No. 23-

IN THE

Supreme Court of the United States

LEASA MARIE WRIGHT, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF GARY DUANE SCHAUER, DECEASED,

Petitioner,

v.

CITY OF PONCA CITY, KELLI KINCAID, KATELYNN LAWSON, AND ERVING ALTAMIRANO, EMTS AND EMPLOYEES OF CITY OF PONCA CITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Decedent, Gary Schauer, was injured in an altercation which resulted in a broken neck and partial paralysis. The Emergency Medical Technicians, ("EMTs"), were aware of his spinal court injury but nevertheless moved him without stabilizing his neck, which resulted in complete paralysis and eventual death. The City of Ponca City was sued for violation of his civil rights for actively injuring him and not for inadequate medical care. The District Court for the Western District of Oklahoma Dismissed the claim and the Tenth Circuit affirmed. A Petition for Rehearing en banc was denied.

This decision conflicts with the Third Circuit case of *Ziccardi v. City of Philadelphia,* 288 F.3d 57 (3d Cir. 2002), under virtually identical facts. The Tenth Circuit rejected Petitioner's argument that any reasonable EMT would know that this was obviously unlawful and held that the EMTs were entitled to qualified immunity *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020). The Petitioner also sued the City of Ponca City for failure to train the EMTs in the proper handling of patients with spinal cord injuries. The EMTs stated that their usual practice was not to immobilize intoxicated patients even if they exhibited symptoms of a spinal cord injury.

The Questions Presented, therefore, are:

1. Is it a violation of substantive due process for state medical personnel to actively and affirmatively inflict injury on a patient?

2. Is it an obvious violation of a patient's rights to transport a patient with a spinal cord injury without immobilization?

3. Does Petitioner state a plausible claim for municipal liability when the EMTs admit that it is their standard practice and routine not to immobilize intoxicated patients?

4. Is Petitioner entitled to limited discovery to uncover evidence of the City's policy to which only the City has access?

PARTIES TO THE PROCEEDINGS

The parties are Petitioner, Leasa Marie Wright, as Special Administrator of the Estate of Gary Duane Schauer, Deceased, City of Ponca City, Kelli Kincaid, Katelynn Lawson, and Erving Altamirano, EMTs and employees of City of Ponca City.

RELATED PROCEEDINGS

- *Wright v. City of Ponca City, et al.,* No. 5:21-CV-01158-HE, U. S. District Court for the Western District of Oklahoma. Judgment entered July 28, 2022

- *Wright v. City of Ponca City, et al.,* No. 22-6137, U. S. Court of Appeals for the Tenth Circuit. Judgment entered Sept. 7, 2023 .

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Leasa Marie Wright, as Special Administrator of the Estate of Gary Duane Schauer, Deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, Pet. App. 1a, is unpublished. The opinion of the United States District Court for the Western District of Oklahoma, Pet. App. 20a, is unpublished. The Tenth Circuit's order denying panel rehearing and rehearing en banc, Pet. App. 49a, is unpublished.

JURISDICTION

The Tenth Circuit entered judgment on September 7, 2023. Pet. App. 1a. A timely petition for rehearing en banc, which the Tenth Circuit also treated as a petition for panel rehearing, was denied on October 10, 2023. Pet. App. 49a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen

> of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

The Fourteenth Amendment, Section One, provides in pertinent part:

> … nor shall any State deprive any person of life, liberty, or property, without due process of law….

INTRODUCTION

This Court has held that "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of Oppression." *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 196 (1989). From this it follows that it is only active injury which is prohibited, not failure to provide assistance.

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Id. at 195.

That is the issue presented in this case, namely, whether causing the fatal paralysis of Gary Schauer was an oppressive act by agents of the State, comparable to the use of excessive force by a police officer, or whether it was merely a case of medical malpractice without constitutional consequences. This was the identical question presented to the Third Circuit under nearly identical facts in the case of *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir.2002). In a decision written by then Chief Judge Samuel Alito, the Court upheld summary judgment for the Plaintiff. The issue, as framed by the Court, was whether

> [D]efendants consciously disregarded, not just a substantial risk, but a great risk that serious harm would result if, knowing Smith was seriously injured, they moved Smith without support for his back and neck.

Id. at 66. The Petitioner asked the Tenth Circuit to apply the same standard to the death of her son. The Tenth Circuit refused. She petitions this Court to grant a Writ of Certiorari to resolve this serious circuit split over the interpretation of this Court's holding in *DeShaney* as it applies to active injury by state medical personnel.

STATEMENT OF THE CASE

I. Factual background

Gary Schauer was involved in an altercation outside The Fox, a tavern located in Ponca City, Oklahoma, on December 13, 2019. Pt. App. 3a. He was physically attacked by an assailant, who punched Schauer in the face, causing him to fall to the ground, striking his head

and neck against a vehicle parked there and was injured Pt. App. 3a. Schauer's body appeared to be immediately limp and immobile after hitting the ground. He did not get back up. An employee of The Fox called 911. Pt. App. 3a.

The Ponca City Police Department first arrived on the scene. Corporal Nathan Loe said that Schauer told him he couldn't feel or move his left arm or his legs. Cpl. Loe advised dispatch on the radio of Schauer's condition to relay to Ponca City Fire Department ("PCFD") Pt. App. 3a. Heather Lee, an employee of The Fox, advised dispatch that Schauer was awake but couldn't move Pt. App. 3a. While the EMTs were enroute, they were advised that Schauer could not move his arms or hands and could not feel his legs. When they arrived, Cpl. Loe personally advised them again that Schauer could only move his right-hand Pt. App. 4a.

The EMTs found Schauer lying face-up on the ground. His chief complaint was that he could not feel or move his left arm or his legs. The EMTs specifically asked Schauer if he could move his extremities. Schauer could only move his right arm. The EMTs dismissed Schauer as just drunk. The EMTs stated that they usually just transport drunk patients without immobilization even if they exhibit symptoms of spinal injury Pt. App. 4a.

The EMTs then picked Schauer up, loaded him into the ambulance and transported him without any attempt to stabilize his spine. The EMTs did not even use a cervical collar or a backboard. Defendant EMTs admitted that Schauer should have been fitted with a cervical collar and placed on a backboard. They stated that when a patient

possibly has a broken neck or a neck injury, the basic protocol is to completely immobilize the person so they can't move, because if someone has that kind of injury and you move them, you can cause further and permanent injury Pt. App. 4a.

Schauer was lifted, loaded and transported, without any immobilization to his broken neck, to the Alliance Health Center in Ponca City. The body cam video from the Officers' Body Cams show Schauer's head "flopping" back and forth because of his broken neck when the EMTs picked him up. The evidence is that this caused further injury to Schauer leading to his death. Schauer was later life-flighted to OU Medical Center in Oklahoma City, where he died on December 17, 2019, as a direct result of his spinal cord injuries. Pt. App. 5a.

II. Procedural background

The Petitioner filed suit against the individual EMTs for violation of Schauer's civil rights and against the City of Ponca City, their employer, for failure to train, pursuant to 42 U.S.C.. § 1983. The EMTs and the City filed Motions to Dismiss which were granted. The Petitioner filed an Amended Complaint. The Defendants again filed Motions to Dismiss which were granted without leave to amend. Pt. App. 20a.

