United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARGARET WARD, et al.,

Plaintiffs,

v.

THE COUNTY OF MENDOCINO, et al.,

Defendants.

Case No. 17-cv-0911-PJH

ORDER GRANTING DR. MARVIN TROTTER'S MOTION TO DISMISS

The motion of defendant Dr. Marvin Trotter to dismiss the constitutional claim asserted against him in the above-entitled action came on for hearing before this court on July 12, 2017. Plaintiffs appeared by their counsel Nathaniel Leeds, and defendant appeared by his counsel Chad Couchot. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion as follows.

BACKGROUND

This is a case brought under 42 U.S.C. § 1983 by the survivors of Earl Ward, a 77-year-old man who was taken into custody by the Mendocino County Sheriff's Department following what appears to have been a complaint of domestic abuse by his wife, Margaret Ward. See First Amended Complaint ("FAC") ¶ 1. He was arrested on March 20, 2016, and held in custody at the Mendocino County Jail, where he fell in his cell on April 16, 2016, and suffered numerous injuries. FAC ¶¶ 1, 43. He died on May 30, 2016, following surgery for his injuries. FAC ¶¶ 1, 44.

Prior to his arrest, Mr. Ward allegedly suffered from dementia, "which made him prone to confusion and uncontrollable rages." FAC ¶ 1. While in custody, he allegedly

displayed symptoms of confusion, delusion, agitation, and paranoia, FAC ¶¶ 25-27, which plaintiffs claim was immediately evident to jail staff. On March 21, 2016, he became agitated, hitting the window in his cell and saying he wanted to die, and later repeatedly pushing on the door of his locked cell. FAC ¶ 25. He was subsequently transferred to a "safety cell." FAC ¶ 25. On March 22, 2016, he was observed standing at the door smiling, and again trying to push out; three hours later he was observed staring at the wall, holding a drinking cup on his head; and an hour later he was observed by a jail staffer to have a "disorganized thought process." FAC ¶ 27.

On March 24, 2016, a social worker from the U.S. Department of Veterans Affairs ("VA") medical services observed that Mr. Ward was unable to articulate why he had been arrested. FAC ¶ 28. On March 28, 2016, jail staff noted that he refused to take his medications. FAC ¶ 29. That same day, a social worker from VA medical services again spoke with Mr. Ward and noted that Mr. Ward indicated he was in Chicago. FAC ¶ 30. On April 2, 2016, a jail deputy observed Mr. Ward standing on his bunk trying to push the window open. FAC ¶ 31. Later that day, another deputy observed Mr. Ward standing on his bunk and falling backwards, possibly hitting his head. FAC ¶ 32.

On April 3, 2016, at 3:40 a.m., after jail personnel observed that Mr. Ward had a bruise on his head with dried blood, he was taken to the Ukiah Valley Medical Center ("UVMC"), FAC ¶ 34, where he was seen in the Emergency Room ("ER"). Medical center staff noted that Mr. Ward remained asleep during the exam, and stated that he was not oriented to person, place, or time. FAC ¶ 34. The deputies stated that it was the first time he had slept since March 20, 2016. FAC ¶ 34. Blood tests showed he had an elevated blood urea nitrogen (BUN), which plaintiffs assert is a sign of dehydration and renal failure. FAC ¶ 35.

That same day (April 3, 2016), Dr. Trotter discharged Mr. Ward from the ER, reporting that he "does have dementia, recently residing in jail, likely had an acute episode of delirium, probably due to lack of sleep, as it is reported he has not slept for a week and a half before presenting to the emergency room. He was on his bunk when he

dozed off and fell." FAC ¶ 36. Plaintiffs claim that upon his return to the jail, Mr. Ward continued to exhibit agitation, confusion, and delusion, and repeatedly attempted to climb out of a fixed window. FAC ¶ 39. Plaintiffs allege that defendants "did not undertake adequate fall-risk protection efforts after observing Mr. Ward's attempts to climb within this cell on April 6th." FAC ¶ 41.

On April 16, 2016, thirteen days after his visit to the ER, Mr. Ward was discovered lying on the floor of his cell and was taken in for further medical evaluation, which revealed that he had multiple vertebral fractures and broken ribs, internal bleeding, a partially collapsed lung, and acute kidney failure. FAC ¶ 43. Mr. Ward's orthopedic injuries required surgery, which plaintiffs claim led to complications and ultimately to his death on May 30, 2016. FAC ¶ 44.

