**IN THE UNITED STATED DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**
**CENTRAL DIVISION**

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| CAROLYN SUMMERS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 2:18-CV-04044-MDH |
| | ) | |
| SECOND CHANCE HOMES OF FULTON, LLC, et al. | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

**STATE DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendants Missouri Department of Mental Health; Mark Stringer; Missouri Department of Mental Health, Division of Developmental Disabilities; Valerie Huhn; Wendy Witcig; Marcy Volner; and Wendy Davis (referred to collectively as State Defendants), through counsel, move to dismiss this case under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

**SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Plaintiffs assert, under 42 U.S.C. § 1983, two counts of alleged civil rights violations against the State Defendants arising from the death of Carl DeBrodie (Plaintiff Summers's son and Plaintiff Samson's nephew). Plaintiffs claim that the individual state defendants (Stringer, Huhn, Witcig, Volner, and Davis) unconstitutionally failed to establish appropriate policies, practices, or customs regarding the "monitoring, supervising, and otherwise ensuring the health and safety of individuals with development disabilities under their care" and failed to provide for the adequate training on and enforcement of such policies or practices (Count IV). Plaintiffs also claim that the state agency defendants (the Missouri Department of Mental Health and its Division of Developmental Disabilities) unconstitutionally failed to have a policy or custom in

place whereby reports of mandated face-to-face contacts could be audited and verified by someone other than the authors of the reports (Count V). Neither of these Counts states a valid claim against the State Defendants.

**Standard of Review.** In assessing a motion under Fed. R. Civ. P. 12(b)(6), a court should not dismiss the complaint unless the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court must presume that the factual allegations of the complaint are true and accord all reasonable inferences from those facts to the nonmoving party. *Cole v. Homier Distributing Co*, 599 F.3d 856, 861 (2010). Under these Rule 12(b)(6) standards for dismissal, this Court should grant this motion to dismiss. Even if every factual allegation of the complaint is presumed true and plaintiff is accorded all reasonable inferences from those facts, the complaint does not state an actionable claim.

**Ms. Samson Is Not a Proper Plaintiff.** Plaintiffs assert that this case is "an action for damages resulting from the wrongful death of Carl Lee DeBrodie, as well as an action under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and other common law avenues of recovery for deprivations of plaintiffs' rights." First Am. Compl. at ¶1. But a wrongful death claim and a § 1983 claim alleging constitutional claims that allegedly resulted in death are not independent claims. It is the wrongful death statute that provides the vehicle by which the survivors designated by that statute may bring the deceased's § 1983 claims (when it is alleged that the constitutional violation is a cause of the death). *Andrews v. Neer*, 253 F.3d 1052, 1058 (8th Cir. 2001).

Wrongful death claims may be filed only:

> (1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;

> (2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;
>
> (3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff ad litem shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff ad litem give bond for the faithful performance of his duties.

§ 537.080.1. As Mr. DeBrodie's mother, Ms. Summers is a proper plaintiff in this case. Because there is a person in class (1), no other person may pursue the wrongful death claim. Ms. Samson should be dismissed as a plaintiff.

**State Agency Defendants and Individual State Defendants in their Official Capacities Not Subject to Suit on Claims Brought under 42 U.S.C. § 1983.** Counts IV asserts claims against the individual state defendants (Stringer, Huhn, Witcig, Volner, and Davis) under 42 U.S.C. § 1983. These officials are sued in both their official and individual capacities. First Am. Compl. at ¶¶ 14 and 16-19. Count V asserts a claim against the state agency defendants under 42 U.S.C. § 1983. But neither state agencies nor state employees sued in their official capacities are "persons" subject to suit under § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). Thus, the official capacity claims against the individual State Defendants in Counts IV and the claims against the state agency defendants in Count V should be dismissed.

**No Constitutional Violations.** Counts IV and V assert violations of Mr. DeBrodie's rights under the Fifth and Fourteenth Amendments to the United States Constitution in that defendants failed to: (1) establish appropriate policies, practices, or customs regarding the "monitoring, supervising, and otherwise ensuring the health and safety of individuals with

developmental disabilities under their care"; (2) provide for the adequate training on and enforcement of such policies or practices; and (3) have a policy or custom in place whereby reports of mandated face-to-face contacts could be audited and verified by someone other than the authors of the reports. Plaintiffs claim that Mr. DeBrodie's injuries and death were the direct result of these alleged failures.

