IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

JOHN DOE and JANE ROE, *on behalf of themselves and for their minor child*	)	
	)	No. 3:16-cv-856
Plaintiffs,	)	JUDGE CRENSHAW, JR.
	)	MAGISTRATE JUDGE BROWN
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO TRANSFER AND TO DISMISS

Plaintiffs John Doe and Jane Roe, Honduran citizens and nationals, have brought this Federal Tort Claims Act ("FTCA") action against the United States alleging negligence, negligent supervision, and intentional infliction of emotional distress. These claims are based on Plaintiffs' temporary detention in Texas. In July 2013, Plaintiffs and their minor son illegally entered the United States at the Texas border and then surrendered to U.S. Customs and Border Protection ("CBP"). CBP temporarily detained them approximately two days before charging them with removal and paroling them into the United States. Plaintiffs allege that they were detained by CBP in Texas in holding rooms that were uncomfortable under conditions that were unpleasant. They allege no specific, actual injury. As discussed below, none of the discomforts Plaintiffs describe set forth an actionable claim for negligence, negligent supervision, or intentional infliction of emotional distress under Texas law.

The Amended Complaint should be dismissed, but the court best suited to grant the motion is the U.S. District Court for the Southern District of Texas, the judicial district where all of the alleged acts occurred. Plaintiffs illegally crossed the border into the United States in Texas. They were apprehended by CBP in Texas, where temporarily detained. Plaintiff Jane Roe was taken by CBP to a private medical center, also located in Texas. The tort law that applies in this case is Texas law. All of the operative facts, a majority of witnesses, and sources of proof are located in Texas. This entire case concerns a two-day detention in 2013 near the Rio Grande in Texas and has absolutely no factual connection to this district.

If this Court does not transfer this case to Texas, the Court should dismiss the Amended Complaint in its entirety for failure to state a claim upon which relief may be granted.[1] First, Plaintiffs cannot show that the temporary discomfort and inconvenience they experienced, and which is inherent to confinement, caused them any injury giving rise to a tort action under Texas law. Second, without a viable claim for negligence, Plaintiffs' negligent supervision claim also fails. Third, Plaintiffs have failed to allege the kind of independent, outrageous action necessary for a claim for intentional infliction of emotional distress. Finally, the Court should also dismiss the action for lack of subject matter jurisdiction to the extent it seeks recovery by Plaintiffs on behalf of their minor child. Plaintiffs did not first exhaust their administrative remedies by filing an administrative claim for that child, as required by the FTCA.

For these reasons, this Court should transfer this action to the Southern District of Texas or dismiss the Amended Complaint because it fails to state a claim and the Court lacks subject matter jurisdiction.

[1] If the Court transfers the case, it should not deny the motion to dismiss. Instead, the motion should be included in the transferred action for determination by the U.S. District Court for the Southern District of Texas.

FACTUAL BACKGROUND

Plaintiffs John Doe and Jane Roe,[2] both citizens and natives of Honduras, brought this action against the United States under the FTCA alleging that conditions during their approximately two-day temporary detention in 2013 at a CBP facility were uncomfortable and unpleasant, and resulted in severe physical pain and suffering, emotional distress, and other damages.

According to the Amended Complaint, Plaintiffs traveled from Honduras to the United States, crossing into Texas from Mexico with their two-year-old son on or about July 26, 2013. Amended Complaint, ¶ 20. At the time, Plaintiff Jane Roe was allegedly six to seven months pregnant. *Id.*[3] Plaintiffs sought out the CBP border patrol station at the Weslaco Station in the Rio Grande Valley Sector, and surrendered to immigration authorities. *Id.* ¶ 21. The Weslaco Station is located just east of McAllen, Texas, along the southernmost point of the State. It is approximately 1,000 miles from Nashville. On the evening of July 26, 2013, CBP took Plaintiffs into custody and placed them in temporary detention in holding rooms at or near the Weslaco station. *Id*. ¶ 22. Plaintiffs remained in custody for just over two days until they were

[2] Plaintiffs stated in their Amended Complaint that they intend to move to proceed pseudonymously. No such motion has been filed. Although the United States does not concede that this case should proceed under the disfavored practice of pseudonymous filing, it will refrain from identifying Plaintiffs by name in this brief at this time.

[3] Plaintiff Roe may have been further along in her pregnancy than alleged. Her A-file maintained by the Department of Homeland Security indicates that she gave birth less than a month after arriving in the United States.

released on parole on July 29, 2013. *Id.* at ¶ 35.[4] Plaintiffs do not allege that CBP lacked authority to take them into custody or that they were unlawfully detained.

The thrust of Plaintiffs' complaint is that their detention in CBP custody for a little more than two days was uncomfortable and unpleasant. They allege that the holding rooms they were kept in were overcrowded and cold; that they lacked beds, soap, toothbrushes, toothpaste, and ran out of toilet paper; that the toilet stall wall did not afford total privacy; that the water was not clean enough to drink or the food edible; and that the holding rooms smelled. Amended Complaint ¶ 23-28. Plaintiff Jane Roe alleges that after sitting for an extended period she began to feel pain in her stomach and requested medical attention, which she admits CBP provided her by "rushing her to the nearby Knapp Medical Center." *Id.* ¶ 32. There she was diagnosed as being in the process of dilation. *Id.* ¶ 31. Medical staff informed CBP officials that Jane Roe was not able to travel, but hospital staff did not admit her to the hospital. *Id.* ¶ 32. She was released to the custody of CBP, who returned her to the holding facility. *Id.* When Plaintiffs' minor child appeared to be suffering from diarrhea, Plaintiffs inquired about medical treatment for their child. They were told by CBP officials that they would take their child to the hospital if Plaintiffs wanted, but it would slow down their release. *Id.* ¶ 34. Plaintiffs apparently declined the offer of medical treatment. Plaintiffs also allege they were subject to harsh language from a CBP official on one occasion. *Id.* ¶ 33.

Plaintiffs assert that they suffered "severe physical pain and suffering, humiliation, emotional distress, loss of enjoyment, and loss of liberty" as a result of the conditions of their brief confinement. *Id.* ¶¶ 40, 48, 51. Apart from this conclusory language, there is no allegation

[4] Plaintiffs claim that they were in detention for "nearly 72 hours," Amended Complaint ¶ 35, but they allege elsewhere that they surrendered to CBP officials "on the evening of Friday, July 26, 2013" and were released at "approximately 12:45 am on Monday, July 29, 2013," *id.* ¶ 35. This is a period of just over two days.

of fact supporting Plaintiffs' assertion that their uncomfortable temporary detention caused injury to them. Plaintiffs allege that in the early morning hours of July 29, 2013, CBP officials drove Plaintiffs to the nearby Greyhound bus station and released them into the United States. There is no allegation that Plaintiffs suffered any physical injury while in custody. With the exception of Roe's dilation and her son's diarrhea, for which Plaintiffs declined to seek treatment, there is no allegation that Plaintiffs suffered any other medical issue. There is no allegation that Roe's dilation was related to anything other than her pregnancy, and there is no allegation that either plaintiff experienced any health issue after they were released by CBP. As for Roe's husband, John Doe, there is no allegation that he ever suffered any medical issue at all while in custody.

On July 24, 2015, two years after their two-day detention, Plaintiffs, through their attorney, filed two administrative claims for damages with CBP. *Id.* ¶ 6; *see* Declaration of Eric Drootman, Exhibit A thereto. Plaintiffs sought $250,000 each for damages. *Id.* The administrative claims contain allegations similar to those in the Amended Complaint that the conditions at the hold rooms were uncomfortable and unpleasant. Drootman Decl., Exh. A thereto. The administrative claims alleged that CBP had engaged in "negligence, gross negligence, invasion of privacy, false imprisonment, and intentional infliction of emotional distress on the part of CBP law enforcement officers and supervisors." *Id.* CBP denied both claims in November 2015. Amended Complaint ¶ 6. This action followed.

ARGUMENT

I. This action should be transferred to the Southern District of Texas.

This action should be transferred under 28 U.S.C. § 1404(a) to the U.S. District Court for the Southern District of Texas because all of the operative facts, the majority of witnesses, and sources of proof are located in Texas, and all of the substantive law to be applied is Texas law. The purpose of § 1404(a) "is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense[.]" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). A district court possesses broad discretion in deciding whether to transfer venue. *Reese v. CNH America, LLC*, 574 F.3d 315, 320 (6th Cir.), *reh'g denied*, 583 F.3d 955 (6th Cir. 2009). The party seeking a transfer under § 1404(a) bears the burden of demonstrating by a preponderance of the evidence that transfer to another district is warranted. *See Nisby v. Barden Mississippi Gaming, LLC*, No. 06–2799, 2007 WL 6892326, at *2 (W.D. Tenn. Sept. 24, 2007).

Section 1404(a) provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." By this statute, "Congress intended to give district courts the discretion to transfer cases on an individual basis by considering convenience and fairness." *Kerobo v. Southwestern Clean Fuels, Corp*., 285 F.3d 531, 537 (6th Cir. 2002). In ruling on a motion to transfer under § 1404(a), a district court should "consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric 'interest of justice.'" *Moore v. Rohm & Haas Co.*, 446 F.3d 643, 647 (6th Cir. 2006) (citation omitted). Therefore, in deciding whether the present forum is inconvenient, the Court should

consider a number of factors, including (1) the location of willing and unwilling witnesses; (2) the residence of the parties; (3) the location of sources of proof; (4) the location of the events that gave rise to the dispute; (5) systemic integrity and fairness; and (6) the plaintiffs' choice of forum. *Id.*; *Kerobo*, 285 F.3d at 537.

A. The convenience of the witnesses weighs heavily in favor of transfer.

The convenience of the witnesses "is often considered to be the most important factor when determining which forum is the most convenient," and weighs heavily in favor of transfer in this case. *See Canada v. Am. Airlines, Inc. Pilot Ret. Ben. Program*, No. 3:09-0127, 2009 WL 2176983, at *2 (M.D. Tenn. July 21, 2009)). In their administrative claims, Plaintiffs identified five individuals with knowledge relevant to the facts of the case. Four of those individuals are located in Texas, and the remaining witness was the plaintiff filing the claim. *See* Drootman Decl., Exh. A thereto. The four Texas witnesses included three CBP officers at the Weslaco station and a physician at the Knapp Medical Center where Plaintiff Jane Roe was briefly seen when she was dilating. *Id.* It is unsurprising that every non-part witness is located in Texas, as the case arose from alleged tortious conduct there and has no connection with this district.

In this case nearly every key witness is located in Texas. As the accompanying declaration from Eric Drootman of CBP states, the key CBP witnesses with knowledge relating to the allegations of the complaint are located in Texas. Drootman Decl. ¶ 4. If the three CBP witnesses identified by Plaintiffs and all other CBP witnesses were required to travel to Tennessee, they would be inconvenienced by having to travel from Texas. *Id.* That would create a substantial burden on the government and detract from CBP's important public functions. CBP officers at the border come into contact with thousands of individuals each year, a large portion of whom are transient, and requiring these officers to travel around the country

every time there is a lawsuit relating to a border detention would significantly aggravate the substantial resource issues already facing CBP at its border stations.

Potential witnesses also include employees of Knapp Medical Center who work in Texas and likely reside there. The medical staff who examined Roe, including the physician identified by Plaintiffs, likely have knowledge of the facts alleged in the Amended Complaint. These medical professionals should not be forced to travel from Texas to Tennessee. Doing so would cause them travel expense and inconvenience, and require them to take leave of their medical work to travel for this case.

Because this case alleges tortious conduct on the part of individuals working at a CBP facility in Texas, and involves potential witnesses from a private Texas hospital, the number of witnesses in Texas greatly outnumbers those in Tennessee. This fact weighs heavily in favor of transfer of venue. *See Clayton v. Heartland Res., Inc.*, No. 3:08-CV-0513, 2008 WL 2697430, at *5 (M.D. Tenn. June 30, 2008) ("[T]he convenience of the witnesses favors Kentucky over Tennessee to the extent that the number of witnesses located in Kentucky outnumbers those located in Tennessee.").

B. The location of the source of proof weighs in favor of transfer.

The CBP hold rooms at issue are unquestionably in Texas. Additionally, the original paper records associated with the temporary detention of Plaintiffs are located in Texas at the Weslaco station. Drootman Decl. ¶ 5. Of course, many documents relevant to this action are likely to be kept in electronic form. But the ease of access to electronic documents does not mean that this factor carries no weight. To the contrary, a court of this district has concluded that this factor weighs in favor of transfer if the document originals are located in a different district: "Although the import of this factor is mitigated in light of technological advances, including the

availability of electronic discovery, to the extent that there may be some minor convenience associated with the existence of the document originals in the district where the case is adjudicated, this factor slightly favors a transfer of venue…" *Clayton*, 2008 WL 2697430 at *6.

C. The "interest of justice" factor weighs in favor of transfer.

The interest of justice factor favors transfer. The public interest factor includes consideration of "the administrative difficulties flowing from court congestion; the local interest in having localized interests decided at home; the familiarity of the forum with the law that will govern the case; and the avoidance of unnecessary problems of conflicts of laws or in the application of foreign law." *B.E. Tech., LLC v. Groupon*, Inc., 957 F. Supp. 2d 939, 943 (W.D. Tenn. 2013). Because this action is brought under the FTCA, the claims are governed by the substantive law of Texas, the state where the alleged acts or omissions occurred. *See* 28 U.S.C. § 1346(b)(1).