Plaintiffs Margaret Ward (in her personal capacity, and as the executor of Mr. Ward's estate), Kevin Ward, and Ina Ward (surviving heir of Jeff Ward, deceased) filed the original complaint in this action on February 22, 2017, and filed the FAC on March 23, 2017. Named as defendants are the County of Mendocino; Thomas Allman, the Sheriff of Mendocino County and two Sheriff's deputies, Michael Grant and Lorrie Knapp; California Forensic Medical Group, Inc. ("CFMG" – a company that provides and manages medical services in jails, including the Mendocino County Jail); and two physicians, Dr. Michael Medvin and Dr. Trotter.

Plaintiffs assert (1) a "personal capacity" Fourteenth Amendment claim of deprivation of life without due process of law, deliberate indifference to serious medical needs, and denial of medical care (against Sheriff Allman, Deputies Grant and Knapp, CFMG, Dr. Medvin, and Dr. Trotter); (2) a "supervisory liability" Fourteenth Amendment claim (against Sheriff Allman); (3) an "elder abuse" claim under California law (against the County, Sheriff Allman, Deputies Grant and Knapp, and CFMG); and (4) a claim of medical negligence and wrongful death (against CFMG, Dr. Medvin, and Dr. Trotter).

Dr. Trotter now seeks an order dismissing the Fourteenth Amendment "deliberate indifference" claim asserted against him, for failure to state a claim.

DISCUSSION

A. Legal Standard

A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Under the minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013).

While the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009); see also In re Gilead Scis. Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008). The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 558-59 (2007) (citations and quotations omitted). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted).

"[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that the pleader is entitled to relief.'" Id. at 679. Where dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

B. Defendant's Motion

Dr. Trotter argues that the FAC fails to state facts sufficient to state a Fourteenth Amendment claim of deliberate indifference to Mr. Ward's serious medical needs, and fails to establish that he acted under color of state law in treating Mr. Ward.

Section 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. See Graham v. Connor, 490 U.S. 386, 393-94 (1989).

To state a claim under § 1983, a plaintiff must allege that a right secured by the Constitution or laws of the United States was violated and that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda County, 811 F.2d 1243, 1245 (9th Cir. 1987). The plaintiff must also allege facts showing that "the defendant's conduct was the actionable cause of the claimed injury;" that is, the plaintiff must establish both causation-in-fact and proximate causation. See Harper v. City of L.A., 533 F.3d 1010, 1026 (9th Cir. 2008) (citing Van Ort v. Estate of Stanewich, 92 F.3d 831, 837 (9th Cir. 1996)).

1. Allegations of deliberate indifference

Dr. Trotter argues that plaintiffs have not alleged facts sufficient to state a claim for deliberate indifference to serious medical needs. He contends that absent a showing of the requisite culpability, plaintiffs' claim against him must properly be characterized as a claim of medical malpractice – i.e., a claim that he denied Mr. Ward proper medical care before discharging him from the hospital, or a claim that the discharge itself was medically negligent. He does not seek dismissal at this time of the separate medical malpractice cause of action.

In opposition, plaintiffs assert that the FAC adequately alleges that Dr. Trotter was deliberately indifferent to Mr. Ward's serious medical needs when he discharged Mr. Ward back to the same jail cell in which he had previously injured himself. They contend that Mr. Ward's condition and conduct were serious medical concerns, because he had already fallen once, and his condition during his ER visit offered no reason to conclude he would not be at risk of falling in the future. Plaintiffs assert that at trial, they will offer

expert testimony concerning the lengths that medical facilities go to assess and address the risks of patient falls, especially with elderly patients like Mr. Ward.

Plaintiffs argue that Mr. Ward's medical need was "serious," because failure to respond to such a medical condition could result in significant injury. They assert that it is not necessary to show that Dr. Trotter knew that Mr. Ward would be injured, and that it is sufficient if Dr. Trotter acted or failed to act despite his knowledge of a substantial risk of serious harm – which they claim was the risk that Mr. Ward would fall. They concede that it is their burden to show that Dr. Trotter was actually conscious of the risk that Mr. Ward would be injured. However, they contend, "[g]iven the inherent difficulty divining what is in a defendant's mind, this element does not require an affirmative confession by a defendant."

