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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 24-50956

MELISSA HICKSON, *Individually and as the Independent Administrator of* THE ESTATE OF MICHAEL HICKSON, *deceased and as next friend of* M.H, M.H. and M.H. (*all minors*); MARQUES HICKSON,

Plaintiffs—Appellants,

versus

ST. DAVID'S HEALTHCARE PARTNERSHIP, L.P., L.L.P.; DR. DEVRY ANDERSON; HOSPITAL INTERNISTS OF TEXAS; CARLYE MABRY CANTU; VIET VO,

Defendants—Appellees.

Appeal from the United States District
Court
for the Western District of Texas
USDC No. 1:21-CV-514

Before KING, JONES, and WILSON, *Circuit Judges*.

EDITH HOLLAN JONES, *Circuit Judge*:

In June 2020, St. David's Healthcare Partnership, L.P., LLP d/b/a St. David's South Austin Medical Center ("St. David's Healthcare") stopped giving food and fluids to Michael Hickson, a loving husband and father of five who was hospitalized for illnesses that he had previously

overcome. The doctors told Michael's wife that his inability to walk or talk meant he had a low quality of life. Michael passed away. His surviving family sued St. David's Healthcare and several doctors for disability discrimination, violation of 42 U.S.C. § 1983, and on various state-law theories. The district court dismissed or granted summary judgment on all claims. We AFFIRM in part and VACATE and REMAND in part. In particular, the federal claims based on the allegations that he was denied medical treatment solely because of his disability may go forward, along with the state claims relating to informed consent and intentional infliction of emotional distress.

I. Background

According to plaintiffs' allegations, Michael Hickson became severely disabled in May 2017 when he suddenly went into cardiac arrest and suffered anoxic brain injury. First responders arrived on the scene to help resuscitate him. But their aggressive resuscitation efforts injured Michael's spinal cord. Ultimately, he experienced quadriplegia, motor weakness, vision loss, slow speech, short-term memory loss, difficulty swallowing, and difficulties with bowel and bladder management. From that time, Michael required assistance to eat, dress, groom, bathe, toilet, and transfer to and from his wheelchair.

Michael was still active in other ways. He could laugh at jokes, do math with his children, respond "yes" or "no" to questions by nodding or shaking his head, speak with his wife and children (in a limited, slow, and muted manner), and sing and pray with family.

Given Michael's condition, his wife Melissa sought in court to become his permanent guardian and refiled the application after the family moved from Dallas to Austin.

But one of Michael's sisters contested Melissa's guardianship application. Before reaching a final decision, the probate court appointed Family Eldercare, Inc. ("Family Eldercare") as Michael's temporary guardian. Family Eldercare assigned employee Ashley Nicole Yates as Michael's temporary guardian until April 1, 2020, when Jessica Drake, a trainee-subordinate, assumed those duties.

Meanwhile, Michael's spinal-cord injury left him susceptible to infections. He was thus hospitalized several times but recovered from recurring urinary tract infections, sepsis, and pneumonia.

The fatal hospitalization occurred in June 2020, when Michael was again admitted to St. David's Healthcare for pneumonia, urinary tract infection, sepsis, and suspected COVID-19. When Michael arrived in the emergency department, St. David's Healthcare used a Modified Early Warning Score to assess risk of mortality and the corresponding level of care that Michael needed. The assessment showed that Michael had a 70% chance of survival.

Despite this chance of survival and Michael's recovery three months earlier after a similar hospitalization, Dr. Steven Jennings suggested to Dr. Carlye Cantu that Michael should be placed on hospice and his code status should indicate do-not-resuscitate ("DNR"). Dr. Cantu acquiesced and developed a care plan that included comfort measures and assistance from palliative-care personnel. Dr. Cantu informed the palliative-care team that comfort care would be a "kind" choice because of Michael's poor quality of life.

Over the next few days, Michael's health fluctuated. He responded quickly to antibiotics but intermittently re-

quired oxygen. He experienced lung aspirations that required the hospital to stop feeding him, as well as a high fever.

Michael's health eventually began to stabilize, however. Jessica from Family Eldercare emailed Melisa that her husband's health was stable and vital signs were improving. His feeding tubes were restarted. His renal function normalized. He only required minimum oxygen at times. And he was able to visit with his wife and children via FaceTime. Michael was "very responsive, smiling[,] and reacting to their conversation."

But after the visit, a nurse told Melissa that Michael was being transferred to inpatient hospice. Melissa then spoke to Dr. Vo, her husband's doctor. Dr. Vo explained that Michael had been moved to hospice and placed on DNR. When Melissa pressed Dr. Vo and the hospital on why they would not treat her husband, Dr. Vo responded that her husband "[did not] have much" of a quality of a life because of his paralysis and brain injury. Dr. Vo also opined that Michael's quality of life was "different" from other patients who were receiving aggressive treatment because other patients were walking and talking. Michael's doctors thus stopped the antibiotics, transferred him to hospice, renewed the DNR order, and ordered the withdrawal of all life-sustaining treatment. Even though Michael's treatment had been working and his chance of survival was still 70%, his doctors ordered cessation of food and fluids.

Miraculously, three days later, Michael's condition improved. The hospital's ethics consultant, a palliative-care nurse, and Dr. Cantu questioned whether inpatient hospice care was still appropriate. But life-sustaining treat-

ments were never restarted. Instead, a hospice nurse reduced Michael's feeding tube to "a low trickle rate" to prevent stomach pain, while still denying fluids.

During this time, Melissa tried to visit her husband. Visitors apparently were not allowed, so at most, Melissa could only experience a FaceTime visit. With no success, Melissa repeatedly called the hospital over the following days to arrange a FaceTime with her husband. Instead, St. David's Healthcare kept telling her that Michael was "comfortable." Eventually, she was advised to call Family Eldercare for more information.

Melissa thus tried multiple times to contact Jessica, the temporary guardian, and eventually received an email from Alice, Jessica's supervisor, stating that Michael had improved and may have to have his hospice care reevaluated. But Family Eldercare responded that Melissa needed to call the hospital to set up visits. Still struggling to get answers from either the hospital or Family Eldercare, Melissa eventually spoke with an individual from hospice care who told her that her husband had passed away, and his body was being sent to a funeral home.

Seventeen days later, Melissa posted a video on Facebook where she complained about Michael's care at St. David's Healthcare and the failings of Family Eldercare. In response, the Chief Medical Officer for St. David's Healthcare, Dr. Anderson, posted a statement on the hospital's website. Dr. Anderson disclosed a significant amount of Michael's protected health information to support his contention that the hospital did not unlawfully withhold treatment because Michael allegedly experienced multi-system organ failure. He slurred Melissa by reporting that the family court declined to appoint her as her husband's temporary guardian and that it was uncommon for guardianship to be taken away from a family

member. Dr. Anderson further stated that Melissa was allowed visitation only when "security was present," and he had "legal authority" from Family Eldercare as the temporary guardian to disclose Michael's protected health information.

Melissa and the family sued St. David's Healthcare, Dr. Anderson, Dr. Cantu, the Hospital Internists of Texas (the organization directly employing Dr. Cantu), and Dr. Vo.[1] They asserted ten claims covering four categories: disability discrimination under § 504 of the Rehabilitation Act of 1973 and § 1557 of the Patient Protection and Affordable Care Act ("ACA") against St. David's Healthcare; various state law medical negligence, informed consent, and wrongful death claims against the hospital and Drs. Vo and Cantu; § 1983 violations; and intentional infliction of emotional distress against the hospital and Dr. Anderson.

Defendants moved to dismiss the Hicksons' complaint. The magistrate judge recommended that the district court dismiss the disability discrimination claims; § 1983 claims; claims against Dr. Vo and Dr. Cantu; and Melissa's intentional infliction of emotional distress ("IIED") claim. The plaintiffs timely objected only to the magistrate judge's recommendation on the disability discrimination and § 1983 claims.

The district court overruled the objections and dismissed with prejudice all the claims recommended by the magistrate judge for dismissal. Certain negligence, negligence per se, and wrongful-death claims remained. Later, the district court granted summary judgment to

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[1] Plaintiffs also sued and settled with Family Eldercare and Jessica Drake.

the defendants on those remaining state law claims. The Hicksons appealed.

II. Standard of Review

This court reviews the district court's order granting a FED. R. CIV. P. 12(b)(6) motion to dismiss de novo, "'accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs.'" *Teeuwissen v. Hinds County*, 78 F.4th 166, 170 (5th Cir. 2023) (quoting *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018)). The court does not "presume true a number of categories of statements, including legal conclusions; mere labels; threadbare recitals of the elements of a cause of action; conclusory statements; and naked assertions devoid of further factual enhancement." *Harmon v. City of Arlington*, 16 F.4th 1159, 1162–63 (5th Cir. 2021) (internal quotation omitted). A complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009). The district court's decision to dismiss with prejudice is reviewed for abuse of discretion. *Dobbin Plantersville Water Supply Corp. v. Lake*, 108 F.4th 320, 325 (5th Cir. 2024) (citing *Club Retro, LLC v. Hilton*, 568 F.3d 181, 215 n.34 (5th Cir. 2009)).

