No. 20-10615

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BERMAN DE PAZ GONZALEZ, INDIVIDUALLY AND AS HEIR AND ON BEHALF OF THE ESTATE OF BERMAN DE PAZ MARTINEZ; EMERITA MARTINEZ-TORRES, INDIVIDUALLY AND AS HEIR AND ON BEHALF OF THE ESTATE OF BERMAN DE PAZ MARTINEZ,
Plaintiffs-Appellants.

v.

THERESE M. DUANE; ACCLAIM PHYSICIAN GROUP, INCORPORATED; TARRANT COUNTY HOSPITAL DISTRICT DOING BUSINESS AS JPS HEALTH NETWORK,
Defendants-Appellees.

On appeal from the United States District Court for the Northern District of Texas Case No. 4:20-CV-0072-A, Judge John H. McBryde

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BRIEF OF APPELLEES THERESE M. DUANE AND ACCLAIM PHYSICIAN GROUP, INC.

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(b) of the Federal Rules of Civil Procedure, and Rule 28.2.1 of the Fifth Circuit Rules, Therese M. Duane, M.D. and Acclaim Physician Group, Inc. (the "Acclaim Appellees") certify:

(1) Appeal No. 20-10615, *Berman De Paz Gonzalez et al v. Therese M. Duane, M.D. et al*

(2) The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Appellants:	Berman De Paz Gonzalez and Emerita Martinez-Torres, individually and as heirs of Berman De Paz Martinez
Their counsel:	William D. Taylor, Taylor & Taylor Law P.C, and Jackson Davis, Streck & Davis Law
Appellees:	Therese M. Duane, M.D., Acclaim Physician Group, Inc.
Their counsel:	Jordan M. Parker, Philip A. Vickers, and Katherine R. Hancock, Cantey Hanger, LLP
Appellee:	Tarrant County Hospital District d/b/a JPS Health Network
Their counsel:	Gregory P. Blaies, Grant D. Blaies, and Brian K. Garret, Blaies & Hightower, LLP

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STATEMENT REGARDING ORAL ARGUMENT

The Acclaim Appellees do not believe that oral argument is necessary to resolve the issues raised in this appeal. But if the Court is inclined to grant Appellants' request for oral argument, then the Acclaim Appellees wish to present oral argument as well.

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Issue 1: Should the dismissal of the § 1983 claim against Dr. Duane be affirmed when neither their Complaint nor the course of proceedings provided notice that such claim was asserted against Dr. Duane in anything other than in her official capacity?

Issue 2: Should the dismissal of the § 1983 claim against the Acclaim Appellees be affirmed based on Appellants' failure to allege any constitutional injury?

Issue 3: Should the dismissal of the § 1983 claim against the Acclaim Appellees be affirmed based on Appellants' failure to allege any injury suffered was the result of a policy or custom adopted by an Acclaim policymaker?

STATEMENT OF THE CASE

Berman De Paz Gonzalez ("De Paz Senior") and Emerita Martinez-Torres ("Torres," and, together with De Paz Senior, "Appellants") appeal a final judgment entered against them dismissing with prejudice their claims and causes of action asserted against Therese M. Duane ("Dr. Duane") and Acclaim Physician Group, Inc. ("Acclaim," and, together with Dr. Duane, the "Acclaim Appellees"). Appellants also appeal a final judgment dismissing claims against Tarrant County Hospital District d/b/a JPS Health Network ("JPS"). ROA. 251-62; ROA.264-76.

Appellants asserted state law claims for medical negligence and a claim under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment's Due Process Clause against the Acclaim Appellees for acts and omissions of negligence and gross negligence while their adult son, Berman De Paz-Martinez ("De Paz"), was a patient at JPS's John Peter Smith Hospital in Fort Worth (the "JPS Hospital"). These claims stemmed from alleged failures by Appellees to comply with the Texas Advance Directives Act, Tex. Health & Safety Code §§ 166.001-.209.

In its May 16, 2020 memorandum opinion and order, the trial court granted the Acclaim Appellees' Motion to Dismiss and dismissed the claims against the Acclaim Appellees. ROA.251-62. Appellants appeal the dismissal of their claims under § 1983, but not the dismissal of their state law claims.

Factual Background and Allegations of Appellants

Acclaim is a non-profit physician group founded by JPS to employ and manage physicians who work at JPS facilities, including the JPS Hospital. Dr. Duane was formerly a physician at the hospital, where she was an Acclaim employee.

The specific factual allegations in Appellants' Original Complaint can be summarized as follows:

On March 29, 2018, 21-year-old Berman De Paz Martinez was admitted to JPS Hospital for treatment in the hospital's intensive care unit. ROA.10. De Paz had suffered a "very serious" brain injury and was in a coma. ROA.10. His "prognosis was extremely poor." ROA.10.

On March 31, 2018, De Paz Senior and Torres, along with other unidentified "family," met with Chaplain Ronald Suarez "in an attempt to process what they were going through and express their beliefs and wishes about how they wished to proceed." ROA.10. The family purportedly "communicated" to the chaplain that "they strongly believe in miracles, saw [De Paz] make movements in response to prayer, absolutely [did] not wish to stop treatment at [that] time, and expressed a need for more time." ROA.10. Appellants do not allege that the family's wishes were ever made known to the Acclaim Appellees. ROA.10. Nor did Appellants allege that their wishes were also an expression of their son's desires and wishes.

At some point on that same day, Appellants claimed "the family" was informed by an unidentified member of "the staff"—Appellants did not allege whose staff—that De Paz would continue to receive medical treatment at JPS Hospital for a week, after which time he would be sent home with medical equipment necessary "to keep him alive." ROA.10. At 10:00 p.m., De Paz's family members, except for De Paz Senior, went home for the night. ROA.10.

The next day, however, Appellants allege Dr. Duane and a language-interpreting nurse entered De Paz's room and explained to De Paz Senior that the decision had been made "to take [De Paz] off life support." ROA.10. Appellants allege treatment was withdrawn without their consent. ROA.11. De Paz died after treatment was withdrawn. ROA.11.

