

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DEBORRAH HARVEY as Administrator  
of the Estate of Gregory Harvey,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ECF CASE

Case No. 14-CV-1787 (PAC)

**SECOND AMENDED  
COMPLAINT**

COMES NOW THE PLAINTIFF, Deborah Harvey as Administrator of the Estate of Gregory Harvey, by her attorneys, Adam S. Handler, Esq., of Pollack, Pollack, Isaac & DeCicco, LLP, and Steven M. Warshawsky, Esq., of The Warshawsky Law Firm, for her second amended complaint against the defendant and alleging as follows:

**NATURE OF THE CASE**

1. This is an action arising from the defendant's negligent and wrongful conduct in failing to provide the decedent, Gregory Harvey, with appropriate, necessary, and timely medical care when he was a federal immigration detainee at the Orange County Correctional Facility in Goshen, New York. As a direct and proximate result of the defendant's negligent and wrongful conduct, Mr. Harvey was not diagnosed with and treated for stomach cancer in a timely manner. The defendant's negligent and wrongful conduct caused Mr. Harvey severe and permanent injuries, physical pain and suffering,

mental and emotional pain and suffering, shortened life expectancy, loss of enjoyment of life, lost income, and, ultimately, death.

2. The plaintiff asserts claims against the United States of America pursuant to the Federal Tort Claims Act (FTCA), which waives the federal government's sovereign immunity "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Under the FTCA, New York law applies to this case.

3. This action originally was filed on March 14, 2014, by plaintiff Gregory Harvey in his individual capacity. Mr. Harvey died as a result of the personal injuries at issue in this case on June 18, 2014. The first amended complaint was filed on January 20, 2016, by Mr. Harvey's widow, Deborah Harvey, in her capacity as Administrator of the Estate of Gregory Harvey. This second amended complaint is being filed by Mrs. Harvey, also in her representative capacity, to assert a wrongful death claim on behalf of Mr. Harvey's beneficiaries, distributees, and next of kin, and to withdraw the claim asserted in the previous complaints against ICE Officer John Doe pursuant to Bivens v. Six Unknown Federal Narcotics Agents and its progeny.

### **PARTIES**

4. Plaintiff **Deborrah Harvey** is an adult person who resides in Queens, New York. Gregory Harvey and Deborrah Harvey were married on November 26, 1991, in Brooklyn, New York. Gregory Harvey died on June 18, 2014, in Lauderdale Lakes, Florida. On January 14, 2015, Deborrah Harvey was granted letters of limited administration over the Estate of Gregory Harvey by the Surrogate's Court of Orange County, New York. She is prosecuting this action in her capacity as Administrator of the Estate of Gregory Harvey.

5. Defendant **United States of America** is the government entity with jurisdiction and control over the agencies and employees whose negligent and wrongful conduct caused Mr. Harvey's personal injury and death, as alleged herein.

### **JURISDICTION AND VENUE**

6. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346(b)(1), because this action arises under the laws of the United States.

7. This Court has venue over this action pursuant to 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to the plaintiff's claims occurred in this district.

8. Mr. Harvey properly exhausted his administrative remedies under the FTCA. On or about November 24, 2012, Mr. Harvey filed a timely claim for damage, injury, or death (SF-95) with DHS and ICE and provided

sufficient information and documentation to enable the government to investigate his claim. The government denied his claim by letter dated September 16, 2013, which was mailed on September 17, 2013. This action originally was initiated within six months after the date of mailing of the final notice of denial. A new SF-95 is not required for the plaintiff to assert a “survival” claim on behalf of Mr. Harvey in this action.

9. Mrs. Harvey properly exhausted her administrative remedies under the FTCA with respect to the “wrongful death” claim asserted in this action on behalf of Mr. Harvey’s beneficiaries, distributees, and next of kin. On or about June 6, 2016, Mrs. Harvey filed a timely SF-95 with DHS and ICE, asserting a wrongful death claim on behalf of Mr. Harvey’s beneficiaries, distributees, and next of kin, and she provided sufficient information and documentation to enable the government to investigate her claim. The government denied her claim by letter dated June 13, 2016, which was mailed on or about June 13, 2016. This second amended complaint is being filed within six months after the date of mailing of the final notice of denial.

### **FACTUAL ALLEGATIONS**

10. The decedent, Mr. Harvey, was a native and citizen of Jamaica. He was born in December 1970. Mr. Harvey moved to the United States with his mother in May 1984, when he was thirteen years old. He was a lawful permanent resident.

