**UNITED STATES DISTRICT COURT**

**WESTERN DISTRICT OF ARKANSAS**

**FAYETTEVILLE DIVISION**

**EDRICK FLOREAL-WOOTEN;**

**JEREMIAH LITTLE; JULIO GONZALES;**

**DAYMAN BLACKBURN; THOMAS FRITCH PLAINTIFFS**

**v. Case No. 5:22-cv-05011-TLB-CDC**

**TIM HELDER, SHERIFF OF WASHINGTON COUNTY,**

**ARKANSAS, in his individual capacity;**

**KARAS CORRECTIONAL HEALTH, P.L.L.C.;**

**DR. ROBERT KARAS, M.D., in his individual capacity DEFENDANTS**

**RESPONSE TO DEFENDANTS’ MOTION FOR**

**JUDGMENT ON THE PLEADINGS**

Consistent with their actions giving rise to this lawsuit, Defendants once again do not tell the whole story. At times, Defendants omit crucial parts of certain legal standards. At others, Defendants purport to impose heightened pleading requirements.[[1]](#footnote-1) Most alarmingly (or perhaps, most tellingly), Defendants routinely mischaracterize the fundamental nature of Plaintiffs’ claims by refusing to mention two of the most significant allegations in the Amended Complaint. Specifically, Defendants never mention Plaintiffs’ allegation that the Karas Defendants **never told them that they were receiving Ivermectin**. Additionally, Defendants choose to ignore Plaintiffs’ allegation that Defendants used overt deception by telling them that the drug cocktail merely contained “vitamins,” “antibiotics,” and/or “steroids.” These types of allegations elevate Defendants’ actions beyond mere negligence or medical malpractice and into the realm of a constitutional violation.

At the outset, it is important to recognize two important things. First, Defendants filed this motion for judgment on the pleadings. Thus, the parties are bound by Rule 12’s liberal pleading requirements. This also requires that the Court **accept each of these allegations as true**. This is important to recognize because this Court just recently emphasized the importance of recognizing and applying the correct standard of review when considering a motion filed under Rule 12. *See* *Bolger v. United States*, 2021 WL 707869 (W.D. Ark. Feb. 23, 2021) (declining to adopt the government’s version of events because doing so “would require the Court to abandon the legal standard at this stage of the proceedings. In considering a [Rule 12 motion], the Court is required to accept as true the facts as pleaded and make all reasonable inference in the plaintiff’s favor”). Second, Defendants filed this motion – not Plaintiffs and not the Court. As the moving party, Defendants shoulder the burden of showing they are entitled to relief, particularly as it relates to any affirmative defenses. As explained below, Defendants fail to do so. And Defendants’ attempts to characterize their constitutional claim as one of medical malpractice are simply unavailing.

Most fundamentally, this case is about the Karas Defendants administering to Plaintiffs Ivermectin as a treatment for COVID-19. The critical fact, however, is that the Karas Defendants **never made this fact known to Plaintiffs**. They never told them they were giving them Ivermectin (a drug with no legitimate scientific backing as a COVID-19 treatment). When provided with the opportunity to do so, the Karas Defendants lied. They told Plaintiffs that they were receiving vitamins, antibiotics, and/or steroids. The Amended Complaint alleges that Sheriff Helder knew about this practice but deliberately chose to do nothing. Each defendant knew this was wrong. And when the public learned of their actions, Defendants then attempted to obtain retroactive consents to the Ivermectin treatment. Detainees are some of the most vulnerable individuals in society, and it is the Court’s job to ensure the protection of constitutional rights. Doing so in this case means denying Defendants’ motion for judgment on the pleadings and allowing discovery to proceed.

**LEGAL STANDARD**

The Court reviews a Rule 12(c) motion under the same legal standard that governs a Rule 12(b)(6) motion to dismiss. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). To survive a motion to dismiss, a complaint ordinarily need only provide a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The court must accept all factual allegations as true, construe them in a light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff’s favor. *Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009). A court should deny a motion for judgment on the pleadings where a complaint contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its facts. *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Rule 8 does not require “detailed factual allegations” but merely requires more than the “unadorned, the defendant-unlawfully-harmed-me accusation.” *Id.*

**ARGUMENT**

The Court should deny Defendants’ motion for three reasons. First, Defendants are incorrect that Plaintiffs do not state a fundamental liberty interest that is entitled to protection. Rather, Plaintiffs ask this Court to vindicate the violations of their right to informed consent in refusing medical treatment. Second, neither individual defendant is entitled to qualified immunity. As it relates to Dr. Karas, he is not even entitled to assert qualified immunity as a defense, a threshold issue of the qualified immunity analysis. And finally, Plaintiffs have stated a well-pled claim for battery against the Karas Defendants. Plaintiffs will handle each of these reasons in turn.

1. **The Amended Complaint alleges the violation of a fundamental liberty interest that is entitled to constitutional protection: the right to bodily integrity through informed consent.**

Defendants’ motion begins by arguing that the Court should disregard Plaintiffs’ substantive due process claim for want of a protected liberty interest. But Defendants’ arguments on this point unreasonably restrict the existing rights and liberties that are afforded constitutional protection. At its core, substantive due process “prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” *United States v. Salerno*, 481 U.S. 739, 746, (1987) (internal citations and quotations omitted); *Mendoza v. United States*, 849 F.3d 408, 421 (8th Cir. 2017). To that end, this Court recently provided the following framework for stating a substantive due process claim:

Substantive due process claims may be stated in two different ways. First, a plaintiff may allege that the government has infringed her fundamental liberty interests. These claims are generally limited to protecting recognized liberty interests such as “matters relating to marriage, family, procreation, and the right of bodily integrity.” *Albright v. Oliver,* 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Second, the Supreme Court has also recognized substantive due process claims when government actions “shock the conscience.” *See Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 846–53, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *Mendoza v. U.S. ICE,* 849 F.3d 408, 420–21 (8th Cir. 2017); *Moran v. Clarke,* 296 F.3d 638, 645, 647 (8th Cir. 2002).

