

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

BARBARA LATHAM, INDIVIDUALLY	§	
& AS REPRESENTATIVE OF MURIEL	§	
L. MINTZ, DECEASED, & ESTELLE	§	
NELSON, INDIVIDUALLY & HEIR OF	§	
MURIEL MINTZ, DECEASED	§	
	§	Cause No. 4:17-cv-03875
	§	
JUDGE MIKE WOOD, IND. & IN	§	
HIS CAPACITY AS STATUTORY	§	
PROBATE JUDGE OF HARRIS	§	
COUNTY, ET AL	§	JURY DEMAND

**DEFENDANT, MICHELE GOLDBERG’S Rule 12(b)(6) MOTION TO DISMISS**

Defendant, Michele Goldberg, moves to dismiss all claims of Plaintiffs and would show the Court the following:

**I.**

**INTRODUCTION AND STATEMENT OF THE ISSUES**

Plaintiffs have filed yet another lengthy complaint wherein approximately 50 pages are dedicated to a “history of proceedings in the probate courtroom.” This complaint includes Plaintiffs’ interpretations of multiple hearings in the probate court and clearly evidences Plaintiffs’ displeasure with the probate proceedings and rulings in state court. Attacking a state court proceeding in federal court is improper and the case should be dismissed for that reason.

Plaintiff Latham continues to represent herself in this complaint as the Personal Representative of the Estate of Muriel Mintz when she is not. Plaintiffs lack the standing or capacity to sue on behalf of Muriel Mintz.

Plaintiffs fail to state a claim for relief under 42 U.S.C. §1983, ADA, Section 504 of the Rehabilitation Act of 1973 or for wrongful death and/or fraud. To the extent that there are any allegations as to Defendant Goldberg, they are only conclusory allegations in the Second Amended

Complaint and fail to state a claim for relief. Accordingly, this Motion to Dismiss should be granted.

## II.

### **APPLICABLE LAW AND STANDARDS OF REVIEW FOR PLEADINGS**

#### **A. Rule 12(b)(6).**

To survive a motion to dismiss under Rule 12(b)(6), a complaint “must contain 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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see also FED R. CIV. P. 12(b)(6); *McCrimmon v. Wells Fargo Bank, N.A.*, 516 F. App'x 372, 375 (5th Cir. 2013). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court may disregard conclusions of fact and law because “they are ... not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. Moreover, the complaint must give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

A complaint must contain “more than labels and conclusions” or mere “formulaic recitations of the elements of a cause of action” to establish a plausible claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Factual allegations must be enough to raise the right of relief above the speculative level to avoid dismissal. *Id.* at 555. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Twombly*, 550 U.S. at 555. Only a complaint that states a plausible claim for relief can survive a motion to dismiss. *Twombly*, 550 U.S. at 556.

A claim has “facial plausibility” when the plaintiff pleads factual content that allows the Court to draw the reasonable inferences that the Defendant is liable for the misconduct alleged.”

*Iqbal*, 556 U.S. at 678. Bare recitals of the elements of a cause of action, supported by mere conclusory statements, are not sufficient.” *Id.*, at 678.

**B. Rule 8(a).**

The Federal Rules of Civil Procedure require that, in order to survive challenge, a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a). A pleading that fails to meet the requirements of Rule 8(a) is subject to dismissal under Rule 12(b)(6). *See Iqbal*, 556 U.S. at 677-79.

**C. Rule 9(b).**

Rule 9(b) imposes a heightened pleading requirement on allegations of fraud and requires plaintiffs to state with particularity the circumstances constituting the alleged fraud. *Sullivan v. Leor Energy, L.L.C.*, 600 F.3d 542, 550-551 (5<sup>th</sup> Cir. 2010). A pleading that fails to plead fraud with particularity as required by Rule 9(b) is subject to dismissal under Rule 12(b)(6). *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5<sup>th</sup> Cir. 1996).

It is impermissible to make general allegations that lump all Defendants together; rather, the complaint must segregate the alleged wrongdoing of one from another. *In Re Parkcentral Glob. Litig.* 884 F. Supp 2d 464, 471 (N.D. Tex. 2012).

Plaintiffs must also specify the statements claimed to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent. *Sullivan*, 600 F.3d at 551; *Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5<sup>th</sup> Cir. 2005).

Pleadings that lack allegations that identify individual defendants responsible for making specific misrepresentations, or lack details of what the defendants allegedly gained thereby, are insufficient to support a fraud claim. *See In Re Alamosa Holdings, Inc.*, 382 F.Supp.2d 832, 857 (N.D. Tex. 2005).

**D. Rule 12(b)(1)**

Fed.R.Civ.P. 12(b)(1) allows a party to move for dismissal of an action for lack of subject matter jurisdiction. If subject matter jurisdiction is lacking, the Court must dismiss the suit. *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5<sup>th</sup> Cir. 1998).

