

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

The Estate of LACETTA ANNE TESTER,)
by and through Personal Representative,)
NATHAN D. TESTER,)
)
Plaintiff,)
)
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,)
)
Defendants.)

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

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)(6) 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 and Demand for Jury Trial (*Amended Complaint*).

I. FACTS

A. Pertinent Facts Derived from the Estate's Amended Complaint

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. During her Hamilton Pointe residency, she required hospitalization for a urinary tract infection in October 2021, and returned to Hamilton Pointe following this hospitalization. *Id.* at p. 5. 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. *Id.* She remained hospitalized until she was returned to Hamilton Pointe on January 1, 2022. *Id.*

During the early morning hours of January 12, 2022, Ms. Tester called Warrick County Emergency Services via 911 three times to request that a police officer be sent to Hamilton Pointe to *take care of her.* *Id.* at pp. 8-14. These calls to 911 were made rather than utilizing her call light to request Hamilton Pointe nursing staff's help. *Id.* In response to Ms. Tester's 911 calls, the Warrick County Sheriff's Department (WCSD) contacted a nursing staff member of Ms. Tester's request for assistance and did not send either police or an ambulance. *Id.* According to the Hamilton Pointe progress note entries provided in the Amended Complaint, the Hamilton Pointe nursing staff responded to the WCSD report that Ms. Tester requested assistance and checked on her. It was noted that she was *yelling out, taking her BiPAP off and throwing it on the ground and calling 911.* *Id.* at p. 14. Ms. Tester's BiPAP was necessary to provide supplemental oxygen due to her chronic medical condition. The nursing staff provided care, including assisting Ms. Tester with re-applying the BiPAP that she had taken off. *Id.* Hamilton Pointe's nursing staff noted that Ms. Tester's call light was within her reach *so that she could summon staff for assistance.* *Id.*

Despite the nursing staff providing care and reminding Ms. Tester to use her call light for assistance, Ms. Tester called Warrick County Emergency Services at 911 again. The WCSD did not believe that Ms. Tester was experiencing a medical emergency; rather, she was *tying up the 911 lines* by repeatedly calling. *Id.* Due to Ms. Tester's behavior and repeated 911 calls rather than

utilizing her call light, 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 again assessed Ms. Tester, and then relayed the WCSD's message to Ms. Tester, who said she understood. She went to sleep. *Id.* NOo ambulance or officers were dispatched to Hamilton Pointe in response to any of Ms. Tester's 911 calls. *Id.* On the morning of January 12, 2022, Ms. Tester was found deceased in her bed due to her chronic medical conditions. *Id.*

B. Procedural History

The Estate filed its original Complaint before this honorable Court on January 10, 2024. *Dkt. No. 1.* In which, 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.*

As part of its Complaint, the Estate attached the Warrick County Coroner's investigation report as Exhibit 1, and screen shots of the Indiana Department of Health Division of Long Term Facility Care Consumer Report for Hamilton Pointe. The Coroner's investigation concluded that Ms. Tester has a *history of inappropriately calling 911*, that Ms. Tester's death was from *a medical condition, not homicide, suicide, or accident*, and *[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.*

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 assertion. The changes to the supporting facts alleged in the Amended Complaint were *de minimis*, and only serve to take away unfavorable facts against the Estate's claims. The most noticeable change was the Estate's removal of Exhibit 1, the Coroner's report thus removing objective information and opinions about the Estate's claim and the care provided by Hamilton Pointe. 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.

II. ARGUMENT

A. Legal Standard

To proceed beyond the pleading stage, a complaint must contain sufficient factual matter to *state a claim that is plausible on its face*. *Bell Atl. Cor. V. Twombly*, 550 U.S. 544 (2007). Dismissal under Rule 12(b)(6) is warranted if the pleading fails to establish facial plausibility, if the Court is unable to draw the reasonable inference from the pleading that the defendant is liable for the misconduct alleged, or if the plaintiff fails to state a claim upon which relief can be granted. *See Fed. R. Civ. P. 12(b)(6); Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The pleading standard *demand more than an unadorned, the-defendant-unlawfully-harmed-me accusation*. *Ashcroft*, 556 U.S. at 678. The allegations must *give the defendant fair notice of what the...claim is and the grounds upon which it rests*, and the [f]actual allegations must *be enough to raise a right to relief above the speculative level*. *Id.* Indeed, the complaint must include *enough facts to state a claim to relief that is plausible on its face*. *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009). The Court is *not bound to accept as true a legal conclusion couched as a factual allegation*. *Olson v. Champaign Cty.*, 784 F.3d 1093, 1099 (7th Cir. 2015) (quoting *Bell Atl. Corp.*, 550 U.S. 544, 555).