11. Mr. Harvey lived continuously in the United States since 1984. He attended high school in New York and obtained his G.E.D. in Virginia. At various times, he was employed as a construction worker and commercial truck driver, among other occupations.

12. On August 17, 2010, Mr. Harvey was taken into custody by ICE and served with a Notice to Appear, charging him with deportability under the Immigration and Nationality Act.

13. During the pendency of his immigration proceeding, Mr. Harvey was housed at the Orange County Correctional Facility in Goshen, New York. The Orange County Correctional Facility a/k/a Orange County Jail is owned and operated by the County of Orange, New York, not by the federal government. Upon information and belief, the Orange County Correctional Facility houses federal immigration detainees pursuant to an Intergovernmental Service Agreement (IGSA).

14. Mr. Harvey was housed at the Orange County Correctional Facility from August 17, 2010, until his Release on Recognizance on July 26, 2012. Throughout this period, Mr. Harvey was under the official custody, control, and care of the federal government, specifically, ICE, which maintained ultimate responsibility for Mr. Harvey's safety, health, and welfare.

15. Under the circumstances, there was a "special relationship" between the federal government and Mr. Harvey within the meaning of New York law. This special relationship imposed, among other obligations, the duty to provide Mr. Harvey with reasonable and timely medical care. This duty

further arises from the Fifth Amendment to the United States Constitution and from established ICE policies and procedures, including but not limited to the National Detention Standards. At all relevant times, ICE has acknowledged its legal obligation to provide or arrange for the medical care of immigration detainees, including at ISGA facilities. As alleged herein, the government breached this duty to Mr. Harvey.

16. At all relevant times, medical services for inmates, including federal immigration detainees, at the Orange County Correctional Facility were provided by employees of Correctional Medical Care, Inc., which was contracted by the County of Orange, New York, to provide such services.

17. Beginning on or about August 17, 2010, and continuing thereafter, Mr. Harvey presented to the medical staff at the Orange County Correctional Facility for evaluation, care, and treatment of certain complaints, symptoms, and conditions, including but not limited to the following:

18. On or about January 23, 2011, Mr. Harvey complained that he was not feeling good, had an upset stomach, and was experiencing right lumbar pain. On or about January 26, 2011, he complained about “belly problems,” including vomiting, abdominal pain, and right lumbar pain. On or about January 28, 2011, he complained about vomiting.

19. On or about July 25, 2011, Mr. Harvey complained about left side pain with nausea. On or about August 1, 2011, he complained that he “was very sick,” with vomiting, lack of appetite, and right lumbar pain. On or

about August 8, 2011, he complained that he was “having stomach problems” for three weeks.

20. On or about February 16, 2012, Mr. Harvey complained about right side pain with nausea and occasional vomiting. On or about February 21, 2012, he complained about persistent intermittent epigastric discomfort, nausea, and occasional vomiting. On or about February 28, 2012, he complained that his GI symptoms were persisting.

21. On or about May 12, 2012, Mr. Harvey complained that his GI symptoms were persisting. On or about June 2, 2012, he complained that his medications were not working, that he was vomiting every night, and that he was losing weight.

22. On or about July 2, 2012, Mr. Harvey complained that his GI symptoms were persisting and that he was vomiting 1-2 times per day. He made further complaints of vomiting on or about July 5, July 9, July 12, and July 23, 2012.

23. Mr. Harvey experienced severe weight loss over this period. According to his medical records, when he entered federal custody, he weighed 215 pounds. By July 12, 2012, his weight was down to 164 pounds.

24. On or about February 21, 2012, the medical staff at the jail referred Mr. Harvey for a GI consult, to be performed by an outside physician, to further evaluate and diagnose his ongoing gastrointestinal problems.

25. ICE was required to approve, schedule, and transport Mr. Harvey to another health facility where the GI consult could be performed.

The 2011 National Detention Standards expressly provide that “[a] detainee who is determined to require health care beyond facility resources shall be transferred in a timely manner to an appropriate facility.” The ICE employees who were responsible for Mr. Harvey’s welfare failed to arrange for Mr. Harvey’s GI consult in a timely manner. Under the circumstances, these employees breached their duty of care to Mr. Harvey.

26. The medical staff notes from February 28, 2012, indicate “await[ing] GI consult.”

27. On or about July 2, 2012, the medical staff at the jail reiterated their request for a GI consult for Mr. Harvey. The medical staff notes from that date state “GI consult for EGD/colonoscopy ASAP.”

