APPENDICES

APPENDIX A

[Filed January 20, 2020]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-51066

DEMETRIAS TAYLOR, As representative of the estate of Iretha Jean Lilly, Deceased; TERRANCE HAMILTON; TERRANCE LAMONT HAMILTON, As
next of friend and father of I.H.,

Plaintiffs–Appellants,

v.

MCLENNAN COUNTY; KIMBERLY RIENDFLIESCH; DESERA ROBERTS; JOHN WELLS,

Defendants–Appellees

Appeal from the United States District Court for the Western District of Texas
USDC No. 6:16-CV-395

Before OWEN, Chief Judge, and BARKSDALE and DUNCAN, Circuit Judges. PER CURIAM: *

Demetrias Taylor, as representative of Iretha Jean Lilly's estate, Terrance Hamilton, and Terrance Lamont Hamilton, as next friend and father of I.H., (collectively, Plaintiffs) filed this 42 U.S.C. § 1983 action, asserting that McLennan County subjected Lilly to unconstitutional conditions of confinement, and Nurses Desera Roberts and Kimberly Riendfliesch failed to provide Lilly with constitutionally adequate medical care. Plaintiffs later filed an amended complaint raising claims against Dr. John Wells for failing to provide Lilly with constitutionally adequate medical care and failure to supervise. The district court granted summary judgment in favor of the defendants on each claim. After carefully reviewing the briefs, record, and oral argument, we affirm for essentially the reasons stated by the district court in its October 2 and December 3, 2018, orders.[1]

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] *See Taylor v. McLennan Cty. et al.*, No. 6:16-CV-395 (W.D. Tex. Dec. 3, 2018); *Taylor v. McLennan Cty. et al.*, No. 6:16-CV-395 (W.D. Tex. Oct. 2, 2018).

APPENDIX B

[Signed December 3, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEMETRIAS TAYLOR, AS	**§**	
REPRESENTATIVE OF	**§**	
THE ESTATE OF IRETHA	**§**	
JEAN LILLY, DECEASED;	**§**	
TERRANETHA RANCH,	**§**	
DAYSHALON RANCH,	**§**	
KEVIN RANCH, TERRANCE	**§**	**W-16-0095-**
HAMILTON, TERRANCE	**§**	**ADA**
LAMONT HAMILTON,	**§**	
AS NEXT OF FRIEND AND	**§**	
FATHER OF I.H.;	**§**	
***Plaintiffs*,**	**§**	
	§	
-vs-	**§**	
	§	
MCLENNAN COUNTY,	**§**	
KIMBERLY RIENDFLIESCH,	**§**	
DESERA ROBERTS,	**§**	
Defendants	**§**	

ORDER DISMISSING PLAINTIFFS' CLAIMS WITH PREJUDICE AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Came for consideration this date the Motion for Summary Judgment filed by McClennan County, (ECF No. 37), and Plaintiffs' Motion for Summary Judgment filed against Defendant McClennan County, (ECF No. 43). The Court also considered the Motions for Summary Judgment filed by Defendants Desera Roberts, (ECF No. 36), and Kimberly Riendfliesch, (ECF No. 38). Finally, the Court considered Plaintiffs' Motions for Summary Judgment against both Desera Roberts, (ECF No. 44), and Kimberly Riendfliesch, (ECF No. 45). The Court has also considered all the responses and replies filed by the Parties. The Court conducted a hearing on all the motions on October 23, 2018.

BACKGROUND

These cross-motions for summary judgment arise out of the death of Iretha Jean Lilly ("Lilly"), a pretrial detainee in the McLennan County (the "County"), Texas, Jail. Lilly died from an untreated heart attack (acute myocardial infarction) less than 12 hours after being admitted to the McLennan County Jail (the "County Jail"). During her short stay in the County Jail, Defendants conducted three separate EKGs on Lilly after she complained of chest and extremity pain to several employees at the County Jail.[2] Plaintiffs' primary theory of liability relates to the undisputed fact that the medical staff did not immediately transfer her to a hospital after

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[2] According to Plaintiffs the results of the second EKG are unavailable. Pl. Mot. Summ. J., ECF No. 43 at 5.

taking the first EKG. The question for the Court is whether this failure to do so amounted to intentional or deliberate indifference sufficient to violate Lilly's constitutional rights. The Court finds that it does not.

McLennan County argues that it is entitled to summary judgment on all Plaintiffs' claims against it because Plaintiffs cannot establish that a constitutional deprivation was caused by a policy, custom, or practice of the county. Defendants Riendfliesch and Roberts assert that they are entitled to qualified immunity because their conduct, in terms of the medical treatment that they provided, did not violate Iretha Jean Lilly's constitutional rights. They also argue, in the alternative, that their conduct was objectively reasonable and did not violate clearly established law. Plaintiffs argue to the contrary, and contend that they are entitled to summary judgment because McLennan County is liable as a matter of law under *Monell*. Plaintiffs also claim that Roberts and Riendfliesch are liable because they acted with deliberate indifference in regard to Lilly's care. Both sides have submitted extensive numbers of allegedly undisputed facts in support of their motions.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party moving for summary judgment need not support the motion with affidavits or other evidence negating the movant's claim. If the non-movant bears the burden of

proof at trial, the movant may satisfy its burden by showing that there is an absence of evidence to support the non- movant's case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Summary judgment is mandatory when a party fails to establish the existence of an essential element of its case on which the party will bear the burden of proof at trial. *Cellotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Once the movant satisfies his initial burden, the burden then shifts to the non-movant to establish that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Cellotex Corp.*, 477 U.S. at 325). "This burden is not satisfied with 'some metaphysical doubt as to the material facts'" . . . by 'conclusory allegations'. . . by 'unsubstantiated assertions' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Electric Industrial Corporation v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882–83 (1990); *Hopper v. Prank*, 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994). Rather the non-moving party must "come forward with specific facts that there is a genuine issue at trial." *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)).

DISCUSSION

"To plead a constitutional claim for relief under § 1983 [a plaintiff must] allege a violation of a right secured . . . by the Constitution or laws of the United States and a violation of that right by one or more state actors." *Johnson v. Dallas Indep. Sch. Dist.,* 38

F.3d 198, 200 (5th Cir. 1994). It is undisputed that Lilly was a pretrial detainee and was entitled to reasonable medical care. Considering that the restraints imposed on pretrial detainees are simply measures to assure their presence at trial, constitutional deprivations become particularly egregious.

To establish inadequate medical care under § 1983, Plaintiffs must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Negligence, medical malpractice, or unsuccessful medical treatment does not constitute deliberate indifference. *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006). Instead, "[a] showing of deliberate indifference requires the prisoner to submit evidence that prison officials refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Id.* (quoting *Domino v. Texas Dep't of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (quotations omitted)). The Fifth Circuit has held that deliberate indifference is an "extremely high standard to meet." *Id.*

The deliberate-indifference standard set forth in *Farmer v. Brennan*, 511 U.S. 825, 837–40 (1994), applies to pretrial detainees as well as prisoners. *See Hare v. City of Corinth, Miss.*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc); *see also Zimmerman v. Cutler*, 657 F. App'x. 340, 348 (5th Cir. 2016). To prevail, a pretrial detainee must demonstrate that a government official was deliberately indifferent to "a substantial risk of serious medical harm." *Wagner v. Bay City*, 227 F.3d 316, 324 (5th Cir. 2000). A prison

official acts with deliberate indifference to an inmate's health "only if he knows that [the] inmate[ ] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847; *see also Gobert*, 463 F.3d at 346 (holding that prisoner must "submit evidence that prison officials refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs" (quotations and citations omitted)); *Reeves v. Collins*, 27 F.3d 174, 176–77 (5th Cir. 1994) (applying *Farmer* to a denial of a medical care claim).

In articulating the scope of this right, the Supreme Court has warned that not "every claim by a prisoner that he has not received adequate medical treatment states a [constitutional] violation." *Estelle*, 429 U.S. at 105. Mere negligence or medical malpractice is not sufficient. *See West v. Atkins*, 487 U.S. 42, 108 n.8 (1988); *Estelle,* 429 U.S. at 105–06. However, "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle*, 429 U.S. at 103. The state has a constitutional obligation to provide adequate medical care to those whom it has incarcerated. *Id*; *see also West*, 487 U.S. at 54. Accordingly, "deliberate indifference to a prisoner's serious illness or injury states a cause of action under [§] 1983." *Estelle*, 429 U.S. at 105.

As a starting point, the Court determines that this standard has not been met with respect to any of the Defendant movants. Rather, Plaintiffs' contentions amount to a complaint about the treatment received or an allegation of malpractice, neither of which amounts to deliberate indifference.

See Stewart v. Murphy, 174 F.3d 530, 534 (5th Cir. 1999); *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995). The Court finds that the summary judgment evidence presented by the Defendant movants establishes that there is no genuine issue of material fact that the Defendant nurses and remaining medical staff did not ignore Lilly's complaints, did not refuse to treat her, did not intentionally treat her incorrectly, and did not exhibit a "wanton disregard" for her "serious medical needs." *See Gobert*, 463 F.3d at 346. The evidence also directly contradicts Plaintiffs' assertions that the Defendants were deliberately indifferent, refused to help Lilly, or let Lilly suffer.

I. McLennan County's Motion for Summary Judgment

Plaintiffs have asserted a claim for an unconstitutional condition of confinement against McLennan County. Additionally, Plaintiffs have alleged facts that can be construed as an episodic act or omission claim against the County. For the reasons set forth below, both of those claims fail as a matter of law and McLennan County is entitled to summary judgment in its favor.

a. Condition of confinement claim against McLennan County

The Court concurs with McLennan County that Plaintiffs' claim sounds more as an episodic act or omission claim rather than a condition of confinement claim. The relevant conduct that relates to the ultimate death of Lilly occurred within a relatively

short period of time on October 6, 2014. The complaints of wrongdoing focus primarily on the conduct of specific nurses in their failure to recognize information from EKGs and to more quickly get Lilly to an emergency room. Despite Plaintiffs' claim sounding more as an episodic act or omission claim, the Court will analyze Plaintiffs' claim as both a condition of confinement claim and as an episodic act or omission claim.[3]

To succeed on a claim of unconstitutional condition of confinement, a plaintiff must prove (1) a rule or instruction, an intended condition or practice, or a *de facto* policy as evidenced by sufficiently extended or pervasive acts of jail officials; (2) not reasonably related to a legitimate government objective; and (3) that violated Lilly's constitutional rights. *Estate of Henson v. Wichita Cty., Tex.*, 795 F.3d 456, 468 (5th Cir. 2015) (citations omitted); *see also Kitchen v. Dallas County, Texas,* 759 F.3d 468, 482 (5th Cir. 2014) ("The deliberate indifference standard, however, is not an obligation for government officials to comply with an 'optimal standard of care.'"); *Thomas v. Carter,* 593 F. App'x. 338, 345 (5th Cir. 2014) ("Even assuming this conduct violated a standard of care, mere negligence is insufficient to sustain a deliberate indifference claim."). At best, Plaintiffs' allegations concern potential negligence, but negligence does not rise to the level of deliberate indifference and cannot sustain a cause of action

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[3] This Court has previously dismissed Plaintiffs' claims against Dr. Wells because the statute of limitations in which to file a claim against Dr. Wells had expired. *See* Order Adopting Magistrate's Report and Recommendation and Dismissing Plaintiffs' Claims Against Defendant Wells With Prejudice, (ECF No. 68), dated October 2, 2018.

under §1983 for denial of medical care. *Hare,* 74 F.3d at 649; *Thompson v. Upshur Cty., TX*, 245 F.3d 447, 459 (5th Cir. 2001); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 532 (5th Cir. 1994). "Claims founded on negligence or medical malpractice simply are not cognizable under 42 U.S.C. §1983." *Jacks v. Normand*, 2018 WL 1363756 at *4 (E.D. LA, Feb. 23, 2018) (citing *Stewart*, 174 F.3d at 534).

To satisfy the first element, Plaintiffs must identify either an actual, explicit policy, or a *de facto* policy. *Id.* A formal, written policy is not required to establish a "condition or practice." As the Fifth Circuit has noted, "a condition may reflect . . . [a] *de facto* policy, as evidenced by a pattern of acts or omissions 'sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by [jail] officials, to prove an intended condition or practice.'" *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009) (quoting *Hare*, 74 F.3d at 645). In other words, it is not enough to show that a plaintiff suffered from episodic acts or omissions of jail officials, but instead, a plaintiff must show that the disputed acts are indicative of a system-wide, extended, pervasive problem. *Shepherd*, 591 F.3d at 455. In *Shepherd*, the Fifth Circuit noted that:

> [I]solated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate . . . Rather, a detainee challenging jail conditions must demonstrate a pervasive pattern of serious deficiencies in providing for his [or her] basic human needs; any lesser

> showing cannot prove punishment in violation of the detainee's Due Process rights.

Id. at 454; *see also Estate of Henson*, 795 F.3d at 469–70 ("Plaintiffs' evidence of one other death that took place in the jail four month prior, is not sufficient to show that the jail's medical staffing was constitutionally inadequate."). The standard is "functionally equivalent to a deliberate indifference inquiry." *Hare*, 74 F.3d at 643. Here, Plaintiffs attempt to establish that a general policy of not sending inmates immediately to an emergency room when they present medical complications was tantamount or the functional equivalent of deliberate indifference. The Court disagrees under the summary judgment facts that have been presented, even when viewed in the light most favorable to Plaintiffs.

To satisfy the second element, Plaintiffs must establish that the condition was not reasonably related to a legitimate governmental objective, but rather was arbitrary or purposeless, thereby inferring "that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Estate of Henson*, 795 F.3d at 463 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). This element is critical because it is, at least in part, what separates a § 1983 case from a medical negligence case.

A properly-stated condition-of-confinement claim is not required to demonstrate actual intent to punish; rather, intent may be inferred from an entity's decision to subject pretrial detainees to an unconstitutional condition. *Shepherd*, 591 F.3d at 452. A county allowing a staph infection to persist

within a jail, for instance, serves no legitimate government purpose. *See Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 207 (5th Cir. 2011). In contrast, body-cavity searches of pretrial detainees are reasonably related to a legitimate government interest in secure facilities, as are cell searches. *Bell*, 441 U.S. at 555–60.