*McKinney as Next Friend of K.P. v. Huntsville School District*, 345, F.Supp.3d 1071 (W.D. Ark. Oct. 12, 2018). Plaintiffs state a claim under either approach.

Plaintiffs’ substantive due process claim is rooted in their right to protect their bodily integrity. Defendants do not seriously dispute that Plaintiffs have a fundamental liberty interest in their bodily integrity, or that such interest is entitled to constitutional protection. *See* Doc. 41, p. 7 (“The United States Supreme Court has found a right to bodily integrity encompassed within the substantive component of the Due Process Clause . . . .”). According to Defendants, however, Plaintiffs here are not entitled to such protection because “[t]here is no allegation in this case that the Plaintiffs were forced to take Ivermectin or any other medicine for COVID-19.” *Id.*

It is true that the Supreme Court has recognized that prisoners retain a liberty interest in refusing forced medical treatment while incarcerated. *Washington v. Harper*, 494 U.S. 210, 221–22 (1990). But the Court has recognized an even broader right: that “a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.” *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990). Sister circuits have inferred from these constitutional rights the existence of a corollary right – “the right to receive information required to decide whether to refuse treatment.” *See Knight v. Grossman*, 942 F.3d 336, 342 (7th Cir. 2019); *Pabon v. Wright*, 459 F.3d 241, 249–50 (2d Cir. 2006); *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002); *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir. 1990). In recognizing this right, the Seventh Circuit explained:

The right to refuse medical treatment carries with it an implied right to the information necessary to make an informed decision about whether to refuse the treatment. *Without crucial information about the risks and benefits of a procedure, the right to refuse would ring hollow*. Together, the right to refuse treatment and the right to information required to do so constitute a right to informed consent. This due process entitlement has similarities to the familiar common law doctrine with which it shares its name, *see* *Cruzan*, 497 U.S. at 269–70, 110 S.Ct. 2841 (describing the common law roots of informed consent), but its constitutional origin imposes different requirements than an informed-consent tort claim.

*Knight*, 942 F.3d at 342 (emphasis added). It is this corollary right – the constitutional right to medical information – which Plaintiffs allege Defendants in this case deliberately disregarded.[[2]](#footnote-2)

The circuits that have embraced this corollary right have acknowledged that it is “far from absolute,” and have adopted four “limitations” on the right. *Id.* at 342-43; *Pabon*, 459 F.3d at 249-50. According to the Seventh Circuit,

The first three limitations address what the prisoner must prove to establish a violation of his right to medical information. Two of the limitations are necessary because the logical source of the right to medical information is the right to refuse treatment, so the right to medical information exists only as far as needed to effectuate the right of refusal.

*Knight*, 942 F.3d at 342. Plaintiffs here satisfy all four limitations.

*First*, the prisoner “must show that, had he received information that was not given to him, he would have exercised his right to refuse the proposed treatment.” *Id.* (quoting *Pabon*, 459 F.3d at 251). Here, the Amended Complaint alleges that Plaintiffs were never told that they were receiving Ivermectin, and instead were told that the drugs merely consisted of vitamins, antibiotics, and/or steroids. (Doc. 34, ¶ 32). It further alleges that Plaintiffs “would have refused to take” Ivermectin had they “been informed that the drugs they were given included the dewormer Ivermectin and informed of its nature and potential side effects.” (*Id.* ¶ 33). At this stage, the Court must accept these allegations as true. That being the case, Plaintiffs satisfy this first limitation.

*Second*, “the prisoner is entitled to only such information as a reasonable patient would deem necessary to make an informed decision.” *Id.* This limitation, according to the Seventh Circuit, avoids imposing “an onerous burden of disclosing ‘all conceivable information’ about a treatment and reduces the opportunity for the right to be used for ‘obstructionist’ gain.” *Id.* Here, the most basic information was not provided, *i.e.*, that the drug was the dewormer Ivermectin. When making a decision about whether to refuse medical treatment, a reasonable patient would, at the very least, need to know what they are being given.

This is not a novel concept and, in fact, is addressed in one of Defendants’ arguments. In arguing that Plaintiffs’ stated no fundamental liberty interest, Defendants cited an opinion (which they credit to be “well-reasoned”) from the Western District of Washington. In that case, the plaintiffs claimed that they did not receive “*all of the information* necessary to understand the proposed treatment.” *Wright v. Fred Hutchinson Cancer Research Center*, 269 F.Supp.2d 1286, 1295 (W.D. Wash. 2002). According to that court,

At most, plaintiffs argue that defendants failed to disclose certain important facts regarding the protocol and their own pecuniary interests in the outcome of the experiments, but such failures, even if proven, would not alter the therapeutic nature of the protocol *or the fact that plaintiffs' decedents knew they were participating in an experiment*.

*Id.* (emphasis added). Thus, though *Wright* similarly deals with informed consent, it is fundamentally different from the instant case. The plaintiffs there knowingly participated in the trial, but they wanted *more* information. Plaintiffs here never even knew they were receiving Ivermectin, never received any information about Ivermectin and its side effects, and never consented to receiving it. Plaintiffs here did not need *more* information – they needed any information at all.

