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 *Defendants*	§	**CIVIL NO. 6:15-CV-00231-ADA-JCM**

AMENDED ORDER REGARDING DEFENDANTS' RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

On this day the Court reconsidered its Order Granting Government Defendants', Somervell County Hospital District and Ray Reynolds in his Official Capacity, 12(c) Motion for Judgment on the Pleadings. Docket No. 157. Plaintiffs filed a Motion for Reconsideration regarding that Order on December 6, 2018. Docket No. 158. On December 7, 2018, the Court notified Plaintiffs and Defendants that it would reconsider its Order and issue an Amended Order at a later date. Docket No. 159.

The Court previously granted Defendants Rule 12(c) Motion because it found that Somervell County Hospital District (the "Hospital") was an arm of the state and therefore entitled to Eleventh Amendment protection.[1] Docket No. 157 at 5–6. The Court also found that

[1] Mr. Reynolds was also found to be entitled to Eleventh Amendment protection since suing a state official in their official capacity would be no different than suing the Hospital itself. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).

even if the Hospital were not an arm of the state, Plaintiffs failed to allege what policy or custom of the Hospital violated Plaintiffs' constitutional rights. Docket No. 157 at 6–7. After further consideration of its previous Order, the Court has determined that the Hospital is not an arm of the state; therefore, neither the Hospital or Mr. Reynolds in his official capacity are entitled to Eleventh Amendment protection. However, the Court will not amend its finding that Plaintiffs failed to allege what policy or custom of the Hospital violated Plaintiffs' constitutional rights; therefore, Defendants' Rule 12(c) Motion should still be granted.

Discussion

I. The Court is Allowing Defendants' Rule 12(c) Motion to be Filed

Plaintiffs argue that the Court should not consider Defendants' Rule 12(c) Motion because it was not timely filed. Document No. 158 at 4–5. Plaintiffs rely primarily on the fact that Defendants' Motion was filed almost a year after the deadline to file dispositive motions without an explanation for the delay. However, as stated previously, motions for judgment on the pleadings may be filed at *any time* before the pleadings are closed so long as the motion does not delay trial—"good cause" need not be shown. FED. R. CIV. P. 12(c). *See U.S. ex rel. Long v. GSDMidea City, L.L.C.*, 798 F.3d 265, 275 (5th Cir. 2015) (holding the district court did not err in allowing the filing of a Rule 12(c) motion after the dispositive motions deadline even though the defendant failed to show "good cause"—the focus was on whether the motion would delay trial). Plaintiffs have failed to present any evidence that the motion would delay trial or that Defendants filed their motion for the purpose of delaying trial. As a result, the Court will not overturn its previous holding allowing Defendants' Rule 12(c) motion to be filed. Document No. 157 at 4.

II. The Hospital as an Arm of the State.

A. Legal Standard

Defendants raised a jurisdictional issue in their Rule 12(c) Motion by suggesting that the Hospital and Ray Reynolds in his official capacity are entitled to immunity under the Eleventh Amendment. Claims barred by sovereign immunity must be dismissed for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Wilkins v. White*, No. 04-CV-332, 2005 WL 8159231, at *1 (N.D. Tex. Feb. 1, 2005) (quoting *Duncan v. Sec'y of Def.*, No. 03-3373, 2004 WL 1118300, at *2 (E.D. La. May 18, 2004) (citing *Warnock v. Pecos Cty., Texas*, 88 F.3d 341, 343 (5th Cir. 1996)). Accordingly, if the Hospital and Mr. Reynolds are entitled to immunity under the Eleventh Amendment, then the Court must dismiss the case for lack of subject-matter jurisdiction.

When a Rule 12(c) motion is used as a vehicle for raising a 12(b) defense, a district court should apply the same standards for granting the appropriate relief or denying the motion as it would have employed had the motion been brought prior to the defendant's answer under Rules 12(b)(1), (6), or (7). *Puckett v. U.S.*, 82 F. Supp. 2d 660, 663 (S.D. Tex. 1999); 5C CHARLES ALAN WRIGHT & ARTHUR MILLER FEDERAL PRACTICE AND PROCEDURE § 1367 (3d ed.). As a result, the Court will apply the same 12(b)(1) legal standard it would have applied had the motion been brought prior to the defendant's answer.

Federal Rule of Civil Procedure 12(b)(1) authorizes the dismissal of a case for lack of subject-matter jurisdiction. A Rule 12(b)(1) motion should be granted "only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle [the] plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction; therefore, the

plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Wilkins*, 2005 WL 8159231 at *1 (citing *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)).

