

No. 20-10615

***IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT***

BERMAN DE PAZ GONZALEZ, INDIVIDUALLY AND AS HEIR AND ON
BEHALF OF THE ESTATE OF BERMAN DE PAZ MARTINEZ; EMERITA
MARTINEZ-TORRES, INDIVIDUALLY AND AS HEIR AND ON BEHALF
OF THE ESTATE OF BERMAN DE PAZ MARTINEZ,
Plaintiffs-Appellants.

v.

THERESE M. DUANE; ACCLAIM PHYSICIAN GROUP, INCORPORATED;
TARRANT COUNTY HOSPITAL DISTRICT DOING BUSINESS AS JPS
HEALTH NETWORK,
Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Texas
Case No. 4:20-CV-0072-A, Judge John H. McBryde

APPELLANTS' RECORD EXCERPTS

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TABLE OF CONTENTS

<u>Tab</u>	<u>Document</u>	<u>Record Citation</u>
1.	Docket sheet	ROA.1-7
2.	Complaint	ROA.8-18
3.	Final Judgment as to Certain Claims	ROA.52
4.	Memorandum Opinion and Order	ROA.251-62
5.	Final judgment at to Certain Defendants	ROA.263
6.	Memorandum Opinion and Order	ROA.264-76
7.	Final judgment	ROA.277
8.	Notice of Appeal	ROA.278-79

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CERTIFICATE OF SERVICE

Record excerpts (without tabs) were originally served on all registered counsel via the Court's electronic filing system on September 9, 2020. I hereby certify that this corrected version of the record excerpts will be served on all registered counsel via the Court's electronic filing system on September 17, 2020.

/s/ William D. Taylor

TAB 1

APPEAL,CLOSED,PAPER_REQUIRED

**U.S. District Court
Northern District of Texas (Fort Worth)
CIVIL DOCKET FOR CASE #: 4:20-cv-00072-A**

De Paz Gonzalez et al v. Duane et al
Assigned to: Senior Judge John McBryde
Case in other court: United States Court of Appeals Fifth Circuit,
20-10615
Cause: 42:1983 Civil Rights Act

Date Filed: 01/28/2020
Date Terminated: 05/19/2020
Jury Demand: None
Nature of Suit: 362 Torts/Pers Inj: Personal
Injury - Medical Malpractice
Jurisdiction: Federal Question

Plaintiff

Berman De Paz Gonzalez
*Individually and as Heir and on behalf of
the Estate of Berman De Paz-Martinez*

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Plaintiff

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the Estate of Berman De Paz-Martinez*

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Plaintiff

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V.

Defendant

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TERMINATED: 05/16/2020

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Defendant

Acclaim Physician Group, Inc.
TERMINATED: 05/16/2020

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Date Filed	#	Docket Text
01/28/2020	<u>1 (p.8)</u>	COMPLAINT against All Defendants filed by Berman De Paz Gonzalez, The Estate of Berman De Paz Martinez, Emerita Martinez-Torres. (Filing fee \$400; Receipt number 0539-10577624) Clerk to issue summons(es). In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the <u>Judges Copy Requirements</u> is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov , or by clicking here: <u>Attorney Information - Bar Membership</u> . If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Davis, Jackson) (Entered: 01/28/2020)
01/28/2020	<u>2 (p.19)</u>	New Case Notes: A filing fee has been paid. File to Judge McBryde. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge. Clerk to provide copy to plaintiff if not received electronically. (bdb) (Entered: 01/29/2020)
01/28/2020	<u>3 (p.21)</u>	Standing ORDER Concerning Paper Filing in Cases Assigned to District Judge John McBryde...see order for specifics. (Ordered by Senior Judge John McBryde on 1/28/2020) (bdb) (Entered: 01/28/2020)

		01/29/2020)
01/29/2020	<u>4 (p.24)</u>	Summons Issued as to Acclaim Physician Group, Inc., Therese M. Duane, Tarrant County Hospital District. (Attachments: # <u>1 (p.8)</u> Additional Page(s) Summons, # <u>2 (p.19)</u> Additional Page(s) Summons) (bdb) (Entered: 01/29/2020)
01/29/2020	<u>5 (p.30)</u>	ORDER: The court ORDERS that by 4:00 p.m. on February 12, 2020, plaintiffs file with the court a probate court order establishing the identity of the personal representatives of such estate and letters testamentary showing that such persons are qualified as personal representatives. (Ordered by Senior Judge John McBryde on 1/29/2020) (bdb) (Entered: 01/29/2020)
02/05/2020	<u>6 (p.32)</u>	ORDER: by 4pm Feb 10 2020, plaintiffs deliver to clerk paper and judge's copy of their complaint, civil cover sheet and certificate of interested persons. (Ordered by Senior Judge John McBryde on 2/5/2020) (wrb) (Entered: 02/05/2020)
02/07/2020	<u>7 (p.34)</u>	Received original and Judge's copy of <u>1 (p.8)</u> Complaint filed by Berman De Paz Gonzalez, Emerita Martinez-Torres, The Estate of Berman De Paz Martinez (wrb) (Entered: 02/10/2020)
02/07/2020	<u>8 (p.46)</u>	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Berman De Paz Gonzalez, Emerita Martinez-Torres, The Estate of Berman De Paz Martinez. (wrb) (Entered: 02/10/2020)
02/11/2020	<u>9 (p.48)</u>	NOTICE of Dismissal of Claims Only in Their Capacity on Behalf of the Estate of Berman De Paz-Martinez filed by Berman De Paz Gonzalez, Emerita Martinez-Torres, The Estate of Berman De Paz Martinez (wrb) (Entered: 02/12/2020)
02/11/2020	<u>10 (p.50)</u>	WAIVER OF SERVICE OF SUMMONS as to Acclaim Physician Group, Inc.. Waiver sent on 2/4/2020; Therese M. Duane. Waiver sent on 2/4/2020. (wrb) (Entered: 02/12/2020)
02/11/2020	<u>11 (p.52)</u>	FINAL JUDGMENT AS TO CERTAIN CLAIMS...the claims brought by plaintiffs Berman De Paz Gonzalez and Emerita Martinez-Torres, on behalf of the estate of Berman De Paz-Martinez, are dismissed w/o prejudice. This final judgment does not affect plaintiffs' claims and causes of action in their capacities as individuals and heirs. (Ordered by Senior Judge John McBryde on 2/11/2020) (wrb) (Entered: 02/12/2020)
02/12/2020	<u>12 (p.53)</u>	ORDER: by 4pm Feb 26 2020, plaintiffs file a document containing sufficient facts to establish that no administration of the estate of Berman De Paz-Martinez is pending or necessary. (Ordered by Senior Judge John McBryde on 2/12/2020) (wrb) (Entered: 02/12/2020)
02/26/2020	<u>13 (p.54)</u>	NOTICE OF FILING OF AFFIDAVITS CONCERNING SUFFICIENT FACTS TO ESTABLISH NO ADMINISTRATION OF THE ESTATE filed by Berman De Paz Gonzalez, Emerita Martinez-Torres, The Estate of Berman De Paz Martinez (npk) (Entered: 02/26/2020)