III. Discussion

The Hicksons challenge the dismissal of several claims. They assert that, contrary to the district court, disability laws do not categorically preclude disability-discrimination claims related to medical-treatment decisions; the defendants acted under color of state law for purposes of § 1983 liability; their informed consent and failure to guide claims against Dr. Vo and Dr. Cantu should not have been dismissed; and Melissa asserted a

cognizable IIED claim against St. David's Healthcare. Each is discussed below.[2]

A. Disability Discrimination

The Hicksons contend that St. David's Healthcare discriminated against Michael by reason of his disability because the reason St. David's Healthcare stopped treating him was his inability to walk or talk. Put more specifically, they raise the question whether an adverse medical treatment decision can be the basis of a disability discrimination claim.

We agree that the district court erred in holding categorically that no disability discrimination can arise from the medical treatment of disabled persons. Although one previous decision observed that disability discrimination laws do not "*typically* provide a remedy for negligent medical treatment," *Carter ex rel. Carter v. City of Shreveport*, 144 F.4th 809, 815 (5th Cir. 2025) (emphasis added), that does not mean that the failure to treat a patient can *never* constitute disability discrimination. Under § 504 of the Rehabilitation Act[3] and § 1557 of the

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[2] As to other claims originally raised and rejected by the district court, the plaintiffs have failed to brief and accordingly have forfeited any arguments on appeal pertaining to those. *See* FED. R. APP. P. 28(a)(8) (an appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *Boone v. Rankin Cnty. Pub. Sch. Dist.*, 140 F.4th 697, 711 (5th Cir. 2025) ("[F]ailure to raise an issue on appeal constitutes waiver of that argument.") (internal quotation omitted).

[3] Section 504 prohibits "any program or activity receiving Federal financial assistance" from discriminating against an otherwise qualified individual "*solely* by reason of her or his disability." 29 U.S.C. § 794(a) (emphasis added).

ACA,[4] a plaintiff establishes a prima facie case by proving that "(1) he has a qualifying disability; (2) he is being excluded from participation in, denied the benefits of, or otherwise discriminated against by a covered entity; and (3) such discrimination is by reason of his disability." *Francois v. Our Lady of the Lake Hosp., Inc.*, 8 F.4th 370, 378 (5th Cir. 2021) (internal citation omitted). Importantly, "the plaintiff must establish that disability discrimination was the sole reason for the exclusion or denial of benefits." *Cummings v. Premier Rehab Keller*, P.L.L.C., 948 F.3d 673, 676 (5th Cir. 2020) (emphasis added) (internal quotation omitted), *aff'd*, 596 U.S. 212, 142 S.Ct. 1562 (2022). In the statute, "[t]he word *solely* provides the key: the discrimination must result from the handicap and from the handicap alone." *Johnson ex rel. Johnson v. Thompson*, 971 F.2d 1487, 1493 (10th Cir. 1992) (emphasis in original).

Several other circuits recognize that a plaintiff may state a disability discrimination claim for a denial (or provision) of medical treatment by alleging that "the defendants made treatment decisions based on factors that are 'unrelated to, and thus improper to consideration of' the inquiry in question." *McGugan v. Aldana-Bernier*, 752 F.3d 224, 234 (2d Cir. 2014) (quoting *United States v. Univ. Hosp., State Univ. of N.Y. at Stony Brook*, 729 F.2d 144, 156 (2d Cir. 1984))); *see also Lesley v. Hee Man Chie*, 250 F.3d 47, 57 (1st Cir. 2001) (an inference of discrimina-

[4] Section 1557 prohibits discrimination based on any of the grounds protected under the Rehabilitation Act (among others), 42 U.S.C. § 18116(a), thereby incorporating the Rehabilitation Act's substantive analytical framework for any disability-discrimination claims. *Francois v. Our Lady of the Lake Hosp., Inc.*, 8 F.4th 370, 378 (5th Cir. 2021) (citing *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 239 (6th Cir. 2019)).

tion may be warranted "[o]nly where the physician's judgment is entirely without any reasonable medical basis"). As the Seventh Circuit explained, "the term 'discrimination' can have a benign (and perfectly lawful) sense, in which a health care provider makes a discriminating professional judgment about the type of treatment to provide to a patient, but [it] can also have a pejorative sense that describes actions taken based on irrelevant criteria under the influence of irrational bias." *Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473, 486 n.6 (7th Cir. 2019) (citing *McGugan*, 752 F.3d at 231–32); *see also McDaniel v. Syed*, 115 F.4th 805, 825–26 (7th Cir. 2024) (concluding that a prison's decision to house the plaintiff in a unit without stairs was more than inadequate medical care and not a real medical treatment decision as the prison contended).

Consistent with the statutes and these decisions, we hold that a plaintiff asserts a cognizable claim for disability discrimination based on adverse medical treatment decisions—or decisions not to treat—when allegations show that the treatment was based "solely," in the pejorative sense, on the individual's disability. 29 U.S.C. § 794(a). A contrary categorical holding that medical treatment decisions can never qualify as disability discrimination could shield improper conduct, such as refusing to prescribe flu medication to a blind person only because of his blindness or refusing to set a person's broken arm only because she is diabetic. Accordingly, we do not accept statements by other circuits that medical treatment decisions, or the withholding of medical care, never qualify as disability

discrimination.[5] Any categorical bar to disability discrimination liability in this context contravenes the statutory text and common sense. The district court erred in holding otherwise.

B. Section 1983

The Hicksons contend that the district court was mistaken when it found that the hospital and Drs. Vo and Cantu were not state actors for purposes of asserting some kind of liability based on 42 U.S.C. § 1983. These defendants, they assert, "act[ed] in concert" with Michael's temporary legal guardian, who qualifies as a state actor, and the defendants "stepped into the State's traditional and exclusive role" as *parens patriae* when they ignored the family's request to take Michael off of DNR status and stopped provided life-sustaining treatment. These assertions are ill founded.

First, appointed guardians are not state actors. Under Texas law, a court may only appoint a temporary guardian if it "is necessary to protect the proposed ward or the proposed ward's estate." TEX. EST. CODE § 1251.051. Guardians therefore do not represent the State of Texas. They represent individuals. Jessica's role

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[5] *See, e.g., Dinkins v. Corr. Med. Servs.*, 743 F.3d 633, 634 (8th Cir. 2014) (per curiam) (affirming dismissal because "claims were based on medical treatment decisions—including not properly diagnosing and treating Dinkins's pernicious anemia—which cannot form the basis of a claim under the RA or the ADA"); *Burger v. Bloomberg*, 418 F.3d 882, 883 (8th Cir. 2005) (per curiam) ("[A] lawsuit under the Rehab Act or the Americans with Disabilities Act (ADA) cannot be based on medical treatment decisions."); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1294 (11th Cir. 2005) ("The Rehabilitation Act, like the ADA, was *never* intended to apply to decisions involving the termination of life support or medical treatment." (emphasis added)).

as a court-appointed guardian for Michael resembles that of a public defender in that she does not represent the state, but only the individual patient or client. See *Polk Cnty. v. Dodson*, 454 U.S. 312, 318–22, 102 S.Ct. 445, 449–52 (1981).

Along with most circuits, Fifth Circuit caselaw suggests that guardians are not state actors. *See Crank v. Crank*, 146 F.3d 868 (5th Cir. 1998) (per curiam) ("Even if the district court had permitted Crank to amend her complaint to add the children's guardian *ad litem* as a party, Crank would still lack a state actor defendant." (internal citation omitted)).[6] The plaintiffs' reliance on *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986), is misplaced. In that case, the guardian worked with the state hospital and local agency officials, *id.* at 377–78, whereas Jessica worked with a private hospital and doctors.

In no way are Dr. Vo or Dr. Cantu state actors. *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 242–43 (5th Cir. 1999) (noting that "a private hospital is not transformed into a state actor merely by statutory regulation" and that "a private citizen or hospital does not become a state actor by participating" in a civil commitment). This fact is fatal to any § 1983 claim, which specifically "protects against acts attributable to a State, not those of a private person,"

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[6] *See, e.g.*, *Milan v. Wertheimer*, 808 F.3d 961, 964 (2d Cir. 2015) ("[W]e hold that law guardians who act as 'attorney[s] for the child' are not state actors for the purposes of suits filed pursuant to § 1983."); *Kirtley v. Rainey*, 326 F.3d 1088, 1096 (9th Cir. 2003) ("[T]he function of the guardian . . . does not satisfy the state action test."); *Long v. Pend Oreille Cnty. Sheriff's Dep't*, 385 F. App'x 641, 642 (9th Cir. 2010) (mem. op.) ("The district court properly granted summary judgment as to the guardian ad litem and her assistant because, as a matter of law, they are not state actors."); *Meeker v. Kercher*, 782 F.2d 153, 154–55 (10th Cir. 1986) ("[A] guardian ad litem is not acting under color of state law for purposes of § 1983.").

and "tracks" the Fourteenth Amendment's requirement that *States* follow constitutional limits. *Lindke v. Freed*, 601 U.S. 187, 194, 144 S.Ct. 756, 764–65 (2024); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929, 102 S.Ct. 2744, 2749 (1982) ("[T]he statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical.").