Appellants never alleged whether De Paz had provided Dr. Duane, Acclaim, or JPS with any form of written or oral advance directive describing his desires with respect to life-sustaining treatment, that De Paz had signed a medical power of attorney naming Appellants as his agents, or that Appellants ever conveyed any instructions *to the Acclaim Appellees* relating to De Paz's care. ROA.10-11. Appellants likewise never alleged that the care received by De Paz contradicted *De Paz's* wishes for end-of-life care. ROA.10-11.

Appellants alleged that the conduct of Dr. Duane, which was alleged to be at the direction of "an order" from "the doctors [who] had gotten together and decided to take [De Paz] off life support," was taken in violation of sections 166.039, 166.040, 166.044, 166.045, and 166.046 of the

Texas Advances Directives Act, codified at Texas Health & Safety Code §§ 166.001-.209. ROA.10-11.

Appellants further alleged that "a piece" published in July 2018 by a local political advocacy group claimed "a medical director at JPS had been making decisions to end life[-]sustaining treatment of patients in violation of the Texas Advance Directive[s] Act." ROA.12. The author of the article is alleged to have received an anonymous email from someone who purported to be a JPS surgical resident naming Dr. Duane as the "medical director." ROA.12.

According to the Complaint, Dr. Duane "chose victims who didn't speak English, weren't insured, and at least one patient … who she mistakenly thought was undocumented," and did so on at least three unspecified occasions. ROA.11.

Procedural History

Appellants sued the Acclaim Appellees and JPS alleging acts and omissions of negligence and gross negligence (the "state law claims") and, under 42 U.S.C. § 1983, violations of the Fourteenth Amendment's Due

Process Clause, for failing to comply with the Texas Advance Directives Act, Tex. Health & Safety Code §§ 166.001-.209. ROA.8-18.

Appellants brought the claims individually, as heirs, and on behalf of their son's estate. ROA.8-18. Appellants later filed a notice of dismissal of their claims on behalf of the estate, and the district court entered final judgment as to those claims. ROA.52.

The Acclaim Appellees then moved to dismiss Appellants' claims against them on the grounds that (1) as to the state law claims, under the Texas Tort Claims Act, the Acclaim Appellees are immune from suit, thus depriving the court of subject matter jurisdiction of those claims, *see* ROA.74-79, and (2) as to all claims, under Rule 12(b)(6) for failure to state a claim for relief. *See* ROA.79-92. Given the Complaint's vague allegations, the Acclaim Appellees made an alternative Rule 12(e) motion for a more definite statement. ROA.92-93. Appellee JPS moved to dismiss on substantially similar grounds. ROA.136-153.

The trial court granted the Acclaim Appellees' motion, determining that the Acclaim Appellees were immune from suit on the state law claims

because the Texas Tort Claims Act does not waive immunity for those claims. It did not reach whether Appellants had stated a claim as to the state law claims.

With respect to the § 1983 claim, the trial court determined that Appellants failed to state a claim against Dr. Duane or Acclaim because Appellants failed to allege that their constitutional rights, rather than De Paz's, were violated. ROA.261-62. The § 1983 claims were dismissed for lack of standing. Appellants only appeal dismissal of the § 1983 claim.

SUMMARY OF THE ARGUMENT

The judgement of the trial court dismissing Appellants' § 1983 claim against the Acclaim Appellees should be affirmed for the reasons stated in the Acclaim Appellees' original Motion to Dismiss.

With respect to Dr. Duane, the trial court's dismissal of the § 1983 claim should be affirmed because neither the Complaint nor the course of the proceedings indicate or provide fair notice that a § 1983 claim was asserted against Dr. Duane in her individual capacity. Although the Acclaim Appellees raised the § 1983 capacity issue below, ROA.87-88, Appellants did not dispute the Acclaim Appellees' characterization of Appellants' § 1983 claim as against Dr. Duane in her official capacity only, and have only raised it for the first time on appeal.

The Court can affirm dismissal of Appellants' § 1983 claim against the Acclaim Appellees because the Complaint does not allege an actionable constitutional violation. Instead, Appellants § 1983 claims are grounded in alleged medical negligence, which does not give rise to a § 1983 claim as a matter of law.

The Complaint also fails to allege a constitutional deprivation of rights for "failure to abide by the ministerial requirements of the [Texas Advance Directives Act]." This is true because the Complaint does not allege facts to show that the Texas Advance Directives Act even applied to De Paz's care, or, if it did, that the Acclaim Appellees violated its terms.

Finally, the Court should affirm dismissal of Appellants' § 1983 claim because Appellants have failed to identify an official policy or custom promulgated by an Acclaim policymaker that was the moving force behind the violation of a constitutional right.

ARGUMENT

A. Standard of Review

A district court's grant of a motion to dismiss under Rule 12(b)(6) is subject to de novo review. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). A complaint fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Instead, pleadings must contain specific, well-pleaded factual allegations, and not mere conclusory allegations. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). The alleged facts must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

In reviewing a motion to dismiss brought under Rule 12(b)(6), a court must accept as true all well-pleaded facts in the complaint, viewing them in the light most favorable to the pleader. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007) (per curiam). Unwarranted deductions of fact and legal conclusions shall not be accepted. *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005). A pleader who does not plead facts showing a plausible right to relief, but just "naked assertions" of wrongdoing or

unlawful conduct, is not entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

On appeal, this Court "may affirm a district court's Rule 12(b)(6) dismissal on any grounds raised below and supported by the record." *Raj v. La. State Univ.*, 714 F.3d 322, 330 (5th Cir. 2013). The trial court's dismissal of Appellants' § 1983 claim may be affirmed for each of the following grounds raised in the Acclaim Appellees' Motion to Dismiss:

1. Appellants' § 1983 claim against Dr. Duane in her official capacity is redundant of the claim against Acclaim and must be dismissed;

2. Appellants' Complaint does not allege a constitutional injury necessary to establish a violation of the 14th Amendment due process provision, but instead alleges at best claims of negligence;

3. Appellants' Complaint does not identify an official policy or custom of Acclaim; and

4. Appellants' Complaint does not identify a final policymaker, or allege that such policymaker knew of or approved the policy or custom.

The Acclaim Appellees respectfully request that the Court affirm the trial court's dismissal of Appellants' § 1983 claim.

B. Because the Complaint only alleged a § 1983 claim against Dr. Duane in her official capacity, but not her individual capacity, the claim against her is redundant of the claim against Acclaim and must be dismissed.

Dr. Duane moved to dismiss the § 1983 claim against her on the ground that the claim was asserted against her, if at all, solely in her official capacity, and the claim was therefore redundant and should be dismissed. Appellants argue on appeal they should be permitted to proceed on the § 1983 claim against Dr. Duane because the § 1983 claim against Dr. Duane is asserted against her in her individual capacity. But neither the Complaint nor the course of the proceedings afforded Dr. Duane fair notice that she was being sued under § 1983 in her individual capacity, and Appellants cannot revise their claim on appeal.

Under the Federal Rules of Civil Procedure, "[a] person's capacity need not be pled except to the extent required to show the jurisdiction of the court." *Parker v. Graves*, 479 F.2d 335, 336 (5th Cir. 1973) (per curiam) (citing Fed. R. Civ. P. 9(a)). But this lenient standard "does not give a plaintiff free rein to change [their] capacity allegations at any time in the litigation." *Robinson v. Hunt Cnty., Texas*, 921 F.3d 440, 446 (5th Cir. 2019). To determine

the capacity in which a defendant is sued, the court examines "'[t]he allegations in the complaint,' and '[t]he course of proceedings,'" *Id.* (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)) (citation omitted). "A district court considering a motion to dismiss is not obligated to imagine potential claims that a plaintiff has not raised." *Id.*

As the Acclaim Appellees noted in their motion to dismiss briefing, the Complaint does not make clear that Appellants intended to assert a § 1983 claim against Dr. Duane *in any capacity*, much less in her individual capacity. ROA.71. ROA.88. Rather, the Complaint included one jumbled section referencing all causes of action asserted, without identifying which causes of action were asserted against which Appellees, leaving the Appellees and the district court to speculate whether Appellants were suing Dr. Duane under § 1983 and, if so, in what capacity. ROA.13. Despite the ambiguity, the Complaint's paragraph describing the § 1983 claim alleges Dr. Duane was a person "with final decision making authority," though without stating on behalf of whom. ROA.14. Therefore, the Acclaim Appellees moved to dismiss the claim against Dr. Duane "to the extent it has been asserted"

against her. ROA.88. Upon its review of the pleadings and briefing, the trial court appeared to agree that the Complaint did not specify that a § 1983 claim was asserted against Dr. Duane, noting that "[t]he complaint does not specify whether each claim is asserted against each defendant." ROA.253.

The "course of pleadings" similarly fails to demonstrate that Appellants asserted a § 1983 claim against Dr. Duane. In their motion to dismiss briefing, the Acclaim Appellees identified their belief that if a § 1983 claim was asserted against Dr. Duane, it was only in her official capacity. ROA.88. The Appellants' Response in the trial court did not dispute the Acclaim Appellees' characterization of the capacity in which Dr. Duane was sued. ROA.197-201. Nor did Appellants move to amend or clarify their allegations or otherwise urge the trial court to permit them to proceed on a § 1983 claim against Dr. Duane in her individual capacity. *Id*.

Instead, Appellants engaged only with the Acclaim Appellees' arguments for dismissal of the § 1983 claim against Acclaim and/or Dr. Duane in her official capacity, arguing their Complaint alleged the disputed elements of their § 1983 claim. ROA.197-201.

In contrast, Appellants did clarify in the trial court briefing that *the state law claims* were asserted against Dr. Duane in her individual capacity. ROA.189. Appellants' silence on the capacity issue in responding to the arguments for dismissal of the § 1983 claim suggests one of two things—that Appellants did not intend to assert a § 1983 claim against Dr. Duane at all, or if they did, the Acclaim Appellees properly understood such claim as asserted against her only in her official capacity. This course of pleadings entirely contradicts the new position Appellants now advance that such claims were instead asserted against Dr. Duane in her *individual* capacity.

When the Complaint's deficiencies are considered along with the "course of proceedings," sufficient grounds for upholding the dismissal of the § 1983 claim against Dr. Duane in her official capacity as moved in the Acclaim Appellees' motion to dismiss exist because such claims are brought against Acclaim and are redundant of the claim against Acclaim. *See United States ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 402–03 (5th Cir. 2004) (affirming the dismissal of individual employees when the defendants argued before the district court that the employees "were only named in

their official capacity" and the plaintiff "never challenged this assertion"). This Court should affirm the dismissal of the § 1983 claim against Dr. Duane.

C. The trial court could have dismissed Appellants' § 1983 claim based on other failure-to-state-a-claim arguments raised and briefed by the Acclaim Appellees

The Acclaim Appellees' Motion to Dismiss identified the following additional reasons Appellants failed to state a § 1983 claim: (1) Appellants failed to identify an official policy or custom; (2) Appellants failed to identify a policymaker or awareness or approval of the policy; and (3) Appellants failed to identify a constitutional violation, and instead alleged mere medical negligence. ROA.88-91. The Acclaim Appellees also argued Appellants had failed to actually state facts necessary to establish a violation of the Texas Advance Directives Act—the basis for Appellants' alleged deprivation of rights. ROA.80-86. The trial court did not address or discuss these grounds for dismissal. Nevertheless, each ground provides a basis for this Court to affirm the dismissal of Appellants' § 1983 claim. *Raj*, 714 F.3d at 330.

1. The dismissal of Appellants' § 1983 claim should be affirmed because the Complaint does not allege a constitutional violation giving rise to § 1983 liability, just a claim for medical negligence

The trial court's dismissal of Appellants' § 1983 claim should be affirmed because the claim as alleged in the Complaint is a repackaged medical negligence claim, which does not give rise to § 1983 liability, and the Complaint alleges no additional constitutional violation.

a. The Complaint alleges no conduct or injury, other than those that underlie Appellants' medical negligence claims, to support a due process claim under § 1983

Appellants argue their Complaint distinguishes their § 1983 claim from their medical negligence claim, but this is inconsistent with the Complaint's actual allegations.

The Complaint alleges as the basis for Appellants' medical negligence claims that "Defendants" owed the Appellants and their son a duty of care; that the duty of care was breached when "Defendants," among other things, "[f]ail[ed] to follow the procedure codified in the Texas Advance Directives Act, more specifically: [sections]] 166.039, 166.040, 166.044, 166.045, [and]

166.046."[1] ROA.13-14. Then, *immediately following* these allegations, Appellants alleged, "Furthermore, the failure to adhere to the Texas Advanced Directives Act was a direct violation of Mr. DePaz'[s] due process rights under the 14th amendment [sic] of the Unites States Constitution." ROA.14.

