

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

The Estate of LACETTA ANNE TESTER,	)	
by and through Personal Representative,	)	
NATHAN D. TESTER,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	CASE NO.: 3:24-cv-00005-MPB-CSW
	)	
THE VILLAGE AT HAMILTON POINTE, LLC,	)	
An Indiana Limited Liability Company;	)	
RIVERVIEW HOSPITAL, d/b/a	)	
HAMILTON POINTE HEALTH AND REHAB,	)	
An Indiana County Hospital Corporation;	)	
TENDER LOVING CARE MANAGEMENT, INC.,	)	
d/b/a TLC MANAGEMENT,	)	
An Indiana For-Profit Corporation; and	)	
NEWBURGH PROPERTY MANAGEMENT, LLC,	)	
An Indiana Limited Liability Company,	)	
	)	
<i>Defendants.</i>	)	

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

The Village at Hamilton Pointe, LLC, Riverview Hospital, d/b/a Hamilton Pointe Health and Rehabilitation Center, Tender Loving Care Management, Inc., d/b/a TLC Management, and Newburgh Property Management, LLC (*Hamilton Pointe*), by their counsel, and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, file this Brief in Support of their Motion to Dismiss the Estate of Lacetta Anne Tester's First Amended and Restated Complaint.

**I. FACTS**

**A. Pertinent facts related to Hamilton Pointe's care and treatment of Ms. Tester.**

Lacetta Anne Tester was a Hamilton Pointe resident off and on from August 2, 2021 until January 12, 2022, due to medical conditions requiring nursing care and rehabilitation services. *Docket No. 27, pp. 4-5.* Ms. Tester was on multiple medications for her psychiatric behavior.

Exhibit A, p. 1. During her residency at Hamilton Pointe, she required hospitalization for a urinary tract infection in October 2021. *Docket No. 27, p. 5*. She also required admission to a psychiatric facility in November 2021 due to her medical condition. *Exhibit A, p. 1*. Ms. Tester was admitted to the hospital on December 26, 2021, due to acute-on-chronic respiratory failure requiring mechanical ventilation. *Id.* Ms. Tester had a history of chronic obstructive pulmonary disease requiring supplemental oxygen and BiPAP at night. *Docket No. 27, p. 5. Exhibit A, p. 1*. She remained hospitalized until she was returned to Hamilton Pointe on January 1, 2022. *Docket No. 27, p. 5; Exhibit A, p. 1*.

Ms. Tester had a history of *calling 911 inappropriately* from her cell phone and the facility phone in her room. *Exhibit A, p. 1*. Additionally, Ms. Tester had a history of *yelling out at staff, threatening them and calling them names*. *Id.* Ms. Tester was *exhibiting this behavior* on the night of January 11 and 12, 2022, when she was *yelling out at staff, repeatedly taking her BiPAP off and calling 911*. *Id.* Ms. Tester's BiPAP was necessary to provide supplemental oxygen. It was noted that the Hamilton Pointe's nurses had Ms. Tester's call light within her reach, and she was instructed to use her call light to ask for help rather than yell out or call 911. *Docket No. 27, p. 14. Exhibit A, p. 1*.

On January 12, during Ms. Tester's three 911 calls to the Warrick County Emergency Services, she requested that a police officer be sent to Hamilton Pointe to *take care of her*. *Id.* A nursing staff member was notified by the Warrick County Sheriff's Department (WCSD) of Ms. Tester's request for assistance. *Id.* The nursing staff checked on Ms. Tester and provided care, including assisting Ms. Tester with re-applying the BiPAP that Ms. Tester kept taking off and throwing to the floor. *Id.*

Due to Ms. Tester's behavior and repeated 911 calls rather than utilizing her call light, the WCSD requested that Ms. Tester *not be allow[ed] to use the phone if the res. continue to tie up the 911 lines. Id.* The Hamilton Pointe nursing staff relayed this information to Ms. Tester, who said she understood. *Docket No. 27, p. 14.* She went to sleep. *Docket No. 27, p. 14.*

The WCSD did not believe that Ms. Tester was experiencing a medical emergency; rather, she was *tying up the 911 lines* by repeatedly calling. *Docket No. 27, pp. 7, 14; Exhibit A, p. 1.* The Hamilton Pointe nursing staff relayed the WCSD's message to Ms. Tester. *Id.* There were no ambulances or officers dispatched to Hamilton Pointe as Ms. Tester was in stable condition, her vitals were within normal limits, including her oxygen saturation, and she was not experiencing an acute medical emergency. *Id.*

