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7 **IN THE UNITED STATES DISTRICT COURT**
8 **DISTRICT OF ARIZONA**

9 ASHLEY CERVANTES, a single woman,
10
11 Plaintiff,

12 vs.

13 UNITED STATES OF AMERICA;
14 UNITED STATES CUSTOMS AND
15 BORDER PROTECTION AGENT
16 SHALEKA LEGGETT and “JOHN DOE”
17 LEGGETT; UNKNOWN UNITED
18 STATES CUSTOMS AND BORDER
19 PROTECTION AGENTS; HOLY CROSS
20 HOSPITAL, INC.; ASCENSION
ARIZONA, INC.; PATRICK F.
MARTINEZ AND “JANE DOE”
MARTINEZ; JOHN DOES 1-5; JANE
DOES 1-5; XYZ CORPORATIONS 1-5;
ABC PARTNERSHIPS 1-5,

21 Defendants.

NO. 4:16-CV-00334-CKJ

**REPLY IN SUPPORT OF DEFENDANT
MARTINEZ’S MOTION FOR
SUMMARY JUDGMENT**

*(Assigned to the Honorable Cindy
Jorgenson)*

22
23 Defendant Patrick F. Martinez, M.D. (“Dr. Martinez”), through his counsel, hereby
24 submits his Reply in Support of his Motion for Summary Judgment. Plaintiff’s Response fails
25 to overcome the high burden of maintaining a *Bivens* claim against a private actor. Here, as
26 was the case in *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006), Plaintiff’s claims must fail for

1 two independently dispositive reasons. First, Plaintiff's insistence that she could not have
2 asserted a state claim against Dr. Martinez is untrue. Plaintiff's entire argument is that she did
3 not consent to the pelvic and rectal exam (or search as she labels it). A.R.S. § 12-561(2) and
4 the case law interpreting it are clear that failure to secure express or implied consent when
5 rendering medical or health-related services is a medical malpractice action or medical
6 battery. A pelvic and rectal examination by a private physician at a private hospital as part of
7 a medical clearance examination is certainly a health-related service. Therefore, Plaintiff's
8 *Bivens* claim must fail due to the availability of a state law remedy. *Id* at 295-297.

9 Plaintiff's *Bivens* claim also must fail because Dr. Martinez was a private physician
10 working in the emergency department of a private hospital. That Plaintiff was brought to the
11 hospital by Customs and Border Patrol agents does not convert every healthcare provider that
12 participated in her experience at Holy Cross into federal actors. Indeed, the only "evidence"
13 she has offered to support her claim that Dr. Martinez was acting as a federal agent is Officer
14 Leggett's testimony that agents could not perform body cavity searches. This is not sufficient
15 to justify classifying Dr. Martinez as a federal agent, especially when Plaintiff admits she
16 received some medical or health-related services by undergoing a medical clearance
17 examination as a function of presenting to an emergency department. Therefore, summary
18 judgment in favor of Dr. Martinez is warranted.

19 **I. Plaintiff's Alternative Remedy Under State Law Bars Her *Bivens* Claim**

20 The federal jurisprudence is clear that *Bivens* claims must fail where an alternative
21 remedy exists. *See* Defendant Martinez's Motion for Summary Judgment, *see also Holly*, 434
22 F.3d at 295-297. The remedy need not be equal, but simply just be available. *Correctional*
23 *Services Corp. v. Malesko*, 122 S.Ct. 515, 515-516 (2001); *Minnecci v. Pollard*, 132 S.Ct. 617,
24 624-625 (2012). Here, the appropriate remedy for Plaintiff's grievances against Dr. Martinez
25 is found in the Medical Malpractice Act, A.R.S. § 12-561 *et seq.*

26

1 records from Holy Cross regarding her interaction with Dr. Martinez. As seen on the
2 documents, vitals were taken, medical, social, and surgical history were taken (including
3 allergies and medications), and a comprehensive physical examination that included HEENT
4 (head, ears, eyes, nose, and throat), neck, respiratory, cardiovascular, skin, extremities,
5 abdomen, and rectum and female genitals was performed. The clinical impression is noted as
6 “medical clearance”.

7 Given the full examination, there is simply no basis to claim that Dr. Martinez’s
8 interaction with her was not “health-related”. This is especially true given Plaintiff’s
9 admission that the providers at Holy Cross had a legal obligation to perform a medical
10 examination to determine her stability pursuant to EMTALA. Of note, Plaintiff has not
11 complained of any part of her medical clearance examination except for the pelvic and rectal
12 examination. She does not contend the rest of her medical clearance examination was
13 performed without consent. Rather, it is only one subset that she wants to separate out as
14 “non-medical” or not “health-related” to support her *Bivens* claim. This is an untenable
15 position as exceeding the scope of consent or failing to secure consent is explicitly
16 contemplated under A.R.S. § 12-561’s definition of a medical malpractice action. That
17 Plaintiff has chosen to label her exam as “forensic” does not change the fact that the allegedly
18 improper conduct was at minimum a health-related service. Therefore, Plaintiff’s allegations
19 are state law claims that prevent maintenance of a cause of action under *Bivens*.

