**IN THE UNITED STATE DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 07-cv-01571-MSK

ESTATE OF EMILY RICE, By SUSAN GARBER and ROY RICE as Co-Personal Representatives; SUSAN GARBER, as parent and Co-Personal Representative of the Estate of Emily Rice; ROY RICE, as parent and Co-Personal Representative of the Estate of Emily Rice

Plaintiffs,

Vs.

CITY AND COUNTY OF DENVER, COLORADO;
DENVER DEPARTMENT OF HEALTH AND HOSPITALS, d/b/a "DENVER HEALTH MEDICAL CENTER" and "DENVER HEALTH";
JASON HAUKOOS, M.D., in his individual and official capacities;
LISA CHENG, M.D., in her individual and official capacities;
ROBERT KELLY COSTIN, R.N., in his individual and official capacities;
MARIA BOUZIANE, R.N., in her individual and official capacities;
MARY CLEARY, R.N., in her individual and official capacities;
MARIA YVETTE GASTON, R.N., in her individual and official capacities;
NANCYE ZIMMER, R.N., in her individual and official capacities;
CAPTAIN JACOB KOPYLOV, in his individual and official capacities;
CAPTAIN JOHN RIORDON, in his individual and official capacities;
SERGEANT LOREN COLLIER, in his individual and official capacities;
SERGEANT HANS RASTEDE, in his individual and official capacities;
SERGEANT RICHARD ROBERSON, in his individual and official capacities;
SERGEANT KAROLINA SICH, in her individual and official capacities;
SERGEANT ANTHONY SULLIVAN, in his individual and official capacities;
DEPUTY KERI ADCOCK, in her individual and official capacities;
DEPUTY JULIANA BARRON, in her individual and official capacities;
DEPUTY SARAH BRIGHT, in her individual and official capacities;
DEPUTY LAKISHA MINTER, in her individual and official capacities;
DEPUTY FAUN GOMEZ, in her individual and official capacities;
DEPUTY SHERMAINE GUZMAN, in her individual and official capacities;
DEPUTY AMANDA LINE, in her individual and official capacities;
DEPUTY JULIE KIRKBRIDE, in her individual and official capacities;
DEPUTY TROY MOTLEY, in his individual and official capacities;
DEPUTY MICHELLE SALEMI, in her individual and official capacities;
DEPUTY JESSICA WANROW, in her individual and official capacities;
JOHN AND JANE DOES 1 THROUGH 20;

DENVER CITY AND COUNTY SHERIFF'S DEPUTIES AND MEDICAL PERSONNEL, in their individual and official capacities;

Defendants.

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**DEFENDANT MARY CLEARY, R.N.'S MOTION TO DISMISS PLAINTIFFS' FEDERAL CLAIMS AND STATE LAW CLAIMS**

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The Defendant Mary Cleary, R.N., by her counsel of record Thomas J. Kresl and Bradley G. Robinson of Johnson, McConaty & Sargent, P.C., pursuant to Fed. R. Civ. P. 12(b)(6) respectfully requests the Court to dismiss Plaintiffs' federal claims for failure to state a claim and pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss Plaintiffs' state law claims for lack of subject matter jurisdiction. As grounds, Defendant Mary Cleary, R.N. states as follows:

## STATEMENT OF CONFERRAL

Defendant Mary Cleary, R.N. certifies that, pursuant to D.C. Colo. L. Civ. R. 7.1(A), counsel discussed the grounds for this motion and the relief requested with counsel for Plaintiffs prior to filing this motion. Plaintiffs' counsel opposes the relief requested herein.

## FACTS

Plaintiffs assert three categories of claims against Defendant Mary Cleary, R.N. First, Plaintiffs' First Claim for Relief asserts that Nurse Cleary failed to provide medical care and treatment to Ms. Rice in violation of 42 U.S.C. §1983. Second, Plaintiffs' Fourth Claim for Relief asserts that Nurse Cleary deprived them of familial association. Third, Plaintiff's assert state claims against Nurse Cleary for outrageous conduct (Sixth Claim for Relief), wrongful death (Seventh Claim for Relief) and medical negligence/negligent medical care and treatment (Eighth Claim for Relief). This Court should decline supplemental jurisdiction over Plaintiffs'

State law claims. Nurse Cleary hereby moves this Court for dismissal of Plaintiffs' First and Fourth Claim for relief against her pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. In addition, Nurse Cleary respectfully requests the Court dismiss Plaintiffs' state law claims (Plaintiffs' Sixth, Seventh and Eighth Claims for Relief) for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1).