Rather, plaintiffs argue, the presence of actual knowledge can be inferred from the very fact that the risk was obvious. They contend that given that Mr. Ward had already suffered one fall, and that the jail deputies reported that he was not sleeping, and that the objective test results showed that he was dehydrated and possibly suffering kidney failure, and that Dr. Trotter himself stated that Mr. Ward was suffering from dementia, even a lay person could conclude that the risk to Mr. Ward of serious future injury was obvious.

Finally, plaintiffs assert that they have recently obtained additional information that they want to add to an amended pleading. They have attached a declaration by their counsel, Nathaniel Leeds, in which he states that at the time he drafted the FAC, his good faith belief was that Dr. Trotter had seen and evaluated Mr. Ward on April 3, 2016. Declaration of Nathaniel Leeds ("Leeds Decl.") ¶ 2. This was based on the fact that Dr. Trotter's name appeared on the discharge summary that was included with Mr. Ward's medical records. Leeds Decl. ¶ 2.

Mr. Leeds states that "at various times" Dr. Trotter's attorney Thomas Doyle "has relayed that it is his belief that Dr. Trotter never saw or participated in the care of" Mr. Ward, but that all of the medical decision making had been done by a "non-doctor

substitute, Jennifer L. Graff." Leeds Decl. ¶ 3. Mr. Leeds states that on June 1, 2017, he asked Mr. Doyle whether Ms. Graff was acting independently or in her capacity as an agent for Dr. Trotter, and he allegedly responded that "he was not ready to take a position as to her agency status." Leeds Decl. ¶ 3. Based on this, Mr. Leeds asserts, "[p]laintiffs have a good faith belief and could allege that Dr. Trotter delegated his evaluation to Ms. Graff." Leeds Decl. ¶ 3.

Plaintiffs contend that this alleged delegation of responsibility by Dr. Trotter provides further evidence of deliberate indifference, as it is "clear" that Dr. Trotter did not evaluate his own patient before discharging him. They assert that the Ninth Circuit has held that reliance on the guidance of "non-specialized medical staff" when more "specialized" options are available constitutes deliberate indifference to the risk that the non-specialist might unwittingly render inferior care. Here, they argue, Mr. Ward was taken to UVMC to see a doctor, one that should have been available to him under state law, but in their view, Dr. Trotter, who was on staff and available, chose to make the decisions without so much as looking at his patient.

In reply, Dr. Trotter notes that the premise of plaintiffs' deliberate indifference claim is that he failed to take some type of action to prevent Mr. Ward's fall at the Mendocino County Jail on April 16, 2016 – thirteen days after he was treated in the ER. Dr. Trotter argues that the standard for showing deliberate indifference is significantly higher than what is required to show medical malpractice, and asserts that plaintiffs have ignored the controlling case law discussing the requisite culpability to maintain a claim for deliberate indifference to serious medical needs.

Dr. Trotter adds that plaintiffs' reference to anticipated future testimony ("at trial") shows that the allegations against him sound in medical malpractice. He notes that while expert testimony is required to prove medical malpractice, expert testimony is not required to prove deliberate indifference, absent some particularly complex fact pattern underlying the claim. He contends that plaintiffs' characterization of the anticipated future testimony (that experts will testify concerning the lengths medical facilities will go to

address the issue of patient falls) shows that they intend to argue that he breached the standard of care.

The court finds that plaintiffs have not alleged facts sufficient to show deliberate indifference to serious medical needs. A person deprives another "of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which [the plaintiff complains]." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). To maintain a claim based on prison medical treatment, an inmate must show "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

Inmates who sue prison officials for injuries suffered while in custody may do so under the Eighth Amendment's Cruel and Unusual Punishment Clause or, if not yet convicted, under the Fourteenth Amendment's Due Process Clause. See Castro v. Cnty of L.A., 833 F.3d 1060, 1067-68 (9th Cir. 2016). Here, plaintiffs allege that Mr. Ward was in custody as a pretrial detainee. FAC ¶ 24. While the language of the two clauses differs, and the nature of the claim often differs, a claim of deliberate indifference to serious medical needs under either clause utilizes the same standard. Id. at 1068-70; see also Simmons v. Navajo Cnty., 609 F.3d 1011, 1017 (9th Cir. 2010).

The standard for "deliberate indifference" is demanding. See Farmer v. Brennan, 511 U.S. 825, 835-42 (1994). Deliberate indifference is established only where the defendant subjectively "knows of and disregards an excessive risk to inmate health and safety." Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (internal citation omitted). The test for deliberate indifference to serious medical needs consists of two parts.