But the Texas Advance Directives Act does not afford an independent cause of action for violation of its provisions. Rather, the Act is a safe-harbor for those medical professionals who follow its procedures, shielding them from liability to the extent they have acted according to its terms. *See* Tex. Health & Safety Code § 166.044(a) ("A physician or health care facility that causes life-sustaining treatment to be withheld or withdrawn from a qualified patient in accordance with this subchapter is not civilly liable for that action unless the physician or health care facility fails to exercise

[1] In their Motion to Dismiss, the Acclaim Appellees also construed the Complaint as alleging causes of action against them for negligent training and negligent supervision, both of which are state law tort claims falling within the purview of the Texas Medical Liability Act, codified as Chapter 74 of the Texas Civil Practice and Remedies Code. *See Ponce v. El Paso Healthcare Sys., Ltd.*, 55 S.W. 3d 34, 38-39 (Tex. App.—El Paso 2001, pet. denied).

reasonable care when applying the patient's advance directive."). Thus, liability does not arise from a failure to follow an advance directive, but only in violating the standard of care in doing so, which standard the Act also describes:

> (d) The standard of care that a physician, health care facility, or health care professional shall exercise under this section is that degree of care that a physician, health care facility, or health care professional, as applicable, of ordinary prudence and skill would have exercised under the same or similar circumstances in the same or a similar community.

Tex. Health & Safety Code § 166.044(d). This is essentially the standard of care applicable in all medical negligence cases in Texas. *See Jackson v. Axelrad*, 221 S.W.3d 650, 655 (Tex. 2007) (describing the physician-of-ordinary-prudence standard of care applicable to medical negligence cases in Texas) (citing *Hood v. Phillips*, 554 S.W.2d 160, 165–66 (Tex. 1977)). The only claim available to Appellants under the Texas Advance Directives Act was one for negligence in applying an advance directive, if such a directive even existed.

Further, a review of the damages described in the Complaint confirms that Appellants' negligence claims and § 1983 claim are one and the same.

In alleging the damages and injuries suffered by Appellants, the Complaint only identifies that their injuries were the "proximate result of the negligence and gross negligence . . . described above." ROA.14. The Complaint contains no separate damages allegation for injuries caused by a due process violation or by any non-negligent conduct.

Moreover, when responding to this argument in the Acclaim Appellees' Motion to Dismiss, ROA.91-92, the only response Appellants offered was that they alleged a constitutional injury by "specifically cit[ing] the 14th Amendment of the United States Constitution and its' due process clause." ROA.201. Appellants then pointed to the alleged negligence of the Acclaim Appellees in failing to follow the Texas Advance Directives Act. ROA.201.

For each of these reasons, the Appellants' argument that "the [Complaint's] references to negligence do not provide the basis for the federal claims under § 1983 at all" is without support and is undermined by the "course of proceedings." *See* Appellants' Brief, p. 33. Instead, Appellants, who presumably knew that the Acclaim Appellees are immune

from suit on claims of negligence under the Texas Tort Claims Act,[2] attempted to avoid dismissal on immunity grounds and state a claim over which the federal court might exercise subject matter jurisdiction by recasting the exact conduct supporting their negligence claim as also supporting a § 1983 claim.

b. The negligent conduct alleged in the Complaint is not of the type the Due Process Clause was designed to prevent, and thus does not support a § 1983 claim against Acclaim

The Due Process clause was designed to "prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989)). As a general rule, "the Due Process Clause works only as a negative prohibition on state action." *Pinder v. Johnson*, 54 F.3d 1169, 1174 (4th Cir. 1995) (en banc). It has long been understood to "afford[] protection against unwarranted government interference with freedom of choice in the context of certain

[2] Indeed, the trial court dismissed all of Appellants' state law claims against the Acclaim Appellees for lack of subject matter jurisdiction after determining that the Acclaim Appellees are immune from suit on those claims by virtue of the Texas Tort Claims Act. ROA.256-260.

personal decisions," but not to confer an obligation on the government to ensure that the person "realize[s] all the advantages of that freedom." *Harris v. McRae*, 448 U.S. 297, 317–18 (1980) (holding the substantive due process right to use contraceptives does not imply "an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives."). But the due process clause does not supplant, or seek to remedy rights protected by, state tort law. *Collins*, 503 U.S. at 128.

For example, in *Collins v. City of Harker Heights*, the widow of a city sanitation department employee asserted § 1983 claims against the City of Harker Heights alleging due process violations after her husband died of asphyxia when he entered a manhole to unstop a sewer line. *Id.* In support of her § 1983 claim, the widow alleged

> [T]hat [her husband] had a right under the Due Process Clause of the Fourteenth Amendment "to be free from unreasonable risks of harm . . . and . . . to be protected from the [city's] custom and policy of deliberate indifference toward [its employees'] safety"; that the city had violated that right by following a custom and policy of not training its employees about the dangers of working in sewers and not providing safety equipment and warnings; and that the city had systematically

> and intentionally failed to provide the equipment and training required by a Texas statute.

Id. at 115. These allegations are strikingly similar to language used in the Complaint to allege the § 1983 claim:

> . . . Dr. Duane was a person with final decision making authority, the hospital employees/doctors were not adequately trained, and the practice of ignoring the laws concerning withholding life sustaining treatment had been widespread, the actions as described above violate 42 U.S.C. § 1983.
>
> Based upon [Appellees'] failure to meet the standard of care as described herein, . . . [Appellees'] negligent and otherwise tortious conduct was a proximate cause of the damages suffered by the [Appellants]. [Appellants] further allege that [Appellees] had actual subjective awareness of their acts and omissions which led to Mr. DePaz' untimely death . . . in violation of his due process rights . . . .

ROA.14. When faced with the very similar allegations of the plaintiff in *Collins*, the Supreme Court rejected the contention that allegations "analogous to a fairly typical state-law tort claim" could support a claim under § 1983. *Collins*, 503 U.S. at 128. The Court said,

> Because the Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society, we have previously rejected claims that the Due Process Clause

> should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law . . . .

Id. at 128.

