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CIVIL DIVISION
Case No. 25-CV-01839

Dawn Benware, et al v. VitalCore Health Strategies, LLC, et al

**DECISION AND ORDER ON MOTIONS TO DISMISS (# 32, 33,
34, and 35)**

This is a personal injury and wrongful death action arising from Alexander Kelley's death, which Plaintiff Dawn Benware alleges was the result of insufficient medical care while Kelley was incarcerated. Defendants Stacy Switzer, Thomas Marleau, Samantha Bartlett, and Amergis Healthcare Staffing, Inc. ("Amergis") move to dismiss under V.R.C.P. 12(b)(6). For the reasons discussed below, Defendants' Switzer, Marleau, and Bartlett's motions to dismiss are denied. Amergis's motion to dismiss is denied in part and granted in part as described below.

The Vermont Supreme Court has described the familiar standard for Rule 12(b)(6) motions to dismiss for failure to state a claim as follows:

"A motion to dismiss ... is not favored and rarely granted." This is especially true "when the asserted theory of liability is novel or extreme," as such cases "should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." In reviewing a motion to dismiss, we consider whether, taking all of the nonmoving party's factual allegations as true, "it appears beyond doubt" that there exist no facts or circumstances that would entitle the plaintiff to relief." We treat all reasonable inferences from the complaint as true, and we assume that the movant's contravening assertions are false.

Alger v. Dep't of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309 (citations omitted); see also 5B A. Benjamin Spencer, *et al.*, *Fed. Prac. & Proc. Civ.* § 1357 (4th ed.) ("Ultimately, the burden is on the moving party to prove that no legally cognizable claim for relief exists.").

Background

The Court recounts the following allegations from the Third Amended Complaint strictly for the purpose of resolving these motions to dismiss. Plaintiff alleges that

Switzer, Bartlett, and Marleau are nurses under the control and direction of VitalCore Health Strategies, LLC (“VitalCore”), which provided medical services to prisoners at Southern State Correctional Facility (“SSCF”). VitalCore contracted with Maxim Healthcare Staffing (“Maxim”) to provide nursing services at SSCF. In the Third Amended Complaint, Plaintiff names Amergis. For the purposes of this motion, the court assumes that the allegations articulated against Maxim are amended to be against Amergis.

On March 1, 2023, Kelley was held without bail at SSCF pending a hearing on an extraditable warrant from New Hampshire. At medical intake, Kelley allegedly reported that he had used illicit drugs within the past two to three days, and he tested positive for cocaine and opiates. VitalCore intake staff identified Kelley as “currently detoxing/risk for detox.” Third Amended Complaint (“Complaint”), ¶ 31. A VitalCore physician’s assistant issued an opiate withdrawal order (“COWS order”). That order provided a list of conditions upon which staff should “contact HCP” and ordered that Kelley be placed on medical observation. *Id.*, ¶ 34. The COWS order specified that nurses observing Kelley should contact an HCP if Kelley became unresponsive or unstable, experienced changes in mental status, or had seizures, temperature above 101.1 F, heart rate above 120, or a COWS score above 13. *Id.*

Switzer observed Kelley during the morning on March 5, 2023. After this point, several nurses observed Kelley, but for purposes of this motion, the Court limits the summary of alleged facts to the nurses who are the subject of the pending motions to dismiss.

Bartlett observed Kelley during the morning on March 7, 2023. She allegedly noted that his heart rate was 175. She called Dr. Fisher, who ordered an EKG and tapered the Subutex. Bartlett observed Kelley again on March 8, 2023. His heart rate was elevated above 120. She called Dr. Fisher, who allegedly issued no new orders.

At 8 p.m. on March 8, 2023, Marleau observed Kelley, and did not document his vitals or condition.

On March 10, 2023, nurses at SSCF allegedly observed Kelley, who was experiencing tremors. *Id.*, ¶ 54. His heart rate was above 120. Shortly after noon, Dr. Leppman saw Kelley and noted that he “may have ongoing withdrawal symptoms” but “part of his problem is probably inactivity.” *Id.*, ¶ 55.

In the morning on March 11, 2023, Barlett observed Kelley and documented sweating, tremors, upset GI, aches, and a heart rate above 165. She contacted Dr. Fisher, who ordered a urinalysis, which was not completed. *Id.*, ¶ 66. That afternoon, Barlett observed Kelley again. She documented a COWS score of 15, and noted “Detox Nurse Progress Note w/phonecall” but did not further document any call. *Id.*, ¶ 67.

On March 12, 2023, Bartlett observed that Kelley’s heart rate was over 120. The Complaint alleges that she did not contact any provider on this occasion.