## ARGUMENT

### I. 42 U.S.C. §1983 CLAIMS OF DELIBERATE INDIFFERENCE AND DEPRIVATION OF FAMILIAL ASSOCIATION.

#### A. Legal Standard for Constitutional Claims

For purposes of deciding issues raised upon a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court "must accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the Plaintiff." *David v. City and County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996), *cert. denied*, 522 U.S. 858, 118 S.Ct. 157 (1997). Plaintiffs cannot establish that Nurse Cleary was deliberately indifferent to a serious medical need of Ms. Rice. Plaintiffs cannot establish that Nurse Cleary had any first hand knowledge of Ms. Rice on February 18, 2006 as Nurse Cleary was not involved with her care and treatment and was not asked to see or assess Ms. Rice on February 18, 2006. The only time Nurse Cleary saw Ms. Rice was during the early morning of February 19, 2006 when she was called to assist another nurse who was notified that Ms. Rice was unresponsive. Accordingly, Plaintiffs cannot prove that Nurse Cleary subjectively was aware of a serious threat to Ms. Rice's health and consciously chose to disregard that risk. As a result, Plaintiffs cannot prevail on their constitutional claims against Nurse Cleary.

A prisoner may assert a claim pursuant to 42 U.S.C. § 1983, based upon the Eighth and Fourteenth Amendments, against a state actor for deliberate indifference to the prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97 (1976). Although the deliberate indifference standard has been described variously in different opinions, there are some well accepted guiding principles. First, it is a very high standard: deliberate indifference requires actions that are "wanton" and "repugnant to the conscience of mankind." *Id.* at 105-06. Second, a state actor must personally participate in any claimed deliberate indifference, *Bennett v. Passic*, 545 F.2d 1260, 1262-1263 (10th Cir. 1976). Third, as the deliberate indifference standard implies, inadvertent failure to provide adequate care, negligent care, and matters of medical judgment are insufficient to state a constitutional claim. *Estelle*, 429 U.S. at 105-07.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court articulated a two-part test, including both an objective and subjective component.

**The Objective Component**

The objective component requires that the deprivation be "sufficiently serious" to be of a constitutional dimension. *Id.* at 834. The Tenth Circuit has held that a "medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000) (quoting *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999). Where the necessity for treatment would not be obvious to a lay person, the medical judgment of the physician, even if grossly negligent, is not subject to second-guessing in the guise of an Eighth Amendment claim. *Green v. Branson*, 108 F.3d 1296, 1303 (10th Cir. 1997). Moreover, a delay in medical care "only constitutes an Eighth

Amendment violation where the Plaintiff can show the delay resulted in substantial harm." *Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001) (quotation omitted). The substantial harm requirement "may be satisfied by lifelong handicap, permanent loss, or considerable pain." *Garrett v. Stratman*, 254 F.3d 946, 950 (10th Cir. 2001). Objective seriousness is based upon the ultimate harm presented. *Self v. Crum*, 439 F.3d 1227 (10th Cir. 2006).

**The Subjective Component**

The subjective component requires the prison official to have a culpable state of mind. *Farmer*, 511 U.S. at 834. The Supreme Court has held that a prison official cannot be liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. The subjective component is similar to "recklessness in the criminal law," where, to act recklessly, a "person must 'consciously disregard' a substantial risk of serious harm." *Id.* Courts have recognized that this presents a high evidentiary hurdle for Plaintiffs. *Self v. Crum*, 439 F.3d 1227 (10th Cir. 2006)(a prison official must know about and disregard a substantial risk of serious harm).