Courts in this Circuit have recognized that transfer is favored where the substantive law to be applied is the law of the district to which transfer is sought, because that district court may be more familiar with that state's law than is the other district court. *Picker Int'l, Inc. v. Travelers Indem. Co.*, 35 F. Supp. 2d 570, 574 (N.D. Ohio 1998); *Kepler v. ITT Sheraton Corp.*, 860 F. Supp. 393, 399 (E.D. Mich. 1994) ("[T]his case will be governed by questions of Florida law, questions with which the federal judges in Florida are much more familiar with than this court."). The substantive law to be applied in this case is Texas law. The Southern District of Texas is likely more familiar with Texas law than this Court.

Further, the Southern District of Texas has a nearly identical case before it that was transferred to it by the U.S. District Court for the Eastern District of Virginia on a venue transfer order earlier this year. *Gladis Morales Aguilar v. United States of America*, 1:16-cv-00048 (S.D.

Tex.) (filed August 5, 2015). Transfer of this case to that same Texas district court may avoid inconsistent results, will serve local interest in the cases, and will further the interests of justice.

D. Plaintiffs' choice of forum is not dispositive and is outweighed by other factors.

Finally, although a plaintiff's choice of forum is an important factor, the Sixth Circuit has explained that this factor does not have the same weight it once did and is not dispositive. *Clayton v. Heartland Res., Inc.*, No. 3:08-CV-0513, 2008 WL 2697430, at *5 (M.D. Tenn. June 30, 2008) (citing *Lewis ACB Bus. Servs., Inc.*, 135 F.3d 389, 413 (6th Cir.1998)). In particular, a plaintiff's choice of forum "has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff." *Esperson v. Trugreen Ltd. P'ship*, No. 2:10-CV-02130-STA, 2010 WL 4362794, at *6 (W.D. Tenn. Oct. 5, 2010), *report and recommendation adopted*, No. 2:10-CV-02130-STA, 2010 WL 4337823 (W.D. Tenn. Oct. 27, 2010); *see also Tuna Processors, Inc. v. Hawaii Intern. Seafood, Inc*., 408 F. Supp. 2d 358, 360 (E.D. Mich. 2005); *Steelcase, Inc. v. Smart Techs., Inc.*, 336 F. Supp. 2d 714, 720 (W.D. Mich. 2004).

Thus, for example, in *Ruiz ex rel. E.R. v. United States*, No. 13-CV-1241, 2014 WL 4662241, at *9-10 (E.D.N.Y. Sept. 18, 2014), the Eastern District of New York transferred to Virginia a case alleging negligence on the part of CBP officers during a brief detention at Dulles Airport. The court rightly concluded that the New York resident plaintiff's choice of forum was "not entitled to the weight generally accorded such a decision where there is lacking any material connection or significant contact between the forum and the events allegedly underlying the cause of action." *Id.* Instead, the court concluded that because the operative facts, the majority of witnesses, sources of proof, and relevant substantive law were in Virginia, the case should be transferred to this district. *Id.* For these same reasons, this Court should transfer venue to the Southern District of Texas.

In sum, the balancing of these factors weighs strongly in favor of transfer because all of the operative facts, a majority of witnesses, sources of proof, and substantive law are in Texas while Plaintiffs' choice of forum receives less weight because there is no connection between their complaint and this district. The Court should grant transfer to the Southern District of Texas.

II. Plaintiffs have failed to state any claim for which relief may be granted under Texas law, and the Amended Complaint should be dismissed in its entirety.

Plaintiffs have failed to state an actionable tort under Texas law[5] for their claims of negligence, negligent supervision, and intentional infliction of emotional distress. First, the Amended Complaint alleges conditions that reflect the ordinary discomfort and inconvenience that comes with confinement that are not actionable except in cases of false imprisonment, and fails to set forth sufficient allegations to support a claim for negligence. Second, if the negligence claim is dismissed, the negligent supervision claim must be dismissed. Third, Plaintiffs have advanced an intentional infliction claim wholly overlaps with the other claims and lacks any allegation of outrageous conduct required by Texas law to support a claim for intentional infliction of emotional distress. Accordingly, the Amended Complaint fails to state any claim for which relief may be granted under Federal Rule of Civil Procedure 12(b), and this action should be dismissed.

A. Standard of Review under Rule 12(b)(6)

An action brought in federal court may be dismissed for failure to state a claim on which relief may be granted. Fed. R. Civ. P. 12(b)(6). In assessing a motion to dismiss under Rule 12(b)(6), the court is required to construe the complaint in the light most favorable to the

[5] Because this action is brought under the FTCA, the claims are governed by the substantive law of Texas, the state where the alleged acts or omissions occurred. *See* 28 U.S.C. § 1346(b)(1) (providing that liability is "in accordance with the law of the place where the act or omission occurred").

plaintiff, accept the plaintiff's factual allegations as true, and determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Heinrich v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393, 403 (6th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 663 (2009)). This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678. Where the well-pleaded facts are "merely consistent with a defendant's liability" or "mere possibility of misconduct," the complaint fails to state of claim for relief that is plausible on its face, and the complaint must be dismissed. *Id.* at 678-79. A plaintiff's factual allegations, while "assumed to be true, must do more than create a suspicion of a legally cognizable cause of action; they must show entitlement to relief." *LULAC v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed. 2004) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). Thus, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 129 S.Ct. at 1949, by stating enough facts to "nudge[ ] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. 544, 570. Mere conclusory statements do not suffice. *Iqbal*, 129 S.Ct. at 1949.

