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

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| BERMAN DE PAZ GONZALEZ and EMERITA MARTINEZ-TORRES Individually and as Heirs, and on behalf of THE ESTATE OF BERMAN DE PAZ-MARTINEZ, | § | |
| Plaintiffs, | § | |
| v. | § | CIVIL NO. 4:20-CV-00072-A |
| THERESE M. DUANE, M.D., ACCLAIM PHYSICIAN GROUP, INC., TARRANT COUNTY HOSPITAL DISTRICT d/b/a JPS HEALTH NETWORK, | § | |
| Defendants. | § | |

**DEFENDANT TARRANT COUNTY HOSPITAL DISTRICT D/B/A JPS HEALTH NETWORK'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' ORIGINAL COMPLAINT**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES:**

**RULES:**



**CODES:**

## I.
## INTRODUCTION

Plaintiffs Berman De Paz Gonzalez ("De Paz Senior") and Emerita Martinez-Torres ("Torres") (together, "Plaintiffs") filed this lawsuit on February 7, 2020, against Defendants Tarrant County Hospital District d/b/a JPS Health Network ("JPS"), Therese M. Duane ("Dr. Duane"), and Acclaim Physician Group, Inc. ("Acclaim").[1] Plaintiffs allege that Defendants committed acts and omissions of negligence and gross negligence while their adult son, Berman De Paz-Martinez ("De Paz"), was a patient at JPS's John Peter Smith Hospital in Fort Worth (the "JPS Hospital"). Plaintiffs purport to bring their claims both individually and as heirs of De Paz.[2]

In general, Plaintiffs complain that Defendants failed to follow the procedure codified in the Texas Advance Directives Act for honoring a patient's advance directives relating to the provision, withholding, and withdrawal of end-of-life treatment, and further that Defendants failed to adequately supervise and train their personnel with respect to that same procedure. Based on these allegations, Plaintiffs assert claims against JPS for negligence, gross negligence, and claims under 42 U.S.C. § 1983 for an alleged violation of De Paz's due process rights under the Fourteenth Amendment to the United States Constitution.

As a county hospital district formed and operating under Chapter 281 of the Texas Health and Safety Code, JPS is a governmental unit within the meaning of the Texas Tort Claims Act ("TTCA"). TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B). JPS seeks dismissal of Plaintiffs'

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[1] As used herein, the term "Defendants" refers to JPS, Acclaim, and Dr. Duane. Defendant Acclaim is a statutorily authorized non-profit physician group created by JPS to employ and manage physicians who work at JPS facilities, including the JPS Hospital. Dr. Duane was a physician at the JPS Hospital and was at all relevant times employed by Acclaim.

[2] Plaintiffs initially filed suit on behalf of the Estate of Berman De Paz-Martinez. On February 11, 2020, the Court entered a Final Judgment dismissing claims brought by Plaintiffs on behalf of the Estate without prejudice. [Doc. #11].

negligence and gross negligence claims pursuant to Rule 12(b)(1) on the basis of sovereign immunity. Specifically, Plaintiffs' state law claims against JPS fall within the scope of the TTCA and Plaintiffs have failed to establish an applicable waiver of sovereign immunity on those claims. JPS also seeks dismissal of Plaintiffs' Section 1983 claim under Rule 12(b)(6), because Plaintiffs have failed to state a claim for which relief can be granted.

## II.
## PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that on March 29, 2018, De Paz was admitted to JPS Hospital for treatment in the hospital's intensive care unit. [Doc. #7 at 2]. De Paz had suffered a "very serious" brain injury and was in a coma. [*Id.* at 3]. His condition was "grave" and his "prognosis was extremely poor." [*Id.* at 2-3].

According to Plaintiffs, on March 31, 2018, De Paz's family, including De Paz Senior and Torres, met with Chaplain Ronald Suarez "in an attempt to process what they were going through and express their beliefs and wishes about how they wished to proceed." [*Id.* at 3]. The family purportedly communicated to the chaplain that they did not wish to stop treatment and expressed a need for more time. [*Id.*]. At some point that same day, Plaintiffs allege they were informed by an unidentified member of the "staff"[3] that De Paz would continue to receive medical treatment at JPS for a week, after which time he would be sent home with medical equipment necessary for his treatment. [*Id.*]. At 10:00 p.m., De Paz's family members, except for De Paz Senior, went home for the night. [*Id.*].

Plaintiffs allege that Dr. Duane entered De Paz's room the next morning, April 1, 2018, with a language-interpreting nurse and explained to De Paz Senior that the decision had been made

[3] Plaintiffs do not allege if this was a representative of Acclaim, of JPS, or both.

to cease providing De Paz with life-sustaining treatment. [*Id.*]. According to Plaintiffs, De Paz Senior asked Dr. Duane "what had happened to the plan to release him home after 7 days," at which time Dr. Duane allegedly responded that "the doctors had gotten together and decided to take him off life support." [*Id.* at 3]. De Paz died after treatment was withdrawn. [*Id.* at 4].

