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. THE VILLAGE AT HAMILTON POINTE, LLC, RIVERVIEW HOSPITAL D/B/A HAMILTON POINTE HEALTH AND REHAB, TENDER LOVING CARE MANAGEMENT, INC. D/B/A TLC MANAGEMENT, NEWBURGH PROPERTY MANAGEMENT LLC, Defendants.	)	No. 3:24-cv-00005-MPB-CSW

ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff The Estate of Lacetta Anne Tester, by and through Personal Representative Nathan D. Tester ("Plaintiff"), sued the Village at Hamilton Pointe, LLC, Riverview Hospital d/b/a Hamilton Pointe Health and Rehab, Tender Loving Care Management, Inc. d/b/a TLC Management, and Newburgh Property Management LLC (collectively, "Defendants"), alleging violations of Ms. Tester's rights under the Federal Nursing Home Reform Act and the Fourteenth and Eighth Amendments. Now pending before this Court is Defendants' Motion to Dismiss for failure to state a claim under Rule 12(b)(6) (Docket No. 30) and for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) (Docket No. 32). Plaintiff also moves the Court to strike Exhibit A from Defendants' Brief in Support of Motion to Dismiss for lack of subject matter jurisdiction. (Docket No. 41). For the reasons detailed below, Defendants' Motion to Dismiss for lack of subject matter jurisdiction (Docket No. 32) is **DENIED,** Defendants'

Motion to Dismiss for failure to state a claim (Docket No. 30) is **GRANTED in part** and **DENIED in part**, and Plaintiff's Motion to Strike (Docket No. 41) is **DENIED as moot**.

I. Background

The Village at Hamilton Pointe, LLC ("Hamilton Pointe") is an Indiana limited liability corporation that operates a long-term skilled nursing facility. (Docket No. 27, Amended Complaint ("Am. Compl."), at ECF p. 2). Riverview Hospital d/b/a Hamilton Pointe Health and Rehab is a municipal corporation owned by Hamilton County. (*Id.* at ECF p. 3). It owned Hamilton Pointe during the period relevant to this action and contracted with TLC Management to manage and operate the facility at Hamilton Pointe. (*Id*.). Newburgh Property Management LLC owns the real property at Hamilton Pointe's location. (*Id*.).

Lacetta Anne Tester ("Ms. Tester") was a resident of Hamilton Pointe. (*Id*. at ECF p. 2). Ms. Tester was admitted to Hamilton Pointe on or around August 2, 2021, for management of her chronic medical conditions and rehabilitation needs. (*Id*. at ECF p. 4). On December 26, 2021, Ms. Tester suffered acute respiratory failure which required mechanical ventilation at Deaconess Hospital. (*Id*. at ECF p. 5). She remained on mechanical ventilation until she was readmitted to Hamilton Pointe on January 1, 2022. (*Id*.). At this point in time, Ms. Tester could not move without assistance and required supplemental oxygen via a BiPAP machine. (*Id*. at ECF pp. 5, 9). On January 8, 2022, Ms. Tester dialed 911 because she was having difficulty breathing. (*Id*. at ECF pp. 5–7). The call is reflected by a Computer Aided Dispatch Report recorded by the Warrick County Sheriff's Office. (*Id*. at ECF p. 7). The report does not show emergency personnel were dispatched to Hamilton Pointe following the call. (*Id.*).

In the early morning of January 12, 2021, Ms. Tester made multiple calls to 911. (*Id*. at ECF p. 8). She stated that she was having a hard time breathing, that she was struggling with her

BiPAP machine, that the staff at Hamilton Pointe was "screwing" with her, and that she needed help. (*Id*. at ECF pp. 8–9). The emergency dispatch responder told Ms. Tester they would send someone to help her. (*Id*. at ECF p. 10). It appears that a member of the Hamilton Pointe nursing staff went to check on Ms. Tester after her first call to 911, though Ms. Tester told the dispatcher that the nurse "didn't do anything for me". (*Id*. at ECF p. 11). Ms. Tester then dialed 911 again, asking for emergency personnel to "come rescue me." (*Id*. at ECF p. 12). According to the call transcript, Ms. Tester told the dispatcher: "If I don't have you guys, I'll be dead. I'll just be dead, that's all. If you don't take care of me I'm gonna be dead." (*Id*. at ECF p. 13).