In this case Plaintiffs have alleged a delay of medical care that resulted in the death of Lilly. However, not every denial or delay of medical care imposed during pretrial detention amounts to "punishment" in the constitutional sense. For instance, the effective management of a detention facility is a valid objective justifying the imposition of conditions or restrictions affecting medical care. *Estate of Henson*, 795 F.3d at 467–68 (citing *Bell*, 441 U.S. at 537). In determining "whether restrictions or conditions are reasonably related to the Government's interest in . . . operating the institution in a manageable fashion," courts must remember that "'[s]uch considerations are peculiarly within the province and professional expertise of corrections officials.'" *Bell*, 441 U.S. at 540 n.23 (quoting *Pell v. Procunier,* 417 U.S. 817, 827 (1974)). Courts must not become "enmeshed in the minutiae of prison operations," which will only distract from the question presented: "does the practice or condition violate the Constitution?" *Bell*, 441 U.S. at 544, 562. For example, absent a clear emergency and a life-threatening situation, it may be necessary for the jail and its providers of medical care to prioritize the important task of providing necessary medicines to prisoners who are patients and whose movements are severely restricted over other tasks.

To satisfy the third element, Plaintiffs must

establish that a rule or restriction, or the existence of an identifiable intended condition or practice, or a *de facto* policy caused a violation of Lilly's constitutional rights. *Estate of Henson*, 795 F.3d at 468. The Court believes that the summary judgment evidence submitted by all the movants establishes that Plaintiffs cannot establish all three elements.

Plaintiffs allege that McLennan County maintained unconstitutional conditions of confinement which caused Lilly to be exposed to inadequate medical care, and/or that the conditions of the County Jail constituted arbitrary punishment of a pre-trial detainee. Pl. Am. Compl., ECF No. 13 ¶ 68. Plaintiffs' condition of confinement claim is based on the following "conditions": (1) that the County had a procedure that prohibited nurses from sending inmates to the hospital without a doctor's approval, even if there was no doctor on-site at the jail and the inmates were suffering from life threatening medical conditions; (2) that the County had "a policy, practice, custom, procedure, or training" wherein medical intake personnel were permitted to perform medical intakes of inmates while not medically clearing inmates and failing to inform the supervising doctor that the inmates had not been medically cleared even after an inmate had been in jail for more than six hours, had been tased, had been complaining of chest pain, and/or had an abnormal EKG; and (3) that the County had a policy, practice, or custom that permitted Lilly to be transferred to the jail without ensuring that the proper personnel were informed that she had been tased, tested positive for methamphetamine and amphetamine, and had

complained of chest pain.[4] *Id.* ¶¶ 68–70, 78.

Plaintiffs allege that Lilly died as the result of a *de facto* policy maintained by the County of refusing to send inmates, even those who needed immediate emergency medical care, to the hospital without obtaining the approval of Dr. Wells. Integral to this argument is a contention that Dr. Wells was the policymaker on behalf of McLennan County, thereby subjecting the County to liability.[5]

The Court finds that there is no credible summary judgment evidence that an alleged practice, rule, or policy of the County of not sending inmates to the hospital without the approval of Dr. Wells (regardless of whether the practice existed or not) violated Lilly's constitutional rights. This is *not* a medical malpractice or negligence case. Plaintiffs must establish the loss of a constitutional right, which requires proof of deliberate indifference rather than mere negligence. To prove the County's medical system was constitutionally deficient, Plaintiffs must

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[4] The Court notes an inherent inconsistency between arguments numbered (2) and (3). While parties are certainly allowed to make alternative theories for liability, in the case the standard the Plaintiff must meet is proof of deliberate indifference. Therefore, it seems irreconcilable to the Court that one argument is that the medical staff were aware of critical medical information concerning Lilly's medical condition and took no steps to help her and the next argument is that the County is liable because Lilly was placed into their care without being adequately informed of her medical condition.

[5] As will be discussed further in the following section of this Order, the Court finds that Dr. Wells was not the policymaker on behalf of McLennan County.

present evidence of "more than an isolated incident; [they] 'must demonstrate a pervasive pattern of serious deficiencies in providing for [Lilly's] basic human needs.'" *Elder v. Hockley Cnty. Comm'rs Court,* 589 F. App'x. 664, 668 (5th Cir. 2014) (quoting *Shepherd,* 591 F.3d at 454); *see also Duvall*, 631 F.3d at 208. Isolated instances of inadequate medical care are insufficient to establish a jail condition case. *Shepherd*, 591 F.3d at 455.

Plaintiffs have not submitted evidence of prior similar instances of inmates not being sent to the hospital due to nurses not getting the approval from the doctor to do so. In addition, Plaintiffs have not presented sufficient summary judgment evidence to demonstrate that serious injury and death were the inevitable result of the practice of requiring the doctor's approval before an inmate can be sent to the hospital. The summary judgment evidence establishes that County Jail's nursing staff did have the training, authorization, and discretion to send inmates to the hospital based on the medical needs of the inmates without first seeking approval from Dr. Wells. Dr. Wells Dep., ECF Nos. 40-2 at 3–4, 5–10, 14; 40-3 at 2–3, 5–6. The summary judgment evidence also establishes that the nursing staff had sent inmates to the hospital in the past without seeking Dr. Wells' approval. Dr. Wells Dep., ECF No. 40-3 at 5–6. Certainly, the evidence eliminates the possibility that Plaintiffs could establish that there was a type of pervasive conduct with respect to this issue that would constitute a constitutional injury.

Moreover, Plaintiffs' cannot rebut the evidence that the County had an *actual* policy that required medical care and emergency medical care to be provided to the inmates at the County Jail.

McNamara Aff., ECF No. 40-4 at 2. Again, while in any individual circumstance a claim of negligence or medical malpractice might be made, it cannot be said that the County agreed, in a *de facto* manner, to deliberately withhold medical care from Lilly or the other prisoners. To the contrary, the County contracted with a third party to provide physician and other medical services to the inmates and pre-trial detainees. Agrmt. for Med. Dir./Phys. Serv., ECF No. 40-4 at 7–14. Simply put, there is no evidence that Lilly's death constituted a form of punishment, or that anything in the County's Health Services Plan resembles punishment sufficient to maintain a claim of constitutional liability. *Bell,* 441 U.S. at 542.

Boiled down, Plaintiffs other alleged conditions are that the Defendant nurses' failure to immediately send Lilly to a hospital violated Lilly's constitutional right. The Court has carefully reviewed all the summary judgment evidence submitted by all the Parties and determines that Plaintiffs cannot establish that the actions of the nurses with respect to Lilly were "arbitrary or purposeless," (as opposed to merely, at most, negligent) to a degree that the decisions that the nurses made were for the purpose of inflicting punishment on Lilly. *Estate of Henson*, 795 F.3d at 463.

The summary judgment evidence establishes that on October 6, 2014, Nurse Outley was working as the Medical Intake nurse at the McLennan County Jail. Outley Aff., ECF No. 40-5 at 1–2. Lilly was checked into the County Jail at approximately 11:30 a.m. *Id.* at 2. It is important to note that the summary judgment evidence establishes that initially Lilly refused to answer the medical screening questions. *Id.* The Court does not note this to ascribe any liability to

Lilly, but to establish that she was being provided with medical care. Apparently, Lilly made comments that she wanted to die. *Id.* Again, the employees working did not fail to respond, but instead put Lilly on suicide watch, so that she would be monitored and observed every fifteen minutes. *Id*. Plaintiffs have not controverted the summary judgment evidence that Outley has proffered that establishes that she was not aware that Lilly had been tased until Lilly was brought to the medical intake complaining of pain in her back and legs at 3:20pm. *Id.* Outley assessed Lilly for pain and observed no diaphoresis and Lilly denied nausea/vomiting and any shortness of breath. *Id.*

The summary judgment evidence further establishes that Lilly was well enough to use the telephone to check on her children and was observed walking back to her cell. *Id.* At approximately 5:20 p.m., Lilly was brought to the medical intake complaining of chest pain and left arm pain. *Id.* The summary judgment evidence establishes that this was the first time Outley became aware of Lilly complaining about chest pain. *Id.* After Lilly made a complaint of chest pain, the staff performed an EKG on Lilly. *Id.* The summary judgment evidence establishes that Outley did not see the results of the EKG, nor was she made aware of what the EKG revealed about Lilly's condition. *Id.* at 3. Outley was told by Defendant Roberts that another EKG needed to be performed on Lilly. *Id.* Outley had no further dealings with Lilly. *Id.* at 2. The Court holds, as a matter of law that Outley's actions could not constitute the infliction of punishment on Lilly; therefore, the County cannot be held liable for her conduct.

It is also undisputed that Defendant Roberts

did not contact Dr. Wells after the first EKG. *Id.* However, she did order an additional EKG to be taken within a relatively short period of time. *Id.* Several hours later, Roberts contacted Dr. Wells to discuss Lilly's situation and inform him that the second EKG[6] had been performed on Lilly. Dr. Wells Dep., ECF No. 40-2 at 11. Neither Defendant Roberts nor any of the nurses discussed with Dr. Wells whether Lilly should be sent to the hospital. *Id.* at 11–12. Roberts sent the EKGs to Dr. Wells for his review. *Id.* at 11. Dr. Wells, after reviewing the EKGs, did not instruct the medical staff to send Lilly to the hospital. Riendfliesch Aff., ECF Nos. 40-1 at 2–3; Dr. Wells Dep., 40-2 at 12–13. Unlike the nurses, Dr. Wells, as a trained medical doctor, was fully capable of reading the EKGs and the Court determines that the fact that he was given the EKGs and asked to review them establishes that there was no deliberate act by either nurse to deny Lilly from obtaining medical treatment. Additionally, Lilly was not subjected to a policy of deliberate indifference

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[6] It appears that the second EKG was actually the third EKG performed on Lilly. *See* Riendfliesch Aff., ECF No. 44- 1 at 40; Pl. Mot. Summ. J., ECF No. 44 at 5. However, the third EKG was conducted right after the second and it appears that the results from the second EKG are unavailable and not in the record. PL. Mot. Summ. J., ECF No. 44 at 5. It also appears that Defendants themselves refer to the third EKG as the second EKG because it was the second EKG that was taken in quick succession. Tex. Rangers' Report, ECF No. 44-1 at 40–42. Therefore, to avoid confusion, this Court will continue to refer to the third EKG as the "second EKG" as that is how it is referred to by most parties.

that resulted in her injury.

While Plaintiffs have *alleged* that Nurses Trinecha Outley and Kimberly Riendfliesch did not send Lilly to the hospital because they had not received approval from Dr. Wells to do so; Plaintiffs are unable to rebut the summary judgment evidence that establishes that the nurses had no knowledge of any substantial risk of serious harm to Lilly which required immediate additional attention and/or transport to the hospital. Additionally, Plaintiffs are unable to rebut Defendants' evidence that Nurses Outley and Riendfliesch believed there was no reason to contact Dr. Wells and seek his approval to send Lilly to the hospital. Plaintiffs have not proffered summary judgment evidence to rebut the evidence proffered by Nurses Outley and Riendfliesch that they had no knowledge or understanding that Lilly's condition was life-threatening at the time.

The unrebutted summary judgment establishes that neither Outley nor Riendfliesch had been trained to interpret EKGs (the most critical element of Plaintiffs' claim of wrongful conduct against them). Outley Aff., ECF Nos. 40-5 at 3; Riendfliesch Aff., 40-1 at 2–3. The summary judgment evidence establishes that they were relying on others who could interpret Lilly's EKGs to provide a diagnosis of Lilly's condition. Dr. Wells Dep., ECF Nos. 40-2 at 12–13; Riendfliesch Aff., 40-1 at 2–3. Thus, either of the nurses may or may not have been negligent by failing to appreciate that the EKGs could have been read to indicate that Lilly should be sent immediately to the hospital. However, the nurses' failure to perform a medical task that they were not trained to do cannot be *deliberate* indifference. The fact that on one occasion an inmate perished (possibly)

because of the failure of these two nurses to have that training is insufficient to establish that the County had a policy that violated Lilly's constitutional rights or was a subterfuge for punishment.

Moreover, the offensive summary judgment evidence submitted by the nurse Defendants calls into question whether Plaintiffs could even establish a negligence claim. The unrebutted summary judgment evidence establishes that Defendant Roberts, who was a Director of Nursing ("DON"), reviewed the first EKG and elected not to send Lilly to the hospital because, in her opinion, the EKG reading was inaccurate and another EKG was needed. Outley Aff., ECF No. 40-5 at 2. It is not this Court's role in a § 1983 case to determine whether or not her decision was negligent. Perhaps (but only perhaps) a refusal to provide Lilly with an EKG at all might raise constitutional issues. However, in this case Lilly was attended to and given three separate EKGs. This is evidence of medical care being provided, and not evidence of a denial that would constitute punishment.

Based on the above reasoning, the Court finds that there is no credible summary judgment evidence that an alleged practice, rule, or policy of the County of not sending inmates to the hospital without the approval of Dr. Wells violated Lilly's constitutional rights. Furthermore, there is also no credible summary judgment evidence that any alleged practice, rule, or policy of medical intake personnel that allowed the personnel to perform medical intakes of inmates while failing to medically clear inmates and failing to inform the supervising doctor that the inmates had not been medically cleared violated Lilly's constitutional rights. Finally, there is

also no credible summary judgment evidence that Lilly's constitutional rights were violated by any alleged policy, practice, or custom that permitted Lilly to be transferred to the County Jail without ensuring that the proper personnel were informed that she had been tased, tested positive for methamphetamine and amphetamine, and complained of chest pain. Therefore, the Court **GRANTS** the Motion for Summary Judgment in favor of the McLennan County on this issue.

b. Episodic act or omission claim against McLennan County

Although Plaintiffs have not expressly alleged an episodic act or omission claim against the County, to the extent Plaintiffs' factual allegations can be construed as asserting such a claim, the claim fails and must be dismissed because Plaintiffs cannot establish that the County was deliberately indifferent to a serious medical need of Lilly. Additionally, Plaintiffs cannot establish that any alleged deliberate indifference was the result of an existing policy, custom, or practice of the County maintained with objective deliberate indifference to the detainee's constitutional rights.