Plaintiffs assert negligence and gross negligence claims against JPS predicated upon what Plaintiffs allege to be a failure by Dr. Duane to comply with the Texas Advance Directives Act[4] and JPS's alleged failure to train and supervise its "employees/doctors." [*Id.* at pp. 6-7]. Plaintiffs also assert a claim against JPS under 42 U.S.C. § 1983—alleging that the failure to adhere to the Texas Advance Directives Act was a violation of De Paz's due process rights under the Fourteenth Amendment. [*Id.* at 7].

## III.
## RULE 12(b)(1) MOTION TO DISMISS FOR LACK OF JURISDICTION

JPS is entitled to dismissal of Plaintiffs' negligence claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure on immunity grounds. Rule 12(b)(1) authorizes federal courts to dismiss an action for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). "Sovereign immunity is jurisdictional in nature." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1992). "Because sovereign immunity deprives the court of jurisdiction," dismissal pursuant to Rule 12(b)(1) is appropriate if a party is entitled to sovereign immunity. *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996); *see also Rodriguez v. Christus Spohn Health Sys. Corp.*, 628 F.3d 731, 737-38 (5th Cir. 2010) (holding 12(b)(1) motion to dismiss on immunity grounds should have been granted). In considering a Rule 12(b)(1) motion to dismiss, the Court may consider evidence

[4] Plaintiffs allege Dr. Duane's actions violated the Texas Advance Directives Act (specifically, TEX. HEALTH & SAFETY CODE §§ 166.039, 166.040, 166.044, 166.045 and 166.046). [*Id.* at pp. 4-5]. Plaintiffs allege that JPS is liable for the acts or omissions of Dr. Duane under the doctrine of respondeat superior. [*Id.* at 6].

outside the four-corners of the complaint and need not accept the non-moving party's allegations as true. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). A plaintiff bears the burden of establishing that the court has jurisdiction over a dispute. *See Dow Jones & Co., Inc. v. Ablaise Ltd.*, 606 F.3d 1338, 1348 (2010) ("Subject matter jurisdiction is a threshold requirement for a court's exercise of jurisdiction over a case.").

**A. The Texas Tort Claims Act Governs this Action**

Under Texas law, governmental entities have sovereign immunity and such immunity is presumed to exist unless the state legislature has expressed clear and unambiguous intent to waive immunity. *See Morgan v. Plano Indep. Sch. Dist.*, 724 F.3d 579, 583-84 (5th Cir. 2013) (citing *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2002)). JPS is a county hospital district established under Chapter 281 of the Texas Health and Safety Code. As a political subdivision of the State of Texas, JPS is considered a governmental entity for sovereign immunity purposes. *Tarrant Cty. Hosp. Dist. v. Ray*, 712 S.W.2d 271, 274 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); *see also Aguocha-Ohakweh v. Harris Cty. Hosp. Dist.*, 731 F. App'x 312, 316 (5th Cir. 2018) (per curiam) (citing *Martinez v. Val Verde Cty. Hosp. Dist.*, 140 S.W.3d 370, 371 (Tex. 2004) (explaining that hospital districts are entitled to governmental immunity)). Accordingly, JPS is immune from suit for torts unless a claim falls within an exception to immunity under the Texas Tort Claims Act ("TTCA"). *See* TEX. CIV. PRAC. & REM. CODE § 101.021.

"[U]nless the TTCA expressly waives immunity, courts lack subject matter jurisdiction over tort claims against governmental units." *See Aguocha-Ohakweh*, 731 F. App'x at 316 (citing *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 224-25 (Tex. 2004)). The party suing a governmental unit bears the burden of pleading facts that affirmatively demonstrate

jurisdiction by alleging a waiver of immunity. *Id.* (citing *DART v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003)).

The TTCA provides three situations in which a governmental entity may waive its sovereign immunity for claims under Texas law. Specifically, Section 101.021 provides as follows:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) 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.

TEX. CIV. PRAC. & REM. CODE § 101.021 (Vernon 2019). Plaintiff's state law claims do not fall within any exception to immunity under this subsection and therefore JPS retains sovereign immunity.