The Court in *Self* concluded that the subjective component is satisfied only where the need for additional treatment or referral to a medical specialist is obvious. There are three possible situations where a need is obvious:

> (1) a medical professional recognizes an inability to treat the patient due to the seriousness of the condition and his corresponding lack of expertise but nevertheless declines or unnecessarily delays referral, *e.g.*, a family doctor knows that the patient needs delicate hand surgery requiring a specialist but instead of issuing the referral performs the operation himself; *see, e.g, Oxendine*, 241 F.3d at 1279;

> (2) a medical professional fails to treat a medical condition so obvious that even a layman would recognize the condition, *e.g.*, a gangrenous hand or a serious laceration; *see id.*; and
>
> (3) a medical professional completely denies care although presented with recognizable symptoms which potentially create a medical emergency, *e.g.*, a patient complains of chest pains and the prison official, knowing that medical protocol requires referral or minimal diagnostic testing to confirm the symptoms, sends the inmate back to his cell. *See, e.g.*, *Mata*, 427 F.3d at 755-59; *Sealock*, 218 F.3d at 1211-12.

*Self*, 439 F.3d at 1233. Negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation. *Id*., citing *Perkins v. Kan. Dep't of Corrections*, 165 F.3d 803, 811 (10th Cir. 1999). The inquiry on the subjective component is based upon the health care provider's knowledge at the time of the care provided, and absent actual knowledge or recklessness, there is no constitutional claim. *Id.*

In applying those concepts, the *Self* court concluded there was no deliberate indifference. The inmate presented with a cough and fever, was treated for respiratory infection, monitored over the weekend, and ultimately sent to the hospital on Monday where he was found to have endocarditis, a life threatening infection. The physician never listened to the patient's heart and allegedly did not consider the patient's history of IV drug use as a risk factor for heart infection. The evidence was that the physician did not consider endocarditis, though it was possible that patient's symptoms were consistent with endocarditis as well as other symptoms. *Id*. The court held that this presented, at most, an issue of misdiagnosis, which did not establish the subjective component. *Id*. "Where a doctor faces symptoms that could suggest either indigestion or stomach cancer, and the doctor mistakenly treats indigestion, the doctor's culpable state of mind is not established even if the doctor's medical judgment may have been objectively

unreasonable." *Id.* The court further noted that the physician's decision to do a focused exam by listening to the patient's lungs and not to the heart was a classic medical judgment which was outside the scope of deliberate indifference. *Id.* The failure of a physician to "connect-the-dots" likewise does not establish deliberate indifference. *Id*. The court concluded there was also no evidence that the physician knew the inmate's condition was other than the one he suspected, thereby precluding an argument of actual knowledge. *Id*.

The *Self* court's analysis is consistent with other Tenth Circuit cases. For example, in *Sealock*, the court held that a nurse's misdiagnosis of an inmate's chest pains as the flu and her failure to appreciate the symptoms as an impending heart attack, while arguably stating a claim for negligence, did not satisfy the subjective requirement for a deliberate indifference claim. *Id.* at 1208, 1211.

### B. Plaintiffs Cannot Establish Nurse Cleary was Deliberately Indifferent to a Serious Medical Need

The objective component requires that the deprivation be "sufficiently serious" to be of a constitutional dimension. *Farmer*, 511 U.S. at 834. On February 18, 2006, Ms. Rice's medical condition while in the Pre-Arraignment Detention Facility (PADF) was not believed to be sufficiently serious as it had not been diagnosed by a physician as mandating treatment and it was not so obvious that even a lay person would easily recognize the necessity for a doctor's attention. Even when viewing this case retrospectively, it is still arguable that one would not objectively appreciate that Ms. Rice's medical condition was serious at the time of Nurse Cleary's involvement.

Under the subjective component of the Supreme Court's two-pronged inquiry, Nurse Cleary must have a "sufficiently culpable state of mind." *Self*, 439 F.3d at 1231. Nurse Cleary

cannot be liable unless she knew of and disregarded an excessive risk to Emily Rice's health or safety; Nurse Cleary must be both aware of the facts from which the inference could be drawn that a substantial risk of serious harm existed, and she must also draw the inference. *Self*, 439 F.3d at 1231.