20 **C. The Factual Disputes Raised by Plaintiff do not Prevent Summary**
21 **Judgment**

22 The core of Plaintiff’s claims against Dr. Martinez is that he performed a pelvic and
23 rectal examination without her consent. While Plaintiff argues that Dr. Martinez was not
24 providing medical or health-related care, but rather a “forensic search”, the distinction is
25 irrelevant because the issue of consent determines whether Plaintiff has any claim, regardless
26 of whether it is labeled a constitutional violation, medical malpractice, or medical battery. If

1 Plaintiff consented to the exam (or search as Plaintiff calls it), then no Constitutional violation
2 occurred and no violation of the Medical Malpractice Act occurred. If, however, she did not
3 consent to the exam, there is no basis to introduce a *Bivens* claim because, as detailed above,
4 Arizona law explicitly provides remedies for the alleged failure to secure consent. This is the
5 fatal flaw in Plaintiff's *Bivens* claim against Dr. Martinez, because regardless of the factual
6 determination, a state remedy is available to Plaintiff.

7 **II. Plaintiff has Failed to Meet Her Burden of Proof to Establish Dr. Martinez as a**
8 **Federal Actor**

9 In addition to the availability of a state remedy requiring dismissal of Plaintiff's *Bivens*
10 claim, Plaintiff cannot maintain her *Bivens* action because she has not satisfied her burden of
11 establishing Dr. Martinez as a federal actor. Multiple different tests have been used to
12 determine whether a private actor should be deemed a federal actor. In the Ninth Circuit,
13 private actions may only be attributed to the government if "there is such a 'close nexus
14 between the State and the challenged action' that seemingly private behavior 'may be fairly
15 treated as that of the State itself.'" *George v. Edholm*, 752 F.3d 1206, 1215, 14 Cal. Daily Op.
16 Serv. 5765 (9th Cir. 2014) (quoting *Brentwood Academy v. Tenn. Secondary School Athletic*
17 *Assoc.*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001)). In determining whether a
18 private actor should be deemed to be acting on behalf of the state or federal government,
19 courts caution that liability of private persons through application of the "state action"
20 doctrine should be limited. *Holly*, 434 F.3d 287(citing *Lugar v. Edmondson Oil Co.*, 457 U.S.
21 922, 937(1982)). The Court in *Holly* recognized that the Bill of Rights is maintained "as a
22 shield that protects private citizens from the excesses of government, rather than a sword that
23 they may use to impose liability upon one another." 434 F.3d at 292.

24 Here, Plaintiff's sole "evidence" that Dr. Martinez's examination of Plaintiff converts
25 his private physician status into that of a federal actor is the fact that the Customs and Border
26 Patrol agents are not permitted to perform a body cavity search themselves. Instead, a medical

1 doctor at a medical facility can perform a body cavity search. Plaintiff has shown no pattern
2 of conduct, no agreement or contract between the government and any defendant to provide
3 the “searches”, no interdependence between Dr. Martinez and the government, no ability of
4 CBP agents to force Dr. Martinez to perform the examination, no significant encouragement
5 or inducement for performance of the examination, no intent by Dr. Martinez to assist the
6 CBP agents, and no benefit to Dr. Martinez arising from the exam such as payment by the
7 government. This scant evidence does not overcome the critical facts that Dr. Martinez was a
8 private citizen, working as a physician in the emergency department of a private hospital,
9 providing medical or health-related services to a patient presenting to the emergency
10 department.

11 Plaintiff’s reliance on *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 is
12 misplaced. The Court in *Schowengerdt* confronted the question at the motion to dismiss stage,
13 before any discovery was undertaken or the record developed. *Id* at 1338-1339. This is
14 significant as the Court merely held that it was possible the private defendants could be
15 deemed federal actors. *Id*. However, the claimant was required to put forth evidence to
16 establish the private defendants engaged in federal action. *Id* at 1337-1338. Here, Plaintiff has
17 had ample opportunity to attempt to develop the record to support the claim that Dr. Martinez
18 should be deemed a federal actor. Plaintiff has failed to do so and discovery is now closed.
19 The lack of evidence warrants summary judgment in favor of Dr. Martinez.

20 **III. Conclusion**

21 As established in Dr. Martinez’s Motion for Summary Judgment and in this Reply, no
22 basis exists on the record for Plaintiff’s *Bivens* claim to stand. It is undeniable that Plaintiff
23 has state court remedies to address her grievances against Dr. Martinez. For some reason,
24 Plaintiff has chosen not to pursue those remedies. However, Plaintiff’s refusal to pursue her
25 state court remedies does not negate their existence or negate the impropriety of a *Bivens*
26 claim in this context. On this ground alone, summary judgment should be entered in Dr.

1 Martinez's favor.

2 In addition, and separately dispositive, Plaintiff's *Bivens* claim must fail because she
3 has not met her burden of proof of putting forth evidence to establish that Dr. Martinez should
4 be deemed a federal actor. The only basis Plaintiff has offered is that Customs and Border
5 Patrol agents are not permitted to conduct body cavity searches. This is hardly sufficient. For
6 all of the above reasons, Dr. Martinez respectfully requests that summary judgment be entered
7 in his favor.

8
9 RESPECTFULLY SUBMITTED this 4th day of April, 2018.

10
11 **BROENING OBERG WOODS & WILSON, P.C.**

12
13 By /s/ Michelle L. Donovan

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19 **CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

20 I hereby certify that on April 4, 2018, I electronically transmitted the attached
21 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
22 Notice of Electronic Filing to the CM/ECF registrants:

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