

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.

United States Court of Appeals,
Fifth Circuit.

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. 17-10139 Summary Calendar

Filed October 24, 2017

Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:15-CV-3942

Attorneys and Law Firms

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Before BENAVIDES, SOUTHWICK, and COSTA,
Circuit Judges.

Opinion

PER CURIAM:*

Plaintiff-Appellant Charlie Wilson, surviving spouse of Plaintiff Debra Wilson, appeals the district court's grant of the Defendant-Appellee's motion to dismiss and the denial of his motion for new trial.¹ We AFFIRM the judgment dismissing the federal claims for failure to state a claim and AFFIRM as MODIFIED the order denying the motion for new trial.

I. FACTUAL AND PROCEDURAL HISTORY

In November 2007, Plaintiff Debra Wilson (“Wilson”) underwent a heart catheterization procedure performed at Defendant-Appellee Parkland Health & Hospital System (“Parkland”). Plaintiff-Appellant contends that during this procedure the hospital staff negligently left a piece of a plastic catheter in Wilson's body. Appellant claims that although Wilson received multiple treatments (including x-rays) at Parkland over the next seven years, Parkland deliberately withheld and concealed this information from her.

In August 2014, Wilson sought care from the emergency room at Parkland, and a CT angiography revealed the calcified catheter fragment extended from her thoracic aorta to her abdominal aorta. Subsequently, Wilson was advised of this discovery.

In August 2015, Wilson brought suit in state court against Parkland and Dr. John Doe, alleging, among other things, negligence, lack of informed consent, and fraudulent nondisclosure. Parkland responded by filing

a plea to the jurisdiction and motion for summary judgment. Wilson amended her suit to add claims under federal law, including violation of a constitutional right to bodily privacy/right against bodily intrusion, cover-up of violation of federal constitutional rights, conspiracy to violate federal constitutional rights, and an alternative claim for unconstitutional taking pursuant to the Fifth Amendment.

Parkland filed a notice of removal of the case to the Northern District of Texas. Shortly thereafter, Parkland filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In response, Wilson amended her complaint. Parkland filed a second motion to dismiss for failure to state a claim. The parties consented to proceed before a magistrate judge.

The magistrate judge issued an opinion dismissing Wilson's federal claims for failure to state a claim. The opinion also declined to exercise supplemental jurisdiction over the state law claims, and thus, the state law claims were remanded to state court. Subsequently, Wilson passed away.

Pursuant to Federal Rule of Civil Procedure 59, Charlie Wilson filed a motion for new trial and, in the alternative, for leave to allow him to amend the complaint. The magistrate judge denied this motion, stating that “it lacked subject matter jurisdiction because Plaintiff's federal claims did not survive Parkland's motion to dismiss; the basis of the Court's jurisdiction under section 1331. This Court no longer has jurisdiction in this matter. Therefore, the Court is without the requisite authority to grant Plaintiff leave

to file an amended complaint.” Opinion at ——. The magistrate judge also quoted the following language from *Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984): “The federal court is completely divested of jurisdiction once it mails a certified copy of the order to the clerk of the state court.” *Id.*² Wilson now appeals.

II. ANALYSIS

A. Appellate Jurisdiction

Parkland asserts that although this Court has jurisdiction to review the magistrate judge's order dismissing Wilson's federal claims, we do not have jurisdiction to review either the magistrate judge's (1) denial of Wilson's Rule 59 motion or (2) the remand order because it was “premised on [a] lack of subject matter jurisdiction.” Brief at p.23 & Statement of Jurisdiction.