Even accepting Plaintiffs' allegations as plead in their Complaint as true, there is no evidence that Nurse Cleary subjectively knew of and disregarded an excessive risk to Ms. Rice's health or safety. Plaintiffs' Complaint states as follows:

> 80. Recognizing immediately that Emily was suffering serious medical issues, the guard alerted a second jail nurse, Defendant Mary Cleary, that Ms. Rice was having medical problems, and that her feet were cold and grey.
>
> 81. Despite the fact that Ms. Rice had been released from Denver Health with a record that she and (sic) been in an automobile accident and instructed to return to the hospital if she had any worsening symptoms or urgent concerns, Defendant Cleary refused to perform any medical evaluation or provide any medical care to Ms. Rice.
>
> 82. Instead, without ever looking at the patient, Defendant Cleary arrived at her diagnosis and remedy: Ms. Rice was still drunk and needed to drink plenty of fluids and sleep it off. By this time, it had been approximately ten hours since Ms. Rice had consumed any alcohol.
>
> *See*, Plaintiffs' Complaint, paragraphs 80-82.

On February 18, 2006, Nurse Cleary worked the 6:00 a.m. to 6 p.m. shift at PADF. See, *Exhibit A*, Nurse Cleary's Declaration, ¶3. Kelly Costin, R.N. was the other registered nurse working the 6:00 a.m. to 6:00 p.m. shift that day. *Id*. at ¶3. Prior to the conclusion of Nurse Cleary's shift on February 18, 2006, she learned that Emily Rice had been transported to PADF. *Id*. at ¶4. Nurse Cleary was not he nurse who performed Ms. Rice's nursing assessment at the nursing station at PADF. *Id*. at ¶5. The initial nursing assessment was performed by Nurse Costin. *Id*. at ¶5. Nurse Cleary was not present in the nursing station at the time Nurse Costin performed Ms. Rice's assessment. *Id*. at ¶6. Nurse Cleary was in a different part of the jail at

the time of Ms. Rice's assessment in the nursing station. *Id*. at ¶6. In addition, Nurse Cleary had no personal knowledge of Ms. Rice either falling down or sitting down in the hallway near the nursing station. *Id*. at ¶7. Nurse Cleary had no personal contact with Ms. Rice and never saw her during her February 18, 2006 shift. *Id*. at ¶8.

Toward the end of Nurse Cleary's shift on February 18, 2006, Deputy Jessica Jaquez came to the nursing station and informed Nurse Cleary that Ms. Rice's feet were cold. *Id*. at ¶9. Deputy Jaquez also advised Nurse Cleary that she had talked to Ms. Rice's mother and had been advised that Ms. Rice may have been taking prescription medications. *Id*. at ¶9. Deputy Jaquez never asked Nurse Cleary to examine Ms. Rice. *Id*. at ¶9. Deputy Jaquez never informed Nurse Cleary that Ms. Rice had a specific medical complaint, other than her feet being cold. *Id*. at ¶9.

While Deputy Jaquez was still at the nursing station, Nurse Cleary went to Nurse Costin and asked him about Ms. Rice's condition since it was Nurse Costin who had performed Ms. Rice's assessment earlier that afternoon and Nurse Cleary had no firsthand knowledge concerning Ms. Rice's condition and had not seen Ms. Rice's medical records. *Id*. at ¶10. Nurse Costin told Nurse Cleary "she is fine Mary." *Id*. at ¶11. After her conversation with Nurse Costin, Nurse Cleary went back to Deputy Jaquez and reported the information from Nurse Costin to her. *Id*. at ¶12. Nurse Cleary also asked Deputy Jaquez if Ms. Rice had been drinking. *Id*. at ¶13. Deputy Jaquez informed Nurse Cleary that Ms. Rice had indeed been drinking. *Id*. at ¶13. Nurse Cleary then told Deputy Jaquez that Ms. Rice needed to drink fluids and sleep it off. *Id*. at ¶13.

