IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

RONALD THOMAS, as personal representative for the estate of BRADLEY STEVEN THOMAS,

Plaintiff,

vs.

LINCOLN COUNTY, *et al.*,

Defendants.

Case No. 6:16-cv-00562-AA
OPINION AND ORDER

AIKEN, Judge:

Two defendants, Samaritan Pacific Health Services, Inc., ("Samaritan") and Central Coast Internal Medicine, PC, ("Central Coast") move to dismiss a Fourteenth Amendment claim brought against them by plaintiff Ronald Thomas, acting as personal representative for the estate of decedent Bradley Steven Thomas. For the following reasons, defendants' Motion to Dismiss is granted.

BACKGROUND

This is a case about the death of a county inmate. Plaintiff alleges that in March 2015, decedent was arrested in Lincoln County and booked into Lincoln County Jail ("the jail"). Second Am. Compl. ("SAC") ¶¶ 17-18. Two weeks later, decedent died in miserable conditions, suffering starvation and dehydration brought on by symptoms of his mental illness. *Id.* ¶¶ 51-52. Plaintiff alleges Mr. Thomas received "widespread recognition" as an individual facing a serious health condition, but did not receive medical or psychological services from either defendant throughout his sixteen days of incarceration. *Id.* ¶ 24.

Central Coast is an Oregon professional corporation and Samaritan is an Oregon non-profit corporation. *Id.* ¶¶ 14-15. Dr. David Long, a shareholder in Central Coast and possibly one in Samaritan, was under contract with Lincoln County to provide medical services at the jail. *Id.* ¶ 16. Plaintiff alleges that Dr. Long was at the jail on at least two occasions during the time decedent was incarcerated there, yet provided no medical or psychological services to decedent. *Id.* at ¶ 54. Plaintiff claims this failure violated decedent's rights under the Fourteenth Amendment, and seeks to hold Central Coast and Samaritan liable for these actions based on their affiliation with Dr. Long. *Id.* at 10. Central Coast and Samaritan argue that, under 42 U.S.C. § 1983, they are liable only for their own policies and practices and cannot be held vicariously liable for Dr. Long's conduct. Defs.' Mot. Dismiss 2.

DISCUSSION

As plaintiff acknowledges, I am bound by Ninth Circuit precedent to dismiss any claim under 42 U.S.C. § 1983 predicated on vicarious liability. Pl.'s Resp. Mot. Dismiss 5. Plaintiff's claim is foreclosed by *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138-39 (9th Cir. 2012). In *Tsao*, the court held that immunity granted to municipalities from vicarious liability under §

1983 must also apply to private entities that act on behalf of municipalities. *Id.* (citing *Monell v. Dept't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). The *Tsao* court, following the lead of several other circuits, saw no basis in *Monell* "for distinguishing the case of a private corporation" from a municipality. *Id.* (quoting *Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir. 1982)). Stare decisis prohibits any deviation from this holding in the present case.

Recognizing the effect of this precedent, plaintiff argues that *Tsao* should be revisited. I agree. *Tsao* applied the municipal exemption from *Monell* to private corporations without considering the significant differences between municipalities and these private actors. The *Tsao* Court based its decision on ambiguous statutory text and yet omitted any analysis of the legislative history or public policy concerns that underlie this issue. These concerns ultimately weigh in favor of *respondeat superior* liability for private entities, regardless of whether they are state actors.

The *Monell* Court's holding rested on both textual analysis and legislative history. The relevant § 1983 language is as follows:

> *[A]ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected*, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured . . . .

Monell, 436 U.S. at 692-93 (emphasis in original). The Court examined the use of the word "cause" and concluded that its inclusion suggested that Congress intended to rule out vicarious liability for municipalities. *Id.* at 692. But "[t]he requirement of causation . . . does not generally preclude *respondeat superior* liability for a given tort." *See Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 793 (7th Cir. 2014) (parsing the meaning of *Monell* and questioning the correctness of *Tsao*). Moreover, the discussion of legislative history strongly suggests that the

Monell Court found the statutory text ambiguous. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186 (2004) ("Because we have held that the text of the statutory reservation [unambiguous], we have no occasion to resort to legislative history."). This ambiguity is important because the legislative history on which the Court relied addressed only municipalities, not private entities contracting with municipalities. *See Monell*, 436 U.S. at 692-93 & n.57. Indeed, neither Congress (in drafting § 1983) nor the Court (in deciding *Monell*) discussed the liability of such private entities. *See Tsao*, 698 F.3d at 1138-39.