As previously set forth, in its remand order, the magistrate judge expressly stated that it declined to exercise supplemental jurisdiction over Wilson's remaining state law claims. This Court has explained that it “has jurisdiction to review a remand order unless the case was remanded for lack of subject matter jurisdiction or there was a defect in the removal procedure.” *Camsoft Data Systems, Inc. v. S. Elec. Supply, Inc.*, 756 F.3d 327, 332 (5th Cir. 2014) (citing 28 U.S.C. §§ 1447(c), (d); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 637, 129 S.Ct. 1862, 173 L.Ed.2d 843 (2009)). When a district court declines to exercise supplemental jurisdiction over state law claims, that “decision is not jurisdictional.” *Id.* Indeed, this Court has “consistently exercised appellate jurisdiction to

review remand orders in which ‘the district court declined to exercise supplemental jurisdiction after first concluding it lacked original subject matter jurisdiction [over the state law claims].’ ” *Jefferson v. Certain Underwriters at Lloyd's London*, 658 Fed.Appx. 738, 740 (5th Cir. 2016) (quoting *Vaillancourt v. PNC Bank, Nat. Ass'n*, 771 F.3d 843, 846 (5th Cir. 2014)). Thus, contrary to Parkland's assertions otherwise, this Court has jurisdiction to review the magistrate judge's orders.

B. Dismissal of Federal Claims

We review de novo a district court's grant or denial of a Rule 12(b)(6) motion, “accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff.” *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007). However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Id.* (citation omitted). A “claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950.

Wilson contends that without adequate discovery, he could not know the specific facts needed to survive the

motion to dismiss for failure to state a claim. Blue brief at 18. We have explained that discovery is not needed to dispose of a Rule 12(b)(6) motion because those motions “are decided on the face of the complaint.” *Landry v. Air Line Pilots Ass’n*, 901 F.2d 404, 435 (5th Cir. 1990). Wilson also contends that the magistrate judge improperly applied a higher standard than what this Court requires to survive a Rule 12(b)(6) motion. Here, the magistrate judge cited and applied the correct standard under Rule 12(b)(6). *See* opinion at p. — (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). Even if the incorrect standard had been applied, we review this claim *de novo*.

In order to plead a section 1983 claim, Wilson was required to allege facts demonstrating that (1) the defendant violated the Constitution or federal law and (2) that the defendant was acting under color of state law while doing so. *See Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252-53 (5th Cir. 2005), *abrogated on other grounds by Kingsley v. Hendrickson*, — U.S. —, 135 S.Ct. 2466, 2473, 192 L.Ed.2d 416 (2015). Wilson complains that the magistrate judge failed to acknowledge the full extent of the pleadings which incorporated by reference a “news article outlining a pattern of neglect and deception on the part of the [Parkland].” Blue brief at 18. Wilson contends that the complaint and the investigative newspaper article established multiple instances of negligence and cover-up on the part of Parkland. Even assuming *arguendo* that the complaint sufficiently raised allegations that Parkland had a custom or policy of committing medical errors, alleging negligence is not enough. As stated above, Wilson must allege facts demonstrating

Parkland violated the Constitution or federal law. Allegations of medical negligence do not rise to the level of a due process claim. *Kinzie v. Dallas Cnty. Hosp. Dist.*, 106 Fed.Appx. 192, 194 (5th Cir. 2003). Further, Wilson was not in the custody of the state, and thus, had no “special relationship” with the state sufficient to establish a constitutional right to medical care. *Id.* at 195. (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197-200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)). In sum, because the allegations in Wilson's complaint do not rise to the level of a constitutional claim, all the federal claims fall by their own weight. Accordingly, we conclude that the magistrate judge properly dismissed Wilson's federal claims pursuant to Rule 12(b)(6).

C. Rule 59 Motion

1. Magistrate Judge's Jurisdiction

Wilson contends that the magistrate judge erred in finding that it lacked jurisdiction to address the merits of his Rule 59 motion for new trial. We agree.

After the magistrate judge remanded the state claims, Wilson filed a Rule 59 motion for new trial or, in the alternative, for leave to allow him to amend the complaint. The magistrate judge held that because it had already remanded the state law claims to state court, it was divested of jurisdiction over the case. The magistrate judge therefore ruled that it did not have jurisdiction to rule on Wilson's Rule 59 motion.

