

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**CHRISTOPHER KELSON,  
DAKOTA KELSON, RYLIE  
KIMBRELL, AND THE ESTATE OF  
HIRSHELL FLETCHER, JR.,**

**Plaintiffs,**

v.

**CITY OF DALLAS, a Municipal  
Corporation et al.,**

**Defendants.**

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**Civil Action No. 3:18-CV-3308-L**

**DEFENDANTS KYLE FOSTER CLARK AND BRAD ALAN COX’S  
MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) AND BRIEF IN SUPPORT**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COME NOW Firefighter Kyle Foster Clark (“Clark”) and Firefighter Brad Alan Cox (“Cox”), Defendants in the above entitled and numbered cause, and pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE, files this their motion to dismiss all of Plaintiffs’ claims alleged against Clark and Cox in Plaintiffs’ Second Amended Original Complaint (“Complaint”) (Doc. 34). In support hereof, Defendants Clark and Cox respectfully show the court as follows:

**I. SUMMARY OF MOTION**

In this civil rights action brought pursuant to 42 U.S.C. § 1983, the Plaintiffs, Christopher Kelson, Dakota Kelson, and the Estate of Hirschell Wayne Fletcher, Jr. (“Fletcher”), attempt to assert claims against the City, two Dallas Fire-Rescue firefighters (Clark and Cox), and several police officers for violations of Fletcher’s constitutional rights guaranteed by the Fourth, Eighth and Fourteenth Amendments. Specifically, with respect to Clark and Cox, Plaintiffs attempt to assert a “failure to treat” claim against Clark and Cox, claiming that Clark and Cox violated Fletcher’s Fourteenth amendment rights “not to be deprived of life, liberty, or property without

due process of law and to be accorded the equal protection of the laws guaranteed to Fletcher.”  
Complaint at 12<sup>1</sup>.

Plaintiffs’ Complaint alleges that on December 30, 2016, at approximately 5:30 p.m., Fletcher, who was homeless and suffering from a mental disability (schizophrenia) and mytonic dystrophy (a speech impediment), was assaulted twice and robbed outside a soup kitchen located in Dallas. After the first assault and robbery, Fletcher fled the scene but returned shortly thereafter where he was assaulted again and punched in the head. The blow to the head caused Fletcher to fall and hit his head on a wall, causing severe injury. Complaint at 5-6.

Shortly after the second assault, bystanders flagged down Dallas Police Department Officer Hernandez. After speaking to Fletcher for a moment, Officer Hernandez called for police and medical assistance. *Id.* at 6. Dallas Fire-Rescue paramedics Clark and Cox, and two Dallas police officers arrived at the scene. At this time, Fletcher allegedly made repeated statements to Clark, Cox, and Officer Hernandez that he hurt his head and he needed medical attention; however, because of his homelessness and mental illness, Clark, Cox, and the police officers on the scene assumed Fletcher was drunk and began laughing at Fletcher as he sat on the sidewalk in pain. *Id.* at 6-7. Thereafter, Fletcher was arrested and cited for public intoxication, and taken to the City’s Detention Facility. *Id.* at 7.

The Plaintiffs allege that Fletcher made repeated statements to police officers and jail officials that he was hurt and required medical attention while he was at the detention center, but his pleas were ignored. *Id.* Early the next morning, Fletcher was found unresponsive in his cell,

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<sup>1</sup> Plaintiffs also attempt to assert a wrongful death claim against all of the Defendants (Complaint at 14-15). It is unclear whether Plaintiff Hirschell Wayne Fletcher, Jr.’s surviving children are asserting this wrongful death claim as a derivative claim under 42 U.S.C. § 1983, or as an independent tort claim under Texas law. To the extent that Plaintiffs assert this claim as a derivative claim under 42 U.S.C. § 1983, Clark and Cox maintain that pursuant to the discussion that follows, they are entitled to dismissal of each of Plaintiffs’ 42 U.S.C. § 1983 claims, and thus, they are also entitled to dismissal of all derivative 42 U.S.C. § 1983 claims as well. To the extent that Plaintiffs intend this claim as an independent state law tort claim, Clark and Cox maintain that they are entitled to dismissal of this claim pursuant to Section 101.106 of the Texas Civil Practice and Remedies Code.

and was rushed to the hospital, where Fletcher died because of a slow brain bleed caused by his head injuries suffered the day before. *Id.* at 8.