The Petitioner appealed. The Tenth Circuit, after oral arguments, affirmed the District Court's dismissal on September 7, 2023. Pt. App. 20. The Petitioner timely petitioned for rehearing en banc, which was denied on October 10, 2023. Pt. App. 49a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit not only did not follow, it did not seriously analyze or discuss, the Third Circuit decision in *Ziccardi,* which was precisely on point. Instead, the Court relied on caselaw limited to the failure to provide adequate medical care to persons who were not in state custody, completely disregarding the issue addressed in *Ziccardi* of whether the active infliction of injury by state medical personnel constituted an abuse of state power under the Fourteenth Amendment.

I. There is a Circuit split over issues of emergency medical care.

A. The issue is whether the state agents actively injured the individual.

The Tenth Circuit failed to recognize that it was the injury actively inflicted on the Decedent which deprived him of civil rights, not any lack of proper medical care. The Court mistakenly analyzed the issues at stake in terms of "defective provision of medical services" and whether such a claim is viable "outside of the context of a custodial setting or situations involving state created danger" or whether such a claim will only shock the judicial conscience "when the state medical provider intends to harm a patient." Pt. App. 14-15a.

The Court repeatedly refers to "defective emergency medical services," Pl App. 13a, "defective provision of medical services," Pl. App. 14-15a, "emergency care free of malpractice," Pl App. 8a n. 6. The Court cites numerous cases in support of this erroneous proposition. None involve the *active* infliction of injury by a state actor.

The Court even cites the Third Circuit case of *Brown v. Commonwealth of Penn., Dep't of Health Emergency Med. Servs. Training Inst.,* 318 F.3d 473, 478 (3d Cir. 2003), which, as the Petitioner pointed out in her Brief, specifically rejected this very argument.

> This case is different from our recent decision in *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir.2002). The paramedics in that case allegedly rendered the plaintiff a quadriplegic by forcefully pulling him off the ground by his arms and throwing him over their shoulders. *Id.* at 59. The allegation in *Ziccardi* was not that paramedics had failed to rescue the plaintiff from a pre-existing injury — as is the allegation in the present case — rather it was that the paramedics actually caused the injury in the first place.

Id. at n. 4. That, of course, is precisely the definitive difference, which the Court completely overlooked. The fact pattern in our case parallels that in *Ziccardi*, not *Brown.*

Although the Court assumed the existence of a constitutional violation, it stated that its conclusion would not change if the fundamental-rights test were applicable. The Court then states that "Wright has not identified a single case supporting the notion the right to bodily integrity imposes upon EMTs the obligation to provide any type of emergency care, let alone emergency care-free of malpractice. Indeed, the case law is uniformly to the contrary." Pt. App. 8a, n. 7. This simply illustrates the depth of the Court's misunderstanding of the legal

issues at stake in this case, as its citation of the *Brown* case above illustrates.

The leading case of *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,* 489 U.S. 189 (1989), involved the failure of a state agency to protect a child from being beaten to death by his father when he was returned to the father's custody. No state actor inflicted any injury on the child, unlike the EMTs in this case, who permanently paralyzed Gary Schauer, which led to his death. In *Linden v. City of Southfield, Michigan,* 75 F.4th 597 (6th Cir. 2023), the emergency medical personnel incorrectly pronounced the victim dead. They did not kill her, unlike Gary Schauer.

In *Salazar v. City of Chicago,* 940 F.2d 233 (7th Cir. 1991), the patient showed no sign of injury and refused to be taken to the hospital. He later died of a latent injury to his liver. Here, Gary Schauer was known to have suffered severe spinal cord injuries, asked for medical assistance, and obviously could not be moved without adequate stabilization. The EMTs *actively* caused his death. In *Bradberry v. Pinellas County,* 789 F.2d 1513 (11th Cir. 1986), a swimmer drowned with a lifeguard failed to rescue him. The lifeguard did not hold him underwater till he drowned and there is clearly no analogy to our case.

The Tenth Circuit cases cited further illustrate this lack of perception. In *Villalpando ex rel. Villalpando v. Denver Health & Hosp. Auth.,* 65 F. App'x 683 (10th Cir. 2003), the widow claimed that the hospital violated her husband's civil right by "failing to provide adequate medical attention" when it did not recommend bypass surgery, a claim certainly unlike any made in this case. In *Johnson ex rel. Johnson v. Thompson,* 971 F.2d 1487 (10th Cir. 1992), the hospital was sued for providing surgical

treatment for some infants born with spina bifida and not others. It did not cause any injury to the infants that died.

The Court's analysis of this case, too, is wide of the mark. Pt. App. 12a. It contended that the Court "rejected the parents' substantive due process claim, holding that because the state did not have custody of the infants, the medical providers did not have a duty to take affirmative steps to preserve the lives of the infants." This, of course, is not the claim that the Petitioner is making. "The parents argue, as does Wright here, that such a right existed because the medical providers took affirmative action by providing some medical services to the infants." This is completely untrue. The Appellant's argument is not that the EMTs took some affirmative action and that they thus had a duty to take other affirmative action but that they took affirmative action which fatally injured Gary Schauer, namely, moving him without immobilization, knowing him to have a spinal cord injury, just as in *Ziccardi.*

The Court then gives the game away by saying, "This court recognizes there is reason to doubt the categoric rule of law apparently set out in *Johnson.*" Pt. App. 12a. There is no such categoric Rule, but it goes on. "In *Gray,* we noted that *Johnson* seemed to ignore Supreme Court precedent noting the availability, pursuant to the shocks-the-conscience test, of a substantive due process claim for arbitrary and oppressive government conduct." In *Gray v. Univ. of Colo. Hosp. Auth.,* 672 F.3d 909 (10th Cir. 2012), the patient was admitted to the Epilepsy Monitoring Unit to be weaned off his anti-seizure medication while being continuously monitored to determine if he would benefit from ameliorative surgery. A technician left the patient temporarily, he suffered a seizure, and died.

The Tenth Circuit sidestepped the issue by saying:

> Today, however, we need not address the breadth of *Johnson's* holding or how that holding might apply in the context of a danger creation claim….

Id. at 929 n. 17.

In this case, by contrast, we are presented with the perfect fact pattern to determine precisely that very issue. Here the State, through its agents, the EMTs, not only created a danger, they inflicted the fatal injury, no less than a police officer firing a fatal shot, essentially a case of excessive medical force. A Writ of Certiorari should be granted to resolve the very question which the Tenth Circuit left unanswered, namely, whether the "arbitrary and oppressive government action" of moving a patient with a spinal cord injury without even elementary immobilization, contrary to the most basic rules of first aid, resulting in his fatal paralysis, "shocks the conscience" and amounts to a substantive due process violation of the victim's civil rights, in Oklahoma no less than in Pennsylvania.

B. The issue is not one of intentional harm but great risk of serious harm.

The Tenth Circuit discounts the Third Circuit's decision in *Ziccardi,* authored by Judge, now Justice, Alito, that the judicial conscience is shocked by nonintentional conduct, as long as the state actor consciously disregarded "a great risk that serious harm would result," Pt. App. 14a, quoting 288 F.3d at 66. The Tenth Circuit, however,

quoted this same language with apparent approval in *Green v. Post,* 574 F.3d 1294, 1307-08 (10th Cir. 2009), with reference to the fact pattern in question.