Ms. Jamestine Cook, a nurse at Hamilton Pointe, entered progress notes about Ms. Tester's calls to 911 on the morning of January 12. *(Id.* at ECF p. 14). The first note shows Ms. Tester had a call light near her to summon nursing staff if she needed assistance, and that she continued to yell out and take off her BiPAP machine. (*Id*.). The second note reflects a conversation between the Warrick County Sheriff's Office and Hamilton Pointe in which, "a Warrick Sergeant . . . request[ed] that she [Ms. Tester] not be allow to use the phone if [she was going] to continue to tie up the 911 lines." (*Id*.). Plaintiff alleges the Warrick County Sheriff's Office made this request after Hamilton Pointe informed them Ms. Tester was not in need of assistance. (*Id*.). According to a voicemail left for Nathan D. Tester, Ms. Tester's son, the staff at Hamilton Pointe removed the phone from her room. (*Id*. at ECF p. 15). As of the time of the voicemail, Ms. Tester was asleep. (*Id.*). At 7:00 A.M. on the morning of January 12, a nurse found Ms. Tester unresponsive in her bed. (*Id.*). Nursing staff at Hamilton Pointe could not revive her. (*Id*.).

Mr. Tester met with a detective from the Warrick County Sherriff's Office to file a police report in connection with Ms. Tester's death. (*Id*. at ECF p. 16). During this meeting, the Warrick

County Sherriff's Office informed Mr. Tester that a criminal investigation into Ms. Tester's death was being referred to the Attorney General of Indiana. (*Id.*). On January 10, 2024, Mr. Tester filed the present action on behalf of Ms. Tester's Estate. (Docket No. 1).

II. Legal Standards

a. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) calls for dismissal of a claim where the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A federal court has jurisdiction over claims that properly allege a federal question pursuant to 28 U.S.C. § 1331. The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Center for Dermatology and Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 589 (7th Cir. 2014).

b. Rule 12(b)(6)

Rule 12(b)(6) allows a defendant to move to dismiss a complaint that fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990) (quoting *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989)).

A plaintiff's complaint must contain "a short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy this standard, a plaintiff need not include "detailed factual allegations," rather, a plaintiff must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 570 (2007). A claim is facially plausible if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). When considering a motion to dismiss for failure to state a claim,

courts "take all of the factual allegations in the complaint as true," *id*. at 678, and draw all reasonable inferences in the plaintiff's favor. *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016). However, courts do not need to accept the truth of legal conclusions in the complaint, and "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Does 1-4 v. Butler Univ.*, No. 1:23-cv-01302, 2024 WL 229743, at *1 (S.D. Ind. Jan. 22, 2024) (quoting *Iqbal*, 556 U.S. at 678). Moreover, because the defendant must ultimately be liable, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

III. Discussion

a. Subject Matter Jurisdiction

Defendants' Motion to Dismiss for lack of subject matter jurisdiction asserts that Plaintiff's Complaint is in substance a medical negligence action. As a result, they argue the claims should be governed by the Indiana Medical Malpractice Act ("MMA"). The MMA mandates that actions for malpractice can only be commenced in a court in Indiana after, or in some cases concurrently with, filing a complaint with a medical review panel. Ind. Code § 34-18-8-4. Defendants argue that because Plaintiff has not submitted a claim to a medical review panel ("MRP"), this Court lacks subject matter jurisdiction. This claim is unconvincing.

As a procedural point, Defendants' Motion to Dismiss for lack of subject matter jurisdiction will be treated as one to dismiss for failure to state a claim under Rule 12(b)(6). In *Thompson v. Cope*, the Seventh Circuit addressed this issue with the MMA, stating "in cases like this, where the defense moved to dismiss for lack of subject-matter jurisdiction under rule 12(b)(1) on the theory that the plaintiff failed to satisfy a non-jurisdictional requirement to exhaust administrative remedies, federal courts should treat the motion as one to dismiss for

failure to state a claim under Rule 12(b)(6)." 900 F.3d 414, 425 (7th Cir. 2018). While Indiana courts dismiss a claim for lack of subject matter jurisdiction if a claim under the MMA has not gone through a MRP, "state law cannot enlarge or contract federal jurisdiction." *Jarrard v. CDI Telecommunications, Inc.*, 408 F.3d 905, 909 n.3 (7th Cir. 2005)). Thus, because state administrative exhaustion requirements are not jurisdictional in federal court, the Court's analysis will proceed under Rule 12(b)(6). *Butler*, 2024 WL 229743 at *2.

A plaintiff is the master of his (or, in this case, its) own complaint. *Mordi v. Zeigler*, 870 F.3d 703, 707 (7th Cir. 2017). Plaintiff chose to bring claims under Section 1983 against Defendants for allegedly violating rights secured by federal law and the Constitution. "[T]he defendant may not use the Indiana Medical Malpractice Act's requirement of presentation of claims to a medical review panel as a means to trump the plaintiff's claim under federal law." *Smith v. State of Indiana*, 904 F.Supp. 877, 880 (N.D. Ind. Oct. 27, 1995). Of course, had Plaintiff chosen to bring claims under state law for medical malpractice, the MMA would apply. But Defendants argument that the MMA must apply here "overlook[s] the basic proposition that the same set of facts can give rise to multiple causes of action under both federal and state law." *Jester v. Zimont*, No. 1:11-cv-14, 2011 WL 5980204 at *3 (N.D. Ind. Nov. 11, 2011); *Hargett ex rel. Humphries v. Corr. Med. Servs., Inc.*, No. 1:11-cv-1316, 2012 WL 695816 at *3 (S.D. Ind. Mar. 1, 2012) (citing *Jester*). Thus, Defendants' motion to dismiss as to their medical malpractice arguments (Docket No. 32) is **DENIED.**