**E. Rule 17**

Rule 17 addresses the Real Party in Interest and capacity to sue. Arguing that a party does not have the authority to bring a claim on behalf of an estate raises a prudential limitation that constitutes an objection to the real party in interest under Fed.R.Civ.P. 17(a). *See Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5<sup>th</sup> Cir. 1999).

**III.**

**SUMMARY OF THE ARGUMENTS**

Plaintiffs' Second Amended Complaint rails extensively on the underlying litigation in Probate Court Number Two and their dissatisfaction with the rulings there.

- Goldberg is immune from suit and liability under the doctrine of derived judicial immunity. All of the allegations against Defendant Michele Goldberg arise out of her duties as the court appointed Temporary Guardian Pending Contest of Muriel Mintz, now deceased, due to the ongoing battle over guardianship between two of Muriel's children.

-Plaintiffs lack the legal standing and/or capacity to sue for claims asserted on behalf of Muriel Mintz, deceased. Latham is not the representative of the Estate of Muriel Mintz. Latham's attempt to be appointed as representative of the Estate in state court is being challenged. There is no subject matter jurisdiction over any claims asserted on behalf of Muriel Mintz.

-Latham and Nelson have stated no non-conclusory facts establishing that Goldberg violated any federal rights pursuant to 42 U.S.C. §1983 or alleged constitutional violations.

-Latham and Nelson have not plausibly alleged any claim for relief for discrimination or retaliatory motive by Goldberg under the ADA or Section 504 of the Rehabilitation Act of 1973.

-Latham and Nelson have failed to state a claim for relief for wrongful death.

-To the extent that they are alleging fraud, such claims fail to meet the standards required in Rule 9(b).

#### IV.

### ARGUMENT AND AUTHORITIES

#### A. GOLDBERG IS IMMUNE FROM LIABILITY

Derivative judicial immunity applies to Goldberg as a Temporary Guardian Pending Contest. Both Texas and Federal Courts apply a functional test to determine the application of derivative judicial immunity.

Derivative Judicial immunity applies here for two reasons. First, Goldberg performed the function necessary to the orderly administration of the probate court. She served as a neutral, independent Guardian on a temporary basis while competing and contradictory claims for an elderly ward were adjudicated. Second, Goldberg exercised discretionary authority comparable to that of the probate court.

##### 1. The Functional Test.

Both Texas and federal law apply a functional test to determine the application of derivative judicial immunity.

An officer of a court who is entitled to the protection of derived judicial immunity “receives the same immunity as a judge acting in his or her official judicial capacity—absolute immunity from liability for judicial acts performed within the scope of jurisdiction.” *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex.2002). The policy reasons for judicial immunity, to protect both

the individual judge as well as the public’s interest in an independent judiciary, “are also implicated when a judge delegates or appoints another person to perform services for the court or when a person otherwise serves as an officer of the court.” *Id.* In such a case, “the immunity attaching to the judge follows the delegation, appointment, or court employment,” and the person appointed to perform services for the court or serving as an officer of the court “also enjoys absolute immunity, known as derived judicial immunity.” *Id.* The policy underlying derived judicial immunity “guarantee[s] an independent, disinterested decision-making process” and “prevent[s] the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion.” *Delcourt v. Silverman*, 919 S.W.2d 777, 782 (Tex.App.—Houston [14th Dist.] 1996, writ denied).

Texas courts use a functional approach in determining whether a person is entitled to the protection of derived judicial immunity. *See Halsey*, 87 S.W.3d at 554–57. This approach focuses on whether the person seeking immunity is “intimately associated with the judicial process and if that person exercises discretionary judgment comparable to that of the judge.” *Halsey*, 87 S.W.3d at 554 (citing *Delcourt*, 919 S.W.2d at 782). Officers of the court who are integral parts of the judicial process, “such as court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees are entitled to judicial immunity if they actually function as an arm of the court.” *Delcourt*, 919 S.W.2d at 781.

Federal law likewise applies a functional test to determine the application of derivative judicial immunity. *Forrester v. White*, 484 U.S. 219, 227–29, 108 S.Ct. 538, 544–545, 98 L.Ed.2d 555(1988); *Hulsey v. Owens*, 63 F.3d 354, 356 (5th Cir.1995).