Although this Court has precedent holding that a district court is divested of jurisdiction once the remand

order is sent to the clerk of the state court, those cases involved orders remanding based on a lack of subject matter jurisdiction. *In re Shell Oil Co.*, 932 F.2d 1523, 1528 (5th Cir. 1991) (citing *Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984); *New Orleans Public Serv., Inc. v. Majoue*, 802 F.2d 166 (5th Cir. 1986)). Remand orders based on a lack of subject matter jurisdiction are not reviewable. *Id.* However, as explained above, in the instant case, the remand order is not jurisdictional and is thus reviewable. “It is clear that, where an exception to non-reviewability exists, ‘an appellate court has jurisdiction to review the remand order, and a district court has jurisdiction to review its own order, and vacate or reinstate that order.’ ” *Id.* (quoting *In re Shell Oil Co.*, 631 F.2d 1156, 1158 (5th Cir. 1980)). Accordingly, the magistrate judge erroneously held that it had no jurisdiction to rule on Wilson's Rule 59 motion.

2. Merits of Rule 59 motion

Because the magistrate judge held that it had no jurisdiction, it did not address the merits of the arguments in the Rule 59 motion. In the interests of judicial economy and because we find a remand would be futile, we address the motion in the first instance. *Cf. McKinney v. Irving Indep. School Dist.*, 309 F.3d 308, 315 (5th Cir. 2002) (explaining that remanding the case to allow another amendment would simply prolong the inevitable).

In the Rule 59 motion, Wilson requested a new hearing or, in the alternative, leave to amend the complaint. We quickly dispense with the request for a new hearing.

This case was resolved on the face of the complaint under Rule 12(b)(6). No hearing was necessary.

With respect to the request for leave to amend the complaint, Wilson contends the court should have granted leave to amend the complaint as a matter “of course.” Wilson is mistaken. Federal Rule of Civil Procedure 15(a)(1) provides that: “A party may amend its pleading *once* as a matter of course within [certain parameters].” (emphasis added). Here, Wilson had already amended the complaint in federal district court prior to the order of dismissal.

In the brief on appeal, Wilson asserts that this is a case of deliberate indifference—not just negligence. Wilson apparently seeks leave to add a claim of deliberate indifference. However, in the motion seeking leave to amend, Wilson never claimed deliberate indifference. In any event, as explained above, Wilson did not have a “special relationship” with the state sufficient to establish a constitutional right to medical care. *Kinzie*, 106 Fed.Appx. at 195. Thus, Wilson is precluded from showing a claim of deliberate indifference.

Finally, Wilson seeks to add a claim of wrongful death based on Debra Wilson's death, which occurred after the dismissal order but before the Rule 59 motion. However, the wrongful death claim is likewise premised upon the medical care (or lack thereof) that Wilson received. Again, under the circumstances of this case, Wilson, who was not in the custody of the state, is precluded from establishing a constitutional right to medical care. In sum, although the magistrate judge improperly denied the Rule 59 motion based on lack of

jurisdiction, we conclude in the first instance that the Rule 59 motion is denied on the merits of the claims.

III. CONCLUSION

For the above reasons, we AFFIRM the district court's judgment dismissing the complaint for failure to state a claim pursuant to Rule 12(b)(6). We AFFIRM as MODIFIED the district court's order denying the Rule 59 motion.

Footnotes

*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.

1This Court previously granted the unopposed motion for leave to substitute Charlie Wilson, who is executor of his wife's estate, as Appellant in the instant appeal.

2The magistrate judge denied as moot the unopposed Notice of Suggestion of Death and the Unopposed Motion for Leave to Substitute Plaintiff.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS DALLAS
DIVISION

1/23/17

No. 3:15-CV-3942-BF

DEBRA WILSON,
Plaintiff,

v.

DALLAS COUNTY HOSPITAL
DISTRICT, et al.,
Defendants.

