IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ALBERT J. TURK, M.D. and SHELLEY TURK, R.N.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
SOMERVELL COUNTY HOSPITAL DISTRICT and RAY REYNOLDS, INDIVIDUALLY, AND IN HIS CAPACITY AS CHIEF EXECUTIVE OFFICER OF GLEN ROSE MEDICAL CENTER-SOMERVELL COUNTY HOSPITAL DISTRICT,	§	**Case No. 6:15-cv-00231-ADA-JCM**
	§	
Defendants.	§	

PLAINTIFFS' OPPOSED MOTION FOR RECONSIDERATION AND NEW TRIAL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE ALAN D. ALBRIGHT:

NOW COME Jay Turk, M.D. and Shelley Turk, R.N., Plaintiffs in the above-styled and numbered cause, by and through their undersigned counsel of record, and respectfully move this Honorable Court pursuant to Rule 59 of Federal Rules of Civil Procedure for reconsideration and a new trial. In support of this Motion Plaintiffs respectfully state:

I.
The Fifth Circuit Has Clearly Ruled That Hospital Districts Are Independent Legal Entities Rather Than an Arm of The State and Thus Subject To Suit Under 42 U.S.C. § 1983

In *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724 (5th Cir. 1993), a case not cited, distinguished or discussed by Defendants, the United States Court of Appeals for the Fifth

Circuit reasoned and held as follows:

> While local government entities may, in some circumstances, be considered an arm of the state, thereby deriving the state's Eleventh Amendment immunity, see *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981) (state institution), independent local political subdivisions are not entitled to such immunity even though they may "exercise a 'slice of state power' ". *Lake Country Estates, Inc. v. Tahoe Planning Agency*, 440 U.S. 391, 400-01, 99 S.Ct. 1171, 1176-77, 59 L.Ed.2d 401 (1979). A federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself. *Mount Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977); *Hander v. San Jacinto Junior College*, 519 F.2d 273, 279 (5th Cir. 1975). Courts typically look at the degree of local autonomy and control, and most importantly whether the funds to defray any award would be derived from the state treasury. *Moore v. Tangipahoa Parish School Bd.*, 594 F.2d 489 (5th Cir. 1979); *Campbell v. Gadsden County Dist. School Bd.*, 534 F.2d 650 (5th Cir. 1976).
>
> Applying these principles to R. E. Thomason General Hospital, it appears that the relationship between the hospital and the state is simply too attenuated to support an extension of Eleventh Amendment immunity. The hospital is part of the El Paso County Hospital District, created pursuant to Article 4494n, Tex.Rev.Civ.Stat.Ann. (Vernon 1976). Under Article 4494n, creation of a hospital district begins by local initiative. Art. 4494n, § 1; cf. *Goss v. San Jacinto Junior College*, 588 F.2d 96, 99 n.5 (5th Cir.), modified on other grounds, 595 F.2d 1119 (5th Cir. 1979). Hospital districts are financed through special local taxes entirely separate from other county or state taxes. Art. 4494n, § 2, and through bonds sold in the name and upon the full faith and credit of the hospital district. Id. § 3. Title to land, buildings and equipment used for medical purposes is vested in hospital districts. Id. § 4. The Board of Hospital Managers appointed by the County Commissioners Court enjoys virtually unlimited autonomy and control over hospital affairs, including, significantly, the power "to sue and be sued and to promulgate rules and regulations for the operation of the hospital," make all hiring decisions and enter into contracts with counties and the state and federal government. Id. § 5. A hospital district may acquire property by eminent domain. Id. § 9. Finally, and most telling in our view, the Texas Constitution provides a hospital district "shall never become a charge against the State of Texas." Const. Art. 9, § 4 (Vernon 1955). It is true, as appellant points out, that the activities of a hospital district are subject to approval of the county commissioners court in several instances. Similar supervision, however, did not prevent the Court from considering that, "(o)n balance," a local Ohio school board was nevertheless not an arm of the state. Mount Healthy, supra, 429 U.S., at 280, 97 S.Ct. at 572. See also *Holley v. Lavine*, 605 F.2d 638, 642-44 (2d Cir. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1843, 64 L.Ed.2d 266 (1980).

> We are left with the definite and distinct impression that a hospital district, and a component thereof such as appellant, is an independent legal entity in relation to the State of Texas. *Bexar County Hospital Dist. v. Crosby*, 320 S.W.2d 247, 249 (Tex.Civ.App.-San Antonio 1958), modified, 160 Tex. 116, 327 S.W.2d 445 (1959).

Laje, 665 F.2d at 727-28.