**B. Dr. Duane Was Not an Employee of JPS and Her Actions Cannot be Imputed to JPS under the TTCA**

A governmental unit's sovereign immunity can only be waived under the TTCA through the acts or omissions of an employee of the governmental unit. *See e.g.*, *Dumas v. Muenster Hosp. Dist.*, 859 S.W.2d 648, 650-51 (Tex. App.—Fort Worth, no writ) (holding that the entire Section 101.021 requires a negligent act or omission by an employee, including the tangible personal

property provision in § 101.021(2)).[5] To be an "employee" for purposes of the TTCA, a person must be "in the paid service of a governmental unit." TEX. CIV. PRAC. & REM. CODE § 101.001(2). The term "employee" does not include an independent contractor. *Id.* For this reason, courts have held that the acts of an independent contractor, such as a physician with staff privileges at a public hospital district, do not waive a hospital district's sovereign immunity under Section 101.025 of the TTCA. *See e.g.*, *Dumas*, 859 S.W.2d at 650-51; *Brown v. Montgomery Cty. Hosp. Dist.*, 905 S.W.2d 481, 484 (Tex. App.—Beaumont 1995, no writ); *Mitchell v. Shepperd Memorial Hosp.*, 797 S.W.2d 144, 146 (Tex. App.—Austin 1990, writ denied).

Plaintiffs' allegations center solely on the alleged conduct of Dr. Duane. However, Dr. Duane was not an employee of JPS. [App. 0005 at ¶ 6]. She was a physician with staff privileges at JPS. [App.0004 at ¶ 3]. Dr. Duane was employed and paid by Acclaim. [*See* App. 0006; *see also* App. 0010 at ¶ 3.5]. She was not "in the paid service" of JPS and, therefore, was not an "employee" of JPS for purposes of the TTCA.[6] [*See* App. 0004 – 0006 and App. 0010]. Dr. Duane's acts or omissions, as alleged by Plaintiff, cannot constitute a waiver of JPS's sovereign immunity under the TTCA as a matter of law. Accordingly, JPS retains its sovereign immunity and Plaintiffs' state law claims should be dismissed pursuant to Rule 12(b)(1).

**C. Plaintiffs Have Not Alleged or Established a Waiver of Immunity under the TTCA**

Even if Dr. Duane were an employee of JPS for purposes of the TTCA (which she is not), Plaintiffs' negligence claims should nevertheless be dismissed because Plaintiffs have failed to

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[5] Although not applicable here, an exception to this rule exists in premises defect cases where the theory of liability is dependent upon a property condition, and not the acts or omissions of an employee. *See e.g.*, *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 612 (Tex. 2000).

[6] In their Motion to Dismiss (Doc. #16), Dr. Duane and Acclaim affirmatively represent that Dr. Duane "was at all relevant times employed by Acclaim." [*See* Doc. #16 at p. 1 (citing Doc. #17 at App. 25, Exhibit D (Declaration of Larry Thompson), ¶¶ 4 & 6].

allege facts sufficient to establish a waiver of immunity under the TTCA. Before a court may exercise jurisdiction over a claim against a governmental party, the party asserting the claim must allege facts sufficient to establish a waiver of immunity. *Aguocha-Ohakweh*, 731 F. App'x at 312; *see also DART v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Here, Plaintiffs have not alleged facts to establish that the TTCA applies to their negligence claims. Rather, the allegations made by Plaintiffs in their Complaint affirmatively demonstrate there is no waiver of immunity.

On the face of Plaintiffs' Complaint, this case clearly does not involve the operation or use of a motor-driven vehicle or equipment under Section 101.021(1). Nor does it involve a condition or use of real property under Section 101.021(2). [*See generally* Doc. #7]. Similarly, Plaintiffs do not allege a claim against JPS for alleged injuries arising from the use or condition of tangible personal property as contemplated under Section 101.021(2). [*See id.*].

To state a cause of action under Section 101.021(2) of the TTCA arising from a condition or use of tangible personal property, a plaintiff "must allege that the negligence which proximately caused [the] harm involved the use or misuse of 'tangible personal property.'" *Callis v. Sellars*, 931 F. Supp. 504, 521-22 (S.D. Tex. 1996) (citation omitted). "Use" means "to put or bring into action or service; to employ for or apply to a given purpose." *Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 588 (Tex. 2001). A "condition" of tangible personal property exists if a governmental unit provides equipment that is defective because it lacks an integral safety component. *Overton Mem'l Hosp. v. McGuire*, 518 S.W.2d 528, 529 (Tex. 1975). Therefore, to pursue a claim under this subchapter of the Act, a plaintiff must establish their claimed injuries resulted from: "(1) the direct use of property by a state actor, or (2) a defective condition of state-issued property." *Forgan v. Howard Cty., Tex.*, 494 F.3d 518, 521 (5th Cir. 2007); *see also Lacy v. Rusk State Hosp.*, 31 S.W.3d 625, 629 (Tex. App.—Tyler 2000, no pet.).

