UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DYNELLE JOHNSON, as Personal Representative of the Estate of AARON CAUVIN, Deceased,

Plaintiff,

v.

WOLVERINE HUMAN SERVICES, INC., a Michigan Non-Profit Corporation, JUDITH FISCHER-WOLLACK, KRISTI EINEM-SMITH, DOMINIQUE COBB-CLEMENTS, SONJA WILLIAMS, JONATHAN HOWARD, and MICHELLE KENNEBREW, jointly and severally,

Defendants.

Case No.: 2:15-cv-13856
Hon. Arthur J. Tarnow

BRIEF *AMICUS CURIAE OF*

MICHIGAN DEFENSE TRIAL COUNSEL

BRIEF *AMICUS CURIAE* OF MICHIGAN DEFENSE TRIAL COUNSEL

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QUESTIONS PRESENTED

The Court invited amicus briefing on the questions surrounding liability for private, non-profit entities under 42 U.S.C. § 1983 (§ 1983):

I. Whether a private, non-profit organization can be considered a "state actor" and/or "acting under color of state law" for purposes of liability in a § 1983 action?

II. If the answer to the first question is "Yes.", what is the proper constitutional standard applicable to 42 U.S.C. § 1983 claims filed against the defendants in this case?

III. Even if the district court finds that any or all of the individual named defendants exhibited "deliberate indifference" to decedent, can they claim qualified immunity from suit?

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae, Michigan Defense Trial Counsel (MDTC), is an association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case.[1]

Private, non-profit and charitable organizations and who provide essential services to the public are naturally concerned about potential liability for torts, including federal claims filed under 42 U.S.C. § 1983. Knowledge of the parameters of such liability are important for these entities to ascertain risk and plan their policies and operations, respectively.

There are also important public policy concerns present in this case. The provision of essential services to the public by non-profit organizations aids the public as a whole by taking a significant portion of the burden off state and local governments, and at the same time provide aid to those in need. These overarching policy reasons are prevalent in the case law supporting freedom of these entities from the burdens of litigation and the crippling effect of imposing liability upon them. MDTC shares the concerns of the defendants in this case that overburdening such entities with litigation could have a chilling effect on the nature and quality of services provided. Such litigation could also deter recruitment efforts by such

[1] After reasonable investigation, MDTC believes that (a) no MDTC member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a MDTC member, represents a party to this litigation; (b) no MDTC member who is a representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than MDTC, or its members who authored this brief and their law firms or employers, made a direct or indirect contribution, financial or otherwise, to the preparation or submission of this brief.

organizations and dissuade those qualified individuals who might be employed by them from seeking such opportunities. A clear and decisive statement by this Honorable Court concerning the status of these entities vis-à-vis federal civil rights law will assist future planning and understanding of the role these entities can continue to play as an integral part of a society of organizations assisting the greater community by providing charitable, but greatly needed, not-for-profit services.

INTRODUCTION

42 USC § 1983 (§ 1983) provides, in relevant part, as follows:

> Every person who, *under color of any statute, ordinance, regulation, custom, or usage*, of any State or Territory or the District of Columbia, *subjects, or causes to be subjected, any citizen* of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

The language of the statute requires the claimant to establish two preliminary elements:

(1) Does the Plaintiff claim a deprivation or violation of a right *secured by the constitution or laws*?

(2) Is the Defendant a *state actor or acting under color of state law*?

Both of these elements are essential to proceed with a 42 USC § 1983 claim.[2]

The "state action" / "acting under color of state law" requirement is "a jurisdictional requisite for a § 1983 action".[3] In order that there be a proper claim under § 1983 relating to civil action for deprivation of rights "secured by the Constitution and laws", an act by or on behalf of a state must be proved. "[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[4] "If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes."[5]

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[2] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50; 119 S. Ct. 977; 143 L.Ed.2d 130 (1999).

[3] *Polk County v. Dodson*, 454 U.S. 312, 315; 102 S. Ct. 445; 70 L. Ed. 2d 509 (1981).

[4] *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 290; 121 S. Ct. 924; 148 L.Ed.2d 807 (2001).

[5] *Id.* at 295 and n. 2, citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 935; 102 S. Ct. 2744; 73 L. Ed. 2d 482 (1982).

The second inquiry in a § 1983 suit is whether the plaintiff has been deprived of a right "secured by the Constitution and laws."[6] If there has been no such deprivation, the state of mind of the defendant, i.e., "deliberate indifference", is wholly immaterial, because simple negligence cannot give rise to § 1983 liability.[7]

This *amicus curiae* brief seeks to aid this Court in explaining the latest analysis concerning these elemental aspects of § 1983 litigation.

I. AS THE FOCUS OF THE LATEST SUPREME COURT JURISPRUDENCE ON THE QUESTION WHETHER A PRIVATE ENTITY IS A STATE ACTOR IS ON THE PRECISE ACTIONS AND CONDUCT ENGAGED IN AT THE TIME IT IS ALLEGED A CONSTITUTIONAL DEPRIVATION OCCURRED, WOLVERINE HEALTH SERVICES (WHS) WAS NOT A STATE ACTOR OR ACTING UNDER COLOR OF STATE LAW WHEN PLAINTIFF'S DECEDENT COMMITTED SUICIDE AND THUS ITS ACTIONS AND CONDUCT ARE NOT SUBJECT TO SECTION 1983 LITIGATION OR LIABILITY

A. Law

The "state action doctrine" emerged from civil rights case law within the realm of the Fourteenth Amendment.[8] Although the Supreme Court created the doctrine in *The Civil*

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[6] *Baker v. McCollan*, 443 U.S. 137, 140; 99 S. Ct. 2689; 61 L. Ed. 2d 433 (1979).

[7] *Id*., see also *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 202; 109 S. Ct. 998; 103 L.Ed.2d 249 (1989); *Daniels v. Williams*, 474 U.S. 327, 334; 106 S. Ct. 662; 88 L.Ed.2d 662 (1986) and the extremely important but oft-overlooked companion case, *Davidson v. Cannon*, 474 U.S. 344; 106 S. Ct. 668; 88 L.Ed.2d 677 (1986) (where a state actor is merely negligent in causing the injury, no procedure for compensation is constitutionally required and constitutional protections are not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property).

[8] Wren, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 151-152 (Winter 2000). Because of the pervasiveness of civil rights litigation in the 1960's and 1970's, Supreme Court decisions prior to 1970 addressed characterizing private entities as state actors. See also LoTempio, *It's Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools for State Actor Status*, 47 WAKE FOREST L. REV. 435, 443 (2012), citing and discussing the Supreme Court's 1961 decision in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715; 81 S. Ct. 856; 6 L.Ed.2d 45 (1961), which established the first of the now five tests, i.e., the "symbiotic relationship" test.