Yet the Court cited *Green* in this case only for the proposition that EMTs could not be liable without an intent to harm in the absence of clearly established Supreme Court or Tenth Circuit precedent based on the entirely different facts of the non-emergency high speed car chase in *Green* as to whether the officer had time to deliberate. Precisely the purpose of the test adopted in *Ziccardi,* as discussed in *Green*, was to apply to "circumstances where no instantaneous decision is necessary, but where the state actor also does not have the luxury of proceeding in a deliberate fashion." *Green,* 574 F.3d at 1307, quoting *Ziccardi,* 288 F.3d at 66.

See the later discussion in *Sanford v. Stiles,* 456 F.3d 298, 307-310 (3rd Cir. 2006) and the Court's discussion of *Sanford* in *Green,* 574 F.3d at 1307-08 and n. 13:

> The Third Circuit accordingly "articulated three possible standards to determine whether behavior rose to the level of conscience-shocking:
>
> > 1) deliberate indifference; 2) gross negligence or arbitrariness that indeed `shocks the conscience'; and 3) intent to harm." *Sanford*, 456 F.3d at 306.

It was this middle ground that was clarified in *Ziccardi.* Shocking the conscience was always the standard which applied to emergency personnel. The Court in this case,

however, gave short shrift to the *Ziccardi* case, which the Petitioner relied on as the basis for bringing her case as a 1983 civil rights violation.

In *Ziccardi,* Judge Alito and the Third Circuit panel recognized an intermediate standard for determining conscience-shocking behavior, somewhere between deliberate indifference and intent to injure. It was not a matter of failure to provide adequate medical care but of *actively* endangering the life of a helpless victim, resulting in his death. It was more akin to manslaughter than to malpractice.

> [D]efendants consciously disregarded, not just a substantial risk, but a great risk that serious harm would result if, knowing Smith was seriously injured, they moved Smith without support for his back and neck.

Id. at 66.

The question is what state of mind on the part of defendants is required to cause the conscience to be shocked. This is the question which the Court in this case asked. Pt. App. 12a. A Petition for Certiorari should be granted to answer it in accordance with the intermediate standard adopted by the Third Circuit in *Ziccardi,* namely that the EMTs consciously disregarded, not just a substantial risk, but a great risk that serious harm would result if, knowing Schauer was seriously injured, they moved him without support for his back and neck. This would resolve a conflict between these two Circuits as well as potentially other Circuits and resolve uncertainty arising out of this Court's prior jurisprudence on the state of mind required under such circumstances.

II. The Petitioner has a valid claim against the City of Ponca City.

The Tenth Circuit failed to recognize that plaintiff had stated a claim for the city's policy to train its EMTs not to violate the civil rights of patients in Schauer's condition. The Court recognized that qualified immunity on the part of the EMTs does not extend to Ponca City. The dismissal of the claim against the City was affirmed on the ground that the Amended Complaint allegedly does not set out a viable claim for failure to train because it does not plausibly allege deliberate indifference by the City. This Court should grant a Writ of Certiorari to clarify the standard of municipal liability under these circumstances.

A. The issue is whether the City had a policy to train its EMTs to injure.

The Plaintiff's Second Claim for Relief is against the City of Ponca City for inadequate training. Plaintiff's Amended Complaint clearly states deliberate indifference on the part of Ponca City to the rights of intoxicated persons who have suffered a spinal cord injury, as did Gary Schauer. Moreover, it complies with prevailing pleading standards.

The Amended Complaint, Pt. App. 4a., alleges that "The EMTS stated that they usually just transport drunk patients without immobilization." This is not a "formulaic recitation" or "conclusory statement" but a specific fact which makes the claim of a City policy the EMTs are implementing plausible. They usually do what they are told to do by the City. Here the Plaintiff alleged precisely that. "Deliberate indifference to patients who appear to be intoxicated and minimization of their injuries is a

policy of the Defendant City which the Defendant EMTs implemented." Pt. App 6a.

This played a role in *Ziccardi* as well.

> The complaint also alleged that the paramedics' conduct was in accordance with an established city custom of treatment toward intoxicated individuals and that the paramedics' conduct resulted from the city's failure to provide proper training despite prior instances of mistreatment.

288 F.3d at 60.

This alleges a pattern of behavior, *i.e.,* what Ponca City EMTs "usually" do. "[W]here the plaintiff alleges a pattern or a series of incidents of unconstitutional conduct, then the courts have found an allegation of policy sufficient to withstand a dismissal motion." *Griego v. City of Albuquerque,* 100 F.Supp.3d 1192, 1214 (D. N.M. 2015). There a police officer's statements attested to the policy. Here, the Plaintiff has quoted the EMTs' own admission that they "***usually just transport drunk patients without immobilization***." This admission of the EMTs shows a policy or practice of not immobilizing intoxicated patients. At the very least, the admission allows the Court to draw the reasonable inference that the City established a policy or practice of not immobilizing intoxicated patients. Yet, the Court dismisses this as "talismanic." Pt. App. 17a.

The Tenth Circuit, following the precedent of this Court, has held this sufficient to state a claim if "the existence of a widespread practice that, although not

authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Moss v. Kopp,* 559 F.3d 1155, 1169 (10th Cir.), quoting *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988). The Plaintiffs further alleges a causal connection between the policy and the injury to Gary Schauer. "There is a direct causal link between the constitutional deprivation suffered by the Plaintiff's Decedent and the inadequate training provided and improper policies adopted by the Defendant." Pt. App. 6a.

The Amended Complaint makes clear that the EMTs were trained ***not*** to use the proper protocol on intoxicated patients because they resisted immobilization. "If EMTs had been trained to immobilize a patient with a spinal injury and not dismiss him as a drunk, Mr. Schauer's injuries would not have been aggravated, and he would not have been further injured and died." Pt. App. 7a.

The Plaintiff in *Pyle v. Woods,* 874 F.3d 1257, 1266 (10th Cir. 2017), failed to allege that the actions complained of "were taken pursuant to a policy or custom." That is not the case here. The Court, furthermore, stated that a policy or custom includes "an informal custom that amounts to a widespread practice…and the deliberately indifferent failure to adequately train or supervise employees." *Id.* The Petitioner alleges "an official, if unwritten, policy not to immobilize intoxicated patients," based in part on the statements of the EMTs and other information available to the Petitioner.

Petitioner alleges that the EMTs were acting pursuant to a policy of the Ponca City ambulance service not to immobilize drunks. It is not just that they needed more

training to do what they already knew was required of anyone with a spinal cord injury. Rather, they needed to be trained to treat intoxicated patients the same as they would any other patients with the same injury. It was improper training on how to treat intoxicated patients with spinal cord injuries which constitutes the policy or custom of Ponca City which resulted in the fatal injury to Gary Schauer and Plaintiff has more than adequately alleged that in her Amended Complaint.

The Court incorrectly characterizes the Amended Complaint as seeking "to impose municipal liability based on a single incident," Pt. App.17a. This simply is not true. The Amended Complaint makes perfectly clear that this was the repeated, routine, habitual practice of Ponca City EMTs, which under the authority of *Moss* and *Woods* is sufficient to state a claim for relief. Yet the Court nevertheless cites *Jenkins v. Wood,* 81 F.3d 988 (10th Cir. 1996) and *Butler v. City of Norman,* 992 F.2d 1053 (10th Cir. 1993), for the proposition that a plaintiff must identify a specific policymaker if the claim is based on a single incident. Pt. App. 17a.