B. Plaintiffs fail to state a claim for negligence or negligent supervision.

In Texas, the elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. *Rodriguesa-Escobar v. Goss*, 392 S.W.3d 109, 113 (Tex. 2013). The Amended Complaint fails to allege that the conditions Plaintiffs complain about caused any legally cognizable injury. Discomfort and

inconvenience are not actionable in tort for lawful confinement, and Plaintiffs have not pled sufficient facts to show that they suffered any actionable negligence under Texas law.

1. Plaintiffs cannot recover for the discomfort and inconvenience they suffered during their brief but lawful confinement.

Plaintiffs fail to state a claim because the kinds of uncomfortable and unpleasant conditions they recount are inherent to confinement and, under Texas law, a plaintiff cannot recover for such discomfort and inconvenience in a negligence claim. A plaintiff may only recover for discomfort and inconvenience as part of damages in an action for false imprisonment, not where confinement is legal.

Plaintiffs' allegations amount to a series of discomforts and inconveniences. They allege that the hold rooms were crowded and cold, and that that they were required to sit on a concrete bench, AC ¶ 23; that they were not provided with beds, warm clothes, jackets, or blankets, *Id.* ¶ 24; and that the toilet was only partially private because it was separated from the rest of the room by a half-wall, *Id.* ¶ 25. Plaintiffs allege that they were provided with food and water, but it was inadequate. *Id.* ¶¶ 24, 30. Plaintiffs complain that the hold rooms ran out of toilet paper, and they were not provided with soap, towels, toothbrushes, toothpaste, or showering facilities. *Id.* ¶ 26. Significantly, they do not allege they were subjected to false imprisonment, and therefore cannot recover in tort for the mere discomfort or unpleasantness they experienced during their brief detention.

A plaintiff cannot recover for discomfort and inconvenience under Texas law. Confinement, by its very nature, is uncomfortable and unpleasant, and lacks amenities and conveniences found elsewhere. *See Wilson v. Lynaugh*, 878 F.2d 846, 849 (5th Cir. 1989) (recognizing "mere discomfort and inconvenience" of confinement); *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988) (noting that confinement is uncomfortable and unpleasant and does

not provide "the amenities, conveniences and services of a good hotel"). For this reason, courts have long recognized that there can be no recovery in tort for the mere physical discomfort and inconveniences of confinement except in cases of false imprisonment. *See, e.g., Gibson Disc. Ctr., Inc. v. Cruz*, 562 S.W.2d 511, 513 (Tex. Civ. App. 1978) (in false imprisonment action, plaintiff may recover for "physical discomfort and inconvenience" without showing physical injury) (citing W. Page Keeton et al., *Prosser & Keeton on the Law of Torts*, § 56, 43-44 (4th Ed. 1971)); *Gau v. Smitty's Super Valu, Inc.*, 901 P.2d 455, 457 (Ariz. Ct. App. 1995) (citing Keeton, *Prosser and Keeton on the Law of Torts* § 11, at 48 (5th ed. 1984), for the proposition that false imprisonment, unlike a negligence claim, permits recovery for "physical discomfort or inconvenience" without requiring physical injury); *Bartee v. Burks*, No. 14-97-151-CV, 1998 WL 802447, at *6 (Tex. App. Nov. 19, 1998) (citing *Gau* and describing the injury from false imprisonment as "primarily a mental one" and not requiring physical injury).[6]

Plaintiffs' action arising out of their brief, two-day confinement is an action to recover compensation for the discomfort they felt during their detention, and for the inconvenience of their confinement. Plaintiffs admit that their detention by CBP after illegally entering the United States was lawful. Plaintiffs do not state an actionable tort, and this Court should dismiss the Amended Complaint.

[6] These decisions are consistent with the Restatement of Torts (Second) that a negligence claim requires bodily harm while false imprisonment does not: "[t]he principal element of damages in actions for battery, assault or false imprisonment…is frequently the disagreeable emotion experienced by the plaintiff….Thus one who insults or annoys another, thereby causing a third person to suffer … physical discomfort[] is ordinarily not subject to liability to the third person unless bodily harm results." Restatement (Second) of Torts § 905 (1979).