Nurse Cleary was not deliberately indifferent to Ms. Rice's medical condition and did not refuse to provide Ms. Rice medical evaluation or care. *Id*. at ¶14. Moreover, Nurse Cleary did not have knowledge during her shift on February18, 2006, that Ms. Rice had any serious medical

need. *Id*. at ¶14. Nurse Cleary was never asked to examine Ms. Rice. *Id*. at ¶14. The only information Nurse Cleary received was being advised about the condition of Ms. Rice's feet; namely, that they were cold, and that she may have been taking a prescription medication. *Id*. at ¶14. It is common for inmates to complain of being cold during the winter months at the PADF. *Id*. at ¶14. Based on Nurse Cleary's education and training, a complaint of cold feet from an inmate in a cold facility in February does not suggest that Ms. Rice was suffering from a serious medical condition or need. *Id*. at ¶14. Since Nurse Cleary did not see or evaluate Ms. Rice on February 18, 2006, it was appropriate for her to ask Nurse Costin about her condition and rely on his advice that she was fine. After her conversation with Nurse Costin, it was Nurse Cleary's belief that Ms. Rice was fine. *Id*. at ¶14. If Nurse Cleary had been asked to examine or see Ms. Rice, or if she believed that Ms. Rice was in need of medical assistance, she would have evaluated Ms. Rice. *Id*. at ¶15.

Accordingly, Nurse Cleary was not deliberately indifferent to a serious medical need as she was unaware of any specific medical complaint by Ms. Rice. First, according to the standard set forth in *Sealock*, Ms. Rice's condition on February 18, 2006 was not sufficiently serious as it had not been diagnosed by a physician as mandating treatment or was not so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). Inmate complaints of cold feet are common during the winter months at the PADF. It was not obvious that Ms. Rice needed to see a physician because of a complaint of cold feet in February. Second, Nurse Cleary was not deliberately indifferent to a serious medical need as she subjectively believed that Ms. Rice was fine on February 18, 2006. The Supreme Court has held that a prison official cannot be liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of

facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. The Court in *Self* concluded that the subjective component is satisfied only where the need for additional treatment or referral to a medical specialist is obvious. After being informed that Ms. Rice's feet were cold and grey, Nurse Cleary took affirmative steps to inquire about Ms. Rice's condition. Nurse Cleary went to Nurse Costin, the nurse who assessed Ms. Rice, and asked him about Ms. Rice. Nurse Costin told Nurse Cleary that Ms. Rice was fine. Therefore, after her conversation with Nurse Costin, Nurse Cleary subjectively believed that Ms. Rice was fine. In light of Nurse Cleary's subjective belief on February 18, 2006, there is no basis to find that Nurse Cleary's conduct was "wanton" and "repugnant to the conscience of mankind." *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976). Accordingly, Plaintiffs cannot establish that Nurse Cleary was deliberately indifference and their Section 1983 claims should be dismissed.

## II. PLAINTIFFS' SECTION 1983 CLAIMS AGAINST NURSE CLEARY SHOULD BE DISMISSED BECAUSE QUALIFIED IMMUNITY SHIELDS HER FROM LIABILITY

A motion to dismiss based on qualified immunity is treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). *Robbins v. BLM*, 252 F.Supp.2d 1286, 1291 (D. Wyo. 2003). The party invoking federal jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists. *Id*.

When a defendant makes a facial attack on the complaint's allegations, which challenges the sufficiency of the complaint, the district court will accept the Plaintiff's allegations as true. *Robbins*, 252 F.Supp.2d at 1291; *Stuart*, 271 F.3d at 1225. If, however, the defendant goes beyond the allegations contained in the complaint and challenges the facts upon which subject matter jurisdiction depends, the district court will not presume the truthfulness of the Plaintiff's

allegations and has wide discretion to consider other documents to resolve the jurisdictional question. *Id.*

Qualified immunity shields government officials performing discretionary functions from individual liability under 42 U.S.C. § 1983 unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir. 1998). Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Roska v. Peterson*, 328 F.3d 1230, 1239 (10th Cir. 2003). The privilege is an immunity from suit rather than a mere defense of liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Id.*