Here, on the contrary, "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need" for additional training. *Jenkins,* 81 F.3d at 994, quoting *City of Canton v. Harris,* 489 U.S. 378, 390 (1989). Clearly, there is a conflict in how the precedent of this Court is to be applied. This in itself warrants a Writ of Certiorari to clarify the standard of review on municipal liability.

The Court further dismisses the Petitioner's claim against the City, without the citation of any specific authority, for her alleged failure to allege "necessary facts about the contours of the alleged policy and both when and why it came into effect." Pt. App. 18a. This supposedly included "when the relevant training occurred, who conducted the training, or how it was deficient." This sort of detailed fact pleading is inconsistent with notice pleading and invites further review by this Court.

B. The Court failed to recognize the need for discovery on failure to train.

Petitioner submits that she has made out a sufficient claim for failure to train against the City of Ponca City at this early stage to warrant limited discovery on that question before dismissal without leave to amend further is warranted. The Petitioner has stated a plausible claim against the EMTs and inferred a plausible claim against the City for failure to train.

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007). Plaintiff is entitled to conduct discovery to uncover proof of the unwritten policy which is plausibly inferred from the statements and actions of the EMTs. It was error to dismiss the claim against the City, even if the EMTs are granted qualified immunity.

The admission of the EMTs raises a reasonable expectation that discovery will reveal evidence of illegal practices by the Ponca City ambulance service. Here the three (3) EMTs all **admit** they were following the usual practice of not immobilizing drunks. It is not mere speculation that they had been trained to do so. It is the three (3) Defendant EMTs' admissions.

The First Circuit has held that "some latitude" is appropriate when the information needed for a plausible claim is in a defendant's control and cautioning that *Iqbal* and *Twombly* must be "tempered by sound discretion" to achieve "a sensible compromise between competing legitimate interests." *Menard v. CSX Transp., Inc.,* 698 F.3d 40, 45 (1st Cir. 2012). The Fifth Circuit agrees. "As we have said in the past, we do not require plaintiffs to plead facts peculiarly within the knowledge of defendants." *Loosier v. Unknown Med. Doctor,* 435 Fed.Appx. 302, 307 (5th Cir. 2010)(unpublished); *see also McCauley v. City of Chicago*, 671 F.3d 611, n. 2,1 (7th Cir. 2011).

Evidence of the unwritten policy not to immobilize intoxicated patients is peculiarly within the knowledge of the Ponca City ambulance service. Plaintiff is entitled to discover that information. Nevertheless, the District Court rejected Plaintiff's request for discovery because "it is unnecessary to examine the City's training policies in the abstract." The Petitioner, of course, has no desire for abstract discovery, but concrete examination of training materials and deposition of training officers.

The Tenth Circuit completely ignored this discovery issue. What is more, it rejected Plaintiff's Motion to Supplement Record on Appeal, Pt. App. at 3 n. 2. The

Court had authority pursuant to FRE 201 to take judicial notice of an adjudicative fact in a related case. The Tenth Circuit has recognized that it has inherent equitable authority to allow supplementation of the record. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096 (10th Cir. 2010); *U.S. v. Kennedy,* 225 F.3d 1187 (10th Cir. 2000). Petitioner urged the Court to consider that this is an exceptional case in which knowledge of the unwritten policies of the City is peculiarly within the control of the City itself and only discovery in the State case has confirmed the existence of the unwritten policy which resulted in the death of Gary Schauer. It is fortunate that a parallel proceeding in State court has produced this evidence.

The Appellant's Motion sought to supplement the record with excerpts from the deposition of Appellee Katelynn Lawson, an EMT, who is also a Defendant in a lawsuit pending in the District Court of Kay County arising out of the same tragic incident, taken after this Appeal was on file. This deposition was the first opportunity Plaintiff had to do discovery in this matter and it produced revealing testimony from the Defendant which confirmed her previous statements that it was proper protocol to immobilize patients with spinal cord injuries but that it was routine practice by Ponca City EMTs not to do so. Moreover, the Court's insistence on the identity of the specific policymaker would be satisfied by Ms. Lawson's statement that she would have done the very same thing with Mr. Schauer if her supervisor, Ken Eck, the EMS Chief, had been present because they were following Ponca City standards.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-6137

LEASA MARIE WRIGHT,

Plaintiff-Appellant,

v.

CITY OF PONCA CITY; KELLI KINCAID; KATELYNN LAWSON; ERVING ALTAMIRANO,

Defendants-Appellees.

Before PHILLIPS, MURPHY, and ROSSMAN, Circuit Judges.

September 7, 2023, Filed

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix A

I. INTRODUCTION

Gary Schauer suffered a neck injury during an altercation outside a tavern in Ponca City, Oklahoma. When emergency medical technicians ("EMTs") employed by Ponca City arrived on the scene,[1] Schauer told them he could not move his left arm or his legs. The EMTs loaded Schauer into an ambulance without stabilizing his spine. During this process, Schauer's head "flopped" forward. He died a few days later "as a direct result of his spinal cord injuries."

Leasa Wright, special administrator of Schauer's estate, brought this 42 U.S.C. § 1983 suit against the EMTs and Ponca City. Wright claimed the EMTs violated Schauer's right to substantive due process when they, knowing Schauer had a possible spinal cord injury, moved him without a cervical collar and backboard. She asserted Ponca City failed to adequately train its EMTs in the handling of patients with suspected spinal injuries, specifically including intoxicated individuals.

Upon the defendants' motions, the district court concluded Wright's Amended Complaint failed to state a claim for relief. It ruled that the facts set out in the Amended Complaint neither shocked the judicial conscience nor implicated a fundamental right and,

1. The three EMTs, all appellees, are Kelli Kincaid, Katelynn Lawson, and Erving Altamirano. Consistent with the allegations set out in the Amended Complaint, the relevant pleading for purposes of this appeal, Kincaid, Lawson, and Altamirano are referred to collectively as "the EMTs."

therefore, did not amount to a violation of Schauer's right to substantive due process. Absent any underlying constitutional violation on the part of its employees, the district court decided Wright's claim against Ponca City also failed.

Wright appeals, asserting the district court erred in dismissing the Amended Complaint. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** the district court's order of dismissal, although we do so for reasons different than those employed by the district court. *See Brooks v. Colo. Dep't of Corr.*, 12 F.4th 1160, 1174 (10th Cir. 2021) (holding that this court can "affirm the district court for any reason that finds support in the record" (quotation omitted)). We conclude that, even assuming the Amended Complaint states a viable violation of Schauer's right to substantive due process, any such violation is not clearly established. Thus, the EMTs are entitled to qualified immunity. This court further concludes Wright's complaint fails to state a plausible failure-to-train claim against Ponca City.