The only item of tangible personal property identified by Plaintiffs in their Complaint is a ventilator. [Doc. #7 at 2]. But Plaintiffs do not complain about the "use" or even "misuse" of the ventilator itself. Nor do Plaintiffs complain that the ventilator was defective. That the ventilator was involved in De Paz's care does not trigger a waiver of sovereign immunity under the TTCA. Under Texas law, a use of personal property, such as a medical device, that merely "furnishes the condition that makes the injury possible is not a sufficient use to waive immunity." *Arnold v. Univ. of Tex. Sw. Med. Ctr. at Dallas*, 279 S.W.3d 464, 467-68 (Tex. App.—Dallas 2009, no pet.). Further, it is well-established that the *non-use* of property cannot support a claim under the TTCA. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 513 (Tex. 2019) ("A claim of 'mere non-use' is insufficient to waive immunity; actual use is required."); *see also Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 585-86 (Tex. 1996) (explaining that, by alleging that health-care providers failed to prescribe medications that could have prevented the injury, the plaintiffs alleged the non-use of tangible property, and thus, their claim was not within TTCA's waiver of immunity); *Univ. of Tex. M.D. Anderson Cancer Ctr. v. King*, 329 S.W.3d 876, 880-81 & nn. 3-8 (Tex. App—Houston [14th Dist.] 2010, pet. denied) (explaining that the TTCA's tangible personal property provision does not waive sovereign immunity for injuries proximately caused by the failure to act or to use property); *Gainesville Mem. Hosp. v. Tomlinson*, 48 S.W.3d 511, 514 (Tex. App.—Fort Worth 2001, pet. denied) (explaining that "the mere non-use of property cannot support a claim under the TTCA."). "Use" of property in the context of the TTCA means "to put or bring [the property] into action or service; to employ for or apply to a given purpose." *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004).

Here, Plaintiffs do not allege the ventilator was misused, or that it was the cause of De Paz's injuries. Rather, Plaintiffs allege that De Paz was "disconnected … from life support" in

violation of the Texas Advance Directives Act. [Doc. #7 at 4]. At its core, Plaintiffs allege injuries that arise from, and are based on, a medical decision (*i.e.*, to withdraw De Paz from life-sustaining treatment), not from a piece of equipment. Plaintiffs' allegation that the ventilator was discontinued, if anything, would constitute a "non-use" of equipment, which does not establish a waiver of sovereign immunity under the TTCA. Again, the gravamen of Plaintiffs' Complaint is that Dr. Duane exercised improper medical judgment by withdrawing life-sustaining treatment from De Paz in violation of state law. Accordingly, Plaintiffs have not met their burden of alleging facts establishing JPS waived its immunity under the TTCA, and the Court should dismiss Plaintiffs' negligence claims under Rule 12(b)(1).

## IV.
## RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiffs also assert a claim against JPS for deprivation of constitutional rights under 42 U.S.C. § 1983. In support of this claim, Plaintiffs allege that "the failure to adhere to the Texas Advance Directives Act was a direct violation of Mr. DePaz' due process rights under the 14th amendment of the United States Constitution." [Doc. #7 at 7]. Plaintiffs further allege that [b]ecause Dr. Duane was a person with final decision-making authority, the hospital employees/doctors were not adequately trained, and the practice of ignoring the laws concerning withholding life sustaining treatment had been widespread, the actions as described above violate 42 U.S.C. § 1983." [*Id.*]. JPS is entitled to dismissal of Plaintiffs' Section 1983 claims under Rule 12(b)(6).

### A. Rule 12(b)(6) Standard

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). To avoid dismissal under Rule 12(b)(6), a plaintiff must

plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Pleadings must show specific, well-pleaded facts, not merely conclusory allegations to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). "[A] complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws." *Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 525, 528 (5th Cir. 2008). Claims must include enough factual allegations "to raise a right to relief above the speculative level . . .." *Twombly*, 550 U.S. at 555.

Courts should neither "strain to find inferences favorable to plaintiffs" nor accept "conclusory allegations, unwarranted deductions, or legal conclusions." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint fails to state a plausible claim to relief. *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009).

**B. Plaintiffs' Section 1983 Claim Should Be Dismissed for Failure to State a Claim Upon Which Relief Can Be Granted**

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a violation of a right secured by the Constitution or laws of the United States and demonstrate that a person acting under color

of state law violated that right. *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 2004). The law is clearly established that the doctrine of respondeat superior does not apply to Section 1983 actions. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Rather, governmental liability under Section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose "moving force" is the policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)).

