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*, vs. 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*.	)	Civil Action No. 3:24-cv-00005

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Plaintiff, Nathan D. Tester as Personal Representative of the Estate of Lacetta Anne Tester (hereinafter, the "Plaintiff"), by and through undersigned counsel, respectfully submits Plaintiff's Response to The Village at Hamilton Pointe, LLC (hereinafter, "Hamilton Pointe"), Riverview Hospital d/b/a Hamilton Pointe Health and Rehab (hereinafter, "Riverview"), Tender Loving Care Management, Inc. d/b/a TLC Management (hereinafter, "TLC"), and Newburgh Property Management, LLC (hereinafter, "NPM") (collectively, the "Defendants") Motion to Dismiss for

Failure to State a Claim Upon Which Relief Can Be Granted [Dkt. 30] and Memorandum of Law in Support Thereof. [1]

INTRODUCTION

Defendants have filed the present Motion to Dismiss pursuant to federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiff has failed to state a claim upon which relief can be granted in Plaintiff's First Amended and Restated Complaint and Demand for Jury Trial (hereinafter, the "Amended Complaint"). This Court, however, should deny the Motion to Dismiss because Plaintiff has stated claims under each of its three (3) counts in the Amended Complaint upon which relief can be granted. To the extent, *arguendo,* that this Court finds that any of those claim(s) should be dismissed for failure to state a claim, Plaintiff respectfully requests that this Court grant it leave to amend the Amended Complaint.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (quoting Fed. R. Civ. Pro. 8(a)(2)). "Specific facts are not necessary, the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 551 U.S. at 93 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint and not the merits of the suit. See *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). A motion to dismiss asks whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In reviewing the sufficiency of a complaint, the Court

[1] When referenced, Defendants' Motion to Dismiss [Dkt. 30] and Defendants' Brief in Support of Motion to Dismiss [Dkt. 31] will be collectively cited as the "Motion to Dismiss" in-text or "*Motion to Dismiss*, p. ___" (referencing the page number of Defendants' Brief in Support of Motion to Dismiss) in citations.

must accept all well-pled facts as true and draw all permissible inferences in favor of the plaintiff. *See Active Disposal, Inc. v. City of Darien*, 635 F.3d 883, 886 (7th Cir. 2011).

ARGUMENT

I. *Plaintiff Has Clearly Stated Claims Upon Which Relief Can Be Granted*.

Despite Defendants' unpersuasive arguments otherwise Plaintiff has adequately stated claims upon which relief can be granted pursuant to the Federal Rules of Civil Procedure for all three counts asserted in Plaintiff's First Amended and Restated Complaint and Demand for Jury Trial (the "Amended Complaint"). Defendants' arguments to the contrary are dispelled in the subsequent sections of this Response.

A. This Court should strike and disregard all facts as asserted by Defendants that are not alleged in the Amended Complaint.

As a preliminary matter, Defendants repeatedly cite unverified and unsubstantiated allegations, without basis or support, which fall outside of the allegations in the Amended Complaint. Plaintiff respectfully moves this Court to strike all such allegations from the Motion to Dismiss, and to disregard them in its ruling on the Motion to Dismiss.

B. Plaintiff has stated claims pursuant to 42 U.S.C.S. § 1983 upon which relief can be granted under the Omnibus Budget Reconciliation Act ("OBRA") and the Federal Nursing Home Reform Act (the "FNHRA").

Plaintiff has stated claims pursuant to Section 1983 under OBRA and the FNHRA upon which relief can be granted in accordance with Federal Rule of Civil Procedure Rule.

Defendants argue that "[u]nder federal notice pleading, factual allegations must plausibly state an entitlement to relief *to a degree that rises above the speculative level*. *Motion to Dismiss*, p. 5 (citation omitted) (emphasis original). Referring to Plaintiff's pleading as a "shot-gun list of alleged violations," Defendants claim that Plaintiff has not pled the sufficient facts to support that list. Defendants, however, cite to no authority to validate this incorrect assertion.

Despite Defendants' misguided argument otherwise, Federal Rule of Civil Procedure 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (quoting Fed. R. Civ. Pro. 8(a)(2)). "Specific facts are not necessary, the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 551 U.S. at 93 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Based on the foregoing precedent, specific facts are not necessary, and combined with the allegations as set forth in the Amended Complaint as a whole, Defendants are on fair notice of the claims against them in satisfaction of Federal Rule of Civil Procedure 8.

Consequently, the Motion to Dismiss should be denied. To the extent, *arguendo*, that this Court grants to Motion to Dismiss as to this claim, Plaintiff respectfully requests leave of this Court to amend the Amended Complaint.

C. Plaintiff has stated a plausible due process violation under the Fourteenth Amendment of the United States Constitution.

For the reasons as set forth hereafter, Plaintiff has stated a plausible due process violation under the Fourteenth Amendment (the "14th Amendment") of the United States Constitution (the "Constitution"). Consequently, this Court should deny Defendants' Motion to Dismiss.

i. *The Amended Complaint sufficiently alleges a substantive due process claim under the state-created danger theory.*

The Amended Complaint sufficiently alleges a substantive due process claim under the state-created danger theory.