This does not even take into account Plaintiffs’ allegations of overt deception. The *Wright* opinion (again, which Defendants laud as “well-reasoned”) addresses this situation, as well. In finding the plaintiffs did not allege a protected liberty interest, the court noted: “*in the absence of allegations that defendants hid the true nature of the experiments and/or conducted them for non-therapeutic reasons*, there is no constitutional claim.” *Wright*, 269 F.Supp.2d 1286 (emphasis added). The Amended Complaint alleges that Karas Defendants did just that – they hid the true nature of the treatment and potentially administered them for non-therapeutic reasons (*i.e.*, research and financial reasons). Accepting the facts in the complaint as true, Plaintiffs satisfy this second limitation.

*Third*, the prisoner must prove that the defendant acted with deliberate indifference to his right to refuse medical treatment. *Id.* at 343 (citing *Pabon*, 459 F.3d at 251). The Seventh Circuit reiterated that neither negligence nor gross negligence is enough to support a substantive due process claim, which must be so egregious as to “shock the conscience.” *Id.* (quoting Lewis, 523 U.S. at 848-89. To illustrate this standard, the Seventh Circuit opined that “[a] physician is deliberately indifferent to a patient’s right to refuse treatment if the doctor subjectively knows that the patient did not consent to the treatment or that the patient would want to know the medical information being withheld in order to decide whether to refuse the treatment.” *Id.*

Here, the Amended Complaint alleges that Ivermectin was an experimental drug that was not FDA-approved as a treatment for COVID-19. (Doc. 34, ¶ 31). It further alleges that Plaintiffs were given incredibly high doses of of Ivermectin, (*Id.* ¶¶ 25-28), and that Dr. Karas admitted publicly to administering as much as 0.4 mg/kg of the drug on the jail population, which is double the recommended dosage for its *intended* use (most typically, worms). (*Id.* ¶ 28). The Amended Complaint alleges throughout that Karas Defendants never told Plaintiffs they were receiving Ivermectin and, in fact, used overt deception by stating the drug cocktailed consisted of vitamins, antibiotics, and/or steroids. Based on these facts, Karas Defendants knew that Plaintiffs did not consent to treatment and should have known that they would want to know they were receiving Ivermectin. In fact, the Karas Defendants allegedly went so far as to obtain “retroactive consents” from detained persons after the fact. (*Id.* ¶ 38). Doing so illustrates that they knew their conduct was improper. This is precisely the type of situation that the Seventh Circuit described when describing deliberate indifference.

And as to Sherriff Helder, the Amended Complaint alleges that he was responsible for the administration and operation of WCDC and its policies, procedures, and customs. (Doc. 34, ¶ 8). It alleges that Sheriff Helder was aware of (or should have been aware of) Karas Defendants’ policy related to the administration of Ivermectin without informed consent but refused to end it. (*Id.* ¶¶ 57, 58). Specifically, Dr. Karas publicly and privately espoused the virtues of Ivermectin to combat COVID-19. (*Id.* ¶ 14). As of August 25, 2021, Karas stated publicly that there had been 531 confirmed COVID-19 cases at WCDC. (*Id.* ¶ 18). With such high numbers of infected detainees – and given the then high profile nature of COVID-19 in jails – it is reasonable to infer that Dr. Karas spoke with Sheriff Helder about treating these patients with Ivermectin. But even if not, Dr. Karas publicly admitted to administering the drug to confined persons at the WCDC. (*Id.* ¶ 17). Karas’s social media posts are often accompanied with precise dosing and treatment plans for so-called “COVID protocols.” (*Id.* ¶ 19). This allegation is important because Karas unequivocally admitted on his social media page to dosing inmates with as much as 0.4 mg/kg, which is double the dosage recommended for the drug’s intended use. (*Id.* ¶ 28). And Karas publicly admitted that the dosing regime in his “COVID protocols” varied between his private clinic patients and “our jail patients.” (*Id.* ¶ 29 n.6). Despite all of this evidence, Sheriff Helder sat idle while Dr. Karas actively and repeatedly violated Plaintiffs’ and others’ constitutional rights. Accepting all these facts as true and drawing all reasonable inferences in favor of Plaintiffs, the Amended Complaint adequately alleges that Sheriff Helder was deliberately indifferent to Plaintiffs’ right to refuse medical treatment because he knew, or should have known, about policy, practice, and custom, of violating detainees’ constitutional rights. That being the case, Plaintiffs satisfy the third limitation as related to both Dr. Karas and Sheriff Helder.

*Finally*, a prisoner’s right to medical information must give way when outweighed by a countervailing state interest. *Knight*, 942 F.3d at 343 (noting that “[a] prisoner’s right to refuse medical treatment cannot be infringed by a prison regulation that is ‘reasonably related to a legitimate penological interests.’” (quoting *Harper*, 494 U.S. at 246)). A common example, according to Seventh Circuit, is when forced medication is needed to avoid the spread of contagious disease or to quell disruptive behavior. *Id.* Here, there is no legitimate penological state interest in providing Plaintiffs with a treatment that is experimental, unapproved, and, quite frankly, of dubious efficacy at all, without their informed consent. Plaintiffs satisfy the last limitation.

In sum, the Court should find that Plaintiffs have sufficiently pled a constitutionally protected interest in their right to informed consent. This corollary right stems from Plaintiffs’ right to their own bodily integrity and their right to refuse medical treatment. In finding that Plaintiffs have sufficiently pled a constitutionally protected liberty interest, the Court should find that Plaintiffs have stated a well-pled substantive due process claim.

1. **Defendants are not entitled to qualified immunity.**

Defendants next argue that the individual defendants are entitled to qualified immunity. Defendants confusingly group their arguments on this point into one section. Because the qualified immunity analysis necessarily requires an evaluation of each individual defendants’ actions, Plaintiffs will explain in separate sections why neither Dr. Karas nor Sheriff Helder are entitled to qualified immunity. To that end, this section will proceed as follows: first, it will provide an overview of the relevant qualified immunity legal standard; then it will focus on why Dr. Karas is not entitled to qualified immunity; and finally, it will explain why Sheriff Helder is not entitled to qualified immunity.

* 1. **Legal Standard for Qualified Immunity.**

Qualified immunity is an affirmative defense, and, when raised in a Rule 12 motion, a finding of qualified immunity is appropriate ***only*** where the immunity is established on the face of the complaint. *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). And because qualified immunity is an affirmative defense, Defendants shoulder the heavy burden of showing that they are entitled to qualified immunity on the face of the complaint. *Bradford v. Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005) (“To prevail [on a Rule 12 motion], defendants must show that they are entitled to qualified immunity on the face of the complaint.”). Importantly, the qualified immunity analysis does not abrogate Rule 12’s standard of review or Rule 8(a)(2)’s notice pleading requirements for purposes of this motion. *See Bolger v. United States*, 2021 WL 707869, \*2 (W.D. Ark. Feb 23, 2021) (noting the same pleading standard applies even “when the moving party asserts the defense of qualified immunity”).

At its core, qualified immunity shields government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Doe v. Gooden*, 214 F.3d 952, 954 (8th Cir. 2000). Notably, qualified immunity protects government officials only when they are performing discretionary functions that are part of his or her job duties. *Mitchell v. Ploudre*, 2015 WL 4448082, \*4-5 (W.D. Ark. July 17, 2015). When evaluating whether an official is entitled to qualified immunity, the Court must first determine “whether the alleged facts demonstrate that the official’s conduct violated a constitutional right, and whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Groenewold v. Kelley*, 888 F.3d 365, 370-71 (8th Cir. 2018).

Courts have sound discretion in deciding which of the two prongs to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Plaintiffs addressed the first prong in Section 1above, so the remainder of section will address the second prong – whether it would have been clear to a reasonable officer that Defendants’ actions violated a clearly established constitutional right. For a right to be 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).“Although earlier cases involving ‘fundamentally similar’ facts can provide especially strong support for a conclusion that the law is clearly established, *they are not necessary to such a finding*.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added); *Anderson*, 483 U.S. at 640 (“This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”).

With that backdrop in mind, the issue for this Court is straightforward: at the time of Defendants’ actions, would it have been clear to a reasonable officer that Defendants’ actions in perpetuating or enabling the administration of Ivermectin to Plaintiffs as a purported treatment for COVID-19 without their informed consent violated those Plaintiffs’ constitutional rights? For the reasons explained below, the answer is “yes” as to both Dr. Karas and Sheriff Helder.

* 1. **Dr. Karas is not entitled to qualified immunity.**

Before discussing the reasons that Dr. Karas is not entitled to qualified immunity, Plaintiffs must preview for the Court an important distinction that is essential to this section – a distinction that Dr. Karas improperly conflates. Specifically, as related to Dr. Karas, two questions must be addressed: first, as a private individual acting under color of state law, there is a threshold question of whether Dr. Karas may even assert qualified immunity as an affirmative defense in the first place. Only after answering that question in the affirmative may the Court then consider whether Dr. Karas is entitled to qualified immunity.

With these distinctions in mind, Dr. Karas is not entitled to qualified immunity at this stage for at least three reasons. First, as a threshold mater, Dr. Karas may not assert qualified immunity as a defense because it is not clear from the face of the complaint whether he was acting within the sphere of his official duties when he administered or caused to be administered Ivermectin to Plaintiffs. Second, Dr. Karas, a private individual acting under color of state law, may not invoke qualified immunity in this case. Finally, Dr. Karas has failed to carry his burden of demonstrating that he is entitled to qualified immunity on the face of the complaint, as he makes no affirmative argument that the underlying constitutional right was not “clearly established” at the time of his actions. Plaintiffs will address each of these in turn.

* + 1. *Threshold Issue: Dr. Karas was not acting within the sphere of his discretionary responsibilities when he gave or caused to be given Ivermectin to Plaintiffs without their informed consent.*

As a threshold issue, Dr. Karas may not raise qualified immunity as a defense at this stage because the facts in the Amended Complaint, accepted as true, allege that Dr. Karas was acting outside the scope of the duties delegated to him by the government. Federal law is clear that qualified immunity applies to shield a government actor from suit only when he “knew or reasonably should have known that the action he took *within his sphere of official responsibility* would violate the conductional rights of the plaintiff.” *Harlow v.Fitzgerald*, 457 U.S. 800, 815 (1982) (emphasis added) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)); *Scott v. Baldwin*, 720 F.3d 1034, 1036 (8th Cir. 2013); *Hill v. City of Nashville, Ark.*, 2008 WL 2439641, at \*4 (W.D. Ark June 12, 2008).

Here, the Amended Complaint alleges, among other things, that Dr. Karas and/or his agents were utilizing the unproven drug Ivermectin on Plaintiffs as a treatment for COVID-19 without their informed consent. (Doc. 34, ¶ 15) (“Upon information and belief, Karas Defendants began utilizing Ivermectin as a treatment for COVID-19 with WCDC detainees at least as early as the fall of 2020.”) (*Id.* at ¶18) (“Dr. Karas has admitted publicly to administering Ivermectin to such confined persons.”). It further alleges that Dr. Karas publicly and privately espoused the virtues of the use of Ivermectin to combat COVID-19. (Doc. 34, ¶ 14).