2. Plaintiff John Doe does not allege any facts to support any claim for injury.

At the end of each of the alleged counts, Plaintiffs include a claim that, as a result of the conditions of their confinement, they each "suffered damages, including, but not limited to, severe physical pain and suffering, humiliation, emotional distress, loss of enjoyment, and loss of liberty." AC ¶¶ 40, 48, 50. The Amended Complaint fails to state a claim for Doe because there is not factual allegation supporting any claim for injury, and the injuries he seeks to recover for are not cognizable under Texas law in this case.

First, John Doe simply does not claim that he suffered an actionable injury. Nowhere in the Amended Complaint is there any allegation that Plaintiff John Doe suffered any physical injury, had a medical issue, or sought any medical treatment during or after his brief detention. What we are told is that John Doe was placed in a hold room, experienced the conditions complained of, and was released approximately two-days after being taken into custody. There is no factual allegation of actual bodily harm contained anywhere in the Amended Complaint to support his recital that he suffered any severe physical pain and suffering, emotional distress, or any other injury. This Court should not accept Plaintiffs' bare legal recitals without factual support making his claims plausible. *See Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 570.

Second, these claimed injuries are not recoverable under Texas in this case. His claim of "severe physical pain and suffering" is unaccompanied by any allegation that he suffered a physical injury of any kind. There is no question that a plaintiff may recover for physical pain and suffering attending a physical injury as a result of negligence. *See*, *e.g.*, *Dabbs v. Calderon*, No. 01-14-00598-CV, 2015 WL 4930622, at *3 (Tex. App. Aug. 18, 2015 ("In personal-injury cases, plaintiffs may also recover for physical pain.")). However, it does not appear that Texas has in any case recognized that a plaintiff claiming negligence may recover for physical pain and

suffering without some attendant physical injury, or that "physical pain and suffering" itself amounts to a physical injury under Texas law.

Because there is no allegation that John Doe was physically injured during his brief detention, he cannot recover from negligently-inflicted emotional distress, barring some special relationship or duty not alleged here. *Temple-Inland Forest Products Corp. v. Carter*, 993 S.W.2d 88, 91 (Tex. 1999). Similarly, he cannot recover for "loss of enjoyment," which, under Texas law, is a factor for consideration in awarding damages where there has been physical injury from negligence. *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 675 (Tex. App. 1991) (explaining that "loss of enjoyment" is not a separate category of injury and could be included as part of consideration for pain and mental anguish arising from physical injury). John Doe also cannot recover for whatever humiliation he may have experienced as part of his confinement, because humiliation is considered as part of a claim for mental anguish, which is a specific form of injury under Texas law that requires serious bodily injury, and which in any event is not alleged here. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993) (mental anguish requires serious bodily injury); *Patel v. Hussain*, 485 S.W.3d 153, 178 (Tex. App. 2016) (humiliation or embarrassment is proof of mental anguish, but not a recoverable damage outside the context of a mental anguish claim). Finally, John Doe cannot recover for the "loss of liberty" he experienced as part of a lawful detention, as loss of liberty is an element of damages in the case of false imprisonment. *Air Florida, Inc. v. Zondler*, 683 S.W.2d 769, 775 (Tex. App. 1984) (discussing, generally, mental and emotional damages). John Doe has not factually supported his naked claim of injury, and he cannot recover the damages he seeks under Texas law. His claims should be dismissed in their entirety.

2. Plaintiff Jane Roe's dilation is not an injury, and in any event is not alleged to be causally connected to the conditions of her brief detention.

Plaintiff Jane Roe asserts the same bare legal recitals as part of the Amended Complaint, *see* AC ¶¶ 40, 48, 50, and her claims suffer the same deficiencies as those discussed above with respect to John Doe. For all the reasons stated above, she also cannot recover for pain and suffering, emotional distress, humiliation, loss of enjoyment, or loss of liberty.

The only difference between the allegations with respect to John Doe and Jane Roe relate to her dilation during her detention. Specifically, she alleges that she "became very ill after holding her son on [a] concrete bench for hours," and "experienced severe stomach pain." AC ¶ 30. She alleges that she "felt she was beginning to dilate or have contractions, [and] feared that her water might break." *Id.* When she was "rushed to a nearby medical center" by CBP officials, AC ¶ 31, the medical staff determined that Roe "was in the process of dilation." AC ¶ 31. There is no allegation that she was admitted to the hospital, suffered any medical issue beyond the dilation associated with her pregnancy, or had any physical injury of any kind. Apart from these allegations, there is no factual allegation that Roe experienced any other medical issue while in CBP custody or after.