Rights Cases[9] in 1883 from the Civil Rights Act of 1871 (42 U.S.C. § 1983), it would be nearly 100 years before the Supreme Court would expand § 1983's reach to private entities.[10] Nonetheless, as early as 1974, the Court would state: "While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private' on the one hand, or 'state action,' on the other, frequently admits of no easy answer."[11] Indeed, in the years that have followed, drawing the line between "state action" and purely private activities has been described by a leading treatise on § 1983 as one the most "troublesome areas of civil rights litigation."[12] Various courts describe jurisprudence on the question as "labyrinthine", [13] multi-layered, fact-bound,[14] and lacking in "rigid simplicity".[15]

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[9] *United States v. Stanley*, 109 U.S. 3; 3 S.Ct. 18; 27 L.Ed. 835 (1883). The Court was addressing five different cases before the Circuit Courts of United States for District of Kansas, California, Western Missouri, Southern New York, and Western Tennessee.

[10] Morris, *The Impact of Constitutional Liability on the Privatization Movement after Richardson v. McKnight,* 52 VAND. L. REV. 489, 500 (1999). Discussing, *inter alia*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144; 90 S.Ct. 1598; 26 L.Ed.2d 142 (1970). See also *Burton v. Wilmington Parking Authority*, 365 U.S. 715; 81 S.Ct. 856; 6 L.Ed.2d 45 (1961).

[11] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349-50; 95 S. Ct. 449; 42 L.Ed.2d 477 (1974).

[12] Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 1.03 (Aspen Publishers 2011).

[13] *Leshko v. Servis*, 423 F.3d 337, 338 (3rd Cir. 2005) (describing weaving its way through the "Supreme Court's labyrinthine state action jurisprudence" and concluding foster care parents are not state actors for purposes of liability under 42 U.S.C. § 1983). See also *Brown ex rel. Estate of Henry v. Hatch*, 984 F. Supp. 2d 700, 707 (E.D. Mich. 2013) (day-to-day decisions made by foster care parents not "state action", but initial placement decision of non-profit entity may be state action, and thus, district court had jurisdiction to consider § 1983 claims against non-profit).

[14] *Brentwood Acad.*, *supra at* 290.

[15] *Id*.

Yet, the last two decades have seen expansive privatization by state and local governments.[16] As a result, § 1983 litigation in federal courts has been consumed with the question of the status of private parties contracted "to perform a wide variety of core government services—often very sensitive services—including operating prisons, providing medical care to prisoners, administering welfare and public benefit programs, processing parking tickets, providing private security services, collecting government debts, fighting fires, and *overseeing foster care and child placement programs*."[17] As with the latter, which are at issue in the instant case,[18] many of these services "are the types that create conditions in which constitutional violations by the private entities providing these services" may occur if they are considered state actors.[19]

While some privatized entities providing these core services have been considered state actors, the focus of the current Supreme Court is less on the characterization or categorization of the services provided, and more on the particular activity or conduct engaged in at the time the alleged constitutional violation is said to have occurred.[20] Indeed, as the Court has clarified, the focus of the "state action" doctrine is on the particular act or conduct alleged to have resulted in the constitutional deprivation, and so it has moved away from categorical

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[16] Frankel, *The Failure of Analogy in Conceptualizing Private Entity Liability Under Section 1983*, 78 UKMC L. REV. 967, 968 (2009-2010).

[17] *Id*. at 968-969. (emphasis added) (internal footnotes omitted).

[18] *Id*., citing *Donlan v. Ridge*, 58 F.Supp.2d 604, 610-611 (E.D. Pa. 1999) (private foster care provider acted under color of state law) and *Bartell v. Lohiser*, 12 F.Supp.2d 640, 649-650 (E.D. Mich. 1998) (finding a private contractor that provided foster care acted under color of state law and was therefore entitled to qualified immunity).

[19] *Id*.

[20] LoTempio, supra at 441 (stating that while the "Warren Court was characterized by an expansive view of the federal government and state action", "the later Burger and Rehnquist Courts attempted to narrow the reach of federal power through the state action doctrine" and "[t]he current court has continued to apply the state action doctrine in a *restrictive and stringent* manner.") (emphasis added).

labels based on the type or nature of the business involved. Thus, as the Court has iterated, "[t]he fact 'that a private entity *performs a function* which serves the public does not make *its acts [governmental] action*.'"[21] As a result, "courts consider whether the party's *particular conduct* qualifies as state action, not whether the particular party is itself a state actor."[22]

As presented in this brief, while the question of "state action" / "acting under color of state law" can be guided by one or more of the "tests" derived from the Supreme Court's jurisprudence, the ultimate outcome is not dictated by the nature of services or function of the particular entity, or on whether the entity is private for-profit or not-for-profit. Rather, the focus is on the acts and conduct engaged in that is alleged to have been the catalyst for the constitutional deprivation supporting the §1983 claim or claims.

For purposes of addressing the first question presented in this brief, *amicus curiae* asserts by analogy from the Supreme Court's decisions in *Blum v. Yaretsky*,[23] and the companion case of *Rendall-Baker v. Kohn*,[24] the closest Supreme Court analogues to the instant case, the actions and conduct of Wolverine Health Services (WHS) and its individual employees which form the basis for the §1983 claims in this case were ordinary and routine actions, and do not constitute state action. The actions and conduct complained of would have been engaged in no matter what the particular function of similarly situated entities, and thus, cannot satisfy "state action" / "acting under color of state law" requirement no matter which of the five tests is applied.

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[21] *S.F. Arts & Ath., Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544; 107 S. Ct. 2971; 97 L.Ed.2d 427 (1987) (emphasis added).

[22] Schwartz, *supra* at § 5.12.

[23] 457 U.S. 991; 102 S. Ct. 2777; 73 L.Ed.2d 534 (1982).

[24] 457 U.S. 830; 102 S. Ct. 2764; 73 L.Ed.2d 418 (1982).