> First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong – defendant's response to the need was deliberately indifferent – is satisfied by showing (a) a

> purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference. Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.

Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations and quotations omitted). In short, "[p]rison officials are deliberately indifferent to a prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical treatment." Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002).

However, an inadvertent or negligent failure to diagnose a medical condition or to provide treatment to a prisoner, without more, does not state a constitutional deliberate indifference claim. Jett, 439 F.3d at 1096 (citing Estelle, 429 U.S. at 105); see also Hutchinson v. U.S., 838 F.2d 390, 394 (9th Cir. 1988). Put another way, medical malpractice does not become a constitutional violation simply because the victim is a prisoner. Estelle, 429 U.S. at 106; see also Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (allegations of nothing more than a "difference of medical opinion" as to the need to pursue one course of treatment over another is "insufficient . . . to establish deliberate indifference"). In addition, the plaintiff must allege facts showing that he was harmed because of the defendant's deliberate indifference. Jett, 439 F.3d at 1096.

Here, the FAC does not plausibly allege that Mr. Ward had a serious medical need at the time he was seen by Dr. Trotter on April 3, 2016, nor does it allege sufficient facts showing that Dr. Trotter's responses were deliberately indifferent or that any action attributable to Dr. Trotter was the proximate cause of Mr. Ward's injury.

The FAC is not clear, but it appears that UVMC is a full-service hospital. Mr. Ward was brought to the ER at UVMC on April 3, 2016, with a bruise on his head with dried blood. Plaintiffs allege that UVMC medical personnel ordered some blood tests. He was treated and discharged that same day. The discharge note stated that Mr. Ward "does have dementia" and that he "likely had an acute episode of delirium, possibly due to lack of sleep," and that he had been "on his bunk" when he "dozed off and fell." FAC ¶ 36.

Plaintiffs suggest that because Mr. Ward had previously fallen, and because he

had dementia, he was at high risk of falling again. See FAC ¶¶ 36-37. However, even if the fact of having dementia and having previously fallen could be construed as a "serious medical need," the FAC does not allege facts showing that Dr. Trotter was deliberately indifferent to such medical need.

For purposes of the present motion, a major deficiency of the FAC is that plaintiffs allege, in the first cause of action for deliberate indifference, that "defendants" violated Mr. Ward's Fourteenth Amendment rights. See, e.g., FAC ¶¶ 47-52. Nowhere in the first cause of action do they allege any specific action taken by Dr. Trotter as opposed to any other defendant. In an earlier section of the FAC labeled "Common Liability Allegations," plaintiffs' only allegation with regard to Dr. Trotter is that he

> discharged Mr. Ward back to the Mendocino County Jail despite observing that "Patient does have dementia, recently residing in jail, likely had an acute episode of delirium, probably due to lack of sleep, as it is reported he had not slept for a week and a half prior to presenting to the emergency room. He was on his bunk when he dozed off and fell."

FAC ¶ 36. As in the first cause of action, the remainder of the allegations in the "Common Liability" section refer collectively to "defendants." Moreover, the primary emphasis is on the alleged failure by the "defendants" to "provide fall-risk protection" after Mr. Ward's falls of April 2 and 3, and their alleged placement of Mr. Ward into an "unsupervised cell" after April 3 – events that had no connection to Dr. Trotter. See FAC ¶¶ 37-38, 41-42.

The only involvement attributed to Dr. Trotter is that he (presumably) saw Mr. Ward in the ER, and discharged him from the ER. Plaintiffs allege no facts showing that Dr. Trotter played any role in the decision to put Mr. Ward back in the jail, in any decision to place him in an "unsupervised cell," or in any decision made with regard to his confinement at the jail or the conditions of that confinement. Nor does the FAC plead any facts sufficient to create a plausible inference that the course of treatment Dr. Trotter chose (exam in the ER, blood work, discharge) was chosen in conscious disregard of an excessive risk to Mr. Ward.

Finally, and most importantly, plaintiffs allege no facts showing that Mr. Ward suffered an injury that was "caused by" Dr. Trotter's deliberate indifference. The only injury plaintiffs claim in the FAC is Mr. Ward's fall on April 16, 2016, which they allege eventually led to his death on May 30, 2016. They plead no facts showing that the April 16 fall was caused by Dr. Trotter's decision to discharge Mr. Ward from the ER on April 3, 2016, other than a generalized assertion that "defendants . . . knew or must have known that he required careful monitoring and that they further had a duty to provide Mr. Ward reasonable housing to allow for monitoring of his health[.]" FAC ¶ 48.

