claim for lack of care or incompetent care at a public hospital. There are also no cases stating that the ethics committee procedures set out in Chapter 166 of the Texas Health & Safety Code are somehow unconstitutional or otherwise violate a clearly established constitutional right. *Cf. Carver v. City of Cincinnati*, 474 F.3d 283 (6th Cir. 2007) (holding that medical technicians who found decedent unconscious and failed to treat him or transport him to a medical facility were entitled to qualified immunity because there were no cases presenting facts similar to the decedent's situation and making it "clear to [an objectively] reasonable officer that his conduct was unlawful in the situation he confronted.").

Plaintiffs failed to plead facts showing that Dr. Halphen deprived Mr. Ohakweh of any clearly established Constitutional right. Dismissal based on qualified immunity was proper.

V. EMTALA creates no private right of action.

To any extent Plaintiffs purported to assert a claim under the Emergency

Treatment and Active Labor Act ("EMTALA") against Dr. Halphen, they again failed to state any claim on which relief can be granted. Virtually without exception, courts have determined that EMTALA establishes no private right of action for recovery of damages against individual physicians. *See, e.g., King v. Ahrens*, 16 F.3d 265, 271 (8th Cir. 1994) (citing assembled cases). As noted, Plaintiffs made no allegations that Dr. Halphen was directly involved in any emergency treatment of Mr. Ohakweh. No factual allegations supporting an EMTALA claim against Dr. Halphen were ever made. Any purported cause of action under the EMTALA was properly dismissed.

VI. Any state law claims, including claims for declaratory relief, were voluntarily dismissed or are barred by the Texas Tort Claims Act.

Before the case was removed to federal court, Plaintiffs filed a notice of non-suit in state court to "Non-suit[] all defendants from the claims brought under the Tort Claims Act *with prejudice* except for Harris Health System and Baylor College of Medicine." (ROA.10920-10922) (italics original; underscoring added). At the time Plaintiffs filed the notice of non-suit, Dr. Halphen was a named defendant. Thus, Plaintiffs dismissed with prejudice all state law claims against Dr. Halphen when they filed their non-suit.

To any extent Plaintiffs might seek to argue that the non-suit did not dismiss all state law claims against Dr. Halphen, he was nonetheless entitled to dismissal of those claims pursuant to Tort Claims Act, Tex. Civ. Prac. & Rem. Code Tex. §

101.106(f).[20] Dr. Halphen is an employee of the University of Texas Health Science Center Houston – a component agency of the State of Texas. Consequently, all causes of action against him are subject to the Tort Claims Act. *Franka v. Velasquez,* 332 S.W.3d 367, 385 (Tex. 2011). The Tort Claims Act is the only avenue for common-law recovery against the government, and all tort theories asserted against a state agency are presumed to be made under the Tort Claims Act. *E.g., Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 658-59 (Tex. 2008). The "tort theories" assumed to be brought under the Tort Claims Act include intentional torts, *Singleton v. Casteel,* 267 S.W.3d 547, 554 (Houston [1st Dist.] 2008, pet. denied), and also claims made under the state declaratory judgment statute where, as here (1) the only injury occurred in the past and (2) the only plausible or conceivable remedy is money damages. *City of Eagle Pass v. Wheeler*, No. 04-00817-CV, 2008 WL 2434228 at *2) Tex. App.—El Paso June 18, 2008, no pet.); *see also City of Houston v. Williams,* 216 S.W.3d 827, 828-29 (Tex. 2007).

[20] Section 101.106 provides for dismissal of claims like those brought against Dr. Halphen, as follows: "If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." Tex. Civ. Prac. & Rem. Code § 101.106(f).

To any extent state law claims survived Plaintiffs' non-suit, Dr. Halphen was nevertheless entitled to dismissal of all the state law tort claims against him, including claims for wrongful death, negligence, gross negligence, intentional torts, and claims under the Texas Declaratory Judgment Act. *See, e.g., Calhoon v. Wilkerson,* No. 04-16-0012-CV, 2016 WL 3020817 at *3 (Tex. App.—San Antonio May 25, 2016, no pet.) ("Based upon the facts and uncontroverted evidence, this court concludes Dr. Calhoon satisfied his burden of showing he acted within the general scope of his employment at the time he provided treatment and care ... . Further, the suit against Dr. Calhoon could have been brought against UTHSC under the Act. Accordingly, Dr. Calhoon was entitled to dismissal under section 101.106(f) of the Act.")

VII. Dr. Halphen did not covert his Motion to Dismiss into a summary judgment motion because his Motion did not attach or incorporate materials or evidence outside the pleadings.