1. Actions for the State and Actions by the State

In 1970 the Supreme Court held a restaurateur who conspired with a police officer to effectuate the arrest of a white school teacher for vagrancy after she was denied service with six of her black students and refused to leave the restaurant was a "state actor" for purposes of § 1983 liability.[25] The Court concluded that the restaurateur had been "a willful participant in joint activity" with a state official (the police officer), and thus, qualified as a "state actor".[26] Importantly, the Court reasoned that to be considered a state actor the private entity had to have conspiratorial intent in the alleged constitutional deprivation, i.e., denial of equal protection of guaranteed by the Fourteenth Amendment.[27] In other words, the private entity's conduct and actions had to be *co-aligned with* and *motivated by* the alleged unconstitutional deprivation occasioned by or incidental to those of the actual state actor.[28] The Court noted that § 1983 "does not forbid a private party, not acting against a backdrop of state compulsion or involvement," to enforce a policy or commit an act that might otherwise be a deprivation of an individual's constitutional rights.[29]

In 1982, the Court abandoned the "bad faith / conspiracy" test and replaced it with the "fair attribution" test in *Lugar v. Edmonson Oil Co.*[30] The Court concluded to find "state action" required only that the "conduct allegedly causing the deprivation of a federal right be *fairly attributable* to the State."[31]

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[25] *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 146-147; 90 S. Ct. 1598; 26 L. Ed. 2d 142 (1970).

[26] *Id*. at 152.

[27] U.S. Const., amend. XIV.

[28] *Adickes*, *supra* at 173-174.

[29] *Id*. at 169.

[30] 457 U.S. 922, 923; 102 S. Ct. 2744; 73 L.Ed.2d 482 (1982).

[31] *Id*. at 937 (emphasis added).

The Court explained there was a two-step analysis. First, the deprivation must be caused by the exercise of some right or privilege created by the State, or by a rule of conduct imposed by the State, or by a person for whom the State is responsible – the equivalent of action *for the state*. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. A surrogate for action *by the state*. The Court explained, this may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[32] The Court noted that without such a limitation, private parties could face constitutional litigation whenever they seek to rely on state law governing their interactions with individuals for whom they are responsible.[33]

This "two-step" analysis remains important because an analysis of the precise function of the private entity, step one, must be undertaken, as well as examination of the nature of the conduct and actions of the individuals alleged to have effectuated the constitutional violation, step two. Both of these must be satisfied to find "state actor" liability under § 1983. So, for example, while the "public defender" in *Polk County v. Dodson*[34] may have been employed by the state and performing a governmental *function* in representing an indigent defendant, i.e., action *for the state*, his actions and conduct, i.e., performing legal representation in accord with the rules of professional conduct and necessarily adversarial to the state, his employer, was not considered action *by the state* effectuating an alleged constitutional

[32] *Id*.

[33] *Id*.

[34] 454 U.S. 312; 102 S. Ct. 445; 70 L.Ed.2d 509 (1981).

deprivation.[35] This duality runs through all the Supreme Court jurisprudence and commentary on the subject.[36]

2. Use of the Tests as Guidance Only

While this state action / acting under color of state law requirement has evolved into several "tests", these two aforementioned dual elements remain as necessary prerequisites to determining whether a private entity can be subject to § 1983 liability.[37] Ultimately, the five "tests" that have been used by the Court as guidance include:

(1) The Public Function / Exclusive Government Function Test – considers whether the private entity exercises "powers traditionally exclusively reserved to the State." This has been described as one of the most restrictive tests.[38] While many functions have been traditionally performed by government, very few, including foster care of children, have been "exclusively reserved" to the state.[39]

(2) The Close Nexus Test – considers whether there is a sufficiently close nexus between the State and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the State itself.[40] This is also co-aligned with the "joint action" test.[41]

(3) The Symbiotic Relationship / State Compulsion Test – considers whether the state has "so far insinuated itself into a position of interdependence" with the private entity that there is a "symbiotic relationship" between them.[42]

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[35] *Lugar*, supra 457 U.S. at 935, n. 18.

[36] See *S.F. Arts & Ath., Inc.*, supra, 483 U.S. at 544; Schwartz, *supra* at § 5.12.

[37] *Brentwood Academy*, *supra*, 531 U.S. at 295..

[38] *Id*. See also *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003); *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 564 (6th Cir. 2007).

[39] *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 158; 98 S.Ct. 1729; 56 L.Ed.2d 185 (1978).

[40] *Id*., citing *Jackson*, *supra*, 419 U.S. at 351.

[41] See *Adickes*, *supra*.

[42] See also *Yaretsky*, *supra*, 457 U.S. at 1004. A left over from *Adickes*, *supra* at 169-170, this test requires a finding that the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id*.

(4) The Joint Action Test – considers whether the private entity is a willful participant in joint activity with the State or its agent.[43]

(5) The Entanglement / Pervasive Entwinement Test – Where a "nominally" private entity is overborne by pervasive entwinement of public institutions and public officials in its composition and workings that there is no substantial reason to claim unfairness in applying constitutional standards.[44]

The Sixth Circuit recognizes at least four of these "tests".[45] However, as already noted, because a private party may engage in state action with regard to certain actions, but not others, courts do not make categorical judgments.[46] In the end, it is an intensely fact-bound jurisdictional inquiry.[47] It is a "normative judgment and the criteria lack rigid simplicity."[48]

"Because the States' 'varied, pragmatic approach in establishing government' has produced a 'staggering[ly] divers[e]' array of governance arrangements, 'no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient….'"[49] Rather, whatever the test (or combination of tests) applied, it is directed to *particular action* and courts typically examine *the conduct itself* to determine whether it constitutes state action.[50] Ultimately, the Court has explained that it

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[43] *Adickes*, *supra*.

[44] *Brentwood Academy*, 551 U.S. at 298.

[45] See *Vistein v. Am. Registry of Radiologic Technologists*, 342 F. App'x 113, 127 (6th Cir. 2009) (describing the tests as (1) public function; (2) state compulsion; (3) symbiotic or nexus; and (4) entwinement, but leaving out the "joint action" test).

[46] Neimasik, *Teen Pregnancy in Charter Schools: Pregnancy Discrimination Challenges Under the Equal Protection Clause*, 22 MICH. JOURNAL OF GENDER AND LAW 55, 63 (2015), citing LoTempio, *supra* at 443.

[47] *Brentwood Acad.*, *supra*, citing *Lugar*, 457 U.S. at 939.

[48] *Id*.

[49] *Id*. at 295. See also *Minges v. Butler Cty. Agric. Soc'y*, 585 F. App'x 879, 880 (6th Cir. 2014). Accord *Norris v. Premier Integrity Sols., Inc.*, 641 F.3d 695, 698 (6th Cir. 2011).