Pretrial detainees are protected by the Due Process Clause of the Fourteenth Amendment. *Cupit v. Jones*, 835 F.2d 82, 84–85 (5th Cir. 1987). To succeed in a § 1983 action based on "episodic acts or omissions" in violation of Fourteenth Amendment rights, a pretrial detainee must show subjective deliberate indifference by the defendants. *Hare*, 74 F.3d at 643. That is, the plaintiff must show that the official knew of and disregarded a substantial risk of

serious harm. *Domino*, 239 F.3d at 755. "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference." *Alton v. Tex. A&M Univ.*, 168 F.3d 196, 201 (5th Cir. 1999). To prove its case, Plaintiffs must establish that the County was deliberately indifferent to a serious medical need of Lilly, or that such alleged deliberate indifference was the result of an existing policy, custom, or practice of the county maintained with *objective* deliberate indifference to the detainee's constitutional rights.

In an episodic act or omission claim, "the complained-of harm is a particular act or omission of one or more officials." *Scott v. Moore*, 114 F.3d 51, 53 (1997) (en banc). A plaintiff in an episodic act or omission case "complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission." *Id.* To prevail on an episodic act or omission case against an individual defendant, a pretrial detainee must establish that the defendant acted with *subjective deliberate indifference* to the person's constitutional rights. *Id.*

A person acts with subjective or deliberate indifference if (1) "he knows that an inmate faces a substantial risk of serious bodily harm," and (2) "he disregards that risk by failing to take reasonable measures to abate it." *Anderson v. Dallas Cty., Tex.*, 286 F. App'x. 850, 860 (5th Cir. 2008) (citing *Gobert*, 463 F.3d at 346). The official's conduct must demonstrate subjective awareness of a substantial risk of serious harm and a failure to take reasonable measures to abate this risk. *Domino*, 239 F.3d at 756. Negligent conduct does not rise to the level of a

constitutional violation. *Daniels v. Williams,* 474 U.S. 327, 333–34 (1986). When the alleged unconstitutional conduct involves an episodic act or omission, the question is whether the state official acted with deliberate indifference to the person's constitutional rights. *Gibbs v. Grimmette*, 254 F.3d 545, 548 (5th Cir. 2001).

The deliberate indifference standard is an obligation not to disregard any substantial health risk about which government officials are actually aware. *Easter v. Powell*, 467 F.3d 459, 463–64 (5th Cir. 2006). To reach the level of deliberate indifference, official conduct must be "wanton," which is defined to mean "reckless." *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985). Under § 1983, officials are not vicariously liable for the conduct of those under their supervision. *Mouille v. City of Live Oak*, 977 F.2d 924, 929 (5th Cir. 1992). Supervisory officials are accountable for their own acts of deliberate indifference and for implementing unconstitutional policies that causally result in injury to the plaintiff. *Id.*

To establish liability based on a delay in medical treatment, a plaintiff must show deliberate indifference to serious medical needs that resulted in substantial harm. *Easter*, 467 F.3d at 464. A plaintiff can show deliberate indifference by showing that an official "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Id.* The pain suffered during a delay in treatment can constitute a substantial harm and form the basis for an award of damages. *Id.* at 464–65. "A serious medical need is one for which treatment has been recommended or for which the need is so apparent

that even laymen would recognize that care is required." *Gobert*, 463 F.3d at 345 n.12.

The Fifth Circuit has further defined deliberate indifference as requiring the plaintiff to show: (1) an *unusually serious* risk of harm existed; (2) the defendant had *actual knowledge* of, or was willfully blind to, the elevated risk; and (3) the defendant failed to take obvious steps to address the risk. *See Leffall*, 28 F.3d at 530 (quoting *Manarite v. City of Springfield*, 957 F.2d 953, 956 (1st Cir. 1992)). Deliberate indifference should not be viewed as heightened negligence. Negligent conduct does not rise to the level of a constitutional violation. *Daniels*, 474 U.S. at 333–34. Deliberate indifference cannot be inferred from a negligent or even grossly negligent reaction to a substantial risk of harm. *Hare*, 74 F.3d at 645, 649. "The "deliberate indifference" standard is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 410 (1997)

Plaintiffs relies heavily on the Eleventh Circuit case of *Mandel v Doe,* 888 F.2d 783 (11th Cir. 1989). The Court finds that this reliance is unwarranted. In *Mandel*, the Court found deliberate indifference, but on facts much different than the ones presented in this case. The Court wrote:

> Indeed, the evidence here is much more demonstrative of deliberate indifference than that shown in *Carswell*. The evidence indicates that Hatfield exhibited complete indifference to Mandel's worsening condition. Hatfield callously and

cavalierly ignored repeated indications from Mandel and his parents that the patient's condition was far more serious than his two different diagnoses—bone inflammation and muscle inflammation—suggested. Mandel had to wait fifteen days after submitting his first request for treatment before even seeing Hatfield. Only after three requests had been filed, twenty days had passed, and a prison guard (who had witnessed Mandel's leg collapse) had intervened on Mandel's behalf, did Hatfield conduct an extensive examination, offer his first diagnosis and prescribe any form of medication and treatment. Hatfield saw Mandel dragging his leg behind him on more than one occasion, and he conducted an examination in which he watched Mandel scream in pain from the movement of his injured leg. In response to mounting evidence that the injured leg was not improving, and, indeed, was deteriorating, Hatfield refused to allow Mandel to see a doctor or to go to a hospital. Hatfield refused to perform an X- ray of the injured leg and stated that he would never order an X-ray. During the course of treatment Hatfield twice ordered that Mandel be removed from the general population and placed in an isolated six-by-eight

> cell with no water or toilet facilities. Finally, when Mandel's mother, concerned that her son was not receiving even rudimentary care, asked that her son be seen by a doctor, Hatfield laughed at her and reiterated his refusal.

Id. at 789.

Other cases where a constitutional deprivation was found fit the same pattern. In *Montano* the Court wrote:

> There can be no denying Mr. Montano was punished. The record demonstrates the county denied him medical care with the expectation that he would heal himself. Witnesses testified the county failed to check his vital signs more than once in almost four-and-one-half days. The county disregarded state standards to search the Texas mental-health-treatment database for pertinent records that would have pointedly informed responsible care. Despite knowing Mr. Montano hardly ate or drank for almost four-and-one-half days, the county did nothing more than continue depositing food in the bubble. The evidence shows there was no mistaking Mr. Montano's dehydration: one observing LVN testified, "every time I tried to give [water] to him, he would take a sip and

> then throw it on the wall and say it was poisoned".
>
> These denials were not the result of negligent staff—as the county maintains, seeking to avoid liability—but the result of the county's well-known and uniformly- practiced *de facto* policy.

Montano v. Orange Cty., Texas, 842 F.3d 865, 878 (5th Cir. 2016)

Unlike the events in the present case, the plaintiffs in these other cases established either a depraved indifference by prison staff or an unconstitutional policy. The *Mandel* court notes that when the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference. 888 F.2d at 789. This Court has carefully reviewed the myriad of "facts" that have been supplied by the Parties and finds that despite the tragic nature of what occurred, the Defendants have established that the standard of deliberate indifference cannot be met by Plaintiffs.

Furthermore, to impose liability on a municipal defendant for the constitutional violation, the pretrial detainee "must show that the municipal employee's act resulted from a municipal policy or custom adopted or maintained with *objective* deliberate indifference to the detainee's constitutional rights." *Scott*, 114 F.3d at 54; *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001); *see also Sibley v. Lemaire*, 184 F.3d 481, 488 (5th Cir.1999) (requiring plaintiff to show objective deliberate indifference "[t]o hold superiors liable"). A municipality acts with

deliberate indifference where its policymakers promulgate or fail to promulgate a policy or custom, despite the known or obvious consequences that constitutional violations will result. *Piotrowsk*i, 237 F.3d at 579. Objective indifference "considers not only what the policy maker actually knew, but what he should have known, given the facts and circumstances surrounding the official policy and its impact on the plaintiff's rights." *Corley v. Prator*, 290 F. App'x. 749, 750 (5th Cir. 2008) (citing *Lawson v. Dallas Cty.*, 286 F.3d 257, 264 (5th Cir. 2002)).

Plaintiffs must identify an official policymaker with actual or constructive knowledge of the constitutional violation that acted on behalf of the municipality. *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 167 (5th Cir. 2010) (citing *Cox v. City of Dallas, Texas*, 430 F.3d 734, 748–49 (5th Cir. 2005)). A policymaker is "one who takes the place of the governing body in a designated area of city administration." *Zarnow*, 614 F.3d at 167 (citing *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir. 1984) (en banc)). The person must "decide the goals for a particular city function and devise the means of achieving those goals." *Bennett v. City of Slidell,* 728 F.2d 762, 769 (5th Cir. 1984). The fact that an official's decisions are final is *insufficient to demonstrate policymaker status*. *Zarnow*, 614 F.3d at 167. "The finality of an official's action does not therefore automatically lend it the character of a policy." *Bolton v. City of Dallas*, 541 F.3d 545, 550 (5th Cir. 2008). For a municipality to be liable, the decision (whether or not one of policy) must be made by an official with *final policymaking authority in respect to the matter decided*:

> 'Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. [footnote omitted] The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. [citation and footnote omitted] The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.'

Jett v. Dallas Ind. School Dist., 7 F.3d 1241, 1246–47 (5th Cir. 1993) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–82 (1986)).

Plaintiffs maintain that Dr. Wells had instituted a policy that the nurses were not permitted to send Lilly to the hospital which resulted in Lilly's death. Pl. Mot. Summ. J., ECF No. 43 at 15. Plaintiffs maintain that this made Dr. Wells the public official who had policymaking authority, which in turn would create liability for the County if his policy were the cause of the Lilly's denial of constitutional rights. *Id.* at 10–12. In analyzing the question of whether a public official has policymaking authority, the Fifth Circuit has distinguished between "final decisionmaking authority and final policymaking authority." *Bolton*, 541 F.3d at 548. "[A]n official whose discretionary decisions on a particular matter are final and unreviewable, meaning they can't be

overturned, is constrained if another entity has ultimate power to guide that discretion, at least prescriptively, whether or not that power is exercised." *Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377, 382 (5th Cir. 2007). "The finality of an official's action does not therefore automatically lend it the character of a policy." *Bolton*, 541 F.3d at 550.

The Court finds as a matter of law that Plaintiffs have failed to establish that it was the physician who was the final policymaker at the McLennan County Jail, and the summary judgment evidence proffered by the Defendants establishes the contrary. Plaintiffs' theory, boiled down, is that Dr. Wells' failure to have his medical staff more quickly send Lilly to the hospital (and their failure to act without his permission to do so) is tantamount to a policy of the hospital and the County. Even if Plaintiffs were to prove that Dr. Wells had the ultimate authority and discretion to make medical decisions at the County Jail, it would be insufficient to establish that he was the ultimate policymaker. This authority, even if it existed, would only make Dr. Wells a final decisionmaker, not a final policymaker. This is established by the unrebutted evidence that Dr. Wells did not have authority to hire or fire nurses and medical personnel at the County Jail or to impose discipline. McNamara Aff., ECF No.40-4 at 2. That authority rested exclusively with the Sheriff. *Id.* The Court also notes that Dr. Wells has proffered sworn evidence that the nurses had the authority and discretion to send an inmate to the hospital, if needed, without his approval. Dr. Wells Dep., ECF No. 40-2 at 9–10. However, the Court bases its decision in this Order on its analysis that Dr. Wells was not the policymaker.

The summary judgment evidence establishes that at the time of the Lilly's death it was the policy of the County to provide medical care and treatment to the inmates confined at the McLennan County Jail. McNamara Aff., ECF No. 40-4 at 2. The County and the County Jail had a Health Service Plan which required the providing of medical care and if needed, emergency medical treatment, to the inmates at the County Jail on a twenty-four-hour basis, seven days per week. *Id.* The plan further provided that no County Jail staff or other employee shall be deliberately indifferent to a serious medical need of an inmate. *Id.* There is no evidence that the Commissioners Court ever ceded its policymaking authority to Dr. Wells or to anyone else. While the day to day operations of the facility may have been turned over to Dr. Wells to exercise as he determined best, Texas law is quite clear. The Commissioners Court of the County must provide safe and suitable jails for the County. Tex. Loc. Gov't Code. 351.001. No employee, even one as highly trained or placed as Dr. Wells, could be given the right to be the keeper of the County Jail, state law *requires* that that power reside in the County Sheriff. *Id.* at 351.041. The County Sheriff is the policymaker for the jail system. *Turner v. Upton County, Texas*, 915 F.2d 133, 136 (5th Cir. 1990).

Thus, Plaintiffs must proffer sufficient evidence to rebut Defendants' contention that the County Sheriff, Parnell McNamara had not implemented, nor was he aware of, any policy of not sending inmates, who were in serious need of medical care, to the hospital without Dr. Wells' approval. Plaintiffs have failed to do so. Plaintiffs have not presented evidence, nor can they, that McLennan County's Commissioners Court or the County Sheriff

implemented and/or had knowledge of any policy or practice that an inmate at the County Jail in serious need of medical attention cannot be sent to the hospital without Dr. Well's approval. The County is liable only if Plaintiffs can establish that the County's policymaker for the County Jail had knowledge of any such policy or practice and condoned it or allowed it to continue. No such evidence exists. Since Sheriff McNamara became the McLennan County Sheriff in 2013, no court has entered a judgment against the County for denial of medical care to inmate, so Plaintiffs cannot establish a policy or pattern of deliberate indifference in that manner. Also, there can be no liability under a practice or pattern theory because the unrebutted summary judgment evidence shows that since Dr. Wells has worked at the County Jail there have been no inmate deaths stemming from sufficiently similar circumstances as those alleged in this case. Dr. Wells Dep., ECF No. 40-2 at 9–10.

