IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BERMAN DE PAZ GONZALEZ.	§	
and EMERITA MARTINEZ-TORRES	§	
Individually and as Heirs of	§	
BERMAN DE PAZ-MARTINEZ	§	
Plaintiff	§	
	§	**NO. 4:20-CV-072-A**
VS.	§	
	§	
THERESE M. DUANE, M.D.,	§	
ACCLAIM PHYSICIAN GROUP, INC.,	§	
TARRANT COUNTY HOSPITAL	§	
DISTRICT d/b/a JPS HEALTH	§	
NETWORK	§	
Defendants	§	

PLAINTIFFS' RESPONSE TO DEFENDANT THERESE M. DUANE, M.D. AND ACCLAIM PHYSICIAN GROUP, INC.'S MOTIONS TO DISMISS

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I.
FACTS AND PROCEDURAL HISTORY

Defendant Dr. Therese Duane was recruited and hired in 2014, as the Medical Director of Acute Care Surgery and Trauma Research and also as Vice-Chair of Quality and Safety at JPS Hospital. JPS is a Level 1 Trauma center as designated by the American College of Surgeons. There are over 6,000 hospitals in the United States and out of those, only 178 have been designated as Level 1 Trauma Centers. Level 1 Trauma Centers provide the highest level of care to trauma patients and provide extensive and comprehensive care to trauma patients. Nearly every patient in the trauma center, including 22-year-old Berman DePaz-Martinez, does not choose to go to JPS. Patients end up there due to the severity of their condition specifically because JPS is a Level 1 Trauma Center.

The Texas Advanced Directives Act is a medical ethics law enacted to provide legal clarity to medical decision-making concerning end of life care when there is disagreement. There have been many critics of the Act, who suggest that the law does not go far enough, for example, that the 10-day waiting period to allow the family time to find another facility to accept the patient is not enough. However, there is near unanimous consensus from both proponents and opponents that the law is necessary for end of life decision making, as there are no re-dos, second chances, or room for mistakes when it comes to end of life care. As the Texas Alliance for Life puts it, the law never allows for patients to be killed by intentionally stopping breathing, a fact that the Chair of Surgery for a Level 1 Trauma Center such as JPS ought to be well aware.

Berman DePaz-Gonzalez endured the unimaginable. Alone with his boy, he had been given hope when told hours before by hospital staff that they expect his son might be

able to go home with necessary equipment to keep him breathing within a week. Without warning, in the early hours of the morning Dr. Therese Duane appeared in his son's room, explained that things have changed, and that the decision has been made to extubate immediately. She then proceeds to extubate his son in front of him, which causes Mr. DePaz-Martinez to die within minutes. No 48-hours notice, no ethics consultation process, no 10-day waiting period, no questions about Mr. DePaz-Martinez' wishes or his family's wishes, and no appeal to a state court for an extension of time. It was too late. The actions of Dr. Duane were so egregious that an anonymous JPS surgical resident sent an alarming email directly implicating Duane for this type of repeated behavior, stating that staff felt compelled to protect patients from Duane calling the actions of Duane and the hospital "beyond reprehensible." **See Exhibit A of Plaintiff's Original Complaint (see Appendix in Support Exhibit B).**

Plaintiffs have brought this case against Defendants and alleged that Defendants were negligent and grossly negligent in violating the Texas Advanced Directives Act and 42 U.S. Code §1983 for violating Mr. DePaz-Martinez' 14th Amendment rights without Due Process.

Defendants Therese Duane have filed a 12(b)(1) Motion to Dismiss challenging this Court's Jurisdiction and a 12(b)(6) Motion to Dismiss for failure to state a claim.