## **2. Goldberg’s Role as a Temporary Guardian Pending Contest.**

Judge Wood appointed Goldberg as a Temporary Guardian Pending Contest because the children of Muriel Mintz quarreled over the care of their mother, including medical care and financial management of their mother's estate. Donald Mintz sought guardianship of his mother, Muriel. Latham contested the guardianship. Judge Wood — faced with the bickering adult children — appointed Goldberg as temporary guardian to administer the affairs of Muriel Mintz until the Court could sort out the competing claims and allegations of the adult children. Texas law provides for such temporary guardians pending contest in §1251.051 of the Texas Estates Code. **Goldberg acted as an officer of the court, not an advocate for either of the contending parties.**

Goldberg was intimately associated with the judicial process. She worked as a neutral and independent guardian of Muriel Mintz during the litigation. Judge Wood determined that an independent and disinterested decision-maker was in the interest of the ward, Muriel Mintz. Goldberg was appointed to perform services for the court, namely the preservation of the person and estate of Ms. Mintz while the hotly contested and emotionally charged litigation was proceeding. Goldberg was the functional equivalent of a court appointed trustee or receiver Muriel Mintz. Judge Wood needed time to sort out the competing and contradictory claims. Judge Wood also needed someone to make decisions for the ward in the meantime. The Estate Code gives Judge Wood broad authority to issue orders for the ward's best interests. See Texas Estate Code §1163.104(b).

### **3. Application of the Functional Test to Goldberg.**

Derivative judicial immunity applies here for two independent reasons.

First, Goldberg performed a function necessary to the orderly administration of the probate court. She served as neutral, independent guardian on a temporary basis while competing and

contradictory claims for an elderly ward were adjudicated. In this respect, Goldberg was much like a guardian ad litem, doctor, psychiatrist, hospital, or drug testing facility. See *B.K v. Cox*, 116 S.W.3d 351, 357-8 (Tex. App. — Houston [14th District.] 2003, no pet.) (doctor and hospital); *Delcourt*, 919 S.W.2d at 782 (Tex.App.—Houston [14th Dist.] 1996, writ denied) (psychiatrist and guardian ad litem). See also, *Gaddis v. United States*, 381 F.3d 444 (5th Cir.2004) (citing *Cok v. Cosentino*, 876 F. 2D 1, 3 (1<sup>ST</sup> CIR 1989, with approval) (guardian ad litem)). Goldberg assisted the court in the integral judicial process of investigating, evaluating and assessing the competing claims of the parties.

Second, Goldberg exercised discretionary authority comparable to that of the probate court. As Temporary Guardian Pending Contest, Goldberg made discretionary decisions concerning the best interests of the ward. The Estate Code vests similar discretionary authority with the Probate Judge. See Estate Code, §1163.104(b) (probate judge may issue orders in the best interests of the ward). This function is similar to that performed by receivers and trustees, roles where derivative judicial immunity applies. See *Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex. 1992) (bankruptcy trustee); and *Davis v. Bayless*, 70 F.3d 367, 373 (5th Cir.1995) (receiver).

**B. PLAINTIFFS' CLAIM AGAINST GOLDBERG FOR SECTION 1983 AND CONSTITUTIONAL VIOLATIONS FAILS TO STATE A CLAIM FOR RELIEF**

There is a failure to state a claim against Goldberg for constitutional violations under 42 U.S.C. §1983 (“Section 1983”), which authorizes suit against state and local governments and officials involving the actor’s conscious disregard of a substantial risk of serious harm to the claimant. 42 U.S.C. §1983; *Farmer v. Brennan*, 511 U.S. 825, 837-39 (1994). Section 1983 itself creates no substantive rights. *Hernandez v. Texas Dept. of Protective & Regulatory Servs.*, 380 F.3d 872, 882 (5<sup>th</sup> Cir. 2014). Rather, it provides a method for vindicating federal rights elsewhere conferred. See *Felton v. Polles*, 315 F.3d 470, 479 (5<sup>th</sup> Cir. 2002).



An examination of this section of Plaintiffs' complaint shows multiple pages where Plaintiffs purport to set out the law with little to no facts therein AND there are NO references to Defendant Goldberg. There is a vague, general and conclusory allegation that "procedural due process violations exist when a governmental entity fails to follow its own statutory procedures... such as this case where Muriel Mintz was deprived of liberty and/or property." Goldberg is not a governmental entity.

Other vague allegations include "the elderly and disabled are subjected to cruel and unusual punishment, deprivations of equal protection of the law, the guarantee of safety while in the custody of the county," all of which are conclusory allegations that don't even mention Michele Goldberg but completely fail to set out a plausible claim against Defendant Goldberg.

Plaintiffs also refer to a "persistent, widespread practice of discrimination and civil rights violations" that are "sufficient to constitute a custom that fairly represents municipal policy"-again, allegations that have nothing to do with Defendant Goldberg. There are references to "Worley" and "Rowan's cases" and a completely unrelated guardianship case under Michigan statutes which has no relevance here and completely fails to meet the pleadings requirements under the Federal Rules of Civil Procedure.