B. The Estate has Failed to State a Claim upon which relief can be granted.

1. The Estate failed to state a colorable 42 U.S.C.S. § 1983 claim upon which relief can be granted under Omnibus Budget Reconciliation Act (OBRA) and the Federal Nursing Home Reform Act.

The Estate's second bite of the apple has failed to cure the fundamental defects in its original Complaint. The Estate failed to state a deprivation of rights under color of state law 42 U.S.C.S. § 1983 claim upon which relief can be granted. There are two basic elements of a 42 U.S.C.S. § 1983 claim. To state a claim under § 1983, a plaintiff must allege that: (1) the defendant deprived the plaintiff of a right secured by the Constitution and the laws of the United States; and (2) the defendant acted under color of state law. See U.S.C.S. § 1983; *Severson v. Bd. Of Trs. Of Purdue Univ.*, 777 N.E.2d 1181 (7th Cir. 2002).

The Estate failed to plead factual and legal allegations showing that Hamilton Pointe deprived Ms. Tester of any rights under the 1987 Omnibus Budget Reconciliation Act (OBRA), the Federal Nursing Home Reform Act (FNHRA), or the United States Constitution. Under federal notice pleading, factual allegations must plausibly state an entitlement to relief *to a degree that rises above the speculative level*. *Munson v. Gaetz*, 673 F.3d 630, 2012 WL 752372 at *2 (7th Cir.

2012); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, (2009). However, the Estate failed to plead facts entitling the Estate to relief in its shot-gun list of alleged violations contained in Count I. *DK No. 27, pp. 18-19*. In addition, as discussed below, the Estate failed to plead any constitutional claim for which relief can be granted. Therefore, the Estate's Count I must be dismissed, with prejudice, for failure to state a claim upon which relief may be granted.

2. The Estate failed to state a plausible due process violation under the Fourteenth Amendment of the United States Constitution.

The Estate failed to state a Fourteenth Amendment claim upon which relief can be granted. The Fourteenth Amendment provides that state officials shall not *deprive any person of life, liberty, or property without due process of the law*. U.S. CONST. amend. IVX. To be deprived of a due process right, one must be deprived of a liberty or property interest that is encompassed within the Fourteenth Amendment's protection and without the proper degree of legal process due for that deprivation. See, *Norris v. Board of Educ. Of Greenwood Community School Corp.*, 797 F. Supp. 1452 (7th Cir. 1992); *Board of Regents v. Roth*, 408 U.S. 564, 569-572 (1972). Before due process can become an applicable concept, a life, liberty, or property interest must be identified. *Id.* citing *1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation*, § 3.08 at 167 (1991). A violation of due process is not triggered by an allegation of lack of due care causing injury to life, liberty or property, as it does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent. *Daniels v. Williams*, 474 U.S. 344 (1986).

The Estate contends that Hamilton Pointe deprived Ms. Tester of her rights by allegedly *subjecting Ms. Tester in custody to punitive conditions of confinement without due process of the law*. *Dkt. 27, p. 21*. The Estate claims that Ms. Tester *irrefutably withdrew and revoked her consent* to be at Hamilton Pointe arguing that she was *in the Defendants' custody and at their mercy*. *Id.*

However, not only do these claims not plead a *liberty* of which Ms. Tester was deprived or the *legal process due for that deprivation*, the Estate's pleading contradicts its assertions.

Ms. Tester was not a prisoner at Hamilton Pointe; she was never *in custody*. Based on the Estate's pleadings, Ms. Tester voluntarily chose to reside at Hamilton Pointe (by entering into a contact with Hamilton Pointe for nursing care and services) and voluntarily admitted to and resided at Hamilton Pointe to receive nursing care and services. Ms. Tester did not *irrefutably withdraw and revoke her consent* during her 911 calls or during the entirety of her residency. She never said that she withdrew her consent to be a resident at Hamilton Pointe to the Warrick Emergency 911 Operator, as the transcripts of her 911 calls included in the Estate's Amended Complaint confirm. In addition, and most importantly, Ms. Tester never told Hamilton Pointe that she wished to be discharged. The Estate failed to identify how residing in a nursing facility that Ms. Tester voluntarily entered deprives her of liberty and deprives her of a legal due process under the Fourteenth Amendment.