b. Failure to State a Claim

Plaintiff asserts three claims against Defendants. First, Plaintiff maintains that Defendants deprived Ms. Tester of rights secured under the Federal Nursing Home Reform Act ("FNHRA"), 42 U.S.C. § 1396r. Second, Plaintiff alleges Defendants deprived Ms. Tester of her due process

rights under the Fourteenth Amendment. Finally, Plaintiff alleges a violation of Ms. Tester's Eighth Amendment right to be free from cruel and unusual punishment. Each claim is brought under 42 U.S.C. § 1983. To state a claim under Section 1983, a plaintiff must allege the defendant deprived them of a right secured by the Constitution and the laws of the United States, and the defendant acted under the color of state law. *Severson v. Bd. Of Trs. of Purdue Univ.*, 777 N.E.2d 1181, 1196 (7th Cir. 2002). Defendants' Motion raises arguments against each cause of action, which this Court now analyzes.

1. Federal Nursing Home Reform Act

Defendants argue Plaintiff failed to plead factual and legal allegations showing any violation of Ms. Tester's rights under FNHRA, and that any entitlement to relief does not rise beyond a speculative level. In taking factual allegations in the Complaint as true and drawing all reasonable inferences in Plaintiff's favor, the Complaint alleges that Ms. Tester made multiple calls to emergency responders (Am. Compl. at ECF pp. 8–14), that Hamilton Pointe staff ignored her desire to be re-positioned in bed to make breathing easier (*id.* at ECP p. 11), and that Hamilton Pointe staff directed the Warrick County Sheriff's Office to refrain from sending emergency medical personnel to transfer her to the hospital because she did not need assistance (*id.* at ECF p. 14). The Complaint also alleges that Hamilton Pointe staff took the phone from her room, and that she died hours after her calls to 911. (*Id.* at ECF p. 15).

Plaintiff lists eleven different grounds for a violation with language traceable to separate provisions of FNHRA, lumping them together under Count I of the Amended Complaint. (Am. Compl. ECF at pp. 18-19). However, while federal statutes can create enforceable rights under §1983, "they do not do so as a matter of course." *Health & Hosp. Corp. of Marion Cnty. v.*

Talevski, 599 U.S. 166, 183 (2023). As a threshold matter, it is proper to analyze each statutory subsection to see if the asserted provisions create individual rights enforceable under § 1983.

Creating enforceable rights is subject to a demanding standard. *Id.* at 180. The statutory provision must "unambiguously confer individual rights, making those rights presumptively enforceable." *Id.* at 183 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002) (cleaned up)). "Courts must employ traditional tools of statutory construction to assess whether Congress has 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs." *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 283, 285–86).

While not mentioned by either party in their briefing, the Supreme Court's recent case, *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, is instructive here. In *Talevski*, the Supreme Court held two provisions of FNHRA do create enforceable rights under Section 1983. 599 U.S. at 166. In coming to its conclusion, the Court clarified that a provision unambiguously confers individual rights when it is "'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Id.* at 183 (quoting *Gonzaga*, 536 U.S. at 284, 287). Alternatively, the Court reiterated that there is no § 1983 enforceability where a provision does not contain "rights-creating language," has "an aggregate, not individual, focus," and "serve[s] primarily to direct the [Federal Government's] distribution of public funds." *Id.* at 183–84.

To begin its analysis, the Court noted both provisions resided in 42 U.S.C. § 1396r(c), titled "[r]equirements relating to residents' rights." *Id.* at 184. The framing of this subsection was "indicative of an individual rights-creating focus." *Id.* The Court then examined the text of the provisions. *Id*. The first provision required "nursing homes to 'protect and promote . . . *[t]he right* to be free from . . . any physical or chemical restraints imposed for purposes of discipline or

convenience and not required to treat *the resident's* medical symptoms.'" *Id.* (quoting 42 U.S.C. § 1396r(c)(1)(A)(ii) (emphasis in original)). Moreover, the provision's exceptions focus on the rights of individual residents. *Id.* (noting restraints could be imposed for the safety of other residents). The Court then analyzed a provision concerning "[t]ransfer and discharge rights." 42 U.S.C. § 1396r(c)(2). That provision "tells nursing facilities that they 'must not transfer or discharge [a] *resident*' unless certain preconditions are met, including advance notice of the transfer or discharge to the resident and his or her family." *Talevski*, 599 U.S. at 185 (quoting 42 U.S.C. §§ 1396r(c)(2)(A)–(B) (emphasis in original)). The notice provision was "more of the same," as the provision and its exceptions "remained focus on individual residents." *Id.*

The Court also stated that while the two provisions "establish who it is that must respect and honor these statutory rights; namely, the Medicaid-participant nursing homes in which the residents reside," that was not a "material diversion from the necessary focus on the nursing home residents." *Id.* at 185. As the Court observed, "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Id.* Thus, both provisions in *Talevski* satisfied *Gonzaga*'s stringent standard because they used "clear rights-creating language," spoke "in terms of the persons benefited," and had an "unmistakable focus on the benefited class." *Id.* at 186.