Liability may be imposed against a local governmental entity only if the governmental unit's official policy or custom caused a plaintiff to be deprived of a federally protected right. *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010). There must be an affirmative link between the official policy and the particular constitutional violation alleged. *City of Ok. City v. Tuttle*, 471 U.S. 808, 823 (1985). Thus, in order to state a claim based upon the existence of a custom or policy, Plaintiffs must allege (1) the existence of a custom or policy; (2) of which governmental policymakers had actual or constructive knowledge; (3) that a constitutional violation occurred; and (4) that the custom or policy served as the moving force behind the violation. *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532-33 (5th Cir. 1996). Plaintiffs' Complaint fails to allege facts sufficient to support a Section 1983 claim against JPS.

**1. Plaintiffs' Section 1983 Claim Predicated Upon an Alleged Violation of the Texas Advance Directives Act Fails as a Matter of Law**

Title 42 U.S.C. Section 1983 does not create any substantive rights, but instead was designed to provide a remedy for violations of federal statutory and constitutional rights. *Sepulvado v. Jindal*, 729 F.3d 413, 420 n.17 (5th Cir. 2013). Absent a showing that a defendant

violated a plaintiff's federal constitutional rights, complaints about the violation of state statutes are insufficient as a matter of law to support a claim for relief under Section 1983.[7]

Here, Plaintiffs allege that Dr. Duane's "failure to adhere to the Texas Advance Directives Act" violated De Paz's due process rights under the Fourteenth Amendment. [Doc. #7 at 7]. The Texas Advance Directives Act is a state statute that addresses medical decision making—specifically, procedures to be followed by physicians with respect to end-of-life medical treatment. Such procedures arise solely as a function of state law and are not federally guaranteed or constitutionally required procedures. Because Plaintiffs' Section 1983 claim is predicated solely upon Defendants' alleged failure to follow the procedures set forth in a state statute (*i.e.*, the Texas Advance Directives Act), Plaintiffs have failed to state a cognizable Section 1983 claim and such claim should be dismissed.

**2. Plaintiffs' Section 1983 Claim Against JPS Based on Respondeat Superior Fails as a Matter of Law**

Plaintiffs generally allege in their "Causes of Action" section that JPS is vicariously liable for the acts or omissions of its "agents/employees" based on the doctrine of respondeat superior. [Doc. #7 at 6]. Specifically, Plaintiffs allege:

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[7] *See Jones v. Lowndes Cty.*, 678 F.3d 344, 352 (5th Cir. 2012) ("[A]n alleged violation of a state statute does not give rise to a corresponding § 1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution."); *Black v. Warren*, 134 F.3d 732, 734 (5th Cir. 1998) (holding alleged violations of TDCJ procedural rules regarding notice and the right to call witnesses and present documentary evidence at a disciplinary hearing did not present an arguable basis to support a due process claim); *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996) (holding a prison official's failure to follow the prison's own policies, procedures, and regulations does not constitute a violation of due process if constitutional minima are nevertheless met); *Giovanni v. Lynn*, 48 F.3d 908, 912 (5th Cir. 1995) (holding a mere failure to accord procedural protection called for by state law or regulation does not itself amount to a denial of due process), *cert. denied*, 516 U.S. 860 (1995); *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994) (holding a state's failure to follow its own procedural regulations does not constitute a violation of due process if constitutional minima are met); *Murray v. Miss. Dep't of Corr.*, 911 F.2d 1167, 1168 (5th Cir. 1990) (holding alleged violations of a state statute did not give rise to federal constitutional claims), *cert. denied*, 498 U.S. 1050 (1991); *Jackson v. Cain*, 864 F.2d 1235, 1251 (5th Cir. 1989) ("A state's failure to follow its own procedural regulations does not establish a violation of due process, because 'constitutional minima may nevertheless have been met.'"); *Brown v. Texas A&M Univ.*, 804 F.2d 327, 335 (5th Cir. 1986) (holding a state agency's violations of its own internal regulations did not establish a due process violation or otherwise give rise to a constitutional claim).

> The injuries caused by the misconduct of Defendants occurred while Defendants' agents and employees were within the regular scope of their employment by Defendants. Plaintiff (sic) specifically pleads the doctrine of respondeat superior. Defendants may be held liable for the negligent acts of its (sic) agents/employment (sic) even if the employer did not personally commit a wrong.

[Doc. 7 at 6].