Appendix A

II. BACKGROUND

A. Factual Background[2]

On December 13, 2019, Schauer was involved in an altercation outside The Fox, a tavern in Ponca City. Amended Complaint ¶ 9. An attacker punched Schauer in the face, causing him to fall to the ground. *Id.* ¶ 10. As he fell, Schauer struck his head and neck against a parked vehicle. *Id.* Immediately thereafter, Schauer's body appeared "limp and immobile"; he did not get back up. *Id.* ¶ 11. An employee of The Fox called 911. *Id.*

Ponca City police officers were the first to arrive on the scene. *Id.* ¶ 12. Schauer told Corporal Nathan Loe that he could not feel or move his left arm or his legs. *Id.* Loe

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2. As we are reviewing the district court's grant of defendants' Fed. R. Civ. P. 12(b)(6) motions to dismiss, we draw the facts from Wright's Amended Complaint. *See Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994) (Rule 12(b)(6) tests "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true"). Notably, Wright incorporated by reference in the Amended Complaint a video recording of the incident giving rise to this action. Thus, it is appropriate to consider the video in resolving whether the Amended Complaint states a valid claim for relief. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). As this court's review is appropriately focused on the allegations set out in the Amended Complaint, together with materials incorporated therein, Wright's Motion to Supplement Record on Appeal with transcripts of a deposition of Lawson taken in a related case is **DENIED**. *See Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282-83 (10th Cir. 2019).

advised dispatch of Schauer's condition so the information could be relayed to the fire department. *Id.* Likewise, Heather Lee, an employee of The Fox, advised dispatch that Schauer was awake but could not move. *Id.* ¶ 13. While EMTs were enroute, they were advised Schauer could not move his arms or hands and could not feel his legs. *Id.* ¶ 14. When they arrived on the scene, Loe personally advised the EMTs that Schauer could only move his right hand. *Id.*

The EMTs found Schauer lying face up on the ground. *Id.* ¶ 15. His chief complaint was that he could not feel or move his left arm or his legs. *Id.* The EMTs specifically asked Schauer if he could move his extremities. *Id.* Schauer could only move his right arm. *Id.* "The EMTs dismissed Schauer as just drunk." *Id.* In so doing, they stated they usually just transport drunk patients without immobilization. *Id.* The EMTs picked Schauer up, loaded him into the ambulance, and transported him without any attempt to stabilize his spine. *Id.* ¶¶ 16, 20. That is, they did not use a cervical collar or backboard. *Id.* The EMTs admitted, after the fact, that Schauer should have been immobilized before being moved to the ambulance. *Id.* ¶ 16. They "stated that when a patient possibly has a broken neck or a neck injury, the basic protocol is to completely immobilize the person so they [cannot] move, because if someone has that kind of injury and you move them, you can cause further and permanent injury."[3]

3. In support of this assertion, Wright's complaint notes the EMTs each made post-incident comments to the police. Amended Complaint ¶¶ 17-19. Kincaid stated as follows: "I told [Altamirano] and [Lawson] later that I wished we would have put a collar on [Schauer] once he got onto the ambulance because they didn't put

Id. Schauer's head "flopped" forward due to his broken neck during the process of moving him from the ground to the cot. *Id.* ¶ 20. Schauer was later life-flighted to the Oklahoma University Medical Center in Oklahoma City; he died as a direct result of his spinal cord injuries on December 17, 2019. *Id.* ¶ 21

Having set out these background allegations, the Amended Complaint moves on to set out two claims for relief. *Id.* ¶¶ 22-36. First, it sets forth a claim against the EMTs. *Id.* ¶¶ 22-25. The claim against the EMTs incorporates the background factual allegations set

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one on him before they moved him onto the cot." *Id.* ¶ 17. For her part, Lawson stated as follows:

> [Kincaid] ended up asking him [Schauer] if he could feel his chest or arms and he lifted his right arm. We picked him up and put him on the cot without using a C-Collar or anything. We just thought he was drunk . . . .
>
> I do remember the guy [Schauer] telling us that he couldn't feel his legs. He was able to move his right arm up at one point. In my opinion, when a patient possibly has a broken neck or a neck injury, the basic protocol is that you completely immobilize the person so they can't move. We do that because if someone has that kind of injury and you move them you can cause permanent injury.

Id. ¶ 18. Finally, Altamirano stated as follows: "I had not been with [the fire department] for very long at the time and was basically in training at the time . . . . We did not put him on a backboard before we did any of that. Looking back, we probably should have taken more precautions." *Id.* ¶ 19.

out above and makes two additional relevant factual assertions. *Id.* ¶¶ 22-25. The Amended Complaint asserts any reasonable EMT should know "moving a patient with a possible spinal injury without immobilization with a cervical collar and backboard ran the risk of greater spinal cord injury." *Id.* ¶ 24. It further asserts the EMTs "consciously disregarded a great risk that serious harm would result if, knowing Schauer was seriously injured, they moved him without support for his back and neck."[4] *Id.* ¶ 25.

The Amended Complaint also sets out a claim against Ponca City. *Id.* ¶¶ 26-36. It alleges Ponca City is responsible for training EMTs and failed to provide such training as to the "handling of patients with suspected spinal injuries." *Id.* ¶¶ 26-27. Ponca City's "failure to train

4. The portion of the Amended Complaint setting out a claim against the EMTs makes the following two additional allegations: (1) at the time of his interactions with the EMTs, Schauer had a clearly established constitutional right to bodily integrity; and (2) any reasonable EMT should have known during the relevant time period that Schauer had such a right. Amended Complaint ¶¶ 22-23. These allegations are not factual assertions but are, instead, legal assertions. *See Harper v. Young*, 64 F.3d 563, 566 (10th Cir. 1995) ("The identification of the liberty interests that are protected by the Due Process Clause is a question of federal constitutional law that we review *de novo*."); *Pyle v. Woods*, 874 F.3d 1257, 1263 (10th Cir. 2017) ("Whether a constitutional right is clearly established is a question of law which we review *de novo*."). This court "need not accept legal conclusions contained in the complaint as true." *Est. of Lockett ex rel. Lockett v. Fallin*, 841 F.3d 1098, 1107 (10th Cir. 2016). We address the ramifications of these legal assertions more fully below. *See infra* n.6.

resulted from a deliberate, conscious choice" and exhibits "deliberate indifference to the safety of members of the public" who suffer spinal injuries. *Id.* ¶¶ 28, 33. "Deliberate indifference to patients who appear to be intoxicated and minimization of their injuries" is a policy of Ponca City that was implemented by the EMTs. *Id.* ¶ 34. Furthermore, harm to Schauer "was a foreseeable and direct result of" Ponca City's conduct. *Id.* ¶ 30.[5] That is, Schauer "was placed at greater risk of serious bodily harm and death as a result of" Ponca City's actions. *Id.* ¶ 31. Finally, the Amended Complaint alleges "[t]here is a direct causal link between the constitutional deprivation suffered by [Schauer] and the inadequate training provided and improper policies adopted" by Ponca City. *Id.* ¶ 35. "If EMTs had been trained to immobilize a patient with a spinal injury and not dismiss him as a drunk, [Schauer's] injuries would not have been aggravated, and he would not have been further injured and died." *Id.*

5. The Amended Complaint also set out the following allegation: "[Ponca City] intentionally chose to give priority to the operation of the ambulance service as a money-making operation over the right of patients to be free of medical malpractice and to be secure in their bodily integrity." Amended Complaint ¶ 29. The import of this allegation is less than clear. In any event, Wright does not rely on this allegation on appeal in support of her argument that she stated a plausible failure-to-train claim against Ponca City. Indeed, she does not even cite to this allegation in her appellate briefs. Accordingly, this court does not address the matter further.