On January 16, 2010, United States District Judge Janis Jack of the Southern District considered and cited to *Laje* opinion on this very point as follows:

> This does not, however, change the outcome on this issue in light of the Fifth Circuit decision in *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 727-28 28 (5th Cir. 1993), and state court decisions such as *Mitchell v. Amarillo Hospital District*, 855 S.W.2d 857, 865 (Tex. App. - Amarillo 1993, writ denied), which have determined that hospital districts (and their components) are independent legal entities rather than arms of the state, and thus subject to suit under Section § 1983. In light of these decisions, the Court concludes that a private entity that contracts with a hospital district must also be an independent legal entity and not an "arm of the state".

Rodriguez v. Christus Spohn Health System Corporation, et al; Civil Action No. C-09-95.

At footnote 5 of Defendants' Motion for Judgment of the Pleadings (Document No. 121), Defendants describe the independent operations of Defendant Somervell County Hospital District under the authority of its Board of Directors, as follows:

> The Board of Directors is responsible for assessing a local tax based upon the budget for the hospital. TEXAS HEALTH AND SAFETY CODE §§ 286.071-.073. The Board of Directors, composed of elected members, is empowered by statute to "manage, control, and administer the hospital system and the funds and resources" of Defendant Somervell County Hospital District. TEXAS HEALTH AND SAFETY CODE, §§ 286.041-.042, 286.074. Also, the Board of Directors is required to sign off on all policies and procedures for the hospital, including Human Resources policies, at least annually. More, regulations provided by Joint Commission and CMS define the Board of Directors as the governing body of hospital districts as well as the responsible parties for compliance with applicable regulations. *See* JCAHO Rule LD.01.03.01; CMS 482.112. Finally, state law dictates that the Board of Directors is responsible for adopting "rules governing the operation of the hospital and hospital system and the duties, functions, and responsibilities of district staff and employees." TEXAS HEALTH AND SAFETY CODE § 286.075.

II.
The Great Weight Of State Authority Holds That Hospital Districts Are Independent Legal Entities Rather Than Arms Of The State And Thus Subject To Suit

In *Mitchell v. Amarillo Hospital District*, 855 S.W.2d 857, 865 (Tex. App. - Amarillo 1993, writ denied), the Court of Appeals determined that hospital districts and their "components" are independent legal entities rather than arms of the state and subject to suit under 42 U.S.C. Section § 1983.

Also relevant is the San Antonio Court of Appeals opinion in *Brooks v. Center for Healthcare Services*, 981 S.W.2d 279 (Tex. App.- San Antonio 1998, no pet.), where the Court held that a Community Crisis Center created under statutory authority was not an arm of the state. The opinion discusses the relevant principles for determining whether a state-created entity is or is not an arm of state.

III.
The Decision in *May v. Nacogdoches Memorial Hospital Disctrict* is Wrong

Plaintiffs respectfully contend that *May v. Nacogdoches Memorial Hospital Dist.*, 61 S.W.2d 623 (Tex. App. - Tyler 2001, no pet.), the case authority upon which Defendants rely, is both conclusory and unreasoned. The fact that the underlying authority for creating a hospital district derives from The Texas Constitution and enabling legislation does not mean that the hospital district is an, "arm of the state." It simply means that the district was created under state law. *May* is an outlier in a large body of federal and state law discussed above, all of which conclude that a "Hospital District" is a person and thus subject to suit under 42 U.S.C. Section § 1983.

IV.
Defendants' Motion Under Rule 12(c) Is Untimely Filed

The Third Amended Complaint (Document No. 61 through 61-4) is the live pleading. It

was filed on September 2, 2016, with no objection from Defendants.

According to the Second Agreed Revised Scheduling Order (Document No. 76) the deadline to file dispositive motions, including motions under Rule 12(c) was **August 31, 2017**. Defendants filed their Motion for Judgment on the Pleadings (Document No. 121) on **August 18, 2018**, just short of one year late.

On the Eleventh Amendment issue, Defendants suggest that they did not cite the *May* decision until the last moment, because they did not locate it until immediately before the trial. The Court has characterized this failure as a matter of "excusable neglect." However, Defendants have not offered any explanation for failing to challenge the sufficiency of the Third Amended Complaint in a timely manner.[1] The Court should not have considered the pleading sufficiency aspect of the Rule 12(c) Motion because it was submitted a year late without leave of Court.

V.
Plaintiffs Have Not Pled Themselves Out Of Court

A Rule 12(c) Motion for Judgment on the Pleadings is properly used when Plaintiffs' pleadings demonstrate an air tight defense. Plaintiff is then said to have "pled himself out of Court." *Richard v. Micheff*, 696 F.3d 636 - 38 (7th Cir. 2012).