Finally, citing *T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9 (Tex. App.—Fort Worth 2020, pet. denied), the Hicksons assert that defendants "stepped into the State's traditional and exclusive role," "act[ed] as *parens patriae*[,] and regulat[ed] the means of [Michael]'s death." But *T.L.* recognized that private healthcare providers are not state actors, and they only become state actors when "a medical treatment decision made for a minor child [is] *contrary to the desires of the child's parents* [and] is the sovereign prerogative of the state as *parens patriae*." 607 S.W.3d at 41 (emphasis in original). Here, Family Eldercare was Michael's temporary guardian. The Hicksons do not allege that St. David's Healthcare, Dr. Cantu, or Dr. Vo withdrew medical treatment against the wishes of Jessica or Family Eldercare. *T.L.* is wholly inapposite.

C. Informed Consent

Because the Hicksons failed to object to the magistrate judge's recommendation for their informed consent claim, plain-error review applies. *See Ortiz v. City of San Antonio Fire Dep't*, 806 F.3d 822, 825 (5th Cir. 2015). On appeal, therefore, the Hicksons "must show (1) an error that has not been affirmatively waived, (2) that is clear or obvious, and (3) that affects [their] substantial rights." *United States v. Huerta*, 770 F. App'x 169, 170 (5th Cir. 2019) (per curiam) (citing *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 1429 (2009)). "Plain error is

a 'stringent and difficult' standard." *Id.* (internal quotation omitted).[7]

The informed consent claim fails to assert sufficient facts to establish a claim. Under Texas law, a physician or health care provider generally has a duty "to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent." TEX. CIV. PRAC. & REM. CODE § 74.101. In the complaint, the Hicksons allege that Dr. Vo's notes on the Treatment Decision Form were "appallingly scant and grossly inadequate." But they fail to specify how Dr. Vo's notes were "grossly inadequate" or what Dr. Vo should have included in his medical notes. They only allege that Dr. Vo was "working at the direction of, under the supervision of, or in cooperation with Defendant Dr. Cantu" when communicating with Michael's temporary guardian. They make no pertinent allegations against Dr. Cantu.

Without further details, the court cannot determine whether some nondisclosure "could have influenced a reasonable person in making a decision to give or withhold consent." TEX. CIV. PRAC. & REM. CODE § 74.101. On appeal, the Hicksons argue that Dr. Vo and Dr. Cantu were required to inform Michael's temporary guardian that he had a 70% chance of survival with appropriate treatment

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[7] The "failure to guide" claim, which pertains to the doctors' alleged inadequate information to Jessica, is forfeited for failure to brief the issue adequately on appeal. *See* FED. R. APP. P. 28(a)(8); *JTB Oil Tools & Oilfield Servs., LLC v. United States*, 831 F.3d 597, 601 (5th Cir. 2016) (concluding that claims were "inadequately briefed and therefore waived" when the brief included only "conclusory assertions," "fail[ed] to offer any support argument or citation to authority," and failed to "identify relevant legal standards" or Fifth Circuit caselaw).

before denying lifesaving treatment, food and fluids. Appellants' arguments, however, do not cure inadequate allegations in the Rule 12(b)(6) context. *Ferrer v. Chevron Corp.*, 484 F.3d 776, 782 (5th Cir. 2007); *see also Sw. Bell Tel., L.P. v. City of Houston*, 529 F.3d 257, 263 (5th Cir. 2008) ("[W]hen deciding, under Rule 12(b)(6), whether to dismiss for failure to state a claim, the court considers, of course, *only* the allegations in the complaint." (emphasis added)). The Hicksons' informed-consent claim was therefore deficient.

More narrowly, however, the district court plainly erred when it dismissed this claim *with* prejudice rather than *without* prejudice. Dismissing an action with prejudice is generally appropriate when "it is clear that the defects are incurable or [when] the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal." *Great Plains Tr. Co. v. Morgan Stanley*, 313 F.3d 305, 329 (5th Cir. 2002).

Here, neither the magistrate judge nor the district court afforded the Hicksons an opportunity to cure the factual deficiencies concerning informed consent. Because the deficiencies are factual and possibly curable, an amendment may not be futile. Dismissal with prejudice constituted plain error.

D. Intentional Infliction of Emotional Distress

Even when we apply plain error review,[8] the district court should not have dismissed Melissa's IIED claim against the hospital.[9]

Under Texas law, a plaintiff must establish four elements to recover damages for intentional infliction of emotional distress: "(1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe." *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004) (citing *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998)). The district court's decision relied only on the second element: extreme and outrageous conduct. This element requires conduct to be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* (quoting *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993)).

Melissa's allegations, if borne out, suggest that St. David's Healthcare engaged in extreme and outrageous conduct. A few days into Michael's hospitalization, Melissa learned that St. David's Healthcare placed Michael on DNR status and stopped giving him food, fluids, or medications other than for pain. Melissa "pleaded" with Dr. Cantu to change Michael's code status, but Dr. Cantu said

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[8] The Hicksons failed to object to the magistrate judge's recommendation for this claim. Thus, plain-error review applies. *See Ortiz*, 806 F.3d at 825.

[9] The plaintiffs have not appealed the district court's dismissal of Melissa's IIED claim against Dr. Anderson.

that only Jessica could do so. And when Michael's condition unexpectedly improved and caused the hospital's ethics consultant, a palliative-care nurse, and Dr. Cantu to question whether inpatient hospice care was still appropriate, the hospital never restarted hydration or nutrition for Michael, leaving him to starve and thirst to death.

Moreover, Melissa was prevented from visiting her husband in person or speaking to him over FaceTime in his last few days of life. Instead, St. David's Healthcare escorted her from the hospital with uniformed security officers, positioned uniformed security officers by her side when she did visit, denied many requests to speak with her husband, disclosed Michael's protected health information in its public statement,[10] and insinuated her unfitness to serve as her husband's guardian. The hospital neglected to inform her of Michael's death and, when pressed to this admission, callously announced that his body was on the way to a funeral home.

These allegations are more than just "troublesome"; they are atrocious. The impact on Melissa of the hospital's starving her husband to death, refusing to give him fluids, preventing her from talking to Michael as he was dying, failing to inform the family immediately of his passing, and posting the public statement against her go far "beyond all possible bounds of decency" and are "utterly intolerable in a civilized community." *Hoffmann-La Roche Inc.*, 144 S.W.3d at 445. Texas courts have found similar conduct to be extreme and outrageous. *See, e.g.*, *Elliott v. Methodist Hosp.*, 54 S.W.3d 789, 796–97 (Tex. App.—

[10] It is difficult to conceive how the guardian could "permit" Dr. Anderson to release such private information, given that Michael's passing meant that the whole reason for the guardianship had ceased to exist.

Houston [1st Dist.] 2001, pet. denied) (finding extreme and outrageous conduct when a hospital refused to provide a patient and her mother certain medical records for eighteen months, causing the patient to suffer pain, distress, and depression from "not having closure" and "not finding out whether the initial [diagnosis] was correct or not"); *Escalante v. Koerner*, 28 S.W.3d 641, 647 (Tex. App.—Corpus Christi 2000, pet. denied) (determining that, after a couple repeatedly asked the doctor about the bodily remains of a twin child that passed away in the womb, a doctor engaged in extreme and outrageous conduct when the doctor lied to the couple, told them that this twin child was "reabsorbed," and instead disposed of the twin's remains as surgical waste rather than allowing the couple to afford the child a proper burial).

Taken together, Melissa's IIED allegations were sufficient to state a claim. The district court plainly erred by dismissing Melissa's IIED claim with prejudice.

IV. Conclusion

For these reasons, the district court's judgment is AFFIRMED in part, and its judgment on the disability discrimination claims and the informed consent and IIED claims is VACATED and REMANDED in part for further proceedings consistent herewith.

APPENDIX B

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

MELISSA HICKSON ET AL.,	§	
PLAINTIFFS,	§	
	§	
V.	§	
	§	CAUSE NO. 1:21-CV-514-
	§	LY
ST. DAVID'S HEALTHCARE PARTNERSHIP, L.P., LLP, DOING BUSINESS AS ST. DAVID'S SOUTH AUSTIN MEDICAL CENTER ET AL.,	§	
DEFENDANTS.		

ORDER ON REPORT AND RECOMMENDATION

Before the court in the above-referenced cause are Defendants Carlye Mabry Cantu, M.D. and Hospital Internists of Texas's Motion to Dismiss (Doc. #10), Defendant St. David's Healthcare, L.P., LLP's ("St. David's") Motion to Dismiss (Doc. #11), Defendant Viet Vo, M.D.'s Motion to Dismiss (Doc. #13), Plaintiffs' Motion to Disqualify (Doc. #31), and all responses and replies, which were referred to a United States Magistrate Judge for Report and Recommendation. *See* 28 U.S.C. § 636(b); FED.. R. CIV. P. 72; Loc. R. W.D. Tex. App'x C, R. 1(d). The magistrate judge rendered a Report and Recommendation on August 8, 2022 (Doc. #44), recommending that

the court grant the three motions to dismiss and dismiss the motion for disqualification as moot.