Similarly, this Court should affirm the trial court's dismissal of Appellants § 1983 claim because the Complaint does not allege more than a medical negligence claim against the Acclaim Appellees.

This Court has rejected similar claims, explaining that "[u]nsuccessful medical treatment, acts of negligence, neglect, or medical malpractice are insufficient to give rise to a constitutional violation. Disagreement with one's medical treatment is not sufficient to state a cause of action under § 1983." *Baez v. INS*, No. 06-30112, 2007 WL 2438311, at *1 (5th Cir. Aug. 22, 2007) (per curiam) (citing *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991)); *see also Aguocha-Ohakweh v. Harris Cty. Hosp. Dist.*, 731 F. App'x 312 (5th Cir. 2018) (unsuccessful medical treatment "does not give rise to § 1983 cause of action."); *Wilson v. Dallas Cty. Hosp. Dist.*, 715 F. App'x 319, 322 (5th Cir. 2017) (affirming dismissal of federal claims against a hospital for an alleged "custom or policy of committing medical errors"); *Kinzie v. Dallas Cnty. Hosp. Dist.*, 106 F. App'x 192, 194 (5th Cir. 2003).

"[B]ecause the allegations in [Appellants'] complaint do not rise to the level of a constitutional claim, all the federal claims fall by their own weight," allowing this court to affirm the trial court's dismissal of Appellants' § 1983 claim. *Wilson v. Dallas Cty. Hosp. Dist.*, 715 F. App'x 319, 322 (5th Cir. 2017) (affirming dismissal of federal claims against a hospital for an alleged "custom or policy of committing medical errors").

2. The dismissal of Appellants' § 1983 claim should be affirmed because even if the failure to comply with the procedure outlined in the Texas Advance Directives Act could result in a due process violation, Appellants' Complaint failed to state a claim for violation of the Act

Assuming for the sake of argument that "failure to abide by the ministerial requirements of the [Texas Advance Directives Act]" can support a due process claim, Appellants' Brief, p. 27, the Complaint nevertheless falls short of alleging facts sufficient to raise an actual violation of the Texas Advance Directives Act above the speculative level. *See Twombly*, 550 U.S. at 555. For example, as the Acclaim Appellees argued below, the Complaint fails to plead facts supporting the conclusion that De Paz was a "qualified patient" to whom the Texas Advance Directives Act applied, fails to allege

that Appellants ever communicated De Paz's wishes for life-sustaining treatment, and fails to allege the Acclaim Appellees did not follow the steps provided for under the statute.[3] ROA.81-86.

a. The Texas Advance Directives Act provides a procedure with which a health care professional or facility must comply, but only under circumstances outlined in the statute

The Texas Advance Directives Act provides the procedure which must be followed with respect to advance directives by qualified patients. A "qualified patient" is one with a terminal or irreversible condition that has been diagnosed and certified as such in writing by the attending physician. Tex. Health & Safety Code § 166.031(2). A "directive" is a written or oral directive by a patient about the patient's options for end-of-life care, including whether the patient wants life-sustaining treatment administered, withheld, or withdrawn. *Id.* at §§ 166.031(1), .032 & .034. The Act also authorizes a patient to designate an agent under a "medical power of

[3] The Acclaim Appellees moved to dismiss Appellants' state law claim for failure to allege a violation of the Texas Advance Directives Act. ROA.82-86. To the extent Appellants now contend the deprivation of rights under § 1983 depends not on negligence, but on violations of the Texas Advance Directives Act, this Court should consider the Acclaim Appellees' arguments on that point that were expressed in their motion to dismiss.

attorney" to make those decisions in the event that the patient becomes incompetent or otherwise incapable of communication. *See* Tex. Health & Safety Code §§ 166.038, 166.151-.166.

If an adult qualified patient has not made a directive and is incompetent or otherwise incapable of communication, the attending physician "*may*" make end-of-life treatment decisions, including a decision to withhold or withdraw life-sustaining treatment from the patient, in consultation with the patient's legal guardian or designated agent under a medical power of attorney. Tex. Health & Safety Code § 166.039(a). If the qualified patient has not made a directive and has neither a legal guardian nor a designated agent, the attending physician "*may*" make a treatment decision with, in this order of priority, the patient's spouse, one of the patient's reasonably available adult children, one of the patient's parents, or the patient's nearest living relative. *See id.* at § 166.039(b). If the qualified patient's family members are not available, a treatment decision may be made by the treating physician, and must be concurred in by another physician. *See id.* at § 166.039(e). Only when a physician refuses to provide

care in accordance with a qualified patient's directive or another treatment decision made by or on behalf of the patient does the statute provide for any procedure for internal review of the physician's decision—what Appellants refer to as the "ministerial requirements of the [Texas Advance Directives Act]" (addressed in Section C.3 below). *Id.* at § 166.046.

In any event, any treatment decision made by a qualified patient's designee or other family member "must be based on knowledge of what the patient would desire, if known." *Id*. at § 166.039(c). And only an expression of the *patient's* instructions to administer or withhold life-sustaining treatment meets the definition of a "directive" for purposes of the Act. *Id*. § 166.031(1), .032, .034. Expressions of a family member's personal wishes are not "directives" under the Act. *See id*. Finally, a physician or health care facility cannot be liable for failure to follow a directive of which they have no knowledge. *Id.* § 166.045(a).

b. The Complaint does not allege facts necessary to establish that the terms of the Texas Advance Directives Act applied to De Paz or that the Acclaim Appellees failed to follow the appropriate procedure

Appellants did not plead De Paz was a "qualified patient" who had been diagnosed or certified in writing as suffering from a terminal or irreversible condition. *See* Tex. Health & Safety Code § 166.031. Indeed, Appellants instead suggest they believed De Paz would have recovered. ROA.10. Appellants never pleaded that De Paz had given a written or oral directive as those terms are defined under the Texas Advance Directives Act. *See id.* at § 166.031-.032, 166.034. Nor did they plead that De Paz had authorized Appellants to serve as his agent under a medical power of attorney. *See id.* at § 151.166. Though Appellants allege they are De Paz's parents, they did not plead facts demonstrating they communicated De Paz's or their own wishes that De Paz continue to receive life support to the Acclaim Appellees. ROA.10. Appellants do not plead that the chaplain the "family" spoke with was employed by or an agent of the Acclaim Appellees. And Appellants do not allege they knew of De Paz's wishes, or that if they did, that their own wishes followed those of De Paz. *See* Tex. Health & Safety

Code § 166.039(c) (designee or family's treatment decision "must be based on knowledge of what the patient would desire, if known."). Rather, Appellants claim only that the Appellants' own wishes, as expressed to a chaplain, were not followed. And Appellants did not allege that, if the Acclaim Appellees knew of Appellants' wishes, the Acclaim Appellees nevertheless failed to follow the Texas Advance Directives Act's other procedures in determining to remove De Paz from a ventilator.