On the morning of January 12, 2022, Ms. Tester was found deceased in her bed due to her chronic medical conditions. *Exhibit A, p. 1.* According to the Warrick County Coroner's investigation, attached as Exhibit 1 to the Estate's Complaint, the conclusion was that Ms. Tester's death was from her medical condition. Sarah Seaton, AGACNP-BC, CMDI, from the Coroner's office, reviewed Ms. Tester's clinical record and other pertinent records, concluding that *there is nothing suspicious about her death. Id.at p. 2.* It was determined that *her death was from a medical condition, not homicide, suicide, or accident. Id.* Moreover, Nurse Practitioner Seaton opined that *[w]hether or not she should have been taken to the hospital would be a judgment call of the trained professionals on staff the morning of her death. Id.*

## **B. Procedural History**

The Estate filed its original Complaint before this honorable Court on January 10, 2024. *Dkt. No. 1.* In the Estate's original Complaint, it alleges that Hamilton Pointe deprived Ms. Tester of her rights under color of state law under 42 U.S.C.S. §1983, violated Ms. Tester's right to due

process under the Fourteenth Amendment of the Constitution of the United States of America by allegedly confining her and not treating her serious medical condition, and claiming that Hamilton Pointe provided *inadequate medical* care violating Ms. Tester's Eight Amendment Right under the Constitution of the United States of America. *Id.*

On March 5, 2024, Hamilton Pointe filed a 12(B)(1) and (6) Motion to Dismiss and its Brief in Support due to the Estate's failure to state a claim and lack of subject matter jurisdiction over the Estate's allegation of medical negligence due alleged inadequate medical care, which falls squarely under the Indiana Medical Malpractice Act. *Dkt. Nos. 17-18.*

On March 26, 2024, the Estate filed an unopposed Motion for An Extension of Time to File Response to the Motion to Dismiss. On March 28, 2024, this Court granted the Estate's Motion for Extension of Time to File Response to Motion to Dismiss. *Dkt. No. 19.*

On April 23, 2024, the Estate filed its First Amended and Restated Complaint and Demand for Jury Trial as well as its Response to Hamilton Pointe's Motion to Dismiss. *Dkt. Nos. 27-28.* The Estate's Response to Hamilton Pointe's Motion to Dismiss only addressed Hamilton Pointe's failure to state a claim. The changes to the alleged supporting facts in the Amended Complaint were *de minimis*, and only serve to take away unfavorable facts against the Estate's claims. Notably, the Estate's Counts I-III held no changes to defeat Hamilton Pointe's original Motion to Dismiss for Failure to State a Claim and Lack of Subject Matter Jurisdiction.

On May 7, 2024, Hamilton Pointe filed its Motion to Dismiss the Estate's Amended Complaint for failure to state a claim upon which relief may be granted, and its Brief in Support. *Dkt. Nos. 29-30.* In the Brief, Hamilton Pointe alluded to the fact that the Estate's Amended Complaint relates to allegations of medical malpractice which are governed by Indiana's Medical Malpractice Act Ind. Code § 34-18-1-1 et seq. (*the MMA*).

## II. ARGUMENT

### A. Legal Standard

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) challenges the jurisdiction in federal court, and the plaintiff bears the burden of establishing the elements necessary for jurisdiction. *Scanlan v. Eisenberg*, 669 F.3d 838, 841-842 (7th Cir. 2012). A motion to dismiss for lack of subject matter jurisdiction may be supported by documents necessary to resolve the jurisdictional issue raised. *Barnhart v. United States of America*, 884 F.2d 295, 296 (7th Cir. 1989).

### B. This Honorable Court does not have subject matter jurisdiction over the Estate's claim of inadequate medical care.

The crux of the Estate's Amended Complaint involves a claim of medical negligence against duly qualified providers and therefore this claim is governed by the MMA and is prohibited from prosecution until after an Opinion is issued by a Medical Review Panel, which has not yet occurred.

Pursuant to Ind. Code § 34-18-8-1 and § 34-18-8-4 of the MMA, no action for medical malpractice may be commenced in a court in Indiana before (1) the claimant's proposed complaint has been presented to a Medical Review Panel established under Ind. Code § 34-18-10; and (2) an opinion is given by the panel. See also, *Thomas v. Deitsch*, 743 N.E.2d 1218, 1220 (Ind. Ct. App. 2001). Ind. Code § 34-18-8-7(a)(1) permits the simultaneous filing of a civil complaint and a Proposed Complaint with the Indiana Department of Insurance; however, upon information and belief, the Estate has not filed a Proposed Complaint with the Indiana Department of Insurance.