A party may serve and file specific written objections to the proposed findings and recommendations of a magistrate judge within 14 days after being served with a copy of the report and recommendation and thereby secure *de novo* review by the district court. *See* 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 Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

Plaintiffs filed objections to the Report and Recommendation on August 22, 2022 (Doc. #45). In light of the objections, the court will undertake a *de novo* review of the record and applicable law in this case.

Plaintiffs first object to the magistrate judge's recommendation to dismiss the claims under the Rehabilitation Act and the Patient Protection and Affordable Care Act (the "Acts"). *See* 29 U.S.C. § 794; 42 U.S.C. § 18116. Plaintiffs argue that the applicable sections of the Acts prohibit disability-based discrimination in healthcare contexts, which, Plaintiffs argue, provide distinct claims unrelated to medical malpractice. The court agrees with the magistrate judge that Plaintiffs' claims ultimately relate to medical-treatment decisions, which are not the type of disability-based claims envisioned under the Acts. *See Kim v. HCA Healthcare, Inc.*, 2021 WL 859131, at *2 (N.D. Tex. Mar. 7, 2021); *Guthrie v. Niak*, 2017 WL 770988, at *14 (S.D. Tex. Feb. 28, 2017).

Plaintiffs also object to the magistrate judge's recommendation to dismiss Plaintiffs' Fourteenth Amendment civil-rights claims. *See* 42 U.S.C. § 1983 ("Section 1983"). Plaintiffs argue that the magistrate judge erred in concluding that Plaintiffs failed to plausibly allege that Defendants—all private actors—acted under color of state law. The court agrees with the magistrate judge's analysis of Plaintiffs' claims under Section 1983. Having reviewed the objections and entire case file, the court will overrule Plaintiffs' objections and accept and adopt the magistrate judge's Report and Recommendation for substantially the reasons stated therein.

IT IS THEREFORE ORDERED that Plaintiffs' objections to the Report and Recommendation (Doc. #45) are **OVERRULED**.

IT IS FURTHER ORDERED that the United States Magistrate Judge's Report and Recommendation (Doc. #44) filed in this cause is **APPROVED** and **ACCEPTED** by the court.

IT IS FURTHER ORDERED that Defendants Carlye Mabry Cantu, M.D. and Hospital Internists of Texas's Motion to Dismiss (Doc. #10) is **GRANTED** as follows: Plaintiffs' informed-consent negligence claims (Count 5), failure-to-guide negligence claims (Count 6), and Section 1983 claims (Count 8) against Cantu and Hospital Internists of Texas are **DISMISSED WITH PREJUDICE**. Plaintiffs' negligence, negligence *per se*, and wrongful-death claims (Counts 3, 4, 7, and 9) against Cantu and Hospital Internists of Texas remain pending before the court.

IT IS FURTHER ORDERED that Defendant St. David's Healthcare, L.P., LLP's Motion to Dismiss (Doc. #11) is **GRANTED** as follows: Plaintiffs disability-based

discrimination claims under the Acts (Counts 1 and 2), informed-consent negligence claims (Count 5), Section 1983 claims (Count 8), and intentional-infliction-of-emotional-distress claims (Count 10) against St. David's are **DISMISSED WITH PREJUDICE**. Plaintiffs' negligence and wrongful-death claims (Counts 7 and 9) against St. David's remain pending before the court.

IT IS FURTHER ORDERED that Defendant Viet Vo, M.D.'s Motion to Dismiss (Doc. #13) is **GRANTED** as follows: Plaintiffs' failure-to-guide negligence claims (Count 6) and Section 1983 claims (Count 8) against Vo are **DISMISSED WITH PREJUDICE**. Plaintiffs' negligence, negligence per se, and wrongful-death claims (Counts 3, 4, and 9) against Vo remain pending before the court.

IT IS FINALLY ORDERED that Plaintiffs' Motion to Disqualify (Doc. #31) is **DISMISSED** in light of the court's dismissal of Plaintiffs' intentional-infliction-of-emotional-distress claims.

SIGNED this 6th day of September, 2022.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

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

MELISSA HICKSON, et al.,	§	
	§	
	§	
Plaintiffs,	§	
V.	§	
	§	**A-21-CV-514-LY**
ST. DAVID'S HEALTHCARE PARTNERSHIP, L.P., LLP, ET AL.	§	
	§	
Defendants.		

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE:

Before the court are Defendant Carlye Mabry Cantu's Motion to Dismiss (Dkt. #10), Defendant St. David's Healthcare, L.P., LLP's Motion to Dismiss (Dkt. #11), Defendant Viet Vo's Motion to Dismiss (Dkt. #13), Plaintiffs' Motion to Disqualify (Dkt. #31) and the parties' responsive briefs.[1] After reviewing the entire case file and

[1] The motions have been referred to the undersigned for a Report and Recommendation by United States District Judge Lee Yeakel pursuant to 28 U.S.C. § 636(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. Dkt. #30.

relevant case law, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

This is a healthcare liability case. On June 10, 2021, Melissa Hickson, individually, Melissa Hickson as the Dependent Administrator of the Estate of Michael Hickson, deceased, Melissa Hickson as next friend of minors Mackenzie, Maceo, and Madison Hickson, and Marques Hickson, individually, (collectively, "Plaintiffs") filed the instant suit against Defendants St. David's Healthcare Partnership, L.P., LLP ("SDHP"), Hospital Internists of Texas ("HIT"), Dr. Devry Anderson, individually, ("Anderson") Dr. Carlye Mabry Cantu, individually, ("Cantu"), and Dr. Viet Vo, individually ("Vo") (collectively, "Defendants"). Dkt. #1.

Plaintiffs' claims stem from the death of Michael Hickson in June of 2020. In 2017, Mr. Hickson suffered sudden cardiac arrest which resulted in long-term disabilities including short-term memory loss, vision loss, slow speech, and quadriplegia. Dkt. #1 at ¶ 25. Due to these disabilities, Mr. Hickson required assistance in certain daily activities such as eating, dressing, grooming, bathing, bowel and bladder management, and transferring to and from his wheelchair. *Id.* In the years following his injury, Mr. Hickson was hospitalized multiple times for recurring urinary tract infections, sepsis and pneumonia. *Id.* at ¶ 27.

Due to his disabilities, Mr. Hickson's wife (Plaintiff Melissa Hickson) filed for permanent guardianship over Mr. Hickson. *Id.* at ¶ 28. Mrs. Hickson's petition was contested by one of Mr. Hickson's sisters, who is a physician. *Id.* Pending a hearing for permanent guardianship, the probate court appointed Family Eldercare, Inc. ("Family Eldercare") as Mr. Hickson's temporary guardian. *Id.*

Specifically, Ashley Nicol Yates ("Yates") was assigned his temporary guardian until April 1, 2020, when her trainee-subordinate Jessica Drake ("Drake") assumed those duties. *Id.*

In March 2020, Mr. Hickson was treated at SDHP for double pneumonia and sepsis. *Id.* at ¶ 29. Upon discharge, he was released to Brush Country Nursing and Rehabilitation, where on May 8, 2020 he tested positive for Covid-19. *Id.* On May 29, 2020, Mr. Hickson was retested for Covid-19 and the results were negative. *Id.* On June 2, 2020, Mr. Hickson was taken to SDHP for acute respiratory illness due to pneumonia, urinary tract infection, sepsis, and suspected Covid-19. *Id.* at ¶ 30. Upon admission to SDHP, Mr. Hickson was assessed and given a Modified Early Warning Score ("MEWS") which predicted that he had a 70% chance of surviving his conditions. *Id.* at ¶ 31.

According to the Complaint, despite the MEWS score predicting 70% chance of survival, shortly after Mr. Hickson's arrival at SDHP, an emergency medicine physician, Dr. Steven Jennings, recommended to a hospitalist, Defendant Dr. Cantu, that Mr. Hickson be placed in hospice, or at the very least to change his code to Do Not Resuscitate ("DNR"). *Id.* at ¶ 32. Dr. Cantu indicated to palliative care that Mr. Hickson had a poor quality of life as a result of his disabilities and recorded in Mr. Hickson's medical records ". . . [s]hould family and, if able, patient choose, I do believe comfort measures would be a kind choice." *Id.* at ¶ 33.

Between June 3 and June 5, 2020, Plaintiffs allege Mr. Hickson's health fluctuated. *Id.* at ¶¶ 35-38. On June 5, 2020, Mrs. Hickson was permitted to visit Mr. Hickson and interact with him via FaceTime from the hallway in the ICU. *Id.* at ¶ 38. Shortly thereafter, Defendant Dr.

Vo, one of Mr. Hickson's providers at SDHP, met with Mrs. Hickson and informed her that Mr. Hickson was being moved to hospice and placed on DNR. *Id.* at ¶ 39. When Mrs. Hickson challenged the decision and asked Dr. Vo for an explanation, Dr. Vo told her "'as of right now, his quality of life, he doesn't have much of one.' When pressed to clarify, Defendant Dr. Vo explained that because of Mr. Hickson's paralysis and brain injury, he has no quality of life. Defendant Dr. Vo then distinguished Mr. Hickson from other of his patients who were being treated aggressively for COVID–19, 'his quality of life is different than theirs. They were walking, talking.'" *Id.*

On June 5, 2020, Dr. Vo completed and executed a Family Eldercare Treatment Decision Form, which he sent to Mr. Hickson's temporary legal guardian at the time, Ms. Drake. *Id.* at ¶¶ 99-100. Based on this information, Ms. Drake subsequently gave consent to SDHP and the physicians to change Mr. Hickson's code to DNR, transfer him to hospice, and to withhold all-life sustaining treatment. *Id.* at ¶ 6.