To the extent Plaintiffs intend to allege respondeat superior liability as a basis for their Section 1983 claim it must fail as a matter of law. It is well established that a governmental entity cannot be liable for civil rights violations under a theory of respondeat superior or vicarious liability. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Instead, liability may be imposed "only where the [government entity] *itself* causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (citing *Monell*, 436 U.S. at 694-9)) (emphasis in original). Thus, JPS does not have any liability under Section 1983 unless Plaintiffs plead and prove that JPS had an unconstitutional policy that caused them to be deprived of a federally protected right. *St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

**3. Plaintiffs Fail to Identify an Official Policy or Custom**

Plaintiffs' Section 1983 claim should also be dismissed because they fail to identify an official policy or custom which led to the deprivation of their constitutional rights. *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532 (5th Cir. 1996). The Fifth Circuit has clearly articulated the definition of an "official policy or custom" as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the

> governing body of the municipality or to an official to whom that body has delegated policy-making authority.

*Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984) (per curiam). Plaintiffs are required to specifically identify each policy which they claim caused a constitutional violation. *Akins v. Liberty Cty., Tex.*, 2014 U.S. Dist. LEXIS 2845, *30 (E.D. Tex. Jan. 9, 2014) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001), cert. denied, 534 U.S. 820 (2001)).

A plaintiff must also plead and prove that the alleged constitutional violation resulted from a policy or custom adopted or maintained by the County with objective deliberate indifference. *Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997) (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). An official or municipality acts with deliberate indifference if its conduct (or adopted policy) disregards a known or obvious risk that is very likely to result in the violation of constitutionally protected rights." *Hovater v. Robinson*, 1 F.3d 1063, 1066 (10th Cir. 1993) (citing *Berry v. City of Muskogee*, 900 F.2d 1489, 1495 (10th Cir. 1990)); *see also Akins*, 2014 U.S. Dist. LEXIS 2845 at *41. "Deliberate indifference" requires a higher degree of fault than negligence, or even gross negligence." *Riley v. Olk-Long*, 282 F.3d 592, 597 (10th Cir. 2002). Thus, a plaintiff alleging an unconstitutional custom or policy must either provide evidence that the governmental entity deliberately enacted an unconstitutional policy or custom, or show "persistent, repeated, and constant violations of constitutional rights." *Boone v. City of Burleson*, 961 F. Supp. 156, 160 (N.D. Tex. 1997).

Plaintiffs' Complaint is devoid of any facts to support the existence of an "official policy" of JPS, let alone one that was adopted or maintained with deliberate indifference and was the moving force behind the alleged violation of Plaintiffs' constitutional rights. There is no allegation in Plaintiffs' Complaint that JPS has "officially adopted and promulgated" any policy relevant to

Plaintiffs' claims.[8] Nor are there any well-pleaded facts evidencing a "persistent widespread practice" or "custom" at JPS. Rather, in conclusory fashion, Plaintiffs allege that: (1) Defendants failed to "adequately supervise their own employees/doctors to ensure that they are following proper procedures in discontinuing life sustaining care;" (2) Defendants failed to "properly train their employees/doctors on how to follow correct procedure in discontinuing life sustaining treatment;[9] and (3) "the practice of ignoring the laws concerning withholding life sustaining treatment had been widespread." [Doc. #7 at pp. 6-7]. These conclusory allegations are not supported by any well-pleaded facts and are insufficient to establish the existence of an "official policy or custom" actionable under Section 1983.

In their Complaint, Plaintiffs reference an internet article published by the political advocacy group Direct Action Texas in July 2018, and attach an email purportedly authored by an "Anonymous Surgical Resident" to Direct Action Texas in response to the article (the "Anonymous Email"). [*See* Doc. #7 at pp. 5-6 and Ex. A thereto]. According to Plaintiffs, "[t]he resident explains that on three different occasions, Dr. Duane chose to withdraw care without appropriate discussions or consent, choosing patients who were uninsured and lacked the resources to seek justice, leading to multiple nurses to report her actions to JPS CEO Robert Early (sic)[10]." [Doc. #7 at pp. 5-6].

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[8] In fact, the word "policy" does not appear in Plaintiff's Complaint.

[9] The Supreme Court has observed that "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. 51, 61 (2011). To satisfy § 1983, "a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Here, Plaintiffs' Complaint does not contain any well-pleaded facts that, if true, would satisfy this "stringent standard of fault." *See id.*

[10] The proper spelling of the name of JPS's CEO is Robert Earley.

Even assuming such allegations were true for purposes of Rule 12(b)(6), including those purportedly made by an "Anonymous Surgical Resident" in Exhibit A to Plaintiffs' Complaint, they fall far short of establishing a "persistent widespread practice" or "custom" at JPS. In fact, they show the opposite. As an initial matter, the general rule is that allegations of isolated incidents are insufficient to establish a custom or policy. *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir. 1992). "Isolated violations are not the persistent, often repeated constant violations that constitute custom and policy." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985). The Anonymous Email alleges that there were "three patients during that month that [Dr. Duane] withdrew care on without appropriate discussions with family or consent" which, in turn, "prompted the ICU nurses to go to [JPS CEO] Robert Early (sic)" to report her. [Doc. #7 at Ex. A]. The Anonymous Email further alleges that Dr. Duane was subsequently "dismissed in lieu of a formal complaint." [*Id.*].