The Court also rejects Plaintiffs' contention that the County is liable on the basis that Dr. Wells failed to properly train or supervise. To succeed on such a claim, Plaintiffs must show that Dr. Wells was deliberately indifferent to the training/supervision of the nurses. The summary judgment evidence established that Dr. Wells believed the nurses to be trained and that the nurses understood that they had the ability to send inmates to the hospital when necessary without his approval. Dr. Wells Dep., ECF Nos. 40-2 at 3–4, 5–10, 14; 40-3 at 2–3, 5–6. There is also unrebutted summary judgment evidence that Dr. Wells and his nurses met for training once a month and that he informed them of this ability. Dr. Wells Dep., ECF No. 40-2 at 6–7. In this case, there is no evidence that the nurses deferred in sending Lilly to

the hospital because Dr. Wells was unavailable to give them permission; rather, they were in contact with him and he gave them directions about the medical care to provide to Lilly, which the nurses followed.

For the reasons set forth above, the Court finds that the County is entitled to Summary Judgment and hereby **GRANTS** its Motion, (ECF No. 37). For all the reasons that the Court grants the County's motion, it finds that Plaintiffs' Motion for Summary Judgment is without merit. Therefore, Plaintiffs' Motion for Summary Judgment Against Defendant McLennan County is **DENIED**, (ECF No. 43).

II. Defendant Desara Roberts' Motion for Summary Judgment

Defendant Desera Roberts, R.N., seeks a summary judgment with respect to the §1983 claim alleged against her because the undisputed facts reflect no evidence of deliberate indifference on Roberts' part in the provision of health care to Lilly. The Court finds that the undisputed facts, established by the summary judgment evidence, proves that Nurse Roberts' actions reflected more than sufficient care for Lilly.

Governmental officials are protected from suit and liability by qualified immunity unless their alleged conduct: (1) violated a Constitutional or statutory right; and (2) the illegality of the alleged conduct was clearly established at the time of the violation. *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) (citing *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). There are two well-established steps in the qualified immunity analysis: a court decides "(1) whether the undisputed facts and the disputed facts,

accepting the plaintiff's version of the disputed facts as true, constitute a violation of a constitutional right; and (2) whether the defendant's conduct was objectively reasonable in light of clearly established law." *Carroll v. Ellington,* 800 F.3d 154, 169 (5th Cir. 2015).

A prisoner's constitutional rights are violated when prison doctors or officials are deliberately indifferent to the prisoner's serious medical needs. *Estelle*, 429 U.S. at 103.[7] Deliberate indifference cannot be inferred from a negligent or grossly negligent response to a substantial risk of harm. *Hare*, 74 F.3d at 645, 649; *Thompson*, 245 F.3d at 459. "Deliberate indifference" describes a state of mind more blameworthy than negligence. *Farmer,* 511 U.S. at 835. The "deliberate indifference" standard is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. *Brown*, 520 U.S. at 410. A defendant must have been aware of a risk of harm and disregarded that risk by failing to take reasonable steps to prevent it. *Hare*, 74 F.3d at 648–49.

To show deliberate indifference, a plaintiff must provide facts that a defendant "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Gobert*, 463 F.3d at 346

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[7] The Court notes that the time the events of this case occurred, Lilly was a pre-trial detainee and not a prisoner. However, the same deliberate indifference analysis applies to both pre-trial detainees and prisoners in regards to whether there was adequate medical care for the individual in custody. *See Wagner v. Bay City, Tex.*, 227 F.3d 316, 324 (5th Cir. 2000).

(quoting *Domino*, 239 F.3d at 756). Plaintiffs cannot meet this standard based on the record established by the filing of the cross motions for summary judgment and the supporting evidence. However negligent, or even grossly negligent, a response may subsequently seem, the Court is mindful of the "significant distinction between a tort and a constitutional wrong." *Lefall*, 28 F.3d at 532. In the Fifth Circuit, a person is not deliberately indifferent if they take some reasonable steps to address a risk of harm. *Hare*, 74 F.3d at 648–49. It is irrelevant whether the steps that were taken to address a risk of harm were successful in averting the harm.

The uncontroverted summary judgment evidence establishes the following conduct on the part of Defendant Roberts. The events leading to Lilly being in the custody of McClennan County began on October 6, 2014, when Lilly attended a 10:30 a.m. hearing at the McLennan County 19th District Criminal Court. Pl. Amend. Compl., ECF No. 13 ¶ 20. The Court ordered her to take a drug test, which tested positive for the controlled substance of methamphetamine, so she was ordered to be taken to County Jail. *Id.* During her booking at the County Jail, Lilly was complaining of chest pain. *Id.* ¶ 27. In response, nursing staff administered an EKG to Lilly at approximately 5:55 p.m. *Id.* ¶ 31. Defendant Roberts was serving as the Director of Nursing at the County Jail at that time. Roberts Aff., ECF No. 36 at 20; Pl. Amend. Compl., ECF No. 13 ¶ 35. At approximately 6:30 p.m., the nurses treating Lilly asked Roberts to review an EKG that had been performed on Lilly. Roberts Aff., ECF No. 36 at 20.

Defendant Roberts inquired about the circumstances surrounding the administration of the

EKG on Lilly, and she was told by the nurses that Lilly was uncooperative, talking, moving, and breathing hard during the EKG's administration. *Id.* Roberts proffered unrebutted summary judgment evidence that she interpreted the EKG results as showing movement in the leads and a possible ST elevation. *Id.* There is no evidence that any nurse treating Lilly informed Roberts that there were other signs of a heart attack, such as diaphoresis, nausea/vomiting, or elevated vital signs. *Id.* Defendant Roberts did not then act with deliberate indifference; rather, she ordered that the EKG be repeated on Lilly to be certain of the results prior to sending it to Dr. Wells. *Id.* The reason Roberts offers for seeking a second EKG is that she believed that movement in the leads and talking during the EKG could have produced a false reading. *Id.* As will be discussed below, the Court notes that the standard for liability that Plaintiffs must prove is not whether Roberts took the correct medical action or made the correct medical decision; rather, the standard is whether she acted with such indifference as to amount to a violation of Lilly's constitutional rights.

Defendant Roberts directed the nursing staff treating Lilly to repeat the EKG on Lilly when Lilly had calmed down. Pl. Amend. Compl., ECF No. 13 ¶ 35. Roberts left work at the end of her shift, but did not terminate communications with her staff and has proffered unrebutted summary judgment evidence that she expected to receive the results of the second EKG performed on Lilly shortly thereafter. Roberts Aff., ECF No. 36 at 20. Roberts received a phone call from Kim Riendfliesch, at approximately 8:04 p.m., indicating the second EKG performed on Lilly was

completed.[8] *Id*. Roberts instructed Nurse Riendfliesch to take the two EKGs to Lieutenant Ward at the booking area so he could take photos of them with his cell phone and forward them via text message to Roberts. *Id.* at 20, 35. At approximately 8:07 p.m., Roberts called Lt. Ward and explained her instructions to Nurse Riendfliesch regarding the EKGs. *Id.* 20–21, 35. Lt. Ward agreed to send the pictures of the EKGs to Roberts. *Id.* At approximately 8:09 p.m., Roberts phoned Dr. Wells, the medical director at the McLennan County Jail, and explained what she knew about Lilly's condition to Dr. Wells. *Id.* at 21, 39. Roberts told Dr. Wells that she would send the photos of the EKGs performed on Lilly to Dr. Wells when she received them. *Id.*

At approximately 8:12 p.m., Roberts phoned the County Jail and spoke with Riendfliesch, who informed Roberts that Lilly's second EKG looked similar to the first EKG. *Id.* at 21. Again, Defendant Roberts did not act with indifference; rather, Roberts concluded that Lilly needed medication and ordered

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[8] As noted above, it appears that the second EKG was actually the third EKG performed on Lilly. *See* Riendfliesch Aff., ECF No. 44-1 at 40; Pl. Mot. Summ. J., ECF No. 44 at 5. However, the third EKG was conducted right after the second and it appears that the results from the second EKG are unavailable and not in the record. Pl. Mot. Summ. J., ECF No. 44 at 5. It also appears that Defendants themselves refer to the third EKG as the second EKG because it was the second EKG that was taken in quick succession. Tex. Rangers' Report, ECF No. 44-1 at 40–42. Therefore, to avoid confusion, this Court will continue to refer to the third EKG as the "second EKG" as that is how it is referred to by most parties.

Nurse Riendfliesch to give Lilly 324 mg of chewable aspirin, a 0.4 nitroglycerin sublingual, and to recheck Lilly five minutes thereafter. Pl. Amend. Compl., ECF No. 13 ¶ 40. Roberts also discussed her concerns with Riendfliesch regarding the necessity for Lilly to have good blood pressure due to the fact that nitroglycerin could lower Lilly's blood pressure. Roberts Aff., ECF No. 36 at 21. Roberts further instructed that Lilly be moved to the medical department at the County Jail so she could be more closely monitored. *Id.* Lilly was placed on a 15- minute watch in a cell in the medical department. Pl. Amend. Compl., ECF No. 13 ¶ 44. At approximately, 8:23 p.m., Roberts received the two EKG pictures on her cell phone, which she immediately forwarded to Dr. Wells' cell phone because Roberts felt that Lilly might be having a cardiac event due to the ST elevation being present in the second EKG. Roberts Aff., ECF No. 36 at 21. At approximately 8:36 p.m., having not heard back from Dr. Wells, Roberts called Dr. Wells and spoke with him to verify that he had received the two EKG photos regarding Lilly. *Id.* at 22. She also informed Dr. Wells that she had ordered a nurse at the County Jail to administer aspirin and nitroglycerin to Lilly. *Id.* Dr. Wells indicated he would check his phone for the photos of the EKGs. *Id.*

At approximately 8:39 p.m., Roberts received a call from Dr. Wells acknowledging his receipt of the photos of the EKGs. *Id.* Dr. Wells indicated he intended to call the County Jail and speak directly with the nurses treating Lilly. *Id.* Roberts identified Nurse Riendfliesch as the person Roberts had been in communication with regarding Lilly's condition and gave Dr. Wells her extension at the County Jail. *Id.* At approximately 9:26 p.m., Roberts called the

County Jail and learned from Nurse Smith that they were in the midst of an emergency. *Id.* Roberts acknowledges that she presumed the emergency involved Lilly. *Id.* At approximately 9:34 p.m., Nurse Smith phoned Roberts and told her that Lilly was found unresponsive in a medical cell and staff had called EMS to transport Lilly to the hospital. *Id.* at 23.

At approximately 9:36 p.m., Roberts phoned Dr. Wells to update him on Lilly's medical status and she told him that Lilly was being sent to the hospital via EMS. *Id.* Dr. Wells informed Roberts that he had spoken with Nurse Riendfliesch and was awaiting an updated evaluation on inmate Lilly from the other nurses. *Id* at 23, 38. There is no evidence that at any point during the day Defendant Roberts expressed any evidence of callous or deliberate indifference to Lilly's medical condition. *Id.* 45–46. Despite that, at approximately 10:23 p.m., Roberts phoned the hospital emergency room and was told an inmate that had been taken there had died at 10:14 p.m. *Id.* at 23. At approximately 10:25 p.m., Roberts phoned Dr. Wells to advise him of Lilly's death at the hospital. *Id.* Lilly's subsequent autopsy concluded Lilly died as a result of atherosclerotic coronary heart disease, indicating that the "toxic effects of methamphetamine contributed to the cause of death." Pl. Amend. Compl., ECF No. 13 ¶ 53.

The facts as set forth above are important for several reasons. First, they establish that Roberts was not neglecting Lilly. Rather, Defendant Roberts ordered two EKGs, monitored the test results from others, and interfaced with Dr. Wells concerning the care and treatment of Lilly. Second, the facts establish that Roberts was not making an

independent decision for how to treat Lilly; instead, she was following the orders of a trained physician. The brevity of the time between when Defendant Roberts began working and when Lilly was sent to the hospital also falls far outside the mainstream of cases where a jail employee has been found to have been deliberately indifferent or to have been "punishing" the inmate. It is clear that Roberts never terminated contact with the medical staff during the relatively short period of time that Lilly was in her care and custody. The Court also expresses no opinion as to whether any of Defendant Roberts' conduct might, or might not, constitute negligence, because that question is irrelevant.

To summarize, Plaintiffs have presented no evidence that Roberts ignored Lilly's complaints, refused to treat Lilly, intentionally treated her incorrectly, or wantonly disregarded her medical needs. Roberts properly relied on the information she was receiving from Defendant Riendfliesch as well as from Dr. Wells and his diagnosis of Lilly's condition. Certainly, given the numerous direct responses, medical treatments, and assistance that Roberts provided to Lilly in response to those medical issues which Roberts was aware, a reasonable official could have believed that Roberts had complied with her constitutional obligations regarding the provision of medical care to inmates. The Court finds that the provision of medical care to Lilly by Roberts was in compliance with the McLennan County's policies and Dr. Wells' standing orders and protocols of providing reasonable medical care to inmates. Therefore, the Court concludes that Roberts was not deliberately indifferent to Lilly's medical condition and needs and that Roberts' conduct was objectively

reasonable under clearly established law. Thus, Defendant Roberts is entitled to qualified immunity and dismissal of Plaintiffs' claim.

Therefore, the Court **GRANTS** Defendant Roberts' Motion for Summary Judgment, (ECF No. 36). For all the reasons that the Court grants the Roberts' Motion, it finds that Plaintiffs' Motion for Summary Judgment is without merit and **DENIES** Plaintiffs' Motion for Summary Judgment against Defendant Roberts, (ECF No. 44).

III. Defendant Kimberly Riendfliesch's Motion for Summary Judgment

Defendant Riendfliesch also seeks summary judgment with respect to Plaintiffs' § 1983 claims against her because the undisputed facts reflect no evidence of deliberate indifference on Riendfliesch's part in the provision of health care to Lilly. The Court agrees with Riendfliesch on this point.

Governmental officials are protected from suit and liability by qualified immunity unless their alleged conduct: (1) violated a constitutional or statutory right; and (2) the illegality of the alleged conduct was clearly established at the time of the violation. *Wesby*, 138 S.Ct. at 589 (citing *Reichle*, 566 U.S. at 664). There are two well-established steps in the qualified immunity analysis: a court decides "(1) whether the undisputed facts and the disputed facts, accepting the plaintiff's version of the disputed facts as true, constitute a violation of a constitutional right; and (2) whether the defendant's conduct was objectively reasonable in light of clearly established law." *Carroll*, 800 F.3d at 169.