Plaintiffs allege that at the time the decision was made to render Mr. Hickson DNR and transfer him to hospice, one of Mr. Hickson's physicians recorded that Mr. Hickson was in "multi-organ system failure," which Plaintiffs allege was false. *Id.* at ¶ 43. Rather, Plaintiffs allege, Mr. Hickson did not show signs of worsening respiratory status until after the decision was made and antibiotics were abruptly withdrawn. *Id.*

On June 8, 2020, Dr. Cantu noted that Mr. Hickson was "actually having somewhat better respiration," and sent messages to SDHP's ethics consultant and palliative care nurse requesting further guidance that Mr. Hickson may no longer be general hospice appropriate, however Defendants never altered Mr. Hickson's hospice or DNR

status. *Id.* at ¶ 47. On June 11, 2020, Mr. Hickson died in SDHP's hospice unit. *Id.* at ¶ 52.

On June 29, 2020, Mrs. Hickson posted a video on Facebook talking about what happened to Mr. Hickson at SDHP and the failings of Family Eldercare. *Id.* at 54. In response, on July 2, 2020, SDHP's chief medical officer, Defendant Dr. Devry Anderson posted a statement on SDHP's website defending the Hospital's actions, and in doing so, disclosed a significant amount of Mr. Hickson's protected health information. *Id.* at ¶ 55. The Complaint alleges that Dr. Anderson's written statement spoke derogatorily about Mrs. Hickson, without mentioning her by name, stating how uncommon it is for guardianship to be taken away from a family member and that Dr. Anderson noted authority to disclose the protected health information was given by the temporary guardian, Ms. Drake. *Id.*

Based on the above allegations, Plaintiffs filed the following claims: (1) Disability Based Discrimination under Section 504, against SDHP; (2) violation of § 1557 of Patient Protection & Affordable Care Act, 42 USC § 18116, against SDHP; (3) Negligence under Texas Medical Liability Act, under TEX. CIV. PRAC. & REM. CODE §§ 74.001, against Dr. Cantu and Dr. Vo; (4) Negligence *per se* in failure to follow procedures of TEX. HEALTH & SAFETY CODE § 166.044(d), against Dr. Cantu and Dr. Vo; (5) Negligence in Obtaining Informed Consent, against SDHP and HIT; (6) Negligence in Failing to Guide Ms. Drake, a Trainee with a Provisional Guardianship Certificate, in Substituted Decision-Making, against Dr. Cantu and Dr. Vo; (7) Section 1983 claims of violation of Fourteenth Amendment right to life, against SDHP, Dr. Cantu, and Dr. Vo; (8) Wrongful Death Claim under TEX. CIV. PRAC. & REM. CODE §§ 71.001, against SDHP, HIT, Dr. Cantu, and Dr.

Vo; and (9) Intentional Infliction of Emotional Distress against SDHP and Dr. Anderson.

Before the court now are three motions: Dr. Cantu and HIT's Motion to Dismiss (Dkt. #10), SDHP's Motion to Dismiss (Dkt. #11), and Dr. Vo's Motion to Dismiss (Dkt. #13). The undersigned addresses the parties' respective arguments in turn.

II. STANDARDS OF REVIEW

When evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6), the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Although Federal Rule of Civil Procedure 8 mandates only that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief," this standard demands more than unadorned accusations, "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57 (2007). Rather, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570. The Supreme has made clear this plausibility standard is not simply a "probability requirement," but imposes a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The standard is properly guided by "[t]wo working principles." *Id.* First, although "a court must 'accept as true all of the allegations contained in a complaint,' that

tenet is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. Second, "[d]etermining 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 679. Thus, in considering a motion to dismiss, the court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations plausibly give rise to an entitlement to relief. If not, "the complaint has alleged–but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting FED. R. CIV. P. 8(a)(2)).

III. ANALYSIS

A. SDHP's Motion to Dismiss

With respect to SDHP, Plaintiffs are asserting the following causes of action: (1) violation of Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794; (2) violation of the Patient Protection and Affordable Care Act, codified at 42 U.S.C. § 18001; (3) negligence; (4) violations of 42 U.S.C. § 1983; and (5) intentional infliction of emotional distress. Dkt. #1 at ¶¶ 56-74, 121-142, & 153-177. Plaintiffs are asserting these claims in their individual capacities under the Texas Wrongful Death Act, and Mrs. Hickson is also presenting claims on behalf of Mr. Hickson's Estate under the Texas Survival Act. *Id.* at ¶¶ 143-152. SDHP's motion seeks to dismiss Plaintiffs' claims under the Rehabilitation Act and Affordable Care Act, claim for intentional infliction of emotional distress (IIED), and claims under Section 1983. *See* Dkt. #11.

1. Section 504 of the Rehabilitation Act and Section 1557 of the Affordable Care Act

Section 504 "protects the disabled who seek to participate in a program or activity receiving federal funds from discrimination." *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 F. App'x 180, 184 (5th Cir. 2015). "To state a §504 claim, 'the plaintiff must establish that disability discrimination was the sole reason for the exclusion or denial of benefits.'" *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 676 (5th Cir. 2020). Section 1557 of the ACA, in turn, "prohibits discrimination based on any of the grounds protected under . . . the [RA] during the provision of health care. *Francois v. Our Lady of the Lake Hosp., Inc.*, 8 F.4th 370, 377 (5th Cir. 2021). In that manner, "for disability-discrimination claims, the ACA incorporates the substantive analytical framework of the [RA]." *Id.* at 378 (explaining "we will analyze [plaintiff's] RA and ACA claims together.")

Here, SDHP contends that Plaintiffs' claims are in essence a medical malpractice claim, to which Section 504 and the ACA do not apply. *See Kim v. HCA Healthcare, Inc.*, 2021 WL 859131, at *2 (N.D. Tex. Mar. 7, 2021) ("every circuit court that has addressed the issue has held that a medical treatment decision cannot form the basis of a Rehabilitation Act claim."). The court agrees. Here, Plaintiffs' core complaint is improper treatment for Mr. Hickson's medical condition, including the decision to withdraw further life-sustaining treatment. *See* Dkt. #1 at ¶¶ 41, 78-90. Accordingly, Plaintiffs' claims are not "classic discrimination claims," but rather medical malpractice claims which are not subject to the RA or ACA and must therefore be dismissed. *Guthrie v. Niak*, 2017 WL 770988, at *14 (S.D. Tex. Feb. 28, 2017) ("Plaintiff's efforts to recast his medical indifference claim as an ADA

claim as a matter of law, because insufficient or negligent medical care is not cognizable under the ADA or Rehabilitation Act."); *see also, G.T. by Rolla v. Epic Health Servs.*, No. 17-CV-1127-LY, 2018 WL 8619803, at *4 (W.D. Tex. Dec. 27, 2018) (Lane, M.J.), *adopted by*, 2019 WL 2565245 (W.D. Tex. Apr. 11, 2019).

2. Intentional Infliction of Emotional Distress

"Under Texas law, to recover damages for IIED, 'a plaintiff must prove that 1) the defendant acted intentionally or recklessly, 2) the conduct was extreme and outrageous, 3) the actions of the defendant caused the plaintiff emotional distress, and 4) the resulting emotional distress was severe.'" *Jonas v. Ocwen Fin. Corp.*, 2011 WL 2960108, at *5 (S.D. Tex. July 20, 2011). Whether the defendant's conduct is sufficiently "extreme and outrageous" is initially a question of law for the court. *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993). The conduct must go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. *Id.* Moreover, the plaintiff's emotional distress must be so severe that no reasonable person could be expected to endure it. *Motsenbocker v. Potts*, 863 S.W.2d 126, 132 (Tex. App.—Dallas 1993, writ denied).

Here, Plaintiffs based their IIED claim on the following instances of alleged conduct by SDHP, and its chief medical officer, Dr. Devry Anderson: that SDHP security guards escorted Mrs. Hickson throughout the hospital, including during "private moments" with her family (Dkt. #1 at ¶¶ 158-159); SDHP failed to communicate basic information about Mr. Hickson's status (*Id.* at ¶¶ 160-164); SDHP failed to coordinate FaceTime visits with Mr. Hickson from June 8-June 11, 2020 (*Id.* at ¶¶ 160, 173); SDHP failed to immediately communicate Mr. Hickson's death to Mrs. Hickson (*Id.* at ¶¶ 165-167); and SDHP, through

Dr. Anderson, posted the written statement on its website including details of Mr. Hickson's protected health information, details of the guardianship proceedings, and the fact that Mrs. Hickson was escorted by security (*Id.* at ¶¶ 168-170).