03/05/2020	<u>14 (p.60)</u>	WAIVER OF SERVICE Returned Executed as to Tarrant County Hospital District. Waiver sent on 2/24/2020. (wrub) (Entered: 03/05/2020)
03/19/2020	<u>15 (p.62)</u>	Partial Suspension of Standing Order of 1/15/19 - The directive in paragraph 1 requiring that no document be filed by electronic means, and the directive in paragraph 2 requiring that paper copies of electronically filed documents be delivered to the clerk for filing, are suspended until 5/1/2020. (Ordered by Senior Judge John McBryde on 3/19/2020) (Order has been served on registered users of the ECF system)(lrl) (Entered: 03/19/2020)
04/06/2020	<u>16 (p.63)</u>	MOTION to Dismiss for Lack of Jurisdiction , Motion to Dismiss for Failure to State a Claim, MOTION for More Definite Statement () filed by Acclaim Physician Group, Inc., Therese M. Duane with Brief/Memorandum in Support. (Vickers, Philip) (Entered: 04/06/2020)
04/06/2020	<u>17 (p.96)</u>	Appendix in Support filed by Acclaim Physician Group, Inc., Therese M. Duane re <u>16 (p.63)</u> MOTION to Dismiss for Lack of Jurisdiction Motion to Dismiss for Failure to State a Claim MOTION for More Definite Statement (Vickers, Philip) (Entered: 04/06/2020)
04/24/2020	<u>18 (p.124)</u>	MOTION to Dismiss <i>Plaintiff's Original Complaint</i> filed by Tarrant County Hospital District with Brief/Memorandum in Support. Attorney Gregory P Blaies added to party Tarrant County Hospital District(pty:dft) (Blaies, Gregory) (Entered: 04/24/2020)
04/24/2020	<u>19 (p.127)</u>	Brief/Memorandum in Support filed by Tarrant County Hospital District re <u>18 (p.124)</u> MOTION to Dismiss <i>Plaintiff's Original Complaint</i> (Blaies, Gregory) (Entered: 04/24/2020)
04/24/2020	<u>20 (p.156)</u>	Appendix in Support filed by Tarrant County Hospital District re <u>19 (p.127)</u> Brief/Memorandum in Support of Motion (Blaies, Gregory) (Entered: 04/24/2020)
04/27/2020	<u>21 (p.180)</u>	RESPONSE filed by Berman De Paz Gonzalez, Emerita Martinez-Torres, The Estate of Berman De Paz Martinez re: <u>16 (p.63)</u> MOTION to Dismiss for Lack of Jurisdiction Motion to Dismiss for Failure to State a Claim MOTION for More Definite Statement (Davis, Jackson) (Entered: 04/27/2020)
04/27/2020	<u>22 (p.204)</u>	Appendix in Support filed by Berman De Paz Gonzalez, Emerita Martinez-Torres, The Estate of Berman De Paz Martinez re <u>21 (p.180)</u> Response/Objection, (Davis, Jackson) (Entered: 04/27/2020)
04/30/2020	<u>23 (p.214)</u>	Continuation of Partial Suspension of Standing Order of 1/15/19 - The directive in paragraph 1 requiring that no document be filed by electronic means, and the directive in paragraph 2 requiring that paper copies of electronically filed documents be delivered to the clerk for filing, are suspended until 6/8/2020. (Ordered by Senior Judge John McBryde on 4/30/2020) (Order has been served on registered users of the ECF system)(lrl) (Entered: 04/30/2020)

05/11/2020	<u>24 (p.215)</u>	REPLY filed by Acclaim Physician Group, Inc., Therese M. Duane re: <u>16 (p.63)</u> MOTION to Dismiss for Lack of Jurisdiction Motion to Dismiss for Failure to State a Claim MOTION for More Definite Statement (Vickers, Philip) (Entered: 05/11/2020)
05/15/2020	<u>25 (p.227)</u>	RESPONSE filed by Berman De Paz Gonzalez re: <u>18 (p.124)</u> MOTION to Dismiss <i>Plaintiff's Original Complaint</i> (Davis, Jackson) (Entered: 05/15/2020)
05/15/2020	<u>26 (p.247)</u>	Appendix in Support filed by Berman De Paz Gonzalez re <u>25 (p.227)</u> Response/Objection (Davis, Jackson) (Entered: 05/15/2020)
05/16/2020	<u>27 (p.251)</u>	Memorandum Opinion and Order...The court ORDERS that the motion be, and is hereby, granted. The court further ORDERS that the state tort claims and causes of action brought by plaintiffs against movants be, and are hereby, dismissed for lack of subject matter jurisdiction, and that the § 1983 claims and causes of action asserted by plaintiffs against movants be, and are hereby, dismissed with prejudice. The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to the dismissal of the claims against movants. (Ordered by Senior Judge John McBryde on 5/16/2020) (wrb) (Entered: 05/18/2020)
05/16/2020	<u>28 (p.263)</u>	FINAL JUDGMENT AS TO CERTAIN DEFENDANTS... The court ORDERS, ADJUDGES, and DECREES that all claims and causes of action brought by plaintiffs, Berman De Paz Gonzalez and Emerita Martinez-Torres, against Duane and Acclaim in the above-captioned action be, and are hereby, dismissed. Acclaim Physician Group, Inc. and Therese M. Duane terminated. (Ordered by Senior Judge John McBryde on 5/16/2020) (wrb) (Entered: 05/18/2020)
05/19/2020	<u>29 (p.264)</u>	Memorandum Opinion and Order... The court further ORDERS that the state tort claims and causes of action brought by plaintiffs against JPS be, and are hereby, dismissed for lack of subject matter jurisdiction, and that the § 1983 claims and causes of action asserted by plaintiffs against JPS be, and are hereby, dismissed with prejudice. (Ordered by Senior Judge John McBryde on 5/19/2020) (wrb) (Entered: 05/20/2020)
05/19/2020	<u>30 (p.277)</u>	FINAL JUDGMENT... In accordance with the order signed this date granting the motion to dismiss filed by defendant Tarrant County Hospital District d/b/a JPS Health Network ("JPS"), The court ORDERS, ADJUDGES, and DECREES that all claims and causes of action brought by plaintiffs, Berman De Paz Gonzalez and Emerita Martinez-Torres, against JPS in the above-captioned action be, and are hereby, dismissed. (Ordered by Senior Judge John McBryde on 5/19/2020) (wrb) (Entered: 05/20/2020)
06/15/2020	<u>31 (p.278)</u>	NOTICE OF APPEAL as to <u>29 (p.264)</u> Memorandum Opinion and Order, <u>28 (p.263)</u> Order,, Add and Terminate Parties, <u>30 (p.277)</u> Judgment, <u>27 (p.251)</u> Memorandum Opinion and Order,, to the Fifth Circuit by Berman De Paz Gonzalez, Emerita Martinez-Torres. Filing fee \$505, receipt number 0539-10915922.

		T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here . (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Davis, Jackson) (Entered: 06/15/2020)
06/25/2020	32 (p.280)	Received letter from United States Court of Appeals Fifth Circuit No. 20-10615. We have docketed the appeal as shown above, and ask you to use the case number above in future inquiries. (tle) (Entered: 06/25/2020)
06/25/2020		USCA Case Number 20-10615 in United States Court of Appeals Fifth Circuit for 31 (p.278) Notice of Appeal, filed by Emerita Martinez-Torres, Berman De Paz Gonzalez. (tle) (Entered: 06/25/2020)

TAB 2

**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, and on §
behalf of THE ESTATE OF §
BERMAN DE PAZ-MARTINEZ §
Plaintiff §

NO. _____

VS. §
§
THERESE M. DUANE, M.D., §
ACCLAIM PHYSICIAN GROUP, INC., §
TARRANT COUNTY HOSPITAL §
DISTRICT d/b/a JPS HEALTH §
NETWORK §
Defendants §

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES **BERMAN DE PAZ GONZALEZ and EMERITA MARTINEZ-TORRES, Individually and as Heirs, and on behalf of THE ESTATE OF BERMAN D PAZ-MARTINEZ** hereinafter referred to as Plaintiffs, complaining of **THERESE DUANE, M.D., ACCLAIM PHYSICIAN GROUP, INC., TARRANT COUNTY HOSPITAL DISTRICT d/b/a JPS HEALTH NETWORK,** hereinafter referred to as Defendants, and for cause of action, Plaintiffs would respectfully show the Court and Jury as follows:

I.

Dr. Therese Duane, M.D. is an individual who resides in Tarrant County, Texas. Dr. Duane may be served with citation at her residence, 1101 Wishing Tree Lane, Keller, Texas 76248, or wherever she may be found.

Defendant Acclaim Physician Group, Inc. , is a Texas Corporation who may be served through their registered agent for service, Robert Earley at 1500 S. MAIN STREET FORT WORTH, TX 76104.

Defendant Tarrant County Hospital District d/b/a JPS Health Network is a local governmental entity who may be served at their principal place of business, 1500 South main Street Fort Worth, TX 76104

II.

Facts

On March 29th, 2018, Berman DePaz Sr. and his wife found themselves in the John Petersmith Intensive Care Unit in an unthinkable position. Their 21-year-old son Berman De Paz was in grave condition and a ventilator was the only thing keeping him alive. As strong Catholics, the DePaz family believed in miracles and even in the midst of tragedy and the chaotic aftermath which marked the hours following their son's admission to the hospital, retained hope that their son would pull through, recover, and live out the rest of his life as intended. As a Level I trauma center, JPS and their doctors are supposed to provide the highest level of care for patients in the most extreme and serious cases. Caring for and dealing with patients who are in the gravest of conditions is a daily reality for JPS doctors and staff. Informing families of all walks of life and assisting them in making the most critical medical care decisions for loved ones is a part of the job. When parents are faced with making crucial end of life decisions regarding their own children, it is the most important decision they will ever make in their lifetime. It is a caretakers job to assist and aid those parents in that decision by providing them with the all of the information and

emotional support they require to make the absolute best decision, because there are no second chances. When it came to their son, Berman DePaz Sr. and his family weren't even afforded a chance, due to the extreme and unconscionable gross negligence of the Defendants JPS and Acclaim Physician Group physician, Dr. Therese Duane.

On March 29th, 2018, the day of their son's injury, mom and dad knew that their son was in a coma and had suffered a very serious brain injury. Through an interpreter, they had been informed by JPS staff that their son's prognosis was extremely poor. The family came together to pray for a miracle to heal Berman DePaz Jr. Almost immediately after the prayers, their son started making movements for the first time. A day and a half after being admitted in the late afternoon of March 31st, 2018, the family spent 45 minutes 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. In that conversation, they communicated to Mr. Suarez that they strongly believe in miracles, saw their son make movements in response to prayer, absolutely do not wish to stop treatment at this time, and expressed a need for more time. From communicating with the staff, the family was told that they would allow him to stay for 7 days, their son would be released to go home with the necessary equipment to keep him alive. At 10 p.m. the family, except for his dad, headed home to rest.

At 6 a.m. the next morning, a doctor by the name of Therese Duane appeared unexpectedly in the room with an interpreting nurse stating that they had an order to disconnect his son from life support. Shocked, unnerved, and panicked, Mr. DePaz Sr. asked her what had happened to the plan to release him home after 7 days, and Dr. Duane stated that the doctors had gotten together and decided to take him off life support. Without

allowing him to even speak with his family or giving his family a chance to return to the hospital, without his consent and right in front of him, Dr. Duane disconnected his son from life support as he helplessly watched his son die.

Under the Texas Advanced Directive Act, Dr. Duane's actions were in direct violation of the following statutes:

-Texas Health and Safety Code Chapter 166.039, outlining the specific procedure in which parents are authorized to make treatment decisions on behalf of patients based on their known desires and the decision must be properly explained, documented, and examined by the medical ethics committee of the hospital in the event of a disagreement.

- Texas Health and Safety Code Chapter 166.040, describing that before withholding or withdrawing life-sustaining treatment from a qualified patient under this subchapter, the attending physician must determine that the steps proposed be taken are in accord with the Texas Advanced Directive Act and the patient's existing desires.

-Texas Health and Safety Code Chapter 166.044, outlining that a physician or health professional must exhibit "reasonable care" in determining whether or not to withdraw life-sustaining procedures, and that the standard of care that a physician, health care facility, or health care professional shall exercise under this section is that degree of care that a physician, health care facility, or health care professional, as applicable, of ordinary prudence and skill would have exercised under the same or similar circumstances in the same or a similar community.

-Texas Health and Safety Code Chapter 166.045, which states that life sustaining care should be provided to a patient until a reasonable opportunity has been afforded for the

transfer of a patient to another physician or healthcare facility if the treatment decision of the family is contrary to the physician's (or the medical ethics committee)

-Texas Health and Safety Code Chapter 166.046, that if a physician and/or a medical ethics committee chooses not to effectuate a directive or a treatment decision, the person responsible for the health care decisions of the patient may be given a written description of the review process, shall be informed of the review process not less than 48 hours before the meeting, shall be provided with a copy of possible transfer options and referral groups, a copy of the patient's medical file for 30 days (including the written explanation for the decision). Further, the patient should be provided life-sustaining treatment pending transfer for at least 10 days.

If Dr. Duane's complete and utter failure to act within the guidelines specifically enumerated in the Texas Advanced Directive Act weren't egregious enough, the motive and method driving Dr. Duane's actions are even more sickening. She chose victims who didn't speak English, weren't insured, and at least one patient (believed to be Berman De Paz Jr. who she (mistakenly) thought was undocumented.

On July 11th, 2018 a political advocacy group in the DFW area called Direct Action Texas published a piece entitled "Does JPS have a plug-pulling problem?" which alleged that a medical director at JPS had been making decisions to end life sustaining treatment of patients in violation of the Texas Advanced Directive Act. In response to the article, an anonymous JPS surgical resident emailed the author of the article naming Dr. Therese Duane. The 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. As described by the resident, her actions are “beyond reprehensible” and the residents were forced into the incomprehensible position of protecting patients from their own doctor. See **Exhibit A**.

IV.

CAUSES OF ACTION AGAINST DEFENDANTS

Incorporating all allegations as set forth above, Plaintiff alleges the following. Defendants are healthcare providers licensed by the State of Texas. 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 specifically pleads the doctrine of respondeat superior. Defendants may be held liable for the negligent acts of its agents/employees committed during the regular course and scope of their agency/employment even if the employer did not personally commit a wrong.

Defendants owed the DePaz family a duty of care to exercise that degree of care required that a reasonable hospital under the same or similar circumstances would. In doing so, the Defendants were required to consider the wishes of the family before discontinuing life sustaining treatment. The Texas Advanced Directives Act specifically codifies the procedure to be followed when the family of a patient disagrees with hospital’s choice to discontinue life sustaining treatment. These Defendants breached this duty of care by the acts and omissions of negligence of Defendants and their agents, employees and representatives, including the following:

- a. In failing to adequately supervise their own employees/doctors to ensure that they are following proper procedures in discontinuing life sustaining care

b. In failing to properly train their employees/doctors on how to follow correct procedure in discontinuing life sustaining treatment

c. Failing to follow the procedure codified in the Texas Advanced Directives Act, more specifically: Texas Health and Safety Code Chapter 166.039, 166.040, 166.044, 166.045, 166.046

Furthermore, the failure to adhere to the Texas Advanced Directive Act was a direct violation of Mr. DePaz' due process rights under the 14th amendment of the United States Constitution.

Because 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.

Based upon Defendants' failure to meet the standard of care as described herein, Plaintiffs would show that Defendants' negligent and otherwise tortious conduct was a proximate cause of damages suffered by the Plaintiffs. Plaintiffs further allege that Defendant had actual subjective awareness of their acts and omissions which led to Mr. DePaz' untimely death without in violation of his due process rights and Plaintiff specifically pleads gross negligence.

As a proximate result of the negligence and gross negligence as above described, Plaintiff, **BERMAN DEPAZ** and his family sustained personal injuries, all of which have caused them in the past, and will cause them in the future, physical pain, mental anguish,

physical impairment, and medical and hospital expenses, for which she should be compensated in accordance with the laws of the State of Texas.

V.

CONDITION PRECEDENT

Plaintiffs would show that they have complied with the provisions set forth in Section 74.051 of the Civil Practice and Remedies Code, in that Defendants have been notified of Plaintiff's claim(s) prior to the filing of this lawsuit.

VI.

**CLAIM FOR WRONGFUL DEATH SURVIVOR
DAMAGES TO PLAINTIFFS**

Plaintiffs' injuries were proximately caused by the grossly negligent and negligent acts or omissions of Defendants. Accordingly, Plaintiffs hereby sue for survivor and wrongful death damages pursuant to the Texas Wrongful Death Statute, Tex. Civ. Prac. & Rem. Code Section 71.001, et. seq. for loss of love, affection, comfort, society and counsel, which exceed the minimum jurisdictional limits of this Court.

VII.

DISCOVERY PROPOUNDED TO DEFENDANT

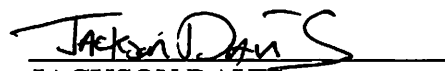
Plaintiff hereby propounds the following discovery to Defendant along with the service of this petition:

- 1) Plaintiff's Request for Disclosure to Defendant

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein, and that upon final hearing hereof, Plaintiffs have judgment against Defendant for all damages to which they are entitled under the Federal law and under the laws of the State of Texas, which amount exceeds the minimum jurisdictional limits of this Court; for pre-judgment interest in accordance with the law; for interest on the judgment; cost of suit; and for such other and further relief, either at law or in equity, to which Plaintiff may be entitled.

Respectfully submitted,

STRECK AND DAVIS LAW
555 S. Summit
Fort Worth, Texas 76104
(817) 332-3117
(817) 549-8898 FAX


JACKSON DAVIS
State Bar No. 24068540
jackson.davis@streckdavislaw.com

ATTORNEYS FOR PLAINTIFF

EXHIBIT A



Christine Welborn

Direct Action Texas
(682) 626-5679
christine@directactiontx.com

Begin forwarded message:

Subject: Does JPS Have a Plug-Pulling Problem?
Date: July 12, 2018 at 9:46:00 AM CDT
To: "info@directactiontx.com" <info@directactiontx.com>

To whom it concerns,

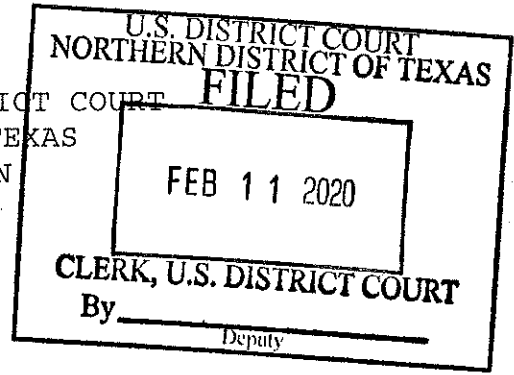
Regarding this story:

- 1) The provider's name is Therese Duane. She was the Chair of the Department of Surgery. She should be named
- 2) She wasn't involved in inappropriate withdrawal of care of 10 patients. That is not accurate. There were however three patients during that month that she withdrew care on without appropriate discussions with family or consent. The patients were uninsured and I believe at least one was an undocumented immigrant. I doubt their families have the resources to seek justice. What she did is beyond reprehensible. There were other questionable instances in the months preceding. She seemed to have become more reckless which prompted the ICU nurses to go to Robert Early
- 3) She had multiple, repeated bad outcomes in the operating room. The surgical residents had been protecting patients from her since she arrived in fort worth. She would not infrequently attempt to begin surgical procedures on her own while the surgical residents were involved in another procedure or care for a patient in the emergency room. The nurses knew to call us repeatedly if and when she did that because she was dangerous. For example, she performed below the knee amputations so incorrectly that they would later need to be revised to an above the knee amputation. This was purely a technical misjudgment on her part that resulted in patients receiving a much more morbid amputation which would make it considerably more difficult for them to be ambulatory with a prosthesis. This is just one example of many.
- 4) Her agreement with the hospital was that she was dismissed in lieu of a formal complaint being placed to the Texas Medical Board. Without a formal complaint she is now free to seek to practice elsewhere and be dangerous elsewhere. The hospital is complicit in any further malpractice she performs elsewhere by sweeping it under the rug. I myself have tried to report it but it is difficult to do so anonymously.

Anonymous Surgical Resident

TAB 3

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, §
 AND ON BEHALF OF THE ESTATE OF §
 BERMAN DE PAZ-MARTINEZ, §

Plaintiffs, §

VS. §

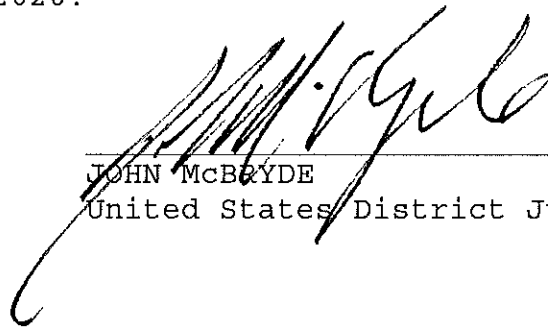
NO. 4:20-CV-072-A

THERESA M. DUANE, M.D., ET AL., §
 Defendants. §

FINAL JUDGMENT AS TO CERTAIN CLAIMS

In accordance with the notice of dismissal filed this date,
 The court ORDERS, ADJUDGES, and DECREES that the claims and
 causes of action brought in the above-captioned action by
 plaintiffs, Berman De Paz Gonzalez and Emerita Martinez-Torres,
 on behalf of the estate of Berman De Paz-Martinez, be, and are
 hereby, dismissed without prejudice. This final judgment does
 not affect plaintiffs' claims and causes of action in their
 capacities as individuals and heirs.

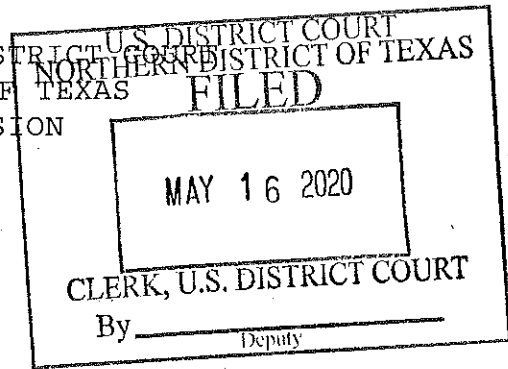
SIGNED February 11, 2020.



 JOHN McBRIDE
 United States District Judge

TAB 4

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,
AND ON BEHALF OF THE ESTATE OF
BERMAN DE PAZ-MARTINEZ,

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Plaintiffs,

VS.

NO. 4:20-CV-072-A

THERESA M. DUANE, M.D., ET AL.,

Defendants.

MEMORANDUM OPINION & ORDER

Came on for consideration the motion by defendants Therese M. Duane, M.D., ("Duane") and Acclaim Physician Group, Inc., ("Acclaim") (collectively, "movants") to dismiss or, alternatively, for a more definite statement. Doc.¹ 16. Having considered the motion and brief in support, the response by plaintiffs, Berman De Paz Gonzalez ("De Paz Gonzalez, Sr.") and Emerita Martinez-Torres, the reply, the record, and the relevant legal authorities, the court finds that such motion should be granted and that the claims brought by plaintiffs against movants should be dismissed.

¹ The "Doc. ___" reference is to the number of the item on the docket in the above-captioned action.

I.

Factual Background

Accepting the allegations in the complaint as true, plaintiff's twenty-one-year-old son, Berman De Paz, Jr., ("De Paz, Jr.") sustained a serious brain injury that left him in a coma. Doc. 1 at 3. He was taken to JPS Hospital for life-sustaining treatment, where staff informed plaintiffs that their son's prognosis was extremely poor. Id. Plaintiffs did not desire to cease the life-sustaining treatment because they believed in miracles and that their son made movements in response to prayer. Id. Staff at the hospital informed plaintiffs that their son could stay for seven days and then be released to go home with the necessary equipment to keep him alive. Id. A few days after their son's admission to the hospital, Duane, a physician, informed De Paz Gonzalez, Sr., that the doctors decided to take his son off life support. Id. Without the consent of plaintiffs, Duane disconnected De Paz, Jr., from life support, and he died. Id. at 4.

II.

Procedural History

On January 28, 2020, plaintiffs sued movants and defendant Tarrant County Hospital District d/b/a JPS Health Network for negligence, gross negligence, and, pursuant to 42 U.S.C. § 1983,

violations of the Fourteenth Amendment's Due Process Clause. Id. at 6-8.² Plaintiffs brought such claims individually, as heirs, and on behalf of their son's estate. Id. at 1. On February 11, 2020, plaintiffs filed a notice of dismissal of their claims on behalf of the estate, Doc. 9, and the court entered final judgment as to those claims, Doc. 10. On April 6, 2020, movants filed their motion to dismiss, or in the alternative, for a more definite statement. Doc. 16. On April 27, 2020, plaintiffs filed their response, Doc. 21, and on May 11, 2020, movants replied, Doc. 24.

III.

Grounds of the Motion to Dismiss

Movants assert that plaintiffs' negligence and gross negligence claims against them should be dismissed for a lack of subject matter jurisdiction because they enjoy sovereign immunity from liability. Doc. 16 at 4-10. Movants also argue that all claims brought against them should be dismissed for failure to state a claim upon which relief may be granted. Id. at 11-23.

² The complaint does not specify whether each claim is asserted against each defendant.

IV.

Applicable Legal Principles

A. Subject Matter Jurisdiction

The plaintiff bears the burden of proof regarding jurisdiction at all stages of litigation. Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980). A district court has the power to dismiss for a lack of subject matter jurisdiction and may make its determination "on any one of three separate bases: (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). "Sovereign immunity deprives the court of subject matter jurisdiction." Walker v. Beaumont Indep. Sch. Dist., 938 F.3d 724, 734 (5th Cir. 2019).

B. Pleading Standards

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal

quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the “showing” contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action. Id. at 555 & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

Moreover, to survive a motion to dismiss, the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. Id. at 678. To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient. Twombly, 550 U.S. at 566-69. “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Iqbal, 556 U.S. at 679. “In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the

pleadings, including attachments thereto." Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000).

V.

Analysis

A. The state tort claims should be dismissed for lack of subject matter jurisdiction.

Movants argue that the negligence and gross negligence claims asserted against them should be dismissed for lack of subject matter jurisdiction. The court agrees.

First, the state tort claims against Duane must be dismissed. Under the Texas Tort Claims Act ("TTCA"), when tort claims are brought against "both a unit of government and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." Tex. Civ. Prac. & Rem. Code § 101.106(e). Movants state that Acclaim qualifies as a unit of government for TTCA purposes pursuant to Texas Health & Safety Code § 281.0565(c), Doc. 16 at 6-8, and plaintiffs do not contest that assertion, Doc. 21 at 7. Duane is Acclaim's employee. Doc 16 at 10. Consequently, the tort claims brought against Duane should be dismissed.

Second, the tort claims brought against Acclaim should be dismissed. The complaint states that Acclaim is liable for negligence and gross negligence (I) because Duane breached a

duty to follow the procedures contained in the Texas Advanced Directive Act before discontinuing life sustaining treatment³ and (II) because Acclaim failed to adequately supervise and train its employees to ensure they followed the act's procedures. Doc. 1 at 6-7 (citing Tex. Health & Safety Code §§ 166.039, 166.040, 166.044, 166.045, 166.046). The Texas Advanced Directive Act states that if a patient has not executed an advanced directive, is incapable of communication, and does not have a legal guardian or an agent under a medical power of attorney, the attending physician and one other person, including the patient's parent, may make the decision to withdraw life support. Tex. Health & Safety Code § 166.039(a)-(b). Further, if an attending physician refuses to honor a decision made on behalf of such a patient, either (I) the physician's refusal must be approved by an ethics or medical committee, id. at § 166.046(a), or (II) life support must be provided to the patient until a reasonable opportunity has been afforded for the transfer of the patient to another healthcare facility willing to comply with the decision, id. at § 166.045(c).

However, under the Texas doctrine of sovereign immunity, a

³ The complaint alleges that Acclaim is liable for Duane's negligence under the doctrine of respondeat superior. Doc. 1 at 6.

governmental entity cannot be held liable for the negligence of its employees unless a constitutional or statutory provision waives its sovereign immunity in clear and unambiguous language. See Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994); Duhart v. State, 610 S.W.2d 740, 742 (Tex. 1980). The TTCA provides waiver in certain circumstances. Tex. Civ. Prac. & Rem. Code § 101.025(a) ("Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter."). The only source of waiver discussed by the parties is found in a TTCA provision which states that a government defendant is liable for "personal injury and death so caused by a condition or use of tangible . . . 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(2).

