UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ADAM KANUSZEWSKI and ASHLEY KANUSZEWSKI as parent-guardians and Next friend to their minor children, D.W.L., R.F.K., and C.K.K.; SHANNON LAPORTE, as parent-guardian and next friend to her Ludington,
minor children, M.T.L. and E.M.O.; and LYNNETTE WIEGAND, as parent-guardian and next friend to her minor children, L.R.W., C.J.W., H.J.W., AND M.L.W.

Plaintiffs,

V

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; NICK LYON, sued in his official and individual capacities; DR. SANDIP SHAH, sued in his official and individual capacities; DR. SARAH LYON-CALLO, sued in her official and individual capacities; HARRY HAWKINS, sued in his official and individual capacities; MARY KLEYN, sued in her official and individual capacities; MICHIGAN NEONATAL BIOBANK, INC also known as MICHIGAN NEONATAL BIOREPOSITORY; DR. ANTONIO YANCEY, sued in his official and individual capacities,

Defendants.

Case No.: 18-cv-10472

Hon. Thomas L.

District Court Judge

Hon Patricia T. Morris,
Magistrate Judge

MOTION TO DISMISS OF DEFENDANT DR. ANTONIO YANCEY, IN HIS INDIVIDUAL CAPACITY

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Defendant Dr. Antonio Yancey, in his individual capacity, by and through his attorneys, Wayne State University Office of the General Counsel, hereby moves this Court, pursuant to Fed. Rule. Civ. Proc. 12(b)(6), to dismiss Plaintiffs' First Amended Complaint as to all claims asserted therein against Dr. Yancey in his individual capacity for the reason that the First Amended Complaint fails to state a claim against Dr. Yancey in his individual capacity. In support of his Motion, Dr. Yancey relies on the accompanying supporting brief.

Prior to filing this Motion, counsel for Dr. Yancey in his individual capacity sought the concurrence of counsel for Plaintiffs in the relief sought by this Motion. Plaintiffs' counsel indicated that he does not concur in the relief sought.

WHEREFORE, Defendant Dr. Antonio Yancey, in his individual capacity, requests that this Court grant his Motion to Dismiss and dismiss the First Amended Complaint with prejudice as to all claims asserted therein against Dr. Yancey in his individual capacity.

Respectfully submitted,
WAYNE STATE UNIVERSITY
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Date: May 29, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ADAM KANUSZEWSKI and ASHLEY KANUSZEWSKI as parent-guardians and Next friend to their minor children, D.W.L., R.F.K., and C.K.K.; SHANNON LAPORTE, as parent-guardian and next friend to her minor children, M.T.L. and E.M.O.; and LYNNETTE WIEGAND, as parent-guardian and next friend to her minor children, L.R.W., C.J.W., H.J.W., AND M.L.W.

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Defendants.

Case No.: 18-cv-10472

Hon. Thomas L. Ludington,
District Court Judge

Hon Patricia T. Morris,
Magistrate Judge

BRIEF IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANT DR. ANTONIO YANCEY, IN HIS INDIVIDUAL CAPACITY

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CONCISE STATEMENT OF ISSUE PRESENTED

Should the claims asserted in the First Amended Complaint against Defendant Dr. Antonio Yancey in his individual capacity be dismissed under Fed. Rule Civ. Proc. 12(b)(6) because the First Amended Complaint fails to allege facts showing Dr. Yancey's personal involvement in the alleged unconstitutional activity that forms the basis of those claims?

This Court should answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Heyerman v *County of Calhoun*, 680 F.3d 527 (6th Cir. 2006)
Revis v Meldrum, 489 F.3d 273, 290 (6th Cir. 2007)

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INTRODUCTION

In their action brought under 42 U.S.C. § 1983, Plaintiffs[1] allege that Defendants violated their constitutional rights by the taking of small amounts of blood shortly after their birth, testing it for various diseases and disorders, and storing it for use by researchers at Defendant Michigan Neonatal Biobank. Defendant Dr. Antonio Yancey serves as Director of the Biobank and is being sued in his individual capacity as well as his official capacity. Plaintiffs' claims against Dr. Yancey in his individual capacity must be dismissed because the First Amended Complaint fails to allege facts showing that Dr. Yancey was personally involved in the alleged constitutional violations.