As Counts IV and V assert violations of the Fifth and Fourteenth Amendments, it appears that plaintiffs are claiming due process violations. While a state has no general duty under the due process clause to protect individuals from injuries committed by private actors, such a duty may arise when the individual is in state custody or when the state affirmatively engages in conduct that creates a danger to the individual. *DeShaney v. Winnebago County Dept. of Social Servs*., 489 U.S. 189, 197-201 (1989). Additionally, conduct by a governmental officer causing injury to a person does not rise to the level of a constitutional violation unless it is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 513 (8th Cir. 2015) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8 (1998)).

> To shock the conscience . . . an official's action must either be motivated by an intent to harm or, where deliberation is practical, demonstrate deliberate indifference. *See Hart v. City of Little Rock*, 432 F.3d 801, 805–06 (8th Cir.2005). Deliberate indifference requires both that the official "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and that the official actually draw that inference. *Id*. at 806 (internal quotation omitted). Mere negligence, or even gross negligence, is not actionable. *Id*. at 805–06.

*Montgomery v. City of Ames*, 749 F.3d 689, 695 (8th Cir. 2014).

Mr. DeBrodie was not in state custody. He resided in a private facility. First Am. Compl. at ¶¶ 28, 46. The Public Administrator of Callaway County was appointed as his guardian and conservator. First Am. Compl. at ¶¶ 11-12, 24, 42-43. No affirmative conduct of

the State Defendants created a danger to Mr. DeBrodie. The state is alleged simply to have licensed and certified Second Chance Homes as a residential care facility and to have contracted with Second Chance Homes and other entities to provide services for Mr. DeBrodie. First Am. Compl. at ¶¶ 28-33. These alleged activities are insufficient to create any liability on the part of the State Defendants. There is no allegation of any intent on the part of the State Defendants to harm Mr. DeBrodie. There is no allegation that the State Defendants were aware of any facts from which they could have drawn an inference that Mr. DeBrodie was in any danger. There is no allegation that any State Defendant actually drew an inference that Mr. DeBrodie was in any danger. Without such allegations, Plaintiffs fail to state a claim. *See DeShaney*, 489 U.S. at 197-201; *Montgomery*, 749 F.3d at 695.

Even if Plaintiffs had alleged a causal connection between the State Defendants and Mr. DeBrodie's death, the alleged conduct is not "so egregious or outrageous as to shock the contemporary conscience." *See Forrester v. Bass*, 397 F.3d 1047, 1057-59 (8th Cir. 2005). In *Forrester*, two state-employed social workers were sued for violating the civil rights of two children on the ground that they failed to follow required statutory protective procedures after a hot line call reported that the children were being mistreated in their home. *Id*. at 1050-51. One social worker visited the home, but failed to investigate, contact law enforcement authorities, complete a mandatory safety assessment, or try to verify the whereabouts of two children whose absence was inconsistently explained by their mother and her live-in boyfriend. *Id*. The second social worker, the supervisor of the first, reviewed the report and completed the safety assessment, thereby certifying the home to be safe, without ever visiting the home or seeing the two children. *Id*. at 1051. Not long after the home visit and the closure of the file in the case, the two children died due to mistreatment in their home. *Id*.

In these circumstances, the Court first concluded that there was not a sufficient causal connection between the conduct of the social workers and the deaths of the children because that conduct did not amount to affirmative acts that created greater risks to the children than those that they were already exposed to. *Id*. at 1058. Second, even if such a causal connection could have been established, the Court also concluded that the claims still failed because the alleged acts of the social workers did not rise to "the requisite degree of offensive conduct or deliberate disregard . . . necessary to establish substantive due process violations." *Id*. The social workers' conduct was neither outrageous nor conscience-shocking. *Id*. at 1058-59. Only after the deaths of the children did it become known that the social workers had misjudged the situation.

Similarly in this case, there is no basis from the allegations made to support any inferences that there is either a causal connection between the alleged state conduct and the death of Mr. DeBrodie or that there is any state conduct that can be considered outrageous or conscience shocking. The claims against the State Defendants should be dismissed.