The Fourteenth Amendment prohibits a state from depriving a person of life, liberty, or property without due process of law. Furthermore, the Due Process Clause of the Fourteenth Amendment "generally does not impose upon the state a duty to protect individuals from harm by private actors." *Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 654 (7th Cir. 2011) (quoting *Buchanan-Moore v.*

County of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009)). The Seventh Circuit Court of Appeals, however, has explained that there are two exceptions to this general rule:

> The first arises when a state has custody over a person. In that instance, the state is obligated to offer protection because no alternative avenues of aid exist. The second exception comes into play "when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced."
>
> *Id.* (internal citations omitted).

Furthermore, *"*[t]o establish a substantive due process claim under a state-created danger theory, [a plaintiff] must demonstrate that: (1) the [defendant], by its affirmative acts, created or increased a danger that [the plaintiff] faced; (2) the [defendant's] failure to protect her from danger was the proximate cause of her injuries; and (3) the [defendant's] failure to protect her 'shocks the conscience.'" *Id.* (quoting *King ex rel. King v. East St. Louis School Dist*. 189, 496 F.3d 812, 817-18 (7th Cir. 2007)).]

As to the first exception, Plaintiff has alleged that the Defendants, acting under color of state law, had Ms. Tester in their custody. Specifically, Plaintiff has alleged that "[d]uring the January 12 Pleas for Help, irrefutably withdrew and revoked any consent for treatment by Hamilton Pointe, and specifically stated that she did not have strength to get up and that Hamilton Pointe refused to help her." *Amended Complaint*, p. 20, ⁋ 64. Importantly, it is alleged that "**Ms. Tester had withdrawn her consent to remain at Hamilton Pointe, and at this point was in the Defendants' custody and at their mercy**." *Id.* at ⁋ 68 (emphasis added). Moreover, Plaintiff has alleged that "[d]espite her pleas for help and affirmations that she would die if no one was sent to help her, the Defendants did not help Ms. Tester, and in a phone call with a Warrick County Sheriff's Deputy, Hamilton Pointe told the Warrick County Sheriff's Office not to send anyone to help." *Id.* at ⁋ 65. Plaintiff also alleged that "Hamilton Pointe then took away her phone, making it impossible for Ms. Tester to reach anyone outside of the walls of the facility in order to get help." *Id.* at ⁋ 66.

Furthermore, the Amended Complaint alleges that "[d]espite her plea, an ambulance did not remove her from Hamilton Pointe and get her to a hospital as a direct result of Hamilton Pointe

telling them not to come." *Id.* at ¶ 67. Paragraph 69 of the Amended Complaint then claims that 42 U.S.C. § 1983 prohibits any person acting under color of law from subjecting any person in custody to punitive conditions of confinement without due process of law. Additionally, Plaintiff has alleged that the "Defendants' conduct, actions and/or omissions were the direct and proximate cause of the violations of Ms. Gomes' Fourteenth Amendment rights, her mental suffering, anguish, other injuries, and death." *Id.* at ¶ 74. As such, all elements of the first exception cited in *Jackson* have been sufficiently pled.

As to the second *Jackson* exception, Plaintiff has alleged that "Defendants, acting under color of law, intentionally and with conscious callous and deliberate indifference, deprived Ms. Tester of her constitutional rights to due process." *Id.* at ¶ 70. Furthermore, the Amended Complaint asserts that the "Defendants, based upon the foregoing facts, placed Ms. Tester in a situation of serious danger, and held Ms. Tester in that situation of serious danger against her will." *Id.* at ¶ 71. Plaintiff has also alleged that "the Defendants' above-described conduct, acts, and/or omissions constituted deliberate indifference to Ms. Tester's serious medical and mental needs, and violated her rights under the Fourteenth Amendment to the Constitution of the United States of America to due process of law, and violated 42 U.S.C. § 1983." *Id.* at ¶ 72. The Amended Complaint also specifically claims that the "Defendants' failure to protect Ms. Tester shocks the conscience." *Id.* at ¶ 73.

As such, all elements of Plaintiff's Fourteenth Amendment Claim have been pled under both *Jackson* exceptions. As this Court is aware, in reviewing the sufficiency of a complaint, the Court must accept all well-pled facts as true and draw all permissible inferences in favor of the plaintiff. *See Active Disposal, Inc. v. City of Darien*, 635 F.3d 883, 886 (7th Cir. 2011). Consequently, Plaintiff has stated a viable Fourteenth Amendment claim.

ii. ***The Amended Complaint identifies how Hamilton Pointe deprived Ms. Tester of liberty and is exactly the kind of government conduct that the Due Process Clause was designed to prevent.***

Notwithstanding Defendants' arguments to the contrary, the Amended Complaint has pled a liberty interest of which Ms. Tester was deprived by Defendants.