Plaintiffs contend that Dr. Yancey (and the rest of the Defendants) violated their due process rights when their blood was taken without the informed consent of their parents. Yet there are no allegations whatsoever that Dr. Yancey participated in the "taking" of their blood, a procedure that was performed by health professionals attending the newborns at the hospital. Plaintiffs also contend that Dr. Yancey is liable for allegedly violating Plaintiffs' Fourth Amendment right against unreasonable search and seizure because the Michigan Neonatal Biobank stores their blood samples indefinitely. No facts, however, are alleged that Dr. Yancey authorized, approved or even knew about the storage of their blood at the Biobank. Their claim rests entirely on Dr. Yancey's supervisory role, but that alone is insufficient to impose liability. As a back-up theory, Plaintiffs assert that Dr. Yancey and the other Defendants engaged in a civil conspiracy to deprive Plaintiffs of their Fourth Amendment rights. That claim fails

[1] As used in this Brief, the term "Plaintiffs" refers to the plaintiff children who are called "Infants" in the First Amended Complaint. *See* First Amended Complaint, paragraph 19.

for lack of any alleged facts supporting a civil conspiracy or Dr. Yancey's participation in it.

Because the First Amended Complaint is bereft of factual allegations showing Dr. Yancey's personal involvement in the alleged unconstitutional conduct, Plaintiffs' claims against Dr. Yancey in his individual capacity fail and must be dismissed.

FACTUAL ALLEGATIONS

Pursuant to Michigan law, small amounts of blood are collected from newborns, shortly after birth, to be tested for disorders, diseases and other health risks. At that time, health professionals in charge of the care of the newborn at the hospital drew blood from them. (First Amended Complaint ["FAC"] ¶s 4, 35.) The blood samples (or "blood spots") are transmitted to the State Bureau of Laboratories where they are tested for various maladies, disorders and diseases. (FAC, ¶s 54 and 55.) After the testing is completed, the blood spots are transferred to the Defendant Michigan Neonatal Biobank, ("Biobank"), whose Director is Defendant Dr. Antonio Yancey, where they are stored indefinitely. (FAC ¶s 29, 55 and 75.)

Plaintiffs are children who as newborns allegedly had their blood drawn, tested and stored as described above. Their five-count First Amended Complaint, based on 42 U.S.C. § 1983, alleges that the process is constitutionally defective. Dr. Yancey is sued, along with the rest of the Defendants, in Counts II, IV and V. In Count II, Plaintiffs allege that Dr. Yancey deprived them of their right to due process by "the taking of the Infants' blood for government seizure and use without proper informed consent of the Parents." (FAC ¶99.) In Counts IV and V (which are combined in paragraphs 108 through 117), Plaintiffs assert that Dr. Yancey violated their Fourth Amendment rights

by "indefinitely" storing their blood spots at the Biobank. (FAC ¶ 109.) Alternately, Plaintiffs assert that Dr. Yancey and the other Defendants engaged in a civil conspiracy to deprive the Plaintiffs of their Fourth Amendment rights. (FAC ¶ 113.)

LEGAL STANDARD

This motion is brought under Fed. Rule Civ. Proc. 12(b)(6) for the First Amended Complaint's failure to state a claim against Dr. Yancey in his individual capacity. A complaint cannot survive a 12(b)(6) motion to dismiss unless it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id.* (*citing Twombly*, 550 U.S. at 556). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (*citing Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint . . . has not "show[n] that the pleader is entitled to relief" and should therefore be dismissed. *Id.* at 679 (*citing* Fed. Rule Civ. Proc. 8(a)(2)).

Significantly, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* at 678; *see also Twombly*, 550 U.S. at 555 ("courts are not bound to accept as true a legal conclusion couched as a factual allegation" (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986))). Therefore, a complaint that merely offers "labels and conclusions"; "a formulaic recitation of the elements of a cause of action"; or "naked assertion[s] devoid of further factual enhancement" is insufficient to survive a motion to dismiss. *Id.* (*citing Twombly*,

550 U.S. at 555, 557)

Under these well-established standards, Plaintiffs' First Amended Complaint must be dismissed as to Defendant Dr. Antonio Yancey in his individual capacity.

ARGUMENT

I. Plaintiffs' Claims Against Dr. Yancey in His Individual Capacity Fail.

Plaintiffs claim that Dr. Yancey is liable in his individual capacity for the constitutional violations alleged in Count II and combined Counts IV and V. The First Amended Complaint, however, is bereft of allegations that Dr. Yancey was personally involved in the alleged violations. As a result, Plaintiffs' claims against Dr. Yancey individually fail.