ORDER

Before the Court is Plaintiff's Motion for New Trial or Alternatively, to Alter or Amend Judgment [ECF No. 35] and Plaintiff's Unopposed Notice of Suggestion of Death and Unopposed Motion for Leave to Substitute Plaintiff [ECF No. 36]. For the following reasons, both motions are DENIED.

Background

This case arises out of a heart catheterization procedure performed at Defendant Dallas County Hospital District d/b/a Parkland Health and Hospital System ("Parkland") on November 1, 2007. Second Am. Compl. 4 [ECF No. 11]. Debra Wilson ("Plaintiff") contends that during the procedure, a twenty

centimeter piece of a plastic catheter broke due to Defendants' negligence and remained inside her aorta. *Id.* [ECF No. 11]. Plaintiff alleges that 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]. On September 21, 2016, this Court granted in part Parkland's Motion to Dismiss [ECF No. 13]. Mem. Op. & Order 1 [ECF No. 32]. The Court entered its Final Judgment dismissing all of Plaintiff's federal claims against Parkland and remanding Plaintiff's state law claims to the 101st Judicial District Court of Dallas County, Texas. *See* J. [ECF No. 33]. The United States District Clerk sent a certified copy of the order and judgment to the state district court. *See* Remand Letter 1 [ECF No. 34].

On September 21, 2016, Plaintiff passed away and Plaintiff alleges this was due, at least in part, as a result of her injuries arising from the allegations against Defendants in this case. Pl.'s Mot. 2 [ECF No. 35]. Plaintiff motions the Court to grant her a new trial or alternatively, alter or amend the judgment pursuant to Federal Rules of Civil Procedure 59(a) and 59(e). *Id.* [ECF No. 35]. Plaintiff also requests the Court to grant leave for Plaintiff to substitute Charlie Wilson, individually and as representative of Plaintiff's estate, as the plaintiff in this case. Pl.'s Motion for Leave to Substitute 2 [ECF No. 36].

Analysis Jurisdiction After Remand

Although not raised by the parties, this Court must determine if it still has jurisdiction over this case.

Subject matter jurisdiction may be raised by a court *sua sponte*. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999). In fact, at any level of the proceedings, a federal court has an independent duty to examine whether it has subject matter jurisdiction over the case. *See id.* at 583 (“[S]ubject matter delineations must be policed by the courts on their own initiative even at the highest level.”). This Court finds it is without jurisdiction pursuant to 28 U.S.C. § 1447(d) which provides,

An order remanding a case to the State court from which it was removed is *not reviewable on appeal or otherwise*, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d) (emphasis added). “The Supreme Court has clarified that [§] 1447(d) only applies when the remand in question is made on the basis of [§] 1447(c), which states in pertinent part: ‘[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.’” *Garza v. Essex Ins. Co.*, No. 7:16-CV-00143, 2016 WL 5534310, at *1 (S.D.Tex. Sept. 29, 2016) (citing *Powerex Corp. v. Reliant Energy Svcs., Inc.*, 551 U.S. 224, 229 (2007); 28 U.S.C. § 1447(c)). “[Section 1447(d)] should be read in *pari materia* with section 1447(c), so that only remands based on the grounds specified in the latter are shielded by the bar on review mandated by the former.” *Powerex Corp.*, 551 U.S. at 229. “Section 1447(d) has an exception: it does not apply to actions that were initially removed

under 28 U.S.C. §§ 1442 or 1443.” *Garza*, 2016 WL 5534310, at *1. The Court notes that Defendants removed this case to federal court pursuant to 28 U.S.C. § 1331. Notice of Removal 2 ¶ 5 [ECF No. 1].