[50] LoTempio, *supra* at 443.

wants constitutional standards to be invoked where it can be said that the State *is responsible* for the specific conduct of which the plaintiff complains.[51] Focus on the actions and conduct of the individual at the time the alleged constitutional deprivation occurred ensures a proper connection can be made to both action by the state and action for the state.[52]

The closest factual analogue to the instant case in the Supreme Court is *Blum v. Yaretsky*.[53] The entity there was a privately owned and operated nursing home. The plaintiffs, who were residents or their representatives, complained that certain discharge decisions and transfers to lower levels of care without adequate notice or hearings violated their Fourteenth Amendment rights, and thus, gave rise to § 1983 liability. The Court focused on the actions and conduct being complained of and held the plaintiffs had failed to meet the "state action" requirement.

Again, adhering to its overarching "two-step" inquiry focusing first on the "function" (whether there had been action for or on behalf of the state) and second on the "actions and conduct" of the individuals (whether there had been action by the state), the Court stated:

> [A]lthough it is apparent that nursing homes in New York are extensively regulated, "[the] mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible for* the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.
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> Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has

[51] *Brentwood Acad.*, *supra* at 295 (emphasis added), citing *Yaretsky*, *supra*, 457 U.S. at 1004.

[52] *Yaretsky*, *supra* at 1004.

[53] 457 U.S. 991; 102 S. Ct. 2777; 73 L.Ed.2d 534 (1982).

> provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.
>
> Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State"[54]

Looking closely at the normative behavior of the individuals, and the conduct that gave rise to the alleged constitutional deprivations (there violation of due process under the Fourteenth Amendment), the Court simply concluded:

> The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that *those decisions* were influenced in any degree by the State[]….[55]

In a companion case, *Rendall Baker v. Kohn*,[56] the Court noted that "[t]he ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights "fairly attributable to the State?"[57]

The Court then went on to address the various factors from the five tests. Dependence on state funding or contracts did not make the acts of the physicians and nursing home administrators acts of the State. In this regard, the Court noted nursing homes were not fundamentally different from many private corporations whose business depends primarily on performing contracts for the government. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing

[54] *Id*. at 1004-05 (emphasis in original) (internal citations omitted).

[55] *Id*. at 1005 (emphasis added).

[56] 457 U.S. 830; 102 S. Ct. 2764; 73 L.Ed.2d 418 (1982).

[57] *Id*. at 838.

public contracts."[58] These acts were rather merely those that would be required for any company or business.

Extensive and detailed regulation of the private entity is also not dispositive. "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."[59] The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity *so that the action* of the latter may be fairly treated as that of the State itself."[60] The "purpose of this requirement", the Court explained, "is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains."[61] The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.[62]

The third factor addressed was whether the entity performs a "public function." Noting the strict requirement of this factor, the Court stated it has found "public function" only where the function performed has been "traditionally the *exclusive* prerogative of the State."[63] With respect to the private school in *Rendall-Baker*, the Court noted there can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. There was no indication that these services were the

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[58] *Id*. at 841.

[59] *Yaretsky*, *supra* at 1004.

[60] *Id*.

[61] *Id*.

[62] *Rendall-Baker*, *supra* at 842.

[63] *Id.*at 842 (emphasis added); Yaretsky, *supra* at 1011.

exclusive province of the State. That a private entity performs a function which serves the public does not make its acts state action.[64]

B. Analysis

Applying the *Blum v. Yaretsky / Rendall-Baker v. Kohn* analyses to the instant case reveals that the action and conduct complained of, that is, the precise acts of housing and monitoring decedent were not conducted on behalf of the state or by the state. As noted by the Supreme Court in *Yaretsky* and *Rendall-Baker*, decisions made in the day-to-day administration of the private entities addressed there were the not the "*kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public*."[65]

These actions, which were the factual bases of the plaintiffs' § 1983 claims, were the focus of the court's analyses. While it is a factually intensive inquiry, it is easily resolved by reviewing precise factual allegations and the record facts. Housing decisions, transfers, initial placements, movement directed within the facility, without more, are logistical determinations.

These include the unfortunate mistake that was made concerning whether the decedent should have gone with one group or another, or stayed behind in his room. A review of the record and testimony by *amicus curiae* does not reveal that he was locked in his room, and indeed, it seems he was allowed to come out of his room and roam about.

As noted, contractual relationships and extensive regulations are not dispositive. Moreover, the public function test does not apply here because foster care has not been traditionally *exclusively* reserved to the government.[66] "No aspect of providing care to foster

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[64] *Rendell-Baker v Kohn*, 457 US 830, 840-43; 102 S Ct 2764; 73 L Ed 2d 418, 427-29 (1982).

[65] *Yaretsky*, *supra* at 1012 (emphasis added).

[66] *Leshko v. Servis*, 423 F.3d 337, 343 (3rd Cir. 2005).

children…has ever been the exclusive province of the government."[67] Even if actual removal of children from their home for placement in foster care is a state action, "the hands-on care may be tendered by families, private organizations, or public agencies…and thus is not exclusively governmental."[68] In Michigan, a combination of state agencies, religious institutions, and private entities have nearly always managed the placement and care of foster children.[69]

Further, several other courts have held that providing social welfare services to minors is not a "traditionally exclusive governmental function."[70] "Providing social services to teens with a history of violent or unruly behavior is not a traditionally exclusive governmental function."[71] Placement recommendations of minor children that have been removed from their original homes was not "state action" as the recommendations and actions of the private

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[67] *Id*.

[68] *Id*.

[69] E.A. Blackstone, et al., *Privatizing adoption and foster care: Applying auction and market solutions*, 26 CHILDREN AND YOUTH SERV. REV.1033, 1037 (2004) (surveying the private and government resources and methods in three states (including Michigan) for foster care and explaining that foster care is not the exclusive function of the government due to the historical participation of a number of charitable and religious institutions in caring for foster children).

[70] *Mabe v. San Bernardino County Dept. of Social Services*, 237 F.3d 1101, 1109, n. 3 (9th Cir. 2001) (foster parents not state actors); *Rayburn ex. rel. Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001) (same); *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 168, n. 9 (3rd Cir. 2001) (legal custodian not state actor); *Malachowski v. City of Keene*, 787 F.2d 704, 710-11 (1st Cir. 1986), cert. denied 107 S. Ct. 107 (1986) (a private, non-profit organization that made available foster care for state agencies and provided recommendations to the juvenile courts with respect to child placement was not a state actor because decisions regarding disposition and recommendations regarding placement were not exclusive prerogatives of the state).