Moreover, plaintiffs assert in the opposition to the present motion that they have recently acquired information relating to what they claim is Dr. Trotter's status as a state actor (discussed below). Plaintiffs' counsel, Mr. Leeds, asserts that through a public-records act request, he has obtained a copy of the contract between defendant CFMG and the Mendocino County Jail, which provides that CFMG would provide a doctor on-site at the jail 8 hours a week – with an on-call doctor available at other times. Leeds Decl. ¶ 4. While this information is not pled in the FAC, plaintiffs have requested leave to add it to an amended complaint.

This information shows that during the two-week period between Dr. Trotter's release from the ER and his fall on April 16, 2017, a doctor was personally available on site at the jail for at least 16 hours, and was "on call" the remainder of the time. In order to be liable under § 1983, a defendant must cause the deprivation of one or more of the plaintiff's constitutional rights. See Van Ort, 92 F.3d at 836-37. "Traditional tort law defines intervening causes that break the chain of causation." Id. An unforeseen and abnormal intervention can break the chain of causation, such that the defendant's conduct is not considered the proximate cause of the plaintiff's injury, and the defendant does not have § 1983 liability. Id. at 837.

Here, there are no facts pled showing that Dr. Trotter's discharge of Mr. Ward on April 3, 2016, was the proximate cause of his fall on April 16, 2016 or his death on May 30, 2016. Moreover, it is difficult to ascertain any basis for liability against Dr. Trotter for

any medical decision made on April 3, 2016, given that (according to plaintiffs) the Mendocino County Jail had medical personnel on site for at least part of the time during the two-week period after Dr. Trotter treated Mr. Ward in the ER, and medical personal available on-call the remainder of the time.

2. Allegations that Dr. Trotter acted under color of state law

In his second argument, Dr. Trotter asserts that the FAC does not allege facts showing that he acted under color of state law. A person acts under color of state law if he "exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." West, 487 U.S. at 49 (citation and internal quotation marks omitted). Generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997); Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476, 479 (9th Cir. 1991).

However, a private individual generally does not act under color of state law. See Gomez v. Toledo, 446 U.S. 635, 640 (1980). Purely private conduct, no matter how wrongful, is not covered under § 1983. Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974). There is no right to be free from the infliction of constitutional deprivations by private individuals. Van Ort, 92 F.3d at 835.

In West, the Supreme Court found that a physician under contract to provide healthcare services to inmates in a prison was acting under color of state law, although the Court also found that it is a physician' function within the state system, not the precise terms of employment, which determine whether the physician's actions can be fairly attributed to the state. See id., 487 U.S. at 55-56.

In cases decided since West, courts have held that private conduct is not generally considered governmental action unless "something more" is present. See Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835 (9th Cir. 1999). Courts have applied certain tests to identify whether there is "something more" – (1) public function, (2) joint action, (3) governmental compulsion, and (4) governmental nexus. See Lugar v.

Edmondson Oil Co., 457 U.S. 922, 939 (1982); see also Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003). Dr. Trotter asserts that none of these tests supports a finding that he was a state actor.

Dr. Trotter relies on a 2013 decision from the Eastern District of California, Clewis v. Cal. Prison Healthcare Servs., 2013 WL 2482521 (E.D. Cal. June 10, 2013). In that case, Clewis, the plaintiff, an inmate at California State Prison, Sacramento, broke his arm during a baseball game with other inmates at the prison, went to the prison medical clinic, and was later transported to the ER at Mercy Hospital of Folsom. The ER doctor treated Clewis and discharged him with instructions to see the prison doctor the next day. The following day, Clewis was transported to U.C. Davis Medical Center, where he had surgery on his arm a day later.

Clewis subsequently filed suit against Mercy Hospital and other defendants, alleging deliberate indifference to serious medical needs. He claimed that the doctor at Mercy should have ordered the surgery to be performed there. Mercy moved to dismiss, and the court found that Clewis' allegations were sufficient at the pleading stage to state an Eighth Amendment claim against Mercy. The court found the question whether a contractual relationship existed between Mercy and the prison such that Mercy was acting under color of state law, and the question whether Mercy had a policy of refusing to provide certain services to prisoners, to be incapable of resolution on the pleadings.

