

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN M. HUMMASTI and GRACE B.
HUMMASTI,

CV-06-251-ST

Plaintiffs,

v.

FINDINGS AND
RECOMMENDATION
TO DISMISS

JOHN BUCKMASTER, M.D., OREGON
HEALTH AND SCIENCE UNIVERSITY, and
LOVEJOY SURGICENTER,

Defendants.

STEWART, Magistrate Judge:

INTRODUCTION

Plaintiffs, appearing *pro se*, have filed a Complaint jointly as the representatives of their son, Ya'acov Hummasti, for wrongful death and individually for the personal injuries sustained by plaintiff Grace Hummasti due to an abortion performed by defendant John Buckmaster, M.D., at defendant Oregon Health and Science University ("OHSU") and due to negligent care following the abortion at defendant Lovejoy SurgiCenter. In particular, plaintiffs allege that on

June 29, 2004, defendants failed to inform them either in Hebrew or Arabic of the risks of an abortion, leading to the wrongful death of their son. They further allege that defendants negligently inserted “seaweed” into plaintiff Grace Hummasti’s uterine cavity causing her pain and suffering, negligently performed an abortion on July 2, 2004, by causing a uterine tear, and negligently failed to provide proper care and supervision after the abortion.

Federal courts are courts of limited jurisdiction and a case is presumed to fall outside a federal courts jurisdiction unless proven otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 US 375, 377 (1994). Under FRCP 12(h), the court is required to dismiss an action “[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter.” *Augustine v. United States*, 704 F2d 1074, 1077 (9th Cir 1983). The jurisdictional statute is strictly construed. See *Lang v. Windsor Mount Joy Mut. Ins. Co.*, 487 F Supp 1303 (ED Pa), *aff’d*, 636 F2d 1209 (3rd Cir 1980); *Hawes v. Club Ecuestre El Comandante*, 598 F2d 698, 702 (1st Cir 1979) (citations omitted).

DISCUSSION

Because federal courts have limited jurisdiction, they cannot hear every dispute presented by litigants. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F2d 1221, 1225 (9th Cir 1989). A district court is empowered to hear only those cases which are within the judicial power conferred by the United States Constitution and those which fall within the area of jurisdiction granted by Congress. *Richardson v. United States*, 943 F2d 1107, 1112-13 (9th Cir 1991), *cert denied*, 503 US 936 (1992). Original jurisdiction must be based either on diversity of citizenship, involving suits involving more than \$75,000 between citizens of

different states, 28 USC § 1332, or on a claim involving the Constitution, laws, or treaties of the United States, 28 USC § 1331.

Diversity jurisdiction requires that all plaintiffs have different citizenship than all defendants. *Pullman Co. v. Jenkins*, 305 US 534, 541 (1939). Because plaintiffs allege that they reside in Oregon, as well as Israel, they cannot establish a diversity of citizenship with any of the defendants who either reside in, are incorporated in, or have their principle place of business in Oregon. 28 USC § 1332(a)(1) & (c)(1).

Instead, plaintiffs seek to invoke federal question jurisdiction by alleging that this court has jurisdiction under 42 USC § 1983 for their injuries. A plaintiff asserting a claim for relief under § 1983 must allege: (1) a violation of rights protected by the United States Constitution or created by federal statute (2) proximately caused (3) by conduct of a person (4) acting under color of state law. *Crumpton v. Gates*, 947 F2d 1418, 1420 (9th Cir 1991).

Because a § 1983 claim can only be alleged against a person “acting under color of state law,” it cannot be brought against private parties. Plaintiffs allege that defendant Lovejoy SurgiCenter is a “corporate person” or a private party. Therefore, it does not act under color of state law and cannot be held liable under § 1983 absent evidence that it conspired with state officials to deprive plaintiffs of a federal right. *Kimes v. Stone*, 84 F3d 1121, 1126 (9th Cir 1996). Plaintiffs do not allege that the Lovejoy SurgiCenter in any way acted in concert with a state actor to commit an unconstitutional act. *Ciambriello v. County of Nassau*, 292 F3d 307, 324 (2nd Cir 2002). Instead, they allege only that the Lovejoy SurgiCenter failed to provide proper care after the abortion was performed at OHSU. As plaintiffs fail to provide this court

with any factual basis for any conspiracy theory, they fail to state a valid § 1983 claim for pleading purposes against the Lovejoy SurgiCenter.

In contrast, defendant OHSU is a “governmental entity performing governmental functions and exercising governmental powers.” ORS 353.020. OHSU and its employees, such as defendant Dr. Buckmaster, act under color of state law and are state actors within the meaning of § 1983. However, plaintiffs fail to allege how OHSU or Dr. Buckmaster violated their constitutional rights or rights protected by a federal statute. At most they allege state law claims for wrongful death and negligence which do not involve the violation of any federal constitutional right or federal statute. Furthermore, this court can discern no federal constitutional or statutory provision which would be violated by a negligently performed abortion.

Because this court lacks federal question jurisdiction over plaintiffs’ claims, this case should be dismissed without prejudice to allow plaintiffs either to file an amended complaint in this court alleging a basis for jurisdiction or instead file a complaint in state court.

RECOMMENDATION

Based on the foregoing, plaintiffs’ complaint should be DISMISSED without prejudice and plaintiffs should be allowed 30 days to file an amended complaint containing a basis for subject matter jurisdiction. Plaintiffs should be advised that failure to timely file an amended complaint will result in the dismissal of this proceeding for lack of prosecution.

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SCHEDULING ORDER

Objections to the Findings and Recommendation, if any, are due **March 17, 2006**. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then a response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

NOTICE

This Findings and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of the district court's judgment.

DATED this 28th of February, 2006.

s/ Janice M. Stewart _____
Janice M. Stewart
United States Magistrate Judge