The theory Defendants set forth in their jurisdictional claim rests solely on technical claims that disconnecting a ventilator by extubating is somehow a non-use of medical equipment, and that both Defendants Duane and Acclaim Physicians Group are "governmental entities" that retain sovereign immunity. Through this response, Plaintiff will show that Defendants' 12(b)(1) Motion does not pertain to Plaintiff's Federal and

Constitutional claims, that JPS has admitted that Dr. Duane is an independent contractor and therefore does not retain immunity, and that unauthorized extubating of a patient is a clear contemporaneous use of tangible property to waive sovereign immunity.

In their 12(b)(6) Motion to Dismiss for Failure to State a Claim, Defendants attempt to characterize this case as a family "dissatisfied" with the medical treatment provided and attack nearly every cause of action set forth by Plaintiff. There is no evidence set forth by Defendants to dispute the egregious actions leading to Mr. DePaz-Martinez' death. In effectuating these attacks on Plaintiff's pleadings, they argue such things as Berman DePaz -Martinez wasn't a "qualified" patient or that it is unclear what Mr. DePaz-Martinez' wishes were. Through this response, Plaintiffs will show that according to the law, the time to ask these questions is before the patient is dead.

II.
APPLICABLE LEGAL STANDARDS

a. Legal Standard under Federal Rule of Civil Procedure 12(b)(1)

A motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b)(1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. Barrera Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996). The plaintiff constantly bears the burden of proof that jurisdiction exists at all stages of the litigation. Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980). In reviewing these motions, we accept all well-pleaded facts in the complaint as true

and view them in the light most favorable to the nonmovant. Bass v. Stryker Corp., 669 F.3d 501, 506 (5th Cir. 2012).

b. Legal Standard under Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails "to state a claim upon which relief can be granted." This rule must, however, be interpreted in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim for relief in federal court. Rule 8(a) calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (holding Rule 8(a)'s simplified pleading standard applies to most civil actions).

As a result, "[a] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir.1982). The Court must accept as true all well pleaded, non-conclusory allegations in the pleadings and liberally construe them in favor of the plaintiff. *See id.* The plaintiff must, however, plead specific facts, not mere conclusory allegations, to avoid dismissal. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir.1992). Indeed, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," and his "factual allegations must be enough to raise a right to relief above the speculative level, ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

The plaintiff must plead facts "plausibly showing" her right to relief on each claim asserted. *See Iqbal,* 129 S.Ct. at 1952. In other words, the plaintiff must "nudge[ ][her]

claims across the line from conceivable to plausible." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955.Gill v. Devlin, 867 F. Supp. 2d 849, 853-54 (N.D. Tex. 2012).

III.
ARGUMENT

a. Defendant Acclaim has waived sovereign immunity and Duane is an independent contractor who does not have sovereign immunity under 12(b)(1)

At the outset, Defendant Dr. Therese Duane and Acclaim's Motion to Dismiss pursuant to 12(b)(1) for a lack of jurisdiction based on immunity grounds can only apply to Plaintiff's negligence and gross negligence claims. Texas' governmental immunity statutory framework does not extend to Plaintiff's causes of action under U.S. Code Section 1983 or Due Process violations pursuant to the 14th Amendment.

Defendants' Therese Duane and Acclaim sovereign immunity arguments with respect to the negligence claims rest on one sole allegation—that Defendants are a governmental entity subject to the Texas Tort Claims Act and that Plaintiff failed to plead a use of tangible personal property to fit within the government's waiver of sovereign immunity. Through this response, Plaintiff will show that Defendant Therese Duane has been characterized by JPS as an independent contractor, and that even if she was afforded governmental entity status, took the affirmative action of disconnecting the life support system keeping Berman DePaz-Martinez alive and that a ventilator is tangible personal property which suffices to waive sovereign immunity for both Defendants Acclaim and Therese Duane.

i. Dr. Duane is an Independent Contractor

In their Motion to Dismiss, Defendants Acclaim and Therese Duane allege that Acclaim is a governmental unit for the purposes of the Texas Tort Claims Act (TTCA).