Like other circuits, the *Tsao* court cited the textual analysis put forth in *Monell* for why municipalities ought to remain free from vicarious liability. The court relied on this as support for its decision to extend the municipal exemption to private corporations. *Id.* The *Tsao* court and others reasoned that because private entities are no more a "cause" of an injury inflicted by its employee than a municipality would be regarding its employee, and because the Court in *Monell* exempted municipalities from *respondeat superior* liability, the same exemption ought to extend to private entities. *Tsao*, F.3d at 1138.

This reasoning elides what should be a straightforward presumption about municipalities and the private entities that work for them. They are different. And because the text of § 1983 is ambiguous and the legislative history inapplicable to private entities, there are additional considerations that should be addressed before closing the door to *respondeat superior* liability for those entities. First, *respondeat superior* liability serves to deter accidents by holding an employer accountable for every action taken by its employees — not just those found in a written policy. *Monell*, 436 U.S. at 693. In theory, greater accountability encourages better policies and avoids accidents in the first place. Second, *respondeat superior* liability serves to diffuse the cost of an accident from a single employee to the entity as a whole; this allows for greater

recovery by the plaintiff and a less severe impact on a single defendant. *Id.* The *Monell* Court acknowledged these considerations, but nevertheless held that *respondeat superior* liability shall not apply against municipalities. *Id.*

When applied to private entities, the above considerations provide plaintiff with a convincing argument. First, *respondeat superior* liability may deter more in the private context than it would for a government body like the Lincoln County jail, which is ethically bound "to serve its community by providing a safe, secure facility."[1] Private contractors are driven by a profit interest, and cutting the frequency or quality of service is a common way for companies to achieve that interest. That the present case emerges in the jail context is of special significance; a 2016 audit of private prisons by the Inspector General for the U.S. Department of Justice concluded that contract prisons "incurred more safety and security incidents per capita than comparable [Bureau of Prisons] institutions" and more frequently used special (segregated) housing units for improper purposes.[2] Second, *respondeat superior* liability is not paid for by taxpayers in the private context, an important difference that would weigh in favor of an exemption for municipalities. Whereas this liability creates a public concern when the cost comes out of a public budget, this concern is lessened when the liability belongs to the contractor. With a private actor, vicarious liability would appear to work as it should, ensuring recovery for the plaintiff while dispersing the cost between a lone defendant and his or her employer, for whom that cost represents a smaller fraction of resources.

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[1] LINCOLN COUNTY SHERIFF'S OFFICE, http://www.co.lincoln.or.us/sheriff/page/jail-inmate-info (last visited July 18, 2017).

[2] *See* OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS ii-iii (2016), *available at* https://oig.justice.gov/reports/2016/e1606.pdf.

Beyond these considerations are two observations about how § 1983 and vicarious liability apply to private entities generally. First, for qualified immunity claims under § 1983, the Supreme Court *has* distinguished between municipal employees and those who work for private entities; there is no immunity for employees of private entities that happen to perform state functions. *See Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (noting that qualified immunity is not available to employees of private prisons). Second, *respondeat superior* is a theory of liability that "has been well-settled in the law of agency for perhaps as long as 250 years." *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 334 (Wis. 2004). It is liability "of general applicability in tort law." Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 Cardozo L. Rev. 35, 61 (2004). That Central Coast and Samaritan suddenly escape liability here, when their affiliations may well have warranted liability outside the *Monell* context, presents an obvious question of fairness.

Looking beyond the ambiguous text and to the factors stated above, § 1983 should be construed to permit *respondeat superior* claims against private entities that contract with municipalities. However, I am bound to follow *Tsao* so long as it remains the law of this circuit. I therefore must grant defendants' motion.

CONCLUSION

Defendants' motion to dismiss (doc. 51) is GRANTED. Plaintiff's first claim for relief is dismissed with respect to Central Coast and Samaritan. Plaintiff's request for oral argument is denied as unnecessary.

IT IS SO ORDERED.

Dated this 27th day of July 2017.

Ann Aiken
United States District Judge