The court subsequently granted Mercy's motion for summary judgment, finding that Mercy was not a state actor because there was no close nexus between the state and the challenged action. Id., 2013 WL 2482521 at *4-6. The court noted that the requisite nexus has been found in cases where a private physician worked under contract at a state-prison hospital on a part-time basis, and where a hospital and ambulance service were under contract with the state to provide medical services to indigent citizens. Id. at *4. However, the court noted, "[i]t does not exist where, as here, a health care provider not contracted to the state has a preexisting commitment to serve all persons who present themselves for emergency treatment." Id. (citing Rodriguez v. Plymouth

Ambulance Serv., 577 F.3d 816, 827 (7th Cir. 2009)).

Clewis had alleged that Mercy was subject to § 1983 liability as a state actor because it was a medical entity under contract with CDCR, but Mercy provided declarations from hospital officials stating that there was no contract. The court found that Clewis had failed to provide evidence establishing the existence of a contract or demonstrating the existence of a material factual dispute regarding state action. Id. at *6. In particular, the court found that it was clear that neither Mercy nor the ER doctor functioned within the state correctional system, and that neither worked for the state. Id. Because Mercy offered emergency services to the general public, the court concluded that it could not be found to have acted under color of state law in the absence of a contract or evidence of some other ongoing obligation to treat prisoners specifically as prisoners (or because they are prisoners). Id.

Dr. Trotter argues that there are no facts alleged in the FAC supporting the conclusion that he acted under color of state law. For example, he contends, the FAC does not assert that he is an employee of the Mendocino County Jail, that he provides medical care or treatment at the Mendocino County Jail, or that he has any control over any aspect of the operation of that facility. Nor, he argues, does the FAC allege that UVMC provides services to Jail inmates pursuant to contract, because (he claims) no such contract exists. He notes that UVMC is not a County facility, but rather a hospital that provides emergency services to all patients who present to the ER in need of emergency care, as required by EMTALA. He contends that his relationship with the Mendocino County Jail extends no farther than his duty under EMTALA.

In opposition, plaintiffs argue that the question whether Dr. Trotter is a state actor cannot be resolved on the pleadings. They claim it is not a legal determination, and that because the circumstances under which a party can be deemed a state actor are varied and not amenable to a fixed test, the issue can only be resolved through "fact-specific" determination. They note that Clewis, the case Dr. Trotter relies on, was resolved at summary judgment, not at the pleading stage. They contend that the role of UVMC and

Dr. Trotter in Mr. Ward's care "raises issues of first impression," as such issues "could never arise in counties where jail facilities have doctors on staff at all times, or there are public hospitals available to treat prisoners."

Plaintiffs assert that they should be given an opportunity in discovery to seek information regarding what the County asked of UVMC and Dr. Trotter when they brought Mr. Ward to UVMC; whether there is an express or de facto agreement between the County and UVMC to treat inmates; who paid for the treatment of County inmates; whether UVMC offered discounted or negotiated rates for treating inmates; how often County inmates were taken to UVMC in the five years preceding Mr. Ward's visit; whether the County brought inmates to any other medical facilities in the five years preceding Mr. Ward's visit; and how often Dr. Trotter treated inmates.

Plaintiffs argue further that the facts as pled in the FAC make a plausible claim that Dr. Trotter was a state actor because he was engaged in a "critical state function" – deciding whether Mr. Ward should be returned to Mendocino County Jail. They argue that this falls within the "public function" analysis, which is one of the tests the Ninth Circuit applies to determine whether someone is a state actor. See Kirtley, 326 F.3d at 1092 (9th Cir. 2003) (citing Sutton, 192 F.3d at 835-36).

Plaintiffs argue that the "public function" test strongly favors recognizing Dr. Trotter as a state actor, because providing medical care to inmates is a governmental function that is constitutionally mandated. "Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Kirtley, 326 F.3d at 1093 (citation and quotation omitted). The scope of the public function test is relatively narrow. Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 158 (1978). The public function test is satisfied only on a showing that the function at issue is "both traditionally and exclusively governmental." Kirtley, 326 F.3d at 1093. However, the relevant question under the public function test is not simply whether a private person or entity is serving a "public function," but "whether the function performed has been

traditionally the exclusive prerogative of the state." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

Plaintiffs are correct that providing medical care to inmates is a governmental function that is constitutionally mandated. Here, however, they argue Dr. Trotter "was delegated" (presumably by the County) an "essential state function" which they identify as the task of determining whether Mr. Ward could continue to be safely housed in the jail, or whether his condition required admission to a medical facility under the statutory scheme set forth in California Penal Code §§ 4011, et seq. Although plaintiffs allege no facts supporting this theory in the FAC, they contend that it is "a reasonable inference" that one of the reasons Mr. Ward was brought to UVMC "in the dead of night" was to have a doctor determine whether it remained appropriate to house him in a jail cell. Plaintiffs assert that this is an inference they are entitled to explore through discovery.