Section 1983 applies only to "persons." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 (1989). States and governmental entities considered "arms of the State" are not "persons" subject to § 1983 and are protected by the Eleventh Amendment. *Id.* at 64, 70. State officials are also entitled to Eleventh Amendment protection since a suit against a state official in their official capacity "is no different from a suit against the State itself." *Id.* at 71. The Eleventh Amendment bars an individual from suing a state in federal court unless the state consents to suit or Congress has clearly abrogated the state's sovereign immunity. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 326 (5th Cir. 2002). If the Hospital is an arm of the state, then the Hospital and Mr. Reynolds in his official capacity are entitled to immunity under the Eleventh Amendment.

The Fifth Circuit requires the examination of a variety of factors when determining whether an entity is an arm of the state. These factors include: (1) whether the state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether it has the right to hold and use property. *Sw. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936, 938 (5th Cir. 2001). "These factors are examined as a whole, and no single factor is dispositive." *Id.* The Court will address each factor in turn based on the information provided by Plaintiffs.

B. Application

The first factor to be examined is whether the state statutes and case law view the entity as an arm of the state. Plaintiffs have provided one Texas case, *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857 (Tex. App.—Amarillo 1993, writ denied), that held that a hospital district was not an arm of the state and therefore not entitled to immunity under the Eleventh Amendment. Document 162 at 4. Plaintiffs insist that the "great weight of state authority holds that hospital districts" are not arms of the state but fails to point to any other authority besides *Mitchell*.

Defendants cite to a more recent Texas case, *May v. Nacogdoches Memorial Hosp.*, 61 S.W.3d 623 (Tex. App.—Tyler 2001, no pet.), that comes to the opposite conclusion of *Mitchell* and finds that hospital districts are entitled to immunity under the Eleventh Amendment. Although Plaintiffs might be correct that *May's* reasoning is flawed and conclusory, the case has yet to be overturned and is still considered good law. In light of the conflicting Texas law cited to by the Parties and the lack of additional cited to authority, the Court finds that this factor has negligible weight.

The next factor to be examined is the source of the entity's funding. While no single factor is dispositive, courts have found the source of the entity's funding to be "the weightiest factor." *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004). A hospital district's funding is primarily derived from bonds taken in the hospital district's name—these bonds can be paid off by levying a tax on citizens living in the hospital's district. TEX. HEALTH & SAFETY CODE §§ 286.141–286.142, 286.144; *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982). A hospital district may also receive funds from an authorized sales and use tax to pay for (1) indebtedness issued or assumed by the hospital district; and (2) a hospital district's maintenance and operating expenses. TEX. HEALTH & SAFETY CODE §§

286.161–286.164; *Laje*, 665 F.2d at 724. Defendants have not provided the Court any specific information regarding the Hospital's funding. Because of the foregoing, the Court finds that the State's funds are not implicated in an action against the Hospital. Accordingly, this factor weighs more strongly in favor of not finding the Hospital as an arm of the state.

The Court will now examine the Hospital's degree of local autonomy. The Hospital is governed by the Board of Directors, the members of which are elected by the general public. TEX. HEALTH & SAFETY CODE §§ 286.041–286.042, 286.074 ("The board shall manage, control, and administer the hospital system and the funds and resources of the district."). The Board has the power to appoint "any doctors the board considers necessary for the efficient operation of the district," and may make any temporary appointments that it considers necessary. *Id.* at § 286.053; *see also* §§ 286.052, 286.054 (allowing the Board to appoint an administrator and to "delegate to the administrator the authority to employ persons for the district."). The Board may also (1) enter into construction contracts for the Hospital; (2) enter into operating or management contracts relating to hospital facilities; (3) acquire necessary facilities and property for the Hospital; and (4) even exercise eminent domain. *Id.* at §§ 286.077–286.080. There is no indication in the Texas Health & Safety Code—and Defendants have not provided any authority saying otherwise—that the State exercises any substantial oversight over the Hospital. As a result, the Court finds that there is insubstantial State supervision of the Hospital; therefore, this factor weighs in favor of not finding the Hospital as an arm of the state.

The next issue is whether the Hospital is concerned primarily with local or statewide problems. Neither Plaintiffs nor Defendants briefed the Court on this issue. Providing access to medical care for Texas residents appears to be a problem of statewide and local concern. The State has elected to create a statutory scheme—specifically, Texas Health & Safety Code

Chapters 281–298B—that empowers local communities to solve a statewide problem by taking into consideration local concerns. *See generally id.* at §§ 286.073–286.085 (confining the board of directors' powers to their respective districts). Plaintiffs have provided no evidence that Texas has abdicated its responsibility for helping to provide access to medical care for its residents, and the Hospital is part of Texas' comprehensive statutory scheme to address this statewide issue at a local level. In sum, the Court finds that providing access to medical care for Texas residents is a problem of statewide and local concern and that Plaintiffs have failed to present any evidence to convince the Court otherwise. As a result, the Court finds this factor weighing in favor of finding the Hospital as an arm of the state.