The Estate cannot proceed against Hamilton Pointe unless or until a Medical Review Panel has issued a determination on its assertions. *[T]he proper course of action when a plaintiff fails to comply with the [Medical Malpractice] Act is for the trial court to dismiss the complaint without*

*prejudice, thereby allowing the plaintiff to refile after the medical review panel has issued its opinion. St. Anthony Med. Center, Inc. v. Smith*, 592 N.E.2d 732, 736 (Ind. Ct. App. 1992)).

**1. The Estate's Amended Complaint falls squarely under the Indiana Medical Malpractice Act**

Title 34, Article 18 of the Indiana Code, covers all claims for medical negligence. The MMA sets forth specific definitions for various legal terms that are used to determine whether the MMA is applicable to certain factual situations. For purposes of the MMA, the Indiana General Assembly broadly defines *tort* as a *legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another*. I.C. § 34-18-2-28. In other words, any alleged breach of duty or unlawful act or omission which occurs during the rendition of health care or professional services by a health care provider is subject to the Act. *Popovich v. Danielson*, 896 N.E.2d 1196 (Ind. Ct. App. 2009). The MMA defines malpractice as a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider to a patient. I.C. § 34-18-2-18. The MMA defines health care broadly as *an act... performed or furnished, or that should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement*. I.C. § 34-18-2-13. The Act defines, what persons or entities are considered a *health care provider* as any of the following:

(1) An individual, a partnership, a limited liability company, a corporation, a professional corporation, a facility, or an institution licensed or legally authorize by this state to provide health care or professional services as a physician, psychiatric hospital, hospital, health facility, emergency ambulance service, dentist, registered or licensed practical nurse, physician assistant, mid-wife, optometrist, podiatrist, chiropractor, physical therapist, respiratory care practitioner, occupational therapist, psychologist, paramedic, emergency medical technician, or advanced emergency medical technician, or a person who is an officer, employee, or agent of the individual, partnership, corporation, professional corporation, facility or institution acting the course and scope of the person's employment.

IC § 34-18-2-14.

Put simply, the MMA applies when a plaintiff's claim meets the following elements: (1) it is a tort or breach of contract; (2) based upon health care or professional services that were or should have been provided; (3) by a qualified health care provider; and (4) to a patient. I.C. § 34-18-2-18.

Here, the Estate's Amended Complaint falls squarely under the MMA: (1) Hamilton Pointe's duty to Ms. Tester arose from a contract for the provision of nursing care and services; (2) the Estate's claim arises out of the alleged failure of Hamilton Pointe to provide nursing care and treatment i.e., claim of inadequate medical care, failure to provide treatment to Ms. Tester's medical condition, and failure to transfer Ms. Tester to the hospital; (3) by a qualified health care provider Hamilton Pointe (Exhibit B, qualified status letter); and (4) to its patient Ms. Tester, which the Estate freely admits in its Amended Complaint. For these reasons, the allegations in the Estate's Amended Complaint sound in medical negligence and not a violation of Ms. Tester's Fourteenth and Eight Amended rights and 42 U.S.C. § 1983 and, therefore, must be subject to the requirements of the MMA.

**2. The Estate's Amended Complaint against Hamilton Pointe sounds in alleged medical malpractice and is subject to the Indiana Medical Malpractice Act.**

The Indiana Court of Appeals held the Act applies to *conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only conduct which is unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill or judgment. Winona Memorial Hospital, Limited Partnership v. Kuester*, 737 N.E.2d 824, 828 (Ind. App. 2000).

In addition, in determining whether a claim sounds in medical malpractice, *the test is whether the claim is based on the provider's behavior or practices while acting in his professional*

*capacity as a provider of medical services. Madison Center, Inc. v. R.R.K.*, 853 N.E.2d 1286, 1288 (Ind. Ct. App. 2006) (emphasis added) (quoting *Collins v. Thakker*, 552 N.E.2d 507, 510 (Ind. Ct. App. 1990)). Thus, in making the determination of whether a Complaint falls within the jurisdiction of the MMA, *a reviewing court must look to the substance of the claim.*

Indeed, whether a plaintiff seeks application of the MMA does not control. It is the substance of a claim, not its caption, which determines whether compliance with the MMA is necessary. *St. Anthony Medical Center, Inc. v. Smith* 592 N.E.2d 732, 736 (Ind. Ct. App. 1992) (the relevant question is not an action's label but its substance) (citing *English Coal Co. v. Durcholz* (1981), Ind. App., 422 N.E.2d 302, 308, trans. denied); *Van Sice v. Sentany*, 595 N.E.2d 264, 266 (Ind. Ct. App. 1992).