Around 8 a.m. on March 13, 2023, Switzer observed Kelley. She documented sweating, tremors, and aches, heart rate at 120, and respirations at 22 and 24. She noted a COWS score of 17. She entered “Detox Nurse Progress Note w/phonecall” but did not further document any call with a provider.

Around 7:30 p.m. on March 13, 2023, Marleau observed Kelley. He entered his notes in the medical chart around 2 a.m. the next day and entered further notes around 6 a.m. on March 14, 2023. *Id.*, ¶¶ 77-78. He noted that he had seen Kelley lying on his bed at 11:10 p.m. with a respiratory rate of 24 per minute.

Kelley was last seen breathing around 12:55 a.m. on March 14, 2023. At 1:09 a.m. that night, Corrections Officer Wilke observed Kelley was non-responsive and did not appear to be breathing. Kelley was declared dead around 1:42 a.m. on March 14, 2023.

An autopsy revealed that bacterial endocarditis caused Kelley’s death.

Discussion

1. Motions 32, 33, and 34

The Court first addresses Switzer, Marleau, and Bartlett’s motions to dismiss Count I (deliberate indifference to a serious medical need, § 1983), Count VI (gross negligence), and Count VII (medical negligence). They argue that Plaintiff’s claims cannot succeed against them because they are entitled to immunity. They also contend that their alleged conduct does not constitute deliberate indifference to a serious medical need, gross negligence, or medical negligence.

A. Immunity

Defendants first argue that the nurses are entitled to qualified and sovereign immunity. According to Defendants, since Plaintiff makes the claim for deliberate indifference to a serious medical need against the nurses in their official capacities as nurses at SSCF and asserts that the nurses acted under color of law, each nurse “is the equivalent of a state official” eligible for qualified immunity. See Defendant Stacy Switzer’s Motion to Dismiss Third Amended Complaint (“Switzer MTD”) at 6; Defendant Thomas Marleau’s Motion to Dismiss Third Amended Complaint (“Marleau MTD”) at 7; and Defendant Samantha Bartlett’s Motion to Dismiss Third Amended Complaint (“Bartlett MTD”) at 7.

Section 1983, under which Plaintiff brings the claim of deliberate indifference to a serious medical need, “basically seeks ‘to deter *state* actors from using the badge of their authority to deprive individuals of their federally guaranteed rights’ and to provide related relief.” *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (quoting *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)). Defendants do not dispute in the context of this motion that as nurses employed by a contractor to provide medical services in a state prison, they are the sort of private parties acting under color of law such that section 1983

liability may attach. See *id.* at 403. The question is whether they may avail themselves of qualified immunity.

“Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The “the mere performance of a governmental function” does not necessarily entitle a private party susceptible to section 1983 liability to qualified immunity, “especially for a private person who performs a job without government supervision or direction.” *Richardson*, 521 U.S. at 408–09 (citation omitted).

In *Richardson*, the Supreme Court determined that privately employed prison guards worked in an “organizational structure [that was] subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments.” *Richardson*, 521 U.S. at 412. Therefore, in the absence of “special reasons significantly favoring an extension of governmental immunity,” the Court concluded that “private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case.” *Id.*

Still, *Richardson* “was not meant to foreclose all claims of immunity by private individuals,” but rather, “the particular circumstances of that case—‘a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms’—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983.” *Filarsky v. Delia*, 566 U.S. 377, 393 (2012) (quoting *Richardson*, 521 U.S. at 413). In *Filarsky*, the Supreme Court concluded that circumstances similar to those in *Richardson* were not involved where an individual attorney “was retained by the City to assist in conducting an official investigation into potential wrongdoing” in a municipal department. *Id.* at 393. It followed that the attorney, who had been hired to perform a discrete assignment, was eligible for qualified immunity. *Id.* at 393–394.

The circumstances in this case, in which the State has contracted with a private firm to provide medical services in a prison, and that firm has in turn hired another firm to employ nurses for those services, resemble the situation in *Richardson* rather than *Filarsky*. Defendants attempt to draw a similarity with *Filarsky* because of the temporary nature of the traveling nurses’ assignments. But the defendant in *Filarsky* was brought on to deal with a particular case due to his particular qualifications for that task, and there is no indication that the nurses here were hired individually to treat the decedent. The Court concludes that, for similar reasons to those articulated in *Richardson*, Switzer, Marleau, and Bartlett are not eligible for qualified immunity. Cf. *Est. of Clark v. Walker*, 865 F.3d 544, 551 (7th Cir. 2017) (privately employed nurse working at a county jail was not eligible for qualified immunity); *McCullum v. Tepe*, 693

F.3d 696, 704 (6th Cir. 2012). The court therefore declines to dismiss on the basis of qualified immunity.