Relatedly, the Amended Complaint alleges (upon information and belief) that Dr. Karas began conducting research as to Ivermectin’s efficacy against COVID-19. (*Id.* ¶ 34). It alleges that, “Dr. Karas remarks often on his clinic’s public social media page regarding the Ivermectin treatments provided in his private practice to his private patients, and even posts signage at his clinic requesting clinical trial volunteers.” (*Id.* ¶ 19). These social media posts, according to the Amended Complaint, are “often accompanied with precise dosing and treatment plans for his so-called ‘COVID protocols.’” (*Id.*). These protocols, according to Dr. Karas himself, varied between his private practice patients and inmates housed at WCDC. (Id. ¶ 28 n.6) (“On December 24, 2021, Dr. Karas wrote the following on his clinic’s Facebook page: ‘The slight difference between jail protocol and the clinic regimen being that we kept the .2-.4 mg/kg Ivermectin dosing on our jail patients.’”).

These allegations, taken as true, paint a picture of Dr. Karas overseeing and perpetuating experiments and research related to Ivermectin’s efficacy against COVID-19. If true, which the Court must assume at this stage, then the administration of Ivermectin to Plaintiffs goes well-beyond the sphere of Dr. Karas’s official responsibilities delegated to him by the state. Because Dr. Karas would not be acting within the scope of his delegated duties, he is not entitled to assert qualified immunity as a defense.

The Southern District of Ohio reached this conclusion in a similar case. There, the plaintiffs alleged that they were “unwitting subjects of Human Radiation Experiments conducted at Cincinnati General Hospital.” *In re Cincinnati Radiation Lit.*, 874 F.Supp. 796, 802 (S.D. Ohio 1995). According to the plaintiffs’ complaint, the defendants conducted these experiments “under the auspices of the University of Cincinnati College of Medicine with funding and authorization from the” United States government. *Id.* The plaintiffs claimed that they were told they were receiving treatments for cancer when, in fact, the experiments were designed to study the effects of radiation on combat troops. *Id.* In finding that certain defendants could not invoke qualified immunity as a defense, the court explained

The Court is compelled to hold that the individual and *Bivens* Defendants may not assert the defense of qualified immunity. The qualified immunity defense is reserved to those officials who are sued for their exercise of discretionary responsibilities delegated to them by the government. There can be no doubt that the individual and *Bivens* Defendant’ alleged instigation of and participation in the Human Radiation Experiments were acts far beyond the scope of their delegated powers. The individual and *Bivens* Defendants, many of whom were physicians, were not acting as physicians when they conducted experiments on unwitting subjects at Cincinnati General Hospital. Rather, the Defendants were acting as scientists interested in nothing more than assembling cold data for use by the Department of Defense. While many government officials are authorized to conduct research, the individual and *Bivens* Defendants were hired by the City to care for the sick and injured. The Constitution never authorizes government officials, regardless of their specific responsibilities, to arbitrarily deprive ordinary citizens of liberty and life.

*Id.* at 814. If the Court accepts Plaintiffs’ allegations that Dr. Karas may have been conducting research into Ivermectin’s efficacy against COVID-19, then Dr. Karas, much like the physicians in the *In re Cincinnati*, was not acting within the scope of his delegated duties (unless of course Sheriff Helder directed him to do so). Because these facts in the Amended Complaint must be accepted as true with inferences in favor of Plaintiffs, the Court should find that Dr. Karas may not raise qualified immunity as an affirmative defense.

* + 1. *Threshold Issue: Dr. Karas fails to show that he, as a private individual, is able to invoke qualified immunity as an affirmative defense in this case.*

As a second threshold issue, Dr. Karas may not assert qualified immunity as a defense for at least two reasons. *First*, Dr. Karas all but concedes this point. Specifically, after acknowledging that “the Eighth Circuit recently found that third-party medical providers *in some circumstances* were not allowed to raise qualified immunity as a defense,” Dr. Karas flatly concludes “the circumstances present there are not present here.” (Doc. 41, p. 13). Dr. Karas does offer some analysis on this point, but only as to why the Eighth Circuit was wrong, and not in an effort to show why he should succeed on this motion. (*Id.*) (acknowledging controlling Eighth Circuit law and claiming that Dr. Karas is merely attempting to “preserve” his position for appeal). Dr. Karas shoulders the burden of demonstrating why he is entitled to qualified immunity based on the face of the Amended Complaint. These eight words and attempts to preserve his argument for appeal fall well-short of that obligation.

*Second*, under controlling Eighth Circuit precedent, Dr. Karas is not entitled to assert qualified immunity. It is well settled that private individuals, though acting as state actors, are not necessarily entitled to assert qualified immunity in § 1983 claims. *See e.g.*, *Domina v. Van Pelt*, 235 F.3d 1091, 1096 (8th Cir. 2000). As Dr. Karas correctly acknowledges, the Eighth Circuit recently evaluated whether certain private medical professionals may raise qualified immunity as a defense. *Davis v. Buchanan County, Missouri*, 11 F.4th 604 (8th Cir. 2021). Two factors guide the Court’s analysis: (1) the general principles of tort immunities and defenses applicable at common law; and (2) the reasons courts have afforded protection from suit under § 1983. *Id.* (citing *Filarsky v. Delia*, 566 U.S. 377, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012)).[[3]](#footnote-3)

With respect to the first factor, courts looks to the “historical availability of immunity” to determine whether there is a “firmly rooted tradition of immunity” for similarly situated individuals. *Id.* at 617-18. As Dr. Karas concedes, the Eighth Circuit, relying on precedent from “[a]ll other circuits” concluded recently that there is no “firmly rooted tradition of immunity for similarly situated privately-employed medical professionals” who merely contract with a jail. *Id.* at 617. The Eighth Circuit concluded that because the medical defendants in *Davis* were “employees of systematically organized private firms, tasked with assuming a major lengthy administrative task” (rather than limited or discrete tasks), they were not entitled to assert qualified immunity. *Id.* at 619 (citing *Richardson v. McKnight*, 521 U.S. 399, (1997). The Amended Complaint similarly alleges that Dr. Karas is a private employee – not a public official – who provides ongoing medical services to the WCDC by contract. (Doc. 34, ¶ 10). As was the case in *Davis*, the first factor supports a finding that Dr. Karas cannot invoke qualified immunity.

The second factor requires the Court to weigh “policy reasons for affording protection from suit under section 1983.” *Davis*, 11 F.4th at 620. In doing so, the Court evaluates three considerations: “avoiding ‘unwarranted timidity’ in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits.” *Id.* (quoting Filarsky, 566 U.S. at 389–90). As in *Davis*, these policy considerations weigh against allowing Dr. Karas to invoked qualified immunity.

The first consideration is the most important. *Id.* (citing *Richardson*, 521 U.S. at 409). This consideration “[e]nsures that those who serve the government do so with the decisiveness and the judgment required by the public good, is of vital importance regardless whether the individual sued as a state actor works full time or on some other basis.” *Id.* (quoting *Filarsky*, 566 U.S. at 390). But where, like here, “a private company subject to competitive market pressures’ works as a state actor,” this concern is less likely present. *Id.*

The second consideration – attracting talented candidates – is likewise not present. The Eighth Circuit acknowledged that private individuals and companies “have the ability to remedy these concerns.” *Id.* at 621. Indeed, private actors such as Dr. Karas insure themselves to cover claims against themselves, are not subject to various civil law restraints, and can offset any increased employee liability with extra pay or benefits. The second consideration does not favor allowing qualified immunity in this case.

Finally, the third consideration, preventing distractions from lawsuits, weighs against allowing Dr. Karas to assert qualified immunity. “Doctors and nurses in private practice generally ‘face a constant threat of claims leading to litigation.’” *Id.* at 622(quoting Tanner v. McMurray, 989 F.3d 860, 867 (10th Cir. 2021)). “Facing constitutional tort claims with a higher burden of proof is not any more daunting or distracting than dealing with the medical malpractice claims with which they are familiar.” *Id.* These considerations, discussed in *Davis*, apply equally here to Dr. Karas. That being the case, the third factor does not support his ability to assert qualified immunity as a defense.

For each of these reasons, Dr. Karas has failed to show that, on the face of the Amended Complaint, he is entitled to assert qualified immunity as an affirmative defense.

* + 1. *Dr. Karas fails to show that a reasonable doctor would not have known his actions violated clearly established rights.*

Assuming the Court answers both the preceding threshold questions in the affirmative (*i.e.*, Dr. Karas is allowed to assert qualified immunity as a defense), the next question is whether Dr. Karas has shown that a reasonable doctor would have known his actions violated clearly established rights. The Court should find that Dr. Karas has failed to make such a showing for two reasons.

*First*, Dr. Karas fails to argue (let alone demonstrate) that the underlying constitutional right at issue was not clearly established at the time of his alleged misconduct. Instead, Dr. Karas merely argues (or, rather, attempts to preserve his argument in advance his anticipated adverse-ruling) the threshold issue discussed above – that he should be able *to raise* qualified immunity as a defense. Even if the Court agrees with Dr. Karas that *Davis* is not controlling here, the Court must then consider whether the underlying right was clearly established. But Dr. Karas make **no argument on this point**. That being the case, Dr. Karas has failed to carry his burden of showing that he is entitled to qualified immunity under the “second prong” of the defense.

*Second*, there can be no question that the abridged right was clearly established at the time of Dr. Karas’s actions. Indeed, Dr. Karas presumably focused only on the *Davis* issue in an effort to avoid this issue because, in order to satisfy the second prong, Dr. Karas would be required to argue that no reasonable doctor would have known that giving these Plaintiffs an experimental drug ***without their knowledge or voluntarily consent*** violated their constitutional rights. This alone violates multiple clearly established rights, including (1) the right to informed consent, *Knight v. Grossman*, 942 F.3d 336, 342 (7th Cir. 2019); *Pabon v. Wright*, 459 F.3d 241, 249-50 (2d Cir. 2006); *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002); *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir. 1990); (2) the right to refuse medical treatment, *Cruzan v. Dir., Mo. Dep’t Health*, 497 U.S. 261, 278 (1990); and (3) a prisoner’s right to refused forced medical treatment while incarcerated, *Washington v. Harper*, 494 U.S. 210, 221-22 (1990).

This does not even take into account that the Amended Complaint further alleges that Defendants overtly deceived Plaintiffs by telling them they were received only vitamins, antibiotics, and/or steroids. (Doc. 34, ¶ 32). This, too, has been recognized as a constitutional violation – including by one case Defendants cited with approval. *See In re Cincinnati*, 874 F.Supp. at 811-13; *Wright v. Fred Hutchinson Cancer Research Center*, 269 F.Supp.2d 1286, 1295 (W.D. Wash. 2002) (“Whether the therapies proved to be wildly effective or heart-breaking failures, in the absence of allegations that defendants hid the true nature of the experiments and/or conducted them for non-therapeutic reasons, there is no constitutional claim.”). One can see Dr. Karas chose to avoid the question – there is simply no doubt that a reasonable official would know that the facts alleged in the complaint violated Plaintiffs’ clearly established rights. For these reasons, Dr. Karas is not entitled to qualified immunity.