A prisoner's constitutional rights are violated

when prison doctors or officials are deliberately indifferent to the prisoner's serious medical needs. *Estelle*, 429 U.S. at 103 (1976).[9] Deliberate indifference cannot be inferred from a negligent or grossly negligent response to a substantial risk of harm. *Hare*, 74 F.3d at 645, 649; *Thompson*, 245 F.3d at 459. "Deliberate indifference" describes a state of mind more blameworthy than negligence. *Farmer,* 511 U.S. at 835. The "deliberate indifference" standard is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. *Brown*, 520 U.S. at 410. A defendant must have been aware of a risk of harm and disregard that risk by failing to take reasonable steps to prevent it. *Hare*, 74 F.3d at 648–49.

To show deliberate indifference, a plaintiff must provide facts that a defendant "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Gobert*, 463 F.3d at 346 (quoting *Domino*, 239 F.3d at 756). Plaintiffs cannot meet this standard based on the record established by the filing of the cross motions for summary judgment and the supporting evidence. However negligent, or even grossly negligent, a response may subsequently

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[9] As noted in a previous footnote, at the time the events of this case occurred, Lilly was a pre-trial detainee and not a prisoner. However, the same deliberate indifference analysis applies to both pre-trial detainees and prisoners in regards to whether there was adequate medical care for the individual in custody. *See Wagner v. Bay City, Tex.*, 227 F.3d 316, 324 (5th Cir. 2000).

seem, the Court is mindful of the "significant distinction between a tort and a constitutional wrong." *Lefall*, 28 F.3d at 532. In the Fifth Circuit, a person is not deliberately indifferent if they take some reasonable steps to address a risk of harm. *Hare*, 74 F.3d at 648–49. It is irrelevant whether the steps that were taken to address a risk of harm were successful in averting the harm.

In this case, Defendant Kimberly Riendfliesch was an intake nurse (a licensed vocational nurse or "LVN") on duty when Lilly reported feeling ill at McLennan County Jail and was taken to medical intake. Riendfliesch Aff., ECF No. 40-1 at 1. It appears to be undisputed from the summary judgment evidence that Riendfliesch arrived at work at 6:45 to begin her shift as intake nurse. *Id.* at 2. She was informed that Lilly had complaints concerning chest pain and that an EKG had been performed on Lilly. *Id.* She was informed that the staff was instructed to perform the second EKG[10] during her shift, which she did at approximately 8:00 pm. *Id.* It is important to note that in determining whether she acted with deliberate indifference, the summary judgment evidence establishes that as a licensed vocational nurse, Riendfliesch had been trained to perform EKGs but had not been trained how to interpret EKG results. *Id.* Riendfliesch had not been trained to nor did she have the expertise to make a diagnosis based on an EKG. *Id.* at 3. Her only obligation was to perform the EKGs and provide the

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[10] As noted above, Riendfliesch really performed two more EKGs; however, the third EKG is being referred to as the "second EKG."

information to the appropriate medical staff. *Id.*

Rather than exhibiting deliberated indifference, Riendfliesch then contacted and received additional instructions from Defendant Roberts concerning the treatment for Lilly. *Id.* at 2. She communicated with Defendant Roberts about the EKG and told Roberts that the EKG looked similar to the EKG taken earlier in the day. *Id.* Defendant Roberts instructed Riendfliesch to give Lilly four tablets of 81mg Aspirin and to check her blood pressure. *Id*; Pl. Amend. Compl., ECF No. 13 ¶¶ 40, 43. Roberts also told Riendfliesch to give Lilly a 0.4 mg tablet of Nitroglycerin if her blood pressure was high. *Id.* Defendant Roberts also instructed Riendfliesch to take the EKG readings to Lieutenant Ward so that he could take a picture of them and send them to Defendant Roberts for review. Riendfliesch Aff., ECF No. 40-1 at 2. Riendfliesch complied with these instructions and gave four 81mg Aspirin tablets to Lilly and checked her blood pressure, which was at 138/90 with a pulse of 88 beats per minute. *Id.* Riendfliesch then gave Lilly a 0.4 mg Nitroglycerin tablet, had her taken to a medical observation holding cell, and placed her on a 15-minute observation schedule. *Id.* Riendfliesch then took the EKG readings to Lieutenant Ward. *Id.* After doing that, Riendfliesch went back and re-checked Lilly's blood pressure, which by that time was within normal limits at 120/83, with a pulse of 99 beats per minute. *Id.* The summary judgment evidence establishes that at that point, Lilly was calm and told Riendfliesch that she wanted to lie down. *Id.* In response, Riendfliesch told Lilly to let officers know if she needed anything. *Id.* Riendfliesch then returned to her station in the medical intake room of the County Jail. *Id.*

At approximately 8:45, Riendfliesch had a conversation with Dr. Wells about the treatment regimen for Lilly and informed him of the steps that she had taken. *Id.* at 2–3; Pl. Amend. Compl., ECF No. 13 ¶¶ 43–48. Dr. Wells did not instruct her to send Lilly to the hospital. *Id.* He did not indicate to her that Lilly was suffering from a condition that required immediate emergency care or to take any specific medical steps. *Id.* Instead, Dr. Wells asked Riendfliesch to have the nurses call him so that they could conduct a further assessment on Lilly. *Id.* At about 9:09 p.m., Riendfliesch heard a call that Lilly appeared to be unresponsive. Riendfliesch Aff., ECF Nos. 40-1 at 3; Pl. Amend. Compl., 13 ¶ 51. The medical staff immediately contacted 911 and began CPR, and Lilly was taken to the hospital where she was pronounced dead. Riendfliesch Aff., ECF Nos. 40-1 at 3; Pl. Amend. Compl., 13 ¶ 52. All of this appears to be undisputed. Therefore, for Plaintiffs to succeed in a claim against Riendfliesch, Plaintiffs must establish that her conduct between 6:45 and 9:09 p.m. amounted to willful indifference.

There is no evidence that Defendant Riendfliesch had ever encountered a patient who had suffered from the same type of cardiac distress that plagued Lilly. Additionally, there is no evidence that Riendfliesch was personally qualified to review and access an EKG herself. Plaintiffs' expert asserts that Riendfliesch would have known that the second EKG revealed a condition that required medical attention, but that is not the correct question. Dr. Dlabal Dep., ECF No. 45-5 at 13. The standard to prove a claim for a constitutional violation is that Riendfliesch did know what the EKG meant and that she acted with deliberate indifference in response. All the evidence is

to the contrary. Riendfliesch has proffered summary judgment evidence that she did not know how to read an EKG, but she also offered evidence that she diligently inquired of staff that did know how to read an EKG. Riendfliesch Aff., ECF No. 40-1 at 2–3. The Court finds that Plaintiffs' contention and proffer of summary judgment proof that Riendfliesch may not have complied with some professional medical standard of care raises no fact issue about deliberate indifference. The Fifth Circuit has specifically held that any such violations "do not establish deliberate indifference, which 'exists wholly independent of an optimal standard of care.'" *Estate of Henson v. Krajca*, 440 F. App'x. 341, 345 (5th Cir. 2011) (quoting *Gobert*, 463 F.3d at 349); *see also Kitchen*, 759 F.3d at 482 ("The deliberate indifference standard, however, is not an obligation for government officials to comply with an 'optimal standard of care.'") "Claims founded on negligence or medical malpractice simply are not cognizable under 42 U.S.C. §1983." *Jacks*, 2018 WL 1363756 at *4 (citing *Stewart*, 174 F.3d at 534).

While Plaintiffs make much of the fact that Dr. Wells realized that Lilly might be suffering from a myocardial infarction, Plaintiffs have not proffered any evidence that Riendfliesch disregarded any instruction that was given to her by any of her superiors, or that she intentionally took any action to injure Lilly. Defendant Riendfliesch does not dispute that Dr. Wells told Riendfliesch that Lilly *could* be having a myocardial infarction and that he did not tell Riendfliesch to send Lilly to the hospital. Riendfliesch Aff., ECF No. 40-1 at 3. Rather, Dr. Wells asked Riendfliesch to tell the other nurses [after pill pass] to further assess Lilly's situation and call him so he could decide what needed to be done with Lilly. *Id.* at

2–3. Plaintiffs submitted summary judgment evidence that Defendant Riendfliesch wondered why Dr. Wells had not instructed her to call an ambulance, but otherwise have failed to proffer any evidence that controverts that the facts as stated above are accurate. Tex. Rangers' Report, ECF No. 45-1 at 43.

The facts as set forth above are important for several reasons. First, they establish that Riendfliesch was not neglecting Lilly; instead, she was communicating with Dr. Wells. Second, the facts establish that Riendfliesch was not making an independent decision of how to treat Lilly; rather, she was following the orders of a trained physician. The brevity of the time between when Defendant Riendfliesch began working and when Lilly was sent to the hospital also falls far outside the mainstream of cases where a jail employee has been found to have been deliberately indifferent or to have been "punishing" the inmate. The time between her phone call with Dr. Wells and Lilly's apparent cardiac arrest was less than a half hour. The Court expresses no opinion as to whether any of Defendant Riendfliesch's conduct might constitute negligence because that question is irrelevant.

To summarize, Plaintiffs have presented no evidence that Riendfliesch ignored Lilly's complaints, refused to treat Lilly, intentionally treated her incorrectly, or wantonly disregarded her medical needs. Riendfliesch is entitled to qualified immunity and the dismissal of Plaintiffs' claim because her conduct was objectively reasonable and did not violate clearly established law. Riendfliesch relied on Dr. Wells and his diagnosis of Lilly's condition. Certainly, given the numerous direct responses, medical treatment, and assistance that Riendfliesch provided

to Lilly in response to those medical issues which Riendfliesch was made aware of, a reasonable official could have believed that Riendfliesch had complied with her constitutional obligations regarding the provision of medical care to inmates. The Court finds that the provision of medical care to Lilly by Riendfliesch followed McLennan County's policies and Dr. Wells' standing orders and protocols of providing reasonable medical care to inmates. Therefore, the Court concludes that Riendfliesch was not deliberately indifferent to Lilly's medical condition and needs and that her conduct was objectively reasonable under clearly established law. Thus, Riendfliesch is entitled to qualified immunity and dismissal of Plaintiffs' claim.

Therefore, the Court **GRANTS** Defendant Riendfliesch's Motion for Summary Judgment, (ECF No. 38). Furthermore, for all the reasons that the Court grants the Riendfliesch's Motion, it finds that Plaintiffs' Motion for Summary Judgment is without merit and the Court **DENIES** Plaintiffs Motion for Summary Judgment Against Defendant Riendfliesch, (ECF No. 45)

CONCLUSION

IT IS THEREFORE ORDERED that Defendant McLennan County's Motion for Summary Judgment, (ECF No. 37) is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Desera Roberts' Motion for Summary Judgment, (ECF No. 36) is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Kimberly Riendfliesch's Motion for Summary Judgment, (ECF No. 38) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment Against Defendant McLennan County, (ECF No. 43), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment Against Defendant Roberts, (ECF No. 44), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment Against Riendfleisch, (ECF No. 45), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' request to take Sheriff McNamara's deposition is **DENIED** for the reasons stated on the record at the hearing that took place on November 30, 2018.

IT IS FURTHER ORDERED that all Plaintiffs' claims against all Defendants are **DISMISSED WITH PREJUDICE.**

IT IS FINALLY ORDERED that this case is **DISMISSED**.

SIGNED this 3rd day of December, 2018.

[handwritten signature]
ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Signed October 2, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEMETRIAS TAYLOR, AS	**§**	
REPRESENTATIVE OF	**§**	
THE ESTATE OF IRETHA	**§**	
JEAN LILLY, DECEASED;	**§**	
TERRANETHA RANCH,	**§**	
DAYSHALON RANCH,	**§**	
KEVIN RANCH, TERRANCE	**§**	**W-16-0095-**
HAMILTON, TERRANCE	**§**	**ADA**
LAMONT HAMILTON,	**§**	
AS NEXT OF FRIEND AND	**§**	
FATHER OF I.H.;	**§**	
***Plaintiffs*,**	**§**	
	§	
-vs-	**§**	
	§	
MCLENNAN COUNTY,	**§**	
KIMBERLY RIENDFLIESCH,	**§**	
DESERA ROBERTS,	**§**	
Defendants		

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION AND DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANT WELLS WITH PREJUDICE

Before the Court is the Report and Recommendation of United States Magistrate Judge Jeffrey C. Manske, (Dkt. 64). The report recommends that Defendant John Wells, M.D.'s Motion for Summary Judgment be granted, (Dkt. 26). The action was referred to Judge Manske for findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The Report and Recommendation was filed on August 31, 2018.

A party may file specific, written objections to the proposed findings and recommendations of the magistrate judge within fourteen days after being served with a copy of the Report and Recommendation, thereby securing *de novo* review by the district court. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a Report and Recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglas v. United Service Auto Ass 'n*, 79 F.3d 1415. 1428-29 (5th Cir. 1996) (*en banc*). The Plaintiffs timely filed an objection to the Report and Recommendation on September 14, 2018, (Dkt. 65).

In light of the Plaintiffs' objections, the Court has undertaken a *de novo* review of the case file in this cause. Having carefully reviewed the Magistrate Judge's Report and Recommendation, the Plaintiff's objections to the Report and Recommendation, and this case file, the Court does not dispute the Magistrate Judge's findings or his recommendation.

Plaintiffs' primary objection is that the statute of limitations defense should not apply in this case to bar the two Plaintiffs' claims who were minors until March 3, 2017 and May 25, 2018. P1. Obj. R&R. at 1, (Dkt. 65 at 1). However, the minor Plaintiffs' claims are derivative of their mother's claims; therefore, any valid statute of limitations defense against their mother's claims is a valid defense against the Plaintiffs' claims. *See Reagan v. Vaughn*, 804 S.W.2d 463, 468 (Tex. 1990), *on reh'g in part* (Mar. 6, 1991); *see also Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997). Thus, Terrance Hamilton and "I.H.'s" claims were not tolled while they were minors and their claims are barred by the statute of limitations.