The eleven provisions Plaintiff includes in its Amended Complaint all reside in 42 U.S.C. Section 1396r, which contains requirements for nursing facilities. 42 U.S.C. § 1396r. Specifically, Plaintiff points to multiple provisions of subsection (b), subsection (c), and subsection (d) as bases for its claim. *Id.* §§ 1396r(b)–(d). This Court finds only the provisions

listed in 42 U.S.C. § 1396r(c) unambiguously confer rights in the manner contemplated by *Gonzaga* and *Talevski*.[1]

i. Subsection (b)

The Quality-of-Life Provision. Plaintiff asserts three violations of subsection (b), titled "[r]equirements relating to provision of services." 42 U.S.C. § 1396r(b). The first provision is under a heading titled "[q]uality of life" and contains two parts. *Id.* § 1396r(b)(1). Plaintiff's Amended Complaint refers to language from the first portion of the provision:

> A nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.

Id. § 1396r(b)(1)(A). This quality-of-life provision, by its terms, is unable to meet the high bar set in *Talevski* because it does not contain clear rights-creating language. *Talevski*, 599 U.S. at 183.

To find Congress unambiguously conferred an individual right, "it must be determined that 'Congress intended to create a federal right' *for* the identified class, not merely that the plaintiffs fall 'within the general zone of interest that the statute is intended to protect.'" *Id.* (quoting *Gonzaga*, 536 U.S. at 283) (emphasis in original). When applying *Talevski* to the quality-of-life provision here, rather than containing clear rights-conferring language, it refers to the general zone of interest the statute is intended to protect. *Id.*

[1] Prior to the Supreme Court's decision in *Talevski*, lower courts often relied on both *Gonzaga* and *Blessing v. Freestone*, 520 U.S. 329 (1997), to determine whether the statute at issue created a federal right of action. *See Saint Anthony Hospital v. Whitehorn*, 100 F.4th 767, 777–78 (7th Cir. 2024). In *Talevski*, the Court noted that "*Gonzaga* sets forth our established method for ascertaining unambiguous conferral" of statutory rights supporting relief under § 1983. *Id.* (quoting *Talevski*, 599 U.S. at 183). The Court's majority opinion contains one citation to *Blessing*, and its status in determining the unambiguous conferral of individual rights is unclear. Indeed, this Court notes that the most recent Seventh Circuit case examining a separate provision of the Medicaid statute for rights-creating language is scheduled for a hearing *en banc*. *Saint Anthony Hospital v. Whitehorn*, No. 21-2325, 2024 WL 3561942 (7th Cir. July 7, 2024). In any event, the analysis proceeds under the Supreme Court's framing of the issue in *Talevski*.

Neither the statutory framework nor the language of the statute references any right that a resident possesses. Compare the quality-of-life provision to the provisions at issue in *Talevski*. Both of those provisions resided in a subsection dedicated to "[r]equirements relating to residents' rights." 42 U.S.C. § 1396r(c). Moreover, the language in the provisions either contained an *explicit* reference to a *right* that the resident held or was located under a heading that identified the right. *See id*. § 1396r(c)(1)(A)(i) ("[t]he right to be free from … any physical or chemical restraint"; *Id*. § 1396r(c)(2)(A) (provision located under a heading titled "[t]ransfer and discharge rights."). Here, by contrast, the quality-of-life provision does not fall within the same statutory framework, nor does it contain any rights-creating language.

At best, the provision evinces a congressional policy *interest* in nursing homes providing care in a way that promotes the highest quality of life for nursing home residents. But an interest in the maintenance or enhancement of the quality of life of each resident is not enforceable under Section 1983; "it is *rights,* not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Gonzaga*, 536 U.S. at 282 (emphasis in original). Moreover, the Seventh Circuit held a provision similar to the quality-of-life provision lacked the unambiguous language necessary to confer an individual right. *See Bruggeman ex rel. Bruggeman v. Blagoejevich*, 324 F.3d 906, 909 (7th Cir. 2003) (finding portion of the Medicaid Act requiring state plans to provide services in the "best interests" of those receiving care insufficient to create private right of action). Thus, the Quality-of-Life provision does not provide Plaintiff with enforceable rights under § 1983.

The Services and Activities Provisions. Plaintiff also alleges Defendants violated two provisions under a heading titled "[p]rovision of services and activities." 42 U.S.C. §

1396r(b)(4)(A). Under this provision, a nursing facility, to the "extent needed to fulfill all plans of care" must provide:

> nursing and related services and specialized rehabilitative services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident;
>
> medically-related social services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.