The pleading requirements for a § 1983 individual capacity case are clear. "To state a cognizable claim against an individual under § 1983, ' a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by the person acting under color of state law." *Heyerman v. County of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012) (*quoting Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006)). As the Sixth Circuit further explained, "[p]ersons sued in their individual capacities under § 1983 can be held liable based only on their own unconstitutional behavior." *Id.* "Personal involvement is necessary to establish section 1983 liability." *Heyerman*, 680 F.3d at 647 (*quoting Murphy v Grenier*, 406 F.App'x 972, 974 (6th Cir. 2011)). The alleged personal involvement must be specific to that defendant. "[P]ersonal liability 'must be based on the actions of that defendant in the situation that the defendant faced, and not based on any problems caused by the errors of others, either defendants

or non-defendants.'" *Heyerman*, 680 F.3d at 647. *(quoting Gibson v. Matthews*. 926 F.2d 532, 535 (6th Cir. 1991)).

A. There are no Factual Allegations that Dr. Yancey was Personally Involved in the Unconstitutional Activity Alleged in Count II.

Count II of the First Amended Complaint asserts that Dr. Yancey deprived Plaintiffs of their liberty interest in violation of the Due Process Clause "[b]y undertaking the taking of the Infants' [i.e., Plaintiffs] blood for government seizure and use without proper informed consent of the Parents [.]" (FAC, ¶ 99.) Dr. Yancey, however, was not involved in the "taking of the infants' blood." According to the First Amended Complaint, the blood was drawn from Plaintiffs, not by Dr. Yancey, but by "a health professional in charge of the care of each newborn infant or at the birth of an infant[.]" (FAC ¶ 35.) The health professionals were "conscripted" to draw the Plaintiffs' blood by Defendant Michigan Department of Health and Human Services and the Defendant State of Michigan officials. *Id.* There are no allegations whatsoever that Dr. Yancey personally participated in "the taking of the Infants' blood". Thus, Count II should be dismissed as to Dr. Yancey in his individual capacity.

B. There are no Factual Allegations that Dr. Yancey was Personally Involved in the Unconstitutional Activity Alleged in Counts IV and V.

Combined Counts IV and V allege that Dr. Yancey (and the other Defendants) violated Plaintiffs' constitutional rights under the Fourth Amendment and civil conspiracy to deprive the Plaintiffs of those rights. The constitutional violation is alleged to be the "indefinite search-and-seizure of the blood of the Infants, for no reasonable and rationale [sic] basis when undertaken without the actual and informed consent of the Infants or their Parents[.]" (FAC ¶ 109.) This appears to be an allegation that Dr.

Yancey is liable for a Fourth Amendment violation consisting of the "indefinite" storage of Plaintiffs' blood spots at the Biobank.

1. Dr. Yancey is Not Liable in His individual Capacity for the Alleged Unconstitutional Storage of Plaintiffs' Blood Spots at the Biobank

Dr. Yancey's liability for the storage of Plaintiffs' blood spots is based on "his role as director of Defendant MICHIGAN NEONATAL BIOBANK" where, by virtue of that position, he has the "custody and control" of the blood spots. (FAC ¶s 61, 76, 114). Dr. Yancey, however, cannot be held individually liable merely because he is the director of the facility where the blood spots are stored.

"Supervisory officials are not liable in their individual capacities unless they 'either encouraged the specific incident of misconduct or in some other way directly participated in it." *Heyerman*, 680 F.3d at 647 (*quoting Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982)). Merely being in charge of the facility in which the blood spots are stored is insufficient to support a § 1983 claim. *See Porter v. Louisville Jefferson Cty. Metro. Gov't*, 2014 U.S. Dist. LEXIS 168669 at *15 (W.D. Ky. Dec. 5, 2014)("simply pointing to the fact that [municipal corrections department director][was] in charge of the [facility] does not state a § 1983 claim.")(brackets supplied). *See also Gill v. Mooney*, 824 F.2d 192, 196 (2d. Cir. 1987)("Dismissal of a section 1983 claim is proper where, as here, the plaintiff 'does no more than allege that [defendant] was in charge of the prison.'" (*quoting Williams v. Vincent*, 508 F.2d 541, 546 (2d Cir. 1974)). Rather, supervisory liability "must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act.'" *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (*quoting Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 206 (6th Cir. 1998)). *See*

also Watson v Mohr, 2017 U.S. Dist. LEXIS 205479 (S.D. Ohio Dec. 14, 2017)("A defendant must, therefore, play more than a passive role in the alleged violation or show mere tacit approval of the actions in question.") "At a minimum, a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Heyerman,* 680 F.3d at 647.