Individuals have a substantial liberty interest in avoiding further, civil confinement to a nursing home. *See Vitek v. Jones*, 445 U.S. 480, 491-492 (1980) (commitment to mental hospital entails "'a massive curtailment of liberty,;" and requires due process protection); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (there is a "substantial liberty interest in not being confined unnecessarily" and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *In re Gault*, 387 U.S. 1, 27 (1967); *Specht* v. *Patterson*, 386 U.S. 605 (1967).

As cited above, the Amended Complaint alleges that Ms. Tester had revoked her consent to treatment by Defendants and under the civil confinement in a nursing home based upon Defendants' actions. These actions were ultimately the cause of her harm and death. As such, plaintiff has certainly identified a liberty interest of which Ms. Tester was deprived.

The facts as alleged in the Amended Complaint are also exactly the kind of government conduct that the Due Process Clause was designed to prevent. *See Addington*, 441 U.S. at 425 ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *In re Gault*, 387 U.S. at 27; *Specht* v. *Patterson*, 386 U.S. 605 (1967).

As such, this Court should deny the Motion to Dismiss.

iii. ***If this Court, <u>arguendo</u>, were to find that Plaintiff has failed to state a claim for relief pursuant to the 14th Amendment of the Constitution, then Plaintiff respectfully requests leave of this Court to amend the Amended Complaint.***

To the extent that this Court finds that Plaintiff is deficient in its pleading of its 14th Amendment claim, Plaintiff respectfully requests leave of this Court to amend its Amended Complaint.

D. <u>Plaintiff has stated a claim under the Eighth Amendment of the United States Constitution.</u>

Plaintiff has also stated a claim under the Eighth Amendment of the United States Constitution, by and through the Fourteenth Amendment.

In claims for inadequate medical care in the context of the Eighth Amendment, by and through the Fourteenth Amendment, "deliberate indifference is the threshold for establishing liability." *Collins v. Seeman*, 462 F.3d 757, 762 (7th Cir. 2006). The deliberate indifference standard has both a subjective and objective element. The objective harm must be that i) the harm that befell the individual must be objectively, sufficiently serious and a substantial risk to his or her health or safety, and ii) the individual defendants were deliberately indifferent to the substantial risk to the individual's health and safety. *Collins*, 462 F.3d at 760, citing *Matos ex. Rel. Matos v. O'Sullivan*, 335 F.3d 553, 556 (7th Cir. 2003).

The Seventh Circuit Court of Appeals has recently held that there are four (4) elements to a claim based on deliberate indifference: i) there was an objectively serious medical need; ii) the defendant committed a volitional act concerning the [plaintiff's] medical need; iii) that act was objectively unreasonable under the circumstances in terms of responding to the [plaintiff's] medical need; and iv) the defendant acts purposefully, knowingly, or perhaps even recklessly with respect to the risk of harm. *Gonzalez v. McHenry County*, 40 F.4th 824, 827-28 (7th Cir. 2022)

Defendants herein argue that Plaintiff has not pled sufficient facts to meet the professional judgment standard, or the deliberate indifference standard. Plaintiff, however, has pled the necessary

facts to survive the Motion to Dismiss, with allegations corresponding to each of the elements above. *See Amended Complaint*, pp. 22-24, ⁋⁋ 76-91.

In any case, however, the Northern District of Indiana has held that "a motion for judgment on the pleadings is not the proper context to measure the actions of a defendant against a standard that could protect them from liability." *Cornell*, 2008 U.S. Dist. LEXIS 89678 at *13 (citing *Minix ex rel. Zick v. Canarecci*, No. 3:05-CV-144 RM, 2007 U.S. Dist. LEXIS 48655, (N.D. Ind. July 3, 2007)). Instead the *Canarecci* Court held that this issue is more appropriately addressed in a motion for summary judgment rather than at the pleading stage. *Id.*

As such, this Court should deny Defendants' Motion to Dismiss. To the extent that this Court finds, *arguendo*, that this claim should be dismissed, Plaintiff respectfully requests that this Court grant it leave to file a Second Amended and Restated Complaint in order to cure any such deficiencies.

CONCLUSION

Based upon the foregoing arguments, this Court should deny Defendants' Motion to Dismiss. To the extent that, *arguendo*, this Court grants the Motion to Dismiss in whole or in part, Plaintiff respectfully requests that this Court grant it leave to amend the Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served with the Clerk of the Court on this 29th 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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UNITED STATES DISTRICT COURT
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THE ESTATE OF LACETTA ANNE TESTER, by and through Personal Representative Nathan D. Tester, *Plaintiff*, vs. 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*.	)	Civil Action No. 3:24-cv-00005

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

This cause has come before the Court upon Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted [Dkt. 30] filed in this action by The Village at Hamilton Pointe, LLC (hereinafter, "Hamilton Pointe"), Riverview Hospital d/b/a Hamilton Pointe Health and Rehab (hereinafter, "Riverview"), Tender Loving Care Management, Inc. d/b/a TLC Management (hereinafter, "TLC"), and Newburgh Property Management, LLC

(hereinafter, "NPM") (collectively, the "Defendants").

Being fully advised, it is now **ORDERED** that the motion be, and hereby is, **DENIED** in all aspects.

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