Id. §§ 1396r(b)(4)(A)(i)–(ii). Much like the quality-of-life provision discussed above, these two provisions do not unambiguously confer individual rights.

Once again, these provisions contain no reference, either in their language or through their statutory positioning, to clear rights-creating language. Instead, the provisions command nursing homes to provide certain services aimed at achieving "the highest practicable physical, mental, and psychosocial well-being" of the residents. *Id.* These are perhaps admirable congressional goals and interests. But goals and interests are not rights, and caselaw is very clear that nothing less than "an unambiguously conferred right" can support a cause of action under Section 1983. *Talevski*, 599 U.S. at 183; *Gonzaga*, 536 U.S. at 283. Assume, for the sake of argument, that the second provision created the right to medically related social services designed to attain or maintain the highest practicable level of well-being for residents. How would a court determine if a nursing facility complied with that directive? Such a question would require courts to analyze resources of different facilities and their effectiveness. Without an express invitation from Congress, this Court declines to do so.

Congress must speak "with a clear voice" if it intends to create individually enforceable rights. *Gonzaga*, 536 U.S. at 273–74. "Creating new rights of action is a legislative rather than a judicial task." *Nasello v. Eagleson*, 977 F.3d 599, 601 (7th Cir. 2020). To determine whether a provision unambiguously confers an individual right, it must, in part, contain "clear rights-

creating language." *Talevski*, 599 U.S. at 186 (internal quotations omitted). The Services and Activities provisions lack that clear language and are ambiguous, leaving this Court guessing as to what right is being created.

Because the Quality-of-Life provision and the Services and Activities provisions under subsection (b) do not unambiguously confer individual rights under *Talevski*, they fail to plausibly state a claim under Rule 12(b)(6).

ii. Subsection (c)

Plaintiff asserts six violations of subsection (c), titled "[r]equirements relating to residents' rights." 42 U.S.C. § 1396r(c). This is the same subsection where the Court found enforceable rights in *Talevski*. 599 U.S. at 184. That statutory framing was "indicative of an individual 'rights-creating' focus." *Id.* (quoting *Gonzaga*, 536 U.S. at 284); *see also West Virginia v. EPA*, 597 U.S. 697, 721 ("words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). These provisions include similar language from *Talevski* about the residents of nursing home facilities.

First, as to the Specified Rights provisions, three of the asserted violations stem from Section 1396r(c)(1)(A). This portion of the statute sets forth ten "[s]pecified rights". 42 U.S.C. § 1396r(c)(1)(A). Among these rights are the following headings: "[f]ree choice," "[f]ree from restraints," and "[a]ccommodation of needs." *Id.* §§ 1396r(c)(1)(A)(i)–(v). Under the free choice heading, nursing facilities must protect and promote:

> The right to choose a personal attending physician, to be fully informed in advance about care and treatment, to be fully informed in advance of any changes in care or treatment that may affect the resident's well-being, and (except with respect to a resident adjudged incompetent) to participate in planning care and treatment or changes in care and treatment.

Id. §1396r(c)(1)(A)(i). Plaintiff next alleges a violation of the free from restraints heading. *Talevski* found this provision created enforceable rights. *Talevski*, 599 U.S. at 186. For comparisons sake, it states residents have:

> The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms.

Id. §1396r(c)(1)(A)(ii). The final provision that Plaintiff cites from this portion of the statute is the accommodation of needs subheading. Plaintiff focuses on the portion of the provision that secures the right:

> to reside and receive services with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered.

Id. §1396r(c)(1)(A)(v). These provisions, like those in *Talevski*, unambiguously confer rights upon the residents of nursing home facilities. In addition to their placement within the statutory framework, the two new provisions indicate that residents are the ones who receive the benefits conferred under the statute. Moreover, both provisions clearly indicate what the right is. In the case of the free choice heading, residents have a "right to choose a personal attending physician" while being informed about their care and treatment plan. *Id.* §1396r(c)(1)(A)(i). And under the accommodation of needs heading, residents have the right "to reside and receive services with reasonable accommodation of individual needs and preferences," with exceptions focused on resident safety and well-being. *Id.* §1396r(c)(1)(A)(v). Congress clearly used the same language throughout this area of subsection (c). Thus, for the reasons the Supreme Court found the "[f]ree from restraints" provision unambiguously conferred individual rights, this Court finds the "[f]ree choice" and "[a]ccomodation of needs" provisions asserted here do the same.

Second, as to the Notice of Rights provision Plaintiff asserts another violation of subsection (c). Still under the "[r]equirements relating to residents' rights" subheading, this particular provision contemplates "[n]otice of rights." *Id.* §1396r(c)(1)(B). The notice of rights heading contains four obligations for nursing homes, but Plaintiff turns its attention to the first of these obligations. This portion of the statute states that a nursing facility must:

> inform each resident, orally and in writing at the time of admission to the facility, of the resident's legal rights during the stay at the facility and of the requirements and procedures for establishing eligibility for medical assistance under this subchapter, including the right to request an assessment under section 1396r-5(c)(1)(B) of this title.