* 1. **Sheriff Helder is not entitled to qualified immunity.**

Sheriff Helder is not entitled to qualified immunity. Sheriff Helder’s argument on this point –like Dr. Karas’s argument – is incredibly brief and devoid of any true analysis. But most importantly, it misconstrues Plaintiffs’ claims against him. Specifically, according to Helder, the Amended Complaint never alleges that he had any “personal involvement in any treatment decisions for the Plaintiffs.” (Doc. 34, p. 13). He further claims that he can rely on medical staff when rendering medical decision. (*Id.*). It is true that Plaintiffs seek to hold Helder accountable for the deprivation of rights stemming from medical treatment that they knew nothing about. But they do not allege that Helder personally administered (or concealed) the drug from them. Instead, Plaintiffs’ allegations against Helder are twofold: he knew or should have known about the practice of administering Ivermectin to Plaintiffs without their consent; and (2) that he refused to do anything about it.

A claim of deprivation of a constitutional right cannot be based on a *respondeat superior* theory of liability. *See* *Monell v. Department of Social Services,* 436 U.S. 654, 694 (1978). “[A] supervisor is not vicariously liable under 42 U.S.C. § 1983 for an employee's unconstitutional activity.” *White v. Holmes,* 21 F.3d 277, 280 (8th Cir.1994). But a supervisor may be subject to § 1983 liability if he was directly responsible for the deprivation of rights, or there is causal link thereto. *Coughran v. Helder*, Case No. 5:14-CV-5371-TLB, 2015 WL 4748157, \*3 (W.D. Ark Aug. 6, 2015) (citing *Clemmons v. Armontrout,* 477 F.3d 962, 967 (8th Cir.2007)). To state such a claim, the plaintiff must demonstrate two things: (1) that the supervisor received notice of a pattern of unconstitutional acts committed by the subordinate; and (2) was deliberately indifferent to or authorized those acts.” *S.M. Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015).[[4]](#footnote-4)

Here, the Amended Complaint alleges that Sheriff Helder was responsible for the administration and operation of WCDC and its policies, procedures, and customs. (Doc. 34, ¶ 8). It further alleges that Sheriff Helder was aware of (or should have been aware of) Karas Defendants’ policy related to the administration of Ivermectin without informed consent but refused to end it. (*Id.* ¶¶ 57, 58). Specifically, Dr. Karas publicly and privately espoused the virtues of Ivermectin to combat COVID-19. (*Id.* ¶ 14). As of August 25, 2021, Karas stated publicly that there had been 531 confirmed COVID-19 cases at WCDC. (*Id.* ¶ 18). With such high numbers of infected detainees – and given the then high profile nature of COVID-19 in jails – it is reasonable to infer that Dr. Karas spoke with Sheriff Helder about treating these patients with Ivermectin. But even if not, Dr. Karas publicly admitted to administering the drug to confined persons at the WCDC. (*Id.* ¶ 17). Karas’s social media posts are often accompanied with precise dosing and treatment plans for his so-called “COVID protocols.” (*Id.* ¶ 19). This allegation is important because Karas unequivocally admitted on his social media page to dosing inmates with as much as 0.4 mg/kg, which is double the dosage recommended for the drugs intended use. (Id. ¶ 28). And Karas publicly admitted that the dosing regime for his “COVID protocols” varied between his private clinic patients and “our jail patients.” (*Id.* ¶ 29 n.6). Despite all of this evidence, Sheriff Helder sat idle while Dr. Karas actively and repeatedly violated Plaintiffs’ and others’ constitutional rights.

In short, there was ample information about and evidence of Dr. Karas’s actions at the jail. At this stage, Sheriff Helder must show that he is entitled to qualified immunity based on the face of the Amended Complaint. When accepting all facts as true and resolving all reasonable inference in Plaintiffs’ favor, which the Court must do at this stage, Sheriff Helder cannot make such a showing. Sheriff Helder had ample notice of Dr. Karas’s actions. He was primarily responsible for the policies and practices at the jail, but he chose to do nothing. For these reasons, Plaintiffs sufficiently state a deliberate indifference claim against Sheriff Helder, and he is not entitled to qualified immunity.

1. **The Amended Complaint states enough facts sufficient to state a claim for battery that is plausible on its face.**

Plaintiffs state a well-pled claim for battery against the Karas Defendants. According to Defendants, however, the Amended Complaint fails to state such a claim against the Karas Defendants because Plaintiffs do not allege any kind of “touching” – harmful, offensive, or otherwise. *See* Doc. 41, p. 19 (“[A]s pled, Plaintiffs have failed to allege a battery. No harmful or offensive touching is alleged. In fact there is no allegation of touching at all.” (emphasis added)). Plaintiffs are wrong for two reasons.

*First*, physical contact between a plaintiff and defendant is not required to succeed on a claim for battery, let alone state a claim for one. *See* 1 Howard Brill, Arkansas Law of Damages § 33:6, Assault and battery (Nov. 2021) (“Liability for a battery does not hinge on any part of an actor’s body contacting the other person’s body. Therefore an action can be subject to liability for battery by causing an indirect offensive or harmful contact . . . .”).