Switzer, Marleau, and Bartlett also contend that they are also entitled to sovereign immunity. There is no indication here that they are being sued in their official capacity. The court declines to apply the doctrine of sovereign immunity to dismiss claims that have not been made.

B. Deliberate indifference to a serious medical need,

“To prove a deliberate indifference claim, the [plaintiff] must satisfy two prongs: ‘(1) an objective prong that requires proof of serious medical need, and (2) a subjective prong that mandates a showing of prison administrators’ deliberate indifference to that need.’” *Off. of Pub. Guardian v. Elliot Hosp.*, 626 F. Supp. 3d 520, 532 (D.N.H. 2022) (quoting *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014)). “The objective ‘medical need’ element measures the severity of the alleged deprivation, while the subjective ‘deliberate indifference’ element ensures that the defendant prison official acted with a sufficiently culpable state of mind.” *Smith v. Carpenter*, 316 F.3d 178, 183–84 (2d Cir. 2003).

Like the motions to dismiss that the court decided on January 12, 2026, many of the nurse defendants’ dismissal arguments are variations on the theme that the factual allegations are conclusory or incomplete. As in the January 12, 2026 decision, the court declines to parse the details of the arguments because they contradict the applicable procedural standard. Treating all reasonable inferences from the facts pleaded in the complaint as true, the court cannot say for certain that even after the evidence and facts are developed, there is no possibility that Plaintiff would be entitled to relief for this count. Defendants have adequate notice of the claims that Plaintiff asserts against them. V.R.C.P.8(a)(1). Once the evidence of the decedent’s condition while in Defendants’ care is developed in discovery and future motion practice, the parties will have the opportunity to explore the question of whether the evidence would support a conclusion that the nurses were deliberately indifferent to a serious medical need.

C. Gross negligence

Defendants argue that the allegations with regard to each nurse defendant do not make out claims against them for gross negligence. “Gross negligence is negligence that is more than an error of judgment; it is the failure to exercise even a slight degree of care, owed to another.” *Sutton v. Vermont Reg’l Ctr.*, 2019 VT 71A, ¶ 56, 212 Vt. 612 (quoting *Kennery v. State*, 2011 VT 121, ¶ 41, 191 Vt. 44) (citations omitted). “In other words, to establish gross negligence, a plaintiff must show a defendant ‘heedlessly and palpably violated a legal duty owed to plaintiff.’” *Id.* (quoting *Amy’s Enters. v. Sorrell*, 174 Vt. 623, 624 (2002)). “Whether a defendant’s conduct rose to the level of ‘[g]ross negligence is ordinarily a question of fact for the jury, and an allegation of gross negligence may be dismissed by the court only if reasonable minds cannot differ.’” *Id.* (quoting *Kennery*, 2011 VT 121, ¶ 41).

Again, Defendants' argument is at odds with the applicable procedural standard. Plaintiff has alleged facts that, if taken as true, show that the nurses each observed the decedent in an increasingly distressed state. Defendants characterize the allegations as "simple incompetence, inaccurate record keeping, and clerical errors" such as those in *Powers v. Off. of Child Support*, 173 Vt. 390, 399 (2002). Here, the complaint contains allegations that beg for development of a factual record. The court cannot at this time rule out the possibility that the nurses did not call the providers at all times when they should have. When they did make the calls, did they accurately report the conditions? Did they accurately record and execute the instructions they were given? Based on their actual observations, how apparent was it that further action should have been taken? See *Johnson v. State of Vermont*, No. 22-CV-00029, 2023 WL 3548801, at *11 (D. Vt. May 18, 2023). It is simply not possible to rule out that discovery will reveal evidence that their acts and omissions were grossly negligent, or to conclude at this early stage in the litigation that this claim cannot succeed. The court declines to dismiss the claim of gross negligence at this juncture.

D. Medical negligence

Defendants contend that the allegations do not support a claim of medical negligence against the nurses. "In a medical-malpractice case, 'plaintiff has the burden of proving the applicable standard of care, that defendant breached that standard, and that as a proximate result plaintiff suffered injuries that would not otherwise have occurred.'" *Watrous v. Porter Med. Ctr.*, 2025 VT 47, ¶ 8 (quoting *Taylor v. Fletcher Allen Health Care*, 2012 VT 86, ¶ 12, 192 Vt. 418) (quotation omitted). Again, the allegations are sufficient to survive the motion to dismiss, and to the extent that Defendants argue that "it is unclear how these actions reflect a lack of degree of knowledge, skill or care," that is something that can be tested in a motion for summary judgment after development of the evidence, or at trial. Switzer MTD at 20. Because the court cannot say with certainty at this time that the medical negligence claims against the nurse will necessarily fail, it declines to dismiss those claims.