IT IS THEREFORE ORDERED that Plaintiffs' Objections to the Report and Recommendation of the United States Magistrate Judge, (Dkt. 65), are **OVERRULED**.

IT IS FURTHER ORDERED that the Report and Recommendation of the United States Magistrate Judge, (Dkt. 64), filed in this cause is **ACCEPTED AND ADOPTED** by the Court.

IT IS FURTHER ORDERED that Defendant John Wells, M.D.'s Motion for Summary Judgment, (Dkt. 26), is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Wells' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, (Dkt. 42), is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment against Defendant Wells, (Dkt. 46), is **DENIED AS MOOT**.

IT IS FINALLY ORDERED that all Plaintiffs' claims against Defendant John Wells in this case are **DISMISSED WITH PREJUDICE**.

SIGNED this 2nd day of October, 2018.

[handwritten signature]
ALAN D. ALBRIGHT
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Signed August 31, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEMETRIAS TAYLOR, AS	**§**	
REPRESENTATIVE OF	**§**	
THE ESTATE OF IRETHA	**§**	
JEAN LILLY, DECEASED;	**§**	
TERRANETHA RANCH,	**§**	
DAYSHALON RANCH,	**§**	
KEVIN RANCH, TERRANCE	**§**	**W-16-0095-**
HAMILTON, TERRANCE	**§**	**ADA**
LAMONT HAMILTON,	**§**	
AS NEXT OF FRIEND AND	**§**	
FATHER OF I.H.;	**§**	
***Plaintiffs*,**	**§**	
	§	
-vs-	**§**	
	§	
MCLENNAN COUNTY,	**§**	
KIMBERLY RIENDFLIESCH,	**§**	
DESERA ROBERTS,	**§**	
Defendants	**§**	

REPORT AND RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN,
UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(c) and Rules 1(h) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. For the reasons discussed below, the undersigned **RECOMMENDS** that Defendant John Wells, M.D.'s Motion for Summary Judgment, (ECF No. 26) be **GRANTED**. The undersigned further **RECOMMENDS** that Defendant Wells' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (ECF No. 42) be **DENIED AS MOOT**. It is further **RECOMMENDED** that Plaintiffs' Motion for Summary Judgment Against Defendant Wells (ECF No. 46) also be **DENIED AS MOOT**.

I. BACKGROUND

Plaintiff filed this action pursuant to 42 U.S.C. § 1983. Plaintiffs Demetrius Taylor, Representative of the Estate of Iretha Jean Lilly, deceased; Terranetha Ranch; Dayshalon Ranch, Kevin Ranch; and Terrance Hamilton, as Next Friend of I.H., bring this suit alleging McLennan County and its employees violated Ms. Lilly's constitutional rights to reasonably adequate medical care. Pl.'s Amended Compl. ¶1, ECF No. 18. Plaintiff names the following defendants: McLennan county, Kimberly Riendfliesch, Desera Roberts, and Dr. John Wells.

On October 6, 2014, Iretha Lilly attended a 10:30 a.m. hearing at the McLennan County 19th District Criminal Court and was ordered to take a drug test. See P1.'s Amended Compl. The results of the drug test showed Lilly tested positive for marijuana,

amphetamine, and methamphetamine. Id. Following the positive test for controlled substances, the judge ordered Lilly to jail for violating the terms of her probation. Id. Three courtroom deputies attempted to take her into custody, and Lilly refused to place her hands behind her back to be handcuffed. Id. During the process of taking Lilly into custody, an officer tased Lilly three times. Id. at ¶ 22. Shortly after being tased, Lilly was taken into custody and booked into McLennan County Jail. Id. Prior to being transported to jail, Lilly allegedly began to complain of chest pain and requested medical attention. The defendants did not immediately take her to an emergency room. That night, staff found her unconscious in her cell. Lilly was then taken to the hospital where she was pronounced dead. A subsequent autopsy concluded that Lilly died as a result of atherosclerotic coronary artery disease, indicating the "toxic effects of methamphetamine contributed to the cause of death." Am. Compl. at 9.

On October 4, 2016, Plaintiffs filed suit. On July 17, 2017, Plaintiffs amended their complaint to add, in part, a claim against Dr. John Wells. Wells brings the instant Motion for Summary Judgment asserting that Plaintiffs sued him after the expiration of the applicable limitation period. Plaintiffs have responded, arguing that the discovery rule permits the otherwise untimely addition of Dr. Wells. The parties have fully briefed the issue. See ECF Nos. 26, 27, 28.

A. Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014). A material fact is one that is likely to reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is not genuine if the trier of fact could not, after an examination of the record, rationally find for the non-moving party. *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As such, the burden of demonstrating that no genuine dispute of material fact exists lies with the party moving for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once presented, a court must view the movant's evidence and all factual inferences from such evidence in a light most favorable to the party opposing summary judgment. *Impossible Elecs. Techniques v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982). Accordingly, the simple fact that the court believes that the non-moving party will be unsuccessful at trial is insufficient reason to grant summary judgment in favor of the moving party. *Jones v. Geophysical Co.*, 669 F.2d 280, 283 (5th Cir. 1982). However, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380-81 (2007).

B. Statute of Limitations

A district court may dismiss a complaint on statute of limitations grounds if it is clear from the

complaint that the claims are time-barred. *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994). Since 42 U.S.C. § 1983 does not provide a statute of limitations, the statute of limitations for a civil rights action is determined by state law. *Owens v. Okure*, 488 U.S. 573 (1989); *Burrell v. Newsome*, 883 F. 2d 416, 418 (5th Cir. 1989). Owens makes it clear that the statute of limitations for all § 1983 claims is the forum state's "general or residual statute for personal injury actions." 488 U.S. at 250; *Jackson v. Johnson*, 950 F.2d 263 (5th Cir. 1992). In Texas, the general personal injury limitations period is two years. *Stanley v. Foster*, 464 F.3d 565, 568 (5th Cir. 2006); Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 2005).

The Texas personal injury limitation statute specifically provides that a cause of action accrues upon the death of the injured person. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(b) (Vernon 2005). The Fifth Circuit has held that the limitations period begins to run "the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001). "The standard in § 1983 actions provides 'that the time for accrual is when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Shelby v. City of El Paso, Tex.*, 577 F. App'x 327, 331 (5th Cir. 2014) (quoting *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989).

In the instant case, Plaintiffs' cause of action arose on October 6, 2014, when Lilly died. Plaintiffs filed their original complaint on October 4, 2016, only two days before the expiration of the two-year limitation period. Absent tolling of the limitation

period, Plaintiffs' new claim against Dr. Wells, added on July 17, 2017, is barred by the limitation statute.

Plaintiffs invoke the Texas discovery rule exception to limitation statutes. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). They argue that in "the summer of 2016", they submitted a Public Information Act request to the McLennan County Sheriff's Department to learn the names of persons involved in Lilly's medical care. ECF No. 27 at 2. The department's response did not identify Dr. Wells. See ECF No. 27-1 at 2. In March of 2017, Plaintiffs served a subpoena on the Texas Rangers to obtain a copy of that agency's investigation report. Plaintiffs obtained the report "on approximately March 24, 2017." ECF No. 27 at 2; ECF No. 27-2 at 2-5. "This report was the first time that Plaintiffs or their counsel became aware of Dr. Wells' name or involvement in this case." ECF No. 27 at 2. Plaintiffs argue that they could not possibly have known of Dr. Wells until they obtained the investigatory report from the Texas Rangers, and as such, the discovery rule should apply, and render their addition of Dr. Wells to this action timely.

The discovery rule, however, "is an accrual rule for the applicable statute of limitations—not a tolling rule—and simply defers the accrual of a cause of action." *Shelby v. City of El Paso*, Tex., 577 F. App'x 327, 331 (5th Cir. 2014) (admonishing parties not to confuse tolling and accrual rules for statute of limitations). The Texas discovery rule defers accrual of a claim until the plaintiff knew of, or through the exercise of reasonable diligence, should have known of the facts giving rise to the claim. *Barker v. Eckman*, 213 S.W.3d 306, 311-312 (Tex. 2006); *Moreno*, 787 S.W.2d at 351.

As discussed above, Plaintiff's cause of action accrued upon the death of Iretha Lilly. When a section 1983 plaintiff knows of an injury and the cause of that injury—for example, negligent medical care resulting in the death of a jail inmate—the limitations period begins. At that time, a plaintiff is charged with a duty to diligently investigate his claims. Simply because a plaintiff later learns through a Texas Rangers investigation, for example, that an additional defendant may also be liable does not restart the limitation period as to the novel defendant. A decision by the Fifth Circuit clearly demonstrates this principle:

> The fact that the Longorias took all of this action after the first flood and before the second clearly establishes that they knew of their injury, and were on notice of its cause, at the occurrence of the first flood. . . . [W]e reject the Longorias' argument here that the statutory period was tolled until they learned through a newspaper article of possible wrongdoing by this defendant. They were on ample notice after the first flood that it would be appropriate to investigate the possibility of fraud. At that point, the limitations period began to run and the Longorias acquired a duty to exercise reasonable diligence to discover their cause of action. The argument that the statutory period is tolled until the plaintiff learns that the defendant's conduct may have been

> wrongful finds no support in the relevant case law.

Longoria v. City of Bay City, Tex., 779 F.2d 1136, 1139 (5th Cir. 1986).

Because the plaintiffs were aware of the death of Iretha Lilly on October 6, 2014, the limitations period began to run on that date. Plaintiffs acquired the duty to investigate all potential defendants who could be responsible. Instead, Plaintiffs appear to have waited until the summer of 2016 to begin investigating their claim. They then waited until two days before the expiration of the limitation period to file this action. After they learned of Dr. Wells' involvement, they waited another four months to seek leave to add him to this lawsuit. Taken in context, this lack of due diligence resulted in the expiration of the statute of limitation as to all claims against Dr. Wells. In these circumstances, the discovery rule cannot operate to alter or defer the accrual of Plaintiffs' cause of action against Dr. Wells.

III. RECOMMENDATION[*]

After thoroughly reviewing the Motions and exhibits, the undersigned **RECOMMENDS** that Defendant John Wells, M.D.'s Motion for Summary Judgment (ECF No. 26) should be **GRANTED**. The undersigned further **RECOMMENDS** that Defendant Wells' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (ECF No. 42) be **DENIED AS MOOT**. It is further

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[*] [there is no section II].

RECOMMENDED that Plaintiffs' Motion for Summary Judgment Against Defendant Wells (ECF No. 46) also be **DENIED AS MOOT**.

IV. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm 'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. See 28 U.S.C. § 636(b)(1)(C); *Thomas v. Am*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (enbanc).

SIGNED August 31, 2018.

[handwritten signature]
JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

[Received March 24, 2017]

Report of Texas Ranger Patrick Peña [Excerpts]

…

7.3

ROBERTS' written statement continued:

"…The EKG that was presented to me was an abnormal EKG…The nurses stated that the inmate was complaining of intermittent chest pain and arm pain. I was not informed by the nurses she was showing signs/symptoms of a heart attack…I asked that the EKG be repeated…"

…

7.6

ROBERTS' written statement continued:

"I received the EKG picture(s) from Lieutenant. Ward at approximately 2023. I received a picture of the initial EKG, along with the second EKG. I felt it was probable inmate Lilly was having a cardiac event due to the ST elevation still present in the second EKG. I immediately forwarded the picture to Dr. Wells on his cell phone. I forwarded the EKG to Dr. Wells so he can make the determination to send inmate Lilly to the hospital. It is policy when Dr. Wells is available, that

he be the determining factor if an inmate is to be sent to the hospital. Dr. Wells was available on the night in question."

"I felt that Dr. Wells would have phoned me when he received the pictures, when he had not phoned I phoned him at approximately 2036. I phoned Dr. Wells to ensure that he had gotten the text with the EKG pictures, and he said he was going to check. I informed him at that time I had given the order to administer Aspirin and Nitro."

7.7 ROBERTS' written statement continued:

"At approximately 2039 I received a call from Dr. Wells stating that he had received the text with the pictures. We discussed that the ST elevations were still present in the second EKG, but the ST elevation was more pronounced. Dr. Wells told me he was going to phone the jail and speak with the nurses himself. I informed Dr. Wells that I had been speaking with Nurse Riendfliesch, which was in Intake and made sure he knew that phone extension. I assumed when Dr. Wells told me he was going to call the jail himself that he was going to order inmate Lilly be taken to the hospital. I assumed this because I felt inmate Lilly was having a cardiac event and needed to go to the hospital for further evaluation."

…

13.8 SMITH's written statement concluded

…INMATE WAS TAKEN BY EMT AT APPROXIMATELY 21:49. I CALLED D.O.N.

ROBERTS BACK AND TOLD HER WHAT HAPPENED AND FOR D.O.N. ROBERTS TO CALL DR. WELLS AND LET HIM KNOW WE HAD AN INMATE TAKEN TO EMERGENCY ROOM, BECAUSE IT IS PROCEDURE TO NOT SEND ANY INMATE OUT OF JAIL WITHOUT DR. WELLS' APPROVAL. HOWEVER, DUE TO THE EMERGENCY CIRCUMSTANCES I MADE THE DECISION TO HAVE EMS CALLED WITHOUT HIS DIRECT APPROVAL AT THE TIME."

…

13.15 RIENDLIESCH's written statement continued:

"At that time he told me to have the nurses call him so they could do a further assessment on inmate Lilly to determine if she needed to go to the hospital and that she could possibly be having a MI (Myocardial Infarction). During my conversation with Dr. Wells he did not sound alarmed and remained calm. Dr. Wells did not order that Inmate Lilly be taken to a hospital emergency room. I am not trained to read EKG's, but when I heard Dr. Wells state Inmate Lilly was possibly having a Myocardial Infarction I was wondering why Dr. Wells was not ordering Inmate Lilly be taken to a hospital emergency room. At approximately 2100, I received a call from Nurse Shelia Smith, LVN in regards to getting a report on inmate Lilly. Once report was given, Nurse Smith stated that she was just laying there on the bunk in MSG 6 and not responding to verbal commands. At that time, she was waiting for female officers to arrive so they could go in and check on inmate Lilly."