The only *specific* facts pleaded that pertain to the Acclaim Appellees are that Dr. Duane reported a decision to remove De Paz from life support and that she did so. ROA.10-11. From those lone facts Appellants jump to conclude "Dr. Duane's actions were in direct violation of" the Texas Advance Directives Act. ROA.11. One cannot reach that conclusion from the pleaded facts without speculating as to the existence of other, unpleaded facts demonstrating the Texas Advance Directives Act applied, such as that De Paz met the Act's definition of a "qualified patient"; that De Paz had provided a "directive" under the definition in the Act or that the Appellants knew De Paz's wishes and that Appellants' wishes matched De Paz's wishes;

that Appellants had actually informed the Acclaim Appellees of a directive or of Appellants' wishes; or that, if the Acclaim Appellees knew of De Paz's or Appellants' wishes, the decision to remove De Paz's life support was nevertheless made without following the procedure outlined in the Texas Advanced Directives Act.

But none of these facts are alleged, and the gaps can only be supplied by guesswork and conjecture. In pleading their claims in such a way that would overcome a motion to dismiss, however, Appellants were required to plead "specific facts, not mere conclusory allegations." *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 305 (5th Cir. 2020) (citing *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)). And the facts pleaded "must be enough to raise a right to relief above the speculative level, assuming all the allegations are true." *Id.* (quoting *Twombly*, 550 U.S. at 555–56). It is not proper to assume a party will prove facts the party has not alleged. Assuming a party can be deprived of due process under the law for violations of "the ministerial requirements of the [Texas Advance Directives

Act]," Appellants' Brief, p. 27, these identified pleading defects demonstrate that Appellants did not allege such a deprivation in their Complaint.

3. The dismissal of Appellants' § 1983 claim should be affirmed because there is not a constitutionally protected interest in continued medical treatment, and the Complaint does not allege a deprivation of such an interest

Appellants argue the Complaint alleges a protected property and liberty interest in continued medical treatment. Appellants' Brief, p. 29-31. But a constitutional right to medical care is not generally recognized under the law, even when that care would save or sustain a patient's life. *See Johnson ex rel. Johnson v. Thompson*, 971 F.2d 1487, 1495–96 (10th Cir. 1992) (rejecting argument that right to life includes right to receive medical care); *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (en banc) (holding that the Due Process Clause does not entitle a terminally ill patient to potentially life-saving experimental drugs not approved by the FDA); *see also Vacco v. Quill*, 521 US. 793, 801 (1997) (recognizing that the intent of a physician who withdraws life sustaining care is not to kill, but to "cease doing useless and futile or degrading things to the patient when the patient no longer stands to benefit

from them"); *see also e.g., In re Welfare of Colyer*, 660 P.2d 738, 743 (Wash. 1983) ("a death which occurs after the removal of life sustaining systems is from natural causes").

Instead, a constitutional right to medical care has only been found "where there exists a special custodial or other relationship between the person and the state." *Kinzie*, 106 F. App'x at 195. Absent a special custodial or other relationship, no general right to medical care exists. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983).

This Court, sitting en banc, has held that the necessary special relationship arises only in three circumstances: (1) "when the state incarcerates a prisoner"; (2) when the state "involuntarily commits someone" to a mental health institution; or (3) when the state places children in foster care. *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 856 (5th Cir. 2012) (en banc) (holding that state does not create special relationship with children attending public schools); *see also Aguocha-Ohakweh*, 731 F. App'x 312; *Whitton v. City of Houston*, 676 F. Supp. 137, 139 (S.D. Tex. 1987) (holding

that paramedics did not owe duty to provide individual with medical treatment). None of these circumstances are present here. Nevertheless, Appellants argue that the Texas Advance Directives Act creates property and liberty interests protected by due process in the rights and procedures it affords patients. Appellants' Brief, pp. 29-31. Appellants cite to cases like *Vitek v. Jones* and *Board of Regents v. Roth* for the position that state statutes like the Texas Advance Directives Act do create such rights. *See Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

While it is true that state statutes *may* create liberty and property interests, none are created by the statute at issue in this case. For a state statute to create a liberty or property interest protected by due process, the statute in question "must use 'explicitly mandatory language' requiring a particular outcome if the articulated substantive predicates are present." *Tony L. v. Childers*, 71 F.3d 1182, 1185 (6th Cir. 1995) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)); *see also Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 462–63 (1989); *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 734 (5th Cir. 2008). On the other hand, "[s]tate-created

procedural rights that do not guarantee *a particular substantive outcome* are not protected by the Fourteenth Amendment, even where such procedural rights are mandatory." *Childers*, 71 F.3d at 1185 (emphasis added). When a state statute does not place limits on official discretion with "'substantive predicates' to govern official decision-making," no protected liberty or property interest is created. *Id.* (quoting *Ky. Dep't of Corrections*, 490 U.S at 463); *see also Ridgely*, 512 F.3d at 735 ("Absent . . . limitations on . . . discretion, [the statute] cannot create a property interest.").