In its motion, SDHP challenges the characterization of several of these incidents, in particular that the decisions to have security escort Mrs. Hickson, withhold certain information about Mr. Hickson's status, and the decision to disclose details of Mr. Hickson's health information in the written statement were all authorized by Family Eldercare through Ms. Drake or Ms. Yates. Dkt. #11 at 12. Nonetheless, even accepting all of Plaintiffs' allegations as true, SDHP argues that Plaintiffs' IIED claims fail as a matter of law because they do not rise to the high standard set by Texas law for such claims. *Id.* at 13. The court agrees.

Specifically, Plaintiffs have failed to allege "circumstances bordering on serious criminal acts," and Plaintiffs have failed to demonstrate that any "conduct was 'beyond all possible bounds of decency,' 'atrocious,' and 'utterly intolerable in a civilized society.'" *Creditwatch, Inc.*, 157 S.W.3d at 818; *Shah v. Univ. of Texas Sw. Med. Sch.*, 54 F. Supp. 3d 681, 706 (N.D. Tex. 2014) ("Because Shah has failed to plead conduct that borders on 'serious criminal acts,' or that was 'beyond all possible bounds of decency,' 'atrocious,' and 'utterly intolerable in a civilized society,' the court grants the individual defendants' motion to dismiss Shah's IIED claim."); *Arnold v. Williams*, 979 F.3d 262, 270 (5th Cir. 2020) (affirming dismissal of IIED claim where the plaintiff "simply failed to allege any conduct 'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'").

Here, the alleged incidents Plaintiffs base their IIED claims on may be troublesome, but they do not border on "serious criminal acts," nor can they be considered "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Arnold*, 979 F.3d at 270. Accordingly, SDHP's motion should be granted as to the IIED claims.

3. Section 1983 Claim

Section 1983 is the statutory vehicle for plaintiffs to recover damages for violations of federal constitutional or statutory law against those acting under the color of state law. *See* 42 U.S.C. § 1983. To state a §1983 claim, a plaintiff must establish "(1) a deprivation of a right secured by federal law (2) that occurred under color of state law, and (3) was caused by a state actor." *White v. City of New Orleans*, 844 Fed. Appx. 719 (5th Cir. 2021). SDHP's motion challenges Plaintiffs' Section 1983 claim, arguing the claim fails as a matter of law because Plaintiffs have not alleged any action occurring under color of state law or any state actor. Dkt. #11 at 15.

Plaintiffs do not dispute that the defendants they joined in this federal lawsuit are private actors. *See* Dkt. #1 at ¶ 19 ("St. David's HealthCare is the third largest private employer in the Austin area"). Rather, Plaintiffs rely on the proposition advanced in a recent state court decision that "hospitals and medical providers step into the shoes of the state and act under the color of state law when they make the determinations to withdraw life-sustaining treatment from individuals traditionally encompassed by the *parens patriae* power of the state without strictly adhering to statutes and regulations governing the provision of care to such individuals." Dkt. #1 at ¶ 132

(citing *T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9 (Tex. App.—Fort Worth July 24, 2020, pet. denied)).

As an initial matter, the state court's holding in *T.L.* is not binding on this court. *See Sys. Contractors Corp. v. Orleans Par. Sch. Bd.*, 148 F.3d 571, n. 23 (5th Cir. 1998) (explaining that, "[a]lthough state courts have the authority to decide issues of federal constitutional law, state court decisions are not binding upon the federal courts"). Moreover, none of the factors discussed in *T.L.* are present here. In *T.L.* the state court relied on the following factors in deciding the hospital acted under the color of state law: that the patient was a minor child, that the minor child's parents refused to consent to the recommended treatment, that the hospital performed a public function in supervening the fundamental right of the parent to make medical decisions for the treatment decisions of her child, that the state has the sovereign authority to regulate what is and is not lawful means of dying, naturally or otherwise, and that the hospital's decision to discontinue life-sustaining treatment over the wishes of the legal guardian invokes the state's delegated authority under Section 166.046 of the Texas Advanced Directives Act (TADA). *See T.L.*, 607 S.W.3d at 24-40.

Here, Mr. Hickson was not a minor child. Nor did Mr. Hickson's legal guardians—Family Eldercare, through Ms. Yates and Ms. Drake—refuse to consent to the treatment recommended by SDHP or physicians. Rather, Mr. Hickson's wife, Mrs. Hickson, who did not have any legal guardianship over Mr. Hickson at the time, brings suit against SDHP after the fact because she disagreed with the treatment that was agreed upon by SDHP and Mr. Hickson's acting legal guardians with Family Eldercare. Accordingly, this case is factually distinguishable from *T.L.* Plaintiffs have thus not properly alleged any state

actors or action under color of state law. Accordingly, Plaintiffs' claims under Section 1983 fails as a matter of law and should be dismissed with prejudice.

4. Negligence Theories

Lastly, SDHP challenges Plaintiffs' claims that SDHP was negligent in (1) failing to "properly train" Drs. Cantu and Vo "in the proper supervision and coaching of persons assessing provisional guardianship certification in rendering informed consent and the exercise of substituted judgment;" and (2) failing to "properly train" Drs. Cantu and Vo in "identifying the level of experience or certification of a court-appointed temporary guardian for purposes of then determining the amount of supervision, guidance and coaching the temporary guardian may require in the rendering of informed consent, substituted judgment and in making other healthcare decisions." Dkt. #1 at ¶¶ 112, 126, 121. SDHP argues these claims are improper "restatements" of Plaintiffs' claims against Drs. Cantu and Vo for failure to obtain informed consent and failure to guide the guardian. Dkt. #11 at 24-26.

Turning first to Plaintiffs' claim that SDHP failed to properly train Drs. Cantu and Vo on rendering informed consent, the court finds that this claim is an improper recasting of an informed-consent claim. Importantly, "[i]n Texas, the duty to obtain informed consent is a nondelegable duty imposed solely upon the treating doctor." *Espalin v. Children's Med. Ctr. of Dallas*, 27 S.W.3d 675, 686 (Tex. App.—Dallas 2000, no pet.). Accordingly, Texas law is clear that "[h]ospitals have no such duty of disclosure of medical or surgical risks, nor are they required to secure a patient's informed consent prior to surgery." *Id.* When a "recast" negligence claim against a hospital "is necessarily predicated on an actual failure to obtain informed consent . . . the claims can be brought only as an informed

consent claim." *Sanchez v Martin*, 378 S.W. 3d 581, 591 (Tex. App.—Dallas 2012) (no pet.). In other words, artful pleading cannot convert an informed consent claim to a negligence claim against a hospital. *Id.*

Similarly, Plaintiffs' claim that SDHP had a duty to train Drs. Cantu and Vo on how to "guide" or "supervise" a legal guardian during the informed consent process fails as a matter of law because such a duty is not recognized by Texas law. Rather, Texas law prohibits such an imposition of duty as an improper "corporate practice of medicine." *See Gaalla v. Citizens Med. Ctr.*, 2010 WL 5387603, at *3 (S.D. Tex. Dec. 17, 2010) (TEX. OCC. CODE §§164.052(a)(17) § 165.156, & 155.001)) ("Under the 'corporate practice of medicine' doctrine contained in the Texas Medical Practice Act and codified in the Texas Occupations Code, the practice of medicine is restricted to licensed physicians."). Accordingly, the court cannot impose a duty on SDHP to train or mandate how a physician must "supervise" or "guide" a legal guardian when the legal guardian is rendering informed consent, as such a duty would improperly invade the patient-physician relationship and constitute an illegal practice of medicine. *See Galla*, 2010 WL 5387603, at *3. Accordingly, SDHP's motion should be granted as to these claims as well.

B. Dr. Cantu and HIT's Motion to Dismiss

Plaintiffs plead the following causes of actions against Dr. Cantu: (1) Negligence under TEX. CIV. PRAC. & REM. CODE Chapter 74 (Dkt. #1 at ¶¶ 75-86); (2) Negligence *Per Se* (Dkt. #1 at ¶¶ 87-93); (3) Negligence in obtaining informed consent (Dkt. #1 at ¶¶ 94-109); (4) Negligence in Failing to Guide Ms. Jessica Drake, a trainee, possessing a provisional guardianship certificate in substituted decision-making (Dkt. #1 at ¶¶ 110-120); (5) a Section 1983 claim for deprivation of 14th Amendment right

to life (42 U.S.C.A. § 1983) (Dkt. #1 at ¶¶ 130-142)); and (6) wrongful death under TEX. CIV. PRAC. & REM. CODE Chapter 74 (Dkt. #1 at ¶¶ 143-152).

Dr. Cantu argues that Plaintiffs' informed consent, failure to guide the guardian, and Section 1983 claims against her fail as a matter of law. *See* Dkt. #10. As HIT is vicariously liable for Dr. Cantu's actions as her employer, all claims dismissed against Dr. Cantu must also be dismissed against HIT.