Clark and Cox now move to dismiss the Plaintiffs' claims against them because the Plaintiffs' Complaint fails to plead facts sufficient to state a plausible claim for relief under the Fourteenth Amendment. Therefore, Clark and Cox are entitled to dismissal of all of Plaintiffs' claims against it.

## II. ARGUMENT AND AUTHORITIES REQUIRING DISMISSAL

### A. Applicable Legal Standards

#### 1. **The standard for dismissal under Rule 12(b)(6): does the complaint state a valid claim for relief?**

Rule 12(b)(6) provides for dismissal of a claim if the complaint fails to state a claim upon which relief can be granted. *Washington v. U. S. Dep't of Hous. & Urban Dev.*, 953 F. Supp. 762, 768 (N.D. Tex. 1996). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims stated in the complaint, and such a motion must be evaluated solely on the basis of the pleadings. *Jackson v. Procunier*, 789 F.2d 307, 309 (5<sup>th</sup> Cir. 1986); *see also, Morin v. Caire*, 77 F.3d 116, 120 (5<sup>th</sup> Cir. 1996).

There are two primary considerations for a court's analysis of the propriety of a motion to dismiss under Rule 12(b)(6). First, the allegations contained in the complaint are to be construed in the plaintiff's favor and all *well-pleaded* facts are to be accepted as true. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5<sup>th</sup> Cir. 2007), citing *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 205 (5<sup>th</sup> Cir. 2004). However, conclusory statements in a complaint are not to be accorded a presumption of truth. *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5<sup>th</sup> Cir. 1982); *Washington*, 953 F. Supp. at 768. Therefore, conclusory allegations and legal conclusions masquerading as factual assertions are not adequate

to prevent dismissal for failure to state a claim. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5<sup>th</sup> Cir. 1993).

Second, the Supreme Court held in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), that the factual allegations in a complaint must be specific enough to raise a right to relief above the speculative level on the assumption that all of the allegations are true. *Twombly*, 550 U.S. 570. That is, it is no longer sufficient that relief could be granted under some theoretical set of facts consistent with a complaint's allegations, which was the familiar standard the Supreme Court established in *Conley*<sup>2</sup>. Rather, under *Twombly*, plaintiffs must “nudge their claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. Therefore, to survive a motion to dismiss made pursuant to Rule 12, a complaint must contain sufficient factual matter, accepted as true, to “state a claim for relief that is plausible on its face.” *Id.* The plausibility standard applies to all of a plaintiff's claims.

**2. A complaint must state sufficient non-conclusory facts to permit the reasonable inference that the defendant is liable.**

The Supreme Court clarified the scope and application of *Twombly* in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *Iqbal* makes clear that the *Twombly* decision was based upon the Supreme Court's interpretation and application of Rule 8, which “governs the pleading standard ‘in all civil actions and proceedings in the United States district courts.’” *Iqbal*, 556 U.S. at 684 (citing *Twombly*, 550 U.S. at 554 and applying FED. R. CIV. P. 1). Therefore, *Twombly's* (and *Iqbal's*) requirements apply to Plaintiffs' allegations against the Defendants in this case.

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<sup>2</sup> *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The legal foundation of this motion is set out in section IV-A of the opinion of the Court in *Iqbal*. In summary, *Iqbal* held that the following standards apply when evaluating the sufficiency of all federal complaints:

- The Rule 8 pleading standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).
- A complaint must be 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.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).
- “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).
- A complaint is insufficient if it merely tenders “‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557).

The *Iqbal* Court stated that its decision in *Twombly* was supported by two principles, from which the foregoing standards were derived. “First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678. Thus, and critically, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Second, “where 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 ‘show[n]’ - ‘that the pleader is entitled to relief.’” *Iqbal*, 556 U.S. at 679 (applying FED. R. CIV. P. 8(a)(2) (requiring “a short and plain statement of the claim showing the pleader is entitled to relief[.]”)). Thus, *Iqbal* directs that a district court considering a motion to dismiss “can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. Such conclusions are not “well-pleaded” factual allegations, and do not give rise to a plausible claim for relief.