Whether defendant is entitled to qualified immunity is a question of law. *Derda v. City of Brighton, Colo.*, 53 F.3d 1162, 1164 (10th Cir. 1995). Once a defendant asserts a qualified immunity defense, the burden shifts to Plaintiff to satisfy a "heavy two-part" test. *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001). The Plaintiff must first establish "that the defendant's actions violated a [federal] constitutional or statutory right." *Id.* If Plaintiff establishes a violation of a federal constitutional or statutory right, he or she must then demonstrate that the right at issue was clearly established at the time of defendant's unlawful conduct. *Id.*

Plaintiff must articulate "with specificity" the clearly established constitutional or statutory right at issue. *Romero v. Bd. of County Comm'rs*, 60 F.3d 702, 704 (10th Cir. 1995). "It is insufficient simply to identify in the abstract a clearly established right and allege that the defendant has violated it." *Derda*, 53 F.3d at 1164. For a right to have been clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand

that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); see also *Beard v. City of Northglenn*, 24 F.3d 110, 114 (10th Cir. 1994).

"Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the Plaintiff maintains." *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 516 (10th Cir. 1998). To be "clearly established," however, the exact conduct in question does not have to have been previously declared unlawful. Instead, in light of pre-existing law, the unlawfulness must be apparent. *Dill v. City of Edmond*, 155 F.3d 1193, 1212 (10th Cir. 1998).

There is no constitutional right to negligent-free medical care. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803, 811 (10th Cir. 1999) ("A negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation."); *Green v. Branson*, 108 F.3d 1296, 1303 (10th Cir. 1997) ("A complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."). "[S]ection 1983 imposes liability for violations of rights protected by the constitution or laws of the United States, not for violations of duties of care arising out of tort law. Remedies for the latter type of injury must be sought in the state court under the traditional tort-law principles." *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981).

Instead, the Tenth Circuit recognizes a constitutional right to adequate medical treatment in narrow circumstances. Specifically, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some

responsibility for his safety and general well-being." *Johnson ex. rel. Johnson v. Thompson*, 971 F.2d 1487, 1496 (10th Cir. 1992). It is the state's affirmative act of restraining a person's "liberty," through incarceration, institutionalization, or other similar means, which triggers the constitutional responsibility for the person's safety and general well-being. *Monahan v. Dorchester Counseling Ctr. Inc.*, 961 F.2d 987, 990 (1st Cir. 1992) (citing *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989)).

To assert a cognizable claim in these narrow circumstances, the "prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106. Conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based. *Hill v. Corr. Corp. of Am.*, 14 F.Supp.2d 1235, 1238-39 (D. Kan. 1998) (dismissing the inmate's claims against the health services because the allegations were mostly conclusory and failed to reflect the level of deliberate indifference on the part of the health services necessary to show an Eighth Amendment violation); *Meade v. Grubbs*, 841 F.2d 1512, 1531 (10th Cir. 1988) (conclusory allegations are not sufficient to state a claim for deliberate indifference).

Here, Nurse Cleary is entitled to qualified immunity because Plaintiffs cannot establish that she violated a clearly established constitutional right. Plaintiffs' section 1983 claim against Nurse Cleary should be dismissed as this claim is nothing more than a medical negligence claim. *Perkins*, 165 F.3d at 811 ("A negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation."). Although Plaintiffs have added the conclusory language that she acted with "deliberate indifference," the factual allegations supporting the section 1983 claim are the same ones supporting the negligence claim. Plaintiffs allege that Nurse Cleary failed to examine, treat and care for Ms.

Rice's medical condition. Compare Plaintiffs' First and Eighth Claims for Relief. Complaint, p. 13 ¶'s 118-129 with p. 18 ¶'s 170-180. Conclusory allegations that Nurse Cleary acted with "deliberate indifference" does not convert a medical negligence claim into a constitutional violation. *Hill*, 14 F.Supp.2d at 1238-39.

