See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.

The Supreme Court of Texas.

Date Filed: 06/05/2020

Charlie WILSON, as executor of the Estate of Debra Wilson, substituted in place and stead of Debra Wilson, deceased, Plaintiff-Appellant
v.
DALLAS COUNTY HOSPITAL DISTRICT, doing business as Parkland Health & Hospital System; John Does, Defendants-Appellees

No. 19-1063

Appeal from the Fifth Court of Appeals, Texas, at Dallas, No. 05-18-01049

ON PETITION FOR REHEARING

THE MOTION[] FOR REHEARING OF THE [] PETITION[] FOR REVIEW [IS] DENIED

s/
Texas Supreme Court Justices

Court of Appeals,
Fifth Court of Appeals, Texas
at Dallas.

DALLAS COUNTY HOSPITAL DISTRICT, doing business as Parkland Health & Hospital System;
Defendants-Appellant

v.

Charlie WILSON, as executor of the Estate of Debra Wilson, substituted in place and stead of Debra Wilson, deceased, Plaintiff-Appellee.

No. 05-18-01049 Summary Calendar

Filed August 7, 2019

Appeal from the 101st Judicial District Court for Dallas County, Texas, No. DC-15-09089

Attorneys and Law Firms

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Before Justices MYERS, OSBORNE, and NOWELL.

Memorandum Opinion

By Justice Osborne

In this interlocutory appeal, Dallas County Hospital District d/b/a Parkland Health and Hospital System (the Hospital) appeals the 101st Judicial District Court's (state district court) order denying its motion to dismiss the lawsuit brought pursuant to Chapter 74 of the Texas Civil Practice and Remedies Code by Charlie Wilson, individually and as representative of the Estate of Debra Wilson (Wilson). In its sole issue on appeal, the Hospital argues the state district court erred when it denied the Hospital's motion to dismiss because the 120-day deadline for Wilson to serve an expert report had expired. We conclude the state district court erred. The state district court's order denying the Hospital's motion to dismiss is reversed, an order dismissing Wilson's claims

with prejudice is rendered, and the case is remanded to the state district court to award the Hospital relief under section 74.351(b) of the Texas Civil practice and Remedies Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 1, 2007, Debra Wilson had surgery, specifically a left heart catheterization procedure. During the procedure, a piece of the plastic catheter broke and remained in Debra Wilson's body. Debra Wilson contended that she was never informed that a fragment of the catheter remained inside of her. On August 18, 2014, Debra Wilson went to the emergency room due to abdominal pain and a CT scan revealed a foreign body in her thoracic and abdominal aorta. As a result, Debra Wilson had additional surgery and treatment for the injuries she sustained from the catheter fragment.

On August 11, 2015, Debra Wilson filed her original petition in state district court against the Hospital and "John Doe, M.D.," for injuries sustained during a heart catheterization procedure. She alleged claims against the Hospital for negligence, lack of informed consent, fraudulent nondisclosure, negligent condition or use of tangible personal property, and vicarious liability for the actions of its medical staff. Also, she alleged claims against "Dr. John Doe" for breach of the duty of care, lack of informed consent, and fraudulent nondisclosure. On September 11, 2015, the Hospital filed its plea to the jurisdiction, motion for summary judgment on the basis that Debra Wilson's claims were barred by the statute of limitations, and original answer generally denying the allegations and asserting sovereign or governmental immunity. This triggered the 120-day deadline for Debra Wilson to file her expert report by January 11, 2016.[1] See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a).

However, on November 13, 2015, before the expiration of the 120-day deadline, Debra Wilson filed her first amended petition adding claims alleging, inter alia, violations of 42 U.S.C. §§ 1983, 1985, and 1986, and in the alternative, an unconstitutional taking under the Fifth Amendment of the Constitution of the United States of America. As a result, on December 11, 2015, ninety-one days after the Hospital filed its original answer, the Hospital filed a notice of removal to federal district court. However, on September 21, 2016, the United States District Court for the Northern District of Texas (federal district court) granted the Hospital's motion to dismiss Debra Wilson's federal claims and remanded the state law claims to the state district court. *Wilson v. Dallas Cty. Hosp. Dist.*, No. 3:15-CV-3942-BF, 2016 WL 5122110 (N.D. Tex. Sept. 21, 2016) (mem. op.).