Plaintiffs state no non-conclusory facts, and actually no facts at all, that plausibly show that Goldberg violated Section 1983 or any constitutional provisions. The Section 1983 claim and alleged constitutional violations should be dismissed pursuant to Rule 12(b)(6). *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

C. **LATHAM AND NELSON'S ADA AND SECTION 504 CLAIMS AGAINST GOLDBERG FAIL AS A MATTER OF LAW**

There are no non-conclusory facts, and really no facts that all, that show that Muriel Mintz was excluded from participation in or denied services or programs, subjected to discrimination or

retaliation. There is a general reference to “Muriel’s right to be free from segregation,” which is conclusory only.

The single reference to Goldberg is that Goldberg “would not get a second opinion as to whether hospice was appropriate,” which is purely conclusory. There are no other facts, non-conclusory or otherwise, pled as to Michele Goldberg with respect to the ADA and/or Section 504. Allegations of mere rendering of improper care or failure to attend to the medical needs of a qualified claimant will not support an action under the ADA or Section 504 unless it is established that that the defendant’s conduct was motivated by the alleged disability. *Nottingham v. Richardson*, 499 Fed. Appx. 368, 377 (5<sup>th</sup> Cir. 2012). There is no such showing.

There is a complete failure by Plaintiffs to state any claim under the ADA and Section 504 of the Rehabilitation Act of 1973, which are generally construed to impose similar requirements with respect to disability based discrimination. *See e.g. Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1261 and n 2 (D.C. Cir. 2008). Therefore, all claims against Goldberg under the ADA and Section 504 should be dismissed pursuant to Rule 12(b)(6). *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

**D. LATHAM AND NELSON LACK STANDING AND CAPACITY TO SUE ON BEHALF OF MURIEL MINTZ, DECEASED**

Latham and Nelson lack standing and capacity to assert harms to the person and estate of Muriel Mintz, deceased.

Neither Latham nor Nelson are an executor, administrator or guardian and are not the real parties in interest. See Fed.R.Civ.P. Rule 17(a). Under Rule 17(b), Latham and Nelson’s capacity to sue is determined by Texas law. Under Texas law, only the guardian of the ward’s estate may bring a lawsuit on her behalf, which is currently the Defendant, Michele Goldberg. Tex. Est. Code

§1151.104(a); *In Re Guardianship of Archer*, 203 S.W.3d at 22-24 (holding relative did not have standing to sue for breach of fiduciary duty owed to ward).

There is no dispute that neither Plaintiff is the duly appointed Estate Representative according to the Amended Complaint. Although Latham is seeking appointment as Estate Representative, this is unlikely based upon the challenge asserted in state court. All claims asserted by Latham and Nelson on behalf of Muriel Mintz, deceased, should be dismissed.

**E. LATHAM AND NELSON FAIL TO STATE A CLAIM FOR WRONGFUL DEATH**

Plaintiffs “plead wrongful death damages against the bond of Judge Mike Wood, Michele Goldberg, Houston Hospice, Stacy Kelly, Donald Mintz, Teresa Pitre and Harris County, Texas.” Plaintiffs have recounted the entire history of the probate proceedings in their complaint. A vague and conclusory allegation that “Muriel was injured, isolated medicated and shuffled off to hospice with only very narrowly prescribed visitation times” constitutes a complete and utter failure to plausibly allege any non-conclusory facts showing wrongful death of Muriel Mintz. To the extent that Plaintiffs are asserting a wrongful death claim, which is not even clear, such claim should be dismissed for failure to state a claim.

**F. LATHAM AND NELSON FAIL TO STATE A CLAIM FOR FRAUD AGAINST GOLDBERG.**

Defendant is unable to ascertain from the complaint whether a fraud claim is actually asserted. There is an allegation that “Defendants fraudulently misrepresented in Court records that Muriel Mintz was served with process. . .” and “fraud vitiates everything it touches this guardianship was void from the start” (sic). To the extent that these vague statements were intended to assert a fraud claim, such claim should be dismissed for a complete failure to meet the heightened standard set forth in Fed.R.Civ.P. 9(b) applicable to fraud claims and for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 9(b), 12(b)(6) and 12(c).

**CONCLUSION AND PRAYER**

For the reasons stated above, Defendant, Michele Goldberg, requests that the Court dismiss all claims against Goldberg with prejudice and grant such other and further relief to which she may be justly entitled.

Respectfully Submitted:

**SPROTT NEWSOM  
QUATTLEBAUM & MESSENGER, PC**

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on the 6th day of March, 2018, a true and correct copy of the foregoing was served by electronic mail through the Court's CM/ECF system, which constitutes service on all parties.

      s/Michele Quattlebaum        
Michele Quattlebaum