This Court dismissed all of Plaintiff’s federal claims arising under 42 U.S.C. §§ 1983, 1985, and 1986, along with Plaintiff’s claim for unconstitutional taking under the Fifth Amendment of the United States Constitution. Mem. Op. & Order 5, 7 [ECF No. 32]. The Court also held that because all of Plaintiff’s federal law claims failed, her request for declaratory relief in connection with her federal claims also failed. *Id.* at 7 [ECF No. 32]. The Court declined to exercise supplemental jurisdiction pursuant to 28 U.S.C. 1367(c)(3) over Plaintiff’s remaining claims. *Id.* at 8 [ECF No. 32].

“[E]ven if the trial court neither states as grounds for remand the specific words of § 1447(c) nor cites the statute itself, the order is unreviewable if, by substantially similar language, it is evident that the court intends to remand for the grounds recited in § 1447(c).” *Hernandez v. Freeport McMoran, Inc.*, 1992 WL 78398, at *2 (E.D.La. Apr. 7, 1992) (citing *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023, 1027 (5th Cir.), *cert. denied*, 112 S.Ct. 176 (1991)). “The magic words ‘this case does not contain a federal claim’ rendered the district court’s remand order unreviewable.” *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994). Although the Court did not specifically cite to § 1447(c), it is clear from the Opinion & Order that this Court remanded this case for lack of subject matter jurisdiction. *See id.* at 7-8 [ECF No. 32]. Furthermore, “[n]ot only may the order not be appealed, but the

district court itself is *divested of jurisdiction* to reconsider the matter. Thus, even if it later decides the order was erroneous, a remand order cannot be vacated even by the district court.” *New Orleans Pub. Serv., Inc. v. Majoue*, 802 F.2d 166, 167 (5th Cir. 1982) (citing cases) (emphasis added); *see also Robertson v. Ball*, 534 F.2d 63, 66 n.5 (5th Cir. 1976) (“[O]nce the federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect.”).

Additionally, this Court declines to grant Plaintiff’s request to amend her complaint. *See* Pl.’s Mot. 4-5 [ECF No. 35]. After removal, the Court found that it lacked subject matter jurisdiction because Plaintiff’s federal claims did not survive Parkland’s motion to dismiss; the basis of the Court’s jurisdiction under § 1331. This Court no longer has jurisdiction in this matter. Therefore, the Court is without the requisite authority to grant Plaintiff leave to file an amended complaint. *Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984) (“The federal court is completely divested of jurisdiction once it mails a certified copy of the order to the clerk of the state court.”) (citing 28 U.S.C. § 1447(c)); *see also Fed. Deposit Ins. Corp. v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979) (“[O]nce a district court has decided to remand a case and has so notified the state court, the district judge is without power to take any further action.”). Do to a lack of jurisdiction, this Court is unable to determine if Plaintiff meets the factors for relief under Rule 59. FED. R. CIV. P. 59; *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003) (“[A]

motion to alter or amend the judgment under Rule 59(e) must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot be used to raise arguments which could, and should, have been made before the judgment issued.”).fn1

Accordingly, the Court finds that under 28 U.S.C. § 1447(d) it cannot review its order remanding this case and is divested of jurisdiction.

CONCLUSION

Thus, Plaintiff’s Motion for New Trial or Alternatively, to Alter or Amend Judgment [ECF No. 35] is **DENIED**. Plaintiff’s Unopposed Notice of Suggestion of Death and Unopposed Motion for Leave to Substitute Plaintiff [ECF No. 36] is **DENIED** as moot.

SO ORDERED, this 23rd day of January, 2017.

Footnote

¹ The Court also notes that since Plaintiff did not have a trial, she cannot satisfy the requisite elements to be granted a new trial. *See* FED. R. CIV. P. 59(a).

United States District Court,
N.D. 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 Court of Appeals,
Fifth Circuit.

Date Filed: 11/27/2017

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. 17-10139

Filed October 24, 2017

Appeal from the United States District Court for the
Northern District of Texas, USDC No. 3:15-CV-3942

Before BENAVIDES, SOUTHWICK, and COSTA,
Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:*

It is ordered that the petition for rehearing is DENIED

s/

US Circuit Court Judge