No such thing has occurred here. There is no, "smoking gun" apparent on the face of the live complaint such as statute of limitations. Instead, the Court must assume that all of the Plaintiffs' pleadings are true and draw all inferences in favor of the Plaintiffs. Further, a Court should hesitate to enter a judgment based only on the pleadings once discovery has closed. *Grajales v. Puerto Rico Ports Authority*, 682 F.3d 40, 45-46 (1st Cir. 2012). Dropping back to a "pleadings only" analysis does not make sense in this case where this Court has already denied

[1] Moreover, in the face of an overwhelming body of federal and state law holding that hospital districts are persons subject to suit under 42 U.S.C. § 1983, Defendants' late discovery of the unreasoned and conclusory decision in *May* hardly qualifies as excusable neglect.

comprehensive Motions for Summary Judgment. See Order (Document No. 118), dated April 30, 2018.

VI.
Any Deficiency in Plaintiffs' Pleadings Leading to Dismissal or Partial Dismissal Should Have Been Followed by Leave to Amend

In Plaintiffs' Response in Opposition to Defendants' Motion for Judgement on the Pleadings, (Document No. 143 at page 5) Plaintiffs asked for leave to amend should the Court find Plaintiffs' pleadings deficient. The Court's Order granting Defendants' 12(c) motion, (Document No. 157 at page 7.) suggests that the Third Amended Complaint is insufficient, but the request to amend was not addressed and was thereby denied without discussion.

Under the Federal Rules, a dismissal for failure to meet pleading requirements is usually met with leave to amend to attempt to cure the pleading deficiency by, for example, pleading more facts. *See*, *Great Plains Trust Co. v. Morgan Stanley Dean Writer & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) ("District Courts often afford plaintiffs at least one opportunity to cure pleadings deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."); *see also*, *United States ex rel. J. Adrian v. Regents of the University of California.*, 363 F.3d 398, 403 (5th Cir. 2004) ("Leave to amend should be freely given, and outright refusal to grant leave to amend without a justification…is considered an abuse of discretion." (internal citation omitted)).

In this circumstance, the Court should have granted leave to amend. Plaintiffs contend that they are willing and able to amend in a manner that will avoid dismissal in this case. Plaintiffs intend to amend to allege that the Somervell County Hospital District is liable for the constitutional deprivations for two reasons. One reason is that the deprivations are pursuant to

governmental custom and practice.[2] Another reason is that at least some of the violations were committed by officials whose edicts and acts may fairly be said to represent official policy of the Somervell County Hospital District.[3]

VII.
SUMMARY AND CONCLUSIONS

Plaintiffs' Opposed Motion for Reconsideration and New Trial should be granted for the following reasons:

1. The Court erred in its Eleventh Amendment analysis. Somervell County Hospital District is not an "arm of the State" and is a "person" subject to suit under 42 U.S.C. § 1983;
2. Defendants' Motion under Rule 12(c) was filed over 11 months late, without leave of Court. Therefore, the Court should not have considered the argument about insufficient pleadings raised in that Motion; and
3. To the extent that the Court perceives any deficiency in the Third Amended Complaint, Plaintiffs must, under Rule 15 of the Federal Rules of Civil Procedure be allowed to amend. A reasonable amount of time should be allowed. Failing to allow such an amendment is an abuse of discretion.

[2] On August 24, 2018, Document No. 131, page 2, Defendants submitted a "Municipal Immunity" jury instruction in part addressing liability created by custom or practice. On August 24, 2018, Document No. 158, page 6, Plaintiffs submitted an "Instruction on Hospital District Liability" which also explained liability created by custom or practice of a governmental entity. Both sides understood that this issue was part of the case to be presented to the Jury as a matter for factual determination.

[3] Even as the pleadings stand now from the Third Amended Complaint (Document No. 61), the Court is required to believe for example, that Dr. Turk engaged in the protected First Amendment free speech activities as detailed in the complaint. (See paragraph 11 for detailed examples). The Court is also required to believe as alleged at paragraphs 13-16 of the Third Amended Complaint that the *Somervell County Hospital District Board of Trustees* surreptitiously posted a closed session agenda item about the termination of Dr. Turk, without advising him or giving him any opportunity to respond. Thus, the highest policy making officials of the Somervell County Hospital District were proceeding to secretly terminate Dr. Turk behind his back and not give him any elements of due process. A reasonable inference from these specific allegations is that retaliation against Dr. Turk was likely to continue. Dr. Turk has, in fact, alleged many specific examples of continuing retaliation since this lawsuit was filed in paragraph 24 of the Third Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Plaintiffs' counsel attempted to confer with opposing counsel on December 4, 2018, with regard to this Motion and have not received a response. We are therefore asking this Honorable Court to assume that this Motion for Reconsideration and New Trial is opposed.

/s/John E. Schulman
John E. Schulman

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with F.R.C.P. 5(b) by electronic e-filing, on the 6th day of December, 2018, as follows:

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