**Allegations of Failure to Train, Enforce, or have Adequate Policies Insufficient to State a Claim.** As directors or subordinate directors of various state agencies or offices, the individual State Defendants are not subject to liability under § 1983 on a *respondeat superior* theory. *Tlamka v. Serrell*, 244 F.3d 628, 635 (8th Cir. 2001). Even supervisors, however, may be liable if they have failed to properly train or supervise an offending employee that has caused a deprivation of constitutional rights. *Andrews v. Fowler*, 98 F.3d 1069, 1078 (1996). A failure to enforce claim can be analyzed as a failure to supervise claim. *See Tanner v. City of Sullivan*, 2013 WL 121536, at *9 (E.D. Mo. 2013). To establish liability for failure to train or supervise, a plaintiff "must demonstrate that the supervisor was deliberately indifferent to or tacitly authorized the offending acts. This *requires a showing that the supervisor had notice* that the

training procedures and supervision were inadequate and likely to result in a constitutional violation." *Andrews*, 98 F.3d at 1078 (internal citations omitted; emphasis added).

Further, liability under § 1983 does not arise simply from a failure to implement a policy that would have prevented an unconstitutional act of a subordinate employee. *Cf. Atkinson v. City of Mountain View*, 709 F.3d 1201, 1216 (8th Cir. 2013) (dealing with liability of municipality as employer). Notice that inadequate policies are likely to result in a constitutional violation is also necessary to establish liability based on such inadequate policies. *Id*.

Plaintiffs' allegations in this case are not sufficient to support claims of failure to train, enforce, or to have adequate policies. The notice required to show such supervisory claims is notice of a pattern of unconstitutional acts by subordinates. *Doe v. Flaherty*, 623 F.3d 577, 584 (8th Cir. 2010). No pattern of subordinate misconduct is alleged from which the individual state defendants could have had notice that either Mr. DeBrodie or any other similarly situated person was at risk of injury or death.

**Individual State Defendants Entitled to Qualified Immunity.** The individual State Defendants also have qualified immunity from the claims against them. Qualified, or good faith, immunity provides governmental officials with immunity from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is immunity from suit rather than a mere defense of liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). "Whether the right at issue was 'clearly established' is a question of law for the court to decide." *Wright v. United States*, 813 F.3d 689, 695-96 (8th Cir. 2015).

The standard for qualified immunity cannot be applied in a general sense. A plaintiff cannot avoid the rule of qualified immunity "simply by alleging the violation of extremely

abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). As the Supreme Court explained in *Anderson*:

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law, the unlawfulness must be apparent.

*Id*. 640. The Court emphasized that this subjective legal reason test requires a "fact-specific inquiry." *Id*. at 641.

Additionally, qualified immunity " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Cross v. City of Des Moines*, 965 F.2d 629, 631 (8th. Cir. 1992) (citing *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)).

In this case, the State Defendants violated no law, clearly established or otherwise. As discussed above, even if true, Plaintiffs' allegations are not adequate to establish that the State Defendants have violated Mr. DeBrodie's constitutional rights because they do not show a causal connection between their alleged conduct and Mr. DeBrodie's death and, even if such a connection were shown, the alleged conduct is not egregious, outrageous, or shocking to the conscience. Even if this Court were now to find some constitutional violation on the part of the State Defendants, they would still be entitled to qualified immunity, because they could not have reasonably forecast this result from the law that existed (for example, rulings in *DeShaney*, 489 U.S. at 197-201, and *Forrester*, 397 F.3d at 1057-59) at the time of their actions. The State defendants are also entitled to qualified immunity because of the absence of any allegation that they had notice of any pattern of specific conduct by subordinates that violated clearly

established rights of Mr. DeBrodie or any similarly situated person. *See S.M. v. Krigbaum*, 808 F.3d 335, 340-42 (8th Cir. 2015).

WHEREFORE, the State Defendants pray this Court to dismiss the claims against them in this case for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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**ATTORNEYS FOR STATE DEFENDANTS**

**CERTIFICATE OF SERVICE**

I hereby certify that on Tuesday, June 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the attorneys of record.

/s/ Michael Pritchett
Michael Pritchett