The Estate also alleges that Ms. Tester was confined to her bed because she could not walk without assistance. Indeed, Ms. Tester used a wheelchair and participated in therapies due to her chronic medical conditions, which was part of the reason she was admitted to Hamilton Pointe. However, just because a nursing facility resident requires assistance with ambulation, this does not mean that the resident is *confined* to his or her bed or to the nursing facility itself. Moreover, Ms. Tester was given a call light by which she could request assistance, including for transfers and ambulation. Again, the Estate failed to identify how Ms. Tester's own medical condition which she had prior to her admission to Hamilton Pointe could possibly deprive her of a protected liberty and the Estate failed to plead exactly of what protected legal due process under the Fourteenth Amendment she was deprived as a result of her medical condition.

Lastly, the Estate claims that Hamilton Pointe failed to *protect Ms. Tester in a situation of serious danger acting in deliberate indifference to Ms. Tester's serious medical and mental needs.*¹ *Id.* This is, in essence, a claim of medical negligence. Based on the Estate's own pleadings, Ms. Tester was not having a medical emergency and she did not require emergent care and transfer by ambulance at the time in question. According to the facts pled in the Amended Complaint, Hamilton Pointe's nursing staff assessed Ms. Tester and found that she removed her BiPAP. The nursing staff then assisted Ms. Tester in re-applying the BiPAP, which was a required medical treatment to assist her breathing. By re-applying Ms. Tester's BiPAP, the nursing staff ensured that Ms. Tester was receiving oxygen as ordered by her physician for her chronic respiratory condition. The crux of Count II is the allegation that Hamilton Pointe was medically negligent in its response to Ms. Tester's health status, which is not a colorable under 42 U.S.C.S. § 1983 or the Fourteenth Amendment of the United States Constitution.

On the face of its Amended Complaint, the Estate failed to identify a *liberty* of which Ms. Tester was deprived, failed to identify the *legal process due for that deprivation*, and failed to identify how Hamilton Pointe deprived Ms. Tester of that legal process. Instead, the Amended Complaint pleads an allegation of lack of due care causing injury, which is not *the sort of abusive government conduct that the Due Process Clause was designed to prevent* (*Daniels*, 474 U.S. 344). Accordingly, the Estate's Count II must be dismissed, with prejudice, for failure to state a claim upon which relief may be granted.

¹ The Estate's allegation of deliberate indifference will be discussed in further detail below as the analysis of a deliberate indifference claim is the same under both the Eighth and Fourteenth Amendments. *Minix v. Canarecci*, 597 F.3d 824, 830-31 (7th Cir. 2010).

3. The Estate failed to state a feasible claim under the Eighth Amendment of the United States Constitution.

Third, the Estate failed to state an Eighth Amendment claim upon which relief can be granted. The Eighth Amendment to the Constitution prohibits the infliction of *cruel and unusual punishments*. U.S. CONST. amend. VIII. The Amendment imposes on prison officials the duty to *provide humane conditions of confinement* including medical care to those who are incarcerated. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). However, the Estate's argument that Ms. Tester's Eighth Amendment rights were violated overlooks the fundamental intention that the Eighth Amendment applies exclusively to criminal process and criminal punishments. As the United States Supreme Court observed in *Ingraham v. Wright*, 430 U.S. 651 (1977), *the primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes*. The Eighth Amendment, therefore, has no application to the current civil claim.

Even assuming, *arguendo*, that an Eighth Amendment claim could apply to Ms. Tester and Hamilton Pointe, the Estate's claim is not colorable under 42 U.S.C.S. § 1983 or the Eighth Amendment. *Every claim by a prisoner that he has not received adequate medical treatment is not a violation of the Eighth Amendment*. *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016). A two-step analysis is used to determine whether the Eighth Amendment has been violated: (1) whether a plaintiff suffered from an objectively serious medical condition, and (2) whether the individual defendant was deliberately indifferent to that condition. *Id.*

The Estate's attempt to cast Hamilton Pointe's alleged actions or inactions in providing medical services to Ms. Tester as *deliberate indifference* of her Eighth Amendment right against cruel and usual punishment is misguided because inadvertent error, negligence, gross negligence

and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

The Estate must prove deliberate indifference to a serious medical need. At a minimum, this requires actual knowledge of impending harm, which is easily preventable so that a conscious, capable refusal to prevent harm can be inferred from the defendant's failure to prevent it. *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997).