Acclaim argues that pursuant to Tex. Civ. Prac. & Rem. Code § 101.106(e), the "employee shall be dismissed on the filing of a motion by the governmental unit." In their motion, Acclaim describes the relationship between JPS and Acclaim as a "charitable organization" created by JPS under Chapter 281 of the Texas Health and Safety Code to facilitate the management of JPS' healthcare program, whose sole member is JPS. As such, JPS and Acclaim are extremely interrelated entities and Acclaim exists because of, and for the sole purpose of JPS.

Prior to filing this lawsuit, Plaintiff presented this claim directly to JPS. In response, JPS directed the De Paz family to submit their claims directly to Dr. Duane, stating that "Dr. Duane has never been, and was not at the time she provided medical care to Mr. De Paz, and employee of TCHD. Texas law holds that physicians such as Dr. Duane, who merely have staff privileges at Texas hospitals, are independent contractors with respect to the hospital and such physicians are not employees of the hospital." **See Tarrant County Hospital District d/b/a JPS Health Network denial letter attached as Exhibit A.**

Plaintiffs have alleged these allegations against Dr. Duane in her individual capacity. Taking all allegations in the light favorable to the non-movant and considering JPS' characterization of her status as an independent contractor with staff privileges at JPS, Dr. Duane cannot avail herself of the sovereign immunity afforded governmental units. As such, the Court should deny Dr. Duane's 12(b)(1) Motion to Dismiss for lack of jurisdiction at the outset.

ii. Acclaim's Sovereign Immunity is waived

Defendant Acclaim Physician Group, Inc. alleges they meet the definition of a "charitable organization" because they are a tax exempt 501(c)(3) organization under

Texas Health and Safety Code Section 281.0565 and that as such, are treated as a local governmental unit under 281.0565(c) and have attached to their motion the entity's certificate of formation and other evidence supporting same. Although Plaintiff questions whether or not the evidence provided by Defendant is sufficient to show that Acclaim Physician Group, Inc. was indeed a tax exempt 501(c)(3) organization at the time of this incident, Plaintiff will accept the allegation as true for the purposes of this response, for regardless of their status, sovereign immunity has been waived.

Under the Texas Tort Claims Act, a governmental unit is liable for personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. **See Texas Civil Practice and Remedies Code Section Sec. 101.021(2).**

While there has been some debate as to what exactly constitutes "tangible personal or real property" in order to waive a governmental unit's sovereign immunity, there is little question that a life sustaining ventilator would suffice.

In *Salcedo*, a man was seen at the El Paso Hospital District's emergency room with complaints of severe chest pains where an electrocardiogram test was ordered. The results showed a classic pattern indicating a heart attack, yet the doctor released him to go home, where he ultimately collapsed and died. The Texas Supreme Court held that reading and interpreting an electrocardiogram graph is a use of tangible property, and that as such, the hospital's sovereign immunity was waived under the Texas Tort Claims Act. Salcedo v. El Paso Hospital District, 659 S.W.2d 30 (Tex. 1983). Here, the "use" of the tangible property was even more concrete and direct, and did not involve the interpretation or reading of a graph. The only thing keeping Mr. DePaz-Martinez alive was the ventilator.

Dr. Therese Duane took the affirmative action of extubating Mr. DePaz-Martinez, disconnecting him from the ventilator, which led to Mr. DePaz-Martinez' death a few minutes later.

Over the years, Courts have attempted to further define what constitutes use of tangible property for the purposes of the Texas Tort Claims Act, and the result has been that the definition has narrowed somewhat. In *Sampson*, the Texas Supreme Court held that the injury must be *contemporaneous* with the use of the tangible property. (defining "use" to mean "to put or bring into action or service; to employ for or apply to a given purpose. Using that property must have actually caused the injury. Sampson v. University of Texas at Austin, 500 SW 3d 380, (2016), quoting Tex. Dep't of Crim. Justice v. Miller, 51 S.W.3d 583, 590–91 (Tex. 2001).