There are no allegations whatsoever that Dr. Yancey either implicitly authorized, approved or knowingly acquiesced in the storage of the Plaintiffs' blood spots at the Biobank. Plaintiffs merely allege that he had "custody and control" of the Plaintiffs' blood by virtue of being the Biobank's director. But that is insufficient to impose individual liability. "Section 1983 liability . . . cannot be premised solely on a theory of respondent superior or *the right to control employees*." *Heyerman*, 680 F.3d at 647 (emphasis supplied). Similarly, an allegation of "custody" falls short. *See Blackwell v. Madison Cty.*, 2016 U.S. Dist. LEXIS 2903, *9 (W.D. Tenn. Jan. 11, 2016)(dismissing § 1983 action for violation of Eighth Amendment against Sheriff where the plaintiff alleged that "the care and custody of inmates is delegated to the Sheriff . . . and his designees pursuant to State law."). There is not even an allegation that Dr. Yancey was aware that the Plaintiffs' blood was stored at the Biobank, and, even if there were such an allegation, it would be insufficient. *See Leary v. Daeschner*, 349 F.3d 888, 903 (6th Cir. 2003) ("[S]imple awareness of employees' misconduct does not lead to supervisor liability."). Thus, Plaintiffs' claim that Dr. Yancey is liable in his individual capacity for the alleged unconstitutional "storage" of Plaintiffs' blood spots fails and must be dismissed.

2. **Dr. Yancey is Not Liable for the Alleged Deprivation of Plaintiffs' Fourth Amendment Rights on a Civil Conspiracy Theory**

Plaintiffs' attempt to hold Dr. Yancey individually liable for the alleged Fourth Amendment violation on a civil conspiracy theory fares no better. A civil conspiracy is "an agreement between two or more persons to injure another by unlawful action." *Revis v Meldrum*, 489 F.3d 273, 290 (6th Cir. 2007). To establish a civil conspiracy, a "plaintiff must show that (1) a 'single plan" existed; (2) defendants 'shared in the general conspiratorial objective' to deprive the plaintiff of his constitutional rights; and (3) 'an overt act was committed in furtherance of the conspiracy that caused [the plaintiff's] injury'." *Webb v. United States*, 789 F.3d 647, 670 (6th Cir. 2015) (*quoting Hooks v Hooks*, 771 F.2d 935, 944 (6th Cir. 1985)(brackets supplied in *Webb*)). Civil conspiracy claims must be pled with particularity. "It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987).

Plaintiffs fail to establish the pleading requirements for a civil conspiracy. Their allegations of a civil conspiracy are in paragraph 113 of the First Amended Complaint. There, Plaintiffs allege that Defendants acted "via a plan" and "shared general conspiratorial objectives" to deprive the Plaintiffs of their Fourth Amendment rights. Plaintiffs offer no details of the "plan" nor any facts showing that Defendants "shared" the alleged "conspiratorial objective" or "agreed" to violate Plaintiffs' constitutional rights. They simply recite the elements of a civil conspiracy. But a complaint that merely offers "labels and conclusions"; "a formulaic recitation of the elements of a cause of action"; or

"naked assertion[s] devoid of further factual enhancement" cannot survive a motion to dismiss. *Iqbal,* 556 at 678 (*citing Twombly*, 550 U.S. at 555, 557).

Moreover, paragraph 113 alleges no facts whatsoever showing that Dr. Yancey was personally involved in the alleged conspiracy. As noted above, personal liability must be "based on the actions of *that* defendant" and not on the actions of others. *Heyerman*, 680 F.3d at 647 (*quoting Gibson v. Matthews*. 926 F.2d 532, 535 (6th Cir. 1991)) (emphasis supplied). Here, Plaintiffs allege no facts showing that Dr. Yancey participated in a "single plan" to deprive Plaintiffs of their Fourth Amendment rights, "shared" with the other Defendants any conspiratorial objective to do so or otherwise "agreed" with them to deprive Plaintiffs of their rights. Without such factual allegations, Plaintiffs' civil conspiracy claim against Dr. Yancey fails and must be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs' First Amended Complaint should be dismissed as to all claims asserted against Defendant Dr. Antonio Yancey in his individual capacity.

Respectfully submitted,
WAYNE STATE UNIVERSITY
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Date: May 29, 2018

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email disclosed on the Notice of Electronic Filing on May 29, 2018.

Dana Rudnicki