On September 27, 2016, the state district court received the order of remand from the federal district

court. At some point during the proceedings, Debra Wilson died and Wilson, her surviving spouse, succeeded Debra Wilson as plaintiff in this case. On January 23, 2017, the federal district court issued an order that denied Wilson's motion for new trial, declined to grant his motion to amend his complaint due to lack of jurisdiction, and denied as moot the unopposed notice of suggestion of death and for leave to substitute Wilson as the plaintiff. *Wilson v. Dallas Cty. Hosp. Dist.*, No. 3:15-CV-3942-BF, 2017 WL 5642583 (N.D. Tex. Jan. 23, 2017) (order). On February 8, 2017, Wilson filed an amended unopposed motion to stay the state district court proceedings during the pendency of his federal appeal. On March 23, 2017, 167 days after it received the order of remand from the federal district court, the state district court signed an order staying the state court proceedings. Then, on May 10, 2017, the state district court signed an agreed order to reinstate the state proceedings.[2]

On October 24, 2017, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming the order that dismissed Debra Wilson's federal claims and affirming as modified the federal district court's order that denied her motion for new trial. *Wilson v. Dallas Cty. Hosp. Dist.*, 715 F. App'x 319 (5th Cir. 2017) (per curiam). Also in the federal suit, Wilson filed a petition for certiorari, which was denied by the U.S. Supreme Court on April 23, 2018. *Wilson v. Dallas Cty. Hosp. Dist.*, 138 S. Ct. 1597 (2018).

On June 5, 2018, Wilson served his Chapter 74 expert report on the Hospital and on June 7, 2018, he served

a second expert report. On June 21, 2018, the Hospital filed a motion to dismiss based on section 74.351(b) alleging that Wilson failed to serve an expert report within 120 days of the Hospital's filing its original answer and challenging the adequacy of the expert reports. On August 7, 2018, Wilson responded to the motion arguing that the removal to federal district court stayed the state district court proceedings and tolled the 120-day deadline for serving his expert report. After a hearing, the state district court denied the Hospital's motion to dismiss on August 21, 2018. This interlocutory appeal followed. See CIV. PRAC. & REM. § 51.014(a)(9).

II. MOTION TO DISMISS

In its sole issue on appeal, the Hospital argues the trial court erred when it denied the Hospital's motion to dismiss because the 120-day deadline for Wilson to tender an expert report had expired. It contends that, even if the 120-day deadline was tolled while the case was removed to federal district court, it resumed the day the state district court received the order of remand. As a result, the Hospital maintains that the deadline expired on October 26, 2016. Wilson responds that the section 74.351 "deadline to file an expert report was eliminated" because the case was removed to federal district court. Wilson maintains that the 120-day deadline was tolled while the case remained under federal jurisdiction, including the time he exhausted his federal appellate rights, and did not begin "anew" until May 10, 2018, when the state court proceedings were reinstated by the state district court, which extended the deadline until June 21, 2018. As a result, Wilson contends that his expert reports were timely.

A. Standard of Review

An appellate court reviews a trial court's decision to grant or deny a motion to dismiss claims for failure to comply with section 74.351 of the Texas Civil Practice and Remedies Code for an abuse of discretion. See *Drake v. Walker*, 529 S.W.3d 516, 523 (Tex. App.—Dallas 2017, no pet.). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010). The trial court has no discretion in determining what the law is or applying the law to the facts. *Sanchez v. Martin*, 378 S.W.3d 581, 587 (Tex. App.—Dallas 2012, no pet.). A clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

B. Applicable Law

For suits involving a "health care liability claim," Chapter 74 requires the claimant to serve an adequate expert report within 120 days after the defendant's original answer has been filed. CIV. PRAC. & REM. §§ 74.351 (setting out expert report service requirements, deadline, and grounds for extension), 74.001(a)(13) (defining "health care liability claim"); *Scott v. Weems*, 575 S.W.3d 357, 362–63 (Tex. 2019). Dismissal with prejudice is required if an expert report is not timely served. CIV. PRAC. & REM. § 74.351(b)(2); *Scott*, 575 S.W.3d at 362–63. Although this deadline can lead to seemingly harsh results, strict compliance with this provision is mandatory. *See Zanchi v. Lane*, 408 S.W.3d 373, 376 (Tex. 2013); *Ogletree v. Matthews*, 262 S.W.3d 316, 320 (Tex. 2007).

The date for serving an expert report may be extended by written agreement of the affected parties. CIV. PRAC. & REM. § 74.351(a). However, in order for an

agreed order or written agreement to extend the 120-day deadline to file an expert report to be effective, the order must explicitly indicate the parties' intention to extend that deadline and reference that specific deadline. See *Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 254 & n.5 (Tex. 2010); *Reid v. Seton Hosp.*, No. 03-16-00301-CV, 2016 WL 7046843, at *2 (Tex. App.—Austin Nov. 30, 2016) (mem. op.).

Once a notice of removal is filed, it "shall effect the removal and the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d); see also *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 624 (Tex. 2007) ("[f]rom the time the case was removed to federal court until it was remanded to state court, the state court was prohibited from taking further action[ ]"). Following removal, the federal court has exclusive jurisdiction over the action. See *In re Laza*, No. 12-17-00280-CV, 2018 WL 271833, at *1 (Tex. App.—Tyler Jan. 3, 2018, orig. proceeding)) (mem. op.) (per curiam); *J.P. Morgan Chase Bank, N.A. v. Del Mar Props., L.P.*, 443 S.W.3d 455, 460 (Tex. App.–El Paso 2014, no pet.). However, federal law provides that when a federal district court lacks subject-matter jurisdiction, a "certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case." 28 U.S.C. § 1447(c); see *Gonzalez v. Guilbot*, 315 S.W.3d 533, 536 (Tex. 2010). A remand transfers jurisdiction back to the state court on the claims that have been remanded. See *Gonzalez*, 315 S.W.3d at 537–38; *Paske v. Fitzgerald*, 499 S.W.3d 465, 470–71 (Tex. App.— Houston [1st Dist.] 2016, no pet.).

Upon remand, the state court is to proceed from the point reached in the state court action prior to removal, as if no interruption had occurred. See *In re Univ. of the Incarnate Word*, 469 S.W.3d 255, 258

(Tex. App.—San Antonio 2015, original proceeding); *Brogdon v. Ruddell*, 717 S.W.2d 675, 677 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (per curiam), disapproved of on other grounds by *Quaestor Invs., Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999).

C. Application of the Law to the Facts

The parties do not dispute that Wilson's claims are health care liability claims, the date the Hospital filed its original answer, when the case was removed to the federal district court, when the state district court received the order of remand, or when Wilson served his expert reports. The only dispute between the parties in this appeal concerns when the 120-day deadline expired and the effect of the removal of the proceedings to federal district court. Assuming, without deciding, the removal of the case to federal district court tolled the 120-day deadline as Wilson contends, we must still address the parties' different methods of calculating the expiration of the 120-day deadline. The parties' arguments essentially turn on the effect of the state district court's orders to stay and reinstate the state court proceedings during the federal appeals process.

The Hospital filed its original answer on September 11, 2015. See CIV. PRAC. & REM. § 74.351(a) (120-day deadline for serving expert report calculated from date defendant's original answer filed). Then, ninety-one days later, on December 11, 2015, the case was removed to the federal district court vesting that court with exclusive jurisdiction over the case. See 28 U.S.C. § 1446(d); *In re Sw. Bell Tel.*, 235 S.W.3d at 624; *In re Laza*, 2018 WL 271833, at *1; *J.P. Morgan Chase*, 443 S.W.3d at 460.

On September 27, 2016, the state district court received the order of remand from the federal district court, transferring jurisdiction back to the state district court and resuming the state proceedings as if

no interruption had occurred. See *Gonzalez*, 315 S.W.3d at 537–38; *In re Univ. of the Incarnate Word*, 469 S.W.3d at 258.

Next, on February 8, 2017, Wilson filed an unopposed motion to stay the state court proceedings. In that motion, he requested a stay until the "final non-appealable resolution of the federal court case." Wilson did not explicitly request an extension of the 120-day deadline for filing his expert report. On March 23, 2017, 167 days after it received the order of remand, the state district court signed an order granting that motion, which stated:

On this date came on to be heard [Wilson's] Unopposed Motion to Stay, and the [state district court] having considered same, is of the opinion that said Motion should be granted. Accordingly,

IT IS HEREBY ORDERED that this case is stayed pending request of either party to re-open or further order of this Court.

Similarly, the state district court's order does not explicitly reference the 120-day deadline. Then, on May 10, 2017,[3] the state district court signed an agreed order to reinstate the state court proceedings.

That reinstatement order also does not reference the 120-day deadline to file an expert report. Accordingly, because the orders fail to explicitly indicate the parties' intention to extend the 120-day deadline or

otherwise reference that deadline, we conclude the state district court's orders staying the state court proceedings and reinstating them had no effect on the 120- day deadline for filing an expert report. See *Spectrum Healthcare*, 306 S.W.3d at 254 & n.5 (Tex. 2010); *Reid*, 2016 WL 7046843, at *2. As a result, assuming without deciding the removal of the case to federal district court tolled the 120-day deadline, the record shows that ninety-one days had expired before the state court proceedings were removed to federal district court, so there were twenty-nine days remaining when the state district court received the order of remand from the federal district court on September 27, 2016. Therefore, the 120-day deadline for serving an expert report expired on October 26, 2016.[4] Wilson did not serve his expert reports until June 5 and 7, 2018.

Further, even if we accepted Wilson's argument that the deadline did not resume until the

U.S. Supreme Court denied his petition for certiorari on April 23, 2018, exhausting his federal appellate remedies, the remaining twenty-nine days would have expired on May 22, 2018, before he served his expert reports.

Because the expert reports were not timely served, the state district court was required to dismiss Wilson's claims against the Hospital with prejudice. CIV. PRAC. & REM. § 74.351(b)(2); Scott, 575 S.W.3d at 362. Accordingly, we conclude the state district court erred when it denied the Hospital's motion to dismiss.

The Hospital's sole issue on appeal is decided in its favor.

III. CONCLUSION

The state district court erred when it denied the

Hospital's motion to dismiss.

We reverse the state district court's order denying the Hospital's motion to dismiss. We render an order dismissing Wilson's claims against the Hospital with prejudice. We remand the case to the state district court to award the Hospital relief under section 74.351(b) of the Texas Civil Practice and Remedies Code.

s/Leslie Osborne/

Footnotes

1We note that January 9, 2016 was 120 days after September 11, 2015. However, January 9, 2016, was a Saturday so the actual deadline was the following Monday, which was January 11, 2016. See TEX. R. CIV. P. 4.

2The reinstatement order states that it was signed on May 10, 2017. However, we note the parties contend the order was signed a year later on May 10, 2018. The state district court's docket sheet also shows that the order was signed in 2018. We are bound by the record on appeal and ordinarily, a trial court's docket sheet entry forms no part of the record which may be considered; it is a memorandum made for the trial court and clerk's convenience. See, e.g., *In re Latimer*, No. 05-14-01099-CV, 2014 WL 4288886, at *1 (Tex. App.—Dallas Aug. 29, 2014, orig. proceeding) (mem. op.); *Energo Int'l Corp. v. Modern Indus. Heating, Inc.*, 722 S.W.2d 149, 151 (Tex. App.—Dallas 1986, no writ). Nevertheless, even if the order had been signed in 2018, it would not change the outcome of this appeal.

3*See supra* n. 2.

4Wilson argues that the removal of the case to federal court extinguished any pre-existing Chapter 74 requirements and deadlines because jurisdiction was no longer vested in any court to which those rules apply. As a result, he contends that the 120-day deadline was reset when the case was remanded to the state district court. Even if we accepted Wilson's argument that the deadline began to run anew when the federal district court remanded the state law claims to the state district court and the order staying the state court proceedings stopped the deadline, which we do not, Wilson's argument fails because the state district court did not stay the proceedings until 167 days after it received the order of remand from the federal district court, which means the deadline ran before the case was stayed.

Court of Appeals,
Fifth Court of Appeals,
Texas at Dallas.

DALLAS COUNTY HOSPITAL DISTRICT, doing business as Parkland Health & Hospital System;
Defendants-Appellant

v.

Charlie WILSON, as executor of the Estate of Debra Wilson, substituted in place and stead of Debra Wilson, deceased, Plaintiff-Appellee.

No. 05-18-01049

Filed August 7, 2019

Appeal from the 101st Judicial District Court for Dallas County, Texas, No. DC-15-09089

JUDGMENT

In accordance with this Court's opinion of this date, the trial court's order denying appellant DALLAS COUNTY HOSPITAL DISTRICT D/B/A PARKLAND HEALTH AND HOSPITAL's Chapter 74 motion to dismiss is REVERSED and an order is RENDERED that:

dismisses with prejudice appellee CHARLIE WILSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DEBRA WILSON's claims against appellant DALLAS COUNTY HOSPITAL DISTRICT D/B/A PARKLAND HEALTH AND HOSPITAL.

The case is REMANDED to the trial court for further proceedings consistent with this Court's opinion.

It is ORDERED that appellant DALLAS COUNTY HOSPITAL DISTRICT D/B/A PARKLAND HEALTH AND HOSPITAL recover its costs of this appeal from appellee CHARLIE WILSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DEBRA WILSON.

Judgment entered this 7th day of August, 2019.

101st Judicial District Court,
Dallas County, Texas.

8/14/2018

No. DC-15-09089

CHARLIE WILSON, individually,
and as Representative of the
estate of DEBRA WILSON,
Plaintiff,

v.

DALLAS COUNTY HOSPITAL
DISTRICT, et al.,
Defendants.

ORDER

On August 14, 2018, came on to be heard Defendant's Objections to Plaintiff's Chapter 74 Expert Reports and Motion to Dismiss, and the Court having considered same and the arguments of counsel is of the opinion that the Objections should be overruled and the Motion denied. Accordingly,

IT IS HEREBY ORDERED that Defendant's objections to Plaintiff's Chapter 74 Expert Reports are overruled, and Defendant's Motion to Dismiss is in all things denied.

s/Staci Williams/

United States District Court
for the Northern District of
Texas, Dallas Division.

12/23/15

No. 3:15-CV-03942-G

DEBRA WILSON,
Plaintiff,
v.
DALLAS COUNTY HOSPITAL DISTRICT, et al.,
Defendants.

ORDER

Before the court is the parties' agreed motion for extension of deadlines (docket entry 6). The parties ask the court to enter an order that extends the deadline for the plaintiff, Debra Wilson, to respond to the motion to dismiss of the defendant, Dallas County Hospital District, to February 8, 2016. Agreed Motion for Extension of Deadlines ("Motion") at 1. Additionally, the parties ask the court to extend the 120-day period, provided under TEX. CIV. PRAC. & REM. CODE § 74.351, to file an expert report until May 9, 2016. *Id.* Next, the parties state that "The [p]arties expressly reserve any right to address whether [p]laintiff Wilson is under any obligation during the pendency of the federal cause of action to provide an expert report pursuant to TEX. CIV. PRAC. & REM. CODE § 74.351." Id. The parties met, conferred and agreed to the relief requested in the motion. *Id.*

The parties' motion requesting an extension of time for the plaintiff to file her response to the defendant's motion to dismiss until February 8, 2016 is GRANTED. Defendant shall electronically file its reply no later than February 22, 2016.

The parties' motion requesting an extension of time to file an expert report beyond the 120-day period provided under TEX. CIV. PRAC. & REM. CODE § 74.351 to May 9, 2016 is DENIED. The TEX. CIV. PRAC. & REM. CODE § 74.351 does not apply to the administration of this lawsuit in federal court. See *Nelson v. Myrick*, No. 3:04-CV-0828-G, 2005 WL 723459 at *4 (N.D. Tex. Mar. 29, 2005) (Fish, Chief J.) (holding that TEX. CIV. PRAC. & REM. CODE § 74.351 does not apply to the administration of a Texas malpractice suit in federal court on the basis of diversity because "there is a direct collision between § 74.351 and FED. R. CIV. P. 26 and FED. R. CIV. P. 37") (internal quotations omitted); *Poindexter v. Bonsukan*, 145 F. Supp. 2d 800, 803 (E.D. Tex. 2001) (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2005 (Supp. 2000)). The Federal Rules of Civil Procedure, and in particular FED. R. CIV. P. 26 and FED. R. CIV. P. 37, govern the court's administration of this lawsuit. *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 687 (5th Cir. 1991) (Federal courts are bound to apply state substantive law "when adjudicating [state law] claims, but in doing so [they] apply federal procedural law to the proceedings."); *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 91-92 (1938). The parties do not have any right to apply Texas civil procedure in federal court and cannot expressly reserve a right to address the applicability of TEX. CIV. PRAC. & REM. CODE § 74.351.

SO ORDERED.

s/Joe Fish/

United States District Court,
Northern District of Texas,
Dallas Division.

Debra Wilson, Plaintiff,
v.

Dallas County Hospital District d/b/a Parkland Health and Hospital System, and John Does, Defendants.

No. 3:15-CV-3942-BF

Signed 09/21/2016

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Opinion

MEMORANDUM OPINION & ORDER

PAUL D. STICKNEY, UNITED STATES MAGISTRATE JUDGE

Before the Court is Dallas County Hospital District d/b/a Parkland Health and Hospital System's ("Parkland") Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6) for Failure to State a Claim [ECF No. 13] ("Motion to Dismiss"). For the following reasons, Parkland's Motion to Dismiss [ECF No. 13] is **GRANTED in part**.