Plaintiffs assert that unlike a case in which a plaintiff has sought to recast a "medical error" as a constitutional violation, Dr. Trotter's error was not simply in how to treat or not treat Mr. Ward's immediate medical needs, but in "how he discharged his obligation to determine whether Earl Ward could be safely returned to his cell." They claim that this assessment function is "traditionally associated with the state," but that because of the limited medical capacity of the jail facilities in Mendocino County, it was necessarily "delegated" to UVMC and Dr. Trotter.

Plaintiffs also assert that the cases cited by Dr. Trotter are distinguishable. They contend that Rodrizuez is distinguishable because the hospital in that case was found not to be a state actor because it did not have a contract with the county and expressly declined to treat the inmate on that basis, and immediately arranged a transfer to a hospital that did have a contract. They assert that Clewis is distinguishable because the plaintiff there did not present any "evidence" of a state function or relationship in response to the motion for summary judgment, and because the case involved the purely medical claim that the physicians improperly delayed surgery instead of operating immediately. By contrast, plaintiffs assert, their claim against Dr. Trotter is not purely

medical, in that they allege that Dr. Trotter did not properly discharge what they call "his blended medical/state duty" to assess Mr. Ward's fitness for detention in a regular cell, which they claim was an "essential state function."

In a final argument in the opposition, plaintiffs contend they have recently acquired additional information relating to what they claim is Dr. Trotter's status as a state actor. Plaintiffs' counsel, Mr. Leeds, asserts that through a public-records act request, he has obtained a copy of the contract between California Forensic Medical Group (CFMC) and the Mendocino County Jail, which provides that CFMC would provide a doctor on-site at the jail 8 hours a week – with an on-call doctor available at other times. Leeds Decl. ¶ 4. He adds that he has also confirmed that UVMC is the only hospital within 20 miles of the County Jail, and that there are no hospitals in Mendocino County. Leeds Decl. ¶ 4. He asserts that based on this information plaintiffs could allege these additional facts.

Plaintiffs argue that this provides additional evidence of Dr. Trotter's status as a state actor. They claim that this new information makes it fair to infer that UVMC regularly saw patients from Mendocino County Jail, and benefitted from the steady stream of payments that the County presumably made for the care of its prisoners.

In reply, Dr. Trotter reiterates that he is not a state actor. First, he asserts, there is no legal basis for the claim that he should be considered a state actor because UVMC "was the only place within 20 miles where Mendocino County prisoners could see a doctor." More importantly, Dr. Trotter argues, he did not make the decision regarding whether to return Mr. Ward to the County Jail. He notes that there is no such allegation pled in the FAC, and that in any event, it was not his duty to determine where or whether Mr. Ward should be incarcerated. His only duty as an emergency medicine physician was to assure that Mr. Ward's medical condition was stable. He asserts that the fact that it was not until thirteen days after Mr. Ward's visit to UVMC that he fell shows that his condition was stable as of his discharge on April 3, 2016.

Finally, Dr. Trotter contends that it would be fundamentally unfair to find that his provision of emergency care to Mr. Ward was de facto state action. He notes that in

Rodriguez, the hospital, which expressly refused to adjust the plaintiff's IV line because it did not have a contract with the county, was found not to be a state actor. Here, however, he asserts that he did not have a legal right to refuse to care for Mr. Ward, because under EMTALA, neither he nor UVMC has a right to refuse treatment to someone who presents at the ER. He argues that it would be fundamentally unfair to force him into the position of a state actor, simply because he was complying with is duty under federal law.

Dr. Trotter reiterates that Clewis is on point, in that the court cited the duties imposed by EMTALA, and held that the provision of emergency medical services to an inmate is insufficient to establish action under color of state law. Dr. Trotter contends that he has not, as plaintiffs claim, assumed any state function. He asserts that the fact that he does not discriminate against incarcerated individuals does not mean that he agreed to step into the shoes of the state and assume the state's responsibility towards those persons.