Id. §1396r(c)(1)(B)(i). Because this provision is "phrased in terms of the persons benefited and contains rights-creating, individual centric language with an unmistakable focus on the benefited class" *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 284, 287) (cleaned up), this Court finds that the provision unambiguously confers an individual right.

In reaching this conclusion, *Talevski's* analysis of the transfer provision is most instructive. While the language of that provision itself did not contain an explicit reference to a right held by residents, the Court noted the provision was within a paragraph concerning "transfer and discharge rights." *Id.* That statutory framework served the basis for the Court's understanding of the relevant transfer language. Here, the same principle applies.

The notice of rights provision makes multiple references to residents and their rights – "the resident's legal rights during the stay" and "the right to request an assessment" feature in the language. 42 U.S.C. §1396r(c)(1)(B)(i). In effect, this provision gives residents a *right* to be notified *about* their rights. The right to be informed is further indicated by the heading of this portion of the subsection, the "notice of rights." *Id.* §1396r(c)(1)(B). Moreover, the language is clear about who is receiving the benefits of this notification. The residents are the ones who

nursing homes must inform. Thus, this provision meets the test set forth in *Gonzaga* and *Talevski* and is plausible under Rule 12(b)(6).

The final provisions to analyze in subsection (c) are the Access and Visitation Rights provisions at 42 U.S.C. §1396r(c)(3). Still under "[r]equirements relating to residents' rights," this area of the statute contemplates "[a]ccess and visitation rights." *Id.* §1396r(c)(3). Plaintiff focuses on two portions of this provision, which state that a nursing facility must:

> permit immediate access to a resident, subject to the resident's right to deny or withdraw consent at any time, by immediate family or other relatives of the resident.

Id. §1396r(c)(3)(B). Additionally, the nursing facility must:

> permit reasonable access to a resident by any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident's right to deny or withdraw consent at any time.

Id. §1396r(c)(3)(D). Much like the transfer provision in *Talevski*, the access and visitation provisions unambiguously create enforceable rights under Section 1983.

The placement of these provisions in the statutory framework clearly and unambiguously tells this Court what rights are being created, namely a resident's right to be accessed and visited by third parties. Those third parties include both immediate family members and entities providing health services, as relevant to the facts of this case. *Id.* §§1396r(c)(3)(B), (D). As such, the transfer paragraph in *Talevski* and the access and visitation paragraph here operate in the same way. For example, the statutory framework tells the Court what the right is, and the provisions under the heading describe who benefits from the right and how it works. *Talevski*, 599 U.S. at 184–85.

In short, because the provisions described above under subsection (c) "use clear rights-creating language, speak in terms of the persons benefited, and have an unmistakable focus on

the benefited class," they satisfy the high bar set by *Talevski* and *Gonzaga. Talevski*, 599 U.S. at 186 (quoting *Gonzaga*, 536 U.S. at 284, 287, 290) (internal quotations omitted). These provisions are presumptively enforceable under Section 1983 and thus are plausible claims.

iii. Subsection (d)

Plaintiff asserts two violations of subsection (d), titled "[r]equirements relating to administration and other matters." 42 U.S.C. § 1396r(d). The two provisions at issue in this subsection are unable to meet the high bar set by *Talevski* for two reasons. First, the provisions lack clear rights-creating language, and second, in part because the last provision does not focus on residents as the benefited class.

The first subheading under "[r]equirements relating to administration and other matters" is titled "[a]dministration." *Id.* § 1396r(d)(1). The first provision states:

> A nursing facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident (consistent with requirements established under subsection (f)(5)).

Id. § 1396r(d)(1)(A). There is no doubt this provision is phrased in terms of the persons benefited and focuses on residents as the benefited class. However, it is also clear this provision does not contain rights-creating language sufficient to unambiguously confer an individual right.

Compare the statutory framework and the language of the provision itself to the provisions in *Talevski*. This administration provision does not reside in subsection (c), which expressly concerns requirements relating to residents' rights. *Id.* § 1396r(c). Here, the subsection concerns requirements relating to administration and other matters. *Id.* § 1396r(d). Additionally, the text of the provision does not contain any reference to an individual right held by the residents. To be sure, the transfer provision at issue in *Talevski* did not use the word "right" in its

language. But that provision was in a paragraph titled "[t]ransfer and discharge rights." *Id.* §1396r(c)(2). There is no such framing here.