**B. Arguments and Authorities Requiring Dismissal of Plaintiffs' Claims Against Clark and Cox**

In this case, Plaintiffs attempt to assert a Fourteenth Amendment “failure to treat” claim against Clark and Cox for allegedly failing to assess Fletcher and render medical care. As more fully described below, Clark and Cox are entitled to dismissal of each of Plaintiffs’ claims against them based upon the defense of qualified immunity.

“The doctrine of qualified immunity shields officials from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Mullenix v. Luna*, 136 S.Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (2015) (*per curiam*) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (in turn quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)); some internal quotation marks omitted). Qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.” *Stanton v. Sims*, 134 S.Ct. 3, 5 (2013) (*per curiam*) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011); internal quotation marks omitted).

“[A] plaintiff seeking to defeat qualified immunity must show: ‘(1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.’” *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (*en banc*) (quoting *Ashcroft v. al-Kidd*, 131 S.Ct. at 2080. In that Plaintiffs cannot meet their burden to defeat Clark and Cox’s defense of qualified immunity, Clark and Cox are entitled to dismissal of each of Plaintiffs’ claims against them with prejudice.

First, Plaintiffs’ pleadings fail to establish that either Clark or Cox violated any of the Plaintiffs’ statutory or constitutional rights. Plaintiffs’ “failure to treat” claim arises under the Fourteenth Amendment, as a pre-trial detainee has a “constitutional right to be secure in his basic

human needs, such as medical care and safety.” *Hare v. City of Corinth*, 74 F.3d 633, 647–48 (5th Cir. 1996)(as cited in *Dyer v. City of Mesquite, Texas*, No. 3:15-CV-2638-B, 2017 WL 118811, at \*8 (N.D.Tex. Jan. 12, 2017)). State officials violate that right when they act or fail to act “with deliberate indifference to the detainee’s needs.” *Hare*, 74 F.3d at 648; *Dyer*, 2017 WL 118811 at \*8.

Plaintiffs alleging deliberate indifference must show that: (1) “each defendant had subjective knowledge of ‘facts from which an inference of substantial risk of serious harm could be drawn’”; (2) “each defendant actually drew that inference”; and (3) “each defendant’s response to the risk indicates that [he] ‘subjectively intended that harm occur.’ ” *Tamez v. Manthey*, 589 F.3d 764, 770 (5th Cir. 2009)(quoting *Thompson v. Upshur Cty.*, 245 F.3d 447, 458–59 (5th Cir. 2001)). “It is not enough that the official was negligent—only a ‘subjective intent to cause harm’ supports a finding of deliberate indifference.” *Dyer*, 2017 WL 118811 at \*8 (quoting *Mace v. City of Palestine*, 333 F.3d 621, 625–26 (5th Cir. 2003)).

Just as in the *Dyer* case, the Plaintiffs herein attempt to assert Fourteenth Amendment violations against Clark and Cox, paramedics who allegedly failed to provide Fletcher with proper medical care before clearing him to be transported. In *Dyer*, the Honorable U.S. District Judge Jane Boyle dismissed the *Dyer* plaintiffs’ Fourteenth Amendment claims for denial of medical care against two paramedics after concluding that the *Dyer* plaintiffs’ pleadings failed to allege sufficient detail regarding the degree of a head injury “from which the Court could infer that upon seeing such an injury [the paramedics] should have known that there was a substantial risk of serious harm if [the patient] was not immediately given medical care.” *Dyer*, 2017 WL 118811 at \*9.

The Plaintiffs in the *Dyer* case, alleged that the patient: “had a visible injury to his head”; had “visible head injuries from the first contact by City personnel”, and had “sustained a visible

and serious head injury”. *See* Plaintiffs’ First Amended Complaint in the Dyer case, Civil Action No. 3:15-cv-02638-B, Doc. 46, at 3, 9, 11. In addition, the Dyer plaintiffs alleged that the paramedics: “had subjective awareness of a head injury as well as the consequences of failing to provide appropriate medical care”, “ignored the obvious and serious injury . . . and provided neither medical treatment nor transport to the hospital”, “knew of the substantial risk of serious harm that would result by ignoring obvious symptoms of serious illness,” knew of the substantial risk of serious harm that would come from failing to monitor or treat head trauma” and yet allowed the patient “to be transported with no treatment or monitoring which lead directly to [the patient’s] death as a result of head trauma.” *See* Plaintiffs’ First Amended Complaint in the *Dyer* case, Civil Action No. 3:15-cv-02638-B, Doc. 46, at 8, 12.