## III. THE COURT SHOULD DECLINE SUPPLEMENTAL JURISDICTION OVER PLAINTIFFS' STATE LAW CLAIMS

A district court generally should dismiss supplemental state law claims after all federal claims have been dismissed, particularly when federal claims are dismissed before trial. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1998); *United States v. Botefuhr*, 390 F.3d 1263, 1273 (10th Cir. 2002) (when all federal claims have been dismissed prior to trial, the court generally should decline to exercise supplemental jurisdiction over pendant state claims). Pursuant to *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), a district court should exercise its discretion and dismiss state law claims when: (1) dismissal would be in the interest of judicial economy, convenience and fairness to the litigants; (2) a surer-footed reading of state law could be obtained in the state court; (3) state issues predominated in terms of proof, scope of issues raised, or comprehensiveness of remedies sought; or (4) if divergent legal theories of relief were likely to cause jury confusion. *Gibbs*, 383 U.S. at 726-727, 86 S.Ct. at 1139.

This Court should exercise its sound discretion and decline to exercise supplemental jurisdiction over Plaintiffs' state law claims since this case is in its early stages of litigation and Plaintiffs' state law claims and issues of the Colorado Governmental Immunity Act prevail over Plaintiffs' federal claims. In the interest of judicial economy and fairness the state court should address Plaintiffs' state law claims. Finally, there is a potential for confusion of the issues

between Plaintiffs' federal claims and the different relief available under Plaintiffs' state law claims. The Court should accordingly exercise its discretion and decline to exercise supplemental jurisdiction over Plaintiffs' state law claims.

## CONCLUSION

For the foregoing reasons, Defendant Mary Cleary, R.N. respectfully requests that this Court dismiss Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim pursuant to Fed. R. Civ.14P. 12(6)(1) for lack of subject matter jurisdiction, and decline to exercise supplemental jurisdiction over Plaintiffs' state law claims.

Respectfully submitted this 8th day of October 2007.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANT MARY CLEARY, R.N.'S MOTION TO DISMISS PLAINTIFFS' FEDERAL CLAIMS AND STATE LAW CLAIMS** was filed via the United States CM/ECF system this 8th day of October 2007, and served to the following:

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**IN THE UNITED STATE DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 07-cv-01571-MSK

ESTATE OF EMILY RICE, By SUSAN GARBER and ROY RICE as Co-Personal Representatives; SUSAN GARBER, as parent and Co-Personal Representative of the Estate of Emily Rice; ROY RICE, as parent and Co-Personal Representative of the Estate of Emily Rice

Plaintiffs,

Vs.

CITY AND COUNTY OF DENVER, COLORADO;
DENVER DEPARTMENT OF HEALTH AND HOSPITALS, d/b/a "DENVER HEALTH MEDICAL CENTER" and "DENVER HEALTH";
JASON HAUKOOS, M.D., in his individual and official capacities;
LISA CHENG, M.D., in her individual and official capacities;
ROBERT KELLY COSTIN, R.N., in his individual and official capacities;
MARIA BOUZIANE, R.N., in her individual and official capacities;
MARY CLEARY, R.N., in her individual and official capacities;
YVETTE DUBOIS, R.N., in her individual and official capacities;
NANCYE ZIMMER, R.N., in her individual and official capacities;
CAPTAIN JACOB KOPYLOV, in his individual and official capacities;
CAPTAIN JOHN RIORDON, in his individual and official capacities;
SERGEANT LOREN COLLIER, in his individual and official capacities;
SERGEANT HANS RASTEDE, in his individual and official capacities;
SERGEANT RICHARD ROBERSON, in his individual and official capacities;
SERGEANT KAROLINA SICH, in her individual and official capacities;
SERGEANT ANTHONY SULLIVAN, in his individual and official capacities;
DEPUTY KERI ADCOCK, in her individual and official capacities;
DEPUTY JULIANA BARRON, in her individual and official capacities;
DEPUTY SARAH BRIGHT, in her individual and official capacities;
DEPUTY LAKISHA MINTER, in her individual and official capacities;
DEPUTY FAUN GOMEZ, in her individual and official capacities;
DEPUTY SHERMAINE GUZMAN, in her individual and official capacities;
DEPUTY AMANDA LINE, in her individual and official capacities;
DEPUTY JULIE KIRKBRIDE, in her individual and official capacities;
DEPUTY TROY MOTLEY, in his individual and official capacities;
DEPUTY MICHELLE SALEMI, in her individual and official capacities;
DEPUTY JESSICA WANROW, in her individual and official capacities;
JOHN AND JANE DOES 1 THROUGH 20;

DENVER CITY AND COUNTY SHERIFF'S DEPUTIES AND MEDICAL PERSONNEL, in their individual and official capacities;

Defendants.