Defendant has cited *Arnold* to suggest that a use of personal property, such as a medical device, that merely furnishes the condition that makes the condition possible is not a sufficient use to waive immunity. In *Arnold,* a doctor replaced breast implants with new ones which were alleged to be too large. The Court held that the use of the breast implants themselves were not enough to meet the tangible property requirement to waive sovereign immunity because the information which the Doctor relied on was the catalyst of Arnold's injury, not the "property" (implants) itself. Arnold v. Univ. of Tex. Sw. Med. Ctr. at Dallas, 279 S.W.3d 464, 467–68 (Tex. App.—Dallas 2009, no pet.) In this case, the affirmative act of extubating Mr. DePaz-Martinez from the ventilator was contemporaneous with his death, as he died a few minutes later. Therefore, it is clear that the ventilator meets the tangible property requirement of the Texas Tort Claims Act.

Defendant has further argued that the "non-use" of tangible property cannot suffice to create a waiver of immunity and implied that somehow disconnecting someone from a ventilator is akin to "non-use". However, simple logic dictates that in order to disconnect someone from a machine, they'd have to "use" the machine, just as the act of turning any machine on and off is its most essential use.

Accordingly, as the treatment of Mr. DePaz-Martinez clearly involved the use of tangible property---a life supporting ventilator—which use (turning it off) was contemporaneous with this death, it is clear that this Court retains jurisdiction over Plaintiff's negligence claims against Acclaim as sovereign Immunity is waived and that Defendant Acclaim's 12(b)(1) motion should be denied.

b. Plaintiff has alleged sufficient facts to satisfy the applicable (12)(b)(6) standard

Defendants Acclaim and Dr. Duane argue that Plaintiffs have failed to allege facts which indicate a duty to act according to an applicable standard of care because Berman De Paz-Martinez was not a "qualified patient" and that the Plaintiffs have further failed to plead facts which indicate that removing Mr. DePaz-Martinez from life support was inconsistent with his wishes. Defendants also allege that no facts pled indicate that Mr. DePaz-Martinez' death was due to the removal of life support.

Through this response, Plaintiff will show that the Texas Advanced Directives Act provides a specific procedure to be followed in the case of an incapacitated individual on life support, that Mr. DePaz-Martinez' family had decision making authority under the Act, the removal of life support ended Mr. DePaz-Martinez' life, and that the facts pled allege and demonstrate that the procedure was patently ignored. Furthermore, Plaintiffs will show that Defendants' attempt to rely on the definitions contained in the Texas Advanced

Directives Act after failing to initially follow the procedures prescribed in the act in the first place, prior to the withdrawal of life sustaining care, is misplaced.

i. Texas Advanced Directives Act

In their 12(b)(6) Motion to Dismiss for failure to state a claim, Defendant's Acclaim and Therese Duane first challenge Plaintiff's negligence and gross negligence claims. More specifically, Defendant has challenged the duty, breach, and causation elements of the negligence causes of action, arguing that Defendants had no "duty" because Plaintiff has failed to plead facts that DePaz-Martinez was a "qualified" patient under the statute or that Dr. Duane was the "attending physician", that there was no "breach" because Plaintiffs have pleaded no facts that suggest the steps weren't followed, and that there was no "causation" because Mr. DePaz-Martinez' condition was already poor.

At the time when Dr. Therese Duane walked into his room and extubated 22-year-old Berman DePaz-Martinez, he did not have a written advanced directive. Under Texas Advanced Directives Act, Sec. 166.039(3) of the Texas Health and Safety Code, if the patient does not have a legal guardian or agent under a medical power of attorney, the patient's parents, in conjunction with the attending physician, may make a treatment decision to withdraw life-sustaining treatment.