2. Motion 35

Amergis moves to dismiss Count V (negligent training); Count VI (gross negligence via *respondeat superior*); Count VII (medical negligence via *respondeat superior*); and Count I (deliberate indifference via *respondeat superior*).

A. Negligent training

One paragraph in the Third Amended Complaint alleges that Maxim (Amergis) "failed to adequately train defendant nurses on matters of following standing medical orders, identifying possible life-threatening conditions, how and when to contact doctors for immediate patient care, or how to document vital signs." Third Amended Complaint, ¶ 140. The court construes this as a variation on a claim for negligent training and supervision.

Amergis states that it “is a nationwide nurse staffing agency that does not conduct facility-specific trainings, and is not privy to the specific medical needs of the patients cared for by the nurses it has staffed in correctional facilities.” Amergis MTD at 10. “After arrangements were made to staff the licensed nurses at SSCF, Amergis had no control over the actions taken by the nurses in treating patients, and had no ability (or contractual responsibility) to supervise or require the nurses to complete additional training courses.” *Id.* “Plaintiff fails to recognize that Amergis is not the entity that bears responsibility for conducting facility-specific trainings on things like ‘how and when to contact doctors for immediate patient care’ or ‘following standing medical orders’ or ‘how to document vital signs’ in a specific facility’s electronic medical record system.” *Id.* These are factual assertions on Amergis’s part that have no place in the consideration of a motion to dismiss for failure to state a claim.

Amergis further argues that Plaintiff “fails to explain how Maxim/Amergis’ training program was inadequate, and provides no evidence as to how better or different training could have prevented Mr. Kelley’s death.” Amergis MTD at 11. Again, Amergis’s argument is out of place in the context of a motion under V.R.C.P. 12(b)(6). Specific explanations and evidence are not needed at this stage, and Amergis will have the opportunity in later procedural stages to argue that evidence of negligent training is insufficient to support the claim.

B. Gross negligence and medical negligence claims against Amergis via *respondeat superior*

Amergis contends that the claims for gross negligence and medical negligence against the nurses are not sufficiently pleaded, and therefore those claims fail as well against Amergis. As discussed above, those claims survive, and the court declines to dismiss them as to Amergis.

C. Amergis’s liability via *respondeat superior* for the § 1983 claims against its nurses

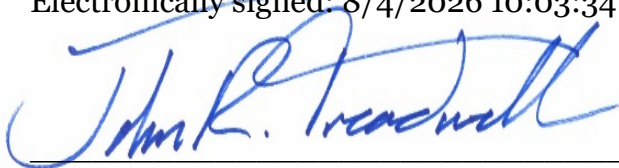
Amergis requests that to the extent that the complaint seeks to impute liability to Maxim/Amergis for the § 1983 claims that it asserts against the nurse defendants, the court should dismiss those claims because *respondeat superior* is not available in a § 1983 action. Indeed, with the exception of cases where a plaintiff claims that the § 1983 violations by employees of a private company stemmed directly from a company policy, private employers are not liable under a theory of *respondeat superior* for the constitutional torts of their employees. See *Smith v. Centurion of Vermont, LLC*, No. 5:20-CV-6, 2022 WL 19519879, at *5 (D. Vt. Sept. 13, 2022), *report and recommendation adopted*, No. 5:20-CV-6, 2023 WL 2446298 (D. Vt. Mar. 10, 2023) (quoting *Rojas v. Alexander’s Dep’t Store, Inc.*, 924 F.2d 406, 408 (2d Cir. 1990)); cf. *Iskander v. Vill. of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982) (collecting cases). Plaintiff has not included allegations that directly connect the alleged § 1983 violations to a Maxim/Amergis policy. The court will therefore dismiss the § 1983 claims against Amergis.

To the extent that Amergis's argument about *respondeat superior* liability for § 1983 veers into an attempt to claim that as a "state actor" fulfilling a discretionary function, it is eligible for qualified and sovereign immunity not only for the § 1983 claims but also for the other tort claims, the court declines to extend immunity to Amergis for the reasons discussed in part 1.A, above.

Order

For the reasons discussed above, Defendant Switzer, Marleau, and Bartlett's motions to dismiss Count I (deliberate indifference to a serious medical need, § 1983), Count VI (gross negligence), and Count VII (medical negligence) are denied. Defendant Amergis's motion to dismiss is denied as to Count V (negligent training), Count VI (gross negligence via *respondeat superior*), and Count VII (medical negligence via *respondeat superior*); and granted as to Count I (deliberate indifference to a serious medical need (§ 1983) via *respondeat superior*).

Electronically signed: 8/4/2026 10:03:34 AM pursuant to V.R.E.F. 9(d)



John R. Treadwell
Superior Court Judge