At the very most, Plaintiffs' allege that one doctor (Dr. Duane) withdrew care with respect to three patients in the course of one month in violation of the Texas Advance Directives Act. No other details concerning the alleged "three patients" are provided. Further, Plaintiffs do not allege that anyone at JPS, other than Dr. Duane, withdrew life sustaining treatment in violation of the Texas Advance Directives Act with respect to any patient at any point in time. Such allegations involving one physician in a one-month period do not evidence a "widespread practice" or "custom" at JPS. *See Bennett*, 728 F.2d at 768 n.3; *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (for purposes of § 1983 liability, the practice must be "so persistent and widespread as to practically have the force of law.").

Furthermore, the Anonymous Email itself contradicts any notion that JPS had a "persistent widespread practice" or "custom" of "ignoring the laws concerning withholding life sustaining

treatment." The anonymous author alleges that Dr. Duane's actions "prompted the ICU nurses to go to [JPS CEO] Robert Early (sic)" to report her, and that Dr. Duane was subsequently "dismissed in lieu of a formal complaint." [Doc. #7 at Ex. A]. The allegations that Dr. Duane was reported by ICU nurses and subjected to discipline completely undercut any notion that a there was a widespread policy or custom of ignoring the Texas Advance Directives Act at JPS. Rather, it shows that JPS, when it became aware of this issue, investigated and took prompt remedial action. Accordingly, Plaintiffs have failed to state a Section 1983 claim and such claim should be dismissed pursuant to Rule 12(b)(6).

**4. Plaintiffs Failed to Identify a Final Policymaker, Nor Did They Allege Such Policymaker Knew of or Approved the Policy or Custom**

Dismissal is also appropriate because Plaintiffs have failed to identify a final policymaker or allege that the final policymaker had knowledge of or approved any unconstitutional policy or custom. *See Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 346 (5th Cir. 2017) (stating "the policymaker must have either actual or constructive knowledge of the alleged policy to be liable"); *see also Williams-Grant v. Arlington Indep. Sch. Dist.*, 2012 U.S. Dist. LEXIS 165277, at *8-9 (N.D. Tex. Nov. 19, 2012) (for Section 1983 liability to attach, the alleged policy or custom must be "approved or sanctioned by defendant's final policymaker.").

Plaintiffs do not identify any final policymaker in their Complaint. In fact, the words "policy" and "policymaker" do not appear at all in Plaintiffs' pleading. Instead, Plaintiffs allege in conclusory fashion that "Dr. Duane was a person with final decision making authority . . . ."[11]

[11] As an initial matter, Dr. Duane is not a "final policymaker" for JPS because she was not employed by JPS. [*See* App. 0004 – 0006 and App. 0010; *see also See* Doc. #16 at p. 1 (citing Doc. #17 at App. 25, Exhibit D, ¶¶ 4 & 6]. Even if she were an employee of JPS (which she was not), however, Plaintiffs' have failed to state a viable Section 1983 claim because Plaintiffs' have failed to allege that Dr. Duane was a "final policymaker" for JPS—much less well-pleaded facts to support such an allegation.

[Doc. #7]. Even taking this allegation as true, it is insufficient as a matter of law to state a Section 1983 claim against JPS. The Fifth Circuit has expressly recognized a "fundamental" "difference between final decisionmaking authority and final policymaking authority" in the context of Section 1983 claims. *Bolton v. City of Dallas*, 541 F.3d 545, 548-49 (5th Cir. 2008). The mere fact that an official has the discretion to make the final decision over a particular function does not mean that the official has final policymaking authority over that function. *Id.* at 549; *Harris v. City of Balch Springs*, 9. F. Supp.3d 690, 708 (N.D. Tex. 2014) (dismissal for failure to state a Section 1983 claim appropriate where, *inter alia*, plaintiff "[did] not allege that the City has delegated policymaking authority to [defendant]"). Thus, Plaintiffs' conclusory allegation that Dr. Duane was a "final decisionmaker" is insufficient on its face to state a Section 1983 claim.

Even if Plaintiffs had alleged that Dr. Duane was a "final policymaker" for JPS, however dismissal would be appropriate because Dr. Duane was not the "final policymaker" for JPS as a matter of Texas law. Whether an official has final policy-making authority is question of law for the court and requires examination of applicable state law regarding the legal authority possessed by local officials. *McMillian v. Monroe Cty., Alabama*, 520 U.S. 781, 784-88 (1997). The "court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" *Id.* at 784-85 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). "This inquiry is specific to the particular action at issue and depends on an analysis of relevant state and local law." *Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir. 2008).