As defined by the Texas Advanced Directives Act in Section 166.031(2), a "qualified" patient" means a patient with a terminal or irreversible condition that has been diagnosed and certified in writing by the attending physician. An attending physician is defined by Section 166.031(3) as a physician selected by or assigned to a patient who has primary responsibility for a patient's treatment and care. The statute and every case which

has before discussed the Texas Advanced Directives Act, involves fact scenarios where the medical providers actually attempted to follow the Texas Advanced Directives Act, rather than blatantly ignoring it. Defendants can not on one hand blatantly ignore the procedures codified in the Texas Advanced Directives Act and then use those ignored procedures in an attempt to escape liability.

Provided for illustrative purposes only and independently pleaded, Mr. DePaz-Martinez' medical records show it is apparent that Dr. Duane had primary responsibility for Mr. DePaz-Martinez' care as she was the one who extubated him and is therefore clearly his attending physician at the time of his death. Dr. Duane was acutely aware at the time of extubation that Mr. DePaz-Martinez would die, and stated to Mr. DePaz-Martinez' father that the condition was "unsurvivable".

NURSE'S NOTES

Progress Notes by Luis, Daniela, RN at 4/1/2018 7:14 AM Version 1 of 1

Author: Luis, Daniela, RN	Service: (none)	Author Type: Registered Nurse
Filed: 4/1/2018 7:25 AM	Date of Service: 4/1/2018 7:14 AM	Creation Time: 4/1/2018 7:14 AM
Status: Signed	Editor: Luis, Daniela, RN (Registered Nurse)	

Weaning parameters obtained per Dr. Duane, the decision was made to extubate. Interpreter called to bedside and extubation was explained to pt father at bedside, questions answered by Dr. Duane via interpreter. Dr. Duane explained that pt's injury is unsurvivable and that the patient would not be reintubated if he started to decline due to futility of care. Dr. Duane answered questions and made sure that the patient's father understood what was happening. Pt was extubated to 2L NC at 0608, pt started to desat and vitals began to decline, Dr Duane and team lead were notified. Pt DNR level A, no compressions were started, and no medications were given per Dr. Duane. Pt expired within minutes of extubation. Time of death pronounced at 0626. Interpreter and chaplain at bedside with physician to answer family's questions.[DL.1]

Electronically signed by Luis, Daniela, RN at 4/1/2018 7:25 AM

Attribution Key

DL.1 - Luis, Daniela, RN on 4/1/2018 7:14 AM

Plaintiffs specifically pleaded that Mr. DePaz-Martinez was in a coma, suffered a very serious brain injury, and that his prognosis was "extremely poor". **See Plaintiff's Original Complaint page 3, paragraph 2.** It is clear that had Defendants followed the Texas Advanced Directives Act as required, their actions and statements indicate their belief that Berman DePaz-Martinez was "qualified" as defined. Plaintiffs have pleaded that

Dr. Duane unexpectedly arrived in Mr. DePaz-Martinez' room at 6 a.m. to remove him from life support. Plaintiffs have pleaded that Mr. DePaz-Martinez' father immediately questioned the decision to take him off life support, asking what happened to the prior plan to send him home with proper equipment to keep him alive. Plaintiffs specifically pleaded that he did not consent to taking his son off of life support. **See Plaintiff's Original Complaint page 3, paragraph 3.** Plaintiffs have pleaded that they believed he was responding to prayers for him to stay alive. **See Plaintiff's Original Complaint page 2, paragraph 1.** Plaintiff has pleaded that the Texas Directives Act was completely ignored. **See Plaintiff's Original Complaint page 5, paragraph 2.**

When a physician has arrived at a decision to end life-sustaining measures, the Texas Directives Act is clearly invoked and the steps must be followed before life sustaining care is removed. Texas Health and Safety Code Section 166.040(b) has been pleaded by Plaintiff as a cause of action states specifically that, "before withholding or withdrawing life-sustaining treatment from a qualified patient under this subchapter, the attending physician must determine that the steps proposed to be taken are in accord with this subchapter and the patient's existing desires." The Court must accept as true all well pleaded allegations and liberally construe them in the Plaintiffs favor. As pled and shown here, Defendant Dr. Therese Duane and Acclaim Physicians Group, either through intentional malice, gross negligence, or a lack of training or knowledge, never even considered taking steps "in accord" with the Texas Advanced Directives Act as required by law.