[71] *Reguli v. Guffee*, No. 3:08-0774, 2009 U.S. Dist. LEXIS 12952, at *14 (M.D. Tenn. Feb. 19, 2009). Accord *Rendall-Baker*, *supra*, 457 U.S. at 842.

organizations were distinguished from actual removal from custody, which was a prerogative exclusively within the auspices of the State.[72]

Indeed, focusing on the "day-to-day" decisions and operations of the private entity, as the Supreme Court did in *Yaretsky* and *Rendall-Baker* with nursing homes and private schools, respectively, the Eastern District of Michigan has also concluded that such does not fit the requirements of a state actor / acting under color of state law for § 1983 liability.[73]

Based on the law as applied to the briefs and documents, *amicus curiae* takes the position that the actions and conduct of WHS and the individual defendants, as those actions and conduct pertain to the incident in question, cannot fulfill the state action / acting under color of state law tests for imposing § 1983 liability on a private entity.

II. IF THE COURT CONCLUDES WHS IS A "STATE ACTOR", THE PROPER STANDARD OF LIABILITY UNDER § 1983 AGAINST WHS IS THE "ENTITY STANDARD" OF "DELIBERATE INDIFFERENCE" AND AGAINST THE INDIVIDUAL NAMED DEFENDANTS THE "INDIVIDUAL DELIBERATE INDIFFERENCE" STANDARD UNDER THE 14TH AMENDMENT

A. Law

Ordinarily, § 1983 claims arising out of injuries suffered by those who are in custodial or quasi-custodial environments, but who are not serving a sentence of imprisonment, are

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[72] *Martinez v. Cty. of Kern*, No. CV F 06-1827 LJO TAG, 2007 U.S. Dist. LEXIS 30150, at *16 (E.D. Cal. Apr. 6, 2007).

[73] *Brown ex rel. Estate of Henry v. Hatch*, 984 F. Supp. 2d 700, 708 (E.D. Mich. 2013), citing *inter alia*, *Leshko*, *supra*; *Rayburn v. Hogue,* 241 F.3d 1341, 1347 (11th Cir. 2001); *Lintz v. Skipski,* 807 F. Supp. 1299, 1306-07 (W.D. Mich. 1992), *aff'd on other grounds,* 25 F.3d 304 (6th Cir. 1994). See also *Lethbridge v. Troy*, No. 06-14335, 2007 U.S. Dist. LEXIS 68281, at *10 (E.D. Mich. Sep. 17, 2007) (stating "[t]he Fourteenth Amendment places an affirmative obligation on states to ensure that minor children who become wards of the state by virtue of state action are not treated with deliberate indifference as to their health and safety" but "[t]his is to be distinguished from providing hands on, day-to-day care, which is not the state's obligation. *See Leshko*, *supra*, 423 F.3d at 342; *Milburn v. Dep't of Social Services*, 871 F.2d 474, 479 (4th Cir. 1989)") (other internal citations omitted).

brought under the 14th Amendment Due Process Clause.[74] This clause provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law."[75] As the amendment guarantees protection against "*deliberate* decisions of government officials to deprive a person of life, liberty, or property", "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."[76] The Supreme Court has therefore stated that "negligent conduct by a state official, even though causing injury" has never been held to constitute a deprivation under the Due Process Clause.[77] Generally, "[w]here a government official's act causing injury to life, liberty, or property is merely negligent, 'no procedure for compensation is constitutionally required.'"[78] Therefore, incidental injuries incurred as a result of an entity's needs to impose regulatory restraints on the freedom of movement for the safety of those being held in a custodial environment are not actionable under § 1983.[79]

As against both entities and individuals, the "standard" for determining whether there has been a constitutional deprivation in violation of the 14th Amendment for an individual who is in a custodial environment is "deliberate indifference".[80] However, as explained herein, that

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[74] *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850; 118 S. Ct. 1708; 140 L.Ed.2d 1043 (1998).

[75] U.S. Const., amend. XIV.

[76] *Lewis*, *supra* at 849 (emphasis added), citing *Daniels v. Williams*, 474 U.S. 327, 334; 106 S. Ct. 662; 88 L.Ed.2d 662 (1986). See also the latter's companion case of *Davidson v. Cannon*, 474 U.S. 344, 347; 106 S. Ct. 668; 88 L.Ed.2d 677 (1986).

[77] *Id*.

[78] *Davidson*, *supra*, 474 U.S. at 347 (where a state actor is merely negligent in causing the injury, no procedure for compensation is constitutionally required and constitutional protections are not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property).

[79] *Bell v. Wolfish*, 441 U.S. 520, 537; 99 S. Ct. 1861; 60 L.Ed.2d 447 (1979).

[80] *Lewis*, *supra* (liability against individual defendants may attach for deliberate indifference to medical needs of detainees) and *City of Canton v. Harris*, 489 U.S. 378, 388-89; 109 S. Ct.

standard is different for entity defendants (which includes official policymakers and decision makers) and for individual defendants.[81]

1. The "Deliberate Indifference" Standard for Entity Liability

When assessing whether a "municipal" or "corporate" entity can be held liable under § 1983, it is important to note at the outset that a cognizable claim against the entity requires a finding that its agents violated the plaintiff's constitutional rights.[82] Simply put, if there is no underlying constitutional violation, i.e., none of the entity's agents acted with the requisite constitutionally proscribed conduct, then there can be no entity liability.[83] So, in the instant case, if the Court were to conclude none of the individual defendants acted with "deliberate indifference", as that standard is jurisprudentially defined and applied, towards decedent's constitutional rights, then WHS cannot be held liable.

For "entity" defendants, the Supreme Court has held "a municipality can be found liable under 42 U.S.C. § 1983 only where the municipality *itself* causes the constitutional violation"[84] "*Respondent superior* or vicarious liability will not attach under § 1983"; the entity itself must have instituted (or, in some cases, failed to institute) and implemented (or failed to implement) a policy that resulted in "deliberate indifference" to clearly established

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1197; 103 L.Ed.2d 412 (1989) (policy, practice, custom or procedure of a municipality may give rise to § 1983 liability where its implementation results in a deliberate indifference to the rights of individuals, and where such implementation was the moving force behind the injury).

[81] *Lewis*, *supra*; *Harris*, *supra*.

[82] *Partin v. Davis*, 675 F. App'x 575 (6th Cir. 2017), citing *Memphis, Tenn. Area Local, Am. Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898, 902 (6th Cir. 2004).

[83] *City of L.A. v. Heller*, 475 U.S. 796, 799; 106 S. Ct. 1571; 89 L.Ed.2d 806 (1986) (stating "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.").