The complaint does not address the TTCA nor waiver of sovereign immunity. See Doc. 1. In their motion to dismiss, movants argue that the TTCA's waiver relating to tangible property does not apply to the facts pleaded in the complaint, Doc. 16 at 8-9, and plaintiffs assert in their response that it does, Doc. 21 at 7. The court finds that it does not and that plaintiffs failed to allege facts to establish waiver of sovereign immunity.

When the alleged negligence does not relate to the use of tangible property, but instead to the thought process that led to the decision to use it, the waiver found in the TTCA's "tangible property" provision does not apply. Tex. Tech Univ. Health Sci. Center v. Jackson, 354 S.W.3d 879, 886 (Tex. App.—El Paso 2011) (finding no waiver of sovereign immunity because the negligence related to the judgment the doctor used to decide how to treat plaintiff's injured eye and not to how the doctor applied the "bandage contact" or a condition of the contact).

For example, in Arnold v. University of Texas Southwestern Medical Center at Dallas, a doctor's negligent use of medical information led him to use implants which were the wrong size during a breast augmentation surgery, which caused a deformity. 279 S.W.3d 464, 466-67 (Tex. App.—Dallas 2009). The patient sued the doctor and his employer "for failure to make proper pre-surgery investigations and arrangements." Id. No waiver took place because although the doctor physically handled the implants, his negligence related to his decision-making process before the surgery and not to a negligent handling or application of the property. Id. at 470 ("Because the true substance of the Arnolds' pleadings is that Dr. Chao miscalculated or misdiagnosed the necessary size of replacement breast implants, the fact that the pleadings also identify a

piece of tangible personal property used during the procedure does not affect our decision that this is not a claim for the negligent use of tangible personal property.").

A ventilator, like the one used to keep plaintiffs' son alive, constitutes tangible property. However, like in Arnold, the alleged negligence in this action relates to the manner in which a medical decision was made - the decision to withdraw life support without following the procedures mandated by the Texas Advance Directive Act - and not to the manner in which the tangible property was used.⁴ Consequently, Acclaim's sovereign immunity has not been waived under the TTCA's "tangible property" provision, and the tort claims asserted against Acclaim should be dismissed.

B. The § 1983 claims should be dismissed.

Movants also argue that the § 1983 claims asserted against them should be dismissed for failure to state a claim for which relief may be granted. Doc. 16 at 18-23. The court agrees.

To state a claim against a unit of government under § 1983, a plaintiff must allege: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the

⁴ The parties disagree about whether the withdrawal of life support even constitutes a "use" of the ventilator. Doc. 16 at 9; Doc. 21 at 7-8; Doc. 24 at 3-4. However, because plaintiffs failed to allege that the withdrawal was performed in a negligent manner, the court need not decide this question.

policy or custom." Cox v. City of Dallas, 430 F.3d 734, 748 (5th Cir. 2005) (internal citations omitted). Such allegations may not be conclusory; they must contain specific facts. Iqbal, 556 U.S. at 679; Pena v. City of Rio Grande City, 879 F.3d 613, 622 (5th Cir. 2018).

The complaint does not explain how plaintiffs' constitutional rights were violated. Instead, it merely states, "the failure to adhere to the Texas Advanced Directive Act was a direct violation of Mr. DePaz' [sic] due process rights under the 14th amendment of the United States Constitution." Doc. 1 at 7. In their response, plaintiffs clarify that this language refers to the deprivation of plaintiffs' son's life by movants without the due process outlined in the Texas Advanced Directive Act. Doc. 21 at 18. However, to state a § 1983 claim, plaintiffs must plead that their own rights were violated and may not claim their son's injury as their own. See, e.g., Morgan v. City of New York, 166 F. Supp. 2d 817, 819 (S.D.N.Y. 2001); Burrow by and through Burrow v. Postville Cmty. Sch. Dist., 929 F. Supp. 1193, 1208 (N.D. Iowa 1996). Plaintiffs might well have alleged facts to support a state law claim for emotional distress, but the legal authorities would indicate that damages of that sort will not support a claim based on an alleged violation of the United States Constitution. Id.

Because plaintiffs failed to allege that their constitutional rights were violated, they have failed to state a claim for relief against movants under § 1983, and such claims must be dismissed.

VI.

Order

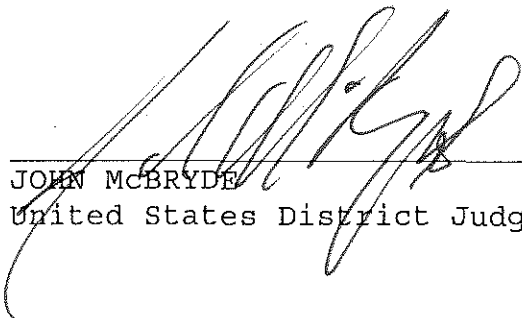
Therefore,

The court ORDERS that the motion be, and is hereby, granted.

The court further ORDERS that the state tort claims and causes of action brought by plaintiffs against movants be, and are hereby, dismissed for lack of subject matter jurisdiction, and that the § 1983 claims and causes of action asserted by plaintiffs against movants be, and are hereby, dismissed with prejudice.

The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to the dismissal of the claims against movants.

SIGNED May 16, 2020.

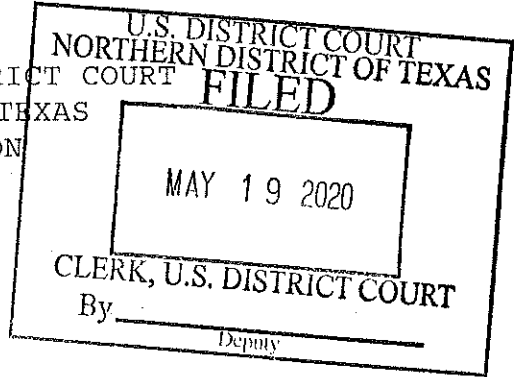


JOHN MCBRYDE
United States District Judge

TAB 5

TAB 6

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,
AND ON BEHALF OF THE ESTATE OF
BERMAN DE PAZ-MARTINEZ,

Plaintiffs,

VS.

THERESA M. DUANE, M.D., ET AL.,

Defendants.

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NO. 4:20-CV-072-A

MEMORANDUM OPINION & ORDER

Came on for consideration the motion by defendant Tarrant County Hospital District d/b/a JPS Health Network (“JPS”) to dismiss. Doc.¹ 18. Having considered the motion and brief in support, the response by plaintiffs, Berman De Paz Gonzalez (“De Paz Gonzalez, Sr.”) and Emerita Martinez-Torres, the record, and the relevant legal authorities, the court finds that such motion should be granted.

I.

Factual Background

Accepting the allegations in the complaint as true, plaintiff’s twenty-one-year-old son, Berman De Paz, Jr., (“De Paz, Jr.”) sustained a serious brain injury that left him in a

¹ The “Doc. ___” reference is to the number of the item on the docket in the above-captioned action.

coma. Doc. 1 at 3. He was taken to JPS Hospital for life-sustaining treatment, where staff informed plaintiffs that their son's prognosis was extremely poor. Id. Plaintiffs did not desire to cease the life-sustaining treatment because they believed in miracles and that their son made movements in response to prayer. Id. Staff at the hospital informed plaintiffs that their son could stay for seven days and then be released to go home with the necessary equipment to keep him alive. Id. A few days after their son's admission to the hospital, Therese Duane ("Duane"), a physician, informed De Paz Gonzalez, Sr., that the doctors decided to take his son off life support. Id. Without the consent of plaintiffs, Duane disconnected De Paz, Jr., from life support, and he died. Id. at 4.