The court finds that the FAC does not allege facts sufficient to show that Dr. Trotter is a state actor or that he became a state actor purely by virtue of giving emergency care to a County inmate. Moreover, he arguably had no choice about treating Mr. Ward, given the requirements of EMTALA. Plaintiffs plead no facts showing that Dr. Trotter played any part in the decision to take Mr. Ward back to the jail, or that he had any input into what kind of cell Mr. Ward was placed in.

3. Analysis

The court finds that the motion must GRANTED. There are no facts alleged sufficient to show that Dr. Trotter acted with deliberate indifference in his provision of medical treatment when Mr. Ward was brought into the hospital on April 3, 2016 following his fall. More importantly, there are no facts pled showing that anything Dr. Trotter did was the cause of Mr. Ward's fall thirteen days later, which allegedly caused the injuries that resulted in his death (during or following surgery).

Plaintiffs contend that whether Dr. Trotter was deliberately indifferent in the

provision of medical care is a question of fact, and assert that they should be permitted to take discovery to learn the facts. At this point, however, the allegations against Dr. Trotter are that he either briefly saw and treated Mr. Ward (or that a subordinate did) and that he authorized Mr. Ward's discharge from the hospital ER that same day. Those allegations are not sufficient to show deliberate indifference to serious medical needs, and plaintiffs have not alleged facts sufficient "to raise a reasonable expectation that discovery will reveal evidence" supporting their conclusory allegations. See Twombly, 550 U.S. at 556. The court is not permitted to "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Iqbal, 556 U.S. at 678-79. Until plaintiffs have alleged facts sufficient to state a claim of deliberate indifference to serious medical needs, they are not entitled to proceed to discovery on that claim.

Second, there are no facts alleged in the FAC sufficient to create a plausible inference that Dr. Trotter acted under color of state law. There is no allegation that Dr. Trotter or UVMC had a contract with the County, and there is no allegation that Dr. Trotter had any duty towards Mr. Ward apart from the duty imposed by EMTALA. There are no facts pled showing that Dr. Trotter had any input into the decision to return Mr. Ward to the jail, or into the decision to place him in one cell as opposed to another cell. Nor are there any allegations that Dr. Trotter was involved in the administration of the jail; that Dr. Trotter's provision of emergency medical services resulted from the state's exercise of coercive power; that the state provided "significant encouragement" for the activity; or that Dr. Trotter operated as a willful participant in joint activity with the state.

CONCLUSION

In accordance with the foregoing, defendant's motion to dismiss the deliberate indifference claim asserted against him is GRANTED. Plaintiffs have not alleged facts sufficient to show that Dr. Trotter acted with a conscious disregard for Mr. Ward's health, or that any action taken by Dr. Trotter was the proximate cause of Mr. Ward's subsequent injury and death.

Plaintiffs suggest that Dr. Trotter's act of discharging Mr. Ward from the ER

equates to deliberate indifference to serious medical needs. As indicated above, to establish a serious medical need, an inmate must allege facts showing that the failure to treat his condition could result in further significant injury or the "unnecessary and wanton infliction of pain." Jett, 439 F.3d at 1096 (citing Estelle, 429 U.S. at 104). However, Mr. Ward was brought into the ER because he had a bruise and dried blood on his head. That in and of itself would not provide justification for hospitalization. Nor would the fact of a dementia diagnosis. Mr. Ward was treated and discharged. There are no facts pled showing that the discharge from the ER was inappropriate.

Nor have plaintiffs alleged facts sufficient to show that Dr. Trotter is a state actor. While the extent of state involvement in an action presents a question of fact, see Lopez v. Dep't of Health Servs., 939 F.2d 881, 883 (9th Cir. 1991), the ultimate determination of whether there is state action presents a question of law for the court, see Blum v. Yaretsky, 457 U.S. 991, 997 (1982). While the question whether Dr. Trotter is a state actor may be an issue that can only be resolved through summary judgment, the court finds it unlikely that plaintiffs will be able to allege facts sufficient to state a Fourteenth Amendment claim against Dr. Trotter for deliberate indifference to serious medical needs.

Nevertheless, the dismissal is WITH LEAVE TO AMEND. Plaintiffs may add the additional facts they identified in their opposition, and must plead additional facts to correct the deficiencies identified above. The amended complaint shall be filed no later than August 14, 2017. No new parties or causes of action may be added without leave of court.

IT IS SO ORDERED.

Dated: July 14, 2017

PHYLLIS J. HAMILTON
United States District Judge