Therefore, analysis of the Estate's claims must *not* focus on whether 42 U.S.C. § 1983, the Fourteenth Amendment, and the Eighth Amendment of the United States Constitution applies to the care at issue, but instead the analysis must focus on the conduct of Hamilton Pointe's nursing staff. From start to finish, the Estate's Amended Complaint is filled with the Estate's alleged failure to provide Ms. Tester with health care. In addition, the Estate's Count II and III claim that Hamilton Pointe nursing staff knew Ms. Tester had a medical condition that caused her to have difficulty breathing, failed to assist Ms. Tester transfer or reposition in bed to relieve her breathing difficulty, failed to transfer Ms. Tester to the hospital, failed to provide or help provide adequate medical treatment for her *serious medical needs*, and that these failures caused Ms. Tester's injuries and death. Despite the Estate's attempt to mask its Amended Complaint as a cognizable action under 42 U.S.C. § 1983, this claim sounds in medical malpractice, and thus falls under the purview of the MMA.



The Estate's assertion that Hamilton Point provided inadequate medical care is an allegation that Hamilton Point's conduct as a health care provider in caring for Ms. Tester fell below the applicable standard of care. The Hamilton Point nursing staff exercised their professional judgment in determining what care to provide Ms. Tester and whether Ms. Tester should have been sent to the hospital. Certainly, Nurse Practitioner Seaton opined that Hamilton Point's nursing staff were exercising their professional judgment in making these decisions. *Exhibit A, p. 2*. The Estate further claims that this conduct caused Ms. Tester's *injuries and death*. Accordingly, the substance of the Estate's claims pertains to Hamilton Point's professional judgment in determining the appropriate course of treatment for Ms. Tester, treating Ms. Tester's health conditions, and determining whether Ms. Tester needed to be transfer to the hospital.

The question of whether Hamilton Point exercised proper professional judgment cannot be resolved by a jury without application of the applicable standard of care. See *Bremer v. Community Hospitals, Inc.*, 583 N.E.2d 780, 783 (Ind. Ct. App. 1991). Therefore, an expert opinion is required, and according to the MMA, that expert opinion must come from a Medical Review Panel.

The Estate's failure to follow the requirements of the MMA is fatal to its Amended Complaint against Hamilton Point; accordingly, the Estate's Amended Complaint as to its medical negligence claims, must be dismissed, without prejudice, as this honorable Court lacks subject matter jurisdiction.

### **III. CONCLUSION**

Hamilton Point is a duly qualified health care provider at all times pertinent to the Estate's allegations. The conduct for which the Estate complains involves Hamilton Point exercising professional skill and judgment while rendering health care services to Ms. Tester, which must

first go before the medical review panel for an expert opinion. There has been no medical review panel opinion rendered on the allegations contained in the Estate's Amended Complaint. Therefore, Hamilton Pointe, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, respectfully requests that this honorable Court dismiss the Estate of Lacetta Anne Tester's Amended Complaint, without prejudice, due to lack of subject matter jurisdiction.

Respectfully submitted,

DREWRY SIMMONS VORNEHM, LLP

/s/ Janet A. McSharar

Janet A. McSharar

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served with the Clerk of the Court on this 7<sup>th</sup> day of May 2024 using the CM/ECF system which sent notification of this filing or by placing it in the U.S. Mail, postage pre-paid, to the following:

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01/25/2022

RE: INVESTIGATION INTO THE DEATH OF LACETTA TESTER 1/12/2022

Call placed to the ADON of Hamilton Pointe, Theresa, who was very helpful with a chart review. Review of the chart shows that Ms. Tester was initially admitted to Hamilton Pointe in August 2021. She had a hospitalization in October 2021 for UTI and was then admitted to the Serenity Psychiatric unit at St. Vincent Hospital in Boonville. She was readmitted to Hamilton Pointe on 11/22/2021. She was then admitted to the hospital again on 12/26/2021 for treatment of acute on chronic respiratory failure and was on mechanical ventilation. She was readmitted to Hamilton Pointe on 1/1/2022. She had a history of chronic obstructive pulmonary disease with supplemental oxygen needs and BiPAP use at night. Additionally, she has a documented history of calling 911 inappropriately from her cell phone and the facility phone in her room asking for things like her water glass to be moved closer to her. Additionally, when she was in the hospital during the October stay, she called the facility numerous times from her hospital room asking for things. She was not always oriented to her surroundings and had a history of yelling out at staff, threatening them and calling them names.