B. Procedural Background

Wright filed a complaint and an Amended Complaint. The only meaningful difference between the two pleadings for purposes of resolving this appeal is that the original complaint alleges Schauer asked for an ambulance to be called, while the Amended Complaint asserts an employee of The Fox called 911. In a series of motions, the EMTs and Ponca City asked the district court to dismiss Wright's action because her complaints failed to state a valid claim for relief. The motions to dismiss filed by the EMTs specifically invoked an entitlement to qualified immunity. The district court granted the defendants' motions, ultimately dismissing the Amended Complaint without leave to amend.

The district court began by concluding the Amended Complaint failed to state a violation of substantive due process on the part of the EMTs. Relying on this court's decision in *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008), the district court undertook a dual-track analysis.[6] It first determined that, outside of the

6. The district court took this dual-track approach because the Amended Complaint asserts Schauer had a fundamental right to bodily integrity. *See supra* n.4. *Seegmiller* does suggest both the shocks-the-conscience and fundamental-rights tests apply in analyzing alleged violations of substantive due process. 528 F.3d at 768-69. In *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079 n.1 (10th Cir. 2015), however, this court concluded the relevant language from *Seegmiller* was dicta and Supreme Court precedent mandates that, in cases of alleged government-official misconduct, the shocks-the-conscience test is the only applicable test. *Id.; see*

context of a "special relationship," the right to bodily integrity does not impose an affirmative duty on state actors to provide adequate medical care. *See Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 923-24 (10th Cir. 2012); *Johnson*, 971 F.2d at 1496; *see also Villalpando ex rel. Villalpando v. Denver Health & Hosp. Auth.*, 65 F. App'x 683, 687 (10th Cir. 2003) (unpublished disposition cited solely for its persuasive value). The district court then analyzed whether Wright's Amended Complaint

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also Dawson v. Bd. of Cnty. Comm'rs of Jefferson Cnty., 732 F. App'x 624, 633-36 (10th Cir. 2018) (Tymkovich, C.J., concurring) (unpublished disposition cited exclusively for its persuasive value). Because this case involves allegedly arbitrary conduct by a state official or entity, the question whether the Amended Complaint states a constitutional violation must be judged exclusively by reference to the shocks-the-conscience test. Importantly, however, in reviewing the claims against the EMTs, this court assumes the existence of a constitutional violation and affirms the dismissal of those claims on the basis the law is not clearly established. In any event, this court's conclusion that the law is not clearly established would not change even if the fundamental-rights test were somehow applicable to the claim set out against the EMTs or Ponca City. Wright has not identified a single case supporting the notion the right to bodily integrity imposes upon EMTs the obligation to provide any type of emergency care, let alone emergency care free of malpractice. Indeed, the case law is uniformly to the contrary. *See Johnson ex rel. Johnson v. Thompson*, 971 F.2d 1487, 1495-96 (10th Cir. 1992); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); *see also Linden v. City of Southfield, Michigan*, 75 F.4th 597, 602 (6th Cir. 2023); *Brown v. Commonwealth of Penn., Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 478 (3d Cir. 2003); *Salazar v. City of Chicago*, 940 F.2d 233, 237 (7th Cir. 1991); *Bradberry v. Pinellas Cnty.*, 789 F.2d 1513, 1517 (11th Cir. 1986).

plausibly alleged conscience shocking behavior on the part of the EMTs. It answered that question in the negative, concluding as follows: "While [Wright's] allegations may rise to the level of the unintentional aggravation of [Schauer's] injuries or tortious conduct, they do not allege that the EMTs intentionally aggravated existing injuries or intentionally inflicted additional injuries on [Schauer]." Having determined no employee of Ponca City violated Schauer's right to substantive due process, the district court ruled that Wright's claims against the City necessarily failed. *See Crowson v. Wash. Cty. State of Utah*, 983 F.3d 1166, 1187 (10th Cir. 2020) ("[A] failure-to-train claim may not be maintained [against a municipality] without a showing of a constitutional violation by the allegedly un-, under-, or improperly-trained [municipal employee]."). Having concluded Wright had "not alleged a substantive due process claim," the district court noted it was "unnecessary to address whether, for purposes of qualified immunity, any pertinent right was clearly established."

III. ANALYSIS

A. Standard of Review

This court reviews Fed. R. Civ. P. 12(b)(6) dismissals de novo. *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1368 (10th Cir. 2015). In undertaking this review, "[w]e accept all the well-pleaded allegations of the complaint as true and . . . construe them in the light most favorable to" the nonmoving party. *Id.* (quotation omitted). "[A] complaint must contain sufficient factual matter, accepted

as true, to state a claim to relief that is plausible on its face. 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not sufficient to state a claim for relief. *Id.* "An allegation is conclusory where it states an inference without stating underlying facts or is devoid of any factual enhancement." *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Finally, as particularly relevant to this court's analysis of Wright's claims against the EMTs, we review de novo the legal question whether a constitutional right is clearly established for purposes of qualified immunity. *Pyle*, 874 F.3d at 1263.

B. Discussion

1. Claim against the EMTs

Qualified immunity shields governmental 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, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The EMT's motion to dismiss raised a qualified immunity defense to the

claim asserted against them in the Amended Complaint. Because the EMTs raised a claim of qualified immunity, the burden shifted to Wright to show that the EMTs are not entitled to that immunity. *Shepherd v. Robbins*, 55 F.4th 810, 815 (10th Cir. 2022).

The qualified immunity test is a two-part inquiry. To avoid application of the doctrine, Wright must demonstrate that the EMTs violated Schauer's right to substantive due process and that Schauer's constitutional rights were clearly established at the time of the EMTs' conduct. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). This court has discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 236. The substantive due process claim alleged against the EMTs involves a situation "in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Id.* at 237. Accordingly, the provident course is for this court to focus our analysis exclusively on the clearly established prong of the qualified immunity test.

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (quotations omitted). To satisfy this high threshold, there must exist Supreme Court or Tenth Circuit precedent on point or, alternatively, the established weight of authority from other courts must support the plaintiff's

view of the law. *Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010). The law is not clearly established unless this precedent "place[s] the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). A reasonable official possesses the requisite understanding if "courts have previously ruled that materially similar conduct was unconstitutional, or if a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct at issue." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008) (quotation and alteration omitted). "The dispositive question [for qualified immunity] is whether the violative nature of particular conduct is clearly established," and "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 12 (quotations and emphasis omitted).

Wright has not carried her burden of demonstrating the right she asserts the EMTs violated is clearly established. This court has, in rather stark terms, rejected the notion that state-employed medical officials can deprive citizens of their right to substantive due process by denying or misapplying medical care. *Johnson*, 971 F.2d at 1495-96. In *Johnson*, parents sued medical providers employed by an Oklahoma state hospital. *Id.* at 1490. The parents claimed the medical providers gave insufficient medical treatment to infants born with spina bifida. *Id.* at 1490-92. This court rejected the parents' substantive due process claim, holding that because the state did not have custody of the infants, the medical providers did not

have a duty to take affirmative steps to preserve the lives of the infants. *Id.* at 1495-96. The parents argued, as does Wright here, that such a right existed because the medical providers took affirmative action by providing some medical services to the infants. This court rejected the parents' argument, concluding that, outside of a custodial situation, even "willfully indifferent or reckless" conduct in the provision of medical services did not violate the Substantive Due Process Clause. *Id.* Numerous courts have adopted this rule, recognizing a cause of action in only two situations, when a plaintiff is in a custodial setting or when a state actor creates private danger. *See supra* n.6. Given the categorical language in *Johnson*, it is possible that when an individual voluntarily undertakes treatment, "state medical care gone awry . . . can never support a substantive due process claim regardless of the responsible party's conduct or state of mind." *Gray*, 672 F.3d at 929 n.17 (emphasis omitted).