1. Negligence in Failure to Obtain Informed Consent

Dr. Cantu's motion first challenges Plaintiffs' claims alleging negligence in obtaining informed consent. Dkt. #10 at 5-8. Plaintiffs allege that Dr. Cantu failed to disclose to Mr. Hickson's legal guardian, Ms. Drake, all material risks, benefits and alternatives which would influence Ms. Drake in deciding whether to consent to hospice transition, DNR status and the decision to withdraw life-sustaining treatment. Dkt. #1 at ¶ 105. Dr. Cantu's motion argues that Plaintiffs fail to state a claim to this effect because Plaintiffs fail to plead sufficient facts regarding what was discussed between the parties who were making medical decisions and what information was communicated in obtaining informed consent. Dkt. #10 at 6. Dr. Cantu points out that Mrs. Hickson was not present for these conversations between the physicians and Family Eldercare guardians. *Id.* Moreover, Dr. Cantu was not a party to the Family Eldercare Treatment Decision Form which served as the basis for Ms. Drake's decision to give consent. *Id.*

The court agrees, Plaintiffs have not alleged facts to support the claim that Dr. Cantu breached her duty to provide Ms. Drake with information that may or may not have influenced her to give or withhold informed consent.

Nor is there anything in the Complaint to suggest Ms. Drake has indicated that she did not have the information necessary to make the decision to place Mr. Hickson in hospice or DNR status. Accordingly, Plaintiffs have not alleged sufficient facts to establish any lack of informed consent claim.

2. Negligence in Failure to Guide the Guardian

Plaintiffs' Complaint further alleges that because Ms. Drake was a "trainee" with a provisional guardianship license, that Dr. Cantu had a duty to "guide" Ms. Drake, to determine her experience and "explore, consider, provide to, and discuss with" Ms. Drake all information to allow for substitute decision making. Dkt. #1 at ¶¶ 110-120.

To assert a claim for medical negligence, a plaintiff must show: "'(1) a duty by the physician/nurse/hospital to act according to applicable standards of care; (2) a breach of the applicable standard of care; (3) an injury; and (4) a causal connection between the breach of care and the injury.'" *Montoya v. Las Palmas Med. Ctr.*, 2015 WL 12551109, at *7 (W.D. Tex. Aug. 6, 2015). "Whether a duty exists is a question of law for the court to decide." *Probst v. Ryder Truck Rental, Inc.*, 1999 WL 184127, at *8 (N.D. Tex. March 29, 1999) (citing *Porter v. Neimer, Jr.*, 900 S.W.2d 376, 385 (Tex. 1995)). And a court's conclusion regarding "[t]he nonexistence of a duty ends the inquiry into whether negligence liability may be imposed." *Id.*

In the instant case, there are no facts plead to support an allegation that Dr. Cantu had a duty to "guide" Ms. Drake nor to determine her experience and to "explore, consider, provide to, and discuss with" Ms. Drake all information which would allow for substitute decision-making. The guardian is appointed by the Probate Court and

as the motion to dismiss points out, Dr. Cantu has no authority or standing to contest the appointment. It is the court-appointed guardian with training in substituted decision-making, not the physicians. Plaintiffs' attempted cause of action for alleged failure to "guide" and determine competency of the guardian is not allowed under TEX. CIV. PRAC. & REM. CODE Chapter 74 which is the statute that governs Dr. Cantu. Accordingly, Dr. Cantu's motion should be granted on this basis as well.

3. Section 1983

Plaintiffs' Complaint concedes that Dr. Cantu is a physician employed by HIT, which is a nonprofit organization, and SDHP, which is a private healthcare provider. *See* Dkt. #1 at ¶¶ 21-22. For the reasons discussed above, Plaintiffs have not alleged any state actors or actions under color of state law, and thus their Section 1983 claims against Dr. Cantu and HIT fail as a matter of law and must be dismissed.

C. Dr. Vo's Motion to Dismiss

Plaintiffs plead the following causes of actions against Dr. Vo: (1) Negligence under TEX. CIV. PRAC. & REM. CODE Chapter 74 (Dkt. #1 at ¶¶ 75-86); (2) Negligence *Per Se* (Dkt. #1 at ¶¶ 87-93); (3) Negligence in obtaining informed consent (Dkt. #1 at ¶¶ 94-109); (4) Negligence in Failing to Guide Ms. Jessica Drake, a trainee, possessing a provisional guardianship certificate in substituted decision-making (Dkt. #1 at ¶¶ 110-120); (5) a Section 1983 claim for deprivation of 14th Amendment right to life (42 U.S.C.A. § 1983) (Dkt. #1 at ¶¶ 130-142)); and (6) wrongful death under TEX. CIV. PRAC. & REM. CODE Chapter 74 (Dkt. #1 at ¶¶ 143-152).

Like Dr. Cantu's motion to dismiss, Dr. Vo's motion asserts that Plaintiffs' claims of negligence in obtaining

informed consent and in failing to guide the guardian, Ms. Drake, and their Section 1983 claims must be dismissed because Plaintiffs failed to state plausible claims under Rule 12(b)(6). *See* Dkt. #12.

1. Lack of Informed Consent

Under Texas law, "[a] cause of action for the failure of a doctor to fully inform a patient of the risks associated with medical care is a negligence cause of action," but it "is a particular subspecies of negligence based on a failure to disclose the risks or hazards of a procedure." *Rodgers v. Coleman*, 1994 WL 52497, at *6 (Tex. App.—Houston [1st Dist.] Feb. 24, 1994, writ denied); *Schaub v. Sanchez*, 229 S.W.3d 322, 323 (Tex. 2007). "In such cases there are two separate parts to the causation analysis: (1) whether a reasonable person could have been influenced to decide to give or withhold consent by being informed of the risks or hazards that were not disclosed; and (2) whether the injury complained of was caused in fact by the undisclosed risk." *Greenberg v. Gillen*, 257 S.W.3d 281, 283 (Tex. App.—Dallas 2008, pet. denied) (emphasis added). Thus, "[t]he inquiry must be whether a reasonable person, not a particular plaintiff, would have refused the treatment or procedure had he been fully informed of all inherent risks which would influence his decision," and "[o]nly in this way may a plaintiff establish that the failure to obtain informed consent was a proximate cause of his injuries." *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989).

With respect to the Plaintiffs' claim that Dr. Vo was negligent in failing to obtain informed consent, Plaintiffs allege that "Dr. Vo . . . took charge of communicating with Mr. Hickson's court-appointed temporary legal guardian," and "[t]he information provided by Dr. Vo on the Treatment Decision Form was the basis for Ms. Drake's consent to the change of Mr. Hickson's code to DNR, his

transfer to hospice and the withholding of all life-sustaining treatment, including artificial nutrition and hydration." *See* Dkt. #1 at ¶¶ 98 & 100. The Complaint goes on to allege that Mr. Hickson's guardian lacked informed consent because, "the information provided on that form by Dr. Vo is appallingly scant and grossly inadequate by which any person can make an informed consent to withdraw life-sustaining treatment," and Plaintiffs contend, "Dr. Vo's failure to provide Mr. Hickson's temporary guardians with sufficient information by which to make an informed consent for the change of his status from full code to DNR, transfer to hospice, and withdrawal of artificial nutrition and hydration, not only subjected Mr. Hickson to the most extreme degree of risk of harm but was intended to and resulted in the most extreme degree of harm, his death." *Id*. at ¶¶ 101 & 109.

Here, based on Plaintiffs' own allegations, it cannot be disputed that Dr. Vo clearly informed Mr. Hickson's legal guardian, Ms. Drake, of the "most extreme degree of harm, his death." *See* Dkt. #1 at ¶¶ 39, 42, 109. Accordingly, Texas law mandates that Plaintiffs have failed to state a valid claim for lack of informed consent, and such claim should therefore be dismissed with prejudice. *See, e.g., Tajchman v. Giller*, 938 S.W.2d 95, 100 (Tex. App.—Dallas 1996, writ denied) ("When the patient is informed of the risk that occurs and causes injury, as here, the question of what a 'reasonable person' would have done is not at issue. The fact is that the patient in this case . . . knew of the risk of stroke yet nevertheless consented to the DEP procedure. For this reason, the cases in which a risk was not disclosed do not apply to this case.").

2. Failure to Guide Guardian

Plaintiff's negligence in failing to guide Ms. Drake as guardian against Dr. Vo fail for the same reasons their

claim against Dr. Cantu failed. There is no duty on Dr. Vo as a physician to "guide" Ms. Drake as the court-appointed legal guardian for Mr. Hickson. Thus any negligence claim against Dr. Vo based on such a duty fails as a matter of law and must be dismissed.

3. Section 1983

As with SDHP and Dr. Cantu, Plaintiffs' Complaint concedes that Dr. Vo is not a state actor. *See* Dkt. #1 at 23 ("Defendant Dr. Vo is self-employed"). For the same reasons their Section 1983 claims against SDHP and Dr. Cantu fail, Plaintiffs' Section 1983 claim against Dr. Vo fails as a matter of law and must be dismissed.

D. Motion to Disqualify

Lastly, Plaintiffs have also filed a motion seeking to disqualify Missy Atwood as counsel for SDHP and Dr. Anderson, arguing that Atwood is a material fact witness to Plaintiffs' claim of intentional infliction of emotional distress against SDHP and Anderson. See Dkt. #31. Defendants oppose the motion. Dkt. #39. As discussed above, the undersigned recommends dismissal of Plaintiffs' IIED claim. Should the district court adopt the undersigned's recommendation, Plaintiffs' motion for disqualification should therefore also be dismissed as moot.