[84] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 695-696; 98 S. Ct. 2018; 56 L.Ed.2d 611 (1978).

constitutional rights.[85] Ever since the Supreme Court decided *Monell*, the availability of entity liability under § 1983 has been established. A private entity may likewise be subject to § 1983 "entity" liability under the same standard.[86]

The critical question under *Monell*, reaffirmed in *L.A. County v. Humphries*,[87] is whether a municipal (or corporate) policy or custom gave rise to the harm (that is, caused it), or if instead the harm (arising from the implementation of that policy or custom) resulted from the acts of the entity's agents (whether negligent or otherwise). There are several ways in which a plaintiff might prove this essential element. First, she might show that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[88] Second, she might prove that the "constitutional deprivation[] [was] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."[89] Third, the plaintiff might be able to show that a policy or custom is "made…by those whose edicts or acts may fairly be said to represent official policy."[90] "A person who wants to impose liability on a municipality for a constitutional tort must show that the tort was committed (that is, authorized or directed) at the policymaking

[85] *Harris*, *supra*, 489 U.S. at 385 (this case established the "deliberate indifference" standard for "municipal" or "entity" liability).

[86] *Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 789-790 (7th Cir. 2014); *Iskander v. Vill. of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982); *Rojas v. Alexander's Dep't Store, Inc.*, 924 F.2d 406, 408-409 (2d Cir. 1990); *Harvey v. Harvey*, 949 F.2d 1127, 1129-1130 (11th Cir. 1992) (citing cases); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 818 (6th Cir. 1996).

[87] 562 U.S. 29; 131 S. Ct. 447; 178 L. Ed. 2d 460 (2010).

[88] *Id.* at 35 (quoting *Monell*, 436 U.S. at 690).

[89] *Monell*, 436 U.S. at 690-91.

[90] *Id.* at 694.

level of government ... ."[91]. As for the supervisory liability under the latter, proof of personal involvement by the policymaker or decision making authority is required."[92]

Importantly, "entity" liability as opposed to individual liability under this standard, arises when execution of a government's policy or custom actually inflicts the injury that the government as an entity is responsible under § 1983."[93] As stated by the Sixth Circuit in *Amerson v. Waterford Twp*,[94] "[t]he custom or policy must be the 'moving force' behind the constitutional violation, so the plaintiff needs to identify the policy, connect the policy to the [entity] itself, and show that the particular injury was incurred because of the execution of that policy".[95]

Most importantly, liability can only be imposed where "[o]fficial municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law."[96] One off instances, or "single incidents" are insufficient because, as the Court has explained, "[i]n virtually every case where a person has had his or her constitutional rights violated…a § 1983 plaintiff [could] point to something [via expert testimony or otherwise] the [entity] 'could have done' to prevent the unfortunate incident."[97]

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[91] *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011).

[92] *Miller v. Calhoun County,* 408 F.3d 803, 817 n.3 (6th Cir. 2005). See also *Kosloski v. Dunlap*, 347 F. App'x 177, 180 (6th Cir. 2009).

[93] *Monell, supra*, 436 U.S. at 694.

[94] 562 Fed. App'x 484, 490 (6th Cir. 2014), citing *Garner v. Memphis Police Department,* 8 F3d 358, 364 (6th Cir. 1993).

[95] *Id*.

[96] *Connick v. Thompson*, 563 U.S. 51, 63; 131 S. Ct. 1350; 179 L.Ed.2d 417 (2011).

[97] *Harris*, 389 U.S. at 392, citing *Okla. City v. Tuttle*, 471 U.S. 808, 823; 105 S. Ct. 2427; 85 L.Ed.2d 791 (1985).

2. The Deliberate Indifference Standard for Individual Defendant Liability

Fourteenth Amendment claims against individual defendants for injuries received in custodial environments are analyzed according to the "deliberate indifference" standard applicable to "conditions of confinement" cases.[98]

In terms of an individual's liability under § 1983 in a failure to protect claim under the 14th Amendment, "deliberate indifference" must be established as to each individual defendant's conduct and actions, separate and apart from the conduct of other defendants.[99] There is no "collective conscience" or "integral participation" theory of "deliberate indifference".[100] Accordingly, the question of whether an official possessed the requisite knowledge and culpable mental state to sustain a deliberate indifference claim "must be addressed for each officer individually."[101] The Court must conduct a particularized analysis of whether each defendant was deliberately indifferent to decedent's circumstances.[102]

Individual deliberate indifference has an objective and subjective component. As the Sixth Circuit has explained, "deliberate indifference" is a higher standard than negligence and requires analysis of the individual defendant's "objective" and "subjective" state of mind.

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[98] *Bell*, *supra*, 441 U.S. at 537-538. See also *Lewis*, *supra*, 523 U.S. at 849.

[99] *Stoudemire v. Mich Dep't of Corrections*, 705 F.3d 560, 570-571 (6th Cir. 2013), citing *Reilly v. Vadlamudi*, 680 F.3d 617, 624 (6th Cir. 2012). See also *Bishop v. Hackel*, 636 F.3d 757, 767 (6th Cir. 2011) (district court erred in failing to make individualized assessment for purposes of subjective component under *Farmer v. Brennan*, 511 U.S. 825, 834; 114 S. Ct. 1970; 128 L. Ed. 2d 811 (1994)); *Phillips v. Roane County*, 534 F.3d 531, 542 (6th Cir. 2008) ("[w]here, as here, the district court is faced with multiple defendants asserting qualified immunity defenses, the court should consider whether each individual defendant had a sufficiently culpable state of mind.").

[100] At least, in the Sixth Circuit, the "integral participant" or "collective conscience" "deliberate indifference" theory for individual liability claims under § 1983 has been rejected. See *Aquisto v. Danbert*, 165 F.3d 26 (6th Cir. 1998), but *cf. Atencio v. Arpaio*, 674 F. App'x 623 (9th Cir. 2016) (adopting the "integral participant" theory).

[101] *Garretson v. City of Madison Heights*, 407 F.3d 789, 797 (6th Cir. 2005).

[102] *Id*. See also *Stoudemire*, *supra*. *Phillips*, *supra*.

First, it must be shown that that the official knew of the risk to the detainee. This is the objective component. The objective component requires evidence of a "sufficiently serious" medical need.[103]

Second, it must be proved that the individuals consciously disregarded the known excessive risk of harm to the detainee's health or safety. This, the subjective prong of *Farmer*, has three parts.[104] It requires proof "that the official being sued subjectively perceived facts from which to infer the substantial risk", "that he did in fact draw the inference," and "that he then disregarded that risk."[105] The Sixth Circuit has therefore required a showing that each individual defendant "knew" that the detainee faced a substantial risk of serious harm, and that each individual then disregarded that risk by failing to take reasonable measures to abate it.[106]

It should also be pointed out to the Court that the Supreme Court held in *Davidson v. Cannon*,[107] that there must be an opportunity for the individual defendant to know of and disregard the risk. If there is no present awareness by the individual, then there can be no *deliberation* with respect to the present risk of harm. The Sixth Circuit has followed this line of reasoning, holding that individuals "cannot be held liable under this theory if they do not have *a realistic opportunity to intervene and prevent harm*."[108]

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[103] *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009).