II.

Procedural History

On January 28, 2020, plaintiffs sued JPS, Duane, and Acclaim Physician Group, Inc., ("Acclaim") for negligence, gross negligence, and, pursuant to 42 U.S.C. § 1983, violations of the Fourteenth Amendment's Due Process Clause. Id. at 6-8.² Plaintiffs brought such claims individually, as heirs, and on

² The complaint does not specify whether each claim is asserted against each defendant.

behalf of their son's estate. Id. at 1. On February 11, 2020, plaintiffs filed a notice of dismissal of their claims on behalf of the estate, Doc. 9, and the court entered final judgment as to those claims, Doc. 10. On April 24, 2020, JPS filed its motion to dismiss and brief in support. Doc. 18; Doc. 19. On May 15, 2020, plaintiffs filed their response. Doc. 25. On May 16, 2020, the court granted a motion to dismiss filed by Duane and Acclaim and entered final judgment as to those defendants. Doc. 27; Doc. 28. JPS is the sole remaining defendant.

III.

Grounds of the Motion to Dismiss

JPS asserts that plaintiffs' negligence and gross negligence claims should be dismissed for a lack of subject matter jurisdiction because it enjoys sovereign immunity from liability. Doc. 19 at 9-15. JPS also argues that the § 1983 claims should be dismissed for failure to state a claim upon which relief may be granted. Id. at 15-26.

IV.

Applicable Legal Principles

A. Subject Matter Jurisdiction

The plaintiff bears the burden of proof regarding jurisdiction at all stages of litigation. Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980). A district

court has the power to dismiss for a lack of subject matter jurisdiction and may make its determination "on any one of three separate bases: (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). "Sovereign immunity deprives the court of subject matter jurisdiction." Walker v. Beaumont Indep. Sch. Dist., 938 F.3d 724, 734 (5th Cir. 2019).

B. Pleading Standards

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2); "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the "showing" contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action. Id. at 555 & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true,

it need not credit bare legal conclusions that are unsupported by any factual underpinnings. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

Moreover, to survive a motion to dismiss, the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. Id. at 678. To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient. Twombly, 550 U.S. at 566-69. “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Iqbal, 556 U.S. at 679. “In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto.” Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000).

V.

Analysis

A. The state tort claims should be dismissed for lack of subject matter jurisdiction.

JPS argues that the negligence and gross negligence claims should be dismissed for lack of subject matter jurisdiction.

Doc. 19 at 9-15. The court agrees.

The complaint states that JPS is liable for negligence and gross negligence (I) because Duane breached a duty to follow the procedures contained in the Texas Advanced Directive Act before discontinuing life sustaining treatment and (II) because JPS failed to adequately supervise and train its doctors to ensure they followed the act's procedures. Doc. 1 at 6-7 (citing Tex. Health & Safety Code §§ 166.039, 166.040, 166.044, 166.045, 166.046). The Texas Advanced Directive Act states that if a patient has not executed an advanced directive, is incapable of communication, and does not have a legal guardian or an agent under a medical power of attorney, the attending physician and one other person, including the patient's parent, may make the decision to withdraw life support. Tex. Health & Safety Code § 166.039(a)-(b). Further, if an attending physician refuses to honor a decision made on behalf of such a patient, either (I) the physician's refusal must be approved by an ethics or medical

committee, id. at § 166.046(a), or (II) life support must be provided until a reasonable opportunity has been afforded for the transfer of the patient to another healthcare facility willing to comply with the decision, id. at § 166.045(c).

However, under the Texas doctrine of sovereign immunity, a government entity cannot be held liable for the negligence of its officers or agents unless a constitutional or statutory provision waives its sovereign immunity in clear and unambiguous language. See Duhart v. State, 610 S.W.2d 740, 741 (Tex. 1980) (citing Lowe v. Tex. Tech Univ., 540 S.W.2d 297 (Tex. 1976)). There is no dispute that as a political subdivision of the State of Texas, JPS is a government entity entitled to sovereign immunity. Martinez v. Val Verde Cty. Hosp. Dist., 140 S.W.3d 370, 371 (Tex. 2004) (hospital districts are entitled to sovereign immunity). Instead, plaintiffs argue that JPS's immunity has been waived. Doc. 25 at 4-9.

Because this action involves tort claims brought against a governmental entity, the Texas Tort Claims Act ("TTCA") applies. The TTCA waives sovereign immunity in certain contexts. Tex. Civ. Prac. & Rem. Code § 101.025(a) ("Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter."). Plaintiffs fail to address waiver of sovereign immunity in their complaint but do in their response to the

motion to dismiss. See Doc. 1; Doc. 25 at 7-15. Plaintiffs argue that the applicable provision of the TTCA states that a government defendant is liable for "personal injury and death so caused by a condition or use of tangible . . . property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Doc. 25 at 7 (citing Tex. Civ. Prac. & Rem. Code § 101.021(2)). The court finds that this provision does not apply to the facts of this action and that plaintiffs failed to establish waiver of sovereign immunity.

When the alleged negligence does not relate to the use of tangible property, but instead to the thought process that led to the decision to use it, the waiver found in the TTCA's "tangible property" provision does not apply. Tex. Tech Univ. Health Sci. Center v. Jackson, 354 S.W.3d 879, 886 (Tex. App.—El Paso 2011) (finding no waiver of sovereign immunity because the negligence related to the judgment the doctor used to decide how to treat plaintiff's injured eye and not to how the doctor applied the "bandage contact" or a condition of the contact).

For example, in Arnold v. University of Texas Southwestern Medical Center at Dallas, a doctor's negligent use of medical information led him to use implants which were the wrong size during a breast augmentation surgery, which caused a deformity. 279 S.W.3d 464, 466-67 (Tex. App.—Dallas 2009). The patient

sued the doctor and his employer "for failure to make proper pre-surgery investigations and arrangements." Id. No waiver took place because although the doctor physically handled the implants, his negligence related to his decision-making process before the surgery and not to a negligent handling or application of the property. Id. at 470 ("Because the true substance of the Arnolds' pleadings is that Dr. Chao miscalculated or misdiagnosed the necessary size of replacement breast implants, the fact that the pleadings also identify a piece of tangible personal property used during the procedure does not affect our decision that this is not a claim for the negligent use of tangible personal property.").

A ventilator, like the one used to keep plaintiffs' son alive, constitutes tangible property. However, like in Arnold, the alleged negligence in this action relates to the manner in which a medical decision was made - the decision to withdraw life support without following the procedures mandated by the Texas Advance Directive Act - and not to the manner in which the tangible property was used. Consequently, plaintiffs failed to show that JPS's sovereign immunity has been waived, and the tort claims asserted against JPS should be dismissed.

JPS argues that even if the withdrawal of life support constituted a "use" under the TTCA, waiver would still not occur

because Duane was an independent contractor and not an employee of JPS. Doc. 19 at 11-12. The court agrees. The TTCA only waives sovereign immunity when the injury is proximately caused by an employee's, and not an independent contractor's, acts or omissions within the scope of the employment. Tex. A&M Univ. v. Bishop, 156 S.W.3d 580, 584-85 (Tex. 2005); Dumas v. Muenster Hosp. Dist., 859 S.W.2d 648, 650 (Tex. App.—Fort Worth 1993). JPS establishes that Duane was employed by Acclaim and worked at JPS as an independent contractor, and plaintiffs do not dispute Duane's status as an independent contractor. Doc. 19 at 11-12; Doc. 25 at 5-7.