This court recognizes there is reason to doubt the categoric rule of law apparently set out in *Johnson*. In *Gray*, we noted that *Johnson* seemed to ignore Supreme Court precedent noting the availability, pursuant to the shocks-the-conscience test, of a substantive due process claim for arbitrary and oppressive government conduct. *Id. Gray* specifically declined to resolve this question, noting as follows:

> Today, however, we need not address the breadth of *Johnson*'s holding or how that holding might apply in the context of a danger creation claim because Plaintiffs allege Defendants'

> misrepresentations coupled with their policy of permitting EMU staff to leave patients unattended precipitated only a negligent act that caused decedent's death. Sufficient is our holding that Plaintiffs' complaint fails to allege a constitutional deprivation because the Due Process Clause is simply not implicated by an underlying negligent act.

Id. (quotations and alterations omitted); *see also supra* n.6 (explaining that substantive due process claims involving executive action should be evaluated exclusively under the rubric of whether the alleged conduct shocks the judicial conscience). Given this court's decisions in *Johnson* and *Gray*, it is not clear in this circuit whether (1) it is possible to state a substantive due process claim against individual state medical actors outside of the custodial setting and, (2) if it is possible, whether such a claim is only available in the additional context of state-created danger. Thus, we cannot conclude that every reasonable EMT in this circuit would be aware that providing even willfully defective emergency medical services would amount to a substantive due process violation.

There exists an additional reason the law underlying the Amended Complaint's claim against the EMTs is not clearly established. Even if this court were to assume some kind of claim could be brought against the providers of emergency medical care outside the context of a custodial setting or danger creation, it is not remotely clear what state of mind is required to state such a claim. Relying on the Supreme Court's decision in *Cnty. of Sacramento*

v. Lewis, 523 U.S. 833, 836, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), the EMTs argue they cannot be liable for violating Schauer's right to substantive due process unless they intended to harm him. Notably, as recognized by the district court and conceded by Wright, the Amended Complaint does not allege the EMTs intended to harm Schauer. Wright, nevertheless, cites to the Third Circuit's decision in *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 66 (3d Cir. 2002), for the proposition that in the context of the provision of emergency medical care, the judicial conscience is shocked by nonintentional conduct, as long as the state actor consciously disregarded "a great risk that serious harm would result." The problem for Wright is that this court has never hinted at the possibility EMTs could be liable for the defective provision of emergency services absent an intent to harm. Indeed, she has conceded as much in her opening brief on appeal[7] and in her filings before the district court. [8] Absent clearly established Supreme Court or Tenth Circuit precedent indicating the EMTs could be liable in the absence of an intent to harm, the law is not clearly established. *Green v. Post*, 574 F.3d 1294, 1309-10 (10th Cir. 2009); *Ralston v. Cannon*, No. 19-1146, 2021 WL 3478634, at *5-6 (10th Cir. Aug 9, 2021) (unpublished disposition cited solely for its persuasive value).

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7. Wright's Opening Br. at 15-16 ("There is not a case on point in this Circuit and Appellants urge the Court to follow *Ziccardi* in resolving this case."); *id.* at 25 ("There appears to be no Tenth Circuit case on point.").

8. R. Vol. 1 at 79-80 (recognizing importance of the issue of intent and noting this court "has not addressed a similar non-prisoner infliction or aggravation of injury medical case"); *id.* at 115 (same).

In sum, the law in this area is entirely unclear. It is not clearly established the Substantive Due Process Clause can support a claim of defective provision of medical services outside of the context of a custodial setting or situations involving state created danger. Even if such a claim is viable, it is not settled whether such a claim will only shock the judicial conscience when the state medical provider intends to harm a patient. Absent clearly established law, the EMTs are entitled to qualified immunity and the district court did not err in dismissing the claim against the EMTs.

2. Claim against Ponca City

"Qualified immunity is not available as a defense to municipal liability." *Pyle*, 874 F.3d at 1264. Accordingly, our conclusion the law was not clearly established at the time the EMTs interacted with Schauer does not resolve Wright's claim against Ponca City. Instead, this court affirms the dismissal of the claim against Ponca City because the Amended Complaint does not set out a viable failure-to-train claim. In particular, the Amended Complaint does not plausibly allege deliberate indifference on the part of Ponca City.

"[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *see also id.* at 691 ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory."). Instead, "the government as an entity" can only be held liable "when execution of

a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694. To establish municipal liability a plaintiff must demonstrate the existence of a "municipal policy or custom." *Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010). Although such a policy or custom can take multiple forms, *see id.*, the only form at issue here is an alleged failure to train. Importantly, to state a viable failure-to-train claim, the plaintiff must satisfy the "stringent 'deliberate indifference' standard of fault." *Waller*, 932 F.3d at 1284.[9] In considering whether the Amended Complaint states a plausible allegation of deliberate indifference, this court must keep in mind the Supreme Court's warning that "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011).

To satisfy the stringent deliberate indifference standard, a plaintiff must plausibly allege "a municipal actor disregarded a known or obvious consequence of his action." *Id.* (quotation and alteration omitted). "A less

9. After establishing the existence of a municipal policy or custom, "a plaintiff must demonstrate 'a direct causal link between the policy or custom and the injury alleged.'" *Waller*, 932 F.3d at 1284 (quoting *Bryson*, 627 F.3d at 788). This court need not resolve whether the Amended Complaint plausibly alleged the existence of a causal link because we conclude the Amended Complaint did not plausibly allege the existence of deliberate indifference on the part of Ponca City.

stringent standard of fault for a failure-to-train claim would result in de facto respondeat superior liability on municipalities." *Id.* at 62 (quotation and emphasis omitted). The deliberate indifference standard is satisfied "when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Waller*, 932 F.3d at 1284 (quotation omitted). "[A]bsent a pattern of unconstitutional behavior," deliberate indifference can be found "only in a narrow range of circumstances where a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction." *Id.* (quotation omitted). Such a pattern is necessary because, "[w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Connick*, 563 U.S. at 62 (quotation omitted). Evidence of "a pre-existing pattern of violations" is only rarely unnecessary, and then only "in a narrow range of circumstances" in which "the unconstitutional consequences of failing to train" are "highly predictable" and "patently obvious." *Id.* at 63-64 (quotation omitted).

The Amended Complaint fails to state a plausible claim that Ponca City acted with deliberate indifference to constitutional violations on the part of its EMTs. Most notably, the Amended Complaint seeks to impose municipal liability based on a single incident without identifying any relevant policymaker. *But see Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996) ("[W]here a plaintiff seeks to

impose municipal liability on the basis of a single incident, the plaintiff must show the particular illegal course of action was taken pursuant to a decision made by a person with authority to make policy decisions on behalf of the entity being sued."); *Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability . . . unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."). There is no hint in the Amended Complaint that the alleged policy caused harm to any individual, let alone any individual similarly situated to Schauer. Given all this, the Amended Complaint's talismanic assertion that Ponca City acted with deliberate indifference and that the harm to Schauer was foreseeable is not enough to state a plausible claim. Instead, as *Jenkins* and *Butler* make clear, the Amended Complaint must identify a particular decision or a municipal policymaker to whom this alleged failure to train can be attributed. In the absence of such allegations, the Amended Complaint can only be seen as attempting to impose respondeat superior liability on Ponca City. *Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009).