As for causation, the medical records clearly show that Mr. DePaz-Martinez was being kept alive by a ventilator and died directly within minutes due to Dr. Duane's

unauthorized extubation. It is clear from any logical reading of the Texas Advanced Directives Act that the purpose of the statute was to provide a procedure to be followed when there is disagreement with the treatment decision that a medical provider thinks appropriate. The argument Defendant makes with respect to causation can be summarized as "he was going to die anyway." In this fact scenario, if a Defendant were able to ignore the Texas Advanced Directives Act and then escape liability on the grounds that they didn't cause his death due to his *disputed* unsurvivable condition, it would make the physician's initial treatment decision the final judgment and undermine the entire purpose of the Advanced Directives Act.

Not only are Defendants' arguments regarding causation at odds with the legislated purpose of the Advanced Directive Act, they are at odds with the facts of this case. Plaintiffs have pleaded that hours before Mr. DePaz-Martinez was taken off life support, the family had been told that he would be allowed to stay for seven days and would then be released with the necessary equipment to keep him alive. **See Plaintiffs' Original Complaint, page 3, paragraph 2.** It is obvious that hospital staff believed that Mr. DePaz-Martinez would be able to survive with the help of a ventilator. Consequently, it is obvious that Mr. DePaz-Martinez' death was directly caused by his extubation.

ii. Plaintiffs' claims for negligent training and supervision

Defendants Acclaim and Therese Duane attack Plaintiff's claims for negligent training and supervision stating that they are conclusory, unsubstantiated, passing references, with nothing more than bare conclusions.

Plaintiffs have pleaded an extremely detailed fact scenario which indicated that the head trauma surgeon at JPS walked into a patient's room and disconnected his life

support in front of his father without consulting the wishes of the family or even attempting to follow the proper procedures codified under the Texas Advanced Directive Act. To that end, Plaintiff attached an anonymous email from a surgical resident which stated that this isn't the first time this has happened, and that Dr. Duane has engaged in a pattern of disconnecting life support from patients in an unauthorized manner. The email even suggests that the hospital is liable for "sweeping it under the rug". **See email from anonymous surgical resident Attached as Exhibit B (also see Exhibit A of Plaintiff's Original Complaint).** The scenario presented in Plaintiff's Original Complaint paints a picture of a situation that was out of control and can logically only be the result of two things, the bad intentions of the parties involved or a complete lack of managerial oversight and supervision. While it remains unclear at this early stage in the litigation the extent or specifics regarding the lack of training or supervision regarding adherence to the Texas Advanced Directives Act and the removal of life-sustaining care, the allegations are anything but bare conclusions.

c. Dr. Duane was a policymaker who's actions deprived Plaintiff of a Constitutional Right under §1983

A governmental entity may be liable under §1983 if the execution of one of its customs or polices deprives a plaintiff of a constitutional right. Monell v. Dep't of Social Serv., 436 U.S. 658, 690-91 (1978). To state a claim for such liability, a plaintiff must allege, in addition to an underlying claim of a violation of rights, a "policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." Cox v. City of Dallas, 430 F.3d 734, 748 (5th Cir. 2005).

