FILED
United States Court of Appeals
Tenth Circuit

September 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LEASA MARIE WRIGHT,

Plaintiff - Appellant,

v.

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

Defendants - Appellees.

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

ORDER AND JUDGMENT*

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

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

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[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."

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, 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.

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 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

[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 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] *Id.* Schauer's head

[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 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

"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 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.

> 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.

[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.*

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 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

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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.

[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.

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.*

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 context of a

[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 also*

"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 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

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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 (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).

[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. Washington Cnty.*, 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 (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 (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 (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 (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 (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 (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).

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

[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).

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 (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 (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 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

[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.

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