Even if the dilation could somehow be seen as a physical injury and not an ordinary and natural event of pregnancy, the complaint also fails to sufficiently allege any causal connection between the alleged breach of duty and the alleged injury suffered by Roe. Under Texas law, proximate cause has two components: cause-in-fact and foreseeability. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005). A tort claim must fail if there is no causal connection between the negligence alleged and the damage alleged. *Strong v. Caudill*, 389 S.W.2d 736, 737 (Tex. Civ. App. 1965). Cause-in-fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred. *IHS*

Cedars Treatment Ctr., 143 S.W.3d at 799. Foreseeability means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

The Amended Complaint identifies no condition of Roe's brief detention that plausibly could give rise to a determination of causation in this action. Even if dilation were a physical injury, there is not allegation of the Amended Complaint that plausibly links any of the conditions of Roe's detention with her dilation. Roe herself alleges that her dilation occurred after "sitting on a concrete bench holding her son for hours," and does not allege that any of the conditions of her confinement caused her dilation. AC ¶ 30. Apart from this, there is nothing in the Amended Complaint to sufficiently allege a nexus between the conditions of Roe's confinement and her dilation.

Plaintiffs have failed to state a claim for negligence under Texas law because the Amended Complaint offers unsupported legal recitals that are insufficient to state a claim under Rule 12(b)(6), the damages claimed are not recoverable under Texas law, and the Amended Complaint fails to plausibly allege a connection between the challenged conditions and any claimed injury. This Court should dismiss the claims for negligence and negligent supervision[7] for failure to state a claim for which relief may be granted.

B. Plaintiffs fail to state a claim for intentional infliction of emotional distress.

[7] Because the negligence claim cannot prevail, the negligent supervision claim also fails under Texas law. The elements of a claim for negligent supervision, like all negligence claims, are (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the damages were proximately caused by the defendant's breach. *Latimer v. Mem'l Hermann Hosp. Sys*., No. 14–09–00925–CV, 2011 WL 175504, at *3 (Tex. App. Jan. 20, 2011) (citation omitted). To prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee, "but also that the employee committed an actionable tort against the plaintiff." *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 801 n.2 (Tex. 2010) (quoting *Brown v. Swett & Crawford of Tex., Inc*., 178 S.W.3d 373, 384 (Tex. App. 2005)).

Plaintiffs fail to state an intentional infliction of emotional distress claim under Texas law. The Texas Supreme Court has repeatedly stressed just how rare and cabined these claims are. *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 815 (Tex. 2005) ("For the tenth time in little more than six years, we must reverse an intentional infliction of emotional distress claim for failing to meet the exacting requirements of that tort."). Plaintiffs' claim of intentionally-inflicted emotional distress is not viable because it violates several of the strict limitations that the Texas Supreme Court has imposed.

First, under Texas law a claim for intentional infliction of emotional distress is only cognizable "in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." *Hoffmann–La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004). The Texas Supreme Court has repeatedly held that this claim is a limited "gap filler" and that "[w]here the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available." *Hoffmann–La Roche*, 144 S.W.3d at 447-48. Thus, for example, the Texas Supreme Court in *Hoffmann–La Roche* cited with approval *Quaker Petroleum Chemicals Co. v. Waldrop*, 75 S.W.3d 549, 555 (Tex. App. 2002), where the court refused to allow the plaintiff to bring an intentional infliction of emotional distress claim based on underlying negligence allegations because that would "circumvent the limitations placed on the recovery of mental anguish damages on a negligence or gross negligence claim." *Id.* The Texas courts have therefore repeatedly dismissed intentional infliction claims where the factual allegations overlap with other tort claims, including negligence. *See, e.g., Hoffmann–La Roche*, 144 S.W.3d at 448 (collecting cases); *Moser v. Roberts*, 185 S.W.3d 912, 915 (Tex. App. 2006). Instead, intentional infliction claims may only be brought in Texas in the rare circumstances where the allegations

are entirely independent of other tort claims, and where there is no other limitation on the recovery of mental anguish damages. *See, e.g., Draker v. Schreiber*, 271 S.W.3d 318, 323 (Tex. App. 2008) (must allege "facts independent" of other tort claims, regardless of whether the other tort claims could be successful); *Conley v. Driver*, 175 S.W.3d 882, 888 (Tex. App. 2005) (must allege evidence "independent of that necessary to establish another tort claim"). Here, the facts set forth in the Amended Complaint to establish Plaintiffs' intentional infliction of emotional distress claim are indistinguishable from, and entirely overlap with, their negligence and negligent supervision claims. As a result, their intentional infliction of emotional distress claim must be dismissed under Texas law.