BACKGROUND

This case arises out of a left heart catheterization procedure performed at Parkland on November 1, 2007. 2d Am. Compl. 4, ECF No. 11. Debra Wilson ("Wilson") contends that during the procedure, a 20 centimeter piece of plastic catheter broke due to the defendants' negligence and remained inside her body. *Id.*, ECF No. 11. Wilson alleges that the defendants knew or should have known that the catheter broke and remained inside her body and failed to warn her that the surgery posed a risk that broken catheter pieces could remain in her body after her surgery. *Id.* at 5, ECF No. 11. Wilson contends that the defendants' failure to warn her of the risks associated with the surgery and their failure to inform her that she had broken catheter pieces in her body precluded her from making informed medical decisions and seeking further medical care. *Id.*, ECF No. 11.

Wilson states that she went to the emergency room at Parkland on August 18, 2014 because she experienced abdominal pains. *Id.*, ECF No. 11. Wilson states that, after several tests and a CT scan were conducted, a foreign body was found in her thoracic and abdominal aorta. *Id.*, ECF No. 11. Furthermore, the CT angiography showed what the examining physician described as an "interesting calcific linear density beginning in the descending thoracic aorta extending to the level of the distal abdominal aorta which has been described as a calcified catheter fragment." *Id.*, ECF No. 11. Plaintiff notified Parkland of this information in September of 2014. *Id.*, ECF No. 11. Wilson contends that she suffered multiple injuries to her abdomen and related areas which caused permanent bodily impairment and disfigurement. *Id.* at 6, ECF No. 11. Wilson states that she underwent numerous surgeries

and treatments for these injuries, has experienced severe physical pain and mental anguish, and has incurred substantial medical expenses. *Id.*, ECF No. 11. On August 11, 2015, Wilson filed her Original Petition in the 101st Judicial District Court in Dallas, Texas. Original Pet. 1, ECF No. 1 at 7. Wilson filed her Amended Petition on November 13, 2015. Am. Pet. 1, ECF No. 1 at 32. On December 11, 2015, Parkland removed the case to the Northern District of Texas. Notice of Removal 1, ECF No. 1 at 1. Wilson then filed her "Federal Complaint" on January 8, 2016. 2d Am. Compl. 1, ECF No. 11. In her second amended complaint, Wilson brings the following state claims against Parkland – **Count 1:** Negligence; **Count 2:** Lack of Informed Consent; **Count 3:** Fraudulent Concealment and/or Non-disclosure; **Count 4:** Negligent Condition or Use of Tangible Property; and **Count 5:** Alternative Claim for Unconstitutional Taking Pursuant to Article I, Section 17 of the Texas Constitution. *Id.* at 6-11, ECF No. 11.

Wilson also alleges the following state claims against the John Doe defendants, whom Wilson describes as the unknown doctors who performed her examinations, tests, treatments, and 2007 surgery – **Count 6:** Lack of Informed Consent; and **Count 7:** Fraudulent Concealment and Non-disclosure. *Id.* at 13-14, ECF No. 11. Wilson contends that, to the extent the John Doe defendants claim to be employees of a governmental entity, sovereign immunity does not apply to their acts of intentional non-disclosure and fraudulent concealment. *Id.* at 14, ECF No. 11. In addition, Wilson contends that *res ipsa loquitur* applies because: (a) the incident is such that it would not ordinarily occur in the absence of negligence; and (b) the instrumentality that

caused the injury was under the management and control of the defendants. *Id.* at 15, ECF No. 11. While Wilson stated in her January 8, 2016 second amended complaint that the "Defendant Doctors 'John Does' who operated on, treated, and withheld information from Plaintiff Wilson at Parkland are not identified at this time, but will be pending further discovery[,]" the case docket does not reflect that those defendants were identified and served at the time of the June 14, 2016 stay of discovery or anytime thereafter. *Id.* at 2, ECF No. 11; Order, ECF No. 28.

Wilson further alleges the following federal claims against Parkland – **Count 8:** Violation of Federal Constitutional Rights through Denial of Medical Care (42 U.S.C. §§ 1983, 1985, and 1986); **Count 9:** Violation of Federal Constitutional Right to Bodily Integrity (42 U.S.C. §§ 1983, 1985, and 1986); **Count 10:** Violation of Federal Constitutional Right to Bodily Privacy/Right Against Bodily Intrusion (42 U.S.C. §§ 1983, 1985, and 1986); **Count 11:** Violation of Federal Constitutional Rights Through Cover-Up of Violation of Federal Constitutional Rights (42 U.S.C. §§ 1983, 1985, and 1986); **Count 12:** Conspiracy to Violate Federal Constitutional Rights Through Cover-Up of Violation of Federal Constitutional Rights (42 U.S.C. §§ 1983, 1985, and 1986); **Count 13:** Conspiracy to Violate Federal Constitutional Rights Through Cover-Up of Violation of Federal Right (42 U.S.C. §§ 1983, 1985, and 1986); and **Count 14:** Alternative Claim for Unconstitutional Taking Pursuant to the Fifth Amendment to the United States Constitution. 2d Am. Compl. 18-29, ECF No. 11. In addition, Wilson "seeks a declaratory judgment that Section 101.101 of the Texas Civil Practice [and Remedies] Code is unconstitutional

and a violation of her 14th Amendment rights under the United States of America Constitution[,]" if the Court finds that "the foregoing causes of action do not otherwise provide a compensable remedy to Plaintiff." *Id.* at 29, ECF No. 11.

ANALYSIS

Under Federal Rule of Civil Procedure ("Rule") 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although Rule 8(a)(2) does not require detailed factual allegations, mere labels and conclusions do not suffice. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* Furthermore, under Rule 12(b)(6), a court examines pleadings by accepting all well-pleaded facts as true and viewing them in a light most favorable to the plaintiff. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citing*Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). A court may dismiss a complaint under Rule 12(b)(6) if the complaint, when viewed in a light most favorable to the plaintiff, fails to state a valid claim for relief. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). In considering a Rule 12(b)(6) motion to dismiss, the court takes as true all facts pleaded in the complaint, even if they are doubtful in fact. *See id.* A court, at this juncture, does not evaluate a plaintiff's likelihood of success, but only determines whether a plaintiff has stated a legally cognizable claim. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004).

As Parkland points out, Wilson must allege that she was deprived of a constitutional right pursuant to an official custom or policy in order to state a claim under 42 U.S.C. § 1983 ("Section 1983") against Parkland because it is a governmental entity. *Id.* at 4, ECF No. 13. Wilson's "description of a policy or custom and its relationship to the underlying constitutional violation... cannot be conclusory; it must contain specific facts." *Spiller v. City of Tex. City Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997). Furthermore, "[i]solated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984); *see also Hatcher v. City of Grand Prairie*, No. 3:14-CV-432-M, 2015 WL 181763, at *7-8 (N.D. Tex. Jan. 14, 2015) ("Plaintiffs fail to allege any factual basis to support a particular policy or custom-formal or informal-that led to the constitutional violations alleged in their complaint....They do not allege facts to establish any other instances where an individual has been shot or tasered for noncompliance with officer commands alone or any other information to suggest that any such conduct constitutes an unwritten custom of Grand Prairie....Plaintiffs' allegations are about one incident involving Officer Bement, which they allege resulted in a constitutional deprivation, from which Plaintiffs ask the Court to infer that Grand Prairie had a *de facto* policy or customary practice of allowing excessive force by its peace officers or that Grand Prairie engaged in ratification by inaction."). In addition, Wilson must "identify the policy, connect the policy to the governmental entity itself, and show that h[er] injury was incurred because of the application of that specific provision." *Hatcher*, 2015 WL 181763, at *7. As

Parkland argues, Wilson's second amended complaint wholly fails to allege the necessary facts to state a Section 1983 claim. *See* Mot. to Dismiss 6-7, ECF No. 13.

As Parkland further argues, Wilson's conspiracy related claims under Sections 1985 and 1986 also fail. *See id.* at 15-16, ECF No. 13. In order to "state a claim for relief under Section 1985(3), a plaintiff must allege (1) a conspiracy involving two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or deprivation of any right or privilege of a citizen of the United States." *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, Civ. Action No. 15-2177, 2016 WL 4479507, at *6 (E.D. La. Aug. 25, 2016) (citing *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994)). "In addition, the conspiracy must be motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.' " *Id.* (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993)). Wilson "must allege sufficient facts showing that the defendants conspired to discriminate against [her] on the basis of" race or other class-based animus. *Id.* (citing *Newsome v. E.E.O.C.*, 301 F.3d 227, 232 (5th Cir. 2002)).

It appears from Wilson's second amended complaint that she believes the defendants discriminated against her because she was "economically disadvantaged and not privately insured." *See* 2d Am. Compl. 26, ECF No. 11. However, as Parkland argues, "[a]ssuming that Wilson intends to invoke her economic and insurance

status as a class, precedent of the United States Supreme Court unequivocally establishes that a patient's inability to pay for medical care does not render the patient within a protected class for purposes of constitutional protection." Mot. to Dismiss 16, ECF No. 13; *Harris v. McRae*, 448 U.S. 297, 323 (1980) ("An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." (internal quotation marks and citations omitted)). In sum, as argued by Parkland, other than conclusory allegations, Wilson fails to state a conspiracy claim under Section 1985. Mot. to Dismiss 16, ECF No. 13. As Parkland further argues, Wilson's Section 1986 claim also fails, because Section 1986 is derivative of Section 1985. *See id.* at 16-17, ECF No. 13; 42 U.S.C. § 1986 ("Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured[.]").

As argued by Parkland, Wilson's alternative claim for unconstitutional taking under the Fifth Amendment of the United States Constitution also fails. Mot. to Dismiss 17-19, ECF No. 13; 2d Am. Compl. 28-29, ECF

No. 11. "The Fifth Amendment applies only to violations of constitutional rights by the United States or a federal actor." *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000). Wilson does not allege that Parkland acted under any federal authority. 2d Am. Compl. 28-29, ECF No. 11. Furthermore, because all of Wilson's underlying federal claims fail, her request for declaratory relief in connection with her federal claims also lacks merit. *Metropcs Wireless, Inc. v. Virgin Mobile USA, L.P.*, No. 3:03-CV-1658-D, 2009 WL 3075205, at *19 (N.D. Tex. Sept. 25, 2009) ("The federal Declaratory Judgment Act [ ], 28 U.S.C. §§ 2201, 2202, does not create a substantive cause of action. A declaratory judgment action is merely a vehicle that allows a party to obtain an 'early adjudication of an actual controversy' arising under other substantive law." (citations and internal quotation marks omitted)). To the extent Wilson seeks declaratory relief in connection with her state claims, she may seek such relief in state court as discussed below.

Having concluded that all of Wilson's federal claims against Parkland should be dismissed, the Court now considers Wilson's state law claims over which "[t]he Court has supplemental jurisdiction. through 28 U.S.C. § 1367(a)." *Exigis, LLC v. City of Dall.*, No. 3:15-CV-1372-N, 2016 WL 3360570, at *4 (N.D. Tex. Mar. 22, 2016). "However, under 28 U.S.C. § 1367(c)(3), the Court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction." *Id.* (citing *Rhyne v. Henderson Cty.*, 973 F.2d 386, 395 (5th Cir. 1992)). "In deciding whether to decline jurisdiction over pendent state law claims, courts should balance considerations of 'judicial economy, convenience, fairness and comity.' " *Id.*

(quoting *Batiste v. Island Records, Inc.*, 179 F.3d 217, 227 (5th Cir. 1999)). Having considered these factors, the Court declines to exercise supplemental jurisdiction over Wilson's remaining state law claims.

CONCLUSION

For the foregoing reasons, Parkland's Motion to Dismiss [ECF No. 13] is **GRANTED in part**. The Court dismisses Wilson's federal claims against Parkland and remands the remaining state law claims to the 101st Judicial District Court of Dallas County, Texas.

SO ORDERED, this 21st day of September, 2016.

United States District Court,
Northern District of Texas,
Dallas Division.

Debra Wilson, Plaintiff,
v.

Dallas County Hospital District d/b/a Parkland Health and Hospital System, and John Does, Defendants.

No. 3:15-CV-03942-D

Filed 02/02/2017

Plaintiff's Notice of Appeal

Notice is hereby given that Plaintiff Charlie Wilson, individually, and as administrator of the estate of Debra Wilson, plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Court's final judgment entered in this action on the 21st day of September, 2016 [Doc. 33]. The orders appealed from include, but are not necessarily limited to, following:

1. Order Granting in Part Dallas County Hospital District d/b/a Parkland Health and Hospital System's ("Parkland') Motion to Dismiss Pursuant to Rule 12(b)(6) for Failure to State a Claim, dated September 21, 2016 [Doc. 32];

2. Judgment dismissing all of Plaintiff's federal claims against Defendant Parkland, dated September 21, 2016 [Doc. 33]; and

3. Order Denying Plaintiff's Motion for New Trial or Alternatively, to Alter or Amend Judgment and Plaintiff's Unopposed Notice of Suggestion of Death and Unopposed Motion for Leave to Substitute Plaintiff, dated January 23, 2017 [Doc. 39].

s/D. Bradley Kizzia/