…

18.6 [Cardiologist Charles Albert SHOULTZ] stated the EKGs indicated a clogged artery and the patient (LILLY) should have been taken to a hospital to receive treatment for a heart attack. SHOULTZ stated both EKGs were "good quality studies" and did not indicate that the patient's (LILLY's) movement or heavy breathing effected the EKG. SHOULTZ stated both EKGs were correct when they indicated "abnormal" and should have been an alert. SHOULTZ ended this interview by stating, "My diagnosis would be that patient is in the midst of having a big heart attack and should be in the hospital."

…

APPENDIX F

[Conducted April 9, 2018]

Deposition of Respondent Dr. John Wells [Excerpts]

…

Page 10

Q. What qualified you for that position?

A. Number one, I have many years of medical experience in background and training. Number two, I received an MBA for the management position there, and they were looking for a clinical and a management position. So this was more about developing policies and procedures, education and developing protocols and economics for the county facility.

Q. Developing those protocols, policies and procedures, that was part of your job?

A. Yes.

…

Page 14

Q. Did you supervise the medical staff at the McLennan County Jail?

A. Yes.

…

Page 28

Q. You mentioned that when you came on board that you were responsible for developing policies, procedures and protocols. Is that accurate?

A. That was one of my job descriptions.

…

Pages 32-33

Q. Is a person presenting with chest pain typically considered a priority?

A. Yes.

Q. Why?

A. Because of the ominous outcome that can occur from that.

…

Page 36

Q. What type of medical care could she have received earlier?

A. The best medical care we could have provided her from McLennan County was to transfer her to the local medical facility.

Q. Is that what should have been done, in your opinion?

A. It depends on which stage we're talking about.

Q. Any stage.

A. Yes.

Q. At what stage should she have been transferred, in your opinion?

A. Based on the information that I have and based on reasonable probable doubt, probably would have been after we had done the first EKG.

…

Page 81

Q. Did you train her [Roberts] on how to read EKGs?

A. No.

Q. But being an ER nurse you know that she was trained how to do this?

A. Somewhere along her education.

Q. Is that because she told you she was trained or because you're surmising she was trained?

A. I'm surmising.

…

Page 82

Q. Do you think she [Nurse Roberts] acted as if this EKG was telling her that Ms. Lilly was experiencing an ST elevation?

A. Yes.

…

Page 84

A. I trained her [Nurse Roberts] in terms of medical policy and procedures and protocols and how to perform EKGs.

…

Page 85

Q. Did she [Nurse Roberts] act when she received this document [the EKG]?

A. From what I hear she did not.

Q. Was that decision to not act after she received this document reasonable, in your medical opinion?

A. No.

…

Pages 108-109

Q. So does that mean there were no nurses in the medical ward?

A. No.

Q. Who was in the medical ward if Nurse Riendfliesch wasn't there and no other nurses were?

A. There was no nurses there.

Q. There were no nurses there. Is that, in your medical opinion, a reasonable scenario to have a medical unit with no nurses in it?

A. Yes. This is a jail. This is not an ICU. This is not intensive care. This is not a hospital. This is a jail facility.

Q. And in your opinion it was reasonable also for there to be no nurses there despite the presence of someone who had elevated ST?

A. Well --

Q. ST elevation. Excuse me.

A. Again, it was beyond my capacity to change anything at that point in time.

Q. I'm not asking you what you had the ability to change. I'm asking you for your opinion as to whether or not you believe it was reasonable.

A. Yes.

Q. You believe it was reasonable for there to be no nurses in the medical unit at the time despite the presence of somebody who had ST elevations?

MR. ROEHM: Objection; form.

Q. (BY MR. DEMOND) Is that accurate?

A. No.

Q. It's not accurate. Was it unreasonable for there to be no nurses in the medical unit at the time Ms. Lilly was in there with ST elevations?

MR. ROEHM: Objection; form.

Q. (BY MR. DEMOND) Was it unreasonable?

A. The hesitation on my part is this, okay. In an ideal situation, yes, it was unreasonable but in the present situation and the area we're working it was not unreasonable.

Q. Because it was a jail?

A. Because it was a jail and what was going on at that particular moment.

Q. What else was happening at that particular moment?

A. During this time period between 7:00 and about 8:30 depending, the nurses are in the process of

passing pills, okay. The nurses are not in the medical ward. The nurses are in various aspects of the jail passing medications, okay. Now, depending on the day and depending on the activities and depending on the volume of patient we try to remain -- try to keep at least one nurse in the medical facility, but apparently on this day at this time we were occupied. The nurses were busy doing other tasks and they were already gone and doing their tasks while this information was going on with Ms. Lilly. And they were not aware of what was going on with Ms. Lilly and there was no way of having another nurse available.

…

Page 112

Q. …it remains your opinion that not having anyone in the medical unit at that time under these circumstances was reasonable because it was a jail. Is that accurate?

A. Yes.

…

Page 113

A. Because I wanted to see -- again, in a jail situation, the jail circumstances, okay, I wanted to see how Ms. Lilly was doing and how she had responded to the first medication to make that determination. That was the reason why I gave her a call before I made a decision on what I should finally do with Ms. Lilly.

Q. But you never did determine whether or not she responded to nitroglycerine, did you?

A. No, I did not. I never got that information.

…

Pages 118-119

Q. Did McLennan County give you ultimate responsibility over the medical unit at the McLennan County Jail?

A. My question is what do you mean by ultimate?

Q. Well, was there anybody who made decisions that could overrule you?

A. Oh, yes.

Q. In what respect could they overrule you?

A. Anybody in the jail administration and the sheriff's administration could overrule my decisions except for medical care.

Q. Well, I appreciate you bringing up the distinction. That was my intended question. So did you have ultimate responsibility with respect to medical care at the McLennan County Jail?

A. Yes.

Q. So there was no one within McLennan County who could overrule your medical decisions. Is that

accurate?

A. Who could, no.

Q. It is accurate that they could not?

A. They could not.

…

Pages 124-125

Q. (BY MR. DEMOND) Did anyone oversee your policies, practices, customs or procedures? Did you have to submit it to anybody for approval?

A. No, I did not.

Q. Did you have to submit a request to anyone to delegate authority to your nurses?

A. No, I did not.

Q. So you had the authority to do that on your own. Is that accurate?

A. Yes, in accordance to the rules by the Texas Medical Board.

Q. And what authorities do they allow you to delegate?

A. Anytime that you train -- adequately train and supervise medical staff you can delegate certain

authority to them. Sometimes that's basically pretty much -- what's the word I want -- standard orders.

…

A. In this particular matter the nurses had the authority to -- particular in this case where we had an RN involved, make an assessment and if they thought it was urgent enough in this case they could have called the paramedics, EMS and transferred the patient only to notify me.

…

Page 126

Q. (BY MR. DEMOND) Did you report to anyone concerning your decisions to treat or not treat inmates at the McLennan County Jail?

A. No, I did not.

…

Page 129

Q. In your medical opinion was her myocardial infarction a severe one?

A. I think so.

…

Pages 130-131

Q. Was there any indication from anything you've seen that would lead you to believe that Ms. Lilly would have healed from her myocardial infarction without medical intervention?

A. No, she would not have.

…

Page 131

Q. Under what circumstances would your nurses normally perform EKGs?

A. In any case where they suspect that the particular inmate might be suffering from a cardiac disease.

…

Q. Are the nurses trained to read and interpret EKGs?

A. No, they're not. Let me clarify. They are taught to read EKGs but they do not have the training or the authority to make a determination.

…

Pages 132-133

Q. Your verbal standing orders, did you submit those

to McLennan County for approval?

A. No, I did not.

Q. So it was just the way you operated the medical unit at the McLennan County Jail?

A. McLennan County Commissioner's Court, McLennan County sheriff, McLennan County Jail administration are not medical authorities. I did not have to submit my medical treatment to a non-medical personnel for authorization.

Q. Because they trusted you to do it?

A. And that's what the Texas Medical Board does by giving me a license.

Q. They didn't ask you to because they trusted you to do it. Is that accurate?

A. Exactly.

…

Page 137

Q. In your medical opinion when do people with an EKG like Exhibit 1 require medical attention?

A. As soon as possible.

Q. Same with EKG -- with Exhibit No. 2?

A. Yes.

…

Page 138

Q. Why did the jail have an EKG?

A. To make the diagnosis and try to assess the patients who complain of chest pain.

Q. Even when there was no doctor on site?

A. Yes.

Q. Was there any other doctor who worked for the McLennan County Jail medical unit other than you?

A. No, sir.

Q. Have you ever personally approved the transfer of an inmate from the jail to the hospital?

A. Yes, I have.

Q. How many times have you done that?

A. I have no idea.

Q. Many?

A. Many.

…

Page 141

A. No nurse ever asked me to transfer Ms. Lilly to a hospital. No nurse asked me should she be transferred to the hospital. No nurse ever recommended to me that they thought that she should be transferred to the hospital.

…

Page 152

Q. So would it be fair to say that you pretty much had full reign and control over the medical unit at the jail?

A. Yes.

…

Page 154

Q. (BY MR. DEMOND) Was anyone at the McLennan County Jail trained to read an EKG other than you and Ms. Roberts?

A. No.

…

Page 172

Q. Did you ever go into detail with her as to the depth of that training when she was an ER nurse?

A. No. Her actual training, no, I didn't.

…

Page 195

Q. So this policy by McLennan County to provide medical care to inmates was a policy that you followed and were obligated to follow during your tenure as the medical director?

A. Correct.

Q. If you go to the second page, Paragraph 4.6, can you read the first two sentences?

A. Emergency medical treatment. Emergency medical treatment is available 24 hours a day, seven days per week. Medical personnel will determine when an inmate is in need of medical attention or is in medical crisis.

…

Pages 227-28

Q. And in that incident you authorized jail medical staff to evaluate, diagnose and treat the patient; is that correct?

A. That's what they [the Texas Medical Board] alleged.

Q. Is that what you were reprimanded for?

A. Yes.

APPENDIX G

[Conducted April 24, 2018]

Deposition of Dr. Paul W. Dlabal
[Excerpts]

Page 37

A. … And in reading the case findings, the various affidavits, it does appear there was confusion among the staff as to who had the authority to do what with regard to emergency care of a serious medical illness.

…

Page 53

A. Yes, I think a clinic in the field such as we are discussing here would be incapable of providing any of those treatments, and ultimately this patient required transport by EMS to a facility containing the capability for these treatments, and that any delay in transfer was harmful or deleterious to her condition as the minutes rolled by minute by minute.

…

Page 64

A. Immediately if not sooner; or if that is not feasible, then to transport this patient because knowing this clinic facility there is no service or treatment available which would be expected to reverse this process.

…

Page 89

A. Well, by nature nurses do not diagnose so she would have had the circumstantial knowledge that at least the physician was considering an MI and that the staff was sufficiently concerned. They had done two, if not three EKGs and the patient had chest pain so to a trained nurse, at any level, this is an MI until proven otherwise.

…

Page 98

Q. Would a reasonably trained medical professional know that this EKG revealed an ST elevation?

A. Certainly that, yes.

…

A. … I would simply tell the court that whether one had EKG skills or not, the computer interpretation of the EKGs is quite clear. On the first EKG in bold letters, consider acute infarct; and on the second EKG, consider acute STEMI, consider acute infarct. So armed with that knowledge any healthcare provider at any level would or should consider acute infarct.

Q. In your opinion would it be arguably reasonable for a medical -- for a reasonably trained medical professional who saw these EKGs to not transfer Ms. Lilly to a hospital?

A. Any medical professional confronted with this

patient with chest pain radiating to the left arm and this EKG indicative of an acute STEMI would have the obligation to transfer this patient through channels or by any means necessary as expeditiously as possible.

…

Pages 107-108

The computer interpretation is written for the less skilled healthcare professionals so that they, number one, know that the tracing is technically satisfactory and they don't have to repeat it in the moment or the computer itself wouldn't read it. And then to give a perspective from the computer's interpretation as to the considerations inherent in this EKG and the concerns to be generated from this EKG.

APPENDIX H

[Signed July 10, 2018]

Dr. Dlabal's Expert Report

Paul W. Dlabal, MD, FACP, FACC, FAHA
Cardiovascular Research Associates, PA

July 10, 2018

William Demond
Attorney
1520 Rutland Street
Houston, TX 77008

Patient **Iretha Jean Lilly (deceased)**

Dear Mr. Demond:

I am a physician licensed in Texas and have been asked to provide medical perspective and opinions regarding the medical care and treatment, surrounding the death of Iretha Jean Lilly at the McLennan County Jail. This report supplements my previously submitted expert report which is now incomplete given some statements from Dr. Wells in Dkt 48 (particularly page 5 at paragraph 18). I supplement my expert report as follows:

Available records have shown the undisputed facts that the patient complained of chest pain radiating to her left arm, lasting up to four hours, during which time multiple medical personnel provided evaluation,

including two EKGs, which were read by computer interpretation as "ACUTE MYOCARIDAL INFARCTION" and "CONSIDER STEMI (the most severe form of Ml). She was not transported to an ER, nor to a hospital, and progressed to the point of sudden cardiac death by cardiac arrest, as a consequence of her myocardial infarction. Autopsy findings showed evidence of the acute myocardial infarction as well as atherosclerotic coronary artery disease and thrombosis of the left anterior descending coronary artery, consistent with STEMI involving the anterolateral portion of her heart. At issue is the standard of care applicable to medical personnel providing care to inmates at the McLennan County Jail, and whether the deficiencies of such care rose to the level of subjective conscious indifference. I will address these questions in 2 parts.

I. Clinical Context

In order to address the considerations above, it is necessary to recall that heart disease is the leading cause of death in men and women in the United States, as well as worldwide, and continues to be so to this day. As reported in medical statistics, heart attacks (myocardial infarctions or MI's) occur in approximately 790,000 Americans each year, of which as many as half suffer out-of-hospital cardiac arrest, which is fatal in more than 90% of cases. This knowledge is widely available to the general public and is part and parcel of the training of any medical personnel. Thus, a layperson or any trained medical person, confronted with an adult patient who complains of chest pain

radiating to the arm, must consider the possibility of heart attack, and the predictably dire consequences of the condition if left untreated.