In addition to failing to allege any facts regarding a relevant policymaker, the Amended Complaint fails to allege necessary facts about the contours of the alleged policy and both when and why it came into effect. The Amended Complaint does not make any allegations as to when the relevant training occurred, who conducted the training, or how it was deficient. Instead, it merely alleges,

in entirely conclusory fashion, that EMTs were somehow led to believe it is acceptable to minimize the injuries of intoxicated or apparently intoxicated individuals and, concomitantly, to transport them without immobilization even in the case of a possible spinal injuries. *See supra* at 3-5 (summarizing the very limited allegations set out in the Amended Complaint). There is so little information in the Amended Complaint that it is simply not plausible to conclude the relevant policy arises from indifference to the constitutional rights of those served by Ponca City's EMTs. The conclusory allegations set forth in the Amended Complaint fail to plausibly nudge the municipal liability claim articulated in the Amended Complaint past respondeat superior liability to municipal liability based on deliberate indifference.

The entirely limited and conclusory allegations set out in the Amended Complaint are not enough to plausibly state the type of claim at issue here. "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. at 61. Given the "most tenuous" nature of such claims, more developed allegations than those presented here are required to plausibly state a failure-to-train claim. *Kan. Penn Gaming*, 656 F.3d at 1215; *Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). The Amended Complaint's conclusory allegations fail to establish that facts available to Ponca City policymakers put those policymakers on actual or constructive notice that acts or

omissions by its EMTs were substantially certain to cause a violation of constitutional rights. *Iqbal*, 556 U.S. at 679 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." (quotations and alteration omitted)); *Waller*, 932 F.3d at 1284. Thus, the district court did not err in dismissing the claim against Ponca City.

IV. CONCLUSION

The order of the United States District Court for the Western District of Oklahoma dismissing the Amended Complaint is hereby **AFFIRMED**.

Entered for the Court

Michael R. Murphy
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED JULY 28, 2022

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-21-1158-HE

LEASA MARIE WRIGHT,

Plaintiff,

vs.

CITY OF PONCA CITY, *et al.*,

Defendants.

July 28, 2022, Decided
July 28, 2022, Filed

ORDER

Presently at issue is defendants' second effort to dismiss plaintiff's claims against them. Plaintiff Wright is the special administrator of the estate of Gary Duane Schauer. She asserts substantive due process claims against the City of Ponca City and three EMT's employed by the City.

The defendants previously moved to dismiss the original complaint on the basis it failed to state a claim

against any of them. The individual defendants also asserted the defense of qualified immunity. The court granted the motion on the basis of failure to state a claim but granted plaintiff leave to file an amended complaint. Order, June 1, 2022 [Doc. #33]. She has now done so.

The amended complaint is almost identical to the original complaint. The amended complaint deletes the allegation that plaintiff asked for an ambulance to be called and replaces it with an allegation that a bar employee called 911. It adds a statement purporting to "incorporate" the police body camera video into the complaint. It also adds a paragraph to the claim against the City of Ponca City noting plaintiff has not had the opportunity to conduct discovery and that information as to pertinent city policies is in the control of the defendants. Defendants have again moved to dismiss, contending the changes from the original complaint do not result in a claim being stated and do not justify a result different from the court's prior order.

The court concurs. The alleged underlying circumstances were described, and the applicable legal standards discussed, in the June 1 order and will not be repeated here. The deletion of the allegation that Mr. Schauer asked for an ambulance to be called does not change the essential consideration — that he was not in state custody nor was there any basis alleged for concluding the state created or enhanced the danger he was in. As a result, to establish a constitutional violation (as opposed to a state law tort claim) a plaintiff must show more than negligence or willful indifference to the decedent's

condition. He or she must show conduct so egregious as to "shock the conscience." *See Hernandez v. Ridley*, 734 F.3d 1254, 1261 (10th Cir. 2013). For the reasons noted in the prior order, the complaint's allegations do not arise to that standard.

Plaintiff relies on the case of *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir. 2002) but that case does not compel some different conclusion. *Ziccardi* involved an appeal from the district court's refusal to grant summary judgment on the basis of qualified immunity. The scope of the appellate inquiry was therefore confined to the legal question of what standard should be applied to determine whether a substantive due process had been established. Once it determined that standard, it remanded the case with instructions that the district court apply that standard and use it for instructing the jury "if one is empaneled." *Id.* at 66-67. *Ziccardi* therefore does not endorse any particular conclusion as to whether conduct like that involved here would or would not make out a violation in the Third Circuit.[1] Further, the Third Circuit has since further concluded that the particular standard

1. *Additionally, while the factual circumstances in Ziccardi had some similarities to those alleged here, they are not identical. For example, in Ziccardi, the individual involved fell off a wall in front of his aunt's house and when the EMT's arrived they apparently thought he might have been drinking. Here, plaintiff's decedent was found outside the door of a tavern where he clearly had been drinking immediately before they arrived. The distinction bears on the question of whether it shocks the conscience, a circumstance-specific inquiry, for the defendants to have dealt with Mr. Schauer on the assumption he was drunk.*

applicable to substantive due process claims against EMTs is the "shock the conscience" standard, the same as the standard determined by the court to be applicable here. *See Brown v. Commonwealth of Pennsylvania,* 318 F.3d 473, 480 (3d Cir. 2003).

The "incorporation" of the body cam video also does not alter the court's conclusions. Incorporating a video clip by reference does not avoid a claimant's obligation to make a "short and plain statement" of the basis for claim. Fed.R.Civ.P. 8(a). That contemplates saying it in words, not just attaching a video clip.[2]

The added reference to a need for discovery as to the City's training efforts also does not change the result. In the absence of a plausible claim being stated against the city employees, it is unnecessary to examine the City's training policies in the abstract.

In sum, the amended complaint does not provide a basis for reaching a conclusion different from that reached as to the original complaint. It fails to state a federal constitutional claim against the defendants and any remedy Mr. Schauer or his estate may be entitled to will necessarily be based on state tort law. The Motions to Dismiss [Doc. Nos. 35 & 36] are therefore **GRANTED**. Plaintiff's claims are **DISMISSED** without prejudice but without leave to amend. Judgment will be entered accordingly.

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2. *The court has, however, reviewed the video clip submitted earlier. It does not suggest some additional basis for a claim not contemplated by plaintiff's written allegations.*

IT IS SO ORDERED.

Dated this 28th day of July, 2022.

/s/ Joe Heaton
*J*OE HEATON
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED OCTOBER 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-6137
(D.C. No. 5:21-CV-01158-HE) (W.D. Okla.)

LEASA MARIE WRIGHT,

Plaintiff - Appellant,

v.

CITY OF PONCA CITY, *et al.*,

Defendants - Appellees.

ORDER

Before **PHILLIPS**, **MURPHY**, and **ROSSMAN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appendix C

Entered for the Court

/s/_____
CHRISTOPHER M. WOLPERT,
Clerk