IV. RECOMMENDATIONS

For the reasons stated above, the court **RECOMMENDS** Defendants' Motions to Dismiss be **GRANTED** (Dkt. #10, Dkt. #11, Dkt. #12).

The referral to the Magistrate Court should now be **CANCELED**.

V. OBJECTIONS

The parties may 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 Battles 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. Arn*, 474 U.S. 140 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED August 8, 2022,

MARK LANE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MELISSA HICKSON, INDIVIDUALLY AND AS THE INDEPENDENT ADMINISTRATOR OF THE ESTATE OF MICHAEL HICKSON, DECEASED AND AS NEXT FRIEND OF M.H, M.H. AND M.H. (ALL MINORS); and MARQUES HICKSON,	§	**CIVIL NO. A-21-CV-00514-ADA**
Plaintiffs,	§	
v.	§	
ST. DAVID'S HEALTHCARE PARTNERSHIP, L.P., LLP, HOSPITAL INTERNISTS OF TEXAS, CARLYE MABRY CANTU, and VIET VO,	§	
Defendants.		

ORDER GRANTING DEFENDANTS'
JOINT MOTION FOR SUMMARY JUDGMENT

Plaintiffs filed this healthcare liability lawsuit following the death of Mr. Michael Hickson after he contracted COVID-19. ECF No. 1. The remaining causes of actions pending in this lawsuit are Plaintiff Melissa Hickson's medical malpractice claims against Defendants St. David's Healthcare Partnership, L.P., LLP, Dr. Viet Vo, Dr. Mabry Cantu, and Hospital Internists of Texas (collectively, "Defendants"). *See* ECF Nos. 47, 49. Defendants now move for summary judgment as a matter of law. ECF No. 81. After careful consideration of Defendants' Motion for Summary Judgment, the relevant facts, and the applicable law, the Court **GRANTS** Defendants' Motion.

LEGAL STANDARD

Defendants filed their Joint Motion for Summary Judgment on September 4, 2024. Pursuant to Local Rule CV-7(d)(2), a response to the Motion was due September 18, 2024. As of October 23, 2024, no response has been filed. While Local Rule CV-7(d)(2) provides that "[i]f there is no response filed within the time period prescribed by this rule, the court may grant the motion as unopposed," the Fifth Circuit has indicated that "[a] motion for summary judgment cannot be granted simply because there is no opposition." *Day v. Wells Fargo Bank Nat'l Ass'n*, 768 F.3d 435, 435 (5th Cir. 2014) (unpublished) (quoting *Hibernia Nat'l Bank v. Administracion Cent. S.A.*, 776 F.2d 1277, 1279 (5th Cir. 1985). However, "a court may grant an unopposed summary judgment motion if the undisputed facts show that the movant is entitled to judgment as a matter of law." *Id.*

DISCUSSION

Plaintiff Melissa Hickson's remaining medical malpractice claims against Defendants allege various forms

of negligence. *See* ECF No. 1 at ¶¶ 75–86 (Count III), 87–93 (Count IV), 121–29 (Count VII). Plaintiffs also assert medical malpractice under the Texas Wrongful Death Act. *Id.* at ¶¶ 143–52 (Count IX). Under Texas law, when the negligence alleged is in the nature of medical malpractice, plaintiffs have the burden of proving (i) a duty by the physician or hospital to act according to an applicable standard of care; (ii) a breach of that standard of care; (iii) an injury; and (iv) a causal connection between the breach of care and injury. *See Quijano v. United States*, 325 F.3d 564, 567–78 (5th Cir. 2003) (citations omitted).

"Texas courts have long recognized the necessity of expert testimony in medical-malpractice cases." *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 876–77 (Tex. 2001) (citations omitted). All four elements require expert medical testimony. *See Quijano*, 325 F.3d at 567–58 (noting that "[t]he standard of care is a threshold issue which the plaintiff must establish before the fact finder . . . consider[s] whether the defendant breached that standard of care" and that "[e]xpert testimony is generally required to prove the applicable standard of care"); *Rayburn v. United States*, 47 F.3d 426 (5th Cir. 1995) ("A plaintiff in a Texas medical malpractice action is required to provide expert medical testimony demonstrating familiarity with the pertinent standard of care, explaining that the defendant breached the standard of care, and indicating that the breach proximately caused the injury.").

Here, it is undisputed that Plaintiffs have not designated an expert regarding (i) the standard of care applicable to Defendants, (ii) any alleged breach of the applicable standard of care by Defendants, or (iii) a causal connection between any alleged breach of care by Defendants

and Mr. Hickson's death. *See* ECF No. 81 at 12–13. Plaintiffs have had over a year to designate experts, which included multiple extensions of time. *See id.* at 7–10. At this time, the Court determines that Plaintiffs will not have an expert for trial. "[T]here can be no other guide [than expert testimony], and where want of skill and attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury." *Am. Transitional Care*, 46 S.W.3d at 876.

Plaintiffs' need for and lack of expert testimony alone warrants summary judgment. *See Patel v. Baluyot*, 384 F. App'x 405, 409 (5th Cir. 2010) (holding that defendants met their summary judgment burden because it was "undisputed that [plaintiff] neither designated nor hired an expert to testify on his behalf"); *Stewart v. United States*, 293 F. App'x 272, 273 (5th Cir. 2008) ("[T]he district court determined that [plaintiff] was not going to have an expert for trial [regarding medical malpractice claims] and therefore correctly granted the [defendant] summary judgment, determining it was entitled to judgment as a matter of law."); *Blank v. United States*, 713 F. App'x 400, 401 (5th Cir. 2018) ("[T]he district court did not err in granting summary judgment given [plaintiff's] failure to provide expert testimony as required by the relevant medical malpractice laws of Louisiana and Texas."); *Nichols v. United States*, No. 21-50368, 2022 WL 989467, at *4 (5th Cir. Apr. 1, 2022) (affirming summary judgment because plaintiff's claims were health-care-related negligence claims requiring expert testimony that plaintiff lacked).

As an independent basis for summary judgment, there is also no dispute regarding the lack of causal connection between Defendants' alleged breach of the standard of care and the injury. Under the Wrongful Death Act, a

plaintiff must demonstrate that the defendant's wrongful actions more likely than not caused the decedent's death—not just that they reduced the decedent's chance of survival by some lesser degree. *Slade v. City of Marshall, Tex.*, 814 F.3d 263, 264–65 (5th Cir. 2016) (citing *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 404 (Tex. 1993)). Relatedly, "[a] healthcare provider may prove its right to summary judgment by establishing there is no causal connection between any breach of the standard of care and the injury." *Hevron v. Pearl*, No. 05-97-02067-CV, 2000 WL 190525, at *3 (Tex. App.—Dallas Feb. 17, 2000, pet. denied).

In this case, Defendants' expert submitted sworn statements opining that, based on the clinical circumstances present at the time Mr. Hickson was admitted, his medical condition was such that the likelihood of his survival was "clearly less than 50% within reasonable medical probability." ECF No. 81-5 at ¶ 15. Thus, Defendants' evidence affirmatively negates the essential element of causation. For this independent reason, Defendants are entitled to summary judgment in this case. *See, e.g., Hernandez v. Calle*, 963 S.W.2d 918, 921 (Tex. App.—San Antonio 1998, no pet.) (affirming summary judgment in medical-malpractice case because "[defendant's] uncontroverted affidavit denying any casual connection between his and Santa Rosa Hospital's acts or omissions and [plaintiff's] injuries is sufficient to conclusively negate an essential element of the plaintiff's cause of action").

CONCLUSION

For the foregoing reasons, the Court finds that there are no genuine issues of material fact, and that Defendants are entitled to summary judgment as a matter of law. Therefore, the Court **GRANTS** Defendants' Motion for Summary Judgment. Accordingly, the Court **ORDERS**

that Plaintiffs' remaining claims be **DISMISSED WITH PREJUDICE** and respectfully directs the Clerk of Court to close the case.

SIGNED this 23rd day of October, 2024.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

APPENDIX E

United States Court of Appeals
for the Fifth Circuit

No. 24-50956

MELISSA HICKSON, *Individually and as the Independent Administrator of* THE ESTATE OF MICHAEL HICKSON, *deceased* and *as next friend* of M.H, M.H. and M.H. (*all minors*); MARQUES HICKSON,

Plaintiffs—Appellants,

versus

ST. DAVID'S HEALTHCARE PARTNERSHIP, L.P., L.L.P.; DR. DEVRY ANDERSON; HOSPITAL INTERNISTS OF TEXAS; CARLYE MABRY CANTU; VIET VO,

Defendants—Appellees.

Appeal from the United States District
Court
for the Western District of Texas
USDC No. 1:21-CV-514

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

Before KING, JONES, and WILSON, *Circuit Judges*.

PER CURIAM:

The petitions for panel rehearing are DENIED. Because no member of the panel or judge in regular active

service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petitions for rehearing en banc are DENIED.

APPENDIX F

Statutory Provisions Involved

29 U.S.C. § 794 – Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of vocational education, or other school system;

(3)

(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

42 U.S.C. § 18116 – Nondiscrimination

(a) In general

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

(b) Continued application of laws

Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of title 29, or the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

(**c**) **Regulations**

The Secretary may promulgate regulations to implement this section.