28. The medical staff notes from July 9, 2012, indicate “GI consult pending.”

29. The medical staff notes from July 12, 2012, indicate “GI consult pending.”

30. Mr. Harvey was not provided with the GI consult until July 25, 2012, more than five months after it was first requested by the medical staff at the jail. At or around this time, Mr. Harvey underwent an endoscopy procedure, which should have been performed several months earlier. He was diagnosed with stomach cancer that had metastasized to his liver. He was advised that his condition was terminal. Upon information and belief, he was advised that he had six months to live.

31. Upon information and belief, based on his terminal stomach cancer diagnosis, Mr. Harvey was released from ICE custody on July 26, 2012. Upon information and belief, Mr. Harvey's last contact with any ICE officers was a few months later.

32. Throughout Mr. Harvey's detention at the Orange County Correctional Facility, he was in regular contact with ICE employees, including immigration enforcement officers Daniel Marino and Shaun McAuliffe and other members of the Jail Liaison Unit, whose duties included ensuring that the National Detention Standards were followed at the jail.

33. In accordance with the National Detention Standards, members of the Jail Liaison Unit visited the jail 2-3 times per week and met with the immigration detainees.

34. During these visits, Mr. Harvey advised the ICE employees about his ongoing medical complaints and concerns. On multiple occasions, Mr. Harvey complained to ICE employees about the poor quality of medical care he was receiving at the jail and asked to be seen by different doctors. The ICE employees who were responsible for Mr. Harvey's welfare, including Officer Marino, Officer McAuliffe, and their supervisors, failed to ensure that Mr. Harvey was receiving appropriate medical care at the jail. Under the circumstances, these employees breached their duty of care to Mr. Harvey.

35. From on or about February 21, 2012, the defendant knew that Mr. Harvey required a GI consult to evaluate, diagnose, and treat his ongoing gastrointestinal problems.

36. From February 2012 to July 2012, during their weekly meetings, Mr. Harvey repeatedly complained to Officer McAuliffe about the delay in arranging for the GI consult. Several times, he told Officer McAuliffe, “I’m dying.” In response to these complaints, Officer McAuliffe told Mr. Harvey, “You’re not dying. Everything takes time.” No explanation was given to Mr. Harvey for the delay in arranging the consult, other than “everything takes time” and also that the “procedures” had to be followed. Under the circumstances, Officer McAuliffe breached his duty of care to Mr. Harvey.

37. The log book maintained by the Jail Liaison Unit shows that Mr. Harvey complained about his ongoing medical problems on numerous occasions:

(a) On August 8, 2011, he told Officer Marino that “for some time he has been having stomach issues and he no longer wants to see a nurse, he wants to see a doctor.”

(b) On February 21, 2012, he told Officer McAuliffe that “medical took him on/off meds and [he] wants to know his diagnosis” and he asked Officer McAuliffe to obtain his medical records for him.

(c) On March 20, 2012, he asked Officer McAuliffe about the “status of [his] being sent out for outside medical procedure.”

(d) On May 20, 2012, he told Officer McAuliffe that he was “coughing up blood” and that “ICE is ignoring his medical needs.”

(e) On May 11, 2012, he “continue[d] to complain about [his] health” and told Officer McAuliffe that he “wants an outside doctor.”

(f) On July 3, 2012, he told Officer McAuliffe that he “went to doctor but OCJ [Orange County Jail] Medical is not helping” and he “keeps losing weight.”

38. At all relevant times, ICE employees, including Officer Marino, Officer McAuliffe, and their supervisors, were on notice that Mr. Harvey was suffering from a serious medical condition and was in need of medical evaluation, care, and treatment beyond that being provided by the medical staff at the Orange County Correctional Facility. The defendant failed to take action to provide or arrange for appropriate medical care for Mr. Harvey.

39. As a direct and proximate result of the defendant’s negligent and wrongful conduct, Mr. Harvey was not diagnosed with and treated for stomach cancer in a timely manner. The defendant’s negligent and wrongful conduct caused Mr. Harvey severe and permanent injuries, physical pain and suffering, mental and emotional pain and suffering, shortened life expectancy, loss of enjoyment of life, lost income, and, ultimately, death.

40. After being diagnosed with stomach cancer in or about July 2012, Mr. Harvey was admitted to the Orange Regional Medical Center in Middletown, New York, where he was treated with surgery and chemotherapy for approximately eight weeks. After his discharge, Mr. Harvey moved to Florida, where he continued to receive chemotherapy and other treatment related to his stomach cancer and surgeries.

