

Defendant, Correctional Medical Services, Inc., by and through its counsel, Whiteford Taylor & Preston, LLC, hereby moves for the dismissal of the Plaintiff's Complaint as to it and in support thereof avers as follows:

1. Plaintiff, Marjorie Lamb, is the mother and next friend of minor children of the decedent Thomas J. Burns and the Administratrix of the Estate of Thomas J. Burns who was an inmate of the Howard R. Young Correctional Institution. Plaintiffs filed this action to redress allegedly inadequate medical care received while Mr. Burns was incarcerated. Movant, Correctional Medical Services, Inc. ("CMS") is alleged in the Complaint to have provided health care services to the inmate pursuant to a contract between CMS and the Delaware Department of Corrections ("DOC").

2. As against CMS, Plaintiffs' Complaint is structured as follows: the Plaintiffs have pled (1) a federal claim under 42 U.S.C. §1983 for cruel and unusual punishment, (2) a federal claim under 42 U.S.C. §1983 for failure to train and/or maintenance of wrongful customs, practices and polices and/or denial of life and liberty without due process of law and cruel and unusual punishment, (3) a claim for wrongful death under 10 Del. C. §3724 and (4) a survival action for medical malpractice under 10 Del. C. §3701.

3. With respect to Plaintiffs' claim under 42 U.S.C. §1983, Plaintiffs correctly assert that CMS was acting "under color of law" pursuant to its contract with the State of Delaware when undertaking its medical treatment of Mr. Burns. This is natural since such an allegation is necessary to support the 42 U.S.C. §1983 claim.

4. This Court has repeatedly held, however, that those retained by the State of Delaware to provide medical treatment for inmates are immune from 42 U.S.C. §1983 liability by virtue of the Eleventh Amendment to the United States Constitution. See, *Abraham v. State of Delaware*

Department of Corrections, et al., 2007 U.S. Dist. LEXIS 89411 (D. Del.) (decided and filed December 4, 2007); *Castillo v. Civigenics Program, et al.*, 2006 U.S. Dist. LEXIS 21992 (D. Del.) (decided March 31, 2006); *Hamilton et al. v. Civigenics, et al.*, 2005 U.S. Dist. LEXIS 2625 (D. Del.) (decided February 22, 2005).

5. Similarly, Plaintiffs cannot maintain their state law wrongful death or medical malpractice claims against CMS in this Court. See, *Hamilton et al. v. Civigenics, et al, supra*.

6. In short, as a state actor providing medical services for the State of Delaware “under color of State law”, CMS is immune from liability for Plaintiffs’ 42 U.S.C. §1983 claims. Similarly, Plaintiffs’ state law wrongful death and medical malpractice claims cannot proceed in this Court. Consequently, Plaintiff’s Complaint must be dismissed as to CMS for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

7. Movant refers the Court to its Opening Brief in Support of Motion to Dismiss Plaintiff’s Complaint filed simultaneously herewith.

WHEREFORE, Defendant, Correctional Medical Services, Inc. respectfully requests that this Honorable Court dismiss Plaintiffs’ Complaint as to it for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

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