Courts traditionally allow motions to dismiss to be converted into motions for summary judgment only where matters outside the pleadings are presented for the court's consideration – and then actually relied upon by the court in making its ruling. *See, e.g., Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 (5th Cir. 1993) (stating a motion to dismiss will be treated as a summary judgment motion by the appellate court only "if it appears that the district court *did* rely on matters outside the pleadings") (italics original; citations omitted); *see also*

Maritrend, Inc. v. The Galveston Wharves, 152 F.R.D. 543, 547 (S.D. Tex. 1993) (citing *General Guaranty Ins. Co. v. Parkerson*, 369 F.2d 821, 823 (5th Cir. 1966)). A court "has complete discretion to convert a motion to dismiss into a motion for summary judgment and thereby consider the matters submitted by the parties that are beyond the pleadings." 152 F.R.D. at 548.

Here, Plaintiffs' argument that the District Court somehow "converted" Dr. Halphen's motion to dismiss into a summary judgment motion must fail. The only matter attached to Dr. Halphen's motion to dismiss in the district court was the Plaintiff's notice of non-suit – a pleading that Plaintiffs themselves filed in the Texas state court action before removal of the action to federal court. (ROA.10920-10922). A notice of non-suit, being a pleading itself, *see* Tex. R. Civ. P. 162,[21] cannot constitute a matter "outside the pleadings." *Cf. Brown v. Ocwen Loan Serv. LLC*, No. PJM-14-3454, 2015 WL 5008763 at *1 n.3 (D. Md. Aug. 20, 2015) (a "court may take judicial notice of docket entries, pleadings and papers ... without converting a motion to dismiss into a motion for summary judgment."), *aff'd*, 639 Fed. App. 200 (4th Cir. 1990).

Moreover, Plaintiffs do not – and cannot – point to any indication in the District Court's order of dismissal that the Court in any way relied upon matters

[21] This Rule states, "At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may [voluntarily] dismiss a case, or take a non-suit … ." Tex. R. Civ. P. 162.

"outside the pleadings" in making its dismissal order. (ROA.12689-12692). *See Sigaran v. U.S. Bank Nat'l Ass'n*, 560 Fed. App. 410, 415 (5th Cir. 2014) (finding district court did not error in failing to convert motion to dismiss into a motion for summary judgment where court "did not rely on [extraneous material] in making its ruling"); *see also, e.g., United States ex. rel Long v. GSD & M Idea City LLC*, No. 3:11-cv-1154-O, 2014 WL 11321670, at *3 (N.D. Tex. Aug. 8, 2014) ("Relator has not identified any portion of the Court's Order that relied on the objectionable material submitted by the parties and, therefore, the Court was not required to convert GSD & M's Rule 12 … motion into a motion for summary judgment."). *Cf. Knighton v. Merscorp Inc.*, 304 Fed. App. 285, 287 (5th Cir. 2008) (noting "district judge only referenced information outside the pleadings in ... opinion ... . This does not show reliance on the information.").

Plaintiffs' conversion argument has no merit and should be rejected.

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

The standard of review for a denial of a motion for leave to amend is 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.

Although Plaintiffs' multiple proposed Thirteenth Amended Complaints sought to add numerous new parties and new causes of action, the only new claim that appeared to involve Dr. Halphen was the 42 U.S.C. § 1985 claim. Allowing this claim would have been futile. § 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).[22] "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.

[22] "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).

App'x. 22, 33 (5th Cir. 2008).[23] Plaintiffs' proposed Third Amended Complaints contain nothing but bald allegations, and are thus insufficient to state a claim. *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980).

Further, the District Court did not abuse its discretion in denying Plaintiffs' leave to file their proposed Thirteenth Amended Complaint because it would unduly prejudice Dr. Halphen, and because Plaintiffs' already had multiple opportunities to amend their complaint. *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998).

Plaintiffs' had ample opportunity to add claims in their first twelve petitions. Serial filing of further claims would have been futile and prejudicial to Dr. Halphen.[24] The District Court's order denying Plaintiffs' leave to amend their complaint a thirteenth time should be affirmed.

[23] *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).

[24] To the extent any other proposed new claims were directed at Dr. Halphen, pursuant to FRE 28(i), Dr. Halphen adopts by reference the responsive portions of the other Appellees' briefs.

Conclusion and Prayer

For the above reasons, the District Court order granting Dr. Halphen's Motion to Dismiss should be affirmed. Dr. Halphen respectfully requests all other appropriate relief.

Respectfully submitted,

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Certificate of Service

I, John R. Strawn, Jr., hereby certify that a true and correct copy of the foregoing instrument has been provided to all counsel of record in accordance with the applicable Texas Rules of Appellate Procedure on this 20th day of November 2017.

/s/ John R. Strawn, Jr.
John R. Strawn, Jr.

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