41. From in or about 2011 to the end of his life, Mr. Harvey suffered severe physical, mental, and emotional pain and suffering, on a daily basis, including but not limited to: He was in constant pain and discomfort. He could not eat normally. He vomited frequently. He was lethargic. He could not work. He could not engage in normal activities of daily living. He had limited social interactions. For many months after his discharge, he required a feeding tube, which was removed surgically in 2013. He wore a brace to hold his abdomen in place. He had a permanent PICC line inserted for the chemotherapy. He was depressed. The only time he felt relief was when he was asleep.

42. Mr. Harvey died on June 18, 2014. The Certification of Death from the State of Florida lists cancer of the stomach as the cause of death. Mr. Harvey was buried in Forest Law North, Pompano Beach, Florida.

**COUNT ONE: SURVIVAL CAUSE OF ACTION**

43. Plaintiff repeats and re-alleges Paragraphs 1-42 above.

44. At all relevant times, defendant United States of America, through its employees and agents, owed a duty of care to Mr. Harvey, specifically the duty to provide reasonable and timely medical care, in accordance with New York tort law.

45. As alleged above, the United States, through its employees and agents, breached this duty of care by failing to provide or arrange for appropriate medical care for Mr. Harvey, including but not limited to failing to

reasonably supervise the provision of medical care to Mr. Harvey at the Orange County Correctional Facility, failing to reasonably ensure that Mr. Harvey received reasonable and timely medical care, and failing to approve and arrange the required GI consult for Mr. Harvey in a timely manner.

46. As a direct and proximate result of the wrongful and negligent acts and omissions of federal employees, Mr. Harvey was not diagnosed with and treated for stomach cancer in a timely manner.

47. The United States' wrongful conduct caused Mr. Harvey severe and permanent injuries, physical pain and suffering, mental and emotional pain and suffering, shortened life expectancy, loss of enjoyment of life, lost income, and, ultimately, death.

48. Pursuant to New York tort law, the plaintiff asserts a "survival" cause of action on behalf of Mr. Harvey's estate, which is entitled to recover damages for Mr. Harvey's conscious pain and suffering prior to his death, his lost earnings prior to his death, his medical, nursing, and rehabilitation expenses, and his funeral expenses.

**COUNT TWO: WRONGFUL DEATH CAUSE OF ACTION**

49. Plaintiff repeats and re-alleges Paragraphs 1-48 above.

50. At all relevant times, defendant United States of America, through its employees and agents, owed a duty of care to Mr. Harvey, specifically the duty to provide reasonable and timely medical care, in accordance with New York tort law.

51. As alleged above, the United States, through its employees and agents, breached this duty of care by failing to provide or arrange for appropriate medical care for Mr. Harvey, including but not limited to failing to reasonably supervise the provision of medical care to Mr. Harvey at the Orange County Correctional Facility, failing to reasonably ensure that Mr. Harvey received reasonable and timely medical care, and failing to approve and arrange the required GI consult for Mr. Harvey in a timely manner.

52. As a direct and proximate result of the wrongful and negligent acts and omissions of federal employees, Mr. Harvey was not diagnosed with and treated for stomach cancer in a timely manner.

53. The United States' wrongful conduct caused Mr. Harvey severe and permanent injuries, physical pain and suffering, mental and emotional pain and suffering, shortened life expectancy, loss of enjoyment of life, lost income, and, ultimately, death.

54. Mr. Harvey was survived by his spouse (Mrs. Harvey), three adult children, and other persons who are his beneficiaries, distributees, and next of kin. During his lifetime, Mr. Harvey visited with and provided financial support to them, and he would have continued to do so had he lived.

55. Pursuant to New York tort law, the plaintiff asserts a "wrongful death" cause of action on behalf of Mr. Harvey's beneficiaries, distributees, and next of kin, who are entitled to recover damages for their pecuniary losses, the lost value of Mr. Harvey's estate that would have been inherited, and funeral expenses they paid as a result of Mr. Harvey's death.

**PRAYER FOR RELIEF**

WHEREFORE the Plaintiff demands judgment against the Defendant for:

- A. A judgment declaring that the United States is liable for the “survival” claim asserted on behalf of Mr. Harvey (Count One);
- B. A judgment declaring that the United States is liable for the “wrongful death” claim asserted on behalf of Mr. Harvey’s beneficiaries, distributees, and next of kin (Count Two);
- C. An award of compensatory damages, as authorized by law, in an amount to be proved at trial;
- D. Pre-judgment and post-judgment interest, as authorized by law;
- E. Attorney’s fees, costs, and disbursements, as authorized by law; and
- F. All other relief that the plaintiff may be entitled to under law, or as justice may require.

Dated: October 28, 2016  
New York, New York

Respectfully submitted,

*Adam S. Handler*

By: \_\_\_\_\_

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