The "final policymaker" at JPS is the Board of Managers. TEX. HEALTH & SAFETY CODE § 281.047 ("The board shall manage, control, and administer the hospital or hospital system of the

district." ). The Board of Managers is responsible for voting upon and approving all official JPS policies. With respect to policies concerning medical decision-making, such policies are first formulated by the Medical Executive Committee at JPS and subsequently recommended to the Board of Managers for approval. *See* TEX. HEALTH & SAFETY CODE § 281.0286(e), (f) (the medical executive committee of Tarrant County Hospital District (*i.e.*, JPS) shall "adopt, maintain, and enforce policies" relating to: "(A) governance of the medical executive committee; (B) credentialing; (C) quality assurance; (D) utilization review; (E) peer review; (F) medical decision-making; and (G) due process."). The Health and Safety Code further provides that, "[f]or all matters relating to the practice of medicine, each physician employed by [JPS] shall ultimately report to the chair of the medical executive committee for the district." *Id.* at § 281.0286(i). As a matter of law, Dr. Duane was not a "final policymaker" for JPS.

Plaintiffs' failure to identify a final policymaker and allege that such policymaker had knowledge of an allegedly unconstitutional policy is fatal to Plaintiffs' Section 1983 claims. Plaintiffs have not (and cannot) state a viable Section 1983 claim against JPS and, accordingly, such claims should be dismissed.

**5. Plaintiffs' Section 1983 Claim is Merely a Repackaged Medical Negligence Claim**

Plaintiffs' Section 1983 claim also fails as a matter of law because it is merely a repackaged medical negligence or gross negligence claim. Again, governmental liability under Section 1983 attaches only where a custom, policy or practice attributable to the governmental entity itself was the moving force behind a violation of a Constitutional right. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Absent a Constitutional violation, there is no claim against a governmental entity, regardless of the entity's custom or policies. *Id.*

Essentially, Plaintiffs' Section 1983 claim boils down to Plaintiffs' dissatisfaction with the medical treatment provided to De Paz. Specifically, Plaintiffs allege that Defendants were negligent in the care provided to De Paz, and failed to adequately supervise and train "their own employees/doctors" with respect to end-of-life procedures, and then, immediately after, claim that the same "actions as described above violate 42 U.S.C. § 1983." [Doc. #1 at pp. 6-7]. Plaintiffs do not describe any additional conduct that might support a Section 1983 claim, other than the same conduct they allege constitutes negligence and gross negligence.

Allegations of improper medical treatment "do[] not give rise to a § 1983 cause of action." *Aguocha-Ohakweh*, 731 F. App'x at 315 (quoting *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). "Nor does mere negligence, neglect, or medical malpractice." *Id.*; *see also Fielder v. Bosshard*, 590 F.2d 105, 107 (5th Cir. 1979) (explaining "[m]ere negligence, neglect, or medical malpractice is insufficient" to support a § 1983 claim). In fact, courts consistently hold that negligence, even gross negligence, does not implicate the Constitution, and does not provide a basis for a § 1983 claim.[12] Thus, Plaintiffs may not recast their allegations of medical negligence or gross negligence as federal constitutional deprivations, and they are not entitled to relief under 42 U.S.C. § 1983.

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12 *See Hare v. City of Corinth*, 74 F.3d 633, 641-42, 646 (5th Cir. 1996) (negligence insufficient to support failure to protect claim under § 1983); *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993) (negligent medical care cannot support § 1983 claim); *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 142 (5th Cir. 1992), *vacated on other grounds*, 15 F.3d 443 (5th Cir. 1994) ("Even when constitutional liberty interests are implicated, not all bodily injuries caused by state actors give rise to a constitutional tort, for it is well settled that mere negligence does not constitute a deprivation of due process under the Constitution.").

## V.
## PRAYER

For the foregoing reasons, Defendant Tarrant County Hospital District d/b/a JPS Health Network respectfully requests that the Court dismiss all claims set forth in Plaintiffs' Complaint and that the Court award it any and all further and additional relief to which it is entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on April 24, 2020, a true and correct copy of the foregoing was served electronically by ECF to the following counsel of record:

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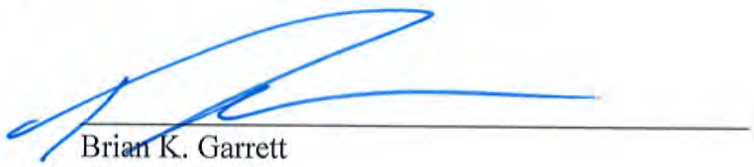

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