Instead, plaintiffs make misstatements of law to argue that waiver under the TTCA is possible despite Duane's independent contractor status. First, plaintiffs incorrectly state that "the Dumas court does not hold strictly that only governmental employees can engage in actionable conduct to waive immunity." Compare Doc. 25 at 5 with Dumas, 859 S.W.2d at 650 ("Section 101.021 provides that for a governmental entity to be liable for the personal injury or death of an individual that it can only be through the acts of its employees."). Second, plaintiffs incorrectly state that "[t]he Texas Supreme Court has held [in Bishop] that the actions of independent contractors can serve to waive immunity for a governmental unit depending on their right

of control." Compare Doc. 25 at 6-7 with Bishop, 156 S.W.3d at 585 (holding that defendant workers were independent contractors and that "[a]ccordingly, their actions could not constitute a 'use' that would waive TAMU's immunity"). Consequently, even if the removal of life support was a "use" of tangible property, that use was not an act by an employee of JPS, and JPS's sovereign immunity was not waived.

B. The § 1983 claims should be dismissed for failure to state a claim upon which relief may be granted.

JPS also argues that the § 1983 claims should be dismissed for failure to state a claim for which relief may be granted. Doc. 19 at 15-26. The court agrees.

To state a claim against a unit of government under § 1983, a plaintiff must allege: "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) (internal citations omitted). Such allegations may not be conclusory; they must contain specific facts. Iqbal, 556 U.S. at 679; Pena v. City of Rio Grande City, 879 F.3d 613, 622 (5th Cir. 2018).

The complaint does not explain how plaintiffs' constitutional rights were violated. Instead, it merely states, "the failure to adhere to the Texas Advanced Directive Act was a

direct violation of Mr. DePaz' [sic] due process rights under the 14th amendment of the United States Constitution." Doc. 1 at 7. In their response, plaintiffs clarify that this language refers to the deprivation of plaintiffs' son's life by movants without the due process outlined in the Texas Advanced Directive Act. Doc. 25 at 13. However, to state a § 1983 claim, plaintiffs must plead that their own rights were violated and may not claim their son's injury as their own. See, e.g., Morgan v. City of New York, 166 F. Supp. 2d 817, 819 (S.D.N.Y. 2001); Burrow by and through Burrow v. Postville Cmty. Sch. Dist., 929 F. Supp. 1193, 1208 (N.D. Iowa 1996). Plaintiffs might well have alleged facts to support a state law claim for emotional distress, but the legal authorities would indicate that damages of that sort will not support a claim based on an alleged violation of the United States Constitution. Id. Because plaintiffs failed to allege that their constitutional rights were violated, they have failed to state a claim for relief against JPS under § 1983, and such claims must be dismissed.

VI.

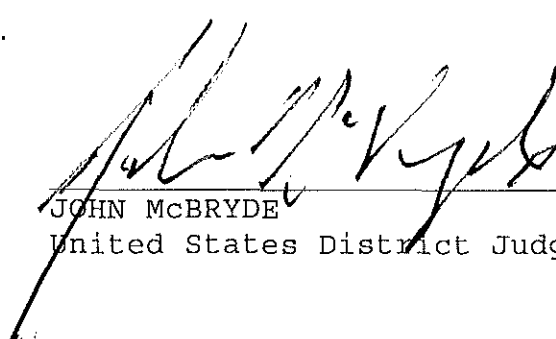
Order

Therefore,

The court ORDERS that the motion be, and is hereby, granted.

The court further ORDERS that the state tort claims and causes of action brought by plaintiffs against JPS be, and are hereby, dismissed for lack of subject matter jurisdiction, and that the § 1983 claims and causes of action asserted by plaintiffs against JPS be, and are hereby, dismissed with prejudice.

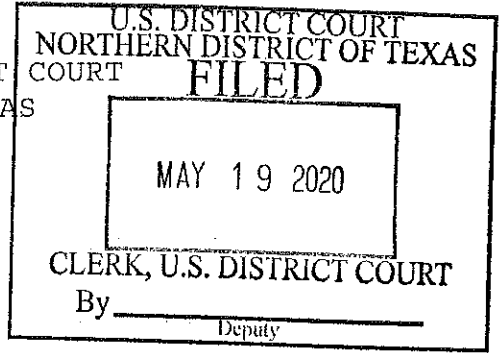
SIGNED May 19, 2020.



JOHN MCBRYDE
United States District Judge

TAB 7

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



BERMAN DE PAZ GONZALEZ AND
EMERITA MARTINEZ-TORRES,
INDIVIDUALLY AND AS HEIRS,
AND ON BEHALF OF THE ESTATE OF
BERMAN DE PAZ-MARTINEZ,

Plaintiffs,

VS.

THERESA M. DUANE, M.D., ET AL.,

Defendants.

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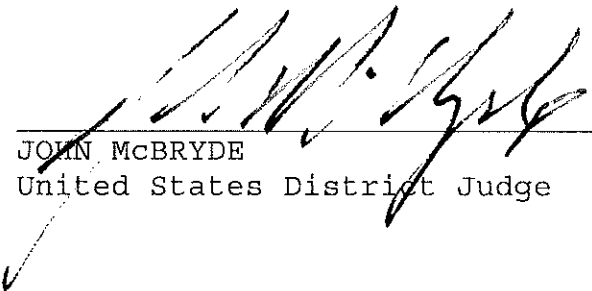
NO. 4:20-CV-072-A

FINAL JUDGMENT

In accordance with the order signed this date granting the motion to dismiss filed by defendant Tarrant County Hospital District d/b/a JPS Health Network ("JPS"),

The court ORDERS, ADJUDGES, and DECREES that all claims and causes of action brought by plaintiffs, Berman De Paz Gonzalez and Emerita Martinez-Torres, against JPS in the above-captioned action be, and are hereby, dismissed.

SIGNED May 19, 2020.



JOHN McBRYDE
United States District Judge

TAB 8

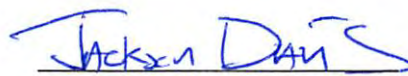
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BERMAN DE PAZ GONZALEZ	§	
and EMERITA MARTINEZ-TORRES	§	
Individually and as Heirs of	§	
BERMAN DE PAZ-MARTINEZ	§	
<i>Plaintiff</i>	§	
	§	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	§	
<i>Defendants</i>	§	

PLAINTIFFS' NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiffs, BERMAN DE PAZ GONZALEZ and EMERITA MARTINEZ-TORRES Individually and as Heirs of BERMAN DE PAZ-MARTINEZ, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Court's May 16th, 2020 and May 19th, 2020 Memorandum Opinion and Orders, ECF No. 27 and ECF no. 29, and the Court's May 16th, 2020 Final Judgment as to Certain Defendants, ECF No. 28 and the Court's May 19th, 2020 Final Judgment, ECF No. 30.

Respectfully submitted,



JACKSON DAVIS

State Bar No. 24068540

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STRECK AND DAVIS LAW

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Fort Worth, Texas 76104

(817) 332-3117

(817) 549-8898 FAX

ATTORNEY FOR PLAINTIFF

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