Deliberate indifference is more than mere negligence and approaches intentional wrongdoing. *Farmer v. Brennan*, 511 U.S. at 825, 835. To establish deliberate indifference, a plaintiff must show the defendant ignored a known risk. *Colligon v. Milwaukee County*, 163 F.3d 982, 988 (7th Cir. 1998). In addition, a plaintiff must show that the defendant was both aware of the fact from which the inference could be drawn that a substantial risk of serious harm exists, and they must actually draw the inference. *Higgins v. Correctional Medical Services*, 178 F.3d 508, 511 (7th Cir. 1999).

The exercise of a health care provider's *professional judgment* does not constitute deliberate indifference. *Youngberg v. Romeo*, 457 U.S. 307, 322-323 (1982). A health care provider's medical decisions, such as whether one course of treatment is preferable to another, are beyond the Eighth Amendment's purview. In addition, disagreement with a health care provider's treatment decision is not a basis for an Eighth Amendment challenge. *Steele v. Choi*, 82 F.3d 175, 178-179 (7th Cir. 1996). Simply put, the Eighth Amendment is not a vehicle for bringing medical malpractice claims. *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996). In order to pursue an Eighth Amendment action, the Estate must prove that Hamilton Pointe knew of a constitutional deprivation and approved it, turned a blind eye to it, or failed to remedy it. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

In this case, the Amended Complaint provides that Ms. Tester was a Hamilton Pointe resident due to her many medical conditions requiring nursing care and treatment and rehabilitation services. The Estate claims that Ms. Tester was experiencing a serious medical condition during the early morning hours of January 12, 2024 and that Hamilton Pointe *denied* Ms. Tester *appropriate treatment* – i.e. failing to provide appropriate treatment to her chronic respiratory failure and failure to allow transfer to receive emergency care and treatment – causing her *injuries and death*. However, the Amended Complaint pleads facts that show the Hamilton Pointe nursing staff provided care and treatment to Ms. Tester in response to her complaints that she was short of breath. Indeed, the Estate provided two progress note entries that clearly show the nursing staff did not act with deliberate indifference to Ms. Tester’s complaints. The nursing staff assessed Ms. Tester and saw that she was non-compliant with her BiPAP (i.e., taking the BiPAP off and throwing it to the ground). The Hamilton Pointe nursing staff exercised its professional judgment in determining Ms. Tester’s non-compliance with her BiPAP was causing her complaints and they responded by assisting Ms. Tester with placing the BiPAP back and educating her on her call light usage. In addition, the Hamilton Pointe nursing staff exercised their professional judgment in determining whether Ms. Tester should have been sent to the hospital. Just because the Estate disagrees with Hamilton Pointe’s professional judgment, does not mean that Hamilton Pointe acted with deliberate indifference (*Youngberg*, 457 U.S. 307) or that the Estate’s disagreement with the nursing staff’s health care decision is a basis for an Eighth Amendment challenge (*Steele*, 82 F.3d 175).

These allegations in substance are a claim of medical malpractice, not deliberate indifference. Accordingly, the Estate’s Complaint fails to support a cause of action under Section 1983 and the Eighth Amendment on the face of the pleadings. The Estate did not meet its burden

to establish a viable claim, as its Amende Complaint did not establish that Ms. Tester was a prisoner as anticipated under the Eighth Amendment, its Amended Complaint did not allege that Hamilton Pointe knew of a constitutional deprivation, approved it, turned a blind eye to it, or failed to remedy it. *Gentry v. Duckworth*, 65 F.3d at 561. In any event, the Estate's allegations are medical malpractice at best, and the Eighth Amendment does not apply to the facts as plead by (the) plaintiff which amounts to nothing more than ordinary malpractice and does not rise to the level of cruel and unusual punishment within the meaning of the Eighth Amendment. *Vance v. Peters*, 97 F.3d at 992. Accordingly, the Estate's Count III must be dismissed, with prejudice.

III. CONCLUSION

The Estate failed to state a colorable claim arising from 42 U.S.C.S. § 1983, the Fourteenth Amendment, and the Eighth Amendment. The Estate's failure to state a claim upon which relief can be granted is fatal to its Amended Complaint against Hamilton Pointe; accordingly, the Estate's Amended Complaint as to its 42 U.S.C.S. § 1983, the Fourteenth Amendment, and Eighth Amendment claims, must be dismissed, with prejudice. Therefore, Hamilton Pointe, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully requests that this honorable Court dismiss the Estate of Lacetta Anne Tester's Amended Complaint.

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 7th 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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