The ultimate inquiry is whether Congress "has unambiguously conferred individual rights upon a class of beneficiaries." *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 283, 285–86). The Administration provision cannot clear that high bar. The provision concerns the competent administration of nursing facilities and their efficient use of resources. 42 U.S.C. § 1396r(d)(1)(A). But devoid of any language or statutory framework demonstrating that Congress intended to grant an individual right to efficient nursing home administration, this Court declines to disturb the careful balance struck by the Legislature. Put another way, "it must be determined that 'Congress intended to create a federal right' *for* the identified class, not merely that the plaintiffs fall 'within the general zone of interest that the statute is intended to protect.'" *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 283) (emphasis in original). This Court cannot make that determination. The administration provision is better understood as protecting a general zone of interest in efficient administration of nursing facilities. Thus, this provision does not confer an individual right enforceable under § 1983.

Finally, the Compliance provision. The second provision of subsection (d) at issue is under a heading titled "[m]iscellaneous." 42 U.S.C. § 1396r(d)(4). The language, under a provision titled "[c]ompliance with Federal, State, and local laws and professional standards" is as follows:

> A nursing facility must operate and provide services in compliance with all applicable Federal, State, and local laws and regulations (including the requirements of section 1320a-3 of this title) and with accepted professional standards and principles which apply to professionals providing services in such a facility.

Id. § 1396r(d)(4)(A). This provision does not use "clear rights-creating language," nor does it "speak in terms of the persons benefited." *Talevski*, 599 U.S. at 186 (internal quotations omitted). Indeed, there is no reference to residents in the statutory heading or the language of the provision itself. Considering the lack of focus on residents, this provision does not unambiguously confer individual rights enforceable under § 1983.

In summary, Plaintiff alleges a violation of one of the same provisions at issue in *Talevski* that the Court held conferred enforceable rights under Section 1983. *Talevski*, 599 U.S. at 186. Plaintiff also pleads violations of additional provisions in FNHRA that the Court did not reach in *Talevski*, some of which grant enforceable rights and some of which do not. Thus, Defendants' Motion to Dismiss is **DENIED** as it relates to the alleged FNHRA violations in Paragraph 55 D, E, F, G, H, and I of Plaintiff's Amended Complaint. (Am Compl. at 18-19, ¶ 55). Defendants' Motion to Dismiss is **GRANTED** as to the remainder of Plaintiff's FNHRA claims.

2. Fourteenth Amendment Due Process Rights

Plaintiff alleges that Defendants violated Ms. Tester's Fourteenth Amendment Due Process rights by failing to respond to her medical needs and by failing to protect her. (Am. Compl. at ECF pp. 19–22). The Due Process Clause generally does not confer an affirmative right to government aid, even when aid from a government actor might be necessary to secure life, liberty, or property interests. *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989). However, there are two recognized exceptions to the *DeShaney* rule. The first exception, known as the state-created danger doctrine, applies when a government actor "'affirmatively places a particular individual in a position of danger the individual would not otherwise have faced.'" *Estate of Her v. Hoeppmer*, 939 F.3d 872, 876 (7th Cir. 2019) (quoting *Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998). The second exception occurs when "the

state has a 'special relationship' with a person, that is, if the state has custody of a person, thus cutting off alternative avenues of aid." *Id.* To maintain a due process claim under these exceptions, a plaintiff must prove three elements: "(1) the government, by its affirmative acts, created or increased a danger to the plaintiff; (2) the government's failure to protect against the danger caused the plaintiff's injury; and (3) the conduct in question 'shocks the conscience." *Hoeppner*, 939 F.3d at 876 (quoting *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015)). Plaintiff's Amended Complaint reflects these elements. But the mere statement of these elements does not satisfy the pleading standard under Rule 8(a)(2). *See Iqbal*, 556 U.S. at 678 (Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.). As Defendants argue, Plaintiff's claim is not plausible because the exceptions to the *DeShaney* rule are not applicable here.

Plaintiff's theory for relief under the state-created danger doctrine is that Defendants placed Ms. Tester in a position of danger that she otherwise would not have faced. Successful cases under this theory are rare, often involve egregious facts, *see Doe v. Village of Arlington Heights*, 782 F.3d 911, 917 (7th Cir. 2015), and generally feature police conduct where the police "encountered a potential danger and turned it into an actual one." *Id.* For example, in *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), the police arrested a driver and gave control of the vehicle to an obviously drunk passenger. *Id.* at 1123. That person caused a collision, and the injured party prevailed in an action against the police officers under the state-created danger theory. *Id.* at 1127. In *Paine v. Cason*, 678 F.3d 500 (7th Cir. 2012), the Seventh Circuit found liability attached when the police arrested the plaintiff in a safe place and released her in a hazardous one, where private actors then harmed her. *Id.* at 509–10. Thus, the doctrine applies in situations where a government actor takes some action that makes the plaintiff more susceptible

to harm by a private actor. *Doxator v. O'Brien*, 39 F.4th 852, 866 (7th Cir. 2022) ("This Court has affirmed that this rule applies only to situations in which the harm is perpetrated by private actors.").