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**DECLARATION OF MARY CLEARY, R.N.**

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I, Mary Cleary, R.N., solemnly swear and aver as follows:

1. I am a registered nurse licensed to practice nursing in Colorado.
2. During February of 2006, I was employed by the Denver Health Medical Center as staff nurse at the Pre-Arraignment Detention Facility (PADF).
3. On February 18, 2006, I worked the 6:00 a.m. to 6 p.m. shift at PADF. Kelly Costin, R.N. was the other registered nurse working the 6:00 a.m. to 6:00 p.m. shift that day.
4. Prior to the conclusion of my shift on February 18, 2006, I learned that Emily Rice had been transported to PADF.
5. I was not the nurse who performed Ms. Rice's nursing assessment at the nursing station at PADF. The initial nursing assessment was performed by Nurse Costin.
6. I was not present in the nursing station at the time Nurse Costin performed Ms. Rice's assessment. I believe that I was distributing medications to the male inmates in a different part of the jail at the time of Ms. Rice's assessment in the nursing station.
7. I was not present at or near the nursing station or in the hallway outside of the nursing station at the time Ms. Rice fell or sat down in the hallway following her nursing assessment and I did not see her fall or sit down in the hallway.
8. On February 18, 2006, I had no personal contact with Ms. Rice and I never saw

her during my shift.

9. Near the end of my shift on February 18, 2006, Deputy Jessica Jaquez came to the nursing station and told me that Ms. Rice's feet were cold. Deputy Jaquez also advised me that she had talked to Ms. Rice's mother and had been advised that Ms. Rice may have been taking prescription medications. Deputy Jaquez never asked me to examine Ms. Rice. Nor did she inform me that she had a specific medical complaint, other than her feet being cold.

10. While Deputy Jaquez was still at the nursing station, I went to Nurse Costin and asked him about Ms. Rice's condition. I asked Nurse Costin about her condition because he had done Ms. Rice's assessment earlier that afternoon and I had no firsthand knowledge about her condition and I had not seen Ms. Rice's medical records.

11. Nurse Costin told me "she is fine Mary."

12. After my conversation with Nurse Costin, I went back to Deputy Jaquez and relayed the information from Nurse Costin to her.

13. I asked Deputy Jaquez if Ms. Rice had been drinking. Deputy Jaquez said that she had been drinking. I told Deputy Jaquez that she needed to drink fluids and sleep it off.

14. I was not deliberately indifferent to Ms. Rice's medical condition and I did not refuse to provide her any medical evaluation or care. Moreover, I did not have knowledge during my shift on February18, 2006, that Ms. Rice had any serious medical need. I was never asked to examine Ms. Rice. I was merely advised about the condition of her feet; namely, that they were cold, and that she may

have been taking a prescription medication. It is common for inmates to complain of being cold during the winter months at the PADF. Based on my education and training, a complaint of cold feet from an inmate in a cold facility in February did not suggest that Ms. Rice was suffering from a serious medical condition or need. Because I had not seen Ms. Rice, I asked Nurse Costin about her condition and was advised that she was fine. After my conversation with Nurse Costin, it was my belief that Ms. Rice was fine.

15. If I would have been asked to examine or see Ms. Rice, or if I believed that Ms. Rice was in need of medical assistance, I would have examined her.

16. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my information, knowledge and belief.

EXECUTED this 5th day of October 2007.

Mary Cleary R.N.
MARY CLEARY, R.N.

STATE OF COLORADO )
) ss.
COUNTY OF Denver )

Subscribed, sworn to and acknowledged before me this 5th day of October, 2007, by MARY CLEARY, R.N.

Witness my hand and official seal.

My commission expires: _____

KELLY L. HEGEL NOTARY PUBLIC STATE OF COLORADO
My Commission Expires 07/08/2008

K L Hegel
Notary Public