[104] *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001).

[105] *Id*. See also *Hinneburg v. Miron (In re Estate of Hinneburg)*, 676 F. App'x 483 (6th Cir. 2017).

[106] *Bishop v. Hackel*, 636 F.3d 757, 766 (6th Cir. 2011), following *Farmer v. Brennan*, 511 U.S. 825; 114 S. Ct. 1970; 128 L. Ed. 2d 811 (1994).

[107] 474 U.S. at 347-48.

[108] *Wells v. City of Dearborn Heights*, 538 F. App'x 631, 640 (6th Cir. 2013) (emphasis added), citing *Ontha v. Rutherford Cnty., Tenn.,* 222 Fed. Appx. 498 (6th Cir. 2007).

B. Analysis

After a review of the pleadings and record documents, *amicus curiae* cannot determine that WHS had an identifiable persistent practice, custom, or policy which can be directly connected to the particular injury complained of. Plaintiff has produced voluminous records of WHS documenting various unrelated instances of what can only be described as "day-to-day" issues that might arise in similar facilities with troubled youths, and which may be considered to have arisen from independent instances of negligence. There appear to be no policy, practice, custom or procedure directly tied to prior identical incidents that are anywhere near to the single incident of decedent's tragic and self-inflicted suicide.[109] *Amicus curiae* has also not seen evidence that a supervisor (policymaker or decision maker) implemented such a policy, practice, custom, or procedure, and that such implementation was a moving force behind, i.e., the cause of, the alleged constitutional deprivation. Again, *amicus curiae* respectfully cautions the Court that where a first-time incident occurs, and then it is later discovered, either through discovery or as posited by "experts", that the entity *should have done things* differently, the entity cannot be held liable because of the specific requirement in Supreme Court jurisprudence that there be a known, established constitutionally infirm policy that has resulted in a pattern of violations over time.[110] In other words, a plaintiff in a § 1983 case cannot use the fact of the incident as "proof" of a constitutionally infirm policy where there is no evidence of past patterns of similar violations.

As to the individual named defendants' liability under the individual "deliberate indifference" standard, it must be determined as to each one whether the objective and subjective components of the test are satisfied. That is, whether there was a known "serious" risk of harm (a serious risk of suicide) to decedent, whether any of the individual named

[109] *Amerson*, *supra*, 562 Fed. App'x at 490, citing *Garner*, *supra*, 8 F.3d at 364.

[110] *Harris*, 389 U.S. at 392, citing *Okla. City v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L.Ed.2d 791, 804 (1985).

defendants knew of or were aware of that serious risk, and whether proof exists that any of the individual named defendants consciously ignored that serious risk, which "*deliberate* indifference" then led to the incident in question.[111] The sudden suicide by the decedent where he was apparently allowed to leave his room, and had previously interacted with the individual defendants separately and over a period of time, would appear to indicate that there was no realistic opportunity to appreciate the risk and/or prevent the incident in this case.[112] Finally, as noted by the Supreme Court, simple negligence, including "medical malpractice", does not rise to the level of a constitutional tort cognizable under § 1983.[113] When professionals provide treatment or care, albeit carelessly or inefficaciously, they have not "displayed a deliberate indifference to the [claimant's] needs, but merely a degree of incompetence which does not rise to the level of a constitutional violation."[114]

Finally, MDTC again points out that if there is no finding of a constitutional violation because the individual defendants cannot be deemed to have acted with the high level of culpability required of the "deliberate indifference" standard, WHS cannot be held liable.[115]

III. IF WHS WAS A STATE ACTOR / ACTING UNDER COLOR OF STATE LAW, AND IF THE INDIVIDUAL NAMED DEFENDANTS WERE "DELIBERATELY INDIFFERENT" THEY ARE STILL ENTITLED TO IMMUNITY

A. Law

As the Sixth Circuit has stated, since the Supreme Court's decision in *Richardson v. McKnight*,[116] determining whether an employee of a private contractor that is acting under

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[111] *Bishop*, *supra*, 636 F.3d at 766.

[112] See *Davidson*, *supra*, 474 U.S. at 347-348; *Wells*, *supra*, 538 F. App'x at 640.

[113] *Comstock*, *supra*, 273 F.3d at 703, citing *Estelle v. Gamble*, 429 U.S. 97, 106; 97 S. Ct. 285; 50 L.Ed.2d 251 (1976).

[114] *Comstock, supra*.

[115] *Heller*, *supra*, 475 U.S. at 799.

color of state law may herself assert immunity demands a fact-intensive analysis under which some employees may be permitted to assert qualified immunity and some may not.[117] For the Court's consideration, the Sixth Circuit has held a prison psychiatrist employed by a non-profit entity may not assert qualified immunity;[118] a prison nurse employed by a private medical provider may not assert qualified immunity;[119] and a private attorney working alongside a prosecutor may not assert qualified immunity.[120] Whereas, *amicus curiae* points out that the Circuit Court has also held that the executive director of a private high school athletics association may assert qualified immunity;[121] private attorneys serving as outside counsel to a city may assert qualified immunity;[122] and, most importantly, employees of a private foster-care agency may assert qualified immunity.[123]

More indicative is the Supreme Court's most recent treatment of this very issue. In *Wyatt v Cole*,[124] the Court had left open the possibility that a "good faith" / "common-law immunity" might be available to private parties who were considered state actors acting under color of state law for § 1983 liability. In the 2012 decision of *Filarsky v. Delia*,[125] the

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[116] 521 U.S. 399, 404-412; 117 S. Ct. 2100; 138 L. Ed. 2d 540 (1997).

[117] *United Pet Supply, Inc v City of Chattanooga*, 768 F.3d 464, 479 (6th Cir. 2014) (citing cases).

[118] *McCullum v. Tepe*, 693 F.3d 696, 702-704 (6th Cir. 2012).

[119] *Harrison v. Ash*, 539 F.3d 510, 521-525 (6th Cir. 2008).

[120] *Cooper v. Parrish*, 203 F.3d 937, 952-953 (6th Cir. 2000).

[121] *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 442 F.3d 410, 438-440 (6th Cir. 2006), *rev'd on other grounds*, 551 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166 (2007).