*Second*, in the context of the medical setting, the important question is whether the patient consented to the medical procedure. *Cf* *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990) (“At common law, even the touching of one person by another without consent and without legal justification was a battery.”); *see also Parkerson v. Arthur*, No. CA00-1110, 2001 WL 719055 (Ark. Ct. App. June 27, 2001) (reversing grant of summary judgment on battery claim based on lack of informed consent.).[[5]](#footnote-5) As discussed above, the core of this case is about the administration of an experimental medical treatment without Plaintiffs’ (patients’) knowledge of such treatment or informed consent to the same. Plaintiffs have stated a well-pled claim for battery against the Karas Defendants.

The bulk of Defendants’ argument related to Plaintiffs’ battery claim is devoted to arguing that Ark. Code Ann. § 21-9-301 should afford Defendants statutory immunity from Plaintiffs’ claim. Put simply, Defendants are wrong. Arkansas law is clear that Ark. Code Ann. § 21-9-301 does not provide immunity from intentional torts. *Bates v. Simpson*, No. 5:19-CV-5014, 2019 WL 1607320, at \*10 (W.D. Ark. Apr. 15, 2019) (“It is ***very well-settled*** under Arkansas law that this statute does not provide immunity from liability for intentional torts.” (emphasis added)). Neither party disputes that battery is an intentional tort under Arkansas law. It naturally follows that Ark. Code Ann. § 21-9-301 does not provide immunity to the Karas Defendants in this case.[[6]](#footnote-6) The Court should deny Defendants’ motion for judgment on the pleadings on this basis.

**CONCLUSION**

For the reasons discussed herein, the Court should deny Defendants’ motion for judgment on the pleadings.

Respectfully submitted,

ROSE LAW FIRM,

a Professional Association

5100 West JB Hunt Drive, Suite 900

Rogers, Arkansas 72758

Phone: (479) 301-2444

By: */s/Bourgon B. Reynolds*

Bourgon B. Reynolds

Arkansas Bar No. 2012290

breynolds@roselawfirm.com

Ryan Smith

Arkansas Bar No. 2018192

rsmith@roselawfirm.com

Luke Vance

Arkansas Bar No. 2021141

lvance@roselawfirm.com

*Attorneys for Plaintiffs*

*On behalf of the Arkansas Civil Liberties Union Foundation, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to all counsel of record.

*/s/ Bourgon B. Reynolds*

1. This is not a fraud case. Plaintiffs are not required to plead the who, what, when, where, why, and how of their cause of action. Plaintiffs need only plead enough factual content to state a claim that is plausible on its face and put the defendants on notice of their claims. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (“Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” (cleaned up) (citations omitted)). [↑](#footnote-ref-1)
2. As an additional basis, the Court can and should infer that Plaintiffs were deprived their constitutional right to refuse forced treatment because Karas Defendants never told them they were taking Ivermectin. *Washington v. Harper*, 494 U.S. at 221–22. In other words, Defendants forced Plaintiffs to take Ivermectin by refusing to disclose Ivermectin was part of the drug cocktail they were receiving. [↑](#footnote-ref-2)
3. Plaintiffs note that these factors and the accompanying policy considerations are heavily dependent on facts not in the record. Indeed, *Davis* was decided on a motion for summary judgment. That being the case, Plaintiffs aver that Dr. Karas cannot show that he is entitled to assert qualified immunity based on the face of the complaint. That aside, Plaintiffs contend (and Defendants effectively concede) that this case is directly on point with *Davis*, which declined to allow certain medical defendants to invoke qualified immunity. [↑](#footnote-ref-3)
4. Unsurprisingly, Sheriff Helder makes no mention of this test. Instead, he summarily concludes that “there is no clearly established law, set at the appropriate level of specificity, to put Sheriff Helder on notice that anything he allegedly did or did not do violated Plaintiffs’ constitutional rights.” (Doc. 34, p. 13). [↑](#footnote-ref-4)
5. Defendants appear to cite *Mullins v. Helgren* as an afterthought, as it is not immediately clear how that case (where the trial court resolved the battery claim on the merits) stands for the proposition that Plaintiffs *insufficiently plead* their battery claim. *See* 2022 Ark. App. 3, \*12, 638 S.W.3d 864, 872. [↑](#footnote-ref-5)
6. Defendants acknowledge that this is the rule of law in Arkansas. (Doc. 41, p. 14) (“The Arkansas Supreme Court has held that Ark. Code Ann. § 21-9-301 only immunizes municipalities and their officials/employees from negligence actions, *see* *Deitsch v. Tillery,* 309 Ark. 401, 833 S.W.2d 760 (1992) . . . .”). According to Defendants, however, the law ought to be different. *Id.* at pp. 14-15 (“[H]owever, no case has ever provided any explanation for how the court arrived at this misreading of the plain language of the immunity statute.”). Despite Defendants’ extensive explanation as to why Arkansas law is wrong on this point, this Court is required to apply governing precedent from the Arkansas Supreme Court. *See* *Murphy Oil Corp., v. Liberty Mut. Ins. Co.*, 357 F.Supp.3d 791, 795 (W.D. Ark. 2019) (“[T]his Court must apply governing precedent from the Arkansas Supreme Court.”). And this Court cannot certify a question to the Arkansas Supreme Court merely because Defendants believe this governing precedent is wrong. *See First State Bank v. City of Elkins, Arkansas*, Case No. 5:17-CV-5084-TLB, 2017 WL 46798229, \*5-6 (W.D. Ark. Oct. 17, 2017) (certifying *novel* issue of *first impression* due to absence of controlling precedent). [↑](#footnote-ref-6)