In addressing Plaintiff's §1983 claims in it's Motion to Dismiss, Defendant Acclaim argues that Plaintiff failed to identify a policy or custom, failed to identify a policy maker, and have not identified a constitutional violation.

i. Policy and Custom

Plaintiff has clearly identified and alleged in their petition a policy or custom of withdrawing life sustaining treatment without following the proper procedure codified in the Texas Advanced Directives Act. **See p. 4-8 of Plaintiffs' Original Complaint.** Specifically, Plaintiff has alleged that the practice of ignoring the laws concerning withholding life sustaining treatment had been widespread. **See p.7 of Plaintiffs' Original Complaint in conjunction with the fact scenario, Exhibit C.** Plaintiff notes in their original complaint that according to an email from an anonymous surgical resident, life sustaining treatment had been removed inappropriately on at least three different occasions by Dr. Duane, who was the Chair of the Department of Surgery. **See Plaintiffs' Original Complaint p. 5, paragraph 3.** These allegations were enough to trigger an article entitled "Does JPS have a plug pulling problem?" to be authored by a Texas advocacy group called Direct Action Texas. Plaintiff further alleges that the removal of life sustaining treatment had been directed at specific types of individuals, who may be uninsured, with at least one believed to be undocumented immigrant, who would likely be in a disadvantaged position to seek justice. **See Exhibit B.** Plaintiff has further pleaded that these actions as described show that JPS' the training policies and customs were wholly inadequate with respect to how to handle situations involving the procedures for removing life sustaining treatment. **See p. 6-7 of Plaintiffs' Original Complaint.**

ii. Dr. Duane is a Policymaker

An important question, in the Rule 12(b)(6) context, becomes the standard to be applied to local government liability pleadings in light of *Iqbal* and *Twombly.* Generally speaking, *Iqbal* and *Twombly* establish a heightened standard for federal pleadings. In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit—decided before *Iqbal* and *Twombly*—the Supreme Court refused to apply a heightened pleading standard to section 1983 claims against municipalities. Leatherman, 507 U.S. 163, 168 (1993). Despite seeming to conflict somewhat with *Iqbal* and *Twombly, Leatherman* remains good law and, as such, courts have decided to apply a less onerous pleading standard to municipal liability claims in light of *Leatherman.* Courts attempting to reconcile these cases have recognized that, before discovery, it is incredibly rare that a plaintiff will have access to (or personal knowledge of) specific details about the existence or absence of internal policies or practices that led to the constitutional violation. *See* Thomas v. City of Galveston, Tex., 800 F. Supp. 2d 826, 842 (S.D. Tex. 2011); *see also* Brown v. City of Houston, 297 F. Supp. 3d 748, 767 (S.D. Tex. 2017); Sanchez v. Gomez, 283 F. Supp. 3d 524, 532 (W.D. Tex. 2017); E.G. v. Bond, Civ. No. 1:16-CV-0068-BL, 2016 WL 8672774, at 5 (N.D. Tex. Sept. 9, 2016), report & recommendation adopted by Civ. No. 1:16-CV-068-C, 2017 WL 129019 (N.D. Tex. Jan. 13, 2017).

Accordingly, while surviving a motion to dismiss requires "more than boilerplate allegations" and mere recitations of the elements, courts have not required plaintiffs alleging that an official policy exists to plead "*specific* facts that *prove* the existence of a policy." Schaefer v. Whitted, 121 F. Supp. 3d 701, 718 (W.D. Tex. 2015) (emphasis added). Thus, a municipal liability claim complies with *Twombly* and *Iqbal* where the

complaint contains at least some further detail, such as "the specific topic of the challenged policy or training inadequacy" that caused the constitutional injury. Wright v. Denison Indep. Sch. Dist., No. 4:16-CV-615, 2017 WL 2262778, at 4 (E.D. Tex. May 24, 2017); *see also* Flanagan v. City of Dallas, Tex., 48 F. Supp. 3d 941, 947 (N.D. Tex. 2014) (quoting *Twombly* and *Iqbal*). Ashcroft v. Iqbal, 556 U.S. 662 (2009).