Second, Plaintiffs fail to allege the necessary extreme and outrageous conduct required to state an intentional infliction claim. Under Texas law, a party must allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Brewerton v. Dalrymple*, 997 S.W.2d 212, 216 (Tex. 1999). The Texas Supreme Court has emphasized that even "heinous acts" are not sufficient: "except in circumstances bordering on serious criminal acts, we repeat that such acts will rarely have merit as intentional infliction claims." *Creditwatch*, 157 S.W.3d at 818; *Conley v. Driver*, 175 S.W.3d 882, 888 (Tex. App. 2005) (same); *Simmons v. Young*, No. 14-99-00122-CV, 2000 WL 1862851, at *1 (Tex. App. Dec. 21, 2000) ("throwing a cup of urine on [prisoner] and by spitting on him" not sufficient). Whether conduct meets these exacting standards is a legal question for the court to determine in the first instance. *See Creditwatch*, 157 S.W.3d at 817; *Brewerton*, 997 S.W.2d at 216. In doing so, the court must account for the fact that the Plaintiff was legally confined in a detention facility, and that detention alone may cause mental distress for which the Plaintiff may not seek

recovery. *See, e.g., Umar v. Price*, No. 09-95-068CV, 1996 WL 4031, at *5-6 (Tex. App. Jan. 4, 1996) (court must account for the plaintiff being "incarcerated in a penal institution"); *Thomas v. Pankey*, 837 S.W.2d 826, 830 (Tex. App. 1992) (denial of shower and out-of-cell time for prisoner not close to sufficient). While detention itself may cause emotional distress, Plaintiffs are barred from bringing such a claim both under 28 U.S.C. § 2680(a) and under Texas law. *See Motsenbocker v. Potts*, 863 S.W.2d 126, 132 (Tex. App. 1993) (holding that a party cannot be liable when he has "done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress").

The allegations set forth in the Amended Complaint fall well below the exacting standards set forth by the Texas courts. It is undisputed that Plaintiffs were lawfully detained by CBP after illegally crossing into the United States and surrendering to CBP officials. The Amended Complaint contains no particularized allegation that Plaintiffs were subjected to conditions that were unique to them and not applied to the detained population generally. Plaintiffs were fed, provided with water and toilet facilities, and were provided medical attention. That Plaintiffs experienced the kinds of ordinary discomforts and inconveniences of detention does not, under Texas law, satisfy the pleading requirements to state a claim for intentional infliction of emotional distress. The Court should dismiss this claim.

III. Plaintiffs have failed to exhaust their remedies with respect to their minor son.

Plaintiffs purport to bring this action on behalf of themselves and their minor child. *See* AC, Caption, ¶ 6. Any claim on behalf of the minor child should be dismissed because Plaintiffs failed to exhaust their administrative remedies with respect to the minor child.

The FTCA requires claimants to first present the claim to the appropriate agency and have the claim finally denied by the agency. *See* 28 U.S.C. § 2675(a); *McNeil v. United States*,

508 U.S. 106, 113 (1993). In order to fulfill this requirement, the claimant must give written notice of the claim sufficient to enable the agency to investigate the claim and place a value on the claim. *See Glarner v. U.S., Dep't of Veterans Admin.*, 30 F.3d 697, 700 (6th Cir. 1994); 28 C.F.R. § 14.2(a). If the agency denies the claim or fails to dispose of it within six months, the claimant may file a civil action in federal court.

Plaintiffs failed to make an administrative claim on behalf of the minor child. Contrary to their claim that the SF-95 claim form Plaintiff Roe filed was on behalf of her minor child, AC ¶ 6, the administrative claim she filed only listed her as a claimant. *See* Drootman Decl., Exh A thereto. Nowhere in that administrative claim does Roe identify the child as a claimant, or place a value on that child's claim. The failure to file an administrative claim for each individual is fatal to any later claim for relief for that individual in an FTCA action. *Holt v. Morgan*, 79 F. App'x 139, 141 (6th Cir. 2003); *Combs v. United States*, No. 2:04-CV-306, 2008 WL 2278661, at *5 (E.D. Tenn. May 30, 2008) (dismissal of minor child's claim for failure to exhaust administrative remedies). This Court should dismiss any claim brought on behalf of Plaintiffs' minor child.

CONCLUSION

For the foregoing reasons, this Court should transfer the action, including the motion to dismiss, to the U.S. District Court for the Southern District of Texas. If this Court declines to transfer the action, it should dismiss this case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, and dismiss any claims as to the minor child for failure to exhaust administrative remedies under Federal Rule of Civil Procedure 12(b)(1).

DATED: August 19, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that that a copy of the foregoing was served by filing the same through the Court's ECF/CM electronic service on August 19, 2016, to the following:

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