On the night of 1/11-1/12 she was exhibiting this behavior and the nurses notes reflect that she was yelling out at staff, repeatedly taking her BiPAP off and calling 911. The nurses notes state that her call light was within her reach and she was instructed to use it to call for help rather than yell out or call 911. At 0134 it is documented that the WCSD called and spoke with the nurse on duty and requested that Ms. Tester be told again to not call 911 unless she is actually experiencing an emergency. They reported that she had been "tying up the 911 lines" by repeatedly calling. The nurses notes reflect that the nurse relayed this information to Ms. Tester. There is no documentation that any phones were taken away from her, however the dispatch log shows that the nurse was awaiting instructions regarding if she could do so. There is no documentation that she was in any distress at the time. Review of medication log shows she was on multiple medications for psychiatric behavior and medical conditions but no medications were given to her that night that might have contributed to respiratory or cardiac failure. Her vital signs taken in accordance with their policy had been within normal range, including her O2 saturation.

At 0750 on 1/12/2022 Ms. Tester was found deceased in her bed. It is unclear from the documentation if she had her BiPAP on at the time she was found. The death was called to the Warrick County Deputy Coroner on duty and it was determined not be a Coroner case as the death is not suspicious and attributed to her known respiratory disease and failure to comply with medical regimen.

A review of the calls to 911 show that Ms. Tester (Ms. Gesger in documentation) called 911 from her room phone (listed as 812-858-5300) to report that the nurses were not doing what they were supposed to and initially stated she could not walk and was out of oxygen. Nurse's notes support 911 notes that the nurse went to check on the patient and she had removed her BiPAP and was advised to replace it. She made three more calls to 911 none of which were not interpreted by 911 as being emergencies. No ambulance or officers were dispatched to Hamilton Pointe. During at least one other call, the dispatcher stayed on the line with the caller until the nurse entered her room. There is no documentation that Ms. Tester requested an ambulance or stated she was having a medical emergency.

## EXHIBIT 1

After careful review of the medical record, Ms. Tester's medical and psychiatric history and the 911 calls from the early morning of her death, there does not appear to be cause for a forensic autopsy. Though it is unclear if Ms. Tester's noncompliance with her BiPAP was the primary cause of her death, there is nothing suspicious about her death. It is agreed upon that her death was from a medical condition, not homicide, suicide or accident. Whether or not she should have been taken to the hospital would be a judgement call of the trained professionals on staff the morning of her death. A physical finding on autopsy would still not indicate her general condition when evaluated by the nurse 7 hour prior to her death. For this reason, I would defer any further investigation into the events surrounding her death to the state Attorney General's office.

Sarah A. Seaton, AGACNP-BC, CMDI

Coroner, Warrick County Indiana



# STATE OF INDIANA

ERIC J. HOLCOMB, GOVERNOR

## Indiana Department of Insurance

Amy L. Beard, Commissioner  
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STATE OF INDIANA  
PATIENT'S COMPENSATION FUND  
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May 06, 2024

**Riverview Hospital Db a Hamilton Pointe Health & Rehab**  
**3800 Eli Place**

**Newburgh, IN 47630**

Dear Health Care Provider:

Pursuant to I.C. 34-18-3-6, you are notified that the Indiana Patient's Compensation Fund has received proof of financial responsibility for your compliance as a qualified health care provider under the Indiana Medical Malpractice Act for the below policy period.

Surcharge Received On .....	<b>03/08/2021</b>
Policy Number .....	<b>PLGL-IN-21-0001161</b>
Policy Type .....	<b>Occurrence</b>
Insurance Company .....	<b>Midwest Insurance Group, Inc., a Risk Retention Group</b>
Coverage Start Date .....	<b>03/01/2021</b>
Coverage End Date .....	<b>03/01/2022</b>
Limit Per Occurrence .....	<b>\$500,000.00</b>
Limit Annual Aggregate .....	<b>\$2,500,000.00</b>
Surcharge Amount Paid .....	<b>\$11,477.00</b>
Retroactive Date .....	
Specialty Code .....	<b>80923</b>
Specialty Description .....	<b>NURSING HOME</b>

If you have any questions regarding this matter, please contact your agent, or your insurance company, or our office.