Similarly, the Plaintiffs herein allege that Fletcher had a visible head injury and that Clark and Cox “had a duty to assess and render care to those in need, specifically Fletcher, and they breached their duty.” *See* Complaint at 12. With respect to this alleged head injury, Plaintiffs fail to provide much information on Mr. Fletcher’s head injury other than to state that “[b]lood and contusions from the beatings was patently visible on Fletcher’s head.” *See* Complaint at 6. Notably, Plaintiffs do not describe the size shape or color of these alleged contusions, list how many contusions were allegedly visible and/or describe whether Mr. Fletcher was actively bleeding from his head at the time that that Clark and Cox encountered him or whether this was simply a small amount of dried blood partially or fully masked by hair. In the absence of this detailed information, Plaintiffs pleadings are insufficient to show that Clark and Cox had subjective knowledge of facts from which an inference of substantial risk of serious harm could be drawn, that Clark and Cox actually drew that inference, and that Clark and Cox’s response to the risk indicated that they subjectively intended that death would occur to Mr. Fletcher as a result of their actions.



Thus, just like in *Dyer*, Plaintiffs' pleadings are insufficient to establish deliberate indifference on the part of Clark and Cox, due to Plaintiffs' failure to plead sufficient detail regarding the degree of Mr. Fletcher's head injury. In this case, an apparent substantial risk of serious harm cannot be inferred, nor does it allow this Court to infer that Clark and Cox failed to provide necessary medical care after observing Fletcher at the scene. *See Dyer*, 2017 WL 118811 at \*8-\*9 ("Plaintiffs fail to add any additional detail regarding the degree of [the patient's] head injury, from which the Court could infer that upon seeing such an injury, [the paramedics] should have known that there was a substantial risk of serious harm if [the patient] was not immediately given medical care."). Further, Plaintiffs fail to plead that Clark and Cox's actions meet the high standard of subjective intent to harm. Not administering medical treatment *is not* tantamount to deliberately withholding medical treatment as Plaintiffs would have the Court conclude. Therefore, dismissal is warranted based upon Plaintiffs' failure to allege a constitutional violation.

Clark and Cox are also entitled to dismissal of each of Plaintiffs' claims against them based upon the Plaintiffs' failure to demonstrate that Clark and Cox violated clearly established law. Plaintiffs' pleadings allege that Fletcher had a visible head injury, and that Clark and Cox apparently misinterpreted Fletcher's symptoms as drunkenness. These allegations are insufficient to demonstrate that Clark and/or Cox violated clearly established law in allowing Fletcher to be transported to the Dallas Marshal's Office & City Detention Facility without providing additional medical care.

### III. CONCLUSION

Plaintiffs' allegations in their Complaint do not state a plausible claim for relief against Defendants Clark and Cox, nor are Plaintiffs' allegations sufficient to overcome these Defendants' defense of qualified immunity. These failures are fatal to Plaintiffs' claims, and therefore, this motion to dismiss should be granted in its entirety.

**IV. PRAYER**

WHEREFORE, Defendants Clark and Cox pray that Plaintiffs take nothing by this suit against it, that all relief requested by Plaintiffs be denied, that the Defendants Clark and Cox recover their attorneys' fees incurred in defending this action, all costs of suit, and for such other and further relief to which Defendants Clark and Cox are justly entitled.

Respectfully submitted,

WALKER BRIGHT PC  
100 N. Central Expressway, Ste. 800  
Richardson, Texas 75080  
Telephone : (972) 744-0192  
Facsimile : (972) 744-0067

/s/ Gerald Bright  
GERALD BRIGHT  
State Bar No. 02991720  
DAVID CRAFT  
State Bar No. 00790522

**Attorneys for Defendants Clark and Cox**

**CERTIFICATE OF SERVICE**

I certify that on the 3<sup>rd</sup> day of September, 2019 I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record in this case.

/s/ Gerald Bright  
Gerald Bright