Here, Plaintiff does not allege Ms. Tester's harm was perpetrated by private actors. The complaint alleges that Defendants, owing to Riverview Hospital's ownership by Hamilton County, each acted under color of state law. The Amended Complaint makes no reference to harm committed by private individuals. Moreover, this Court did not encounter any successful claims imposing liability against a nursing home under the state-created danger doctrine. The only case that discusses such liability comes out of a district court in New York. *LaRock v. Albany County Nursing Home*, No. 1:19-cv-604, 2020 WL 1530792 at *5 (N.D. N.Y. Mar. 31, 2020) (dismissing claim under state-created danger doctrine because "the harm suffered is not alleged to be the result of some private assailant's conduct."). While this Court is not bound by that ruling, its reasoning is instructive. Here, Defendants' actions did not set about a chain of events that caused a private individual to harm Ms. Tester. As a result, Plaintiff's claim for relief is not plausible.

Plaintiff's second theory for relief under the Fourteenth Amendment is that Ms. Tester was in the custody of Defendants. According to the Complaint, Ms. Tester withdrew her consent to live at Hamilton Pointe through her 911 calls, and as a result Ms. Tester was in their custody. (Am. Compl. at ECF pp. 20–21). Defendants argue that Ms. Tester voluntarily chose to reside at Hamilton Pointe, and that she was never in custody of Defendants.

The custody exception to the *DeShaney* rule is designed to protect individuals with whom the State has a special relationship. *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). There are a few clearly defined situations where a state has custody of an

individual. *See Youngberg v. Romero*, 457 U.S. 307 (1982) (finding custodial relationship for mental patients involuntarily committed to state institution); *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983) (requiring medical care for suspects in police custody); *K.H. Through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (finding child in state custody had liberty interest in avoiding an abusive foster home). These cases limit custody to situations where the person is in police custody or has otherwise had their liberty interest curtailed by some action of the state. None of these cases contemplate custody in a nursing home setting. Ms. Tester entered a private contract and entrusted her care to Hamilton Pointe. While she did make multiple calls for assistance to 911 and argues that she was confined to her bed due to her medical conditions, this does not mean that she was in the *custody* of Defendants. This is not the kind of special relationship between the State and an individual that results in custody under existing caselaw. As a result, Plaintiff is unable to successfully assert liability against Defendants under either exception to the *DeShaney* rule.

3. Eighth Amendment

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Plaintiff alleges Defendants violated Ms. Tester's Eighth Amendment rights by acting with deliberate indifference to her pain and suffering and by directing the Warrick County Sheriff's Office not to provide her with medical assistance. (Am. Compl. at ECF p. 23). In response, Defendants assert that, as a matter of law, Plaintiff's claim under the Eighth Amendment must fail because it does not apply to Ms. Tester, a person who has not been convicted of a crime.

Caselaw dictates that the prohibition on the infliction of cruel and unusual punishment applies to those convicted of crimes. *See Ingraham v. Wright*, 430 U.S. 651, 664 (1977) ("Bail,

fines, and punishments traditionally have been associated with the criminal process."). The Supreme Court has not wavered from this approach. *Wilson v. Seiter*, 501 U.S. 294 (1991); *Farmer v. Brennan*, 511 U.S. 825 (1994). The Seventh Circuit, citing *Brennan*, has concluded "the Eighth Amendment applies only to convicted persons." *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). Simply put, Ms. Tester was not a convicted person or an "inmate" of Hamilton Pointe. Consequently, the protections of the Eighth Amendment do not apply to her treatment by Defendants. Here, as a matter of law, Plaintiff could not obtain relief on its Eighth Amendment claim under any set of facts. *Neitzke v. Williams*, 490 U.S. 319 (1989).

c. Motion to Strike

Plaintiff filed a Motion to Strike Exhibit A of Defendants' Brief in Support of Motion to Dismiss for lack of subject-matter jurisdiction. (Docket No. 41). Because the Court denied that portion of Defendants' Motion to Dismiss, Plaintiff's Motion to Strike is **DENIED as moot**.

IV. Conclusion

The Court **DENIES** Defendants' Motion to Dismiss (Docket No. 32) for lack of subject matter jurisdiction. The Court **DENIES** Defendants' Motion to Dismiss for failure to state a claim (Docket No. 30) as to Plaintiff's FNHRA claims in Paragraph 55 D, E, F, G, H, and I of Plaintiff's Amended Complaint, **GRANTS** Defendants' Motion as to Plaintiff's FNHRA claims in Paragraph 55 A, B, C, J and K of the Amended Complaint, and **GRANTS** Defendants' Motion as to the Fourteenth Amendment Due Process and Eighth Amendment claims. The Court **DENIES as moot** Plaintiff's Motion to Strike (Docket No. 41).

IT IS SO ORDERED.

Dated: September 20, 2024

Matthew P. Brookman, Judge
United States District Court
Southern District of Indiana

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