The Texas Advance Directives Act does not contain an explicit and mandatory *substantive* right to continued medical treatment that might create the protectable interests to which Appellants claim entitlement. Rather, the Act creates a *procedure* for review that will be followed in very limited circumstances. *See* Tex. Health & Safety Code § 166.046. When a physician refuses to follow a qualified patient's directive or another treatment decision made on behalf of the patient, the decision is to be submitted through a review process. *Id*. During the course of the review process, a qualified patient "shall" receive life-sustaining treatment. *Id.*

Though the *procedural rights* outlined in the review process are mandatory once the process is invoked, the statute itself does not guarantee a substantive outcome or afford a qualified patient or his surrogates the right to invoke the process. *Id.* Instead, the process depends upon on the existence of either a qualifying directive or treatment decision with which a physician could disagree. *Id.* In the case of a qualified patient who is incapacitated, a physician "*may*" make a treatment decision with the patient's agent under a medical power of attorney or a familial surrogate if the patient has not executed a directive, but the physician is not required to. *Id.* at § 166.039. This grant of discretion—the authorization with a lack of a mandate—to consult with a qualified patient representative is sufficient to negate any notion that patients are entitled to the internal review process and, as a result, to receive medical treatment during the course of such process. *Ridgely*, 512 F.3d at 735 ("Absent . . . limitations on . . . discretion, [the statute] cannot create a property interest.").

Further, as discussed at page 19 *supra*, rather than confer a positive right of care, the Act creates a safe-harbor defense for physicians and medical

facilities that follow its procedures through the exercise of "reasonable care." *See* Tex. Health & Safety Code § 166.044. The statute's contemplation that physicians and medical facilities must exercise "reasonable care," as opposed to directing an imposition of strict liability for any violation of the Act, suggests that physicians and medical facilities maintain a level of discretion over the care provided under the Act, therefore further negating any possibility that the Act creates rights protectable under the due process clause. *Ridgely*, 512 F.3d at 735 ("Absent . . . limitations on . . . discretion, [the statute] cannot create a property interest."); *see also Ky. Dep't of Corrections*, 490 U.S at 463.

For these reasons, the Texas Advance Directives Act does not create a protectable liberty or property interest in continued medical care for which Appellants may bring a claim under § 1983.

4. The dismissal of Appellants' § 1983 claim should be affirmed because the Complaint does not identify an official policy promulgated by a policymaker

a. The municipal liability standard applies, which means Acclaim can only be liable under § 1983 if an official policy promulgated by a policymaker was the moving force behind a constitutional deprivation

The dismissal of Appellants' § 1983 claim can also be affirmed because the Complaint failed to identify an official policy or custom, or a policymaker who knew of or approved an alleged policy or custom. ROA.89-92.

Though the Fifth Circuit does not appear to have addressed what standard applies when evaluating corporate liability under § 1983, lower courts, this court's sister circuits, and the parties appear to agree that "[t]he standards applicable to determining liability under § 1983 against a municipal corporation are applicable to determining the liability of a private corporation performing a government function." *Olivas v. Corrs. Corp. of Am.*, 408 F. Supp. 2d 251, 254 (N.D. Tex. 2006), *aff'd* 215 F. App'x 332 (5th Cir. 2007); *see also, e.g., Shields v. Illinois Dept. of Corrs.*, 746 F.3d 782, 789 (7th Cir. 2014) ("[A] private corporation cannot be held liable under § 1983 unless the

constitutional violation was caused by an unconstitutional policy or custom of the corporation itself."); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727-28 (4th Cir. 1999) ("[T]he principles of § 1983 municipal liability articulated in *Monell* and its progeny apply equally to a private corporation."); *Eldridge v. CCA Dawson State Jail*, No.3:04-CV-1312-M, 2004 WL 1873035, at *2 (N.D. Tex. Aug. 19, 2004), rec. accepted, 2004 WL 2075423 (N.D. Tex. Sept. 16, 2004). This means that to establish § 1983 liability against Acclaim, Appellants had to allege "(1) an official policy (2) promulgated by the [corporate] policymaker (3) was the moving force behind the violation of a constitutional right." *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)).

Appellants cite *Jett v. Dallas Independent School District* for the position that this court can look to state corporate law to potentially broaden the scope of liability for a corporate entity like Acclaim. 7 F.3d 1241, 1245 (5th Cir. 1993); *see* Appellants' Brief, p. 41. They claim *Jett* permits this court to consider the "vice principle doctrine," which has been adopted by Texas courts to determine whether and when a corporation can be subjected to

punitive damages for acts of its vice principals. *See Hammerly Oaks, Inc v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997). But Appellants did not make a claim for punitive damages in their Complaint, and *Jett* does not suggest that Texas corporate law could *expand* liability in the context of § 1983. Rather, *Jett* stands for the proposition that if a person as a matter of law does not have authority to direct policies for the entity with whom she is employed, her unilateral act could not subject her employer to § 1983 municipal liability. *See Jett*, 7 F.3d at 1245-46 (determining that because section 23.26 of the Texas Education Code vests a school district's policymaking authority solely in the trustees of the district, the superintendent as a matter of law was not a "final policymaker" such that his unilateral conduct could subject the school district to § 1983 liability).

b. The Complaint does not identify any official policy or custom

Section 1983 liability against an entity depends upon a plaintiff establishing the existence of a custom or policy that led to the deprivation of his or her constitutional rights. *See Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532-33 (5th Cir. 1996).

The Fifth Circuit has articulated the definition of an "official policy or custom" in this context as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [entity's] lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent widespread practice of [government] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [governmental] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the [entity] or to an official to whom that body has delegated policy-making authority.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (per curiam). Appellants must specifically identify each policy they claim caused a constitutional violation. *Id.* Where the existence of a policy or custom is not pleaded, a § 1983 claim cannot be sustained. *See Meadowbriar*, 81 F.3d at 523-33.

The Complaint's only allegations of any alleged Acclaim custom or policy were conclusory assertions that: the Acclaim Appellees failed to "adequately supervise their own employees/doctors to ensure that they are following proper procedures in discontinuing life sustaining care," ROA.13;

Defendants failed to "properly train their employees/doctors on how to follow correct procedure in discontinuing life sustaining treatment;" and "the practice of ignoring the laws concerning withholding life sustaining treatment had been widespread," ROA.14. Appellants alleged no specific facts to support these conclusions.

"To proceed beyond the pleading stage, a complaint's 'description of a policy or custom and its relationship to the underlying constitutional violation . . . cannot be conclusory; it must contain specific facts.'" *Pena v. City of Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018) (quoting *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997)). Appellants conclusory allegations are not supported by any facts to suggest that they might be true, and thus cannot establish the existence of a custom or policy supporting a policy or custom actionable under § 1983. *Turner v. Lieutenant Driver*, 848 F.3d 678, 685 (5th Cir. 2017) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.") (quoting *Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009)).