[122] *Cullinan v. Abramson*, 128 F. 3d 301, 310-311 (6th Cir. 1997).

[123] *Bartell v. Lohiser*, 215 F.3d 550, 556-57 (6th Cir. 2000).

[124] 504 US 158, 168-169; 112 S Ct 1827; 118 L Ed 2d 504 (1992).

[125] 566 U.S. 377, 387; 132 S.Ct. 1657; 182 L.Ed.2d 662 (2012).

Court expounded upon and detailed the rationale behind the availability of such immunity to private parties sued under § 1983.

First, the Court stated that the analysis of whether private entity individuals are entitled to immunity is based on the common law recognized immunities at the time the predecessor to § 1983 was enacted.[126] The Court noted several situations in which "private" entities sued under § 1983 were nonetheless entitled to immunity.[127] The Court further noted § 1983 was to be read in harmony with common law immunities, which had been incorporated into the judicial system.[128]

The Court's rationale detailed reasons why common law immunities were and should be extended in certain circumstances. "[S]uch immunity" the Court noted "protect[s] government's ability to perform its traditional functions."[129] It did this, the Court explained, by "helping to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits."[130] This, the Court concluded, was "the most important special government immunity producing concern."[131] Further, the Court stated that "[e]nsuring that those who serve the government do so 'with the decisiveness and the judgment required by the public good'" was of "vital importance…."[132] Noting that "it is often when there is a particular need for

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[126] *Id*. at 385.

[127] *Id*. at 386-388.

[128] *Id*. at 389.

[129] *Id*., citing *Wyatt*, *supra*, 504 U.S. at 167.

[130] *Id*. at 389-390, citing *Richardson*, *supra* at 409-411.

[131] *Id*. at 390.

[132] *Id*., citing *Scheuer v.Rhodes*, 416 U.S. 232, 240; 94 S. Ct. 1683; 40 L. Ed. 2d 90 (1974).

specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals."[133] The Court acknowledged that its prior decisions were decidedly narrow, and specifically did not foreclose the possibility of extending immunity to private individuals.[134]

B. Analysis

MDTC respectfully suggests that in the event the Court were to conclude all other aspects to bring a 42 U.S.C. § 1983 claim against WHS are satisfied, i.e., that WHS is a state actor / acting under color of state law, and that any of the individual defendants acted with the requisite deliberate indifference resulting in a constitutional violation, that a straightforward application of the rules set out above is sufficient to resolve this case in favor of immunity for the individual defendants.

First, the common law in Michigan in 1894 recognized immunity of entities providing charitable services to the state.[135] In 1894, the beneficiary of the services of a charitable organization was unable to recover for damages resulting from negligence of an employee or agent of the charity.[136] Although *Parker*, which dealt with the charity of providers of medical care, purportedly did away with that immunity in 1960,[137] the United States Supreme Court fixes its determination of such immunity at the time of the enactment of § 1983's predecessor, the Civil Rights Act of 1871.[138] Likewise, at least before 1972, intra-family

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[133] *Id*.

[134] *Id*. at 393.

[135] *Parker v. Port Huron Hosp.*, 361 Mich. 1, 9; 105 N.W.2d 1 (1960).

[136] *Id.*

[137] See *Guardiola v. Oakwood Hosp.*, 200 Mich. App. 524, 526; 504 N.W.2d 701(1993) (explaining that the law before 1960 extended immunity to all charitable entities, including orphanages).

[138] *Filarsky*, 566 U.S. at 384, citing *Tower v. Glover*, 467 U.S. 914, 920; 104 S.Ct. 2820; 81 L.Ed.2d 758 (1984).

immunity and foster parent immunity were also recognized common law immunities in Michigan.[139]

Indeed, many of the reason cited by the Supreme Court in *Filarsky*, were the same reasons immunity existed in the first place by and between charitable entities and their charges, and by and between parent and child. Immunity protects those performing the exceedingly important function of housing and caring for foster children who may need mental health care, counselling, and special attention that cannot otherwise be provided by the state. These services are directly beneficial to the state and help to avoid, or at least allay, the burdens often attendant to caring for wards of the state.

Second, immunity should be extended to avoid "unwarranted timidity" in the performance of these duties.[140] Insulating such individuals from litigation and liability would prevent "harmful distractions from carrying out the work", which can occur when faced with damages suits.[141] Ensuring that foster children are well-cared for by competent individuals who have incentive to provide unbiased and appropriate care in trying circumstances is of utmost importance to WHS and those organizations like them. Extending immunity when discretionary decisions are made (even negligent ones that may result in injury) is of vital importance to the promotion of sound practice and adequate care. One can certainly ascertain from a cursory review of the record in this case that disciplinary decisions, relationship decisions, housing decisions, and decisions affecting socialization and socializing, are difficult to make and tenuous even for the ordinary child of any age. The sensitivity of these decisions is amplified when made with respect to children who have already suffered the

[139] See *Plumley v. Klein*, 388 Mich. 1, 3; 199 N.W.2d 169 (1972) (discussing previous common-law immunity and abolishing it).

[140] *Filarsky*, supra at 389-90.

[141] *Id*.

misfortunes of being in foster care, and who have come from environments that necessitated this often desperate situation in the first instance.

Finally, extending immunity would also promote, rather than deter, those who want to pursue a career in providing such services.[142] Stress and the difficulties of trying to care for foster children most certainly leads to higher turnover in these professions. Exposing such individuals to litigation and potential liability would make it all the more difficult to choose to pursue such a career.

CONCLUSION

MDTC, as *amicus curiae*, provides the Court with the foregoing analysis, which it deems important for the issues in this case and which most certainly affect many of MDTC's members. Prospectively, MDTC and its members also seek consistency and finality in the law so that they may properly assess risk and understand the rules of law applicable to their actions and conduct in going about their day-to-day operations.

MDTC asserts that the defendants in this case are not state actors and were not acting under color of state law with respect to the actions and conduct that formed the basis of plaintiff's § 1983 claims. MDTC also asserts that in the event this Court finds WHS was a state actor acting under color of state law, that the standards of entity liability and individual liability have not been met. Finally, in the event the Court finds that any of the defendants acted with the requisite degree of culpability, they are nonetheless entitled to immunity from suit under § 1983.

Respectfully submitted,

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Dated: July 12, 2017

[142] *Id*. at 390.

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2017, I electronically filed the Brief *Amicus Curiae* of Michigan Defense Trial Counsel with the Clerk of the Court using the ECF system, and that said pleading was served on all counsel of record by the ECF system.

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