In terms of differential diagnosis, when encountering such a patient, the first and most likely cause of unprecedented and unprovoked chest pain is heart attack, for which the appropriate response is emergency transport to the nearest medical facility capable of providing emergency care. It is not necessary to know the type, severity or even the confirmation of the presence of MI; it is sufficient to know that MI is a possible consideration, which should lead to the appropriate response of activation of EMS services for transport of the patient to the nearest medical facility. Failure to initiate such transport and access care predictably and foreseeably reduces the patient's likelihood of survival in MI, and dramatically increases the risk of cardiac arrest and sudden cardiac death. Once cardiac arrest has occurred, resuscitation efforts, even by the most well-trained personnel with sophisticated equipment, in or out of a hospital setting, do not guarantee survival. In fact, despite the best of efforts, cardiac arrest continues to carry a 90% mortality rate. Early intervention for Ml is the only reasonable approach to prevent progression of Ml to cardiac arrest and sudden cardiac death.

II. Triage

Medical resources, whether personnel, facilities, or equipment, are by nature limited and are incapable of providing ultimate treatment to each and every patient in each and every care setting. Accordingly, there must be a system of rational application of resources for optimal effect, to do the most good for the greatest number of patients. This process is called *Triage,* and this concept is not new. Rather, it was developed during the Napoleonic Wars by physicians attending battlefield wounded, wherein they employed a system of sorting or ordering patients' treatments, based upon the severity of their injuries, as well as the probability of survival, allowing for the efficient rationing of treatment despite limited resources which were insufficient for all. In triage, the highest priority is given to those for whom immediate care will likely make the greatest positive difference in outcome.

While the usual context for triage is initial care of injured, or disaster management, the same concept applies to sophisticated tertiary care centers where one must decide the order in which patients require and receive surgery. It is even extended to complex and sophisticated treatment protocols, such as heart transplants, where one must prioritize care according to the availability of donor organs, the need of the patient, as well as the likelihood of a successful outcome.

Considering the case of **lretha Jean Lilly,** in context of the above, it is clear that any layperson, whether a correctional officer on duty or medical personnel, aware of her symptoms and complaints, should consider the very likely possibility of heart attack (Ml) as a cause of this patient's chest pain. The simple recognition of this possibility is sufficient for anyone, whether medically trained or not, to activate emergency response systems and to initiate transport to appropriate medical facilities.

With regard to the medical personnel on duty in the McLennan County Jail, on the day of occurrence, the standard of care rises to a level of triage in order to address the predictable and foreseeable consequences of myocardial infarction. Given the limited resources available in a medical clinic dedicated to the first aid/emergency care of inmates, the recognition of the possibility of myocardial infarction is sufficient to allow and require triage, resulting in transport of this patient to emergency facilities where available. Of the approximately 900 inmates incarcerated at that time, there could be none with more need of medical care and attention than lretha Jean Lilly, for whom the consequences of failure to access such care predictably and foreseeably conferred a risk of death, and which in fact did occur, consistent with the natural history of untreated disease.

Considerable debate has arisen over the use of the prison EKG, its attempted interpretation by unqualified personnel and the responsibility for them to act on the findings of the EKG. In simplest terms, the EKG is unnecessary for the recognition of MI**,** and to perform the function of triage as described above.

By education, training, and licensure, nurses are not capable of nor allowed to render medical diagnosis at the bedside, nor interpretation of studies such as an EKG. The capability of nursing personnel allows them to access clinical data for reporting to the responsible attending physician and, in the emergency setting, to access emergency care as appropriate.

Nurses, by nature, are not capable of rendering medical diagnoses. Precisely for this reason, computer interpretation of EKGs has been implemented in order to allow untrained and unqualified medical personnel to focus their attention on the possibility of heart disease and, where applicable, its severity.

In this case, the statements "CONSIDER ACUTE MYOCARDIAL INFARCTION" and "POSSIBLE STEMI,'" raise the level of concern to the highest possible based upon computer reporting, given that STEMI is the worst of all possible heart attacks and, by implication, carries the highest risk of complication, including death.

Given that an EKG was taken at the outset of this condition, it was confirmatory of the condition. Further, based upon the computer interpretation written in plain English, there was sufficient information to have heightened the awareness of the nonmedical and medical personnel on duty as to the acuity and severity of the condition, and should have provided further impetus for initiating transport of this patient to appropriate care. The rendering of judgments regarding the accuracy and reproducibility of the EKG by personnel insufficiently trained or

unqualified to render such judgments only served to delay transport of the patient to necessary care, and provided nothing in the way of meaningful benefit.

Summary;

The care and treatment of lretha Jean Lilly by officers and medical personnel at the McLennan County Jail failed to meet even the most basic standards of care applicable to such a patient and did, by definition, rise to the level of subjective conscious indifference, which ultimately led to the progression of the condition, untreated, to its natural consequence, which is sudden cardiac arrest leading to sudden cardiac death at the time and place, and in the manner in which it occurred.

Respectfully submitted,

____[handwritten signature]___
Paul W. Dlabal, MD, FACP, FACC, FAHA

APPENDIX I

[Filed June 15, 2018]

Defendant Desera Roberts' Motion for Summary Judgment [Excerpt]

The summary judgment evidence reflects that Nurse Roberts' actions were taken without malice or bias whatsoever toward Lilly. To the contrary, Nurse Roberts' actions reflect an effort to provide a diagnosis and treatment of Lilly's serious medical condition – based on information shared with her in person, and later telephonically and electronically by other medical staff at the Jail. No reasonable person or jail nurse would have known that Nurse Roberts' conduct was unlawful under the circumstances she confronted in connection with Lilly's condition, if such actions were found to be in violation of Lilly's rights or other law.

APPENDIX J

[Filed June 15, 2018]

Defendant Kimberly Riendfliesch's Motion for Summary Judgment
[Excerpts]

…

Dr. Wells contacted LVN Riendfliesch around 8:45 p.m. to discuss Lilly. Dr. Wells told LVN Riendfliesch that Lilly *could* be having a myocardial infarction but did not tell Riendfliesch to send Lilly to the hospital. Rather, Dr. Wells asked LVN Riendfliesch to tell the other jail nurses [after pill pass] to further assess Lilly's situation and call him so he could decide what needed to be done with Lilly. Ex. A, Riendfliesch Aff,, ¶7; Doc. 13, ¶¶45-48.

…

The provision of medical care to Lilly by Riendfliesch was in compliance with the McLennan County's jail policies and Dr. Wells' standing orders and protocol of providing reasonable medical care to inmates.

APPENDIX K

[Signed June 5, 2018]

Affidavit of McLennan County Sheriff Parnell McNamara [Excerpt]

I had no involvement in the medical care and treatment which was provided to Iretha J. Lilly on October 6, 2014, while she was an inmate at the McLennan County Jail. At no time prior to the death of Ms. Lilly, did I have any actual or constructive knowledge that medical care and treatment was not being provided to inmates as required by McLennan County's official policy or that the medical needs of inmates were being ignored by the jail and medical staff at the McLennan County Jail, nor do I have any such knowledge today…At no time prior to the death of Ms. Lilly, did I have any actual or constructive knowledge of any alleged policy or practice that the nurses at the County Jail had to get prior approval from Dr. Wells before they could send an inmate to the hospital/ER. Additionally, at no time prior to the death of Ms. Lilly, did I have knowledge of a policy, practice, custom, procedure, or training wherein medical intake personnel were permitted to perform medical intakes of inmates while not medically clearing inmates and failing to inform the supervising doctor that the inmates had not been medically cleared even after an inmate had been in jail for more than six hours, had been tased, had been complaining of chest pain, and/or had an abnormal EKG.

APPENDIX L

[Sent February 26, 2018]

Email from McLennan County's Attorney Regarding Deposition under Federal Rule of Civil Procedure 30(b)(6)

From: John Roehm
To: Meagan Hassan; William Pieratt Demond
Cc: Steve Henninger
Subject: RE: Taylor v. McLennan County, et al.
Date: Monday, February 26, 2018 11:35:16 AM
Attachments: image00 l. png
McLennan County Jail Health Services Plan (567965).pdf

Counselors,

Just want to let you know that we have not forgotten about your request to take a Rule 30(b){6) deposition from the County. However, in order to designate the appropriate person, we need to understand the scope of your intended examination. Along those lines, you provided the following topic area:

County policies, procedures, trainings, customs, and protocols concerning the provision of emergency healthcare to inmates at the McLennan County Jail and methods utilized by McLennan County to ensure medical staff at the McLennan County Jail were aware of and in compliance with same.

We are not completely sure of what information you are seeking from the County.

…

[I]f you are seeking information about medical decisions and/or what treatment should be given to a specific inmate for a specific ailment, then this information will have to come from members of the medical staff. It is our understanding that Dr. Wells did not promulgate any written policies/protocols while he was in charge but rather had standing verbal orders nor did he adopt and/or incorporate any of the medical protocols that had been promulgated by his predecessor. As the Medical Director, Dr. Wells was solely responsible for promulgating and enacting medical protocols for the jail medical staff.

We want to make sure we understanding [sic] what information you are seeking from the County and whether there is a County representative who can provide such information. We want to prevent any misunderstanding at the deposition. Look forward to hearing from you.

John
John F. Roehm III │ Attorney │
Fanning, Harper, Martinson, Brandt & Kutchin, P.C. │ www.fhmbk.com │ Two Energy Square │ 4849 Greenville Avenue │ Suite 1300 │ Dallas, TX 75206! [sic] Direct; [sic] 972.860.0306 │ Main Phone: 214.369.1300 │ Facsimile: 214.987.9649

APPENDIX M

[Sent July 5, 2016]

McLennan County's Response to Petitioners' Public Information Act Request

McLennan County Sheriff Dept
Health Services Division
3201 E Hwy 6
Waco, TX 76705
254 757-2555
254-753-2219 fax

July 5, 2016

To whom it may concern:

This memo is in reference to a request for information for the names of the medical personnel involved in the care of lretha Lilly on October 6, 2014.

Below are the names of the nurses involved in her care on the requested date above.

Kimberly Riendfliesch
Chris Pryor
Trinecha Outley
Mary Wilson
Sheila Smith
Desera Roberts

Respectfully,
Alfredo Martiz
Medical Office Manager
Health Services Division
McLennan County Jail

APPENDIX N

[Signed November 8, 2011]

Agreement for Medical Director/Physician Services between McLennan County and Dr. Wells [Excerpts]

…

Article 1
Duties of Medical Director

1.1 The Medical Director and the Jail Physician will be provided by the Company. The Company agrees that the duties of the Medical Director and Jail Physician shall include, but not necessarily be limited to:

- Provision of medical evaluation, care and treatment to inmates of the Jail in accordance with the applicable standards of care, accepted medical practices, and any applicable laws, rules or regulations;

  …

- Provision of medical services at the Jail at times other than scheduled sick calls when such is needed for the immediate welfare of an inmate;

- Referral of inmates to specialists or facilities as medically necessary;

- Establish and implement procedures, policies, systems and protocols, and, review performance and compliance of medical staff, ensure orders have been charted and comp1ied with by staff, and handle administrative duties;

- Oversee the supervision of all Jail Medical Staff, including the Director of Nursing, nurses, EMTs, and clerical/administrative staff;

- Establishing strict controls and accountability for medications;

- Implement procedures to ensure that the Jail Medical Department maintains compliance with all applicable government and professional standards, including the standards of the Texas Jail Commission;

- Implement procedures to ensure the preparation and maintenance of appropriate medical records as to each patient to see that the accumulation and organization of such records is accomplished to provide adequate medical care;

- Implement procedures to ensure that proper licenses and credentials are held by all professional medical staff, and that continuing education requirements are met;

…

- Approving all protocols followed by the Jail Medical Staff;

- Scheduling of all Jail Medical Staff;

- Oversight and supervision of annual evaluations of all Jail Medical Staff;

- Annually reviewing policies, procedures and protocols for improvement/updating;

- Providing leadership and guidance to Jail Medical Staff;

- Attending periodic meetings with Sheriff's Office administrators to report on the Medical Department's operations and to address outstanding or emerging issues; and

- Implementing quality assurance plans.

…

1.3 The primary purpose of transitioning to a more permanent on-site physician is to provide increased and consistent access to a physician at the Jail and improvement of the administration and oversight of the medical department. However, it is expected that this transition will also result in the avoidance of certain costs of outside care (and the transport and security issues related thereto) where such care could be just as aptly performed at the Jail.

…

1.4…the Jail Captain shall have no control over the means or methods by which medical services are provided or over the Physician's exercise of medical

judgment, and has no authority to terminate this Agreement.

…

Article 4
Medical Judgment and Discretion
The parties agree that decisions as to the care and treatment of inmates shall be within the sole medical judgment of the Physician, subject to the constitutional requirement that there not be deliberate indifference to a serious medical need of an inmate.

…

6.1 County does not hold the Company or its Physician harmless from suit or liability for performance of services hereunder; nor does the Company or its Physician hold harmless or indemnify the County. Company agrees that its Physician shall exercise professional skill and judgment in providing medical services. Physician's exercise of medical judgment is independent, and Physician shall not be considered an employee of the County.

…

6.2 … The Physician is an independent contractor providing professional medical services using his own training, skill and medical judgment.

EXECUTED in duplicate this [8th] day of [November], 2011

"COUNTY"

McLennan County, Texas

By: ___[handwritten signature]___

County Judge

"MEDICAL DIRECTOR/PHYSICIAN"

Melchizedek Medical, PLLC

By: ___[handwritten signature]___
John A. Wells, M.D.

Its: Manager

APPENDIX O

[Taken October 6, 2014 at 5:56:45 pm]

Ms. Lilly's First EKG

(See following fold-out page)

APPENDIX P

[Taken October 6, 2014 at 8:09:01 pm]

Ms. Lilly's Third EKG

(See following fold-out page)