These deficiencies notwithstanding, Appellants attempt to construe the Complaint as "directly alleg[ing] facts indicating . . . a policy . . . granting . . . physicians . . . the authority to make unilateral end-of-life decisions without obtaining consent or providing any process of law."[4] They argue that the Complaint "necessarily creates an inference" or a "policy that allowed physicians such as Dr. Duane to make unilateral life-termination decisions." Appellants Brief, p. 36.

The direct allegations Appellants cite as supporting this inference are the assertions that a political activist organization published an article alleging an unnamed "medical director at JPS had been making decisions to end life sustaining treatment of patients," and that an anonymous source informed the publisher of the article that he believed Dr. Duane to be the director named in the article. ROA.12. The Complaint itself did not actually

[4] On the issue of whether a policy and policymaker have been alleged, Appellants' brief is not entirely clear. The brief includes a discussion of why Appellants believe they have pleaded a policy and policymaker *as to JPS*, then state that "the same points apply equally to Acclaim." Appellants' Brief, p. 35-40.

allege these things occurred, but instead alleges *reports* that the acts occurred. ROA.12.

Assuming any credibility could attach to the article and anonymous email referenced by Appellants, at best they support a conclusion that one doctor withdrew care from three patients within just one month. ROA.18. But this is not a "policy," and Appellants do not allege anyone other than Dr. Duane followed a purported policy by withdrawing life sustaining treatment in violation of the Texas Advance Directives Act such that the action could be attributed to Acclaim.

Allegations involving one physician in a one-month period, even if true, do not evidence a "widespread practice" or "custom." *See Bennett*, 728 F.2d at 768 n.3; *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (for purposes of § 1983 liability, the practice must be "so persistent and widespread as to practically have the force of law"). Rather, allegations of isolated incidents, like the incidents described in the allegations about the anonymous email, are generally held insufficient to establish a custom or policy sufficient to support a § 1983 claim because they are not the "persistent, often repeated

constant violations that constitute custom and policy." *Bennett*, 728 F.2d at 768 n.3; *see Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir. 1992) (holding allegations of "an isolated incident are not sufficient to show the existence of a custom or policy").

c. Plaintiffs Failed to Identify a Policymaker, Nor Did They Allege Such Policymaker Knew of or Approved the Policy or Custom

In addition to the other deficiencies, the Complaint failed to allege facts that Acclaim or an Acclaim policymaker knew of or approved any policy or custom. *See Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 346 (5th Cir. 2017) (stating "the policymaker must have either actual or constructive knowledge of the alleged policy to be liable").

The Complaint does not identify a "policymaker," and further fails to even contain the words "policy" or "policymaker." Instead, Appellants simply alleged that "Dr. Duane was a person with final decision making authority," and as a result, "the hospital employees/doctors were not adequately trained." ROA.14. But these conclusory assertions do not find factual support in the Complaint, which instead references only the isolated

conduct of Dr. Duane. ROA.12-13. And, even taking these allegations as true, they are insufficient as a matter of law to state a Section 1983 claim against Acclaim.

In the context of a § 1983 claim, there is a "fundamental" "difference between final decisionmaking authority and final policymaking authority" in the context of § 1983 claims. *Bolton v. City of Dallas*, 541 F.3d 545, 548-49 (5th Cir. 2008) (per curiam). The mere fact that an official is given discretion to make a final decision over a particular function does not mean the official has final policymaking authority over that function. *Id*. at 549; *Harris v. City of Balch Springs*, 9 F. Supp. 3d 690, 708 (N.D. Tex. 2014) (dismissal for failure to state a Section 1983 claim appropriate where, *inter alia*, plaintiff "[did] not allege that the City has delegated policymaking authority to [defendant]"). Appellants' conclusory allegation that Dr. Duane was a "final decisionmaker" is insufficient on its face to state a § 1983 claim.

In briefing these issues on appeal, Appellants clarify their position that the "nature" of Dr. Duane's position and the "surrounding facts" support an inference that Dr. Duane was a "final policymaker" *for JPS*. Appellants Brief,

p. 38. They suggest that the Complaint's sufficiency does not even depend on such an inference, because at the pleading stage "it does not matter who the final policymaker was [at JPS] because some policymaker gave Dr. Duane unilateral discretion to decide whether or not to end a patient's life." *Id.* Appellants then go on to state that the "same points will apply equally to Acclaim," *id.* at 40, which could mean either that Appellants believe § 1983 liability may be attributed to Acclaim based upon Dr. Duane's role at JPS, or based upon Dr. Duane having the same role at Acclaim that she had with JPS. It is not clear.

In any event, the statements contained in Appellants' brief, no matter how applied to Acclaim, do not cure the Complaint's failure to allege an official policymaker who adopted a policy or custom leading to a constitution violation. *Peterson*, 588 F.3d at 847. "[S]pecific facts, not mere conclusory allegations" must be alleged to support *each* element of a claim against Appellees if the claim is to survive a motion to dismiss. *Powers*, 951 F.3d at 305 (citing *Tuchman*, 14 F.3d at 1067). When no actual facts on a topic are alleged, it is impossible to then make reasonable inferences against a

defendant based upon those facts. A party cannot simply recite an element of their claim and then avoid dismissal by simply averring that some reasonable inference can surely arise from the recitation. A party should not expect a court to assume facts it did not allege. *Twombly*, 550 U.S. at 555 & n.3 (explaining that while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings.).

These defects were raised in the Acclaim Appellees' motion to dismiss and establish that the Complaint does not state a claim for relief. And each defect in Appellants' claim provides an independent basis for this Court to overrule the issues raised by Appellants and affirm the trial court's dismissal of Appellants' § 1983 claim against the Acclaim Appellees.

D. CONCLUSION

Appellant's issues should be overruled, and the trial court's judgment affirmed, because Appellants failed to state a claim under 42 U.S.C. § 1983 as to either of the Acclaim Appellees.

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I certify that the following counsel of record were served this 20th day of November 2020, with a copy of the foregoing document via the Court's electronic filing system:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume imitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,126 words, excluding the portions of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This brief complies with the typeface and type and style requirements of Rule 32(a)(5)-(6) of the Federal Rule of Appellate Procedure because this brief has been prepared in a proportionately-spaced typeface using Microsoft Word 2013 in "Palatino Linotype" size fourteen (14) font.

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