A policymaker is someone who has been granted final decision-making authority who is not supervised except for the totality of their performance. Even if they do not have final decision-making authority, the actor may be delegated that power by the person with final decision making authority. Webb v. Town of Saint Joseph, 925 F.3d 209 (5th Cir. 2019) When the policymakers are the violators, no further proof of municipal policy or custom is required. Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S. Ct. 1292, 1299 (1986). Even a single decision when the policymaker "performs the specific act that forms the basis of the §1983 claim." *See* Webb, 925 F.3d 209 (5th Cir. 2019), Anderson v. City of McComb, 539 F. App'x 385, 388 n.2 (5th Cir. 2013) ("When the policymakers are the violators, no further proof of municipal policy or custom is required.").

Here, it is clear that Dr. Therese Duane had final decision-making authority and qualifies as a policymaker. At the time she was removing the life sustaining treatment of Mr. DePaz-Martinez, she was the Chair of the Surgery Department at JPS. In Defendant Acclaim's Motion to Dismiss, they attach their articles of incorporation which show that she was one of five doctors on the Board of Directors, in which the "direction and management of the affairs of the corporation shall be vested". **See Defendant's Motion to Dismiss Exhibit A, Appx. p. 3**. Even if she had not been a policy maker as shown, Plaintiff need not prove that a municipal policy or custom was in place to maintain a §1983

claim. Plaintiff has nonetheless pled specific facts which prove that this behavior was repeated and targeted. **See Plaintiff's Original Complaint p. 5, paragraph 3.**

iii. Constitutional Injury

In their Motion to Dismiss, Defendants Acclaim have tried to argue that Plaintiff did not allege a constitutional injury by reframing Plaintiff's allegations as being "dissatisfied with the type and scope of medical treatment afforded to Mr. DePaz." **See Defendant's Motion to Dismiss p. 22**. Defendants ignore that Plaintiff specifically cites the 14th Amendment of the United States Constitution and its' due process clause, which states "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive any person of life, liberty,* or property, *without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. The fact scenario alleged by Plaintiff in the Original Complaint is that Defendants deprived Mr. DePaz-Martinez of his right to life and ignored the Texas Advanced Directive Act. Removing life sustaining treatment without following the steps provided for by the law is a clear violation of Mr. DePaz-Martinez' due process rights. **See Plaintiff's Original Complaint page 7, paragraph 2.**

IV.
CONCLUSION

Plaintiff has named three defendants in their Original Complaint, Dr. Therese Duane, Acclaim Physician Group, and Tarrant County Hospital. The Defendants Duane and Acclaim have tried to invoke state sovereign immunity through a FRCP 12(b)(1) Motion to Dismiss for Lack of Jurisdiction. Plaintiff has shown that Duane is an independent contractor and cannot invoke immunity. Plaintiff has shown that Acclaim

waived sovereign immunity by the contemporaneous use of tangible property by extubating Mr. DePaz Martinez inappropriately. Plaintiff has further shown that these claims of immunity do not pertain to Plaintiffs' §1983 claim or due constitutional due process claims.

In Plaintiffs' Original Complaint, the Plaintiffs have pled a very detailed factual with extremely serious allegations. The pleadings standards adopted by the Courts note that Motions pursuant to FRCP Rule 12(b)(6) are rarely granted. Plaintiffs have taken great care in filing their Original Complaint to identify the specific actions taken by Defendant and lay out the factual scenario, identifying which specific causes of actions pertain to each fact. Plaintiffs have gone well beyond the requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief."

The record before the Court is devoid of facts disputing Plaintiffs factual claims and shows that the Defendants violated Mr. DePaz Martinez' rights by failing to consult or consider the process pursuant to the Texas Advanced Directives Act.

Plaintiff prays that Defendant's Motion to Dismiss be denied in its entirety and for any other relief under the Federal Rules which this Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, **JACKSON DAVIS**, do hereby certify that a copy of the foregoing document will be served on all counsel of record via the Court's ECF/ENS system on the date of entry on the Court's docket.

JACKSON DAVIS