The last two issues to be examined are whether the Hospital has the authority to sue and be sued in its own name and whether it has the right to hold and use property. The Texas Health & Safety Code explicitly states that the "board may sue and be sued on behalf of the district." *Id.* at § 286.086; *Laje*, 665 F.2d at 724. The Hospital may also acquire property by eminent domain and takes "title to land, buildings, improvements, and equipment related to the hospital system . . . that are owned by the county, municipality, or other governmental entity" in which the Hospital is located. TEX. HEALTH & SAFETY CODE §§ 286.071(1), 286.080. Based on the foregoing, the Court finds that these factors weigh in favor of not finding the Hospital as an arm of the state.

After carefully applying the required factors for determining whether an entity is an arm of the state, the Court finds that the Hospital is not an arm of the state of Texas for the foregoing reasons. As a result, neither the Hospital or Mr. Reynolds in his official capacity are entitled to protection under the Eleventh Amendment; therefore, they are not immune from suit.

III. Plaintiffs Failed to Allege the Hospital has a Policy or Custom that Violates Plaintiffs' Constitutional Rights and are not Entitled to Amend their Complaint.

In its previous Order, the Court held that Plaintiffs failed to allege what policy or custom of the Hospital violates Plaintiffs' constitutional rights. Docket No. 157 at 6. Furthermore, the Court held that Plaintiffs failed to allege any facts suggesting Mr. Reynolds was sufficiently high up to be considered a policymaker. *Id.* at 7. Plaintiffs argue in their Motion for Reconsideration that they did allege the Hospital had a policy or custom that violated Plaintiffs' constitutional rights. Docket No. 158 at 7 n.2 – 3. Additionally, even if they did fail to do so, the Court should grant them leave to amend. *Id.* at 6. The Court will address each argument in turn.

Plaintiffs claim their Third Amended Complaint is sufficient because it alleges that: (1) Dr. Turk engaged in protected First Amendment activity; (2) the Hospital posted a closed session agenda item about Dr. Turk's termination; (3) the Hospital's highest policymaking officials terminated Dr. Turk; and (4) these officials continued to retaliate against Dr. Turk since the filing of this lawsuit. Docket No. 158 at 7 n.3. Even taking these allegations as true, Plaintiffs have failed to allege sufficient facts to support their § 1983 claim. Plaintiffs allegations describe just one incident and it is hornbook law that "[a]llegations of an isolated incident are not sufficient to show the existence of a custom or policy." *Fraire v. City of Arlington,* 957 F.2d 1268, 1278 (5th Cir. 1992). Additionally, making a conclusory statement that Mr. Reynolds or his counterparts were sufficiently high up to be considered policymakers is insufficient to support Plaintiffs' complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.")

Plaintiffs are also wrong that the Court is required to allow them leave to amend to cure the pleading deficiency. Although courts generally allow plaintiffs to amend their complaint to cure pleading deficiencies, courts are not required to give plaintiffs an unlimited number of opportunities to do so. There comes a time when a court may deny leave to amend and dismiss a case after giving a plaintiff a fair opportunity to make their case. *Hermann Holdings Ltd. v. Lucent Technologies Inc.*, 302 F.3d 552, 566–67 (5th Cir. 2002) (upholding district court's denial of the plaintiff's request for leave to amend because they "were given ample opportunity to plead their statutory claims"—the district had already allowed the plaintiff to twice amend their complaint). *See also Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998); *Jacques v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986).

Here, the Court has repeatedly given plaintiffs a fair opportunity to plead their § 1983 claim. Plaintiffs have known, or should have known, since day one that they would have to identify an official policy or custom and a violation of constitutional rights whose "moving force" is the alleged policy or custom. *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001). Plaintiffs have had three and a half years to do so and have already been allowed to amend their complaint three times. As a result, the Court finds that Plaintiffs have had a fair opportunity to make their case and therefore are not entitled to amend their complaint for a fourth time.

IV. Conclusion

The Court's previous Order issued on November 9, 2018 is correct in its entirety except as to the finding regarding whether the Hospital is an arm of the state. Under the analysis required by the Fifth Circuit, the Court finds that the Hospital is not an arm of the state. However, Plaintiffs failed to allege the Hospital has a policy or custom that violated Plaintiffs' constitutional rights.

Moreover, they have been given a fair opportunity to make their case; therefore, they are not entitled to amend their complaint to cure the pleading deficiency. Accordingly:

It is **ORDERED** that Plaintiffs' claims as to Defendants' Somervell County Hospital District and Ray Reynolds in his Official Capacity are **DISMISSED WITH PREJUDICE**.

SIGNED this 15th day of January 2019.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE